

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CIVIL APPEAL NO. E021 OF 2022

JAMES OMARO OPIYO.....
.....APPELLANT

VERSUS

MORGAN ONYANGO OCHIENG.....1ST
RESPONDENT

ATTORNEY GENERAL.....2ND
RESPONDENT

*(Being an Appeal from the Judgement and Decree of **Hon. B. Omollo, Resident Magistrate** delivered on 23rd February, 2022 in Kisumu CMCC No. 53 of 2018).*

JUDGEMENT

1. This appeal was preferred by **James Omaro Opiyo** (hereinafter referred to as “the Appellant”), against the judgement and decree of **Hon. B. Omollo**, Resident Magistrate delivered on 23rd February, 2022 in **Kisumu CMCC No. 53 of 2018.**
2. In the matter before the lower court, the Appellant herein was the 1st Defendant while the 1st and 2nd Respondents were the Plaintiff and 2nd Defendant respectively.
3. In the plaint dated 30th January, 2018 and filed in the lower court on 31st January, 2018, the 1st Respondent sought the following reliefs against the Appellant and the 2nd Respondent;
 - a. **General damages for unlawful arrest and detention.**

- b. General damages for malicious prosecution.**
- c. Special damages in the sum of Ksh.50,000/- for legal fees.**
- d. Costs of the suit.**
- e. Interest on (a), (b), (c) and (d) above.**

4. In precis, the 1st Respondent pleaded in the plaint that on or about the 21st of October, 2015, the Appellant, without any probable cause made a false and malicious report at Koru Police Station to the effect that the 1st Respondent had stolen Ksh.44,000/- from the Appellant and thereby caused the police to charge the 1st Respondent at Tamu Senior Resident Magistrate's Court vide Tamu SRMCCR Case No. 524 of 2015 with the offence of stealing contrary to *Section 275 of the Penal Code*
5. The 1st Respondent pleaded the following particulars of malice by the Appellant and the 2nd Respondent:

Particulars of malice by the 1st Defendant (the Appellant).

- 1. Making a falsified and dishonest allegation of theft of Ksh.44,000/- against the Plaintiff.**
- 2. Causing the 2nd Defendant to irregularly, illegally and unlawfully effect arrest on an unfounded and baseless allegation.**

Particulars of malice by the 2nd Defendant (the 2nd Respondent).

- 1. Effecting the Plaintiff's arrest without verifying whether there was reasonable or probable cause to do so.**
 - 2. Effecting the Plaintiff's arrest without verifying the truthfulness of the allegation of theft.**
 - 3. Institution, maintenance and continuation of criminal proceedings in the absence of reasonable and proper cause of action of the allegation of theft.**
6. The 1st Respondent pleaded that as a result of the false charge, his alleged unlawful arrest, confinement and malicious prosecution which was eventually terminated in his favour, he suffered great loss and damage for which he sought the above reliefs against the Appellant and the 2nd Respondent, which included monies expended as legal fees in the criminal case amounting to Ksh.50,000/-, which he pleaded as special damages.
7. The Appellant resisted the 1st Respondent's suit by filing a statement of defence and counterclaim dated 16th March, 2018.
8. In his defence, the Appellant denied the 1st Respondent's allegations, particularly that he made a false and malicious report to the police and that the arrest and confinement of the 1st Respondent and subsequent prosecution was caused and actuated by malice on the part of the Appellant. The Appellant

denied the particulars of malice that the 1st Respondent listed as being attributed to him.

9. The Appellant further denied the 1st Respondent's claim that he was entitled, as against the Appellant, to the reliefs that he prayed for in the plaint. He pleaded that all he did was to make a report to the police but denied that he was capable of causing the 1st Respondent to be apprehended and charged, as he was not a police officer or investigator. He stated that he only exercised his civic duties by reporting the loss of his money to the police. He prayed that the 1st Respondent's suit be dismissed with costs.
10. In his counterclaim, the Appellant (as a Counterclaimant) pleaded that the 1st Respondent fraudulently swindled him of Ksh.44,100/- on 21st October, 2015 and sought for judgement for the said amount, interest on the same and costs of the counterclaim. The Appellant listed the following particulars on his claim:

Particulars of the Plaintiff's (the 1st Respondent's) fraud:

- 1. Obtaining access to the Counterclaimant's contact details by false pretence.**
- 2. Stealing Ksh.44,100/- through various mobile number requests.**
- 3. Giving misleading information to the Counterclaimant's shop attendant.**

