REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL APPEAL NO. E050 OF 2024

JOHN KYENDO ……. 1ST APPELLANT

RHODA MUKONYO ……. 2ND APPELLANT

-VERSUS-

PETER KIMUNDI …….. RESPONDENT

(Being an Appeal from the Judgment of Hon. F. Makoyo, Principal Magistrate in Kilungu Magistrates Court Civil Suit no. 63 of 2020 delivered on 23rd May, 2023)

JUDGMENT

1. The background to this appeal arises from a dispute that began as a land-related disagreement at Sultan Hamud and later gave rise to criminal proceedings and a subsequent civil claim for malicious prosecution, which is now the subject of appeal. The Respondent was charged

before the Principal Magistrate's Court at **Kilungu in Criminal Case No. 600 of 2018** with the offence of interfering with boundary features.

2. The complaint that led to the criminal process originated from a report made to the police concerning the alleged removal of beacons placed on Plot No. 71, which the 2nd Appellant claimed had been allocated to her. Following the trial, the Respondent was acquitted under **Section 215** of the **Criminal Procedure Code.**
3. After the acquittal, the Respondent instituted by **Kilungu Civil Suit No. 63 of 2020** a plaint dated 24th February, 2020 seeking general and special damages for malicious prosecution against the Appellants and the Attorney General. The Respondent contended that the Appellants had made a false report to the police without reasonable or probable cause, thereby setting the criminal law in motion with malice. The Appellants denied liability, maintaining that they merely lodged a complaint which was independently investigated and prosecuted by the police and the Office of the Director of Public Prosecutions.

4. In a judgment delivered on 23rd May, 2023, the trial Court found that the ingredients of malicious prosecution had been proved on a balance of probabilities. The Court held that the Appellants were instrumental in setting the criminal process in motion and that the subsequent prosecution lacked reasonable and probable cause and was actuated by malice, in light of the earlier prosecutorial direction advising that the dispute be pursued before the Environment and Land Court. The trial Court awarded general damages of Kshs. 200,000/= and special damages of Kshs. 50,000/= together with costs and interest.
5. Aggrieved by that decision, the Appellants lodged the present appeal vide a memorandum dated 12th April, 2024 premised upon the grounds that:

a. ***The learned Magistrate erred in law and in fact in making a decision which was not supported by evidence and in delivering a judgment that was not properly reasoned.***

b. The learned Magistrate erred in law and in fact by misdirecting himself into making

a judgment that was not supported by the evidence.

c. The learned Magistrate erred in law and in fact in misapplying the law under Article 157(6)(a) and (10) in making a finding against the 1st and 2nd Appellants.

d. The learned Magistrate erred in law and in fact in finding that the threshold of proof on a balance of probabilities had been met by the Plaintiff.

e. The learned Magistrate erred in law and in fact as there were glaring errors and inconsistencies in the judgment, indicating a failure to properly understand the subject matter of the suit.

f. ***The learned Magistrate erred in law and in fact in ignoring the evidence adduced by the Defendants' witnesses and in being carried away by the Plaintiff's claim.***

Submissions:

6. In their written submissions, the Appellants principally argue that the trial Court misapprehended both the facts and the law governing the tort of malicious prosecution. They rely heavily on *Stephen Gachua Githaiga & another v Attorney General (2015) eKLR* for the proposition that a claimant must strictly prove all the four elements of the tort, namely that the prosecution was initiated by the defendant, that it terminated in the claimant's favour, that there was absence of reasonable and probable cause, and that the prosecution was actuated by malice. They further invoke *Nelles v Ontario, Radford v Stewart, Chopra v T. Eaton Co., and Kasana Produce Store v Kato* as persuasive authorities elaborating the constituent elements of malicious prosecution and the policy rationale behind the tort.
7. On the question of who can be said to have set the law in motion, the Appellants rely on *Tobias Moinde Kengere v Postal Corporation of Kenya & 2 others (2019) eKLR* to argue that a person who merely makes a report or appears as a witness cannot automatically be held liable for the prosecutorial decisions of the police or the Office of the Director of Public Prosecutions. They also cite

Socfinaf Kenya Ltd v Peter Guchu Kuria & another (2002) eKLR and Daniel Odhiambo Apel & another v Telkom Kenya Ltd (2006) eKLR in support of their contention that the trial Court improperly attributed the decision to prosecute to the Appellants rather than to the independent discretion of investigative and prosecutorial authorities.

