



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL SUIT NO. 3B OF 2016

TOBIAS MOINDE KENGERE.....PLAINTIFF

VERSUS

THE POSTAL CORPORATION OF KENYA.....1ST DEFENDANT

THE INSPECTOR GENERAL OF POLICE.....2ND DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....3RD DEFENDANT

JUDGEMENT

By a plaint dated 25th May 2016 and filed in court on 26th May 2016 supported by the witness statement, list of witnesses and list of documents all dated 25th May 2016 the Plaintiff sued the Defendants seeking general damages for malicious prosecution, false imprisonment and loss of employment and earning; special damages; interest and costs of the suit.

The 1st defendant opposed the plaintiff's claim by an amended defence filed in court on 19th April 2018 and supported by the supplementary witness statement of Francis Wambugu dated 25th September 2018 and filed in court on the 4th October 2018. The 2nd and 3rd Defendants filed their joint statement of defence dated 13th December 2016 in court on 25th January 2017.

At the hearing on 4th October 2018, the plaintiff adopted his statement and supporting documents. Similarly, the Defence witness adopted his statement as evidence.

The Plaintiff filed submissions dated 12th October 2018 on 15th October 2018. The Defendants' filed joint submissions dated 26th October 2018 on the 29th October 2018.

It was the Plaintiff's case that he was employed by the 1st Defendant in the year 1991 as a counter officer and worked for it faithfully and diligently until sometime in April 2005, when he was arrested and charged in the Senior Resident Magistrates Court at Kajiado vide criminal cases numbers 1521 of 2005 and 590 of 2005. In criminal case number 1521 of 2005, the plaintiff was charged with forgery contrary to section 349 of the Penal Code and false accounting contrary to Section 330 (b) of the Penal Code. In criminal case number 590 of 2005, the plaintiff was charged with stealing by servant employed in public service contrary to section 280 Penal Code. In the second count, the Plaintiff and his co accused were charged with fraudulent false accounting contrary to Section 330 (c) of the Penal Code.

The Plaintiff averred that criminal cases numbers 1521 of 2005 and 590 of 2005 were determined on 27th June 2011 and 3rd June 2015 respectively. In both cases, the Plaintiff was acquitted of all charges.

In his evidence, the Plaintiff contended that his arraignment in court in criminal case 1521 of 2005 was not reasonable or justified. He averred that the Kshs. 7,000/ paid to the minor through her guardian one KLOM was done procedurally and in the presence of the minor. Further that the guardian in question was never called by the prosecution to testify. As for criminal case 590 of 2005, the plaintiff stated that he was working under his co-accused the post master. That he was only the counter officer who only received money and other transactions, which were handed over to the post master for accounting and returns to the employer's headquarters.

According to the Plaintiff, he gave his side of the story to the employer's investigators a Mr. Kamau and Munyi and also recorded his statement when the two handed him over to the police who eventually charged him in court, action which he considers and believes was malicious and meant to have him sacked from employment, hence the reason for this suit.

According to the Plaintiff, the particulars of malice against the Defendants were: lining up of witnesses to testify in the criminal case when a prudent and reasonable person ought to have known that the evidence couldn't eventually sustain the charges; willing to give testimonies by witnesses which the Defendants ought to have known were prejudicial to his workstation/position; bringing up of trumped up charges to pave

way for the Plaintiff's sack; hurriedly and without justifiable reasons giving the plaintiff a sack whilst the criminal cases were still pending determination; failing to carry thorough investigation within the circumstances permitting at the time with the sole purpose of establishing the truth of the allegations of stealing and fraudulent accounting; having conspirators as witnesses to fix the plaintiff and causing him troubles.

The loss and damage alluded to by the Plaintiff included being unlawfully sacked by his employer, hence loss of gainful employment before retirement; hiring the services of a lawyer to represent him when he hadn't committed any offence at all which cost the plaintiff and emotional stress, anguish and embarrassment to the plaintiff by depicting him as a corrupt employee.

The 1st Defendant, through its amended defence and the statement of DW1 which was adopted at the hearing, denied that the Plaintiff's arrest and prosecution was actuated by malice and contended that it acted on probable cause. It was further averred that the suit was time barred.

