Gachau & another v Attorney General & another (Civil Appeal E775 of 2022) [2025] KEHC 11747 (KLR) (Civ) (5 August 2025) (Judgment)

Neutral citation: [2025] KEHC 11747 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E775 OF 2022

WM MUSYOKA, J

AUGUST 5, 2025

BETWEEN

SAMUEL NG'ANG'A GACHAU ..... 1ST APPELLANT

ALICE MUNINI MUTHENGI ..... 2ND APPELLANT

AND

THE ATTORNEY GENERAL ..... 1ST RESPONDENT

KENYA POWER & LIGHTING COMPANY LIMITED ..... 2ND RESPONDENT

(Appeal from judgement and decree of Hon. Edgar M. Kagoni, Principal Magistrate, of 5th September 2023, in Milimani CMCCC No. 3672 of 2016)

JUDGMENT

1. The suit, at the primary court, had been initiated by the appellants against the respondents. That suit was founded on malicious prosecution, arising from criminal proceedings conducted in Makadara CMCCRC No. 2638 of 2008, where the appellants had been charged with stealing but were acquitted. They sought general damages, legal fees, subsistence, costs and interests.

2. The suit was resisted by the respondents. The 1st respondent argued that if there was a prosecution of the appellants, the same had been thoroughly investigated by the police, and the prosecution was based on honest belief, that guilt would be established, and the charges were founded on reasonable and probable cause. The 2nd respondent averred that the complaint it had lodged with the police was not malicious, arguing that the mere fact that the appellants were prosecuted and acquitted, on account of non-attendance of prosecution witnesses, was not evidence of malice. It was averred that that the 2nd respondent had not been notified of the criminal hearing, nor were its witnesses bonded by the police, nor summoned to court for the trial.

3. A trial was conducted, on the civil suit. The 2 appellants testified, and 1 witness testified for the defence. Judgement was delivered on 6th September 2022, in favour of the respondents, dismissing the said suit.

4. The appellants were aggrieved, hence the appeal. The grounds were that burden of proof at the trial was shifted to the appellants; the trial court re-opened the criminal trial and sat on appeal on the findings of the trial criminal court; the trial court erred in suggesting that their case failed because they failed to call the officer who had investigated the criminal matter; the inordinate delay in the conclusion of the criminal case was itself evidence of malice; the trial court erred in finding that success or failure of their case depended on identification of the exact point where the criminal prosecution lost bona fides; their submissions were ignored; the judgment was against the weight of the evidence; the trial court based the judgement on wrong considerations; and the dating of the judgment on 6th September 2022, when in fact it was delivered on 9th September 2022, indicates the state of mind of the trial court.

5. It is unclear, from the record, whether directions were ever given, on how the appeal was to be canvassed. The matter was, however, mentioned several times for receipt of submissions. In the end, only the appellants filed submissions.

6. In their submissions, the appellants aver that the criminal matter dragged in court for 8 years. In the end, only 1 witness was presented. They submit that no evidence was tendered, incriminating them, and that their acquittal, under section 210 of the Criminal Procedure Code, Cap 75, Laws of Kenya, was for lack of evidence. They argue that the trial court found that no document was produced implicating them, instead a letter was produced where the Director of Public Prosecutions had directed that the matter be withdrawn for lack of evidence. They submit that, as no evidence was produced at trial, then there was spite and malice. On the law, they cite Mbowa vs. East Mengo Administration [1972] EA 352 (Sir William Duffus P, Lutta & Mustafa, JJA), Kagane and others vs. Attorney General and another [1969] EA 643 (Rudd, J), Thomas Mboya Oluoch & another vs. Lucy Muthoni Stephen & another [2005] KEHC 1259 (KLR) (Ojwang, J), Samuel Kiprono Chepkonga vs. Kenya Anti-Corruption Commission & another [2014] eKLR (Odunga, J)and Thomas Mutsotso Bisembe vs. Commissioner Of Police & Another[2013] eKLR (Odunga, J), which discuss the elements of the tort of malicious prosecution, the key elements being that the criminal prosecution was without reasonable or probable cause; was actualized by malice or spite; and it terminated in favour of the plaintiff.

