REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL NO. E019 OF 2025

ALFRED KIRAGU NJOGU..... APPELLANT

VERSUS

THE HON. ATTORNEY GENERAL .....1ST RESPONDENT

KENYA FOREST SERVICE ..... 2ND RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment and decree in Othaya PMCC No. E030 of 2023 delivered on 14.03.2025 by Hon. Sandra Ogot (Principal Magistrate). The Appellant was the plaintiff in the court below.

2. The appellant filed a suit claiming damages against the respondents for unlawful arrest, confinement in police cells, arraignment in court and malicious prosecution. The appellant alleged that he was the owner of land parcel number Chinga/Gikigie/1257. The appellant was charged for felling forest produce without authority contrary to section 64(1)(A) as read with section 64(2) and 68(1) of the Forest Act.

3. The appellant was accused of cutting 138 eucalyptus trees valued at Ksh. 574,654/=, property of forest produce. He stated that he sought and was granted permission to fell 30 trees on a private plantation and woodlots that were approved by the Kenya Forest Service. He averred that on 24.11.2020 the officials of the second respondent caused him to be taken to Othaya Police Station and incarcerated and taken to Othaya Law Courts and charged. He was tried and acquitted after a lengthy trial that lasted 2 years. He set particulars of wrongful arrest, malicious prosecution, damages and special damages. The later was fees for defending Othaya PMCR No. E108 of 2015.

4. The respondents filed a defence on 15.11.2023, where they denied the malicious prosecution. They stated that the arrest was due to a reasonable or justifiable and or probable cause. It was averred that there was a cognizable offence which was acted upon.

5. The appellant adopted his statement and produced 9 exhibits. He had a permit to fell trees that have no family dispute. On 21.11.2020 he was invited by the forest rangers for verification. The rangers had gone to his home to inquire if he had a permit for the trees he cut. He showed them the permit together with the Mucharage Sub-location chief's letter. He was arrested but the respondents did not do due diligence. He stated that the court acquitted him.

6. He stated that he was in the cells between 21.11.2020 to 25.11.2020. He said that he did not know the police rangers who arrested him.

7. The respondent's witness was Francis Mburugu of Forest Zuti station and adopted his statement dated 26.07.2024. He stated the appellant was arrested on 24.11.2020 after they found him cutting 138 eucalyptus trees without a license. The appellant produced two letters to cut trees from his private farm and from the chief of the Gacharage sub-location.

8. On cross-examination, the witness stated that permission had been given to cut 30 trees, but he cut 138 trees. He was found with 138 trees. He stated that there was a forest boundary issue. He stated that the witness was found in the forest and not a private farm. On re-examination, the witness stated that Exhibit 9 was a request for a survey and not a notice to show cause.

Impugned Judgment

9. The court below delivered its judgment on 14.03.2025. The court found that there are five elements that must be present for malicious prosecution. Reliance was placed on the supreme court of the UK in the case of *Willers v Joyce and another* (in substitution for and in their capacity as executors

of Albert Gubay (2016) UKSC 43 50. The court found that the prosecution ended in the appellant's favour.

10. The court found that, given that the appellant was given permission to cut 30 trees, the forest service cannot be faulted for the 138 trees the appellant was found with, which must have been felled from the forest. The court found that there was reasonable and probable cause for assuming that the trees were cut from the forest. The court found that the element of malice was missing. It dismissed the suit with each party bearing their own costs.

11. Aggrieved by the decision, the appellants set forth three grounds as follows:-

    1. THAT the learned trial magistrate erred in law by holding and finding that the Appellant had not proven all the elements of the tort of malicious prosecution, whereas the Appellant had proven the same, thereby occasioning a gross miscarriage of justice.

    2. THAT the learned trial magistrate erred in law and fact by applying the wrong principles of law, thereby occasioning a gross miscarriage of justice.

    3. THAT the learned trial magistrate erred in law and fact by failing to address her mind to the pleadings on record and the evidence by the parties, thereby occasioning a gross miscarriage of justice.

12. The appellant prayed that the appeal be allowed with costs and:

> THAT the Judgment of Honorable Sandra Ogot, Principal Magistrate in Othaya Principal Magistrates Court Civil Case No. E030 of 2023, delivered on 14th March, 2025, be set aside and/or varied, and be substituted with an order allowing the suit with costs.