11. The second Respondent did not enter appearance despite having been served with summons to enter appearance and the plaint, to the satisfaction of the court.
12. The 1st Respondent filed a reply to defence and defence to counterclaim, wholly resisting the Appellant's counterclaim, in respect of which he sought an order for dismissal, with costs.
13. The matter proceeded before the trial court and the court, in its judgement delivered on 23rd February, 2022, concluded that the 1st Respondent had proved his case on a balance of probabilities against the Appellant and the 2nd Respondent and proceeded to enter judgement against the two parties jointly and severally as follows:
- a. General damages for malicious prosecution in the sum of Ksh.300,000/-.**
 - b. Special damages in the sum of Ksh.50,000/-.**
 - c. Costs of the suit.**
 - d. Interest on general damages from the date of the judgement until payment in full.**
14. Being aggrieved with the judgement of the trial court, the Appellant herein preferred the instant appeal vide the

memorandum of appeal dated 20th March, 2022, based on the following grounds:

1. **The learned trial Magistrate erred in both law and fact in entering judgement for the 1st Respondent and dismissing the Appellant's counterclaim.**
 2. **The learned trial Magistrate erred in both law and fact in misconstruing evidence and thereby arriving at a wrong finding.**
 3. **The learned trial Magistrate erred in both law and fact in failing to consider the Appellant's submissions before arriving at her decision.**
 4. **The learned trial Magistrate erred in both law and fact in failing to appreciate that the Appellant was merely executing his civic duties by notifying the police of a theft in his business premises and hence ought not to have been punished for the same.**
 5. **The learned trial Magistrate erred in both law and fact in failing to appreciate that the police had all the reasonable and probable cause to execute the arrest and prosecution of the 1st Respondent and which police duties the Appellant had no control over.**
 6. **The judgement was against the weight of evidence.**
15. The Appellant proposes that the appeal be allowed with costs and that the judgement of **Hon. B. Omollo** be set aside

in its entirety and be substituted with an order dismissing the 1st Respondent's suit.

16. This being the first appellate court, I am required under *Section 78 of the Civil Procedure Act* and as was espoused in the case of ***Selle v Associated Motor Boat Co. Ltd [1969] E.A. 123*** to reassess, reanalyze and reevaluate the evidence adduced in the Magistrate's Court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.

17. In ***Selle***, Sir Clement De Lestang observed that:

“This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had 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.”

18. Going to the evidence before the trial court, the 1st Respondent testified as PW1 and adopted the contents of his

witness statement filed before the trial court, dated 30th January, 2018.

19. In his statement, the 1st Respondent stated that on 21st October, 2015, the Appellant lodged a false, malicious and baseless and unreasonable report to Koru Police Station, whereby he alleged, without any colour of right or justification that the 1st Respondent had stolen his cash Ksh.44,000/-.

20. The 1st Respondent further stated in his statement that following the report to the police by the Appellant, the 2nd Appellant's agents (the police) arrested the 1st Respondent on 23rd October, 2015 and that he remained in police custody until 26th October 2015 when the police caused him to be charged at Tamu Senior Resident Magistrate's Court vide Tamu SRMCCR Case No. 524 of 2015 with the offence of stealing contrary to *Section 275 of the Penal Code*, where he denied the charge.

21. The 1st Respondent further stated that the trial in the criminal case proceeded and was ultimately terminated in his favour, whereby he was acquitted under *Section 210 of the Criminal Procedure Code* on 2nd March, 2017.

22. The 1st Respondent stated that his apprehension by the police was illegal and unlawful and was instigated by the

Appellant, driven by malice and lack of reasonable and/or probable cause. He stated that as a result of the unlawful arrest, illegal confinement and subsequent prosecution, which he termed as malicious, he suffered “from the disheartening experience” unbearable mental anguish and anxiety and great loss and damage for which he sought compensation. The 1st Respondent stated that he expended Ksh.50,000/- for legal representation in the criminal matter, which he also sought to recover from the Appellant and the 2nd Respondent.

23. The 1st Respondent produced the following documents in support of his case:

- A copy of a receipt for Ksh50,000/- expended towards legal fees in the criminal matter - PExh3.
- A copy of a notice to institute proceedings against the Attorney General dated 18th October, 2017, served on 24th October, 2017 - PExh4.
- A copy of a letter from the Attorney General dated 24th October, 2017 copied to the 1st Respondent's Advocates acknowledging receipt of the notice dated 18th October, 2017 - PExh5.

24. Upon being cross-examined, the 1st Respondent told the trial court that he got to know the Appellant on 23rd October,

2015 when the Respondent accused him of stealing his money. He stated that on 21st October, 2015, he travelled to Fort Tenan to visit his parents and denied having stopped over at the Appellant's Mpesa outlet.

25. The 1st Respondent told the trial court that he had only two mobile numbers; Safaricom line 0723****64 and Equitel line 0763****11 and denied having ever owned any other number. He stated that he had nothing to do with the Appellant's money that was allegedly stolen. He stated that he got to know **Nancy Auma Otieno** (DW2) and **Winnie Akinyi Otieno** (DW3), both of whom testified against him in the criminal case, well after he had been charged. He stated that one **Humphrey Ochiewo** was well known to him, having been his schoolmate in high school.

26. Upon re-examination, the 1st Respondent reiterated that the report that was made to the police by the Appellant led to his arrest and subsequent arraignment and prosecution.

27. **Paul Ochieng Onono**, a Court Administrator at Tamu Law Courts testified before the trial court as PW2 and produced the following documents as exhibits:

- A copy of the charge sheet in the criminal case - PExh1.
- A copy of the proceedings in the criminal case - PExh2a.

- A copy of the ruling in the criminal case - PExh2b.

28. The 1st Respondent closed his case at that point.

29. The Appellant testified as DW1 and adopted the contents of his undated statement that was filed in court on 19th March, 2018. He stated in his statement that he was a businessman who operated an Mpesa outlet and that on 21st October, 2015, he lost Ksh.44,100/- from his outlet, information that he was given on phone by his shop attendant **Nancy Auma Otieno** (DW2). He stated in his statement that he immediately proceeded to his outlet where DW2 told him that a man had approached her and pretended that he wanted to purchase a phone but claimed that he did not have sufficient cash and requested DW2 to use her phone to ask to be sent some money, claiming that his phone had run out of charge. DW2 informed DW1 that it was during that time that DW2 lost the money.

30. The Appellant further stated in his statement that he went to a neighbouring Mpesa outlet where they found the attendant **Winnie Akinyi Otieno** (DW3) and upon describing the man who had been to the Appellant's Mpesa outlet, DW3 stated that a man fitting that description had approached her with the same trick but did not manage to steal any money from her outlet.

31. DW1 stated in his statement that later that evening, he was informed that the fraudster was a friend to one **Humphrey Otieno Ochiwo** (DW4). The matter was reported to the police the next day.

32. DW1 further stated in his statement that on 23rd October, 2015, a lunch date was arranged with at Kakwacha Hotel in Kisumu with the intention of nabbing the fraudster and that when the 1st Respondent arrived, DW2 stealthily went and saw him and confirmed to the Appellant that the 1st Respondent was the man who had defrauded her. The 1st Respondent was promptly arrested and taken into police custody. He was subsequently charged before Tamu Senior Resident Magistrate's Court.

33. The Appellant stated that he had a justifiable cause to believe that the 1st Respondent had swindled DW2, hence his report to the police, adding that he is not the one who arrested and charged the 1st Respondent.

34. The Appellant produced the following documents in support of his case:

- A copy of a single business permit for his Mpesa outlet - DExh1.

- A copy of an agreement/contract dated 17th September, 2013 between Mpesa and the Appellant - DExh2.
- A copy of an Mpesa statement - DExh3.

35. Upon cross examination, the Appellant admitted that he was the complainant in the criminal case. He stated that he relied on information that was given to him by DW2 and that the 1st Respondent was not known to him prior to his arrest.

36. On being further cross examined, the Appellant stated that his Mpesa agent number was 46**75 and the till name was Carol Enterprises. He stated that as per the Mpesa statement (DExh3), the loss of money occurred when several transactions were done transferring money to other numbers in the registered names of **Stanley Ndoli, Matthew Sabul** and **Michael Njoroge** and that none of the names or corresponding numbers belonged to the 1st Respondent. He stated that he did not know of any connection between the three names and the 1st Respondent and that he did not know his Safaricom number.

37. **Nancy Auma Atieno** testified as DW2 and adopted as her evidence the contents of her undated witness statement filed before the trial court on 19th March, 2018.

38. In her statement, DW2 stated that she worked for the Appellant at his shop where the Appellant sold phones and operated an Mpesa outlet. She stated that on 21st October, 2015, a man visited the shop and expressed an intention to buy a Tecno cellphone but stated that he did not have sufficient cash for the purchase. The man requested DW2 for a cellphone so that he could make a call and be sent money, stating that his cellphone was running out of charge.

39. DW2 further stated that he gave the man a cellphone and that it later occurred to her that when purporting to make a call, the man edited the Appellant's number 0727****47 which the witness had saved as "**Baba Agal**" and saved another number in that name, such that incoming messages from that other number appeared in the name "**Baba Agal**" as the sender, as though they had been sent by the Appellant.