7. It is submitted that the prosecution dragged on for 8 years, which was evidence of malice, as it placed the appellants in a position where they were regarded as thieves. The appellants lost their employment, and the benefits that went with it. The fact that the respondents did not take steps to terminate the prosecution, once it became evident that there was no evidence, also reeked of malice. It is also submitted that the appellants were acquitted for lack of evidence, but the 2nd respondent chose not to reinstate them to employment, which also displayed malice. They argue that, although the evidence was overwhelming, the trial civil court dismissed their case. The trial civil court is accused of re-opening the criminal case, by suggesting that the criminal court should have shifted the burden of proof to the appellants. They also fault the trial civil court for suggesting that they ought to have called the investigating officer in the criminal case to prove their civil case. They reiterate that the long and inordinate delay in the criminal matter amounted to adequate evidence of malice or spite.

8. Finally, the appellants cite William Kabogo Gitau vs. George Thuo & 2 Others [2010] eKLR (Kimaru, J), on burden of proof in civil cases; and on Samuel Kiprono Chepkonga vs. Kenya Anti-Corruption Commission & another [2014] eKLR (Odunga, J), to make the point that the mere lodge of a complaint, with the police, does not justify criminal prosecution, before investigations have been done.

9. On its part, the 2nd respondent submits on only 1 issue, whether the prosecution was malicious. It cites Mbowa vs. East Mengo Administration [1972] EA 352 (Sir William Duffus P, Lutta & Mustafa, JJA), on what constitutes malicious prosecution; and Nzoia Sugar Company Limited vs. Fungututi [1988] KLR 399 (Platt, Apaloo JJA & Masime Ag JA), to make the point that acquittal alone is not adequate, there should be more, spite, ill-will, and improper motive. It also cites Stephen Gachau Githaiga & another vs. Attorney General [2015] KEHC 655 (KLR)(Mativo, J), for the same point. It also cites Robert Okeri Ombeka vs. Central Bank of Kenya [2015] KECA 464 (KLR) [2015] eKLR (Githinji, Musinga & Mohammed, JJA) and Kagane and others vs. Attorney General and another [1969] EA 643 (Rudd, J), on probable or reasonable cause, being about a prosecutor being satisfied, as any reasonable or cautious person would, into believing that the material was adequate, to establish the plaintiff's guilt. It also cites Robert Okeri Ombeka vs. Central Bank of Kenya [2015] KECA 464 (KLR) [2015] eKLR (Githinji, Musinga & Mohammed, JJA), Egbema vs. West Nile District Administration [1972] EA 60 (Sir William Duffus P, Law Ag VP & Lutta JA) and Gichanga vs. BAT Kenya Limited [1989] KLR 352 (Aluoch, J), to argue that malicious prosecution could only attach on the prosecutorial authorities, as it only filed a complaint, it did not prosecute. It submits that malice was not established.

10. There is no dispute on what would constitute malicious prosecution, going by the authorities that have been cited. 4 elements are at play, and it is these that must be established: a complaint from the defendant; probable or reasonable cause to prosecute; prosecution driven by malice or ill-will or spite or ulterior motive; and the prosecution terminating in favour of the plaintiff. There is no disagreement on the first and last elements, that a complaint had been made and the prosecution terminated in favour of the appellants. The real dispute is on whether there was reasonable or proper cause for the prosecution, and whether the prosecution was animated by spite or ill-will or improper motives. The malicious prosecution case rises or falls on the basis of these 4 elements.