13. The appeal raised only one ground, that is, whether the court erred in dismissing the appellant's suit for unlawful arrest, detention, and malicious prosecution.

Appellants' Submissions

14. The appellant filed submissions dated 16.9.2025. He submitted that the court erred in applying a narrow test of malice, the case was proved to the required standards, and that malice should be inferred from lack of reasonable and probable cause and reckless conduct on the part of the Respondents. They stated that the court erred in inferring that malice must be from bad blood or animosity. Malice cannot be limited to personal spite or ill will. It should include improper and indirect motive, including reckless disregard for the truth, and acting without honest belief in the guilt of an accused. Reliance was placed in the case of **Mbowa vs. East Mengo District Administration** [1972] EA 352.

15. He submitted that he had in his possession exculpatory permits which were ignored. The number of trees were exaggerated, there was disregard that the produce was from his farm. The question of certification of boundary request was made as evidence of doubt as to the honesty of belief of truth of the accusation. It was submitted that had proper investigations been carried, the arrest could have been avoided.

16. Reliance was placed on the case of **Ohito v Attorney General (Civil Suit 14 of 2015)[2022] KEHC 16766 (KLR**) and *Kagane v Attorney General & Another [1969] EA 643* in support of the proposition that malice can be inferred from absence of reasonable and probable cause.

17. The appellant proceeded that the court correctly found the applicability of the decision of F. Gikonyo J in St**ephen Kaburu & 5 others v Attorney General & 7 others [2018] KEHC 8559, (KLR)**, but failed to apply to the case. In that case the court stated as follows:

> [11] From the record of the criminal trial presented in court, I see that the prosecution called a total of 16 witnesses in support of their case. The arresting and Investigation Officer, I.P. John Mucheru stated that he carried out investigation and received circumstantial evidence which led to his arresting the Appellant. He even visited the scene and established that water pipes had been damaged. This

fact was also observed by the criminal trial court which visited the scene. Faced with these facts, I do not think that the police officers acted without reasonable and probable cause. The criminal trial court found that prima facie case had been made by the prosecution upon which the Appellants were put to their defence. As the trial court correctly observed, so am I content to cite Rudd J in the case of Kagane & Others Vs. AG & Another [1968] EA643 that:

> Consequently, the subjective test should be applied where there is some evidence directly tending to show that prosecutor did not believe in truth of his case. Such evidence could be afforded by words or letters or conduct on the part of the prosecutor which tending to show that he did not believe in it and I think possibly, an unexplained failure to call an essential witness who provided a basis part of the information upon which the prosecution was based''.

The investigation officer carried out investigation before arresting and arraigning the Appellants in court. There was reasonable and probable cause to charge the Appellants. And as I stated, acquittal alone is not per se proof of lack of reasonable and probable cause to charge the person. Such evidence tending to show that the prosecutor did not honestly believe in his case should be provided. None was provided here.

18. He prayed for the appeal to be allowed.

19. The respondents filed submissions dated 10.11.2025 and stated that there is only one issue, whether the court erred in finding that the appellant had not proved all the elements of the tort of malicious prosecution. They submitted that malicious prosecution is an intentional tort that seeks to redress loss incurred by a plaintiff in an unsuccessful and malicious proceedings without any reasonable and probable cause. Reliance was placed in the case of **George Masinde Murunga v Attorney-General [1979] KEHC 34 (KLR)**, where Eugene Cotran J, held as follows:

> *As to malicious prosecution the plaintiff must prove four things: (1) that the prosecution was instituted by Inspector Ouma (there is no dispute as to this); (2) that the prosecution terminated in the plaintiffs' favour (there is also no dispute as to this); (3) that the prosecution was instituted without reasonable and probable cause; and (4) that it was actuated by malice.*

20. They submitted that the tests must be conjunctive as held in the case of **Attorney General v Peter Kirimi Mbogo & Another [2021] eKLR**.

