REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
THE CIVIL APPELLATE DIVISION
(Coram: A.C. Mrima, J.)
CIVIL APPEAL NO. E867 OF 2024

-between-

KENYA EDUCATION MANAGEMENT INSTITUTE……APPELLANT

-versus-

1. **HARNOLD MAMBILI CHITILA**
2. **THE INSPECTOR GENERAL OF POLICE**
3. **THE DIRECTOR OF PUBLIC PROSECUTIONS**
4. **THE HON. ATTORNEY GENERAL…… RESPONDENTS**

(Being an Appeal from the Judgment and Decree of Hon. B. M Cheloti in Milimani Chief Magistrate Commercial Courts No. 2529 of 2015, delivered on 28th February 2024)

JUDGMENT

Background:

1. On 10th December 2012, *Harnold Mambili Chitila,* the 1st Respondent herein, was arrested by some police officers, being the agents of the *Inspector General of Police*, the 2nd Respondent herein, at the premises of the Appellant, *Kenya Education Management Institute*. The arrest was precipitated by a complaint lodged by the Appellant to the effect that, in concert with others, the 1st Respondent had attempted to obtain assorted textbooks valued at Kshs 4,873,300 by presenting a forged Local Purchase Order (LPO No. 0570) and fake cheques, which he falsely held out to have originated from the *Salvation Army Headquarters*.

2. Following the investigations by the 2nd Respondent, the 3rd Respondent herein, the Director of Public Prosecutions, preferred criminal charges against the 1st Respondent in *Milimani Chief Magistrate's Court Criminal Case No. 1858 of 2012* (hereinafter referred to as ***'the criminal case'***). The

charges included attempting to obtain goods by false pretences, forgery, making a document without authority, and uttering a false document.

3. During the pendency of the criminal case, the 1st Respondent was unable to raise the bond of Kshs 500,000/= or cash bail of Kshs 300,000/=. Consequently, he was remanded in custody at the Industrial Area Prison for approximately two years. Ultimately, on 9th September 2014, the trial Court acquitted him under Section 210 of the Criminal Procedure Code. The trial Court found that the prosecution failed to secure the attendance of the investigating officers to produce the exhibits, even though the Appellant's witness had testified and identified the 1st Respondent.

4. Following his acquittal, the 1st Respondent instituted *Milimani Chief Magistrates Court Civil Suit No. 2529 of 2015* against the Appellant, the 2nd Respondent, the 3rd Respondent, and the Honourable Attorney General, the 4th Respondent. He sought general damages for malicious prosecution and detention, alongside an unreserved apology.

5. In a judgment delivered on 28th February 2024, the trial Court found the 2nd and 3rd Respondents liable for malicious prosecution. However, in its final orders, the trial Court directed all Defendants, including the Appellant, to pay the 1st Respondent Kshs 1,000,000/= as damages for malicious prosecution and detention, and to issue an unreserved apology.

6. It was that decision which elicited the instant appeal. Save for the 1st Respondent, the rest of the Respondents did not take part in the hearing of the appeal.

The Appeal:

7. Through the Memorandum of Appeal dated 30th July 2024, the Appellant asserted the following grounds of appeal: -

    1. *THAT the Learned Trial Magistrate erred in law and, in fact, in failing to consider the totality of the evidence on record, the witness testimony presented at the hearing and the*

written submissions of the Appellant and hence finding that the 1st Respondent had proved a case for the tort of malicious prosecution against the Appellant herein, contrary to the evidence on record.

