



**Halable & 2 others v Mohamed & another (Civil Appeal E048 of 2023)
[2025] KEHC 15153 (KLR) (23 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15153 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CIVIL APPEAL E048 OF 2023
JN NJAGI, J
OCTOBER 23, 2025**

BETWEEN

**ADEN YUSUF HALABLE 1ST APPELLANT
SALAD OSMAN ABDILLE 2ND APPELLANT
MOHAMED MAHAMUD DAGAL 3RD APPELLANT**

AND

**MOHAMED ABDI MOHAMED 1ST RESPONDENT
ABDI GUYO BORU 2ND RESPONDENT**

(Being an Appeal from the judgment and decree of Hon. P. E. Nabwana, Senior Resident Magistrate, in Mpeketoni Civil Case No. E017 of 2021 delivered on 2/8/2023)

JUDGMENT

1. The Respondents herein were tried jointly at a Garissa Court wherein the 1st Respondent was facing a charge of hoaxing contrary to section 26 of the *Prevention of Terrorism Act* while the 2nd Respondent was facing a charge of giving false information to a public officer contrary to section 129(a) of the Penal Code. After a lengthy trial that took three years wherein the three appellants herein were prosecution witnesses against them, the respondents were acquitted of the charges vide section 215 of the criminal procedure Code. It was the case for the respondents that the appellants are the ones who made false accusations against them to the police thereby causing their arrest and prosecution. They sued the appellants together with Director of Public Prosecutions and the Attorney General seeking the following reliefs:
 - (a) General, aggravated and exemplary damages for false imprisonment, malicious prosecution and defamation



- (b) Special damages of Ksh.1,581,000/=
 - (c) Costs and interest.
2. The trial court awarded them Ksh.800,000/= in general damages, Ksh.400,000/= in exemplary damages and special damages of Ksh.1,581,000/=. The Appellants were aggrieved by the judgment of the trial court and lodged the instant appeal that sets 21 grounds of appeal which are in summary that:
- 1. That the Learned Magistrate erred in fact and in law in entering judgment against the Appellants in a case where the threshold for malicious proceedings had not been reached.
 - 2. That the Learned Magistrate erred in fact and in law by awarding damages to the Respondents amounting to Kshs. 3,048, 515/-
 - 3. That the Learned Magistrate erred in fact in law by entering judgment against the Appellants' weight of evidence.
 - 4. That the Learned Magistrate erred in fact and in law by failing to appreciate that the Appellants were merely witnesses in the criminal proceedings giving rise to the malicious prosecution suit.
 - 5. That the Learned Magistrate erred in law and in fact by misdirecting himself and failing to appreciate that the Appellants never lodged a formal complaint against the Respondents in the trial court.
 - 6. That the Learned Magistrate erred in law and in fact in faulting the Appellants of trumped up charges against the Respondents in the criminal case failing to appreciate that the Appellants are not mandated to prepare charge sheets neither are they experts in law.
 - 7. That the Learned Magistrate erred in law and in fact in failing to consider that the Appellants as witnesses ought to have been protected under the law and not be victimized.
 - 8. That the Learned Magistrate erred in law and fact in failing to appreciate that the complainant in the Criminal Case No. 886 of 2018 was the Anti-Terrorism Police Unit Garissa who were not included in the Civil case giving rise to this Appeal.
 - 9. That the Learned Magistrate erred in law and in fact in failing to consider and apply the law appropriately.
3. The appellants sought to have the appeal allowed and the judgment and decree of the trial court set aside.

