

REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL NO. E136 OF 2024

WAKENYA PAMOJA SACCO LTD
APPELLANT

VERSUS

DENNIS NG'ONG'O MISESI**1ST**
RESPONDENT

THE HON. ATTORNEY GENERAL.....**2ND**
RESPONDENT

JUDGMENT

1. This Appeal arises from the Judgement and Decree of Lower Court delivered on 15.07.2024 by Hon. P.K Mutai, SRM in Kisii CMCC No. 369 of 2017. The Appellant was the 1st defendant in the lower court.

2. The court made the decision to allowed the suit and held the appellants and the second respondent jointly and severally liable and awarded general damages of Ksh. 800,000/=. Aggrieved the appellant set forth the following grounds of appeal:
 - a) THAT the Learned Trial Magistrate misdirected himself by failing to evaluate the evidence presented by the Appellant clearly

demonstrating that there was a probable cause to prosecute the 1st Respondent of stealing by servant and in so doing arrived at an erroneous decision.

- b) THAT the Learned Trial Magistrate erred in law and in fact by failing to consider the proceedings and the judgment of criminal case No. 1637 of 2015 and in so doing, misdirected himself by making a finding that the 1st Respondent's detention was malicious and not instituted with reasonable and probable cause.
- c) THAT the Learned Trial magistrate erred in law and in fact by considering extraneous matters not pleaded and arriving at the erroneous decision that the prosecution was malicious and not instituted with reasonable and probable cause against the weight of evidence presented by the 1st respondent
- d) THAT the Learned Trial Magistrate erred in law by shifting the burden of proof from the 1st Respondent to the Appellant and in so doing misdirected himself on the law and facts.
- e) THAT the Learned Trial Magistrate erred in law and fact by awarding a high excessive amount of Kshs. 800,000/= as general dmager without any basis in law.

- f) THAT the Learned Trial Magistrate erred in law and fact by failing to consider the submission of the Appellant and in so doing misdirected himself.
- g) THAT the Learned Trial Magistrate erred by making a finding that the 1st Respondent had proved his case against the Appellant contrary to the evidence presented.
- h) THAT the Learned Trial Magistrate totally misconstrued and/or misapprehended the claim as had been presented by the Appellant as against the 1st Respondent.

3. The 1st respondent filed suit through a plaint dated 21.08.2017 claiming damages for malicious prosecution arising out of arrest on 11.12.2015. He was charged with an offence of stealing by servant contrary to section 281 of the penal code. He was charged in MCCC 1637 OF 2015. He was acquitted under section 215 of the criminal procedure code on 24.08.2016. He stated that the Appellant acted without a probable cause and came up with malicious allegations.

4. He alleged that he was humiliated, and defamed and his standing was lowered in the eyes of the right-thinking

members of the society. The particulars of defamation are not set out, in the plaint.

5. The appellant filed defence and raised a counterclaim dated 14.09.2017 seeking special damages of 738,975/=, being amounts not accounted for. This was said to be as a result of fraud carried out by the first respondent. The appellant reported to Keroka police station for a loss caused by the first respondent. They averred that the report was made to lawful authorities and as such the report was not malicious. The denied arresting the 1st respondent. It was stated that they lawfully followed on a culprit and followed public money lost. It was their case that the claim was fictitious. An amended defence was filed but there does not appear to be a counterclaim annexed to it.

Proceedings

6. The first respondent testified on 23.11.2022 and stated that the appellant were his employers. He adopted a statement dated 21.08.2017. He stated that he was engaged as a teller and they were reconciling accounts every day. He stated that he was not teller number though he was the only Misesi in the appellant's employ. He stated that the company had a right to report missing money to the police. He produced the list of documents dated 2.08.2017.

