REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 8 OF 2016

ATHUMANI AHMED & 15 OTHERS.....APPELLANTS

VERSUS

1. CHIEF INSPECTOR MACHARIA

2. HON. ATTORNEY GENERAL.....RESPONDENTS

(Being an appeal from the Judgment delivered by Resident Magistrate

Honourable L. N. Juma in Kilifi SPMC, Civil Suit No. 156 of 2012 on 20th day of January 2016)

CORAM: Hon. Justice R. Nyakundi

Kenga Advocates for the Appellants

Ms. Lutta for the respondents

JUDGMENT

On 20.1.2016 the Learned Resident Magistrate **(Hon. L. N. Juma)** having heard the evidence by the plaintiffs, hereinafter referred as the appellants for a claim of arrest and malicious prosecution against the defendants, hereinafter referred as the respondents arrived at a finding and the decision that the appellants did not discharge the burden of proof on a balance of probabilities to warrant an award of damages. Following the dismissal of the suit on both liability and quantum, the appellants were necessitated to file an appeal to challenge the Judgment of the trial court.

Their dissatisfaction is reflected in the following grounds of appeal:

1. That the Learned Magistrate erred in law and fact in holding that the appellants had failed to prove their case on a balance of probabilities, yet the respondents had failed to prove that there was a reasonable and/or probable cause for the appellants' arrest and subsequent prosecution.

2. That the Learned Magistrate erred in law and in fact by holding that where there is no grudge in the arrest and prosecution, automatically malice may not be inferred.

3. That the Learned Magistrate erred in law and in fact in holding that malicious arrest and/or prosecution can only happen where there is bad blood between the appellants and the respondents.

4. That the Learned Magistrate erred in law and in fact in holding that there was a reasonable or probable cause for the arrest and/or prosecution of the appellants on the mere strength of a purported security threat posed by MRC group which had no links to the appellants as correctly found out at the trial.

5. That the Learned Magistrate erred in law and in fact by not evaluating the evidence tendered before the Criminal trial court as well as not appreciating the provisions of Section 79 as read with Section 78 (1) of the Penal Code and by so doing arriving at a wrong decision.

6. That the Learned Magistrate erred in law and fact by not appreciating the benefits of Article 37 of the constitution which had been passed and/or promulgated at the time of the arrest and/or prosecution of the appellants.

7. That the Learned Magistrate erred in law and fact by dismissing with costs the appellants' suit, regardless of the strong evidence presented before the court for its success.

Background

The claim principally was brought by the appellants against the respondents vide a plaint dated 20.6.2012 filed in court on 22.6.2012. In relation to five foundational facts namely:

(1). That on or around 28.8.2010 the appellants were maliciously arrested by the 1st respondent and detained at Kilifi Police Station to the extent that the appellants had committed the offence of taking part in an unlawful assembly contrary to Section 79 of the Penal Code Cap 63 of the Laws of Kenya.

(2). That following the arrest, the appellants were charged with above said offence on 30.8.2010 by the 1st respondent who acted with malice and falsehoods and charged them with the offence in Criminal Case No. 733 of 2010 at Kilifi Principal Magistrate Court.

(3). That on consideration of the Criminal Case, by the Criminal Court the appellants were acquitted under Section 210 of the Criminal Procedure Code.

(4). That by the dismissal of the charge the appellants claimed general and special damages for an alleged unlawful arrest, false imprisonment and malicious prosecution by the respondents.

(5). That again was also dismissed for non-proof on a balance of probabilities as required by the Law.

Submissions on appeal

Mr. Kenga for the appellants argued and submitted that the respondents had no probable cause to arrest or prosecute the appellants for the offence of taking part in an unlawful assembly as indicted, tried and acquitted by the trial court.

