

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. E270 OF 2024**

**PANESAR COMPANY LIMITED..... APPELLANT/APPLICANT**

**-VERSUS-**

**JAMES KAMAU MWANGI.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment of Hon. Lucy Ambasi (CM) in Milimani CMCC No. E7951 of 2021 delivered on 16/2/2024)*

**JUDGMENT**

- 1) The 1<sup>st</sup> Respondent in this case filed Milimani CMCC NO. E7951 of 2021 seeking general damages for false arrest, unlawful detention and malicious prosecution against the appellant and the Attorney General who was the 1<sup>st</sup> defendant.
- 2) The 1<sup>st</sup> respondent averred that on 25/9/2018 he was arrested following an accusation fabricated by the appellant at Langata police station.
- 3) The 1<sup>st</sup> respondent's evidence was that the appellant made a false report that the respondent had stolen mahogany timber

worth Kshs.1,134,000 from the appellant's workshop along Mombasa road.

- 4) The respondent was detained at the police station for 2 days and charged at Kibera law Courts.
- 5) The respondent was released on a cash bail of kshs.200,000. He was finally acquitted under Section 202 of the Criminal Procedure Code.
- 6) The appellant and the Attorney General filed statements of defence denying the respondent's claim.
- 7) The respondent's evidence in summary is that he was employed by the appellant since 2003 as a machine operator.
- 8) On 25/9/2018, the Human Resource Manager of the appellant called CID and the respondent was arrested and taken to Akila police post and later to Langata police station on allegation that he had stolen 3,240 board feet of mahogany timber worth Ksh. 1,134,000.
- 9) On 27/9/2018, the respondent was charged at Kibera court with the offence of stealing timber worth Ksh.1.3 million.
- 10) The respondent denied the charge and he was released on a bond of Ksh.200,000.

- 11) The respondent was finally acquitted in the criminal case under Section 202 of the Criminal Procedure Code for reasons that no witness went to court.
- 12) The appellant called one witness in Milimani CMCC NO. E7951 of 2021, DW 1, David Oching Madote who said that on 22/8/2018 when they reported on duty, they found pieces of timber missing.
- 13) The matter was reported to Mohan Panesar and upon reviewing the CCTV footage, they saw someone had covered the camera. They saw that a lorry had gone to the yard. The matter was reported to security company Secure Kenya and police took over the case.
- 14) The trial court found the appellant and the attorney general liable jointly and severally for false arrest, unlawful detention and malicious prosecution and she awarded the respondent damages of Kshs.1,000,000 together with costs and interest from the date of the judgment until payment in full.
- 15) The appellant has appealed against the said judgment on the following grounds;

- i. That the learned trial magistrate erred in law and in fact by failing to appreciate the long established principle of stare decisis, precedent law thus bringing law on malicious prosecution into confusion and more-so in the instance where malice, improper or wrongful motive, fabrications, spite or improbable cause was never demonstrated.***
- ii. The learned trial magistrate failed to appreciate that the appellant had been wrongly joined in the suit as the claim for damages for unlawful arrest, false imprisonment and malicious prosecution since the proper party is the Attorney General.***
- iii. The learned trial magistrate grossly misapplied the law on malicious prosecution as she failed to appreciate that it is trite law that the mere fact that a person has been acquitted of the criminal charge does not necessarily connote malice on the part of the Director of Public Prosecutions.***
- iv. The learned trial magistrate erred by failing to uphold an appreciate that an acquittal and/or discharge in a criminal prosecution should not necessarily lead to a cause of action in a malicious prosecution law suit.***
- v. The learned trial magistrate erred in law and in fact in failing to uphold the 1<sup>st</sup> respondent did not meet the threshold of malicious prosecution as no malice was ever demonstrated.***
- vi. The learned trial magistrate failed to appreciate that the appellant was acquitted under Section 202 of the***

***Criminal Procedure Code, and which acquittal was technical as the veracity of the available evidence was never tested.***

