



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KABARNET**  
**CIVIL APPEAL NO. E009 OF 2024**

**MOHAMED KIPTIRIM ARAP CHEBOI,  
JOSHUA TUITOEK RUTO,  
ELIJAH KULEI, AND  
WESLEY KOMEN YATOR.....**  
**APPELLANTS**

**VERSUS**

**MICHAEL KANGOGO.....RESPONDENT** **KANDIE**

**(Being an appeal against the judgment and decree of the  
chief Magistrate's court at Kabarnet by Hon. Caroline R.T.  
Ateya delivered on the 31<sup>st</sup> July 2024 in CMCC No. E021 of  
2021)**

**JUDGMENT**

**BACKGROUND**

1. This is an appeal arising from the judgment of the Chief Magistrate's Court at Kabarnet in MCCC No. E021 of 2021 delivered in favour of the respondent, **Michael Kandie Kangogo**, against the appellants, who were officials of the Kapkirwok Community Water Project.
2. Before the trial court, the respondent had sued the appellants, the Office of the Attorney General, and the Office of the Director of Public Prosecutions seeking damages for malicious prosecution, unlawful detention, libel, and defamation, as well as an order for reconnection of his water supply.
3. The claim arose from events surrounding *Criminal Case No. 230 of 2018*, where the respondent was charged with willfully and unlawfully damaging assorted community water pipes valued at Kshs. 30,000 belonging to Kapkirwok Water Project. The trial court in that criminal case acquitted him under section 210 of the Criminal Procedure Code on 14th October 2020, having found that no witness actually saw him cutting the pipes.
4. Subsequently, he filed the civil suit alleging that his prosecution was actuated by malice and that the appellants defamed him by causing false reports to be aired in local media outlets.

5. Upon hearing, the trial court by judgment delivered on 31<sup>st</sup> day of July 2024 dismissed the defamation claim but found the appellants liable for malicious prosecution and unlawful arrest, awarding general, aggravated, and exemplary damages together with special damages of Kshs. 152,000, and costs.
6. "Being dissatisfied with the trial court decision, the appellants filed a memorandum of appeal raising the following grounds.

### **APPELLANT'S SUBMISSIONS**

7. In their memorandum of appeal, the appellants challenged both the finding on liability and the quantum of damages. They submitted that the trial court erred in finding them liable for malicious prosecution despite evidence that they merely discharged their civic duty by reporting a criminal offence to the police.
8. Further that the trial court misapprehended the law on malicious prosecution by failing to appreciate that it is the State, through the police and the DPP, that undertakes investigation and prosecution and that the trial magistrate erred in holding that there was malice without proof thereof and the damages awarded were excessive and unsupported by evidence.
9. The Appellants further argued that the appellants' role ended with reporting the incident as the decision to

investigate, charge, and prosecute lay exclusively with the police and the Director of Public Prosecutions. They cited authorities to the effect that mere reporting of a suspected offence does not amount to malicious prosecution unless it is shown that the report was false or made with ill motive.

10. The respondent did not file submissions despite being duly served.

### **ANALYSIS AND DETERMINATION**

11. This being a first appeal, this Court is required to re-evaluate, re-analyse, and reconsider the evidence adduced before the trial court and draw its own independent conclusions, while bearing in mind that it neither saw nor heard the witnesses testify. The duty of a first appellate court has been clearly articulated in several authorities, including *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, where the Court of Appeal stated as follows:-

“This Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”

12. *Further in the case of Peters v Sunday Post Ltd [1958] EA 424*, where the Court stated that:-

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or it is based on a misapprehension of the evidence, the appellate court will interfere.”

13. The same principle was reaffirmed in *Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR*, where the Court of Appeal observed that:-

“A first appellate court has the duty to analyse and re-evaluate the evidence on record and reach its own conclusions. It is not bound necessarily to follow the trial court’s findings of fact if it appears that the trial court 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.”

14. Guided by the above authorities, I have perused the lower court record and note that the respondent testified and called two witnesses. He stated that he was arrested

and charged because of false allegations made by the appellants, who were the then officials of kapkirwok community water project. The appellant's argument is that the case and the media coverage humiliated him and damaged his reputation.

15. The appellants denied any wrongdoing. They testified that, as committee officials of the water project, they only reported to the police that the community water pipes had been cut and water service disrupted. They maintained that they neither arrested the respondent nor gave any information to the media.

16. Upon evaluating the evidence, the trial court found that:-

- The appellants were the complainants in the criminal case;
- There was no direct evidence linking the respondent to the offence;
- The prosecution was based on suspicion;
- The prosecution was actuated by malice;
- The claim for defamation failed as the alleged defamatory broadcasts were made by media houses not joined in the suit.

17. Upon considering evidence adduced before the trial court together with the judgment delivered, grounds of

appeal and submissions filed herein, I find the following as issues for determination in this appeal: -

1. Whether the respondent proved the ingredients of malicious prosecution against the appellants; and
  2. Whether the trial court erred in its findings and award.
18. The four essential elements of malicious prosecution were set out by the court in the case of *Mbowa v East Mengo District Administration [1972] EA 352* as follows:-
- a) That the prosecution was instituted by the defendant or by someone for whose acts he is responsible;
  - b) That the prosecution terminated in the plaintiff's favour;
  - c) That the prosecution was instituted without reasonable and probable cause; and
  - d) That the prosecution was actuated by malice.
19. The same position was restated by the Court of Appeal in *Murunga v The Attorney General [1979] KLR 138*, and later affirmed in *Nzoia Sugar Company Ltd v Fungututi [1988] KLR 399* and *Kagane & Others v Attorney General & Another [1969] EA 643*.
20. It is undisputed that the respondent was prosecuted and later acquitted, satisfying the first two elements. The

question is whether the appellants lacked reasonable and probable cause and acted maliciously.

21. From the record, there was clear evidence that the Kapkirwok Community Water Project pipes were cut, leading to water loss. The appellants being officials of the project had a legitimate duty to report the damage to the police. The police thereafter investigated and made their independent decision to arrest and charge the respondent based on his prior threats and the Respondent's proximity to the scene.
22. In *Gitau v Attorney General [1990] KLR 13*, the court held that a person who makes a genuine report to the police cannot be said to have set the law in motion maliciously unless it is shown that the report was false and made without reasonable cause. Similarly, in *Joseph C. Kamau & Another v Attorney General [2006] eKLR*, the High Court emphasized that the mere fact of reporting a complaint does not constitute malicious prosecution, as the discretion to prosecute lies with the police and the Director of public prosecution (DPP).
23. There is no evidence that the appellants fabricated the complaint, gave false statements, or influenced the police or prosecution to act contrary to the law. Their conduct was consistent with responsible community leadership. In the case of *Kagane & Others v Attorney General [1969] E.A. 643*

the court held that an acquittal per se does not establish malice or lack of reasonable and probable cause. The trial magistrate erred in imputing malice merely because the prosecution ended in acquittal.

24. Malice requires proof of spite, ill-will, or improper motive. None was demonstrated. On the contrary, the evidence shows that the appellants were acting in good faith to protect community property.

25. From the foregoing, the respondent failed to prove two essential elements of malicious prosecution being lack of reasonable and probable cause and malice. The finding of liability was therefore not supported by the evidence.

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### **Disposition**

26. Having re-evaluated the entire record, I am satisfied that the learned trial magistrate misapprehended both the facts and the law in holding the appellants liable for malicious prosecution and unlawful arrest. The prosecution of the respondent was undertaken by the police and the DPP, not the appellants. The appellants merely reported a genuine complaint of damage to community property. From the foregoing, the appeal herein therefore succeeds.

### 27. **FINAL ORDERS:-**

1. This appeal is allowed and Judgment delivered on 14<sup>th</sup> February 2024 is hereby set aside.

2. Costs of appeal and trial court be paid to the Appellants.

**Judgment** delivered, dated and signed Virtually at Kabarnet this **9<sup>th</sup> Day of October, 2025.**

.....  
**RACHEL NGETICH**  
**JUDGE**

**In the presence of:**

- Mr. Kiptoon for Appellant.
- Ms Musanzu for Respondent.
- CA, Elvis.