REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
THE CIVIL APPELLATE DIVISION
(Coram: A.C. Mrima, J.)
CIVIL APPEAL NO. E139 OF 2025

-between-

PAUL SILA MUNGUTI…….…….. APPELLANT

-versus-

1. **THE ATTORNEY GENERAL**
2. **TUFFSTEEEL LIMITED…….. ……RESPONDENTS**

[Being an appeal from the Judgment and Decree of Hon. C.A. Ogweno (SRM) in Milimani Chief Magistrates Court Civil Case No. MCCC/E4528 of 2023 delivered on 6th February 2025]

JUDGMENT

Background:

1. On 29th February 2020, *Paul Sila Munguti,* the Appellant herein, was arrested and detained at the Capitol Hill Police Station. His arrest was informed by a complaint lodged by *Tuffsteel Limited*, the 2nd Respondent herein, that he stole 750 tons of cement worth Kshs. 25,276,000/- on diverse dates between 1st June 2019 and 15th January 2020. To that end, the Appellant was arraigned in Court and charged for the offence of conspiracy to defraud and stealing in *Kibera Chief Magistrates Criminal Case No. 278 of 2020* [hereinafter referred to as ***'the criminal case'***]. However, the charges were withdrawn under Section 210 of the Criminal Procedure Code.

2. Aggrieved, the Appellant instituted *Milimani Chief Magistrates Civil Case No. 4528 of 2023* (hereinafter referred to as *'**the civil case'***) against the Respondents for malicious prosecution and false imprisonment. He claimed that the 2nd Respondent set in motion legal action against him without reasonable and probable cause. He also claimed that the prosecution relied on unsubstantiated allegations and none of its witnesses gave any

evidence against him for the offences. It was his case that the prosecution acted in bad faith that resulted in 2 years of trial which occasioned him emotional and physical distress as well as financial loss.

3. In its defence the 1st Respondent claimed that the Appellant's prosecution was based on probable and reasonable cause. It asserted that the decision to prosecute was driven by the desire and statutory duty to vindicate justice and not ill-will or spite. On its part, the 2nd Respondent stated that the decision to prosecute was made by the Office of the Public Prosecutions who are not its servants or agents. It denied causing the Appellant embarrassment, emotional, physical distress and financial loss.

4. In its judgment dated 6th February 2025, (hereinafter referred to as '***the impugned judgment'***) the trial Court was of the assessment that the 2nd Respondent was responsible for setting in motion the law that led to the arrest and prosecution of the Appellant and as such was the party that instituted his prosecution. On whether there was probable and reasonable cause for the Appellant's prosecution, the learned trial Magistrate observed that the prosecution witnesses were unable to link him to the charges. It drew the inference that here had been no probable and reasonable cause for instituting charges against the Appellant since even a *prima facie* case was not established.

5. On the question as to whether the 2nd Respondent's actions were actuated by malice and ill-will, the learned trial Court observed that no such evidence had been availed. It, however, found that there was no reason for the 1st Respondent to sustain the charges, a demonstration of malice, since the 2nd Respondent never identified the Appellant. On the issue of false imprisonment, the learned trial Magistrate observed that the 2nd Respondent had no reason to instigate the arrest of the Appellant and the police officers had no business arresting him in absence of evidence linking him to the offences. The trial Court then held that, to the extent that the Appellant was arrested before being arraigned in Court, it was unlawful and amounted to false imprisonment.

6. In conclusion, the trial Court, based on the offences, various authorities and the two days the Appellant spent in custody, awarded him Kshs. 500,000/- for malicious prosecution against the 1st Respondent and Kshs. 50,000/- for false imprisonment against both Respondents. The Appellant was also awarded special damages, costs and interest.

7. The impugned judgment resulted to an appeal by the Appellant and a Cross-Appeal by the 2nd Respondent.

The Appeal:

8. The Appellant was dissatisfied with the findings of the trial Court. Through a Memorandum of Appeal dated 13th February 2025, he challenged the finding that the 2nd Respondent' was not liable for malicious prosecution on the following grounds: -

    1. *That the learned Magistrate erred in law and in fact and misdirected herself in the determination of liability of the 2nd Respondent on allegations of malicious prosecution.*

    2. *That the learned Magistrate erred in law and in fact and misdirected herself in finding that the Appellant had not proved his case for malicious prosecution against the 2nd Respondent whilst the evidence on record do not support such a finding.*

    3. *The learned Magistrate erred in law and in fact in failing to correctly analyse the evidence thereby arriving at the wrong conclusion/decision in the determination of liability of the 2nd Respondent.*

    4. *The Learned Trial Magistrate applied the wrong and inaccurate principles and/or considered erroneous, irrelevant and/or extraneous factors in determining the quantum of damages for malicious prosecution and false imprisonment and she erred by failing to consider the issues and/or judicial authorities and or submissions raised by the Appellant in awarding damages that were inordinately low and manifestly unjust in view of the circumstances of the case.*

The submissions

9. The Appellant filed two sets of written submissions dated 28th May 2025 and 16th July 2025 respectively. In making a case for

the tort of malicious prosecution against the 2nd Respondent, he submitted that two out of the three witnesses who testified for the prosecution, they knew him but could not identify him in relation to the charges. To that end, he stated that it could only have been the 2nd Respondent who set in motion the process. It was his case that his unwillingness to facilitate the attendance of its witnesses and the failure by the 2nd Defendant to identify him to the prosecution was another sign of malice. The Appellant submitted that the trial Court erred by failing to connect the lack of probable cause and malice. In reference to the case in *Teresia Wanjiku Njoroge -vs- Standard Chartered Bank Kenya Limited & Another (*2015) eKLR, the Appellant submitted that malice may be inferred from want of reasonable and probable cause.

10. Submitting on inadequacy of the damages of Kshs. 500,000/- the Appellant stated that the trial Court did not distinguish authorities he cited. While relying on the Court of Appeal case in *Maina -vs- Attorney General, (*2023) KECA 1586 (KLR), where Kshs. 6,000,000/- was awarded for malicious prosecution, it was his case that the amount awarded by the Court did not strike the chord of fairness. The Appellant submitted that the claim by the 1st Respondent that it ought to have sued the Director of Public Prosecutions was not pleaded in the primary suit and is not a ground in the Memorandum of Appeal. It was his case that under section 12 of Government proceedings Act, civil proceedings are instituted against the Office of the Attorney General.

11. The foregoing notwithstanding, the Appellant, drew support from the case of *Thomas Mutsotso Bisembe -vs- The Commissioner of Police & Another* (2013) eKLR where it was observed that misjoinder or non-joinder is not necessarily fatal.

The Cross-Appeal:

12. On its part, *Tuffsteel Limited* challenged the decision of the trial Court through the Memorandum of Cross Appeal dated 6th March 2025 and asserted the following grounds: -

    1. *The Learned Trial Magistrate erred in law and fact by holding the 2nd Respondent liable for false imprisonment*

despite the absence of any evidence linking it to the Appellant's arrest, detention, or confinement.

2. *The Learned Trial Magistrate erred in law by holding the 2nd Respondent jointly liable for the payment of Kshs. 50,000.00 in damages for false imprisonment despite finding no evidence that the 2nd Respondent played any role in the Appellant's arrest or detention, thereby imposing liability without any legal or factual basis.*

3. *The Learned Trial Magistrate erred in law and fact by holding the 2nd Respondent jointly and severally liable for special damages of Kshs. 92,000.00 despite finding that the 2nd Respondent was not liable for malicious prosecution.*

4. *The Learned Trial Magistrate erred in law and in fact by attributing liability for damages to the 2nd Defendant while simultaneously acknowledging that there was no evidence linking it to the Plaintiff's prosecution or imprisonment.*

5. *The Learned Trial Magistrate erred in law and in fact by failing to dismiss the suit against the 2nd Defendant with costs.__*

The Submissions

13. The 2nd Respondent urged its case further through written submissions dated 6th July 2025. From the outset, it was its position that the Appellant failed to establish the essential elements required to sustain a claim for malicious prosecution. It claimed that it did not institute or procure the prosecution of the Appellant; that he was not identified or named by it in any report or statement to the police; that it did not make the decision to be prosecuted; that the prosecution had probable and reasonable cause and that there was no spite or ill-will against it.

14. It was its case that that although the Appellant was arrested, the arrest was effected by the police pursuant to their constitutional and statutory mandate, following independent investigations and not at the instigation or direction of the 2nd Respondent. The decision in *Daniel Waweru Njoroge & 17 Others -vs- Attorney General* [2015] eKLR, was relied on to front the position that the Appellant failed to establish unlawful

restraint, against their will without justification, which formed the ingredients of the claim of malicious prosecution.

15. The 2nd Respondent further submitted that no evidence implicated it of having restrained or caused the restraint of the Appellant. It asserted that the arrest and subsequent prosecution were decisions made independently by the police and the Director of Public Prosecutions, both constitutionally autonomous entities. It was its case that reporting a suspected offence did not in itself amount to false imprisonment. Based on the finding in *Katerregga -vs- Attorney General* [1973] EA 287 and *Juma Khamisi Kariuki -vs- East African Industries Ltd & Another [1986] eKLR* its urged that liability only arose where the report is false, actuated by malice and directly causes the arrest and that the appellants acquittal did not establish that the arrest was unlawful or that the report was false.

16. The 2nd Respondent was of the position that the award of Kshs. 500,000 for malicious prosecution, was not properly founded in law for the reasons that the prosecution of the Appellant was undertaken by the police and the Office of the Director of Public Prosecutions, both of whom were not parties to the suit.

17. On the question of false imprisonment, it argued that the general damages against it was without basis since it merely reported a suspected loss of goods, a lawful and reasonable course of action and took no further steps in the matter.

Analysis:

18. Having appraised of the appeals, the written submissions and the decisions therein, the following issues emerge for determination: -

    i. Whether the 2nd Respondent ought to have been found liable for malicious prosecution.

    ii. Whether the 2nd Respondent was liable for false imprisonment.

    iii. The propriety of quantum of damages.

19. This is a first appeal. The Court's role as a first appellate Court is settled. In ***Selle -vs- Associated Motor Boat Co.*** [1968] EA 123, the Court of Appeal for East Africa observed thus: -

> *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 demeanor of a witness is inconsistent with the evidence in the case generally.*

20. In ***Susan Munyi -vs- Keshar Shiani*** [2013] eKLR the Court of Appeal stated as follows: -

> *As a first appellate Court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.*

21. A consideration of the issues now follows.

[a] Whether the 2nd Respondent ought to have been found liable for malicious prosecution:

22. The Appellant was dissatisfied with the trial Court's finding that the 2nd Respondent was not liable for malicious prosecution. The Court of Appeal in ***Attorney General -vs- James Alfred Koroso*** [2018] KECA 129 (KLR) affirmingly referred to its earlier decision in *George Masinde Murunga -vs- Attorney General* (1979) KLR 138 where the test for malicious prosecution was laid out as follows: -

    i. *That the prosecution was instituted by the police officers;*

    ii. *That the prosecution terminated in the plaintiff's favour;*

iii. *That the prosecution was instituted without reasonable and probable cause; and*

iv. *That it was actuated by malice.*

23. It is common ground that the decision to commence the criminal proceedings against the Appellant was made by the Office of the Director of Public Prosecutions, which is a distinct constitutional office. However, it only did so upon a complaint being lodged by the 2nd Respondent. In his statement, Rakesh Mistry stated that when they discovered that goods worth Kshs. 25,276,000/- had been diverted to unknown sites, they lodged a complaint and recorded a statement at the Police Station. In ***Gitau -vs- Attorney General*** (1990) KLR 13, the Court observed that in order to succeed in a claim for malicious prosecution, the Plaintiff must establish that the Defendant was instrumental in causing a person with some judicial authority to take action that involves instituting criminal charge against another.

24. There is no doubt that were it not for such information of complaint, the Appellant would not have faced the criminal charges. The 2nd Respondent, therefore, is responsible for setting the law in motion against the Appellant.

25. There is no contest that the criminal proceedings terminated in favour of the Appellant.

26. As regards the crucial question whether the 2nd Respondent set in motion the law against the Appellant *without reasonable and probable cause*, the decision in of the English Court in ***Hicks -vs- Faulkner*** 1878 8 QBD 167 171 will provide useful insight as to what '*reasonable and probable cause'* means. The Court observed that it is: -

> *…. an honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead to any ordinarily 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.*

27. The Appellant was an employee of the 2nd Respondent. In the course of its operations, the 2nd Respondent conducted an internal audit which revealed that consignment of cement and steel, despite being duly dispatched to its client, *Varenas Development Limited,* did not get delivered. *John Mungai*, a Quantity Surveyor at Varenas Development Limited testified that the Appellant was one of the drivers that would deliver the cement from the 2nd Respondent. When he was cross-examined, he stated that he did not know the Appellant in person but had heard the name. He stated that he never mentioned him in his statement. He admitted that he never saw him at the site and could not confirm him involved in stealing the cement.

28. *Pvatik Kumar Manojkumar Shah*, a Manager at Varenas Development Limited also testified for the prosecution. It was his evidence that he blamed the staff of the 2nd Respondent especially the drivers for carrying away the bags of cement to different locations other than Varenas Development Limited. He, however, conceded that he had not seen and did know the Appellant.

29. From a re-assessment of the evidence, and having regard to the nature of business the 2nd Respondent was engaged in with Varenas Development Limited, it cannot be ascertained with precision the persons who were responsible for the loss of the cement. However, an inevitable component in the web that resulted in the loss of the bags of cement are the warehouse employees and drivers of the 2nd Respondent. There is no denying that they had a role to play since they were in charge of dispatching and moving the goods. As such, the 2nd Respondent cannot be faulted for having an honest belief in the circumstances to reasonably believe that some of them were conduits in the theft. Therefore, such employees had to be in the dragnet of police investigations as people of interest. Similarly, those found culpable after investigations would face prosecution as sanctioned by the powers vested in the Director of Public Prosecution provided for in in *Article 157(11)* of the Constitution.

30. Therefore, without evidence by the Appellant that the 2nd Respondent singled him out from the rest of the employees, and

pursued him, and having regard to the fact that the Appellant did not deny that he was cited as one of the 2nd Respondent employees at the material time, it is this Court's finding that the 2nd Respondent had an honest belief that he could have been involved. There was reasonable and probable cause in his participation in the offences.

31. As to whether the 2nd Respondent was actuated with malice, the decision if the Court of Appeal in ***Attorney General -vs- James Alfred Koroso*** [2018] KECA 129 (KLR) will come in handy. The Court, guided by the various definitions of the term *ill will* or *evil motive*, observed thus: -

> *We are guided by the following definitions: -*
>
> *Osborne's Concise Law Dictionary defines "malice" as:*
>
> > *ill will or evil motive: personal spite or ill-will or sometimes called actual malice, express malice, or malice in fact. In law an act is malicious if done intentionally without just cause or excuse.*

32. In this Court's view, taking cue from the foregoing definition, *ill-will, evil motive or malice,* and *reasonable and probable cause* are two sides of the same coin. There cannot be ill-will or evil motive where it is established that there was reasonable and probable cause. Essentially, therefore, having found that there was reasonable and probable cause, it follows that the report to the police by the 2nd Respondent was not actuated by malice. Rather, it was an honest pursuit of justice for loss of goods.

33. In premise, the 2nd Respondent cannot be found responsible on account of malicious prosecution.

[b] Whether the 2nd Respondent was liable for false <u>imprisonment:</u>

34. The 2nd Respondent was aggrieved that it was found liable for false imprisonment, when in fact it was not responsible for the Appellant's detention. In arriving at its finding, the trial Court observed that the 2nd Respondent had no reason to instigate the arrest of the Appellant and the Police officers had no business

arresting him in absence of evidence linking him to the offences.

35. *False imprisonment* is the unlawful restraint of a person. In the case of ***Daniel Waweru Njoroge & 17 Others -vs- Attorney General*** (2015) eKLR the Court observed that to succeed in a claim for unlawful imprisonment, a Claimant must prove *unlawful restraint, against their will, without lawful justification.* Having carefully combed through the record, there is no evidence that the 2nd Respondent directly curtailed the freedom of the Appellant. All it did was to lodge a complaint which was acted upon by the Police.

36. On its part, the Appellant did not adduce evidence to support the fact that the report by the 2nd Respondent implicated him for the offences. In the case of ***Services Limited vs- Charles Obingo Angujo*** *(*2005) eKLR, the Court observed that false imprisonment arises where the report is false, actuated by malice and directly causes the arrest. There was no trail of evidence that the 2nd Respondent influenced the authority and independence of the Police and that resulted in his unlawful imprisonment. The finding by the trial Court that the police officers were in communication with the 2nd Respondent's Director and that he shared photos of him with the said officers is without evidence. Further, it is worth mentioning that not every arrest or detention culminates in unlawful arrest. Some may be out of necessity; to facilitate the arraignment of a suspect before the Court to answer to charges. The Court of Appeal in Civil Appeal 9 of 2015, ***Maina -vs- Attorney General*** [2023] KECA 1586 (KLR) (27 October 2023) (Judgment) spoke to the subject as follows: -

> *…we agree with the trial Court that the appellant was not entitled to be awarded damages for unlawful arrest, unlawful detention and false imprisonment. The appellant was arrested and kept in custody in the normal course of criminal investigations and for the purposes of securing his arraignment before the trial court to take plea once a decision was made to charge him with the offences that he was later acquitted. We hold that it is not every instance of arrest and detention in custody that results in the accrual of the tort of unlawful arrest, unlawful detention or false imprisonment. We take judicial notice of the fact that in the course of*

investigations or in order to secure the arraignment of a suspect before court so that they can answer to the criminal charges facing them, it may be necessary to secure their arrest and detention in custody prior to their arraignment in court.

37. In the premise, this Court is inclined to make the finding that the 2nd Respondent did not have a hand in the Appellant's false imprisonment. The trial Court, therefore, erred in arriving at the conclusion that it instigated his arrest and detention.

[c] <u>The propriety of quantum of damages:</u>

38. As a matter of principle, quantum of damages is a matter within the discretion of the trial Court. In ***Maina -vs- Attorney General*** supra, the Court of Appeal observed thus: -

> *... The principles to be considered by this Court in determining whether or not to overturn the assessment of damages by the trial Judge are well settled. This Court in Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR held thus:*
>
> > *"…it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages, it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principles of law, or that the amount awarded was so extremely high or so very low as to make it in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Root v Rairre [1941] AllER 297. It was echoed with approval by this Court in Butt v Khan [1981] KLR 349 when it held as per Law JA that:*
> >
> > > *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 the wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.*

39. The Appellant decried that the award of Kshs. 500,000/- against the 1st Respondent for malicious prosecution and 50,000/- for false imprisonment was inadequate. This Court has intently

revisited the trial Court's appreciation of the issue. The Court indeed considered the authorities cited by the Appellant and went further to consider the Court of Appeal decision in ***Lucas Omari -vs- Attorney General & Another*** (2017) eKLR and also the Court's finding in ***Jackson Muthui Maluki & Another -vs- Attorney General*** (2020) eKLR. In the former case, the Petitioner was awarded Kshs. 500,000/- for malicious prosecution on account of the offence of robbery with violence. In the latter case, the Appellant was awarded Kshs. 300,000/- and 400,000/- for malicious prosecution and false imprisonment respectively.

40. The trial court, on the reasoning that the Appellant was only held in custody for two days, awarded Kshs. 50,000/-.

41. This Court has also appreciated the decisions cited by the Appellant including the one in ***Bobby Macharia -vs- Attorney General & 3 Others*** (2018) eKLR, and the one in ***Teresia Wanjiku Njoroge -vs- Standard Chartered Bank Kenya Limited & Another*** *(*2015) eKLR. The two authorities are distinguishable from the circumstances of the instant case. In the former case, the dispute involved the offence of trafficking of Narcotics and the use of premises for the distribution of narcotic drugs, a far more serious offence than the ones in this case. Additionally, the period of false imprisonment was a period of over 10 months. In this case it was only two days. Similarly, in the latter case, the circumstances were materially different. The Appellant was tried and sentenced and was pregnant at the time of prosecution. She also delivered in the course of her one-year prison term. Those were aggravating circumstances for malicious and false imprisonment.

42. The foregoing authorities, therefore, do not align with the circumstances of this appeal. In view of the nature of the charges, the time spent in custody, this Court finds no fault in the trial Court's assessment of damages.

43. Having found that no liability was established against the 2nd Respondent for both malicious prosecution and false imprisonment, if follows that the trial Court's award of damages of Kshs. 50,000/- against it must be set aside. Similarly, the

special damages of Kshs. 92,000/- against it must fall by the wayside.

Disposition:

44. Drawing from the above findings, the final orders in these appeals that lend themselves to this Court are as follows: -

[a] The Appellant's Appeal dated 13th February 2025, is without merit and is hereby dismissed.

[b] The 2nd Respondent's Cross-appeal hereby succeeds. The General damages of Kshs. 50,000/- and the Special damages of Kshs. 92,000/- against the 2nd Respondent are hereby set aside and quashed accordingly.

[c] For avoidance of doubt, the judgment against the 1st Respondent remains in place.

[d] Each party shall bear its own costs of the appeals.

Orders accordingly.

DELIVERED, DATED and **SIGNED** at **NAIROBI** this **19th** day of **November, 2025.**

A. C. MRIMA
JUDGE

Judgment virtually delivered in the presence of:

Mr. Joroge, Learned Counsel for Appellant.

Mr. Owino, Learned Counsel for the 2nd Respondent.

Michael/Amina – Court Assistants.