7. He reiterated the contents of the plaint as his evidence though the statement filed dated 21.8.2017.
8. On cross examination by the second respondent, he stated that 5 witnesses testified in the trial resulting him being placed on the defence. He blamed the police for instituting the criminal case in a malicious manner. He stated that he was terminated before the case went to court. It was his evidence that he attended all the 4 court attendances. On cross examination he stated that there was a disciplinary process but was asked to wait for the court verdict. dismiss the suit for failure to join the director of the public prosecutions in a claim for malicious prosecution. The case was closed.
9. The appellant testified though one Fred Miruka, a Human Resources Manager. He produced reports of the internal auditor ,suspension letter and termination letter for the first respondent. He adopted a statement dated 8.12.2017.he stated that he was not aware that the internal auditor's report was produced. He stated that the 1st respondent did not attend court as there was an active court case. On cross examination by Mr. Rono he stated that they lost a huge sum of money, being 755,000/=. He was categorical that the report was not malicious. He maintained that they had a stooge case.

10. DW2 was Sarah Nyanmwaya, CPA(K) who testified saying she was an internal auditor. He stated that the internal system revealed discrepancies. It was Elkana Onjoro Michoma who reported to the police and disciplinary action commenced. He stated that he did not prepare the internal audit report, though she was part of it. The auditors singled out certain entities. Investigations were carried out by the Directorate of Criminal Investigations. It was her case that they had no control of the criminal investigations.

11. The second Respondent did not tender any evidence. The court reserved the judgment and found the appellant and the second respondent jointly and severally liable. This resulted in this appeal. The court stated that the lower court found that the stated did not discharge the burden of proof and resulted in the acquittal. The court then awarded Ksh 800,000/= . No finding related to damages were dealt with. No authorities were referred to.

EVIDENCE

12. This Court has considered the pleadings, evidence, submissions and authorities relied on by the parties in support and opposition to the Appeal. The issue that falls for this Court's determination is whether the lower Court erred in dismissing allowing the suit for malicious

prosecution. the second issue is whether the damages granted were excessive.

13. This being a first Appeal, the Court should, evaluate the evidence, consider arguments by parties applying the law thereto, and make its own determination of the issues in controversy. Except however, that it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies. In the case of **Selle & Another vs. Associated Motor Board Company Ltd. [1968] EA 123**, 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 from 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 demeanour of a witness is inconsistent with the evidence in the case generally.

14. The lower court found the appellant jointly and severally liable. However, the court did not assign any specific role to the parties. The arrest was done by the police. So were the investigations. However, the reporting was done by the appellant. The Raison d'être for reporting is to allow investigations. There is only one authority with the right to make a decision that there is a probable cause. Both the police and the appellant were involved before the probable cause was reached. Only the director of public prosecutions can make such a determination. The police, for who the attorney general is sued, did not participate in making the decision to charge after finding that there was a probable cause. They are not party to the case.

15. In discerning the lawfulness of the arrest and malicious prosecution, the elements to be proved in an action for malicious prosecution are well settled. In **Mbowa vs. East Mengo District Administration [1972] EA 352** (Sir William Duffus P, Lutta and Mustafa JJA), the court summarized the law as follows:

The action for damages for malicious prosecution is part of the common law of England...The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The

purpose of the prosecution should be personal and spite rather than for the public benefit. It originated in the medieval writ of conspiracy which was aimed against combinations to abuse legal procedure, that is, it was aimed at the prevention or restraint of improper legal proceedings...It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth. Its essential ingredients are: (1) the criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority; (2) the defendant must have acted without reasonable or probable cause i.e. there must have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified; (3) the defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose; and (4),

the criminal proceedings must have been terminated in the plaintiff's favour, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge...The plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must unite in order to create or establish a cause of action. If the plaintiff does not prove them he would fail in his action. The damage that is claimed is in respect of reputation but other damages might be claimed, for example, damage to property...The damage to the plaintiff results at the stage in the criminal proceedings when the plaintiff is acquitted or, if there is an appeal, when his conviction is quashed or set aside. In other words, the damage results at a stage when the criminal proceedings came to an end in his favour, whether finally or not. The plaintiff could not possibly succeed without proving that the criminal proceedings terminated in his favour, for proving any or all of the first three essentials of malicious prosecution without the fourth which forms part of the cause of action, would not take him very far. He must prove that the court has found him not guilty of the offence charged...The law

in an action for malicious prosecution has been clearly defined and in so far as the ordinary criminal prosecution is concerned the action does not lie until the plaintiff has been acquitted of the charge. In this case the respondent could have brought his action for malicious prosecution until the prosecution ended in his favour. He could not have maintained his action whilst the prosecution was pending nor could he have maintained an action after he had been convicted. His right to bring the action only accrued when he secured his acquittal of the charge on appeal, and he then had the right to bring this action for damages...Time must begin to run as from the date when the plaintiff could first successfully maintain an action. The cause of action is not complete until such a time, and in this case this was only after he was acquitted on appeal.

