

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CORAM: R. MWONGO, J.
CIVIL APPEAL NO. E056 OF 2025

PATRICK MUTUGI MUNYI.....APPELLANT

-VERSUS-

EMBU WATER AND SANITATION COMPANY LTD.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

*(Appeal arising from the decision of Hon. D. Endoo in Embu MCCC No. E215 of 2024
delivered on 25th June 2025)*

J U D G M E N T

The Appeal

1. Through a memorandum of appeal dated 03rd July 2025, the appellant seeks the following orders:
 - 1) That this appeal be allowed in its entirety;
 - 2) That the judgment and decree of the Magistrate's Court delivered on 25th June 2025 be set aside in part, and be substituted with orders:
 - i. That judgment be entered against both Respondents jointly and severally for malicious prosecution;
 - ii. That the Appellant be awarded enhanced general damages and exemplary damages for malicious prosecution, and the special damages awarded be sustained of Kshs.71,000/=;
 - iii. That the costs of the suit in the lower court and this appeal be awarded to the Appellant;
 - iv. Any other relief that this Honourable Court may deem just and fit to grant.
2. The appeal is premised on the extensive grounds set out in the memorandum of appeal, namely, that:
 - 1) The Learned Magistrate erred in law and in fact by mischaracterizing the nature of the complaint made by the 1st Respondent as a general complaint on abstraction of their water despite clear and uncontroverted evidence on record showing that the report was made specifically against the Appellant;
 - 2) The trial magistrate erred in law and fact when she failed to consider the evidence by IP Gladys Wachuka witness of the 2nd respondent that the complaint against the appellant was made by the 1st respondent and to also

- give effect to the Crime and Incident Report, which clearly named the Appellant as the subject of the complaint by EWASCO, thereby falling into error in dismissing the 1st Respondent's liability;
- 3) The Learned Magistrate erred in Law and fact by exonerating the 1st respondent, misunderstanding the entirety of the evidence on record particularly that the appellant was arrested by the officers of the 1st respondent EWASCO in corroboration with the water police officers who both were at the scene; was transported by officers of the 1st respondent to the Itabua Police Station, the officers of the 1st respondent recorded witness statements and testified in the criminal proceedings yet they knew the suspect and the purported perpetrator was one John Munyi and not the appellant herein;
 - 4) The court failed to appreciate that the Appellant was arrested before any illegal water connection was discovered, which made the arrest speculative, premature, and unlawful;
 - 5) The Honourable Magistrate erred in law and fact by ignoring the Appellant's unchallenged testimony that he was arrested while taking a photo at the scene where EWASCO officers and police were digging. Despite doing nothing unlawful, he was called a "thief" in the presence of villagers by the arresting officers, a statement that irreparably injured his reputation as a veterinary practitioner;
 - 6) The trial magistrate erred by failing to consider the Appellant's evidence that he was publicly humiliated and labelled a criminal in his own village, where he operates as a veterinary practitioner. Since the incident, he has been ostracized and lost substantial professional work, resulting in reputational and economic damage that was neither assessed nor compensated;
 - 7) The Honourable Magistrate erred by failing to consider the evidence from the criminal trial where EWASCO's own officers admitted that the property under investigation belonged to John Munyi (the Appellant's father), not the Appellant making his arrest and prosecution based on their complaint wrongful, reckless and without reasonable or probable cause;
 - 8) The Honourable magistrate erred in law and fact by failing to consider the broader context of the prosecution, including the mistaken identity, disregard of due process, and failure to verify the suspect's connection to the alleged offence, all of which pointed to malice and bad faith by both respondents;

- 9) The Honourable Magistrate erred by finding that only the 2nd Respondent was liable, while disregarding the direct involvement of the 1st Respondent in a sequence of events that led to the wrongful arrest and prosecution of the Appellant;
- 10) The court failed to properly apply the legal threshold for malicious prosecution, especially on the issue of malice, despite its own findings that the arrest and prosecution lacked reasonable cause and violated fair trial safeguards guaranteed by the law;
- 11) The Learned Magistrate erred by awarding only general damages of Kshs.200,000, which are inordinately low and fail to reflect the gravity of the harm, stigma, and personal and professional loss suffered by the Appellant;
- 12) The Learned Magistrate erred in Law and fact by establishing that there was recklessness and/or bad faith by an arrest without reasonable and/or sufficient reason, done under a wrong name, without investigation, and driven by ulterior motives but failing to award exemplary damages against the respondents herein for the oppressive, arbitrary and unconstitutional behavior towards the appellant and his subsequent persecution;
- 13) The court failed to appreciate and give weight to the observation made in the criminal case proceedings that the Appellant was treated as a "sacrificial lamb", which was a judicial acknowledgment of an unfair and unjustified prosecution;
- 14) The Learned Magistrate erred in fact and law by dismissing the suit against the 1st Respondent without fully analysing the cumulative evidence that pointed to its central role in initiating, directing and supporting the unlawful process that led to the malicious prosecution; and
- 15) The entire judgment is against the weight of evidence and is based on selective appreciation of facts and misapplication of the settled principles of law governing malicious prosecution.

Background

3. In the lower Court, the appellant filed a plaint dated 09th December 2024 seeking judgment against the respondents for general and exemplary damages for malicious prosecution; special damages and costs of the suit with interest.
4. The appellant claimed that at around 12:00pm on 12.9.2023 at Kiandundu village, the Water Police Unit police officers together with officers and/or employees of the 1st respondent had him arrested and maliciously and without probable cause alleged the that he had illegally connected to the main water supply of the 1st

respondent. That he was illegally discharging and using water therefrom. Subsequently, the investigating officer (among the arresting officers) preferred charges against him under direction of the 2nd respondent. He was then charged in Embu Criminal Case No.E008 of 2023 with two counts of the offences under Section 145 (e) as read with Section 147 of the Water Act 2016 and Sections 145 (d) as read with Section 147 of the Water Act 2016. In the charge sheet his name was indicated as Patrick Muturi Munyi instead of his official names Patrick Mutugi Munyi.

5. It was the appellant's claim that he was forced to undergo a criminal trial as an accused person and the case lasted for a period of one year and one month. He was acquitted under section 215 of the Criminal Procedure Code. He asserted that he was wrongfully arrested and prosecuted for the offences named. He claimed that the 1st respondent was malicious in its endeavor to prosecute him and he detailed the malice in issue. He stated that he spent Kshs.70,000/= in legal fees; and Kshs.1,000/- to process his request for proceedings in the criminal case. These monies he claimed as special damages, alongside general and exemplary damages to be assessed by the court.
6. In its statement of defense, the 1st respondent denied the appellant's averments as made in the plaint and put him to strict proof of the same. The 2nd respondent also filed a statement of defense denying the averments made in the plaint. It referred to Article 157(6) of the Constitution alluding to the prosecutorial powers of the Director of Public Prosecutions (DPP) to undertake criminal proceedings against any person before any court in respect of offences alleged against them. It also cited section 14(1) of the Police Act and stated that the relevant officers exercised their duties in accordance with the law.

Summary of Evidence in the trial Court

7. PW1 was the appellant. He stated that the police officers from Water Police Unit and officers from the 1st respondent visited his father's home and accused them of using EWASCO water for farming activities. They arrested his step mother Mary Mwarania and when they were taking her away, they met his father, John Munyi. They released Mary and arrested his father in her place. They told him to pay a fine of Kshs.2 million and later they took him to Embu Police Station. Given his ill health, they had to release him from police custody and took him to a private clinic in Kithimu. John Munyi was issued with a requisition to attend EWASCO offices.

While they were at the hospital, he received news that the same officers had arrested his step-sister.

8. His father advised him to return home to find out what was happening and he went. When he arrived home, he found EWASCO officers digging around the home and he took out his phone to take photos and videos. The officers arrested him and took him to the police vehicle that was there at around midday. They kept him there until about 5pm when they escorted him to Itabua Police Station. The following day, he was arraigned in court and pleaded not guilty. He was released on a cash bail of Kshs.25,000/=. The case proceeded and he learned that the charges had nothing to do with him and that he was charged under the name Patrick Muturi Munyi and not Patrick Mutugi Munyi.
9. He stated that the requisition to attend was issued to his father and not him, thus he was maliciously prosecuted. He added that at the time of his arrest, the officers insulted him in public calling him a thief. That he lost a lot of money because of the prosecution and his family suffered since his wife was expectant at the time. That the prosecution has damaged his reputation and he is entitled to the damages prayed. He produced documentary evidence in support of his case. In cross-examination, he stated that the 1st respondent had summoned John Munyi through a letter but they decided to prosecute him to 'teach him a lesson'. That the findings of the trial court in the criminal case caused him to understand that he was simply a scapegoat since the 1st respondent's officers lied to that court. In re-examination he stated that when he was given the witness statements in the criminal case, he saw that the summons were issued by the 1st respondent to his father and not to him.
10. DW1 was Wincate Karimi Ndwiga a security officer of the 1st respondent. She stated that she was present when her team and police officers arrested the appellant for an illegal water connection on his land. That the decision to prosecute him was made by the police officers working with the DPP. She denied being involved in preparation of the police file or lining up of witnesses in the criminal case. She stated that the question of whether there was probative cause for arresting the appellant could only be answered by the investigating officer.
11. On cross-examination, she stated that the police acted by themselves in arresting the appellant, without her directing them to do so. That it was the police who conducted investigations and produced witnesses in court and the 1st respondent was the complainant. Through the criminal proceedings, the appellant was

acquitted. She stated that she did not know that the appellant was arrested the day after John Munyi had been arrested.

12. DW2 was IP Gladys Wachuka, the officer in charge of operations at the Water Police Unit. She stated that members of her unit were patrolling as usual when they were informed by members of the public that the appellant's father had connected water illegally, without the authorization of the 1st respondent. This was taken as reasonable suspicion and they visited the home of the appellant's father in the company of officers from the 1st respondent. At first, no one responded when they knocked on the gate but they gained access through a nearby butchery.
13. They found an underground water overflowing with water, the farm being irrigated and crops flourishing and they saw an illegal water connection traced back to the main water line. A woman at the homestead admitted to the illegal connection and she was arrested for that. Mzee Munyi failed to settle the matter with the 1st respondent and he stated that he was doing farming activities in partnership with his son, the appellant herein. Both of them failed to settle the matter with the 1st respondent and they were arrested.
14. In cross-examination, he stated that John Munyi did not record a statement. That the error on the appellant's name was a typing error at the point of drafting the charge sheet. That there was sufficient reason to arrest the appellant and his father after they interviewed some villagers and neighbours. That John Munyi was arrested but when he was released, she was not at the police station. John Munyi was not charged with any offence even though it had been established that he did not settle his water bill with the 1st respondent. She stated that the appellant was acquitted and the ODPP has not appealed against that decision.

Findings of the trial court

15. The trial court found that the tort of malicious prosecution had been proved, citing the cases of **James Karuga Kiiru v Joseph Mwamburi & 2 others [2001] KECA 354 (KLR)** and **Mbowa v East Mengo District Administration [1972] EA 352**. It awarded Kshs.200,000/= as general damages, Kshs.71,000/= as the proved special damages and costs of the suit.

Parties' Submissions on the appeal

16. The appeal was canvassed by way of written submissions.
17. The appellant submitted that the trial court misconstrued the elements of malicious prosecution and he cited that cases of **Gitau vs Attorney General [1990] KLR 13** and **Mbowa v East Mengo District Administration (supra)**. He argued that it was abundantly clear that the property belonged to his father and the officers still

arrested him without probable cause. He relied on the case of **Stephen Gachau Githaiga & another v Attorney General [2015] KEHC 655 (KLR)** where the court stated that probable cause must be based on facts known to the arresting officer. He also argued that the officers called him a thief in public and yet he is a veterinary officer. As a result, people started avoiding his professional services leading to his economic and reputational damage. He relied on the case of **Chrispine Otieno Caleb v Attorney General [2014] KEHC 8485 (KLR)** where the court awarded Kshs.2,000,000/= as general damages for malicious prosecution and Kshs.500,000/= as exemplary damages.

