REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CIVIL APPEAL NO. 19 OF 2017

KASIO MATUKU.....1ST APPELLANT

KENYA POST OFFICE SAVINGS BANK.....2ND APPELLANT

VERSUS

JAMES KIPKEMBOI CHERUIYOT.....RESPONDENT

AND

INSPECTOR GENERAL OF POLICE....1ST INTERESTED PARTY

THE ATTORNEY GENERAL.....2ND INTERESTED PARTY

[An appeal from the original judgment and decree of the Principal Magistrate's Court at Kabarnet PMCC No. 23 of 2015 delivered on the 14th day of July, 2015 by Hon. S.O. Temu, PM]

JUDGMENT

THE APPEAL

1. The appellant appeals from the decision of the trial Court in Kabarnet PMCCC No. 23 of 2013 in which the Court gave judgment for malicious prosecution and awarded the respondent the sum of Ksh.1,500,000/= in general damages and Ksh.110,000/= as special damages together with costs of the suit. The civil suit for malicious prosecution arose from the Respondent's acquittal after full trial for the charge of theft by servant in Kabarnet PMCCR. Case No. 154 of 2010. In his suit for malicious prosecution by Plaint dated 30th September 2013, the Respondent had sought reliefs as follows:

> "**REASONS WHEREFORE:-** the plaintiff prays for judgment against defendants jointly and severally for:
>
> a. A Declaration that the arrest, detention in police custody was wrongful and subsequent prosecution was malicious.
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> b. General damages for wrongful arrest, unlawful detention in police custody, malicious prosecution and defamation.
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> c. Special damages of Ksh110,000/=.
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> d. Costs of the suit.
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> e. Ancillary expenses (To be adduced during the hearing)
>
> f. Interest on (a), (b) (c) and (e) above at Court rates from the date of filing suit.
>
> g. Any other relief this Honourable Court may deem fit to grant."

2. The appellants' grounds of appeal were set out in the Memorandum of Appeal dated 28th July 2015 as follows:

> 1. "The Learned Magistrate erred in Law and in Fact in holding that the Defendants were jointly and severally liable for the tort of malicious prosecution which assumes that the Appellants were in charge of making the decision to prefer charges of

stealing by servant against the Respondent yet that is a prosecutorial function which the Appellants have no power over.

2. The Learned Magistrate erred in Law and Fact in failing to find that there was reasonable and probable cause in prosecution of criminal case no. 154 of 2010 of Principal Magistrate's Court at Kabarnet.

3. The Learned Magistrate erred in Law and Fact in failing to find that the prosecution of criminal case No. 154 of 2010 of Principal Magistrate's Court at Kabarnet was not motivated by malice.

4. The Learned Magistrate erred in Law and Fact in failing to find that the special damages based on legal fees that the 1st Respondent claims to have incurred in criminal case No. 154 of 2010 were unreasonably high and the same had not been taxed or assessed by the Court.

5. The Learned Magistrate erred in Law and Fact by shifting the burden of proof in the case to the Appellants.

6. The Learned Magistrate erred in Law and Fact in continuously showing bias against the Appellants during the trial process.

7. The Learned Magistrate erred in Law and Fact by exceeding his jurisdiction in awarding general damages for wrongful arrest and unlawful detention in police custody, malicious prosecution and defamation.

8. The Learned Magistrate erred in Law and Fact by awarding the 1st respondent excessive general damages.

9. The Learned Magistrate erred in Law and Fact in failing to take into account the Appellants submission.

10. The Learned Magistrate erred in Law and Fact in disregarding the supplementary list of documents dated the 22nd of September, 2014, and filed in Court on the 23rd of September 2014."

Submissions

3. The appellants and the Respondent filed written submissions, respectively dated 6/3/18 and 17/11/17. The interested parties (referred to as the 3rd and 4th defendants in the suit) did not filed submissions.

Respective cases of the parties

The appellant's case

4. The appellants cited ***Nzoia Sugar Company Ltd. v. Collinsus Faugututi*** Civil Appeal no. 7 of 1987, [1988] eKLR on the elements of malicious prosecution and urged that there was reasonable and probable case for the prosecution of the Respondent and his co-accused for the offence of theft by servant, a position, they urged, was confirmed by the placing of the accused on their defence following a finding of a *prima facie* case by the trial Court in Kabarnet PMCCr. Case No. 154 of 2010 and the charge was only dismissed because of inconsistencies in the evidence as to the amounts allegedly stolen by the accused. Citing a passage in the ***Law of Tort,*** 2nd edition by A. Grubb, it was urged that where there was a prima facie case of commission of an offence, there could not be a basis for malicious prosecution. The appellant further urged that the appellate Court has a duty to re-evaluate the evidence before a trial Court and make its own finding on the matter.

5. As regards damages, it was submitted for the appellants that special damages claimed as legal fee for representation of the plaintiff in the criminal trial the subject of the malicious prosecution suit must be based on an actual ***taxed*** fees on the basis of Advocate - Client Bill of Costs.

6. It was further submitted that the jurisdiction to redress violations of the Bill of Rights lies with the High Court under Articles 23 and 165 (3) (b) of the Constitution and the Magistrate Court, the trial Court herein, had clearly no jurisdiction to award in damages for wrongful arrest and unlawful detention.

7. Finally, it was urged that the appellate Court had a duty to interfere with the award of damages made without jurisdiction citing the ***Owners of the Motor Vessel Lilian 'S' v. Caltex Kenya Ltd*** (1989) KLR 1 and the Supreme Court's decision in ***Deynes Murithi and 4 Ors v. L.S.K & 4 Ors.*** [2016] eKLR.

The Respondent's case

8. The Respondent urged that there was no reasonable and probable cause to prosecute the Respondent and that the appellants and the police were actively responsible for the prosecution of the Respondent even when there was no cogent evidence to sustain a conviction.

9. As regards general damages, it was contended that the sum of Ksh.1.5 million was within the pecuniary jurisdiction of the trial Court magistrate and the Court was justified in making the award because "as a result of the malicious and baseless prosecution of the appellants and the interested parties, the Respondent incurred loss of his job, livelihood, reputation and even mental status was affected [and] it unlikely that employers can consider him for employment due to past history of prosecution for stealing by servant". The decision of ***Stephen Gachau Githaiga v. Margaret Wambui Weru & Anor*** Nyeri HCCA No. 27 of 2014 (Mativo, J.) was cited.

10. It was urged that the Respondent had proved the ingredients of the tort of malicious prosecution and that the allegations of bias on the

part of the trial Court were unsubstantiated and an afterthought having not been taken up by an application for recusal of the magistrate.

11. Finally, it was urged that the special damages were proved by receipts amounting to Ksh.110,000/= for legal fees incurred by the Respondent in defending himself in the Criminal proceedings, and that the appellant ought to have challenged the dismissal of their application for supplementary list of documents by an appeal there from and that having failed to do so, the issue of supplementary list of documents is *res judicata.* The prosecution was faulted for failure to conduct investigation which would have disclosed that there was no reasonable evidence to justifying continued prosecution.

The issues for determination

12. The core issues before the Court are three-fold, namely-

a. whether liability for malicious prosecution has been established on the evidence before the Court; and, if so,

b. whether the general damages awarded by the trial Court were excessive and made without jurisdiction, and whether the special damages were proved; and

c. whether the Court will interfere with the award of damages by the trial Court.

13. Peripheral issues of allegations of bias and shifting of the burden of proof and failure to take into account appellant's submissions and to admit supplementary list of documents are discussed at the preliminary stage.

Allegation of Bias against trial Court

14. On alleged bias on the part of the trial was raised by the appellant, although the trial Court should not have used coloured language the 1st appellant had no instructions "the sneak to the plaintiff's place of work," there is a greater objection to such a finding; on the authority of the Privy Council in ***Rosetta Cooper v. Gerald Nevill & Anor.*** (1969) EA 63 "*that it was not open to the Court … to adopt a speculative explanation…without any evidence to support it",* there was evidence in this case of prior notice of impending surprise visits for bank inspections on unannounced dates.

