IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: NAMBUYE, KOOME & KANTAI, JJA

CIVIL APPEAL NO. 282 OF 2018

BETWEEN

JOHN NGANGA KINUU …….……..…..…… 1ST APPELLANT

SAMUEL GIATHI NJOORGE…….…..…….2ND APPELLANT

JOHN KAHIA GIATHI……...……....……..3RD APPELLANT

AND

PETER RUBIRO NDONGI ……..……1ST RESPONDENT

JOSEPHINE KARIMI MUIGAI…….....…2ND RESPONDENT

LEONARD NDONGI RUBIRO……....….....3RD RESPONDENT

INSPECTOR GENERAL OF POLICE……...…4TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL…….....….5TH RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Sergon, J) dated 13th July, 2018 **in HC. Civil Appeal No. 73 of 2017)**

JUDGMENT OF THE COURT

This is an appeal from the Judgment of the High Court of Kenya at Nairobi, Milimani law courts, **(J.K. Sergon, J.)** dated 13th July, 2018. The appellants had filed a civil suit seeking compensation for malicious prosecution following a trial and a retrial for alleged criminal offences.

The brief facts are that, the three appellants were arraigned before the Senior Resident Magistrate's court at Kikuyu, in Criminal Case No. 18 of 1998, with two offences of robbery with violence, contrary to **section 296(2)** of the Penal Code. The offences were committed separately at **Ngarariga** Village in Kiambu District of the Central Province, against **Peter Rubiro Ndongi** and **Josephine Karimi Muigai** on 17th -18th May, 1998, and in the manner described in the particulars of the respective charges. The appellants denied the charges prompting a trial conducted by Magistrate **Ann Ongeri (Mrs.)** Senior Resident Magistrate which they successfully challenged. While the re-trial was done by **Murage** (Mrs) Principal Magistrate respectively at Kikuyu Law Courts. After the trial, the appellants were, convicted and sentenced. The sentences and convictions resulting from the trial is what triggered the filing of Criminal Appeal Numbers 519, 520 and 521 of 2000, which were consolidated, heard together and gave rise to the Judgement dated 23rd March, 2004, in which the learned Judges of the High Court ordered a retrial before another Magistrate for reasons stated in the said Judgment.

The appellants were re-arraigned before the Principal Magistrates court at Kikuyu in Criminal Case No. 7 of 2004, with three counts of robbery with violence based on the same set of facts as in the initial trial, re-tried by **Murage (Mrs). PM**, found guilty, convicted and sentenced accordingly giving rise to Nairobi High Court Criminal Appeal Numbers 514, 515 & 516 of 2005, which were also consolidated and heard together by **J.B. Ojwang** and **M. Warsame, JJ**. (as they were then). The learned Judges re-evaluated the record and summarized the salient features of the re- trial court's findings as follows:

"*That appellants were related to PW1 and PW3; that the robbers took 1½ hours in PW1's house and about 30 minutes in PW3's*

house. From there they proceeded to the house of PW2 where they also robbed her; that the time spent in PW1 and PW3s' houses was sufficient for positive identification because, appellants were well known to the complainants; that issue of grudge raised by appellants in their defences had not been challenged by the prosecution; that injuries were real and not a creation of PW1 and PW3; that appellants had not given an account of themselves on the night the robbery occurred and concluded that their defences had no basis; the re-trial court appreciated that the matter arose out of a retrial and the OB requested for by appellants was missing and could not be traced; and lastly, that the re-trial court concluded that whether the OB was produced or not, would not have changed the evidence of positive identification by PW1, PW2 and PW3 and on that account, found appellants guilty, reconvicted them and resentenced them accordingly."

Considering the above in light of the rival positions, the High Court made findings *inter alia,* that it was incumbent upon the prosecution to tender evidence to demonstrate that appellants were directly or circumstantially connected to the commission of offences that took place on 17th -18th May, 1998; that, if witnesses who connected appellants to the commission of those offences were known to the appellants, the holding of identification parades, was superfluous and inconsequential to the proof or otherwise of the prosecution's case especially when the person who allegedly conducted those ID parades was never called to testify. Reliance on that evidence in support of the prosecution case in the Judges' view was therefore untenable in law; that evidence connecting appellants to the commission of offences allegedly perpetrated against 1st -3rd Respondents was doubtful because, in the Judges' view, mystery surrounded the failure of the prosecution to produce the OB books showing where, when and to whom the first report of the incident of the robberies against the 1st-3rd Respondents was reported. Second, there was failure of the prosecution to explain why it took long to arrest appellants who were allegedly related and neighbours to the complainants.

