Attorney General & another v Kaaria & 5 others (Civil Appeal 27 of 2020) [2026] KEHC 756 (KLR) (27 January 2026) (Judgment)

Neutral citation: [2026] KEHC 756 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL 27 OF 2020

DKN MAGARE, J

JANUARY 27, 2026

BETWEEN

HON ATTORNEY GENERAL ..... 1ST APPELLANT

INSPECTOR GENERAL OF POLICE ..... 2ND APPELLANT

AND

ELIAS GITONGA KAARIA ..... 1ST RESPONDENT

PETER MUTEMBEI GITUMA ..... 2ND RESPONDENT

PHINEAS MUTWIRI KIRUJA ..... 3RD RESPONDENT

DENIS KIMATHI MURIUNGI ..... 4TH RESPONDENT

GEORGE GICHURU KURUJA ..... 5TH RESPONDENT

JUSTIN MUTUA MBURUGU ..... 6TH RESPONDENT

(Appeal Against Judgment and decree in Othaya SRMCC 29 OF 2017 delivered on 23.11.2018 by Hon. C.D.M. Ireri, Senior Resident Magistrate.)

JUDGMENT

1. This appeal arises from the Judgment and decree in Othaya SRMCC 29 OF 2017 delivered on 23.11.2018 by Hon. C.D.M. Ireri, Senior Resident Magistrate. The Appellants were the defendants in the lower court. The appeal was filed out of time vide leave granted on 21.07.2020. While granting leave, the court found the application for stay untenable and dismissed it.

2. The court decided the suit in the court below, entered judgment for the respondents, and awarded a sum of Ksh. 1,100,000 as damages together with costs and interest. this provoked the appeal herein, where the following grounds were raised:

1. The learned magistrate erred in fact and in law by holding that there was no probable and reasonable cause for the plaintiffs' arrest and prosecution.

2. The learned magistrate erred in fact and in law in holding that the police did not conduct any sufficient investigations when no such inference could be drawn from the evidence.

3. The learned magistrate erred in fact and in law in holding that the alleged lack/ insufficient investigations were tantamount to a lack of reasonable or probable cause or malice on the part of the police.

4. The learned magistrate erred in fact and in law in holding that the plaintiffs that the plaintiff's prosecution was malicious when the plaintiffs failed to prove actual malice, bad faith and or ill will in their arrest and prosecution.

5. The learned magistrate erred in fact and in law by considering extraneous and or irrelevant matters in reaching his decision.

6. The learned magistrate erred in fact and in law by granting the plaintiff an award of damages that was manifestly excessive in the circumstances.

7. The learned magistrate erred in fact and in law in disregarding the defendants' written submissions and by not appreciating and fully considering all material evidence on record and hence delivered an unconsidered judgment

3. Ordinarily, this court does not address the materials raised in ground 8. However, it has now become necessary to elucidate on the three concepts that were sprinkled in the ground without regard to the correct position of the law.

4. The appellants set forth several grounds that are prolix and unnecessary. Only three issues are raised:

   a. Liability for unlawful arrest, detention, and malicious prosecution.

   b. General damages.

   c. Submissions and evidence.

5. There is a document christened notice of appeal filed at page 1 of the record of appeal. It is of no importance to this case and is thus struck out. This is informed by the procedure for appeal set out in Order 42 Rule 1 of the Civil Procedure Rules, which provides:

   1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

   2. The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

6. The Civil Procedure Rules and Act do not have a provision for filing a notice of appeal. It is a complete waste of paper to file such a document. However, parties are free to file one to the court of appeal after this decision.

Pleadings

7. The matter herein started at the close of the last decade. For some strange reason, the same is still fresh in court. The Respondents filed suit against the Appellants by a plaint dated 02.08.2017. Unfortunately,

the record of appeal is so jumbled up that it is a study on how not to file an appeal. The order given in order 42 rule 13(4) is more appropriate than in this matter, where there is no chronology of documentation. The said rule provides as follows:

> Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say-
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> (a) the memorandum of appeal;
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> (b) the pleadings;
>
> (c) the notes of the trial magistrate made at the hearing;
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> (d) the transcript of any official shorthand, typist notes, electronic recording or palantypist notes made at the hearing;
>
> (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
>
> (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

8. Though there is no direction that the record be so filed, this is more appropriate for purposes of checking the proceedings and analyzing evidence without necessarily being influenced by the trial court's decision. This should be the last document filed with the decree and order granting leave. I digress.