DW-1 an investigator with the 1st Defendant testified that regarding the Plaintiff's prosecution in Kajiado Senior Resident Magistrates Court Criminal Case No. 1521 of 2005, on 15th February 2005, a customer by the name JM sent money from Kiserian Post Office by way of Money Order to his sister JM, a student at [Particulars Withheld] Girls High School. However, the school did not receive the Money Order. During investigations, the Money Order was retrieved from the accounts section. It indicated to have been paid to the payee, who was a student and could not have had an identification card. However, the identification card number quoted on the order belonged to one KLOM an unknown person who was not the payee. Consequently, the Corporation decided to report the matter to the Criminal Investigation Department (CID) for investigations and further action. Upon conclusion of investigations, the plaintiff was charged in court.

It was further averred that concerning Kajiado Senior Resident Magistrates Court Criminal Case No. 590 of 2005 the 1st Defendant after conducting investigations discovered that money received from customers at Namanga Post Office could not be accounted for despite the said customers having been issued with deposit slips. The 1st Defendant thus decided to lodge a complaint with the Criminal Investigation Department. The matter was investigated and the Plaintiff together with the Postmaster at the branch Jotham Kemboi Kimengich were charged in Kajiado Criminal Case No. 590 of 2005.

It was averred that the decision to refer the matters to the Criminal Investigation Department was done in utmost good faith. Once the matter was reported to the CID, the 1st defendant who was merely a complainant played no role in conducting investigations and prosecution of the case other than availing witnesses and evidence required by the prosecution.

The 2nd and 3rd Defendant's in their joint defence denied the averments made by the Plaintiff. It was their case that the arrest and prosecution of the Plaintiff was conducted within the ambit of the statutory duty of the 2nd Defendant. Further, it was their case that this court lacked the jurisdiction to entertain the suit as the same ought to have been brought before the Employment and Labour Relations Court. They sought to have the suit dismissed with costs.

Plaintiff's Submissions

Counsel for the Plaintiff formulated 5 issues for determination to wit:

- a) Whether the defendants instituted criminal proceedings against the Plaintiff
- b) Whether the defendants preferred the criminal charges against the Plaintiff without cause or reasonable justification
- c) Whether the criminal proceedings were terminated in favour of the Plaintiff
- d) Whether the defendants acted maliciously
- e) Whether the plaintiff suffered damage and loss as a consequence of the criminal proceedings.

On the first issue, Counsel for the Plaintiff admitted that it was the Plaintiff who was charged and after full trial subsequently acquitted in criminal cases numbers 1521 of 2005 and 590 of 2005 at the Senior Resident Magistrate Court at Kajiado.

For the second issue, it was submitted that the charges preferred against the plaintiff had no reason or justification. The 1st and 2nd Defendants claim to have carried out their investigations before arraigning the accused in court. The 1st Defendant through their investigators after their work took the plaintiff to the CID who later charged the plaintiff in court. In case 1521 of 2005, it was submitted that the Defendants' action would have been reasonable or justified if they would have established the relationship between the minor (JM) and the guardian (KLOM), who received the Kshs.7.000/= on her behalf and in her presence. The defendants failed to call the guardian as witness.

Regarding criminal case number 590 of 2005, it was submitted that the plaintiff informed both the police and the 1st defendant's investigators that most of the transactions regarding the alleged false accounting took place when he was on leave. The allegations of false accounting should have been subjected to audit and also distinguish between the duties performed by the post master and the Plaintiff, who was a mere counter officer. The 2nd defendant's investigation officer failed to testify as to why he was convinced that there was any justification or reasonable cause to charge the plaintiff who had explained and even recorded a statement on his whereabouts at the time of the alleged and unproved offence. As such, the Defendants had no justification or reasonable cause to charge the Plaintiff.

Submitting on the third issue, Counsel reiterated that both criminal cases were terminated in favour of the Plaintiff. Criminal case number

1521 of 2005. was terminated on 27th June 2011 and criminal case number 590 of 2005 was terminated on 3rd June 2015.

