

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL APPEAL NO. E1063 OF 2024**

**ADAN KATELLO**

**ADANO.....APPELLANT**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTION.....1<sup>ST</sup>**  
**RESPONDENT THE SOLICITOR GENERAL.....**  
**.....2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup>**  
**RESPONDENT** (*Appeal from the Judgement and Decree of the Learned Senior Resident Magistrate's Court at Nairobi of the Learned Hon. R.L. MUSIEGA delivered on 6th Day of September 2024 in SRMCC 318 of 2022*)

**JUDGMENT**

1. This is an appeal that emanates from the lower Court for malicious prosecution. The history of this matter is that the Appellant was charged along with 7 others for corruption related offences as to wit -conspiracy to commit an offence of corruption. The facts of the case are that on diverse dates between 22<sup>nd</sup> October 2012 and 23<sup>rd</sup> November 2012, the Appellant conspired with other Accuseds to commit the offence of corruption as follows-fraud by altering the substance of a tender for supply of solar lanterns for the March 2013 General election for a company which was unqualified. The case proceeded to full trial upon which the

Appellant was acquitted. The Appellant filed a suit at the lower Court for malicious prosecution which was dismissed prompting this appeal. I have read the documents on records including the submissions and wish to note the following;

2. It is well settled that a suit hinged on malicious prosecution requires the following to be to be proven:

***a) That the Defendant instituted the prosecution***

***b) The Plaintiff was acquitted***

***c) There was no reasonable and probable cause to institute the suit in the first-place***

***d) Prosecution was actuated by malice***

3. The constitution is clear on the duties of prosecution generally before instituting a suit which are; to do so independently, objectively, without malice and in the interest of justice. In a suit of this nature this Court must interrogate whether the Prosecution was done in line with the provisions of the constitution and if so, if the main tenets of malicious prosecution has been proved. The prosecutors must fully comply with these provisions and cannot be heard to say "let the Court decide "where the evidentiary basis has collapsed. This should be strictly applied because of the consequences that arise out of a malicious prosecution and the great injustice on wrongful incarceration and anxiety of a criminal trial.
4. Having set the fulcrum upon which a decision to charge someone for malicious prosecution, it is now incumbent upon

me to see if this threshold has been met. First, it is clear that in this case the prosecution was instituted by the Defendants and secondly that the Appellant was acquitted leaving two more ingredients-that is if there was probable and reasonable cause to charge the Appellant and whether there was malice.

- 5.** Malicious prosecution has gained several interpretations and for the purpose of this appeal, it may be inferred to include reckless regard to exculpatory evidence. To determine if this could be the case, this Court must look at the proceedings at the lower that led to the acquittal. The law is firm that not all acquittals lead to success in a case of malicious prosecution. The same also applies to the principle that not all prosecutions lead to conviction and so one can be charged and acquitted but still cannot sustain a charge of malicious prosecution. To this extent therefore this court must refer to the fourth tenant of reasonable or probable cause so as to determine if there was malice in the prosecution.
- 6.** The principle that applies in determining if there is no reasonable cause or probable cause beneath a decision to charge a person lies in the evidence available. Courts hearing a malicious prosecution case must carefully sift through the evidence on record from the beginning to just before judgement where there is an acquittal just like in this case. This is because prosecution is a continuous process that is tampered with justice at any stage especially where it is clear

that justice will not be met. The law allows a prosecutor to terminate any case before judgement and this was not put just as a formality by the members of Parliament but as a key ingredient in protecting the rights of an accused person whose case is feeble and dancing with the wind like fine pine tree branches in the midst of a storm. It is meant to do damage control in a case of wrongful prosecution so as to avert a long aftermath of anxiety during prosecution and reduce awards of future cases of malicious prosecution. The following are analysis of the facts of this case in detail;

- 7.** The Appellant in this case was charged with h conspiracy on the 7th day of November 2013 and the matter leading to his acquittal was concluded on the 28th day of February 2022 after a trial that lasted for 9 years. The Appellant was charged and even when he was exonerated by the Forensic report who examined his signature, the prosecution sustained the charge. In its investigative report, the EACC acknowledged that the Appellant was exonerated in the report but still did not recommend that he be removed from the case because of the evidence that he was told to sign the document. The Appellant through his advocate wrote to the Prosecution during the pendency of the corruption case, in fact 7 years before the matter was finally concluded but still no action was taken. The only evidence that appears to link the Appellant to the corruption charges was that his "his colleague" said that he was the one who signed the

document forming the basis of conspiracy charges against him. This evidence was thwarted by the forensic report that indicated clearly that the Appellant did not sign that document and it is a case of heresy evidence locking horns with forensic evidence and one is called upon to determine what to rely on- and my answer is that the forensic evidence is weightier and there is no reason to depart from it.

- 8.** The decision to sustain a trial even after exoneration by the forensic evidence reek of recklessness and total disregard to the rule of evidence. It breeds, infers and harbors malice which is key to the last ingredient of malicious prosecution.
- 9.** The prosecution must know or if they do not know, they must now know that the standard of prove in a case of this caliber is not that of balance of convenience so as test the braveness of a witness testimony of what he allegedly saw against forensic evidence of their own (prosecution) witness and that any doubt raised against their evidence especially by their own "other witness" must always work out for the benefit of the Accused. In a nutshell there is sufficient prove of Malicious prosecution.
- 10.** Having proven the case of malicious prosecution, I must now assess quantum. The law is settled on the issues of the evidence by third parties proving quantum in malicious. There are cases where third parties need not to be called in

order to support an award of damages under this limb. The mere fact that the Appellant was charged in corruption related charges is enough for the Court to determine the quantum. The Appellant was entangled in Court for 9 years and must have suffered mental anguish, ridicule, damaged reputation, loss of earnings, loss of time, anxiety and expenses in hiring an advocate. The charge of corruption jeopardizes one's reputation and diminish a chance to get a better employment. The prosecution stuck on its decision to charge the Appellant even after being exonerated and despite a letter by his advocate to terminate the charge, they continued being adamant. The amount in the charge sheet involves a tender of Ksh 105,000,000.. Needless to say, even after acquittal of the corruption charges, the reputation of the Appellant cannot be absolutely wiped out especially given that in most jobs today, candidates are required to indicate if they have been charged with a criminal offense or not and the mere fact that one admits having been charged may raise eyebrows even if an acquittal follows.

The conclusion of the above is that upon consideration of relevant authorities in award of damages, I proceed to award the Appellant Ksh 3,100,000 (three million one hundred thousand only) as damages jointly and severally against the Respondents.

Each party shall bear own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 30<sup>TH</sup>  
DAY  
OF APRIL 2026.**

**L P KASSAN**

**JUDGE**

ORIGINAL