2. *THAT the Learned Trial Magistrate erred in law and, in fact, in failing to hold that the Appellant reported the case to the police based on a sound, probable and reasonable cause of an attempt by the 1st Respondent to defraud the Appellant an assortment of textbooks worth Kshs. 4,873,300/ by presenting fake cheques claiming to have emanated from the Salvation Army Headquarters.*

3. *THAT the Learned Trial Magistrate erred in law and, in fact, in awarding the 1st Respondent exaggerated and exorbitant general damages for malicious prosecution of Kshs. 1,000,000/-, without specifying the particulars of malice or any factual or legal basis.*

4. *THAT the Learned Trial Magistrate erred in law and, in fact, by condemning and requiring the Appellant to pay the 1st Respondent damages amounting to Kshs.1,000,000/= for malicious prosecution and detention, yet she did not make a specific or express finding that there was bias meted against the 1st Respondent or any fault in reporting the incident by the Appellant.*

5. *THAT the Learned Trial Magistrate erred in law and, in fact, by ordering that the Appellant herein pay the costs of the suit despite her finding that only the 2nd and 3rd Respondents were liable for the tort of malicious prosecution.*

6. *THAT the Learned Trial Magistrate erred in law and, in fact, by demanding that the Appellant offer an unreserved apology to the 1st Respondent despite not finding the Appellant liable for the tort of malicious prosecution. Additionally, the case in point was not a matter subject to media coverage and hence does not necessitate the issuance of a public apology.*

7. *THAT the Learned Trial Magistrate erred in law and, in fact, in failing to consider the totality of the evidence on record and find that the Criminal Trial Court in Chief Magistrates Criminal Case No. 1858 of 2012 at Milimani Nairobi found that the Appellant had discharged its burden of proof by testifying and identifying the 1st Respondent as the person who presented the forged L.PO document and fake cheques intending to defraud the Appellant.*

8. *THAT the Learned Trial Magistrate erred in law and, in fact, in failing to appreciate that the decision by the Criminal Trial Court in Criminal Case No. 1858 of 2012 at Milimani Nairobi to acquit the 1st Respondent under Section 210 of the Criminal Procedure Code was reached after finding that the testimony of the arresting officer was not given and that the documents marked for identification were not produced in court as exhibits, which matters were not within the powers or jurisdiction of the Appellant.*

9. *THAT the Learned Trial Magistrate erred in law and, in fact, by condemning the Appellant to pay compensation to the 1st Respondent despite the Appellant not being found liable for the tort of malicious prosecution. Moreover, the Appellant had discharged its role in the Criminal Trial Court in Criminal Case No. 1858 of 2012 at Milimani Nairobi by giving testimony and providing documents for trial as required.*

10. *THAT the Learned Trial Magistrate erred in law and, in fact, in failing to consider the totality of the evidence on record and find that the burden of proof of all material squarely rested on the 1st Respondent to prove to the trial court that he was working or had been sent by one Mr. Majani to collect the assortment of books from the Appellant, noting that Mr. Majani was a creation of the 1st Respondent and not the Appellant herein.*

The Submissions

8. The Appellant urged its case further through main written submissions filed on 18th June 2025, and supplementary submissions (rejoinder) filed on 24th October 2025. The Appellant contended that it was erroneously condemned to pay damages and issue an apology since the trial Court's own judgment explicitly ascribed liability solely to the 2nd and 3rd Respondents. The Appellant further argued that the 1st Respondent failed to prove the four essential elements of malicious prosecution against it, as established in the case of *Mbowa -vs- East Mengo District Administration (*1972) EA 352 and restated in *Stephen Gachau Githaiga & Another v Attorney General* [2015] eKLR.

9. The Appellant submitted that it merely reported an attempted fraud to the police after verifying with the *Salvation Army Headquarters* that the LPO and cheques presented by the 1st

Respondent were fake. The Appellant asserted that making a report to the police did not constitute instituting a prosecution. To fortify that position it referred to the decision in *Samson Kirera Turuchiu -vs- Francis Mukungi* [2006] eKLR and *Standard Chartered Bank Kenya Ltd -vs- Intercom Services Ltd & 5 others,* Civil Appeal No. 37 of 2003 (2004) eKLR.

