



**Kirimi v Meru Central Dairy Co-op Limited (Civil Appeal  
18 of 2020) [2025] KECA 1262 (KLR) (27 June 2025) (Judgment)**

Neutral citation: [2025] KECA 1262 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL 18 OF 2020**

**J MOHAMMED, JW LESSIT & A ALI-ARONI, JJA**

**JUNE 27, 2025**

**BETWEEN**

**PAUL KIRIMI ..... APPELLANT**

**AND**

**MERU CENTRAL DAIRY CO-OP LIMITED ..... RESPONDENT**

*(Being an appeal from the Judgment of the High Court at Meru  
(Chitembwe, J.) delivered on 5th December 2019 in HCCA No. 33 of 2019)*

**JUDGMENT**

1. The appellant filed a plaint on 2<sup>nd</sup> June 2015, seeking compensation for wrongful arrest, false imprisonment, malicious prosecution, and career loss. The appellant was an employee of the respondent as a driver until 18<sup>th</sup> July 2011, when he was suspended. On 3<sup>rd</sup> August 2011, the respondent lodged a complaint with the police accusing him of theft, which complaint resulted in the appellant's arrest on 20<sup>th</sup> August 2011, when he was detained for two days, and subsequently arraigned in court to face criminal charges of stealing by a servant, contrary to Section 281 of the Penal Code, and creating a disturbance, contrary to Section 95(1)(b) of the Penal Code, in *Criminal Case No. 720 of 2011*.
2. In a judgement delivered on 12<sup>th</sup> February 2015, the court found the case, as presented by the prosecution, to be doubtful and the burden of proof not met. Consequently, the appellant was acquitted of both counts under Section 215 of the Criminal Procedure Code.
3. Having been acquitted, the appellant filed CMCC Case No. 161 of 2015, where he claimed that the respondent's action of reporting him to the police was malicious, leading to his wrongful arrest, false imprisonment, and malicious prosecution, resulting in loss of his career, and for legal costs of Kshs. 200,000. He also claimed loss of earnings for the 42 months while attending to the criminal matter; he sought Kshs. 502,000.



4. The respondent opposed the suit in a statement of defence dated 6<sup>th</sup> August 2015. The respondent asserted that the appellant's arrest, subsequent arraignment in court, and the charges preferred were lawful. Further, it contended that there was no malice on its part and that it was not liable for any losses or damages suffered by the appellant. Additionally, the respondent claimed that the appellant did not suffer any loss of income, as he was lawfully terminated from his job, and the compensation sought by the appellant was unjustified since due process was followed in his termination.
5. In a judgement delivered on 20<sup>th</sup> February 2019, the case was determined in favour of the appellant where he was awarded Kshs 5,000,000 for general damages and Kshs. 200,000 as special damages.
6. Aggrieved by the judgement, the respondent preferred an appeal to the High Court on the grounds that the trial magistrate erred in fact and law by finding that the appellant acted without a reasonable and/or probable cause; by failing to find that the appellant reported the loss of ghee and/or its value which was collected by the respondent for safe delivery to a customer; by failing to find that the police were duly bound to investigate the alleged theft and upon investigation charged the respondent; by finding that the appellant acted without any probable cause to the exclusion of the police or the Director of Public Prosecutions (DPP); in awarding a manifestly high sum for general and special damages.
7. At the hearing of the appeal in the High Court, the respondent brought to the attention of the court that the decree being appealed against was not part of the record and urged that the appeal was not properly before the court. The court was not convinced that the lack of a decree was an issue to be canvassed before it. It was of the opinion that the extraction of the decree is the duty of the court, which ought to have ensured that it was included as part of the record before an appeal proceeds for a hearing. The learned judge directed that the same be filed before the file was released for judgment as the appeal was canvassed by way of submissions.
8. In its judgement, the High Court was of the view that in a claim for malicious prosecution, the court ought to interrogate the evidence in the criminal trial to understand whether the prosecution was grounded on the need to enforce the law or it was actuated by malice. Having considered the record, the court formed the view that the particulars of malice as pleaded in the plaint were not proved. The court also found that the evidence of the eight (8) employees who recorded their statements did not evince any malice against the appellant. Furthermore, the police were not to blame for acting on the appellant's complaint and wondered why the appellant, whose employee had stolen, was being held responsible.
9. The court was satisfied that, even though the appellant was acquitted of the charges, there was probable cause to have prosecuted him, and no malice was demonstrated in the entire prosecution process. In the end, the High Court set aside the trial court's judgment and allowed the appeal with costs in a judgment delivered on 5<sup>th</sup> December 2019.
10. The judgement of the High Court precipitated this appeal. Fourteen grounds of appeal were raised in a memorandum of appeal dated 10<sup>th</sup> February 2020. We find the grounds grossly repetitive and have collapsed the same into seven as follows: the learned judge erred in law by allowing an appeal in the absence of a decree; in finding that the trial court should have analysed the respondent's complaint in the criminal case instead of being guided by the judgment in that case; by descending into the arena of litigation; demonstrated bias; disregarded the appellant's pleadings and submissions; misdirected himself regarding the applicable law and facts in reaching his decision, and failed to consider the dispute over the weight of the evidence presented at the hearing. The appellant thus sought to have the judgment of the High Court set aside and substituted with an order upholding the judgment of the lower court dated 20<sup>th</sup> February 2019.



