REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO.153 OF 2018

CONSOLIDATED WITH CIVIL APPEAL NO.151 OF 2018

THE NATIONAL TRANSPORT AND SAFETY AUTHORITY.....1ST APPELLANT

HON.ATTORNEY GENERAL.....2ND APPELLANT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....3RD APPELLANT

V

ELISHA ZEBEDEE ONGOYA..... RESPONDENT

(Being an appeal from the Judgment and decree of Hon. D.Alego SPM in Kap.CMCC no. 125 of 2016)

JUDGMENT

1. The respondent **(ELISHA ZEBEDEE ONGOYA)** sued **THE NATIONAL TRANSPORT AND SAFETY AUTHORITY (NTSA)** (1st appellant) **HON.ATTORNEY GENERAL** (2nd appellant) and **THE DIRECTOR OF PUBLIC PROSECUTIONS** (3rd respondent) the in relation to events which occurred on the 5.6.2015 while driving his motor-vehicle reg.no. **KBU 553 C Subaru Legacy** along **Chavakali-Kapsabet** road when PW1 one **Ezekiel** (an officer of NTSA) stopped him at **Tindinyo**, and noticed a slight crack on the windscreen of the Respondent's motor vehicle, which he claimed was a danger to other road users. The Respondent sought to know how this slight crack would pose danger to other road users or persons on board the motor vehicle but these concerns were brushed aside, with the officer insisting that the Respondent must be charged and would get a chance to raise those issues in court.

2. The said **Ezekiel** pressured the officers at the **Kapsabet Police Station** to prefer charges of failing to maintain parts of a motor vehicle contrary to **section 55 of the Traffic Act**. The Respondent was subsequently arraigned before the plea court at the **Kapsabet Law Courts** where he pleaded not guilty and was granted a cash bail of Kshs. 3,000. and informed him he had failed to maintain parts of his car namely the windscreen. He was subsequently charged for failing to maintain parts of the motor-vehicle contrary to section **55** of the **Traffic Act** vide **Kapsabet Trcase no. 375 of 2015**.

3. When the matter went to court, the presiding magistrate announced that the traffic offenders were to be kept in a separate room awaiting to process their cash bail. However, an officer named **Lokoria** could hear none of the above and he slapped the respondent at the back and pushed him towards the cells in a very undignifying manner, in full view of other officers who did nothing to rescue him.

4. The vehicle was inspected and found to have a slight crack on the right side of the windscreen away from the driver, so it had no effect on other road users. Although the motor-vehicle was released, the **DPP** insisted on prosecuting the matter. Eventually, the case was dismissed under section 210 of the Criminal Procedure Code. The Respondent in this matter, filed a claim the magistrates' court where he sought general damages for malicious prosecution, exemplary damages and costs of the suit.

5. In its decision delivered on 29th October 2018, the trial magistrate held that the 1st appellant was liable for the wrongs of its officer Ezekiel, the 2nd appellant was found liable for the wrongs of the police officer who decided to press charges against the respondent and for detaining him in the cells in full violation of the bail/bond policy guidelines and the 3rd appellant was found liable for prosecuting the plaintiff without any cogent evidence. The court awarded the respondent:

a. general damages at **Kshs. 3,500,000**;

b. exemplary damages are granted to the Plaintiff at **Kshs. 1,500,000**

c. the total of Kshs. **5,000,000** is jointly and severally administered against the three appellants herein.

d. The respondent was awarded costs of the suit plus interest.

e. A 30-day stay of execution was also granted.

6. The 1st appellant filed its statement of defence denying every content of the plaint and asked the plaintiff's case be dismissed with costs.

7. The 2nd and 3rd appellants denied the plaintiffs allegation except that indeed the respondent was charged and acquitted under section 210 of the Criminal Proceedings Code and that his acquittal did not entitle him to a claim under malicious prosecution, thus the suit ought to be dismissed.