15. However, lack of notice of Judgment to the appellant's counsel so that judgment was delivered in his absence is not as submitted by the appellant *"a clear sign of bias."* Bias on the part of the Court is a serious claim which must be proved to a high degree of probability.

Standard of proof of bias

16. In ***Henry Hidaya Ilanga v. Manyem Manyoka*** (1961) EA 705, the Court of Appeal from Eastern Africa held that there were different standards within the civil (and criminal) standard of proof. In the words of Sir K. O'Connor, P. (with whom Sir Alastair Forbes, V-P and Newbold, J.A. agreed) at 709:

"Mr. Thornton, for the appellant, contended that this was a misdirection. He submitted that while the standard of proof required in a civil case is not so high as that required in a criminal case, it is not correct to say or imply that the standard of proof is the same in all civil cases – namely a mere balance of probabilities: the standard varies according to the gravity of the matter to be proved and, as the allegation on the present issue was an allegation of breaking and forcibly taking possibly amounting to theft, the standard of proof required was very high – at least as high as is required in cases of civil fraud. I think that Mr. Thornton is right. The question was discussed by DENNING, L.J. (as he then was) in **Bater v. Bater** (1), [1950] 2 All E.R. 458, at p. 459:

a. "It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal case the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear."

This passage was approved in Hornal v. Neuberger Products Ltd. (2), [1956] 3 All E.R. 970. In that case DENNING, L.J., said at p. 973:

b.; "The more serious the allegation the higher the degree of probability that is required; but it need not a civil case, reach the very high standard required by the criminal law."

HODSON, L.J., in his judgment in that case also cited, as illustrative of progressive gradations in the standard of proof both civil and criminal cases according to the gravity of the matter to be proved, a passage (quoted by Professor Kenny) from LORD BROUGHAM'S eloquent speech in defence of Queen Caroline:

"The evidence before us is inadequate even to prove a debt – impotent to deprive of a civil right – ridiculous for convicting of the pettiest offence-scandalous if brought forward to support a charge of any grave character-monstrous if to ruin the honour of an English Queen."

17. There are degrees of proof within the civil standard of proof on a balance of probabilities. An allegation of bias on the part of the Court being an infringement of the very character of a Court as an independent and impartial tribunal must be proved to a higher degree than ordinary civil claims. This Court does not find established any allegation of bias on the part of the trial Court on the evidence before it.

18. The exercise of judicial discretion to allow or refuse leave to file further list of documents cannot be evidence of bias, as it was properly within the Court's discretion under the Civil Procedure Rules. As discussed below, it may be a ground of appeal but not evidence of bias on the part of the Court.

Appeal from ruling and order of the trial Court dismissing an application by the Defence for the filing of a supplementary list of documents

19. The issue arose whether the appellant could properly rely on a ground of appeal relating to their grievance as relates to a ruling of the trial Court in the course of hearing. The respondents objected that the appellant should have sought to appeal from the ruling when it was made, and having failed to do so, were barred from raising it in the appeal from the final judgment. The trial Court had on an application dated 22/9/14 for the filing of a supplementary list of documents made by the 1st and 2nd defendant's in the course of the defence hearing after the plaintiff had closed his case and three of the defence witnesses had testified ruled as follows:

> "The issues of documents is provided under Order 7 rule 5 when defence is filed and the terms there is that the defence and counterclaim filed under rule 1 and 2 SHALL be accompanied by (d) copies of documents to be relied on at trial. The said provisions does not provide a situation where the documents are to be introduced at anytime and worse after the close of the plaintiffs' case as that is supposed to have been dealt with during the pre-trial directions and conference as provided for under order II.
>
> The applicant submitted that they came into possession of the intended documents on 30.6.14 which was before the defence case took off as the 1st defence witness had testified on 15.7.14. The defence should have at least raised that issue then as it could have been easy to re-open the plaintiff's case for cross-examination of the documents that were to be introduced.
>
> The defendants chose to proceed with what they had upto after two defence witnesses had testified, especially the 1st defendant who prompt to introduce the documents.
>
> It is now settled that parties must be given fair trial. If the defendant was to be allowed to introduce new documents how the plaintiff can be granted a chance to respond to them. And also since two defence witnesses have testified who will produce the said list since the defence did not pray for an order to recall any of the two witnesses who have testified on behalf of the 1st and 2nd defendant.
>
> The time lapse from when the defendant obtained the alleged documents on 30.6.14 to the time the sought for leave to introduce time is suspect and it can be seen as an afterthought as they waited up to the time defence witnesses had testified before introducing them.
>
> The provision of section 3A under which the application is guided is meant for both parties in a case.
>
> By allowing the applicant to introduce new documents after the close of the plaintiff's case will be denying the plaintiff a chance to respond to the new issues and thus an injustice.
>
> The applicant/defendant had a chance to produce the documents as required but they waited to see the direction of the case during the trial of the defence case before the Court produce them. That is an ambush and the same will not amount to justice.
>
> I thus find that the applicant's application is not made in good faith nor is merited as it will occasion more injustice than good.
>
> The application is thus dismissed with costs to the plaintiff."

20. The ruling and order of the Court refusing leave to file the list of documents was clearly an exercise of discretion under section 3A of the Civil Procedure Act, which can only be interfered with by an appellate Court in the circumstances set out in the leading case of ***Mbogo v. Shah*** (1968) EA 93 as follows:

> "A Court of appeal should not interfered with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judgment was clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

21 In addition, under the formal requirements for the competency of such an appeal from orders is not one for which an appeal lies as of right by virtue of section 75 of the Civil Procedure Act, and leave of *"the Court making such order or of the Court to which an appeal would lie if leave were granted"* was not sought and obtained. Section 75 of the Act is in the following terms:

> "75. Orders from which appeal lies (1) an appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the Court making such order or of the Court to which an appeal would lie if leave were granted—
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> a. an order superseding an arbitration where the award has not been completed within the period allowed by the Court;
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> b. an order on an award stated in the form of a special case;
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> c. an order modifying or correcting an award;
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> d. an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;

e. an order filing or refusing to file an award in an arbitration without the intervention of the Court;

f. an order under section 64;

g. an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;

h. any order made under rules from which an appeal is expressly allowed by rules.

(2) No appeal shall lie from any order passed in appeal under this section."

22. Moreover, section 76 of the Act specifically bars such an appeal from the order in these circumstances where there is an appeal from the decree of Court as follows:

"76. Other Orders

Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order affecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal. (2) Notwithstanding anything contained in subsection (1), where any party aggrieved by an order of remand from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness

23. The appellant's objection to the ruling of the trial Court with regard to the filing of a supplementary list of documents could only be raised if it were an *"error, defect or irregularity in any order affecting the decision of the case"* and it would be set forth as a ground of objection in the Memorandum of Appeal. The appellant has not sought leave to appeal from the said decision in accordance with section 76 of the Civil Procedure Act. For that reason, appeal from the said ruling an order is incompetent.

Shifting of the burden of proof

24. The trial Court in its determination of the matters raised in the civil suit Kabarnet PMCCC NO. 23 of 2010 for malicious prosecution ruled as follows:

"Upon reading the submission it was clear that the parties had CONDENCED their issues into three, whether there malice, whether the criminal case entered in favour of the plaintiff and whether the criminal case was instituted without reasonable and probable cause.

I have considered the cited cases herein by both parties and especially the cases of – Leonard Ataros Peter vs AG 2008 eKLR NRB HCCC NO. 1773/2002 where it was held that malice may either be express or inferred from the conduct.

The case is quite relevant and in the present circumstances DW1 stated that he had gone to Kabarnet Kenya Post Office Saving Bank on 10.2.10 without notifying the plaintiff and that he had issued the plaintiff with two demand letters on the same day, suspended him on the same day and handed him to the police on the same day.

DW3 and DW4 all acted on the instructions of DW1 and without establishing how much the bank had lost, they caused the arrest of the plaintiff even before the auditor report was produced on 12.10.12.

The 1st defendant's action were full of malice as he had no instructions to sneak to the plaintiff's place of work whereas he stated that they used to issue notices before. He was the complainant, investigator and dismissing office.

DW1 did not produce any document to demonstrate that he had acted within the known bank procedures while dealing with the plaintiff "every action had commenced and ended with the 1st defendant in dealing with the plaintiff on 10.2.10.

In this civil matter it was incumbent upon the 1st defendant to demonstrate that he had acted within the known rules while initiating prosecution against the plaintiff not to recite the evidence that was given at the criminal proceedings where the plaintiff had been acquitted.

It was clear that the 1st defendant who purported [since had no written authority to investigate reprimand and suspend the plaintiff] to act for the 2nd defendant had expressed malice through his conduct against the plaintiff.

In the case of Emily Nduta Kiregi vs Monica Muthoni Kanyura the trial appeal Court held that "where the complainant reports a commission of crime to the police and police upon INDEPENDENT investigations initiate a prosecution, the reporter is not liable for the tort of malicious prosecution unless the report is made falsely and maliciously.

In the instant the only evidence that was relied on was the one that was gathered by the 1st defendant and the bank's agents. That evidence was full of inconsistencies as per the criminal trial Court's finding in the judgment.

The police relied on the said evidence without any further investigation as per Pw5 the investigating officers evidence on cross examination. Thus, there was no independent investigations by the police.

Having established herein above that the 1st defendant who was the 2nd defendant's agent had acted with malice in the entire process, the 1st and second defendant cannot hide under the above cited case as there was no independent investigations conducted by the 3rd defendant.

The 1st and 2nd defendant are thus to blame for causing the prosecution of the plaintiff with insufficient evidence since that was clear that the police had relied on the audit report by DW3 which was never produced in Court when the plaintiff was arrested which gave figure of Kshs.1,032,087 which was later changed to Kshs.1391273.80/= as per exhibit p6 which was prepared by DW3 herein.

In the case of Gitau vs Attorney General 1990 KLR13, trainor J. stated:

To succeed on a claim for malicious prosecution the plaintiff must first establish that the defendant or his age 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. I mean being actively instrumental in causing 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 with the above cited case in mind it is then clear that the criminal proceedings which gave rise to the civil suit herein was instituted by the complainants who are the 1st and 2nd defendants herein.

Having established that there was malice on their part, I am of the guided view that the plaintiff has established a case against the two.

The police had charged the accused/plaintiff herein after receiving the report from the complainant but as per the evidence of DW1 herein he blamed the police for having not conducted further investigations.

Though the agents of the 3rd and 4th defendants did not testify it is on record as per the judgment in criminal case No. 154/10 that the Investigating Officer one Boaz Oganga had allegedly investigated the matter while in the company of the bank officials but on cross examination he stated that, quote, "I did not collect bank statements from Post Bank, I cannot tell how the money was stolen, I cannot tell who signed the cash control register for the shortage of 992087/= I do not have a report to verify the signatures I do not know how the amount was arrived at. I do not know who had the other 2 accounts. I do not know the balances."

The above extract demonstrated that the Investigating Officer had believed what the witnesses told him as he could not tell how the figures were arrived at now the balances from where the figures were calculated from.

The Investigating Officer then cannot be covered as in the case of Gitau vs Attorney General [1990] KLR.

The Investigating Officer informed the Court that the accused/plaintiff was not given bond while at the police station nor was he informed of his right to bond which meant that the police had failed to discharge their mandate hence the malicious detention.

The Investigating Officer having stated above that he never knew how the figures and balances were arrived at meant that he never acted **INDEPENDENTLY** as required of him which omission resulted to prosecution which resulted to an acquittal.

Had the police discharged the above the accused/plaintiff could have not been charged since not even the auditor recommended prosecution of the plaintiff herein. The auditor's report was prepared after the plaintiff had been charged which then demonstrated that the police had charged and commenced prosecution without any proper investigation or evidence.

I thus find the 3rd and 4th accused liable for their agent's action of perpetrating and the malicious prosecution of the plaintiff herein.

The defendant's advocates stated that the plaintiff was not entitled to damages on the cost he spent in paying the advocate for criminal case No. 154 of 2013 as the receipt produced did not have stamps on them.

I have looked at the documents filed herein and it is clear that the advocates receipts dated 26.4.10, for Kshs.40,000/= one dated 18.2.11 for Kshs.40,000/= one dated 21.7.11 for Kshs.30,000/= have all revenue stamps and thus the defence's submission is not true.

With the above in mind, I find that the plaintiff has established a case against the defendants herein for malicious prosecution jointly and severally.

In establishing and assessing the general damages that the plaintiff is entitled to, I have considered the grounds that were set out in the case of Leonard Ataro Peter Ajaro vs Attorney General 2008 eKLR. that is:

1. An award of damages is a matter of discretion on the part of the Court making the award.

2. The said discretion is enfettered save that the only fetter attached to it is that it has to be exercised judicious and with reason.

3. An award of damages should not be inordinately too low or too high.

4. An award of damages is not meant to enrich a party but to compensate the victim for the loss suffered and where possible to restore him in the position he were in before the damage was caused.

5. Awards in past decision are mere guides and each case should depend on its own circumstances.

With the above in mind and given that the accused was confined for only two days after arrest, he was acquitted after trial without being sent to prison, and that he had suffered or traumatized during and after the arrest the arrest and trial, the Court is of the guided opinion that the figure of Kshs.300,000/= proposed by the plaintiff's advocate is on the higher side and a figure of Kshs.1.5m for general damages is hereby awarded.

The issue of defamation was not proved during the trial of this case and the same fails.

The plaintiff pleaded for Kshs.110,000/= for special damages and since the same was proved I do award it.

I also award cost of the suit.

I award interest from the date of the judgment to payment in full at Court rates.

The above award entered in the favour of the plaintiff against the four defendants jointly and severally.**"**

25. The Court does not find that in its judgment the trial Court shifted the burden of proof to the 1st defendant. The Court ruled that –

"In this civil matter [it] was incumbent upon the 1st defendant to demonstrate that he acted within the known rules while initiating prosecution against the Plaintiff."

The trial Court only called for discharge of evidential burden of the defendant in a suit for malicious prosecution where the Court is expected to determine on the evidence the presence or absence of reasonable and probable cause or malice. This is the very course suggested by the learned author of text authority, ***The Law of Tort, 2nd ed.*** at paragraph 30, 31, page 1635, *which was cited by the appellants, as follows:*

"It is for the claimant to prove the absence of reasonable and probable cause and not for the defendant to prove its presence. In order to succeed, the claimant must lead some evidence that tends to show the absence of reasonable and probable cause operating on the mind of the defendant. To do this the claimant will give evidence of the circumstances in which the decision to prosecute was taken. **Where there is at least prima facie evidence that an offence has been committed, the claimant will fail to discharge the relevant burden. Moreover, that on the real facts a reasonable person could possibly have concluded that the claimant was other than innocent is not sufficient to establish the absence of reasonable and probable cause, unless it is shown that the defendant was aware of those facts. However, evidence showing that the defendant did not himself believe that the case was a proper one to prosecute may be sufficient to establish the case. Alternatively, the evidence may be supplied by proving that the defendant had before him evidence on which no reasonable and discreet person could possibly conclude that it was proper to initiate a prosecution. Usually the question whether the defendant honestly believed that the case was a proper one to prosecute will depend on resolving a conflict of evidence between the claimant and the defendant.** However, in Gibbs v Rea, the defendants elected to give no evidence. **By a majority the Privy Council held that the silence of the defendants, in circumstances in which they were expected to answer, could convert evidence tending to establish the plaintiff's claim into proof."**

26. However, on the finding of this Court on the existence of reasonable and probable cause below, nothing turns on any alleged misdirection as to the burden of proof.

Wrongful termination

27. The Court would agree with the appellants that a grievance on the wrongful termination of employment ought to be the proper subject of a labour suit before the Employment and Labour Court.

DETERMINATION

The role of an appellate Court

28. An appellate Court has a duty to re-evaluate the evidence before a trial Court and make its own finding on matter as held by the Court of Appeal in ***Peters v. Sunday Post Ltd.*** (1958) EA 424 as follows:

"Whilst an appellate Court has jurisdiction to review the evidence to determine whether the conclusion of the trial judge should stand, the jurisdiction is to be exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved or has plainly gone wrong, the appeal Court will not hesitate so to decide. Watt v Thomas (1947) 1 ALL ER 582; (1947) AC 484, applied."

29. In the same vein, the Court in ***Selle & Anor. v. Associated Motor Boat Co. Ltd & Ors***. (1968) EA 123 held that:

"On appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial Judge's findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally."

30. In this case, the appellate Court is not bound by the trial Court's finding of lack of reasonable and probable cause, or indeed, by the trial Court's finding in the Criminal Prosecution of presence or absence of a *prima facie* case, what matters, in my view, is the want of reasonable and probable cause from the initiation of the prosecution and the outcome of acquittal basis from malicious prosecution.

31. As regards the award of damages, the Law is settled. See ***Shabani v. City Council of Nairobi*** (1985) KLR 516, 519 citing ***Butt v. Khan*** C.A. No. 40 of 1977, per Law JA, as follows:

"The test as to when an appellate Court may interfere with an award of damages was stated by Law JA in **Butt v Khan**, Civil Appeal 40 of 1977 (a case referred to in another context by the learned judge) as follows:

"An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that the misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

This direction has since been followed frequently by this Court.

Liability

a. The Law –

Malicious Prosecution

32. The learned editors of ***Clerk and Lindsell on Torts,*** 19th ed. (2006) at p. 972 discuss the Tort of malicious prosecution as follows:

"Essentials of the tort of malicious prosecution

In 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; thirdly, that it was without reasonable and probable cause; fourthly, that it was malicious**. The onus of proving everyone of these 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 tort."

33. At p. 991, ibid, the learned authors of ***Clerk and Lindsell*** discuss ***Malice*** as follows:

"Improper motives

Malice in this context has the special meaning common to other torts and covers not only spite or ill-will but also improper motive. The proper motive for a prosecution is, of course, a desire to secure the ends of justice. If a claimant satisfies a jury, either negatively that this was not the true or predominant motive of the defendant or affirmatively that something else was, he proves his case on the point. Mere absence of proper motive is generally evidenced by the absence of reasonable and probable cause. The jury, however, are not bound to infer malice from unreasonableness and in considering what is unreasonable they are not bound to take the ruling of the judge."

b. Reasonable and Probable Case

34. A Plaintiff in a case for malicious prosecution or false imprisonment must show lack of reasonable and probable case for the prosecution. See C.A. in ***Nzoia Sugar Co. Ltd v. Fungututi*** C.A. No. 7 of 1987 (Kisumu) (Platt, Apaloo JJA, and Masime Ag. JA) where Apaloo, JA., with whom Platt and Masime agreed, said:

"But in my opinion, the case of malicious prosecution must founder on the absence of proof of malice or ill-will. The only reason why the respondent claimed he was maliciously prosecuted, was because the prosecution terminated in his acquittal. As he put it in evidence.

"I was acquitted under section 210 of the Criminal Procedure Code and in view of this, I am claiming damages from the

defendant company because since my acquittal, I have not been employed because I have been treated as a thief as a result of this case."

It is trite learning that acquittal, per se, on a criminal case charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor. The mental element of ill-will or improper motive cannot be found in an artificial person like the appellant. But there must be evidence of spite in one of its servants that can be attributed to the Company. "

35. In the Kenyan case of ***Murunga v. A.G*** (1979) KLR 138, the High (Cotran, J.) set out the test for reasonable and probable cause in a case of false imprisonment and malicious prosecution as follows; (following another Kenyan case of ***Kagane v. AG*** (1969) EA. 643):

In proceedings for malicious prosecution, the plaintiff must show (1) that a prosecution was instituted by the defendant or by someone for whose acts he is responsible, (2) that the prosecution terminated in the plaintiff's favour, (3) that the prosecution was instituted without reasonable and probable cause, and (4) that it was actuated by malice. The test whether the prosecution was instituted without reasonable and probable cause is whether the material known to the prosecutor would have satisfied a prudent and cautious man that the plaintiff was probably guilty of the offence.

36. Kagene v. AG & Anor. (1969) EA 643 held that the test for reasonable and probable cause was objective, as follows:

"**Held:** (i) whether there was reasonable and probable cause for the prosecution is primarily to be judged on the objective basis of whether the material known to the prosecutor would satisfy a prudent and cautious man that the accused was probably guilty (Hicks v. Faulkner (1) adopted;

(ii) the fact that the prosecution was instituted on the advice of State Counsel did not it itself constitute reasonable and probable cause. The material must be fairly put to counsel and the prosecutor must still believe in his case;

(iii) once the objective test is satisfied, it may be necessary to consider whether the prosecutor did not honestly believe in the guilt of the accused; but this subjective test should be applied only where there is evidence directly tendering to show that the prosecutor did not believe in the truth of his case (Glinski v. Mcver (3) adopted);

(iv) on the facts, no reasonable person could honestly have believed that the prosecution was at all likely to succeed; and the second defendant was actuated by malice.

37. The test for reasonable and probable cause is dependent on *"the material known by the prosecution"* being suit as *"would have satisfied a prudent and cautious man that the plaintiff was probably guilty of the offence."*

38. Does a finding of prima facie under section 210 of the Criminal Procedure Code support proof of *"reasonable and probable cause."* Is a defendant to a case of malicious prosecution entitled to say that there was reasonable and probable case for the prosecution because the trial Court found a prima facie case under section 210 of the Criminal Procedure Code?

39. Where there is a ***prima facie*** evidence that an offence has been committed the claimant will fail to discharge the relevant burden, as observed by the learned author of ***The Law Tort*** 2nd Ed. at paragraph 30, 31, page 1635, supra.

40. Prima facie evidence or *prima facie* case has the meaning given in the leading case in East Africa of ***Ramanlal Trambakal Bhatt v. R*** (1957) EA 332, 334, as follows:

"[A] prima facie case [is] one which a reasonable tribunal properly directing its mind to the law and he evidence could convict if no explanation is offered by the defence."

41. Suppose the trial Court wrongly find a *prima facie* case and therefore places the plaintiff on his defence, only to acquit him of the offence at the end of full trial? Is a wrong finding of a case to answer or *prima facie* case evidence of reasonable and probable cause? No! The trial Court is not infallible. In the end the trial Court did not find evidence to support the charge.

Favourable termination of Criminal case

42. It must be pointed out that were acquittal of the Criminal charge is not conclusive in a suit from malicious prosecution. The substratum of the suit from malicious prosecution is malice in the institution of the prosecution with the outcome of the prosecution which depends on the manner of the prosecution as well as on the evidence presented. In this suit the acquittal was based on the Courts' finding of inconsistencies in the testimony of the witnesses.

43. The fact of favourable determination of the criminal proceedings for theft is not disputed. The criminal Court in the Principal Magistrate's Court at Kabarnet Criminal Case No. 154 of 2011, ***Republic v. Jane Cheruto Kosen and James Kipkemboi Cheruiyot*** after full hearing found as follows*:*

"I have carefully appraised the evidence on record. It was the testimony of PW1 that when he arrived he was alone and when he undertook a cash count there was an anomaly which prompted him to call PW3 and PW4.

According to him the sum missing was Kshs.1,300,340/25. PW4 also had a different figure Kshs.1,391,273/80. And this is the figure

which was captured in the charge sheet. Interestingly a sum of Kshs.400,000/= was discovered later and is included in the sum in the Charge Sheet. PW1, PW3 and PW4 did not note this shortage during the inspection of 10th February 2010 which calls into question the thoroughness of the exercise of that date. PW1 and PW4 were not consistent on the sum of Kshs.40,000/= which was found with the 1 million withdrawn from KCB. PW1 said it was the 1 million while PW4 said he did not know where it came from. The defence have alleged malice on the part of PW1. The first accused alleged she had not even restarted her computer for the day and she was forced to give her passwords to PW1. She also alleged that the print out was the work of PW1. Her allegations are vindicated by the manner in which both accused were handled with successive notice to show cause and suspension letters. The officer who took over was not called to testify and explain the remedies taken to deal with the alleged shortage. **In view of the inconsistencies alluded to and the alleged bias and the fact that the accused were dismissed even before a determination was made I do find myself in doubt as to the guilt of the accused and acquit them under section 215 CPC.***"*

44. The question, therefore, remains whether the prosecution was driven by ***malice*** or there was a ***reasonable and probable cause*** for the complaint leading to the prosecution. See ***Nzoia Sugar Company*** case, supra.

Whether Criminal complaint by the appellants actuated by malice.

45. 'Malice' in the context of malicious prosecution was considered in ***Murunga,*** following ***Kagane*** as *"something more than a sincere desire to vindicate justice."* In considering evidence of malice, Rudd, J. in ***Kagane*** at p.645 held as follows:

> "The plaintiff has further to prove that to prosecution was instituted with malice on the part of the prosecutor King. In this connection malice means that the prosecution was motivated by something more than a sincere desire to vindicate justice."

46. Malice is demonstrated, in my view, when the action taken is without a sincere or "genuine" or truthful pursuit of interests of justice in a prosecution, but is aimed at achieving other ulterior motive. Black's Law Dictionary, 8th Edition (2004) defines malice, as relevant, to be *"the intervention, without justification or excuse, to commit a wrongful act,"* and malicious prosecution as *"the institution of a Criminal or Civil proceeding for an improper purpose and without probable cause. The tort requires an adversary to prove your claimants: (1) the initiation or continuation of a law suit; (2) lack of probable cause; (3) malice; and (4) favourable termination of the law suit."*

47. Clearly, apart from proving absence of reasonable and probable cause, a plaintiff in a malicious prosecution suit must prove malice or wrongful intention on the part of the prosecution.

Analysis of the Evidence

Evidence in C*ivil Suit No. 23 of 2013*

48. The parties to the suit adduced evidence in support and in opposition to the case. On the plaintiff's side the Executive Officer and the plaintiff testified. **PW1** Cyrus Kiambo the executive Officer of the Court criminal case file in ***KBT PMCCr. Case No. 154 of 2010*** in which the accused were Jane Cheruto Kosen and the Respondent herein James Kipkemoi Cheruiyot as the 1st and 2nd accused, respectively, and indicated that the accused had been acquitted after full trial under section 215 of the Criminal Procedure Code.

49. PW2, the Respondent herein testified that he had on 10/2010 been sent by the 2nd Appellant's Kabarnet branch In-charge to collect from its Banker Kenya Commercial Bank (KCB) Ksh.1,000,000/- which he had done and handed it to the In-Charge. At 10-11 am he had been served with a show cause letter on the ground that some money was missing and he was involved in a cover-up of the shortage by collecting the cash from the KCB. At about 5pm on the same date he was given a second show cause letter after replying to the first one. He was handed over to the police together with the Branch In-charge, and while in custody on the same day he was served with another letter – one of suspension from employment on the ground that he had been involved in the disappearance of Ksh.1,032,087.80 and that he had tried to cover it up. He was detained in police custody from 10/2/2010 to 12/2/2010 when he was produced in Court.

50. For the 1st and 2nd defendants four witnesses testified. DW1, the 1st appellant herein testified that he had on 10/2/2010 following a publicised inspection visit to the Kabarnet Branch of the 2nd Appellant, which was within his region of supervision, found a shortage in the money held by the Branch at which one Jane was the in-charge and the respondent herein a senior cashier. During the exercise, the respondent had been sent to the Branch banker, KCB, to collect ksh.1,000,000/- and he suspected that the money was meant to cover-up forth shortage, and he had upon establishing the amount of shortage by cash count by the internal auditor given notices to show cause to the branch in charge and the respondent, handed them to the police and eventually suspended them.

51. DW1 explained the show cause letters and the suspension as follows:

> "At that stage it was clear that the branch had shortage and the Ksh.1,000,000/- was meant to cover the same. I had enquired as to what was the issue and they did not tell me anything and I proceeded with the actions which were necessary at that stage. I called the director of operations, one Chares Munge and informed him of the situation. I had informed the Investigation Officer one Onsongo and also Eliud Lumwachi bank internal auditor based in the region and I advised them to proceed to Kabarnet and carry out investigations. I had then issued show cause letters to James and Jane.
>
> The show cause letters were meant to be an opening to investigations. When I did not receive any response from James I had given him another show cause letter over the irregularity. When the bank investigator came one Onsongo had asked me to report the matter to the police. Later in the day a report was made to the police and Jane and James were arrested. As per the Code of Conduct one is supposed to be interdicted or suspended when in the police cells. I had then suspended James as he had not responded to my letter. I had considered the matter on its merits. There was need of my action as the issue was of concern. I was later called in as witness in the criminal case…. The action I took as accounting officer was based on issues at hand and as per the facts that were

present at that time and there was no malice."

52. However, on the 2nd show cause letter and on the suspension letter, set out in full below, issued the same day, the DW1 had referred to the respondent's response so it was not accurate that the respondent did not respond to the show cause letters.

53. On Cross-examination, DW1 confirmed that-

> "Investigations were going on when I suspended the plaintiff herein…. The plaintiff was suspended for covering up irregularities…. When I discovered the loss of money I had my auditor and internal investigation officer from Nakuru and I reported to headquarters. The auditor and investigator had prepared a report and based on the said report I reported the matter to the police…. In my own opinion the investigation was complete internally by the bank. We had given the police enough evidence to charge the plaintiff in Court."

54. DW2, Elizabeth Chepleting Tarus, a subordinate staff of the Post bank branch at Kabarnet confirmed by her testimony that *"I had gone out and I had found James Cheruiyot and he had given me a paper bag which contained money. He asked me to take the money to the branch Manager's table."* Interestingly, on cross-examination the subordinate staff indicated that she had *"accepted to take the money because it was my duty"* and *"it was not wrong to take the money to the manager's officer. I was the messenger in the Bank."*

55. DW3, Eliud Lumwaji the 2nd appellant's Internal Auditor that he had arrived at midday on 10/2/2010 upon a message from 1st appellant that there was an assignment at Kabarnet Branch. Cash count at the bank had revealed 991,273.80 shortage and there was information from the Bank that the plaintiff had cashed a cheque for Ksh.1,000,000/-. Upon audit, there was discovered a fraudulent transfer of Ksh.400,000/- from the Branch Manager's account to a cashier account that was not in operation, and the shortage had risen to 1,391,273.80/- as the overall shortage and amount lost by the Bank. He had prepared an Audit Report on 12/02/2010 but had given interim findings thereof to the 1st appellant DW1 on the same day of the count at about 2.00pm. His report confirmed that by the time of the final report on 12/02/2010, Jane and James (respondent) had already been suspended

56. DW4, the Bank's investigation officer Thomas Mongare Onsongo gave contradictory evidence as to the amounts allegedly stolen by the plaintiff and his co-accused as follows:

> "As per my investigations the two accused persons had stolen Ksh. One Million and thirty one Thousand. I had not handed my report to the investigation officer. I had given his statements. I had given Mr. Okara the exhibits. This is the envelope and case register."

57. DW4 also confirmed that the figure of the amount allegedly stolen originated from the Bank and not the police and that the plaintiff was *"arrested from the Bank where we had detained them."* This gives credence to the evidence of the plaintiff that the 1st appellant had taken over the operations of the Bank on the material date.

58. The 3rd and 4th Defendants did not avail any witnesses and they had closed their case without calling any witness.

Prosecution of the Plaintiff

59. The state prosecutorial powers lie with the Director of Public Prosecution under Article 157 of the Constitution. The liability of the person who makes a complaint to the police is discussed in ***Clerk and Lindsell on Torts*** 19th edition (2006) at p. 973 as follows:

> **i. What is a prosecution?** In the establishing the first essential element of the tort of malicious prosecution two key issues must be addressed, what constitutes a prosecution? And who is the prosecutor? To prosecute is to set the law in motion, and the law is only set in motion by an appeal to some person clothed with judicial authority in regard to the matter in question, and to be liable for malicious prosecution a person must be actively instrumental in so setting the law in motion. So forensic scientists who prepared reports for the police and the DPP as a result of which the claimant was prosecuted for murder could not be liable for malicious prosecution for in no way did they initiate those proceedings. They merely provided information requested by those seeking to decide whether to set the law in motion. **If a charge is made to a police constable and he thereupon makes an arrest, the party making the charge, if liable at all, will be liable in an action for false imprisonment, on the act of the law.** But if he goes before a magistrate who thereupon issues his warrant, then his liability, if any, is for malicious prosecution.

60. As foot-noted on the passage *"But note that simply supplying information to the police on the basis of which a Police Officer decides to make an arrest with not of itself engage liability for false imprisonment,* ***Davidson v. Chief Constable of North-Waters*** *[1994] 2 A LL E.R. 597 C.A."*

61. The appellants herein did more than supply information to the police, and it was not the decision of the police to charge but that of the appellants. On cross-examination, the witness confirmed it was he and or the bank Investigation officer who called the police; that the investigations were completed internally in the bank; and he acted in consultation with the headquarters through the director of operations one Charles Munge. From the evidence, it was clearly a case of the 1st appellant assisted by his colleagues the internal auditor and the Investigation Officer acting as the accuser, the investigator and the judge in their own cause.

Objective test for reasonable and probable cause

62. Both the accused in the trial Court, the 1st accused and the Respondent herein confirmed in their witness statement and on cross-

examination that there had been no dispute between him and the 1st appellant. The issuance of Notice to Show Cause letters to the respondent and report to the police was based on the proceedings of the 2nd appellant and on irregularity of having account open. The impromptu investigation checks was an exercise that the 1st appellant was conducting on all the branches in the region for which he had given prior notice to all branch managers.

63. Had the Notice to Show Cause been done in accordance with the set procedures, they could not amount to malicious act or prove malice as no wrongful intention is demonstrated; it would only have been a scrupulous compliance with the proceedings of the 2nd appellant.

64. The 1st appellant went out his way as a supervisor and usurped the powers of the Managing Director to suspend the Respondent and his Branch in charge in clear breach of Regulation 10 of the Employee Code of Conduct which provided for suspension only by the Managing Director and after an employee had been charged with a criminal offence, as follows:

> "**10.4 Suspension**
>
> **10.4.1 Where an employee has been charged with a criminal offence, the Managing Director shall order his suspension from the exercise of his duties, pending consideration and determination of the case.**
>
> 10.4.2 While an employee is under suspension, he will not be entitled to any salary, but the Managing Director may, on application, grant an allowance, as he may deem appropriate. A similar privilege may be accorded to an employee on interdiction without salary in terms of paragraph 1 (c) above.
>
> 10.4.3 When suspension is uplifted and any of the formal punishment provided under part XI of this code is meted out to an employee then part or whole of the salary, withheld during the suspension period shall not be payable."

65. Further, the 2nd appellant dismissed the Respondent long before the determination of the criminal case, again in breach of the Regulation 10:4 of the Employee Code of Conduct. I consider the actions of appellant to have been targeted to achieve improper motive to punish the Respondent for his perceived role in suspected cover-up of alleged shortage of funds from the branch rather than punishment in accordance with criminal law for any suspected theft of funds.

66. That the Respondent was never suspected of theft of the money with which he was charged alongside his senior, the Branch in charge, is clear from the three letters written by the 1st appellant, respectively to give him Notice to Cause and to suspended him from service as follows:

> "Kenya Post Office Savings Bank
>
> Rift Valley Region
>
> KPSB/18/PF 0933/R.V/2010
>
> 10th Feb 2010
>
> James Cheruiyot PF 0933
>
> Cashier Kabarnet Branch
>
> Re: Show Cause Letter; Covering of a major Irregularity; Kabarnet Branch
>
> You will recall that today 10th Feb 2010. I came to Kabarnet Branch and found you and the Branch Manager Jane Kosen in the office at about 7:55 am. I told both you that I had come for Normal Branch Inspection that involves Cash Count.
>
> **As we were waiting for Christopher Kemboi, the Strongroom Key Holder, you accepted to be issued with a Postbank Cheque No. 001006 to go and collect Ksh One Million (1m) from KCB. You knew very well that this cheque was issued to you directly, accepted the same and without my knowledge you went and collected Ksh. 1,000,000/=, (you went in the disguise of going to pick Mr Kemboi from the stage).**
>
> **You knew very well that this money was meant to cover a major irregularity in the branch because when he carried the cash count and found a shortage, Jane said that she had left the money in her drawers. But you did not object to this and say the truth. It was only after I discovered that the above mentioned cheque had been issued that you accepted that you had indeed gone directly to KCB.**
>
> **This is a serious irregularity on your part as an officer of the Bank that calls for severe disciplinary action.**
>
> Before action is taken on you, show cause why you should not be disciplined and state how much you know about the shortage in the Branch and why you should not be hold partly accountable for the same.
>
> **Your reply should be recovered immediately you receive this letter.**

Issued in Duplicate Copy to note as acknowledgement.

Kasio Mutuku RM/ R.V.

C.C D/o, D/HR, SM/O (R), M/HR AM/ER Officer, HRO/R.V

…….

Kenya Post Office Savings Bank

Rift Valley Region

KPSB/18/PF 0933/R.V/2010

10th Feb 2010

James Cheruiyot PF 0933

Cashier Kabarnet Branch

Re: Show Cause Letter, major Irregularity

Further to the Show Cause letter issued to you earlier in the day you know very well that as the holder of the Strongroom door combination you are supposed to ensure that all the Bank cash is on the Strongroom before you use your combination to lock the same.

During the cash count carried out today, as shortage of Ksh1,032,087.80 was discovered from the Banks' operational cash.

As the Strongroom door combination holder you are hereby held responsible for disappearance of this cash, an act that calls for serious disciplinary action taken on you. Before action is taken please show cause why you should not be held responsible. You should not be held responsible. Your reply is expected immediately to receive that letter issued in Duplicate copy to note.

Kasio Mutuku

…….

Kenya Post Office Savings Bank

Rift Valley Region

KPSB/18/PF 0933/R.V/2010

10th Feb 2010

James Cheruiyot PF 0933

Cashier Kabarnet Branch

Re: Suspension from Duty

Following your suspected involvement in the disappearance of Ksh1,032,087.80 from Kabarnet Branch and your Role in trying to cover up the same by collecting Ksh 1,000,000/= from KCB vide Cheque No. 001006, the Show Cause issued to you **and your subsequent reply,** you are hereby place on suspension with immediate effect.

Investigation will be carried on while you are on suspension and you are expected to corporate with the investigators.

Issued in Duplicate copy to Note as acknowledgement.

Kasio Mutuku PF 0686

CC. D/O, D/HR, SM/O (R), M/HR, AM/ER, HRO/R.V."

67.The internal auditor's report of 12/02/2010 did not implicate the Respondent in the alleged theft of money, only in alleged *"collusion"* towards cover up of the shortage, as follows:

> "**Concealing of the shortage and the role played by each staff member at the Branch**
>
> **Pf. 0725 Jane Kosen.**
>
> - Was unwilling to have the RM conduct a cash count claiming one safe key holder C. Kemboi Pf.1636 had not arrived.
> - She sent Mr. James Cheruiyot Pf.933 to inform Mr. C. Kemboi Pf.1636 to disappear.
> - Issued a Bankers cheque no.1006 of Kshs.1 million to James Cheruiyot Pf.933 to collect the cash from KCB with an aim to conceal the shortage.
> - Issued the safe key to the messenger E. Tarus Pf.2154 to deliver the key to the Branch guard for onward forwarding to C. Kemboi Pf.1636 when he comes in.
> - Claimed to have stored the Kshs.1 million collected from Bank by Pf.933 in the cabinet overnight thereby lying to the Rm/Rift.
>
> **Pf.0933 James Cheruiyot**
>
> - He was issued with a Bankers cheque by the Branch in charge to rush to Bank and collect Ksh.1 million.
> - Used his personal vehicle to collect cash and was served at KCB at 8.40 am as per the copy of the cheque obtained from our Bankers.
> - Delivered the 1 million to the messenger to ferry the cash to the cabinet behind the in charges desk.
> - Informed Mr. C. Kemboi Pf.1636 to disappear from the Branch's vicinity.
> - **Conspired with the Branch in charge to cover up the Shortage.**
>
> **Pf.1636 C. Kemboi**
>
> - The officer had reached the Branch at the time he was informed by Mr. James Cheruiyot Pf.933 to disappear.
> - The RM called him thrice but claimed to have a sick child with a broken collar bone.
> - Arrived at the Branch at 9.15 am with the safe key handed to him by the guard thereby delaying branch operations from 8.30 am.
> - Conspired with the above two officers to deceive the RM.
>
> **Pf.2154 E. Tarus**
>
> - Was used to deliver the safe key to the guard in the morning for onward forwarding to C. Kemboi Pf.1636.
> - Was used to deliver the Kshs.1 million received from Bank by Mr. James Cheruiyot Pf.933 to a cabinet behind the in charges desk.
>
> **Recommendation**
>
> Serious disciplinary action should be taken on the above officers for the role played in concealing the said shortage. It is clear they all conspired conceal the correct cash position of the Branch.
>
> Pf.0725 and 0933 have since been suspended and arraigned in Court."

68. As shown below, the Respondent was never charged with any conspiracy offences or of having had any common intention to steal any money as to justify his charge with theft as principal offender, in accordance with the law.

Joint Offenders on the charge of theft

69. The Charge Sheet dated charged the Respondent and his co-accused as joint offenders in a charge of theft by servant contrary to section 281 of the Penal Code with particulars that *"**(1). Jane Cheruto Kosen (2) James Kipkemboi Cheruiyot.** Between the dates 16th January 2010 and 10th February 2010 at Kabarnet Township in Baringo district within Rift valley jointly being employees of the Kenya Post bank stole from the said Kenya Post bank Ksh.1,032,087.80 [amount later amended]."*

70. Section 20 of the Penal Code allows the joint charge of offenders on terms that-

> "20. (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say-
>
> (a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids or abets another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence;

and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.

(2) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

(3) Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission."

71. Clearly, the plaintiff/Respondent herein could have been charged with theft of the money subject of an alleged shortage discovered by the 1st appellant and other employees of the 2nd Appellant upon a cash count at the 2nd appellant's Kabarnet Branch. There was simply no evidence to support theft, which is defined in section 268 of the Penal Code as follows:

"268. (1) A person who fraudulently and without claim of right **takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property,** is said to steal that thing or property.

(2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say –

(a) an intent permanently to deprive the general or special owner of the thing of it;

(b) an intent to use the thing as a pledge or security;

(c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;

(d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;

(e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner; and "special owner" includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.

(3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it; and it is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it.

(4) When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that the owner cannot be discovered.

(5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move."

72. There was no evidence that the 1st Respondent/plaintiff was one of persons who stole the money alleged to have been stolen from the Bank, or that he was an ***enabler*** of the theft by any other person, or that he ***aided*** or ***abated*** the theft of the money by any person, or that he had ***procured*** or ***counselled*** any other person to steal the money.

73. At worst, the Respondent may on the evidence be shown to have been guilty of breach the 2nd Appellant's internal regulations for the handling of money at the Bank and during collection from the 2nd Appellant's banker. But not theft.

Collusion

74. Although loosely asserted by the appellants that the plaintiff had colluded with the Branch manager co-accused to cover-up the shortage, there was no evidence of common intention to steal the money as would permit the prosecution of the plaintiff together with the Branch Manager in charge of the 2nd appellant's Kabarnet Branch, within the principle of section 21 of the Penal Code, which provides as follows:

"21. When two or more persons form **a common intention** to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

75. All that could be proved by the evidence available was that the plaintiff obeyed the instruction by his senior to collect cash from the bank, which he did and brought the money to the branch Manager, even if he used his own car to get to and from the Bank contrary to procedures which he were not shown to have been aware of and sent the Bank Subordinate staff (DW3) to handover the money. The plaintiff may have been guilty of breach of the bank's administrative procedures, for which he could be disciplined in accordance with the Bank Employee's Code of Conduct, but it was not shown that he had stolen the money either alone or as a joint offender with his Branch manager co-accused. The charge of theft by servant against the plaintiff was wholly unjustified and in actively pursuing his prosecution therefor, the appellants were jointly and severally liable for malicious prosecution.

76. Moreover, no charges of conspiracy, for instance, as appropriate, conspiracy to defraud contrary to section 317 of the Penal Code or general conspiracy to commit any felony contrary to section 393 of the Penal Code, were preferred and proved against the plaintiff and his co-accused.

Malice

77. Improper motive or malice in law on the appellants is evidenced by the following proved facts, clearly demonstrating that the setting in motion of the prosecution of the respondent was not driven by a desire to secure the ends of justice in punishment for suspected theft of monies allegedly lost in the shortage, but merely to punish the appellant for failing to observe standards of honesty in allegedly seeking to cover-up a shortage of funds at the Bank for which there was no evidence of theft by or involving him by agreeing to be sent to collect the same for the 2nd appellant's Kabarnet branch banker KCB Bank; breach of operating the 2nd Appellant's procedures in collecting and delivery of money to the Branch; and for alleged failure to observe security procedures in locking the bank's safe, if it were proved, which he vehemently denied, that he was the holder of one of the safe keys or combination, none of which defaults amounted to the criminal offence theft by servant:

a. There was no evidence of involvement of the plaintiff in any shortage of money at the bank, and the appellants knew this as early as 2.00pm on the same date of arrest and suspension of the respondent as the Bank auditor had given an interim report to the 1st appellant which only indicated alleged cover and not theft of the money subject of the shortage;

b. There was also clear evidence that the loss of money in alleged fraudulent transfer of ksh.400,000/- from the Branches main TAC account was the responsibility of the Branch in-charge who managed the Branch account, and therefore no justification for charging the respondent with theft thereof..

c. There was only evidence that the plaintiff had collected money from the 2nd respondent's banker without following due process for encashing a cheque with approval of the 1st appellant and using his motor vehicle in breach of the 2nd Appellant's Regulations, the knowledge of which he was not shown to possess;

d. From the two letters for Notice to show cause and the subsequent suspension from service of the 1st respondent, it was clear that the 1st appellant sought to discipline the Respondent for his suspicion of collusion with the Branch Manager to cover-up for the alleged shortage of money at the Branch; the motive for the arrest and prosecution was not punish, as he was charged, the Respondent for any theft of money by servant but to punish him severely for apparent for his role in alleged cover up of the shortage. This lack of proper motive amount to malice in law, and the appellants are liable for malicious prosecution.

e. In addition, the suspension of the Respondent was done by the Respondent allegedly on delegated authority which was not demonstrated in evidence, while section 10.4 of the 2nd Appellants Employee Code of Conduct for the discipline of staff indicated that suspension could only be done by the Managing Director where the member of staff had been charged in Court with a criminal offence. The 1st appellant suspended the Respondent while in police custody on the same day of alleged discovery of shortage of money at the Bank.

f. The procedure for discipline of staff under part IX section 9 on cases warranting dismissal, the notice to show cause allowed the member of staff a period of three days to respond to the charges; the Respondent herein was suspended on the same day of the two notices to show cause.

g. Ultimately, contrary to the provisions of the 2nd Appellant's Employee Code of Conduct, section 10.4.1, the Respondent was dismissed from service before the determination of the criminal case against him.

78. On the subjective test of reasonable and probable cause, see ***Kagane,*** supra, it was clear that the 1st appellant did not believe in the involvement of the respondent in any theft of money as he so said in cross-examination that –

> **"I had suspended James because he breached the general policy of the Bank. James was arrested for collective responsibility…. I am not sure who called the police between me and Onsongo [Bank's Investigating Officer] DW4."**

79. The 1st appellant in presenting the respondent for prosecution for theft by servant on evidence which he said he had completed internally within the bank, and being aware that it did not support a case of theft (there is no charge for collective responsibility in theft), was also malicious on the subjective test.

Damages for wrongful arrest and unlawful detention in police custody

80. It is trite that the general jurisdiction to redress violations of the Bill of Rights lie with the High Court under Articles 23 and 165 (3) (b) of the Constitution, save in specified areas, enacted under the Article 23 (2) by the Magistrate's Courts Act 2015, being -

"8. (1) Subject to Article 165 (3) (b) of the Constitution and the pecuniary limitations set out in section 7(1), **a magistrate's Court shall have jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.**

(2) The applications contemplated in subsection (1) shall **only** relate to the rights guaranteed in Article 25 (a) and (b) of the Constitution.

(3) Nothing in this Act may be construed as conferring jurisdiction on a magistrate's Court to hear and determine claims for compensation for loss or damage suffered in consequence of a violation, infringement, denial of a right or fundamental freedom in the Bill of Rights.

(4) The Chief Justice shall make Rules for the better exercise of jurisdiction of the magistrate's Courts under this section."

The jurisdiction of the subordinate Court does not however extend the compensation for breach of such rights. Judgment in this case was delivered on 14/7/2015 before the enactment of the Magistrate Courts Act 2015 which empowered the Court to redress specified initiations of the Bill of Rights. But this finding does not settle the matter because the claim to damages was presented by the plaintiff as a claim in the tort of malicious prosecution not a constitutional application for redress of violations of the Bill of Rights.

81. The Court clearly had jurisdiction in damages for wrongful arrest and unlawful detention as a part of the common law tort of malicious prosecution as distinguished from the constitutional cause of action for redress of violations of the Article 29 rights of freedom and security of the person.

82. The nature of damage contemplated by the tort of malicious prosecution is wide enough to cover wrongful arrest and detention, and consequently damages therefor may properly be recovered and awarded by a trial Court on a claim for malicious prosecution. Writing on the nature of the damage in malicious prosecution, the learned editors of ***Clerk and Lindsell on Torts,*** ibid at 970 observes as follows:

"**Nature of damage thereby caused**

An abuse of the right to institute proceedings may of necessity be injurious, involving damage to character, or it may in particular case bring about damage to person or property. There are, according to Holt, C.J. three sorts of damage to a claimant, any one of which is sufficient to support an action of malicious prosecution:

'First, damage to his fame if the matter whereof he be accused be scandalous. Secondly, to his person whereby he is imprisoned. Thirdly to his property, whereby he is put to charges and expenses.'

To these may be added the damage which someone suffers when his house is entered and his property searched."

83. The plaintiff herein was entitled to recover damages for the tort to "*to his person whereby he is imprisoned.*" All it means is that had the plaintiff also filed a constitutional suit under Article 22 of the Constitution for the enforcement of the protection for arbitrary arrest and detention, he would not have been able to twice recover damages for the same wrong.

Damages

General damages

Excessive award of damages

84. There is an apparent inconsistency to the judgment of the trial Court where the trial Court considers the sum of *"Ksh.300,000/= proposed by the plaintiff's advocate is on the higher side and a figure of Ksh.1.5m from general damages is hereby awarded."*

However, having perused the trial Court file, it is clear that the amount proposed by the Plaintiff was Ksh.3,000,000/- and not Ksh.300.000/-.

85. It has not been demonstrated that the award of general damages in this case was inordinately high as to be an erroneous estimate or that in awarding the damages, the trial Court laboured under a wrong principle or appreciation of the facts of the case. ***I do not find that the sum of Ksh.1,500,00/- awarded by the trial Court in general damages was excessive in the circumstances of the case.***

Special damages

86. It is easy to agree with the appellant that special damages claimed as legal fee for representation of the plaintiff in the criminal trial the subject of the malicious prosecution suit must be based on an actual taxed fees on the basis of advocate - client costs. Otherwise, even unreasonably high fees agreed between counsel and his client may be the basis of a reimbursement claim by way of special damages in a malicious prosecution suit. Proof of such damages by receipts of payment between the clients to his advocate cannot suffice.

87. The Court rejects the claim for special damages in the sum of Ksh.110,000/- because although payment may have been proved by receipted payments to the advocate, the same was not for the amount of costs taxed and allowed by a taxing master of the Court in accordance with the Advocates' Remuneration Order. Recovery for the costs incurred by a party in litigation may only properly be on the basis of the costs as would be certified by the Court as due to the claimant after the taxation of such costs in the usual way. The trial Court

was in this regard, on the test in ***Shabani,*** plainly wrong in awarding special damages on the basis payments of fees to counsel without taxation of the Advocate – Client Bill of Costs for that purpose.

88. Accordingly, I disallow the claim for special damages in the sum of Ksh.110,000. Without proof thereof, the Court will take judicial notice of the provisions of the Advocate Remuneration Order made under the advocates Act and award the basic instruction fee only with respect to case of the nature the subject of appeal.

CONCLUSION

89. It was clear on the evidence that the complaint of theft and prosecution therefor was driven by and based solely on the investigations and evidence supplied by the appellants. The prosecution of the plaintiff was an act of the law but that of the appellants who insisted on prosecuting the plaintiff and his co-accused for theft by servant, when the evidence revealed by their own investigations only showed the role of the appellant as that of covering up alleged cash shortage by agreeing to go to encash a cheque from the 2nd appellant's Banker. There was nothing criminal about breach of procedures for the collection procedures for encashing a cheque by Bank motor vehicle and or delivery thereof to the branch Manager through a member of staff (DW2) who in any event insisted that there was nothing wrong in her taking the money as it was her duty.

90. The ingredients of the tort of malicious prosecution were proved in the evidence of the acquittal in criminal case no. 154 of 2010, where the Respondent and his senior colleague at the 2nd appellant's Kabarnet branch were charged with theft by servant contrary to section 281 of the Penal Code; the prosecution was done by the appellants and the 3rd and 4th defendants/Interested parties, the appellants not merely reporting the matter for action by the police; the prosecution of the Respondent being malicious as there was not reasonable and probable cause to charge him for the offence of theft of the monies allegedly found short in the Bank's accounts following a cash count; and the malice further being manifested by the abruptness of the action of the 1st appellant in giving out two notices to show cause and suspending the Respondent from service over the matter on the same day, in breach of the 2nd Appellant's Employee Code of Conduct and dismissing him from service shortly thereafter before he was found guilty of any offence by a Court of competent jurisdiction.

91. The prosecution was conducted actively by the appellants, who called the police to the Bank and presented the Respondent and his co-accused to the police for criminal prosecution and the Interested Parties who prosecuted the two on the evidence presented to them without further investigations for the offence of theft by servant contrary to section 281 of the Penal Code, which charges were eventually dismissed.

92. I find the tort of malicious prosecution proved against the appellants and the 3rd and 4th respondents/Interested Parties, and the Respondent entitled to general damages as awarded by the trial Court which this Court finds no reason on the applicable principle to interfere, but disentitled to the claim for legal fees as special damages, which this Court finds to have been misconceived having been based on the monies allegedly paid to counsel rather than on taxed costs on the basis of a taxation of Advocate-Client Bill of Costs. The Court, therefore, awards the basic instruction fee of Ksh.50,000/- for a suit by the nature of which no specific sum is sued for as set out in the Advocates (Remuneration) (Amendment) Order LN No. 35 of 2014, section 2 of Schedule 7 increased by 50% advocate-client cost, to a total of Ksh.75,000/-.

Orders

93. Accordingly, for the reasons set out above, the Court makes the following orders:

a. The appeal on liability is dismissed.

b. The appeal against the award of damages is allowed to the extent that the award of special damages made by the trial Court is set aside, and substituted therewith by an award of Ksh.75,000/-, and the award of general damages in the sum of Ksh.1,500,000/- is upheld.

c. There shall, therefore, be judgment for the Respondent against the appellants and the Interested Parties, jointly and severally, in the sum of **Ksh.1,575,000/-** together with interest at 14% from the date of the judgment in the trial Court. The Respondent shall also have the costs of the suit in trial Court.

d. As the appellants have been partly successful in their appeal there shall be no orders at costs in the appeal.

Order accordingly.

DATED AND DELIVERED THIS 2ND DAY OF APRIL 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Lubullellah & Associates Advocates for Appellants.

M/S Omwenga & Co. Advocates for the Respondent.