8. With respect to the element of malice, the Appellants rely on *Kagane v Attorney General (1969) EA 643 and Vastu Company Limited v Mwangi (2022) KEHC 3006 (KLR),* submitting that malice must be proved as an improper motive going beyond a genuine desire to vindicate the law, and that an acquittal or lack of sufficient evidence alone cannot establish malicious prosecution. They therefore contend that the trial magistrate erred by equating insufficiency of evidence with proof of malice and by failing to analyse each ingredient of the tort distinctly against the evidence on record.
9. The Respondent supports the judgment of the trial Court and urges the appellate Court not to interfere with the findings on liability or damages. The Respondent begins by restating the factual background that the Appellants

reported him to the police leading to his arrest and prosecution for allegedly interfering with boundary features, a prosecution which ultimately terminated in his favour. It is submitted that the appellate court's duty, guided by *Mbogo & Another v Shah (1968) EA 93 and Peters v Sunday Post Ltd (1958) EA 424*, is limited to re-evaluating the evidence while exercising restraint and only interfering where the trial court misdirected itself or reached a plainly wrong conclusion.

10. The Respondent contends that the evidence on record demonstrates that the Appellants were instrumental in setting the criminal process in motion, relying on the occurrence book entry and witness statements showing that the 1st Appellant made the initial report to police regarding alleged removal of beacons on Plot No. 71. It is further argued that the report was false and malicious because the Appellants knew that ownership and occupation of the plot were disputed and that construction was being undertaken by a third party, yet they pursued criminal sanctions instead of civil remedies.

11. Counsel argues that the testimony of the investigating officer indicating that an earlier direction from the Office of the Director of Public Prosecutions advised that the matter was more civil in nature, and that the later prosecution appeared to follow external pressure, which the trial Court correctly inferred as evidence of improper motive.

12. On the legal ingredients of malicious prosecution, the Respondent relies on *Robert Okeri Ombeke v Central Bank of Kenya, Civil Appeal No. 105 of 2007 and Christine Atieno Caleb v Attorney General (2014) eKLR*, submitting that the four elements were satisfied: the Appellants initiated the process, the criminal case ended in acquittal, there was absence of reasonable and probable cause, and the prosecution was driven by malice. According to the Respondent, the Appellants sought to use the criminal justice system to silence county officials who had opposed their attempts to place beacons on the disputed land, which amounted to an abuse of the criminal process.

13. In conclusion, the Respondent maintains that the trial magistrate properly analyzed the evidence and

applied the correct legal principles, and therefore urges the appellate court to dismiss the appeal with costs

Analysis & Determination:

14. The sole issue for determination is whether the Respondent established, on a balance of probabilities, the ingredients of the tort of malicious prosecution so as to warrant the finding of liability and the award made by the trial Court.

15. This being a first appeal, this Court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

16. 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 is***

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."

17. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of ***Selle and another Vs Associated Motor Board Company and Others [1968] EA 123***, where they held as follows;-

"... this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

18. The elements of the tort of malicious prosecution have been discussed in various authorities including

Murunga vs 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.***

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

20. From the record, the first two elements are largely uncontested. It is common ground that the Respondent was arrested and prosecuted in **Kilungu Criminal Case No. 600 of 2018** following a complaint arising from the dispute over Plot No. 71 at Sultan Hamud. It is equally

undisputed that the criminal proceedings terminated in the Respondent's favour when he was acquitted under **Section 215** of the **Criminal Procedure Code**. The question is whether the Appellants can be said to have set the law in motion without reasonable and probable cause and whether the prosecution was actuated by malice.

