REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL SUIT NO. E001 OF 2022

JONAH WAWERU KAMAU ..... 1ST PLAINTIFF

LIONS SECURITY LIMITED .....2ND PLAINTIFF

-VERSUS-

KINGDOM BANK LIMITED ..... RESPONDENT

JUDGMENT

1. This suit was instituted vide the Amended Plaint dated 25.7.2023 and filed on 26.7.2023 against the Defendant seeking the following reliefs:

    a. A declaration that the arrest, detainment and prosecution of the plaintiff was unlawful.
    b. Loss of business and future earnings calculated at Kshs. 500,000,000/=.
    c. Damages for defamation and character assassination of both plaintiffs as shall be determined by the court.
    d. Damages for emotional and mental frustration.
    e. General damages as shall be determined by this Honourable Court.
    f. Expectation damages.
    g. Restitution damages.
    h. Punitive damages.

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i. Costs of this suit.
j. Interest on(b),(c),(d),(e)&(f) (g) (h) above at court rates.

2. It was pleaded that the 1st Plaintiff was the sole director of the 2nd Plaintiff, a security and parcel courier service firm. The defendant is a limited liability company duly registered as a bank for all purposes of banking transactions and dealings within the Republic of Kenya, and previously known as Jamii Bora Bank. The Plaintiff is the sole director of Lions Security Limited, a Security and Parcel Courier services firm offering private residential, commercial and body guard protection as well as parcel courier services.

3. It was averred that or about the 13.02.2020, at around 10.00 am or thereabout, the plaintiff was lawfully and legally in his office situate in Nyeri county, at Githii House, Room Number 28, while performing his daily duties when police officers arrested him on the instructions of the defendant on allegations of issuing dishonoured cheques to various payees under the plaintiff's security firm's name.

4. It was his case that the police officers disarmed him of his firearms in the presence of his staff members, and marched him down a busy road and the Nyeri matatu and bus terminal stages in the full glare of the general public both known and unknown to the plaintiff, in handcuffs much to the dismay and embarrassment of the plaintiff.

5. He further averred that the officers at the station refused to grant the plaintiff cash bail on instructions of the defendant

ORIGINAL

forcing the plaintiff to spend a night in police custody. The 1st Plaintiff was arrested while in his office on 13.02.2020 by police officers from Bank Fraud Investigation Unit on the instructions of the Defendant who accused him of issuing dishonoured cheques. The arrest was done and the 1st Plaintiff manhandled and handcuffed in the full glare of the members of the public leading to embarrassment.

6. He was not given bail and was arraigned and granted bond terms of Ksh. 200,000/- by court. The arrest and restraint affected the 1st Plaintiff's plans including arrangements of a family *ruracio*. He spent 4 additional nights at GK prisons at King'ong'o. The first plaintiff averred that that the reason for the withdrawal of the criminal case number 425 of 2020 was because the plaintiff paid penalties for the bounced cheques (bank charges). They averred that the cheques issued were postdated hence the case against them was unsustainable.

7. He averred that the he was acquitted on 26.10.2021 after the applicant made the application to withdraw.

8. Subsequently, the Defendant failed to prosecute the matter and instead withdraw it despite having lost the 1st Plaintiff businesses opportunities and damaged his image. The plaintiffs particularized that the 1st Plaintiff lost business opportunities leading to financial loss due to loss of contracts with third parties.

9. The Defendant filed an amended defence 18.8.2023 in which it was materially averred that the withdrawal of the criminal

ORIGINAL

case was arrived at following the 1st Plaintiff's request for settlement. It was further stated that the mandate of arresting was with the Kenya Police Service, who executed their duties and which mandate was not with the defendant.

Directions

10. Before proceeding, there were several applications which I handled. The pending applications, going up to 11 were handled and by a ruling dated 25.03.2025 reported as **Kamau & another v Kingdom Bank Limited** (Civil Suit E001 of 2022) [2025] KEHC 4329 (KLR), this court ordered as follows:

> 58. In the upshot, I make the following Orders:
>
> a. The Application dated 14.4.2022 is dismissed for lack of merit.
> b. The Application dated 23.3.2023 is dismissed for lack of merit.
> c. The Application dated 26.7.2022 is dismissed for lack of merit.
> d. The Application dated 8.8.2022 is dismissed for lack of merit.
> e. The Preliminary Objections filed herein and dated 22.4.2022 and 3.9.2023 are hereby dismissed.
> f. All pending applications stand dismissed for lack of merit.
> g. The Defendant shall have costs of the dismissed applications of Ksh. 45,000, payable within 30 days, in default execution do issue.

