

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 1st Respondent 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 1st respondent was arrested following an unfounded allegation by the appellant reported as a criminal offence at Kehancha Police Station. The allegations were that the 1st Respondent, while armed with a panga, bow, and arrow, attacked the Appellant. 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 1st Respondent'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 from 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 1st Respondent 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 M'noti 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. In the case of **Simiyu v Attorney General of Kenya & 3 others** [2024] KEHC 16374 (KLR), R. NYAKUNDI J, held as follows:

35. The principles of justice that underpin our legal system demand not just the correction of legal wrongs but also the restoration of rights wrongfully infringed. Having carefully weighed the evidence and considered the complex history of this matter, justice requires substantive remedial action. Liability for malicious prosecution which is traceable way back to investigation, arrest, detention and prosecution is a term with complexity of cannons of interpretation for reasons that involves an investigation into a particular crime identified in any of the provisions of the penal Code or other Penal laws. The liability or otherwise of the National Police Service or the Director of Public Prosecution will depend on whether or not they had information that led them to believe of objective grounds that a suspect if taken through a criminal process, there will be a prima facie case to find him/her guilty of the offence followed with a conviction. Therefore, there is need for such constitutional organs in Kenya to have reasonable and probable cause for a prosecution that the committed offences did take place and if it is only on mere suspicion, their conduct will be that which is actuated by indirect and improper motives. The appreciation of the judgments of the trial court and that of the Court of Appeal provides some key milestones in which the highest court came to a

conclusion that the nature of the charges initiated against the Plaintiff did not reasonably comprise of sufficient evidence that he was probably the person who committed the offences in question. There was also the issue of duplex charges in which an unreasonable Police officer, the 4th defendant acting on the information available would not have concluded that the allegations against the Plaintiff disclosed full material facts to the police to recommend the institution of criminal proceedings. ►

36. In the persuasive case of *A v. New South Wales*, Gleeson CJ (2007) 233 ALR 584, the court discussed both the subjective and objective aspect of probable and reasonable cause as follows:

“to decide whether the prosecutor did not have reasonable and probable cause for commencing or maintaining the prosecution, the material available to the prosecutor must be assessed in two ways. What did the prosecutor make of it? What should the prosecutor have made of it. To ask whether there was material to the prosecutor which assessed objectively would have warranted commencement or maintenance of the prosecution would deny relief to the person acquitted of a crime prosecuted by a person who not only acted maliciously, but who is shown to have acted without forming the view that the material warranted prosecution of the offences. Conversely, to ask only what the prosecutor made of the material that he/she had available when deciding to commence or maintain the prosecution would favor the incompetent or

careless prosecutor over the competent and careful.”

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. reliance was placed in the Hayanga J in the case of Odongo - Vs - HCCC No. 195 of 97, (1997) further 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.

31. The 1st Respondent 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.

32. In the case of **Simiyu v Attorney General of Kenya & 3 others [supra]**, the court continued as follows regarding damages:

The justification is that tort law aims to award compensation to a claimant or Plaintiff in circumstances where tort-feasor should be held responsible for the harm caused. The function of the court here is therefore to determine what is the compensation worthy of the Plaintiff. The concepts of

punishment and compensation are the underlying goals of tort law and an award against the tort-feasor serves as a punishment for that matter. In order to exercise discretion on assessment of damages of the various limbs constituting malicious prosecution referenced to past awards from the superior courts would be of significant relevance: In *Jacob Juma and another v The Commissioner of police and another* [2016] eKLR the court awarded the following: False imprisonment - Kshs. 200,000/=, Exemplary damages for false imprisonment - Kshs. 400,000/=, General damages - Kshs. 2,000,000/=, Exemplary damages for malicious prosecution Kshs. 400,000/=

33. In this case, the first respondent did not lead any evidence of the injury suffered other than the malicious prosecution. He had been released on bond, and the matter concluded in time. Other than submissions, there is no evidence of his station in life. Submissions cannot be pleadings or evidence. A Party cannot found a claim in submissions. They are neither evidence nor pleadings. Mwera J posited as follows when postulating on the role of submissions. He stated that they are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim in the case of **Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993:**

“Indeed, and strictly speaking, submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which

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

34. Submissions are not, strictly speaking, part of the case, the absence of which may do no prejudice to a party. Their presence or absence does not in any way prejudice a case as held in **Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749**, where the Court held that:

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

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

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

36. In the circumstances, the court ought to have awarded nominal damages. In the case of **Jogoo Kimakia Bus Services LTD v Electrocom International LTD [1992] KECA 48 (KLR)**, the court of appeal [**Gicheru, Cockar & Muli JJ A**] stated as follows regarding nominal damages:

In ‘Medina’ and the ‘Mediana’ [1900] AC 113, 116 Earl of Halsbury LC as he then was defined nominal damages:-

“My Lords, here I wish, with reference to what has been suggested at the bar, to remark upon

the difference between damages and nominal damages.

‘Nominal damages’ is a technical phrase which means that you have negated anything like real damages, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term nominal damages does not mean small damages. The extent to which a person has a right to recover what is called by the compendious phrase damages, but may be also represented as compensation for the use of something that belongs to him, depends upon a variety of circumstances, and it certainly does not in the smallest degree suggest that because they are small they are necessarily nominal damages.”

37. The court [Nambuye, Kiage & Murgor, JJA] posited further as follows in regard to nominal damages in the case of **Nyamogo & Nyamogo Advocates v Barclays Bank of Kenya [2015] KECA 744 (KLR):**

Grabbe JA. in the case of **Kanji Naran Patel versus Noor Essa and another [1965]EA484** at page 487 paragraph G-I had this to say:-

“Nominal damage is a technical phrase which means that you have negated anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to

any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term nominal damage does not mean small damages. The extent to which a person has a right to recover what is called by the compendious phrase damages but may also be represented as compensation for the use of something that belongs to him, depends upon a variety of circumstances and it certainly does not in the smallest degree suggest that because they are small, they are necessarily nominal damages.

In the earlier case of Beumont versus Great head [1846] 2C.B. 494, Maule, J. [1846] 2C.B. at P.499) spoke of nominal damages as a sum that may be spoken of but that has not existence in point of quantity” and as a “mere peg on which to hang costs.”

38. Nominal damages do not mean small damages. They simply mean that the loss is not related to either business or reputation. Particulars of loss were not pleaded. It is unknown then how the loss occurred. It is not enough to tender evidence on loss; there must be a pleading to the said effect. 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. The court has thus to look at the damages suffered in abstract, not in reality. In the case of **Douglas Odhiambo Apel & another v Telkom Kenya Limited** [2014] KECA 868 (KLR), the Court of Appeal (**Nambuye,**

Ouko & Kiage JJA) noted situations where nominal damages do not apply, that is, where the claims extend to other areas, such as contract. It stated as follows:

It is to be noted that the general damages claim was not limited to unlawful confinement and malicious prosecution alone but also on inducing breach of contract as well.

Being persuaded that the respondent had voluntarily admitted liability and agreed to shoulder it, we assess and award the damages at the sum of Kshs. 50,000 for each appellant as proposed by the respondent itself in its submissions before the trial court. This sum shall attract interest at court rates from the date of the High Court judgment.

40. However, where damages cannot be ascertained, nominal damages suffice. In the case of **Ndiritu v Muigai & 3 others (Civil Appeal E258 of 2023) [2024] KEHC 3796 (KLR) (15 April 2024) (Judgment)**, this court stated as doth:

A normal award is given where the appellant plays a minimal role. In the case of *Jamuto Enterprises Limited v County Government of Meru* [2021] eKLR, Justice Patrick J.O Otieno posited that:

19. It is thus not the law that no general damages are ever awardable where a clear breach is established. My appreciation of the law is that

every time there is a breach of a contract, the innocent party is, from the onset, entitled to nominal damages but will also get general damages where he proves an injury flowing as a natural consequence from the breach. I find this to be the congruent position in both text books and stare decisis. The author of The Halsbury's Laws of England, Third Edition vol. II, takes the position that: "where a plaintiff whose rights have been infringed has not in fact sustained any actual damage therefrom, or fails to prove that he has; or although the plaintiff has sustained actual damage, the damage arises not from the defendant's wrongful act, but from the conduct of the plaintiff himself; or the plaintiff is not concerned to raise the question of actual loss, but brings his action simply with the view of establishing his right, the damages which he is entitled to receive are called nominal. Thus in actions for breach of contract nominal damages are recoverable although no actual damage can be proved.

20. In *Kinakie Co-operative Society v Green Hotel* (1988) KLR 242, the Court of Appeal while taking the position that damages are indeed awardable for breach of contract in deserving cases held: "Where damages are at large and cannot be quantified, the court may have to assess damages upon some conventional yardstick. But if a specific loss is to be compensated and the party was given a chance to prove the loss and did not, he cannot have more than nominal damages."

41. The first respondent was charged with a misdemeanor. There was no serious threat to his livelihood. The court is aware of the remit of the first appellate court. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

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

42. The allegations were mundane and not very serious. Thus, an award of Ksh 200,000/= will suffice. There was thus no basis for the award of Ksh 700,000/=. The same is excessive for the nature of the criminal conduct involved. 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.

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

44. 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.

45. Furthermore, the two parties were family, hence the loss is minimal, being a family feud. 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/=. Being a misdemeanor, it should not attract very high awards. An award of a sum of KSh. 200,000/= shall suffice.

46. 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. 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 flurried 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

47. 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 they 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 pleadingsfor 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.

48. 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.

49. 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.

50. 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.

51. The order shall therefore apply even to the second respondent. This leaves the issue of costs, which is governed by Section 27 of the Civil Procedure Act, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

52. Costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited** [2018] KECA 158 (KLR) had this to say:

"It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

53. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Rai & 3 others v Rai & 4 others [2014] KESC 31 (KLR)**, as follows:

18. It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation

22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging

consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

54. The appellant was found to have maliciously instituted the claim. Despite being malicious, he had partly succeeded. Being a tortfeasor, the court will not exercise discretion in his favour. Each party shall bear its own costs.

Determination

55. In the upshot, I make the following orders: -

- 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