Further Learned counsel, submitted that the respondents failed to appreciate applicability of Section 78 (1) and 79 of the Penal Code read conjunctively with Article 37 of the Kenyan Constitution. That in making a determination to charge the appellants, contended Learned counsel, the respondents had no sufficient evidence to mount a Criminal charge intended to secure a conviction.

On approaching the criminal case Learned counsel submitted that it was actuated with malice and the appellants ended up being arrested and prosecuted for a non-existence offence.

In support of the arguments to this appeal Learned counsel cited the guiding principles in the cases of **James Alfred Koroso v The Attorney General HCCC No. 2966 of 1996 (Nairobi), Jacob Juma & Another v Commissioner of Police & Another HCCC No. 661 of 2007 (Nairobi), Thomas Mboya Oluoch & Another v Lucy Muthoni Stephen & Another HCCC No. 1729 of 2001 (Nairobi), Micheal Ochieng Odera v The Attorney General HCCA No. 125 of 2009 (Kisumu), Zablon Mwaluma Kadori v National Cereals and Produce Board HCCA NO. 152 OF 1997 (Mombasa), The Kenya Penal Code (Cap 63), Laws of Kenya, The Kenyan Constitution, promulgated on 27th August 2010,** with these he then urged this court to allow the appeal, set aside the dismissal order and substitute it with a finding on liability and award of damages. He proposed that in the event this court agrees with his submissions each of the appellant be awarded general damages of Kshs.800,000/= for arrest and detention and a further sum of Kshs.1,000,000/= for malicious prosecution as well as cost of the appeal and costs of the lower court suit.

The respondents case

Learned Senior litigation counsel **Ms. Lutta** for the respondents stated in her written arguments that the appeal is not merited. She provided two main points. That first there was reasonable and probable cause to arrest the appellants with regard to the offence of taking part in an unlawful assembly. That further, the respondents had gathered evidence in support of the allegations that would be material on which the trial court was asked to determine the threshold issue of the offence.

Further, she argued that having found that an offence had been committed a decision was made to prosecute the appellants, on which the respondents relied on the witnesses who recorded statements. Thus in so far as the claim of malicious prosecution was concerned **Ms. Lutta** argued and submitted that the ingredients as premised in **Susan Mutheu Muia v Joseph Makau Mutua {2018} eKLR** were never satisfied to render the prosecution malicious.

In order to buttress the arguments that there is no prospect of the appellants' appeal succeeding, **Ms. Lutta** also referred this court to the principles in the cases of **Joseph Ihuo Mwaura & 82 others v The Attorney General Petition No. 498 of 2009, B. A. & Another v Standard Group Limited & 2 others {2012} eKLR, S v Makwanyane & Another 1995 (3) SA 391, 436 (CC), National Super Alliance (NASA) Kenya v Cabinet Secretary for Interior and Co-ordination of National Government & 3 others {2017} eKLR, Downey Venture v LMI Insurance Company {1998} 66 Cal. App. 4th 478, Lackner v LaCroix {1979} 25 Cal. 3rd 747, Plumley v Mockett, (supra), 164 Cal. App. 4th at page 1059**

From the submissions, its evident that the respondent counsel specifically urges this court to dismiss the appeal for it has failed sufficiently so, to establish that the arrest, detention and prosecution was carried out without reasonable and probable cause or on the other hand the prosecution was malicious. To this questions **Ms. Lutta** rested her case respectively.

Evidence at the trial

The appellants at the trial court opted to rely on the evidence of **Athmani Hemedi Tangauko** as their representative in articulating the issues that stood out in the claim. Relying on his witness statement and the pleadings **Hemedi** told the trial court that on 28.8.2010 they were arrested by the 1st respondent on allegations that they held an unlawful assembly without a license. He gave a narration of the events which culminated in an indictment of the sixteen of them before **Kilifi Magistrate Court in Criminal Case No. 733 of 2010.** According to his testimony at the end of the trial each one of them was acquitted of the charge as evidenced by the proceedings and Judgment delivered on 24.6.2011. He stated that the arrest and prosecution was initiated without any sufficient cause which in so far as they are concerned occasioned loss and damage.

In cross-examination, the witness stated that on arrest each of the appellants was placed in police custody for two days before taken to court for plea. He further explained that the purported unlawful assembly was a well-intended meeting even known to the area chief. According to his evidence the meeting is always held every Saturday in the house of one of the nembers. With that a witness statement on the claim, the appellants closed their case.

The respondents case

It was the case for the respondents through the testimony of Chief Inspector **Macharia** that while at Kilifi Police Station he received information on members of the MRC holding a meeting aimed at raiding some land belonging to a foreigner. Before the meeting, the witness stated that some members had approached his office for a permit but the same was denied due to security reasons.

Nevertheless, a group of sixteen members proceeded to hold the meeting even after being denied a permit by his office. What followed therefore was an arrest and a prosecution of the sixteen appellants to face trial for the offence of taking part in an unlawful assembly. The facts as they appear formed the basis of the indictment.

The Learned trial Magistrate on the evidence obtained returned a verdict of a claim not proved on a balance of probabilities to warrant assessment of damages. This decree triggered the appellants appeal.

Analysis and Determination

On the jurisdiction of this court, I rely heavily upon the principles in **Pandya v R {1957} EA 336 and Ruwala v R {1957} EA 570** requiring that as a first appellate court I consider the questions of fact as well as questions of Law, weigh the conflicting evidence and to draw my own conclusions, bearing in mind that. I have neither seen nor heard the witnesses, an advantage availed only to the trial court. Thus in **Jabane v Olinja {1986} KLR 664**

> ***"In the first appeal the court is mandated to reconsider and re-evaluate the evidence adduced by the witnesses before the trial Magistrate's court so as to arrive at an independent decision whether or not to uphold the decision of the trial Magistrate."***

> ***"It can also be emphasized that it's important that, sitting in the appellate court, one of the consideration is to bear in mind the advantages enjoyed of a trial Magistrate who saw and heard the witnesses and were in all in an incompatibly better position that the appeal court to assess the significant of what was said, and equally important what was not said."***

Whereas it may be plausible to interfere with the decision of the trial court at all stages of the appeal its incumbent upon the court to be guided by the following principles in **Shah v Mbogo {1968} EA 93** where on numerous occasions in the case of an appellate court discretion it has been held that:

> ***"In the exercise of discretion such a Ruling or Judgment shall not be interfered with unless the court is satisfied. That in exercising discretion the Learned trial Magistrate erred in principle either by failing to take into account relevant factors or gave little or too much weight to certain factors or was influenced by other irrelevant material failed to appraise the evidence appropriately and as a result erred in Law and fact to arrive at a wrong decision."***

Further therefore in assuming jurisdiction, the ultimate effect must be to rule in one way or another on matters in issue. It was clearly the letter of the constitution that the conditions stated by **Viscount L. C.** in **Charles Osenton & Co v Johnston {1941} 2 AER 245 at 250** has to be met thus:

> ***"The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the Judge, or Magistrate. In other words appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. If, however, the appellate tribunal reaches the clear conclusions that there had been a wrongful exercise of discretion, in that no weight, or no sufficient weight, has been given to relevant considerations, such as those urged before us, by the appellant, then the reversal of the order on appeal may be justified."***

Bearing in mind the above guidelines, for purposes of this appeal throughout what happened before the trial court the claim lodged was to determine the following issues:

> ***(a). Whether on the pleadings and evidence the appellants discharged the burden of proof on liability against the respondents with regard to arrest and detention being made without probable and reasonable cause.***

(b). Secondly, that by the respondents initiating the prosecution for the offence of an unlawful assembly contrary to Section 78 (1) of the Penal Code they were motived or actuated by malice.