21. In **Stephen Gachau Githaiga & another v Attorney General** [2015] KEHC 655 (KLR), Mativo J, as he then was held as follows:

> The malice requirement is the key to striking the balance that the tort was designed to maintain: between society's interest in the effective administration of criminal justice and the need to compensate individuals who have been wrongly prosecuted for a primary purpose other than that of carrying the law into effect.
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> Quoting from the Supreme Court of Canada decision in Nelles v. Ontario[1989] 2 SCR 170, the Alberta Court of Appeal, in Radford v Stewart, said:-
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> > "There are four elements to the tort of malicious prosecution: the prosecution must have been initiated by the defendant, the proceedings must have been terminated in favour of the plaintiff, there must be an absence of reasonable and probable cause and there must be malice or a primary purpose other than that of carrying the law into effect."
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> In 1999, the Alberta Court of Queen's Bench, in Chopra v. T. Eaton Co. (240 A.R. 201) adopted these words in relation to this tort:
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> > "The underlying basis for actions founded on malicious prosecution is the allegation of facts which, if believed, would establish abuse of the judicial process while acting out of malice and without reasonable and probable cause and which judicial process did not result in a finding of guilt of the party alleging the abuse."

22. They submitted that there is no question that the prosecution was initiated by the respondents and it ended in the appellant's favour, but denied that malice was proved. They felt fortified by the decision of **Nzoia Sugar Company**

Limited & another v Fungututi & another [1988] KECA 93 (KLR), where the court of appeal [HG Platt, FK Apaloo, JJA & JRO Masime, Ag J] held as follows:

> **It is trite learning that acquittal, per se, on a criminal case 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. The respondent gave no evidence from which it can be reasonably inferred that the Security Officer made this report to the police on account of hatred or spite that he had for him.**

23. They continued addressing the question of malice as settled in a binding decision of **Robert Okeri Ombeka v Central Bank of Kenya [2015] KECA 464 (KLR),** where the court of appeal [Githinji, Musinga & J. Mohammed, JJ.A] at paragraph 29 and 30 (my addition for completeness) posited as follows:

> 29. Comparative judicial experience in other jurisdictions also shows an emerging legal principle that an acquittal or discharge in a criminal prosecution should not necessarily lead to a cause of action in malicious prosecution law suits. A malicious prosecution plaintiff cannot establish lack of probable cause based on having obtained in an earlier action an acquittal based on insufficiency of the evidence. Successfully defending a prosecution

or a law suit does not establish that the suit was brought without probable cause. It is the state of mind of the one commencing the arrest or imprisonment, and not the actual facts of the case or the guilt or innocence of the accused which is at issue. Probable cause is determined at the time of subscribing a criminal complaint and it is immaterial that the accused thereafter may be found not guilty.

30. Public policy favors the exposure of crime, and the cooperation of citizens possessing knowledge thereof is essential to effective implementation of that policy. Persons acting in good faith who have probable cause to believe that crimes have been committed should not be deterred from reporting them by the fear of unfounded suits by those accused. This view is in accord with the decision of the South African case of Beckenstrater V Roffcher & TheunisseN, 1955 1 SA 129 (A) 135D-E, and carried forward in the case of Relyant Trading (Pty) Ltd V Shongwe, 2007 1 ALL SA 375 (SCA) para 14 where Malan JA stated that:

> "... the requirement of reasonable and probable cause "is a sensible one" since "it is of importance to the community that persons who have reasonable and probable cause for a prosecution should not be deterred from setting the criminal law in motion against those whom they believe to have committed offences, even if in so doing they are actuated by indirect and improper motives."

24. The respondents submitted that though the appellant posited that specific rangers were involved, they now question

the court's reliance on bad blood, animosity or grudge. They stated that the appellant was given permission to cut 30 trees. He was bordering the forest. There was reasonable assumption that he cut them from the forest. Since his land bordered the forest, it is only he who could have cut the forest trees. He maintained that it was incumbent upon the appellant to show, which he failed to do, that the criminal process was used for other reasons other than bringing the appellant to justice.

25. They submitted that malice must be provide. Reliance was placed in the case of **Gitau Vs East Africa Power & Lightening Co. Ltd (1986) KLR, 365**, where Scofield J held that;

> *"In order for a claim of malicious prosecution to succeed the plaintiff must not only show that he was prosecuted but that he was prosecuted upon the instigation of the defendants and that there existed malice and which malice he must prove."*

26. They submitted that the appellant failed to demonstrate ill will, malice and lack of probable and reasonable cause. Reference was made to the case of **Chogo V Attorney General & 2 Others (Civil Appeal E859 Of 2022) [2024] Kehc 7693 (KLR),** where the court, Musyoka J, held as follows:

Part of the reason why the appeal herein was filed was because the respondents did not attend court when the case was heard orally. The appellant thinks that he had a field day, and a walkover, as his testimony was not subjected to cross-examination, and the respondents did not present evidence to counter his. He appears to harbour the notion that since his testimony was not challenged, by way of cross-examination, and counter evidence, then the trial court should have treated it as unrebutted and uncontroverted, and should have found in his favour, on that score alone. The argument appears to be that since there was no counter evidence, whatever evidence he adduced was adequate, on account of balance of probability. It was the only evidence available, he thinks, and, therefore, it was preponderant.