As to whether the Defendants acted maliciously, it was submitted that the 1st Defendant arrested the plaintiff on allegations that it could not reasonably justify. The 1st Defendant's internal investigators could not establish that the person paid the Kshs. 7,000/= a Mr. KLOM whom the minor presented to the plaintiff did not exist despite the fact that his particulars were clearly entered during payment. The 2nd Defendant who charged the plaintiff in court had the particulars of the said payee and where he could be found, but just took the plaintiff to court after holding him in custody for several days. Counsel argued that if it was a genuine complaint, the defendants would have surcharged for any loss that would have been incurred by the 1st Defendant. According to Counsel, malice is revealed by the events that followed the prosecution of the Plaintiff. Insufficient evidence was presented to have the plaintiff charged in court. Shortly after prosecution, the plaintiff was interdicted and sacked from employment before the criminal cases could concluded. The failure by the 2nd Defendant's investigating officer to testify or have relevant witnesses testify is further proof of malice.

Coming to whether the Plaintiff suffered damages and loss, it was submitted that on arrest the plaintiff remained in custody for five days before he was released on bond. Secondly, the plaintiff testified that after the arrest and dismissal his wife left him together with the children. Thirdly, as at the time of dismissal the plaintiff was aged 43 years and would have worked for the 1st Defendant to retirement at the age of 60 years. He lost 17 years, which he would have worked and earned promotion and salary of over 2813160 /=. The plaintiff further stated in his evidence that he never got employed after dismissal. He paid for legal services in defence of his criminal cases.

In closing, advocate for the Plaintiff urged the court to grant general damages and loss to the tune of Ksh. 8,000,000/- for malicious prosecution; Ksh. 5,000,000/- for false imprisonment; Ksh. 10,000,000/- for loss of employment and earning as well as interest and costs.

In support of his submissions, the Plaintiff relied on the following authorities: **Kenneth Onyango Odhiambo vs The Attorney General and 2 Others Civil Suit No. 269 Of 1999; Leornard Ataro & Peter Ajaro Vs The Honourable Attorney General Civil Suit No. 1173 Of 2002 and Joseph C. Mumo Vs Attorney General And Another Civil Suit No. 250 Of 2004.**

Defendants' Submissions

On its part, the Defence formulated 4 issues for determination as below:

- a. Whether the suit is time barred
- b. Whether the prosecution that leads to an acquittal is malicious
- c. Whether the Plaintiff is entitled to damages for malicious prosecution
- d. Whether the Plaintiff is entitled to costs of the suit

Addressing whether the instant suit was time barred, the Defence submitted that while this suit was filed on 26th May 2016, suit No. 1521 of 2005 was determined on 27th June 2011 while 590 of 2005 was determined on 3rd June 2015 over a year before the suit was filed. It was further submitted that **Section 3(1) of the Public Authorities Limitation Act, 1974 Laws of Kenya** provided that; **"No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued."** In support of its argument, the defence relied on **Lucia Wambui Ngugi vs. Kenya Railways & Another Nairobi HCMA No. 213 of 1989.**

It was further submitted that limitation of time and jurisdiction of the court was clearly pleaded in the 1st Defendant's statement of defence and as was held in **Okoth and Others vs. Godwin Waniuki Wachira (1978) KLR 53; [1976-80] KLR 768**, when limitation is relied on as a defence, it is sufficient to plead that the claim is barred by limitation. Counsel also cited **Eaton vs. Tapley 1899 1 QB 953.**

Counsel went on to submit that as there is no jurisdiction to extend time in respect of the claim in malicious prosecution, this suit in so far as the claim therefor is incompetent and cannot stand. Notwithstanding this fact. It is without doubt that this suit was filed after three years and no leave of the court was sought before filing and it should therefore be dismissed for being time barred. Reliance was placed on **Owners and Masters of the Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367**

Advocates for the Defence submitting on whether every prosecution that leads to an acquittal is malicious cited **Kagane & Others -US- Ag & and Another [1969] EA and Murunga vs AG [1982-88 KLR 133** where the court outlined the elements of malicious prosecution as: the prosecution was instituted against the plaintiff by the defendant; that the prosecution was terminated in favour of the plaintiff; without reasonable and probable cause and finally that the prosecution was actuated by malice. Counsel admitted that the plaintiff had established the first two elements. On whether the making of the said complaint by the plaintiff was malicious, it was submitted that the mere fact that a person had been acquitted of the criminal charge does not necessarily connote malice on the part of the prosecutor. Reliance was placed on **James Karuga Kiiru vs. Joseph Mwamburi and 3 others, Nrb C.A No. 171 of 2000** where it was held that to prosecute a person is not prima facie tortuous, but to do so dishonestly or unreasonably.

