REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL NO. E196 OF 2024

KHISA NYONGESA.....

1ST APPELLANT

KENYA POWER & LIGHTING COMPANY ..... 2ND APPELLANT

VERSUS

DAVID SENEMA MANGONDI.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment and decree in Kisii CMCC No. E767 of 2021 delivered on 04.11.2024 by Hon. C.A. Ocharo, Chief Magistrate. The Appellants were the 1st and 2nd defendants while the 2nd Respondent was the 3rd respondent in the lower court.

2. The court made the decision to allow the suit and held the appellants and the second respondent jointly and severally liable and awarded general damages of 1,000,000/= for unlawful arrest, detention, and malicious prosecution. They were granted a sum of Ksh. 3,200,000/= as special damages.

The court made a fascinating finding regarding the amount of costs. Whichever decision is made, I shall set aside the findings on special damages. When relying on fees paid in the lower court, the advocate must be guided by the advocate's remuneration order. All advocates in the lower court, however many, are deemed to be one advocate. The defendant cannot pay for superfluous or extravagant expenses that are not justified. Access to legal services must be maintained at a level that Kenyans can afford. The subject matter is always crucial in such cases. The case was a misdemeanor, thus requiring a minimum amount of legal fees. The advocates are entitled to be paid all the money in the world. However, they cannot claim the same from the other party. The court shall revert to this shortly.

3. Aggrieved by the decision, the appellants set forth several grounds that are prolix and unnecessary. The court will thus not edify them by setting them forth in the judgment. Only three issues are raised:
    a. Liability for unlawful arrest, detention, and malicious prosecution.
    b. Special damages.
    c. General damages.

Pleadings

4. The 1st respondent filed suit through a plaint dated 14.07.2021, claiming damages for malicious prosecution,

unlawful arrest, detention, defamation, and malicious prosecution arising out of arrest on 11.12.2018. He claimed against the attorney general on behalf of the permanent secretary for internal security.

5. The appellant was indicated to be an auctioneer. The said auctioneer was in the process of effecting warrants of attachment when they were arrested for breach of peace. They were arraigned in court for threatening breach of peace contrary to section 95(1) (b) of the Penal Code. The agents of the second respondent caused the arrest.

6. The appellant was charged in Kisii CMCR 803 of 2019. He was acquitted under Section 215 of the Criminal Procedure Code on 19.11.2020.

7. The appellants filed a defence dated 30.09.2021. They stated that the 1st respondent had not exhausted all mechanisms for redress under the law. The acquittal was denied; they averred that they were not party to the prosecution. They stated that the proper parties should have been the National Police Service and the Office of the Director of Public Prosecutions. Despite being given an early opportunity to amend the plaint to bring in the said proper parties, the 1st respondent did not do so.

8. The second respondent averred that the arrest was proper. They set out the statutory duty of the third defendant. The statute was not named, and it is unclear where they obtained such responsibilities.

Proceedings

9. The first respondent indicated that he went with Omwoyo Auctioneers to execute a warrant given in Keroka PMCC 2 OF 2018. They went to Rangi Mbili, where the appellant's vehicle was parked. The 1st appellant pleaded with him that the vehicle they were attaching was assigned to the security officers. They stated that they were bringing another vehicle to replace the same. As he waited for the exchange, three gentlemen came. There was a commotion. The officers handcuffed him, took a firearm and were taken to Kisii police station. He was placed in the cells where he spent the night and was charged with creating a disturbance. The list of documents was adopted, including the proceedings in Cr. 803 of 2019.

10. He reiterated the contents of the plaint as his evidence through the statement filed dated 14.07.2021. He stated that Omwoyo Auctioneers were present.

11. On cross-examination, he stated that it was Mr. Omwoyo who authorized him to execute. The authority was not produced in court. He did not even know how much the

decretal sum was. There were warrants, but not in his name. He stated that he did not request that the driver drive the vehicle to a place of his choice. He stated that he was a licensed gun holder and produced a certificate to that effect. He produced a letter from the director of public prosecution stating that he be charged. Initially, he was charged with threatening to kill. He said there was a letter from KPLC directing that he be charged, but he did not have it. He was locked in the cells, but police officers from KPLC, were not KPLC employees. He stated that it is the ODPP that charged him.

