

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. E232 OF 2024

WILLIAM O. OLOLO APPELLANT

- VERSUS -

NATIONAL HOUSING CORPORATION RESPONDENT

**(Being an appeal from the Ruling of Hon. K. Cheruiyot SPM delivered on the
22/11/2023 in Kisumu CMCC No. 576 of 2019, William O. Ololo v National
Housing Corporation & 3 Others)**

J U D G M E N T

1. The appellant sued the respondent and four others jointly for general damages for defamation of character, malicious prosecution, false imprisonment and advocates fees as a result of his arrest, charging, trial and subsequent acquittal.
2. The 1st respondent entered appearance and filed an amended defence dated **14/02/2013** in which it denied the allegations made by the appellant and put him to strict proof of the same. The other four defendants being, **Inspector Aggrey Omondi, Commissioner of Police, The Permanent Secretary**

Office of the President and the Attorney General did not file any defences against the cases brought against them.

3. In its judgment dated **22/11/2023**, the trial court entered judgment against the 2nd to 5th defendant in the suit for **Kshs. 3,500,000/=** plus special damages of **Kshs. 30,000/=** but dismissed the appellant's suit against the respondent.
4. It is the aforesaid judgment that is the subject of this appeal. The appellant impugned the trial court's ruling vide a memorandum of appeal dated **4/11/2024** on the following eight (8) grounds, that: -

- a) *The learned trial magistrate erred in law and fact by failing to consider the evidence and pleadings on record thereby arriving at a wrong decision.*
- b) *That the learned trial magistrate erred in law and in fact in failing to make a finding the respondents (sic) perpetuated and facilitated the arresting and false imprisonment of the Appellant*
- c) *That the learned trial magistrate erred in law and in fact in failing to make a finding that the respondents perpetuated and facilitated the malicious prosecution of the Appellant.*

- d) That the learned trial magistrate erred in law and in fact in failing to make a finding that there was glaring misrepresentation committed by the Respondents.*
- e) That the learned trial magistrate failed to find the BURDEN OF PAYING THE COST of the suit ought to have been borne by the Respondent who was to blame for false imprisonment and malicious prosecution of the Respondents.*
- f) The learned magistrate erred in law and fact by ignoring the authorities submitted by the appellant in their submissions when arriving at his decision in apportioning liability between the parties.*
- g) The learned magistrate erred in fact ad in law in failing to uphold the doctrine of precedent as a result arrived in unjustified decision.*
- h) In arriving at her decision, the trial magistrate did so in a speculative and cursory manner not guided by any set of principles and failed to exercise his discretion within the applicable principles of natural justice and fair hearing and his failure to adhere to the foregoing has occasioned a serious miscarriage of justice and ought to be reversed.*

5. The parties agreed to dispose of the appeal by way of written submissions. The appellant submitted that the respondents purporting to arrest him were acting without justification or reasonable cause.
6. That the respondent's failure to call witnesses whom it had listed in its list of witnesses demonstrated that his claim of malice stood unchallenged. Reliance was placed on the cases of **North End Trading Company Limited (Carrying on Business under the Registered name of) Kenya Refuse Handlers Limited v City Council of Nairobi (2019) eKLR & Edward Mariga through Stanley Mobisa Mariga v Nathaniel David Shulter & Another [1979] eKLR.**
7. That the respondents were liable in damages for false imprisonment as the Attorney General and the department of the police ought to have investigated the case properly.
8. That there was no reasonable cause or justification to prosecute the appellant as the people who stole from the 1st respondent had already been arrested and charged with stealing in court. Further, that the appellant's prosecution was terminated in his favour with the court making a conclusion that there was no case and that the matter should be closed.

9. The appellant submitted that the court ought to have awarded him **Kshs. 10,000,000/=** for false imprisonment and **Kshs. 15,000,000/=** for malicious prosecution. Reliance was placed on the cases of **Daniel Njuguna Muchiri v Barclays Bank of Kenya Ltd & Another [2016] eKLR** where the court awarded **Kshs. 200,000/=** for general damages and **Kshs. 300,000/=** for exemplary damages for malicious prosecution and false imprisonment as well as the case of **Naqvi Syed Omar v Paramount Bank Ltd & Another [2015] eKLR** where the court awarded **Kshs. 2,000,000/=** in general damages and **Kshs. 400,000/=** as exemplary damages.
10. On its part, the respondent submitted that the appeal was defective in that, despite alleging to challenge the entire judgment in his favour and against Inspector Aggrey Omondi, The Commissioner of Police, The Permanent Secretary in the Office of the President and the Attorney General, the said parties had not been joined in the appeal and this failure offended the provisions of ***Order 42 Rule 1 of the Civil Procedure Rules*** that presupposes that all persons directly affected by an appeal ought to be parties thereto.
11. That the appellant's arrest was precipitated by a whistle-blower's letter a fact corroborated by the appellant's own testimony thus his arrest was founded

upon a formal complaint lodged and investigated by the relevant agencies thus the appellant cannot assert that his arrest lacked legal justification.

12. That the appellant did not tender any evidence such as a charge sheet or other documentary proof to demonstrate that the respondent or its agents were the complainants who instigated the criminal process against him. That in absence of this evidence and in light of the appellant's own testimony, no liability could attach to the respondent. That the appellant did not lead any evidence in which he attributed malice to the respondent save for the fact that he was acquitted in the criminal case.
13. That in light of the foregoing submissions, the appellant failed to prove his case before the trial court and thus this court ought to uphold the trial court's judgment and dismiss the appeal with costs.
14. In rejoinder, the appellant submitted that the respondent's objection was misconceived as his appeal was only against the 1st respondent and thus the other defendants were not necessary parties in the appeal and further that the respondent could not raise an objection on behalf of other parties.
15. The aforementioned submissions were highlighted by the parties on the **24/11/2025**.

16. This being a first appeal, the Court is duty bound to evaluate the evidence before the trial court afresh and come to its own independent findings and conclusions. See Selles & Anor v Associated Motor Boat Co Ltd & Others [1968] EA 123.
17. The appellant testified in support of his case before the trial court as **Pw1**. He adopted his statement dated **25/05/2011** as his evidence in chief. It was his testimony that the malicious prosecution against him was initiated by the respondent but he was acquitted. That he had no relationship with the respondent.
18. That his co-accused in the prosecution filed a case before the ELRC and was awarded **Kshs. 3.5 million** for malicious prosecution. That his former employee, **Mr. Okeyo**, wrote a malicious letter to the respondent which was relied on by the prosecution.
19. In cross-examination, he told the court that had **Mr. Okeyo** not written the letter to the 1st respondent, his prosecution would have not been initiated. That the prosecution had a role to ensure sufficient evidence was produced. He admitted that he did not enjoin **Mr. Okeyo** to the case and further that the respondent had no prosecutorial powers.

20. In re-examination, he stated that the charge sheet against him showed that the respondent was the complainant.
21. The respondent called one witness in support of its case. **Dw1, Pamela Atieno Ombole** who testified that she the respondent's legal assistant. She adopted her statement dated **24/06/2022** and stated that the appellant was not its employee. That there was a theft of **Kshs. 1.6 million** from the respondent and subsequently a complaint was made against the appellant by one of his former employees. That the respondent had no role in the prosecution and in collecting evidence to sustain the appellant's prosecution.
22. In cross-examination, she told the court that the appellant was acquitted and that the money stolen belonged to the respondent. That she could not confirm that the respondent was the complainant.
23. In re-examination, **Dw1** testified that the complaint was triggered by a letter by the appellant's former employee.
24. Having carefully considered the entire record, the grounds of appeal may be summarized as follows;

a) Whether the appeal is competent and if so,

b) Whether it has merit.

25. As to the competency of the appeal, on the face of the memorandum of appeal, the appellant indicated that he intended to challenge the entire judgment of Hon. K. Cheruiyot SPM delivered on **22/11/2023** in **Kisumu CMCC No. 576 of 2019**.
26. In the said judgment, the court had found for the appellant against the 2nd to 5th defendants for **Kshs. 3,500,000/=** plus special damages of **Kshs. 30,000/=** but dismissed the appellant's suit against the respondent.
27. The 2nd – 5th defendants before the trial court were **Inspector Aggrey Omondi, The Commissioner of Police, The Permanent Secretary in the Office of the President and the Attorney General**. They neither appeared nor defended the suit. None of them was joined in this appeal.
28. The appellant submitted that this objection by the respondent was misconceived as his appeal was only against the 1st respondent and thus the other defendants were not necessary parties in the appeal and further that the respondent could not raise an objection on behalf of other parties.
29. The appellant relied on a number of cases to the effect inter alia that ***it is not necessary to implead all the parties to the suit if the decree appealed against does not affect them or if no relief is claimed against them in the appeal.*** i.e. the cases of Indian Supreme Court in **Ram Swarup v Munshi &**

Others AIR 1965 SC 331 & English Court of Appeal in Cave v Robinson Jarvis & Rolf [2002] UKHL 18.