It was further submitted that in the present case the arrest and arraignment of the plaintiff was reasonable. Upon cross examination by counsel for the 1st Defendant, the Plaintiff confirmed that as a counter officer his work among others was to receive money, that money was lost as a result of which investigations were conducted. Further reliance was placed on **Music Copyright Society of Kenya v Tom Odhiambo Bowl (2014) KLR.**

For an explainer on what amounts to reasonable and probable cause for the purposes of malicious prosecution, Counsel relied on **Kagane &**

Others vs. AG & Another (supra)

Citing **Section 24 National Police Service Act** on the functions of the Kenya Police Service, Counsel submitted that the Police in this case carried out investigations after a complaint was made to them by the 1st Defendant. After conducting investigations, they found the plaintiff herein had committed a cognizable offence. The Plaintiff was subsequently charged in a court of law of cognizable offences. Several witnesses were called to testify in the Criminal matter as evidenced in the judgments where the prosecution called almost ten witnesses. To be liable for malicious prosecution, the 2nd Defendant must have acted without reasonable or probable cause. Therefore, as this was not the case the criminal proceedings were justified. The 2nd Defendant was justified in its action and therefore malice has not been proved. Reliance was placed on **Mbowa vs. East Mengo District Administration [1972] EA 352**.

The Defence submitted that the Plaintiff had failed to show any level of dishonesty or unreasonable behaviour on the part of the 2nd Defendant. PW1 testified that he did not have any grudge with the police officers a fact that shows the absence of malice. On this Counsel cited **Gitau Vs. Attorney General (1990) KLR 13**.

Counsel further submitted that upon cross-examination PW-1 admitted that he was put in his defense in both criminal cases. Counsel relied on **Murunga vs Attorney General (1979)** where the Court held that ***“the fact that the appellant was put on his defence was proof enough that there was reasonable and probable cause for prosecuting the appellant and that the prosecution was commenced after reasonable suspicion”***.

In closing on this issue, it was submitted that the Plaintiff had not shown that his arrest was directed by improper and indirect motive on the part of the Defendants and thus it follows that malice has not been proved.

As to whether the Plaintiff was entitled to general damages reliance was placed on **James Karuga Kiiru vs. Joseph Mwamburi & 2 Others Civil Appeal No. 171 of 2000** for the submission that 2nd Defendant arrested the Plaintiff after the complaint was made which was after the investigations were complete. He was granted bail and later taken to court on time and subsequently charged with a cognizable offence in law. A claim for false imprisonment cannot therefore be sustained in this matter. It was further submitted that claims for damages for Loss of employment and earning could not be sustained in a suit for malicious prosecution and ought to be dismissed.

On special damages, it was submitted that it is trite law that special damages must not only be pleaded but also proved. The Plaintiff never produced any evidence including receipts and therefore his claim under this head should fail.

Finally, on costs, the Defence submitted that the Plaintiff had failed to prove malice and therefore he was not entitled to damages or costs of the suit. The Plaintiff had failed to prove his case on the balance of probabilities and therefore the claim ought to be dismissed with costs to the Defendants.