12. He confirmed that he was placed on his defence. He testified that he paid 400,000/= to Ms. Ochoki and company advocates. He paid Ben Gichana a sum of Ksh 760,000/ to times. He hired Aboki Begi and paid him 1.2 million. He did not have evidence of having the money.

13. Evans Okoth Owino testified that he was a driver with the second appellant. Where he had worked for 22 years. On December 1st, the respondent stopped him as he was entering Rangi Mbili to repair the vehicle, and just entered the vehicle. He called the 1st respondent and told him that someone had indicated he was an auctioneer who had entered the vehicle and had not shown him any identification papers. He adopted his statement. The witness refused to hand over the vehicle as the first respondent did not produce any identification.

14. The first respondent made himself comfortable in the vehicle, which was at Rangi Mbili. There was an altercation, which resulted in the first respondent drawing a gun. He stretched his gun and was held by Chief Inspector Simotwo. The first respondent was disarmed, handcuffed, and escorted to the Kisii police station.

15. On cross-examination, he stated that he worked with KPLC. He was driving a KPLC vehicle. He stated that he saw a gun when the plaintiff was coming out of the driver's seat. The plaintiff did not tell the first respondent and Kennedy, that the plaintiff had a gun. It is police officers who removed the plaintiff from the vehicle as he had refused to move until CI Simotwo removed him. He stated that the first respondent did not point a gun at anyone.

16. On re-examination, he stated that Mr. Omwoyo was not present at the scene. DW2 was Nyongesa Khisa who adopted his witness statement. He stated that he works for KPLC. He recalled that DW1 called him that the first respondent had stopped him, while he was driving the subject motor vehicle to repair a puncture. The first respondent demanded immediate possession and the ignition key. He stated that dw1 had driven the vehicle to Rangi Mbili garage.

17. The witness advised DW1 not to hand over but wait for the witness. The witness left office with DW3 and PC Oduor and on reaching Rangi Mbili Garage they found DW1 and the first respondent who was already at the passenger seat. Upon requesting documents authorizing attachment of the subject motor vehicle, the first respondent could not produce the same. The first respondent was requested to get out of the vehicle but he declined. He started insulting the witness and an argument ensued. The first respondent drew a gun and no sooner had he finished aiming at the witness than CI Simotwo held his hand and disarmed him, handcuffed him and escorted the first respondent to Kisii Police Station.

18. He later learnt that there was a warrant in favour of Omwoyo auctioneers while the first respondent trades as Senema Africa auctioneers. He stated that he was a witness in the criminal matter and there was no malice on part of the 3rd defendant. He stated that the first respondent drew a gun and was arrested before he pointed at him the decision to charge was made by the ODPP. The fire arm was removed from the first respondent's arm. He removed the same from his waist. He did not see any old man in the premises.

19. DW3 was CI Michael Simotwo, attached to KPLC, Kisii County. He received information that one of the security officers, DW2, that a driver had been accosted by unknown people, when the subject motor vehicle was been driven to

Rangi Mbili Garage. DW2 asked the witness to accompany him to the scene, 400-500m away. He went and saw a stranger seated in the subject motor vehicle. DW2 enquired what this was all about from the stranger and he learnt that he wanted to attach the vehicle. But did not have a warrant.

20. He was requested to get out but the man drew a pistol. The witness grabbed the man's hand and grabbed the firearm. He took the assailant to police custody. He adopted the statement dated 14.03.2023 and a list of documents.in the statement, he reiterated what he testified to herein.

21. On cross-examination he stated that the complainant was the state ,though the witness. The ODPP approved the charges. He stated that he was performing his duties as a police officer. He stated that the firearm did not fall. The first respondent threatened the witness with a gun. He stated that he is aware of the acquittal. He stated further that there was no warrant given to the first respondent to execute.

22. He stated that his employer was the National Police Service Commission. The third respondent did not tender any evidence

Appellants' Submissions

23. The appellants filed submissions dated 20.9.2024. They place reliance on many authorities, some of which are

repetitive, that is *Dickson Chebuye Ambeyi v National Police Service & another Peter Sifuna Wesonga & another (Interested Parties) 2020KEHC870 (KLR), James Kahindi Simba v Director of Public Prosecution & 2 others 2020KEHC5684(KLR), John Nganga Kinuu & 2 others v Peter Rubiro Ndongi & 4 others 2020KECA711 (KLR), National Oil Corporation v John Mwangi Kaguenyu & 2 others 2019KECA884 (KLR), Silvia Kambura v George Kathurima Japhet & 2 others* 2021KEHC2048 (KLR) and *Susan Mutheu Muia v Joseph Makau Mutua* 2018KEHC6584 (KLR).