ORIGINAL

h. In the interest of expeditious hearing and determination of this suit, the suit herein shall conclude by 26.4.2026, failing of which it shall be dismissed with costs.
i. Mention on 14/5/2025 for trial directions.

11. The order number (h) was important for purposes of expediting the hearing herein. Parties were faithful to the timelines and the hearing was concluded well before 26.4.2026. However, the parties have been filing almost on daily basis documents, long after the court reserved the ruling. Some documents appear to be evidence which this court did not formally deal with. The last filing was by the plaintiff, less than 4 days ago. The court will do its best to deal with only the case before it and avoid the underlying currents.

12. Hitherto the court had handled high octane altercations and an application for recusal. However, the hearing itself was characterized by civility and decorum. The parties are therefore thanked for the effort. The recusal application was handled in between the several applications referred above. It is reported as **Kamau & another v Kingdom Bank Limited [2025] KEHC 2545 (KLR)**, delivered on 27.02.2025.

13. The parties filed submissions as follows:

a. Plaintiffs' submissions dated 4.02.2026.
b. Plaintiffs' further submissions dated 6.03.2026.

ORIGINAL

c. Plaintiffs' supplementary submissions dated 11.02.2026.
d. Defendant's submissions dated 09.03.2026
e. Plaintiffs' rejoinder submissions dated 13.03.2026.

Submissions

14. The plaintiff filed submissions dated 04.02.2026 with a list of 11 authorities, which I have painstakingly read. If I do not mention all the authorities is not because of lack of effort but due to economy of scale and to avoid repetition. He stated the elements of malicious prosecution were set out in the locus classicus case of **Mbowa Vs. East Mengo District Administration** [1972] Ea 352.

15. It was submitted that the prosecution of the 1st Plaintiff was malicious. They among others cited **Crispine Otieno Caleb v Attorney General** civil suit no. 782 of 2007 to anchor the ingredients of malicious prosecution.

16. They also submitted that the criminal proceedings were initiated by the Defendant without reasonable cause or justification as was held in **Daniel Simiyu Omali & Another v Attorney General & 3 Others** (2016)e KLR.

17. The Plaintiff submitted that the Defendant made an Application to withdraw the charges under Section 204 of the Criminal Procedure Code and the favorable determination leading to acquittal was achieved regardless

ORIGINAL

of the route taken. They cited **Office of Public Prosecutions v Ngatia** Civil Appeal No. E077 of 2023.

18. On compensation, it was submitted that the 1st Plaintiffs suffered injury to his reputation and was entitled to the reliefs sought. Thy relied among others on **Dr. Willy Kaberuka v Attorney General Kampala** HCCC No. 160 of 1993.

19. It was also submitted that the 1st Plaintiff was acquitted because the Defendant failed to prove men's rea and actus reus. The doctrine of first in time, according to the Plaintiffs would apply as the Plaintiffs only issued postdated cheques after having been issued with some payments.

20. It was submitted that section 316A (1)(a) (4) of the Penal Code did not apply as the cheques were postdated issued according to Section 316A (2) thereof.

21. The Plaintiff also submitted that the ODPP was not a necessary party as they never objected to the withdrawal of the case. They were not involved in the drafting or instituting of the case. They cited **Kinoti & 77 Others v Chief Magistrate's Court- Milimani & 2 Other Constitutional** Pet No. E495 of 2021.

22. On the first element they stated that the prosecution was initiated by the defendant. reliance was placed on the case of **Reuben Mwangi v Director of Public Prosecutions & 2 others**; **UAP Insurance & another (Interested**

ORIGINAL

Parties) [2021] eKLR. and **Simiyu v Attorney General of Kenya & 3 others** [2024] KEHC 16374 (KLR).

23. The plaintiff filed supplementary submissions dated 11.02.2026. He indicated that they were in lieu of re-examination, and that leave was reportedly given. Reliance was placed on the case of **Republic v Njoroge** (Criminal Case 19 of 2019) [2025] KEHC 12653 (KLR), regarding the issues of *Mens rea Actus reus*.