10. On the element of termination of proceedings, the Appellant maintained that an acquittal under Section 210 of the Criminal Procedure Code did not automatically prove malicious prosecution. It drew support from the case of *Nzoia Sugar Company Ltd -vs- Fungututi* C.A. No. 7 of 1987 (Kisumu) and *Robert Ombeka v Central Bank of Kenya* [2015] eKLR. The Appellant submitted that it had reasonable and probable cause to report the matter, given the fake documents, a fact the 1st Respondent conceded during cross-examination. Further, the Appellant contended that the prosecution was not actuated by malice, as the Appellant did not control the police investigations or the prosecution. It called to its aid the case of *Republic -vs- Commissioner of Police and Another Ex-parte Micheal Monari & Another [2012] eKLR*, *Patrick Nyamuke Etori -vs- National Police Service Commission & 2 Others (eKLR)*, and *Mosigani -vs- Khisa & Another* (Civil Appeal No. 001 of 2020) [2025] KEHC 1677. Reliance was also placed on the case of *Mary Kanini Muriuki -vs- the DCIO Imenti North & the AG, Meru High Court Civil Case No. 28 of 2018* and *Margaret Ndege and 3 Others -vs- Moses Oduor Ademba* (2021) eKLR, to establish that malice could not be inferred merely from an acquittal.

11. Finally, the Appellant argued that the claim for detention was separate from malicious prosecution and that it possessed no statutory power to detain the 1st Respondent. The Appellant prayed that the appeal be allowed, and the trial Court's judgment set aside as against it.

The Respondents case:

12. The 1st Respondent challenged the appeal through written submissions dated 20th August 2025. From the outset, it was his case that the appeal lacked merit and opposed it in its entirety.

He, firstly, stated that the appeal was a nullity for being filed out of time and without a separate Memorandum of Appeal. He referred the Court to various decisions, among them the case of *Tego -vs- Tego* (Miscellaneous Civil Application E005 of 2023) [2024] KEHC 1501 (KLR), *Nicholas Kiptoo Arap Korir Salat -vs- Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR, and *Muringa Company Ltd -vs- Archdiocese of Nairobi Registered Trustees* [2020] eKLR to front the position that extension of time is not a right of a party and a party must demonstrate sufficient cause for delay.

13. On the substantive merits, the 1st Respondent submitted that he successfully established all elements of malicious prosecution. He asserted that the Appellant was the initiator of the complaint and actively set the law in motion, hence was jointly liable with the investigative and prosecutorial agencies. He drew support from the case of *Mehomood Shaukatali Jagani v Pietro Canabio and 2 Others* (Civil Appeal No. 22 of 2020). The 1st Respondent further submitted that the criminal case ended in his favour, satisfying the second element. He argued that the charges were instituted without reasonable and probable cause and were actuated by malice, evidenced by the Appellant's alleged failure to follow up on the case and procure witnesses.

14. Regarding damages, the 1st Respondent relied on the authority in *Murunga -vs- Attorney General [*1979] KLR 138 and *Gitau -vs- Attorney General* [1990] KLR 13, arguing that damages were inevitable once malicious prosecution was established. He justified the award of Kshs 1,000,000/= and the order for an unreserved apology as adequate compensation for the loss of liberty, reputational harm, and mental anguish he endured. He prayed that the trial Court's decision be upheld.

Analysis:

15. Having considered the pleadings, the record of appeal, the rival submissions, and the decisions referred thereto, this Court distils the following issues for determination: -

i. *Whether the appeal is competent and properly before the Court.*

ii. *Whether the 1st Respondent proved the tort of malicious prosecution against the Appellant.*

16. This Court, sitting as a first appellate Court, is bound by the duty to re-evaluate, re-assess, and analyze the evidence adduced before the trial Court and draw its own independent conclusions. This principle was firmly established in *Selle and Another -vs- Associated Motor Board Company and Others* (1968) EA 123 where it is was observed;

> *…. An appeal from a High Court is by way of rehearing and the Court of Appeal is a first appellate Court. It is not sufficient to merely scrutinize the evidence and say whether the trial Judge was right or wrong. An appellate Court is not bound to accept the trial Judge's findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally.*

17. Similarly, in *Abok James Odera t/a AJ Odera & Associates -vs- John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR the Court set out the role of the first appellate Court in the following terms: -

