Makuto v Bhayko Distributors Limited & another (Civil Appeal E016 of 2024) [2025] KEHC 13848 (KLR) (6 October 2025) (Judgment)

Neutral citation: [2025] KEHC 13848 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E016 OF 2024

RN NYAKUNDI, J

OCTOBER 6, 2025

BETWEEN

ERICK MAKUTO ..... APPELLANT

AND

BHAYKO DISTRIBUTORS LIMITED ..... 1ST RESPONDENT

THE ATTORNEY GENERAL ..... 2ND RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. P.N Areri SPM delivered on 09/01/2024 in Eldoret CMCC No. 315 of 2017)

JUDGMENT

Background

1. The background of this Appeal is that the Appellant sued the Respondents vide a Plaint dated 27th March 2017 seeking general damages for unlawful arrest, detention, malicious prosecution and defamation and also costs and interest. The Appellant's case at the trial court was that on or about the month of June 2016, the 1st Respondents, directors' servant/agents and/or employees caused the Appellant to be arrested by the Kenya Police and remanded in custody at Eldoret Police Station. The Appellant also averred that on 05/06/2016, he was arraigned in court before the Chief Magistrates at Eldoret in Eldoret Criminal Case No. 2791 of 2016, Republic Vs Eric Makuto and charged with the offence of stealing by servant contrary to section 281 of the Penal Code all at the instance and/or orchestration of the 1st Defendant. The Appellant further averred from the Plaint that upon pleading not guilty to the charges, despite the overwhelming evidence that exonerated him from any wrong doing, he was unfairly and maliciously subjected to a lengthy, humiliating and defamatory prosecution at the instance on instruction of the Respondents. The Appellant furthermore averred that on 29/09/2016, the charges against the Appellant were withdrawn by the 2nd Respondent for lack of evidence and/or probable cause to sustain a conviction, owing to malicious

investigation and prosecution by the 2nd Respondent. The Appellant moreover averred that the 1st Respondent proceeded to instigate and/or cause to be reported in a daily newspaper of wide national circulation that the Appellant had been arrested and charged with stealing Kshs. 2,900,000/= from the 1st Respondent and also that the report and publication was meant to maliciously embarrass, humiliate, intimidate, malign, defame and/or assassinate the Appellant's character with sole intention of destroying his reputation in the public.

2. The 1st Respondent filed a Statement of Defense dated 13th April 2017 traversing all the allegations of fact contained in the plaint and put the Appellant to strict proof thereof. The 1st Respondent also averred that in the alternative and without prejudice, discharge under section 87A of the Criminal Procedure Code laws of Kenya does not amount to an acquittal and therefore the rights to sue for malicious prosecution does not accrue.

3. The 2nd Respondent filed a written statement of defense dated 10th July 2017 in which the 2nd Respondent averred that on or about the month of June 2016, a compliant was lodged with the police that the Appellant had committed an offence and that acting upon the said complaint the police proceeded to investigate whereupon they were convinced that the Appellant had committed the offence of stealing by servant. The 2nd Respondent also averred that the completion of the investigations led to the arrest and prosecution of the Plaintiff in Eldoret CRC No. 2791 of 2016 and added that all the actions taken by the police were in execution of statutory duties bestowed upon them and denied that the same was actuated by malice or was intended to injure his reputation as alleged.

4. The matter proceeded for a full trial and judgement was entered on 9th day of January 2024 where the Appellant's claim who was the Plaintiff therein was dismissed wholly with costs to the Defendants.

5. The Appellant herein being aggrieved and dissatisfied with the judgement and decree delivered on 09/01/2024 by Hon. P.N. Areri (SPM) preferred this appeal vide a Memorandum of Appeal dated 25th January 2024 based on 9 grounds as follows: -

    a. That the learned Magistrate erred in law and in fact in arriving at a conclusion based on unfair and unequal treatment of the evidence adduced at the hearing.

    b. That the Learned Magistrate erred in law and in fact in failing to consider and give sufficient weight to the appellant's pleadings and evidence adduced at the hearing.

    c. That Learned Magistrate erred in law and fact in dismissing the Plaintiff's suit entirely.

    d. That the learned Magistrate erred in law and fact by misapprehending the evidence tendered by the appellant.

    e. The Learned Magistrate erred in law and in fact by relying on the wrong principles of law in reaching his conclusion.

    f. That the learned Magistrate erred in law in finding that the prosecution was not actuated by malice.

    g. That the learned Magistrate erred in law in finding that the conditions required to prove malicious prosecution were not established yet the evidence on record was to the contrary.

    h. That the Learned Magistrate erred in law and fact by failing to award the appellant damages for unlawful arrest, detention, malicious prosecution and defamation.

    i. That the learned Magistrate erred in law and fact in failing to consider the submissions of the Appellant and the authorities cited.

6. The Appellant sought the following orders from his memorandum of appeal: -

   a. This appeal be allowed.

   b. The judgement and decree entered in Eldoret CMCC No 315 of 2017, Erick Makuto Vs Bhayko Distributors Limited & The Attorney General be set aside.

   c. This Honourable Court to make its independent determination on the issues in contest.

   d. Costs for this appeal.

7. The Appeal was canvassed by way of written submissions.

Appellants Written Submissions.

8. The Appellant filed written submissions dated 4th September 2025 through legal representation of Mr. Ombima. The learned counsel for the Appellant, Mr. Ombima, submitted that the issues for determination are:

   a. Whether the Appellant's arrest, detention, imprisonment and prosecution was malicious.

   b. Whether the Plaintiff suffered defamation of character and reputation.

   c. Who is to bear the costs of these proceedings.

9. On malicious arrest, detention, imprisonment and prosecution, counsel submitted that the trial magistrate dismissed the claim for malicious prosecution on the grounds that despite the arrest, detention and arraignment, there was no trial, and further that the criminal case was withdrawn under Section 87(a) of the Criminal Procedure Code, hence the discharge was not an acquittal and therefore not a basis for a claim.

10. Counsel argued that the finding was erroneous in fact and law, as the law requires that before arrest and prosecution, there must be reasonable and probable cause. In Kagame's case, it was held that reasonable and probable cause is an honest belief in guilt founded on reasonable grounds. In this case, the complaint was based on alleged CCTV footage, but the Respondents did not proceed with trial or explain the termination of proceedings. The police also failed to seek the Appellant's version of events. Neither the Appellant's colleagues were questioned, nor was the alleged evidence ever produced.

11. Counsel relied on James Karuga where it was held that in the absence of circumstances to justify arrest, malice is inferred. He also cited Gulam & Another v The Chief Magistrate's Court & Another (2006) eKLR, where the Court held that a prosecution without proper factual foundation is suspect for ulterior motives and contrary to public policy.

12. Counsel submitted that the absence of trial does not override the fact that the Appellant's arrest, detention and prosecution was unlawful and malicious. The termination under Section 87(a) was, in effect, akin to an acquittal, particularly since over nine years had passed without fresh charges. He cited Egbema v West Nile Administration (1972) EA 60 where the Court held that failure to re-prosecute after five years is equivalent to acquittal. He argued that the trial court erred in failing to so determine.

13. On defamation of character, counsel submitted that following the complaint and prosecution, the Appellant's employment was terminated and his photograph published in a newspaper, which hindered his ability to secure alternative employment. This publication questioned his reputation, causing indignity and humiliation among peers, family and colleagues.

14. Reliance was placed on Dr. Willy Kaberuka v Attorney General (Uganda HCCS No. 160 of 1993), where damages were awarded for injury to feelings, humiliation, and damage to reputation. Counsel also cited Peter M. Kariuki v Attorney General (2014) eKLR, where it was held that damages in defamation compensate for non-pecuniary loss and aim to restore dignity.

15. In conclusion, counsel prayed that the Court sets aside the trial court's judgment of 09/01/2024 and enters independent judgment in favour of the Appellant as follows:

    a. General damages for unlawful arrest and detention – Kshs. 500,000/=

    b. General damages for malicious prosecution – Kshs. 1,500,000/=

    c. General damages for defamation of character – Kshs. 1,500,000/=

    d. Total – Kshs. 3,500,000/=

    e. Costs of the suit and interest.

1st Respondent's Written submissions

16. The 1st Respondent filed its written submissions dated 5th August 2025. The learned counsel for the 1st Respondent, Mr. Kimani, submitted that the issues for determination are threefold: (a) what is the duty of the first appellate court; (b) whether the Appellant had proved his case on the balance of probabilities; and (c) which relief is available in the premises.