40. DW2 further stated in her statement that later at about 1.48pm, she received and picked a phone call whereby the caller appeared in her cellphone as "**Baba Agal**". The call was unclear as the caller was in a noisy place. Shortly thereafter, she received a message from the same number saved as "**Baba Agal**" instructing informing her that the caller was in a noisy place and instructing her to send Ksh.6,800/- to cell phone number 0725****08; Ksh.9,700/- to 0727****60; Ksh.10,200/- to 0725 ****08; Ksh.12,800/- to

0727****60; and Ksh.4,600/- to 0727****09. Believing that the message was from the Appellant, DW2 obliged and sent money to the numbers, save for the number 0727****09/- as the balance in her Mpesa phone was not sufficient to complete that transaction. She stated that in total, she sent Ksh.44,100/- to the other numbers. She again attempted to call the number that had sent the message but received another text that the subscriber was in a noisy place.

41. DW2 stated that she got suspicious and realized that she had been defrauded as her employer's number as saved in her phone had been edited and another number input as his number. She quickly informed a neighbour one **James Omaro Opiyo** and the two embarked on searching for the man who had been to the Mpesa outlet and were informed by DW3 that a man fitting the description of the fraudster had been at her (DW3's) Mpesa outlet and had attempted a similar fraudulent scheme but was unsuccessful.

42. DW2 further stated that on a date that she did not state, the Appellant asked her to travel to Kakwacha Hotel in Kisumu town for lunch. Upon arrival, the Appellant asked her to go into the hotel and confirm whether a man who was seated with DW4 was the one who defrauded her. She went in and confirmed that the man - the 1st Respondent - was the one who had allegedly defrauded her at the Mpesa outlet. The 1st

Respondent was subsequently arrested and later charged in the Tamu Court criminal case.

43. On being cross examined, DW2 told the trial court that she saw the 1st Respondent for the first time during the trial of the criminal case where she was a witness. She further stated that she did not know how the man who visited the Mpesa outlet knew that she had saved the Appellant's name in her phone as "**Baba Agal**".

44. **Winnie Akinyi Otieno** (DW3) testified and adopted her undated witness statement filed in court on 19th March, 2018 as her evidence in chief.

45. In her statement, DW3 stated that on an unstated date in the year 2015, a man approached her at her father's Mpesa outlet where she was working and requested that she sends money directly to "another person" but DW3 declined as the service provider did not allow such transactions. He then asked her for her phone so that he would talk to the "other person" to confirm if he was available as his phone was low on charge. He shortly returned DW3's phone and left, claiming that the "other person" had already received the cash that he needed.

46. DW3 stated further that about 30 minutes later, she received a message saved under the name "**Dad**" asking her

to send Ksh.12,000/- to the number. As she did not have sufficient cash, she responded to the message, believing that it was her father who had sent it, that she was low on cash. Immediately, a response was sent to her requesting for Ksh.8,000/- but she could not honour it as the money she had was not sufficient.

47. DW3 stated that a while later, another message was sent to the witness asking for Ksh.4,000/- under the guise that the sender was her relative one Fred, who was nearby. She walked to Fred's place of work where she met him but he denied having sent the text. That is when DW3 realized that the man who had visited her place of work was a fraudster. She learnt that the man had attempted similar fraudulent schemes in other nearby Mpesa outlets.

48. DW3 stated that she was later called upon to identify the man in an identification parade that was conducted at Koru Police Station and that she was able to positively identify him.

49. Upon being cross examined, DW4 stated that she first saw the 1st Respondent at the Mpesa outlet where she worked and that he was the man who attempted to defraud her. She stated that the messages from the 1st Respondent were sent from the number 0727****47.

50. The last witness that the 1st Respondent called was **Humphrey Otieno Ochiwo** (DW4), who adopted his undated statement filed on 23rd April, 2018.

51. In his statement, DW4 stated that he had known the 1st Respondent for more than 6 years as the two were schoolmates in secondary school and played football together. He stated that on 21st October, 2015 at about 1.00pm, he was at Koru bus station when the 1st Respondent alighted from a vehicle and greeted DW4. The two then parted ways.

52. DW4 stated that later that day, he was informed that there was a man who had been involved in defrauding Mpesa outlets and that the man had been seen with DW4 earlier that day. A description of the man was given to the witness, which included his physique and the clothes that he had - jeans and a pink shirt - and the description fitted that of the 1st Respondent, in DW4's view.

53. DW4 stated that a plan was made and he invited the 1st Respondent to Kakwacha Hotel in Kisumu town, where DW2 went and identified the 1st Respondent as the fraudster, following which the 1st Respondent was apprehended and taken into police custody.