24. On the non-joinder of the ODPP and the police, he submitted that the police were merely doing their civic duty. he relied on the case of **Monari & another v Commissioner of Police & another; Abubakar & another (Interested Parties) [2012] KEHC 4595 (KLR),** in which **M. WARSAME** J, as he then was_posited as follows:

> Under Article 157(4) of the *Constitution*, the Director shall have power to direct police to investigate any information or allegation of a criminal conduct and it is mandatory for the police to comply with any directions or instructions given by the Director of Public Prosecution. Under article 157(10) the Director of Public Prosecution shall not require the consent of any person or authority for commencement of criminal proceedings and shall not be under the direction or control of any person. It is also clear in my mind that the police have a duty to investigate on any

complaint once a complaint is made. In deed the police would be failing in their constitutional mandate to detect and prevent crime. The Police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said not to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.

15.It is not the duty of the court to go into the merits and demerits of any intended charges to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and the merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused

> has engaged in conduct which amounts to an offence and on that account is deserving punishment.
>
> 16.In *William & Others vs Spautz* [1993] 2 LRC 659 it was held;"We find no procedural impropriety on the part of the police in conducting the investigations and in framing the charges. The argument that the criminal proceedings were instituted to exert pressure on the applicant to forego a disputed claim is not borne out. The criminal process is clearly aimed at proof of the alleged forgery. If proven, forgery constitutes real vice in the criminal justice system."

25. He stated that the director of public prosecution did not object to the withdrawal of the charges. He relied on the case of **Kinoti & 7 Others v Chief Magistrates Court Milimani Law Courts & 4 Others** (Constitutional Petition E495 of 2021). He submitted, rather curious that the office of the director of public prosecution was not involved in drafting the charges. He then set out long submissions on what he called the 'doctrine of first in time' and the fact that cheques issues were postdated. It was his position that the payers ought to have waited until the last date of the cheques, being before the lapse of 6 months.

26. The Defendant filed submissions dated 9.3.2026. It was submitted that the Defendant was not in any fault as four

necessary conditions for malicious prosecution were not meant.

27. Further, the police were not made parties and the claim ought to fail. Reliance was placed on **Susan Mutheu Muia v Joseph Makau Mutua** (2018) KEHC 6584.

28. It was also submitted that there was an offence under section 316 of the Penal Code and the 1st Plaintiff approached the Defendant to have the case withdrawn following which it was withdrawn.

29. On compensation, it was submitted that there was no evidence that the damages were incurred as to claim a hefty five hundred million Kenya shillings and other unjustified reliefs. The Plaintiffs, accordingly failed to prove their case on a balance of probabilities.

Evidence

30. The 1st Plaintiff testified on 7.10.2025 as PW1. He relied on his witness statement dated 25.7.2023 which was adopted in his evidence in chief. He also relied on his lists and bundle of documents dated 26.7.2023, 16.8.2023 and 8.7.2025 produced in evidence.

31. On cross examination, he indicated that he was the sole director of the 2nd Plaintiff. He was accused in Nyeri MCCR No. E425 of 2020 by action of the Defendant as complainant who alleged that he had issued bounced cheques. The bank accounts were held with Jamii Bora Bank and was later

ORIGINAL

changed to Kingdom Bank. There was a cheque for Ksh. 500,000/= dated 8.2.2019. He stated that he was the accused in the matter. He was affected as the director of the second plaintiff. He was stood down but PW1 was later recalled.

32. In further cross examination it was his testimony that the cheques were issued when the account was not in funds. The account had negative. The account was overdrawn. The cheques in the defence list bounced on various dated. He was aware of Section 316 A of Penal Code on bounced cheques. He issued postdated cheques. Dated 8.2.2019. It was presented on 24.5.2019. The account did not have funds on 7.5.2019. he was arrested on 13.2.2020 on directions of the Defendant. The police had capacity and authority after the complaint had been lodged.

33. The case was withdrawn before it kicked off. He was asked to pay bank charges of Ksh. 30,500/= as a condition for withdrawal. He paid it. The Defendant then withdrew the case.

34. It was his case that it was the DPP who prosecuted the case. The matter was not a private prosecution. He was taken to prison. He lost business as a result of the arrest.

35. PW2 was Daniel Asiago. He relied on his witness statement dated 25.7.2023. He was given a cheque which he banked. It was returned unpaid. The account did not have money.