24. They submitted that the salient elements of the tort for malicious prosecution are founded in the words of Duffus V.P. in the case of **Kasana Produce Store Vs Kato** at page 191, paragraph G-I, as follows:

    a. The plaintiff was prosecuted by the defendant in that the law was set in motion against him by the defendant on a criminal charge. The test is not whether the criminal proceedings have reached a stage at which they may be described as a prosecution but whether they have reached a stage at which damage to the plaintiff result.
    b. That the prosecution was determined in the plaintiff's favour.
    c. That it was without reasonable or probable cause. On the evidence, the defendant did not believe in the justice of his own case.

d. It was malicious - The defendant had improper and indirect motives in pursuing the false charge against the plaintiff.

25. They submitted that, the law imposes an obligation on a party who claims that he was unlawfully arrested, falsely imprisoned, and or maliciously prosecuted to prove that the arrest had no basis in law at all. It is not enough for him to state that the arrest was unlawful merely. They posited that the Appellants' duty was to report that the 1st Respondent had illegally occupied the 2nd Appellant's motor vehicle registration number KCH 305Q while in possession of a gun. The responsibility of investigating, charging and conducting prosecution was that of the police. At the time of the 2 Page 1-3 of the Record of Appeal. Page 3 of 7 arrest, the first Respondent did not have any Identity Card.

26. They posited that the second element of the tort demands evidence that the prosecution terminated in favour of the plaintiff. This requirement precludes a collateral attack on a properly rendered criminal conviction and thus avoids a conflict between civil and criminal justice. They relied on the decision of this court in **Dickson Chebuye Ambeyi v National Police Service another Peter Sifuna Wesonga another** (Interested Parties), where the court stated as follows:

> In this petition, it is true that the petitioner's wife was arrested, charged in Court and prosecuted. It

is also true that the prosecution ended in her favour because she was acquitted of the charge. Even with these, there was a duty to prove that there was malice in making the report that lead to the arrest and prosecution. Acquittal alone cannot amount to proof of malice. There must be something more than just acquittal. In the case of Nzoia Sugar Company Limited vs. Fungutuli [1988]) elk, the Court of Appeal observed; “It is trite learning that acquittal, per se, on a criminal case 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.”

“A party who suspects that there has been a violation of the law, has an obligation to report the matter to the police who carry out investigations and decide whether or not to charge and prosecute the person depending on the strength of the evidence. The fact that an accused person, though charged and prosecuted, was acquitted is not proof of malice. There must be proof of existence of malice in making the report. In other words, the petitioner must prove that there was no reasonable basis for making the report. The decisions referred to above are clear that there must be unreasonable basis for reporting a complaint to the police and that the report was actuated with malice. In the present petition the petitioner did not even show that the

> complaint was false and that it was full of spite or malice."

27. It was their submissions that there was a probable cause. They posited that the first respondent must prove the absence of reasonable and probable cause to commence or continue the prosecution. Reliance was placed on the case of **James Kahindi Simba v Director of Public Prosecution & 2 others**, where the court, while defining reasonable and probable cause, referred the case of *Hicks v Faulkner {1878} 8Q.B.D. 167, 171* – where Hawkins J said:

> I should define reasonable and probable cause to be 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 to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accused to the conclusion that the person charged was probably guilty of the same imputed."

28. They stated that this cause will appreciate that there was a glaring, reasonable, and probable cause to commence or continue the prosecution. They urge the court to find that the court was oblivious of the presence of a reasonable and probable cause to commence or continue the prosecution. they made further reliance on the case of **John Nganga Kinuu 2 others v Peter Rubiro Ndongi 4 others**, where the Court of Appeal stated as follows:

> "Turning to the High Court, the approach the Judge took was to take into consideration the same case the trial court had relied upon namely; of John Ndeto Kyalo versus KTDA & Another (supra), and set out the principles that guide a Court of law in sustaining a claim for malicious prosecution as already highlighted above. The Judge observed and correctly so in our view that the principles set out in the John Ndeto Kyalo case (supra), formed the threshold for determining the appeal before him. Applying that threshold to the record, the Judge rendered himself as follows:
>
> I have on my part re-evaluated the evidence presented before the trial court. It is clear to me that the criminal charge preferred against appellants arose out of investigations carried out pursuant to a complaint filed by the 1st, 2nd, and 3rd respondents. It is apparent that the complaint was not false; therefore, the investigation was instituted pursuant to reasonable and probable cause. There is no dispute that on 17th May, 1998, the 1st, 2nd and 3rd respondents were attacked and robbed. The trio booked a report before Kikuyu police station. The report was real and not false. In the end, I find no merit in the appeal as against the orders on liability.

29. Finally, they submitted that there was no malice. It was their submissions that the first Respondent is the author of his own misfortune, vide his criminal activities as outlined in the ODPP's letter dated 07.03.2019. They prayed that the trial

court's impugned judgment be set aside as it was wanting, misconceived, and bereft of legal fragrance.

30. The second respondent's submissions dated 2.12.2025 supported the appeal. They relied on the *locus classicus* case of **Mbowa vs. East Mengo District Administration** [1972] EA 352. They submitted that instead of analyzing evidence, the learned magistrate faulted the second respondent for failing to call any evidence.

31. They stated that there was a reasonable and probable cause. They supported allowing the appeal with costs.

Respondents Submissions

32. The first respondent filed submissions dated 7.09.2025 and set out the case as pleaded and the duty of the court. Reliance was placed on the case of **Mursal & another v Manese** (suing as the legal administrator of Dalphine Kanini Manesa) [2022] KEHC 282 (KLR), where Mativo J, as he then was posited that:

> A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is

required to address itself to all issues and decide the case by giving reasons.

33. They submitted that the elements of malicious prosecution were settled by the High Court sitting in Kakamenga in the case of **George Masinde Murunga v Attorney-General** [1979] KEHC 34 (KLR), where E. Cotran J, as he then was, was posited as follows:

> As to malicious prosecution, the plaintiff must prove four things:
>
> (1) That the prosecution was instituted by Inspector Ouma (there is no dispute as to this);
>
> (2) That the prosecution terminated in the plaintiffs' favour (there is also no dispute as to this);
>
> (3) That the prosecution was instituted without reasonable and probable cause; and
>
> (4) That it was actuated by malice.

34. It was their submissions that the first respondent proved all the said elements. Reliance was placed on sections 107-109 and 112 of the Evidence Act. The said section provide as follows:

> 107. (1) 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.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

> 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

35. On quantum, they submitted that a sum of Ksh 1,500,000/= was sufficient as awarded. They relied on the principles settled in the case of Ahmed Butt v Uwais Ahmed Khan (1982-88)1 KAR 1; and Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) [1985] KECA 137 (KLR). It was their submissions that the court should not interfere with the award using similar cases. Reliance was placed on two cases where over 2,000,000/=. These were Jacob Juma & another v Commissioner of Police & another [2013] KEHC 6308 (KLR) and Chrispine Otieno Caleb v Attorney General [2014] KEHC 8485 (KLR)

36. On special damages, they relied on the case of **Swalleh C. Kariuki & another v Viloet Owiso Okuyu** [2021] KEHC 4863 (KLR), where L. Kimaru J, as he then was held as follows:

In regard to special damages the law is quite clear on the head of damages called special **damages.** Special Damages must be both **pleaded and proved,** before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in **Hahn V. Singh, Civil Appeal No. 42 Of 1983 [1985] KLR 716**, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:

> **Special damages must not only be specifically claimed** *(pleaded) but also strictly proved…. for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.*

37. The court was urged to dismiss the appeal with costs.

Analysis

38. 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 allowing the suit for malicious prosecution. The second issue is whether the damages granted were excessive. Thirdly is the question of proof of special damages.

39. 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 form a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect, in particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.

40. 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 made 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 course. 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 Ministry of Interior and the national government coordination, against whom the attorney general sued, did not participate in the decision to charge after probable cause was found. They did not take part in any. They should not be party to the case.