8. The matter proceeded to hearing where the respondent who was the dean at Kabarak University's Faculty of Law testified that while driving around Tindiyo area, he was flagged down by an NTSA officer who informed him that his car had a crcked windscreen, which rendered the vehicle un-roadworthy, although at that point no inspection of the vehicle had been carried out. He invited the officer to sit in his car and determine whether the crack posed any danger to either the driver, or other road users, but this was spurned. He was eventually charged in court whereupon taking plea, he was granted a cash bail of Kshs 3000/-. For undisclosed reasons, the court orderly slapped him and took him to the cells, thereby refusing to give him an opportunity to pay the cash bail This resulted in him remaining in the cells from 12pm to 4pm when a court assistant helped him pay the cash bail. The respondent termed this treatment as 'un-dignifying'. Eventually when the vehicle was subjected to inspection, the report showed that the cracked windscreen posed no danger to other road users, or persons on board the said vehicle. When the matter next came up in court, the respondent drew the attention of the prosecutor, to the findings of the Motor Vehicle Inspector, but the prosecutor decided to carry with the hearing. and two witnesses adduced evidence to support the case against the respondent.

9. These acts are what the respondent deemed as propelled by malice, and he explained that **EZEKIEL** (the NTSA officer) had a negative public attitude as he did not take the vehicle for inspection before making the allegations he purported, the Attorney general was sued because of the actions of the Base Commander and Lokorio who countermanded the trial court's order once bail was granted, slapping him without any legal justification slapped and placing him in cells for hours. The Office of the DPP is blamed for failing to make a rational assessment that would have resulted in the respondent not being charged, and the malice is made manifest by the fact that even after being informed of the results in the inspection report, its officer subjected respondent to the unnecessary rigors of a trial which ended with the court finding that the respondent had no case to answer.

10. EZEKIEL BARTINA MAROITIM (DW1) – the NTSA officer explained to the trial court that driving a motor vehicle with a cracked windscreen constituted an offence under the Traffic Act, so:

"I formed the opinion that plaintiff had committed an offence by having a cracked windscreen"

Seeing that DW1 had made this conclusion, the respondent then requested to be taken to court immediately, although DW1 informed him that he had called for inspection of the motor vehicle. So he decided to take the respondent to court immediately.

11. **JARIUS ONKOBA (DW2),** a prosecutor at the DPP's office confirmed to the trial court that the decision to charge rests with the DPP, and that there are guiding principles under Art 157 of the Constitution of Kenya, and the ODPP Act regarding termination of proceedings. He clarified that the charge against the respondent6 was the offence of failing to maintain body parts of a motor vehicle, namely the windscreen. While conceding that the inspection report exonerated the respondent, DW2 insisted that he did not act out of malice

12. The trial magistrate in her judgment took into account the legal constitutional roles of the 2nd Appellant under Article 156 as the principal legal advisor of the government representing government in litigation departments and institutions, and 3rd appellants as having the ultimate power to prosecute or discontinue prosecution under Article 157.

13. The trial magistrate pointed out that the claims about the cracked windscreen remained DW1's opinion which could only be confirmed by an expert. The trial magistrate held that there was even no justification in hastening the prosecution where the respondent was first charged before investigations were complete, and even after comprehensive investigations were done, the 3rd appellant still decided to press on with the charges against the respondent.

14. The trial court also held that the respondent had been slapped by a court orderly and detained in the cells for some hours as a way of ensuring he did not get to pay the cash bail immediately so as to enjoy his freedom.

15. The appellants were dissatisfied with the trial court's decision and filed separate appeals which the court directed to be consolidated, with **HCCA No. 153 of 2018** being designated as the lead file.

16. The grounds can be condensed to the effect that:

a. the trial magistrate erred in relying on the respondent's evidence and submissions, and failing to consider theirs.

b. the trial court erred in holding the appellant's jointly and severally liable together with NTSA without any evidence to that effect,

c. The trial court did not give a well reasoned judgment on each item pleaded and the evidence adduced,

d. The trial court erred in failing to find the respondent had not proved his case, awarding damages that were so high and failing to find the appellants were not in any way liable for unlawful arrest, malicious prosecution and therefore ought to be dismissed with costs.

e. that the court erred in finding they were jointly and severally liable for the malicious prosecution yet **NTSA** did not have power to influence the office of the **DPP** or the power to direct the **National Police Service** as regards the manner in which to effect arrest,

f. the trial court failed to appreciate that an acquittal in a criminal case was not proof of malicious prosecution, or that the 1st respondent's(plaintiff) admission to have had a cracked windscreen put him in the ambit of the appellant's authority,

g. the court failed to appreciate the officer acted under **section 42 of the NTSA Act 2012** by flagging down and inspecting the respondent's vehicle and there was no basis for the court to award the sum jointly and severally against all the parties.

This court is urged to allow the appeal and make an order dismissing the lower court case and award the costs of this appeal to the appellants.

17. Parties canvassed the appeal by way of written submissions.

The 1st appellant submitted that the respondent confirmed to the trial court that he had a cracked windscreen, so its agent had a reasonable cause to flag him down. That they later made a complaint to the police officer who were present at the scene as provided under **section 55** of the Traffic Act, and in light of this, the respondent's argument against their action and that of the 3rd appellant's does not stand.

18. That the trial court should therefore not have held them jointly and severally liable when all they did was to make a complaint. The court was referred to **section 24 of the National Police Service Act** which provides for the functions of the police. In support of this submission reference is made to the case of **Charles Mwapagha v. Kenya Airways Ltd & Anor [2015] eKLR**, the court held that the discretion as to whether to charge a suspect or not lies with the police, this was also held by the Court of Appeal in **Jediel Nyaga v. Silas Mucheke , Civil Appeal No. 59 of 1987.**

19. Further that that the law in Kenya as respect to the torts of unlawful arrest, false imprisonment and malicious prosecution is that it is the Attorney General alone who could be held liable in damages. To support this position reference is made to the case of **Douglas Odhiambo Apel& anor v. Telkom Kenya Ltd & Anor [2006] eKLR**, where the court held that the proper defendant in a suit for malicious prosecution was the A.G. In addition, it is argued that for a person to be held to have set the law in motion, he must be instrumental in prosecution which was not the case here. They were merely complainants and could not be liable on the decision to prosecute. The court was referred to **Clark and Lindsell on Torts pg.827 at 16-11,** in addressing the complex question of who should be held responsible for initiating a matter when the police act on information offered or charges preferred by a private person. The court further stated as follows:

> **"their lordships confirmed that a person who merely gives information to the police on the basis of which a decision to prosecute is made by the police or the crown prosecution service will not be liable for malicious prosecution. The informant will not be the prosecutor. However, a complainant will be regarded as the prosecutor and liable for malicious prosecution if the following conditions are set:**
>
> > **i. The defendant falsely and maliciously gave information about an alleged crime to a police officer stating a willingness to testify against the claimant and in such manner as makes it proper to infer that the defendant desired and intended that a prosecution be brought against the claimant.**
> >
> > **ii. The circumstances are such that the facts relating to the alleged crime are exclusively within the knowledge of the defendant so that it is virtually impossible for the police officer to exercise any independent discretion or judgment on the matter.**
> >
> > **iii. The conduct of the defendant must be shown to be such that he makes it virtually inevitable that a prosecution will result from the complaint. His conduct is of such nature that if a prosecution is instituted by the police officer the proper view is that the prosecution has been procured by the complainant"**

20. The contention here is that, the police had the duty to investigate the complaint unlike the respondent's argument that they had to first get an investigator to assess the effect of the crack on the windscreen. The trial court in its judgment had recognized that the duty to carry out investigations was by the police and not the 1st appellant. See ***Koech v. Highlands & Produce Co. Ltd & Anor*** **[2006] 2 EALR.**

21. In addition, the trial court had failed to recognize that an acquittal in a criminal; case was not proof of malicious prosecution. The respondent had failed to prove that their agent's action had instituted a criminal suit without reasonable or probable cause. Further the respondent had failed to prove that the report by the 1st appellants agent (DW1) was actuated by malice, a mandatory requirement or element in malicious prosecution, as was held in ***Mbowa v. East Mengo District Administration*** **[1972] EA 352.** The trial court therefore erred in awarding general damages of Ksh. 3500000/= and exemplary damages of ksh1500000 against the appellants jointly and severally in the absence of any wrong doing on the part f the 1st appellant. The court was urged to allow the 1st appellant's appeal with costs

<u>The 2nd and 3rd respondents' submissions</u>.

