REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL NO. 59 OF 2019

THE ATTORNEY GENERAL……………………………………………….APPELLANT

VERSUS

STEPHEN CHEMWOR KOSGEI…………………………………………………RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. Charles Obulutsa in Eldoret CMCC No. 578 of 2008 delivered on 24th May 2019)

JUDGEMENT

1. By way of Plaint dated 8th October 2008, the Respondent instituted a suit against the appellant for general damages, special damages and costs of the suit. The cause of action arose from malicious prosecution alleged to have been instituted on 5th May 2004. The defendant alleged that the Plaintiff had aided prisoners' escape at Eldoret law courts which charges were dismissed on 11th October 2007.

2. The defendant filed a statement of defence dated 27th November 2008 where it denied all the allegations on the plaint.

Hearing at the trial court

3. PW1 was the Plaintiff who stated that he was an officer deployed to Tarakwa Police Station in Langas, Moiben, Turbo and lastly Eldoret Central Police station. He was assigned as a court orderly in 2004 and he was, on the material date, sent to find out about a case. On his way back, the OCS informed him that prisoners had escaped from the court cells. He stated that

arriving at the cells, they confirmed that 8 out of the 92 inmates had escaped. He was then detained and arrested with other orderlies and placed in custody from 5th to 18th March 2004 when they were charged. They were interdicted and put on trial and on 11th October 2007, they were acquitted under section 210 of the Criminal Procedure Code.

4. The prosecution closed its case and the defence and the defence called one witness in support of its case.

5. DW1 was **Inspector Dennis Nandi** who testified that the plaintiff and the orderlies allowed prisoners to escape which constituted a disciplinary offence under the police force standing orders. That an inquiry was done and the plaintiff could not explain his absence of 2 hours on the material date. He stated that it was resolved that the plaintiff be dismissed as he had accumulated disciplinary offences and 3 warning letters. He urged that the Plaintiffs' arrest was justified and a complaint was made, investigated and probable cause established.

6. Upon considering the evidence, testimonies and submissions, the trial court entered judgement in favor of the plaintiff awarding Kshs. 3,000,000/- as damages for malicious prosecution.

7. Being aggrieved with the decision of the trial court, the appellant instituted this appeal vide a Memorandum of Appeal dated 28th May 2019 premised on the following grounds;

1) **The Honourable Magistrate erred in law and in fact in awarding Kshs. 3,000,000 as damages for malicious prosecution which award is inordinately high.**

2) **The Honourable Magistrate erred in law and fact in finding that the respondent had established liability on a balance of probability on the claim of malicious prosecution.**

3) **The Honourable Magistrate erred in law and in fact in finding that there was no reasonable or probable cause to continue with criminal trial against the plaintiff.**

4) **The Honourable Magistrate erred in law and in fact in finding that the Police service could not conduct both orderly room proceedings and criminal proceedings against the respondent.**

5) **The Honourable Magistrate erred in law and in fact in failing to hold that the suit for termination from police service was time barred.**

6) **The Honourable Magistrate applied wrong principles of the law and his decision is without substance.**

7) **The Honourable Magistrate ignored crucial documentary evidence and authorities relied on by the defendant therefore arriving at the wrong decision.**

8. The parties prosecuted the appeal by way of written submissions.

Appellants' Submissions

9. Counsel for the Appellant submitted that the award of Kshs. 3,000,000 is inordinately high, and further, that in in making the award, the trial court

relied on the Decision in Willy Kaberuka Vs. The Attorney General (HCCC 160 of 1993) while distinguishing the circumstances and on grounds that the defence did not make any proposal on damages. He urged that the Learned Magistrate did not cite any authority for this and failed to consider the Defendant's case. Counsel placed reliance on the guidelines set in the case of Daniel Waweru Njoroge & 17 Others vs Attorney General Civil Appeal No. 89 of 2010 (2015) eKLR in this regard.

10. Counsel urged that the Trial Court's award did not fully consider relevant authorities and the circumstances of the suit and is thus inordinately high. He urged that the defence case established that the Plaintiff's prosecution was not actuated by ill will or malice by the police and that the same was informed by reasonable cause of the Plaintiff letting his guard down and causing escape of 8 prisoners from custody. He cited the Court of Appeal's decision in Stephen Gachau Githaiga & another v Attorney General [2015] eKLR which restated the four established elements of malicious prosecution which the Plaintiff had to prove on a balance of probability to sustain his claim. He highlighted that the elements are that the criminal proceedings were instituted by the defendant, the said prosecution was actuated by malice, that there was no reasonable cause and/or justification to prosecute and that the criminal proceedings terminated in the Plaintiffs favour.

11. Counsel urged that the Respondent was lawfully prosecuted in the criminal case based on complaints that necessitated the discharging of lawful duty to maintain law and order and upon carrying out investigations it was reasonably believed that it was legally proper to institute criminal charges against the Respondent. He cited the case of Kagane -vs- Attorney General H969) EA 643 in this regard and urged that the trial court did not find that the Respondent's prosecution was actuated by malice but stated that there was no

reasonable or probable cause to continue with the criminal prosecution given that the Respondent had already been taken through orderly room proceedings. Further, that the element of malice in the prosecution must be established and cannot be substituted with the element of reasonable and probable cause of the prosecution as was done by the trial court.

12. Counsel urged that the prosecution of the Respondent and the orderly room proceedings were lawful and relied on Mbowa vs. East Mengo District Administration (1972) 1 EA 352. Counsel further submitted that the Trial Court found that the criminal proceedings against the respondent ended in an acquittal which was not sufficient to award him the damages. He cited the decision of the Court of Appeal in Nzoia Sugar Company Ltd. vs. Fungututi (1988) KLR 999 in this regard. Counsel submitted that the court did not consider whether all the four elements of malicious prosecution were established. The issue of malice was left out entirely by the court. He placed reliance on the Court of Appeal's decision in James Karuga Kiiru -vs- Joseph Mwamburi and 3 Others, Nrb C.A No. 171 of 2000 in this regard.

13. Counsel reiterated that the trial court held that the police took the Plaintiff through orderly room proceedings before he was charged with the criminal offence and further, that it was double jeopardy to take him through another criminal trial and as such there was no reasonable or probable cause to continue with the criminal trial which ended in acquittal. He urged that in this regard, the court misconceived the import of probable cause by tying it to the orderly room proceedings. He cited Kagane -vs- Attorney General (1969) EA 643and urged that the preference of criminal charges against the Plaintiff was within the lawful mandate of the police. The Plaintiff was the custodian of the lock-up keys and could not account as to how the prisoners escaped and was charged alongside his colleagues responsible for the escapees. The police,

therefore acted honestly without malice but the sole purpose of bringing the plaintiffs and his co-accused to justice as per the law.

14. Counsel urged that the trial court erred in law and in fact in finding that the police service could not conduct both orderly room proceedings and criminal proceedings against the respondent. Further, that the proceedings were not criminal in nature but administrative and the ruling of the said proceedings was not in itself punitive to the Respondent as the decision was simply forwarded to higher authority by the Presiding Officer. He cited the case of Republic v Public Service Commission of Kenya Ex parte James Nene in this regard.

15. Counsel submitted that the trial court erred in holding that the suit was filed within time. He pointed out that the Learned Magistrate held that the Plaintiff was acquitted on 29th March 2004 and should have filed the claim by 28th March 2007 but justified the delay by tying the orderly room proceedings with the criminal trial. He stated that orderly room proceedings and criminal proceedings are distinct proceedings in law and that the same can be instituted and be continued simultaneously. Further, that one does not need a decision in the orderly room proceedings to institute a claim of malicious prosecution.

16. He pointed out that the only reason one needs to wait for criminal proceedings to come to an end is because acquittal is an element of malicious prosecution that must be proved. Counsel urged that the Plaintiffs claim was barred by virtue of section 4(2) of the Limitation of Actions Act and Section 3 of the Public Authorities Limitation Act Cap 39 Laws of Kenya. He placed reliance on the case of Obias Moinde Kengere v Postal Corporation of Kenya & 2 Others (2019) eKLR in this regard. Counsel reiterated that there is no

valid reason given as to why the case was not filed within time and as such the suit ought to have been dismissed.

17. Counsel urged that the trial magistrate applied wrong principles of the law in finding that the Respondent is entitled to general damages. Further, that the court did not incorporate the defendant's documentary evidence since counsel for the Plaintiff objected to the production of the same. He urged that the documents ignored are listed in the Supplementary Record of Appeal and submitted that the Court has the duty and powers to consider them in the instant appeal.

18. He cited the duty of the court and cited Section 78 of the Civil Procedure Act on the same. He additionally cited the cases of Peter M. Kariuki v Attorney General [2014] eKLR and Ndung'u Dennis V Ann Wangari Ndirangu & Another (2018) in support of these submissions. He urged the court to allow the application as prayed.

Respondents' Submissions

19. Learned counsel for the respondent submitted that on quantum, the Respondent proposed a global figure of Kshs. 5,000,000/= and the Appellant herein did not make any proposal. He urged that the ground that the award of Kshs. 3,000,000/= is inordinately high is an afterthought and time wasting since they had a chance to make a proposal they deemed fit but they chose not to. He urged that taking into account the circumstance of the case, the trial magistrate did not err and that the award of Kshs. 3,000,000/= is not inordinately high. He placed reliance in the case of Sammy Kiprotich Tangus -versus-Attorney General [2015] KEHC 4698 (KLR) where the Court awarded Kshs. 3,000,000/= as damages for malicious prosecution.

20. Counsel urged that for a party to succeed in a claim for malicious prosecution one has to prove the elements set out in the case of Mbowa -versus- East Mengo District Administration [1972] EA 352 as follows;

a. The plaintiff must show that prosecution was instituted by the defendant

b. That the prosecution was terminated in the plaintiffs favour

c. That the prosecution was instituted without reasonable and probable cause

d. That the prosecution was actuated by malice

21. Counsel submitted that it is not in dispute that the criminal proceedings by the Appellant herein were terminated in the favour of the Respondent herein. Further, that the Appellant does not deny that the Respondent was taken through orderly room proceedings and dismissed from his duties. There was therefore no probable cause to continue with criminal trial was held by the trial magistrate. He stated that the test to be used on reasonable and probable cause to arrest and charge an accused person is whether the facts known to the prosecutor would have satisfied a prudent and cautious man that the respondent was probably guilty of the offence. The Appellants were well aware that the Respondent ought to have been found not guilty and therefore acted on malice. Counsel reiterated that the trial court was proper in entering judgment in favour of the Respondent herein and that the same be upheld by this Court.

22. On whether the court erred in finding that the police service could not conduct both orderly room proceedings and criminal proceedings against the Respondent, counsel urged that Article 50 (2) (p) of the 2010 Constitution of

Kenya guarantees the right not to be tried for an offence for which one has already been convicted or acquitted. Further, that a court may discontinue a criminal proceeding against a police officer if the police service has already conducted orderly room proceedings and dismissed the officer for the same offence, this is based on the principle against double jeopardy. The trial magistrate was therefore right in holding that the Appellant could not conduct both orderly room proceedings and criminal proceedings against the Respondent.

23. On whether the suit for termination from police service was time barred, Counsel urged that the Respondent was arrested, detained and taken through the police orderly room proceedings for the offence of allowing the escape of 8 remandees. At the same time he was charged in court for the same offence. Before the decision in the criminal proceedings, the Respondent was dismissed from his duties. The appellant cannot therefore aver that this were two distinct procedures and that they did not depend on each other yet the two relate to the same person and the same offence. He urged that the trial magistrate did not make any errors in his findings about time.

24. Counsel submitted that the trial magistrate relied on the evidence presented by both parties and analyzed them well/ He urged the court to uphold the trial court's judgment and disallow this appeal.

Analysis & Determination

25. In the case of **Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123** it was stated as follows;

> **" This being a first appeal, it is trite law, that this court is not bound necessarily to accept the findings of fact by the court below and that 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 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 allowances in this respect.

Issues for determination

26. Having considered the pleadings and the submission, I now draw the issues for determination as hereunder;

a) **Whether the trial court erred in finding that the Plaintiff had established the tort of malicious prosecution**
b) **Whether the award of damages was inordinately high**

27. On the first issue of whether the trial court erred in finding that the Plaintiff had established the tort of malicious prosecution, the e**lements that a court needs to establish in a tort of malicious prosecution**, the East African Court of Appeal rendered itself thus in the case of **Mbowa v East Mengo District Administration [1972] EA 352**

"...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."

28. The duty to prove malice lies with the person who asserts it as is provided by Section 107 (1) of the Evidence Act, Cap 80 Laws of Kenya which provides that:

> **Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

29. In **Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, the Court of Appeal held that:

> **"As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."**

30. 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. Further, in the case of **Dr. Lucas Ndungu Munyua v Royal Media Services Limited & Another [2014] eKLR**, it was stated that:

> **With respect to malice, the law is clear that the mere fact that a person has been acquitted of the criminal charge does not necessarily connote malice on the part of the prosecutor."**

32. The above said on the issue of whether or not a prosecution can be construed to be malicious, the test for whether a case was instituted with a reasonable and probable cause was also laid out by the Court of Appeal in **Kagane & Other v The Attorney General & Another [1969] EA 643,** where Rudd J held as follows: -

> **"the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of an objective test. That is to say, to constitute reasonable and probable cause, 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 so far 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."**

33. In the case of **Hicks v Faulkner [1878] 8 Q.B.D 167 at 171,** Hawkins J held as follows with respect the meaning of reasonable and probable cause: -

“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 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.”

34. On the issue of whether the Respondent was subjected to double jeopardy as was held by the Hon Trial magistrate as already herein summarized, the court herein observes that the defence of double jeopardy is provided for under Article 50(2)(o) of the Constitution which provides that:

“50 (2) Every accused person has the right to a fair trial, which includes the right—

(o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted.”

33. This principle was discussed in **Nicholas Kipsigei Ngetich & 6 others v Republic [2016] eKLR** where Odero J cited the case of Connelly v DPP [1964] 2 All ER 401 wherein the principle had been stated that:

“ (i) That this test must be subject to the proviso that the offence charged in the second indictment had in fact been committed at the time of the first charge;

(ii) That on a plea of autrefois acquit convict or autrefois convict a man is not restricted to a comparison between the latter indictment

and some previous indictment or to the records of the court, but that he may prove by evidence all such questions as to the identity of persons, dates and facts as are necessary to enable him show that he is being charged with an offence which is either the same or is substantially the same as one in respect of which he has been acquitted or convicted or as one in respect of which he could have been convicted;

(iii) That what has to be considered is whether the crime or offence charged in the latter indictment is the same or is in effect or is substantially the same as the crime charged in a former indictment and it is immaterial that that facts under examination or the witnesses being called in the later proceedings are the same as those earlier proceedings;

(iv) That apart from circumstances under which there may be a plea of Robbery with Aggravation. The accused objected to this second trial and pleaded 'autrefois acquit'. The House of Lords in England rejected this plea and held that a plea of 'autrefois acquit' does not protect a person from further prosecution for a different offence on the same facts simply because he had been prosecuted on those facts and acquitted."

35. The Respondent's claim before the trial court was largely based on the fact that he was acquitted by the Trial Court. In addressing itself to this issue, the Court of Appeal in **Nzoia Sugar Company Ltd v Fungututi [1988] KLR 399**, held as follows;

"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."**

36. In the instant case, having considered the issues raised by the Respondent in this appeal, the submissions made by both Counsel and having also read the impugned judgement and the proceedings of the Trial Court, it is the court's finding that the plaintiff did not establish that the prosecution was actuated by malice for reasons that from my re-evaluation and summation of the evidence on record, it is highly probable that the plaintiff was a suspect in the escape of the prisoners in question for reasons that the said evidence points to the fact that he was a court orderly on the material date, time and place where the escape occurred and he was not able to satisfactorily explain his whereabouts when the prisoners escaped. Further, I find that the Trial Court did not sufficiently interrogate this issue in sufficient detail by dint of the fact that his decision was almost solely hinged on the fact that the Criminal proceedings were taking place parallel to at the Orderly Room Proceedings. Additionally, it is my further finding that the trial magistrate did not clearly state his basis for the establishment of malice as against the Appellant.

37. The court further notes that Hon Trial Magistrate invoked the principle of double jeopardy by dint of the fact of the disciplinary process was taking place at the same time as the criminal trial. However, this in my very well considered opinion and going by the case law that I have herein cited and relied on fully, is a misunderstanding of the principle of double jeopardy for

reasons that as far as my understanding of the principle is, it pertains to an individual being prosecuted for *the same criminal offence* more than once. Orderly room proceedings are an internal administrative disciplinary process within the Police Force and cannot in this regard be equated to proceedings wherein a person has charged with a criminal offence in a court of law.

38. Further to the above, for an award of damages to stand the test of scrutiny, the same must be based among other parameter on the right principles of law that guide the apportionment of damages. This is the position the position as was stated in **Butt v Khan {1981} KLR 470 and Kitavi v Coastal Bottlers Ltd {1985} KLR 470)** the court pronounced itself as follows;

> **"Although one would expect that in the normal course of things, the claimant to the accident might get well and restored to his or her original health status prior to the accident sometimes that is not the case in most instances. It is necessary to find the correct bearing which seldom alludes the Judges with expertise and knowledge on this areas of specialization. An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirety erroneous estimate. It must be shown that *the Judge proceeded on wrong principles,* or that he misapprehended the evidence in some material respect, and so arrived a figure which was either inordinately high or low."**

39. The upshot then is that in light of my conclusions and findings as above, I find that the Hon Trial Magistrate erred in his finding that the appellants were liable to compensate the plaintiff under the tort of malicious prosecution by dint of the fact that the acquittal of the respondent which largely informed the decision was premised on a misapprehension of the

principle of double jeopardy as already herein summarized. Consequently, I am also of the finding that the Hon Trial Magistrate erred by thereafter proceeding to award damages to the appellant as a consequence of that finding which in itself the court has already found was arrived at in error. It follows therefore that the damages were based on a misapprehension of the principle of double jeopardy. Accordingly therefore, I am satisfied that the appeal has merit and the same is now hereby allowed in its entirety, and the impugned judgement is now hereby set aside in its entirety.

40. For reasons that the record shows that the Respondent was eventually dismissed from the force, I will not subject him to pay costs but order that the costs be in the cause.

Read Dated and Signed at ELDORET on 19th December 2025

E. OMINDE

JUDGE