



**Mugambi v Kanario (Civil Appeal 195 of 2018)
[2024] KECA 1883 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KECA 1883 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 195 OF 2018
W KARANJA, LK KIMARU & AO MUCHELULE, JJA
DECEMBER 20, 2024**

BETWEEN

MWITI MUGAMBI APPELLANT

AND

JULIET KANARIO RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Meru
(A. Ong'injo, J.) delivered on 27th July 2018 in H.C C.A. No. 31 of 2018)*

JUDGMENT

1. This appeal has its origin in a suit filed in the Magistrates' Court at Meru through a plaint filed on 8th November 2011. Juliet Kanario, the respondent herein, sued Mwiti Mugambi, the appellant, and the Attorney General for general and special damages for unlawful arrest, detention, and malicious prosecution. Judgment was entered in her favour and she was awarded special damages to the tune of Kshs.17,500.00 and general damages of Kshs.500,000.00.
2. Being dissatisfied with the decision of the Magistrates' Court, the appellant lodged an appeal before the High Court. Upon hearing the appeal, the High Court (A. Ong'injo, J.) dismissed the appeal and upheld the decision of the trial court. The appellant is now before us on a second appeal.
3. The appeal is predicated on five grounds in which he faults the learned Judge for, inter alia, failing to analyse the evidence tendered in the lower court as a result of which she arrived at the wrong finding; failing to find that the evidence before her did not disclose malicious prosecution; in shifting the burden of proof from the respondent to the appellant; failing to consider all the grounds of appeal and make a finding on them and in treating the appeal casually which made her arrive at the wrong finding.
4. At the hearing of the appeal, learned counsel Mr. Kimathi, appeared for the appellant. There was no appearance for the respondent despite service and neither did she file submissions.



5. The appellant submitted that he made a report to the police after carrying out a private investigation of disappearance of his items from his shop and that the items were in possession of the respondent who was at one time his employee. Further that when the respondent was arrested and charged in court her defence to the offence was that the items found in her possession did not belong to her but that they were left in her shop by a person called Boniface who was his employee at some point.
6. Counsel submitted that it is not in dispute that the prosecution of the respondent was instituted by the appellant and that the prosecution terminated in the respondent's favour. Counsel submitted that the third and fourth ingredients of malicious prosecution are the ones in dispute for the reasons that the respondent did not prove in the primary suit that the prosecution against her was instituted without reasonable and probable cause and/or that the prosecution was actuated by malice. Further, that there is a duty to prove all the four ingredients of the offence. Reliance was placed on *Anthony Shiveka Alielo -vs- Kenya Post Office Savings Bank & Another* [2019]eKLR.
7. Counsel maintained that there was a reasonable and probable cause to arrest and charge the respondent with the offence of stealing contrary to section 275 of the Penal Code and with an alternative count of handling stolen goods and that was the reason she was placed on her defence in the criminal case.
8. It was submitted that both the trial court and High Court erred in holding that the prosecution was motivated by malice and that there was no reasonable and probable cause to mount the prosecution. On the definition of 'malice', counsel relied on the *Black Law Dictionary*, 9th Edition on the definition of malice as –

“The intent without justification or excuse to commit a wrongful act, the reckless disregard of the law or of a person's legal rights, ill will wickedness of heart.”
9. It was submitted further, that the appellant has demonstrated the circumstances that led him to cause the arrest, charging and prosecution of the respondent and that in the light of the definition of malice he was not actuated by malice in anyway in causing the arrest, charging and prosecution of the respondent and that he was only seeking justice after goods were stolen from his shop by the respondent which act was witnessed by police officers that conducted a search at her shop and retrieved the said books.
10. Finally, the appellant contended that the award of Kshs.500,000.00 in general damages was exaggerated, exorbitant and without any factual basis, it was stated that if the respondent had proved her claim, which she failed to do, the trial court should have awarded Kshs.20,000.00. Counsel relied on *Hassan Ogwimba Akibaya -vs- Attorney General & 2 others* [2015] eKLR and *Risper Nyomenda -vs- George Kenyatta* [2021] eKLR.
11. What is before us is a second appeal. In *Maina -vs- Mugiria* [1983] KLR 78, this Court held that on a second appeal, only matters of law may be taken, and if the High Court upholds a Resident Magistrate on a question of whether or not he exercised his discretion judicially, the issue as to whether he was right or wrong to do so is a question of law. In *Stanley N. Mureithi & Anor -vs- Bernard Munene Ithiga* [2016]eKLR, the Court applying *Kenya Breweries Limited -vs- Godfrey Odoyo* [2010] eKLR, stated that on a second appeal, the Court confines itself to matters of law only, unless it is shown that the court below considered matters it should not have considered or failed to consider matters it should have considered, or looking at the entire decision, it is perverse. See also *Naomi Kemunto -vs- Total (K) Limited and Kisii Total Service Station (Kisumu Civil Appeal No. 211 of 2008)* (UR).
12. We have considered the record of appeal along with the submissions filed by learned counsel for the appellant vis a vis our restricted jurisdiction on second appeal. With profound respect to learned



counsel for the appellant, most of the content in his submissions is purely factual. The circumstances under which the respondent was arrested and how the allegedly stolen items were recovered are matters of fact. The only way that evidence could have been presented to the trial court was by the appellant testifying before the trial court to that effect. He did not do so and it is too late in the day to try and bring on board the said evidence by way of the submissions before us.

13. The main complaint by the appellant is that the Judge erred in failing to analyse the evidence tendered in the lower court and as a result she arrived on the wrong finding and further erred in law and fact in treating the appeal casually which made her arrive at the wrong finding. Failure by the first appellate court to re-analyse and re-evaluate the evidence adduced before the trial court and make independent findings based on the re-evaluation is a point of law. For the evidence to be re-considered, the same must be adduced before the trial court.
14. The record shows that the appellant had been notified of the hearing date of 18th October 2016. When the matter came up for hearing, the appellant and his counsel were absent. The matter proceeded for hearing of the respondent's case which was closed. On 9th November 2017 when the matter came up for defence hearing Ms. Atieno who held brief for Mr. Mutuma was present for the respondent while the appellant and his counsel were absent. The matter was placed aside for hearing at 12.17 pm and when called out at that time, both the appellant and his counsel were still absent. The trial court proceeded to mark the defence case as closed and ordered parties to file written submissions. The appellant did not file any submissions. On 16th January 2018, once again the appellant and his counsel failed to attend court and a date for judgment was set for 19th March 2018 when the respondent's suit was allowed and the respondent awarded special and general damages. In view of the above, there was no evidence adduced before the trial court for the High Court to re-analyse.
15. In light of the above the mandate of the trial Judge in the circumstances of this appeal was constrained to determining the trial magistrate's findings based on the respondent's pleadings especially when it is not disputed that those pleadings had not been rebutted by the appellant through evidence tendered on oath. What was left for the trial court to determine was simply whether the respondent had proved the claim to the required threshold or not. The appellant's complaint that the Judge erred in failing to analyse the evidence tendered in the lower court and as a result arrived at the wrong finding and further erred in law and fact in treating the appeal casually which made her arrive at the wrong finding is, therefore, unfounded and is accordingly dismissed.
16. In our view, issues of liability for the alleged malicious prosecution were determined by the trial court on a factual basis without any rebuttal by the appellant and that being a factual issue, there is no other interpretation in law that would change the situation to shift the blame to the respondent. We do not find any issue of law raised capable of being determined by this Court, contrary to the factual findings by the High Court that the appellant did not rebut the respondents suit at the trial court.
17. Accordingly, we decline to delve into matters of the appellant's liability as liability was arrived at based on matters of fact presented before the trial court and confirmed by the High Court. The two courts below arrived at concurrent findings of fact in that regard which we must defer to.
18. On the issue of general damages, the principles under which an appellate court can interfere with an award of damages made by a trial court are well captured in the cases of *Kemfro Africa Limited T/A Meru Express Services [1976]* and another -vs- *Lubia* and another (No.2) [1985] eKLR, in which the Court (Kneller, Nyarangi, JJA and Chesoni, Ag JA) stated as follows:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court



of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See *Ilanga v Manyoka*, [1961] EA 705, 709, 713 (CA-T); *Lukenya Ranching and Farming Co-operative Society Ltd -vs- Kavoloto*, [1979] EA 414, 418, 419 (CA-K).

19. This Court follows the same principles.
20. In *Shabani -vs- City Council of Nairobi* [1985] KLR 516 at page 518, Hancox, JA stated as follows:

“The test as to when an appellate court may interfere with an award of damages was stated by Law JA in *Butt -vs- Khan*, Civil Appeal No. 40 of 1997 as follows:

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that, he misapprehended the evidence in some material respect, and so arrived at a figure which was so inordinately high or low. This discretion has since been followed frequently by this Court.””
21. The learned Judge of the High Court was clearly alive to the principles stated in the above cases and found no reason or justification to interfere with the award made by the trial court. In the circumstances we find no error with the learned Judge’s decision as the trial magistrate proceeded on the correct principles and took into account relevant factors, and the award of Kshs.500,000.00 to the respondent as general damages was not so inordinately high as to justify interference.
22. The upshot of the foregoing is that this appeal is without merit and it is hereby dismissed in its entirety with no orders as to costs.

DATED AND DELIVERED AT NYERI THIS 20TH DAY OF DECEMBER 2024.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