ORIGINAL

36. PW3 was Henry Kinyanjui. He was responsible for auditing as per his report dated 26.4.2020. There was loss and the client closed business. He knew tax returns were to be filed. There was no evidence of payment of taxes. He produced his audit report in evidence.

37. PW4 was Arnold Muriu. He adopted his witness statement dated 25.7.2023. He was issued with cheque number 000135. He banked it and it bounced. Due to insufficient funds. He did not report the incident to any police station. He stated that he was not aware that he needed to produce the raw data used. He stated that he was the one who filed tax returns. He did to have evidence of payment of taxes. He stated that in exhibit 48A the ledger balance was Ksh 2002. He stated that exhibit 49 does not show debits and credits. It was a saving account.

38. The accounts shown belonged to the first plaintiff and not second plaintiff. He stated that he indicated income for 2019 as Ksh. 16,012,976=/ but it was not from the bank statements. The invoices for that period were also not annexed.

39. PW5 was Peter Kariuki. He also adopted his witness statement dated 25.7.2023. He provided surety for the 1st Plaintiff in the criminal case. He was a business partner of the 1st Plaintiff. The criminal case was withdrawn.

40. DW1 was Jackson Waigera. He was head of legal services at Kingdom Bank Limited, the Defendant. He relied on his

ORIGINAL

witness statement dated 20.1.2025. He produced documents in the list dated 30.1.2024 and additional list dated 20.1.2025. Jamii Bora Bank raised a complaint in 14.2.2020. The cheques were dishonoured. He could not tell if the cheques were postdated. the amount lost was charged on bounced cheques. The DPP could withdraw the court case.

Analysis

41. Whereas the matter is a humongous file with several reams of documents, at the outset is a simple matter with three main issues and one subsidiary issue:
    a. Whether the defendant is liable for the arrest, detainment and prosecution of the plaintiff.
    b. Whether the defendant is liable for damages for defamation and character assassination of either of the plaintiffs.
    c. Whether the plaintiff is entitled to the damages, loss of business and future earnings and declarations sought.
    d. Reliefs.

42. What is not in dispute is that the first plaintiff was arrested by the Kenya police and arraigned in court in criminal case number 425 of 2020, Republic versus Jonah Waweru Kamau, at the chief magistrate's court. The case was terminated under section 204 of the criminal procedure code resulting in the acquittal of the first plaintiff. The role of the second plaintiff however, in the case is hazy hence requiring analysis. The charge sheet read as follows:

ORIGINAL

Charge: Issuing bad cheque contrary to section 316A(1)(a)(4) of the penal code.

i. Count 1- charge: Issuing bad cheque contrary to section 316A(1)(a)(4) of the penal code.

The particulars of the charge were that Jonah Waweru Kamau: on 27.6 2019 at Lions security offices in Nyeri town, Nyeri County, issued a Jamii Bora Bank cheque serial number 000135 in favour of Arnold Muriu Mwangi valued at Ksh. 32,750/= (Thirty-two thousand seven hundred and fifty shillings) drawn in your account 3161823264002 in the name of Lions security limited with knowledge that the said account had insufficient funds.

ii. Count II- charge: Issuing bad cheque contrary to section 316A(1)(a)(4) of the penal code.

The particulars of the charge were that Jonah Waweru Kamau: on 2.07.2019 at Lions security offices in Nyeri town, Nyeri County, issued a Jamii Bora Bank cheque serial number 000136 in favour of Githi Traders Enterprises Limited valued at Ksh. 50,000/= (fifty thousand shillings) drawn in your account 3161823264002 in the name of Lions security limited with knowledge that the said account had insufficient funds.

iii. Count III

The particulars of the charge were that Jonah Waweru Kamau: on 05.07.2019 at Lions

ORIGINAL

security offices in Nyeri town, Nyeri County, issued a Jamii Bora Bank cheque serial number 000128 in favour of Regina Muthoni Wangare valued at Ksh. 31,800/=(Thirty one thousand eight hundred shillings) drawn in your account 3161823264002 in the name of Lions security limited with knowledge that the said account had insufficient funds.

iv. Count IV

The particulars of the charge were that Jonah Waweru Kamau: on 16.07.2019 at Lions security offices in Nyeri town, Nyeri County, issued a Jamii Bora Bank cheque serial number 000138 in favour of Anne Nyambura Kamotho valued at Ksh. 8,300/=(eight thousand three hundred shillings) drawn in your account 3161823264002 in the name of Lions security limited with knowledge that the said account had insufficient funds.

v. Count V

The particulars of the charge were that Jonah Waweru Kamau: on 17.07.2019 at Lions security offices in Nyeri town, Nyeri County, issued a Jamii Bora Bank cheque serial number 000139 in favour of Joseph Mwiti Ituri valued at Ksh. 14,600/= (Fourteen thousand six hundred shillings) drawn in your account 3161823264002 in the name of Lions security limited with knowledge that the said account had insufficient funds.

ORIGINAL

vi. Count VI

The particulars of the charge were that Jonah Waweru Kamau: on 20.07.2019 at Lions security offices in Nyeri town, Nyeri County, issued a Jamii Bora Bank cheque serial number 000143 in favour of Joel Kerich Sato valued at Ksh. 40,000/=(Forty thousand shillings) drawn in your account 3161823264002 in the name of Lions security limited with knowledge that the said account had insufficient funds.

vii. Count VII

The particulars of the charge were that Jonah Waweru Kamau: on 26.07.2019 at Lions security offices in Nyeri town, Nyeri County, issued a Jamii Bora Bank cheque serial number 000140 in favour of Daniel Osiago Kwaba valued at Ksh. 16,600/=(Sixteen thousand six hundred shillings) drawn in your account 3161823264002 in the name of Lions security limited with knowledge that the said account had insufficient funds.

viii. Count VIII

The particulars of the charge were that Jonah Waweru Kamau: on 28.07.2019 at Lions security offices in Nyeri town, Nyeri County, issued a Jamii Bora Bank cheque serial number 000125 in favour of Githi traders enterprises limited valued at Ksh. 50,000/=(fifty thousand shillings) drawn in your account 3161823264002 in the name of Lions

ORIGINAL

> security limited with knowledge that the said account had insufficient funds.

43. The first plaintiff upon arrest was arraigned in court and released on bond. His partner stood surety for him. The plaintiff-initiated negotiations, that resulted in the case being withdrawn under section 204 of the criminal procedure code. The said section states as follows:

> If a complainant, at any time before a final order is passed in a case under this Part, satisfies the court that there are sufficient grounds for permitting him to withdraw his complaint, the court may permit him to withdraw it and shall thereupon acquit the accused.

44. To be able to contextualise, problematise and conceptualise the imbroglio that is the withdrawn case, we have to go back to the basics. Section 204 of the Criminal Procedure Code involves withdrawal of the case but with satisfaction of the court. The prosecutor indicated to the trial court that they intended to settle the matter. At page 7 of the first bundle, it is recorded as follows:

14.09.2021

> Prosecutor- I now have the court file. The manager of the complainant- Jamii Bora bank has informed me that they intend to settle with the accused. I seek time so that I can get the consent from the ODPP.

ORIGINAL

Accused- It is okay.

14.10.2021

Prosecutor- I haven't received any communication from the compliant that they wish to withdrawal the case. I pray for a hearing date.

Accused- The complainant asked I pay some money to them in an out of court settlement. I paid Ksh. 30,500/= which was inclusive of bank charges.

Prosecutor- The investigating officer informs me that the bank's legal manager said they are working on a letter to withdrawal the case.

Court: Mention on 25.10.2021

25.10.2021

Accused: a letter was done by the bank this morning. It will be in court tomorrow.

Prosecutor: That is the position

Court: directions on 26.10.2021.

26.10.2021.

Prosecutor- I have received instructions from the complainant that it wishes to withdraw the case. Credit manager is present.

Proceedings on oath

Dennis Kamau Akunja

ORIGINAL

> Relationship manager- Kingdom Bank – Nyeri. My job card is before the court. The bank lost some money though the court. He was our customer. He has fully settled the issues. The bank no longer wishes to proceed with the case.
>
> Accused- no objection
>
> Prosecutor -no objection
>
> Court – ruling
>
> The application to withdraw the case is allowed by the court under section 204 of the Criminal Procedure Code. The accused is acquitted. Surety is discharged.

45. The withdrawal was not driven by the defendant but the plaintiff. This was admittedly out of court settlement. The withdrawal under section 204 was consented to. The bank indicated that it lost some money. The plaintiff paid the money and penalties. This marked the end of the dispute. He was the one who indicated that the letter to withdraw was on the way and could be in court the following day.

46. This therefore means that the process of withdrawal was party driven and sacrosanct. It is encouraged by the constitution under Article 159(2)© of the constitution. It provides as follows:

> In exercising judicial authority, the courts and tribunals shall be guided by the following principles-

ORIGINAL

> (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

47. The parties reconciled and the complaint was withdrawn as provided for under the constitution. The plaintiff who owed money, in terms of bank charges paid to the bank. He requested that the matter be settled. When the prosecutor wanted a hearing day he wanted a date. His exact words were- *The complainant asked I pay some money to them in an out of court settlement. I paid Ksh. 30,500/= which was inclusive of bank charges. This was out of court settlement. The court cannot go round a settlement and revive ghosts of a case. It is irrelevant on how strong or weak the case was. It was settled and the defendant paid their money.*

48. The court is under duty not only to protect but promote Alternative Dispute Resolution mechanisms. In the case of **Benjamin Koome Kaithu v Republic** [2020] KEHC 4355 (KLR), Mabeya J, held as follows:

> 20. In my considered opinion, all that the Court has to satisfy itself when a matter is being withdrawn is that there is no coercion, bribery or any other form of undue pressure from any front upon the complainant. That has not been alleged or suggested in the present case.

ORIGINAL

> 21. In any event, the Court is under a duty to promote Alternative Dispute Resolution ("ADR") mechanisms as provided for under Article 159 (2) (c) of the Constitution. In Mary Kinya Rukwaru v Office of the Director of Public Prosecutions & another [2016] eKLR the court observed:
>
> "I would agree with Counsel for the Interested Party that the Constitution of Kenya 2010 recognizes that justice is not only about prosecution, conviction and acquittals [and that] it reaches out to issues of restoration of the parties [with] court assisted reconciliation and mediations are the order of the day with Article 159 being the basic test for that purpose.
>
> Accordingly, Alternative Dispute Resolution (ADR), including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms, are available means of settlement of criminal cases under the Constitution, and the Court is enjoined under Article 159 to promote ADR".

49. This was reiterated by Mureithi J, in the case of **In re Estate of John Gakunga Njoroge (Deceased) [2015] KEHC 927 (KLR),** as follows;

> 8. As a problem-solving court, the court must, in accordance with its duty to promote alternative dispute resolution under Article 159 of the Constitution, provide opportunity for the parties to

negotiate a possible amicable settlement of the matter.

50. The second aspect is what constitutes malicious prosecution. 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 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,
>
> (2) the criminal proceedings must have been terminated in the plaintiff's favor,
>
> 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...

51. The essential elements of the tort of malicious prosecution were authoritatively articulated in **Murunga v Attorney General [1976–1980] KLR 1251**, where the court held that a plaintiff must establish, conjunctively, that:

    a) The prosecution was instituted by the defendant or by someone for whose acts he is responsible.
    b) The prosecution terminated in the plaintiff's favour.
    c) The prosecution was instituted without reasonable and/or probable cause.
    d) The prosecution was actuated by malice.

52. In this case, the matter was settled amicably. Therefore, it did not terminate in favour of any part. The plaintiff was acquitted while the complainant got its money. It was a win-win situation arising from out of court settlement. Out of court settlement is encouraged even in the criminal procedure code. Section 176 of the criminal procedure code provides as follows:

> In all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not

> aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated.

53. There was payment of a sum of Ksh. 30,500/= by the first plaintiff. This brought the settlement within the dictates of Section 176 of the Criminal Procedure Code.

54. The third aspect was that the prosecution was carried out by the prosecution. The director of public prosecution has exclusive right under article 157 to carry out prosecutions. They were not joined to the suit. Therefore, the suit was a non-starter from the word go.

55. The next aspect is question of arrest and detainment of the plaintiff. This was carried out by the police and not the defendant. Article 245 provides as follows regarding the duty of the inspector general of police:

> (1) There is established the office of the Inspector-General of the National Police Service.
> (2) The Inspector-General-
> (a) is appointed by the President with the approval of Parliament; and
> (b) shall exercise independent command over the National Police Service, and perform any other functions prescribed by national legislation.

56. The defendant did not arrest the 1st Plaintiff, has no detention facility and as such the prayer related to arrest and detention are untenable as against the defendant. The

defendant remained the complainant, who lost money though bounced cheques. They were paid and restituted to where they ought to be. The witnesses for the plaintiff confirmed that they were issued with cheques that were retuned unpaid. These were cheques for as little as Ksh 8,300/= for lack of funds.

57. On the general damages awarded relating to General Damages for malicious prosecution, the Court of Appeal in **Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd [1992] KLR 177** stated that:

> …General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it…

58. Similarly, in the case of **Butler –V- Butler (1984) KLR 225** the court held: -

> The assessment of damages is more like an exercise of discretion by the trial judge and an appellate court should be slow to reverse the trial judge unless he has either acted on wrong principles or awarded so excessive or so little damages that no reasonable court would; or he has taken into consideration matters he ought not to have considered, and in the result arrived at a wrong decision.

59. There were no damages shown to have been suffered. It is the defendant who had to go to the place for them to finally recover a sum of Ksh. 30,500/=.

60. The plaintiff issued a series of small cheques that were not paid. At the time of issuance of the cheques only Ksh 2002 was in the company, which subsequently went into negative Balance.

61. The plaintiff prayed for damages for defamation. This prayer is a nonstarter for reasons. First the claim is alleged to have arisen on 14.02.2020. It ought to have been filed in court by 14.02.2021. There was no claim filed as at that time. Section 4(2) of the limitation of actions Act provides as follows:

> An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:
> Provided that an action for libel or slander may not be brought after the end of twelve months from such date.

62. The claim is thus stale and otiose. The second aspect is what constituted defamation. there needs to be circumstances and particulars of defamation. Indeed, no evidence was even led to this. Order 2, Rule 7 of the Civil Procedure Rules provides as follows:

> 1. Where in an action for libel or slander the plaintiff alleges that the words or matters complained of

were used in a defamatory sense other than their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of such sense.

2. Where in an action for libel or slander the defendant alleges that, in so far as the words complained of consist of statements of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, or pleads to the like effect, he shall give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true.
3. Where in an action for libel or slander the plaintiff alleges that the defendant maliciously published the words or matters complained of, he need not in his plaint give particulars of the facts on which he relies in support of the allegation of malice; but if the defendant pleads that any of those words or matters are fair comment on a matter of public interest or were published upon a privileged occasion and the plaintiff intends to allege that the defendant was actuated by express malice, he
4. Shall file a reply giving particulars of the facts and matters from which the malice is to be inferred.

5. This rule shall apply in relation to a counterclaim for libel or slander as if the party making the counterclaim were the plaintiff and the party against whom it is made the defendant.

63. None of the complained words that were defamatory were set out in the plaint. Parties are bound to plead their cases fully. In the case of **Migore v South Nyanza Sugar Co Ltd [2018] KEHC 5465 (KLR)**, A C Mrima, J, stated as follows:

> 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

ORIGINAL

> .....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
>
> ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.

64. In the case of **Malawi Railways Ltd vs Nyasulu [1998] MWSC 3**, **Malawi Supreme Court of Appeal** stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled The Present Importance of Pleadings published in [1960] Current Legal Problems at p 174 whereof the learned author posited that:

> As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings .....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court

> itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice….
>
> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called Any Other Business in the sense that points other than those specific may be raised without notice.

65. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on *inter alia* scrutiny in the case of **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** found and held as follows in an election petition:

58. In the case of Arikala Narasa Reddy v Venkata Ram Reddy Reddygari & anr, Civil Appeal Nos 5710-5711 of 2012; [2014] 2 SCR the Supreme Court of India held that [paragraph 8]:

....

52.Further, the court went on and observed that:

"In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings. The court cannot exercise discretion of ordering recounting of ballots just to enable the election petitioner to indulge in a roving inquiry with a view to fish material for dealing the election to be void. The order of recounting can be passed only if the petitioner sets out his case with

precision supported by averments of material facts.

66. The claim for defamation of character is dismissed for lack of merit. There was a claim for myriads of other kinds of damages. These were damages for emotional and mental frustration, general damages, expectation damages, restitution damages, and punitive damages. A court is not a place to deal with mental anguish and frustration. The court is dealing with a situation of alleged *Damnum Sine Injuria*, meaning that the alleged damages are self-inflicted and do not arise from a breach of a legal wrong. Therefore, the damage is without legal injury. There was no causal link between the emotion and the actions of the defendant.