Is that it? No. Let me reiterate what I have stated hereabove, at paragraph 10, that the burden of proving malice and of lack of probable and reasonable cause, with respect to the tort of malicious prosecution, lies with the plaintiff, and shifts to the defendants only after the plaintiff has presented evidence of malice and of lack of probable or reasonable cause, for the defendants to explain themselves. There can be no walkover, in a case of malicious prosecution, for one has to prove lack of probable cause and malice, to be entitled to a judgment in their favour, where the claim is undefended or uncontested.

27. In conclusion, they prayed that the appeal be dismissed with costs.

Analysis

28. This Court has considered the pleadings, evidence, submissions and authorities relied on by the parties in support and opposition to the appeal. The issue that falls for this Court's determination is whether the lower Court erred in dismissing the suit for malicious prosecution and wrongful arrest.

29. This being a first appeal, the Court should evaluate the evidence, consider arguments by parties applying the law thereto, and make its own determination of the issues in controversy. Except however, that it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies. 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.

30. The duty of this court as an appellate court was further enunciated in the case of **Mursal & another v Manese** (suing as the legal administrator of Dalphine Kanini Manesa) [2022] KEHC 282 (KLR), where Mativo J, as he then was posited that:

> **A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons.**

31. Other than the question of what needs to be proved, the parties narrowed the case to a question of lack of malice or otherwise. To start with, salient elements of the tort for malicious prosecution are found in the words of Duffus V.P. in

the case of **Kasana Produce Store Vs Kato** at page 191, paragraph G-I, as follows:

a. *The plaintiff was prosecuted by the defendant in that the law was set in motion against him by the defendant on a criminal charge. The test is not whether the criminal proceedings have reached a stage at which they may be described as a prosecution but whether they have reached a stage at which damage to the plaintiff result.*
b. *That the prosecution was determined in the plaintiff's favour.*
c. *That it was without reasonable or probable cause. On the evidence, the defendant did not believe in the justice of his own case.*
d. *It was malicious - The defendant had improper and indirect motives in pursuing the false charge against the plaintiff.*

32. The law imposes an obligation on a party who claims that he was unlawfully arrested, falsely imprisoned, and or maliciously prosecuted to prove that the arrest had no basis in law at all. Further it must be remembered that malicious prosecution precludes a collateral attack on a properly rendered criminal conviction and thus avoids a conflict between civil and criminal justice. In the case of this court in **Dickson Chebuye Ambeyi v National Police Service another Peter**

Sifuna Wesonga another (Interested Parties), the court stated as follows:

> In this petition, it is true that the petitioner's wife was arrested, charged in Court and prosecuted. It is also true that the prosecution ended in her favour because she was acquitted of the charge. Even with these, there was a duty to prove that there was malice in making the report that lead to the arrest and prosecution. Acquittal alone cannot amount to proof of malice. There must be something more than just acquittal. In the case of Nzoia Sugar Company Limited vs. Fungutuli [1988]) elk, the Court of Appeal observed; "It is trite learning that acquittal, per se, on a criminal case 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."
> "A party who suspects that there has been a violation of the law, has an obligation to report the matter to the police who carry out investigations and decide whether or not to charge and prosecute the person depending on the strength of the evidence. The fact that an accused person, though charged and prosecuted, was acquitted is not proof of malice. There must be proof of existence of malice in making the report. In other words, the petitioner must prove that there was no reasonable basis for making the report. The decisions referred to above are clear that there must be unreasonable basis for

> reporting a complaint to the police and that the report was actuated with malice. In the present petition the petitioner did not even show that the complaint was false and that it was full of spite or malice."