The burden of proof expected of the appellants

The Law

The starting point on this is as stated under Section 107 (1) of the Evidence Act that:

> ***"Whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."***

Section 109:

> ***"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."***

The rule was firmly construed with regard to court cases in the persuasive case **Bradshaw v McEwans Ply Ltd {1956} 94 CLR 470** the court held:

> ***"In a civil cause, you need only circumstances raising a more probable inference in favour of what is alleged ….. Where direct proof is not available, it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference. They must do more than give rise to conflicting inferences of equal degree of probability so that the choice between them is a mere matter of conjecture. All that is necessary is that according to the course of common experience the more probable inference from the circumstances that sufficiently appear by evidence or admission, left unexplained, should be that the injury arose from the defendants negligence, by more probable is meant no more that on a balance of probabilities such an inference might reasonably be considered to have some greater degree of likelihood."***

The more accurate position was stated by **Starkies Law of Evidence 5th Edition {1853} 817, 818** thus:

> ***"A mere preponderance of evidence on either side may be sufficient to turn the scale…. But even where the contest is as to civil rights only, a mere preponderance of evidence such as would induce a jury to incline to the one side, rather than the other, is frequently insufficient. It would be so in all cases where it fell short of fully disapproving a legal right once admitted or established or of rebutting a presumption of law."***

It is therefore abundantly clear that the appellants had the legal duty to produce at least sufficient evidence for the trial Magistrate to consider the disputed claim on whether the prosecution initiated against them was malicious. The necessity of proof for this cause of action was on the appellants and never shifted to the respondents.

That evidential burden is within the scope of Section 107 (1) of the Evidence Act. This essential factor on the burden of proof was stated by Learned Author **Dennis I. H. Dennis** in his book the **Law of Evidence 2nd Edition (Reprinted 2008) at 271** in this sense:

> ***"When a party has discharged an evidential burden and raised an issue for the court to consider, there arises a tactical onus on the other party to respond with some rebutting evidence. There is no legal obligations to adduce (further) evidence on the issue, but the party against whom the evidence has been adduced increases the risk of losing on the issue if nothing is done to challenge. The evidence when a Judge is deciding whether an evidential burden has been discharged he looks only at the evidence favouring the party who bears the evidential burden. The question for decision is whether the favourable evidence is sufficient by itself to raise an issue for the court to consider, the fact that there may be substantial other evidence contradicting the favourable evidence is immaterial at this stage. When a fact finder (Judge, Jury or bench of Magistrates) is deciding whether a legal burden has been discharged, the fact finder will take into account the evidence which first served to discharge the evidential burden plus any other evidence which tends to confirm or rebut it. The discharge of an evidential burden does not involve a decision that any fact has been proved. All it signifies is that a question has been validly raised about the existence of a material fact, the decision is only that enough evidence has been adduced to justify possible finding in favour of the party bearing the burden. The discharge of the legal burden orders at a later stage in the trial, when the fact finder is required to decide on the existence or non-existence of facts whose possible existence is in issue."***

In respect of this appeal, the failure or success of it lies on whether the appellants satisfied the requirements of the Law in particular the evidential and standard of proof imposed on them in the context of the claim.

With the above observations, material evidence and the relevant applicable issues that came up for trial in relation to the burden of proof and the standard of proof ought to be appraised in order to establish the interplay on both sides of the cause of action.

Thus by virtue of this case, the pleadings and the record its desirable to point out as follows on undisputed facts:

(1). On 30.8.2010 the sixteen appellants were indicted and arraigned before the Principal Magistrate Court, Kilifi in Criminal Case No. 733 of 2010 to answer a charge of taking part in unlawful assembly contrary to Section 78 as read with Section79 of the Penal Code.

(2). Each of the appellant pleaded not guilty to the charge and were subsequently released on bail.

(3). The criminal trial commenced in earnest on 7.2.2011 and in discharging the burden of proof the prosecution called evidence of two witnesses and other documentary exhibits.

(4). At the close of the prosecution case the Learned trial Magistrate retired to appreciate the evidence and decide on issues raised by the defence counsel Mr. Kenga for the appellants on a motion of no case to answer under Section 210 of the Criminal Procedure Code.

(5). For the reasons stated in his Ruling dated 24.6.2011 it must be noted that the prosecution had not established a primafacie case that would require further evidence to be adduced by the defence.

Once the Learned trial Magistrate made that election the criminal proceedings against the appellants was determined in their favour. It is now the duty of this court to re-set and retest the interaction of the burden of proof in that case and the appellants claim against the respondents. If the appellants succeeds in persuading this court they would have the appeal decided in their favour and a reversal of the Judgment made by setting it aside and substituting it with any other orders for the interest of justice.

The concerns here rests with whether the appellants were falsely arrested, and detained at the police station in circumstances that can be considered as unlawful. From this element a question also arises whether they were maliciously prosecuted by the respondents without reasonable and probable cause and in charging them, the prosecution was actuated with malice.

Thus our Law is harnessed with myriad jurisprudence decisions and legal scholarly works on the objective test which has to be taken into account essentially to determine claims of this nature.

The question whether the appellants were reasonably and lawfully arrested in the circumstances of the case would in my view begin with a consideration on the higher elements on malicious prosecution, the penultimate of their claim. Authority to this may be found in the leading text **Salmon on the Law of Torts 7th Edition** where its stated that:

"In order that an action shall lie for malicious prosecution, the following conditions must be fulfilled:

(i). The proceedings must have been instituted or continued by the defendant.

(ii). He must have acted without reasonable and probable cause.

(iii). He must have acted maliciously.

(iv). The proceedings must have been successful that is to say, have been terminated in favour of the plaintiff now suing.

"Further the same Author defines "malice", to mean the presence of some improper and wrongful motive, that is to say, an intent to use the legal process in question for some other than its legally appointed and appropriate purpose."

Analysis of some prominent cases reveals the spectrum of the criterion in regard to the element on a malicious prosecution. In **Gitau v Attorney General {1990} KLR 13** the court held that:

"To succeed on a claim for malicious prosecution the plaintiff must first establish that the defendant or his agent set the law in motion against him on a criminal charge. Setting the law in motion" In this context has not the meaning frequently attributed to it of having a police officer take action, such as effecting arrest. It means being actively instrumental in causing a person with some judicial authority to take action that involves the plaintiff in a criminal charge against another before a magistrate. Secondly he who sets the law in motion must have done so without reasonable and probable cause…. The responsibility for setting the law in motion rests entirely on the Officer-in-charge of the police station. If the said officer believed what the witnesses told him then he was justified in acting as he did, and the court is not satisfied that the plaintiff has established that he did not believe them or alternatively, that he proceeded recklessly and indifferently as to whether there were genuine grounds for prosecuting the plaintiff or not. The Court does not consider that the plaintiff has established animus malus, improper and indirect motives, against the witness."

Further in the case of **Joseph C. Mumo v Attorney General & Another {2008} eKLR** the court defined malice means:

"Prosecution for a reason other the vindication of justice that the burden of proving malice lies on the plaintiff by showing what the motive was and that it was wrong, or by showing that the circumstances were such that the prosecution can only be accounted for by imputing some wrong or indirect motive to the prosecutor."

As mentioned in **Broughton v State of New York, 37, NY 22451, 456 (1975):**

"The Common Law also recognizes a cause of action for the separate tort of malicious prosecution, which protects the plaintiffs distinct interest of Freedom from unjustifiable litigation." "Thus while false arrest and malicious prosecution are kindred actions in so far as they often aim to provide recompense for illegal law enforcement activities each action protects a different personal interest and is comprised of different elements."

In the instant appeal the events which triggered the chain of events leading to the prosecution of the appellants started with an application made to Kilifi Police Station by the appellants for a permit to hold a meeting. According to the testimony by **(DW1) Sergeant Macharia** on receipt of the application, the District Security Committee scrutinized it and based on intelligence reports that application was declined, as such no meeting was to be held.

