Airtel Network Kenya Ltd v Alakonya & 3 others (Civil Appeal 87 of 2023) [2024] KEHC 6497 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6497 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL 87 OF 2023

SC CHIRCHIR, J

MAY 30, 2024

BETWEEN

AIRTEL NETWORK KENYA LTD ..... APPELLANT

AND

WILSON ALAKONYA ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION ..... 3RD RESPONDENT

SHEER LOGIC MANAGEMENT ..... 4TH RESPONDENT

(Being an appeal against the Judgment of the Resident magistrate's court at Kakamega (Hon. Caroline J. Cheruiyot (R.M) in Kakamega CMCC No. 267 of 2021 delivered on 24{{^th}} April 2023)

JUDGMENT

1. The 1st respondent filed suit against the Appellant and the 2nd to the 4th Respondents at the chief magistrate's court at Kakamega seeking for damages for malicious prosecution. On a judgment delivered on 24th April 2023, the trial court returned a verdict in favour of the 1st respondent and awarded him damages as follows: a). Damages for malicious prosecution- ksh. 1,000,000

   b). Damages for unlawful confinement- ksh. 500,000

   c) special damages- ksh. 500,000.

2. Aggrieved by the Judgment, the Appellant filed the present Appeal , and set out the following grounds:

   a. That the learned trial magistrate erred in law and fact in arriving at a decision that is contrary to the law and facts before the court.

b. That the learned trial magistrate erred in law and in fact by failing to properly evaluate the evidence on record thus reaching an erroneous finding that the appellant was liable for the tort of malicious prosecution as against the 1st Respondent.

c. That the learned trial magistrate erred in fact and in law in reaching the finding that the 1st respondent's prosecution in the criminal case was actuated by malice on the part of the appellant on the mere and erroneous conclusion that there was no sufficient evidence to sustain the criminal case.

d. That the learned trial magistrate erred in law and in fact in failing to consider and analyse the entire evidence of the appellant's, the 2nd respondent's witnesses and thereby arrived at wrong findings on the issues before the court.

e. That the learned trial magistrate erred in fact and in law by not considering the fact that it was not the appellant's duty to charge, prosecute or conduct the criminal case so as to reach the conclusion that the Appellant failed to avail sufficient evidence leading to its collapse.

f. That the learned trial magistrate in fact and in law by not considering the Appellant's evidence to the effect that it was not aware of the withdrawal of the criminal case on account of insufficient evidence and unavailability of the witnesses which according to the appellant was misleading and not factual.

g. That the learned trial magistrate erred in fact and in law by not taking into account the express testimony of Sergeant David Sugut (DW2) the 2nd respondent's witness which confirmed that the Appellant supplied the police with all the information and documents in support of the complaint against the 1st Respondent and thus, could not have been the reason for the criminal case.

h. That the learned trial magistrate erred in fact and in law in ignoring the 2nd respondent's evidence to the effect that the prosecutor was persuaded that the 1st respondent was probably guilty of the offence which absolved the appellant of any blame for the collapse of the criminal case.

i. That the learned trial magistrate erred in fact and in law by not reaching the conclusion that the appellant may not have privy to the criminal case.

j. That the learned trial magistrate erred in fact and in law by failing to consider the appellant's submissions and the judicial authorities tendered before the court.

k. That the learned trial magistrate erred in law and in fact by making an award of general damages that was excessive in the circumstances and not in consonance with the prevailing parimateria cases.

l. That the learned trial magistrate erred in law and fact by making an award of special damages without the same having been strictly proven.

m. That the learned trial magistrate erred in law and fact by failing to find that the 1st respondent had failed to prove his case and thereby failing to dismiss the case for want of merit.

2. The Appeal was canvassed by way of written submissions

Appellant's submissions

3. The Appellant submits that the ingredients for malicious prosecution had not been met as set out in the case of Stephen Gachua Githaiga & another Vs. Attorney General (2015) eKLR. He further submits that the burden of proof of each these elements lie with the 1st respondent (hereafter referred to The Respondent) and that all the elements must be proved. He has relied on the case of Tobias Moinde Kengere vs. Postal Corporation of Kenya and 2 others (2019) eKLR in this regard.

