REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL NO. E074 OF 2023

SAMSON MARIGO MAKUBO ..... APPELLANT

VERSUS

JOSEPH MWITA RAGITA.....1ST RESPONDENT

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

JUDGMENT

1. This appeal arises from the Judgment and decree of lower court delivered on 16.5.2023 by Hon. M.O. Obiero, SPM in Kehancha SPMCC No. 24 of 2019.

2. The appeal is against liability and the award of general and exemplary damages in a case for malicious prosecution and false imprisonment. However, the Appellant filed a 15-paragraph mammoth Memorandum of Appeal dated 20.6.2023. It is certainly not edifying for advocates to present 15 grounds of appeal and then argue only two issues. This is anathema to the provisions of Order 42 Rule 1 of the Civil Procedure Rules, which posits as doth: -

> **(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.**

3. The Court of Appeal had this to say about compliance with Rule 86 of the Court of Appeal Rules (which is *pari materia* with Order 42 Rule 1 of the Civil Procedure Rules) in the case of **Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR**: -

> We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others

> [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:
>
> We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric…A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs. The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues…

4. Repetitive grounds of appeal tend to cloud the key issues in dispute for determination by the Court. The same issue was addressed succinctly by court of appeal in the case of **Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR** as follows:

> Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether *Section 62* of the **Kenya Ports Authority Act** ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court.
> In **William Koross V. Hezekiah Kiptoo Kimue**

& 4 others, Civil Appeal No. 223 of 2013, this Court stated:

> **The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better.**

5. The grounds are thus ancillary, repetitive, prolixious and a waste of judicial time. This court will have to deal with whether the magistrate erred in finding the Appellant liable for malicious prosecution of the 1st Respondent and whether the award of the damages was unwarranted and or excessive.

6. In the Plaint dated 2.11.2019, the Appellant sought general and aggravated damages for malicious prosecution and false imprisonment as against the 1st Respondent. Special damages of Ksh. 156,855 were also pleaded.

7. The claim arose from averments that on 26.5.2027, the Appellant was arrested following an unfounded allegation by the 1st Respondent reported as a criminal offence at Kehancha Police Station on the allegation that the Appellant, while armed with a panga, bow, and arrow, attacked the 1st Respondent. The allegations were pleaded to have been false and malicious.

8. It was pleaded that the 1st Respondent was later arraigned in court and charged with the offence of criminal intimidation contrary to section 238 (1) of the Penal Code vide Kehancha PMCRC No. 336 of 2017.
9. It was the case of the 1st Respondent that the court found that the charges against him were premature and reckless and acquitted the 1st Respondent on 5.11.2018.

10. The Appellant entered an appearance and filed a defence dated 16.12.2019 denying the allegation in the plaint. The 2nd Respondent also filed defence denying the averments in the plaint.

11. The lower court heard the matter and rendered its judgment on 16.5.2023, allowing the suit and awarding the following reliefs:

    (a) General damages for unlawful arrest, wrongful confinement, and malicious prosecution at Ksh. 700,000/=
    (b) Aggravated damages of Ksh. 200,000/=
    (c) Special damages of Ksh. 156,855/=
    (d) Cost of the suit and interest

Evidence

12. The 1st Respondent testified as PW1. He relied on his witness statement and list of documents, which he adopted in evidence. The Appellant alleged that the 1st Respondent

threatened him, which was false. The court acquitted him because he had no case to answer. He spent Ksh. 156,000/= to defend himself. He was a teacher by profession. He suffered mental anguish.

13. DW1, the Appellant, testified that he lodged a complaint against the 1st Respondent with the police. Following the report, the 1st Respondent was arrested and subsequently charged. According to DW1, the complaint was truthful. He further stated that the police conducted investigations into the matter before preferring the charge.

Submissions

14. The 1st Respondent filed submissions dated 11.12.2025. It was submitted that malicious prosecution was proved to the required standard. Reliance was placed *inter alia* on **Chrisine Otieno Caleb v Attorney General (2014) eKLR** to submit that there ought to have been investigations before charging him and the charges were dishonest and unreasonable.

15. It was submitted that in the criminal trial, PW1 and PW2 evidence differed, and it was clear that the prosecution was unwarranted. Further, the 1st Respondent submitted that the Appellant had not proved the allegations in the appeal as required under Sections 108 and 109 of the Evidence Act.

Analysis

16. The issue that falls for this Court's determination is whether the lower court erred in allowing the Appellant's suit seeking damages for malicious prosecution and so wrongly awarded damages that were also excessive.

17. This being a first appeal, the court should consider arguments by parties and apply the law thereto, and make its own determination of the issues in controversy. However, it should take into account that it neither saw nor heard the witnesses' testimony. In the case of **Selle & Another vs. Associated Motor Board Company Ltd. [1968] EA 123**, the Court stated as follows:

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

18. On perusal of the Memorandum of Appeal and the entire record of the lower court, the court is alive to the fact that my task is to re-evaluate the evidence in order to establish whether or not the lower Court erred in finding malicious prosecution.

19. In discerning the lawfulness of the arrest and malicious prosecution, the elements to be proved in an action for malicious prosecution are well settled. In *Mbowa vs. East Mengo District Administration* [1972] EA 352 (Sir William Duffus P, Lutta and Mustafa JJA), the court summarized the law as follows:

> The action for damages for malicious prosecution is part of the common law of England... The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit.... It 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,
>
> (2) the criminal proceedings must have been terminated in the plaintiff's favor,
>
> The plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the four

requirements must unite in order to create or establish a cause of action. If the plaintiff does not prove them, he would fail in his action...

20. The Appellant was acquitted under section 210 of the Criminal Procedure Code. This was at the no case to answer stage. This was because the criminal proceedings against the 1st Respondent terminated in his favour. An acquittal, whether on a finding of no case to answer or after a full trial, constituted a favourable termination for purposes of a malicious prosecution claim.

21. The court of appeal in **Attorney General v Peter Kirimi Mbogo & Another** [2021] eKLR, 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.

22. 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:

a) The prosecution was instituted by the defendant or by someone for whose acts he is responsible.

b) The prosecution terminated in the plaintiff's favour.

c) The prosecution was instituted without reasonable and/or probable cause.

d) The prosecution was actuated by malice.

23. The effect of the Section 210 of the CPC was an acquittal. In *Stephen Gachau Githaiga & another vs. Attorney General* [2015] eKLR, Mativo J (as he then was), stated that a termination of a prosecution would be favourable to a party regardless of the route taken, be it an acquittal, a discharge, a withdrawal, or a stay. In that case, the court said:

> The second element of the tort demands evidence that the prosecution terminated in the plaintiff's favour. This requirement precludes a collateral attack on a conviction properly rendered by a criminal court, and thus avoids conflict between civil and criminal justice. The favourable termination requirement may be satisfied no matter the route by which the proceedings conclude in the plaintiff's favour, whether it be an acquittal, a discharge at a preliminary hearing, a withdrawal, or a stay.

24. Sentiments were expressed in **Paramount Bank Limited vs. Vaqvi Syed Qamara & another [2017] eKLR** (Makhandia, Ouko and MÍnoti JJA), that:

> 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.

25. The 1st Respondent satisfied the critical element of malicious prosecution. The Appellant acted maliciously without reasonable suspicion in making a false report that led the 2nd Respondent to institute criminal proceedings, with an

improper and wrongful motive, that is, with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose.

26. There was clearly no action on the part of the 1st Respondent that made the Appellant feign apprehension and report the 1st Respondent for the purpose of arrest and prosecution.

27. On the general damages awarded relating to general damages for malicious prosecution, the Court of Appeal in *Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd [1992] KLR 177* stated that:

> *...General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it...*

28. Similarly, in the case of **Butler –V- Butler (1984) KLR 225** the court held: -

> The assessment of damages is more like an exercise of discretion by the trial judge and an appellate court should be slow to reverse the trial judge unless he has either acted on wrong principles or awarded so excessive or so little damages that no reasonable court would; or he has taken into consideration matters he ought not to have considered, and in the result arrived at a wrong decision.

29. Therefore, for me to interfere, it should be demonstrated that the lower court fettered its discretion in the award of damages. This can be gauged from a finding as to whether the award was manifestly and inordinately high or low, or the assessment was such as to lead to an inference that the court considered matters it ought not to have considered or failed to consider matters it ought to have considered and so arrived at an erroneous conclusion.

30. In this case, the court awarded Ksh. 700,000/= for general damages. In the case of **Odongo – Vs – HCCC No. 195 of 97, (1997) LLR 484 (HCK)** Hayanga J .....

31. D.K Magara J as he then was in **Zablon Mwaluma Kadori v National Cereals & Produce Board [2005] KEHC 1455 (KLR)** awarded the sum of Sh. 500,000/- as reasonable damages for malicious prosecution.

32. The appellant did not lay any basis for the award of a sum of Ksh. 700,000/=. It is true that the appellant suffered injuries. However, he did not produce materials for this. In the circumstances, I set aside the award of Ksh. 700,000/=. In lieu thereof, I enter judgment for a sum of Ksh .200,000/=. This was a quarrel over minor issues and a charge of criminal intimidation, contrary to section 238(1) of the Penal Code. The said section provides as follows:

> **Any person who intimidates or molests any other person is guilty of an offence and is liable to imprisonment for a term not exceeding three years.**

33. This is a misdemeanor. Under section 2 of the Penal Code, a misdemeanor means any offence which is not a felony.

34. Under section 2 of the penal code, a felony is defined as follows:

> "*Felony*" *means an offence which is declared by law to be a felony or, if not declared to be a misdemeanour, is punishable, without proof of previous conviction, with death, or with imprisonment for three years or more.*

35. Being a misdemeanor, it should not attract very high awards. An award of a sum of KSh. 300,000/= shall suffice.

36. The court awarded a sum of Ksh 200,000/= as aggravated damages. However, these were claimed under facts akin to defamation. The appellant did not, as such, prove aggravated damages. The award is set aside. Aggravated damages are not given by virtue of the feelings to the plaintiff, but by the conduct of the defendant. In this case, his hurt feelings were relied on. In the case of **Gitau v Mbugua [2024] KEHC 15751 (KLR)**:

> The plaintiff in her plaint made a claim for aggravated or exemplary damages. In the case of Francis Xavier Ole Kaparo v the Standard & 3 others HCCC No. 1230 of 2004 (UR) as reported in Vimalkumar Bhimji Deepar Shah v Geryl Otieno & another [2021] eKLR, it was held that:"Malicious and/or insulting conduct on the

> part of the Defendant will aggravate the damages to be awarded. The aggravated damages (distinguished from exemplary damages) are meant to compensate the plaintiff for the additional injury going beyond that which would have flowed from the defamatory words or statements above, caused by the presence of the aggravating factors ...Damages will be aggravated by the Defendant's improper motive."
>
> 40.The Court of Appeal in the case of Miguna Miguna v The standard Group Ltd & 4 others [supra] while quoting the case of John v GM Limited [1993] QB 586 stated:"Aggravated damages will be ordered against a defendant who acts out of improper motive e.g. where it is attracted by malice; insistence on a flurry defence of justification or failure to apologize."
>
> 41.The defendant in this case declined to offer an apology when the same was demanded from him yet there was no plausible defence on his part. This aggravated the defamation. The plaintiff is entitled to an award of aggravated damages. I award her a sum of Ksh.500,000/= in aggravated damages

37. There are no aggravated factors pleaded. The court cannot proceed to deal with facts that were not pleaded. It is not enough to pray for the aggravated damages, they must be pleaded before the same are proved. Parties are bound to plead their cases fully. In the case of **Migore v South Nyanza**

Sugar Co Ltd [2018] KEHC 5465 (KLR), A C Mrima, J, stated as follows:

> 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
> .....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
>
> ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by

which no opportunity is given to the other party to meet the new situation.

In the case of **Malawi Railways Ltd vs Nyasulu [1998] MWSC 3**, **Malawi Supreme Court of Appeal** stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled The Present Importance of Pleadings published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings …….for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice….

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called Any Other Business in the sense that points other than those specific may be raised without notice.

38. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on *inter alia* scrutiny in the case of **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** found and held as follows in an election petition:

> 58. In the case of Arikala Narasa Reddy v Venkata Ram Reddy Reddygari & anr, Civil Appeal Nos 5710-5711 of 2012; [2014] 2 SCR the Supreme Court of India held that [paragraph 8]:
>
> 52.Further, the court went on and observed that:
>
> "In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings. The court cannot exercise discretion of ordering recounting of

> ballots just to enable the election petitioner to indulge in a roving inquiry with a view to fish material for dealing the election to be void. The order of recounting can be passed only if the petitioner sets out his case with precision supported by averments of material facts.

39. Without pleadings, there was nothing to award. The factors that were pleaded were particulars of malice. The particulars of malice only address the first limb of malicious prosecution. Nothing relates to aggravated damages.

40. The award of aggravated damages is set aside entirely. The claim is dismissed. The results are mixed. In the circumstances, each party will bear their own costs.

41. The last issue is whether the order affects the 2nd respondent, who did not appeal. There can be no mixed results. Order 42 Rule 5 of the Civil Procedure Rules provides as follows:

> *Where there is more than one plaintiffs or defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the High Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be.*

42. The order shall therefore apply even to the second respondent.

Determination

43. In the upshot, I make the following order: -

a) The appeal on liability is hereby dismissed.

b) Appeal on general damages is allowed. The sum of Ksh. 700,000/= is set aside and in lieu thereof substituted with a sum of Ksh. 200,000/=.

c) Aggravated damages are set aside; in lieu thereof, I dismiss the award in toto.

d) 30 days stay of execution.

e) Right of appeal 14 days.

f) Each party shall bear its own costs.

DELIVERED, DATED and **SIGNED** at **NYERI** on this **4th** day of **March, 2026**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for the Appellant

Mr. Muhisa for the Respondent

Court Assistant – Michael