9. The first appellant was sued on behalf of the government pursuant to his constitutional mandate. The 2nd appellant was sued pursuant to the duties carried out under *the constitution* concerning investigating, arresting and charging persons accused of offences. Nevertheless, the last part belongs squarely within the mandate of the director of public prosecution. The gamut of the case was that the Respondents were arrested and charged in Othaya SRMCCR No 722 of 2015. They averred that they were law abiding but were unlawfully arrested on 18.10.2015 and 19.10.2015 and prosecuted until 11.08.2016 when they were acquitted under section 210 for lack of evidence.

10. They averred that there was no reasonable or probable cause for their arrest and the appellants were negligent in their duty. It was averred that there were no investigations and if any, they were vitiated by bad faith, were not impartial, motivated by malice, and meant to injure the reputation of the appellants in society.

11. They contended that they underwent psychological torture during the false imprisonment, were traumatized, and were extremely humiliated. They stated that this affected their constitutional rights. They prayed for damages for wrongful arrest, unlawful detention, and malicious prosecution. They also sought general damages for loss of reputation and defamation. The aspect of defamation was dismissed. It is therefore not part of this appeal.

12. The appellants filed defence on 13.09.2017 and denied that the respondent was maliciously prosecuted, wrongfully arrested, and acquitted. They averred that the prosecution, arrest was with probable cause and justified, and in execution of the second appellant's statutory duty. Particulars of the statutory duty were set out. There was a denial that a demand notice was given. The defence was a classic defence falling under the category of a mere denial. None of the factual propositions in the plaint were traversed in the defence.

Proceedings

13. Parties agreed that the 1st, 3rd, and 6th respondents to give direct evidence in court. Witness statements of the 2nd, 4th, and 5th respondents be adopted for purposes of quantum and liability. Documents in a list dated 2.08.2017 were adopted as exhibits, 1-5. The documents on the supplementary list were to be produced by witnesses.

14. The 6th Respondent testified as PW1. He stated that he was arrested on 18.10.2015. in connection with an alleged bank robbery in Othaya. Upon cross-examination, he indicated that he had not joined Equity Bank as a party to the case, which had lodged the initial report leading to his arrest. He further testified that he was detained in police custody for five days and for additional days thereafter, before being admitted to bond in the sum of Kshs. 3,000,000/=. Owing to his inability to raise the said amount, he remained in remand.

15. He attributed his arrest and continued detention to what he described as shoddy investigations conducted by the police. He denied any involvement in the alleged fraudulent registration of SIM cards through an unnamed entity. He further testified that as a consequence of the arrest and prosecution, he lost both a scholarship and a prospective employment opportunity. He stated that he was only informed of the reasons for his arrest approximately two hours later, while at the Railway Police Station.

16. He stated that he was arrested as he was found cleaning an office at Asterisk Technologies Company. He stated that the line in question was registered by Irene Kendi in Nyeri and not the above company.

17. PW2 was the third Respondent. He testified and adopted his witness statement dated 3.08.2018. He produced exhibits 6 and 7, showing that he was unable to resume his studies. He stated that he was working at Asterisk Technologies Company between March 2014 and December 20214. He stated that he was arrested and recorded his statement. He stated that he was granted bond but did not raise the same. The police have requested time to investigate. He stated he was working at Asterisk Technologies Company with the second respondent only. He stated that he was not involved in SIM card registration; he was just an office assistant.

18. On re-examination, he stated that he was arrested in Nairobi at his place of work. He stated that the court found there was no evidence to link him to the crime.

19. The first Respondent testified as PW3. He stated that he was an ICT expert working in the name and style of Asterisk Technologies.

20. He reiterated the contents of the plaint as they provide IT and related services. They develop and host websites for various clients ranging from government to individuals.

21. He stated that he was asked to report at the DCI offices, Nairobi. He went and found DCI officers from Othaya. He was arrested in connection with a robbery. He was taken to Chinga police station and informed that he was being charged with robbery with violence.