4. On the issue of the role played by the Appellant in the prosecution of the Respondent , it is submitted that the role of the Appellant was simply to make a report to the police and did not take part in the arrest and prosecution of the Respondent; that a complainant can not be held responsible for the decisions of the investigators and the Director of public prosecution(DPP). To buttress its submissions it has relied on the case of Socfinaf Kenya ltd vs peter Guchu Kuria & Ano (2002) e KLR and Daniel Odhiambo Apel & Ano vs Telkom Kenya Ltd (2006) eKLR. It thus faults the trial court for arriving at the decision it reached without properly analysing its role.

5. The Appellant further submits that the trial court failed to distinctly address each element of malicious prosecution and test it against the evidence presented. On the element of malice , it is its submission that it was not proved. The counsel cites the case kagane Vs, Attorney General (1969) EA643 and Vastu company limited vs. Mwangi civil appeal 547 of 2019 (2022) KEHC 3006 (KLR) (Civ) 17 June 2022 where the court of Appeal defined malice to mean "that the prosecution was motivated by something more than a sincere desire to vindicate justice"

6. The Appellant further argues that the scope of what would amount to malicious prosecution as was set out in the case of Vastu company ltd vs mwangi(2022) KEHC 3006 (KLR) require not only the prove of malice, but also the need to demonstrate that the court process was being abused; to show the foundation upon which the rights of the accused person was being threatened; or that he did not get a fair trial. It is submitted that none of the above elements were proved in this case.

7. On the respondents' assertion that he was held beyond the constitutional timeline of 24 hours before being presented to court , the Appellant states that the 1st respondent's own testimony at the trial court negated that assertion.

8. The Appellant further faults the trial court for equating lack of Evidence, with malice , and relies on the case of Tobias Moinde Kengere vs. Postal Corporation of Kenya & 2others (2019) eKLR. Where it was held that an acquittal of an Accused person for lack of evidence in itself is not enough to sustain a claim for malicious prosecution.

9. The Appellant further argues that the trial court misdirected itself by holding that new evidence only emerged after termination of prosecution, and that even if that was the case, the emergence of new evidence did not infer malice. ; that even if such malice existed it cannot be attributed to the Appellant as an artificial person unless there is evidence of spite in one of its servants that can be attributed to the company; and finally on this element, it is submitted that the fact that the case was withdrawn just after 14 days thereafter, is proof enough that the prosecution was guided by a sincere desire to vindicate justice.

10. On the element of probable cause, the Appellant submits that to the extent that its role was limited to simply making a report to the police , an assertion as to the existence or non- existence of probable cause to proceed with arrest and prosecution could not be attributed to the Appellant.

11. It is further submitted that, in any event, the police and the prosecution had sufficient and probable cause to charge the Appellant as evidenced by Respondent's own admission during trial. The Appellant has relied on the case of Hicks vs. Faulkner (1878) 8QBD 167. 171 in this regard.

12. The Appellant asserts that acquittal perse does not entitle the respondent to a claim for malicious prosecution.

13. The Appellant further contends that the trial court failed to make a distinction between malicious prosecution and unlawful confinement; that the court did not address itself to this issue in the analysis but in conclusion awarded damages for both unlawful confinement and malicious prosecution even though the two are separate causes of action as was held in the case of John Ndeto kyalo vs Kenya tea development Authority. & Ano (2005) e KLR ; that in any event the respondent did not make any distinctive claim in respect of malicious prosecution and illegal confinement; and finally that there was no evidence of illegal confinement.

14. On the assessment of damages for malicious prosecution, it is the Appellant's submission that there was no basis for it and went to distinguish the evidence presented in the present case with those which existed in the case of Chrispine Otieno vs AG (2014) e KLR and Kasio Mutuku vs Kenya post office savings Bank (2017) eKLR. Kipkemboi Cheruiyot inspector General of police & Attorney General (Interested parties) (2019) eKLR , where the court awarded damages.

15. The award on special damages was faulted on grounds that there was no evidence of payment of stamp duty on it , and further there was no evidence that the fees paid was taxed or agreed costs between Advocate and client.

Responden'ts submissions

16. The Respondent blames the appellant for not providing the prosecution with the necessary evidence to prosecute its case despite being given a 2nd chance after the case was withdrawn under section 87(a) of the Criminal procedure code(CPC)

17. On the Appellant's assertion that it merely filed a complain with the police , the 1st respondent states that the action of the appellant led to his unlawful arrest, confinement and subsequent arraignment in court.

18. On the elements of malicious prosecution, he relied in the case of Mbowa vs. East Mengo district Administration (1972) EA 352, which spelt out the elements that constitute malicious prosecution.

19. He claimed that other than the charges being malicious, there was no probable cause for instituting the criminal proceedings. The respondent further argues that the basis of establishing whether there was a probable cause was the proceedings in the Kakamega chief Magistrate's court criminal case No. 1118 of 2017

20. He avers that malice can be expressed or gathered from the surrounding circumstances as was held in the case of R vs. attorney General exp. Kipngeno Arap Ngeny High court civil application No. 406 of 2001.

21. He faulted the prosecution by relying on its mandate under Article 157 (10 and 11) for commencing the prosecution at the lower court when it was not ready to prosecute the case.

22. The respondent further submits that his right to dignity pursuant to Article 28 of *the constitution* was violated in the manner he was arrested , transported and confined from 6th April 2017 to 10/4/2017 .

23. On what constitutes human dignity, he relied in the case of MWK & another Vs. The attorney General & 4 others; Independent Medical Legal unit (IMLU) interested party; The Redress Trust (Amicus Curiae) constitutional petition 347 of 2015(2017) KEHC 1496(KLR).

24. He argues that he was arbitrarily deprived of his freedom and that consequently he is entitled to the award of ksh. 500,000 that the trial court awarded him.

25. On whether the court should interfere with the discretion of damages he cites the decision in catholic Diocese of Kisumu vs. Sophine Achieng tete Civil Appeal No 284 of 2001(2004) eKLR 55 where it was held that the court can only interfere if the decision in damages was made on the wrong principles.

26. He further claimed that his rights under Article 28, 29 and 31 were infringed upon by his unlawful arrest and that the award of Kshs. 1,500,000/= was sufficient compensation for the humiliation he underwent.

27. On the legal fees paid he submits that the amount was not outrageous considering that his advocate represented him twice in the lower court, and once on Appeal, and that failure to pay stamp duty should not affect him.

2nd Respondent's submissions

28. The Attorney General (AG) who is the 2nd respondent herein filed submissions in support of the Appeal. The 2nd respondent briefly summarised the pleadings and evidence as tendered at the trial court and came up with the following issues for determination:

    a. Whether the prosecution was instituted by the 2nd respondent; or by someone for whose acts the 2nd respondent is responsible;

    b. Whether the prosecution terminated in the 1st respondent's favour

    c. Whether the prosecution was instituted without reasonable and probable cause

    d. Whether the prosecution was actuated by malice

29. On the first and second issue, the 2nd respondent does acknowledge that proceedings were instituted following a complain by the Appellant and that the Respondent was acquitted under section 210 of the CPC.

30. On whether there was a reasonable or probable cause the 2nd respondent cited Salmon on Torts where he defined reasonable or probable cause to mean " ... a genuine belief , based on reasonable grounds, that the proceedings are justified"

31. The 2nd respondent also cites Hicks Vs. Faulkner (1878)8 QBD 167 as cited in the case of Margret Ndege & 3 others vs. Moses Oduor Ademba (2021) eKLR which gave an elaborate definition of what constitutes reasonable and probable cause.

32. The 2nd respondent points out that the respondent had admitted that he had responsibility as the branch manager of the appellant's shop and that he was responsible for anything that would go wrong while working for the appellant.

33. The 2nd respondent has also referred to the testimony of DW1 , head of security at the Appellan'st shop. That DW1 did confirm that the respondent was in charge of the shop during the period of 21/10/2017-01/02/2017 when the appellant realized that stock was missing and that stocks valued at Kshs. 828,852 could not be accounted

34. On whether the 2nd respondent verified the information, they assert that the respondent had recorded a statement at the police station against the allegations made against him; that the prosecution had 2 witnesses who were lined up to testify.

35. He avers that the 2nd respondent had sufficient material and statements from the respondent's colleague to make a case against the respondent , since he was the one in charge of the shop; that the testimonies of DW1 and DW2 were enough to show a reasonable and probable cause to charge the respondent.

36. On the claim that he had been unlawfully held in custody from 06/04/2017to 10/04/2017 the 2nd respondent submits that according to Dw2, the respondent was arrested on Friday 07/04/2017 taken to Nairobi Central police station at 2 p.m. and later they travelled to Kakamega via public means and arraigned in court on 10/04/2017. He argues that the respondent was therefore arraigned in court within the stipulated time frame.

37. The 2nd respondent further submits that the fact that the respondent was acquitted under section 210 of the CPC did not disclose any wrong motive on the part of the prosecution as they acted within their mandate to bring the 1st respondent to justice. They relied in the case of Robert Okeri Ombeka Vs. central Bank of Kenya Civil Appeal no 105 of 2007 (2015) eKLR.

38. It is further submitted that the prosecution was within their mandate under Article 157 to independently withdraw the charges facing the accused ,in the interest of justice, pursuant section 87 (a) or (b) of the CPC.

39. On the issue of whether the prosecution was actuated by malice, he reiterated the fact that the appellant made a reasonable and honest report to the police after learning that they had missing cash and asset at their kakamega Branch office and that they were supplied with evidence by Mr. Rotich including statements from the watchman a ; that investigations were carried out before the respondent was arrested and the fact that he had been acquitted did not connote malice on the part of the prosecution . He has relied on the case of Nzoia sugar company Ltd vs. Fungutuli (1988) KLR 399, in this regard.

40. It is the 2nd respondent's submission that there was a reasonable and probable cause that led to the arrest, confinement and prosecution of the plaintiff and there was no malice on the part of the police or the prosecution of the plaintiff.

Evidence in brief

Plaintiff's case

41. PW1 was the respondent herein. He relied on his witness statement dated 8/3/2022 which was adopted as his evidence in chief as well as the list of documents dated 18/2/2022 and 6/6/2022.

42. He testified that he started working on 20/1/2015 as a customer service team leader, cashier and a manager; that he had worked on that station for 2 years. He stated that on 31/1/2016 the daily reconciliation was done and sent the results to the finance department. He later he received a call and was told to hand over his keys to one of the staff but he refused. Instead he opted to go to the police station.

43. He further testified that on 8th march 2019 when he visited the 3rd defendants' office at Well park towers, he was locked in the boardroom and informed that the police were looking for him on account of loss of goods at the Airtel office at Kakamega. He stated that he was picked by David Sugut on 7/4/2017 and was taken back to kakamega where he was charged with stealing by servant. He was arraigned in court on 10/4/2017.

44. He recalled that on 24/4/2017 Mr. Sugut and the ODPP applied for the case to be withdrawn under section 87 (a) although he was not informed of the consequences. Thus he filed an Appeal at the high court . The high court reversed the the withdrawal, and ordered the trial to go on; that when the matter came up for hearing on 6/9/2021 ,the prosecution did not call any witness and he was acquitted under section 210 of the CPC.

45. During cross examination, he acknowledged that he was the manager at the Appellant's defendant's shop and that he was in charge when the stocks / funds valued at Kshs. 828,852/= went missing.

46. He accepted the suggestion that that the Appellant had a right to report to the police whenever items are missing. He also agreed that the police had the mandate to investigate the allegations made. However he insisted that in his case, the police did not investigate the incident.

47. He stated that he was embarrassed by the trip from Nairobi to Kakamega via public means and that he was detained for 2-3 days. He paid the legal fees of Kshs. 500,000/= as the legal fees

48. On cross examination by the Appellant , he acknowledged that he was the branch manager, customer service, cashier and the one in charge of the shop. He acknowledged that he was responsible if anything went wrong and he was the one to answer.

49. He claimed that when the matter was being withdrawn by the trial court under section 87 (a) of the CPC, the investigating officer Sugut was present while the other witnesses did not attend court despite being bonded.

50. He insisted that the Attorney General had not investigated the case, and that he never saw any witness in court when the case was withdrawn and thus he was aggrieved by the withdrawal under section 87 (a), and hence the appeal to the high court

Defence case

51. The first defence witness was one Brian Makokha (DW1) .He adopted his written statement as his evidence- in- chief and the list of documents dated 14/11/2022.

52. During cross examination, he stated that he had been employed at Airtel ltd since June 2013. He stated that between 21/1/2017 to 1 /2/2017 the 4th defendant lost some goods and airtime worth Kshs. 828,852/=. He told the court that the plaintiff was in charge of the Branch then; that when stock- taking was being done they realised the items were missing. They reported the incident at kakamega police station and investigation was conducted. He stated that the plaintiff could not be traced immediately, but was later arrested in Nairobi.

53. On further cross- examination, he stated that he was involved in the internal investigation; that when the items went missing, the plaintiff was not traceable. He acknowledged that the plaintiff was released from service on 1/2/2017 and that the statements were recorded on 7/2/2017. He stated that on 31/1/2017, the reconciliation were sent to the Area manager and that according to the audit report dated 20/1/2017 signed by the plaintiff and one Antony Ndungu did not pick on the discrepancies.

54. On re-examination, he confirmed that he took the statements of some of the colleagues David Mango and Benson Rotich and the case was reported to the police station for investigation.

55. DW2, sergeant David Sugut relied on his written statement dated 9/3/2022 which he adopted as his evidence- in- chief.

56. He confirmed that he was the investigation officer in kakamega Criminal case No 1118 of 2017. He stated that the accused had been arrested on Friday and arraigned in court on Monday within the required time for arraignment.

57. During the cross examination by the 4th defendant, he confirmed that he was the investigating officer in the matter and that he was able to track the plaintiff's contact and traced him in Nairobi and arrested him with the help of the 3rd defendant's officers. He stated that Airtel was the complainant since it was their assets that had been missing.

58. He admitted that the plaintiff was arrested on 6/4/2017 and he was transported via public means after he was taken from Nairobi central police on 7/4/2017.

59. He claimed that the plaintiff had been supplied with the relevant documents and that the witnesses included the Area manager, Benson Rotich and Corporal Sugut .

60. He confirmed that their investigation was still ongoing as they were still waiting for more documentary evidence from senior management of Airtel ltd, based in India

Determination

61. This is a first Appeal and the role of this court is to review the evidence presented at the trial court , re-evaluate it and arrive at its own conclusion (Ref: Selle & Ano Associated Motro Boat Ltd and others (1968) EA)

62. I have considered the evidence, the parties submissions and Authorities relied on , and in my view the following issues arise for determination :

    a. Whether the prosecution was instigated by the Appellant.

    b. Whether the respondent proved his case on a balance of probabilities

    c. Whether the respondent is entitled to damages for unlawful confinement

    d. Whether the trial Court erred in awarding Kshs.1, 500,000/= in damages.

Whether the prosecution was instigated by the Appellant

63. The Appellant has strongly argued that it had nothing to do with the prosecution, as all it did was to file a complain with the police. And that whatever happened thereafter was outside its control.

64. I have looked at the charge sheet in Kakamega chief magistrate's court criminal case No. 1118 of 2017 (document No. 1 of the plaintiff's list of documents dated 8th march 2021)the complainant is Airtel Kenya ltd through Benson Rotich. The property stolen belonged to Airtel.

65. In Ruli vs Republic(1985) KLR 373 it was held: " we must state from the onset that we are satisfied that the term "complainant" in section 201 (current Section 204 of the CPC includes the prosecution as well as the person described in the particulars of the charge"

66. Further in the case of Gitau vs AG (1990) KLR 13 it was stated: "To succeed in a claim for malicious prosecution the plaintiff must establish that the defendant or his Agent set the law in motion against him on a criminal charge. " setting the law in motion" in this context has not the meaning frequently attributed to it of having a police officer take action such as effecting arrest. It means being actively instrumental in causing a person with some judicial authority to take action that involves the plaintiff in a criminal charge against another before a magistrate"(Emphasis added)

67. On the basis of the charge sheet and the testimony of DW2 I have no hesitation in making a finding that the Appellant indeed set in motion the arrest and prosecution of the respondent. The police did not simply wake up and decided to go and arrest the Respondent . It was the Appellant's complain that set the police after the respondent .

Whether the 1st Respondent proved its case on a balance of probabilities

68. To succeed in a claim for malicious prosecution, the claim must meet certain elements as set out in the case of Mbowa v East Mengo District Administration [1972] EA 352; The elements are :

    a. The plaintiff must show that prosecution was instituted by the defendant, or by someone for whose acts he is responsible;

    b. That the prosecution terminated in the plaintiff's favour;

    c. That the prosecution was instituted without reasonable and probable cause;

    d. That the prosecution was actuated by malice.

69. Further clarity is provided in the case of Stephen Gachau Githaiga & Another V Attorney General [2015] EKLR cited by the Appellant in which Justice Mativo stated: ".....I find useful guidance in the wise words of Duffus V.P. in the case of Kasana Produce Store Vs Kato at page 191, paragraph G-I where he laid down the ingredients for malicious prosecution as follows:

    i. The plaintiff was prosecuted by the defendant in that the law was set in motion against him by the defendant on a criminal charge. The test is not whether the criminal proceedings have reached a stage at which they may be described as a prosecution but whether they have reached a stage at which damage to the plaintiff result.

    ii. That the prosecution was determined in the plaintiffs favour.

    iii. That it was without reasonable or probable cause-on the evidence the defendant did not believe in the justice of his own case.

    iv. It was malicious-The defendant had improper and indirect motives in pursuing the false charge against the plaintiff."

70. The burden of proving the above elements is on the plaintiff, in this case the duty was on the respondent herein. The question of who set in motion the proceedings against the 1st respondent has already been addressed .

71. On the 2nd element there is common ground that the proceedings were terminated in favour of the respondent.

Was there a reasonable and probable cause?

72. It is not in doubt that the 1st respondent was discharged under section 87 (a) of the CPC upon Application by the 3rd Respondent. The respondent challenged this acquittal at the high court and the high court overturned the withdrawal and ordered for the proceedings to go on. When the case resumed , the prosecution told the court that it did not have a witness and sought for an adjournment, which they were denied. The court then acquitted the 1st respondent on account of lack of evidence under section 210 of the CPC.

73. In Kagane vs A.G(1969) EA 643 it was held : "Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded on reasonable grounds of existence of a state of circumstances which, assuming them to be true, would lead to an ordinary prudent and cautious man placed in the position of the accuser, to the conclusion that the person charged was probably guilty"

74. The salient facts from the evidence tendered are that the Respondent was in charge of the Appellant's outlet/ shop in Kakamega Town. He was the manager of the shop. In his own words he was the customer care person, cashier and manager. He admitted during cross examination that he was the one to account for if anything went wrong in the outlet. ; he admitted that he was aware that stocks worth 828,852 went missing during his tenure; he further admitted that if there was any discrepancies he was the one to account for; he further stated that he recorded a statement at the police station.

75. Thus there was a loss , which the 1st respondent admitted to, he said he was accountable ; that he was responsible for even reporting any loss, which apparently he did not do in this case. As the person in charge, who would be accountable for any losses or discrepancies , and who admitted that the stocks lost got lost during his tenure as the manager and the same stocks were reflected in the charge sheet , then the Appellant could not be faulted for reporting the matter to the police. There were also documents showing that that goods worth 828,852 were lost. Any reasonable owner of goods, within the context of the court's finding in Ruli's case(supra) would file a complain with the police. In any case DW1's testimony to the effect that the Respondent disappeared and was only arrested in Nairobi was not challenged at cross- examination

76. On the investigation, it is the respondent's contention that no investigations were done; that documents were simply given to DW2, thereupon which he drew the charge sheet. However he did admit that he recorded a statement at the police station. There were also statements that had been recorded from DW1 and Dw2 as the investigation's officer. The charge was stealing by servant and the said documents were definitely part of the investigation. The recording of his statement and the other witnesses too was part of the investigation . It is not therefore true to sate that no investigations were done.

77. The Court in Republic vs. Commissioner of Police and Another exparte Michael Monari & Another [2012] eKLR held:

> " ...the police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. (Emphasis added)

78. Once the theft had been reported to the police it would have been a negation of duty not to take any action .

79. The law equally protects the right of the prosecution to commence proceedings in criminal case. Under Article 157 (10) of *the Constitution* and Section 4 of the Office of the Director of Public Prosecution Act No. 2 of 2013, the DPP does not require the consent of any person or authority to commence any criminal proceedings and in exercise of his/her powers and functions, shall not be under the direction or control of any person or authority.

80. The exercise of that power is however subject to Subsection (11) of Article 157 and Section 4 of the DPP Act, which provides that in exercise of the said power, the DPP shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of legal

process. Only in circumstances where it is manifest that the DPP acted unlawfully by failing to exercise their own independent discretion; acting under the control and direction of another person; failing to take into account public interest or interest of the administration of justice in all their manifestations; abusing the legal process; and by acting in breach of fundamental rights and freedoms of an individual will the High Court intervene.

81. In the case of Diamond Hasham Lalji & Another v A.G. & 4 others [2018]eKLR which this Court was referred to by both Counsel, the Court of Appeal stated:-

> "
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> "(34) It is also indubitable that the constitutional prosecutorial power of DPP is reviewable by the High Court as Article 165(2)(d)(ii) of *the Constitution* ordains. However, the doctrine of separation of powers should be respected and the courts should not unjustifiably interfere with the exercise of discretion by DPP unless it is exercised unlawfully by, inter alia, failing to exercise his/her own independent discretion; by acting under the control and direction of another person; failing to take into account public interest or interest of the administration of justice in all their manifestations; abusing the legal process; and by acting in breach of fundamental rights and freedoms of an individual.
>
> The DPP is entitled to make errors within his constitutional jurisdiction and the decision will not be reviewed solely on the ground that it was based on misapprehension of facts and the law.(Matululu and Anor v. DPP [2003] 4 LRC 712.

82. In Republic v James Mureri Karugu & 2 others [2019] eKLR it was held that the respondent has the burden to prove that the prosecutor acted dishonestly and unreasonably. It is a burden that that the respondent failed to prove during trial in the lower court.

83. It is the finding of this court that there was a reasonable and probable cause to charge the respondent.

Was the prosecution motivated by malice?

84. It was also upon the respondent to prove that malice was the reason for his prosecution.

85. In Mary kanini muriuki vs the DCIO imenti North & the AG, meru high court civil case no. 28 of 2018, the court stated that;-

> "In a claim for malicious prosecution it is important that the court evaluate the evidence in the criminal trial so as to draw an inference as to whether the prosecution was based on the need to enforce criminal law or it was actuated by malice. It's not necessary to evaluate the entire evidence but the court has to find out the source of the complaint and what the basis of the prosecution was."

86. In the present case there is nothing much for this court to make any inference . But it is evident that shortly after the respondent was charged , the prosecution sought for withdrawal under section 87(a) of CPC. The withdrawal was not objected to by the respondent but still appealed against the withdrawal . The matter went on appeal in the year 2018 was concluded in the year 2021. The retrial process began on 8.4.2021. On the 1st scheduled hearing , which was on 6.9.2021,the prosecution did not have a witness. The trail court disallowed the adjournment sought, and discharged the respondent under section 210 of the CPC.

87. There is nothing in the criminal proceedings to suggest any malice on the part of the prosecution. Failure to avail witnesses is not evidence of malice.

88. Further in the case of Margaret Ndege and 3 Others v Moses Oduor Ademba (2021)eKLR add another element. The court stated as follows;

> " It is not enough to simply state that the criminal proceedings were malicious. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the appellants were under serious threat of being undermined by the criminal prosecution. In the absence of concrete grounds for supposing that a criminal prosecution is an "abuse of process", is a "manipulation", "amounts to selective prosecution" or such other processes, or even supposing that the appellants did not get a fair trial as protected in *the Constitution*, it is not mechanical enough that the existence of an acquittal on two out of three charges is sufficient enough to amount to malicious prosecution and false imprisonment."

89. The respondent failed to demonstrate how the court process was being abused. However in what I believe was an attempt to infer malice , the respondent referred to an alteration with one of the managers of the 4th respondent , who threatened him of running the risk of being re- arrested if "he failed to cooperate" . This happened after the prosecution had withdrawn the case under section 87(a) of the CPC. However this attempt falls when one considers the fact that the retrial was at the insistence of the respondent, not the 3rd respondent.

90. I would conclude this issue of malice by quoting Justice Mativo in Stephen Gachua Githaiga(supra) where he stated: " As a matter of policy if reasonable and probable cause existed at the time the prosecutor commenced or continued the criminal proceedings in question , the proceedings must be taken to have been properly instituted regardless of the fact that it is ultimately terminated in favour of the accused.....The malice aforethought requirement is key to striking that the tort was designed to maintain: between the society's interest in the effective administration of criminal justice and the need to compensate individuals who have been wrngly prosecuted fro a primary purpose other than that of carrying the law into effect"

91. In conclusion the arraignment and prosecution of the respondent was with reason. The respondent failed to establish his case on a balance of probabilities on the tort of malicious prosecution.

Illegal confinement

92. I agree with the Appellant that malicious prosecution and illegal confinement are separate causes of action and the trial court ought to have addressed each separately.

93. In Egbema vs west Nile Administration (1972) EA the court held: " false imprisonment and malicious prosecution are separate causes of action: a plaintiff may succeed on one and fail on the other . If he established one cause of action in one , then he is entitled to an award of damages on that issue"

94. The Appellant argues that in any event damages for illegal confinement was not prayed and should not have been awarded. However the this head of damages was pleaded for and evidence led to prove it. In the case of Great Lakes Transport Co Ltd vs Kenya Revenue Authority (2009) e KLR , the court of Appeal stated that where a claim has has been pleaded , and evidence led in support, the court ought to take cognisance of the fact that the issue has been placed before it, and it needs to make a determination on it. The respondent therefore is entitled to this claim as he pleaded it and led evidence to prove it

95. Although the respondent contradicted himself on his day of arrest, Dw2 admitted in cross-examination that the 1st respondent was arrested on Thursday 6th April 2017 and taken to court on Monday the 10th April 2017.

96. Pursuant to Article 49(1) (f)of *the constitution* he ought to have been presented to court on Friday the 7th April. I have noted the investigation's officer's excuse , where he stated that considering the distance between Nairobi and kakamega , they could not travel the same day.

97. There should be no excuse for violation of basic rights. There was the option of travelling on the night of Thursday to be in kakamega the following day. I do find that the 1st respondent's right under Article 49(1) (f), which require that an arrested person should be arraigned in court within 24 hours was therefore violated.

98. What about the award of ksh. 500,000 on damages?

99. It is trite law that assessment of damages is an act of discretion by the trial court and the Appellate court can only interfere with such award if the award is too high , too low or the lower court fail to take into account a relevant factor or considered an irrelevant one. *The constitution* makes allowance for Saturday and Sunday as the courts are not open on these two days. The respondent was therefore kept in custody illegally for one day only.

100. In the case of Joseph kipkemboi Ariambe vs Officer Commanding police Division- Kisii police station & 7 others(2017) e KLR the petitioner had been kept in illegal custody for 5 days. The court awarded him sh. 300,000. In the present case , even after taking into consideration the factors of inflation , I consider an award of ksh. 500,000 for a day's confinement to be too high. This court therefore have a reason to interfere with it. I consider an award of ksh . 250,000 reasonable instead.

101. The illegal confinement was the work of the Agents of the 2nd respondent , and the 2nd respondent is therefore vicariously liable for their actions.

102. I have considered the issue of legal fees , the Appellant argues that the receipts in support had no revenue stamps. The record does not indicate that the Appellant raised any objection to their production. However am in agreement that on the fact that the fees should be based taxed costs as between an Advocate and client as was held in the case of Kasio Mutuku (supra)

103. In conclusion I hereby make the following orders:

a). The claim for damages for malicious prosecution is hereby dismissed and the award on general damages by the trial court is hereby set aside.

b). The claim for damages for illegal confinement is upheld as against the 2nd respondent , but the award of ksh. 500,000 is hereby set aside and substituted with ksh 250,000

c). The claim for special damages is dismissed and the award of ksh. 500, 000 set aside.

d) The 1st respondent is awarded costs of the suit in the lower court based on the claim of ks. 250,000

e) Each party will meet their own costs in this Appeal

e) The award will attract interest at court rates from the date of judgment at the trial court

DATED , SIGNED AND DELIVERED AT NAIROBI, VIA MICROSOFT TEAMS, THIS 30TH DAY OF MAY 2024.

S. CHIRCHIR

JUDGE

In the presence of :