REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

(CORAM: R.MWONGO, J)

HCCC NO 1210 OF 2006

BOBBY MACHARIA.....PLAINTIFF

VEERSUS

THE ATTORNEY GENERAL.....1ST DEFENDANT

GEDION KIMILU.....2ND DEFENDANT

PETER NJERU.....3RD DEFENDANT

FRANCIS WAMBUA.....4TH DEFENDANT

JUDGMENT

Background

1. Bobby Macharia, the Plaintiff, was working as the general manager of Pepe Limited an inland container depot, in Industrial Area of Nairobi, when, on 28th December, 2004, he was arrested and imprisoned by the 2nd, 3rd and 4th Defendants who are Police officers. He alleges that he was kept in prison until 7th January, 2005, when he was taken before the Chief Magistrate's Court in Nairobi. There, in Criminal Case No 93 of 2005, he was charged with six others with two counts of trafficking in Narcotic drugs; one count of aiding the trafficking of narcotic drugs, and one count of unlawfully permitting premises to be used for the purpose of distribution of narcotics drugs.

2. He alleges that he was denied bail from 7th January, 2005 when the trial commenced, until its conclusion on 17th November, 2005. Eventually, he was acquitted of all charges by the trial court under section 210 of the Criminal Procedure Code, on the grounds that he had no case to answer.

3. Distraught, shaken and un-amused by the ordeal he had undergone, Mr Macharia filed this suit for false imprisonment, malicious prosecution, loss and suffering on 16th November, 2006. In his plaint, he seeks general damages for malicious prosecution and false imprisonment, exemplary and aggravated damages, and special damages of Kshs 1,432,120/=. He alleges, among other things, that his career suffered, his health deteriorated, and his esteem was destroyed on account of, and during the ordeal he underwent.

4. The suit was filed against the Attorney General and, initially, the three Defendants, then police officers attached to the Anti-Narcotics Unit of the Kenya Police. At the hearing, however, it was agreed by consent that the 2nd, 3rd and 4th defendants be struck out from the proceedings, with costs. By consent also, the parties agreed that the plaintiff's list of issues filed on 17th May, 2007, be deemed as the parties' agreed list of issues.

5. Finally, during the hearing, the 1st defendant objected, pursuant to the Stamp Duty Act, to the admission of certain receipts produced by the plaintiff on the grounds that they were unstamped. The court ordered the stamping and re-filing of all such unstamped receipts before the hearing could proceed. The defendant duly complied, and the hearing proceeded.

The Parties' cases

6. Bobby Macharia gave evidence as PW1, and adopted his witness statement filed on 18th June 2012, and his bundle of documents in two volumes. He testified that he was arrested on 28th December, 2004. About forty General Service Unit officers came onto the premises. The

reasons for his arrest were unclear although it was alleged that there were drugs on the premises. He was held at Kileleshwa Police Station from the date of his arrest until he was charged on 7th January, 2005.

7. According to Macharia, although he was told of the anticipated charge the night before he was arraigned in court, he was never asked to write a statement at any stage since his arrest, nor was he interrogated by any officer. At the trial, there were sixteen or seventeen witnesses, but none of them said they identified him as being involved in drugs. Further at the start of the trial the court was made aware that the alleged drugs were never availed as exhibits; that no one in the office where he worked saw the containers which allegedly contained the drugs, nor did they ever see any drugs.

8. The particulars of the charges with which Macharia was charged state:

In respect of Count 1- trafficking in Narcotic Drugs contrary to section 4(a) of the Drugs and Narcotic Substances (Control) Act No 4 of 1994:

> ***"Between 31st January, 2004 and 24th March, 2004, at Kilindini Harbour in Mombasa District within the Coast Province jointly with others not before court trafficked in 295 kilogrammes of cocain with an estimated street value of 1.65 billion by storing in containers Serial Numbers PCLU433452-4 and PCLU 443452-5 in contravention of the said Act"***

In respect of count 2- trafficking in Narcotic Drugs contrary to section 4(a) of the Drugs and Narcotic Substances (Control) Act No 4 of 1994:

> ***"Between 25/3/04 and 7/7/04 at Pepe Limited Athi River in Machakos District within Eastern Province, jointly with others not before court trafficked in 295 kilogrammes of cocain with an estimated street value of 1.65 billion by storing in containers Serial Numbers PCLU 433452-4 and PCLU 443452-5 in contravention of the said Act"***

In respect of count 4- Aiding the trafficking in Narcotic Drugs contrary to section 5(3) of the Drugs and Narcotic Substances (Control) Act No 4 of 1994:

> ***"On 24th March 2004, at Pepe Limited Athi River in Machakos District within Eastern Province, having reasons to believe that containers Numbers PCLU 433452-4 and PCLU 443452-5 contained Narcotic drugs namely cocain weighing 295 kilogrammes aided Central Valley Supplies Limited in trafficking the same in contravention of the said Act"***

In respect of count 5 – Unlawfully permitting premises to be used for the purpose of distribution of Narcotic Drugs contrary to section 5(1) (c) of the Drugs and Narcotic Substances (Control) Act No 4 of 1994:

> ***"Between 25the March, 2004 and 7th July, 2004 at Pepe Limited Athi River in Machakos District within Eastern Province, being the General Manager concerned in management of Pepe Limited permitted the company premises to be used for the purpose of distribution of 296 kilograms of cocain in contravention of the said Act"***

9. Macharia produced as Volume 1 pages 22-200 and Volume 2 pages 201-412 the charge sheet and entire proceedings and ruling of the lower court in the criminal case CMCC No 93 of 2005 Republic v Yusuf Mohamed Yakub, Joshua Omondi Obuor, Daniel Tsofwa Masha, Mohamed Hatibu Dxungweh, Jones Kathuo Musuli, Bobby Macharia and Boaz Kilimo.

10. The witness gave a detailed account of the procedures used by his company, Pepe Limited, as a dry port inland container customs designated area, in the receiving, processing and clearance of containers and goods. In all the processes he stated that Pepe Limited was merely following the legally laid down procedures as approved by customs officials for clearance of goods in the normal course of business.

11. He also stated in his witness statement that after his arrest, he was denied bail on the strength of the prosecution's assertions that he would be dangerous and likely to interfere with witnesses. This, he testified was despite the fact that the state did not have any reasonable cause to prefer the grievous charges he was arraigned with, and that it knew or ought to have known that the charges, and information leading to the charges, was baseless, false and devoid of merit.

12. The Plaintiff further testified that whilst in custody, he cracked a tooth which necessitated a root canal operation at Kenyatta Hospital. He said that he still had wires in his teeth to date. He pointed out in the Plaintiff's Bundle Vol 2 page 259 where the record shows that his lawyer raised the issue in court and the court directed that he be taken to Kenyatta Hospital.

13. In court, the plaintiff was visibly emotional when asked how he was affected by the case, as he explained his feelings of anxiety and humiliation.

14. The Defendant's evidence was adduced by Senior Superintendent of Police Peter Njeru. He filed a witness statement on 28th March, 2017, and appeared in court to testify thereon. Although he was recorded in the charge sheet as one of the three key witnesses to be called to give evidence for the prosecution in the criminal trial against Macharia, the case was eventually closed without him being called. The plaintiff asserts that the failure to call him in the criminal case somehow lowers the relevance or efficacy of his evidence. As the two trials are distinct proceedings, I do not see how his evidence is diminished.

15. His evidence was that on 9th December, 2004, the police in Netherlands impounded containers labelled PCLU 4334524 and PCLU 4334525. They allegedly contained 295 kgs of cocaine. Investigations revealed that the containers had originated in Kenya. He was assigned

with others, to investigate the case. His investigations found that the containers had been at Pepe Ltd inland container depot, and they visited the premises on 16th December, 2004. They took and perused various registers and books of Pepe Ltd, and established that the two containers in issue had been received at the depot from Mombasa on 25th March 2004. The inward and outward registers revealed that the containers had been documented as PLCU whilst the prefix on the containers was PCLU.

16. To the investigation team, this action was:

> ***"a clear manifestation by the plaintiff to disguise the actual movement of the containers having full knowledge that the containers would be used to traffic 295 kgs of cocaine to the Netherlands."***

17. In cross examination, Mr Njeru said that he did not give evidence in the lower court because he designated this case to one of the colleagues with whom he investigated the case, an Inspector Wambua, whilst he handled another case.

18. He also stated that Mr Macharia was un-cooperative and declined to write a statement. In cross examianation he stated that Mr Macharia refused to write a statement. He himself wrote a statement as indicated in PB2 Pg 366, but the said statement was never requested for the particular criminal case involving Mr Macharia.

19. Mr Njeru further stated in cross examination that they arrested Mr Macharia because he ignored the request to change the prefix on the containers, and instead continued to enter the wrong prefixes. Consequently, the investigators viewed this as an indication that he had knowledge of the 295 kgs of cocaine.

20. Ultimately, the evidence availed did not include the testimony of Mr Njeru and Mr Kimilu, the plaintiff's arresting officers. Nor did it include any testimony from officers of the Netherlands police who impounded, the alleged cocaine haul, weighed or tested it.

21. The evidence availed included substantial documentation by the plaintiff in Volumes 1 and 2 of his bundles, and an additional bundle with stamped original receipts.

22. The court has carefully listened to the parties representations and considered the evidence, documentation and authorities availed by the parties. The parties identified nine issues for determination, but in their submissions they each approached them \differently and did not cluster them as in the agreed list. In my view the issues for determination are as follows:

a) *Whether the plaintiff was falsely imprisoned or unlawfully detained ;*

b) *Whether the plaintiff was maliciously prosecuted;;*

c) *Whether the plaintiff's health and career suffered and his reputation was injured*

d) *Whether the plaintiff is entitled to general damages in respect of a), b), or c) above*

e) *Whether the plaintiff is entitled to any of the special damages alleged;*

f) *Who bears the costs of the suit?*

23. I now deal with each item in the list of issues.

False Imprisonment / Unlawful Detention

24. In his prayers at paragraph b) Macharia has sought general damages for false imprisonment. He goes as far as to state that his denial by the court of bail and his being held in custody until the conclusion of his case on 17th November,2005, amounted to unlawful detention. I think that is stretching the argument on unlawful detention too far. The refusal of a court to grant bail is an action of the court's judgment, challengeable only by way of appeal. That is, the court having considered the application for bail and all the circumstances of the case, may allow or disallow bail. This is a decision that is subject to appeal, and there is no evidence that Macharia preferred an appeal. From that point when the court made its decision, the detention was made lawful by the court, and cannot be the subject of a false imprisonment claim, except if fraud, bribery or collusion were alleged or shown.

25. The plaintiff has sued for both false imprisonment and malicious prosecution. On the first, he claims he was not brought to court within twenty four hours of his arrest or within reasonable time. The two are distinct causes of action. **Black's Law Dictionary, 7th Edition, page 459** defines the word "detention" as:

> ***"[The]act or fact of holding a person in custody, confinement or compulsory delay."***

This involves obviously the situation where the detention is without justification in law.

26. A proper understanding of this tort includes situations where there is justification to arrest, but failure to act reasonably thereafter in accordance with the constitution or the law. An example would be a failure to comply with **Section 72 (3) (b)** of the repealed Constitution under which a suspect ought not to have been held in remand for more than 24 hours without any justifiable cause.

And as the word "false imprisonment" is defined in **the Black's Law Dictionary** (Ibid) at page 618 as follows:

> ***"A restraint of a person in a bounded area without justification or consent. False imprisonment is a common law misdemeanor and a tort. It applies to private as well as government detention,"***

27. In **Egbema vs. West Nile Administration [1972] EA 60**, the East African Court of Appeal drew the distinction between the two torts in the following words::

> ***"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.".***

28. In the present case, the defence does not dispute that Macharia was arrested on 28th December, 2004. Macharia asserts so in his evidence. DW1, Peter Njeru also confirmed in his evidence that:

> ***"We again visited Pepe Ltd premises on the 28th December, 2004….When we further questioned him about the directors, he failed to give a satisfactory answer. We then arrested him as he was the General Manager of the premises…"***

29. Macharia testified that he was not brought to court within twenty four hours of his arrest. Instead he was held in police custody until arraigned on 7th January, 2005, over a week later. This fact is not disputed by the defendant, and the criminal trial proceedings support that fact. No explanation for the delay in arraigning Macharia is given.

30. Accordingly, and as this is not disputed, whilst it is true that Macharia was detained for a period of over one week before being brought to court, this would ordinarily have constituted a breach of his fundamental rights under **Section 72** of the **Repealed Constitution,** in breach of the right not to be deprived of his personal liberty, except as authorised under the law. Although this provision was not specifically pleaded, it is clear to the court that **Section 72(3**) of the repealed Constitution availed the following protections to all citizens including Macharia:

> ***" (3) A person who is arrested or detained - (a) for the purpose of bringing him before a court in execution of the order of a court; or (b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.*** (Emphasis added).

31. In this case, although Macharia was neither under suspicion of having committed an offence punishable by death the lower court upheld the position that Macharia had been properly held. In the defendant's submissions he argues that the lower court dealt with the question of the delay in arraigning the plaintiff. The plaintiff had raised it as a request for a constitutional reference. The reference was considered and declined by the lower court which stated (at page 36 of criminal proceedings):

> ***"I do not want to be seen to be concerned about the accused's right to be charged within 24 hours of his arrest but the law envisages a situation where it may not be possible to charge the accused immediately owing to the nature and complexity of the offence and the investigations to be carried out***
>
> ***In this case we're dealing with a serious offence that has international links, an offence that is usually connected with cartels and syndicates that have to be penetrated and laid bare. It is not an easy matter. It is for those reasons that I find that the application for reference is not seriously founded but is frivolous. It is refused. I ask 6th accused to take plea."***

32. Accordingly, I must make a finding that the unlawfulness of Macharia's detention before arraignment was subjected to judicial scrutiny, and no appeal therefrom was raised. Accordingly, I am unable to hold, in the circumstances of this case, that he was unlawfully detained for an unreasonable period which has not been explained or otherwise legally justified. Whilst it is true that he should have been produced in court within twenty four hours of his arrest, that was excused by the lower court in its finding cited above.

Malicious Prosecution

33. The tort of malicious prosecution is a well-established component of Kenyan jurisprudence. An action for malicious prosecution is the remedy for what is considered by the courts to be a baseless and unreasonable prosecution instituted or actuated by malice or considerations other than emanating from a rigorous appreciation of justifiable suspicion of wrongdoing.

34. The ingredients of malicious prosecution were well stated in the Ugandan case of **Mbowa v East Mengo District Administration [1972] EA 352** where the East African Court of Appeal famously 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… rather than for the public benefit. It originated in the medieval writ of conspiracy which was aimed against combinations to abuse legal procedure, that is, it was aimed at the prevention or restraint of improper legal proceedings...It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth. Its essential ingredients are: (1) the criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority; (2) the defendant must have acted without reasonable or probable cause i.e. there must have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified; (3) the defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose; and (4), the criminal proceedings must have been terminated in the plaintiff's favour, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge...The plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must "unite" in order to create or establish a cause of action. If the plaintiff does not prove them he would fail in his action. The damage that is claimed is in respect of reputation but other damages might be claimed, for example, damage to property...The damage to the plaintiff results at the stage in the criminal proceedings when the plaintiff is acquitted or, if there is an appeal, when his conviction is quashed or set aside. In other words, the damage results at a stage when the criminal proceedings came to an end in his favour, whether finally or not. The plaintiff could not possibly succeed without proving that the criminal proceedings terminated in his favour, for proving any or all of the first three essentials of malicious prosecution without the fourth which forms part of the cause of action, would not take him very far. He must prove that the court has found him not guilty of the offence charged...The law in an action for malicious prosecution has been clearly defined and in so far as the ordinary criminal prosecution is concerned the action does not lie until the plaintiff has been acquitted of the charge. In this case the respondent could have brought his action for malicious prosecution until the prosecution ended in his favour. He could not have maintained his action whilst the prosecution was pending nor could he have maintained an action after he had been convicted. His right to bring the action only accrued when he secured his acquittal of the charge on appeal, and he then had the right to bring this action for damages...Time must begin to run as from the date when the plaintiff could first successfully maintain an action. The cause of action is not complete until such a time, and in this case this was only after he was acquitted on appeal".

35. It is apt to summarise the ingredients which the plaintiff must prove in a malicious prosecution claim.

First, there must be proof that the prosecution was initiated by the defendant, that is to say, the defendant is the one who actively set the law in motion regarding the prosecution of the plaintiff;

Second, it must be shown that the prosecution was concluded in the plaintiff's favour, whether by acquittal, termination or other form of discharge.

Third, is that there must be proof that there were no reasonable and probable grounds to commence or continue the proceedings.

Fourthly, the plaintiff must show that the defendant acted maliciously in that he must have acted with an improper and wrongful motive, or with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose;

36. I now assess the facts in this case in relation to each of the ingredients listed.

Initiation of the prosecution by the defendant

37. There is no dispute concerning this aspect, and the point need not be belaboured. The charge sheet was drawn by the state; the witnesses were police officers. The defendant gave evidence through DW1 that after they arrested Macharia, they subsequently charged him in court.

38. This element need no further discussion and I find the ingredient proved.

Conclusion of the prosecution in the defendant's favour

39. It is clear beyond per adventure that the case against Macharia was terminated through a finding by the lower court that there was no case to answer. The ruling of the lower court in the criminal case was produced as evidence in the PB Vol 2 pages 402-412. At page 411 the Learned Magistrate (Ougo, SPM, as she then was) held:

"I find that the charge against Accused 6 has also failed thus. I find that he has no case to answer and I acquit him of the said offence under section 210 of the CPC"

40. **Section 210** of the CPC) the **Criminal Procedure Code, Cap 75** provides as follows:

"If at the close of the evidence in support of the charge and after hearing and such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that <u>a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and forthwith acquit him</u>" (emphasis supplied).

41. There can be no doubt that the case against the plaintiff was terminated through acquittal. In **Stephen Gachau Githaiga v Attorney General [2015] eKLR** Mativo J held as follows concerning proof of termination of a case against an accused:

> ***"The second element of the tort demands evidence that the prosecution terminated in the plaintiff's favour….The favourable termination requirement may be satisfied no matter the route by which the proceedings conclude in the plaintiff's favour, whether it be an acquittal, a discharge at a preliminary hearing, a withdrawal or a stay"***

I agree with the learned Judge on this point.

42. Accordingly, it needs no belabouring that this ingredient of the tort is also proved, and I so hold.

Absence of reasonable or probable grounds for initiating the prosecution

43. It must be shown by the plaintiff that there was no reasonable and probable cause for initiating the prosecution. There are numerous authorities that lay the legal foundation for the proof of this ground, and I will advert to a number of those cited by the parties.

44. The first thing to note is that the mere acquittal of an accused person is not a sufficient basis to found a case of malicious prosecution. As was aptly stated by Aganyanya J. (as he then was) in the case of **Socfinaf Kenya Ltd v Peter Guchu Kuria [2002] eKLR :**

> ***"That a suspect was acquitted of a criminal case is not sufficient ground for filing a civil suit to claim damages for malicious prosecution or false imprisonment. Evidence of spite, ill will, lack of reasonable and probable cause must be established."***

45. The plaintiff has argued that at the time the case was commenced the material known to the prosecutor was insufficient to justify the probable and reasonable cause criteria, and cited the case of **Naqvi Syed Qmer v Paramount Bank Ltd and the Attorney General [2015] eKLR,** where Rika J of the Industrial Court stated:

> ***"39. Was there reasonable and probable cause? The question whether there was 'probable and reasonable cause' requires the Court to examine whether the material known to the Prosecutor, would have satisfied a prudent and cautious man, that the Claimant was probably guilty of the offence. This is the test laid out in the Murunga decision. The Court must similarly be satisfied that the Respondent verified facts through an enquiry, with the level of scrutiny of the facts commensurate with the seriousness of the charges against the Claimant."***

Further, Rika J stated:

> ***"41. In establishing the last element, the Claimant is supposed to show the Respondents had an improper frame of mind…..Malice is present in a prosecution when criminal charges are preferred against a Person for other purposes, other than carrying the law into effect. Traditionally Police Officers enjoyed protection from civil liability for the manner in which they conducted criminal investigations and prosecuted offenders. The law has changed. Common law positions have to be aligned to the demands of the Constitution. Commonwealth jurisdictions such as Canada have developed the tort of negligent investigation, where Police Officers are deemed to owe a duty of care to suspects under investigation. Malicious prosecution involves wrongful assault on the dignity of the Person, Name and Privacy. These are values which enjoy protection under the Constitution. The Police become liable when sufficiently connected with the laying of the charges, or carriage of the prosecution once started."***

46. These holdings follow the older established authorities such as **Hicks v Faulkner (1878), 8 Q.B.D. 167 at pg 171** where Hawkins J. defined probable and reasonable cause as follows:

> ***"Reasonable and probable cause is an honest belief in the guilty 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."*** (See also **Zablon Mwaluma Kadori v National Cereals and Produce Board [2005] e KLR**).