- vii. That the learned trial magistrate erred in law by failing to cogently evaluate evidence on record and submissions by the appellant thus arriving at an erroneous decision.***
- viii. The learned trial magistrate erred in law and in fact by taking into consideration extraneous matters thereby arriving at erroneous decisions to the prejudice of the appellant.***
- ix. The learned trial magistrate erred in law and in fact by failing to appreciate the impeccable defence of the appellant herein and thereby arrived at a grossly erroneous conclusion in awarding general damages of Kshs.1,000,000 special damages of kshs.200,000.***
- x. The learned trial magistrate erred both in law and in fact in delivering a contradicting judgment wherein the court on one side noted that the 2<sup>nd</sup> defendant/appellant had a reasonable and probable cause to believe tin the plaintiff's guilt and thereafter went further to state that the criminal court put the plaintiff on his defence indicative of establishment of a prima facie case, then on the converse held that the defendants were malicious, dishonest, unreasonable and reckless in the prosecution of the plaintiff.***

16) The parties filed written submissions as follows; the appellant submitted that the 1<sup>st</sup> respondent did not prove malicious

prosecution. The appellant argued that the mere fact that a person has been acquitted of a criminal charge does not necessarily connote malice on the part of the prosecutor. The Director of Public Prosecutions preferred charges against the 1<sup>st</sup> Respondent on basis of 'a reasonable or probable cause'. The test lied with the office responsible to prosecute and not the person who made the complaint i.e., the Appellant. The Appellant cannot therefore be held liable for merely making a complaint to the Police for their investigations and prosecution thereafter by the Director of Public Prosecutions.

17) The appellant submitted that the 1<sup>st</sup> Respondent was acquitted under Section 202 of the Criminal Procedure Code, which acquittal was technical as available evidence was not tested. The 1<sup>st</sup> Respondent was not tried through the criminal process to test the veracity of the allegations against him and thus a suit for malicious prosecution against the appellant was premature and unwarranted. That further the 1<sup>st</sup> respondent having testified that there has never been any malice or bad blood between the himself and his employer, the averments of malice were not only unfounded but also unwarranted.

18) The appellant submitted that after reporting a suspected crime, it was then the duty of the Police under Article 243 of the Constitution to independently investigate the matter and arrive at the conclusion of whether or not to charge anyone with such crime. The Appellant at this point has nothing to do with the matter and cannot in any way influence or interfere with the action the police will take. The Director of Public Prosecutions (hereinafter referred to as '*the DPP*') under Section 5(1)(b) of the Office of the Director of Public Prosecutions Act, No.2 of 2013 has the sole duty of instituting criminal proceedings. In preferring those charges, the DPP is under no direction from any person. The Appellant did neither procure the charges against the Plaintiff nor drafted the charge sheet. The Appellant was neither the investigative or prosecuting officer, it cannot be held liable for malicious prosecution as the DPP has monopoly of instituting charges against the Accused Persons.

19) The appellant contended that it has a reasonable and probable cause to believe in the 1<sup>st</sup> respondents guilt and reported the aforesaid theft at Langata Police Station for the

police to undertake their independent investigations, identify culpable persons and thereafter liaise with the Director of Public Prosecutions to prefer charges. The 1<sup>st</sup> Respondent was employed as a machine operator and as such dealt with furniture products. Importantly, he confirmed to the trial court that he knew where timber is usually stored by the virtue of being key personnel in machine operations. Also, it was coincidental that the timber stolen from the company's yard was recovered at a certain workshop in Komarock and equally the 1<sup>st</sup> Respondent lives in Komarock within Nairobi County. The complaint that was made to the police was therefore premised on an honest belief devoid of any malice, fabrications or spite.