11. The appeal was presented through written submissions, which were briefly highlighted at the plenary hearing. Learned counsel for the appellant filed submissions dated 18<sup>th</sup> March 2024 and a digest of authorities dated 5<sup>th</sup> December 2024. Learned counsel distilled the issues for determination into four: whether the learned judge erred in failing to find that the appeal was defective in the absence of a decree, in issuing directions for the respondent to extract and file a decree despite the parties having argued their case and it pending judgment; and in considering matters he should not have; and in criticizing the findings of the criminal court.
12. On whether the learned judge erred by not finding the appeal defective in the absence of a decree, learned counsel referred to Section 79G of the *Civil Procedure Act* (“the Act”) and Order 42, rule 2 of the *Civil Procedure Rules*, noting that Order 42, rule 13(4) provide that without the decree or order being appealed against, the record of appeal cannot be considered complete.
13. The learned counsel further contended that, in the absence of a decree, there is effectively no appeal; it ought to have been deemed incompetent and should have been struck out. Further, Section 79G of the Act is mandatory and cannot be disregarded; thus, no valid appeal can be said to have been filed. In support of the argument, the case of *Bwana v Bonaya & 2 Others* (Election Petition 15 of 2014) [2015] KESC 8 (KLR) was cited, where the Supreme Court held that a court could not adjudicate on an appeal without a proper record of appeal. So, if essential documents are missing, an appeal is incompetent and defective, as it fails to meet the legal requirements.
14. Learned counsel also relied on the case of *Chege v Suleiman* [1988] eKLR, which was cited in the case of *Rachael Wambui Nganga & Another v Rahab Wairimu Kamau* [2020] KEHC 4563 (KLR), where this Court stated that failure to attach the decree is a jurisdictional point, which is founded on a proper interpretation of Section 66 of the Act, which confers a right of appeal from the High Court to this Court from “decrees and orders” of the High Court.
15. Learned counsel also contended that the learned judge erred by directing the respondent to extract and file a decree despite the case having already been argued and was awaiting judgment. Yet, the respondent’s counsel neither sought an extension of time to file a decree as required by Section 79G of the Act nor did he request the court to dispense with the production of the decree, as allowed under Order 42, rules 2 and 13(4) of the *Civil Procedure Code*. Further learned counsel asserted that the judge acted without jurisdiction in issuing those directions while the case was pending judgment.
16. In claiming that the learned judge considered inappropriate matters, learned counsel submitted that the learned judge ought to have relied on the judgement of the *Criminal Case No. 720 of 2011* as opposed to criticising the same. Despite finding that none of the documents in the criminal case were presented as evidence, the judge relied on the testimonies of prosecution witnesses and oral evidence. He claimed that the learned judge’s findings were based on assumptions and presumptions, which contradicted the criminal court’s judgment, leading to a misguided decision.
17. In opposing the appeal, learned counsel for the respondent filed submissions dated 14<sup>th</sup> December 2024, where he collapsed the grounds of appeal into five issues namely, lack of a formal decree among the documents in court; whether the court was correct in directing that the formal decree be filed after submissions had been filed and the matter was awaiting judgement; lack of criminal proceedings the subject matter of the suit on malicious prosecution; whether the High Court correctly analysed the pleadings and evidence as against the applicable law; whether the appellate court ought to have made a finding on the sum awardable for malicious prosecution while dismissing the appeal on liability.
18. Learned counsel argued that *Civil Procedure Rules* applicable in the High Court do not impose a duty on the appellant to furnish the court with any documents, as opposed to the obligation on an appellant