22. It was aurged that the respondent was arrested on 16.6.2015 and was charged with the offence of failing to maintain parts of his motor-vehicle, that is he had a cracked windscreen contrary to section 55of the traffic act. The complaint was lodged by one Ezekiel an officer of

the 1st appellant. The respondent admitted to having a cracked windscreen. The respondent failed to prove that he was locked in the cells and was slapped by one **Lokorio.** The police under section 29 of the criminal procedure code is permitted to arrest without warrant of arrest. The agents of the 1st and 2nd appellants acted within the law. See ***James Karuga Kiiru v. Joseph Mwamburi & 2 ors*, Nrb CA no. 171 of 2000.**

23. That the respondent's allegation that he was confined in police custody till 4.30p.m was not supported with any evidence, there was no eye witness to confirm the same, therefore since the arrest was justified, then his detention of less than 24 hours was proper was reasonable in the circumstances. Drawing from the decision in **John Ndeto Kyalo v. Kenya Tea Development Authority & Anor(2005)eklr** it is argued that the 2nd and 3rd appellants were not liable for the period the respondent was in the cells. That in any event that the arraignment in court was based on an honest opinion since he had also admitted that he had a cracked windscreen.

24. The appellants contend that the respondent did not establish the principles or conditions to warrant the reliefs sought for malicious prosecution. Their position is that the agent of the 1st appellant had made the complaint to the police and it should be deemed that they were the ones who instituted the prosecution. The court is urged to be guided by the case of ***John Ndeto v. Kenya Tea Development Authority*(supra)** where the 1st defendant had not pointed out who stole the tea, but the police went ahead on their own and charged a person they think may have stolen, the complainant could not be held to have instituted the prosecution against such person.

25. The appellants also cite the case of **Hicks v. Faulkner (1878)8QBD 167** where Hawkins J. defined what reasonable and probable cause meant to argue that the respondent had not proved that the prosecution was instituted without reasonable and probable cause. He had contested that his prosecution was based on malice but did not prove the same. It is submitted that the respondent had not proved who had set the motion, and the trial court ought to have found that the police had only conducted their investigations upon a complaint, and it was therefore logical to conclude that reason and probable cause was met to institute prosecution.

26. The appellants point out that even though the prosecution ended in the respondent's favour, that alone should not constitute malicious prosecution, because for a person acquitted under section 210 of the CPC there is a presumption that the respondent had a prima facie case of which he had to answer to. The submission is supported by the case of **Nzoia Sugar Co. Ltd v. Fungututi(2002) KLR 1** where it was held that,

> **"it is trite law that acquittal, per se, on a criminal case is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against a prosecutor."**

27. They submit that the respondent had to prove that his prosecution was actuated by malice, yet in the present case the only malice leveled against the police was his arrest and detention. That his claims of being pushed and slapped by **Lokorio** were not proved and did not satisfy section 107, 109 and 110 of the Evidence Act.

28. The award by the trial court of Ksh3500000/= as general damages is faulted as being too high considering that the respondent was out on cash bail and he was held for less than 24 hours and he failed to prove all the ingredients to warrant the said award for malicious prosecution. Further they do not concede to the award of exemplary damages by the trial court which was punitive in nature, pointing out that in ***James Mwangi Wanyoike & 9 Ors v. A.g*(2012) eKLR,** Mumbi Ngugi J held that:

> **"to award both general and an additional award as exemplary damages would in the circumstances be to make a double award in respect to the same violations"**

The court is urged to take note that the award is to be paid using tax-payers' money which amount is too high to burden the tax payer, and the appeal should be allowed with costs.

29. The respondent submits that he had particularized the wrong committed by each of the appellants, and the 1st appellant was vicariously liable for the wrongs of its officer **Ezekiel** for deciding that he had committed an offence without the input of an important professional opinion from a motor-vehicle inspector. That the 2nd defendant was liable for the offence by its police officer to charge him and in fact an inspection was carried out and he was exonerated from the same. Also for the wrongs of **Andrew Lokoria** who detained him in the cells in violation of the bail/bond policy guidelines and for assaulting him. The 3rd defendant was liable for the officer who accepted to admit the charge prepared by the police for purposes of commencement of the prosecution process without cogent evidence.

30. The 2nd and 3rd defendants filed a defence but did not file any statement nor did any person testify in support of their case. That in the absence of this, their pleadings remained a mere statement and the evidence adduced by the plaintiff remained uncontroverted and therefore unchallenged, as was held in ***Trust bank ltd v. Paramount Universal Bank Ltd & 2 Ors***.

31. The respondent maintains that the material evidence by the appellants in effect admitted the wrong on their part, especially the witness statement dated 8.6.2018 claiming that he decided to charge the respondent since he wanted to be taken to court, thus not giving the authorities a chance to subject the said motor-vehicle to a proper inspection. Further, that the 3rd appellant conceded to the fact that the blame was on the investigating officer for failing to inform the prosecution or any representative of the 3rd respondent of material development which would have necessitated a termination at an earlier stage without going to full hearing. This constituted an admission on the part of the 2nd appellant who prepared a statement for the 3rd appellant and filed it in court. That in order to avoid liability, the 3rd appellant put on the dock a vehicle inspector as a prosecution witness in the traffic case and even produced an inspection report.

32. The respondent had been charged under section **55 of the Traffic Act,** but during trial in the traffic case, this section was not referred to. The appellants only insisted that the respondent requested to be taken to court. There was no need to have the motor-vehicle inspector yet he had already in his report cleared the respondent, and there was no justification to detain him in the cells thus making it difficult to facilitate his payment of cash for bail. The respondent contends that the acts of the appellants were unlawful, malicious and unjustifiable. That the

officers were driven by their own desire to enforce the law, thus they abused the powers conferred upon them to teach the respondent a lesson and to achieve selfish and personal satisfaction.

33. The respondent had proved malicious prosecution by showing that the criminal proceedings were instituted maliciously and unsuccessfully, citing the case of ***Kasana Produce Store v. Kato*** **(1973) EA 190** which laid down the ingredients of malicious prosecution as

> **i. The plaintiff was prosecuted by the defendant in that the law was set in motion against him by the defendant in criminal proceedings have reached a stage at which they may be described as a prosecution but whether they have reached a stage at which damage to the plantiff results**
>
> **ii. That the prosecution was determined in the plaintiff's favor**
>
> **iii. It was malicious. The defendant had improper and indirect motives in pursuing the false charge against the plaintiff. See also *George Masinde Murunga v. A.G* [1979] eKLR.**

The respondent urged that he was prosecuted without reasonable and probable cause.

34. On damages it is submitted that there are certain categories of cases in which an award of exemplary damages should be awarded as was held by Lord Devlin in ***Rookes v. Barnard*** **(1964),** the first category is oppressive, arbitrary or unconstitutional action by the servants of the government and those in which the defendants conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff. The respondent contends that the actions of the three state agencies was oppressive, arbitrary and unconstitutional, and refers to ***Jacob Juma & Anor v. The Commissioner of Police & Anor*****. Nairobi High court civil case no. 661 of 2007, where t**he court gave an award of **Ksh 4,000,000/=** as general and aggravated damages for malicious prosecution. Also in ***Teresia Wanjiku Njoroge v. Standard Chartered Bank Kenya Ltd & Anor*** **[2015] eKLR**, the court made an award of **Ksh5000000/=** as general damages. The court is urged not to interfere with the award as the trial court took into consideration the evidence on record, the submissions and authorities relied upon by the parties, and the court gave an analysis as to the facts leading to the acquittal of the traffic case, for it to come up with the judgment.

35. In response to the 1st appellant's memorandum of appeal, it is argued that DW1'S evidence set in motion the legal machinery that led to prosecution of the respondent, and also the officers who charged and prosecuted him, thus making them all liable for malicious prosecution. In support of this limb of the submissions, reference is made to ***Kasio Matuku & Kenya Post Office Savings Bank v. James Kipkemboi Cheruiyot: Inspector General of police & A.G (interested party)*** **[2019] eKLR**.

36. It is also pointed out that the respondent did not at any time during the traffic case or the malicious prosecution case contest that his car had a slight crack, but his contention was that the **NTSA** had formed an opinion that his car was un-roadworthy yet it was not an expert. Were it not for his action to conclude that way he could not have been prosecuted.

37. In response to the 2nd and 3rd appellants' memorandum of appeal dated 27.11.2018, he urged that the court to refer to his entire evidence on record, submissions and authorities to argue that he had proved all the requirements to prove malicious prosecution as held in ***Stephen Gachau Githaiga & anor v. A.g*** **[2015] eKLR.**

38. Further, that the trial court did not use the wrong principles in assessing damages which were set out in **Hellen Waruguru Waweru v. Kiarie Shoe Stores Ltd, HCA no.22 of 2014** to the effect that the court cannot disturb an award of damages by court unless it is:

> **i. Inordinately high or low as to represent an entirely erroneous estimate**
>
> **ii. It must be shown that the judge proceeded on wrong principles**
>
> **iii. Or that the judge misapprehended the evidence in some material aspect and so arrived at that figure which is either inordinately high or low.**

39. The court is urged to dismiss the two appeals with costs.

Analysis and determination

40. The issues that arise for determination are

> i. Whether the appellants' agent acted in malice
>
> ii. Whether the respondent had proved his case.
>
> iii. Whether an acquittal can lead to malicious prosecution.
>
> iv. Who is to bear costs.

41. The appellants filed two appeals which were consolidated. The respondent herein was charged under section 55 of the traffic case and was acquitted of the offence under section 210 of the Criminal Procedure Code. The respondent filed a suit citing malicious prosecution and

the court found the appellants had wrongfully charged him and thus was given an award of **Ksh. 5,000,000/=** as both exemplary and general damages. Being a first appeal, this court is duty bound that its role is to re-evaluate, re-assess and re-analyse the evidence on record and make its own independent conclusion, as was held in ***Abok James Odera & Associates v. John Patrick Machira t/a Machira& Co. Advocates*(supra) and *Peters v. Sunday Posts*(1958) EA 424**

42. It is not in dispute that the respondent motorvehicle had a cracked windscreen, and it was well within the rights of DW1 to stop him and raise issues in that regard. Indeed, section 55 of the Traffic Act recognizes such an offence. His contention is that the slight crack could not have been a hindrance to any person, the 1st appellant on the other hand alleged that the crack was the cause that he was flagged down and the respondent was to stop. That the respondent insisted he be taken to court and it is for that reason that they made a complaint to the police. The respondent averred that the 1st appellant's agent **Ezekiel** had set in motion and therefore, the police preferred charges against him. An inspection of his motor-vehicle was carried out and he was exonerated. The evidence by the prosecutor in court was that the police gave him the charge sheet, he had an opportunity to go through it, but he did not have a car inspection report at that time. He even saw the car. The offence was that he had failed to maintain the body parts, since he had a cracked windscreen.

43. The suit upon which the appellants are appealing is on malicious prosecution. What is malicious prosecution? It is an intentional tort designed to provide redress for losses flowing from an unjustified prosecution. It is the remedy for baseless and malicious prosecution which the respondent alleged that he had been subjected to. That is what the respondent had respondent had to prove. In ***Stephen Gachau Githaiga & Anor v. A.G* [2015] eKLR**, the court quoted from the Supreme Court of Canada the decision in ***Nelles v. Ontario[10]***, the Alberta Court of Appeal, in ***Radford v Stewart***, said:-

> **"There are four elements to the tort of malicious prosecution: the prosecution must have been initiated by the *defendant*, *the proceedings must have been terminated in favour of the plaintiff*, *there must be an absence of reasonable and probable cause and there must be malice or a primary purpose other than that of carrying the law into effect."***

In 1999, the Alberta Court of Queen's Bench, in **Chopra v. T. Eaton Co.[11]** adopted these words in relation to this tort:-

> **"The underlying basis for actions founded on malicious prosecution is the allegation of facts which, if believed, would establish abuse of the judicial process while acting out of *malice* and without reasonable and probable cause and which judicial process did not result in a finding of guilt of the party alleging the abuse."**

I find useful guidance in the wise words of Duffus V.P. in the case of ***Kasana Produce Store Vs Kato*[12] at page 191**, paragraph G-I where he laid down the ingredients for malicious prosecution as follows:-

> **i. The plaintiff was prosecuted by the defendant in that the law was set in motion against him by the defendant on a criminal charge. The test is not whether the criminal proceedings have reached a stage at which they may be described as a prosecution but whether they have reached a stage at which damage to the plaintiff result.**
>
> **ii. That the prosecution was determined in the plaintiffs favour.**
>
> **iii. That it was without reasonable or probable cause-On the evidence the defendant did not believe in the justice of his own case**.
>
> **iv. It was malicious-The defendant had improper and indirect motives in pursuing the false charge against the plaintiff.**

44. I think the most rational step for the 1st appellant's officer to take was to take the respondent's vehicle for inspection, and in the meantime issue the respondent with a notice of intention to prosecute. It is a rather lame excuse, given the independent authority which the DPP has, to wax lyrics about the respondent's demand to be taken to court as the reason for the hasty prosecution without proper investigation. In any event, even if the hasty action was fueled by the respondent's demands and allegation that he had been stopped so as to squeeze a bribe out of him, then there is no reasonable explanation why in the middle of the proceedings, upon being shown the contents of the report, the DPP's representative opted to ignore the same, and proceed with prosecution.

45. The 2nd and 3rd appellants averred that the motion was set by the agent of the 1st appellant they merely acted on a complaint brought forth. Indeed, the 1st appellant's agent set in motion the case, if it were not for him, then the police could not have charged the respondent. The prosecution of the traffic case was ruled in favor of the respondent, the 2nd appellants witness had testified and said that he had the opportunity to refer to the charge sheet. At that point he could have chosen not to admit the charge sheet in court. I consider the case of **Mbowa v. East Mengo District Administration (1972) EA 352**, it was established that a party has to prove the four ingredients alluded to.

46. The trial court duly considered the factual roles of each player in the chain and their legal and nexus to the corresponding appellant. She made a rational analysis and applied the appropriate principles of law, and she did not err in holding the appellants jointly and severally liable, because once the 1st appellant had made the complaint to the police who drafted the charge sheet, the prosecutor relied to it to charge the respondent of the offence.

47. The continuation of the charge was without reasonable or probable cause- indeed on the evidence the defendant did not believe in the justice of his own case, and towards the end made a feeble attempt to terminate the proceedings, a little too late in the day. It was malicious- and the 3rd appellant had improper and indirect motives in pursuing the charge against the respondent. Needless to say, the prosecution was determined in the plaintiffs favour, and the four ingredients alluded to in the **Mbowa** case were satisfied

48. On quantum of damages, the award of **Ksh3500000/=** as general damages I take note of the approach in the case of ***James Mwangi Wanyoike & 9 ors v. A.G(2012)* eKLR,** where the court held that making an award of both exemplary and general damages was a double

award. The case of Cassel and Co. Ltd v Broome and Anor (1972) AC where reference was made to the speech by Lord Devlin in Rookes v Bernard (1964) AC 1129 as follows:

> "Thus a case of exemplary damages must be presented quite differently from one for compensatory damages, … But the fact that these two sets of damages differ essentially, does not necessarily mean that there should be two awards…"

Exemlary damages are appropriate if the compensatory damages are considered inadequate and is aggravated by the way in which the defendant has behaved towards the plaintiff. The defendant's conduct must be so outrageous and repeated as to warrant deterrence.

49. From the fore going I take note that the prosecution against the respondent was not inordinately delayed, and there is no evidence that the events of that day adversely affected the respondent's work. I therefore consider that the amount of damages is high. and I am inclined to interfere with the same, and substitute it with general damages in the sum of Kshs 500,000 (Five hundred and thousands only). There was no basis for awarding exemplary damages, and I share the sentiments expressed by Mumbi (J). I award 2/3 cost of this appeal to the respondent. The appellants are awarded 1/3 costs of the appeal

E-Delivered and dated this 15th day of May 2020 at Eldoret

H.A. OMONDI

JUDGE