18. The court in **Jacob Juma & another v Commissioner of Police & another [2013] KEHC 6308 (KLR)** was guided by the decision in the **Chrispine Otieno case**. He stated that the award of Kshs.200,000/= is inordinately low considering that the 1st respondent abused its powers. He prayed for an award of Kshs.1,500,000/= relying on **Katungu v Attorney General (Civil Suit 214 of 2019) [2024] KEHC 15133 (KLR)**. Further reliance was placed on the case of **G.B.M Kariuki v Attorney General [2016] KEHC 7276 (KLR)** where the court awarded Kshs.24 million for malicious prosecution of a Judge. He urged the court to maintain the finding of the trial court on special damages and allow the appeal.
19. The 1st respondent relied on the elements of malicious prosecution as discussed in **Secretary, Board of Management Lugulu Mixed and Boarding Primary School & another v Mutanda [2024] KEHC 5319 (KLR)**. That the officers were acting on a tip-off about a resident in the area who was stealing water through an illegal connection. That it was reasonable to arrest and prosecute the man on whose land an illegal water connection was found, and that is how the officers proceeded.
20. It argued that malice or ill will cannot be inferred on an artificial person such as itself and it relied on the case of **Nzoia Sugar Company Limited & another v Fungututi & another [1988] KECA 93 (KLR)**. It argued that the appellant was arrested and charged for a cognizable offence according to section 29 of the Criminal Procedure Code and there was no conspiracy between its officers and the police to arrest and charge the appellant. Further reliance was placed on the case of **Coop Bank Fleet Africa Ltd v Lang'at [2024] KEHC 9509 (KLR)** and it argued that the appellant did not prove the special damages claimed, hence the award should be dismissed.

Issues for Determination

21. The issue for determination is whether or not the appeal has merit.

Analysis and Determination

22. From the onset, is significant to highlight that the trial court in paragraphs 13 and 14 of its judgment, found that the tort of malicious prosecution had been proved against the 2nd respondent. It stated:

'13. Malice is evidenced in the manner in which the prosecution was conducted, including the use of the wrong name (Patrick Muturi Munyi instead of Patrick Mutugi Munyi and the arrest without a clear reason or sufficient inquiry. Further, the fact that the 1st Defendant issued a complaint against a third party but the Plaintiff was arrested instead, without amendment of the allegations or clarification, is indicative of either recklessness or bad faith. The 2nd Defendant's own admission that it never recorded a statement from the Plaintiff before charging him supports the disregard for due process.

*14. The court in **James Karuga Kiiru vs Joseph Mwamburi & 3 Others (2001) eKLR** held that to prosecute a person is not prima facie tortuous, but to do so dishonestly or unreasonably is. In **Mbowa vs East Meno District Administration (1972) EA 352**, the tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings and that the purpose of the prosecution should be personal and spite rather than for the public benefit.'*

23. The appellant has now taken issue with the fact that the trial court dismissed the case against the 1st respondent even though it acknowledged that the 2 respondents' officers worked together to arrest and charge him with malice. He is seeking that both respondents be held liable for malicious prosecution jointly and severally and that the damages awarded be significantly increased.

24. As a first appellate court, it is the duty of this court to examine the evidence adduced before the trial court afresh. This was so held in the case of **Coghlan v. Cumberland (1898) 1 Ch. 704**, where the English Court of Appeal stated as follows:

"Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion

that the judgment is wrong...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen." [Emphasis added]

25. Malicious prosecution, according to the 9th Edition Black's Law Dictionary means:

"The institution of a criminal or civil proceeding for an improper purpose and without probable cause. The tort requires proof of four elements: (1) the initiation or continuation of a lawsuit; (2) lack of probable cause for the lawsuit's initiation; (3) malice; and (4) favorable termination of the original lawsuit. The tort claim resulting from the institution of such a proceeding. Once a wrongful prosecution has ended in the defendant's favor, he or she may sue for tort damages."

26. The trial court found that the evidence proved liability against the 2nd respondent and not the first respondent. In her testimony, DW1, a Security Officer with the 1st respondent (EWASCO) stated that she was present when the appellant was arrested following allegations of illegal water connection. However, her testimony was that she did not instruct the police to arrest or investigate the appellant. That the Police did so on their own motion. DW2 was the investigating officer, a police officer in charge of operations at Water Police Unit. She stated that once it was clear to her that there was reasonable cause to arrest the appellant, her team proceeded to arrest him and he was subsequently charged. She said the matter was reported to her by the 1st Respondent.

27. The appellant was charged notwithstanding the fact that he was not the owner of the land and that the owner of the land had been initially arrested and released from custody. The summons made out to the owner of the land where an illegal water connection was found were produced as evidence. This land owner is John Munyi, the appellant's father. It was alleged that he did not clear his pending water

bill with the 1st respondent. Seemingly, however, no action was taken against him but instead it was taken against his son, the appellant.

28. According to PW1, he was arrested by the officers for taking photos and videos of the operation to find the illegal water connection. He stated that in the course of arresting him, the officers manhandled him and insulted him. This was in the presence of onlookers who are potential and actual customers for his business, a professional veterinary practice in the area. He stated that he suffered financial loss since he lost customers and his reputation was also injured because the officers called him a thief.

29. The complainant in the criminal proceedings was the 1st respondent and copies of the court's record of the criminal proceedings were produced as evidence. In the criminal case, DW1 herein testified as PW1 therein. In the end, the trial court failed to find a connection between the appellant and the land on which an illegal water connection was found since the land belonged to his father and not to him. The criminal court found, instead, that *"the accused was the sacrificial lamb for this offence"*. It concluded that there was a strong suspicion but the same was not sufficient to sustain a conviction.

30. In **Mbowa vs. East Mengo District Administration (supra)**, the East African Court of Appeal stated:

"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". (See also the case of **Chrispine Otieno Caleb v Attorney General [2014] KEHC 8485 (KLR)**) [*Emphasis added*]

31. The police undoubtedly knew that the appellant was not the owner of the land, there being no document proving ownership of the land upon which an illegal water connection was found. In those circumstances, it cannot be said that the police officers acted reasonably by arresting the appellant. For what purpose and to what end was such arrest made? Further, from the evidence on record, it is clear that the officers from the 1st respondent did not instruct, direct or urge the police to arrest the appellant. In my view, therefore, the trial court's finding dismissing the case against the 1st respondent is entirely merited.
32. As for the issue of damages, the trial court awarded Kshs.200,000/= as general damages for malicious prosecution. The appellant stated that these damages were inordinately low, and that the amount ought to be increased. In his submissions, he relied on the case of **Chrispine Otieno Caleb v Attorney General (supra)** where the court awarded Kshs.2,000,000/= as general damages for malicious prosecution and exemplary damages of Kshs.500,000/=. He prayed for Kshs.1,500,000/= as general damages. He also prayed for exemplary damages.

Conclusions and Disposition

33. In the case relied upon by the appellant, the court considered the fact that the appellant has spent some time in custody and as a result, he missed out on promotions at work, which he would have gotten had he not been incarcerated. That narrative was the basis for awarding the amount of general and exemplary damages awarded. This is distinguished from the present case where the appellant was arrested on 12/09/2023, charged on 13/09/2023 and released on a Kshs.50,000/- bond on that date.
34. In **Secretary, Board of Management Lugulu Mixed and Boading Primary School & another v Mutanda (supra)**, the trial court awarded general damages of Kshs.200,000 upon a finding of unlawful arrest, detention and malicious prosecution. For the special damages in that case the trial court awarded Kshs.150,000/=. The awards in the case relied upon by the trial court were upheld by the appellate court which dismissed the appeal.

35. In my considered view, the assessment of general damages by the trial court herein is based on sound logic and precedent. I find and hold that there is no error in that regard.

36. Accordingly, the appeal herein is hereby dismissed.

37. Orders accordingly.

Delivered, dated and signed at Embu High Court this 29th day of April, 2026.

**R. MWONGO
JUDGE**

Delivered in the presence of:

1. M. Njiru for 1st Respondent
2. Muriithi for Appellant
3. No Representation for AG- 2nd Respondent
4. Francis Munyao - Court Assistant