30. In the present case, the grounds of appeal relied on by the appellant impugn the trial court's judgment on failing to find that respondents facilitated his false imprisonment and malicious prosecution. That the trial court failed to apportion liability between the respondents.
31. It is therefore misleading for the appellant to submit that the 2nd – 5th defendants before the trial court would not be affected by the result of this appeal. The aforementioned defendants were vital and necessary parties as the judgment of this court is likely to affect them in one way or the other. The appellant himself submitted that the judgment be set aside and damages be enhanced from **Kshs.3.5m to Kshs.10m.**
32. Consequently, the failure by the appellant to include the 2nd – 5th defendants before the trial court in this appeal is fatal and renders the present appeal incompetent. In in **Bwana Mohammed Bwana v Silvanus Buku Bonaya & 20 Others [2015] eKLR,** the Court held: -

“... An incompetent appeal divests the Court of the Jurisdiction to consider factual or legal controversies embodied in the relevant issues.”

33. It is my view that, where an appellant presents an appeal and presents a record that is incomplete or is replete with mistakes, errors or omissions, the appellant must be ready to suffer the consequences of his action(s) or inaction(s) (omissions). There is no doubt that the presence of the 2nd – 5th defendants was central to the determination of the appeal and their exclusion from the record is a fatal omission.
34. The jurisdiction of the court has therefore not been properly invoked as per the law, the latent mistakes in the record of appeal leave this Court with no option but to decline jurisdiction.
35. The appellant insisted that the appeal was only against the respondent herein. Even if that was the case, is the appeal meritorious?
36. The crux of the appellant's appeal is that the trial court erred in apportioning liability between the defendants by dismissing the suit against the respondent herein.
37. The tort of malicious prosecution is an intentional tort that provides redress to a party, for losses incurred following unsuccessful and malicious proceedings which are initiated without any lawful reasonable and/or probable cause by the Defendant. Although it is within any person's rights to approach the Courts and/or other quasi-judicial bodies to seek redress for

wrongs committed against them, this right must be exercised within the confines and parameters of the law, for genuine and lawful reasons. If the right is exercised with other ulterior motives, this constitutes abuse of process, which is in itself a wrong and/or violation attracting a claim for damages for malicious prosecution.

38. The elements of the tort of malicious prosecution have been discussed in various authorities including **Murunga v The Attorney General (1976-1980) KLR 1251** where Cotran J listed them as follows: -

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

ii). That the prosecution terminated in the Plaintiff's favour.

iii). That the prosecution was instituted without reasonable and/or probable cause.

iv). That the prosecution was actuated by malice.

39. Instructively, all the elements apply conjunctively and must all be proven in order to successfully claim for damages for malicious prosecution. See **Attorney General v Peter Kirimi Mbogo & Another, Meru Civil Appeal 52 & 56 of 2020 (Consolidated) [2021] eKLR.**

40. On the first element, the evidence before the trial court by both the respondent and the appellant was that the appellant's prosecution commenced following a complaint by his own former employee, a Mr. Okeyo. It is the complaint by Mr. Okeyo that was the basis for the appellant's arrest and prosecution.
41. On whether the prosecution terminated in the appellant's favour, it is evident that the appellant was acquitted after the court found that there was no evidence against the appellant to sustain his prosecution.
42. The last element on whether the prosecution was actuated by malice, In **Nzoia Sugar Company Ltd v Fungututi [1988] KLR 399**, the Court of Appeal held;

“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. The mental element of ill will or improper motive cannot be found in an artificial person like the appellant but there must be evidence of spite in one of its servants that can be attributed to the company.”

43. The appellant herein failed to adduce any evidence of any employer or agent of the respondent as the individual who commenced his prosecution. Ill will or improper motive cannot attach to the respondent.
44. In the circumstances I am convinced that the trial court did not err in dismissing the appellant's case against the respondent. There was no sufficient evidence presented by the appellant to warrant liability being attached on the respondent.
45. Accordingly, I find that this appeal lacks merit and proceed to dismiss it with costs to the respondents.

It is so decreed.

DATED and DELIVERED at Kisumu this 6th day of March, 2026.

A. MABEYA, FCI Arb

JUDGE