22. He recalled that PW2 was an intern in Asterisk Technologies between March and December 2014. he had issued PW2 a letter date 13.11.2014. He stated that the second respondent had never worked for him, though he was a brother-in-law. Upon discovery of who had the subject line, they wrote to the investigating officer to withdraw the case. He stated that when a line is dormant, it is deregistered and reassigned. It can be reissued. He stated that they did not deal with the issuer of the line, one Irene Kendi.

23. He later produced audited statements. he stated that the line is alleged to have been used on 24.03.2015. The said date is unrelated to the alleged robbery.

24. On cross-examination, he stated that the second respondent was a relative and not working for him. he stated that the 5th respondent had just visited the 3rd respondent and had no connection with registration at all. The 6th respondent used to clean his offices on weekends as a student. none of the respondents ever registered sim cards. he stated that they were discharged pursuant to section 210 of the CPC.

25. The second respondent testified as PW4. He stated that he was a student at a university in Nairobi. He stated that he was an orphan and the community could not support him in 2016 due to the case. he stated that he did not work for Asterisk Technologies but occasionally visited PW3, who was a relative. He stated that he had gone to visit the 6th respondent when he was arrested. He denied ever registering Sim (Subscriber Identity Module) cards. He stated that he was charged with conspiracy to commit an offence, which he had not committed.

26. PW6 was the 5th Respondent; he adopted his statement. he stated that he had gone to Kenya Railways Police Station to enquire why his brother, the 3rd respondent, was arrested. Instead, he was arrested. He denied knowing the first respondent and had never worked for him. The defendants closed their case without calling witnesses.

Appellants' Submissions

27. The appellants filed submissions dated 17.09.2024. They submitted that the elements of malicious prosecution were settled by the High Court sitting in Kakamega 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.

28. They further submitted there was no evidence produced to show unlawful arrest, charging and prosecution; they then set out a series of facts not in the record, which I shall proceed and ignore. Reliance was placed on the case of Kagane vs Attorney General (1969) E.A 643. They said that there must be an improper motive in setting in motion the persecution. They sought refuge in the case of Joseph C. Mumo V Attorney General & Another [2008] KEHC 3235 (KLR), where, RN Nambuye J, as she then was, held as follows:

> Liability for wrong done attaches only where there is proof of spite, ill-will and improper motive as holding otherwise would paralyze police action to the detriment of vindication of justice. This being the position the duty of this court is to determine whether on the facts displayed herein spite, ill-will, and improper motive have been demonstrated.

29. The part referred to in submissions is not part of the court's determination, but submissions by counsel. However, the part quoted above will suffice. They further submitted that the acquittal was satisfied. However, acquittal itself does not amount to malicious prosecution. They supported their submissions through the cases of Mbowa vs. East Mengo District Administration [1972] EA 352, Nzoia Sugar Company Limited vs. Fungutuli [1988]) eKLR, and of James Karuga Kiiru v Joseph Mwamburi and 3 Others (2001) eKLR.

30. I directed the respondents to file submissions, which I am still awaiting.

Analysis

31. 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.

32. 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. The principles upon the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions. However, 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.

33. 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.

34. The court will, however, not interfere with the exercise of discretion, unless the same was not exercised judiciously as held in the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

35. The same applied to findings of fact. The court cannot differ with such findings unless they are not justified. the court must be caution in so doing. In the case of Peters vs Sunday Post Limited [1958] EA 424, court therein rendered itself as follows: -

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

36. The first handicap the appellants run into is that no evidence was tendered on their behalf. Ipso facto, the factual matrix set out in the respondent's case stands. In other words, the appellants did not controvert the respondent's evidence. Before delving with this aspect, I must as the appellant to face a reality check. Cases are proved by evidence. The burden of proof is set out in sections 107-109 of the *evidence act* 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."