16. The Appellant was acquitted under section 215 of the Criminal Procedure Code. The same provided as follows:

215. The court having heard both the complainant and the accused person and their witnesses and evidence shall either convict the accused and pass sentence upon or make an order against him according to law, or shall acquit him

17. The effect of the Section 215 of the CPC was an acquittal after defending oneself. In **Stephen Gachau Githaiga & another vs. Attorney General** [2015] eKLR where 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.

18. In **Paramount Bank Limited vs. Vaqvi Syed Qamara & another** [2017] eKLR (Makhandia, Ouko and M'noti JJA), stated:

The favourable termination requirement of criminal charges may be satisfied in various ways depending on how the proceedings are concluded in favour of the

accused person. For instance, by acquittal, a discharge or a withdrawal.

Courts in this jurisdiction have relied, over the years on the following passage from the case of Egbema v. West Nile Administration [1972] EA 60 for the foregoing proposition;

For the purposes proof that the criminal proceedings have been determined in the appellant's favour it is enough that the criminal proceedings have been terminated without being brought to a formal end. The fact that no fresh prosecution has been brought, although five years have elapsed since the appellant was discharged, must be considered equivalent to an acquittal, so as to entitle an appellant to bring a suit for malicious prosecution...

Although the withdrawal of a charge under Section 87 is technically not on acquittal and does not operate as a bar to subsequent proceedings against an accused person on account of the same facts, guided by the foregoing holding, we note in this appeal that five years after the charges were withdrawn on 30th July, 2012, ostensibly pending the arrest of Lawrence Atieno, no fresh charges have been preferred against the 1st respondent. There was no indication whether Lawrence Atieno was ever arrested and charged. The

discharge of the respondent, therefore amounted to a termination of the prosecution in his favour.

19. Whereas an acquittal is a termination in favor of the accused; the accused had already been placed with a case to answer. It means, ipso facto, that there was a plausible cause for reporting the crime. Prima facie case means, as per the court of appeal in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003]** eKLR, to be as hereunder. the court of Appeal noted that: -

4. A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case in which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right that has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter.

20. In **Republic v Owuor** (Criminal Case E002 of 2022) [2024] KEHC 3712 (KLR) (16 April 2024) (Ruling), the court, R. E. Aburili, held as follows regarding having a case to answer.

In simple terms, terms, *prima facie* means the establishment of a rebuttable presumption that an accused person is guilty of the offence he/she is charged with. In *Ramanlal Trambaklal Bhatt v R* [1957] E.A 332 at 335, the court stated as follows:

Remembering that the legal onus is always on the Prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution's case, the case is merely one in which on full consideration might possible be thought sufficient to sustain a conviction.

This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather, hopes the defence will fill the gaps in the Prosecution case. Nor can we agree that the question ...there is a case to answer depends only on whether there is some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence. It may not be easy to define what is meant by a, prima facie case, but at least it must mean one on which a reasonable, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.

21. The 1st Respondent did not satisfy a critical element of malicious prosecution. The appellant and 2nd respondent together with the director of public prosecutions must have acted maliciously in that he must have acted in instituting criminal proceedings with an improper and wrongful motive, that is, with an intent to use the legal process in

question for some other than its legally appointed and appropriate purpose. In my view, the Respondent acted on reasonable suspicion. the 1st respondent was acquitted upon testifying and explain the circumstances. the court had already found that there was a probable course for arrest.

22. The court's finding in the criminal case was that it was uncertain on whether there was a double deposit or money was actually lost. The court gave the benefit of doubt to the 1st respondent. The evidence by the prosecution and the defence in the criminal case did not rule out a possibility that money was stolen. As it was stolen in the docket, the Appellant worked as a clerical officer; it was not inconsistent with probable suspicion, and I dismiss the assertion that the process was malicious.

23. The benefit of doubt, is in the criminal standard. The test in civil cases is different. The benefit of doubt has its routes in most oft quoted English decision of by Viscount Sankey L.C in the case of H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481 , comes in handy in describing the legal burden of proof in criminal matters, that;

Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the

end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

24. In the case of **R vs. Lifchus** {1997}3 SCR 320 the Supreme court of Canada explained the standard of proof as doth:-

The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically

derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt.

25. The legal burden refers to the burden of proof which remains constant throughout the trial. It is the obligation of a party to establish the facts and contentions necessary to support its case, in this case the prosecutor. According to *Halsbury's Laws of England*, 4th Edition, Volume 17, paras 13 and 14:

The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof

normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues

26. A mere fact that prosecution took place does not make it tortious. It is the malice that changes the ball game. In the case of **James Karuga Kkiiru v Joseph Mwamburi and 3 others** (2001)eKLR where it was held that:

To prosecute a person is not prima facie tortious, but to do so dishonestly or unreasonably is. Malicious prosecution thus differs from wrongful arrest and detention, in that the onus of proving that the prosecutor did not act honestly or reasonably, lies on the person prosecuted.

27. An acquittal does not *ex facie* mean that there was malice. The mere fact that the criminal proceedings terminated in favour of the plaintiff only satisfies one element of the tort of malicious prosecution. It does not, without more, establish that the prosecution was instituted without reasonable and probable cause or that it was actuated by malice. The law is clear that malice must be proved by cogent evidence demonstrating that the defendant set the criminal process in motion for an improper purpose, and not merely because the prosecution

ultimately failed to secure a conviction. in the case of **Dr. Lucas Ndungu Munyua v Royal Media Services Limited & Another** 2014 eKLR, it was held 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.

28. Further, no malice was seen. The case reported was plausible and cannot be said to be unreasonable. There was no evidence of malice. In the case of **Phen Gachau Githaiga & Another V Attorney General** [2015] eKLR Justice Mativo discussed the tort of malicious prosecution and stated as follows:

Malicious prosecution is an intentional tort designed to provide redress for losses flowing from an unjustified prosecution. Under the first element of the test for malicious prosecution, the plaintiff must prove that the prosecution at issue was initiated by the defendant. This element identifies the proper target of the suit, as it is only those who were actively instrumental in setting the law in motion that may be held accountable for any damage that results.

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.

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.

Finally, the initiation of criminal proceedings in the absence of reasonable and probable grounds does not itself suffice to ground a plaintiff's case for malicious prosecution, regardless of whether the defendant is a private or public actor. Malicious prosecution, as the label implies, is an intentional tort that requires proof that the defendant's conduct in setting the criminal process in motion was fueled by malice. The malice requirement is the key to striking the balance that the tort was designed to

maintain: between society's interest in the effective administration of criminal justice and the need to compensate individuals who have been wrongly prosecuted for a primary purpose other than that of carrying the law into effect.

29. The third and fourth elements of malicious prosecution were not proved. The tort of unlawful arrest was not proved. In the case **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.

30. The appellant had no role in the actual arrest and prosecution of the 1st Respondent. this domain lies elsewhere. court treated the two torts as one and the same. The Appellant has no role in the arrest and prosecution of the 1st Respondent. in the case of **James Karuga Kiiru v Joseph Mwamburi and 3 Others (2001)eKLR** the court stated as follows:

To prosecute a person is not prima facie tortious, but to do so dishonestly or unreasonably is. Malicious prosecution thus differs from wrongful arrest and detention, in that the onus of proving that the

prosecutor did not act honestly or reasonably, lies on the person prosecuted.

31. In **Samuel Gitonga Ringera v Henry Mutegi Maingi & 2 others [2021] eKLR**, PJO Otieno J stated as follows regarding the belief in the guilt of the Accused:

The law makes it imperative that the belief in the guilt of the accused be founded upon a decision made after due inquiry into and consideration of the facts presented to the respondents. But the reasonable belief need not be based on actual existence of a definite cause, but upon reasonable belief held in good faith in the existence of facts as are perceived by the respondents. The converse is that where there is no basis to believe that the accused is guilty of the accusation and the prosecution is all the same set in motion, there is clear evidence of malice.