41. DW3 was categorical that he is a member of the national police service. The service does not take orders from any quarter save as provided under Article 245. They are not in any case not party to the case. The relevance of the office of the Attorney General and the Ministry of Interior and National Coordination is not apparent in these proceedings. This is because the ministry does not have operational control over members of the Kenya Police Service. Article 245 of the Constitution provides as follows:

> (1) There is established the office of the Inspector-General of the National Police Service.
> (2) The Inspector-General
> (a) is appointed by the President with the approval of Parliament; and
> (b) shall exercise independent command over the National Police Service, and perform any other functions prescribed by national legislation.
> (3) The Kenya Police Service and the Administration Police Service shall each be headed by a Deputy Inspector-General appointed by the President in accordance with the

recommendation of the National Police Service Commission.
(4) The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to—
(a) the investigation of any particular offence or offences;
(b) the enforcement of the law against any particular person or persons; or
(c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.
(5) Any direction given to the Inspector-General by the Cabinet secretary responsible for police services under clause (4), or any direction given to the Inspector-General by the Director of Publicv Prosecutions under Article 157(4), shall be in writing.

42. The suit against the third respondent was thus a non-starter from the word go. the next question is whether the right parties were sued. The police are responsible and actually carried out the arrest. DW3 was candid that he made the arrest. 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.

43. The decision to charge was made by the Director of Public Prosecutions. They are not parties to the case. There can be no malicious prosecution without the prosecutor. The Appellant was acquitted under section 215 of the Criminal Procedure Code. The same provides 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*

44. The duties listed under paragraph 5 of the were transferred to the office of the director of public prosecution by virtue of Article 157 of the Constitution, which parties can

read in their free time. Article 157 of the Constitution provides, *inter alia*, as follows:

> (1) There is established the office of Director of Public Prosecutions.
>
> (6) The Director of Public Prosecutions shall exercise State powers of prosecution and may-
> (a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
> (b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
> (c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

45. The appellants had no role in the actual arrest and prosecution of the 1st Respondent. This domain lies elsewhere. The court treated the two torts as 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.

46. 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.

47. The first aspect is that even if the right parties were sued, the test is whether the arrest and prosecution were malicious. The court trying the case found that the state had met a threshold. It is upon the first respondent answering the case that the appellant was acquitted. The effect of Section 215 of the Criminal Procedure Code 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.

48. The requirement of favourable termination of criminal proceedings may be satisfied in various ways, depending on how the proceedings are concluded in the accused person's favour. In **Paramount Bank Limited vs. Vaqvi Syed Qamara & another [2017] eKLR** (Makhandia, Ouko and MÍnoti 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.

49. 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 **Mrao Ltd v First American Bank of Kenya Ltd & 2 others** [2003] eKLR, as hereunder:

> ***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.

50. 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.

51. The 1st Respondent did not satisfy a critical element of malicious prosecution. He needed to prove that the appellants, together with the director of public prosecutions, must have acted maliciously in that they must have 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. The appellants acted on reasonable suspicion.

52. The first Respondent stated that auctioneers are like advocates, and he could have executed on their behalf. This is a very dangerous argument that is not anchored in the Auctioneers Act. The fact remains that the 1st respondent did not have a warrant of arrest and was simply causing disturbance and becoming a nuisance at Rangi Mbili, where the KPLC vehicle was being repaired. It is imperative to note that there was no proclamation by the 1st respondent on the record. None was produced.

53. I cannot understand how the 1st respondent intended to collect a vehicle he had not proclaimed. He was there by virtue of being a gun holder, as muscle for hire. Even where unlawful instructions are given, the auctioneer must carry the warrant. It does not matter that a warrant exists somewhere

in the court file. Without a warrant, such a person is nothing other than a robber.

54. The 1st respondent was acquitted upon testifying and explaining the circumstances. The court had already found that there was a probable cause for arrest. Indeed, the appellant had no reason to be in the said car. He had no warrants of attachment, and no instructions had been issued to him to execute any warrants. Warrants are not transferable. In any case, a person executing must have the warrants at the time of execution. The first respondent acted like a gangster, waylaying a vehicle that was not even proclaimed against. There are supposed to be documents in terms of form… to be left with the driver. These were not issued. Surprisingly, the Director of Public Prosecution did not prefer robbery with violence charges contrary to section 296(2).

55. The first respondent laid a premium that he is licensed to carry a gun. The witnesses were not an immediate danger to him. Removing and brandishing a gun, even with no intention to harm, is criminal in itself. I have read the decision of the lower court acquitting the first respondent. I am unable to understand the tenor thereof. The first respondent was acquitted because there were contradictions. The same are not indicated. Nevertheless, the report was made with a reasonable cause.

56. The first respondent had no authority to enter the car without a valid warrant of arrest. there are tenets of execution, none of which were used. DW3 was entitled to have him arrested and subsequently forwarded for charging.

57. The first respondent was given the benefit of doubt, which is in the criminal standard. The test in civil cases is different. The benefit of doubt has its roots 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.''

58. The standard and burden of proof was also explained by the Supreme court of Canada In the case of **R vs. Lifchus {1997}3 SCR 320** as follows:

> 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.

59. 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*

60. This then brings the matter to the question of whether malice was shown. In the case of **James Karuga Kiiru 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.

61. With respect to malice, a mere fact that a person has been acquitted of the criminal charge does not necessarily connote malice on the part of the prosecutor as held in the case of **Dr. Lucas Ndungu Munyua v Royal Media Services Limited & Another (2014) eKLR**. 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 dam age 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.

62. The net effect is that I find that there was no malice in prosecuting the first respondent. Secondly, the correct party, that is, the Office of the Director of Public Prosecutions and the Inspector General of Police, were not sued. Thirdly, the first appellant correctly and procedurally made a complaint after the first respondent, in a gangster like manner, drew out his gun, which ought to have been concealed. There was a probable cause to charge the first respondent.

63. Before making final orders, I must address two aspects that arose from this matter. The first is the auctioneers' authority to execute non-existent warrants. The auctioneer can only execute warrants in his name or when authorized in writing by the auctioneer. In any case, an auctioneer must leave documents, including a copy of the warrant and notice of attachment and notification of sale with the judgment debtor. Failure to do so, the action is robbery with violence and nothing more.

64. 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.

65. The last issue is what to do with the suit against the second respondent. The appellant and second respondent had been

found jointly and severally liable, there is no way of severing the outcome. Order 42 rule 5 provides for the way forward as doth:

> **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.**

66. The suit proceeded on the premises that there was malicious prosecution. The court has found none. Indeed, the court has found that the case in the court below was well founded. It is irrelevant that there was an acquittal. An acquittal does not of itself make a prosecution malicious. This is more poignant where an accused is placed on his defence. It is more crucial, in a case like this one, where the first respondent was charged of minor offence instead of the multiple offences disclosed in the proceedings in the court.

67. The court cannot set aside part of the decree in a case where the parties were jointly and severally liable. The entire appeal must succeed *in toto*. It is however surprising in this time and age that there are people labouring under the

impression that the Attorney General is in charge of prosecution.

68. The next issue is damages. There was no evidence of loss. The first respondent 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.

69. The aspect of defamation is dismissed. The question of assessing damages even where suit is dismissed was addressed in the case of **Lei Masaku versus Kalpama Builders Ltd [2014] eKLR** 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.

70. This leaves only arrest and prosecution. Had the same being proved, a nominal award ought to have been given. The award of damages was excessive. The court could have granted

nominal damages of Ksh.200,000/=. This is because the first respondent stayed briefly in police cells and was timeously availed in court.

71. Regarding special damages, the test has been set in various cases. The same must not only be particularized but also procured. Throwing a figure of 3,200,000/= is not proper. The same ought to be particularized. It is also not enough to show that an amount was paid, but that it was incurred as well. Advocates are entitled to raise their fee notes in accordance with the Advocates' (Remuneration) (Amendment) Order, 2014. There was no subject matter warranting the legal fees of Ksh. 3,200,000/=.

72. The fees were not particularized, and there was no tax invoice showing that they were paid. Amounts being thrown at court had no connection to the case. As a profession, an advocate can only issue an ETR receipt for funds received. There was no evidence that such costs were incurred. The sad bit is that advocates were complicit in issuing receipts that were not accompanied by any exchange of funds. The receipts will one day be useful to the Kenya Revenue Authority, where there will be gnashing of teeth and regret for the fraud. The receipts issued and purported to be issued are bogus and have no link to legal fees paid. Unless the fees payment was used for money laundering, there was no basis for raising a fee note for Ksh 3,200,000/= leave alone Ksh 100,000/=. The evidence

on special damages remind me the words of G V Odunga, while addressing the words of C B Madan in the case of **Kioko Peter v Kisakwa Ndolo Kingóku** [2019] eKLR, as follows:

> Parties and Counsel ought to give the court's some credit that the courts are not manned by morons who can be easily duped into believing all manner of incredible stories with little or no iota of truth. It is these kinds of allegations that Madan, J (as he then was) had in mind when in N vs. N [1991] KLR 685 he expressed himself in the following terms:
>
> "I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted."
>
> 5. In the South African case of Matatiele Municipality & Others vs. President of the Republic of South Africa & others (1) (CCT73/05) (2006) ZACC 2: 2006 (5) BCLR (CC); 2006(5) SA 47 (CC) it was held that "In my view a person who deliberately either by commission or omission misleads the court and the public that a particular state of affairs exist while knowing very well that that is not the position cannot be said to be open, candid and transparent. Dishonest in my

view is an Act which is antithesis to transparency and vice versa…"

73. Even if the said amount were actually paid, the court is not prepared to allow the same as the amounts are exaggerated and do not relate to the defence of a misdemeanor. They do not reflect the relative seriousness of the matter. In the case of **Dodhia v National and Grindlays Bank Limited and Another** (Civil Appeal No. 53 of 1968) [1969] EACA 3 (21 November 1969), the court addressed the question of exaggerated expenses. The expenses were exaggerated and cannot be payable in toto.

74. In the case of **David Bagine Vs Martin Bundi [1997] eKLR**, the Court of Appeal stated as follows: -

> **"It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: "....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:**
> **"Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the**

> **particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it."**

75. Strictly proving entails, justifying the expenses. It is not just tendering the receipts. The first respondent failed to do so in this case. The said expenses must be set aside as unreasonable.

76. This court is not a repository for churning out special damages that must arise. I think it is high time that claimants must be disabused of the notion that so long as they have received the court will award any ridiculous expenses. Special Damages must be both **pleaded and proved** before they can be granted by the Court. In the case of **Swalleh C. Kariuki & another v Viloet Owiso Okuyu** [2021] eKLR, the court, Justice Luka Kimaru, as then he was, stated as doth; -

> "In regard to special damages the law is quite clear on the head of damages called special **damages.** Special Damages must be both **pleaded and proved,** before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in **Hahn V. Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716**, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held*:*
>
> **"Special damages must not only be specifically claimed** *(pleaded) but also strictly proved…. for they are not the direct natural or probable consequence of the act complained of*

> *and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."*

77. In the end, the special damages of Ksh 3.200,000/= are set aside both for not being specifically pleaded and proved on one side and on being exaggerated on the other hand. The claim for special damages is thus dismissed. It must be reiterated that even where normal fees are charged, only one advocate's fee is applicable and on scale. There was never a certificate for two advocates.

78. Even where there are, legal fees must be such that the public can afford. Excessive fees make legal fees a reserve of very few. In the end the entire appeal is merited and accordingly allowed.

79. 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.

80. 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 – a position well illustrated by the considered opinions of this Court in other cases.

81. 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.**

82. 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 220,000/= will suffice.

83. As I depart, I note that the first Respondent is an officer of this court acting as an auctioneer. He breached the cardinal rules of the Auctioneers Act by brandishing a firearm, and purporting to execute without warrants from the court. Secondly, by whipping out a gun at an unarmed driver, it brings into question the competence of the first respondent. The licensing officer ought to examine the fitness of the first respondent to continue holding a firearm, in view of the blatant misuse against members of the public.

Determination

84. In the upshot, I make the following orders:

a) The appeal is allowed. Judgment and Decree in Kisii CMCC No. E767 of 2021 delivered on 04.11.2024 by Hon. C.A. Ocharo, CM, is set aside. In lieu thereof, I dismiss the entire of the 1st Respondent's suit with costs.

b) Costs of Ksh.220,000/= to the appellants.

c) The 2nd Respondent to bear its costs.

d) The Deputy Registrar of this court to serve a copy of this judgment on the Auctioneers Licensing Board for further action.

e) The 2nd respondent to have costs in the lower court.

f) 30 days stay of execution.

g) Right of appeal 14 days.

h) The file is closed.

DELIVERED, DATED and **SIGNED** at **NYERI** on this **16th** day of **December, 2025**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Ododa for the Appellant

Mr. Chepkorir for the 1st Respondent

Mr. Nderitu for the 2nd Respondent

Court Assistant – Michael