33. The appellant must prove the absence of reasonable and probable cause to commence or continue the prosecution. Reliance was placed on the case of **James Kahindi Simba v Director of Public Prosecution & 2 others,** where the court, while defining reasonable and probable cause, referred to the case of *Hicks v Faulkner* {1878} 8Q.B.D. 167, 171 – where Hawkins J said:

> I should define reasonable and probable cause to be an honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds of the existence of a state of circumstances which, assuming to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accused to the conclusion that the person charged was probably guilty of the same imputed."

34. In this case the appellant's own evidence is that he was granted permission to cut 30 trees. That permission is not controverted. The evidence throughout the trial that was not controverted was that he cut 138 trees. In other words, he cut 108 trees without a license. It is not controverted that one needs a license to cut trees whether in a private woodlot or a forest. There was thus 108 trees that were unaccounted for. If

he cut 30 trees lawfully from his farm, where did he cut the other 108 trees? The trial court, in its wisdom did not find that the 108 extra trees were cut from the public forest.

35. This does not however remove the fact that cutting 108 trees without a license gave a glaring, reasonable, and probable cause to commence or continue the prosecution. There was an obviously a presence of a reasonable and probable cause to commence or continue the prosecution. The trial court found that the Appellant had a prima facie case and placed the appellant on his defence.

36. Whereas an acquittal is a termination in favor of the appellant, he had already been placed with a case to answer. It means, *ipso facto*, that there was a plausible cause for reporting the crime. Prima facie case means, as per the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others** [2003] eKLR, as hereunder:

> ***4.*** **A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case in which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right that has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter**.

37. In **Republic v Owuor** (Criminal Case E002 of 2022) [2024] KEHC 3712 (KLR) (16 April 2024) (Ruling), the court, R. E. Aburili, held as follows regarding having a case to answer.

> In simple terms, terms, *prima facie* means the establishment of a rebuttable presumption that an accused person is guilty of the offence he/she is charged with. In Ramanlal Trambaklal Bhatt v R [1957] E.A 332 at 335, the court stated as follows:
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> Remembering that the legal onus is always on the Prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution's case, the case is merely one in which on full consideration might possible be thought sufficient to sustain a conviction.
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> This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather, hopes the defence will fill the gaps in the Prosecution case. Nor can we agree that the question ...there is a case to answer depends only on whether there is some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence. It may not be easy to define what is meant by a, prima facie case, but at least it must mean one on which a reasonable, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.

38. The main question is whether there was a reasonable cause to arrest the appellant. He was in possession of more than trees he had been licensed to cut. Indeed, the rangers took their time to verify. Indeed, one of them even requested for survey. Requesting for survey is not evidence that the trees were cut from a private or public woodlot. It creates a possibility that they may have been cut either from a public forest or a private woodlot. The main determining factor was that there was a cause to believe and the information was not false. Premium was taken from an obiter comment by the trial court that proper investigations may have exonerated him. This was obiter. It is speculative on what outcome of further investigations were. In the case of **John Nganga Kinuu 2 others v Peter Rubiro Ndongi 4 others,** the Court of Appeal stated as follows:

> "Turning to the High Court, the approach the Judge took was to take into consideration the same case the trial court had relied upon namely; of John Ndeto Kyalo versus KTDA & Another (supra), and set out the principles that guide a Court of law in sustaining a claim for malicious prosecution as already highlighted above. The Judge observed and correctly so in our view that the principles set out in the John Ndeto Kyalo case (supra), formed the threshold for determining the appeal before him. Applying that threshold to the record, the Judge rendered himself as follows:
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> I have on my part re-evaluated the evidence presented before the trial court. It is clear to me

> that the criminal charge preferred against appellants arose out of investigations carried out pursuant to a complaint filed by the 1st, 2nd, and 3rd respondents. It is apparent that the complaint was not false; therefore, the investigation was instituted pursuant to reasonable and probable cause. There is no dispute that on 17th May, 1998, the 1st, 2nd and 3rd respondents were attacked and robbed. The trio booked a report before Kikuyu police station. The report was real and not false. In the end, I find no merit in the appeal as against the orders on liability.

39. Therefore, 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 originated in the medieval writ of conspiracy which was aimed against combinations to abuse legal procedure, that is, it was aimed at the prevention or restraint of improper legal proceedings...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, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority; (2) the defendant must have acted without reasonable or probable cause i.e. there must have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified; (3) the defendant must have acted maliciously in that he must have acted, in instituting 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; and (4), the criminal proceedings must have been terminated in the plaintiff's favour, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge…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. The damage that is claimed is in respect of reputation but other damages might be claimed,

for example, damage to property...The damage to the plaintiff results at the stage in the criminal proceedings when the plaintiff is acquitted or, if there is an appeal, when his conviction is quashed or set aside. In other words, the damage results at a stage when the criminal proceedings came to an end in his favour, whether finally or not. The plaintiff could not possibly succeed without proving that the criminal proceedings terminated in his favour, for proving any or all of the first three essentials of malicious prosecution without the fourth which forms part of the cause of action, would not take him very far. He must prove that the court has found him not guilty of the offence charged...The law in an action for malicious prosecution has been clearly defined and in so far as the ordinary criminal prosecution is concerned the action does not lie until the plaintiff has been acquitted of the charge. In this case the respondent could have brought his action for malicious prosecution until the prosecution ended in his favour. He could not have maintained his action whilst the prosecution was pending nor could he have maintained an action after he had been convicted. His right to bring the action only accrued when he secured his acquittal of the charge on appeal, and he then had the right to bring this action for damages...Time must begin to run as from the date when the plaintiff could first successfully maintain an action. The cause of action is not complete until such a time, and in this case this was only after he was acquitted on appeal.

40. The decision to charge was made by the Director of Public Prosecutions. They are not parties to the case. There can be no malicious prosecution without the prosecutor. It is not enough to sue Attorney General. The Office of the Director of Public Prosecutions is an independent office.

41. The duties listed under paragraph 5 were transferred to the Office of the Director of Public Prosecution by virtue of Article 157 of the Constitution, which parties can read in their free time. Article 157 of the Constitution provides, *inter alia*, as follows:

> (1) There is established the office of Director of Public Prosecutions.
>
> (6) The Director of Public Prosecutions shall exercise State powers of prosecution and may-
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> (a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
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> (b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
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> (c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

42. Not every prosecution that results in an acquittal is malicious. The standards are different for civil and criminal. In this matter the appellant was given the benefit of doubt. It does not mean that he did not do so but because, the standards of criminal nature is high. The appellant was given the benefit of doubt, which is in the criminal standard. The test in civil cases is different. The benefit of doubt has its roots in most oft quoted English decision by Viscount Sankey L.C in the case of **H.L. (E) Woolmington vs. DPP [1935] A.C 462** pp 481, where it was held that:

> Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.''

43. The standard and burden of proof was also explained by the Supreme court of Canada In the case of **R vs. Lifchus {1997}3 SCR 320** as follows:

> The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty…the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt.

44. The legal burden refers to the burden of proof which remains constant throughout the trial. It is the obligation of a party to establish the facts and contentions necessary to

support its case, in this case the prosecutor. According to *Halsbury's Laws of England*, 4th Edition, Volume 17, paras 13 and 14:

> *The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues*

45. In the case of **James Karuga Kiiru v Joseph Mwamburi and 3 Others (2001) eKLR** the court stated as follows regarding malicious prosecution:

> To prosecute a person is not prima facie tortious, but to do so dishonestly or unreasonably is. Malicious prosecution thus differs from wrongful arrest and detention, in that the onus of proving that the prosecutor did not act honestly or reasonably, lies on the person prosecuted.

46. In **Samuel Gitonga Ringera v Henry Mutegi Maingi & 2 others [2021] eKLR**, PJO Otieno J stated as follows regarding the belief in the guilt of the accused:

> The law makes it imperative that the belief in the guilt of the accused be founded upon a decision made after due inquiry into and consideration of the facts presented to the respondents. But the reasonable belief need not be based on actual existence of a definite cause, but upon reasonable belief held in good faith in the existence of facts as are perceived by the respondents. The converse is that where there is no basis to believe that the accused is guilty of the accusation and the prosecution is all the same set in motion, there is clear evidence of malice.

47. The test is whether the arrest and prosecution were malicious. The court trying the case found that the state had met a threshold. It is upon the first respondent answering the case that the appellant was acquitted. The Appellant was acquitted under section 215 of the Criminal Procedure Code. The same provides as follows:

> *215. The court having heard both the complainant and the accused person and their witnesses and evidence shall either convict the accused and pass sentence upon or make an order against him according to law, or shall acquit him.*

48. The effect of Section 215 of the Criminal Procedure Code was an acquittal after defending oneself. 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.

49. The requirement of favourable termination of criminal proceedings may be satisfied in various ways, depending on how the proceedings are concluded in the accused person's favour. In **Paramount Bank Limited vs. Vaqvi Syed Qamara & another [2017] eKLR** (Makhandia, Ouko and MÍnoti JJA), stated:

> 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.

50. The appellant did not satisfy a critical element of malicious prosecution. He needed to prove that the appellants, together with the director of public prosecutions, must have acted maliciously in that they must have instituted 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. The Respondents acted on reasonable suspicion.

51. With respect to malice, a mere fact that a person has been acquitted of the criminal charge does not necessarily connote malice on the part of the prosecutor as held in the case of **Dr. Lucas Ndungu Munyua v Royal Media Services Limited & Another (2014) eKLR**. Further, no malice was seen. The case reported was plausible and cannot be said to be unreasonable. There was no evidence of malice. In the case of **Phen Gachau Githaiga & Another V Attorney General [2015]** eKLR Justice Mativo discussed the tort of malicious prosecution and stated as follows:

> Malicious prosecution is an intentional tort designed to provide redress for losses flowing from an unjustified prosecution. Under the first element of the test for malicious prosecution, the plaintiff must prove that the prosecution at issue was initiated by the defendant. This element identifies the proper target of the suit, as it is only those who were actively instrumental in setting the law in motion that may be held accountable for any dam age that results.
>
> 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.

The third element which must be proven by a plaintiff — absence of reasonable and probable cause to commence or continue the prosecution — further delineates the scope of potential plaintiffs. As a matter of policy, if reasonable and probable cause existed at the time the prosecutor commenced or continued the criminal proceeding in question, the proceeding must be taken to have been properly instituted, regardless of the fact that it ultimately terminated in favour of the accused.

Finally, the initiation of criminal proceedings in the absence of reasonable and probable grounds does not itself suffice to ground a plaintiff's case for malicious prosecution, regardless of whether the defendant is a private or public actor. Malicious prosecution, as the label implies, is an intentional tort that requires proof that the defendant's conduct in setting the criminal process in motion was fueled by malice. The malice requirement is the key to striking the balance that the tort was designed to maintain: between society's interest in the effective administration of criminal justice and the need to compensate individuals who have been wrongly

> prosecuted for a primary purpose other than that of carrying the law into effect.

52. The net effect is that I find that there was no malice in prosecuting the appellant. Secondly, the correct party, that is, the Office of the Director of Public Prosecutions and the Inspector General of Police, were not sued. At least the Inspector General was sued on behalf of the police. However, we do know the role of the police, as the second respondent admitted to having been involved in one of the arrests, among others. The complaint was legitimate, as prima facie, there was a crime of cutting 108 trees without a license. He had a license for 30 only. It is only that one element was said not to have been proved, that is, that the trees were from a public forest. An appeal may or may not vindicate either party.

53. The net effect is that I find that the appeal is not merited and is accordingly dismissed. The judgment and decree in Othaya PMCC No. E030 of 2023 delivered on 14.03.2025 by Hon. Sandra Ogot, Principal Magistrate, is therefore affirmed.

54. The only lacuna the court noted is that no one addressed the question of damages. In the case of **Lei Masaku v Kalpama Builders Ltd** [2014] KEHC 1196 (KLR), A. MABEYA J, held as follows:

> It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been

established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court needs to know the view by the Court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum."

55. . Had the same been proved, a nominal award ought to have been given. The court could have granted nominal damages of Ksh.100,000/=.

56. 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.**

57. 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.**

58. 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.

59. Costs follow the event. In this case, the event is the dismissal of the appeal. The respondent is entitled to costs payable by the appellant. A sum of Ksh 55,000/= will suffice.

Determination

60. In the upshot, I make the following orders:

a) I find that the appeal is not merited and is accordingly dismissed. The judgment and decree in Othaya PMCC No.

E030 of 2023 delivered on 14.03.2025 by Hon. Sandra Ogot, Principal Magistrate, is therefore affirmed.

b) Costs of Kshs. 55,000/= to the Respondent.

c) 30 days stay of execution.

d) Right of appeal 14 days.

e) The file is closed.

DELIVERED, DATED and **SIGNED** at **NYERI** on this **19th** day of **March, 2026**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Magua for the Appellant

Ms. Akinyi for the Respondent

Court Assistant – Michael/Martin