



**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**CIVIL SUIT NO. 578 OF 2012**

**JOSEPH WAMOTO KARANI.....PLAINTIFF**

**-VERSUS-**

**C. DORMAN LIMITED.....1<sup>ST</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By a plaint dated 30<sup>th</sup> November 2012 and filed in court on 5<sup>th</sup> December 2012 supported by the witness statement, list of witnesses and list of documents all dated 30<sup>th</sup> November 2012 the Plaintiff's further list of documents dated 30<sup>th</sup> January 2013, the plaintiff **Joseph Wamoto** sued the Defendants **C. Dormans Limited** and **The Attorney General** seeking for special and general damages for **malicious prosecution**.

2. The suit is opposed by the 1<sup>st</sup> Defendant who filed a Defence on 17<sup>th</sup> January 2013 along with list of witness statements of Alphonse Andole and Monica Mungai.

3. The 2<sup>nd</sup> Defendant filed a statement of defence on 9<sup>th</sup> January 2013 but with no witness statements. The suit proceeded to full trial whereupon the Plaintiff called one witness whereas the 1<sup>st</sup> Defendant called two witnesses The 2<sup>nd</sup> Defendant Attorney General did not call any witness.

4. The plaintiff **Joseph Karani Wamoto** claims that he worked as a Security Guard for **Dormans Coffee Limited** and had been hired from **G4S, a security Company**. He claims that he was arrested on 12<sup>th</sup> October 2010 along with two other employees by police officers from Kilimani Police Station on allegations that he was involved in the theft of two motor vehicles Registration Numbers **KAT 550Y and KBL 703A** both the property of **C. Dormans Limited**, the 1<sup>st</sup> Defendant herein.

5. The plaintiff was later charged in **Kibera Magistrate's Court C.R No. 4459** of 2010 with three counts of; **(1) Theft of Motor Vehicle No. KBT 307A contrary to Section 278 (A) of the Penal Code**; **(2) Theft of Motor Vehicle No. KAT 305Y contrary to Section 278 (A) of the Penal Code** and **(3) failing to prevent a felony contrary to Section 392 of the Penal Code**. The complainant in the criminal case was the 1<sup>st</sup> Defendant herein **C. Dormans Limited**.

6. The plaintiff claims that he was remanded from **14<sup>th</sup> October 2010** to **2<sup>nd</sup> November 2011** when the Court released him on a free bond and after a trial, the Court in **Kibera C.R case No. 4459 of 2010** acquitted him under **Section 215 of the Criminal Procedure Code**. He therefore brought this claim for malicious prosecution seeking for general damages and special damages, costs and interest against the Defendants jointly and severally.

**Evidence tendered by the parties.**

7. The Plaintiff, **Joseph Wamoto Karani** testified on oath as (PW1) on his own behalf in support of his case and relied on his witness statement filed in court. He told the court that he was not an employee of the 1<sup>st</sup> Defendant **C. Dormans Limited** but that he was employed by a company called **Dormans Coffee Limited**. He narrated the circumstances leading to his arrest and arraignment in court. He categorically denied any involvement in the offences and told the court that his duties at **Dormans Coffee Limited** entailed body searches on employees, slicing bread, packaging and labeling, and that his duties were restricted to the bakery area only.

8. The plaintiff told the court that the other two guards charged alongside him were the ones tasked with the responsibility of guarding the 1<sup>st</sup> Defendant's property and that they were under the **SGS Security Company, not G4S which had employed the plaintiff**.

9. The plaintiff further told the court that as a result of his arrest and detention, he lost his job after his prosecution. He produced documentary evidence in support of his case contained in the Bundle of documents as **P exhibit-1**; Supplementary Bundle of documents as **P exhibit -2**; Letter from the Defendant – **P exhibit -4**; and Letter to the Attorney General **P exhibit-4**

10. The said exhibited documents comprised of certified copies of proceedings and judgment in **Kibera Criminal Case No. 4459 of 2010**; pay slips from G4S; contract between **G4S and Dormans Coffee Limited**; Notice of termination of employment of the plaintiff by G4S; copy of charge Sheet; and witness statements of **Alphonse Endole** and **Monica Mungai**.

11. The Plaintiff testified that he lost his job because of the unwarranted charges leveled against him. He further told the court that he was incarcerated for **18 months** awaiting completion of his trial and that he was later acquitted by the Court under **Section 215 of the Criminal Procedure Code** therefore he lost his earnings totaling **Kshs. 232, 308/=**. The Plaintiff therefore urged the court to award him General Damages for wrongful arrest and detention for 13 months and for malicious prosecution and Special damages of **Kshs. 232, 308/=**.

12. The plaintiff did not however, call any of the witnesses whose statements he had filed in court.

13. Both Defendants to this Suit entered appearance and filed defences. Beyond filing a Defence, there was no further participation in the Suit by the 2<sup>nd</sup> Defendant, the Honorable Attorney General.

14. 1<sup>st</sup> Defendant **C. DORMAN LIMITED** filed its Defence dated 14<sup>th</sup> January 2013 and called two (2) witnesses, **Monica Mungai (DW1)** and **Alphonse Endole (DW2)**. The two witnesses relied on their witness statements and the crux of their defence evidence is that once they reported the occurrence of the theft of the two motor vehicles to the police, they left the police to conduct their investigations. They maintained that the Police exercised their discretion in the prosecution of the plaintiff.

15. According to the two defence witnesses, the Plaintiff was an employee of G4S Security Company, deployed at the 1<sup>st</sup> defendant's premises for purposes of maintaining security at the 1<sup>st</sup> Defendant's premises. That two of the 1<sup>st</sup> Defendant's motor vehicles registration numbers KAT 550Y and KBL 703A were stolen from the 1<sup>st</sup> defendant's premises on the night on which the Plaintiff was on duty as a Security Guard. That the 1<sup>st</sup> Defendant's staff reported the theft of the motor vehicles to Kilimani Police Station; That Officers from Kilimani Police Station conducted investigations into the theft, and the police of their own motion decided to charge the Plaintiff (alongside two other Security Guards who were on duty on the night that the vehicles were stolen); That the 1<sup>st</sup> Defendant has no knowledge of the precise date on which the Plaintiff was remanded, if at all, or of the date on which he was eventually released; That as a private individual, the 1<sup>st</sup> Defendant had no capacity to institute or undertake criminal proceedings against the Plaintiff, as that was the role of law enforcement and reserved for the Director of Public Prosecutions. That the 1<sup>st</sup> Defendant cannot therefore be held responsible for the institution and conduct of criminal proceedings against the Plaintiff.

16. The 1<sup>st</sup> Defendant's witnesses denied that the 1<sup>st</sup> defendant caused the arrest and detention of the Plaintiff; failing to disclose "*exculpatory evidence*" in relation to the Plaintiff; or that it acted through its agents and employees in bad faith, maliciously, recklessly, or negligently on representations made to the Police; or giving false information to the Police as against the Plaintiff so as to get a conviction "*at all costs*"; and That it is only just and fair that the Plaintiff's Suit be dismissed with costs.

17. As earlier stated, there was no participation on behalf of the 2<sup>nd</sup> Defendant Attorney General.

## **SUBMISSIONS**

18. The plaintiff and the 1<sup>st</sup> defendant's advocates filed written submissions which they adopted canvassing the issues in the suit.

### **PLAINTIFF'S SUBMISSIONS**

19. The Plaintiff submitted that the 1<sup>st</sup> Defendant and the police did not have reasonable and/or probable cause to institute criminal proceedings against him and that the same was actuated by malice, bad faith, recklessness and negligence of the veracity of the allegations leveled against him.

20. The plaintiff's counsel submitted that the law is replete with authorities on the essential ingredients of the tort of malicious prosecution. He relied on the case of **MBOWA –VS- EASY MENGO ADMINISTRATION (1972) E.A** at **page 334**, where the Court laid out the ingredients for malicious prosecution thus;

*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. 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. Thus there must exist facts which on reasonable grounds, the Defendant genuinely believes that the Criminal proceedings are justified.*

*3. The Defendant must have acted maliciously. In other words the Defendant must have acted, in instituting the Criminal proceedings, with an improper and wrongful motive, that is, he must have had intent to use the legal process in question for some reason other than its legally appointed and appropriate purpose.*

*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...”*

21. On the question of who instituted or was instrumental in the prosecution of the criminal proceedings, it was submitted on behalf of the plaintiff that the 1<sup>st</sup> Defendant’s Agent and/or employees together with the police officers from Kilimani Police Station were instrumental in setting the law in motion against the Plaintiff.

22. Further, that the 1<sup>st</sup> Defendant’s Defence is that they only reported the matter to the police and left the police to do their work. This defence, it is claimed, is untenable going by the evidence that was tendered in **Kibera C.R No. 4459 of 2010. DW1 and DW2** where it was clear that the two witnesses for the 1<sup>st</sup> defendant and who were its employees are the ones who reported the matter to the police and that they also recorded statements in respect of the theft that happened on **11<sup>th</sup> October 2010**. Further, that it was **DW2** who went to call the Police and he did this since facts surrounding the offence were within his knowledge.

23. Further reliance was placed on the case of **ZABLON MWALUMA KADORI –VS- NATIONAL CEREAS& PRODUCTS BOARD (H.C.C.C. NO. 152 OF 1997 at MOMBASA)** where Justice Maraga (*as he then was*) held;

*“Regarding the institution of the prosecution, counsel for the Defendant submitted that arrest and prosecution of the Plaintiff was done by the state and the Defendant had nothing to do with it suggesting that the Plaintiff is in this case flogging the wrong horse. I cannot accept this argument. The Defendant did not have, by its own officers, to conduct the prosecution in order to be held as having instituted the proceedings. It is enough if it can be shown that they were actively instrumental in putting the law in force. ....the Defendant cannot therefore be heard to say that it did not institute the prosecution of the Plaintiff. I find that it did”.*

24. The plaintiff further relied on the writings by **CLERK & LINDSELL ON TORTS (20<sup>TH</sup> EDITION)** at page 1072 par. 16-11 where the authors posit;

*“In establishing the first essential element of the tort of malicious prosecution two key issues must be addressed, what constitutes a prosecution? And who is the Prosecutor? To prosecute is to set the law in motion, and the law is only set in motion by an appeal to some person clothed with judicial authority in regard to the matter in question, and to be liable for malicious prosecution a person must at least be actively instrumental into setting the in motion.....”*

25. The plaintiff’s counsel also drew the court’s attention to excerpts from the proceedings in **Kibera C.R No. 4459 of 2010** to demonstrate that the 1<sup>st</sup> Defendant’s employees set the law into motion.

26. On the Institution of the proceedings by the Defendants without reasonable or probable cause and maliciously, it was submitted that the Plaintiff in his Plaint set out the particulars of the Defendants’ malice in instigating the proceedings without reasonable or probable cause.

27. Further, that the Plaintiff was faced with the charges of theft contrary to **Section 278 (A)** of the **Penal Code** and failing to prevent a felony contrary to **Section 392 of Penal Code**.

28. That during trial and also in **Kibera C.R No. 4459 of 2010**, it was evident that the Plaintiff was employed by **Dormans Coffee Limited** and not the 1<sup>st</sup> Defendant herein who was the complainant in the said Criminal case.

29. It was further submitted that it is trite law that a company is a separate legal entity and even if they shared common directors (*which were never proved*), they remain distinct.

30. It was submitted that **DW1 & DW2** confirmed that they were both employees of **C. Dormans Limited, the (1<sup>st</sup> Defendant)** while the Plaintiff was employed by **Dormans Coffee Limited**.

31. In addition, it was submitted that in the particulars of the charge sheet on the alternative count of failing to prevent a felony, the same indicates or presupposes that the Plaintiff was employed by **C. Dormans Limited**, the 1<sup>st</sup> Defendant herein which is not the case. Further that both **DW1 & DW2** ought to have disclosed to the police the fact that the Plaintiff was employed by **Dormans Coffee Limited** and that his duties were not to guard **C. Dormans Limited** property or the latter’s side of the premises.

32. The plaintiff’s counsel submitted that both the 1<sup>st</sup> Defendant’s employees, who were **DW1 & DW2**, had a duty to disclose to the police both exculpatory and inculpatory evidence against the Plaintiff. That It is apparent that **DW1 & DW2** failed to disclose material evidence to the police and hence the same can safely be concluded as negligence and recklessness whereof malice should be inferred. It was further submitted that much evidence only came to light during cross-examination of **DW2** and a visit to the site by the trial court. Several instances were referred to to prove malice on the part of the 1<sup>st</sup> defendant namely that;

- a) **DW1 & DW2** statements to the police did not disclose that the Plaintiff was employed by a different entity and also the duties that had been assigned to him.
- b) **DW2** did not disclose to the police and in his statements to the police that he was the custodian of the keys of the vehicles subject of the theft.
- c) **DW2** did not disclose to the police that there were about **10** people who were at the bakery on the night of the theft.

d) DW2 did not disclose to the police or in his statement that there was an alarm system in the kitchen where the keys were kept and that the alarm did not go off that night.

e) DW1 & DW2 did not disclose to the police that some employees had resigned i.e a driver and a messenger. That this evidence only came out during cross-examination of **Mr. George Kiarie (PW3 in the criminal proceedings)**.

f) DW2 did not disclose to the police that his co-caretaker, **Mr. Kwatsima** was on leave and that he also had access to the kitchen where the keys to the stolen vehicles were kept.

g) DW2 did not disclose to the police that together with **Mr. Kwatsima** they had the codes of the alarm system.

33. The plaintiff's counsel also quoted some excerpts in the Kibera Court proceedings in order to demonstrate the above, to wit;

a) at **page 8**, line 10, while being cross-examined by the Plaintiff that;

*“...I did not know you well. You come to work when I have already left. You are an employee of Dormans Limited and not C. Dormans. Lost motor vehicles belong to C. Dormans and not Dormans Coffee Limited. You are employed by G4S.....SGS is employed to guard the motor vehicle”.*

b) At **page 25, Paragraph 3,Line 7**;

*“.....the place where the keys were locked was not locked. I had to lock....”.*

c) At **page 25, Paragraph 2**;

*“.....The people who had been fired had just been away for about 2 weeks.....”.*

d) At **page 28, paragraph 3**, police constable **Mathew Mwilu** during cross-examination;

*“.....I was not told that the former driver had been in the compound. I am not aware John Kwatsima a purported care taker-was seen talking to the drivers...”*

e) At **page 29, paragraph 1**;

*“...I do not know that there are employees of the bakery who work in the night shift. I am not aware that 8 other people were in that compound that night.....”*

f) At **page 938, Paragraph 2**;

*“.....I am not aware the door was to be locked and placed on alarm”.*

g) At **page 38, 1<sup>st</sup> line**;

*“.....I am not aware that 2 drivers were sacked on 1/10/10. At Paragraph 1, 11<sup>th</sup> line; “.....I was not shown any alarm.”*

h) At **page 40**, last Paragraph;

*“.....I put on the alarm it has a code. John Kwatsima has his code. John Kwatsima was on leave”.*

34. It was submitted that the police at Kilimani had no idea of the above fact which was only revealed upon cross-examination of **DW2** and when the Court visited the scene of crime

i. At **page 43, Paragraph 2**;

*“.....He never told me of an alarm system. I did not check on the alarm. The accused were the suspect who were handed to me...”I did not investigate them. I did not know some of the employees were on leave...”.*

35. Further reliance was placed on the case of **MARTIN –VS- WATSON (H.L.E) 1996** where the House of Lords held;

*“Allowing the appeal, that where a complainant had falsely and maliciously given police officer information indicating that a person was guilty of an offence and the facts relating to the alleged offence were solely within the complainant's knowledge, so that the officer could not have exercised any Independent discretion, the complainant, although not technically the prosecutor,*

*could properly be said to have been the person responsible for the prosecution having been brought, by having been actively instrumental in setting the law in motion, and as such could be sued for malicious prosecution by the individual wrongly charged; and that, accordingly, since the plaintiff had proved that the Defendant had been in substance the person responsible for the prosecution having been brought and that the prosecution having been brought and that she had done so maliciously and without reasonable and probable cause, the Defendant was liable in damages for malicious prosecution....”*

36. It was also submitted that during cross-examination, DW2 *admitted that the information that he withheld from the police was crucial in enabling them to carry out their investigations, which admission only points to recklessness and willful attempt to suppress information which was exculpatory in respect of the offences against the Plaintiff.*

37. It was further submitted that the police were equally reckless, negligent and malicious in conducting the prosecution against the Plaintiff and that this position is buttressed by the **proceedings and especially the testimony of the investigating officer in the Criminal case and the Judgment.**

38. It was submitted on behalf of the plaintiff that no proper investigations were done to warrant his prosecution. For instance, that in order for the police to charge the Plaintiff with the offence of failing to prevent a felony under **Section 392 of the Penal Code**, the police ought to have considered the material ingredients of the offence. Reliance was placed on the case of **APC RASHID & ANOTHER –VS- REPUBLIC (2012)eKLR** where the Court held;

*“A construction of Section 392 of the Penal Code however shows that it is not sufficient for the prosecution to prove that ambit of felonious offence occurred. The more important question is whether any of the Appellant knew that this felony was going to occur, hence at the design stage or witnessed it in progress. It is this limb of the offence which provides the mens rea even as the third limb. Failure to take reasonable measures to stop the commission of the felony provides the actus reus.”*

39. Further, that had the police been diligent and reasonable enough, they would not have preferred the charges against the plaintiff. Reference was made to the Judgment of the trial court to demonstrate the above argument and holding by the court to wit;

i. at **page 62, Paragraph 3;**

*“.....PW6 stated that he was the investigating officer in this case. He was handed three suspects allegedly guarding premises where 2 motor vehicles were stolen. He visited the premises being C. Dormans in the company of his colleague P.C Mbuvi. They were shown where the motor vehicles were parked. There were notices of break in. PW6 was convinced that the guards had an idea of the source of the theft. He charged them with the offence in court. In cross-examination by Maingi for Accused 3, PW6 conceded that he was never told of the existence of an alarm system. He was only told of the key which were checked on the alarm. He said he never investigated the caretaker.....He conceded that he never investigated the driver. He had no idea that there were certain employees on leave”.*

ii. further, that at **page 62 last line and page 63 Paragraph 1;**

*”...Accused confirmed that Accused 3 always worked inside and had no business outside. Accused 3 said he was on duty at Dorman’s Coffee where he had been deployed at the bakery. His work to conduct body search on bakery employees and ensure employees did not leave with items...”.*

iii. at **page 62, 14<sup>th</sup> line that;**

*“....The court had the chance to go to the scene of crime and has its own findings to make. It is not in doubt that the security of the entire premises was on the responsibility of Accused 1 and Accused 2. This is because the duty of Accused 3 was purely confined to the bakery where his role was very elaborate. I wonder why the police never recorded any statement from any one of 10 employees who were present at the bakery on the fateful night. These leave the Accused 1 and 2 as the most probable suspects. However there are many questions unanswered. First it took the court to go the scene to know that the door to the kitchen where the car keys were kept had an alarm system which operated it. This was never told to court by PW1 &PW2. Secondly, it emerged that only PW2 and another care taker by the name of Mr. John Kwatsima had the alarm code that opened the door to the kitchen....”.*

40. Reliance was placed on the case of **THOMAS MBOYA OLUOCH & ANOTHER –VS- LUCY MUTHONI STEPHEN & ANOTHER (2005) eKLR**, where the court at **page 21** held;

*“It is clear to me that, of the spinning of yarns of dubious evidence, this may be the apotheosis. I do not expect that any reasonable police officer or prosecution officer would bring 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. The prosecution in question was in my view, malicious prosecution, and accordingly I must determine this suit against the Defendants....”.*

41. Further reliance was placed on the case of **G.B.M KARIUKI –VS- ATTORNEY GENERAL (2016) eKLR** where the Court at **page 20** held;

*“...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 officer 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 prosecution arm of the government is not a mere conduit for complainants. The police must act impartially and independently on respect of a complaint and are expected to carry out through investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect....”.*

42. On the Acquittal of the Plaintiff, it was submitted by the plaintiff's counsel that the criminal case against him was terminated in his favour under Section 215 of the Criminal Procedure Code hence the Judgment of **Hon. Opande** settles this condition.

43. It was further submitted that the 2<sup>nd</sup> Defendant did not call any witness to controvert the assertions by the Plaintiff and that as such, the Court should find and hold that the suit as against the 2<sup>nd</sup> Defendant is unchallenged, as was held in the case of **CHRISPINE OTIENO CALEB –VS- ATTORNEY GENERAL (2014) eKLR** where **Justice G.V Odunga** held that:

*“Again in the case of Trust Bank Limited –vs- & 2 others Nairobi (Milimani) H.C.C.C. No. 1243 of 2001 the learned Judge citing the same decision stated that it is trite where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence by the Plaintiff against them is unconverted....”.*

44. On Damages payable, the plaintiff's counsel proposed a sum of Special damages of Kshs. 232, 304/= based on 18 months' salary at Kshs. 12, 906/= from 14<sup>th</sup> October 2010 to 2<sup>nd</sup> November 2011 and General damages of Kshs. 2, 000, 000/= as general damages to represent a just compensation to the Plaintiff for wrongful arrest, detention for 13 months and malicious prosecution, and relied on the cases of **CHRISPUS KARANJA NJOGU –VS- HON. A-G & KENYATTA UNIVERSITY NAIROBI [H.C.C.C.. NO. 574 of 2002]** where the court in 2008 awarded the Plaintiff **Kshs. 800, 000/=** for malicious prosecution; **ZABLON MWALUKA KADORI –VS- NATIONAL CEREALS & PROCEDURE BOARD [MOMBASA H.C.C.C. NO. 152 of 1997]** where the court in 2005 awarded a Plaintiff **Kshs. 500, 000/=** for malicious prosecution and **CHRISPINE OTIENO CALEB –VS- A-G [2014] EKLK (Supru)** where the court in 2014 awarded the Plaintiff **Kshs. 2, 000, 000/=** for malicious prosecution and **Kshs. 500, 000/=** as punitive exemplary

45. The plaintiff also prayed for costs of the suit and interest.

#### **THE 1ST DEFENDANT'S SUBMISSIONS**

46. The 1<sup>st</sup> defendant filed submissions and framed issues and additional issues for the court's determination namely:-

- a) *Whether the Plaintiff's arrest by the Police on 12<sup>th</sup> October 2010 was wrongful, and if it was, who would be liable for it;*
- b) *Whether the Plaintiff's detention on 14<sup>th</sup> October 2010 was wrongful, and if it was, who would be liable for it;*
- c) *Whether the Plaintiff's prosecution in Chief Magistrate's Court (Kibera) Criminal Case Number 4459 of 2010 was malicious, and if it was, who would be liable for it;*
- d) *If the Plaintiff's arrest, detention or prosecution was unlawful, what amount of damages would be adequate to compensate him, and who would be liable to pay the damages.*

47. In addition to the issues set out above, the 1<sup>st</sup> defendant's counsel suggested additional issues for the court's consideration given the law applicable to the torts of wrongful arrest, wrongful detention and malicious prosecution. These are:

- a) *Whether the Kenya Police Service was a necessary party to the Plaintiff's Suit;*
- b) *Whether the Plaintiff's failure to enjoin the Kenya Police Service as a party to the Suit is fatal to the Suit;*
- c) *Whether a private individual, such as the 1<sup>st</sup> Defendant, can be liable under the torts of wrongful arrest, wrongful detention and malicious prosecution, and if so, under what circumstances.*

47. In the 1<sup>st</sup> defendant's lengthy submissions filed by its counsel and supported by case law and statutory law, it was submitted that it is evident from the Court Proceedings that the Prosecutors were Kenya Police Inspectors in that at one time it was Chief Inspector Mwale, at another Chief Inspector Mugambi and Chief Inspector Kilonzo, who called six (6) witnesses to testify on several aspects of the Case in the trial court and the witnesses were:

1. *Monica Mungai (C. Dorman Limited's employee)*
2. *Alphonse Andole (C. Dorman Limited's employee)*
3. *George Kiarie (C. Dorman Limited's employee)*

4. P.C Mathews Mwilu – Kilimani Police Station (Arresting Officer)

5. Corporal Benson Ingosi – Kilimani Police Station (Arresting Officer)

6. Chief Inspector Benard Gicheru Maina – Special Crime Prevention Unit, Nairobi Area – (Investigating Officer).

48. It was submitted on behalf of the 1<sup>st</sup> defendant that from the testimonies of the 1<sup>st</sup> Defendant's employees Ms. Monica Mungai, Mr. Alphonse Andole and Mr. George Kiarie as set down in the Court Proceedings, it is clear that:

a) *Their testimonies in the Criminal Case was limited to facts that were in their knowledge, being that: motor vehicles registration numbers KAT 550Y and KBL 703A belonged to the 1<sup>st</sup> Defendant herein; on 11<sup>th</sup> October 2010 they were packed at the Parking Lot next to the 1<sup>st</sup> Defendant's offices; that they were found to be missing from the said Parking Lot on 12<sup>th</sup> October 2010; and that*

b) *They did not have any knowledge of the person(s) who were behind the theft and neither did they insinuate that the Plaintiff herein or any of his co-accused were culpable.*

49. It was submitted that at Page 14 of the Court Proceedings, Ms. Monica Mungai the 1<sup>st</sup> Defendant's Administrator stated in the Criminal Court, on cross examination by the 2<sup>nd</sup> Accused: ***"I do not know how the theft took place"***.

50. It was also submitted that the testimony of Prosecution Witness No. 6, Chief Inspector Benard Gicheru Maina (at Page 44 and 45 of the Plaintiff's Bundle of Documents) tells exactly who made the decision to charge the Plaintiff and why in that he stated on oath as follows..... *"I took a colleague P.C Mbuvi, we went to the Company for further investigations. We were shown where the motor vehicles were packed. It was between the administration building and the I.T Building. We checked for any traces of break but there was none. There was no breakage of the perimeter wall. **We were convinced that the guards had an idea of the source of the theft. We charged the accused persons with the offence in Court.***

***"The accused were unable to explain how the motor vehicle left the compound. They refused to explain. We charged them in Court."***

***"I visited the scene of crime. By the time of taking over the investigations I decided who to charge."***

51. According to the 1<sup>st</sup> defendants, prayer (a) of the Plaintiff denotes that the Plaintiff's claim is in respect of alleged wrongful arrest, wrongful detention for 13 months, and malicious prosecution. It was submitted that David Maraga, J. (as he then was) in **John Ndeto Kyalo -vs- Kenya Tea Development Authority and the Hon. Attorney General, High Court (Mombasa) Civil Case No. 502 of 1999 [2005] eKLR**, at Paragraphs 4 and 5 of his Judgment stated follows:

a) *claims for false imprisonment and malicious prosecution are distinct causes of action, and even though the evidence that may be adduced by a Plaintiff may cover them both, the evidence must prove each of them distinctly, on a balance of probabilities;*

b) *as regards a claim for false imprisonment, the cause of action would arise on the last day of the period of the alleged imprisonment;*

c) *by dint of Section 3(1) of the Public Authorities Limitations of Actions Act, a claim for false imprisonment would be time barred as against the Attorney General unless instituted within one year of the last day of the period of the alleged imprisonment.*

52. **On** whether the police were necessary parties to the plaintiff's suit, it was submitted that from the pleadings and testimony by the plaintiff, it is clear that the substratum of the Plaintiff's complaint is with respect to the conduct of the Police and therefore he **should have enjoined the Kenya Police Service as a defendant to the Suit. Reliance was placed on** the Court of Appeal decision (Nyeri) (Gachuhi, Kwach & Muli, JJ.A.) in **Jadiel Nyaga v. Silas Mucheke C.A. Civil Appeal No. 59 of 1987 (Unreported), cited in Henry Giflex Ombati vs. University of Nairobi High Court (Nairobi) Civil Case No. 2682 of 1998 [2001] eKLR** where it was held:

***"The Respondent's case as it appears in the Plaintiff was that he claimed damages for false arrest, malicious prosecution and false imprisonment. He did not join the Police in the suit although it was clear that the acts complained of were in fact committed by the Police. The Appellant had made a complaint or the report to the GFT***

***Police and nothing more. What followed had nothing to do with him. The decision to arrest the Respondent was made by the Police who must have found some merit in the report. They decided to, detain, to charge and to prosecute the Respondent....The Respondent's suit was a non -starter for failure to join the police who were the main actors on the stage as far as the Respondent's claim was concerned."***

53. Further reliance was placed on **Civil Appeal No. 130 of 2010: Lake Victoria Water Services Board -vs- Martin Okola(Kisumu)** where the High Court addressed the question of non-joinder of the Police as follows:

***"Although the above grounds ought to dispose this appeal, the other issues of failing to enjoin the Attorney-General and police are equally valid. Clearly the complainant in that case was not the one who led to the arrest and prosecution of the respondent. In his testimony he told the court that he was incarcerated for about 5 hours and released at the police station. In the criminal regime***

it is only the business of a complainant to raise forth a complaint but the decision of arrest and prosecution is left to the wisdom of the police. **In that case the police were not enjoined which then made the entire case fatal.**”

54. The 1<sup>st</sup> defendant’s counsel maintained that the Plaintiff’s failure to enjoin the Kenya Police Service as a defendant in this Suit was not just legally wrong, but the default hampers the court’s ability to test the facts of the Plaintiff’s claim of wrongful arrest and prosecution. This is so as it was the Police who arrested the Plaintiff and made the decision to charge him in the criminal case hence only the Kenya Police Service would be best placed to tell the Court what reasons they had for arresting and charging the Plaintiff.

55. The 1<sup>st</sup> defendant urged the court to adopt the holding of the Court of Appeal in **Jadiel Nyaga v. Silas Mucheke (Supra)** and to find, rightly so, that the Plaintiff’s failure to enjoin the Kenya Police Service is fatal to his claim.

56. On the issue of whether a private individual, such as the 1<sup>st</sup> defendant, can be liable under the torts of wrongful arrest, wrongful detention and malicious prosecution, the 1<sup>st</sup> defendant relied on **(Nairobi) High Court Civil Suit No. 2547 of 1998: Douglas Odhiambo Apel & another vs. Telkom Kenya Limited, the Commissioner of Police and the Attorney General** where Justice Kihara Kariuki (as he then was) at Page 2 – 3 of the Judgment, rendered himself as follows:

*“The second difficulty is that by the time the case came before me for Judgment, the claim against the Commissioner of Police and the Attorney General had already been withdrawn leaving Telkom Kenya as the sole Defendant in the Suit. **The Plaintiffs were arrested and charged by the police.** And the prosecution was undertaken by the Attorney-General as Public Prosecutor. Telkom Kenya was merely a complainant. The decision to charge and prosecute the plaintiffs was taken by the Police and the Attorney-General. Telkom Kenya as a complainant would not have been involved in the process. Once Telkom Kenya had made a complaint to the police, it was left to police to investigate the complaint and decide whether or not to charge the plaintiffs. **That is why in a claim for damages for unlawful arrest, false imprisonment and malicious prosecution the proper defendant is always the Attorney General.**”*

57. It was submitted that the decision of the High Court in **Douglas Odhiambo Apel & another vs. Telkom Kenya Limited, the Commissioner of Police and the Attorney General (supra)** was appealed against at the Court of Appeal, and the Court of Appeal (Nambuye, Ouko, Kiage JJA) in **Civil Appeal No. 115 of 2006: Douglas Odhiambo Apel & another vs. Telkom Kenya Limited [eKLR 2014]** stated thus:

*“On the law of malicious prosecution, we do not doubt that the judge directed himself properly in holding that the claim lay as against the Attorney General alone. He was also correct in holding that the withdrawal of the suit against the Commissioner of Police and the Attorney-General meant that that claim was essentially non-suited.”*

58. On the strength of the decision of the High Court as upheld by the Court of Appeal in **Civil Appeal No. 115 of 2006: Douglas Odhiambo Apel & another vs. Telkom Kenya Limited [eKLR 2014]**, the 1<sup>st</sup> defendant submitted that the law in Kenya as respects the torts of unlawful arrest, false imprisonment and malicious prosecution, is that it is the Attorney General **alone** who can be held liable in damages.

59. On whether the plaintiff’s arrest by the police on 12<sup>th</sup> October 2010 was wrongful, and if it was, who would be liable for it, the 1<sup>st</sup> defendant’s counsel submitted that the Statement of Prosecution Witness Number 4 in the Criminal Case, the Arresting Officer Police Constable Mathews Mwilu, sets out the circumstances under which the Plaintiff was arrested. He states as follows (**See Page 31 of the Plaintiff’s Bundle of Documents / Page 24 of the Court Proceedings in the Criminal Case**):

*“On 12/10/10 I was at the Station. I was called by Corporal Benson Ingosi... He had some one who had reported a case of car theft...the person was **Alphonse Andole**”*

*“They were interrogated for more than 30 minutes. We reached there at about 7.30am. I talked to them. They were taken to the Station for further investigations. I only arrested.”*

60. The 1<sup>st</sup> defendant’s counsel also quoted the Plaintiff, in his defence in the Criminal Suit, where he stated as follows regarding the events in the morning of 12<sup>th</sup> October 2010 (**See Page 55 of the Plaintiff’s Bundle of Documents / Page 48 of the Court Proceedings in the Criminal Case**):

*“After I had finished my work, the day shift guard came in and I handed in the shift. There was nothing abnormal. I changed uniform. As I was about to leave, care taker Alphonse came to the Station where I was with two Police Officers. One [Police Officer] asked me whether I knew why they were there. I said I do not know. He told me they were present because cars had been stolen at C. Dorman side. **They asked me to go write a statement at Police. I refused. I told them I had nothing to write since nothing happened at my station.**...I was asked to get into the alarm motor vehicle.... We went upto Kilimani Police.”*

61. It was submitted that from the statements of the Plaintiff and the Arresting Officer as set out above, that:

a) On the morning of 12<sup>th</sup> October 2010, Mr. Alphonse Andole, an employee of the 1<sup>st</sup> Defendant herein, went to Kilimani Police Station and reported two of the 1<sup>st</sup> Defendant’s vehicles as having been stolen;

b) Police Officers from Kilimani Police Station went to the 1<sup>st</sup> Defendant’s premises, and embarked on preliminary investigations;

c) *In the course of their investigations the Police Officers sought to interrogate the Security Guards who were on duty on the night of 11<sup>th</sup> October 2010, including the Plaintiff herein;*

d) *The Police Officers requested the Plaintiff to accompany them to Kilimani Police Station so as to record a statement. The Plaintiff was uncooperative. He refused to do so;*

e) *Following the Plaintiff's refusal to cooperate with the Police, they arrested him, alongside the other Security Guards, and took them to Kilimani Police Station for further investigations.*

62. It was submitted that the questions that beg determination are from the facts set out above are whether:

a) *A deduction of wrongful arrest could be made; and*

b) *Whether the 1<sup>st</sup> Defendant could be held liable for the Plaintiff's arrest, if the arrest is held to have been wrongful.*

63. The 1<sup>st</sup> defendant's counsel relied on the decision by the High Court at Eldoret in **High Court Civil Appeal No. 89 of 2002: Services Limited -vs- Charles Obingo Angujo [2005] eKLR** which addressed the question of wrongful arrest as follows:

***“It is clear from the above that for a claim of false arrest or false imprisonment to succeed there must be a report which was false and actuated by malice. The arrest should be attributed to the defendant either because he arrested on that false report or that the police arrested on the basis of his false report.”***

64. It was submitted that it is evident from the testimony of the Arresting Officer Police Constable Mathews Mwilu that the report that was lodged at the Kilimani Police Station on 12<sup>th</sup> October 2010 was that vehicles belonging to the 1<sup>st</sup> Defendant had been stolen from the 1<sup>st</sup> Defendant's premises. That this report was true. It was not actuated by malice, and that indeed the Criminal Court in its Judgment found that the vehicles had indeed been stolen.

65. Accordingly, it was submitted that there is no evidence whatsoever in any of the documents provided by the Plaintiff, of the 1<sup>st</sup> Defendant or any of its employees having suggested to the Police that the Plaintiff was involved in the theft of the vehicles. Further, that indeed, from the Plaintiff's and the Arresting Officer's statements in the Criminal Suit, it is clear that the Plaintiff was arrested following preliminary interrogations by the Police and following his refusal to accompany them to the Police Station. That had he co-operated with the Police, he probably would not have been arrested.

66. It was therefore submitted that the Plaintiff's proposition under Paragraph 10 of the Plaintiff's Complaint that the 1<sup>st</sup> Defendant caused his arrest is unsupported by the documentary evidence available to him. Further, that in fact, the documentary evidence disproves the Plaintiff's suggestion and that it is a proposition made with the aim of propping up the Plaintiff's chances at securing a finding against the 1<sup>st</sup> Defendant in this Suit.

67. The 1<sup>st</sup> defendant's counsel further submitted that the Plaintiff himself does not believe in the 1<sup>st</sup> Defendant's liability in this respect. That what he believes is that any liability for wrongful arrest should be borne by the Police as shown by the **Notice to the Attorney General** dated 29<sup>th</sup> March 2012 issued by his Advocate, a copy of which is contained at Page 65 of the Plaintiff's Bundle of Documents. It is noted, under Paragraph 1(a) and (b) of the Notice as follows:

***“That on or about the 12<sup>th</sup> day of October, 2010, police officers from Kilimani Police Station maliciously, unlawfully and without any justifiable cause arrested Joseph Wamoto and thereafter maliciously and unlawfully prosecuted him...”***

68. It was therefore submitted that there can be no sustainable cause of action for wrongful arrest against the 1<sup>st</sup> Defendant as there is no evidence in support of it.

69. As against the Attorney General, it was submitted that a claim for wrongful arrest would be time barred, by dint of section 3(1) of the **Public Authorities Limitation Act, Chapter 39 Laws of Kenya for reasons that the section provides:**

***“No proceedings founded on tort shall be brought against the Government...after the end of twelve months from the date on which the cause of action accrued”***

70. In this case, it was submitted that a cause of **action for wrongful arrest would have arisen on the date of the arrest, 12<sup>th</sup> October 2010 and the** Plaintiff would then have had one year from that point to file a claim for wrongful arrest, enjoining the Attorney General. That that window came to a close on **11<sup>th</sup> October 2011 since the** Plaintiff instituted this suit on **5<sup>th</sup> December 2012.** That at the point of institution of the Suit the Plaintiff had the option of lodging an application for extension of time to claim for wrongful arrest and not having done so, the claim for wrongful arrest is statute barred and therefore incompetently before the court.

71. In addition, it was submitted that in the event that the Court finds the arrest to have been wrongful, only the Attorney General can be held liable for it.

72. On the question of whether the plaintiff's detention from 14<sup>th</sup> October 2010 to 2<sup>nd</sup> November 2011 was wrongful, and if it was, who

would be liable for it, the 1<sup>st</sup> defendant submitted that at Paragraph 8 of the Plaintiff's averments that **"he was remanded at Industrial Area Remand Prison on 14<sup>th</sup> October 2010 upon taking plea in Court and remained incarcerated in remand until 2<sup>nd</sup> November 2011 when he was released by the Court on a free bond"**.

73. That at Paragraph 11 of the Plaintiff's averments that his incarceration was wrongful and injured him in the following respects:

a) injured his credit, character and reputation, in addition to causing him inconvenience and anxiety;

b) caused him to lose the income he would have earned had he not been incarcerated. He computes loss of income as follows: (**18 months** \* 12,906 = Kshs 232,308/=).

74. It was submitted that under the Prayers set out in the Plaintiff's averments, the Plaintiff, in respect of the alleged wrongful detention seeks:

a) General damages for wrongful...detention for **13 months**; and,

b) Special damages of Kshs 232,304/=.

75. That that being the case, the 1<sup>st</sup> defendant contends that the following facts should be noted:

a) the Plaintiff has not provided any particulars or evidence of the alleged injury to his credit, character and reputation;

b) the Plaintiff was in remand from 14<sup>th</sup> October 2010 to 2<sup>nd</sup> November 2011, which is in effect a period of twelve and a half months, not 18 months as stated under Paragraph 11 of the Plaintiff's averments or 13 months as stated under the Prayer (a) of the Plaintiff's averments;

c) No evidentiary basis has been laid by the Plaintiff in support of the averment that he would have been earning Kshs 12,906/= per month, had he not been incarcerated. His Pay Slip for September 2010, annexed at Page 60 of the Plaintiff's Bundle of Documents, provides a net pay of Kshs 7,480/=;

d) multiplying Kshs 7480 by 12.5 months would give one Kshs 93,500/=, not the Kshs 232,304/= prayed for;

e) In his Demand Letter dated 31<sup>st</sup> July 2012 addressed to the 1<sup>st</sup> Defendant, the Plaintiff demanded for "Kshs 154,872.00 being lost salary during the time he was remanded in prison, together with general damages for loss of freedom, pain and suffering". A copy of this letter is contained at Pages 63 and 64 of the Plaintiff's Bundle of Documents. The figure sought in the Plaintiff's averments is almost double that sought in the Demand Letter, yet the amount sought in the Demand is stated to comprise both special and general damages;

f) in seeking special damages for loss of earnings, the Plaintiff fails to credit the Kshs 59,280/= that he received from his then employer G4S Security Services (K) Limited upon termination of his employment on 20<sup>th</sup> December 2010;

g) No evidence was availed that would establish that the Plaintiff's loss of his job was a result of his incarceration. Any loss of earnings arising from the termination of the Plaintiff's employment cannot therefore be held, on a balance of probabilities, to have arisen from the Plaintiff's detention.

76. The 1<sup>st</sup> defendant also submitted that the law on the tort of wrongful detention was set out by David Maraga, J. (as he then was) in **High Court (Mombasa) Civil Case No. 502 of 1999 [2005] eKLR: John Ndeto Kyalo -vs- Kenya Tea Development Authority and the Hon. Attorney General**, at Paragraphs 4 and 5 where he noted:

a) **claims for false imprisonment (wrongful detention) and malicious prosecution are distinct causes of action, and even though the evidence that may be adduced by a Plaintiff may cover them both, the evidence must prove each of them distinctly, on a balance of probabilities;**

b) **as regards a claim for false imprisonment (wrongful detention), the cause of action would arise on the last day of the period of the alleged imprisonment;**

c) **by dint of Section 3(1) of the Public Authorities Limitations of Actions Act, a claim for false imprisonment (wrongful detention) would be time barred as against the Attorney General unless instituted within one year of the last day of the period of the alleged imprisonment;**

d) **a Defendant would not be liable to a Plaintiff for wrongful detention, where the detention was as a result of a Court Order remanding the Plaintiff in custody pending hearing of the Suit as the Defendant would have had no control over the Court giving the order. For this proposition Maraga J. placed reliance on Katerregga -vs- Attorney General, High Court of Uganda (Kampala), High Court Civil Case No. 96 of 1971 (1973) EA 287 as well as Juma Khamisi Kariuki -vs- East Africa Industries Limited And George Okoko, High Court of Kenya At Nairobi, Civil Case No 1414 of 1980 [1986] eKLR.**

77. Further reliance was placed on the **Juma Khamisi Kariuki** case (*supra*) where the Court rendered itself as follows:

**"The plaintiff alleges false imprisonment and says that he was remanded in prison for three months and four days. This**

however, was the result of an order made in Makadara Court....In the *Katerregga* case, at page 288 paragraph 8, Mead J, in commenting on a case where the imprisonment of the plaintiff was the result of magisterial remand orders, says this:

*“The defendant is not liable for these magisterial acts, the magistrate not being a person for whose acts the defendant in the present instant is liable. The proposition that a person instituting legal proceedings before a court is not liable in respect of imprisonment where the imprisonment is the result of a court order has long been established in English law; Lock v Ashton [1848] 12 QBD 871 and the more recent case of Diamond v Minter [1941] 1 KB 656 at page 674.”*

78. On the strength of the authorities quoted above, it was the 1<sup>st</sup> defendant’s considered view that the 1<sup>st</sup> Defendant cannot be held liable under a cause of action for wrongful detention since the detention complained of occurred pursuant to an order of the Magistrate Court made by Hon. Mrs. Nyakundi on 14<sup>th</sup> October 2010 in *Chief Magistrate’s Court (Kibera) Criminal Case Number 4459 of 2010* as is borne out by Paragraph 8 of the Plaintiff and therefore the general damages and special damages sought on account of the alleged wrongful detention cannot be granted as against the 1<sup>st</sup> Defendant.

79. Further, that as against the Attorney General, a claim for wrongful detention would be time barred, by dint of section 3(1) of the **Public Authorities Limitation Act, Chapter 39 Laws of Kenya which stipulates that** “No proceedings founded on tort shall be brought against the Government...after the end of twelve months from the date on which the cause of action accrued.”

80. On the issue of whether the plaintiff’s prosecution was malicious, and if it was, who would be liable for it, was submitted that the factual background behind the Plaintiff’s prosecution is clear: following a reported theft of two vehicles belonging to the 1<sup>st</sup> Defendant, Police Officers drawn from Kilimani Police Station conducted investigation and on the basis of their investigations decided to charge the Plaintiff, and two other persons, in *Chief Magistrate’s Court (Kibera) Criminal Case Number 4459 of 2010*.

81. Further, that documentary evidence provided by the Plaintiff clearly indicates who made the decision to prosecute the Plaintiff and why. In this case, it was submitted that in any event-

- a) *The 1<sup>st</sup> Defendant did not, at the material time, know how the motor vehicles were stolen or who was behind the theft;*
- b) *Police Officers investigating the theft, on the basis of the findings of their investigations, unilaterally made the decision to charge the Plaintiff, alongside two other persons, for the theft of the motor vehicles.*

82. It was therefore submitted in contention that it beats logic why the Plaintiff would subsequently lodge a claim for malicious prosecution against the 1<sup>st</sup> Defendant, given the fact that he had the benefit of documentary material that clearly notes that the decision to prosecute him was made by the Police, without any influence from the 1<sup>st</sup> Defendant complainant.

83. It was further submitted that although the plaintiff at Paragraph 10 of the Plaintiff, avers that the Criminal Prosecution against him was instigated by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant without any reasonable and probable cause, was actuated by malice; and that the Plaintiff then particularizes the claim against the 1<sup>st</sup> Defendant as follows:

- a) *Causing the arrest and detention of the Plaintiff without reasonable and probable cause while in the knowledge that the Plaintiff was neither its employee nor did he owe it a duty of care;*
- b) *Failing to disclose to the Police exculpatory evidence in its possession;*
- c) *Acting through its agents and/or employees in bad faith, and negligently in relation to representations made to the Police;*
- d) *Giving false information to the Police and/or misrepresenting facts as against the Plaintiff in order to get a conviction at all costs.*

84. It was submitted that on the facts and on the law there is no scope for holding the 1<sup>st</sup> Defendant liable to the Plaintiff in the tort of malicious prosecution and that the plaintiff has not established, on a balance of probabilities as stipulated in the Court of Appeal case (Nambuye, Ouko, Kiage JJA) in *Civil Appeal No. 115 of 2006: Douglas Odhiambo Apel & another vs. Telkom Kenya Limited [eKLR 2014]* where the Court stated thus:

*“On the law of malicious prosecution, we do not doubt that the judge directed himself properly in holding that the claim lay as against the Attorney General alone.”*

85. Reliance was placed on **Clerk, John Frederic, Clerk and Lindsell on Torts (18<sup>th</sup> ed., 2000)** at page 823 Paragraph 16-06, which states, regarding the elements of the tort of malicious prosecution:

*“In an action of malicious prosecution the claimant must show first that he was prosecuted by the defendant, that the law was set in motion against him on a criminal charge; secondly that the prosecution was determined in his favour; thirdly that it was without reasonable and probable cause; fourthly, that it was malicious. The onus of proving everyone of this is on the claimant. Evidence of malice of whatever degree cannot be invoked to dispense with or diminish the need to establish separately each of the first three elements of the tort”.*

86. It was submitted that on the whole, the 1<sup>st</sup> defendant had reasonable cause to report to the police the loss of its two motor vehicles and in doing so it had no malice. That being the case, there is no way it would be held liable for malicious prosecution even if the prosecution as mounted by the second defendant against the plaintiff was terminated in favour of the plaintiff.

87. Reliance was placed on **Clerk and Lindsell**, at Page 821, regarding the need to exercise caution in cases of malicious prosecution:

*“...in relation to malicious prosecution the interests of the claimant must be weighed against the defendant’s right to institute proceedings if he does so with the honest intention of protecting his own, or the public interest, or if the circumstances are such that whatever the defendant’s own motives there are good grounds for instituting a prosecution”*

88. The 1<sup>st</sup> defendant further claimed that Clerk and Lindsell cites **Fleming, The Law of Torts (8<sup>th</sup> ed., 1992), p.609**, thus:

*“The tort of malicious prosecution is dominated by the problems of balancing two countervailing interests of high social importance: safeguarding the individual from being harassed by unjustifiable litigation and encouraging citizens to aid in law enforcement”*

89. On the prosecution by the defendant, it was submitted that **Clerk and Lindsell on Torts, (Supra)**, p.825 at 16-08, addresses the question of what prosecution is thus:

*“In establishing the first essential element of the tort of malicious prosecution two key issues must be addressed, what constitutes a prosecution? And who is the prosecutor?”*

*“To prosecute is to set the law in motion, and the law is only set in motion by an appeal to some person clothed with judicial authority in regard to the matter in question, and to be liable for malicious prosecution a person must be actively instrumental in so setting the law in motion.”*

*“If a charge is made to a police constable and he thereupon makes an arrest, the party making the charge, if liable at all, will be liable in an action for false imprisonment, on the ground that he has directed the arrest and therefore it is his own act and not the act of the law. But if he goes before a magistrate who thereupon issues his warrant, then his liability, if any, is for malicious prosecution.*

*The party making the charge is not liable to an action for false imprisonment because he does not set a ministerial officer in motion but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment.”*

*“The gist of the action for malicious prosecution is that the defendant set the magistrate in motion.”*

90. It was therefore submitted that the 1<sup>st</sup> Defendant herein **did not lay the charge before a magistrate and that** therefore it did not set the trial magistrate in motion against the Plaintiff, but that the Police did hence the 1<sup>st</sup> Defendant could not have commenced the prosecution of the Plaintiff?

91. **On who Who is the prosecutor?** The 1<sup>st</sup> defendant relied on the House of Lords in **Martin -vs- Watson [1996] 1 A.C 74**, referenced in **Clerk and Lindsell on Torts, (Supra)**, p.827 at 16-11, addressing the complex question of who should be held responsible for initiating a prosecution when the police act on information offered or charges preferred by a private person.

92. **It was contended that Clerk and Lindsell**, at Para 16-12, notes:

*“Their Lordships confirmed that a person who merely gives information to the police on the basis of which a decision to prosecute is made by the police or the Crown Prosecution Service **will not be liable for malicious prosecution. The informant will not be the prosecutor.** However a complainant will be regarded as the prosecutor and liable for malicious prosecution if the following conditions are met:*

*(1) The defendant falsely and maliciously gave information about an alleged crime to a police officer **stating a willingness to testify against the claimant** and in such manner as makes it proper to infer that the defendant desired and intended that a prosecution be brought against the claimant.*

*(2) The circumstances are such that the facts relating to the alleged crime **are exclusively within the knowledge of the defendant so that it is virtually impossible for the police officer to exercise any independent discretion or judgment on the matter.***

*(3) The conduct of the defendant must be shown to be such that he makes it virtually inevitable that a prosecution will result from the complaint. His conduct is of such nature that “...if a prosecution is instituted by the police officer the proper view is that the prosecution has been procured by the complainant”.*

*“The Judgment clearly establishes that the claimant **must demonstrate** that the defendant acted in such a manner as to be responsible directly for the initiation of proceedings. The responsibility for initiating the prosecution must be his, not the result of a*

*truly independent judgment to prosecute on the part of the police, or some other third party.*

93. It was submitted that documentary evidence of the reports given to the Police by the 1<sup>st</sup> Defendant's employees shows that:

*a) none of the three tests which must be met before a Private individual is by law deemed to be a prosecutor has been established. The 1<sup>st</sup> Defendant cannot therefore be deemed to have been the Plaintiff's prosecutor;*

*b) it was not the 1<sup>st</sup> Defendant who laid the charges against the Plaintiff before the Magistrate in the Chief Magistrate's Court in Kibera. It was the Police. The 1<sup>st</sup> Defendant cannot therefore be deemed to have commenced the Plaintiff's prosecution.*

94. It was therefore submitted that the first element of the tort of malicious prosecution falls off.

**95. On the issue of whether the prosecution determined in the plaintiff's favour, it was conceded that the Chief Magistrate's Court (Kibera) Criminal Case Number 4459 of 2010 was determined in the Plaintiff's favour, under Section 215 of the Criminal Procedure Code. However, that the Prosecution determined after the Plaintiff had been found to have a case to answer and had been put to his defence, which evinces the fact that the Criminal Court considered the Prosecution's evidence against the Plaintiff to be of such weight as to establish a *prima facie* case against him.**

99. It was contended that the Criminal Court could have convicted the Plaintiff had the Plaintiff not elected to defend himself, which, in the view of the 1<sup>st</sup> defendant would support the argument that the Police had reasonable and probable cause for the decision to charge the Plaintiff.

97. It was submitted that the second element of the tort of malicious prosecution, is established.(sic).

98. on the third element of reasonable and probable cause, it was submitted that the term "reasonable and probable cause" was defined by Hawkins J. in *Hicks –vs.- Faulkner [1878] 8 Q.B.D. 167 at 171* as follows:

*"An honest belief in the guilt of the accused based upon full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would lead any 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."*

99. that *Clerk and Lindsell on Torts, (Supra)*, p.832 at 16-20, notes regarding proof of the element of reasonable and probable cause as follows:

*"The Claimant has, in the first place, to give some evidence tending to establish absence of reasonable and probable cause operating on the mind of the Defendant."*

*"The issue of whether the defendant had reasonable and probable cause to institute a prosecution... will normally depend on resolving a conflict of evidence between the Claimant and the Defendant"*

100. It was accordingly contended that the principle is that reasonable and probable cause depends, not on the actual facts, but on facts which the prosecutor had knowledge or believed on reasonable grounds to exist.

101. The 1<sup>st</sup> defendant maintained that the Plaintiff was prosecuted on a charge which was divisible in its nature, two being for theft of motor vehicles, and the other an being an alternative count of failure to prevent a felony. That the Plaintiff has not advanced any evidence tending to establish absence of reasonable and probable cause operating in the mind of the Prosecutor, whether in respect of the main counts or in respect of the alternative count.

102. The 1<sup>st</sup> defendant urged the court to note that the Defendant and its employees never suggested to the Police that the Plaintiff was guilty of the theft of the motor vehicles, as it had no reason to believe whether he was guilty or not and therefore left that to the investigations by the Police, and that only the Police would be in a position to tell, on a first-hand basis, what led them to charge the Plaintiff. One can however deduce the reasons from testimonies of Police Constable Mathews Mwilu, Corporal Benson Ingosi, and Chief Inspector Benard Gicheru Maina in the Criminal Case as follows:

**1. The vehicles were indeed stolen from the 1<sup>st</sup> Defendant's premises sometime between 9.00pm on 11<sup>th</sup> October 2010 and 5.00am on 12<sup>th</sup> October 2010;**

**2. The Plaintiff and his co-accused were on duty as a security guards in the 1<sup>st</sup> Defendant's premises on the night in which the two vehicles were stolen;**

**3. The two vehicles were parked only a few metres away from where the Plaintiff and the co-accused were, and were in their plain sight;**

**4. The Plaintiff and his co-accused had access to the Kitchen area where the keys to the two vehicles had been kept;**

5. *The Plaintiff and his co-accused had custody of the keys to the two gates by which one could access or exit the 1<sup>st</sup> Defendant's premises;*

6. *The gates and the perimeter wall at the 1<sup>st</sup> Defendant's premises had not been broken down – meaning that whoever stole the vehicles opened the gates and drove the vehicles away*

7. *The Plaintiff and his co-accused had panic alarm buttons which they could set off in the event of a breach in security – which they did not;*

8. *When the Police asked the Plaintiff and his co-accused to explain how the vehicles left the Defendant's premises, they remained silent and were non-co-operative;*

103. It was submitted that the facts set out above makes the Plaintiff an obvious suspect. reliance was placed on the Court of Appeal decision by (Law, Sir William Duffus, and Lutta, J.A) in **Egbema -vs- West Nile District Administration [1972] E.A 60 at 62** where it was stated:

***“The appellant was an obvious suspect, as he was responsible for the security of the office from which the cash box disappeared. It cannot be said that there was no reasonable and probable cause for the respondent instigating a prosecution against the appellant. The actual decision to do so was taken by the Uganda Police. As the judge has made no finding as to whether the instigation of the prosecution was due to malice on the part of the respondent, this court must make its own finding. In my view the circumstances of this case reasonably pointed to the appellant as a suspect, and there was no sufficient evidence that in handing the appellant over to the Uganda Police for his case to be investigated and, if necessary, prosecuted, the respondent was actuated by malice.”***

104. The 1<sup>st</sup> defendant maintained that the prosecution was instituted and carried out by the Police who would be best placed to address the question as to whether they had reasonable and probable cause to do so and that in view of the above, the Plaintiff has not discharged his burden of proving the absence of reasonable and probable cause operating in the mind of the Prosecutor, whether he considers the Prosecutor to be the 1<sup>st</sup> Defendant or the Police.

105. On the element of malice, reliance was placed on Clerk and Lindsell on Torts, and the case of **Gibbs v. Rea [1998] A.C. 786 at 797**, where it was stated:

***“Malice in this context has the special meaning common to other torts and covers not only spite or ill-will but also improper motive [in the mind of the Prosecutor]. The proper motive for a prosecution is, of course, a desire to secure the ends of justice”***

106. It was submitted that the Plaintiff has not laid before this Court any evidence of spite or ill-will between him and the 1<sup>st</sup> Defendant that would actuate the 1<sup>st</sup> Defendant in seeking his prosecution and conviction. That the Plaintiff was a security guard whereas the 1<sup>st</sup> Defendant is a company with over a hundred years in the coffee sector therefore there would be no conflict of interest or spite. The 1<sup>st</sup> defendant maintained that evidence of spite or ill motive was missing.

107. On the allegation that the 1<sup>st</sup> Defendant failed to disclose to the Police exculpatory evidence in its possession that would have aided the Plaintiff, it was submitted that no such evidence existed and that failure to disclose exculpatory evidence was no ground to place liability upon the defendants.

108. In response to the plaintiff's submissions, it was submitted by the 1<sup>st</sup> defendant it was contended that the Plaintiff in his written Submissions, cites several authorities whose facts are either clearly distinguishable from the facts of this Case, or in which crucial legal questions appear not to have been addressed. That the damages awarded in those cases are also quite high because of the social statuses of the Plaintiffs involved hence those authorities are unreliable to that extent. It was submitted that in **Zablon Mwaluma Kadori –vs- National Cereals and Produce Board, High Court (Mombasa) Civil Suit No. 152 of 1997**, the Defendant was the investigator of the crime that led to the Plaintiff's prosecution, and that liability attached to the Defendant because of its primacy in the Plaintiff's prosecution.

109. Further, that inn **Thomas Mboya Oluoch -vs- Lucy Muthoni, High Court Civil Suit No. 1729 of 2001, [2005] eKLR** the Defendant had directly implicated the Plaintiffs for an offence that turned out to have never occurred but that in the Instant case, the 1<sup>st</sup> Defendant never implicated the Plaintiff.

110. It was further contended that in **G.B.M Kariuki -vs- The Attorney General, High Court Civil Suit No. 696 of 2009 [2016] eKLR** the Plaintiff was able to prove all the four elements of the tort of malicious prosecution, and hence was successful while in the instant case, three of the four elements of the tort of malicious prosecution are unsustainable.

111. That in **Chripine Otieno Caleb -vs- The Attorney General, High Court Civil Suit No. 782 of 2007** the Plaintiff's Suit was uncontested and so was the case in **Crispus Karanja Njogu -vs- The Honourable Attorney General & Kenyatta University, High Court Civil Suit No. 574 of 2002**.

112. In the end, the 1<sup>st</sup> defendant urged the court to find that the plaintiff had not proved his case on a balance of probabilities and to dismiss the same with costs in favour of the 1<sup>st</sup> defendant.

## **DETERMINATION**

113. This court has carefully considered the plaintiff's claim against the defendants jointly and severally based on the plaint dated 30<sup>th</sup> November, 2012, the defendant's defence and evidence adduced by the plaintiff and the 1<sup>st</sup> defendant. I have also given equal consideration to the detailed useful submissions filed by the plaintiff and defendants' counsels on record, citing statutory and case law in extensor.

114. In my humble view, the issues that flow for determination are:

*i. Whether the arrest and detention of the plaintiff was wrongful;*

*ii. Whether the arrest, arraignment in court and prosecution of the Plaintiff in the said criminal case was malicious; and whether or not the Defendants are jointly and severally liable to the Plaintiffs in respect of the claim for malicious prosecution.*

*iii. Whether the Plaintiff suffered special and general damages as a result of his arrest, arraignment in Court and prosecution in the said Criminal Case and what damages if any are payable to him*

*iv. What if any is the quantum of special and general damages payable to the Plaintiff?*

*v. Who should bear the costs of this suit?*

115. This suit before is predicated on the Plaintiff's Plaint dated 30<sup>th</sup> November 2012, filed on 5<sup>th</sup> December 2012 wherein the plaintiff seeks Judgment against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's jointly and severally for:

- a) General damages for wrongful arrest, detention for 13 months, and malicious prosecution;
- b) Special damages of Kshs 232,304/=;
- c) Costs of the Suit;
- d) Interest on general damages, special damages, and costs;
- e) Any other relief that the Court may deem fit.

116. The substance of the Plaintiff's claim is that the Plaintiff was at all material times to his this suit an employee of **G4S Security Company** deployed as a Security Guard at **Dormans Coffee Limited's** Bakery along Gichugu Road, Nairobi.

117. Upon completing his duty shift on the morning of 12<sup>th</sup> October 2010, he was approached by Police Officers from Kilimani Police Station, who questioned him regarding the theft of two motor vehicles registration numbers KAT 550Y and KBL 703A which were the property of C. Dorman Limited, the 1<sup>st</sup> Defendant herein.

118. The plaintiff claims that the said Police Officers arrested him and that he was subsequently charged and arraigned in the **Chief Magistrate's Court (Kibera) Criminal Case Number 4459 of 2010: Republic -vs- Michael Mwangi Muhoro, Benedict Luvembe Khamalishi, and Joseph Wamoto Karani** with two counts of theft – of the said motor vehicles - contrary to Section 278(a) of the Penal Code, and an alternative count of failing to prevent a felony contrary to Section 392 of the Penal Code.

119. He further claims that he was kept in remand from 14<sup>th</sup> October 2010 to 2<sup>nd</sup> November 2011, when he was released by the Court on a free bond, and on 25<sup>th</sup> January 2012 he was acquitted of the charges laid against him under Section 210 of the Criminal Procedure Code, after a full hearing of the case.

120. The plaintiff claims that the Criminal proceedings instituted against him by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were actuated by malice and were unlawful and that as a result, he suffered damage. He produced documentary evidence to show that he worked for Dormans Coffee and that upon being charged with the criminal offence, he was discharged from his duties by his principal employer G4S who had been contracted by Dormans Coffee to provide security services. He also produced court proceedings in the criminal case at Kibera showing that he was jointly charged and prosecuted with others for the offences of stealing two motor vehicles and neglect of duty, which prosecution ended in his favour as he was acquitted under section 215 of the Criminal Procedure Code.

121. The defendants filed defenses separately denying the allegation leveled against them by the plaintiff. However, only the 1<sup>st</sup> defendant actively participated in the proceedings. The 2<sup>nd</sup> defendant neither attended the hearings nor called any evidence to rebut the evidence adduced by the plaintiff and the 1<sup>st</sup> defendant.

122. The 1<sup>st</sup> defendant maintains that although it was the complainant in the criminal case, the report to the effect that it had lost two vehicles which were parked at its premises was not false and that the decision to charge the plaintiff with a criminal offence was in the discretion of the police who are not enjoined to these proceedings hence the suit is a non-starter. Further, that the 1<sup>st</sup> defendant did not arrest or detain the plaintiff hence the tort of wrongful arrest and detention does not lie against it. In addition, it is contended by the 1<sup>st</sup> defendant that in any event, the torts of wrongful arrest and detention was lodged outside the statutory period namely section 3(1) of the Local Authorities Limitation Act hence the claims as against the Attorney General are statute barred and incompetent and cannot lie against a private person who did not arrest or detain the plaintiff.

123. The 1<sup>st</sup> defendant maintains that the tort of malicious prosecution does not lie against it as no malice was proved against it and urged the court to dismiss the plaintiff's suit with costs.

124. Only the plaintiff and 1<sup>st</sup> defendant filed written submissions which I have considered in detail and make my determination based on the law and facts.

### **DETERMINATION OF THE ISSUES**

125. From the foregoing pleadings, evidence and detailed submissions by parties which I have reproduced as presented to court in soft copy formats, I now proceed to determine the issues framed above.

**126. On whether the arrest and detention of the plaintiff was wrongful**, it is important to appreciate that the terms wrongful arrest and false imprisonment are used interchangeably.

127. A compensation claim for false imprisonment or wrongful arrest can occur if one is detained unlawfully by the police or another public authority. Wrongful arrest or false imprisonment consists of False imprisonment and is described by **Halsbury's Laws of England 4<sup>th</sup> Edition page 606 as:**

*“Any total restraint of the liberty of the person, for however short a time, by the use or threat of force or by confinement, is an imprisonment. To compel a person to remain in a given place is an imprisonment, but merely to obstruct a person attempting to pass in a particular direction or to prevent him from moving in any direction but one is not. The gist of the action of false imprisonment is the mere imprisonment. The plaintiff need not prove that the imprisonment was unlawful or malicious, but establishes a prima facie case if he proves that he was imprisoned by the defendant; the onus lies on the defendant of proving a justification.”*

128. In **Daniel Waweru Njoroge & 17 Others V Attorney General [2015] e KLR** the court set out elements of false imprisonment as follows:

*“The gist of an action for false imprisonment is unlawful detention, without more. The commonly accepted definition of false imprisonment defines the tort as:*

- 1. The unlawful restraint of another;*
- 2. Against their will; and*
- 3. Without justification.*

*Proving the first element of false imprisonment involves looking at the facts whether there was any force or threat or some kind used in restraining the accusing party. It is important to note that actual force is not necessary. Proving the second element of false imprisonment involves applying ‘reasonable person’ standard. Thus, the court will determine whether a reasonable person in the same factual situation would believe that they have been detained against their will. The final element of false imprisonment involves determining whether there is a legal basis for the detention. Many legal bases for detention for exist such as a lawful arrest by law enforcement. Determining whether probable or a legal basis for the detention exists is the key in false arrest cases.”*

129. In my humble view, the question of whether or not there is wrongful arrest is a question of fact which depends on the circumstances of each case. As was held in the case of **Daniel Waweru Njoroge & 17 Others V Attorney General** (supra), that the term false imprisonment and false arrest are synonymous. The learned judge adopted the holding in **Price V Phillips**.....where it was held that:

*“They are different names for the same tort and that the gist of an action for false imprisonment is unlawful detention, without more.*

130. The High Court in **Civil Appeal No. 89 of 2002: Services Limited -vs- Charles Obingo Angujo [2005] eKLR** addressed the question of wrongful arrest as follows:

*“It is clear from the above that for a claim of false arrest or false imprisonment to succeed there must be a report which was false and actuated by malice. The arrest should be attributed to the defendant either because he arrested on that false report or that the police arrested on the basis of his false report.”*

131. The law on the tort of wrongful detention was set out by Maraga, J. (as he then was) in **High Court (Mombasa) Civil Case No. 502 of 1999 [2005] eKLR: John Ndeto Kyalo -vs- Kenya Tea Development Authority and the Hon. Attorney General**, at Paragraphs 4 and 5 where the learned Judge observed:

*“Claims for false imprisonment (wrongful detention) and malicious prosecution are distinct causes of action, and even though the evidence that may be adduced by a Plaintiff may cover them both, the evidence must prove each of them distinctly, on a balance of probabilities;*

*As regards a claim for false imprisonment (wrongful detention), the cause of action would arise on the last day of the period of the alleged imprisonment;*

*By dint of Section 3(1) of the Public Authorities Limitations of Actions Act, a claim for false imprisonment (wrongful detention) would be time barred as against the Attorney General unless instituted within one year of the last day of the period of the alleged imprisonment;*

*Defendant would not be liable to a Plaintiff for wrongful detention, where the detention was as a result of a Court Order remanding the Plaintiff in custody pending hearing of the Suit as the Defendant would have had no control over the Court giving the order. For this proposition Maraga J. placed reliance on Katerregga -vs- Attorney General, High Court of Uganda (Kampala), High Court Civil Case No. 96 of 1971 (1973) EA 287 as well as Juma Khamisi Kariuki -vs- East Africa Industries Limited And George Okoko, High Court Of Kenya At Nairobi, Civil Case No 1414 of 1980 [1986] eKLR.*

132. In the Juma Khamisi Kariuki case (*supra*) the Court rendered itself as follows:

*“The plaintiff alleges false imprisonment and says that he was remanded in prison for three months and four days. This however, was the result of an order made in Makadara Court....In the Katerregga case, at page 288 paragraph 8, Mead J, in commenting on a case where the imprisonment of the plaintiff was the result of magisterial remand orders, says this:*

*“The defendant is not liable for these magisterial acts, the magistrate not being a person for whose acts the defendant in the present instant is liable. The proposition that a person instituting legal proceedings before a court is not liable in respect of imprisonment where the imprisonment is the result of a court order has long been established in English law; Lock v Ashton [1848] 12 QBD 871 and the more recent case of Diamond v Minter [1941] 1 KB 656 at page 674.”*

133. From the facts of this case, there was evidence before the lower court as reiterated in this case that two motor vehicles belonging to the first defendant were stolen from the parking lot at its premises along Gichugu road. The 1<sup>st</sup> defendant’s employees who discovered the theft reported the matter to the police for investigations and the police proceeded to investigate. In the process, they arrested the plaintiff herein and others and charged them in court with the offence of stealing the said motor vehicles and failing to prevent a felony.

134. In my humble view, it cannot be said that the arrest was wrongful as it was based on the report made to the police by the 1<sup>st</sup> defendant for investigations into the theft, and which report by itself was not false. The fact that the plaintiff was acquitted of the offences charged in itself does not mean that the report that led to his arrest was false. Further, the fact that the police did not carry out proper investigations before arresting the plaintiff does not mean that his arrest was wrongful.

135. On the strength of the authorities quoted above, it is my humble view that the 1<sup>st</sup> Defendant complainant cannot be held liable under a cause of action for wrongful arrest and detention since the detention complained of occurred pursuant to an order of the Magistrate’s Court made by Hon. Mrs. Nyakundi on 14<sup>th</sup> October 2010 in Chief Magistrate’s Court (Kibera) Criminal Case Number 4459 of 2010 as is borne out by Paragraph 8 of the Complaint and therefore the liability and general damages as well as special damages sought on account of the alleged wrongful arrest and detention cannot be granted as against the 1<sup>st</sup> Defendant.

136. In addition, the claim as against the Attorney General for wrongful arrest or false detention or imprisonment would not lie for the simple reason that since the detention complained of occurred pursuant to an order of the Magistrate’s Court made by Hon. Mrs. Nyakundi on 14<sup>th</sup> October 2010 in Chief Magistrate’s Court (Kibera) Criminal Case Number 4459 of 2010, (see Lock v Ashton [1848] 12 QBD 871 and Diamond v Minter [1941] 1 KB 656 at page 674) as cited above in Katerregga -vs- Attorney General, High Court of Uganda (Kampala), High Court Civil Case No. 96 of 1971 (1973) EA 287 and in Juma Khamisi Kariuki -vs- East Africa Industries Limited And George Okoko, HCC No. 1414 of 1980 [1986] eKLR.

137. Furthermore, by dint of section 3(1) of the **Public Authorities Limitation Act, Chapter 39 Laws of Kenya** which stipulates that “*No proceedings founded on tort shall be brought against the Government...after the end of twelve months from the date on which the cause of action accrued*”, the claim for false or wrongful imprisonment or arrest as against the Attorney General is statute barred as it was filed after 12 months from the date when the cause of action allegedly arose and therefore not maintainable. Accordingly, the claim for wrongful arrest or false detention is hereby declined and dismissed.

138. On the second issue of **whether the prosecution of the plaintiff was malicious**, as correctly submitted by both parties’ advocates, the law relating to the tort of malicious prosecution is now settled as set out in various decisions including the case of Mbowa vs. East Meno District Administration [1972] EA 352, where the East African Court of Appeal stated:

*“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 not 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".

139. In Egbema vs. West Nile Administration [1972] EA 60, the same Court held:

*"False imprisonment and malicious prosecution are separate causes of action; a plaintiff may succeed on one and fail on the other. If he established one cause of action, then he is entitled to an award of damages on that issue...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...There was no finding that the prosecution instituted by Uganda Police was malicious, or brought without reasonable or probable cause. The Uganda Police, unlike Administration Police, are not servants or agents of the respondent...The decision whether or not to prosecute was made by the Uganda Police, who are not servants of the respondents after investigation. There is no evidence of malice on the part of the respondent. The appellant was an obvious suspect as he was responsible for the security of the office from which the cash box disappeared. It cannot be said that there was no reasonable and probable cause for the respondent instigating a prosecution against the appellant. The actual decision to do so was taken by the Uganda Police. As the Judge has made no finding as to whether the instigation of the prosecution was due to malice on the part of the respondent, this Court cannot make its own finding. The circumstances of this case reasonably pointed to the appellant as a suspect and there was not sufficient evidence that in handing the appellant over to the Uganda Police for his case to be investigated and, if necessary, prosecuted, the respondent was actuated by malice."*

140. 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"*

141. What amounts to reasonable and probable cause for the purposes of malicious prosecution was explained by **Rudd, J** in **Kagane and Others vs. Attorney-General and Another** (supra). Citing **Hicks vs. Faulkner [1878] 8 QBD 167** at 171, **Herniman vs. Smith [1938] AC 305** and **Gliniski vs. McIver [1962] AC 726** the learned judge stated:

*"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 reasonably lead 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...Excluding cases where the basis for the prosecution is alleged to be wholly fabricated by the prosecutor, in which the sole issue is whether the case for the prosecution was fabricated or not, the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of objective test. 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 consisted of facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty. If and insofar as that material is based on information, the information must be reasonably credible, such that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution...If it is shown to the satisfaction of the judge that a reasonable prudent and cautious man would not have been satisfied that there was a proper case to put before the court, then absence of reasonable and probable cause has been established. If on the other hand the judge considers that prima facie there was enough to justify a belief in an ordinary reasonable prudent and cautious man that the accused was probably guilty then although this would amount to what I call primary reasonable and probable cause the judge may have to consider the further question as to whether the prosecutor himself did not believe in the probable guilt of the accused, and this is obviously a matter which is to be judged by a subjective test. This subjective test should only be applied where there is some evidence that the prosecutor himself*

*did not honestly believe in the truth of the prosecution...Inasmuch as this subjective test only comes into operation when there were circumstances in the knowledge of the prosecutor capable of amounting to reasonable and probable cause, the subjective test does not arise where the reason alleged as showing absence of reasonable and probable cause is merely the flimsiness of the prosecution case or the inherent unreliability of the information on which the case was based, because this is a matter for the judge alone when applying the objective test of the reasonable prudent and cautious man. Consequently the subjective test should only be applied where there is some evidence directly tending to show that the prosecutor did not believe in the truth of his case. Such evidence could be afforded by words or letters or conduct on the part of the prosecutor which tended to show that he did not believe in his case, as for example a failure or reluctance to bring it to trial, a statement that he did not believe in it and, I think possibly, an unexplained failure to call an essential witness who provided a basic part of the information upon which the prosecution was based”.*

142. Therefore, on whether the arrest, arraignment in Court and prosecution of the Plaintiff in the said Criminal Case was wrongful and malicious, the plaintiff claims that his prosecution was actuated by malice on *inter alia* the fact that the complainants gave false report to police to the effect that he was a guard at their premises when the evidence was clear that he was assigned to the Bakery and therefore he could not have been found at the car park.

143. Further, that the police failed to investigate the crime thoroughly to establish the culpability of the plaintiff. As a result, it was averred that the defendants acted recklessly and in haste; that there were no proper and/or any meaningful investigations before arraignment in court; that the defendants failed to take into account the fact that crucial witnesses were not interviewed and called to give evidence in the criminal trial.

144. The law as stipulated above is clear that the mere fact that a person has been arrested and charged with a criminal offence does not necessarily mean that the arrest is false. Further, that an acquittal of one of the criminal charge does not necessarily connote malice on the part of the complainant or the prosecutor.

145. As was held in **James Karuga Kiiru –vs- Joseph Mwamburi and 3 Others, Nrb C.A No. 171 of 2000**, *to prosecute a person is not prima facie tortuous, but to do so dishonestly or unreasonably is and the burden of proving that the prosecutor did not act honestly or reasonably is on the person prosecuted.* Malice, however, can either be express or can be inferred or gathered from the circumstances surrounding the prosecution.

146. 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. I am in agreement with the decision in the case of **G.B.M KARIUKI –VS- ATTORNEY GENERAL (2016) eKLR** where the learned Judge at **page 20** held;

*“...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 officer 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 prosecution arm of the government is not a mere conduit for complainants. The police must act impartially and independently on respect of a complaint and are expected to carry out through 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.*

*However, where the police deliberately decide not to take into account the version of the suspect and act 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. 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.*

*Nonetheless, 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.”*

147. In this case, PW1 Monica Mungai a Human Resource Management Assistant of the complainant Company C. Dormans Limited testified that she was only called by their caretaker on 12/10/2010 at 5.30 am and informed that the two vehicles for the company were missing. The witness proceeded to the office and confirmed the loss but she did not know how the theft occurred. She then called her boss and notified him but her boss never recorded any statement with the police. On being cross examined by the plaintiff herein who was the 3rd accused person, she clearly stated that the plaintiff was an employee of Dormans Coffee and not C. Dormans. She stated that she had told the police that the plaintiff could work with the guards of C. Dormans as a team.

148. PW2 Alphonse Andole the caretaker for the 1st defendant's premises also testified that he knew where the vehicles keys were kept- in the kitchen drawer. He reported to work and found the 1st defendant's two guards drugged. He called the boss. He stated that the plaintiff manned Dormans Coffee, not the complainant/1st defendant's premises although the two companies are in the same compound and that the distance between the two was only 50 meters apart but that where the plaintiff sat he faced the cars.

149. The evidence of PW3 George Kiarie the driver who parked one of the stolen vehicles, was that he kept the keys and that the messenger and other drivers knew where the cut outs for the stolen vehicles were and that guards too knew where the keys were kept. He did not know the plaintiff herein.

150. From the evidence of the investigating officers, they were very much aware that the plaintiff worked for Dormans Coffee and not the 1st defendant herein but that they had to arrest the plaintiff as well because C. Dormans and Dormans Coffee were close to each other.

151. The plaintiff in his defence before the subordinate court maintained that his work involved checking bakery employees to ensure they left the bakery with nothing and that he packed the bread. He was concerned about Dormans Coffee and not the 1st defendant herein. Further, that his employer was not the same as the other 2 co-accused's employer. He denied seeing any incident of theft that night as he guarded the bakery side throughout. He claims that he was charged with the offence of theft because initially when he was called upon to go and record a statement at Milimani Police Station he resisted because he was not the guard for the 1st defendant and did not understand why he was required to record a statement.

152. In the humble view of this court, if the statements that were recorded by the police from witnesses clearly showed that the plaintiff herein was not concerned with the security of the vehicles of the 1st defendant herein but with that of Dormans Coffee and that he was confined to the bakery side, in the absence of any evidence that the plaintiff could possibly have colluded with the SGS guards at the 1st defendant's premises to steal the complainant's vehicles, no legal duty of care was placed on the plaintiff to guard the 1st defendant's vehicles.

153. Accordingly, I find that on the evidence adduced and the circumstances as described by the witnesses who testified against the plaintiff in the trial court, no offence could possibly have been committed by the plaintiff. It was the duty of police investigators to carry out their investigations to establish who could have been culpable and not just pick on anyone who worked near the premises. This court also notes that the second defendant ignored the statements made by the 1<sup>st</sup> defendant's employees on where the plaintiff worked and for who. Further, it was upon the 2<sup>nd</sup> defendant's agents, the police who received the report of theft to investigate the facts and circumstances surrounding the theft of the two motor vehicles. The 2nd defendant ignored the same and proceeded with the arrest and prosecution of the plaintiff simply because the plaintiff did **not cooperate with them** and because he worked in the same compound with the 1<sup>st</sup> defendant's guards. If that was the case, the police had power to charge the plaintiff with the offence of obstructing their duties which they did not. Instead, they charged him with theft and failure to prevent a felony. This in my humble view was reckless exercise of power on the part of the police, without taking into account the chances of success of the said prosecution which would in my view amount to malice.

154. I reiterate that it was upon the 2nd defendant's/investigating officers concerned to countercheck the 1<sup>st</sup> defendant's complaint as well as any exonerating material gathered from the said investigations in order to prove that there was probable and reasonable material upon which a successful prosecution could be mounted against the plaintiff. To the contrary, all the evidence presented before the trial criminal court exonerated the plaintiff while some people who ought to have been called to adduce evidence were not even questioned by the police or called such as the bakery employees who were on duty that fateful night and worked with the plaintiff, and numbering 10.

155. The trial court was clear in its judgment and in acquitting the plaintiff that the work of the plaintiff in the bakery was very elaborate. Further, that the doors to the kitchen where car keys were kept had an alarm and the codes were kept by PW2 and one John Kwatsima. Further, that doors were never tampered with and no alarm went off yet the alarm was on the doors to the kitchen. Nonetheless, that evidence was never adduced as the police never recorded any statement of witnesses who had knowledge of that evidence, until the trial court visited the scene of crime and made a discovery.

156. While such crucial evidence as that of the messenger and driver of one of the vehicles was never called, in my humble view, there was lack of diligence on the part of the prosecution in failing to investigate properly and availing crucial evidence. The casualness with which the investigations and the prosecution of the said criminal case was conducted as shown in the proceedings leaves the court in serious doubt as to whether the 2<sup>nd</sup> defendant honestly believed in the probable guilt of the plaintiff and truth of the prosecution.

157. I am inclined to believe that the 2<sup>nd</sup> defendant's agents only prosecuted the plaintiff because he refused to cooperate with them when they first asked him to go and record a statement at Milimani Police Station concerning the theft and he told them that he never worked for the 1<sup>st</sup> defendant hence he did not understand the reason why he would be involved in statement recording.

158. Albeit I find no fault in the police arresting a person who fails to cooperate in assisting them carry out investigations, as failure to cooperate could amount to obstruction of justice, but it is the duty of the police to ensure that proper investigations are carried out and not to assume that every arrested person must be prosecuted for the offence that he is suspected to have committed, simply because he has not cooperated with them in their investigations.

159. Therefore under the subjective test I am satisfied that on the evidence adduced in this matter, a reasonable, prudent and cautious man would not have been satisfied based on the material availed that the 2<sup>nd</sup> defendant had a proper case to put before the court of law for the prosecution of the plaintiff herein hence I find that no reasonable and probable cause has been shown. In the result I find that the prosecution of the plaintiff was 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”.[emphasis added].***

160. On the basis of the above analysis, I have no hesitation in finding that the defendants are not jointly and severally liable for the tort of malicious prosecution as the 1<sup>st</sup> defendant's report was of theft of its motor vehicles which was true but the police failed to carry out investigations that would link the plaintiff to the offence of stealing and or failure to prevent a felon.

161. This is so because the plaintiff was employed by Dormans Coffee not C Dormans Ltd - He could therefore not be charged with failing to prevent a felony. He was under no legal duty to guard the property of C. Dormans Ltd as he was not employed to guard the said property of C. Dormans.

162. There was also no evidence proving that the plaintiff and the employees or /guards at C. Dormans Ltd the 1<sup>st</sup> defendant herein were jointly tasked to work together on the material night or on any other occasion.

163. DW1 & DW2 herein during investigations disclosed that the plaintiff was employed by Dormans Coffee Ltd and not C. Dormans Ltd. They only mentioned that the guards for the two companies would work as a team because the premises were in the same compound. They did not say that the plaintiff was under a duty to guard the 1<sup>st</sup> defendant's premises or that he was involved or could have been part of the people that stole the two vehicles and as a result, the investigators assumed that any guard in the premises adjacent to C. Dormans Ltd premises must have been an employee of the latter.

164. It was also the duty of the investigators to interrogate the plaintiff to find out who his employer was and what he was tasked to guard and not to assume that the plaintiff was the 1<sup>st</sup> defendant's employee.

165. There is no plausible evidence to demonstrate that DW1 and DW 2 failure to disclose to the police certain facts of the case that the plaintiff was employed by a different company not the 1<sup>st</sup> defendant; that DW2 was custodian of the keys to the vehicles allegedly stolen, and that the driver and messenger had resigned which were only discovered by the trial court visiting the scene of crime is evidence of malice as it was the duty of the investigators to question all possible witnesses in the theft allegation and cover sufficient ground. It cannot, therefore, be inferred that the 1<sup>st</sup> defendant had malice as the police did not claim that the complainant/first defendant failed to cooperate in the investigations and if there was any such malice then it can only be attributed to the individuals who had to take the trial court to a visit to the alleged scene of crime to discover that the plaintiff was employed by a different company not the 1<sup>st</sup> defendant; that DW2 was custodian of the keys to the vehicles allegedly stolen, and that the driver and messenger had resigned which in order to nail innocent persons evidence was material yet suppressed .

166. There was also no disclosure that Kwatsima DW2 co-worker had access keys to the kitchen where the keys to the stolen vehicles were kept and that they had codes of the alarm system. However, it was the duty of the police to interrogate witnesses to establish sufficient evidence for charging the plaintiff.

167. In this case, I find that no proper investigations were done to warrant prosecution of the plaintiff with failing to prevent felony under Section 392 of the Penal Code. Material ingredients of an offence includes *mens rea*. There was no evidence that the plaintiff failed to take reasonable measures to stop the commission of the felony.

168. There appears to be the theory of the plaintiff having had a hand in drugging the other guards but there were no investigations into this theory hence no evidence was adduced linking him to the theory.

169. I must reiterate that no evidence was adduced by the prosecution and the 2<sup>nd</sup> defendant in this case that the 'premises' included C. Dormans premises or that the plaintiff also received instructions for C. Dormans Ltd or was reassigned to guard C. Dormans Ltd premises.

170. Since C. Dormans Ltd was not the plaintiff's employer, it is superfluous to allege that the plaintiff could not be assigned to slice bread, label and package, or his duties be limited to the bakery area. Therefore, only Dormans Ltd can tell the extend of instructions given to the plaintiff not a stranger to the contract.

171. In the end, I find and hold that the plaintiff has proved on a balance of probabilities that the 2<sup>nd</sup> defendant maliciously prosecuted him leading to his acquittal under section 215 of the Criminal Procedure Code.

172. The third issue is **whether the plaintiff is entitled to an award of damages and if so what damages are awardable to the plaintiff for malicious prosecution an.** The plaintiff claimed for general damages and special damages. The law is clear that special damages must be specifically pleaded and strictly proved. There must be evidence of earnings by way of receipts or pay slips. In this case it is not in dispute that the plaintiff's employer was G4S Security Services (K) Ltd and the plaintiff was deployed as a guard at Dormans Coffee Ltd. The contract of employment produced in evidence shows that the plaintiff was to guard the whole periphery of premises and to provide security services with one night guard as per customer instructions, which customer is Dormans Coffee Ltd and not any other.

173. The plaintiff sought special and general damages for **loss of earning/ employment.** The court notes that the plaintiff did not enjoy his employer for wrongful termination of his employment and even if he did so, this court would not have jurisdiction to hear and determine such a claim as the jurisdiction is vested in the Employment and Labour Relations Court. However, there was uncontroverted evidence that owing to his incarceration, the plaintiff lost his job and therefore he lost earnings. He produced pay slips to show how much he earned as a security guard.

174. The claim that the 2<sup>nd</sup> defendant was responsible for the loss of earnings was not controverted. It was specifically pleaded and strictly proved on a balance of probabilities. The Plaintiff testified that he lost his job because of the unwarranted charges leveled against him. He further told the court that he was incarcerated for **18 months** awaiting completion of his trial and that he was later acquitted by the Court under **Section 215 of the Criminal Procedure Code** therefore he lost his earnings totaling Kshs. 232, 308/=. The Plaintiff therefore urged

the court to award him Special damages of Kshs. 232, 308/=. I have no reason to deny him the claim. I award him the said special damages as prayed and proved.

175. With respect to general damages for malicious prosecution, the Court must take into account the applicable principles as was held in the **Uganda case of Dr. Willy Kaberuka vs. Attorney General Kampala HCCS No. 160 of 1993** that:

*“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”. [emphasis added].*

176. The plaintiff’s counsel sought for kshs 2 million general damages for malicious prosecution and relied on several decisions. In **Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another** the plaintiffs were in 2005 awarded Kshs 500,000.00 each general damages for malicious prosecution. In **Crispus Karanja Njogu vs. The Attorney General [2008] KLR Waweru, J** on 1<sup>st</sup> February 2008 awarded the plaintiff, whose substantive office was Assistant Registrar though was Acting Senior Assistant Registrar in the Examinations Section of Kenyatta University, the second defendant, Kshs 800,000.00 general damages for malicious prosecution.

177. Taking into account all the circumstances of this case including the status of the plaintiff as a security guard, as well as the age of the said awards and inflationary trends in Kenya, I award the plaintiff a global sum of Kshs 2,000,000.00 general damages for malicious prosecution.

178. Total award of damages against the 2<sup>nd</sup> defendant:

a. Special damages for loss of earnings for 18 months Kshs. 232, 308/=.

b. General damages for malicious prosecution Kshs 2,000,000/=

**Kshs 2, 232,308/=**

179. The special damages will earn interest from the date of filing suit until payment in full. General damages will earn interest from date of this judgment until payment in full. The plaintiff will also have costs of this suit.

180. The suit against the 1<sup>st</sup> defendant is dismissed without costs for reasons that the claim against was not frivolous or vexatious. The inclusion of the 1<sup>st</sup> defendant in this matter was necessary for the court to appreciate circumstances under which he was arrested, arraigned in court, tried and acquitted.

Dated, signed and delivered in open court at Nairobi this 25<sup>th</sup> day of January, 2018.

**R.E.ABURILI**

**JUDGE**

**In the presence of:**

Mr Odaga h/b for Mr Leshan for the 1<sup>st</sup> defendant

N/A for the Plaintiff

N/A for the 2<sup>nd</sup> Defendant

CA: Kombo