21. Needless to say, the mere fact that someone has been acquitted, even does not *ipso facto* entitle a party to damages. There must be dishonesty or unreasonableness in doing so. In the case of ***James Karuga Kiiru v Joseph Mwamburi and 3 Others, Nrb C.A No. 171 of 2000***, the Court held:

> ***"To prosecute a person is not prima facie tortuous, but to do so dishonestly or unreasonably is. And the burden of proving that the prosecutor did not act honestly or reasonably lies on the person prosecuted."***

22. Turning to the contested elements, a significant feature emerging from the record is that the 1st and 2nd Appellants were not ordinary complainants; they were, by their own testimony, a retired senior police officer and a

retired civil servant respectively. It is apparent that the 1st Appellant upon making his report, the police through CPL Langat who testified as **PW3** conducted investigations.

23. In his self-recorded statement, CPL Richard Langat expressly expressed uncertainty as to whether a criminal process was appropriate at all, stating as follows:

> ***"ownership of the plot is still pending. To my conclusion I find it difficult to say who should be the complainant in respect to the alleged offence of interfering with bound… Any demarcation… beacon in this case. Let me get direction as from your office for or else the case should be kept pending the confirmation of ownership."***

24. He would subsequently receive a letter from the ODPP dated 18th April, 2018 which expressly rejected the proposed charge. The letter stated that:

> ***"The matter is best litigated before the Environment and Lands Court (ELC) as it involves demarcated boundaries and land***

beacons which are issues substantive to land or boundary disputes and;

The matter is more civil than criminal in nature as it lacks the successful criminal requisite prosecutorial threshold for prosecution…

The said charge sheet is therefore rejected in its entirety by the undersigned Office."

25. Notwithstanding that clear direction, a subsequent letter dated 17th July, 2018 from the ODPP reversed course and authorized prosecution. In that later correspondence, the ODPP stated:

"After a careful analysis of evidence as contained in the duplicate police file, appears that the two suspects were seen uprooting the beacons on the subject parcel boundary… You are therefore directed to charge the suspect with interfering with boundary feature contrary to section 21(1) of the Land Registration Act, No. 3 of 2012… Although the issue of ownership of the said land may only be put to rest by civil suit before the Environment and Lands Court, the matter

at hand is in removing boundary features which act is criminal …"

26. The existence of two diametrically opposed prosecutorial positions within a relatively short span of time inevitably raised questions before the trial Court regarding the basis upon which the earlier rejection was revisited. The testimony of **DW3**, CPL Langat, was central to that inquiry. In cross-examination, he testified, in material part, as follows:

"After I finished my investigations and the ODPP directed that the matter be an ELC I had no problem. <u>But later so many letters started coming in applying pressure. I cannot tell who was the instigator of these letters… I was not the one who charged the plaintiff subsequently and I do not know who charged him… The charge sheet was signed by OCS Salama and not signed by the ODPP</u>… As the investigating officer I was never showed that letter by the time I testified…. The DCI Salama seemed to be saying we had not done the right thing and were proceeding with the matter… I did not see

any beacons on the front of the land and 2 witnesses said they saw the plaintiff and another person removing them."

27. To a discerning mind, after the initial prosecutorial rejection and cessation of investigations, the matter was revived through processes not fully explained by the investigating officer himself. The trial Court considered this sequence, together with the Appellants' acknowledged follow-up with authorities and their background as former police officers, as circumstances capable of supporting an inference that the criminal process was pressed forward notwithstanding the earlier view that the dispute was essentially civil.

28. The Appellants, on their part, urged that they merely made a report to the police and that the decision to charge rested solely with investigative and prosecutorial agencies. That submission is correct as a general proposition of law; however, the question before the Court is factual rather than abstract - whether, in the particular circumstances of this case, their conduct went beyond a neutral complaint and became instrumental in

setting the law in motion after the initial rejection of charges.

29. What followed thereafter is where the trail of evidence becomes less certain and, in some respects, deeply troubling. The second letter from the Office of the Director of Public Prosecutions dated 17th July, 2018 purported to reverse the earlier prosecutorial position. Yet, a careful reading of that communication reveals that it did not disclose what fresh material, if any, had emerged after the unequivocal rejection of the charge on 9th April, 2018.

30. The author merely stated that there had been "a careful analysis of evidence as contained in the duplicate police file," and proceeded to direct that the suspects be charged. No new witness, no additional forensic inquiry, and no intervening investigative step was identified. The letter thus spoke in the language of re-evaluation, but remained silent on the circumstances, impetus, or evidentiary foundation upon which such re-evaluation was undertaken.

31. That quagmire becomes more pronounced when viewed alongside the testimony and further statement of CPL Richard Langat. After the file was returned to him, he recorded in his further statement that:

> ***"Further to my earlier statement… this same file was returned to me… I visited the said office… he further advised that since the beacons are used in marking the portions of land parcels and they have connection to piece of land… it could be very better if the entire process could be tackled in civil court as a civil matter… Therefore… it was better… through court order the same plot be resurveyed and new beacons put in place."***

32. This sequence of events reveals a prosecution that appears to have proceeded despite the investigating officer's reservations, despite an earlier rejection as to charge, and without clarity as to the source of the momentum that revived the criminal process. The record does not disclose any intervening investigative breakthrough; instead, the narrative emerging from **DW3** is one of the file that moved through unseen hands,

propelled by “letters… applying pressure,” and ultimately culminating in charges.

33. Moreover, the record lends weight to that unease. The charge sheet on record bears no endorsement by a prosecuting counsel from the Office of the Director of Public Prosecutions, a fact expressly admitted by CPL Langat when he testified that, “The charge sheet was signed by OCS Salama and not signed by the ODPP.”

34. When these strands are woven together, the inference drawn by the trial Court was not conjured from speculation. Rather, it arose from the cumulative weight of a record that suggested a process revived and driven forward under circumstances that were never satisfactorily explained.

35. Taken together, these circumstances render it difficult to escape the conclusion that influences external to the investigative process intervened and ultimately propelled the criminal proceedings forward in a manner inconsistent with the earlier professional assessment that the dispute was civil in nature.

36. In the result, and applying the civil standard of proof, this Court is satisfied that it was more probable than not, that the Appellants conspired behind the scenes to revive and drive the criminal process against the Respondent after the initial rejection of charges.

37. In so far as quantum is concerned, this Court finds no basis to interfere with the exercise of discretion by the trial Court. The learned magistrate properly directed himself on the guiding principles in assessment of damages and anchored the award on comparable precedent, including ***Risper Nyomenda v George Martin Kenyatta [2021] eKLR***.

38. That approach is consistent with the reasoning adopted in ***Kioni v Mugo & another (Civil Appeal E016 of 2023) [2025] KEHC 8993 (KLR),*** where the High Court upheld a similar figure, and reiterated that an appellate Court will not disturb an award of damages merely because it might have arrived at a different figure, but only where the trial Court applied wrong principles or the award is so inordinately high or low as to represent an erroneous estimate.

39. In the present matter, the award of Kshs.200,000/= for general damages reflects a moderate and comparable figure for malicious prosecution claims of this nature, and there is nothing on record to demonstrate misdirection, excess, or insufficiency. Consequently, this Court finds that the trial Court's assessment of quantum was sound and therefore does not warrant interference.

Disposition:

40. In the result, the appeal herein is found to be devoid of merit and is hereby dismissed in its entirety.

41. The judgment and decree of the trial court delivered on 23rd May, 2023 in **Kilungu Civil Suit No. 63 of 2020** are hereby upheld.

42. The Respondent shall have the costs of this appeal, together with interest at Court rates.

43. Orders accordingly.

DATED, DELIVERED and **SIGNED** at **NAIROBI** through the Microsoft Teams Online Platform on this **18TH** day of **FEBRUARY, 2026.**

……

HON C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl