



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Equity Bank Limited v Mungai & 2 others (Civil Appeal 170 of 2019)  
[2025] KEHC 10891 (KLR) (Civ) (26 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 10891 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 170 OF 2019**

**JM OMIDO, J**

**JUNE 26, 2025**

**BETWEEN**

**EQUITY BANK LIMITED ..... APPELLANT**

**AND**

**SAMUEL STANLEY KIARIE MUNGAI ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal from the Judgement and Decree of Hon. A.M. Obura,  
SPM delivered on 1st March, 2019 in Milimani CMCC No. 5609 of 2013)*

**JUDGMENT**

1. This appeal was preferred by Equity Bank Limited (hereinafter referred to as “the Appellant”), against the judgement and decree of Hon. A.M. Obura, Senior Principal Magistrate delivered on 1<sup>st</sup> March, 2019 in Milimani CMCC No. 5609 of 2013.
2. In the matter before the lower court, the Appellant herein was the 1<sup>st</sup> Defendant, the 1<sup>st</sup> Respondent was the Plaintiff while the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively.
3. The grounds of appeal presented by the Appellant vide the memorandum of appeal dated 27<sup>th</sup> March, 2019 upon which it seeks to upset the judgement and decree of the lower court, are as follows:
  1. That the learned Magistrate erred in law and in fact in finding that the prosecution of the 1<sup>st</sup> Respondent was instituted by the Appellant.



2. That the learned Magistrate erred in law and in fact in holding that the Appellant acted without probable and reasonable cause.
  3. That the learned Magistrate erred in law and in fact in holding that the Appellant's actions were actuated by malice.
  4. That the learned Magistrate erred in law and in fact by entering judgement in favour of the 1<sup>st</sup> Respondent when there was no evidence to prove that the arrest and prosecution of the 1<sup>st</sup> Respondent in Nairobi Criminal Case No. 654 of 2010 was malicious and without probable or reasonable cause.
  5. That the learned Magistrate erred in law and in fact by failing to consider the Appellant's evidence in defence to the 1<sup>st</sup> Respondent's suit and its written submissions and/or by overly favouring the evidence by the 1<sup>st</sup> Respondent.
  6. That the learned Magistrate erred in law and in fact by failing to properly analyze the evidence on record and find that the key ingredients of the tort of malicious prosecution had not been proven on a balance of probabilities.
  7. That the learned Magistrate erred in law by awarding special damages when there was no documentary evidence to prove that the 1<sup>st</sup> Respondent had incurred and/or suffered special damages.
  8. That the learned Magistrate erred in law and in fact by awarding Ksh.3,000,000/- as general damages which amount is excessive and not based on any judicial precedent and/or submission by counsel.
  9. That the learned Magistrate erred in law and in fact in placing reliance on extraneous evidence and matters in arriving at her decision.
  10. That the learned misdirected herself on the facts and the law and based her findings on wrong and irrelevant considerations.
  11. That the learned Magistrate misdirected herself on the facts and the law in holding the Appellant, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents jointly and severally liable to the 1<sup>st</sup> Respondent.
  12. That in the circumstances, the judgement of the Learned Magistrate is a miscarriage of justice.
4. It is proposed by the Appellant that the appeal be allowed with costs to the Appellant and the judgement and decree of the trial court be set aside.
  5. This being the first appellate court, I am required under Section 78 of the *Civil Procedure Act* and as was espoused in the case of *Selle v Associated Motor Boat Co. Ltd* [1969] EA 123 to reassess, reanalyze and reevaluate the evidence adduced in the trial court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.
  6. The duty of the first appellate court was also discussed by the Court of Appeal for East Africa in the case of *Peters v Sunday Post Limited* [1958] EA 424 in which it was held that the appropriate standard of review established in cases of appeal can be stated in three complementary principles:
    - “i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;



- ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
  - iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.”
7. The matter before the trial court, based on tortious liability (a malicious prosecution claim), was commenced by the 1<sup>st</sup> Respondent against the Appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents jointly and severally, by way of a plaint dated 10<sup>th</sup> September, 2013.
8. The 1<sup>st</sup> Respondent pleaded that on or about the 6<sup>th</sup> May, 2010, the Appellant, maliciously and without probable or reasonable cause lodged a complaint with the Banking Fraud Investigation Unit of the Kenya Police against the 1<sup>st</sup> Respondent, who was an employee of the Appellant, as a result of which the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents caused the 1<sup>st</sup> Respondent to be charged and prosecuted with the offence of stealing by servant contrary to Section 281 of the *Penal Code*, *vide* Criminal Case No. 654 of 2010.
9. The 1<sup>st</sup> Respondent contended that the report that was made by the Appellant was malicious and false as the same was not founded on proper facts.
10. The 1<sup>st</sup> Respondent set out the particulars of malice on the part of the Appellant, the 2<sup>nd</sup> and the 3<sup>rd</sup> Respondents as follows:
  - a. The 1st Defendant made a reckless/false and unsubstantiated report to the Banking Fraud and investigation Unit of the Kenya police, leading to the arrest and prosecution of the plaintiff notwithstanding that there was no conclusive evidence linking Plaintiff to the alleged theft.
  - b. The Banking Fraud and investigation Unit of the Kenya police acted on unsubstantiated reports and pursued criminal action against the Plaintiff without probable cause,
  - c. The 2nd and 3rd Defendants acting on the false and reckless complaint made by the 1st Defendant proceeded to prosecute the Plaintiff without looking into the factual basis of the claim.
  - d. The Banking Fraud and investigation Unit of the Kenya police failed to conduct sufficient investigations into the report made by the 1st Defendant.
  - e. The prosecution acting on behalf of the 2nd and 3rd Defendants failed to call any witness who could justify any of the charges maliciously brought against the Plaintiff.
  - f. The Defendants, without any evidential justification opted to have the Plaintiff investigated and prosecuted yet they were in a position to identify the real perpetrators of the alleged crime.
  - g. Proceeding and maintaining the Plaintiff's prosecution even after the real culprit was apprehended, arraigned before absconding, is a strong indication of malice.
  - h. Proceeding with the Plaintiff's prosecution even after addressing the 3rd Defendant on the matter clearly indicating there was no offence disclosed against the Plaintiff.
11. The 1<sup>st</sup> Respondent stated that he appeared before the Magistrate's Court in Nairobi and pleaded not guilty. The 1<sup>st</sup> Respondent was put on trial and the court subsequently acquitted the him under Section 210 of the *Criminal Procedure Code* on the 19<sup>th</sup> of September 2012.



12. The 1<sup>st</sup> Respondent pleaded that as a result of the aforesaid prosecution, he was greatly injured in his credit, character and reputation and suffered mental anguish pain and incurred expenses, loss and damage. He further claimed that his constitutional rights were violated in the resulting incarceration and subjection to ridicule as a criminal suspect.
13. The 1<sup>st</sup> Respondent sought the following reliefs before the trial court:
  - a. General damages for malicious prosecution and malicious falsehoods.
  - b. Special damages of Ksh.221,240/- being legal fees paid in the criminal trial.
  - c. Costs of the suit.
  - d. Interest on a, b and c above.
14. The Appellant resisted the 1<sup>st</sup> Respondent's claim by filing a statement of defence dated 1<sup>st</sup> November, 2013 in which it denied all liability.
15. In its defence, the Appellant denied the allegations and particulars of malice attributed to the it and further denied that the report and/or complaint that it made to the police was malicious, false, unfounded and/or lacked reasonable and probable cause.
16. The Appellant stated in its defence that on or about the 3<sup>rd</sup> of April, 2010 the Appellant learnt that on diverse dates between 1<sup>st</sup> and 3<sup>rd</sup> April 2010, a sum of KShs.6,060,050/- was fraudulently withdrawn from one of its customer's accounts being account number 04XXXXXXXXX24 belonging to the Kenya National Examinations Council (KNEC). The said amount had been withdrawn from the account aforesaid from various Automatic Teller Machines using an Automated Teller Machine card number 44XXXXXXXXX91 belonging to one Jenny Masia Mmboga (Mmboga), who was the holder of account number 05XXXXXXXXX88, which the Appellant established had been fraudulently linked with the KNEC account and its ATM withdrawal limit raised and/or enhanced.
17. The Appellant further stated in its defence that it established that Mmboga had not applied for the ATM card. It was further established that the 1<sup>st</sup> Respondent, who was an ATM Officer with the Appellant, charged with the responsibility of ensuring that ATM cards remained in safe custody until they were dispatched to the customers, had received the said ATM card on 9<sup>th</sup> November, 2009. That the 1<sup>st</sup> Respondent could however not explain how the card left his custody and declined to cooperate with investigators and instead tendered his resignation to the Appellant soon after investigations commenced.
18. The Appellant stated that the decision to charge the 1<sup>st</sup> Respondent was reached by the police, and not itself, and that there was reasonable and probable cause to charge the 1<sup>st</sup> Respondent given his role as an ATM Officer who had the actual physical custody of the ATM card that was used to fraudulently withdraw the money from KNEC's account, and who could not explain how the card left his custody.
19. The Appellant pleaded that there was no malice on its part in reporting the fraudulent withdrawal of the money to the police from its customer's account.
20. The Appellant sought that the 1<sup>st</sup> Respondent's claim be dismissed with costs.
21. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed a joint statement of defence to the 1<sup>st</sup> Respondents suit, dated 19<sup>th</sup> November, 2014.
22. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents denied that the police acted maliciously in preferring criminal charges against the 1<sup>st</sup> Respondent. The two Respondents stated that the 1<sup>st</sup> Respondent was arrested



and charged after a legitimate complaint was made to the police by the Appellant and that the police conducted investigations in accordance with their statutory mandate and/or duties, which included receiving reports of offences that are committed or are likely to be committed, undertaking investigations and apprehending suspects and causing them to be charged where there was reasonable and probable cause.

23. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents stated that the police acted on information that they received from the Appellant, investigated the matter and acted reasonably and honestly in apprehending and arraigning the 1<sup>st</sup> Respondent. The two Respondents denied that the police in arresting and charging the 1<sup>st</sup> Appellant, acted maliciously.
24. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents prayed that the trial court dismisses the 1<sup>st</sup> Respondent's suit with costs.
25. Going to the evidence before the trial court, the 1<sup>st</sup> Respondent testified and adopted the contents of his witness statement recorded on 10<sup>th</sup> September, 2013.
26. In his statement, the 1<sup>st</sup> Respondent stated that he was at the time material to the claim employed by the Appellant as an ATM Officer. He stated that on or about 6<sup>th</sup> May, 2010, the Appellant maliciously and without reasonable or probable cause lodged a complaint against him with the Banking Fraud Investigation Unit to the effect that he was involved in the theft of Kshs. 6,060,050/=, the property of the Appellant. Following the said complaint, the 3<sup>rd</sup> Respondent charged and prosecuted him with the offence of stealing by servant contrary to section 281 of the Penal Code at the Nairobi Law Courts in Criminal Case No. 654 of 2010.
27. The 1<sup>st</sup> Respondent further stated in his witness statement that the report and/or complaint against him was false, reckless and malicious, just as the ensuing prosecution, because the same was not supported by any direct or circumstantial facts/evidence for the reasons that:
  - a. The report by the Appellant was not reasonable and was informed by malice and the desire to implicate him.
  - b. The Banking Fraud Investigation Unit acted on unsubstantiated reports and rushed to charge the 1<sup>st</sup> Respondent unfairly.
  - c. The Banking Fraud Investigation Unit failed to conduct sufficient investigations.
  - d. The prosecution failed to call any witness who could justify the charges brought against him.
  - e. The Appellant without any evidential justification opted to have him investigated and prosecuted whereas the real culprit was known to the Appellant.
  - f. The Appellant triggered his prosecution by its report which report bore no semblance of truth, all the circumstances of his work place and those of the alleged theft considered.
28. The 1<sup>st</sup> Respondent stated further that the criminal case against him proceeded for hearing and that the trial court found that it was not necessary to proceed with the case against the 1<sup>st</sup> Respondent and proceeded to acquit him on 19<sup>th</sup> September, 2012 under Section 210 of the Criminal Procedure Code after the prosecution failed to tender any evidence that would warrant him to be placed on his defence. The criminal trial took about two years.
29. The 1<sup>st</sup> Respondent stated that as a result of the said charges and prosecution, he was greatly injured in his credit, character and reputation as the report of his arrest and arraignment was reported in the Daily Nation newspaper and that he suffered mental anguish and pain as he was incarcerated for about two months.



30. The 1<sup>st</sup> Respondent explained that he had to contract the services of an advocate, whom he paid Ksh.217,000/-, to represent him in the criminal trial. He expended a further Ksh.4,000/- in court fees.
31. The 1<sup>st</sup> Respondent stated that as a direct result of his prosecution, he was viewed as an outcast in the banking sector and that he was as a result unable to procure employment. In effect his career in banking was ruined by the acts of the Appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
32. The 1<sup>st</sup> Respondent prayed for judgement against the Appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and sought reliefs in the nature of damages for malicious prosecution.
33. Upon being cross examined, the 1<sup>st</sup> Respondent told the court that he had prior to working with the Appellant, worked with ABC Bank. He stated that he cooperated with the officers who investigated the criminal case. He further stated that his prosecution was malicious as there was CCTV footage in the custody of the Appellant in which one Stephen Kibathi, who was also an employee of the Appellant based at a different branch, could be seen withdrawing money through ATM outlets from KNEC's account, yet corporate entities were not issued with ATM cards. He explained that Kibathi was also charged but absconded.
34. The 1<sup>st</sup> Respondent stated that although the ATM cards were kept in his custody, the Appellant's Operations Manager had access to the cabinets where they were kept as he had keys to the same. He stated that he only realized that the particular ATM card was missing after reconciliation. He further stated that the enhancement of the ATM withdrawal limit was done at the head office. He stated that it was true that the ATM card disappeared from his custody while the PIN number for the card disappeared from the custody of one Mercy, who was also charged alongside the 1<sup>st</sup> Respondent.
35. The 1<sup>st</sup> Respondent told the trial court that he was prosecuted by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents pursuant to the report that was made by the Appellant. He stated that he tendered his resignation to the Appellant, giving a two- month notice, but did not serve the notice period as he was soon thereafter charged in the criminal case. He further stated that the report that was made to the police by his erstwhile employer was malicious as CCTV footage showed Kibathi, who was based at a different branch, withdrawing money from the KNEC account.
36. In respect of the missing ATM card, the 1<sup>st</sup> Respondent told the trial court that he did not have records of its collection and added that he did not have exclusive access to the ATM cabinets and that the Operations Manager would keep the keys and only hand them over to the 1<sup>st</sup> Respondent when there was need to access the cabinet. He explained thus that in a 24-hour period, two people (himself and the Operations Manager) would have access to the cabinets.
37. On being further cross examined, the 1<sup>st</sup> Respondent told the trial court that the enhancement of the ATM withdrawal limits could only be done at the Appellant's head office and the fraud must, therefore, have been orchestrated at the head office.
38. On being cross examined by learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, the 1<sup>st</sup> Respondent told the trial court that the newspaper report on his arrest and arraignment was authored by a journalist from the Daily Nation newspaper.
39. The 1<sup>st</sup> Respondent stated that he did not record the collection of the ATM card in the designated register because the same was not collected from him.
40. The 1<sup>st</sup> Respondent called Kenneth Ng'ang'a Mungai, an Advocate of the High Court of Kenya and the proprietor of the law firm of Mungai & Gakuo Advocates, who told the court that he was the father of the 1<sup>st</sup> Respondent and that he hired an Advocate to represent the 1<sup>st</sup> Respondent in the criminal



- trial and paid the Advocate, at the request of the 1<sup>st</sup> Respondent. The witness stated that he expected the 1<sup>st</sup> Respondent to repay him the money that he expended in legal fees.
41. The second witness that the 1<sup>st</sup> Respondent called was Mercy Wairimu, a secretary at the law firm of Mungai & Gakuo Advocates, whose evidence was to the effect that she prepared payment vouchers for monies that were paid to one Mr. Githinji Advocate, who represented the 1<sup>st</sup> Respondent in the criminal trial.
  42. The following documents were produced in support of the 1<sup>st</sup> Respondent's case before the lower court: Charge sheet in Nairobi Criminal Case No. 654 of 2010. The 1<sup>st</sup> Respondent's witness statement dated 10<sup>th</sup> September, 2013. Statement by David Ngigi Wamuti dated 6<sup>th</sup> April, 2010. Statement by James Mbugua Thuo dated 10<sup>th</sup> April, 2010. Bail Deposit Receipt dated 7<sup>th</sup> May, 2010. Daily Nation newspaper caption photo dated 7<sup>th</sup> May, 2010. Payment vouchers to Githinji & Company Advocates. Receipt for proceedings dated 19<sup>th</sup> June, 2013. Letter to the Director of Public Prosecutions dated 8<sup>th</sup> June, 2010. Copy of Proceedings in the Nairobi, Criminal Case No. 654 of 210. Ruling by Hon. E.G. Nderitu delivered on 19<sup>th</sup> September, 2012. Notice of intention to sue the Government dated 9<sup>th</sup> July 2013, addressed to the offices of the Attorney General and Director of Public Prosecutions. Demand letter addressed to Equity Bank Limited dated 24<sup>th</sup> July, 2013. Letter from the Office of the Director of Public Prosecutions addressed to Ndung'u Njoroge & Kwach Advocates, dated 5<sup>th</sup> August, 2013, acknowledging receipt of the notice of intention to sue. Reply to the demand letter from Equity Bank dated 15<sup>th</sup> August, 2013.
  43. The 1<sup>st</sup> Respondent closed his case.
  44. The Appellant called Joakim Thumbi (DW1), a security officer working with the Appellant, as its witness. The witness testified before the trial court and adopted his statement that he recorded on 13<sup>th</sup> May, 2016.
  45. In his statement, DW1 stated that Ksh.6,060,050/- was fraudulently withdrawn from account number 04XXXXXXXXX24 held by KNEC from various ATM machines by use of ATM card number 44XXXXXXXXX91 in the name of MMBoga, who was the Appellant's customer and holder of account number 04XXXXXXXXX24. An application for a Visa card for MMBoga had been made and the card subsequently produced and dispatched to the said customer on 9<sup>th</sup> November, 2009. The witness stated that MMBoga did not apply for ATM card number 44XXXXXXXXX91.
  46. The witness further stated in his statement that the 1<sup>st</sup> Respondent was charged with the responsibility of receiving ATM cards at the branch where he worked, storing them securely, issuing the same to customers, activating them upon issuance and keeping records of the same. The 1<sup>st</sup> Respondent received ATM card number 44XXXXXXXXX91 but could not explain the circumstances under which it left his custody. He had no records of its dispatch. The witness thus believed that the 1<sup>st</sup> Respondent was involved in the fraud that led to loss of money as it was the same card that was used to withdraw cash from the KNEC account. The witness stated that there was therefore no malice by the bank in making a report on the fraud to the police.
  47. On being cross examined by learned counsel for the 1<sup>st</sup> Respondent, DW1 told the trial court that although he was one of the officers who investigated the fraud, he did not testify in the criminal case in which the 1<sup>st</sup> Respondent was charged. He however stated that his fellow investigator testified in the criminal case. DW1 further stated that he worked at a different branch from the one where the 1<sup>st</sup> Respondent worked.



48. DW1, on being cross examined by learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents told the trial court that he conducted internal investigations and reported the matter to the police, who conducted further investigations and charged the 1<sup>st</sup> Respondent.
49. The proceedings of the trial court indicate that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents called Police Sergeant Nehemiah Ndung'u, who testified before the trial court as DW2 and adopted the contents of his statement, which he said was dated 6<sup>th</sup> May, 2010. I have combed through the record of appeal and I note that the said statement was not included in the record.
50. Be that as it may, from the proceedings of the trial court, DW2 stated that the Appellant made a fraud report to the police and he was tasked with the duties of investigating the same. He recorded statements of 7 witnesses and conducted investigations. He charged the 1<sup>st</sup> Appellant and others. The investigations revealed that the 1<sup>st</sup> Appellant was the custodian of the ATM card and could not account for it as he failed to explain how it left his custody. As the card was fraudulently used to withdraw cash from the KNEC account, there was probable cause to treat the 1<sup>st</sup> Respondent as a suspect. That was the basis upon which he was charged.
51. DW2 stated, upon being cross examined by the 1<sup>st</sup> Respondent's counsel that he testified in the criminal case. He stated that it was only the 1<sup>st</sup> Respondent who had access to the cabinet where the ATM cards were kept. However, when further queried, he stated that he could not confirm if the Operations Manager had access to the cabinet.
52. On being cross examined by learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' DW2 told the trial court that the police established a probable cause against the 1<sup>st</sup> Respondent upon the conclusion of investigations and reached a decision to charge him on that basis. The officer stated that he was not under the directions or control of the Appellant.
53. The trial before the lower court was closed at that stage.
54. The trial court, upon considering the evidence that the parties presented and the record reached the finding that the 1<sup>st</sup> Respondent proved, on a balance of probabilities, the tort of malicious prosecution against the Appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents jointly and severally on 100% basis. The court went on to assess and award the 1<sup>st</sup> Respondent damages as follows:
  - a. General damages – Ksh.3,000,000/-.
  - b. Special damages – Ksh. 221,240/-.
55. Having considered the grounds in the Memorandum of Appeal, the submissions filed by the Appellant and the record in its entirety, I discern the issues for determination to be:
  - a. Whether the elements of the tort of malicious prosecution were established and/or proved by the 1<sup>st</sup> Respondent against the Appellant in the lower court case and thus whether the trial Magistrate reached proper findings that the Appellant was liable.
  - b. Whether the award of Ksh.3,000,000/- in general damages for malicious prosecution was excessive and/or inordinately high.
56. I will proceed to determine the two issues as hereunder.



57. *Black's Law Dictionary*, 9<sup>th</sup> Edition defines the term 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.”
58. The tort of malicious prosecution is an intentional tort in respect of which if proved on a balance of probabilities, a party would be entitled to redress in the form of damages and recovery of any losses incurred or expended during the malicious proceedings which follow.
59. The malicious proceedings must in the case have been initiated without any lawful reasonable and/or probable cause by the Defendant.
60. In the case of *Silvia Kambura v George Kathurima Japhet & 2 others* [2021] eKLR it was held that although it is within any person's rights to approach the courts and/or other quasi-judicial bodies to seek redress for wrongs committed against them, this right must be exercised within the confines and parameters of the law, for genuine and lawful reasons. If the right to approach the courts is exercised with other ulterior motives, this constitutes abuse of process, which is in itself a wrong and/or violation attracting a claim for damages for malicious prosecution.
61. The elements of the tort of malicious prosecution were laid down in the case of *Murunga v The Attorney General* [1976-1980] KLR 1251 where the court outlined them as follows:
- i. That a prosecution was instituted by the defendant or by someone for whose acts he is responsible.
  - ii. That the prosecution terminated in the Plaintiff's favour.
  - iii. That the prosecution was instituted without reasonable and/or probable cause.
  - iv. That the prosecution was actuated by malice.
62. As was held in the case of *Attorney General v Peter Kirimi Mbogo & another* [2021] eKLR, all the four elements are conjunctively applicable and must therefore all be proved for a Plaintiff to be successful in a claim for malicious prosecution.
63. On the first element whether the prosecution was instituted by the Appellant or by someone for whose acts he is responsible, it is clear from the proceedings in the criminal case and the lower court matter that gives rise to the instant appeal that it is the Appellant, through its officers, who made the report to the police pursuant to which the Appellant was arrested, arraigned and prosecuted. As a matter of fact, the Appellant's witness admitted before the lower court that he is the one who made the report to the police on behalf of the Appellant, upon which the 1<sup>st</sup> Respondent was arrested and charged. The first element was therefore proved by the 1<sup>st</sup> Respondent.
64. Regarding the second element as to whether the prosecution terminated in the 1<sup>st</sup> Respondent's favour, it is instructive from the what the Appellant told the court in the civil matter before the trial court that he was ultimately acquitted in the criminal matter. The 1<sup>st</sup> Respondent produced the proceedings and ruling of the trial court in the criminal case. From the said ruling, the 1<sup>st</sup> Respondent was acquitted under Section 210 of the *Criminal Procedure Code*, Cap 75 Laws of Kenya, following the court's finding that the prosecution failed to establish a prima facie case against the 1<sup>st</sup> Respondent that would warrant him to be placed on his defence. The 1<sup>st</sup> Respondent therefore proved the second element.
65. The third and fourth elements are whether the prosecution of the Appellant was instituted without reasonable and/or probable cause and whether the prosecution was actuated by malice.



66. On this, I will borrow from the persuasive authority of the High Court in *Silvia Kambura v George Katburima Japhet & 2 others* [2021] eKLR where the court stated thus:

“The real thrust of the Appeal is found in this and the next issue. In a determination of whether there was any probable and/or reasonable cause, the reasonable man’s standard applies. In the case of *Hicks v Faulkner* (1878) 8 Q.B.D 167 at 171, Hawkins J held as follows with respect the meaning of reasonable and probable cause: -

“An honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead any ordinarily prudent and cautious man placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.”

The test for whether a case was instituted with a reasonable and probable cause was also laid out by the Court of Appeal in *Kagane & others v The Attorney General & Another* [1969] EA 643, where Rudd J held as follows: -

“...the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of an objective test. That is to say, to constitute reasonable and probable cause, the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of facts discovered by the prosecutor or information which has come to him or both, 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. If and so far as that material is based upon information, the information must be reasonably credible, such that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution.”

In *Samson John Nderitu v The Attorney General* [2010] eKLR, Nambuye J (as she then was) held as follows: -

“It is trite and this court, has judicial notice of the fact that before an accused person is taken to court, and arraigned in court for criminal prosecution, the prosecuting authority namely the police or whatever unit, whose functions fall under the office of the Defendant, usually carry out investigations, record statements from potential witnesses, analyze the facts to determine if the facts disclose an offence before arraigning such a person in a court of law.”

67. From the foregoing therefore, the test lies on the factors, facts, circumstances and evidence that the prosecution relied on in charging the Appellant.

68. The charge sheet that the 1<sup>st</sup> Respondent produced before the trial court, indicated that he was in the criminal case charged with the offence of stealing by servant contrary to Section 281 of the *Penal Code*, Cap 63 Laws of Kenya. The particulars of the offence were that on diverse dates between 1<sup>st</sup> April, 2010 and 3<sup>rd</sup> April, 2010 in Nairobi within Nairobi area, being a servant to the Appellant, the 1<sup>st</sup> Respondent, jointly with another before court, stole Ksh.6,060,050/-, the property of the Appellant which came into his possession by virtue of his employment.



69. It is however instructive from the ruling of the court in the criminal case that the 1<sup>st</sup> Respondent was charged and tried on two counts of stealing by servant contrary to Section 281 of the *Penal Code*, Cap 63 Laws of Kenya. The particulars of the first count were that on 1<sup>st</sup> April, 2010 in Nairobi within Nairobi area, being a servant to the Appellant, the 1<sup>st</sup> Respondent, jointly with his two co-accused and another not before court, stole Ksh.1,764,000/-, the property of the Appellant which came into his possession by virtue of his employment. The particulars of the second count were that on 2<sup>nd</sup> April, 2010 in Nairobi within Nairobi area, being a servant to the Appellant, the 1<sup>st</sup> Respondent, jointly with his two co-accused and another not before court, stole Ksh.4,385,000/-, the property of the Appellant which came into his possession by virtue of his employment. The 1<sup>st</sup> Respondent denied both counts. It would appear that the charge sheet may have been amended. All the same, the contents of the criminal proceedings were not contested.
70. As per the proceedings in the criminal case, seven prosecution witnesses testified including Paul Githinji Kariuki (Kariuki), Eliza Muthoni Mwaniki (Muthoni), James Mbugua (Mbugua) and David Ngigi Wamuti (Wamuti), who were all, at the time material to the criminal case employees of the Appellant; and Sergeant Nehemiah Ndung'u (the investigating officer).
71. It is noteworthy from the evidence of Kariuki that records of applications for ATM cards were kept by the Appellant, but no such application was produced to prove indeed that the application for card number 44XXXXXXXX91 was made. The person who made the application was therefore not disclosed to the court that heard the criminal case. There was also no evidence provided before the trial court to show that the 1<sup>st</sup> Respondent received the ATM card. The witness on being further cross examined stated that he did not carry the card issuance register to court to show who received the particular ATM card. He further stated that he did not have any reason to suspect the 1<sup>st</sup> Appellant and did not recommend that he be investigated.
72. In her evidence, Muthoni told the learned trial Magistrate in the criminal trial that one set of keys to the cabinet where the uncollected ATM cards were kept by the Operations Manager, who alongside the 1<sup>st</sup> Respondent had access thereto.
73. On his part, Mbugua told the trial court in the criminal matter that processing of ATM cards was done at the head office and not at the branches. He further stated that it was possible for the Appellant to tell who processed the card at the Appellant's card centre but added that he did not have that information in court. The witness added that the bank system had a loophole that could be exploited by fraudsters as it was possible for two cards to be produced in respect of an account by ICT persons who had access. He stated that the particular ATM card was produced at the Appellant's card centre and not at the branch where the 1<sup>st</sup> Respondent worked.
74. In his evidence before the trial court in the criminal matter, Wamuti told the court that the Appellant had ATM images of one of its staff at the card center – Stephen Kibathi – making an ATM withdrawals from the KNEC account. He stated that the card was used at various ATM points to withdraw an amount above Ksh.6,000,000/- from the said account. The witness produced inter alia the ATM images as exhibits. He stated that the “leakage” must have been exploited at the head office.
75. In the criminal case, the learned trial Magistrate noted that no record was produced to show that the 1<sup>st</sup> Respondent ever received the ATM card that was used to withdraw money from the KNEC's account and that the Appellant's witness confirmed that such records were kept by the bank but did not produce them in evidence. The learned Magistrate further noted that the investigating officer narrated to the court his frustrations occasioned by the Appellant's failure and/or refusal to provide the records, despite several requests.



76. The learned trial Magistrate in the criminal case further observed in her ruling that the evidence that was provided was to the effect that duplication of cards could only be done at the head office and that it was possible for the Appellant to tell who processed the particular card, but failed to present that evidence to the court. The trial court further took note of the evidence from the Appellant's witness that it was possible for ICT officers to produce more than one card for one account, yet the 1<sup>st</sup> Respondent was not an ICT officer.
77. The court further noted that the culprit was caught on ATM camera withdrawing money from the KNEC account but the Appellant and the police insisted on charging the 1<sup>st</sup> Appellant despite there being no evidence that the ATM card that was used to commit the offence emanated from or was used by him to transact.
78. In her judgement in the civil case that gave rise to this appeal, the learned trial Magistrate, in reaching her findings on whether the prosecution was instituted without reasonable and/or probable cause and whether the same was actuated by malice, rendered herself as follows:
- “ 33. What can be deduced from the above is that anybody other than the Plaintiff could have accessed the said cabinet and committed the alleged offence. It is evident that the investigations conducted by the 1<sup>st</sup> Defendant's agents were far from thorough and resulted in making a complaint against the Plaintiff without just and probable cause.
34. The Trial Court also concluded that there was no credible basis for charging the Plaintiff and opined that he and his co-accused were mere scape goats. A damning incidence of admission of how weak the security system was is the fact that the 1<sup>st</sup> Defendant after the fraud incident took measures to address the security loopholes such as repairing the central locking system and changed rules on how the cards were to be stored.
35. I am thus satisfied that the 1<sup>st</sup> Defendant acted without probable and reasonable cause on a balance of probability. I also find that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, being independent institutions, had a duty to investigate and re-evaluate the circumstances independently before mounting the prosecution. The loop holes identified at the trial are indicative of no effort to get to the bottom of the matter. Instead they relied on the internal investigation results and proceeded to arrest and charge the Plaintiff.
36. Was the said prosecution was actuated by malice? As a general rule the mere fact that a person has been acquitted of the criminal charge does not necessarily connote malice on the part of the prosecutor as held by Hon. P. Nyamweya J in the case of *Johnson Muendo Waita v Odillah Mueni Ngui* [2018] eKLR citing *James Karuga Kiiru v Joseph Mwamburi & 3 others*, Nrb C.A. No. 171 Of 2000. Malice can either be expressed or can be gathered from the circumstance surrounding the prosecution.
37. In determining whether there is malice on the part of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, one has to consider the following words by Ojwang J (as he then



was) in *Thomas Mboya Oluoch & Another v Lucy Muthoni Stephen & Another*  
Nairobi HCCC No. 1729 of 2001 cited by Mativo J:-

“Unless and until the common law tort of malicious prosecution is abolished by Parliament, policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense... I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State’s prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes”.

38. There was evidence that the actual culprit was identified as one Stephen Kabathi who was caught on camera making withdrawals with the flagged ATM. It was found that he worked at the card centre at the head office hence capable of having effected the fraudulent linkage of the corporate account and the card. There was no evidence linking the Plaintiff to Stephen Kabathi. Despite this evidence in their possession, the 1<sup>st</sup> Defendant went on to make an unjustified against the Plaintiff to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who then instituted the charges.
39. It is noteworthy that even the Investigating Officer told the trial court that he was frustrated by the Bank (1<sup>st</sup> Defendant) when he asked for the records pertaining to the case and none was forthcoming. In her ruling, the court questioned whether the Bank was fully aware of what transpired but were trying to sacrifice the accused who is the Plaintiff herein or his co-accused persons. It was also ill-advised of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to insist on proceeding with the charges against the Plaintiff yet they had identified the real culprit who was caught on CCTV footage using the card and who had also absconded.
40. The selective approach undertaken by the Defendants in this matter and the glaring loop holes suggest on a balance of probability that there was malice in the circumstances. In the premises, I am satisfied that the Plaintiff proved his case on a balance of probability.”
79. In my view, the learned trial Magistrate in the civil case that gave rise to this appeal reached the proper observations that the available evidence before the criminal court pointed to the fact that anybody else, other than the 1<sup>st</sup> Respondent could have accessed the cabinet where the ATM cards were kept, as the Appellant’s evidence was that the cabinet could be accessed by the Operations Manager. I would add that, if anything, the ATM images pointed to another person, other than the 1<sup>st</sup> Appellant as being the fraudster and/or thief.
80. The learned trial Magistrate, in her judgement in the civil case also reached the correct findings, in my view that an analysis of the evidence by the trial court in the criminal case gave the result that despite



crucial evidence such as the ATM register records and the records of the person who processed the questioned ATM card being in the possession of the Appellant, the same was not produced.

81. As a matter of fact, the investigating officer lamented that despite several requests made to the Appellant to present the evidence to him, the former failed to do so. The rhetorical question I would then ask is, why did the police proceed to prefer charges against the 1<sup>st</sup> Respondent, knowing well that crucial evidence was not in their hands and the evidence submitted to the police was weak? I agree with the findings of the trial court that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, being independent institutions, had a duty to investigate and re-evaluate the circumstances independently before mounting the prosecution.
82. So then, was the prosecution of the 1<sup>st</sup> Respondent instituted without reasonable and/or probable cause and was it actuated by malice? From my analysis above on the observations made by the trial court in its judgement, I reach the same findings as did the trial court that there were no tenable reasons for the 1<sup>st</sup> Respondent to be to be suspected to have committed the offence as the evidence that was provided was to a large extent insufficient. There was therefore no basis to prosecute him for the same.
83. In spite of the fact that the Appellant knew well that there were loopholes in its systems and that there was a possibility that more than one card could be produced for an account, coupled with its failure and/or refusal to present crucial evidence to the police, the Appellant still pursued the prosecution of the 1<sup>st</sup> Respondent, which in the circumstances was actuated by malice and without probable cause.
84. With respect to the police, I hold the view that the decision to proceed with the prosecution of the 1<sup>st</sup> Respondent, even in a case where the complainant failed and/or refused to present the required evidence to the investigating officer, with the result that culpability on the part of the 1<sup>st</sup> Respondent was highly in doubt, coupled with the many gaps in the evidence that was presented in the criminal court, the prosecution was instituted without reasonable and probable cause, as there was basis no for the same.
85. The other issue for this court to determine is whether the amount assessed and awarded as compensation to the 1<sup>st</sup> Respondent was in error and/or inordinately high or excessive.
86. Compensatory damages are awarded to a wronged party in exercise of the court's discretion. The principles upon which an appellate court can interfere with judicial discretion were laid down in the case of *Price & another v Hidler* [1996] KLR 95 as follows:

“The court will not interfere with the exercise of discretion by an inferior court unless its satisfied that its decision is clearly wrong, because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters it should have taken into consideration and in doing so arrived at a wrong decision.”

87. Further, in the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR the Court of Appeal while discussing the principles upon which an appellate court may disturb an award of damages by an inferior court held that:

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of



this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297.

It was echoed with approval by this Court in *Butt v Khan* [1981] KLR 349 when it held as per Law, JA that:

“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 either inordinately high or low.”

88. There is also the authority of *Mbogo & Another v Shah* [1969] EA 93, where it was held, *inter alia*, that:

“An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which it should be taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless satisfied that the judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice.”

89. In the present appeal, the Appellant merely stated that the award in compensation that was made in favour of the 1<sup>st</sup> Respondent was inordinately high or excessive. The Appellant did not proffer and/or demonstrate to this court the ground that the exercise of the discretion by the trial court was clearly wrong or that the court misdirected itself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. If anything, the learned trial Magistrate relied on case law and made a comparative award. There is therefore no basis upon which I can interfere with the discretion of the trial court.

90. Having reached the above persuasion, I find that the trial magistrate reached the proper conclusions and findings that the 1<sup>st</sup> Respondent proved the tort of malicious prosecution against the Appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to the required standards and proceeded to make an appropriate award in damages.

91. Being of the foregoing persuasion, I find that the appeal herein lacks merit. I proceed to dismiss it with costs to the 1<sup>st</sup> Respondent. I make no order as to costs on the part of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as they did not participate in the appeal.

**DELIVERED (VIRTUALLY), DATED & SIGNED THIS 26<sup>TH</sup> DAY OF JUNE, 2025.**

**JOE M. OMIDO**

**JUDGE**

For the Appellant: No Appearance.

For the 1<sup>st</sup> Respondent: Ms. Gatuhi.

For the 2<sup>nd</sup> & 3<sup>rd</sup> Respondent: No Appearance.

Court Assistants: Mr. Ngoge & Mr. Juma.