Appellants'/Defendants evidence at the trial court

4. It was the evidence of the 1st Appellant, Aden Yusuf Halable who was DW1 at the lower court, that on the 30/11/2018 he and the 1st respondent (Mohamed Abdi Mohamed), the 2nd Appellant (Salad Osman) and one Abdikadir Abdullah were arrested and taken to Mandogo police station where they spent the weekend. They were told that they were being investigated on terror related charges. They were taken to court on 3/12/2018 where the court ordered them to be placed in custody for 3 more days for the police to complete investigations. They were detained for a further 3 days after which he, Salad (2nd appellant) and Abdikadir were released but the 1st respondent (alias Mohamed Fujo) was charged over terror related charges together with the 2nd respondent (Abdi Guyo Boru). It was the case for the 1st Appellant that it is the 4th Respondent (the ODPP) who decided to charge the two upon being satisfied that there was evidence against them. That the decision to charge was not his and he



- did not institute any charges against the respondents. That he only came in in the case as a witness for the state.
5. The witness however admitted in cross-examination that he on the 10/11/2018 went to Witu Police Station in the company Abdikadir and lodged a complaint that the 1st Respondent wrote a message in the phone of Abdikadir that the three appellants were involved in terrorism activities. He admitted that the 1st Respondent was arrested as a result of his report.
 6. The 2nd and 3rd Appellants/defendants did not testify in the civil case at the lower court.
 7. The Attorney General who was the 4th defendant at the lower court called 3 witnesses in the case. PC Raymond Okoth, DW2 testified that he was at the time stationed at Witu police station. That on the 10/11/2018, Aden Yusuf (the 1st Appellant) and one Abdikadir went to the police station and made a report that there was a message on the phone of Abdikadir that claimed that Aden Yusuf was connected to Al-Shabaab. Abdikadir claimed that it is one Mohamed Abdi Mohamed (alias Mohamed Fujo, the 1st respondent) who had written the message in his phone. That he summoned the said Mohamed Fujo to the police station but he denied writing the message. He however indicated that the contents of the message were true. He PC Okoth handed over the matter to Anti- Terror Police Unit for further action.
 8. CI Kennedy Bowen, DW3, testified that he was at the material time the Officer in charge of Mandogo and Bangale. That on 28/11/2018 while at Mandogo he received intelligence information from the then DCIO Tana River CI Mohamed that the 3rd Appellant, Mohamed Muhamud Dagal, was in possession of firearms at his residence at Bangale. He went to Bangale and picked the 3rd appellant. He went with him to his residence and searched it but he did not recover anything. He informed the DCIO of the results of the search who instructed him to hand over the 3rd Appellant to the ATPU Garissa. He did not know who had given out the information about the 3rd Appellant.
 9. Cpl Samuel Karani DW4 testified that he was at the material time attached to the ATPU Witu. That on 24/11/2024 he received intelligence information in his whatsapp group that one Mohamed Mohamud Dagal, the 3rd Appellant was an Al-Shabab operative and that he was in possession of a cache of weapons in his house. That on the same day the said suspect was handed over to him by the CID Bungale.
 10. That in December he learnt of a text message that was shared to intelligent agencies branding Adan Halable (the 1st appellant) and Sheikh Mohamed as members of Al-Shabaab terror group. That ATPU officers arrested the 1st, 2nd and 3rd appellants herein and a police informer called Abdikadir Abdullahi. That he investigated the case and found that Mohamed Abdi Mohamed alias Fujo (the 1st respondent) had used the mobile phone of the police informer (Abdikadir) to compose a hoax message that Adan Halable and Sheikh Mohamed were Al-Shabaab operatives. That he found that the police informer is illiterate and cannot have composed a text of that nature. That later on there was disagreement on payment between the informer and Mohamed Fujo which led to the disclosure of the hoax message to Aden Yusuf Halable who reported the same at Witu police station.
 11. It was the evidence of Cpl Karani that he summoned the area chief, Abdi Guyo Boru, to shed light on the conduct of the 3rd appellant, Sheikh Mohamed. The chief admitted that he was the originator of the information circulating on intelligence agencies about Sheikh Mohamed. He recorded a statement stating that the 3rd appellant and his brother the 2nd appellant are Somali nationals and that they obtained their Kenyan identity cards illegally. That after investigations he found that there were personal differences between Sheikh Mohamed and the chief. That the chief made the allegations against Sheikh Mohamed to settle personal scores. He found that the Sheikh and his young brother, the 2nd appellant are Kenyans by birth and that it is the chief himself who approved for the 2nd appellant



to be issued with an identity card by signing form R136 when the 2nd appellant applied to be issued with a Kenyan identity card.

12. CPL Karani also found that the text message drafted by Mohamed Fujo and shared to intelligence agencies was meant to make Adan Yusuf to be arrested and falsely charged before a court of law. However, that the police informer thereafter failed to appear in court to testify against Mohamed Fujo, the 1st respondent.

Respondents`/Plaintiffs Evidence before the trial court

13. Mohamed Abdi Mohamed, the 1st Respondent herein who was the 1st plaintiff and PW1 in the civil case at the lower court, testified that he is a businessman at Witu township in Lamu county. That he is a supplier of schools with sugar, rice and other food stuff. That on the 10/11/2018 he was called by PC Raymond of Witu police station. He proceeded there and on arrival he was shown a message that implicated Aden Yusuf Halable, Salad Osman Abdille and Mohamed Mohamud Dagal (the 1, 2nd and 3rd appellants herein) with terrorism activities. He was accused of writing the message in the mobile phone of one Abdikadir. He denied doing so. That on 1/12/2018 he was summoned to the police station by Cpl Wafula. He found Aden Yusuf and Salad Osman at the police station. They were arrested and placed in the cells. After an hour they and one Abdikadir were taken to the DCIO's office at Minjila. They were put in another vehicle and taken to Mandogo police station. Abdikadir was released on the ground that he was a police informer. He and the other three were locked up over the weekend and presented before court on 3/12/2018 where they were branded Al-Shabaab operatives and the police obtained their custodial orders for 3 days pending investigations. The other two were then released and he was arraigned in court over the count stated above. He was arraigned with the 2nd respondent (the chief) on separate counts yet he had never met him before. It was his evidence that Aden Yusuf was his business rival. That the arrest and prosecution was out of malice.
14. The 2nd Respondent herein, Guyo Boru PW2 who was the 2nd plaintiff in the case, told the trial court that he is a former Chief of Bungale location in Tana River county. That on 30/11/2018 he received a phone call from the DCIO Bura asking him to give a confidential report with the ATPU Garissa of one Mohamed Dagal, the 3rd appellant, who was his neighbour. That he gave his verbal report to Cpl Samuel Karani and wrote a report. His report was that he had been informed by an informer that the subject person was a Somali national and that he had obtained his Kenyan identification card fraudulently. He was later arrested and charged with giving false information. The particulars of the offence were that on the 30th November 2018 at ATPU Garissa Office with intent to mislead he knowingly gave false information to a police officer Cpl Karani that Mohamed Mohamud Dagal and Salad Osman Abdille were Somali nationals and members of an organized criminal gang that is intended to commit violent crimes in Bungale location within Tana River County and Witu in Lamu county which information would have likely caused the arrest and prosecution of the above mentioned. It was his argument that his report was given in confidence and it was for the police to investigate it.
15. The appeal was canvassed by way of written submissions of counsel for the appellants and counsel for the respondents.

Appellants` submissions

16. The appellants submitted that the learned trial magistrate erred in attributing liability to the Appellants based on flawed findings. That the decision of the trial court was unreasonable and erroneous in principle given that the Appellants had no prosecutorial role in the criminal case yet they were held liable in civil proceedings on account of alleged malicious prosecution.



17. It was submitted that the Appellants were held liable for malicious prosecution despite the absence of any substantive evidence connecting them to the initiation of the criminal proceedings when they were not the ones who preferred the criminal charges against the Respondents that gave rise to the civil case. Reliance was placed on the case of *Gitau v Attorney General* (1990) KLR 13 for the elements required to prove malicious prosecution and in the case *Thomas Mboya Oluoch & Another v Lucy Muthoni Stephen & another* Nairobi HCC No. 1729 of 2001 for the proposition that investigative agencies should not use the criminal justice system in a malicious way. In the latter case the court held that:

“Unless and until the common law tort of malicious prosecution is abolished by Parliament, policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense...I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State’s prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes”.

18. The appellants further submitted that the trial magistrate erred in his finding that the Appellants were liable for damages for malicious prosecution when their role in the criminal case was simply that of witnesses and as such there was no obligation upon them to arrest, investigate, prefer charges, apprehend, prosecute or even prove their case beyond any reasonable doubt. That by virtue of them being witnesses in the criminal case they were protected by the law as far as the *Witness Protection Act* is concerned wherein section 33(1) (a) and (b) provides that:

- 1) No action or proceeding, including a disciplinary action, may be instituted or maintained against a witness in respect of—
 - (a) any assistance given by the witness to the court or to a law enforcement agency;
 - (b) a disclosure of information made by the witness to the court or to a law enforcement agency.

19. The appellant urged the court to allow the appeal and award costs of the appeal to the appellants.

Respondents’ submissions

20. The Respondents through their counsel submitted on two issues; first, whether the learned trial magistrate erred in finding that all the limbs necessary to prove the tort of malicious prosecution were proved and secondly, whether the trial court erred in its assessment of damages.

21. On the 1st issue, the respondents submitted that the Appellants purported to appeal against the whole of the trial court’s decision but the appeal was centered on ground whether the Respondents satisfied the first limb of proving malicious prosecution. As such, it is imperative for the court to conclude that the three limbs to wit that the prosecution’s case terminated in favour of the Plaintiffs, that the prosecution was instituted without reasonable or probable cause and that the prosecution was actuated by malice are uncontested. Reliance was made on the case of *George Masinde Murungi vs Attorney General* (1976) KLR 138 where the court set out the following principles to prove malicious prosecution;

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



- b. The prosecution must show that the prosecution terminated in his favour;
 - c. The Plaintiff must demonstrate that the prosecution was instituted without reasonable or probable cause; and
 - d. He must also show that the prosecution was actuated by malice.
22. It was submitted that from the evidence on record, the Appellants instigated the malicious prosecution of the Respondents and were the proper parties to be held liable for the tort of malicious prosecution. Counsel relied on the case of *Lawrence Onyango Oduori v Attorney General & Another* (2022) eKLR where the court held that for a suit of malicious prosecution to succeed the Plaintiff must prove that the proceedings were instigated by the defendants. Counsel cited the case of *Gitau -vs -East African Power & Lighting Co. Ltd*, (1986), Schofield J (as he then was), with approval, held inter alia:-
- “In order for a claim of malicious prosecution to succeed the plaintiff must not only show that he was prosecuted but that he was prosecuted upon the instigation of the defendants and that there existed malice and which malice he must prove.”
23. It was their submission that the appellants made a false report to the police who relied on that false report to prosecute without conducting proper investigations.
24. On the 2nd issue, it was submitted that for the Appellate court to disturb the award of damages that are awarded discretionary by the trial court, the appellants have to prove that either the judge in assessing the damages, took into account an irrelevant fact or left out of account a relevant one that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages. Reliance was placed in the case of *Ndiritu v Muigai & 3 others* (Civil Appeal E258 of 2023) [2024] KEHC 3796 (KLR) (15 April 2024) (Judgment) citing with approval the cases of *Mbogo and Another v Shah* (1968) EA 93 and *Kemfro Africa T/A Meru Express & Another v A. M. Lubia & Another* (1982 – 88) 1 KAR.

Analysis and determination

25. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:
- “An 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 finding 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. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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. In particular, this 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 demeanour of a witness is inconsistent with the evidence in the case generally.”
26. I have considered the grounds of appeal, the evidence adduced before the trial court and the submissions by the respective advocates for the parties. The following issues arise for determination:



- i) Whether the elements for the tort of malicious prosecution were established by the Respondents; and if so
 - ii) Whether the award on damages was erroneous or manifestly excessive.
27. A copy of the judgment in the criminal case was produced as exhibit in the case. The trial court in acquitting the 1st respondent of the charge stated that the person whose phone was used to send the alarming message, Abdi Abdikadir, was not called as a witness in the case. That without the evidence of the said person the evidence adduced against the 1st respondent was all hearsay and the charge against him could not stand.
 28. On the charge against the 2nd respondent, the trial court stated that the 2nd respondent gave confidential information that the 2nd and 3rd appellants were not Kenyan nationals and that they obtained their Kenyan identity cards illegally. That the investigating officer did not investigate the aspect that the identity cards were obtained fraudulently. The court acquitted the respondents of the criminal charges under section 215 of the CPC.
 29. The appellants argued in this appeal that they had nothing to do with the prosecution. That the only part they played in the entire case was being called as witnesses. Further, that they were neither complainants nor representatives from the office of the Director of Public Prosecution.
 30. The ingredients to be proved in a case of malicious prosecution were stated in the cases of Kagane and Others v Attorney General and Another [1969] EALR 643 and Murunga v Attorney General [1979] 138 to be as follows:
 - a) The plaintiff must show that 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;
 - d) That the prosecution was actuated by malice
 31. It is therefore the duty of this court to examine the evidence and judgment of the trial court and determine whether the four elements of the tort of malicious prosecution were proved against the appellants.
 32. It is not in dispute that the prosecution terminated in favour of the respondents who were acquitted of the charges under section 215 of the Criminal Procedure Code. It is the other three elements that this court has to examine.

Whether the prosecution was instituted by the appellants

33. In this element, it has to be proved that the defendant is the one who set into motion the process that led to the arrest and prosecution of the plaintiff. In the case of Gitau vs AG (1990) KLR 13 it was stated:

“To succeed in a claim for malicious prosecution the plaintiff must 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.”



34. The 1st Appellant Aden Yusuf Halable admitted that he in the company of one Abdi Abdikadir went to Witu police station and lodged a report that the 1st respondent, Mohamed Fujo had written a message in the mobile phone of Abdi Abdikadir that Aden Halable and his colleague called Sheikh Mohamed were members of Al Shabaab terror group. The report was made to PC Raymond Okoth, DW2. It was the evidence of PC Okoth that after receiving the said report, he summoned the said Mohamed Fujo who denied authoring the SMS. It is therefore clear that it is Aden Halable, the 1st Appellant and Abdi Abdikadir who set into motion the process that led to the arrest of the 1st Respondent herein, Mohamed Fujo. There was no evidence that Salad Osman Abdille, the 2nd appellant made such a report to the police concerning Mohamed Fujo.
35. As regards the report concerning the chief, the 2nd respondent, it was the evidence of the investigating officer in the criminal case, Cpl Karani DW4 that while investigating a report that the appellants herein were members of Al-Shabaab, he summoned the chief of Bangale location, the 2nd respondent, to give a report of what he knew about the said people. That the chief told him that the 3rd appellant, Sheikh Mohamed, together with his brother Salad Osman, the 2nd appellant, were not Kenyan nationals and that they obtained their Kenyan identity cards fraudulently. Further that the two had illegal guns at their home. He investigated the report given by the chief and found it to be false.
36. It is then clear from the evidence of Cpl Karani that he is the one who set into motion the arrest and prosecution of the 2nd Respondent, the chief. The trial court did not make a proper finding as to who was the cause of the arrest and prosecution of the 2nd Respondent. The appellants were not responsible for his arrest and prosecution. It is the police through the action of Cpl Karani who were responsible for it.

Whether the prosecution was instituted without reasonable or probable cause

37. Reasonable and probable cause was defined in the case of Kagane –vs- Attorney General & another (1969) EA 643 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...

38. The test as to what constitutes probable or reasonable cause is objective and it 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. In Kagane v Attorney General and Another (Supra), it was held as follows: -

...to constitute reasonable and probable cause the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty. If and insofar as that material is based upon information, the information must be reasonably credible, such that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution.



39. The 1st respondent herein was charged with the offence of hoaxing contrary to section 26 of the *Prevention of Terrorism Act*. He was accused of transferring a hoax message through mobile phone of one Abdi Abdikadir that the appellants herein were members of Al-Shabaab terror group.
40. It was the evidence of the investigating officer in the criminal case, Cpl Samuel Karani DW4, that he investigated the case against the 1st Respondent, Mohamed Fujo, and found that he is the one who wrote the message in the phone of Abdikadir who was a police informer. That Abdikadir could not write the message as he was illiterate. That Mohamed Fujo asked Abdikadir to send it to his masters. That Abdikadir sent it to a police officer based at special forces unit at Witu and to an officer of National intelligence service. That Abdikadir had been promised Ksh.200,000/= by Mohamed Fujo. He was paid Ksh.3,000/=. Mohamed Fujo did not pay the balance and Abdikadir showed the message to Aden Yusuf upon which the two of them reported the matter to the police. It was the evidence of CPL Karani that he was relying on the statement of Abdikadir that Mohamed Fujo wrote the message. That Abdikadir was to be used as a state witness against Mohamed Fujo. However, that Abdikadir failed to turn up in court during the hearing and the case against Mohamed Fujo, the 1st respondent was dismissed.
41. It was however the evidence of PC Raymond Okoth DW2 who is the officer who received the initial report from Aden Yusuf and Abdikadir that there was bad blood between Aden Yusuf and Mohamed Fujo after Aden Yusuf divorced a cousin to Mohamed Fujo which matter had ended up at the police station but was withdrawn after intervention by elders. Cpl Karani also confirmed this evidence.
42. The question then is whether with this kind of evidence there was reasonable and probable cause of charging the 1st respondent with the offence of hoaxing. The material witness in the charge against the 1st Respondent was Abdi Abdikadir who was alleging that it is the 1st respondent who had written the message in his phone. The investigating officer found that the said person had been promised Ksh.200,000/= by the 1st respondent for sending the message but that he turned to Aden Yusuf after the 1st respondent failed to pay him the money promised. It is important to note that it is Abdikadir's phone which contained the message that was taken to the police. He was therefore an accomplice to the offence. The investigating officer Cpl Karani should have known that an accomplice is unworthy of credit unless his evidence is corroborated by some other evidence. Abdikadir would have been the worst of a discredited witnesses even if he had turned up in court. A witness who was misusing his position as a police informer to extort money from members of public cannot in any way be described a credible witness to be relied on as the key witness in a criminal trial. The investigating officer, Cpl Karani had all this information when he decided to charge the 1st Respondent with the offence. In my view no reasonable and prudent investigator would have used such kind of evidence as was before Cpl Karani to charge the 1st respondent with the offence. Accordingly, I find that there was no honest belief in the guilt of the 1st appellant founded upon reasonable grounds that would have led a prudent and cautious investigator to the conclusion that the 1st respondent was probably guilty of the crime imputed. There was thus no reasonable and probable cause for charging the 1st respondent with the offence.
43. As regards the 2nd respondent, the chief, he was charged with giving false information to Cpl Karani that the 2nd and 3rd Appellants were Somali nationals and were members of an organized criminal gang that was intended to cause violent crimes in Tana River and Lamu counties. The 2nd respondent admits to have given a written statement to Cpl Karani about the appellants but contends that the same was based on intelligence report received from his informers.
44. Cpl Karani however denied that the 2nd respondent gave the statement as intelligence information. He said that there was bad blood between the 2nd respondent and Sheikh Mohamed, the 3rd Appellant.



That though the 2nd respondent said that the 2nd and 3rd appellants are Somali nationals and obtained their Kenyan identity cards fraudulently, he the 2nd respondent, is the one who recommended the issuance of Kenyan national identification cards to them by approving form R136 for them.

45. The 2nd respondent did not disclose to Cpl Karani that he is the one who approved the 2nd and 3rd appellants being issued with Kenyan national identity cards. He did not explain why he did so when the said people were not Kenyan nationals. In my view there was reasonable and probable cause to believe that the 2nd respondent had committed an offence of giving false information to a police officer. The fact that he was acquitted of the charge did not lay a strong basis for a claim of damages for malicious prosecution.

Whether the prosecution was intuited by malice.

46. In *James Karuga Kiiru –vs- Joseph Mwamburi and 3 Others* (2001) KECA 354 (KLR) the Court of Appeal held:-

“To prosecute a person is not prima facie tortuous, but to do so dishonestly or unreasonably is. And the burden of proving that the prosecutor did not act honestly or reasonably lies on the person prosecuted.”

47. In *Nzoia Sugar Company Ltd v Fungututi* [1988] KLR 399, the Court of Appeal held;

“Acquittal per se on a criminal 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.”

48. As observed above, there was bad blood between the 1st appellant, Aden and the 1st Respondent, Mohamed Fujo, after the 1st appellant divorced the 1st respondent's cousin. The attempt by the 1st appellant to implicate Mohamed Fujo with writing the message into the phone of Abdikadir was made out of spite and ill-will. That he had to pay Abdikadir money to access the message was proof of malice.

49. As regards the 2nd respondent (the chief), it was proved that there was long standing feud between him and Sheikh Mohamed, the 3rd appellant. According to Cpl Karani the 2nd respondent had at one time taken shop goods from the 3rd appellant on credit and refused to pay for them. He did not pay until when the 3rd appellant engaged the intervention of a lawyer and elders. At another time he accused the 3rd appellant to the police of being involved in human trafficking which upon investigation was found to be false. It was clear that the 2nd respondent was using the police to fight his battles with 3rd appellant. The report by the 2nd respondent on the 2nd and 3rd appellants was made out of malice.

50. In view of the foregoing I find that the 1st respondent had proved the tort of malicious prosecution against the 1st appellant, Aden Yusuf Halable. The 2nd and 3rd appellants were only witnesses in the criminal case after they were implicated by the 2nd respondent, the chief, with commission of some criminal offences. The trial court wrongly found that the 2nd and 3rd appellants liable in damages for malicious prosecution. The upshot is therefore that the appeal by the 1st appellant Aden Yusuf against the 1st Respondent, Mohamed Abdi Mohamed fails while the appeal by the 3rd appellant against the 2nd respondent, Abdi Guyo Boru, succeeds.

51. On the award of damages to the 1st respondent, counsel for the Appellants did not make submissions on the same. The award on damages by the trial court therefore stands. However the award was made jointly for the 2 respondents. Since the appeal against the 2nd respondent has succeeded, the



1st Respondent ought to be paid half of the award made by the trial court. The award for the 1st Respondent against the 1st appellant is as follows:

General damagesKsh.400,000/=

Exemplary damagesKsh.200,000/=

Special damagesKsh. 848,000/= as pleaded in his witness statement dated 22/11/2021, costs and interest of the above.

52. For clarity the award to the 1st respondent, Mohamed Abdi Mohamed, is to be paid jointly with the 4th and 5th defendants at the lower court who did not file an appeal.
53. The 1st appellant, Aden Yusuf Halable, to bear the costs of the appeal for the 1st respondent, Mohamed Abdi Mohamed.
54. The 2nd Respondent, Abdi Guyo Boru, to bear the costs of the appeal for the 2nd and 3rd appellants (Salad Osman Abdille and Mohamed Mahamud Dagal).

Orders accordingly.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 23RD DAY OF OCTOBER 2025

J.N. NJAGI

JUDGE

In the presence of:

Mr. Abdullahi Dido for Appellants

Mr. Oduor for Respondents

Court Assistant – Jumaa.