On 28.8.2010 it became apparent to **(DW1)** that inspite of the Security Committee rejecting the permit for a planned meeting, the appellants went ahead to reschedule and affirm it. That is how he moved on site with other police officers to arrest the appellants and further in his evidence have them charged with taking part in an unlawful assembly.

Thus in substance the appellants witness representative (PW1) did state at the trial court that all those steps taken to have them charged and prosecuted were malicious.

What was the duty imposed on the office commanding police station, **Chief Inspector Macharia (DW1).** There is a duty under the Constitution in Article 245 and Section 24 of the National Police Service Act to balance the interest of the freedom of the individual and of the individual and that of the type in detecting crime; maintenance of Law and order, protection of life and property, investigations of crimes, collection of criminal intelligence and apprehension of offenders. In doing so the police must show that:

> ***(1). They had reasonable grounds for believing that an offence had been committed.***
>
> ***(2). That they have reasonable grounds for believing that the person arrested or charged was only as a result of the crime, and there is material evidence to prove the commission of the crime, as in the case of this appeal, appellants participated in an unlawful assembly.***

It has been observed by the appellants above that what the **Chief Inspector Macharia** actually did was in a very general sense the duty imposed by the statute but in executing that duty he unlawfully arrested the appellants without reasonable and probable cause.

I was left wondering in this present case what exactly is the opposite to this case. The police having been approached to issue a permit to the appellants to hold a meeting, which on consideration on criminal intelligence at their disposal moved to reject the application. The appellants having been told of the situation went ahead to assemble and take part in the meeting.

I am alive with the Constitutional rights in Article 29 on Freedom and Security of the person and Article 37 on Assembly, demonstration, picketing and petition. The Constitution in total sum espouses the principle that a man's right to freedom, security and assembly should not be hindered or prevented except on the surest grounds. It must not be taken away on a suspicion which is not grave enough to warrant his or her arrest.

It is for this reasons that I concur in the persuasive case in **R v Oakes {1986} 26 CDLR {200} SCC 277** approach applicable to the instant appeal the Court observed as follows that:

> ***"Two tier test to establish that a limitation is reasonable and demonstrably justified in a free and democratic society: firstly, the objective, which the measures responsible for a limit on a charter right or freedom are designed to serve, must be of sufficient importance to warrant overriding constitutionally protected right or freedom. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain Section 1 protection. Once a sufficiently significant objective is recognized, then the party invoking Section 1 must show that the means chosen and reasonable and demonstrably justified. There must be a proportionately between the effects of the measures which are responsible for limiting the charter right or freedom and the objective which has been identified as of sufficient importance that the means, even if rationally connected to the objective, in the first sense, should impair as little as possible, the right to freedom in question. Secondly, another important consideration is whether the limitation serves a legitimate purpose in an open and democratic society."***

This seems a reasonable stated point in principle and probably underlines what in practice happens in the various agencies tasked with the duty and discretion in pursuit of the ends of criminal justice.

In my Judgment, everyone has the right to be secure against unreasonable arrest which intrudes to their right to liberty and privacy. I need to scarcely mention that not every conduct of a police officer that interferes with a person's right to liberty, assembly or security may constitute circumstances that they were no reasonable grounds to effect an arrest and subsequent indictment for a cognizable offence.

The notion that every prosecution which turns out to be in favour of a defendant lies a malicious prosecution to me would be completely to ignore the significance of our constitutional democracy and the tenets of the rule of Law and due process. If malice connotes malicious use or employment of legally provided procedure distinctly for the purposes not in a manner contemplated by the said Law, then that abuse of the process ought to be demonstrated by way of evidence to obtain the relief of a malicious prosecution.

Realistically, under Article 157 (6) of the Constitution:

> ***"The Director of Public Prosecutions shall institute and undertake criminal proceedings against any person before any court other than a court martial in respect of any offence alleged to have been committed."***

Under subsection (11):

> ***"in doing so the Director shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process."***

As the record shows the prosecutor had certain well defined duties to prosecute the appellants following an investigations conducted by the National Police Service under Article 244 of the Constitution, in order to enforce the Criminal Law. These constitutional mandates are enshrined in the constitution to protect any other citizens as of right to accord them the equal protection of the Law. The fact that the meeting took place after a denial of a permit should not obscure this fundamental distinction between public and private functions. The obligation to act in due accordance with the Law is clearly bestowed upon the National Police Service and the Director of Public Prosecution, to discharge their public duties particularly by investigating any crime, to initiate such proceedings against the perpetrators that may arise in a proper manner as established by the prevailing statutory scheme and regulations.

The mere fact that the appellants were arrested, prosecuted and the independent tribunal under Article 50 (1) of the Constitution retained a verdict of no case to answer primafacie is not a redressable action for malicious prosecution.

At first glimpse or impression one can manifest that the prosecution was without a probable cause, however on a closer analysis of the indictment it reveals that the alleged meeting took place against the rejection of a permit applied by the appellants prior to the due date of the assembly.

The materiality of defects in the indictments must not necessary amount to a malicious prosecution. Under Article 50 (2) (a) of the Constitution:

> ***"Every accused person has a right to be presumed innocent until the contrary is proved."***

Dismissal of an indictment is the proper sanction where the state fails to proof to the contrary on the right to presumption of innocence. However, I hold the view that this does not lead the court to conclude that such a prosecution was actuated maliciously.

From the record and the impugned Judgment apart from the annexed findings and the decision in **Criminal Case No. 733 of 2010**. The appellant witness concluded his testimony without the sufficiency of the evidence set forth in the familiar four – prong test for the claim on malicious prosecution in **Mbowa v East Mengo District Administration {1972} EA 352.**

> ***"The action for damages for malicious prosecution is part of the common law of England … The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit. It originated in the medieval writ of conspiracy which was aimed against combinations to abuse legal procedure, that is, it was aimed at the prevention or restraint of improper legal proceedings … It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth. Its essential ingredients are: (1) the criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority; (2) the defendant must have acted without reasonable or probable cause i.e. there must have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified; (3) the defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose; and (4), the criminal proceedings must have been terminated in the plaintiff's favour."***

This ultimately leads me to conclude that the indictment notwithstanding the defects mentioned by the Learned trial Magistrate in his Ruling the appellant failed to proof the essential elements of malicious prosecution.

The twin element to malicious prosecution strictly speaking is in relation with the question on reasonable and probable cause for the prosecution. **Clerk & Lindsell on torts 13th Edition {1969}** argues as follows:

> ***"The question of reasonable and probable cause frequently occasions no little embarrassment in the conduct of a trial, not so much from its own inherent difficulty as from the manner in which it presents itself since, first it involves the proof of a negative, and second, in dealing with it, the Judge has to take on himself, a duty of an exceptional nature. The plaintiff has, in the first place to give some evidence tending to establish an absence of reasonable and probable cause operating on the mind of the defendant. To do this he must show the circumstances in which the prosecution was instituted. It is not enough to prove that the real facts established no criminal liability against him, unless it also appear that those facts were withi.n the personal knowledge of the defendant. If they were not, it must be shown what was the defendant on which the defendant acted, which is sometimes done by pulling in the depositions which were before the Magistrate."***

See also the dicta and guiding principles in **Kagane & Others v The Attorney General {1969} EA 643, Hicks v Faulkner {1878} 8 Q.B.D. 167**. Another possible basis for the distinction under this element is the proposition found in **R v Lewes Crown Court exparte HCCC {1991} 93 CR Appeal No. R 60.** The view espoused by **Bingham L. J.** is as follows:

> ***"The police and Criminal Evidence Act governs a field in which there are two very obvious public interests. There is, first of all, a public interest in the effective investigations and prosecution of crime. Secondly, there is a public interest in protecting the personal property and rights of citizens against infringement and innovation. There is an obvious tension between these two public interest in protecting the personal and property rights of citizens against infringement and innovation. There is an obvious tension between these two public interests because crime could be most effectively investigated and prosecuted if the personal and property rights of citizens could be freely overridden and the total protection of the personal and property rights of citizens would***

make investigations and prosecution of many crimes impossible or virtually so."

At the risk of over-simplification of the matter, the prosecution witnesses PW1 and PW2 asserted that they received credible information that the appellants were set to design a plan on how to invade the farm of one **Christopher Wilson** of Kilifi County. The fact that they were not armed does not in any event lessen the ingredients to be proven for the offence under Section 78 as read with 79 of the Penal Code.

Either way the evidence shows that the appellants appeared to be well aware that for their meeting to fall within the ambit of the Law, they required to be issued with a permit. However, upon being denied the permit they went ahead to hold the assembly of about sixteen people. That alone was enough for the police to move in and establish the real circumstances why the meeting had to be held without a permit.

The investigations by the police cannot be said to be without reasonable or probable cause that in so acting the **O.C.S (PW2)** did so for an improper purpose. Without, necessary impeaching the proceedings before the criminal court there is primafacie impression that the appellants purported assembly was an abuse of the process of the Law which according to the police fall within their scope of investigations.

An argument was made by **Mr. Kenga** for the appellants that conceiving the idea of arresting and indicting the appellants had been reached without reasonable and probable cause to the extent of being malicious.

Summarizing what has hitherto been said in respect of the scope and object of this ingredient the court stated in **A v State of New South Wales {2007} HCA 10, 2007 81 at 86:**

> ***"It is clear that the absence of reasonable and probable cause is not demonstrated by showing that there were further inquiries that could have been made before a charge was laid. With a prosecution acts on information given by others, it will very often be the case that some further inquiry could be made. The whole point in an adversarial system the basic duty of the police force is to investigate cases as per the procedure laid down in the various statutes including the Criminal Procedure Code and to send them to the Director of Public Prosecution to initiate an indictment. The cases investigated by the police upon presentation to the prosecution are to be adjudicated by the courts."***

In the case before me this appeal court has not been told that investigations, arrest and subsequent prosecution of the appellants was done by the respondents without ascertainment of the facts and circumstances of the case, collection of relevant evidence relating to the commission of the offence, the formulation of the opinion on the material at hand was done with an improper motive and not for the public interest.

From the above, one can safely conclude that the submissions by the appellants in my respectful view fails the threshold to rule otherwise other than affirm the findings by the trial Magistrate. What was crucial however, was for the appellants to prove the respondents' malice and want of probable cause in bringing the prior action.

The upshot of this appeal is that, there was probable and reasonable cause within the knowledge of the officer commanding Kilifi Police Station to warrant arrest, investigations and prosecution initiated against the appellants. It is not enough for the appellants to merely assert that the criminal proceedings were terminated in their favour rather the basis for that must be made clear that the offence to which they were prosecuted relate with particularity of a malicious prosecution.

A police officer under the National Police Service Act and the Criminal Procedure Code Act without a warrant to arrest a suspect of a crime if he or she on reasonable grounds believes that any steps taken are for the preservation of the internal security or the prevention of any offence.

In the result the appeal is dismissed to the extent that the Judgment by the trial court is affirmed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF JULY 2020

.....

R. NYAKUNDI

JUDGE

This ruling has been delivered in terms of Article 48 and 159 (D) of the Constitution and practice directions on the general risks associated with COVID – 19 pandemic and the specific consents signed by both counsels dated **16.7.2020** ***(See Gazette Notice No. 3137 of 17.4.2020)***