54. DW4 stated on being cross examined that he was not present when the 1st Appellant defrauded DW2.

55. The defence case was closed at that stage.

56. After considering the evidence on record, the submissions by the parties and the record before her, the learned trial Magistrate set out the following issues for determination:

- 1. Whether the Plaintiff was maliciously prosecuted by the Defendants?**
- 2. Did the Plaintiff sustain injuries as a result of the false imprisonment?**
- 3. Whether the Plaintiff is entitled to damages and if so what is the award of damages?**
- 4. Who should bear the costs?**

57. In her judgement, the learned trial Magistrate rendered herself as follows:

“The principles that govern a claim founded on malicious prosecution were laid down by Cotran, J in the case of Murunga v Attorney General [1979] KLR, 138 as follows: -

(a) The Plaintiff must show that the prosecution was instituted by the Defendant, or by someone for whose acts he is responsible.

(b) The Plaintiff must show that the prosecution terminated in his favor.

(c) The Plaintiff must demonstrate that the prosecution was instituted without reasonable and probable cause.

(d) He must also show that the prosecution was actuated by malice.

It is my view that the claim for unlawful arrest and detention/false imprisonment and injury of reputation is one and the same thing as malicious prosecution. This is so because when a person is arrested and detained and not prosecuted, he could claim that that arrest and detention that did not materialize into prosecution was actuated by malice - See the case of Josephat Mureu Gibiguta v Howse & Mc George Ltd eKLR H.C. At Nairobi Civil Case No. 2646 Of 1993 in which Githinji, J (as he then was) stated: -

“In my view the arrest, detention and prosecution consists of one transaction which has given rise to the Plaintiff's claim. In the circumstances of this case the cause of action for damages for unlawful arrest and false imprisonment arose only when Plaintiff was acquitted.”

The Plaintiff in the present case was arrested and subsequently charged in court with stealing and was later

acquitted of the charges being preferred against him. He was PW1 and he testified thus;

“On 22nd October, 2015 I was arrested on suspicion of having stolen cash in the sum of Kshs. 44,100/= the property of the 1st Defendant.”

The Plaintiff at Paragraph 8 of his Plaint avers that the Defendants actions adversely affected him and caused him mental anguish, anxiety and thus made him suffer great loss and damage.

The Plaintiff submitted inter alia that he was acquitted under Section 210 of the Criminal Procedure Code, that the prosecution was actuated by malice.

Further that he has proved the key elements of malicious prosecution and false imprisonment in this case.

I now turn to the question whether or not the tort of malicious prosecution was proved to the required standard. Malicious prosecution is an action for damages brought by one against whom a civil suit or criminal proceeding has been unsuccessfully commenced without probable cause and for a purpose other than that of bringing the alleged offender to justice.

An action for malicious prosecution is the remedy for baseless and malicious litigation. It is not limited to criminal prosecutions but may be brought in response to

any baseless and malicious litigation or prosecution, whether criminal or civil. The criminal Defendant or civil Respondent in a baseless and malicious case may later file this claim in civil court against the parties who took an active role in initiating or encouraging the original case. The Defendant in the initial case becomes the Plaintiff in the malicious prosecution suit, and the Plaintiff or prosecutor in the original case becomes the Defendant.

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 damage that results.

The second element of the tort demands evidence that the prosecution terminated in the Plaintiff's favor. 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 favorable termination requirement may be satisfied no matter the route by which the proceedings conclude in the Plaintiff's favor, 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 favor 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.

I note that the 1st Defendant has denied liability in his Defense and Counterclaim, they called three witnesses to give evidence on his behalf.

DW 1 told court that he did not know the Plaintiff before

the incident and arrest of the Plaintiff happened. He said that by virtue of the Plaintiff's actions, he lost the sum of Kshs. 44,100/=.

It was the testimony of DW 2 that she first encountered the Plaintiff during the trial of the Criminal Case at Tamu Law Courts. She further said that the Plaintiff had changed her contacts in her phone.

DW 3 told court that she encountered the Plaintiff at the 1st Defendant's shop and that she had given the Plaintiff her mobile phone.

This court has noted that the evidence of the three witnesses called by the 1st Defendant are at variance. Further, the claims made by the 1st Defendant in his Defence and Counter-claim are unsubstantiated and in the circumstances, the Counter-claim must fail.

I note that although the 2nd Defendant has denied liability in their Defense, they did not call any witness to give evidence on their behalf. That means that not only does the defence rendered by the Plaintiff's case stand unchallenged.

I place reliance in the case of Trust Bank Limited v Paramount Universal Bank Limited & 2 Others, where the Learned Judge Lesiit citing the decision in Autar Singh Bahra and Another v Raju Govindji, stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of

fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged.

I am guided by the decision in Thomas Mutsotso Bisembe v Commissioner of Police & Another, it was held that the failure by the police to take statements from relevant witnesses was proof that the police neglected to make a reasonable use of the sources of information available and therefore there was want of reasonable and probable cause and also malice.

In the present case, the 2nd Defendant did not call any witness at trial, hence as far as the 2nd Defendant's case is concerned, the case was uncontested.

Without any evidence emanating from the Defendants on how the decision to arrest and charge the Plaintiff was arrived at, the Court has no option but to find that there was no probable and reasonable cause.

The next issue is whether the criminal proceedings terminated in the Plaintiff's favor. There is no doubt that the criminal proceedings were terminated in favor of the Plaintiff. It is now trite law that acquittal whether after hearing both prosecution and defence witnesses or on a finding that there is no case to answer amounts to a termination in favor of the accused.

The law is that for the purposes proof that the criminal proceedings have been determined in the Appellant's favor, it is enough that the criminal proceedings have been terminated without being brought to a formal end.

In Stephen Gachau Githaiga & Another v Attorney General [2015] eKLR it was held that:

"The third element which must be proven by a Plaintiff is 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 favor of the accused."

"Accordingly, the finding of no case to answer or a withdrawal was a termination in favor of the Plaintiff."

I find that the Plaintiff herein was clearly entitled to an award of damages for malicious prosecution."

58. With that, the learned trial Magistrate proceeded to find in favour of the 1st Respondent, that the Appellant and the 2nd Respondent were liable for the torts of false imprisonment and malicious prosecution and proceeded to assess damages for the same at Ksh.300,000/-. She further awarded the 1st

Respondent special damages of Ksh.50,000/- as having been pleaded and proved. The Appellant and the 2nd Respondent were condemned to pay the 1st Respondent's costs of the suit in the trial court.

59. This appeal proceeded by way of written submissions. Having considered the grounds in the Memorandum of Appeal, the submissions filed by the Appellant, the 1st Respondent (the Attorney General did not participate in the appeal) and the record in its entirety, I discern the issues for determination to be:

a. Whether the elements of the tort of malicious prosecution were established and whether the learned trial Magistrate erred in law and fact in holding that the Appellant was liable for the tort of malicious prosecution, notwithstanding the Appellant's contention that he merely reported an alleged offence to the police in the course of discharging his civic duty and in light of the role played by the police in investigating, arresting and prosecuting the 1st Respondent.

b. Whether the elements of the tort of false imprisonment were established and whether the learned trial Magistrate erred in law and fact in holding the Appellant was liable for the tort of false imprisonment,

in the absence of evidence that the Appellant directly arrested, detained or exercised control over the police officers who apprehended and confined the 1st Respondent.

- c. Whether the learned trial Magistrate properly evaluated and appreciated the evidence on record in determining the existence or absence of reasonable and probable cause for the arrest and prosecution of the 1st Respondent, particularly considering the evidence of DW2, DW3 and DW4 and the undisputed fact that the Appellant was the complainant in the criminal proceedings.
- d. Whether the learned trial Magistrate erred in law and fact by failing to sufficiently consider the Appellant's defence and counterclaim and by dismissing the counterclaim and whether such dismissal was without adequate analysis of the evidence tendered in support thereof.
- e. Whether the learned trial Magistrate erred in principle in the assessment and award of general and special damages, including whether the award of Ksh.300,000/- for false imprisonment and malicious prosecution and Ksh.50,000/- as special damages was

justified, reasonable and supported by the evidence and applicable legal principles.

60. The first issue for determination is whether the elements of the tort of malicious prosecution were established and whether the learned trial Magistrate erred in holding the Appellant liable, despite his contention that he was merely reporting an alleged offence to the police in the course of discharging his civic duty.

61. The tort of malicious prosecution is well settled. Its essential elements were authoritatively articulated in ***Murunga v Attorney General [1976-1980] KLR 1251***, where the court held that a plaintiff must establish, conjunctively, that:

1. The prosecution was instituted by the defendant or by someone for whose acts he is responsible.
2. The prosecution terminated in the plaintiff's favour.
3. The prosecution was instituted without reasonable and/or probable cause.
4. The prosecution was actuated by malice.

62. These elements are conjunctive and failure to prove any one of them is fatal to the claim. This position was reaffirmed by

the Court of Appeal in ***Attorney General v Peter Kirimi Mbogo & Another [2021] eKLR***, where the court emphasized that malicious prosecution claims attract a high evidential threshold, given the competing public interest in encouraging citizens to report crime while safeguarding individuals from abuse of the criminal process.

63. This careful balance was explained by the Court of Appeal in ***James Alfred Koroso v Attorney General [2018] eKLR***, where the court stated:

“To prosecute a person is not prima facie tortious, but to do so dishonestly or unreasonably is.”

64. The law therefore guards against punishing complainants merely because a prosecution fails, absent proof of impropriety.

65. On the first element, there is no dispute that the Appellant made the initial report to the police, which set the criminal justice process in motion and culminated in the prosecution of the 1st Respondent. A prosecution may be said to have been instituted by a party even where it is formally undertaken by the police or the Director of Public Prosecutions, provided the party’s complaint was the proximate cause of the proceedings.

66. Accordingly, although the Appellant neither arrested nor charged the 1st Respondent, his report to the police was sufficient to satisfy the first element. This position is consistent with long-standing authority that a private citizen who lays a complaint that leads to prosecution may be held responsible for its initiation.
67. The second element is equally not contested. The criminal proceedings against the 1st Respondent terminated in his favour following an acquittal under *Section 210* of the *Criminal Procedure Code*. An acquittal, whether on a finding of no case to answer or after full trial, constitutes favourable termination for purposes of a malicious prosecution claim (see ***Murunga***, supra).
68. The third element, absence of reasonable and probable cause, lies at the heart of this appeal. The applicable test is objective and focuses on the state of knowledge of the complainant or prosecutor at the time the prosecution was instituted, not on the eventual outcome of the trial.
69. In the case of ***Kagane & Others v Attorney General & Another [1969] EA 643***, the Court of Appeal adopted the classic formulation by **Hawkins J.** in ***Hicks v Faulkner (1878) 8 QBD 167***, stating that reasonable and probable cause means:

“An honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds, such as would reasonably lead an ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.”

70. The same principle was reiterated in **Kathingo & Another v Musee & Another [2025] eKLR**, where the court cautioned that:

“Probable cause is determined at the time of subscribing a criminal complaint and it is immaterial that the accused thereafter may be found not guilty.”

71. An acquittal, therefore, does not of itself demonstrate absence of reasonable and probable cause.

72. In evaluating this element, it is critical to distinguish the role of the complainant from that of the investigating and prosecuting authorities. As **Nambuye J.** (as she then was) observed in **Samson John Nderitu v Attorney General [2010] eKLR**, the police are under a duty to independently investigate complaints before preferring charges and a complainant is ordinarily entitled to rely on that investigative function.

73. In the present case, the Appellant acted on information supplied by his employee (DW2), who believed that the 1st Respondent had defrauded the Mpesa outlet. The Appellant reported this information to the police, who thereafter conducted investigations and made the decision to arrest and charge the 1st Respondent. There is no evidence that the Appellant dictated the course of the investigation or prosecution.

74. While it later emerged in the criminal trial that the Mpesa transaction records did not directly link the 1st Respondent to the fraudulent transfers, the relevant inquiry is whether, at the time of reporting, a reasonable and prudent person in the Appellant's position could honestly believe that an offence had been committed and that the 1st Respondent was involved.

75. The learned trial Magistrate appears to have conflated weaknesses in the prosecution case and investigative gaps with absence of reasonable and probable cause. This was a misdirection. As the authorities make clear, reasonable and probable cause is not negated merely because the prosecution ultimately fails or because evidence later proves insufficient.

76. On the totality of the evidence, the Appellant's belief, though possibly mistaken, cannot, in my view, be said to have been so devoid of factual basis as to be objectively unreasonable. The existence of eyewitness accounts,

transaction anomalies and a pattern of alleged fraud in nearby Mpesa outlets provided sufficient material to justify a *bona fide* complaint to the police.

77. The fourth and final element is malice. Malice may be proved by direct evidence of spite, ill-will or improper motive or inferred from lack of reasonable and probable cause. However, absence of reasonable cause does not automatically establish malice.

78. In the case of **Attorney General v Peter Kirimi Mbogo** (supra), the Court of Appeal underscored that malice requires proof that the dominant purpose of the prosecution was something other than bringing an offender to justice.

79. In the present case, there is no evidence that the Appellant bore any personal animosity towards the 1st Respondent, whom he did not previously know. The Appellant's actions were directed at recovering or accounting for money he believed had been fraudulently lost from his business. Even if his judgment was flawed, negligence or error does not amount to malice.

80. Accordingly, the essential element of malice was not established to the requisite standard.

81. Concluding on the first issue for determination, although the first two elements of malicious prosecution were satisfied,

the 1st Respondent failed to establish absence of reasonable and probable cause and, critically, failed to prove malice. The tort of malicious prosecution was therefore not proved and the learned trial Magistrate erred in law and fact in finding the Appellant liable.

82. The second issue for me to address is whether the elements of the tort of false imprisonment were established and whether the learned trial Magistrate erred in law and fact in holding the Appellant liable for the tort of false imprisonment, in the absence of evidence that the Appellant directly arrested, detained or exercised control over the police officers who apprehended and confined the 1st Respondent.

83. False imprisonment consists of the unlawful and total restraint of a person's liberty without lawful justification. Courts have consistently held that liability attaches only where the defendant directly causes or authorises the restraint.

84. In ***Wangari Maathai v Attorney General [2001] eKLR***, the court held that mere reporting of a suspected offence does not amount to false imprisonment, absent evidence that the complainant exercised control over the arresting authorities.

85. In this case, the Appellant neither arrested nor detained the 1st Respondent, nor did he exercise authority or control over the police officers who effected the arrest and confinement.

The deprivation of liberty arose from independent police action carried out pursuant to their statutory mandate.

86. The essential element of direct interference with the 1st Respondent's liberty was not established. Liability for false imprisonment cannot attach to the Appellant.

87. The third issue for me to determine is whether the learned trial Magistrate properly evaluated and appreciated the evidence on record in determining the existence or absence of reasonable and probable cause for the arrest and prosecution of the 1st Respondent, particularly considering the evidence of DW2, DW3 and DW4 and the undisputed fact that the Appellant was the complainant in the criminal proceedings.

88. As already noted, the trial court erred by treating the absence of police testimony and the eventual acquittal as conclusive proof of lack of reasonable and probable cause. This approach was inconsistent with binding authority, which requires assessment of the factual basis available at the time the complaint was made.

89. The learned trial Magistrate failed to properly analyse the Appellant's evidence, the information supplied by DW2 and DW3, and the independent role of the police in investigating and prosecuting the matter.

90. The irresistible conclusion that I reach on this issue is that the learned trial Magistrate misdirected herself on the applicable legal test and failed to properly evaluate the evidence on reasonable and probable cause.
91. The next issue for me to determine is whether the learned trial Magistrate erred in law and fact by failing to sufficiently consider the Appellant's defence and counterclaim and by dismissing the counterclaim and whether such dismissal was without adequate analysis of the evidence tendered in support thereof.
92. The Appellant's counterclaim sought recovery of Ksh.44,100/- allegedly lost through fraud. While the evidence established that money was transferred under a mistaken belief, the Appellant failed to prove, on a balance of probabilities, that the 1st Respondent was the recipient or beneficiary of those funds.
93. In this respect, the trial court correctly applied the principle that a claimant must establish causation and liability to succeed in a recovery claim.
94. The dismissal of the counterclaim was justified and does not warrant interference on appeal.
95. The fifth and last issue to address is whether the learned trial Magistrate erred in principle in the assessment and

award of general and special damages, including whether the award of Ksh.300,000/- for false imprisonment and malicious prosecution and Ksh.50,000/- as special damages was justified, reasonable and supported by the evidence and applicable legal principles.

96. Awards for malicious prosecution and false imprisonment pre-suppose that liability has been properly established. Having found that neither tort was proved by the 1st Respondent against the Appellant, there was no legal basis for the awards of general damages of Ksh.300,000/- or special damages of Ksh.50,000/-.

97. The awards of damages against the Appellant were not justified and cannot stand.

98. For the foregoing reasons, the appeal succeeds. The judgement of the trial court holding the Appellant liable for malicious prosecution and false imprisonment is set aside, while the dismissal of the Appellant's counterclaim is upheld.

99. Under *Section 27 of the Civil Procedure Act*, costs follow the event unless the court, for good reason, orders otherwise and such costs are in the discretion of the court.

100. In the present appeal, the Appellant has substantially succeeded, the judgment of the trial court having been set aside on the core issues of malicious prosecution and false

imprisonment. No exceptional circumstances have been demonstrated to justify a departure from the general rule. Accordingly, the 1st Respondent shall bear the Appellant's costs of this appeal which I assess at Ksh.30,000/-, and those of the proceedings in the trial court.

101. This file is hereby closed.

102. Orders shall follow accordingly.

DELIVERED (virtually), DATED & SIGNED this 19th day of February, 2026.

JOE M. OMIDO
JUDGE

FOR THE APPELLANT: **Ms. Wagumba.**

FOR THE 1ST RESPONDENT: **Ms. Odhong.**

FOR THE 2ND RESPONDENT: No appearance.

COURT ASSISTANTS: **Mr. Ngoge & Mr. Juma.**