17. On the first issue, counsel cited Damiano Migwi v Timothy Maina Waitugi [2009] KECA 219 (KLR) where the Court of Appeal held that a first appellate court has a duty to reappraise the entire evidence on record and make its own findings of fact on the issues, while allowing for the fact that it had not seen the witnesses testify. Counsel also relied on Ephantus Mwangi v Duncan Mwangi Wambugu [1984] eKLR, where it was held that an appellate court will not normally interfere with findings of fact unless based on no evidence, a misapprehension of evidence, or demonstrable wrong principles.

18. Turning to the second issue, counsel argued that the Appellant did not prove his case on a balance of probabilities. The Appellant had sought damages for unlawful arrest, detention, malicious prosecution, and defamation. Citing Kenya Agricultural Research Institute v Morris Shikuvale Muranga & another [2021] eKLR, counsel outlined the four elements of malicious prosecution. He submitted that prosecution was not instituted by the 1st Respondent, who merely lodged a complaint with the police after discovering deleted invoices leading to a loss of Kshs. 2,900,000/=. The police thereafter investigated and charged the Appellant. Reliance was placed on David Kirimi Julius v Fredrick Mwenda [2009] eKLR where it was held that once a complaint is made, subsequent prosecution is under the control of the police.

19. Counsel submitted that prosecution was not terminated in the Appellant's favour, as it was withdrawn under Section 87(a) of the Criminal Procedure Code while parties were negotiating. Referring to Njuca Consolidated Company Ltd v George Otieno [2020] eKLR, counsel noted that a discharge under Section 87(a) is not a final termination since the DPP retains residual power to reopen the case. Further, the Appellant himself admitted in cross-examination that he was the accounts manager responsible for tallying invoices with banked cash and cheques, and that in case of a shortfall, he would be the first suspect. This admission, counsel argued, estopped the Appellant from denying probable cause. Thus, the trial magistrate was correct in finding that the case was not proved.

20. On defamation, counsel submitted that the claim was unfounded and unproven, as the Respondents were not the authors of the article and had probable cause to lodge the complaint. He cited National

Cereals & Produce Board v Samson Kimutai Chemalan [2011] KEHC 828 (KLR), where it was held that defamation is not proved where a police report was made with probable cause. Counsel emphasized that one cannot vouch for their own reputation; only a third party can. The Appellant failed to call any witness. In Selina Patani & another v Dhiranji V. Patani [2019] eKLR, the Court of Appeal held that a claimant must adduce third-party evidence to show lowered reputation. Counsel therefore submitted that the Appellant's case was built on quicksand, bound to fail, and the trial court's decision should be upheld.

21. On relief, counsel urged the Court to dismiss the appeal for failure to discharge the burden of proof. Additionally, the appeal was incompetent for want of a decree, which is mandatory. Reliance was placed on Lucas Otieno Masaye v Lucia Olewe Kidi [2022] eKLR, where the court held that absence of a decree renders an appeal fatally defective and liable to be struck out.

22. In conclusion, counsel prayed that the Honourable Court uphold the trial court's decision and dismiss the instant appeal with costs to the Respondents. Authorities cited:

    a. Damiano Migwi v Timothy Maina Waitugi [2009] KECA 219 (KLR)

    b. Ephantus Mwangi v Duncan Mwangi Wambugu [1984] eKLR

    c. Kenya Agricultural Research Institute v Morris Shikuvale Muranga & Another [2021] Eklr

    d. David Kirimi Julius v Fredrick Mwenda [2009] Eklr

    e. National Cereals & Produce Board v Samson Kimutai Chemalan [2011] KEHC 828 (KLR)

    f. Selina Patani & Another v Dhiranji V Patani [2019] Eklr

    g. Lucas Otieno Masaye v Lucia Olewe Kidi [2022] eKLR

Analysis and Determination

23. The key duty of an appellate court, especially when dealing with a first appeal, is to undertake a comprehensive and independent re-assessment of the evidence presented before the trial court and to arrive at its own conclusions. While it is not bound by the factual findings of the trial magistrate and may reach different conclusions where the trial court misapprehended the evidence or failed to consider relevant circumstances and probabilities, the appellate court must nonetheless remain mindful that the trial court had the distinct advantage of directly observing the witnesses' demeanor and hearing their testimony firsthand. In the case of Mbogo and Another v Shah [1968] EA 93 the Court stated:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

24. The said duty of the appellate Court was explained in the case of Selle & Another Vs Associated Motor Board Company Ltd. [1968] EA 123, where the Court stated as follows:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal form a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the 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,

in particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

25. After carefully reviewing the memorandum of appeal, the lower court proceedings and the parties' submissions, the court has identified two (2) primary legal questions for determination: -

    a. Whether the Appellant's arrest, detention and prosecution was malicious.

    b. Whether the Appellant suffered defamation of character and reputation.

Whether the Appellant's arrest, detention and prosecution was malicious

26. From the facts of the case on record being from the Plaint, the Appellant pleaded his case and his evidence was that the 1st Respondent through its director instigated the police to arrest and charge him with stealing by servant in Eldoret Criminal Case No. 2791 of 2016 and that the charge was subsequently withdrawn on 29/09/2016. The Appellant alleges that the complaint and subsequent prosecution were malicious, without reasonable and probable cause and caused him humiliation and loss of employment. The 1st Respondent pleaded defence and the 2nd Respondent's case from the statement of defense was that a complaint was legitimately made to the police after invoices were discovered missing from the 1st Respondent's systems and an alleged loss of Kshs. 2,900,000/=; the police investigated, formed the view there was a case and charged the Appellant.

27. Malicious prosecution is an intentional tort designed to provide redress for losses flowing from an unjustified prosecution. The fundamental ingredients for a successful malicious prosecution claim have been definitively articulated by Cotran, J in the landmark case of Murunga v Attorney General (1979) KLR, 138. To prevail in such a claim, a claimant must demonstrate the following elements to the court's satisfaction, based on a balance of probabilities:

    a. The plaintiff must show that the prosecution was instituted by the defendant, or by someone for whose acts he is responsible;

    b. The plaintiff must show that the prosecution terminated in his favour;

    c. The plaintiff must demonstrate that the prosecution was instituted without reasonable and probable cause;

    d. He must also show that the prosecution was actuated by malice."

28. To succeed in the claim of malicious prosecution, the plaintiff must establish that the Defendant and/or his or her agent set the law in motion against him or her on a criminal charge. In Gitau v Attorney General [1990] KLR 13, Trainor, J had this to say: -

> " To succeed on a claim for malicious prosecution the plaintiff must first establish that the defendant or his agent set the law in motion against him on a criminal charge. Setting the law in motion" in this context has not the meaning frequently attributed to it of having a police officer take action, such as effecting arrest. It means being actively instrumental in causing a person with some judicial authority to take action that involves the plaintiff in a criminal charge against another before a magistrate. Secondly he who sets the law in motion must have done so without reasonable and probable cause...The responsibility for setting the law in motion rests entirely on the Officer-in-Charge of the police station. If the said officer believed what the witnesses told him then he was justified in acting as he did, and

the court is not satisfied that the plaintiff has established that he did not believe them or alternatively, that he proceeded recklessly and indifferently as to whether there were genuine grounds for prosecuting the plaintiff or not. The Court does not consider that the plaintiff has established animus malus, improper and indirect motives, against the witness."

29. It is not disputed that Eldoret Criminal Case No. 2791 of 2016, Republic Vs Erick Makuto was initiated by the 2nd Respondent through the police report. It is also not disputed that in in the said case, the appellant was discharged under section 87(a) of the Criminal Procedure Code. The trial court while dismissing the claim gave an account on the events leading to the withdrawal of proceedings. In particular, the trial court held as follows, "On the claim for malicious prosecution, I have considered the evidence before me and I find that although the Plaintiff was arrested and arraigned before court, there was no trial as the prosecution did not call any witness for examination by the court. The case was withdrawn under section 87 (a) of the Criminal Procedure and the Plaintiff was discharged. Discharge was not an acquittal and therefore will not be the basis of a claim for malicious prosecution."

30. In the dictum of Stephen Gachau Githaiga & another v Attorney General [2015] eKLR Mativo J (as he then was), stated that a termination of a prosecution would be favourable to a party regardless of the route taken, be it an acquittal, a discharge, a withdrawal or a stay. In that case, the court said: -

> "The second element of the tort demands evidence that the prosecution terminated in the plaintiff's favour. This requirement precludes a collateral attack on a conviction properly rendered by a criminal court, and thus avoids conflict between civil and criminal justice. The favourable termination requirement may be satisfied no matter the route by which the proceedings conclude in the plaintiff's favour, whether it be an acquittal, a discharge at a preliminary hearing, a withdrawal, or a stay."

31. It is correct as the trial court held that a discharge under section 87(a) is not per se an acquittal as the DPP retains residual power to reopen the case. That said, the legal effect of section 87(a) of the Criminal Procedure Code is that the discharge depends on the circumstances. The Appellant urges that the lapse of time and the conduct of the Respondents points to finality akin to acquittal. While lengthy inaction may be relevant, the mere fact of withdrawal under section 87(a) of the Criminal Procedure does not automatically satisfy the second element of malicious prosecution and in this case there is no persuasive material establishing that the withdrawal was a final and unconditional termination amounting to acquittal. The trial Magistrate was therefore entitled to treat the withdrawal as a qualified termination.

32. Nonetheless, on that account it is evident that the 1st and 2nd ingredients were duly proved. The prerequisites for a malicious prosecution claim are not merely suggestive, but cumulative. Critically, the absence of even a single essential ingredient is sufficient grounds for the court to dismiss the claim. Each element must be comprehensively established to sustain a successful malicious prosecution action.

33. As to whether the prosecution of the appellant was instituted without reasonable and probable cause, what amounts to reasonable and probable cause was well explained by Rudd J in Kagame & others v AG & another [1969] EA 643 where it was held as follows: -

> "Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed..."

34. In the case of Phen Gachau Githaiga & Another v Attorney General [2015] eKLR, the Court discussed the tort of malicious prosecution and stated as follows with regards to the third element of successful malicious prosecution: -

> " The third element which must be proven by a plaintiff - absence of reasonable and probable cause to commence or continue the prosecution further delineates the scope of potential plaintiffs. As a matter of policy, if reasonable and probable cause existed at the time the prosecutor commenced or continued the criminal proceeding in question, the proceeding must be taken to have been properly instituted, regardless of the fact that it ultimately terminated in favour of the accused."

35. Regarding the third ingredient of malicious prosecution, lack of reasonable and probable cause; this court finds significant guidance in the precedent set by Rudd J in Kagame & others v AG & another (supra). Reasonable and probable cause requires an honest belief in the accused's guilt, founded on reasonable grounds that would lead an ordinary prudent person to conclude the charged individual was probably guilty. I take cognizance that the Appellant bears the burden of proving that the prosecuting party lacked reasonable grounds. The Appellant's own admissions at trial are material. On cross-examination he acknowledged that he was the accounts manager whose role was to receive invoices and reconcile receipts and that in case of any shortfall he would naturally be the first suspect.

36. In particular, PW1, Erick Makuto who is the Appellant herein during cross-examination at the trial court stated as follows, "I was employed as an accounts manager by Bhyako Limited. My role was to receive invoices from sales, tally with cash and cheque s which were banked." There is also unchallenged evidence before the Court that invoices had been deleted and a loss of funds alleged. Viewed objectively, these facts amount to a legitimate complaint giving rise to a reasonable and probable belief that an offence may have been committed. The Appellant has not placed before this Court cogent evidence of fabrication or that the complaint was frivolous.

37. Finally, on malice- malice is a state of mind and may be inferred from facts such as lack of grounds or ulterior motive. In the case of Dr. Lucas Ndungu Munyua v Royal Media Services Limited & Another [2014] eKLR, it was stated that, "With respect to malice, the law is clear that the mere fact that a person has been acquitted of the criminal charge does not necessarily connote malice on the part of the prosecutor." In this matter the Appellant has not shown that the 1st Respondent acted with vindictiveness or an ulterior purpose beyond making a complaint about a suspected loss. The record does not disclose fabrication of evidence by the 1st Respondent or any conduct from which malice can reasonably be inferred.

38. The court notes that the 1st Respondent maintains it did not play a direct role in the decision to hold the Appellant in custody, charge, or institute criminal proceedings. The decision to charge after investigations was that of the 2nd Respondent as a state agency. Significantly, as rightly noted by the 1st Respondent, the withdrawal of criminal proceedings under Section 87(a) of the Criminal Procedure Code does not automatically absolve the Accused Person of the offense. The prosecution/police retain the right to re-arrest after release by the court. The Appellant has failed to demonstrate that the actions of the Respondents in setting legal processes in motion were motivated by spite rather than a genuine attempt to administer criminal justice.

39. After a comprehensive analysis of the evidence and submissions before me, I am of the considered view that: the first two ingredients of malicious prosecution were met; there was reasonable and probable cause for the prosecution but no malice was proven. In the end the Appellant has failed to substantiate his claim of malicious prosecution.

Whether the Appellant suffered defamation of character and reputation.

40. Generally, a defamatory statement may take the form of either libel or slander. Such words are regarded as defamatory if they expose the person referred to hatred, contempt, or ridicule, or if they lower that person in the estimation of ordinary, right-thinking members of society. The test applied is that of the perception of right-thinking individuals in general. It must be shown that the words were understood, or were reasonably capable of being understood, by the audience as defamatory rather than merely insulting. The duty to prove that the words are defamatory rests on the plaintiff, who must establish that a reasonable person would not have interpreted the words in any other way except as defamatory. The ingredients of defamation were summarized in the case of John Ward V Standard Ltd , HCCC 1062 of 2005 as follows:-

> " .....The ingredients of defamation are:
>
> a. The statement must be defamatory.
>
> b. The statement must refer to the plaintiff.
>
> c. The statement must be published by the defendant.
>
> d. The statement must be false."

41. In the case of Phinehas Nyaga Vs Gitobu Imanyara [2013] eKLR it was held that; "defamation was not about publication of falsehoods against a Plaintiff but rather, the Plaintiff must show that the published falsehood disparaged his reputation and lowered him in the estimation of right-thinking members of society generally." Thus, to prove defamation, the claimant must establish or demonstrate that the matter complained of was defamatory in nature, that the defamatory statement was uttered to someone else other than the person who was said to have been defamed and that the defamatory statement was published maliciously. In other words, the element of the tort of defamation are that the words must be defamatory in that they must tend to lower the Plaintiff's reputation in the estimation of right-minded persons, in the society or they must tend to cause the Plaintiff to be shunned or avoided by other persons. The words complained of must be shown to have injured the reputation, character or dignity of the Plaintiff. Abusive words may not be defamatory perse. The words must be shown to have been construed by an audience as defamatory and not simply abusive. The burden of proving the above is upon the Plaintiff to demonstrate that a reasonable man would not have understood the words otherwise than being defamatory.

42. Further, the words must be malicious. Malicious here does not necessarily mean spite or ill will but there must be evidence of malice and lack of justifiable cause to utter the words complained of. Evidence showing the Defendant knew the words complained of were false or did not care to verify can be evidence of malice. In Anne Wairimu Njogu Vs Radio Africa Limited [2017] eKLR, it was held that malice also had to be inferred form the alleged defamatory statement. In addition, the defamatory words must be shown to have been published by the Defendant. In the instant appeal, it was the Appellant's contention that that the 1st Respondent proceeded to instigate and/or cause to be reported in a daily newspaper of wide national circulation that the Appellant had been arrested and charged with stealing Kshs. 2,900,000/= from the 1st Respondent and also that the report and publication was meant to maliciously embarrass, humiliate, intimidate, malign, defame and/or assassinate the Appellant's character with sole intention of destroying his reputation in the public.

43. A clear reading from the record of the trial court, DW1 Ashit Ketak during Re-Examination stated as follows, "we had a reason to complain to the police. We noted cheques had been deleted and some

customers had not paid for goods. After investigations, police charged Mr. Makuto. The case was withdrawn after the customers and Makuto approached us and requested us to withdraw the case. We did not publish the case in the newspaper. That is all." In the case of Miguna Miguna v Standard Group Limited & 4 Others [2017] eKLR, the Court of Appeal stated as follows regarding defamation: -

> " Speaking generally a defamatory statement can either be libel or slander. Words will be considered defamatory because they tend to bring the person named into hatred, contempt or ridicule or the words may tend to lower the person named in the estimation of right - thinking members of society generally. The Standard of opinion is that of right-thinking persons generally. The words must be shown to have been construed or capable of being construed by the audience hearing them as defamatory and to simply abusive. The burden of proving the defamatory nature of words is upon the Plaintiff. He must demonstrate that a reasonable man would not have understood the words otherwise than being defamatory. The law of defamation or more accurately, the law of libel and slander, is concerned with the protection of reputation: "As general rule, English law gives effect to the ninth commandment that a man shall not speak evil falsely of his neighbor. It supplies a temporal sanction..." Defamation protects a person's reputation that is the estimation in which he is held by others; it does not protect a person's opinion of himself nor his character. The law recognizes in every man false statement to his discredit and it affords redress against those who speak such defamatory falsehoods."

