

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO. 42 OF 2014

EUNICE JACQUELINE CHEBUKWA WANJALA.....PLAINTIFF

-VERSUS-

KENYA COMMERCIAL BANK LTD.....1ST DEFENDANT

THE HONORABLE ATTORNEY GENERAL.....2ND
DEFENDANT

JUDGMENT

Pleadings

1. By a Plaint dated **23/01/2014**, **Eunice Jacqueline Chebukwa Wanjala** (*hereafter the Plaintiff*) sued **Kenya Commercial Bank Ltd** and **The Honorable Attorney General** (*hereafter the 1st & 2nd Defendant/Defendants*) seeking judgment as against the Defendants for-;
 - a) *General Damages.*
 - b) *Punitive, aggravate and exemplary damages*
 - c) *Costs of the Suit*
 - d) *Interest on (a), (b) & (c) at Court rates from date of judgment.*
 - e) *Any other relief that the Court may deem just and fit to grant.*

2. The Plaintiff averred that at all material times relevant to the suit she was an employee of the 1st Defendant at its Bungoma

Satellite Branch and on occasionally at the Nambale Satellite Branch. On or about 26/04/2002 the Plaintiff was unlawfully arrested by the Anti-Banking Fraud Unit in respect of a matter involving the 1st Defendant's River Road Branch, its Mumias Branch and Butere County Council. It was further averred that upon her arrest she was transferred to several police stations and in each case underwent inhumane and deplorable conditions.

3. It was further averred that the 1st Defendant's Chief Executive Officer noted that the procedure of arresting the Plaintiff without obtaining concurrence of the 1st Defendant was irregular as it was the mandate of the 1st Defendant's Security Manager to conduct investigations within the Bank without calling the police and without express authority if the 1st Defendant's Director of Human Resource or in his absence the Manager Employee Relations.
4. That the Plaintiff was eventually charged in **Nairobi Milimani Criminal Case Number 1114 of 2002** by the 2nd Defendant on a number of counts among them Stealing Contrary to Section 275 of the Penal Code, Handling Stolen Property Contrary to Section 322(2) of the Penal Code, Forgery Contrary to Section 349 of the Penal Code, Uttering False Documents Contrary to Section 353 of the Penal Code, Obtaining by False Pretences Contrary to Section 313 of the Penal Code, Handling Stolen Goods Contrary to Section 322(b) of the Penal Code. The Plaintiff went on to aver that on 21/02/2009 she was convicted

on two counts and fined Kshs. 100,000/- for each count or in default serve twenty-four (24) months imprisonment.

5. That being aggrieved by the conviction and sentence the Plaintiff lodged an appeal in the **High Court vide Nairobi HC Criminal Appeal No. 43 of 2009**, which upon hearing resulted in the quashing and setting aside of the conviction and sentence. The Plaintiff avers that by reason of being unlawfully arrested and maliciously prosecuted, she has suffered pain, injury, mental anguish and has suffered loss and damage. It was further averred that the High Court in its decision apologized to the Plaintiff for her ordeal leading up thereto whereas post the said judgment, she sought treatment for pneumonia and post-traumatic stress having experienced insomnia and stress.
6. The **1st Defendant** filed a statement of **defence dated 02/05/2014** denying the key averments in the plaint.
7. The **2nd Defendant on its part** filed a statement of **defence dated 08/05/2014** also denying the key allegations in the plaint meanwhile stated that the police acted within the law when they decided to conduct investigations and arrest the Plaintiff, that they were not required to obtain any concurrence to initiate the arrest and prosecution from anyone including the **1st Defendant**. It was further stated that two charges were preferred as against the Plaintiff upon which a conviction and sentence arose.

8. The suit proceeded to full hearing during which only the Plaintiff and 1st Defendant called evidence in support of the averments in their respective pleadings.

Plaintiff's Case and Evidence

9. The Plaintiff testified as **PW1**. She began her evidence by stating that she had worked for the 1st Defendant from 02/05/1974 to 12/06/2004 whereas the 2nd Defendant agents arrested her on 12/04/2002. She proceeded to adopt her witness statement dated 23/01/2014 as her evidence in chief meanwhile adduced into evidence the bundle of documents appearing in her **list of documents dated 23/01/2014, supplementary list of documents dated 20/06/2019, further list of documents dated 24/09/2019 and further supplementary list of documents dated 14/09/2020 as PExh.1-4.**
10. It was her evidence that she was the only employee of the 1st Defendant that was charged in **Nairobi Milimani Criminal Case Number 1114 of 2002** later convicted and sentenced to two (2) years imprisonment or fine of Kshs. 200,000/-. That being aggrieved by the said decision she appealed as against it vide **Nairobi HC Criminal Appeal No. 43 of 2009**, to wit, she was eventually acquitted meanwhile the Judge handling the matter apologized to her in the said decision.
11. It was her evidence that upon her arrest she was escorted to Mumias Police Station, later Kakamega Police Station,

thereafter Kileleshwa Police Station, then to Anti Banking Fraud Unit Cells and finally Langata Police Station. She stated while being detained at the respective police stations she was subjected to in humane and degrading conditions consequently affecting her health, to wit, she sought medical treatment.

- 12.** Despite being charged she continued to work for the 1st Defendant however left her employment on 12/06/2004. She asserted that the ordeal affected her personally and equally tarnished her family name, contrary to how she was viewed by her local chief, church and cultural society. In conclusion she stated the letter dated 01/07/2002 from the 1st Defendant's Chief Operating Officer captured that her arrest was irregular and gave directions on the way forward therefore it was her branch manager who instigated her arrest in the first instance, of which, was unprocedural.
- 13. On cross-examination,** she confirmed that the 1st Defendant terminated her employment on grounds of illegal and fraudulent documentation receipts. She further confirmed having been arrested at the 1st Defendant's Mumias Branch and later charged two (2) counts for theft of cheques. At the time, she was part of three (3) bank officials who approved cheques. She went on to confirm that her termination letter was on the premise issues concerning her accommodation and transport receipts being fraudulent. She further acquiesced to the fact that the letters appearing in **Pexh.4** were issued long after her arrest, conviction and subsequent acquittal in 2013.

- 14. In re-examination**, she stated that the 1st Defendant accorded her an advocate to represent her upon request. However, she asserted that there was malice on the part of the Defendants, given the selective prosecution, while there were three (3) other persons who had signed the cheques in question.

1st Defendants Case and Evidence

- 15.** On behalf of the 1st Defendant, **Alloys Ombui**, a former employee of the 1st Defendant – a Forensic Investigator – testified as **DW1**. He proceeded to adopt his witness statement filed on 12/11/2014 as his evidence in chief meanwhile adduced into evidence **Document No. 21** and **34** appearing in the **1st Defendant's list of documents dated 05/12/2014** as **Dexh.1 & 2**. The gist of his evidence was that upon receiving a report concerning fraud at the 1st Defendant's Mumias Branch, he carried out investigations in respect payments of two (2) cheques for Kshs.1,581,000/- and Kshs. 1,632,000/-. It emerged that the Plaintiff who was a Section Head, confirmed payment of the said cheques which were above her limit before contacting the drawers or requesting her manager to countersign as against the limit. He stated that the two cheques had already been cleared by the time they received instructions from the drawer to stop the payments.
- 16.** He went on to state that the account holders reported the matter to Mumias Butere Deputy DCIO however when they visited the branch to arrest the Plaintiff they requested them for an opportunity to finalize their internal investigations. Upon conclusion they recommended disciplinary action as against

the Operations Manager and the Plaintiff. They later learnt that the Plaintiff had been arrested, charged in Court and convicted whereas they did not have any hand in the decision by the police to arrest and prosecute the Plaintiff.

- 17. On cross examination, DW1** stated that the Plaintiff's duties were to authorize and deputize customer accounts within her limit which at the time was Kshs. 250,000/-, to wit, the cheques in question were way above her limit. He further stated that the 1st Defendant was not of the opinion that the Plaintiff ought to be charged. That the drawers of the cheques are the ones who reported the matter to the police whereafter the issue was investigated, the Plaintiff charged and prosecuted. He asserted that there was no malice on the part of the 1st Defendant however the Plaintiff's actions facilitated fraud and constituted negligence.
- 18. In re-examination,** he stated that the 1st Defendant's internal investigations recommended disciplinary actions for negligence whereas it could not stop the prosecution of the Plaintiff as it was not the complainant.
- 19. The 2nd Defendant** did not call any evidence in support of the averments in its pleadings.
- 20.** At the close of the trial, parties were accorded an opportunity to file submissions. Only the Plaintiff and 1st Defendant complied.

Plaintiff's Submissions

- 21.** Counsel for the Plaintiff began his submissions by restating history of the matter, pleadings and evidence by the respective parties. Pointing out that the cheque in the sum of Kshs.1,581,000/- that was relied on by the prosecution in the criminal proceedings as against the Plaintiff was approved by another employee of the 1st Defendant, certainly meant that there was malice towards Plaintiff's prosecution without proper evidence that would have put her squarely liable for fraud and loss of monies. That the Plaintiff was arrested by Anti Banking Fraud Unit officers attached to the bank therefore the 1st Defendant cannot feign being an innocent by-stander in her prosecution.
- 22.** It was further submitted, on accord of the Defendants callously and unlawful malicious prosecution, the Plaintiff lost her illustrious banking career which span over 30 years and has not been able to get gainful employment with her name tarnished and appearing in the newspapers as evidently stated in the sworn testimony and the documents produced in Court. While calling to aid the decision in **Stephen Gachau Githaiga & another v Attorney General [2015] eKLR** and **Jeremiah ole Dashii Pallangyo v Attorney General & 4 others [2021] eKLR** counsel posited that the Plaintiff suit has met all the requisite ingredients to establish a case of malicious prosecution, to wit, the Court ought to award damages. In summation, counsel urged this Court to draw guidance from the latter decision to award damages in the sum of Kshs. 4,000,000/-, punitive damages in the sum of Kshs. 1,000,000/-, special damages and costs of the suit.

1st Defendant's Submissions

- 23.** On the part of the 1st Defendant equally restating events leading hereto, the pleadings and evidence by the respective parties' counsel condensed his submission into two (2) cogent issues for the Court's consideration.
- 24.** On whether the Plaintiff had made out a case for malicious prosecution, counsel anchored his submissions on the decisions in **Murunga v The Attorney General (1976-1980) KLR 1251**, **Gitau v Attorney General [1990] KLR 13**, **Nzioa Sugar Co. Ltd v Funguti [1988] KLR 399**, **Kagane & Others v The Attorney General & Another [1969] E.A 643**, **James Karuga Kiiru v Joseph Mwamburi & 3 Others NRB CA No. 171 of 2000** and **Reproduction Health Service & 3 Others v Attorney General [2011] KEHC 14051 (KLR)** to posit that the conjunctive ingredients of malicious prosecution have not been met by the Plaintiff.
- 25.** Firstly, a complaint was not instigated by the 1st Defendant but rather Butere Mumias County Council. Secondly, the fact that the Plaintiff was put on her defence and eventually acquitted on appeal proves that there was reasonable and probable cause for her prosecution whereas it is trite that an acquittal per se does not necessarily connote malice. Thirdly, it was established during prosecution of the Plaintiff there was a fraudulent transaction in respect of two (2) cheques of which she was at the centre thus buttressing the fact that there was reason and cause for her prosecution. Fourthly, given the role the Plaintiff

played leading up to the transaction in respect of the cheques in question placed her at the center of the case before the criminal Court therefore she cannot not assert that there was malice leading up to her prosecution.

26. Penultimately, while calling to aid the decisions in **Attorney General v Peter Kirimi Mbogo & Another [2021] KEHC 5902 (KLR)**, **Brutus Nandwa Wa Ambunya v Inspector General of Police & Another [2018] eKLR**, **George Ngige Njoroge v Attorney General [2018] eKLR**, **Kenya Power & Lighting Co. Ltd v Michael Murewe & Another [2016] eKLR** and **Hartwell J.M Mwazighe v Attorney General [2021] KEHC 701 (KLR)** counsel submitted that should the Court be inclined to allow the suit it ought to decline the claim on aggravated and exemplary damages however award general damages in the tune of Kshs. 300,000/-. In conclusion, the Court was urged to dismiss the suit with costs.

Analysis and Determination

27. The Court has carefully considered the respective parties' pleadings, the evidence adduced by respective witnesses, and the parties' written submissions.

Issues for determination:-

- a. *Whether the Plaintiff has made out a case of malicious prosecution against the Defendants?*
- b. *Whether the Plaintiff is entitled to the reliefs sought?*
- c. *Who ought to bear costs?*

Whether the Plaintiff has made out a case of malicious prosecution as against the Defendants?

28. At the heart of the suit is a determination whether the Plaintiff has established on a balance of probabilities demonstrated that her prosecution as instigated was malicious by design, without reasonable and or probable cause.
29. Pertinent to the determination of the said issue are the pleadings, which forms the basis of the respective parties' case before this court. See-; **Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91**. Akin to pleadings is evidence in support of the pleadings. The applicable law as to the burden of proof is found in **Section 107, 108 and 109** of the **Evidence Act**. In **Karugi & Another v Kabiya & 3 Others (1987) KLR 347** the Court of Appeal stated that-:

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....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.”

30. As stated earlier, the Plaintiff's cause of action was founded on malicious prosecution. Further, as rightly submitted by the 1st

Defendant, the conjunctive elements to be proved in an action founded on malicious prosecution are well settled since **Mbowa v. East Mengo District Administration [1972] EA 352**, where the East African Court of Appeal 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 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 other words, the defendant must have acted, in instituting*

criminal proceedings, with an improper and wrongful motive, that is, he must have had, “an intent to use legal process in question for some other than its legally appointed and appropriate purpose” Pike v. Waldrum [1952] 1 Lloyd’s Rep. 431 at p. 452; 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...”

See also **Murunga v Attorney General** (supra)

- 31.** The above ingredients must be established for a claimant to succeed in a cause of action founded on malicious prosecution. The undisputed events leading hereto are that the Plaintiff was at all material times relevant to the suit an employee of the 1st Defendant at its Mumias Branch. On 26/04/2002, the Plaintiff was arrested, charged and convicted on two (2) counts of obtaining by false pretense in respect of Kshs. 1,632,000/- & Kshs. 1,581,000/ later sentenced. On appeal the conviction was quashed and sentence set aside. These facts formed the basis of the Plaintiff’s causes of action before this Court.
- 32.** At the outset it is not in dispute that the criminal proceedings terminated in favour of the Plaintiff, after appellate proceedings wherein she was acquitted of the charges she had been convicted of, before the lower Court. The forested in essence resolves ingredient **(4)** in **Mbowa** (supra). However, as a preliminary issue *in limine*, the Court must establish whether

the 1st Defendant set into motion the criminal proceedings as against the Plaintiff.

- 33.** In his testimony **DW1** stated that upon receiving a report concerning fraud at the 1st Defendant's Mumias Branch he carried out investigation in respect of two (2) cheque payments wherein it emerged that the Plaintiff whom at the time was Section Head, had confirmed the payments which were above her limit before contacting the drawers or requesting her manager to countersign. He further stated, it was the account holders of the said cheques that reported the matter to Mumias Butere DCIO whereas when the latter visited their branch they sought for an opportunity to finalize internal investigations. That 1st Defendant only came to learn later of the Plaintiff's arrest.
- 34.** A cursory review of **Dexh.1**, it can be garnered therefrom, that the 1st Defendant, indeed conducted its internal investigations wherein recommendations were to the effect that severe disciplinary action ought to be taken against the Plaintiff for negligently abetting fraud by confirming cheques "*.....before obtaining confirmation form the customer and without referring the same to the attention of her superiors...*". It was equally recommended that the customer was to blame for the loss incurred as there was no stop-payment for the paid cheques; its cashier, the custodian of the cheque book, were alerted in advance to act.
- 35.** From the evidence on record, the Court is not convinced that the 1st Defendant set into motion the criminal proceedings

against the Plaintiff. The undisputed facts earlier captured in this judgment are that the Plaintiff was an employee of the 1st Defendant where the purported fraud took place. Further, the casualty of the said offences, to wit, the Plaintiff alongside others were charged with, was Butere County Council. As can, be garnered from the evidence, it is the latter who lodged a complaint at Mumias Butere DCIO thus setting in motion the chain of events leading up to the arrest and eventual arraignment of the Plaintiff.

- 36.** As stated in **Mbowa** (supra), “.....*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*”.
- 37.** The 1st Defendant obviously preferred an internal resolution of the matter and in their own finding arrived at the conclusion that no fraud was perpetrated by Plaintiff save for negligence. It is only after the signatories to the Butere County Council lodged a complaint, that the 2nd Defendant’s agents acted towards arresting the Plaintiff alongside others whereafter the latter were subsequently arraigned in Court. Therefore, it would be difficult to arrive at the determination that the 1st Defendant set in motion the events leading up to the Plaintiff’s arrest and prosecution.

38. Having set out the above, what presents for consideration at this juncture is whether the 2nd Defendant's agents acted without reasonable or probable cause and acted maliciously thus leading to the prosecution of the Plaintiff. According to Halsbury's Laws of England, 4th Edition – Reissue, Vol.45 (2):-

“[R]easonable and probable cause for a prosecution has been said to be an honest belief in the guilt of the accused person based on a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of an accuser, to the conclusion that the person charged was probably guilty of the crime”.

39. In **Murunga v Attorney General [1979] KLR 138** the Court applied the test in **Kagane & Others v Attorney General & Anor (1969) EA 643**, namely that, whether there was a reasonable and probable cause for the prosecution is primarily to be judged on the objective question whether the material known to the prosecutor would satisfy a prudent and cautious man that the accused was probably guilty.

40. The Plaintiff's evidence had earlier been set out in this judgment. That said, it is notable that the 2nd Defendant failed and or opted not to call evidence to shore up the averments in its statement of defence. DW1's evidence was to the effect that the Plaintiff was the Current Account Section Head at Mumias KCB Branch.

- 41.** That said, what this Court gathers from the totality of evidence presented before it, is that persons involved with verification and passing of cheques as good for payment were three (3) within the aforestated branch. The Plaintiff as In-Charge current accounts, one **Mr. William Kipyegon as Passing Clerk and Mrs. Joyce Wambani** as Operations Manager. It would appear that before a customer's account is debited for payment of a cheque, the above three (3) were involved in verification of signatures and or whether the account in question could be debited.
- 42.** The gist of DW1's evidence can equally be gathered from Dexh.1. It was to the effect that the Plaintiff usurped powers by clearing cheques, which were beyond her limit of Kshs. 250,000/- without contacting the drawer or referring to her superiors. It was on the backdrop of the above and investigation by the 2nd Defendant's agents that the Plaintiff was charged with the offence of Obtaining by false pretenses contrary to Section 313 of the Penal Code in respect of the cheques in the sums of Kshs. 1,632,000/- and Kshs. 1,581,000/-.
- 43.** With the above in reserve, the question that begs is whether there was reasonable or probable cause for charges being preferred as against the Plaintiff. It is pertinent to note that alongside the above charges preferred as against the Plaintiff here co-accused were charged with other offence such as Stealing Contrary to Section 275 of the Penal Code, Handling Stolen Property Contrary to Section 322(2) of the Penal Code, Forgery Contrary to Section 349 of the Penal Code and Uttering

False Documents Contrary to Section 353 of the Penal Code. It would appear that the gist of the 2nd Defendant's case as against the Plaintiff and her co-accused was premised on a conspiracy between officials of Butere County Council and 1st Defendant's employees in the theft and clearing of the cheques in the sums of Kshs. 1,632,000/- and Kshs. 1,581,000/-.

- 44.** While I concur with the Plaintiff's evidence that she was merely performing her duties when she cleared the cheques in question, no explanation was offered as to why she cleared cheques in excess of her limit without contacting the drawer or referring to her superiors. From Pexh.3, it can be noted from the judgment in Nairobi Criminal Case Number 1114 of 2002, the Plaintiff's defence was that the checking and clearing was a collective function whereas it was not the first time she had cleared a cheque in excess of her limit meanwhile did not know any of her co-accused persons. She went on to state that by dint of her position she could approve up to a limit of Kshs. 20,000,000/-. And that given there being no stop order she performed her duties by proceeding to clear the cheques.
- 45.** With the above in reserve, reviewing the evidence including the charge sheet and the decision of the criminal Court, premised on the above it was not in dispute that the Plaintiff by her designated role was in a position to benefit from the offences she was charged with. As to whether the prosecution could prove the charges levelled as against the Plaintiff and or whether the Plaintiff benefitted, was preserved for the Criminal trial Court, of which, was in the affirmative based on the resultant judgment that was subsequently appealed.

46. In hindsight, no explanation was offered before this Court on why the Plaintiff did not refer to the drawers or her superiors in respect of the cheques in question before clearing them in excess of her limit. No evidence that she could authorize cheques up to Kshs. 20,000,000/- as purported was tendered.
47. To the forestated end, has the Plaintiff proved that the 2nd Defendant agents acted without reasonable or probable cause?
48. As to what constitutes reasonable or probable cause, recently the Court of Appeal in **Mukonya v Equity Bank Limited & another [2025] KECA 1720 (KLR)** observed that-;

“What amounts to reasonable and probable cause is the existence of a state of circumstances that would reasonably lead a prudent and conscious accuser or prosecutor to the conclusion that the suspect is probably guilty of the crime he is accused of. The four elements are conjunctive so that even in the absence of reasonable and probable cause, still, the plaintiff must prove that the prosecution was actuated by malice. In this regard, while the absence of reasonable and probable cause may be indicative of the presence of malice, the plaintiff needs to do more to demonstrate that the prosecution was actuated by malice or motivated by some ulterior reason other than a genuine pursuit of justice for the victim or in public interest.”

49. From the evidence tendered, I believe the Court has reasonably addressed itself to the fact there was reasonable and probable cause leading up to the Plaintiff’s arrest and subsequent

arraignment. Whereas officials of Butere Mumias County Council having lodged a complaint with the police, the 2nd Defendant's agents held a reasonable and probable belief in the existence of a state of circumstance that would reasonably lead to the conclusion that the Plaintiff was probably guilty of the crime she was accused of. Consequently, her arrest and charges being preferred against her.

50. That said, reasonable or probable cause ought to be considered alongside the question of malice. Here, the Court of Appeal in **Commissioner of Customs & Excise v Hasmukh Shamji Halai & 3 others [2018] KECA 669 (KLR)** pronounced itself as follows; -

“31. The final element for proof was malice. For it would not matter that there was an acquittal of the two respondents; that the commissioner was the instigator of the prosecution; and that there was no probable or reasonable cause for it, if it is established that there was no malice. All the elements must dovetail in order to establish a cause of action. As this Court stated in Nzoia Sugar Company Ltd vs Fungututi [1988] KLR 399:

“Acquittal per se on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor.”

32. In the **Githaiga case (supra)** the court explained as follows:-

“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."

51. Referring to the element of malice, the former East African Court of **Appeal in the Mbowa case (supra)** stated:-

"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 purpose other than its legally appointed and appropriate purpose."

52. The same Court in **Hassan Magiya Kiage v Attorney General & another [2017] KECA 203 (KLR)** cited with approval the words of the Supreme Court of Canada in **Nelles vs. Ontario [1989] 2SCR 170** to the effect that:

"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.”

- 53.** Was there a demonstration of malicious either out of spite or ill will, between the complainant and the prosecuting agent, to prosecute the Plaintiff? In this case, from the evidence before the criminal trial Court, it would appear that the Plaintiff attempted to make a case of there being bad blood between herself and her superior Mrs. Wambani, thus leading to her prosecution. The criminal Court dismissed this position as the Plaintiff failed to prove the same before it. Further, no evidence was equally led that there was malice or collusion between officials of Butere Mumias County Council, the 1st Defendant’s employees and the 2nd Defendant’s agents when the former reported the matter to the latter. In particular, with an intent to use the legal process in question for some purpose other than its legally appointed and appropriate purpose.
- 54.** The fact that the prosecution preferred to prosecute the Plaintiff to the exclusion of passing clerk and operations managers given the Plaintiffs specific role as in charge of current accounts at the said branch; the fact that the 2nd Defendant failed to call any witness evidence; the fact that the HC in Criminal Appeal No. 43 of 2009, quashed the conviction and set aside the sentence as against the Plaintiff; that fact that the Court in HC in Criminal Appeal No. 43 of 2009 observed that the “prosecution had no basis for charging the appellant in the first place and that the trial magistrate erred both in fact and in law in making assumptions and drawing conclusions which were not supported by the record nor by the

law applicable”, all cannot conclusively connote that the Plaintiff was maliciously prosecuted.

- 55.** At the risk of repetition, Plaintiff ought to have demonstrated malice either out of spite or ill will between either 1st Defendant’s employees or officials of Butere Mumias County Council and Investigative authorities. Shoddy investigations and or an erroneous finding by the criminal trial Court on a finding of guilt as against the Plaintiff cannot in itself connote malice without the same being specifically proved. Therefore, notwithstanding, High Court decision on appeal, the onus was still on the Plaintiff to visibly and identifiably demonstrate malice.
- 56.** As observed earlier, there was a reasonable and probable honest belief in the guilt of the accused person that would reasonably have led any ordinary prudent and cautious man, placed in the position of an accuser, to conclude that the person charged was probably guilty of the crime. Hence the complaint to police for investigation. Even where the Plaintiff was acquitted of the charge and the subsequent quashing of her conviction and setting aside of sentence in respect of the charge, it was incumbent upon her to discharge the burden of proving the various ingredients required in a successful suit for malicious prosecution.
- 57.** In my own evaluation of the trial evidence, the Plaintiff’s case did not rise to the standard of proof on a balance of probabilities of the ingredients necessary to establish a case of malicious prosecution against the Defendants. Stated another

way, under Section 107 of the Evidence Act, the burden of proof lay with the Plaintiff and because her evidence did not support the facts pleaded, she failed as the party with the burden of proof.

58. In the result, this Court finds the Plaintiff's suit lacks merit and will accordingly dismiss it with no order as to costs.

Orders accordingly.

Delivered Dated and Signed at Nairobi this 5th day of February, 2026.

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JANET MULWA.

JUDGE