67. The claim for general damages is not attributable to any breach on part of the defendant. The evidence was succinct that there was no malice on part of the defendant. On the other hand, it was clear that the cheques issued bounced and caused the defendant loss. The plaintiff made good the loss in what is referred to as restitutio in integrum. The complainant was restored to its original position after financial loss of Ksh 30,500/=.

68. The plaintiff cannot again claim to be restored to its original position when they were the ones in the wrong. Finally, there is a claim for business and future earnings calculated at Kshs. 500,000,000/=. There was no basis laid for this amount. There can be no award of damages without a breach of legal right. Secondly, even if it could be laid,

there was no evidence that the first plaintiff who was sued was involved in any business. The second plaintiff was not a defendant in the case in the lower court. The criminal case was against the first plaintiff and none else. Effectively, the second plaintiff was a busybody and has no causal link to the case in court. The name Lion Security Limited, is the locus in quo. The questions raised related to the first plaintiff who signed cheques for very small amounts that were not backed by case. The claim for the second plaintiff is speculative and an abuse of the court process. The second plaintiff shall pay costs based on the subject matter, that is, Loss of business and future earnings calculated at Kshs. 500,000,000/= and other prayers.

69. The court has a duty to assess damages even where the court dismisses the case. 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."

70. There was no basis from the actions of the defendant report, receiving the compensation contemplated under section 176 of the Criminal Procedure Code and applying for withdrawal with concurrence of the first plaintiff, the director of public persecution and the complainant. The first plaintiff gained by termination after he paid. Payment does not remove criminality. Having been forgiven, he did not suffer any loss. Therefore, general damages cannot flow from the actions. In the case of **Jogoo Kimakia Bus Services Ltd V Electrocom International Ltd [1992] Keca 48 (KLR)**, the Court of Appeal (G**icheru, Cockar & Muli JJ A** described what general and nominal damages are:

> The law on damages stipulates various types of damages.
>
> The distinction between general damages and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of

pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded. (See *Chitty on Contracts* 26 edition para 1772 at p117 *et seq*.)

With greatest respect the Judge misdirected himself when he speculated that the respondents were kept away from other contractual work. Although the respondent did not quantify the loss to be entitled to an award of special damages, they in fact proved the breach of the contract but failed to prove the actual amount of the loss or any loss flowing from the breach of the contract. The award of general damages was not available to them. The loss suffered was therefore capable of compensation by an award of nominal damages.

In *'Medina' and the 'Mediana'* [1900] AC 113, 116 Earl of Halsbury LC as he then was defined nominal damages:-

"My Lords, here I wish, with reference to what has been suggested at the bar, to remark upon the difference between damages and nominal damages.

'Nominal damages' is a technical phrase which means that you have negatived anything like real

> damages, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term nominal damages does not mean small damages. The extent to which a person has a right to recover what is called by the compendious phrase damages, but may be also represented as compensation for the use of something that belongs to him, depends upon a variety of circumstances, and it certainly does not in the smallest degree suggest that because they are small, they are necessarily nominal damages."

71. Consequently, a sum of Ksh 1/= will have sufficed had the plaintiffs succeeded in their claim. otherwise, the entire claim is dismissed. 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.**

72. 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 if 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.

ORIGINAL

73. 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,

ORIGINAL

whether or not the circumstances merit an award of costs to the Applicant.

74. The defendant was forced to defend an unnecessary suit claim inter alia, Loss of business and future earnings calculated at Ksh. 500,000,000/=. They are entitled to costs on a higher scale. The amount of acrimony that has gone to this matter is nerve recking. The defendants will thus have costs to be taxed or agreed.

Determination

75. In the circumstances, I make the following orders:
    a. The suit lacks merit and is hereby dismissed.
    b. 14 days right of appeal.
    c. 30 days stay of execution on costs.
    d. File is closed.

DELIVERED, DATED and **SIGNED** at **NYERI** this **8TH** day of **May,** the year of our Lord Two Thousand and Twenty - Six.
Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE
JUDGE

In the presence of;

1st Plaintiff in person and for the 2nd Plaintiff as a director.

Mr. Rurige for the Defendant.

Court Assistant: Martin / Michael.

ORIGINAL