44. To succeed in the tort of defamation, the Appellant was required to establish publication of a defamatory statement to a third party, that the statement referred to him and that the statement was likely to lower his reputation. The Appellant's case would have been strengthened by production of the impugned newspaper clipping, independent corroboration of the publication, testimony from third parties who saw/read the article and evidence of the actual impact on his employment prospects. The record does not show that such independent proof was put before the trial court. The Appellant testified about the alleged publication and loss of employment, but he did not call third-party witnesses to verify reputation loss or produce the publication itself. As a result, his evidence on publication and consequential damage was largely uncorroborated.

45. In the case of Selina Patani & another v Dhiranji V. Patani [2019] eKLR, the Court held as follows: -

> " In law, to constitute a cause of action, the alleged defamatory statement should be published to a third party. If the statement complained of has only been made to the person the letter is addressed to, this will not suffice. If a defamatory statement is placed in the hands of a clerk so that he is in a position to learn its contents those contents, are published to the clerk no less than any other person to whom the document is given. In her evidence, the 1st appellant testified that the letter was delivered to her shop and she was given the same by her workers; that the letter was not in a sealed envelope. The 2nd appellant testified that she received the letter from her employer's office; that any correspondence received in the office must go through her boss regardless to whom it is addressed; and that her boss had read the letter."

46. The burden to prove publication is on the claimant, in this case the appellant. Nevertheless, in certain cases the law will presume publication to a third party unless evidence to the contrary is forthcoming. Such a presumption arises where the document is put in the way of being read and understood by those through whose hands it passes in the ordinary course of events. For instance, if it is a postcard, it will be presumed, in the absence of evidence to the contrary, that others besides the person to whom it is addressed will read and have in fact read what is written thereon. However, the presumption can be rebutted and the onus of doing so rests with the defendant.

47. In the judgement of the trial court, the learned Trial Magistrate held as follows, "On the claim for damages for defamation, for a statement to qualify as defamation, the Plaintiff must show that the statement was false, damaging, published and unprivileged. From the evidence adduced, there is no dispute that the Plaintiff was the 1st Defendant's accountant. There is no dispute that the defendant's director complained about the loss of money to the police and carried out investigations and arrested the accused. There is no evidence to show that any of those were false. What the Plaintiff is complaining about is the newspaper article filed by a reporter who was in court when the plaintiff was arraigned before court. The article was not written by the 1st or 2nd defendant's agents and therefore the defendants cannot be said to have published the article. Lastly, the plaintiff did not demonstrate that following the publication his reputation was injured. For the foregoing reasons, the claim for damages for defamation will fail."

48. In the comparative jurisprudence of Pullman Vs Walter Hill & Co (1891) 1 QB 524, the English Court of Appeal explained what publication constitutes as follows:

> " What is the meaning of 'publication'? The making known the defamatory matter after it has been written to some person other than the person of whom it is written. If the statement is sent straight to the person of whom it is written, there is no publication of it; for you cannot publish a libel of a man to himself. If there was no publication, the question whether the occasion was privileged does not arise..... If the writer of a letter shows it to his own clerk in order that the clerk may copy it for him, is that a publication of the letter? Certainly it is, showing it to a third person; the writer cannot say to the person to whom the letter is addressed, 'I have shown it to you and to no one else.' I cannot, therefore, feel any doubt that, if the writer of a letter shows it to any person other than the person to whom it is written, he publishes it"

49. Guided by the above dictum on the publication of a defamatory letter to the addressee, I find no reason to interfere with the finding of the trial Magistrate that the article was not authored by the 1st or 2nd Defendant's agents. The Defendants cannot be said to have published the article, and in the absence of evidence on record from a third party claiming to have read the newspaper article, the claim cannot stand. It is my considered view that in applying the authorities above, the Appellant did not establish publication and the resulting damage to his reputation on a balance of probabilities. Accordingly, the claim for defamation fails for want of proof.

50. Having re-evaluated the evidence and applied the correct legal principles, I am satisfied that the trial magistrate properly weighed the evidence and was within bounds in dismissing the Appellant's claims for malicious prosecution and defamation. The Appellant has thus not discharged the burden of proof on a balance of probabilities. In view of the foregoing, the following orders shall abide: -

    a. This appeal be and is hereby dismissed.

    b. The judgment and decree delivered on 9th January 2024 by Hon. P. N. Areri (SPM) in Eldoret CMCC No. 315 of 2017 be and is hereby upheld.

    c. The Appellant shall pay the costs of this appeal to the Respondents.

    d. It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET VIA CTS THIS 6TH DAY OF OCTOBER 2025

.....

R. NYAKUNDI

JUDGE