11. Let me start with the reasonable or probable cause. Once a complaint is made to the police, the expectation is that the police will conduct investigations, to establish whether there is a prosecutable cause. Once investigations are complete, the police would assess or evaluate the evidence gathered and thereafter decide whether a prosecution could be mounted or not. If the police form an opinion that the complaint is not prosecutable, they will close their investigations. If, however, the police form an opinion that there could be a prosecutable case, the file would be placed before the Director of Public Prosecutions for opinion. If the Director of Public Prosecutions concurs with the police, a prosecution could be mounted. If the Director of Public Prosecutions does not agree, the file would be returned to the police, for either closure of the enquiry or conduct of further investigations. Probable cause or reasonable cause is about being satisfied, as would be expected of a reasonable person, in the shoes of a police investigator or detective, or prosecutor, that the evidence tabled has substance, to support a successful prosecution. Prosecutions are mounted based on the material in the hands of the prosecution, no doubt, gathered by the police, during investigations.

12. Whether or not the police had gathered material that could be evaluated, to assess the reasonableness or probability of the cause, can only be assessed based on what the police had in their hands. The same would apply to the prosecution, that is the Director of Public Prosecutions, in terms of the evidence in the hands of the Director of Public Prosecutions, as at the time when he moved to court, to charge the plaintiff. Where an actual prosecution is conducted to the very end, that material would be in the court record. Where only a partial prosecution is done, by presentation of just 1 or 2 witnesses, some of the evidence would be in the court record, some would still be in the hands of the prosecutor and the police. Where the trial does not start in earnest, but plea has been taken, the material would be in the police file; with the prosecution; and in the evidential material furnished on the accused person, as required by Article 50(2) of *the Constitution*. Whether or not there is a reasonable or possible cause

can only be evaluated from such material. This would be an assessment of what the investigators and prosecutors should have in their hands.

13. Malice or ill-will or ulterior motive is usually with the actual complainant, instead of the police or the prosecutor. The police and the prosecutor only act on the information or complaint from the person who initiates it, and, on account of that, it is usually not proper to attribute malice or ill-will or ulterior motive on them. Malice or spite should, usually, be sought from the initiator of the process, the person who sets the ball rolling, the complainant. It would involve examination of the background or the context. The police may unearth that through their investigations, and, if they do unearth it, the probable or reasonable cause would be destroyed. A prosecution conducted, despite knowledge of that context, would be without probable cause, and should be deemed to be driven by malice, even if, on the substance of it, it appears strong or reasonable. Where the police or prosecution cannot establish the existence of spite or malice, the accused persons can bring it out, in cross-examination of the prosecution witnesses, and in their own defence.

14. The lack of a probable cause and the existence of malice are to be established or picked out from the substance of the prosecution case, that is from the evidential material. It is about the basis for the prosecution, and not the process. It is about the evidence in the hands of the prosecution, whether the same is presented in court or not. The probability or reasonableness of the cause is to be found in the evidence, the substance of the case, and so is the malice or ill will.

15. The collapse of a prosecution, on technical grounds, rather than on the merit or substance, cannot be a basis for imputing malice. Malice can only be properly imputed on the basis that the evidence led by the prosecution had no substance or foundation, upon which the guilt of the accused could be established, hence the conclusion that it was driven by other motives. In other words, it must be established that there was no case, in the first place, for investigation. A prosecution, where the process is bungled, despite it being properly grounded, and it fails, cannot be a basis for malicious prosecution in the civil courts. A dismissal on grounds that the prosecution has not availed witnesses, or its case has taken too long to commence, or complete, are not basis for imputing lack of a probable or reasonable cause, or malice or ill-will.

16. The only other observation, that I would like to make, is that an acquittal is one of the elements of malicious prosecution, but it is not the most decisive. Of the 4 elements, the most crucial are that there was no probable or reasonable cause, and that the prosecution was, even where there is probable cause, driven by malice and ill-will. It is not enough, therefore, to merely prove that there was an acquittal. Where the acquittal is at the stage where no witnesses have testified, or just a few have, chances are that the acquittal would be founded on lack of evidence, as no evidence will have been led, or that that adduced up to that point, was inadequate. Even then, that would not be enough to establish lack of probable cause or malice. It is not so much about the evidence placed on record, but more about the evidence or material that prompted the initiation of the prosecution in the first place. The question would be whether the prosecutor had evidence, to the threshold of probable cause, to justify a prosecution. It is not so much about the evidence that was actually adduced.

17. What was the position here? There is no dispute that a complaint was filed by the 2nd respondent, with the police. The appellants were arrested, charged, prosecuted and acquitted. Riding on that acquittal, they moved the trial court for compensation for malicious prosecution. The trial court was not satisfied that the prosecution was without probable cause, and that there was malice. The claim was dismissed. The key grievance, by the appellants, appears to be that their prosecution dragged on, in the criminal court, for 8 years, which, by itself, according to them, suggests malice. The prosecution called only 1 witness, and was forced to close its case after that, which suggested that the evidence adduced was inadequate, and did not establish a probable cause.

18. I have perused the criminal proceedings, in Makadara CMCCRC No. 2638 of 2008. Plea was taken on 17th July 2008, and the case, thereafter, dragged in court, until 22nd January 2015, when the trial court acquitted the appellants, under section 210 of the Criminal Procedure Code. The matter had come up several times, and was adjourned on diverse grounds, ranging from exhibits not being ready, Advocates for the accused persons not being ready, prosecution witnesses being admitted in hospital, absence of accused persons, death of an accused person, the court being involved in other matters, the matter not being reached, the Advocates for the defence being held up in other courts, the accused persons attending burials, the defence Advocates being absent, prosecution witnesses being absent, children of the accused being ill, prosecution witnesses attending workshops, original prosecution exhibits not being availed, the trial court being on transfer, the prosecutor being new in the matter, the judicial officer presiding over the trial court attending official functions, the presiding judicial officer preparing for vetting, the police file not being availed to the prosecutor, to the regular prosecutor being indisposed.

19. Before the prosecution was terminated, on 22nd January 2015, the trial court delivered a ruling, on 3rd November 2014, where it noted that the hearing dates lapsed for one reason or other. It also noted that both sides had contributed to the delay. In the words of the trial court:

> "Several hearing days have lapsed for one reason or another. Interesting to note is that numerous adjournments were occasioned by the absence of the accused persons when the witnesses were present. Though the matter has taken long, justice cuts both ways, whereas the rights of the accused persons must be considered, the complainant too has a right to justice. Both defence and prosecution has contributed to serious delays in the matter ..."

20. The trial court was spot on, in view of what I have narrated in paragraph 18 hereof. It could not be said that the delay was occasioned solely by the respondents. The delay was caused 2/4 by the prosecution, 2/4 by the defence and ¼ by the court. It cannot then be said that the respondents dragged the criminal case, hence they were malicious, in circumstances where both sides equally contributed to the delay.

21. The record also shows that the respondents had witnesses attending court, who could not give evidence for one reason or another, including because the defence was not ready. It was not the case that the respondents, did not have witnesses, or did not have evidence. The narrative, from the recorded proceedings, was that there were witnesses, and there was material evidence, however, for one reason or other, the witnesses did not testify, and the material evidence was not eventually placed before the court, consequently. It was not a case that there was no evidence. I would reiterate, that collapse of a prosecution, on a technicality, is not proof that there was no probable cause, nor that the prosecution was spiteful or malicious.

22. The ruling of 3rd November 2014 gave time to "the prosecution to seek directions from the office of the DPP within 30 days, failure to which they close their case", or "in the alternative, the witnesses to be bonded within the said 30 days thereafter matter be fixed for hearing." On 6th January 2015, the prosecution indicated that it had instructions to withdraw the case and sought discharge under section 87(a) of the Criminal Procedure Code. That was resisted. The trial court chose to acquit the accused, based on section 210 of the Criminal Procedure Code, rather than withdrawal of the case under section 87(a) of the Criminal Procedure Code.

23. The acquittal of the appellants, on 22nd January 2015, was not on merit. It was not based on the evidence tendered. The prosecution was under pressure, and it was not, in view of the record, inclusive of the ruling of 3rd November 2014, giving up on the prosecution, but the trial court and the defence was pushing it to a corner.

24. I would reiterate, that establishing that there was malicious prosecution, and more especially that there was no probable cause and that the case was driven by malice, is not about the case that the prosecution presented, but rather the case that it had, and which it would and could have presented, if all had gone well. The lack of probable cause and the existence of malice is not to be established exclusively from what transpired in court, particularly in circumstances where the prosecution terminated prematurely. The evidence, that the prosecution would have presented, is now readily available, due to pre-trial disclosure, unlike in the past where such evidence could only be available after an actual trial had been conducted. It can now be gauged from the pre-trial evidence disclosed, on the strength of Article 50(2) of *the Constitution*, to the accused, through witness statements and supporting documents. Plaintiffs, in suits for malicious prosecution, should be able to establish, even without a full trial being conducted, whether there was a probable cause or not.

25. There is the matter of the letter of 7th November 2014, allegedly from the Director of Public Prosecutions, which allegedly suggested that there was lack of evidence, and which the trial court partially relied on, in its ruling of 22nd January 2015, to acquit the appellants, under section 210 of the Criminal Procedure Code. The appellants place reliance on that letter, to argue that the respondents themselves had no confidence in their own case, and, therefore, there was no probable cause. Several issues arise.

26. Firstly, a copy of that letter is in the record of appeal. Unfortunately, it is not a complete copy. It appears to have been in several pages, only 1 page of it is exhibited. I have not seen the other pages, particularly the last page, which should bear the signature of the maker of the letter. I have also not seen the portion which concludes that the prosecution did not have adequate evidence. I am unable, therefore, to gauge the context within which it was referred to by the trial court, to assist me evaluate whether the Director of Public Prosecutions was concluding that there was no evidence to support the case, and, therefore, the same ought to be withdrawn or terminated, and whether it should be concluded, on that account, that there was no probable cause, or there existed malice or ulterior motives.

27. Secondly, the proceedings were not terminated based on section 87(a) of the Criminal Procedure Code, but section 210 of the said Code. Section 87(a) is about withdrawal by the prosecution, at any stage before the closure of the prosecution case. Ideally, the trial court need not write a detailed ruling, on whether it is allowing the withdrawal or not. Where it declines the withdrawal, it may write a ruling, to explain the refusal, and it may refer or cite any material that might have been placed on record, including documents submitted at the Bar by an Advocate. Where a termination is founded on section 210 of the Criminal Procedure Code, it would not be by way of withdrawal, but a termination based on an assessment of the case on the available evidence. It would be a termination on merit, founded on the evidence presented by the parties, and not on extraneous material.

28. In this case, only 1 witness had testified, before the withdrawal application was made. That witness was from the 2nd respondent, Kenya Power and Lighting Company Limited, and not from the police. He did not testify on whether the prosecution was weak or strong. He did not refer to correspondence from the Director of Public Prosecutions, and he did not present and produce the letter dated 4th November 2014. As no other witness testified, it cannot be that that letter was later produced as an exhibit. It could only have made its way into the record upon being presented at the Bar by an Advocate during oral arguments or oral submissions, as indeed happened on 6th January 2015. In any event, the trial court could only rely on it if it was terminating the matter under section 87(a) of the Criminal Procedure Code, at withdrawal of the prosecution, and not under section 210 of the Criminal Procedure Code, which is based on the merits of the case, founded on the evidence on record, taken from the witnesses. PW1 did not tender evidence by producing that letter. It could not be used by the court to determine

whether there was a case to answer, for purposes of section 210 of the Criminal Procedure Code. It was an extraneous record, which the court should not have referred to.

29. The question of malice should only arise where and after lack of probable cause is established. Whereas probable cause focuses on what the investigative and prosecutorial authorities have collected, by way of material and evidence, for presentation in court, malice focuses more on the complaint. Once it is established that there was no probable cause, in terms of the complaint not being supported by evidence, or being by evidence which is discredited, the next consideration would be whether there was malice or ill-will animating the case.

30. Lack of probable or reasonable cause is not, per se, evidence of malice or ill-will. There could be a genuine complaint, founded on real loss, or suspicion that the accused person had done some wrong. Investigations into the complaint may be weak or strong, so that a properly founded complaint could end up with insufficient evidence being collected. It also could be the case of the perpetrators of the offence complained of having been able to effectively cover their tracks, making it difficult to collect any useful evidence. So, the mere paucity of the evidence collected, hence lacking a probable cause, may not be proof of malice. However, where a weak case is pushed through the prosecution process, to serve the sole purpose of vexing the accused persons, with no prospect of a conviction being obtained, would point to malice, not just on the part of the complainant, but also of the investigators and prosecutors.

31. Sometimes what appears to be a probable cause, may be rendered unreasonable, by existence of malice, on the part of the complainant. In such cases, it would have to be the responsibility of the plaintiffs to bring out facts which disclose such malice or ill-will. That would be common, in such cases as the instant one, in the context of employment, where there could be tensions between employer and employee, or amongst the employees themselves. The circumstances of their interactions could provide a background to the complaint. It could be nuanced. Not obvious, nor easily discernible. It would require evidence from an insider, to explain why the employees or the employers would have an axe to grind with the plaintiffs, to explain the basis for the prosecution. That was the kind of material that the trial court, in the malicious prosecution suit, was looking out for, and did not find.

32. I have very closely perused the judgment of the trial court, in the civil matter. I have noted that the trial court largely addressed all the issues that came up in the evidence and the testimonies. It especially looked at the witness statements. The trial court is accused of shifting the burden of proof to the appellants, with respect to calling the investigating officer, in the criminal matter, to support their malicious prosecution case. It was the appellants who raised the issue of the investigating officer, and the trial court merely analysed their evidence with relation to that. It was noted, by the trial court, that, in their witness statement, they had alleged that the investigation officer confessed or intimated to them that he was under pressure to prefer charges. They wanted the court to rely on that conversation.

33. The veracity of that conversation could only be gotten from the oral testimony of the investigating officer. It was them who dragged the name of the investigating officer into that civil case. If they desired to have the trial court believe the allegations in their witness statements, they should have called the alleged investigating officer to the witness box. If they knew that it would have been difficult for them to call the said investigating officer, as their witness, they should not have referred to his alleged remarks, in their witness statement. He who alleges proves. They made allegations about remarks by the investigating officer, which they wanted the court to believe, the court merely remarked that it was upon them, to prove that the remarks were in fact made by the said investigating officer, by calling the maker of the remarks, the investigating officer. The trial court did not suggest that the said investigating officer should have been called at the criminal trial, in defence of the appellants, for the matter, at the criminal court, never got to that stage.

34. The appellants also made a lot of play about passwords and the conclusions made by the trial court in relation to them. It was the appellants who raised issue with passwords, suggesting that some undisclosed persons used their passwords. It is a matter of common knowledge, and which the court could take judicial notice of, that passwords are personal, and not meant to be shared. The fact that someone else gets access to them can only be explained by the owner of the password, and where no explanation is offered, or an implausible one is offered, the trial court would be entitled to draw adverse inferences. That is precisely what the trial court did, which was justified.

35. Malice was inferred, by the appellants, from the event of the refusal by the 2nd respondent to reinstate them, into employment, after the termination of the criminal case. Malicious prosecution is about the prosecution of the criminal charges. Focus is around the charges themselves, the background to them and the evidence supporting them. What happens after the termination of the charges, has no bearing on the charges, for they would not be existing, for there would be no prosecution. Secondly, the termination of the charges did not absolve or clear the appellants of the charges. The charges were not withdrawn, which would have amounted to an absolution. The charges were terminated under section 210 of the Criminal Procedure Code, on the technicality, related to witnesses having not testified. The charges were terminated, not because the appellants were innocent, but because the prosecution had not called its witnesses, not because they were not there, but because the prosecution had been delayed, by all the actors involved in the case, the prosecution, the appellants, their Advocates and the court. Under those circumstances, there was no legal basis for the appellants to expect that they should have been reinstated into employment.

36. The appellants have submitted on the burden of proof. These are civil proceedings. The burden of proof was on them, to establish the critical elements of malicious prosecution, to the required standard, of balance of probability. The legal and evidential burdens rested with them. The burdens would have shifted, to the respondents, upon them, the appellants, establishing the elements to the required thresholds. The crucial elements to be established were 2, whether the cause, by the respondents, lacked probability or reasonableness; and whether the prosecution was animated by malice. I am not persuaded that the evidence marshalled, by the appellants, reached the required thresholds, to shift the legal and evidential burdens to the respondents.

37. In the first place, the case by the appellants was solely built on the acquittal, under section 210 of the Criminal Procedure Code. The fact of that acquittal, to them, meant they were innocent, and that the case by the respondents had no foundation. There is ample case law that an acquittal alone is not enough, the other elements must be established. Of the 4 elements of malicious prosecution, the fact that the complaint was initiated by one of the defendants, and terminated in favour of the plaintiffs, are the easiest to prove. The other 2, which are the more critical of the 4, lack of probable cause and existence of malice, are more difficult to prove. Their proof does not rest only on the termination of the criminal proceedings, in favour of the plaintiffs, nor only on the proceedings that were recorded by the trial court. Much more is required, and I have discussed it, in the preceding paragraphs of this judgement.

38. Secondly, the appellants rely on the fact that the prosecution dragged in court for 8 years, before termination by the court, to argue that there was no probable cause and malice existed. Yet, the criminal trial court itself, in its ruling of 3rd November 2014, found that that delay was not solely caused by the prosecution, but the appellants had contributed to it too. I perused the criminal trial court record, and, it is very clear in my mind, that the prosecution, the defence and the trial court contributed to the delay. The mere fact of the 8-year delay, in the criminal case, therefore, could not be blamed wholly on the respondents, and even if it could, it would still not be adequate to establish lack of probable cause or presence of malice, without more.

39. Thirdly, probable cause can only be gauged from the case that the prosecution took to court, the evidence it had against the accused person, whether that evidence was presented in court. It is about what took the case to court in the first place. Malicious prosecution can only be assessed or evaluated based on that. It is that that the plaintiff should place before the civil court, and seek to persuade that court that, from that evidence, there was no material which established a probable cause for his criminal prosecution. That, based on that material, there was no foundation for the charges, hence there was no probable cause, and possibly there was malice.

40. The appellants had possession of that evidence. The record of the criminal trial court is clear that that evidence was given to the appellants, as required of the prosecution, by Article 50(1) of *the Constitution*. The appellants did not place that material before the civil court, neither did they attempt to demonstrate to the civil court, from it, that it did not disclose a probable cause, or that the case behind it was driven by malice or ill-will, or ulterior motive. The burden was not on the respondents, at the civil court, to justify their case at the criminal court, it was on the appellants, to establish that the evidence that the respondents had could not sustain a criminal case against them, to warrant them being charged and prosecuted.

41. It would be upon that being done that the burden would have shifted to the respondents, to adduce counterevidence. The burden did not shift, upon mere allegations being made. It would have only shifted upon a demonstration or establishment that the evidence presented or held by the respondents, against the appellants, for the purposes of the criminal prosecution, could not sustain a criminal case, hence there was no probable cause for their prosecution. No attempt was made to demonstrate that, so the burden did not shift to the respondents, to justify their criminal case against the appellants.

42. I believe I have said enough to demonstrate that the appeal, against the respondents, is not well founded, given that their case at the trial court was not properly conceived. I, accordingly, dismiss the appeal. The 2nd respondent shall have the costs. Orders accordingly.

DELIVERED, VIA EMAIL, SIGNED IN CHAMBERS, AT BUSIA, ON THIS 5TH DAY OF AUGUST 2025.

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant, Busia.

Ms. Carolyne Oyuse, Court Assistant, Milimani, Nairobi.

Advocates

Ms. Khisa, instructed by PK Kamau & Company, Advocates, for the appellants.

Mr. Mbugwa, instructed by Mbugwa Atudo Macharia, Advocates for the 2nd respondent.