Analysis and Determination

Taken in totality, the respective parties' evidence and submissions raise three issues for determination:

- e. Whether the instant suit is time barred by Section 3(1) of the Public Authorities Limitation Act, 1974 Laws of Kenya
- f. Whether the elements necessary to sustain a claim for malicious prosecution have been met
- g. Whether the Plaintiff is entitled to the reliefs sought

The law on malicious prosecution is well settled. The principles that govern a claim founded on malicious prosecution were laid down by Cotran, J in the case of **Murunga vs Attorney General, [1979] KLR, 138** as follows:

- a) *The Plaintiff must show that the prosecution was instituted by the Defendant, or by someone for whose acts he is responsible.*
- b) *The Plaintiff must show that the prosecution terminated in his favour.*
- c) *The Plaintiff must demonstrate that the prosecution was instituted without reasonable and probable cause.*
- d) *He must also show that the prosecution was actuated by malice.*

According to the authors of **Clerk and Lindsell on Torts, 18th Edition** at page 823, the essentials of the tort of malicious prosecution are as follows:

“in an action of malicious prosecution the claimant must show first that he was prosecuted by the defendant, that is to say, that the law was set in motion against him on a criminal charge, secondly that the prosecution was determined in his favour, and thirdly that it was without reasonable or probable cause; fourthly that it was malicious. The onus of proving every one of this is on the claimant.

Evidence of malice of whatever degree cannot be invoked to dispense with or diminish the need to establish separately each of the first three elements of the torts.”

In *Mbowa vs. East Mengo District Administration* [1972] EA 352, the East African Court of Appeal expressed itself as follows:

“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, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge...The plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must “unite” in order to create or establish a cause of action. If the plaintiff does not prove them he would fail in his action. The damage that is claimed is in respect of reputation but other damages might be claimed, for example, damage to property...The damage to the plaintiff results at the stage in the criminal proceedings when the plaintiff is acquitted or, if there is an appeal, when his conviction is quashed or set aside. In other words, the damage results at a stage when the criminal proceedings came to an end in his favour, whether finally or not. The plaintiff could not possibly succeed without proving that the criminal proceedings terminated in his favour, for proving any or all of the first three essentials of malicious prosecution without the fourth which forms part of the cause of action, would not take him very far. He must prove that the court has found him not guilty of the offence charged...The law in an action for malicious prosecution has been clearly defined and in so far as the ordinary criminal prosecution is concerned the action does not lie until the plaintiff has been acquitted of the charge. In this case the respondent could have brought his action for malicious prosecution until the prosecution ended in his favour. He could not have maintained his action whilst the prosecution was pending nor could he have maintained an action after he had been convicted. His right to bring the action only accrued when he secured his acquittal of the charge on appeal, and he then had the right to bring this action for damages...Time must begin to run as from the date when the plaintiff could first successfully maintain an action. The cause of action is not complete until such a time, and in this case this was only after he was acquitted on appeal”.

2. Trainor J in *Gitau vs. Attorney General* [1990] KLR 13 stated 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.”

3. In the case of *Egbema vs West Nile District Administration*, (1972) E.A. Law, Ag. V. P. as he then was, said:

“Is the respondent also liable in damages in respect of the abortive prosecution” I do not think so. The decision whether or not to prosecute was made by the Uganda Police, who are not servant or agents of the respondents after investigation. I can see no evidence of malice on the part of the respondent.

The appellant was an obvious suspect as he was responsible for the security of the office from which the cash box disappeared. It cannot be said that there was no reasonable and probable cause for the respondent instigating a prosecution against the appellant. The actual decision to do so was taken by the Uganda Police. As the judge has made no finding as to whether the instigation of the prosecution was due to malice on the part of the respondent, this Court must make its own finding.

In my view the circumstances of this case reasonably pointed to the appellant as a suspect and there was not sufficient evidence that in handing the appellant over to the Uganda Police for his case to be investigated and, if necessary, prosecuted, the respondent was actuated by malice.”

I can do no better than associate myself with the erudite account of what amounts to reasonable and probable cause for the purposes of malicious prosecution illustrated by *Rudd, J in Kagame & Others vs. AG & Another* [1969] EA 643. Citing *Hicks vs. Faulkner* [1878] 8 QBD 167 at 171, *Herniman vs. Smith* [1938] AC 305 and *Glinski vs. McIver* [1962] AC 726 the learned judge stated:

“Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed...Excluding cases where the basis for the prosecution is alleged to be wholly fabricated by the prosecutor, in which the sole issue is whether the case for the prosecution was fabricated or not, the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of objective test. That is to say, to constitute reasonable and probable cause the totality of the material within the knowledge of the prosecutor at the time he

instituted the prosecution, whether that material consisted of facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty. If and insofar as that material is based on information, the information must be reasonably credible, such that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution...If it is shown to the satisfaction of the judge that a reasonable prudent and cautious man would not have been satisfied that there was a proper case to put before the court, then absence of reasonable and probable cause has been established. If on the other hand the judge considers that prima facie there was enough to justify a belief in an ordinary reasonable prudent and cautious man that the accused was probably guilty then although this would amount to what I call primary reasonable and probable cause the judge may have to consider the further question as to whether the prosecutor himself did not believe in the probable guilt of the accused, and this is obviously a matter which is to be judged by a subjective test. This subjective test should only be applied where there is some evidence that the prosecutor himself did not honestly believe in the truth of the prosecution...Inasmuch as this subjective test only comes into operation when there were circumstances in the knowledge of the prosecutor capable of amounting to reasonable and probable cause, the subjective test does not arise where the reason alleged as showing absence of reasonable and probable cause is merely the flimsiness of the prosecution case or the inherent unreliability of the information on which the case was based, because this is a matter for the judge alone when applying the objective test of the reasonable prudent and cautious man. Consequently, the subjective test should only be applied where there is some evidence directly tending to show that the prosecutor did not believe in the truth of his case. Such evidence could be afforded by words or letters or conduct on the part of the prosecutor which tended to show that he did not believe in his case, as for example a failure or reluctance to bring it to trial, a statement that he did not believe in it and, I think possibly, an unexplained failure to call an essential witness who provided a basic part of the information upon which the prosecution was based”.

Tackling the issue of whether an acquittal rendered a prosecution malicious the Court of Appeal in **Robert Okeri Ombeka v Central Bank of Kenya, Civil Appeal No. 105 of 2007 [2015] eKLR** referred to its decision in *Jediel Nyaga vs Silas Mucheke, (CA NO. 59 OF 1987 (NYERI) (UR)* where it was stated:

“It is trite law that false arrest and false imprisonment may very well be found where prosecution is dismissed and the accused acquitted. Malicious prosecution may also be found where determination of prosecution was in favour of the accused i.e. in cases where the prosecution was withdrawn and the accused is not re-charged or where prosecution has been terminated with the acquittal of the accused. False arrest may also be constituted where the matter of the false report was actuated by malice. In the instant case, there was no evidence adduced to show that the report by the appellant about the damage to his crop and trees by the respondent was false. He admitted as having made the report. There was evidence that the respondent had erected a stone building on the appellant’s land although the dispute was not on the ownership of the land. The police investigated the complaint and arrested the respondent. The arrest by the police could not be attributed to the appellant. The position would have been different if the appellant had arrested the respondent himself or that the report was false. Police action cannot be attributable to the appellant who had no authority over them. There was no evidence to suggest that the arrest and prosecution of the respondent was brought without reasonable or probable cause.”

The court in *Robert Okeri Ombeka vs Central Bank of Kenya (supra)* went further and stated:

“Comparative judicial experience in other jurisdictions also shows an emerging legal principle that an acquittal or discharge in a criminal prosecution should not necessarily lead to a cause of action in malicious prosecution law suits. A malicious prosecution plaintiff cannot establish lack of probable cause based on having obtained in an earlier action an acquittal based on insufficiency of the evidence. Successfully defending a prosecution or a law suit does not establish that the suit was brought without probable cause. It is the state of mind of the one commencing the arrest or imprisonment, and not the actual facts of the case or the guilt or innocence of the accused which is at issue. Probable cause is determined at the time of subscribing a criminal complaint and it is immaterial that the accused thereafter may be found not guilty.”

Similarly, in the case of *Socfinaf Kenya Ltd vs Peter Guchu Kuria & Another, Civil Appeal No. 595 of 2000 (2002) eKLR*, Aganyanya, J (as he then was), observed as follows:

“Moreover, when there is a case of suspected theft the first step is to report the matter to police, who in their own way find out how to carry out investigations. And it is up to the police to take further steps like taking a suspect to court if they have sufficient evidence against such suspect to warrant such action. This then is the action by police and the state should be involved or joined in such suit and that the complainant should not be blamed for making such report to police. What is of great significance in such case is whether or not there is a reasonable and/or probable cause for the arrest and/or prosecution of the culprit. And the onus of proving that there was no reasonable and probable cause for the arrest and prosecution of the suspect lies on him/her who queries such arrest or prosecution. As to the prosecution of the respondents, the complainant could not force police to do so when there was no evidence to take them to court. Police carry out investigations before taking suspects to court and there are various incidents when police have declined to prosecute a suspect when investigations have disclosed no offence to warrant this. If the respondent’s case fell in the latter category, then I am sure they would not have taken to court. That a suspect was acquitted of a criminal case is not sufficient ground for filing a civil suit to claim damages for malicious prosecution or false imprisonment. Evidence of spite, ill-will, lack of reasonable and probable cause must be established.”

4. In *Dr Lucas Ndungu Munyua v Royal Media Services Limited & Another Civil Case 52 of 2008 [2014] eKLR* it was stated that:

*“73. With respect to malice, the law is clear that the mere fact that a person has been acquitted of the criminal charge does not necessarily connote malice on the part of the prosecutor. As was held in *James Karuga Kiiru vs. Joseph Mwamburi and Others Nrb C.A No. 171 of 2000 [2001] eKLR*, to prosecute a person is not prima facie tortious, but to do so dishonestly or unreasonably is the burden of proving that the prosecutor did not act honestly or reasonably being on the person prosecuted. Malice, however, can either be express or can be gathered from the circumstances surrounding the prosecution. A prosecution*

can either be mounted based on an offence committed in the presence of law enforcement officers or by way of a complaint lodged by a person to the said officers or agencies. However, the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. I say ordinarily because the mere fact that the version of one of the parties is not considered does not make the subsequent prosecution malicious. However, where the police deliberately decide not to take into account the version of the suspect and acts on a story that eventually turn out to be improbable and which no ordinary prudent and cautious man would have relied upon that failure may constitute lack of reasonable and probable cause for the purposes of malicious prosecution. On the other hand it would be obviously absurd to make a defendant liable because matters of which he was not aware put a different complexion upon facts, which in themselves appeared a good case for prosecution. But neglect to make a reasonable use of the sources of information available before instituting proceedings would be evidence of want of reasonable and probable cause and also malice. It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but whether there is a reasonable and probable case for a prosecution. Circumstances may exist in which it is right before charging a man with misconduct to ask for an explanation but no general rule can be laid down.”

Armed with the generous jurisprudence on malicious prosecution I have endeavoured to illustrate in the foregoing, all that remains is to juxtapose said law against the facts and the evidence in the instant case. My point of departure is the claim that this suit is time barred. **Section 3(1) of the Public Authorities Limitation Act, 1974 Laws of Kenya** provides that; *"No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued."*

Odunga J in **Jacob Juma & another v Commissioner of Police & Another Civil Suit 661 of 2007 [2013] eKLR** opined thus:

“The first issue for determination is whether the claim herein is time barred. As was held in Mbowa vs East Menyo District Administration (supra) the damage to the plaintiff results at the stage in the criminal proceedings when the plaintiff is acquitted or, if there is an appeal, when his conviction is quashed or set aside. In other words, the damage results at a stage when the criminal proceedings came to an end in his favour, whether finally or not since the plaintiff cannot possibly succeed without proving that the criminal proceedings terminated in his favour, for proving any or all of the first three essentials of malicious prosecution without the fourth which forms part of the cause of action, would not take him very far. In other words the action does not lie until the plaintiff has been acquitted of the charge and he cannot maintain an action after he had been convicted. His right to bring the action only accrues when he secured his acquittal of the charge or on appeal after which he then has the right to bring this action for damages. Time, for the purposes of limitation must begin to run as from the date when the Plaintiff could first successfully maintain an action and the cause of action is not complete until such a time, and in this case this was only after he was acquitted on 20th November 2006. This suit was filed on 16th September 2007. Under section 3(1) of Cap 39 aforesaid, proceedings on tort against the Government or a local authority must be brought before the end of twelve months from the date on which the cause of action accrued. Since the “cause of action” has been held to mean “every fact which is material to be proved to entitle the plaintiff to succeed, every fact which the defendant would have a right to traverse”, it does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. See Cook vs. Gill [1873] LR 8 Cp 107 at 114 and Read vs. Brown [1889] 22 QBD 128 at 131.”

Flowing from the preceding, time for the purposes of limitation must begin to run as from the date when the Plaintiff could first successfully maintain an action and the cause of action is not complete until such a time. In the instant case, the Plaintiff’s cause of action is based on criminal cases numbers 1521 of 2005 and 590 of 2005. In Criminal case 1521 of 2005, the Plaintiff was acquitted on 27th June 2011. Conversely, in criminal case 590 of 2005, his acquittal came via judgement issued on 3rd June 2015. The instant suit was on the other hand filed on 26th May 2016.

The period from the time of acquittal in both cases to the time the suit was instituted is over 5 years for criminal case 1521 of 2005 and slightly less than 12 months in criminal case 590 of 2005. As it stands therefore, the Plaintiff’s cause of action is only tenable with respect to his prosecution in criminal case 590 of 2005 and I hereby find and hold as much. Therefore, in determining whether the Plaintiff’s claim ought to succeed, I will restrict myself to the cause of action that arose with the Plaintiff’s prosecution in Kajiado Criminal Case 590 of 2005.

I now turn to question whether the requirements for a malicious prosecution claim have been met. The first and second limbs requisite in proving a claim for malicious prosecution are not contested and I am quick to find and hold that they have been proven. There is no doubt that the prosecution of the Plaintiff in Kajiado Senior Resident Magistrates Court Criminal Case No. 590 of 2005 was instituted upon investigations by agents of the 1st Defendant who was the complainant then and investigated and prosecuted by the 2nd Defendant’s agents/servants. It is also not in question that the prosecution in Court Criminal Case No. 590 of 2005 was terminated in favour of the Plaintiff by judgement delivered on 3rd June 2015.

What follows is the all-important issue of whether the actions of the Defence were undertaken without reasonable or probable cause and were hence a product of malice on the part of the prosecution.

The Plaintiff argued that he informed both the police and the 1st defendant's investigators that most of the transactions regarding the alleged false accounting he had been accused of occurred when he was on leave. The allegations of false accounting should have been subjected to audit and also distinguish between the duties performed by the post master and the Plaintiff, who was a mere counter officer. According to the Plaintiff, the 2nd defendant's investigation officer failure to testify and his interdiction and sacking prior to the conclusion of his criminal cases is proof of malice.

On the other hand, upon discovering the loss of money at Namanga Post Office, the 1st Defendant engaged its agents for investigations.

Upon conclusion of those investigations, the 1st Defendant's investigators forwarded the Plaintiff and his post master to the police who in turn preferred charges against both persons.

While acquitting the Plaintiff in Criminal case 590 of 2005, it was noted that prosecution had failed to prove its case against the accused by failing to call crucial expert witnesses.

The facts being as they are; I am not convinced that the 2nd Defendant in prosecuting the Plaintiff acted without reasonable or probable cause. A crime was committed and the 2nd Defendant was well within its statutory duty to decide to charge the Plaintiff. The Plaintiff has not shown this court that in prosecuting the Plaintiff, the Defendant applied extraneous considerations. To me, the 2nd Defendant had reasonable cause to suspect the Plaintiff had committed the offences alleged. As has been intimated above, that the Plaintiff was acquitted for lack of evidence in itself cannot sustain a claim for malicious prosecution. Not an iota of malice can be inferred on the part of the prosecution. As such, the Plaintiff's claim fails.

In the premises, aside from the fact that the Plaintiff's claim was partially barred by limitation and beyond salvage by extension of time, it is my view and I hold that the whole suit was unmerited as the plaintiff failed to prove the ingredients of malicious prosecution.

Having failed to prove his case on a balance of probabilities, I find and hold that the Plaintiff is not entitled to the reliefs sought.

In the upshot, this suit is dismissed.

Dated Delivered and Signed, in open case at Kajado this 4th day of February 2019

R NYAKUNDI

JUDGE

Representation

Ms. Achieng for the 1st Respondent

Ms. Warugi for the 2nd Respondent

The Appellant present