Third, there was also failure of the victims to mention the identity of the attackers who were allegedly well known to them to the authorities or persons who came to the scene soon after the robberies at the earliest opportunity. Fourth, PW1 and 3 were not able to mention the names of persons or police stations in which the first report was made, a matter which in the Judge's view weakened the evidence that the two had recognized the attackers, thereby making the chain connecting appellants to the commission of the offences incomplete. Fifth, no explanation was given by the prosecution as to why material witnesses namely, wife of PW1, the Chief who received the first report and the AP's who arrested the first appellant were never called to testify. Sixth, the trial court misdirected itself by shifting the burden of proof especially when in law it was not the duty of the appellants to prove their innocence. The Judges therefore, found conviction of the appellants unsafe, gave them the benefit of doubt, allowed their respective consolidated appeals, quashed their convictions and set them at liberty.

It is the above success in their respective above mentioned consolidated Criminal appeals against both reconvictions and sentences handed down against them by **Murage (Mrs) PM,** following a re-trial that triggered the civil litigation resulting in this second appeal. The civil litigation was initiated by a plaint dated 18th July, 2013. In summary, appellants' complaints against the 1st -3rd Respondents was that, they maliciously and without reasonable cause instigated their arrest, arraignment, initial trial and re-trial before the Magistrates' court at Kikuyu. Particulars of malice were given as: 1st-3rd Respondents made a false report to police, knowing that appellants were not guilty of the crimes imputed against them; giving false and fabricated evidence against appellants; concealing material facts when they were making the false report to police; and lastly, using the criminal process not for purposes of bringing appellants to justice or to vindicate justice but solely for purposes of settling scores and to further intimidate appellants.

Complaint against police who were, the 4th and 5th Respondents agents and or servants, were that they maliciously, intentionally and or negligently and without any reasonable and or probable cause launched the prosecution against appellants based on material and prevailing circumstances police knew and or ought to have reasonably known did not disclose the crime then imputed against appellants; soliciting for bribes from appellants in order to release them and punishing them when they failed to give the bribes; knowingly and willingly proffering trumped up charges, against appellants; arresting and arraigning appellants in court without carrying out any or proper investigation or without being presented with sufficient evidence implicating appellants; subjecting appellants to unwarranted identification parades when appellants were well known to 1st -3rd Respondents; conveniently leaving out key prosecution witnesses; deliberately and knowingly allowing police **constable Muasya** to prosecute the matter occasioning a retrial to the detriment of appellants.

Appellants therefore claimed that they were greatly injured in their credit, character, reputation; were brought to Public hatred, ridicule, scandal, odium, contempt and had therefore suffered damages and loss for being falsely imprisoned for a period of over 10 years, hence the claim for special, general and exemplary damages for malicious prosecution, advocates fees incurred in the defence of the two criminal trials they underwent; costs of the suit and interests incidental thereto and any other relief the court may deem fit to grant.

The 1st - 3rd Respondents 'filed a defence not included either in the main or supplementary record of appeal but mentioned in their written submissions as dated 18th July, 2019 and filed on 23rd July, 2019; indicated to have been dated 14th August, 2013, in which they averred *inter alia,* that they made a genuine complaint to the police who had a statutory duty to investigate, and which the police did carry out and, found basis for the complaint. The appellants were properly charged with offences imputed, convicted and sentenced twice following a trial and re-trial. The 4th and 5th Respondents also filed their joint defence dated 13th August, 2013, averring *inter alia* that, appellants were never maliciously, unlawfully arrested and or prosecuted; denied particulars of malice attributed to them; averred that the prosecution was undertaken pursuant to probable and reasonable cause and in execution of the statutory duties of the 4th and 5th Respondents and was therefore lawful, procedural and within the limits of the relevant legal provisions of the law, and after a thorough and proper investigation and execution of the statutory duty that a probable criminal offence punishable in law was duly established. The particulars of statutory duty were given as: receiving and acting upon information received that an offence cognizable in law had been committed; investigations were carried out in the cause of which every credible evidence was pursued and a decision made upon reasonable and probable cause leading to the apprehension, detention in custody and arraigning appellants in court where they underwent a trial and retrial in the course of which they were convicted and sentenced twice. On that account, the respondents prayed the appellants' suit against them to be dismissed with costs.

The trial Magistrate **(G. Onsango- R.M.)** analyzed the rival pleadings, evidence and submissions, took into consideration the threshold in the case of **John Ndeto Kyalo versus Kenya Tea Development Authority and Another HCCC No. 502 of 1999 (MBA)** on the threshold for sustaining a claim for malicious prosecutions, identified ingredients appellants were required to establish in order to succeed on their claim. Applying the above threshold to the rival positions before him, dismissed appellants' claim for reasons we shall revert to at a later stage of this Judgment.

The appellants appealed to the High Court raising various grounds in Civil Appeal Number 73 of 2017. The Judge re-evaluated the record in light of the rival submissions before him and principles of law relied upon by the respective parties in support of their opposing positions, and concurred with the findings of the trial magistrate and dismissed the appeal for reasons we shall also revert to at a later stage of this Judgment.

Undeterred, the 3rd appellant filed this appeal raising four grounds of appeal which may be paraphrased as follows: that the learned Judge erred both in law and in fact:

> ***(1) In dismissing the 3rd appellant's appeal by failing to properly appreciate that the 3rd appellant had proved his case on a balance of probability, that prosecution carried out against him was malicious and he was therefore entitled to damages.***
>
> ***(2) To appreciate that it was fatal for the trial court to fail to make a finding on quantum in a case of malicious prosecution and accordingly vitiate the trial on that account."***

The appeal was canvassed by way of written submissions, adopted and orally highlighted by 1st appellant in person and supported by oral submissions by the 2nd and 3rd appellants. Learned counsel, **Mr. A.J. Ambani** appeared for the 1st-3rd Respondents, while **Mr. Munene** appeared for the 4th and 5th Respondents respectively. Both learned counsel adopted and orally highlighted their respective written submissions dated 18th July, 2019 and filed on July, 2019 for the 1st -3rd Respondents, and 23rd August, and filed on 29th August, 2019 for the 4th and 5th Respondents respectively.

Supporting the appeal, the first appellant faulted the Judge for sustaining the trial court's order dismissing their claim for damages for malicious prosecution for failure to properly appreciate that: the High Court's order allowing their criminal appeal numbers 514, 515 and 516 of 2005 respectively and overturning their convictions and sentences on retrial as corroborated by evidence of PW2 and PW3, that first Respondent fabricated the charge against them was sufficient proof that the charges levelled against them were false; no evidence was adduced by the prosecution in both the Criminal trials and re-trial nor the 1st- 3rd Respondents in the Civil trial to controvert appellants assertions that the 1st Respondent was using police and prosecution to settle family issues; the trial court's failure to assess quantum of damages after concurring with the submissions of both parties that damages ought to have been assessed notwithstanding, the rejection of appellants' claim was fatal and therefore, the trial stood vitiated.

The 2nd and 3rd appellants' associated themselves fully with 1st appellants written submissions and oral highlights and maintained their innocence of the malicious charges and prosecution that they were subjected to in the criminal proceedings at the magistrate's court; that the appellate Judges in their successful criminal appeals aforementioned, were right when they acquitted them of those charges as being baseless; that this Court should take into account all the injustices, they have suffered since the false and malicious charges were instigated against them and vindicate them accordingly.

Opposing the appeal, **Mr. Ambani** for the 1st- 3rd Respondents relied on the case of **Stanley N. Muriithi & another versus Benard Munene Ithiga [2016] eKLR,** among numerous others and reminded the Court of its role as a second appellate court, namely to confine itself to matters of law only unless it is demonstrably 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. **Mr. Ambani,** relying on the case of **John Ndeto Kyalo versus KTDA & another** (supra), and **David Kirimi Julius versus Fredrick Mwenda [2009] eKLR**, submitted that the trial magistrate correctly applied the threshold in the above case as approved by the High Court and after analyzing each and every principle *vis- a – viz,* the evidence that was adduced by appellants in support of their claim, both at the trial and on appeal, arrived at the only logical and correct conclusion that appellants had not proved malice on a balance of probability; that the High Court Judge in his Judgment not only re-evaluated the evidence but also correctly, restated the law and applied it to the facts before arriving at a finding that 1st - 3rd Respondents' complaint was not false as there was no dispute that 1st - 3rd Respondents had been attacked on the night of 17th -18th May, 1988 and robbed of various items enumerated in the charges appellants faced.

He also relied on the case of **Andrew Mwori Kasaya versus Kenya Bus Service [2016], eKLR,** for the submission that the Judge fell in no error when he failed to vitiate the trial court's decision for the failure to assess the quantum of damages payable to appellants had they succeeded on their claim, because, they neither quantified their claim in the magistrates court nor produced receipts to support the claim for special damages; and lastly, that, failure to assess quantum of damages in the peculiar circumstances of this appeal did not of itself qualify as sufficient reason for the High Court to vitiate the decision of the trial court and urged the court to dismiss the appeal with costs to them.

Also opposing the appeal, **Mr. Munene**, submitted that since the memorandum of appeal was filed by the 3rd appellant, the grounds of appeal only relate to him and not the other two cited appellants, especially in the absence of the 1st and 2nd appellants adopting the 3rd appellant's grounds of appeal as their grounds of appeal, or alternatively, the 3rd appellant indicating in his memorandum of appeal that the appeal was brought by the 3rd appellant on his own behalf and that of the co-appellants. **Mr. Munene** relied on the case of **Antony Shiveka Allelo versus Kenya Post Office Savings Bank & another, Nairobi Court of Appeal Civil Appeal No. 52 of 2016**, in which the Court of Appeal relied on the case of **Kenya Breweries Limited versus Godfrey Odoyo Civil Appeal No. 127 of 2007** for the holding *inter alia* that, on a second appeal, the Court has to resist the temptation of delving into matters of fact; that it is imperative for the Court to confine itself to matters of law only, 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. The Court's hands were therefore tied as it is bound by the concurrent findings of fact by the two courts below.

On the merits of the appeal, **Mr. Munene** submitted that the Judge was right in dismissing the 3rd Appellant's appeal, for failure to prove his case on a balance of probabilities. After rehashing the evidence, the 1st- 3rd Respondents tendered twice before the trial and the retrial court's in the criminal proceedings before the magistrate's courts, **Mr. Munene,** submitted that based on the rehashed evidence, the arrest, confinement and subsequent prosecution of appellants was lawful and devoid of any malice; that both courts below considered the issues before them and properly reached concurrent decisions based not only on sound evidence, but also on sound principles of law; that in

rejecting the 3rd appellant's appeal to the High Court, the High Court upheld the principles laid down by numerous case law for sustaining a claim for malicious prosecution.

Mr. Munene concurred with **Mr. Ambani's** submissions that the Judge re-evaluated the evidence and the law, re-stated the law and correctly applied it to the facts of appeal that complaints by the 1st- 3rd Respondents to police were not false as there was no dispute that the 1st-3rd Respondents had been attacked on the night of 17th -18th May, 1998 and robbed; that the Judge also observed and correctly so in **Mr. Munene's** view, that there was a reasonable and probable cause to warrant the arrest, charging and prosecution of appellants. The court also correctly noted that there was therefore no malice on the part of the 4th and 5th Respondents in the action they took in the prosecutions resulting in this appeal as they were only discharging their statutory duties as mandated by law.

On the elements for sustaining a claim for damages for malicious prosecution, **Mr. Munene** relied on the case of **Mbowa versus East Mengo District Administration [1972] 352,** as approved in the case of **Anthony Shiveka Allelo versus Kenya Post Office Savings Bank & another** (supra), on the ingredients for sustaining a claim based on the tort of malicious prosecution. **Mr. Munene** added that it is from the same **Antony Shiveka Alielo's** case (supra), that elements for sustaining a claim for damages for malicious prosecution were restated as already highlighted above.

On the role of police, **Mr. Munene** relied on the case of **Gitau versus Attorney General [1990] eKLR 13**, for the holding *inter alia* that, if the person making a complaint or the police officer to whom the complaint is made genuinely believed the facts and acted upon them, being satisfied that a probable crime has been established, then the arrest and subsequent prosecution would be justified.

On the issue of reasonable and probable cause, **Mr. Munene** relied on the case of **Kagane & others versus Attorney General & another [1969] EA 643**, for the holding *inter alia* that:

> ***" (i) whether there was reasonable and probable cause for the prosecution is primarily to be judged on the objective basis of whether the material known to the prosecutor would satisfy a prudent and cautious man that the accused was probably guilty (Hicks V. Faulkner (i) adopted)"***

and submitted that in the instant appeal, there is no evidence that the 1st- 3rd Respondents made a false report, or that they were actuated by malice or that appellants' prosecution was brought without reasonable or probable cause; that the correct position as borne out by the evidence on record before the two courts below was that the 1st -3rd respondents were robbed by people known to them and made a report to police. The evidence on record clearly demonstrates that: the police were justified in while believing it to be true and therefore correctly proceeded to arrest and charge appellants.

On the Judges' failure to vitiate the trial for the trial court's failure to make a finding on quantum had 3rd appellant succeeded on his claim against Respondents, Mr. **Munene,** submitted that it was not fatal especially when 3rd appellant failed to prove his case on a balance of probability as already demonstrated above. Second, that issue of awarding damages is within the discretion of the court. That in the instant appeal, the two courts below concurrently noted that indeed appellants attacked and robbed the 1st - 3rd Respondents; that in such a scenario there would be no reason for the court to make a finding on quantum of damages since the prosecution was not driven by malice as any attempt to do so would be tantamount to a mockery to the criminal justice system.

Lastly, **Mr. Munene** relied on the case of **Mbogo & another versus Shah [1968] EA 93** and submitted that the Judge was right in dismissing 3rd appellant's appeal as there was no basis for disturbing the trial court's findings. We should therefore find that the two courts' below properly exercised their discretion in arriving at the concurrent conclusions. There is therefore no basis to warrant this Court's interference with the exercise of that discretion by the two courts' below.

In reply to the Respondents' submissions, the first appellant stressed that no OB was tendered to court to confirm the lodging of the complaint; that the charge sheet was forged; that there was evidence to demonstrate that their arrest and subsequent prosecution in criminal proceedings had been instigated by reason of a grudge between appellants and the 1st – 3rd respondents. The 2nd appellant added that, since there was no OB, then evidence of a first report on the alleged commission of the crime was lacking, while the 3rd appellant urged the court to consider the reasons given by the Judge in the successful criminal appeals which according to him, were the correct position as regards the litigation resulting in this appeal.

This being a second appeal, our mandate is confined to consideration of matters of law only. See the case of **Kenya Breweries Limited versus Godfrey Odoyo Civil Appeal No. 127 of 2007**, in which the Court stated *inter alia* that:

> ***" In a second appeal ……., 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 have considered the above mandate in light of the record, rival submissions and authorities cited by the respondents in support of their opposing positions. The issues that fall for our determination are as follows:

> ***(1) Whether the appeal under consideration relates to the 3rd appellant only.***
>
> ***(2) Whether the High Court erred when it sustained the trial court's dismissal of the appellants' claim.***

Issue number 1 arises because the memorandum of appeal on record was signed by the 3rd appellant only. There is no other document on

record, endorsed and filed by the first and second appellants to the effect that they adopt the 3rd appellant's memorandum of appeal as their Memorandum of Appeal. The above position notwithstanding, the first appellant filed written submissions which he orally highlighted and were merely adopted by the 2nd and 3rd appellants as already indicated above. **Rule 77 (1)** of the Court of Appeal Rules (CAR) obligated the 3rd appellant as the party who filed the notice of appeal to serve it "**on all persons directly affected by the appeal**". **Rule 90(1**) of the CAR obligated the 3rd appellant as the party filing the record of appeal to serve it on all parties who participated in the original proceedings giving rise to the appeal. It is therefore our finding that the 1st and 2nd appellants' participation in this appeal is limited to compliance with the above rules. The 3rd appellant and the Respondents are therefore the main contestants in this appeal.

Issue number 2, has two limbs to it. The first limb deals with issue as to whether the appeal is meritorious, while the 2nd limb deals with the issues as to whether it was fatal for the trial court to fail to make a finding on quantum notwithstanding, that 3rd appellant had not succeeded on his claim of malicious prosecution against the Respondents. Starting with the 1st limb, it is not disputed that the two courts below evaluated and re-evaluated the record as highlighted above,applied thereon principles that guide a court of law when sustaining a claim for malicious prosecution, found appellants' claim had not met that threshold and concurrently dismissed the same.

The threshold appellants were obligated to meet in order to succeed on their claim of malicious prosecution against the Respondents is as was set out by the predecessor of the Court in the case of **Mbowa versus East Mengo District Administration [1972] EA 352,** 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 instigating criminal prosecution. 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 ingredients are:***
>
> ***(1) The criminal proceedings must have been instituted by the defendant.***
>
> ***(2) The criminal proceedings must have been terminated in the plaintiffs' favour.***
>
> ***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 then he would fail in his action….."***

In light of the above threshhold, we find no basis for faulting the two courts below for holding that the above are the essential ingredient 3rd appellant was mandatorily required to establish before succeeding on his claim for malicious prosecution against Respondents.

What amounts to or does not amount to a reasonable and probable cause was also elaborated by the predecessor of the Court in the case of **Kagane & others versus A.G. & Another [1969] EA 643** as follows:

> ***"Reasonable and probable cause is an honest belief in the guilt of the accused upon a full conviction founded upon reasonable grounds of the existence of circumstances which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accused to conclusion that the person charged was probably guilty of the crime imputed."***

We also find that the two courts below properly appreciated and addressed their minds to the above pre-requisites.

What amounts to false arrest and false imprisonment is as was set out by the Court in the case of **Jediel Nyaga versus Silas Muchoke Civil Appeal No. 59 of 1987 (Nyeri) (UR)** as follows:

> ***"It is trite law that false arrest and false imprisonment may very well be found where prosecution is dismissed and the accused acquitted. Malicious prosecution may also be found where determination of prosecution was in favour of the accused i.e in cases where the prosecution was withdrawn and the accused is not recharged or where prosecution has been terminated with the acquittal of the accused. False arrest may also be constituted where the matter of the false report was actuated by malice."***

See also **Egbema versus West Nile District Administration [1972] EA 60**, in which the predecessor of the Court exonerated the complainant from responsibility for damages for an abortive prosecution in an instance where investigations were carried out and the decision whether or not to prosecute was made by Uganda Police. The above guiding principles were restated, approved and applied by the Court in the case of **Anthony Shiveka Allelo versus Kenya Post Office Savings Bank & another** (supra), as the correct threshold for sustaining a claim for malicious prosecution. It is the same threshold we adopt, in our determination as to whether there was basis for the High Court sustaining the trial court's dismissal of the 3rd appellant's claim.

As already highlighted above, the trial court took into consideration the guiding principles for sustaining a claim for malicious prosecution as was restated in the case of **John Ndeto Kyalo versus Kenya Tea Development Authority and Another (**supra); in which the Court was categorical that to succeed on a claim for malicious prosecution " **it is incumbent upon the plaintiff to prove on a balance of probabilities all four essential elements and not just one, two and not even three** (emphasis added). Those elements were set out by the trial court as follows:

> ***(i) The defendants instituted the prosecution against the plaintiff.***
>
> ***(ii) The prosecution ended in the plaintiffs' favour.***

(iii) The prosecution was instituted without reasonable and probable cause.

(iv) The prosecution was actuated by malice.

Applying the above threshold to the record, the trial magistrate made observations that the report of robbery with violence against appellants was made by the 1st- 3rd Respondents who were able to identify appellants to the police as the persons who had robbed them, hence causing them to be arrested and charged with the offence of robbery with violence. On that account, the trial court held that the 4th respondent instituted the proceedings against appellants following the report received from the 1st- 3rd Respondents.

Turning to the second ingredient, the trial court held that appellants were tried twice and convicted twice as both prosecutions were never withdrawn or terminated.

The trial court was alive to and appreciated correctly so in our view, that appellants were ultimately acquitted of those charges on their first appeal after a retrial.

As for the 3rd ingredient as to whether the prosecution was instituted without reasonable and probable cause, the trial court made observations that the 1st- 3rd Respondents had testified that they were attacked on 17th – 18th May, 1998 and a report regarding the said robbery made at Kikuyu Police station. The trial court sustained the making of that report as being truthful because there was no evidence tendered by appellants to prove that the report of robbery was false or that it was actuated by malice or that their prosecution was brought without reasonable and probable cause.

In reaching the above conclusion, the trial court applied the threshold set by the predecessor of the Court in the case of **Kagane versus Attorney General & another** (supra); for the holding *inter alia* that:

> ***"To constitute reasonable cause, the totality of the material within the knowledge of the prosecution at the time of the institution of the prosecution must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty."***

Considering the above threshold in light of the record, the trial court was satisfied that the prosecution was instituted with reasonable and probable cause; namely, that, 1st- 3rd Respondents were indeed robbed and therefore had cause to complain to the police who were justified in taking action.

Turning to the last ingredient, the trial court considered appellants' assertion that they had a grudge with the 1st Respondent over a political campaign in which they were involved and which the 1st Respondent lost in addition to allegation that he was also involved in a relationship with the 2nd appellant's mother. In dismissing the appellants' assertions, the trial court rendered itself as follows:

"There was no evidenced from anyone else, that indeed there was a long standing enemity between appellants and the 1st respondent.

On that account, the trial court found appellants had not proved their claim to the required threshold and dismiss the same.

Turning to the High Court, the approach the Judge took was to take into consideration the same case the trial court had relied upon namely; of **John Ndeto Kyalo versus KTDA & Another** (supra), and set out the principles that guide a Court of law in sustaining a claim for malicious prosecution as already highlighted above. The Judge observed and correctly so in our view that the principles set out in the **John Ndeto Kyalo** case (supra), formed the threshold for determining the appeal before him. Applying that threshhold to the record the Judge rendered himself as follows:

> ***"I have on my part re-evaluated the evidence presented before the trial court. It is clear to me that the criminal charge preferred against appellants arose out of investigations carried out pursuant to a complaint filed by the 1st, 2nd and 3 rd respondents. It is apparent that the complaint was not false, therefore, the investigation were instituted pursuant to a reasonable and probable cause. There is no dispute that on 17th May, 1998, the 1st, 2nd and 3rd respondents were attacked and robbed. The trio booked a report before Kikuyu police station. The report was real and not false. In the end, I find no merit in the appeal as against the orders on liability."***

It has been the appellants' consistent arguments throughout the litigation resulting in this appeal and now before this Court on this second appeal that their success in Criminal Appeal numbers 514,515 &516 of 2005 was sufficient basis for sustaining their claim. We have considered the reasons the learned Judges gave for allowing the above criminal appeals in light of the reasons both courts below gave as reasons for dismissing appellants' claims at the trial and affirming the trial court's dismissal order by the High Court. We find nothing in the reasoning of the Judges in the mentioned criminal appeals to suggest that the report by 1st - 3rd Respondents' that they had been robbed on the night of 17th-18th May, 1998 was false. It was therefore correctly, concurrently found by the two courts below that 1st-3rd Respondents were indeed robbed on the material date and were therefore entitled to complain to police for police to take action to vindicate them. It is the above report that triggered police investigation. The Judges in the above criminal appeals vitiated appellants' conviction on retrial because if the appellants were persons known to 1st-3rd Respondents, there was no basis for holding an identification parade which the Judge's found superfluous and inconsequential to proof of appellants' guilt especially when the very person who had allegedly conducted those identification parades did not testify. Second, failure to produce OB requested for by appellants left gaps in the prosecution's case as to when and by whom the report was made. Third, PW1and 3 failed to tell the Court the particular police officer to whom the report was made at the police station. Fourth, no explanation was given as to why crucial witnesses were never tendered to court to give evidence. Failure to produce the OB also left gaps in the prosecution's case as to whether the report was made at the earliest opportunity to any authority. What all the

above reasoning amounts to is that, there was poor investigation and handling of the prosecution case resulting in appellant being given a benefit of doubt, hence their acquittal, which in our view, did not affect the truthfulness of the report as initially laid by 1st- 3rd Respondents. 2nd, the standard of proof in both the criminal trial and re-trial was higher, that is beyond reasonable doubt far much more above that required to be met in a Civil claim of proof on a balance of probability.

In light of the above reasoning, it is therefore our finding that only one ingredient was established by 3rd appellant that is that he was ultimately acquitted, which finding in our view, did not oust the existence of facts to support lack of existence of the other three crucial elements for sustaining a claim for malicious prosecution. The position in law as stated and restated by the case law highlighted above is that, in order to succeed on a claim for malicious prosecution, a party has to satisfy all the four ingredients for sustaining a claim for malicious prosecution, a threshold 3rd appellant never met. As was the position in the case of **David Kirimi Julius versus Fredrick Mwenda** (supra), all that 1st- 3rd Respondents did was to report the robbery undoubtedly committed against them and which all the courts which handled proceedings in relation thereto found not to have been false. The matter was left to the police to investigate and prosecute if there was basis. There is nothing to suggest that 1st - 3rd Respondents did more than reporting the robberies against them. Neither is there evidence to suggest that the 4th and 5th Respondents went beyond the call of duty when they investigated, arrested and prosecuted 3rd appellant pursuant to that report. Being a civil claim, the onus was on the 3rd appellant to prove that there was more than mere reporting. Neither was there evidence to suggest that the 1-3rd Respondents directed the investigations or that police had been interfered with by them in any way. There was therefore nothing to suggest that they were malicious.

Turning to the 2nd limb, it is not in dispute that the trial court upon dismissing 3rd appellant's claim, did not assess quantum of damages, 3rd appellant would have been accorded had he succeeded in his claim, a position the High Court did not interfere with, for reasons that no prejudice was occasioned to 3rd appellant for the trial court's failure to undertake the above noble task as was required of it.

In **Andrew Mwari Kasay a versus Kenya Bus Services [2016] eKLR**, the rationale or otherwise of assessing damages, even where they are withheld by the trial court as had been set out by the Court in **Modekai Mwangi Nandwa versus Ms. Bhogall Garage Limited Civil Appeal No. 124 of 1993 (UR)** as follows:

> ***"……That was in compliance with this Court's then repeated directions to trial Judges to proceed in that manner so as to obviate the need for sending back a case for them to assess damages in the event of this Court allowing an appeal. The practice of assessing damages by a trial Judge irrespective of whatever his findings are does not and cannot mean that such a Judge is writing an alternative Judgment."***

In the same **Andrew Mwori Kasaya's case,** (supra), it was observed that the major reason as to why the Court had given the above directive to the courts below was because, they are not courts of last resort. Second, it was to avoid this Court having to send the matter back to the High Court to carry out that noble exercise. Indeed we agree that for courts of first instance, it is prudent to carry out that duty. We however find nothing in the said directive in the **Andrew Mwori Kasaya cas**e (supra), to suggest that the directive was cast in stone and therefore a mandatory requirement. It is simply a matter of good practice. It does not therefore take away the discretion of the two courts below to consider each case on its own set of facts. Likewise, of the Court of appeal neither does it take away the discretion in instances, where the claim is sustained even on a second appeal, to refer the matter back to the High Court to carry out that noble task. A position not obtaining in this appeal because, firstly, the special damages pleaded by appellants never met the threshold for pleading and proof of special damages. See the case of **Hann versus Singh [1985] KLR 716** for the holding *inter alia*

> ***"special damages must not only be specifically claimed but also strictly proved. The decree of certainty and the particularity of proof required depends on the circumstances and the nature of the acts themselves. The Judge was right in holding that the appellant had failed to prove his claim for the depreciation of the vehicle after the accident."***

Second, 3rd Appellant stands to suffer no prejudice for the failure to quantify his damages as he has not succeeded before this Court on his second appeal. This Court being a court of last resort quantifying 3rd appellant's claim would not only be an exercise in futility but also for cosmetic or aspirational value only.

On the totality of the above reasoning, we find no merit in this appeal. It is accordingly dismissed with costs to the Respondents payable by 3rd appellant for reasons given above.

Dated and Delivered at Nairobi this 24th day of April, 2020.

R.N. NAMBUYE

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR