



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

PETITION NUMBER 57 OF 2013

JEREMIAH OLE DASHII PALLANGYO.....PETITIONER

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

THE INSPECTOR GENERAL

OF THE NATIONAL POLICE SERVICE.....3RD RESPONDENT

THE OCS ATHI RIVER POLICE STATION.....4TH RESPONDENT

FRANCIS WANGOMBE WACHIRA.....5TH RESPONDENT

JUDGEMENT

1. According to the Petitioner herein, **Jeremiah Ole Dashii Pallangyo**, (hereafter referred to as the Petitioner), he is a Pastor at Pentecostal Evangelical Fellowship of Africa (PEFA) Church.

2. The 1st Respondent is the Honourable Attorney General of the Republic of Kenya who has been sued pursuant to the provisions of Article 156 of the Constitution of Kenya in his capacity as the Principal Legal Advisor to the Government of Kenya while the 2nd Respondent is the Director of Public Prosecutions (“the DPP”) established under Article 157 of the Constitution and has the mandate to exercise State powers of prosecution including instituting and undertaking criminal proceedings against any person before any court (other than a court martial).

3. The 3rd Respondent is the Inspector General of the National Police service who exercises ultimate command over all officers in National Police Service in the Republic of Kenya while the 4th Respondent is the Officer Commanding Station (hereinafter referred to as the OCS) of Athi River Police Station who exercised command over the officers of Athi River Police Station at the material time, the station that arrested the Petitioner and in which the officer who shot the petitioner worked. The 5th Respondent was the Deputy OCS at Athi River Police Station at the material time and the Officer who fired the shot that injured the Petitioner.

4. In this petition, the Petitioner seeks for:

(a) A declaration that the violent dispersal of the protest against forceful evictions carried out by the 3rd Respondent’s officers led by the 5th Respondent on the 22nd of October, 2011, the use of live ammunition leading to the gunshot injuries suffered by the Petitioner violated the resident’s and in particular the Petitioner’s their rights under Article 28,29,32,33,37 of the constitution and was, therefore, unconstitutional.

(b) General damages for the breach of the Petitioner’s rights under Articles 28,29,32,33,37 of the Constitution.

(c) A declaration that the prosecution of the Petitioner in Machakos Criminal Case no.33 of 2012 was carried out for an improper motive, was a blatant abuse of court process and amounted to malicious prosecution.

(d) General and aggravated damages for malicious prosecution.

(e) Costs of this petition be awarded to the Petitioner.

(f) Any other or further relief that this Honourable Court may deem fit and just to grant.

(g) Special damages amounting to shillings forty- seven thousand four hundred and thirty nine (Kshs. 47,439.00) and further damages in respect of necessary constructive surgery and dentures to replace the lost teeth to be quantified at the hearing of this petition at a cost of Kshs. 353,200/

(h) Any other relief this Honourable Court may deem just and appropriate to safeguard the fundamental rights and freedoms contained in Articles 29, 37, 49 and 51 of the Constitution in relation to the Petitioner herein and the broader Kenyan public.

5. The Petition was supported by an affidavit sworn by the Petitioner in which he averred that on the 22nd day of October, 2011 at around 6 am he heard screams some commotion outside the house in Kinanie estate where he lived. In the company of village elder, **Philip Mutua**, he went to check what was happening, he saw a group of the villagers gathering outside on one side while on the opposite side were 5 armed police officers with dogs from Athi River Police Station led by the 5th Respondent. On inquiring, he was informed that the police were demolishing some houses in that area based on a court demolition order and the police declined to show the villagers the alleged Court Order and after looking around he saw some policemen armed with guns and dogs. Since the villagers who were armed and peaceful, were resisting the demonstration the policemen threatened to release the dogs on the crowd but did not do so.

6. According to the Petitioner, he in the company of a few other colleagues then went to talk to the policemen and asked why they were demolishing the houses yet the residents had title deeds for them, to which the police responded by saying that title deeds are only pieces of paper. The police officers then chased them away from them and they started walking away. However, some young people who were still resisting the demolition of the houses kept telling the police officers to shoot them and it was at this point that the Petitioner found himself on the ground having been shot. According to the Petitioner, the gunshot was from the gun of the 5th Respondent.

7. The Petitioner was then rushed me to the Athi River Police Station by his friends where he was issued with a note on the basis of which he was taken for first aid at the Athi River Medical Services Clinic and subsequently referred to Kenyatta National Hospital for further treatment where he was admitted up to 31st October, 2011 when he was discharged to continue with outpatient treatment and management of the injuries suffered from the gunshot wound.

8. According to the Petitioner, at Kenyatta National Hospital the following injuries were noted:

(i) A bullet wound on the upper lip with an exit on the left cheek

(ii) Grown facial oedema

(iii) Laceration on the upper lip

(iv) Fracture of Alveolar bone of the maxilla and palate

(v) The teeth in upper left quadrant were grossly shattered by the bullet including 23,24,25,26,27,28 and 38.

(vi) Bullet exit wound below the left ear.

(vii) A gunshot wound on the left jaw; and

(viii) Soft tissue injuries resulting in loss of upper teeth

9. As a result, he was admitted at the Kenyatta National Hospital where he was taken to theatre as an emergency for surgical debridement, extraction of all the shattered teeth and soft tissue repair of all the lacerations was done and he subsequently developed saliva escape from the left parotid duct which was damaged by the bullet. He also developed a saliva fistula on the left side due to the injury to the parotid duct for which was treated even post the discharge from the hospital on 2nd November, 2011.

10. He therefore claimed medical expenses amounting to Kshs 47,439.00 and was in need of replacement of the lost teeth by use of prosthesis the cost of which is expected to be KES 353,300.00. He annexed the investigations diary and a copy of a medical report prepared by Dr Mutangili and receipts for consultation and an x-ray. He also annexed the discharge document.

11. When I had regained strength and was able to move about, he went to Athi River Police Station on the 21st of November, 2011 to formally report the gunshot wound, while there he was told to bring witnesses. On the 22nd day of November, 2011, he went back to the police station and was told to go and see the Deputy OCS who did not take it kindly that I wanted to make the report against him and after refusing to issue him with a P3 form threatened to charge him before he could report him. After saying that, the Deputy OCS took him to the OCS and informed the latter that he had brought the liar who claimed he had been shot by the police to which the OCS directed that the Petitioner should be arrested and charged. As a result, the Petitioner was arrested and charged on 3rd January, 2012 with the offences of;

(a) Willing fully obstructing police officers contrary to section 253(b) of the **Penal Code**.

(b) Disobeying a lawful order contrary to section 3(a) of the **Penal Code**.

(c) Taking part in unlawful assembly contrary to section 79 of the **Penal Code**.

12. The Petitioner relied on both the investigations diary and the charge sheet copies of which he annexed.

13. At the remand prison where he was taken the Petitioner tried to seek medical attention but was not taken to hospital until his then advocates presented the matter before court and sought that he be released on a cash bail which application was allowed and that is when he got to get medical attention.

14. According to the Petitioner he kept going to court during the subsistence of the case despite the fact that he did not have enough money to cater for his transport and could not work due to his injuries. He also needed to keep going to hospital and this cost me a lot of money amounting to approximately Kenya Shillings Forty Three Thousand Six Hundred and Thirty Nine (Kshs. 43,639.00) obtaining treatment in respect of which he claimed special damages. He also spent a further Kshs 3,800.00 on consultation and an x-ray ordered for purposes of preparation of a medical report. He annexed copies of the receipts of the money spent on medication.

15. According to the Petitioner, the criminal case was prosecuted over a period of 10 months where the prosecution called witnesses and he was eventually acquitted under section 215 of the **Criminal Procedure Code**. It was deposed that in the judgment the Court held *inter alia* as follows;

- (a) Right to have his dignity recognized and respected under Article 28 of the Constitution.
- (b) Right to assemble and demonstrate peacefully and while unarmed under Article 37 of the constitution.
- (c) Right not to be deprived of freedom arbitrarily or without just cause under – Article 29 (a) of the Constitution.
- (d) Rights not to be subjected to any form of violence from either public or private sources under Article 29(c) of the Constitution.
- (e) Right not to be treated in a cruel, inhuman and degrading manner under Article 49 of the Constitution.

16. He annexed copies of the proceedings and the judgment delivered in the criminal case and based on legal advice, deposed that the 5th Respondent used excessive force in quelling the unarmed demonstration by firing live ammunition at him contrary to section 241 and 231 (a) of the **Penal Code** and thereafter proceeded to arrest and detain him on unsubstantiated offences when he sought to register a complaint in a manner suggesting that the 4th Respondent sought to justify the charges through actions that were in and themselves illegal. Though the 3rd and 4th Respondents were aware where of his residence and thus they could have immediately arrested him, they found it prudent to do so three (3) months later when he presented myself at the station to follow up on a complaint I had previously sought to register in vain. According to the Petitioner, besides the infringement of his constitutional rights, he was maliciously prosecuted on trumped up charges and eventually acquitted. The prosecution was, therefore, malicious. The particulars of the wrongdoing on the part of the Respondents, according to him were as follows:

As against the 1st & 3rd Respondents.

- (a) vicarious liability for the wrongs of its officers, the 4th and 5th Respondents, who arrested and recommended charges against him to the 2nd Respondent when there was no reasonable basis for doing so except that he presented himself at the station seeking to lodge a complaint against the 5th Respondent and persisted on this quest for justice;
- (b) For tasking the 5th Respondent, the person against whom he sought to lodge a complaint against, with the role of investigating the same thus making him judge over his own cause;
- (c) The wrong of the police officers who testified (as part of the advancement of the prosecution process) against the Petitioner knowing well that these were trumped up charges meant to suppress his complaint and quest for justice; and
- (d) The wrongs of the 5th Respondent who shot and injured the him while unarmed.

As against the 2nd Respondent

- (a) Admitting the charge prepared by the Police for purposes of commencement of the prosecution process without cogent evidence; and
- (b) For prosecuting the Petitioner without any cogent evidence leading to the acquittal.

As against the 4th and 5th Respondents

- (a) Personal responsibility on the part of the 5th Respondent for shooting and injuring him and for recommending that he be charged when he persisted on his quest to lodge a complaint against the officer in respect of the gun shot;
- (b) Personal responsibility on the part of the 4th Respondent for bowing to pressure from the 5th Respondent to charge him on

trumped up charges intended to silence him for making a complaint against the 5th Respondent.

17. As a result of the malicious prosecution, the Petitioner averred that he spent six months in remand prison and future days in trial which culminated in his acquittal. During the time that he had been arrested his family suffered a lot as he was the sole bread winner. The Petitioner therefore urged this Court to find that his constitutional rights were violated by the actions of the Respondents through the violent dispersion of the unarmed crowd at Kinanie Estate, Athi River, on 22nd October, 2011, his being shot and wounded, his subsequent arrest, charging and malicious prosecution mounted to suppress his quest for justice and sought compensation for the same. He sought to be awarded special, general and aggravated damages as pleaded in the Petition in the interest of justice.

18. In his oral evidence, he stated that he heard one police officer ordering that the dogs be released and the people started running towards them and he saw one officer with a baton removing a pistol and pointed it in their direction at which point fell down. He also produced as exhibits the documents he annexed to his supporting affidavit.

19. In cross-examination, he stated that he never saw any house being demolished and was unaware that the police were enforcing a court order at that time. He insisted that he did not reach where the police were and when the crowd started running towards them he raised his hands. He however never heard any gunshot. He however saw the person who shot him at the Police Station. When he was taken to court, he was placed on his defence.

20. In support of his case the Petitioner called **Dr Mathew Nzomo**, who testified as PW1. According to him, he was an oral surgeon and the Petitioner was his patient whom he first saw on 22nd October, 2011. After examining, he prepared a report which he exhibited as well as the Petitioner's treatment receipts. It was his evidence that the injuries sustained by the Petitioner were consisted with his being shot. According to him, the Petitioner having lost all his teeth, the option for him is to have an implant at the cost of Kshs 353,200.00.

The Respondents' Case

21. In response to the Petition, the Respondents called **CIP Francis Wachira**, the 5th Respondent who testified as DW1. He adopted the contents of his replying affidavit as part of his testimony.

22. According to him, on 22nd October, 2011, being the Deputy OCS at Athi River Police Station, he was instructed to command a team of 12 police officers who were to provide security to Mambo Auctioneers who had been ordered by the Court to execute an eviction order at Kinanie Area. In the company of the police officer he proceeded there and the said Auctioneers proceeded to execute the said orders and for two hours the process proceeded well after which he saw a group of about 100 people charging towards them armed with bows, arrows, stones, pangas, rungas and other crude weapons while blowing whistles. Despite explaining to them the existence of the court orders, they kept advancing while attacking the police officers who were outnumbered. The officers fired severally in the air to scare the crowd away and he instructed the officers to withdraw from the scene.

23. According to him, the officers did not aim or fire at anybody and in his evidence, no member of the public was injured during the incident.

24. According to him the petitioner and the others were armed and attacked the officers and he saw the Petitioner addressing people but due to the fact that the police were outnumbered he was unable to arrest him or the other members of the public. During the incident, three members of the Auctioneering Firm were injured and recorded statements with the police and nine arrows and bows were recovered.

25. DW1 however denied that the petitioner's complaints were never recorded. According to him, on 3rd January, 2012, the petitioner presented himself at Athi River Police Station claiming that he had been injured during the incident in question and he recorded the report in the OB. According to him, since it was obvious that the Petitioner was present at the scene and was amongst the people who attacked them, they decided to arrest him and charged him with wilfully obstructing police officers, disobeying a lawful court order and taking part in an unlawful assembly. He therefore denied that the Petitioner was arrested and detained in order to suppress his complaint. The petitioner was however acquitted after being found that he had a case to answer hence the prosecution was not malicious. He exhibited the court file.

26. In cross-examination he stated that he never knew the Petitioner prior to the incident and the Petitioner had no criminal record at the station. Though he denied that his officers shot at anyone, he disclosed that his officers shot more than 100 bullets. He stated that the only report of injury was that of the Plaintiff and no else. What they recorded was an incident report which was what they relied on to charge the Petitioner since the complainants were police officers. According to him, the petitioner appeared before him for two months after his initial report and that there were pending investigations in between. It was his evidence that there was no time to investigate the complaint by the petitioner since they were looking for the suspects. It was his evidence that none of the officers were injured.

27. He however insisted having seen the petitioner when he was addressing the crowd in front and that he was holding a *rungu*.

28. The Respondents also called **Francis Makau Mbuvi**, DW2 who testified that he was an Auctioneer trading as Mambu Auctioneers. According to him, he was served with two court orders which authorised him to carry out evictions on properties situated at Kinanie Area within Mavoko and the orders also directed the OCS Athi River to provide him with security during the process.

29. On 22nd October, 2011 he, in the company of his team of auctioneers and police officers assigned to him proceeded to the suit properties and started to remove the structures therein. Two hours into the process a group armed with bows, arrows, stones, pangas, rungas and other crude weapons attacked them. Despite DW1 explaining to the crowd that they were enforcing a court order, the crowd continued with the attack and being outnumbered, DW1 instructed them to withdraw from the scene but as they were running to their car, a group continued chasing them and throwing stones and arrows injuring three members of the Auctioneering Team. As a result, the police fired in the air to scare the crowd away but the attack continued.

30. According to DW2, the police did not aim at the crowd or at any specific person and the demonstration was not peaceful. It was his evidence that the petitioner and the crowd were armed with crude weapons.

Petitioner's Submissions

31. On behalf of the Petitioner, it was submitted that based on **Stephen Iregi Njuguna vs Attorney General, Civil Appeal No. 55 of 1997 (1995-1998) 1EA 252** that in this instance, the burden of proof lies on the petitioner to prove, on a balance of probability, that his shooting and injury was a result of police action. Once he does this, then the burden shifts to the respondents to prove that the shooting was justified. To help prove the above, the petitioner is required to prove first that indeed he was injured as a result of a gunshot and secondly, that the said gunshot was a result of police action.

32. To prove the first issue, the petitioner has adduced evidence confirming that he was shot by the police during the forceful eviction and that indeed upon being shot, he was taken to Athi River Police Station where he was issued with a note which he was enabled him to be attended to at Athi River Medical Services. From the medical evidence adduced, it was submitted that it is not in dispute that indeed the petitioner was shot and sustained serious injuries due to gunshot.

33. As regards the issue whether the said gunshot was as a result of police action, it was submitted that the petitioner led direct evidence which was and remains uncontroverted that indeed, there were demonstrations on the 22/10/2011 at Kinanie Estate within Athi River protesting against the demolition of houses which was being conducted under the command of the Deputy OCS Athi River Police Station. There were shots fired by non-other than the police personnel who were charged with enforcing the eviction orders- a total of 138 bullets were spent. Indeed, the above statement was affirmed by the Incident report which was recorded under OB/21/22/2011 which confirms that indeed there were gunshots fired of live bullets and even the number of shots fired by each of the officers present at the scene from which none of the officers fired less than 12 rounds of live ammunition each. The petitioner led direct evidence to confirm that indeed he was injured at the said demonstrations which information was confirmed by the respondents in their affidavit in reply to the petition as the basis of charging him as he confirmed that indeed he was at the scene and having interacted with the 5th respondent in person.

34. It was submitted that the petitioner's evidence shows that he was shot, as the report from the doctor and the referral note from Athi River Medical Services who examined him barely a day after the incident indicates. He also draws attention to the fact that there was a fracas, and that live ammunition was used.

35. According to the Petitioner, based on the foregoing facts, he has established the threshold laid down on a balance of probability that indeed he was shot as a result of police action.

36. As to whether the force used by the police was excessive in the circumstances, it was submitted that the police do not have unqualified license to resort to shooting and any such shooting need be authorized when it is necessary to do so and it's up to the police to demonstrate that the shooting is necessary. It was contended that the ***National Police Service Act***, at Paragraph 2 in the Sixth Schedule allows the police to use force in appropriate circumstances and conditions and states that the force to be used is to be proportionate to the objective to be achieved, the seriousness of the offence, the resistance by the person against whom it is used and only to the extent necessary.

37. In the instant case, it is not in dispute that the police spent over one hundred and thirty (130) live ammunition to disperse a crowd of people who were demonstrating against the demolition of their houses. The 5th respondent who was in-charge of the enforcement of the said evictions confirmed on oath that none of his officers were injured in whatever manner and those who were injured being employees of the auctioneer company never sustained any major injuries as they were bruises on the arms and legs. The 5th respondent confirmed the fact that indeed his officers and himself discharged not less than 12 live ammunition each on that fateful day.

38. Based on the foregoing, it was submitted that the use of live ammunition to disperse the protest against forceful eviction on the 22/10/2011 was violent and excessive use of force by the 3rd to 5th respondents and as such a breach of the constitution and this court was urged to find in the affirmative.

39. As to whether the prosecution of the Petitioner was malicious, it was submitted that in proving malicious prosecution this court in **Stephen Gachau Githaiga & another v Attorney General [2015] eKLR, Mativo J** came up with a checklist of six points in determining a malicious prosecution case. First is whether the criminal proceedings were instituted by the defendant. Secondly, whether the said prosecution was actuated by malice. Third, whether there was reasonable cause and/or justification to make the complaint to the police. Fourth, whether the criminal proceedings terminated in the plaintiff's favour. Fifth, whether the defendant is liable to compensate the plaintiffs and if so what should be the award of damages. And lastly, who should bear the costs of the suit?

40. According to the Petitioner, the elements of Malicious prosecution are also brought out by **Duffus V.P.** in the case of **Kasana Produce Store Vs Kato at page (1973) EA 190, paragraph G-I** and reiterated in the case of **George Masinde Murunga v Attorney-General [1979] eKLR**, where he laid down the ingredients for malicious prosecution as follows: - First, 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. Second, that the prosecution was determined in the plaintiff's favour. Third, that it was without reasonable or probable cause and lastly that the defendant had improper and indirect motives in pursuing the false charge against the plaintiff.

41. Bearing in mind the above requirements, a person who sets in motion without reasonable and proper cause, the legal machinery that ultimately leads to prosecution of the complainant, can be deemed to have prosecuted him. See **Gitau vs East African Power & Lighting Limited [1996] KLR 365** and **Kariuki vs East African Limited & Another [1996] KLR 683**.

42. According to the Petitioner, it is not in dispute that the petitioner was arrested at the police station almost four months after the eviction incident when he went to make a follow up regarding the complaint he had registered at Athi River Police Station in relation to his having

been shot by the same police officers. In cross examination, the 5th respondent intimated to this court that the petitioner was charged following a complaint recorded under Occurrence Book Number 19/22/10/11 after the same being recorded under Occurrence Book 21/22/10/11 which is a back incident report. It was however submitted that under Occurrence Book Number 19/22/10/11, the complainants therein are clearly stated to be one **Antony Kinyata, Omar Maina** of Tel. No. 0721898297 and **Stephen Mburu** of Telephone Number 0711045279. Upon cross examination, the 5th respondent indeed confirmed that he knew them as they were employees of the auctioneer company and the same confirmed by **Francis Makau Mbuvi**, the auctioneer trading as Mambu Auctioneers. But despite all the knowledge of the said complainants and their phone numbers, none of them testified or adduced evidence in Machakos Criminal Case Number 33 of 2012.

43. It is also not in dispute that the said Machakos Criminal Case Number 33 of 2012 was decided in favour of the accused person as the court acquitted him of the charges and we humbly submit that putting an accused person on their defence does not in itself justify the prosecution of the accused person as only the ultimate decision or outcome of the case should determine. (*See George Masinde Murunga v Attorney-General [1979] eKLR*) where 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.

44. In addition to the above, it was submitted that the trial court in its determination, read malice in the actions by the police at pg. 80 of the petitioner's bundle where the court finds that despite the police alleging that they saw the accused stoning their vehicle armed with a spear, the court failed to understand why they failed to arrest him then or the following day or days thereafter and was only arrested after presenting a complaint to the police of the injury suffered. The court went on to make a finding that the arrest of the accused didn't appear to be in pursuit of justice for the crime committed on the material day but only seems to be engineered to suppress his complaint.

45. On the foregoing facts, it was submitted that all the elements required to prove the case for malicious prosecution have been proved by the petitioner herein to sustain the issue and as such, the court was urged to make a finding in the affirmative.

46. As to whether the petitioner has proved the breach of his constitutional rights and freedoms, it was submitted that the petitioner has gone at length to prove with certainty and precision the constitutional provisions as breached by the defendants and the manner in which the said provisions have been breached as contained in his petition as highlighted and the court was urged to make a positive finding that the constitutional breaches have been stated with precision.

47. According to the Petitioner, having proved the three issues above set out to justify the award of the reliefs sought by the petitioner, the only outstanding issue is the issue of compensation in terms of damages for malicious prosecution. In this regard reliance was sought from and the breach of the case of **Dominic Arony Amolo vs. Attorney General [2003] eKLR**.

48. This approach of lump sum compensation, it was submitted, has since been most attractive in torture cases. The High Court **Lenaola J in James Odemba Akong'o v Attorney General & 3 others [2013] eKLR** where this court awarded a lump sum amount of Kshs 4,000,000 as general damages also stated its view on the issue of exemplary damages and has declined to grant exemplary damages for torture violations as they amount to violation of constitutional rights. *See Benedict Munene Kariuki and 14 Others -v- the Attorney General High Court Petition No. 722 of 2009, and Samuel Waweru Kariuki* where the court stated that;- I see no reason to depart from this reasoning with regard to exemplary damages because in the present case, the 2nd, 3rd and 4th Respondents have already been criminally punished for their actions and that is sufficient in the circumstances.

49. With that in mind, and alive to the fact that the Petitioner has suffered a permanent disability which neither this Court nor the Respondent can ever offer enough redress, and doing the best in the circumstances, the Petitioner believes a global award of Kshs.10, 000,000/= in respect of malicious prosecution as well as all violations of the right of protection from torture, inhuman and degrading treatment is sufficient, Kshs. 47,439/= special damages and further Kshs. 353,200/= for necessary reconstructive surgery as sufficient to compensate the petitioner herein.

2nd Respondents' Submissions.

50. On the part of the 2nd Respondents, it was submitted that the petitioner was present and in the company of other people that were at the scene of the evictions on 22/10/2012, this is not disputed by the Petitioner. The 3rd to 5th Respondents were working under their mandated duties as per **Section 24 of the National Police Service Act** that stipulates that the functions of the police shall be;

- a) Provision of assistance of the public when in need
- b) Maintenance of law and order
- c) Preservation of peace
- d) Protection of life and property.
- e) Investigation of crimes.
- f) Collection of criminal intelligence.
- g) Prevention and detection of crimes.
- h) Prevention and detection of crimes and apprehension of offenders.

51. The 3rd to 5th Respondents are allowed by the law to use minimal force possible. However, where their life is at risk, they are allowed to use justifiable amount of force to protect themselves from imminent danger as seen in **Palmer vs. Reginam [1971] 1 ALL E.R. 1077**

52. It was submitted that ***The Kenya Police Manual of 1980*** Chapter 11 deals with the use of Force and Firearms by Police. In that chapter the circumstances in which a police officer may be justified in using a firearm are:

(a) to protect human life;

(b) to suppress or disperse a riotous mob committing or attempting to commit serious offences against life or property;

(c) to prevent the escape of a person in lawful custody, convicted or charged with felony;

(d) to prevent a rescue by force from lawful custody;

(e) to effect a lawful arrest if the police officer is in danger because the person to be arrested is in possession of and is intending to use a dangerous weapon against him;

(f) if the person to be arrested has been seen to commit a serious crime of violence or is known to have committed a serious crime of violence and he is trying to escape and there are no other means of preventing his escape.

53. It was therefore submitted that a policeman may have to use his firearm if he cannot by any other means which are available to him carry out his duty of protecting life, suppressing rioters or effecting the arrests, or preventing the rescue of escapees described above. However, well justified a police officer may consider himself to be in resorting to the use of a firearm, the act, whether or not it results in loss of life or injury, will become the subject of legal investigation. He must, therefore, be prepared to prove that he acted with humanity, caution and prudence, and that he was compelled by necessity alone to have recourse to firearms.

54. From the evidence, it was submitted that it is clear that the Petitioner among others were armed with arrows and bows, rungs and stones and were using them to attack the 5th Respondent and the Auctioneers. The 5th Respondents used what he had to protect the Auctioneers, where some of them were injured and to protect themselves.

55. Rule 9 of the Auctioneer Rules 1997 authorizes an auctioneer to apply police assistance in circumstances where the auctioneer has reasonable cause to believe that he may be subject to resistance or a breach of peace is likely to occur as a result of repossession of any property. In this case it happened, hence the 3rd to 5th Respondents were merely executing their statutory mandate. It is also not in dispute that there was a court order in Milimani Commercial Court Case No. 5743 of 2010 and No. 5744 of 2010 that the Petitioner and other occupants had to be evicted from the said piece of land. The Petitioner was identified to be among those rioting against the forceful eviction. The fact that the Petitioner contributed in demonstrations that do not lie under Article 37, as he was armed with crude weapons shows that the demonstrations were not peaceful in any way.

56. According to the Respondents, the Petitioner's fundamental freedoms under Article 28, 29, 32, 33 and 37 were not breached, he was charged before a competent court with jurisdiction and further he has not demonstrated that it was indeed the 5th Respondent who shot him since in his complaint against police form he did not clarify if he was shot from behind while escaping since the dog had been released to chase them or how close the 5th Respondent was when shooting him.

57. It was submitted that the Director of Public Prosecution is empowered with prosecutorial powers by the Constitution of Kenya 2010 under Article 157 and that decision on whether or not to charge lies with the 2nd Respondent and in making the same decision, the 2nd Respondent is usually guided by the evidence that is availed by the investigation agencies. The 2nd Respondent acted within its mandate as per the Constitution, made its decision to charge independently and without any malice. Although under Article 157(4) the Director of Public Prosecutions has powers to direct the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct, this does not give the 2nd respondent general oversight powers over investigations conducted by the National Police Service. The power is a discretionary power that may only be invoked by the 2nd respondent in appropriate circumstances. No evidence was laid before the trial judge to show that the Director of Public Prosecutions was party to the investigation of the 5th Respondent's alleged criminal conduct, or that he had reason to exercise his discretion under Article 157(4) of the Constitution. In the circumstances, the 2nd Respondent's liability only extends to the prosecution of the appellants.

58. The case of **Socfinaf Kenya Limited vs. Peter Guchu Kuria (HC Civil Appeal No. 595 of 2000)** was relied upon for the proposition that acquittal of a suspect in a criminal case is not sufficient ground for filing a claim damages for malicious prosecution or false imprisonment; and that evidence of spite, ill will, lack of reasonable and probable cause must be established. It was submitted that the fact that the Petitioner was acquitted under Section 215 of the ***Criminal Procedure Code*** does not amount to malicious prosecution as he was lawfully arrested, charged and taken through a competent Court with Jurisdiction to hear and determine the case. In his petition, the Petitioner has not in any way demonstrated that the 2nd Respondent was under any influence by any external force or had any personal interest in the outcome of the matter. Further, the 2nd Respondent did not know the Petitioner personally or had any grudge before, during and after the matter was concluded in court. Further, acquittal under Section 215 ***Criminal Procedure Code*** does not in any way translate to malicious prosecution but demonstrates that the prosecution established a prima facie case against the Petitioner and as a result the Petitioner was put to his defence and then acquitted due to lack of the prosecution to prove its case beyond reasonable doubt. It is clear that the respondent in his pleadings and evidence did not allege lack of reasonable and probable cause. He seemed to assume that his acquittal was enough to prove his claim in malicious prosecution. From his Petition the Petitioner has failed to show how the 2nd Respondent violated his rights as alleged in the petition while discharging its constitutional mandate under Article 157 of the Constitution of Kenya hence the 2nd Respondent ought not to have been enjoined in this petition.

59. It was submitted that the elements of malicious prosecution were set out in the case of **Murunga vs. Attorney General [1979] KLR 138** and **Samson John Nderitu vs the Attorney General 2010 eKLR**.

60. Collusion, it was submitted, has been defined under Section 21 of the ***Penal Code***

61. According to the 2nd Respondent, the Petitioner ought to show that there was collusion between the 2nd Respondent and the 3rd to 5th Respondents to institute criminal charges that is Machakos Criminal Case No. 33 of 2012 against him. Even if a complainant in a criminal case makes a malicious complaint that malice cannot automatically be transferred to the prosecutor unless it is proved that there was collusion between the complainant and the prosecutor. There is no evidence that the 2nd Respondent colluded with 3rd to 5th Respondents to institute proceedings against the Petitioner. To be liable for malicious prosecution, the 2nd Respondent must have acted without reasonable or probable cause. Therefore, as this was not the case the criminal proceedings were justified.

62. It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but whether there is a reasonable and probable case for a prosecution. A crime was committed and the 2nd Respondent was well within its statutory duty to decide to charge the Petitioner or not. The Petitioner has not shown this court that in prosecuting the Petitioner in the Machakos Criminal Case No. 33 of 2012, the 2nd Respondent applied extraneous considerations. As has been intimated in the judgment, that the Petitioner was acquitted under Section 215 ***Criminal Procedure Code*** in itself cannot sustain a claim for malicious prosecution. Not an iota of malice can be inferred on the part of the prosecution. It also clear that the Petitioner in his pleadings and evidence did not allege lack of reasonable and probable cause. He seemed to assume that his acquittal was enough to prove his claim in malicious prosecution. The petition did not disclose any violations of the Petitioner fundamental rights and freedoms for which the 2nd Respondent could be held liable.

63. On the issue raised on damages the 2nd Respondent argues that the Petitioner is not entitled to any exemplary or aggravated damages as the violations suffered by him were not actuated by malice nor was there any brazen or high handed deliberate actions by the 2nd Respondent hence the same should be dismissed. The 2nd Respondent relies on the case of **Leonard Ataro Peter Ajaro vs. Attorney General 2008 eKLR**.

64. The claim to damages was presented by the Petitioner as a claim in the tort of malicious prosecution which has neither been in any way proved to have been done by the 2nd Respondent nor any of the violations of the Petitioner's constitutional rights of the Bill of Rights.

65. It was submitted that this petition is frivolous and unmeritorious as the threshold for grant of the orders sought has not been met. Further the petition is incompetent, misconceived, misplaced and is an abuse of the process of this Court as the Petitioner's rights and fundamental freedoms have not been breached and the same be dismissed with costs.

Determination.

66. I have considered the evidence adduced in this Petition. This petition revolves around the actions of the police. The State protects its citizens through the police service. The police service is the organ responsible for maintaining law and order, preservation of peace, protection of life and property as well as prevention and detection of crime including the apprehension of offenders. Article 245(8) of the Constitution empowers Parliament to enact legislation giving effect to that provision. Consequently, Parliament enacted the ***National Police Service Act*** as Act No. 11A of 2012 under which the functions of the police are found at section 24 of the Act.

67. In my view this obligation placed on the State to protect the lives and properties of the people stems from a holistic and philosophical interpretation of Article 1 of the Constitution. The people's sovereign power is delegated to the three State organs. In the context of the petitions it means that the petitioners delegated their sovereign power, including the power to protect their property and lives, to the State. The State has, in turn, set out certain organs tasked with ensuring that the authority delegated to it is performed in accordance with the wishes of the people who have delegated the same to it and we have already found that organ to be the police service. As a result of this understanding between the government and the governed, the latter no longer have the power to take up arms and defend themselves save for limited situations which call for self defence. That is my understanding of the decision in **Palmer vs. Reginam [1971] 1 ALL E.R. 1077** where the Privy Council said at p.1088C:-

“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend on the particular facts and circumstances It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger, he may have to avert the danger by some instant reaction.”

68. It is my view that section 24 of the ***National Police Service Act*** impose a negative obligation on the part of the Government in general and the police in particular not to violate the rights and fundamental freedoms but also imposes a positive obligation on the part of the said agencies to protect the people from threat of violation of the said rights and fundamental freedoms. To this extent and as to whether the state is liable for violations of fundamental rights and freedoms by private and or third parties, I am guided by the decision in **Association of Victims of Post Electoral Violence and Interights vs. Cameroon (272/2003)** at para 88 and 89 where it was held that:

“The respect for the rights imposes on the State the negative obligation of doing nothing to violate the said rights. The protection targets the positive obligation of the state to guarantee that private individuals do not violate these rights. In this context, the commission ruled that the negligence of a state to guarantee the protection of the rights of the Charter having given rise to a violation of the said rights constitutes a violation of the rights of the charter which would be attributable to this

state even where it is established that the state itself or its officials are not directly responsible for such violations but have been perpetrated by private individuals....According to the permanent jurisprudence of the commission, Article 1, imposes restrictions on the authority of the state institutions in relation to the recognized rights. This article places on the state parties the positive obligation of preventing and punishing the violation by private individuals of the rights prescribed by the charter. Thus any illegal act carried out by an individual against the rights guaranteed and not directly attributed to the state can constitute, as had been indicated earlier, a cause of international responsibility of the state, not because it has itself committed the act in question, but because it has failed to exercise the conscientiousness required to prevent it from happening and for not having been able to take the appropriate measures to pay compensation for the prejudice suffered by the victims.”

69. This principle of positive obligation has also been recognised by the European Court of Human Rights in Mahmut Kaya vs. Turkey Application No. 22535/93, European Court of Human Rights where it was held that:

“the court recalls that the first sentence of article 231 enjoins the state not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction...this involves a primary duty of the state to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose life is at risk from criminal act against individual.”

70. The police had an obligation to facilitate and create a peaceful environment which would ensure that every citizen enjoyed his fundamental rights and freedoms. Accordingly, the police would be held liable to a citizen when that individual can demonstrate that the police owed him a special duty of care. As to how an individual can demonstrate that special duty of care that would make the police liable, the learned judges in the Charles Murigu Murithii & 2 Others vs. Attorney General (2015) eKLR stated that;

“the applicant must demonstrate that the acts complained of were directly perpetrated against him by the Police; that the police had placed the applicant in danger he would otherwise not have faced or that a special relationship existed between the applicant and the police on the basis of which Police protection had been assured.”

71. In this petition, the first issue for determination is whether the plaintiff was shot on 22nd day of October, 2011 at Kinanie Area. The Petitioner testified that on that day he heard screams and commotion from the said area and when he proceeded there, he found a standoff between police officers and a crowd. That the Police Officers were in that area on that day is not in dispute. DW1 and DW2 conceded in their affidavits that the Petitioner was actually present and the submissions filed on behalf of the Respondents does not challenge the Petitioner's presence in the area. It is not disputed that as a result of the standoff, live ammunitions were fired to scare away the crowd though the Respondents case is that none of them were fired directly at the crowd.

72. The Petitioner has however presented medical evidence showing that he sustained bullet wounds. Soon after the incident he made a report at Athi River Police Station and this is supported by the evidence emanating from that Police Station.

73. Accordingly, there can be no doubt that the plaintiff was shot on 22nd day of October, 2011 at Kinanie Area.

74. The second issue is whether the alleged shooting was done by the police. Apart from the police officers who were present in the area, there was no evidence that any other person was armed. In fact, according to the Respondents' witnesses, the crowd were only armed with crude weapons. It is not in doubt that the said officers were acting in the course of their duty. In Muwonge vs. Attorney General of Uganda [1967] EA 17, it was held by the then East African Court of Appeal that:

“It is not in dispute that the principles of law governing the liability of the Attorney General in respects of acts of a member of the police force are precisely the same as those relating to the position of a master's liability for the act of his servant. That being so the legal position is quite clear and has been quite clear for some considerable time. A master is liable for the acts of his servant committed within the scope of his employment or, to be more precise in relation to a policeman, within the exercise of his duty. The master remains so liable whether the acts of the servant are negligent or deliberate or wanton or criminal. The test is: were the acts done in the course of his employment or, in this case with the exercise of the policeman's duty" The acts may be so done even though they are done contrary to the orders of the master...The test of a master's liability for the acts of the servant does not depend upon whether or not the servant honestly believes that he is executing his master's orders. If that were so the master would never be liable for the criminal act of the servant, at any rate when the criminal act is towards benefiting the servant himself. It is dangerous to lay down any general test as to the circumstances in which it can be said that a person is acting within the course of his employment as each case must depend on its own facts. All that can be said is that even if the servant is acting deliberately, wantonly, negligently or criminally, even if he is acting for his own benefit, nevertheless if what he did was merely a manner of carrying out what he was employed to carry out then his acts are acts for which the master is liable. Therefore the sole principle of law which should be applied in determining whether the Attorney General is responsible for the acts of this policeman is: Were those acts committed in the course of the duty of the policeman, no matter whether they were committed contrary to the general instructions" ...A policeman may still be acting in the course of his duties if the manner in which he carries out his duty is a wrong one; but nevertheless he is still carrying it out...The policeman who caused this death did so by following what he thought was a rioter entering into the house and firing wantonly into the house, not carrying whom he killed or injured, is merely a wrong manner, a wrong mode, of carrying out the policeman's duty and therefore the Attorney General is liable. In all these cases in which a question arises as to whether a particular act is or is not done in the course of employment, it is a question of fact, a question of degree. In almost every case there is room for a difference of opinion.”

75. In Sengendo vs. Attorney General [1972] EA 140 it was stated:

“It is stated that the attack on the plaintiff was illegal. In the state of evidence before the court, there is nothing to show that there was any provocation by the plaintiff or any justification for the attack. The attack was a flagrant infringement of the plaintiff’s legal rights to personal safety. The description and the details given by the plaintiff of the attack, which the court accepts as truthful, show that the intention of the attack could have been none other than to cause grievous injuries to the plaintiff and for the purposes of this suit it is unnecessary to discuss whether or not the motives and intentions showing the state of mind of a person committing an attack should be enquired into. The evidence before the court has established that the plaintiff was intentionally and illegally attacked by the soldiers...In the circumstances of the case it is fair and proper inference to draw that the soldiers posted at various points and armed with rifles were there to control an emergency which had arisen due to an attempt to assassinate the then President, Dr. Milton Obote. There is evidence that before the plaintiff reached the point where he was attacked, he had been stopped by soldiers at three points on the way where he had been questioned and searched. Therefore it is held that the soldiers were acting in the course of duty when they attacked the plaintiff...The act of the soldiers was clearly wanton, unlawful and unjustified one. An act may be done in the course of a servant’s employment so as to make his master liable even though it is done contrary to the orders of the master; and even if the servant is acting deliberately, wantonly, negligently or criminally or for his own benefit, nevertheless if what he did is merely a manner of carrying out what he was employed to carry out then his master is liable. In all these cases in which the question arises as to whether a particular act is or is not done in the course of employment, it is a question of fact, a question of degree. In almost every case there is a room for a difference of opinion...Upon the facts of this case the act of the soldiers in shooting at the plaintiff, although it was a wanton, unlawful and unjustified act, was nevertheless a manner in which they proceeded to carry out the duties for which they were armed with rifles and posted at the place where the attack took place. Therefore the defendant is vicariously liable for the act of the soldiers, and the plaintiff is entitled to claim general and special damages from the defendant.”

76. In the present case similarly, though it was alleged that the Petitioner was in the crowd that attacked the police officers, the explanation given by the Respondents for not effecting the arrest of the Petitioner immediately as opposed to months later when the Petitioner insisted on his complaint being investigated does not hold. What the police were expected to do was to investigate the Petitioner’s complaint. Where an allegation of violation of constitutional rights and fundamental freedoms are alleged particularly against State actors, the State is enjoined to investigate the same. This was the position adopted by the Inter-American Court of Human Rights in Velasquez Rodriguez vs Honduras, Judgment of 27 July 1985 in which the Court stated that:

“The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim’s full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.”

77. The State has a general duty to investigate human rights violations and in the instant case, the Respondents have not indicated what steps they have taken to investigate the Petitioner’s complaint. However, the reluctance of the police to do so is not difficult to understand considering the fact that the complaint was laid at the doorsteps of the 5th Respondent who was in charge of the police contingent whose action the Petition was complaining against and who was the one to receive the complaint.

78. Just like the trial court in the criminal trial, I find no evidence that the Petitioner was part of the crowd that was attacking the police assuming such an attack took place. In my view, the act of the security officers in shooting at the plaintiff, although it was a wanton, unlawful and unjustified act, was nevertheless a manner in which they proceeded to carry out the duties for which they were armed and assigned to execute the court orders. Even if the crowd became violent, the police officers ought to have used a less lethal force. They could have used rubber bullets for example or adopted the use of batons which they had. They instead unleashed more than 13 rounds of ammunition which was unwarranted in the circumstances. In so holding I am guided by the decision of Stephen Iregi Njuguna vs. Hon. the Attorney General Civil Appeal No. 55 of 1997 [1995-1998] 1 EA 252 where the Court of Appeal expressed itself as follows:

“The police do not have an unqualified licence to resort to shooting. They are authorised to shoot only when it is necessary to do so and it is up to them to demonstrate that the shooting was necessary and that the deceased was shot by them by accident. From the circumstances it is obvious that the deceased died as a result of the police firing. So the onus had shifted onto the respondent to prove that in the circumstances of the case they were excused by law for having caused the death of the deceased, particularly when there is evidence of PW 2 that the people whom the police could have been chasing were not shooting back and were unarmed. As it is there is no evidence on the record to show that the people the police were chasing, if a chase there was, were criminals; that they were dangerous criminals and were particularly dangerous to the police.”

79. Therefore, the 1st and 2nd Respondents are vicariously liable for the act of the police, and the Petitioner is entitled to claim general and special damages from the 1st and 2nd Respondents. I have no option but to believe the petitioner in this case and I find that the shooting of the petitioner was negligent, unlawful, illegal and with use of excessive force. The 1st and 2nd respondents are therefore liable for the act of the said officer. I find that they violated the petitioner’s rights to human dignity, which, as was held in Charles Murigu Murithii Case, is the foundation of all other rights and together with the right to life, forms the basis for the enjoyment of all other rights. I also find that his right to security of person was similarly violated.

80. As regards the tort of malicious prosecution, law surrounding the tort of malicious prosecution is well settled in our jurisdiction. In Mbowa vs. East Mengo District Administration [1972] EA 352, the East African Court of Appeal expressed itself as follows:

“The action for damages for malicious prosecution is part of the common law of England...The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be

personal and spite rather than for the public benefit. It originated in the medieval writ of conspiracy which was aimed against combinations to abuse legal procedure, that is, it was aimed at the prevention or restraint of improper legal proceedings...It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth. Its essential ingredients are: (1) the criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority; (2) the defendant must have acted without reasonable or probable cause i.e. there must have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified; (3) the defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose; and (4), the criminal proceedings must have been terminated in the plaintiff's favour, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge...The plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must "unite" in order to create or establish a cause of action. If the plaintiff does not prove them he would fail in his action. The damage that is claimed is in respect of reputation but other damages might be claimed, for example, damage to property...The damage to the plaintiff results at the stage in the criminal proceedings when the plaintiff is acquitted or, if there is an appeal, when his conviction is quashed or set aside. In other words, the damage results at a stage when the criminal proceedings came to an end in his favour, whether finally or not. The plaintiff could not possibly succeed without proving that the criminal proceedings terminated in his favour, for proving any or all of the first three essentials of malicious prosecution without the fourth which forms part of the cause of action, would not take him very far. He must prove that the court has found him not guilty of the offence charged...The law in an action for malicious prosecution has been clearly defined and in so far as the ordinary criminal prosecution is concerned the action does not lie until the plaintiff has been acquitted of the charge. In this case the respondent could have brought his action for malicious prosecution until the prosecution ended in his favour. He could not have maintained his action whilst the prosecution was pending nor could he have maintained an action after he had been convicted. His right to bring the action only accrued when he secured his acquittal of the charge on appeal, and he then had the right to bring this action for damages...Time must begin to run as from the date when the plaintiff could first successfully maintain an action. The cause of action is not complete until such a time, and in this case this was only after he was acquitted on appeal."

81. In Gitau vs. Attorney General [1990] KLR 13, Trainor, J had this to say:

"To succeed on a claim for malicious prosecution the plaintiff must first 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. Secondly he who sets the law in motion must have done so without reasonable and probable cause...The responsibility for setting the law in motion rests entirely on the Officer-in-Charge of the police station. If the said officer believed what the witnesses told him then he was justified in acting as he did, and the court is not satisfied that the plaintiff has established that he did not believe them or alternatively, that he proceeded recklessly and indifferently as to whether there were genuine grounds for prosecuting the plaintiff or not. The Court does not consider that the plaintiff has established *animus malus*, improper and indirect motives, against the witness."

82. It is my considered view that the foregoing set out the law and the conditions to be satisfied in order for a plaintiff to succeed in the tort of malicious prosecution.

83. On the first issue whether the criminal proceedings were instituted by the Respondents, it was conceded by the 5th Respondent that the decision to charge the Petitioner was made by the police who were also the complainants. The arrest was carried out by the police who are represented by the 1st and the 3rd Respondents herein and the charge was preferred by the same police. Therefore, I have no hesitation whatsoever in finding that the 1st and 2nd Respondents are liable for the said action of the police.

84. With respect to the second issue whether there was a reasonable and probable cause for prosecuting the Petitioner, the Court is enjoined to consider the proceedings in determining whether or not the action taken by the police was malicious.

85. In James Karuga Kiiru –vs- Joseph Mwamburi and 3 Others, Nrb C.A No. 171 of 2000, the court held:

"To prosecute a person is not *prima facie* tortious, but to do so dishonestly or unreasonably is. And the burden of proving that the prosecutor did not act honestly or reasonably lies on the person prosecuted."

86. Rudd J. in Kagane –vs- Attorney General (1969) EA 643, set the test for reasonable and probable cause thus:

"Reasonable and probable cause is 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 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 of the crime imputed."

87. It was similarly held in Simba –vs- Wambari (1987) KLR 601 that:

"The plaintiff must prove that the setting of the law in motion by the inspector was without reasonable and probable cause....if the inspector believed what the witnesses told him then he was justified in acting as he did and I am satisfied the

plaintiff has not established that he did not believe them or alternatively that he proceeded recklessly and indifferently as to whether there were genuine grounds of prosecuting the plaintiff or not.”

88. Malice, however, can either be express or can be gathered from the circumstances surrounding the prosecution. A prosecution can either be mounted based on an offence committed in the presence of law enforcement officers or by way of a complaint lodged by a person to the said officers or agencies. However, the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. I say ordinarily because the mere fact that the version of one of the parties is not considered does not make the subsequent prosecution malicious. As was held by **Ojwang, J** (as he then was) in **Nairobi HCCC No. 1729 of 2001 – Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another**:

“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.”

89. Therefore, where the police deliberately decide not to take into account the version of the suspect and acts on a story that eventually turn out to be improbable and which no ordinary prudent and cautious man would have relied upon that failure may constitute lack of reasonable and probable cause for the purposes of malicious prosecution. On the other hand, it would be obviously absurd to make a defendant liable because matters of which he was not aware put a different complexion upon facts, which in themselves appeared a good case for prosecution. But neglect to make a reasonable use of the sources of information available before instituting proceedings would be evidence of want of reasonable and probable cause and also malice. It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but whether there is a reasonable and probable case for a prosecution. Circumstances may exist in which it is right before charging a man with misconduct to ask for an explanation but no general rule can be laid down.

90. The law as I understand it is that in order to succeed on the ground that the prosecution of the plaintiff was malicious, the plaintiff must show that the defendant or his servants were actuated by ill will or spite against him or an improper motive. The plaintiff has to show that the defendant had no reasonable or probable cause to prosecute him. The question of reasonable and probable cause depends in all cases not upon the actual existence but upon reasonable *bona fide* belief in the existence of such state of things as would amount to a justification of the course pursued in making the accusation complained of no matter whether the belief arises not on the recollection and memory of the accuser or out of the information furnished to him by others. In other words, the person preferring the charge or laying a complaint before the court should have an honest belief in the guilt of the person charged based upon reasonable grounds depending on the state of circumstances which if they are true would lead any prudent and cautious man placed in the position of the prosecutor to the conclusion that the person he is charging is probably guilty of the crime imputed. 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 and that is to say, to constitute reasonable and probable cause, the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution whether that material consists 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 prudent and cautious man to the extent of believing that the accused is probably guilty. If and in so far as that material is based upon information, the information must be reasonably credible such that an ordinary prudent and cautious man could honestly believe it to be substantially true and to afford a reasonably strong basis for the prosecution. Malice means a wrongful act done intentionally without a just cause or excuse. So to prosecute anyone for an improper motive can be evidence of malice.

91. As was held in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001**:

“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable”.

92. Therefore, criminal process ought to be invoked only where the prosecutor has a conviction that he has a prosecutable case. Whereas he does not have to have a full proof or watertight case, he ought to have in his possession such evidence which if believable might reasonably lead to a conviction. He does not have to have evidence which disclose a *prima facie* case under section 210 of the **Criminal Procedure Code** since a decision as to whether a *prima facie* case is disclosed is a jurisdiction reserved for the trial Court. He however must have evidence which satisfy him that his is a case which ought to be presented before a trial Court. He must therefore consider both incriminating and exculpatory evidence in arriving at a discretion to charge the accused. Unless this standard is met, the Court may well be entitled to infer based on the evidence that the prosecution was mounted without reasonable or probable cause in that there were no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified.

93. That leads to the issue whether the prosecution was actuated by malice. Malice, as stated hereinabove, can either be express or can be gathered from the circumstances surrounding the prosecution. Although malice means a wrongful act done intentionally without a just cause or excuse, to prosecute anyone for an improper motive can be evidence of malice and as was appreciated in **R vs. Attorney General exp Kipngeno Arap Ngeny** (supra) a criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose.

94. In this case it is clear from the above discourse that the arrest and arraignment of the Plaintiff was only done after the Petitioner insisted on his complaint being investigated by the police. It was not based on the outcome of the independent investigations by the police themselves. In his judgement, the learned trial magistrate expressed himself as hereunder:

“The police allege that they saw the police stoning their vehicle armed with a spear. If the stated position was correct I do not see how the police failed to arrest him then or on the following day or days thereafter. The accused was arrested after presenting a complaint to the police of the injury suffered. To me the arrest of the accused doesn’t appear to be in pursuit of justice for the crime allegedly committed on the material day but it only seems to be engineered to suppress his complaint.

95. I associate myself with the said findings and looking at the totality of the evidence adduced both before the trial Court and before this Court, it is clear that the prosecution of the Plaintiff was at the very least instigated recklessly and as was held in **J P Machira vs. Wangethi Mwangi and Nation Newspapers Civil Appeal No. 179 of 1997**, malice can be inferred from a deliberate or reckless or even negligently ignoring of facts. While placing an accused on his defence was be one of the factors to be considered in determining the existence of malice, it does not necessarily follow that where an accused person is placed on his defence, there is no malice.

96. That brings me to the issue of the termination of the proceedings. There is no doubt that the criminal proceedings were terminated in favour of the Petitioner. It is now trite law that acquittal whether after hearing both prosecution and defence witnesses amounts to a termination in favour of the accused. The law is that for the purposes proof that the criminal proceedings have been determined in the appellant’s favour it is enough that the criminal proceedings have been terminated without being brought to a formal end. In **Egbema vs. West Nile Administration [1972] EA 60**, it was held:

“For the purposes proof that the criminal proceedings have been determined in the appellant’s favour it is enough that the criminal proceedings have been terminated without being brought to a formal end. The fact that no fresh prosecution has been brought, although five years have elapsed since the appellant was discharged, must be considered equivalent to an acquittal, so as to entitle an appellant to bring a suit for malicious prosecution...”

97. The next issue for determination is whether the defendant is liable to compensate the plaintiffs and if so what should be the award of damages.

98. Based on my findings above, I hold that the 1st and 3rd Respondents are liable to the Petitioner for infringing on his constitutional rights. Having found as I have, the next issue is what remedy is available to the petitioner. It is now an established principle that violations of fundamental human rights must be remedied **Kriegler J.** properly captured this in the Constitutional Court of South Africa case of **Ntanda Zeli Fose vs. The Minister of Safety and Security Case CCT 14/96** where he expressed himself that:

“..... our object in remedying these kinds of harms should, at least be to vindicate the constitution, and to deter its further infringement. Defense speaks for itself as an object, but vindication needs elaboration. Its meaning, strictly defined, is to “defend against encroachment or interference.” It suggests that certain harms, if not addressed, diminish our faith in the constitution. It recognizes that a constitution has as little or as much weight as the prevailing political culture affords it. The defense of the constitution—its vindication is a burden imposed not exclusively, but primarily on the judiciary. In exercise of our discretion to choose between appropriate forms of relief, we must carefully analyses the nature of a constitutional infringement and strike effectively at its source....”

99. In the Uganda case of **Dr. Willy Kaberuka vs. Attorney General Kampala HCCS No. 160 of 1993** it was held:

“The plaintiff suffered injury to his reputation. He testified that the news of his appearance in court was published in a newspaper whose circulation is believed to be generally wide. He spent a period of over four months appearing in court on charges, which were hardly investigated by the defendant’s servants. He must have suffered the indignity and humiliation. He is also entitled to recover damages for injuries to his feelings especially the possibility of serving a sentence...There are no hard and fast rules to prove that the plaintiff’s feelings have been injured or that he has been humiliated as this is inferred as the natural and foreseeable consequence of the defendant’s conduct. The plaintiff’s status in Society is also a relevant consideration and for all these reasons the plaintiff is entitled to damages...A plaintiff who has succeeded in his claim is entitled to be awarded such sum of money as will so far as possible make good to him what he has suffered and will possibly suffer as a result of the wrong done to him for which the defendant is responsible.”

100. The Petitioner claims general damages, aggravated damages, special damages, costs and interests. I agree with the decision in the case of **Dominic Arony Amolo** as cited in **James Odemba Akong’o vs. Attorney General & 3 others [2013] eKLR** where the Court expressed itself as follows:

“For our part, we have two options both of which are attractive and reasonable in our view. The first is an award of a lump sum for all the breaches cited elsewhere and posit that, because the breaches happened almost within a defined period and within the defined area of E Block at Kamiti Prison, it would be a fair proposition to award such lump sum figure in damages. A further reason to be advanced in support of this position is that the breaches happened contemporaneously with each other and it would be difficult, nay impossible to separate each of them and give a fair and reasonable award in respect of each. The alternative approach is to award damages for each of the heads of breach of Fundamental Rights. The difficulty with the latter in the circumstances of this case has been expressed and this may not be the right place to explore the efficacy of such an approach. We must as we hereby do, come to the firm conclusion that a lump sum figure in damages would be the better, the fairer and the more reasonable approach to take in this matter.

101. In **Bank of Baroda (Kenya) Limited vs. Timwood Products Ltd Civil Appeal No. 132 of 2001**, the Court of Appeal citing **Obongo**

& Another vs. Municipal Council of Kisumu [1971] EA 91 and **Rookes vs. Banard & Others [1964] AC 1129** held that in Kenya punitive or exemplary damages are awardable only under two circumstances, namely (i) where there is oppressive, arbitrary or unconstitutional action by the servants of the government; and (ii) where the defendant's action was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff. With respect to aggravated damages in **Francis Xavier Ole Kaparo vs The Standard & 3 Others, HCCC No.1230 of 2004 (unreported)** the Court expressed itself thus:

“Malicious and/or insulting conduct on the part of the defendant will aggravate the damages to be awarded. The aggravated damages (distinguished from exemplary damages) are meant to compensate the plaintiff for the additional injury going beyond that which would have flowed from the defamatory words or statements above, caused by the presence of the aggravating factors...Damages will be aggravated by the defendant's improper motive”

102. Aggravated damages, therefore, are meant to compensate the plaintiff for the additional injury going beyond that which would have flowed from the words complained of but for the presence of the aggravated circumstances. In this case, it is clear that the conduct of the police was oppressive, arbitrary or unconstitutional. Accordingly, the Petitioner is entitled to punitive or exemplary damages.

103. Based on the authorities cited I make the following awards in favour of the Petitioner against the 1st and 3rd Respondents, jointly and severally:

(a) General damages for infringement of the Petitioners constitutional rights - Kshs 4,000,000.00.

(b) Punitive or exemplary damages – Kshs 1,000,000.00.

(c) Special damages Kshs 353,200.00.

(d) Interests on (a) and (b) at court rates from the date of the judgement till payment in full while interests on (c) shall accrue at the same rate from the date of filing suit till payment in full.

(e) The Petitioner will also have the costs of the suit.

104. Judgement accordingly.

Read, signed and delivered in open Court at Machakos this 25th day of January, 2021

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Kayugira for the Petitioner

Mr Ngetich for the 2nd Respondent

CA Geoffrey