37. Though the matter arose form a criminal trial, this is not a criminal trial. It is a civil hearing where the court has to find for one part or another on a balance of probabilities. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

38. This was further enunciated in the case of Palace Investments Limited v Geoffrey Kariuki Mwenda & Dollar Auctions [2015] KECA 616 (KLR), where the Court of Appeal [J Karanja, GG Okwengu, CM Kariuki, JJA] stated as follows:

> The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. Denning J. in Miller –vs- Minister of Pensions [1947] 2 ALL ER 372 discussing the burden of proof had this to say:-
>
> > " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if

the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

39. Even in formal proof hearings a plaintiff still has a burden to proof the case brought before the court. In the case of Samson S. Maitai & Another -vs- African Safari Club Ltd & Another [2010] eKLR, the High Court in trying to defining Formal Proof stated thus:

> " ..... I have not seen judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption."

40. Therefore, attempting to sneak facts into the court file though submissions does not have any legal effect. They are inadmissible. Submissions are neither evidence not pleadings. They must be conceptualized and contextualized as a marketing language and nothing more. In the case of while addressing a scenario similar to the case herein, in Robert Ngande Kathathi v Francis Kivuva Kitonde [2020] eKLR, Odunga J stated as follows:

17.

In this case, however, instead of producing the exhibits by consent or otherwise, the parties proceeded to file submissions instead. No exhibits were produced before the trial court. The law is clear on how exhibits are to be produced. Even in a full-fledged trial, if documents are simply referred to by witnesses but not formally produced they do not acquire the status of exhibits in the case. This was the position in Kenneth Nyaga Mwige vs. Austin Kiguta & 2 Others (2015) eKLR where the court held;-

> " 16. The fundamental issue for our determination is the evidential effect of a document marked for identification that is neither formally produced in evidence nor marked as an exhibit. Is a document marked for identification part of evidence" What weight should be placed on a document not marked as an exhibit"
>
> 17. The respondents' contention is that the appellant by failing to object to the three documents marked as "MFI 1", "MFI 2" and MFI 3" must be taken to have accepted their admissibility; that at no time did the appellant contest the documents or allege that they were forgeries.
>
> 18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not became part

of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record.

19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which document was before the witness. The marking of the document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.

20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation or it authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the documents produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would be hearsay, untested and unauthenticated account.

21. In Des Raj Sharma –vs- Reginam (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa –vs- The state (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.

22. Guided by the decision cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production o the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.

23. In the instant case, we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondent's case. The documents

did not become exhibits before the trial court; they were simply been marked for identification and they have no evidential weight. The record shows that the trial court relied on the document "MFI 2" that was marked for identification in its analysis of the evidence and determination of the dispute before the court. We are persuaded by the dicta in the Nigerian case of Michael Hausa –vs- The state (1994) 7-8-SCNJ 144 that a document marked for identification is not part of the evidence that a trial court can use in making its decision.

24. In our view, the trial judge erred in evaluating the evidence on record and basing his decision on 'MFI 2' which was a document not formally produced as an exhibit. It was a fatal error on the part of the respondents not to call any witness to produce the documents marked for identification....."

18. In this case no witness was called and no document was referred to. It was not indicated that the parties were consenting to the production of certain documents filed with the pleadings. In fact, no reference at all was made to any such document. The Court was not addressed on what documents to rely on. However, the court relied on the copies of documents filed with the plaint as if there was a consent by the parties that the same were agreed documents. It also relied on submissions of the parties to which no agreed documents were annexed. Submissions, with due respect, do not amount to evidence unless expressly adopted as such. Consequently, in legal proceedings, evidence ought not to be introduced by way of submissions. As was held by Mwera, J (as he then was) in Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007:

> " Submissions simply concretise and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided."

41. The same court proceeded as follows; -

25. Whereas parties are at liberty in civil proceedings to consent to the manner of proceeding and even to compromise a suit, any compromise whose effect is to amount to the court abdicating its adjudicatory duty or one that amounts to abuse of the court's process or exposes the adjudicatory process to ridicule ought not to be accepted by the Court hook, line and sinker, simply because it is consensual. In my view whereas in adversarial systems like ours parties are at liberty to conduct their matters in a manner they deem fit, the process of doing so ought to lawful and procedural. A consent that leaves the court in a dilemma on how to make a final decision ought not to be countenanced. To quote Oder, JSC in the case of Gokaldas Tanna vs. Rosemary Muyinza & DAPCB SCCA No. 12 Of 1992 (SCU):

> " An agreement on the terms that upon finding the issue in the positive judgement should be entered in favour of the plaintiff and that upon finding the issue in the negative judgement should be entered in favour of the defendants was objectionable on at least two grounds. The first is that by doing so the parties sought to tie in advance the hands of the learned Judge in his judgement. The parties also appeared to have attempted to oust the functions of the court to arbitrate fairly the dispute between the parties and to come out with decisions that appeared just in the opinion of the court. This, parties cannot and should not do. The second objection is that the agreement would have the effect of asking for a judgment in favour of one or other of the parties, whether or not such a judgment was contrary to any legal provisions".