outlined in Rules 84(1)(b), 89(1) and 89(2) of this *Court's Rules*. Instead, Order 42, rule 15(2) of the *Civil Procedure Rules, 2010*, places the responsibility for providing all relevant documents on the trial court upon receiving a notice of appeal from the High Court, as stated in Rule 15(1) preceding it. Regarding the parties involved in the appeal, Rule 15(3) specifies that “either party may on application and upon payment of the requisite charges obtain copies of any such papers as aforesaid.”

19. Learned counsel submitted further that while it may seem unusual to proceed with an appeal without the decree being appealed from, a closer examination of the definitions in Section 2 of the Act reveals the underlying logic. Learned counsel asserted that, therefore, if a judgment is filed, a formal decree need not be extracted and filed for an appeal from the Magistrate's Court to the High Court. Although it may be considered good practice to do so, it is not mandatory under the Act or the Rules, and that failure to extract or file a formal decree does not render an appeal to the High Court incompetent, whether done by the trial court under Order 42 rule 15(2) of the *Civil Procedure Rules, 2010*, or by the appellant in the spirit of the overriding objective as outlined in Section 1A of the Act.
20. On the role of the first appellate court, learned counsel argued that it is well established that a first appellate court must re-evaluate the evidence presented before the trial court and form its own opinion. The appellant contended that the High Court should have reviewed and re-evaluated P. Exh. 7, which was the criminal judgment, but not evaluated P. Exh. 6, which included the proceedings and evidence leading to that judgment. This, he contended, would have been counter-productive and that if the appellant did not intend for the court to review and analyse the criminal evidence, he should have excluded it from his list of documents and exhibits. A party cannot submit an exhibit and later complain that the court erred by analysing it and making findings based on that analysis.
21. Regarding the pleadings and the allegation that the High Court did not give adequate weight to the evidence presented before it, learned counsel submitted that the court found the respondent's goods to have been lost or could not be accounted for, which gave a valid reason for it to complain to the police, who recorded statements from eight (8) witnesses and charged the appellant. Furthermore, the court also found that the appellant had caused a commotion in the complainant's office, which was equally a valid reason to complain. Thus, none of the complaints were motivated by malice.
22. On whether the trial court was biased in giving directions for the filing of the decree, learned counsel submitted that the directions were issued to encourage good practice. It is not currently a mandatory legal requirement. Further, no appeal or review was filed regarding the direction. A complaint concerning orders or directions issued on 24<sup>th</sup> October 2019 cannot be the basis for an appeal initiated by the notice of appeal dated 6<sup>th</sup> December 2019, which was filed on 11<sup>th</sup> December 2019, more than 45 days after the order was issued. The Rules of this Court stipulate that a notice of appeal must be filed within 14 days of the decree or order being appealed.
23. On whether the trial court was correct in assessing damages, learned counsel argued that this ground does not challenge the assessment of damages made by the High Court. Instead, it questions the court's capacity and/or duty to dismiss a case for lack of proof of liability while still assessing the quantum of damages that would have been awarded had the appellant proven liability. The fact that a court determines the amount of damages it would have awarded does not negate its primary finding regarding liability. Similarly, in situations involving shared liability (apportionment), the ratio of liability is applied to the total damages awarded to calculate the net amount payable. In cases where the defendant is found not liable, the entire quantum of damages is removed from their responsibility.
24. This being a second appeal, our mandate is limited only in determining points of law and not of fact as set out under Section 72(1) of the *Civil Procedure Act*, and explained by this Court in the case of *Stanley N. Muriithi & Another v Bernard Munene Ithiga* [2016] KECA 821 (KLR) where this Court quoted



*Kenya Breweries Limited v Godfrey Odoyo* [2010] eKLR (Civil Appeal No. 127 of 2007) (Onyango Otieno, JA) where the mandate was succinctly spelt out in the following words:

“...In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

We hasten to observe, however, that failure on the part of the first appellate court to re-evaluate the evidence tendered before the trial court and as a result, arriving at the wrong conclusion is a point of law.”

25. Having considered the record of appeal, submissions by both counsel and the law applicable, we are of the view that three issues turn for our consideration as follows: whether the appeal before the High Court was incompetent for lack of a decree; whether the first appellate court analysed the evidence on record; and whether the learned judge considered matters that were irrelevant to the appeal before him thus arriving at a wrong decision.

26. It is not in dispute that the decree from the trial court was not among the documents before the court and that the appellant’s counsel took issue with the omission and was overruled by the learned judge, who directed that the decree be extracted and placed before him before he wrote his judgement. The hearing was by way of submissions. The learned judge, in giving directions on the filing of the decree, stated; -

“The decree is a condition necessary before an appeal is listed for hearing. It is incumbent upon the judge who admits the appeal for hearing to ensure that the decree is extracted and is part of the record before the appeal is given the green light to proceed for hearing. Cases should be determined on their substance as opposed to being struck out on technicalities only, for the litigant to come back a second time. I do therefore find that the extraction of the decree is the duty of the court which must ensure that it is part of the record before an appeal proceed for hearing. - The decree herein shall be deemed to be part of the record.”

27. To appreciate what transpired in court, we have considered the record, which shows that the appellant’s counsel drew to the attention of the court that the decree was missing from the record. Upon hearing the response from the appellant’s counsel, the court directed that the decree be filed within 7 days. Thereafter, a date for judgment was issued, as the earlier direction had been that the matter would proceed for hearing by way of written submissions.

28. Order 42 rule 13 of the *Civil Procedure Act* states:

1. Upon notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the registrar shall cause the appeal to be listed for the giving of directions by a judge in chambers.
2. Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this rule.
3. The judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any



exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise.

4. Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—
  - a. the memorandum of appeal;
  - b. the pleadings;
  - c. the notes of the trial magistrate made at the hearing;
  - d. the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
  - e. all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
  - f. the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal.
29. Order 42 rule 15 of the [Civil Procedure Rules](#) states that; -
  1. When a memorandum of appeal is lodged the court to which such appeal is preferred shall send notice of the appeal to the court from whose decree the appeal is preferred.
  2. The court receiving such notice shall send with all practicable despatch all material papers in the suit, or such papers as may be specially called for by the court to which such appeal is preferred.
  3. Either party may on application and upon payment of the requisite charges obtain copies of any such papers as aforesaid.
30. In our view, failure to file the decree with the memorandum of appeal did not render the appeal incompetent, as the rules require either the judgment, order, or decree to have been filed. Since the judgement being appealed from formed part of the record, we see no prejudice that the respondent would have suffered, absent the decree. As rightly submitted by the appellant, when the learned judge made the order for the decree to be submitted, the respondent did not seek to appeal against that order and, therefore, he cannot be heard several months later to raise the issue, in an appeal against the judgement.

Indeed, the notice of appeal speaks to the judgment. In any event, the appeal was considered after the decree was filed as directed. Further, we do not detect any irregularity or bias in the judge's direction. This ground must, therefore, fail.
31. The role of the first appellate court, as stated in several decisions, entails considering, analysing, and evaluating the evidence heard by the trial court, bearing in mind that the trial court heard and saw the witnesses firsthand and made an allowance for this, and to arrive at an independent decision. This Court stated so in the case of [Abok James Odera t/a. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates](#) [2013] eKLR, where it was held in part that:

“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-analyze 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.”



32. We have keenly considered the impugned judgement, and in several paragraphs of the same, the learned judge analysed the record, evaluated the same and came to a decision. His analysis forms the basis of this appeal. It is an understatement to say that the learned judge did not analyse and evaluate the evidence. One may disagree with his findings, but he cannot be faulted for failure to consider the record. We find this ground to have no merit.
33. The learned judge went into details of analysing both the criminal and civil cases involving the parties. The civil appeal is the subject of this appeal. We agree with the appellant only to the extent that the learned judge provided a detailed account of the criminal case, which was not before him nor necessary, as the issue before the court was whether the appellant had proved a case of false imprisonment and malicious prosecution.
34. To prove a case of malicious prosecution, the appellant was required to demonstrate that there was no probable cause for the trial and that the trial was conducted with malice. Further, he was required to prove the alleged malice. Regarding this allegation, the learned judge had this to say; -

“I am satisfied that even if the respondent was acquitted of criminal charges, there was probable cause to have had him prosecuted, even before the complaint in relation to count one was pursued, the respondent was already on suspension due to other debts. The respondent confirmed during cross-examination in the criminal case that, at times, he worked as a salesman. He was entrusted with goods which, as per the evidence, he signed for but didn't remit the sales proceeds. That fact sufficiently amounts to a reasonable probable cause. He went to the appellant's office and created a disturbance. That was a probable or reasonable cause for the prosecution...”

35. In the case of *Mbowa v East Menyo District Administrator* [1972] EA 352, this Court stated that; -

“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 spiteful rather than for the public benefit....It occurs as a result of the abuse of the minds of judicial authorities whose responsibility it is to administer criminal justice. It suggests the existence of malice and the distortion of the truth. Its essential ingredients are: i. The criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff. It suffices if he lays 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. ii. The defendant must have acted without reasonable or probable cause. Thus, there must exist facts which, on reasonable grounds, the defendant genuinely believes that the criminal proceedings are justified. iii. The defendant must have acted maliciously. In other words, the defendant must have acted in instituting criminal proceedings with an improper and wrongful motive. That is, he must have had ‘an intent to use the legal process in question for some other than its legal, appointed and appropriate purpose’ *Pike v Waldrum* [1952] 1 Lloyds LLP 431 at P 452; and iv. 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...”



In the case of *National Oil Corporation v John Mwangi Kaguenyu & 2 Others* [2019] eKLR, the court stated that; -

“...case law is replete on the issue of malicious prosecution. Of critical importance is that a litigant must establish malice. It is not sufficient to find one liable on the basis that he/she is the one who made the complaint. In the often-cited case of *Murunga v Attorney General*[1979] KLR 138, the principles of the tort of malicious prosecution were spelt out. These are:

- “i) The defendant instituted the prosecution against the plaintiff.
- ii. The prosecution ended in plaintiff’s favour.
- ii. The prosecution was instituted without reasonable and probable cause.
- iii. The prosecution was actuated by malice.”

- 36. We agree with the findings of the learned judge that the respondent’s employer, the appellant, having entrusted goods with the respondent, which is not denied and which goods had not been accounted for, had every reason to complain the loss to the police. Equally, when the respondent created a disturbance at its offices, it was entitled to complain. The police conducted investigations and chose to charge the appellant. They cannot be faulted, either.
- 37. In his evidence before the trial court, the appellant did not prove an iota of malice or spite that would have driven the appellant to file a claim against him. It is not enough to make a claim. The claim must be supported by evidence that proves the claim on a balance of probabilities.
- 38. As regards the quantum of damages assessed by the learned judge, the issue was not relevant before the learned judge as he had not found the respondent liable. His assessment of damages, though, does not negate his finding on liability.
- 39. Ultimately, we find the appeal not merited. We dismiss the same with costs to the respondent.

**DATED AND DELIVERED AT NYERI THIS 27<sup>TH</sup> DAY OF JUNE, 2025.**

**JAMILA MOHAMMED**

**JUDGE OF APPEAL**

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**J. LESIIT**

**JUDGE OF APPEAL**

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**ALI-ARONI**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR.**

