



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEALNO. 52 OF 2020

THE HON. ATTORNEY GENERAL.....APPELLANT

VERSUS

PETER KIRIMI MBOGO.....1ST RESPONDENT

THE NATIONAL TRANSPORT

& SAFETY AUTHORITY.....2ND RESPONDENT

CONSOLIDATED WITH

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEALNO. 56 OF 2020

THE NATIONAL TRANSPORT

& SAFETY AUTHORITY.....APPELLANT

VERSUS

PETER KIRIMI MBOGO.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

1. The National Transport & Safety Authority, is the body mandated to among other functions, implement road safety strategies. It does this in a number of ways, one of which is by monitoring the speed of vehicles to ensure conformity with the speed limits set and in the event of non-compliance, to facilitate in the punishment of offenders. Early in the morning of 22nd September 2015, the 1st Respondent, an Advocate of the High Court of Kenya, was travelling from Maua where his office is to Meru High Court to attend to one of his matters. While on his way, somewhere past Muthara market, he was flagged down by the NTSA officers and told that their electronic speed gun had captured him speeding and that they wanted to book him for speeding. There was a back and forth between him and the officers and he was ultimately charged with 2 counts of speeding and having a cracked windscreen in Meru Traffic Case No. 10008 of 2015. The charges against him were however later withdrawn. He claims to have suffered and that his reputation was tarnished including to the minds of his client and other members of the public who believe that he was compromised. These feelings prompted him to file a suit for malicious prosecution, unlawful arrest and wrongful imprisonment being Tigania Civil Case No. 67 of 2016 and he was indeed successful. The trial Court awarded him Ksh 7.7 Million in damages to be paid by the Attorney General.

2. Being aggrieved by the Judgment of the trial Court, both the Attorney General and the National Transport and Safety Authority filed their respective appeals being Civil Appeal No. 56 of 2020 and Civil Appeal No. 52 of 2020. The two appeals were consolidated. Both the Attorney General and the National Transport and Safety Authority urge that the trial Court failed to appreciate the principles on the tort of malicious prosecution.

3. By the memorandum of appeal dated 20th July 2020, the Attorney General raised the following grounds of appeal: -

i) The learned Chief Magistrate erred in law and in fact by failing to appreciate the principles of malicious prosecution and unlawful arrest as alleged in the Plaintiff in his Judgment.

ii) The learned Magistrate erred in law and in fact by failing to consider the Appellant's evidence in his defence.

iii) The learned Magistrate erred in law and in fact by failing to properly analyze the evidence on record and find that the key ingredients of the tort of malicious prosecution had not been proven on the balance of probabilities.

iv) The learned Magistrate erred in law and in fact by awarding special and general damages when there was no documentary evidence to prove the Respondent incurred and/or suffered.

v) In all the circumstances of the case, the award of Ksh 7.7 million is exorbitant, unwarranted and not based on any judicial precedent and/or submission by Counsel.

vi) The Judgment by the Learned Magistrate is a miscarriage of the justice and an affront to the constitutional right to the Appellant to enjoy protection of the law.

4. The National Transport and Safety Authority filed the memorandum of appeal dated 27th July 2020 raising the following grounds of appeal: -

i) The learned Chief Magistrate erred in law and in fact by failing to properly find that the key ingredients of the tort of malicious prosecution had not been proved on the balance of probabilities.

ii) The learned Magistrate erred in law and in fact by disregarding the evidence tendered by the Appellant before arriving at his decision.

iii) The learned Magistrate erred in law by awarding special and general damages when there was no documentary evidence to prove that the 1st Respondent had incurred and/or suffered loss.

iv) The learned Magistrate erred in law and in fact by entering Judgment in favour of the Respondent when there was no evidence to prove that the arrest and prosecution of the 1st Respondent was malicious and without reasonable and/or probable cause.

v) The learned Magistrate erred in law and in fact by failing to consider the Appellant's Statement of Defence that the 1st Respondent had actually created disturbance in a manner likely to cause a breach of peace and the acquittal in the criminal case was based on a mere technicality.

vi) The Judgement of the learned Magistrate is a miscarriage of justice and an affront to the constitutional right of the Appellant to enjoy protection of law.

vii) The learned Magistrate erred in law and fact by shifting the burden of proof in the case to the Appellant.

viii) The learned Magistrate erred in law and fact in showing bias against the Appellant during the trial process.

ix) The learned Magistrate erred in law by passing Judgment without giving the Appellant time and opportunity to file submissions.

x) The learned Magistrate erred in law and fact by awarding the 1st Respondent excessive general damages in the sum of Ksh 7.7 Million.

5. Ultimately, the Appellants seek to have the Judgment of the trial Court and the award of Ksh 7.7 Million to be set aside. The Appeal was canvassed by way of written submissions.

Appellant's (Attorney General's) Submissions

6. The Appellant filed his submissions which are dated 3rd November 2020. Citing the provisions of *Torts, 18th Edition by Clerk and Lindsell at page 823* on malicious prosecution and the definition of malice under *the Black's Law Dictionary 2nd Edition*, the provisions of *Section 29 (a) and (b) of the Criminal Procedure Code* which provides for the powers of a police officer to arrest a person reasonably believed to have committed an offence as well as other authorities including the case of *John Ndeto Kyalo v Kenya Tea Development Authority & Another (2005) eKLR*, she urges that the 1st Respondent, was not able to prove all the essential elements of malicious prosecution on a balance of probabilities and hence his suit ought to have failed. Citing the case of *James Karuga Kiiru v Joseph Mwamburi & 2 Others (2001) eKLR*, she urges that the fact that charges were preferred against the 1st Respondent and later dropped was not a ground for him to file a suit for malicious prosecution and unlawful arrest. She submits that both the police and the Director of Public Prosecutions were discharging their mandate as provided for by the law and they were not in any way malicious to the 1st Respondent. She urges that there was reasonable and probable cause to arrest the 1st Respondent and to prefer charges against him and that the police officers who arrested the 1st Respondent were on duty discharging their lawful mandate. She urges that during the hearing, the 1st Respondent was not able on a

balance of probabilities to show that there was bad blood between him and the police and/or prosecution; that the police did not know the 1st Respondent and that a person cannot be malicious to another with whom they don't have bad blood with. She urges that the mere fact that the 1st Respondent was acquitted does not connote malice on the part of the police officers. She relies on the case of *James Karuga Kiiru vs Joseph Mwamburi & 2 Others (2001) eKLR*.

7. She highlighted the provisions of Section 42 of the Traffic Act Cap 403 Laws of Kenya which provides for speed limits and Section 14 (1) of the Police Act and Section 24 of the National Police Service Act, both of which provide for the functions of the police. She urges that the 1st Respondent was flagged down by the police officers and was thereafter informed that he had been driving beyond the speed limit. She urges that it is after the 1st Respondent committed the act of speeding, protested and refused to co-operate that he was arrested and charged with the offence, which is a cognizable one. She urges that the police officers were merely discharging their duty as no one is exempt from the law and that the 1st Respondent was not able to prove the allegations of malice on a balance of probabilities. Relying on the case of *Charity Karambu v Joseph Kinyua (2018) eKLR*, she urges that despite not having filed her submissions in the trial Court, the burden of proof does not shift from the 1st Respondent to prove his claim for malicious prosecution and that the trial Court in finding that the failure to file submissions meant that the 1st Respondent had not made his case. She also cites the cases of *Evans Nyakwana v Cleophas Bwana Ongaro and Karugi & Another v Kabiya & 3 Others (1987) KLR 347* and *Sections 107, 108 and 109 of the Evidence Act Cap 80 Laws of Kenya*.

8. She also urges that the 1st Respondent and his witness in the lower Court gave contradicting testimony as the 1st Respondent said that he had been driving at less than 80 km/hr and yet the NTSA officers claimed that he was driving at 120km/hr whereas his witness first said that the officers had accused the 1st Respondent of driving at 110km/hr and yet the said witness later said that he could not tell at what speed the 1st Respondent was driving at.

9. On special damages, she urges that these must not only be pleaded but also proved and that the 1st Respondent failed to produce any evidence including receipts and therefore his claim under this head should fail.

10. On general damages, she urges that the award of Ksh 7.7 Million is excessively high and was arrived at based on wrong principles of law. Relying on the case of *Dorcas Mututho Ileve vs Muithya Lydia (2018) eKLR*, she urges that that award was outrageous and not conventional.

11. She also urges that the 1st Respondent gave misleading submissions in the trial Court and that in one of the authorities cited by the 1st Respondent to urge his claim for general damages, no damages were in fact awarded. This is the case of *Simon Kamere v Attorney General & 2 Others (2008) eKLR*.

1st Respondent's Submissions

12. The 1st Respondent filed submissions dated 28th April 2021. He gave a brief background on the events of the morning of 22nd September 2015. That while on his way from Maua to Meru High Court, he was flagged down by police and NTSA officers who informed him that he had been speeding at 110km/hr. That being sure that he was not overspeeding, he informed the officers of this fact and this was confirmed by the 2 passengers that were in his vehicle. That the officers alleged that they had recorded his infractions with a speed gun. That being vast of his rights, he insisted on being shown the data of the speed gun as well as the calibration certificate from the Kenya Bureau of Standards. That this agitated the officers who turned hostile, insulted him and made very derogatory remarks to the effect that him being a lawyer, he was a thief just like other lawyers and that the vehicle he was driving was bought with stolen money.

13. That the officers vey unethically and illegally harassed him and that since a big crowd had gathered, they embarrassed him by bundling him out of his vehicle, handcuffing him and frog matching him all over the road before finally imprisoning him in a very unorthodox manner inside the NTSA vehicle. That during this debacle, good spirited members of the crowd that had gathered at the scene raised money to pay cash bail for the Respondent but the officers kept raising the amount in order to ensure that he does not get bailed out, despite of him pleading that he was required in the High Court. That at one point, the officers even made derogatory remarks about his mother. That after several hours of being imprisoned in the NTSA vehicle, he was ordered to drive to Meru town where he was put in the court cells before being taken to Court where he was charged with 2 counts of over speeding at 110km/hr and driving a vehicle without a windscreen.

14. That after being granted bond in Court, the joint team of officers further disenfranchised him by refusing to give him back his motor vehicle ignition keys which they had impounded after he parked his vehicle at Meru Police Station and that by the time of the trial at the subordinate Court, the officers had not released his keys.

15. That in the said case, Meru CM Traffic Case No. 1008 of 2015, the trial Court had ordered the Prosecution to provide the Respondent with the speed gun data proving overspeeding and the speed gun's calibration certificate and evidence of the wind screen cracking as well as witness statement and that after 4 hearings without the officers complying with this order and/or without the Prosecution witnesses attending a single hearing, on 25th July 2016, the Prosecution withdrew the charges. She urges that during hearing, these facts were corroborated and that the Attorney General did not call any witnesses while the NTSA officers called a witness who denied all wrong doing and blamed the police officers.

16. On the elements for the tort of malicious prosecution, she urges that they have all been part. She urges that it was a joint team of police officers and NTSA officers who set into motion his arrest, imprisonment and prosecution; That the prosecution was determined in his favour as the Prosecution was forced to withdraw the charges after the police officers and NTSA officers refused, failed and neglected to attend court on 4 different occasions and also failed to supply evidence and witness statements; That there was no reasonable or probable cause for his arrest, imprisonment and prosecution as his witnesses confirmed that he was not speeding and that both his witnesses and the NTSA witness confirmed the integrity of the windshield. He urges that the burden of proof as to the reasonableness of the actions of the officer and to the existence of a probable cause rests solely on the officers who are alleging so and that to the extent that the officers refused to offer evidence upon which the charges were based, there was no reasonable and/or probable cause. On malice, he urges that going by the

humiliation he was put through by the Appellant's agents during the arrest, for several hours thereafter and going by the unchallenged evidence of insults, attack on his profession, frustration of attempts to raise cash bail, discrimination on the amount of cash bail, handcuffing him, frog matching him while holding him on his belt all infer malice. That these actions were vindictive and capricious.

17. He urges that he indeed discharged the burden of proof to the required standard. He urges that in his Complaint, he sought for general, punitive, exemplary and/or aggravated damages for false arrest, wrongful imprisonment, malicious prosecution and harassment; That the Appellant's submissions shows that she is challenging the aspect of malicious prosecution and has not addressed himself to the three other torts which are of great importance too.

18. He urges that the learned Magistrate properly analyzed the evidence and law in arriving at quantum and was guided by among others the case of *Mohammed Feisal & 19 Others vs Henry Kandie & Others (2018) eKLR* where the Court awarded one of the Claimants who was an Advocate Ksh 3,000,000/= for a similar situation save that the instant situation entailed greater embarrassment, demeaning and humiliating experiences all of which actions were premised on his being an Advocate.

19. Concerning the remarks made by the Appellant that in the case of *Simon Kamere v Attorney General & 2 Others* that he had relied on in the trial Court and yet in the said case, no damages were awarded, he urged that Court in the case had pronounced itself clearly that it dismissed the suit over a technicality, being that it had been filed out of time and he however and most importantly posited that it had it not been for the technical hitch, the Court would have awarded the Claimant a global sum of Ksh 5,000,000/=. He urges that the award was not too high and thus there is no basis for this Court to interfere as the global figure of 7.7 Million is reasonable and well within the parameters of guidance as set out by different precedents, especially considering the viciousness and collous behavior exhibited by the Appellants agents in handling him. That all this was juxtaposed with the negative effects of their actions to the professional standing and respect of the Respondent by his clients and potential clients militate for the Respondent to retain the award.

2nd Respondent's (National Transport and Safety Authority's) Submissions

20. The 2nd Respondent filed submissions dated 26th February 2021 which are very similar to those filed by the Appellant. Citing the case of *John Ndeto Kyalo v Kenya Tea Development Authority & Another (2005) eKLR*, the text *Torts, 18th Edition by Clerk and Lindsell at page 82, Section 24 of the National Police Service Act and Section 29 of the Criminal Procedure Code*, she submits that the 1st Respondent failed to prove all the elements of malicious prosecution and that the police officer arresting him did not have authority to do so and thus, the suit should have been dismissed. Relying on the case of *James Karuga Kiiru v Jospeh Mwamburi & 2 Others*, she urges that the prosecution of a Defendant does not amount to malicious prosecution and that an acquittal does not amount to a ground to file a suit for malicious prosecution.

21. Relying on the case of *Evans Nyakwama v Cleophas Bwana Ongaro (2015)*, he urges that it is the 1st Respondent who had the burden of proof even though the Appellant failed to file submissions.

22. On special damages, she urges that these are awarded based on the financial burden incurred in mitigating the damage of injury and that a Plaintiff must plead, pray and prove special damages which the 1st Respondent did not do and thus should not be awarded special damages.

23. On general damages, she urges that the award of Ksh 7.7 Million was excessively high and was arrived at based on wrong principles.

Issues for Determination

24. From the Memorandum of Appeal and submissions by parties, the issues arising for determination are as follows: -

i) Whether the elements for the tort of malicious prosecution were established by the 1st Respondent.

ii) Whether the award of Ksh 7.7 Million as general damages was manifestly excessive.

Whether the elements for the tort of malicious prosecution were established by the 1st Respondent.

25. The tort of malicious prosecution is an intentional tort that seeks to provide redress to a Plaintiff, for losses incurred following unsuccessful and malicious proceedings which had been initiated without any lawful reasonable and/or probable cause by the Defendant.

26. While it is within any person's rights to approach the Courts and/or other quasi-judicial bodies to seek redress for what they believe was a violation of rights and/or was an offence committed, this right must be exercised within the confines and parameters of the law, and for the genuine and proper reasons the law allows for, otherwise, such exercise may be tantamount to abuse of process, which is in itself a wrong and/or violation attracting a claim for damages for malicious prosecution.

27. For a long time, the tort of malicious prosecution, as known in English Common law was only available to Plaintiffs against whom malicious criminal proceedings had been instituted and subsequently determined in their favour. The trend is however changing as we have recently witnessed the tort being extended and/or being available to persons against whom malicious civil proceedings have been instituted. See the UK Supreme Court, case of *Willers Vs Joyce and Another (2016) UKSC 43 50*. The matter herein was however filed following conclusion of criminal proceedings.

28. Turning to the element of the said tort, authorities have indicated them to be as follows: -

i) The Defendant must have been responsible for having caused the claim to be brought.

ii) The claim must have been determined in the Plaintiff's favour.

iii) The claim must have been brought without reasonable and/or probable cause.

iv) The Defendant must have been actuated by malice.

v) The Plaintiff must have suffered damage.

29. Instructively, the five elements apply conjunctively and all five must be present in order to successfully sustain a claim for damages for malicious prosecution. In the instant matter, the 1st Respondent claims to have been prosecuted with malice and without reasonable and /or any probable cause. As can be seen from submissions by parties, there are two competing interests which this Court must weigh in determining the matter. This include the freedom and statutory role of police officers to bring offenders of the law to justice and the need to protect innocent persons from falsified accusations.

30. This Court will analyze the existence or otherwise of each of these elements whilst applying them to the various arguments as raised by parties: -

Were the Appellant and the 2nd Respondent responsible for having caused the claim against the 1st Respondent to be brought?

31. It is not in dispute that it is the Appellant's and 2nd Respondent's agents, through the Director of Public Prosecution who initiated the charges against the 1st Respondent.

Was the claim determined in the 1st Respondent's favour?

32. On 25th July 2015, the Prosecution withdrew the charges against the 1st Respondent under Section 87 (a) of the Criminal Procedure Code, which is a discharge, although not entirely barring the Prosecution from bringing the same charges in future. It is therefore clear that the case was determined in favour of the 1st Respondent. According to *Winfield & Jolowicz on Tort*, at page 681,

'The Plaintiff must show that the prosecution ended in his favour, but so long as it did so it is of no moment how this came about, whether by a verdict or acquittal, or by discontinuance of the prosecution by leave of the court, or by quashing of the indictment for a defect in it, or because the proceedings were coram non iudice, or by nonsuit.'

33. In the premises, withdrawal of the charges leads to a positive finding that the proceedings were determined in the 1st Respondent's favour.

Was the claim brought without reasonable and/or probable cause.

34. In order to determine whether there was any probable and/or reasonable cause, the reasonable man standard applies. In the case of *Hicks v Faulkner (1878) 8 Q.B.D 167* at 171, the Court adopted the following definition of reasonable and probable cause: -

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

See also the case of *Kagane & Others vs Attorney General & Another (1969) E.A. 643*.

35. In the case of *Emmanuel Kuria Wa Gathoni v Commissioner of Police & another Civil Suit No. 934 of 2004 [2017] eKLR* L Njuguna held as follows with respect to the element of reasonable and probable cause: -

"Also in Samson John Nderitu v. The Attorney General (2010) eKLR it was held as follows:-

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

36. It is thus clear that the existence of a reasonable and probable case is dependent on the facts, circumstances, materials that the Prosecution had when charging the Plaintiff. It would thus be prudent to first of all ask the question whether there were any state of facts upon which the charges could be founded. In the present case, the 1st Respondent was charged with speeding and driving with a cracked windscreen.

37. The record of proceedings indicate DW1, an employee of the 2nd Respondent testifying that he could not tell whether the 1st Respondent's vehicle had a cracked windscreen. He also could not give details of the speed gun which was purportedly used to measure the speed at which the 1st Respondent was driving. The 1st Respondent's witnesses all testified to the effect that the 1st Respondent was not

speeding and that his windscreen was intact.

38. Although the Appellant and the 2nd Respondent claim that they are enjoined by law, being Section 14 (1) of the Police Act and Section 24 of the National Police Service Act to arrest persons believe to have committed an offence, this Court is not satisfied that the arrest were based on a firm belief that there was a state of facts which could sustain a conviction upon trial. It does not help that the Appellant and 2nd Respondent failed to avail witnesses in Court in the traffic case on all the four (4) occasions the matter came up and they also failed to supply the 1st Respondent with the evidence they intended to rely on despite the Court having ordered them to do so.

39. This Court is aware that a discharge under Section 87 (a) of the Criminal Procedure Code does not prevent the Prosecution from bringing the same charges against an accused person in future, but in the circumstances of the case, it being that despite 4 court attendances, no evidence was ever supplied and none of the Prosecution witnesses ever attended Court, this Court is not convinced that on a balance of probabilities, the Prosecution have any evidence against the 1st Respondent and/or they would be able to bring the same charges in the future. This Court finds that there was no reasonable and/or probable cause to bring the charges against the 1st Respondent.

Was the Appellant actuated by malice?

40. The element of malice is the epitome of malicious prosecution. Malice connotes the use of justice for some other motive other than bringing the Plaintiff to justice upon a reasonable belief that he is guilty. It is said that malice can be inferred from the lack of reasonable and probable cause but not vice versa. See the case of **Stephen Kaburu & 5 Others v Attorney General & 7 Others Civil Appeal No. 51 of 2016 (2018) eKLR**. This Court agrees as much because the probability or improbability of a party speeding remains the same however much the police officers who initiated the prosecution dislike the said accused of speeding. On the other hand, the probability that a prosecution was actuated by malice may be inferred from the fact that there was no reasonable and probable cause to institute the proceedings. In the present case, the fact that there appears to be no facts, by way of evidence upon which the 1st Respondent was believed to have been guilty for the offence of speeding and the other offence of driving with a cracked windscreen can be used to infer malice.

41. Of course, it would be probative if there was evidence that the 1st Respondent knew the police officers and the NTSA officers who arrested him. This Court however finds that malice can also be inferred from the manner in which the arrest and/or act being complained of was handled.

42. In the present case, it is on record that the officers who conducted the arrest were caught in a heavy exchange with the 1st Respondent after the 1st Respondent demanded for evidence that he was speeding being the speed gun. The 1st Respondent's witnesses testified to the effect that the Appellant's officers attacked the 1st Respondent's profession claiming that lawyers are thieves and the vehicle he was driving may have been purchased using stolen money. Notably, the Appellant and the 1st Respondents did not comment on the manner of arrest in that the 1st Respondent claims to have been humiliated, manhandled, handcuffed and incarcerated.

43. Further, there is the issue of cash bail. The 1st Respondent urged that the Appellant's officers frustrated his efforts to raise cash bail and in fact kept on raising the amount in a calculated manner to ensure that the 1st Respondent could not raise the same. He urged that members of the public helped him raise cash bail of Ksh 37,000/= but the Appellants' agents still refused this amount. It is also the 1st Respondent's case that the amount of cash bail applied to him was discriminatory as he was charged an exorbitant Ksh 50,000/= while other motorists were being charged a lesser amount for the same offence. This matter was discussed at length by the trial Court when determining the question of unlawful arrest and the Constitutional rights to bail, on reasonable conditions. In addition to its relevancy in the aspect of unlawful arrest, this Court finds that the said issue similarly finds relevance to the element of malice in malicious prosecution, to the extent that malice can be inferred from the circumstances of arrest which led to the charges.

44. The ultimate question is whether it can be seen, on a balance of probabilities, that the case was being used for some other skewed reason other than the ordinary pursuit of bringing the offender to justice. This Court finds in the affirmative. It is apparent that the Appellant's officers were engaged in a power struggle with the 1st Respondent and were determined to use their authority to frustrate the 1st Respondent by all means. It is not true that the omission to file submissions by the 2nd Respondent influenced the decision of the trial Court. This Court has perused the entire Judgment and this failure was not highlighted. This Court finds that the 1st Respondent indeed proved all the elements of the tort of malicious prosecution.

Whether the award of Ksh 7.7 Million as general damages was manifestly excessive.

45. The nature of damages recoverable in a claim for malicious prosecution is punitive, for the malicious acts of the Defendant and this is ordinarily in the form of general damages which are awarded to compensate the Plaintiff for tarnished reputation. In awarding damages, the trial Court observed as follows: -

'On the aspect of assessment of damages, this Court has taken into account that the Plaintiff is an Advocate renown in the region and the spectacle of his arrest, detention and prosecution the subject hereof was conducted in utterly degrading set of circumstances and in full glare of members of the public, some of them who were his clients, friends and acquaintances. He suffered the squalor of a jail cell and the stigma of a dock appearance like a common criminal over several months.'

46. The 1st Respondent claimed that his client, whom he was going to represent was given adverse orders as a result of the Appellant's actions. He claims that his reputation was tarnished among members of the public some of who were his clients. Although the 1st Respondent has argued that the Appellants do not seem to be challenging the awards under unlawful arrest and false imprisonment, this Court finds that this is not true since the award of Ksh 7.7 Million was awarded not only for malicious prosecution but also for unlawful arrest and false imprisonment. The award of Ksh 7.7 Million was broken down as follows: -

- i) *General damages for unlawful arrest* Ksh 100,000/=
 - ii) *Punitive damages for unlawful arrest* Ksh 1,000,000/=
 - iii) *General damages for false imprisonment* Ksh 100,000/=
 - iv) *Punitive damages for false imprisonment* Ksh 1,000,000/=
 - v) *General damages for malicious prosecution* Ksh 500,000/=
 - vi) *Punitive damages for malicious prosecution* Ksh 5,000,000/=
- Total** Ksh 7,700,000/=

47. Going by the above, it is important to look at the distinction between general damages and punitive damages. In the case of ***Brutus Nandwa wa Ambunya v Inspector General of Police & Another High Court Civil Case No. 166 of 2013 [2018] eKLR*** T. B. Jaden J held as follows: -

“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. (See the Court of appeal exposition in Obongo & another v Municipal Council of Kisumu [1971] EA 91)”

48. In the case of ***National Transport and Safety Authority & 2 others v Elisha Zebede Ongoya [2020] eKLR*** H. Omondi J held as follows: -

“On quantum of damages, the award of Ksh 3,500,000/= as general damages I take note of the approach in the case of James Mwangi Wanyoike & 9 Others v. A.G(2012) eKLR, where the court held that making an award of both exemplary and general damages was a double award. The case of Cassel and Co. Ltd v Broome and Anor (1972) AC where reference was made to the speech by Lord Devlin in Rookes v Bernard (1964) AC 1129 as follows:

“Thus a case of exemplary damages must be presented quite differently from one for compensatory damages, ... But the fact that these two sets of damages differ essentially, does not necessarily mean that there should be two awards...”

Exemplary damages are appropriate if the compensatory damages are considered inadequate and is aggravated by the way in which the defendant has behaved towards the plaintiff. The defendant’s conduct must be so outrageous and repeated as to warrant deterrence.

49. To this Court’s mind, exemplary damages are not automatically awarded but are only awarded when the general damages are not adequate to compensate the aggrieved party. It therefore does not always follow that a Court will award both damages. The Court is primarily concerned on whether the amount awarded serves the justice of the case.

50. In the present case, the actions of the Appellants’ agents which included among others the unconstitutional actions of imposing excessive, let alone discriminatory bail terms were arbitrary and oppressive thereby demanding punitive damages. Furthermore, the Prosecution compelled the 1st Respondent to attend Court on four different occasions over a prolonged period of ten (10) months from September 2015 to July 2016 when the charges were withdrawn. This was not necessary and they ought to have discharged him much earlier.

51. This Court is however of the view that the award of Ksh 5,000,000/= for punitive damages was excessive taking into account awards made in various other authorities. This Court has considered other authorities including the case of ***Emmanuel Kuria Wa Gathoni v Commissioner of Police & Another [2017] eKLR*** where the award of Ksh.5,000,000/= was made for general damages and Ksh 2,000,000/= was made for aggravated damages. The Plaintiff in this case was in prison remand for three (3) years unlike in the instant case where the 1st Respondent was held in custody for a few hours and the case went on for 10 months.

52. This Court will thus substitute the award for punitive damages for malicious prosecution of Ksh 5,000,000/= with an award of Ksh 1,000,000/=. It will also substitute the award for punitive damages for wrongful imprisonment of Ksh 1,000,000/= with an award of Ksh 500,000/= and the award for punitive damages for unlawful arrest of Ksh 1,000,000/= with an award of Ksh 500,000/=.

53. In doing so, this Court considers that the three causes of action of unlawful arrest, wrongful imprisonment and malicious prosecution are all parts of the same unlawful transaction and there is an element of overlapping compensation. In the end, the Courts substitutes the trial Courts finding on quantum with a total an award of **Ksh 2,700,000/=**.

54. The trial Court did not make any award on special damages and as such, the Appellant’s and 2nd Respondent’s submissions and grounds of appeal on this issue is erroneous.

ORDERS

55. In the end, this Court makes the following orders: -

- i) The Appellant's Appeal partially succeeds to the extent that the damages have been reviewed.*
- ii) The trial Court's award of Ksh 7.7 Million as damages is hereby set aside and substituted with an award of Ksh 2.7 Million.*
- iii) The trial Court's finding on liability for the torts of unlawful arrest, false imprisonment and malicious prosecution is hereby upheld.*
- iv) The findings on costs and interests by the trial Court remain undisturbed.*
- v) As each party has partially succeeded, each party shall bear their own costs of the Appeal.*

Order accordingly.

DATED AND DELIVERED ON THIS 24TH DAY OF JUNE, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. J. M. Kiongo, Senior Litigation Counsel for the Hon. Attorney General, the Appellant

M/S Mbogo & Muriuki Advocates, for the 1st Respondent

M/S Gakoi Maina & Co. Advocates for the 2nd Respondent.