32. The net effect is that the Appeal is merited and is accordingly allowed. The judgment of the lower court is set aside and in lieu thereof, substituted with an order dismissing the suit in the court below. The court is alive to the provisions of order 42 rule 5, which provides as follows:

Where there is more than one plaintiffs or defendants than one in a suit, and the decree appealed from

proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the High Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be.

33. The appellant did not prove malicious damages. Further, there was a key party that made the decision to charge. The parties could not be held liable for a nonparty. .

34. The next issue is damages. There was no evidence of loss. The first respondent's defamation, which became time barred. In any case there were no pleadings related to defamation. Order 2 rule 7 provides as follows:

(1) Where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of such sense.

(2) Where in an action for libel or slander the defendant alleges that, in so far as the words complained of consist of statements of fact, they are

true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, or pleads to the like effect, he shall give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true.

(3) Where in an action for libel or slander the plaintiff alleges that the defendant maliciously published the words or matters complained of, he need not in his plaint give particulars of the facts on which he relies in support of the allegation of malice; but if the defendant pleads that any of those words or matters are fair comment on a matter of public interest or were published upon a privileged occasion and the plaintiff intends to allege that the defendant was actuated by express malice, he shall file a reply giving particulars of the facts and matters from which the malice is to be inferred.

(4) This rule shall apply in relation to a counterclaim for libel or slander as if the party making the counterclaim were the plaintiff and the party against whom it is made the defendant.

35. The aspect of defamation is dismissed. The question of assessing damages even where suit is discussed was addressed in the case of **Lei Masaku versus Kalpama Builders Ltd** [2014] eKLR, the court noted as follows: -

It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court needs to know the view by the Court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum.

This leaves only arrest and prosecution. Had the same being proved, a nominal award ought to have been given.

36. However, the sum of Kshs. 800,000/= does not appear to have any evidential or legal basis. The criminal case proceeded for a relatively short period, and the acquittal was entered on the basis of the benefit of doubt. In the

circumstances, an award of Ksh. 300,000/= would have sufficed. The first respondent did not address anything on the kind of loss he suffered.

37. However, the sum of Kshs. 800,000/= does not appear to have any evidential or legal basis. The criminal case proceeded for a relatively short period, and the acquittal was entered on the basis of the benefit of doubt. In the circumstances, an award of Kshs. 300,000/= would have sufficed. The first respondent did not address the nature or extent of any loss he allegedly suffered. There is no shame in being subjected to a criminal process where reasonable suspicion exists, and the mere fact of prosecution. there has to be more.

38. The issue of costs is governed by section 27 of the civil procedure act, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to

try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

39. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR**, as follows:

[18] It emerges that the award of costs would normally be guided by the principle that costs follow the event: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the

motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs- that costs follow the event - it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings.

40. The Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR)** had this to say:

It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

41. Costs follow the event. in this case, the event is allowing the appeal the appellant is entitled to costs payable by the first respondent. costs of Ksh 65,000/= will suffice.

42. The award of damages was excessive. The court could have granted nominal damages of Ksh. 500,000/=.

Determination

43. In the upshot, I make the following orders:
- a. The Appeal is allowed. Judgement and Decree of Lower Court delivered on 15.07.2024 by Hon. P.K Mutai, SRM in Kisii CMCC No. 369 of 2017 is set aside.
 - b. In lieu thereof, the 1st Respondent's suit is dismissed.
 - c. The appellant shall have costs of the suit.
 - d. The Appellant shall have costs of Ksh.65,000/=.
 - e. Right of appeal 14 days.
 - f. The file is closed.

DELIVERED, DATED and SIGNED at Nyeri, virtually on this **18th** day of **November 2025**. Judgement delivered through Microsoft Teams Online Platform.

KIZITO MAGARE
JUDGE

In the presence of: -

No appearance for the Appellant

No appearance for the Respondent

Court Assistant - Michael