42. Mwera J, in the case of Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993, posited as follows when postulating on the role of submissions. He stated that they are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim :

> " Indeed, and strictly speaking, submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So, submissions are not necessarily the case."

43. Submissions are not, strictly speaking, part of the case, the absence of which may do prejudice to a party. Their presence or absence does not in any way prejudice a case as held in Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749, the Court held that:

> " As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

44. The Court of Appeal was more succinct in that Submissions cannot take the place of evidence when they addressed the question in the case of Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR:

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

45. The court will disregard facts introduced though submissions as that is not the route to admit evidence. The evidence on record remains that of the respondents. The next question is to deal with the questions posed by the appellants in their memorandum of appeal. Though they are respective the court discerns the following sub issues:

    a. Malicious prosecution

    b. Unlawful arrest

    c. Submissions

46. The facts that there was no evidence to link the respondents to the court were expressly admitted. The court will thus have regard to the law affecting admissions set out in section 21 of the *Evidence Act* as follows:

> 21. Subject to the provisions of this Act, an admission may be proved as against the person who makes it or his representative in interest; but an admission cannot be proved by or on behalf of the person who makes itor by his representative in interest, except in the following cases-
>
> (a) when it is of such a nature that, if the person making it were dead, it would be admissible as between third persons under section 33 of this Act;
>
> (b) when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable;
>
> (c) if it is relevant otherwise than as an admission.

47. The admissions on the paucity of evidence against the respondents were expressly admitted in court by agents of the Appellants. Statements by a party to suit or agent are admissible as provided under Section 18 of the *Evidence Act* provides as follows:

> (1) Statements made by a party to the proceeding, or by an agent to any such party, whom the court regards in the circumstances of the case as expressly or impliedly authorized by him to make them, are admissions.
>
> (2) Statements made by parties to suits, suing or sued in a representative character, are not admissions unless they were made while the party making them held that character.
>
> (3) Statements made by—
>
> (a) persons who have any proprietary or pecuniary interest in the subject- matter of the proceeding, and who make the statement in the character of persons so interested; or
>
> (b) persons from whom the parties to a suit have derived their interest in the subject-matter of the suit, are admissions if they are made during the continuance of interest of the persons making the tatements.

48. the foregoing is buttressed by Section 19 of the *Evidence Act* provides as follows:

> Statements made by persons whose position or liability it is necessary to prove as against any party to a suit, are admissions if such statements would be admissible as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position or is subject to such liability.

49. The effect of admission is set out in sections 34 of the *Evidence Act* as follows:

> 24. Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained.

50. During the criminal proceedings, the State conceded that there was no evidence against the Respondents. It was not a case of insufficient evidence; rather, there was none. The State further

acknowledged that the investigations were not properly conducted. In the circumstances, I will let the record speak for itself, as set out below.:

> I pray for a warrant of arrest to issue against the 5th and 6th accused. I wish to make an application; I have instructions from the Director of Public Prosecutions for the 7th-12th accused persons due to insufficiency of evidence. Charges be withdrawn pursuant to Section 87(a) of the CPC Reason. After thorough investigation, there has been no sufficient evidence, they registered phone numbers without necessarily being aware of the conspiracy to the commission of the offence...

51. What the learned prosecutor was saying is that they had no evidence to link the respondents to the charge. They bundled people into vehicles and charged them of a grave offence. They went ahead and arrested those who came to visit them. This is not just evidence of malice, but reckless disregard of human dignity and the right to be treated well. The investigating officer not only conducted shoddy investigations but also conducted ex post facto investigations, which found the appellant had caused innocent young men to be incarcerated. 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.

52. PW3 went ahead and investigated and found the number they ought to have followed. The appellant's conduct constituted a wanton disregard of the respondents' rights and amounted to an abuse of

authority by the second respondent. If a civilian could obtain such information easily, then either dire incompetence or unbridled malice could explain the arrest and prosecution of innocent persons. The admission in the lower court was fatal to the appellant's case. To make matters worse, there was no attempt to explain why the respondents were arrested. Failure to testify and explain the arrests and prosecution of the appellants must lead any reasonable tribunal to conclude that had the investigating officer testified, his evidence could have been adverse to the appellant's case. Odunga, J as he then was in Bernard Philip Mutiso v Tabitha Mutiso [2022] eKLR stated as follows:

> In this case the only people who could have explained the circumstances under which the accident occurred were Musyoka Mutiso who was ahead of the deceased, PW2 and the Appellant. PW2 gave evidence that tended to show that the accident was caused by the negligence of the Appellant while Musyoka Mutiso was not called to testify. In those circumstances one would have expected the Appellant to testify in order to controvert the evidence of PW2 but he chose not to do so. Accordingly, I find that not only was the evidence of PW2 uncontroverted but the conduct of the Appellant invited the inference that his evidence, had he testified, would have been adverse to his case as pleaded.

53. Secondly, there was an attempt to link the failure to join the Equity Bank as a party. From the evidence, a crime occurred and it was reported. There was no report by Equity Bank Plc, as far as the evidence is concerned, regarding the particular respondents. They reported theft of 30million from the bank. The appellants just rounded up everyone they could and charged them; their case then became untenable when they realized they were relying on rumours and amateur tactics.

54. From the evidence it is the second respondent that dropped the ball. They have powers under Article 245 of *the Constitution* as doth:

(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.

55. They had a duty to investigate and then send the file to the Director of Public Prosecutions for a decision to charge. The first respondent is sued on behalf of the Director of Public Prosecutions. They flouted, with abandon, their duty to serve as the sieve for cases brought due to vendetta and serious matters. They also dropped not only the ball but the net also. How could the Director of Public Prosecutions approve such charges before investigations are conducted, connecting the respondents to the case? the powers of the Director of Public Prosecutions are set out in 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).

56. This then brings me to the crux of the matter. Was there malicious prosecution? 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.

57. 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 because he was acquitted. However, where there was absolutely no evidence linking the prosecution to the accused persons, in this case the respondent, there is a finding that there was no probable cause. A probable cause cannot exist where the state admits that there was no evidence. In other words, on the evidence tendered, no reasonable and fair prosecutor could have preferred the charges when there was no evidence. For example, the arrest of PW6 was not only unconstitutional but could have been comic were it not for the seriousness of the charges the 5th Respondent was facing.

58. A student was also just cleaning an office for his keep and then was arrested. The respondent then had the audacity to place the burden of proving bad faith on the same student. Where the facts are such that no reasonable and properly informed and trained lawyer, working as a prosecutor, will have, on the

evidence on record, approved the charges, and made authority to charge, there is a presumption that the approval of the charges was either made recklessly or with ulterior motives. There is no difference in the conclusion. The idea of arresting young men and then thinking what to charge them with to keep them behind bars is not only barbaric but deserving of the wrath of this court.

59. The court found that there was no prima facie case established. On the evidence given, the respondents were charged due to recklessness and malice on the part of the state. There is no requirement that the court find actual malice. The fact that the appellant did not believe that the case was in furtherance of the cause of justice is enough to show malice. Proof of spite, ill-will, and improper motive can be inferred from circumstances. Arresting a visitor who came to see a prisoner or suspects smacks of impunity and an improper motive. causing arrest and charging where there is no scintilla of evidence, is on the face, proof of ill will. There can be no direct evidence that the police, in secret dungeons, agreed on kamata-kamata Fridays, or on funny jokes that end up in prosecution. Malice must be inferred from the conduct of the appellant.

60. The first requirement is that tort of malicious prosecution 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. this was found to have been the case. The court found that there was no case to answer as there was no evidence. more than that, the arrest was not related at all to the alleged robbery at Equity bank in Othaya. In the case of Dickson Chebuye Ambeyi v National Police Service another Peter Sifuna Wesonga another (Interested Parties), 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."

61. 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.

62. 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.

63. 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.

64. Proof of the absence of reasonable and probable cause to commence or continue the prosecution is sacrosanct. In this case, it was shown and not rebutted that there was no reasonable and probable cause. this was defined in 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."

65. Failure to rebut cogent evidence tendered by the respondent means that the facts were not disputed. There was no attempt whatsoever, during cross-examination, to link any of the respondents to a crime. They did not have evidence that had been excluded at the lower court. The proceedings show there was no evidence to prefer the charges.

66. The burden of proof remained with the Respondents to prove their case in the absence of defence evidence. The Court of Appeal in the case Charterhouse Bank Limited (Under Statutory Management Vs. Frank N. Kamau (2016) eKLR had occasion to consider the burden of proof of the plaintiff where the defendant failed to adduce evidence. The court stated in that case: -

> We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified.

67. In the case of Safarilink Aviation Limited v Trident Aviation Kenya Limited & another [2015] KEHC 2609 (KLR), A Mabeya J, while addressing on rebuttal of evidence stated as follows:

> ... failure to rebut evidence tendered by one party leaves the court with no option but to draw an inference that the facts as presented are true. See Karuru Munyoro v. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988 where Makhandia J. discussed the effect of failure to rebut evidence as follows:-
>
> > "The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon."

In the absence of evidence in rebuttal from the Defendants, I find that the Plaintiff has proved his case against the Defendants on a balance of probability. I therefore find and hold that the accident occurred as a result of the 1st Defendant's negligence.

1. Further in Karuru Munyoro v. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988 where Makhandia J posited as follows in regard to failure to rebut evidence as follows:-

> " The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon."

68. All said and done, I make the following finding on malicious prosecution. The court below was correct in finding that malicious prosecution was proved. All the elements of malicious prosecution were proved. 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.

69. Further in the case of 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.

70. The state did not have reasons to believe the guilt of the respondents. They just filed charges as a matter of routine and not in furtherance of the rights of the respondents.

71. The next question is unlawful arrest. The arrest was equally carried out without probable cause. The appellants admitted that the respondents were not connected to the offence in any way.

72. This leaves only one issue for determination, that is, submissions and considering evidence on record. the appellants did not tender any evidence. there was thus no evidence to consider. The ground is thus otiose. The ground of failing to consider submissions is not untenable. I have already addressed the position of submissions in the previous paragraphs. These are marketing languages and cannot be an independent basis for an appeal.

73. Lastly, it is untrue that the judgment was unconsidered. The court took time to analyse the evidence and arrive at a well-reasoned judgment.

74. On quantum, the appellant submitted that the court's award of a sum of Ksh 550,000/=. The respondents have submitted that each of the respondents be awarded Ksh. 5,000,000/=. The Appellant did not submit on quantum. there was thus no disregard of submission as they did not submit on this limb. each plaintiff was awarded a sum of Ksh 1,100,000/=. The court relied on the cases of George

Ngige Njoroge v Attorney General [2018] KEHC 7243 (KLR) and Patrick Murithi Mukuha v Edwin Warui Munene; Ann Warui; Mugo Nguro; Wandiri Ruiga; OCS Yusuf; Attorney General [2005] KEHC 2207 (KLR). In the latter case, a sum of Ksh. 700,000/= was awarded in 2005 for malicious prosecution for a charge of robbery with violence.

75. The principles on interfering with general damages were 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). Therefore, considering the inflation, the nature of the charges, the effect on the young men, whose business were ruined and who schooling was interrupted, a sum of Ksh. 1,100,000/= was on the lower side. However, there is no appeal to enhance the same. Consequently, the appeal on quantum is dismissed.

76. 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.

77. 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.

78. 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.

79. 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.

80. 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.

81. Costs follow the event. In this case, the event is the dismissal of the appeal. The Respondents are entitled to costs payable by the first respondent. Costs of Ksh 225,000/= will suffice.

Determination

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

    a. The appeal lacks merit and is accordingly dismissed with costs of Ksh. 225,000/=.

    b. 30 days stay of execution.

    c. Right of appeal 14 days.

    d. The file is closed.

DELIVERED, DATED AND **SIGNED** AT **NYERI** ON THIS 27TH DAY OF **JANUARY 2026**. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Mugo for the Respondents

Court Assistant - Michael