> *…. This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority vs Kustron (Kenya) Limited 2000 2EA 212.*

18. With the above guidance this Court will now address the above issues.

[a] Whether the appeal is competent and properly before the Court:

19. The 1st Respondent argued that the appeal was filed out of time. However, the record indicates that the Appellant was granted leave to file the appeal out of time on 16th July 2024, and the

Record of Appeal, which incorporated the Memorandum of Appeal, was duly filed within the extended timelines on 30th July 2024. Further, the proceedings of 20th May 2025 indicate that the *Mr. Gathumbi* and *Mr. Wobale* Counsel for the Appellant and 1st Respondent respectively agreed on throw away fees in respect of the delay in filing the Record of Appeal. Therefore, this Court finds that the appeal is competent and properly on record.

[b] Whether the 1st Respondent proved the tort of malicious prosecution against the Appellant:

20. It is the position that the Police and the Director of Public Prosecutions are bestowed with the constitutional mandates to respectively investigate and prosecute criminal offences. When the constitutional mandates are abused or weaponized or deployed recklessly, it inflicts profound financial, and psychological harm upon an individual. The common law tort of malicious prosecution provides an avenue for redress flowing from an unjustified and unsuccessful criminal prosecution.

21. A foundational precedent setting out the ingredients a litigant must prove in order to succeed is the case of ***George Masinde Murunga -vs- Attorney General*** (1979) KLR where the Court observed that a Plaintiff must sequentially and conjunctively prove four essential ingredients. It was observed thus;

> *…. 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*

22. The foregoing standard was later enunciated in ***Mbowa -vs- East Mengo District Administration*** (1972) EA 352 and reaffirmed in ***Stephen Gachau Githaiga & Another -vs- Attorney General*** [2015] eKLR. In the former decision, the Court had the following to say: -

…. 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…..

23. An interrogation of the above four ingredients follows sequentially.

i. <u>Institution of proceedings:</u>

24. The evidence on record, including the witness statements of *Richard Ndungu Thomi* (DW1) and *George Kimotho Karimi (*DW3), demonstrate that the Appellant merely reported an attempted fraud. The Appellant discovered that the LPO and cheques presented by the 1st Respondent were not authentic after verifying with the Salvation Army Headquarters. The subsequent decisions respectively investigate, arrest and charge the 1st Respondent rested exclusively with the 2nd and 3rd Respondents.

25. As held in ***Samson Kirera Turuchiu -vs- Francis Mukungi*** [2006] eKLR, a party who merely makes a report to the police is not liable for malicious prosecution unless they actively instigate or fabricate evidence.

26. In this case, no evidence was availed to the effect that the Appellant's actions transcended that of simply reporting and providing information to law enforcement in good faith. In this instance, the Appellant neither usurped investigative nor prosecutorial mandate. The police and the prosecution exercised their independent statutory discretion to arrest and charge, thereby breaking the chain of causation between the Appellant and the prosecution. To buttress the foregoing further, this Court's attention is drawn to *Article 157[10]* and *[11]* of the *Constitution* which provides as follows: -

(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers

or functions, shall not be under the direction or control of any person or authority.

(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

ii. <u>Absence of probable cause:</u>

27. In ***Hicks -vs- Faulkner*** 1878 8 QBD 167 171 the English Court discussed '*reasonable and probable cause'* as follows;

> *..... 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 them to be true, would reasonably lead to any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed....*

28. *In* ***R vs. Attorney General exp Kipngeno Arap Ng'eny*** [High Court Civil Application No. 406 of 2001], the Court observed thus: -

> *..... A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable.*

29. The 1st Respondent having presented cheques and LPOs which appeared suspect made the Appellant to, as a matter of precaution, and in an honest belief, presume that a crime was being committed and as such had a reason to invoke the other investigative agencies. Indeed, it was affirmed by the 1st Respondent during cross-examination that the Appellant was within its rights to call the police upon realizing the documents were fake.

30. As the Appellant had a duty to protect itself from a potential loss of Kshs 4,873,300 and acted with reasonable limits and care, then the 1st Respondent failed to establish that the Appellant or any reasonable and prudent person evaluating the available material would not have believed the exposure to loss and acted as the Appellant did. It is, therefore, in this Court's assessment that there was ample probable cause for the Appellant to lodge a report with the 2nd Respondent.

iii. Malice

31. The 1st Respondent relied heavily on his acquittal under Section 210 of the Criminal Procedure Code as a demonstration of malice. However, an acquittal *per se* is not a sufficient basis to ground a suit for malicious prosecution. In **Nzoia *Sugar Company Ltd -vs- Fungututi case*** *[supra], the* Court of Appeal held that an acquittal, on its own, is not sufficient proof of a lack of reasonable and probable cause. The learned Judges aptly observed thus;

> *…. 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.*

32. The evidence indicates that Appellant's witness (PW1) testified and identified the 1st Respondent as the one who presented the fake cheques and LPOs to its servants. However, the prosecution failed solely because the police did not testify or produce the exhibits. The failure of the 2nd and 3rd Respondents to diligently prosecute the case could not be imputed to the Appellant as malice. There was no evidence of spite, ill will, or improper motive on the part of the Appellant. Therefore, this Court finds that the 1st Respondent failed to prove the elements of malicious prosecution against the Appellant on a balance of probabilities.

iv. Favourable termination:

33. There is no doubt the criminal case terminated in favour of the 1st Respondent. However, it must be pointed out that while an acquittal or a discharge generally satisfies this element, a Court must differentiate between an acquittal on the substantive merits and a discharge based on procedural technicalities. An acquittal under Section 210 of the Criminal Procedure Code (CPC), where the prosecution fails to establish a *prima facie* case requiring the accused to mount a defence, is a good basis for a malicious prosecution claim. In contrast, a discharge under Section 202 of the CPC, which occurs due to the non-attendance of the complainant or the failure of witnesses to appear, does not automatically denote that the prosecution was fundamentally baseless.

34. The learned trial Magistrate explicitly stated that the 2nd and 3rd Respondents had malicious intent. However, the trial Court did not ascribe liability to the Appellant. As such and with tremendous respect to the trial Court, it was a contradictory and erroneous conclusion in condemning the Appellant to jointly pay Kshs 1,000,000/= as damages and issue an unreserved apology whereas no such liability accrued to the Appellant. Absent any liability, the Appellant could not be penalized. Therefore, the trial Court's orders condemning the Appellant were fundamentally flawed and unsupported by the evidence and its own findings. Such ought to be set aside.

35. Drawing from the above, and having found that there was probable cause for the Appellant in lodging the complaint with the 2nd Respondent and that the Appellant acted without any malice, then the tort of malicious prosecution was not proved against it.

Disposition:

36. As I come to the end of this judgment, I wish to apologize to the parties for the late delivery of this decision which was to be in February 2026. The delay was occasioned by my engagement at the Judicial Service Commission where I serve as a

Commissioner given that the Commission has been running interviews since December 2025 to date. Once again, galore apologies.

37. With the foregoing conclusions, this Court finds merit in the appeal. Accordingly, the following final orders hereby issue: -

[a] The appeal is hereby allowed.

[b] The Judgment and Decree of the trial Court delivered on 28th February 2024 in *Milimani CMCC No. 2529 of 2015*, in so far as it finds the Appellant herein, Kenya Education Management Institute liable to the 1st Respondent, is hereby set aside. For clarity, the 1st Respondent's suit against the Appellant in the trial Court is hereby dismissed with costs and the judgment for the 1st Respondent against the 2nd and 3rd Respondents is hereby affirmed.

[c] The 1st Respondent shall also bear the costs of this appeal.

Orders accordingly.

DELIVERED, DATED and **SIGNED** at **NAIROBI** this **30th** day of **April, 2026.**

A.C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Webale, Learned Counsel for the 1st Respondent.

No appearance for the Appellant.

Michael/Amina – Court Assistants.