- 20) On the award of damages, the appellant submitted that the award was erroneous and that it should not be condemned to pay damages for making a complaint to the police based on an honest belief. In support the appellant cited Kenya **Tourist Development Corporation v Sundowner Lodge Limited CA [2018] eKLR** where it held

as follows on the issue of awarding damages that are not quantified:

***"It was a wholly erroneous approach on the part of the learned Judge to award some Kshs. 30 million with absolutely no foundation. There was no authority cited on quantum, no discussion, no justification and no comparable that would have led to that sum. Essentially, as Mr. Musyoka complains, the learned Judge whimsically and capriciously imposed that figure, literally plucking it out of the air. That cannot be a proper way to arrive at damages because it is a judicial exercise not an oracular pronouncement. The sum, even were it awardable would have been, with respect, impossible to comprehend, less still defend. In view of our analysis, it is plain that the appeal succeeds and the award of Kshs. 30 million in damages is accordingly set aside."***

- 21) The 1<sup>st</sup> respondent alternatively submitted that the 1<sup>st</sup> respondent was the complainant in Criminal Case Number 1223 of 2018 Republic V James Kamau Mwangi. That is not in dispute that DW1 was an employee of the appellant who relayed information to the investigating officer that was

founded on falsehoods. Based on the 1<sup>st</sup> respondent's testimony and the testimony of its employee the appellant lodged a fabricated complaint with the police and set the matter in motion.

22) The 1<sup>st</sup> respondent submitted that during the trial DW1 referred to an alleged CCTV footage, that allegedly, recorded the alleged theft of the Timber. The alleged CCTV footage was never presented in Court during the hearing inferring that the footage never existed and was a fabrication of the appellant with the intent of lodging a malicious complaint against the 1<sup>st</sup> respondent. DW1 indicated that he saw some one block the lens of the CCTV however he could not positively identify the said person. The appellant therefore had no reasonable or probable cause to lodge the complaint against the 1<sup>st</sup> respondent.

23) The 1<sup>st</sup> respondent submitted that he was acquitted under the provisions of section 202 of the Criminal Procedure Code and therefore the criminal proceedings were terminated in his favour. The 1<sup>st</sup> respondent in support of his case cited the case **of Gitau vs. Attorney General [1990]**

**KLR** cited with approval in the case of **Tobias Moinde Kengere vs. the Postal Corporation of Kenya Civil Suit No. 3B of 2016** where the Court held as follows:

***"To succeed on a claim for malicious prosecution the plaintiff must first establish that the defendant or his agent set the law in motion against him on a criminal charge Setting the law in motion" in this context has not the meaning frequently attributed to it of having a police officer take action such as effecting arrest. It means being actively instrumental in causing a person with some judicial authority to take action that involves the plaintiff in a criminal charge against another before a magistrate Secondly, he who sets the law in motion must have done so without reasonable and probable cause... The responsibility for setting the law in motion rests entirely on the Officer-in-Charge of the police station. If the said officer believed what the witnesses told him then he was justified in acting as he did and the court is not satisfied that the plaintiff has established that he did not believe them or alternatively that he proceeded recklessly and indifferently as to whether there were genuine grounds for prosecuting the plaintiff or not."***

24) The key issues arising for this court's determination in this appeal are as follows:

- (i) **Whether the learned trial magistrate erred in law and fact in finding the appellant liable for the torts of false arrest, unlawful detention, and malicious prosecution;**
- (ii) **Whether the learned trial magistrate erred in holding the appellant jointly and severally liable with the second respondent (the Honourable Attorney General); and**
- (iii) **Whether the award of general damages in the sum of Kshs.1,000,000 was excessive and unjustified.**

25) On the first issue concerning liability for malicious prosecution, the legal principles are well settled in Kenyan jurisprudence.

26) For a claim of malicious prosecution to succeed, a plaintiff must prove four essential elements:

- (i) That the prosecution was instituted by the defendant or at his instance;
- (ii) That it terminated in favour of the plaintiff;

(iii) That it was instituted without reasonable and probable cause; and

(iv) That it was actuated by malice.

27) The onus of proving the absence of reasonable and probable cause and the presence of malice rests squarely on the plaintiff.

28) In the present case, the trial magistrate found that the appellant, through its employee DW1, set the law in motion by making a complaint to the police which led to the respondent's arrest, detention, and prosecution.

29) The respondent's acquittal under Section 202 of the Criminal Procedure Code constituted a termination in his favour, satisfying the first two elements.

30) The critical question is whether the appellant acted without reasonable and probable cause and with malice.

31) The appellant's contention that it merely reported a suspected crime to the police and cannot be held liable for the independent decisions of the police and the Director of Public Prosecutions is only partially correct.

- 32) The principle from cases such as ***Gitau Vs Attorney General [1990] KLR***, as cited by the respondent, is that a complainant can be held liable if they were "actively instrumental" in causing the prosecution by providing information they knew to be false or by acting with reckless indifference as to its truth.
- 33) The trial court, having evaluated the evidence, found that the appellant's report was fabricated.
- 34) DW1 testified about a CCTV footage that was never produced in court, and the allegation that the stolen timber was recovered near where the respondent lived was not substantiated with any evidence linking the respondent to that recovery.
- 35) The appellant failed to provide any concrete basis for singling out the respondent, a long-serving employee with no prior history of dispute, as the culprit.
- 36) In the circumstances, the trial magistrate was entitled to infer a lack of reasonable and probable cause.

- 37) As for malice, which in law refers to an improper and wrongful motive, it can be inferred from the absence of reasonable cause.
- 38) Where there is no reasonable and probable cause, malice may be presumed. The trial court's finding on liability for malicious prosecution was therefore grounded on a proper evaluation of the evidence and the application of correct legal principles.
- 39) Regarding false arrest and unlawful detention, the appellant's argument that it is not the proper party to be sued for these torts has merit.
- 40) The act of arrest and detention is a function of state power exercised by police officers.
- 41) The appellant, a private entity, cannot effect an arrest. The proper respondent for claims based solely on the acts of arrest and detention is the Attorney General, as the legal representative of the government.
- 42) However, this distinction loses practical significance in this case because the appellant has been found liable for

malicious prosecution, which is the overarching tort that set the entire process in motion.

43) The appellant cannot escape liability by hiding behind the police when its own malicious complaint was the catalyst for the respondent's ordeal.

44) Concerning the second issue on joint and several liability, the finding against the appellant does not absolve the state.

45) The police have a duty to investigate complaints diligently before depriving a person of their liberty.

46) The trial magistrate found that the police, and by extension the Attorney General, also failed in this duty by proceeding on a baseless complaint.

47) The doctrine of joint and several liability is applicable where the separate wrongful acts of multiple parties combine to cause a single indivisible injury.

48) The appellant's malicious report and the state agents' failure to conduct a proper investigation before arresting and charging the respondent collectively caused his injury.

- 49) The trial magistrate's imposition of joint and several liability was therefore legally sound.
- 50) On the third issue regarding the quantum of damages, an appellate court will be slow to interfere with a trial court's award unless it is shown that the judge acted on wrong principles, misapprehended the evidence, or awarded a sum that is so inordinately high or low as to be an entirely erroneous estimate.
- 51) Awards for malicious prosecution are guided by previous awards for comparable injury to the reputation, dignity, and psychological well-being of the claimant.
- 52) The respondent was a gainfully employed individual who was arrested, detained for two days, subjected to a criminal trial, and forced to pay a substantial cash bail of Kshs. 200,000 before being acquitted.
- 53) Considering the erosion of currency and more recent authorities, an award of Kshs.1,000,000 for the trauma, stigma, and violation suffered cannot be said to be so inordinately high as to represent a wholly erroneous estimate. This court finds no basis to disturb the award.

54) In the final analysis, the appeal is devoid of merit. The learned trial magistrate correctly evaluated the evidence, applied the established principles of law on malicious prosecution, and arrived at a reasonable award for the harm suffered.

55) Consequently, the appeal is hereby dismissed in its entirety with costs to the first respondent.

56) The judgment of the trial court in Milimani CMCC No. E7951 of 2021 delivered on 16th February 2024 is affirmed.

57) Orders to issue accordingly.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this **22<sup>nd</sup> day of January, 2026.**

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**A. N. ONGERI**

**JUDGE**

In the presence of:

..... for the Applicant

..... for the Respondent