47. **Rudd, J** in **Kagane v Attorney General (1969) EA 643,** had also long set out, in great detail, the test for reasonable and probable cause. Citing **Hicks vs. Faulkner [1878] 8 QBD 167 at 171**, **Herniman vs. Smith [1938] AC 305** and **Glinski vs. McIver [1962] AC 726** the learned judge had stated thus:

> ***"Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would 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 judges 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."

48. In the present case, the evidence is that the plaintiff was arrested on the basis of alleged information the Police received from the Netherlands Police concerning impounded containers originating from Kenya and containing 295 kgs of cocaine. The impounded containers were marked PCLU 4334524 and PCLU 4334525. Police investigations locally led them to identify that the containers had been at Pepe Ltd. They visited the premises at Athi River. The General Manager was the Plaintiff, Mr Macharia. Their investigation led to a discovery that the containers had been registered with the pre-fixes *PLCU* 4334524 and *PLCU* 4334525 instead of PCLU in the Pepe Ltd registers. The police arrested Mr Macharia, amongst six others, on suspicion that he had been involved an attempt to disguise the movement of the containers with full knowledge that they would be used to traffic in narcotic drugs.

49. The key investigating officers in respect of the Plaintiff's aspects of the criminal case were Mr Gedion Kimilu and Chief Inspector Peter Njeru – although later on Inspector Francis Wambua, who testified as PW 16, was given the case concerning Macharia to follow through and testify upon. According to the Charge Sheet, these three officers were expected to testify as the key witnesses in the criminal trial. When the criminal case was instituted, Macharia challenged his arrest and the charges and also sought bail. The trial court required him to plead and declined bail.

50. At the hearing, the Prosecutor stated that the subject containers were shipped to Antwerp, where they were as the hearing commenced. Importantly, the prosecutor stated that they would call a scene of crimes officer to produce photographs, and if necessary would move the court to the jurisdiction. They intended to call the scenes of crime officers from Antwerp who dealt with the drugs. He pointed out that they did not have the drugs or the containers as evidence before the court. See Page 61-62 Plaintiff's Bundle Vol 1.

51. Seventeen witnesses were called by the prosecution. However, although Inspector Wambua was called as PW 16, none of the officers who actually conducted the substantive investigations leading to the arrest of Macharia was called to give evidence. PW 16 said in his testimony that:

" I wish to mention that later in the day I was given by CIP Njeru the 6th and 7th Accused persons for charging" PB Vol 2 pg 324

52. Yet in cross examination Inspector Wambua clearly explained the role of the investigating officer as critical to uncovering the truth about a crime – suggesting that he could not have done the job properly himself – when he said:

"…the role of the investigating officer is to do what it takes to discover the author of a crime… I can state that I don't know why I brought someone to court. The case was investigated by two people. I was aided by CIP Njeru. He arrested accused 6 and 7 and he told us why he did so. I can't doubt him. I have no shred of evidence that accused 7 trafficked in cocaine" (PB Vol 2 pg 333

53. There is still further evidence that Inspector Wambua knew little about the case against Mr Macharia, the 6th accused, prior to charging him. He also could not tell why Macharia was charged, and expected that evidence concerning Machaia would be availed by Chief Inspector Njeru. These disclosures are in the testimony Wambua gave at the criminal trial as set out in PB Vol2 Pg 360 where he stated:

"…I didn't contact my colleagues at the other prots. Yes I am the investigating officer. We had a case supervisor whoi contacted the Antwerp Ploice. I didn't make contact with the said ports.

Mr Kimilu is the case supervisor…..I didn't know why accused 6 (Macharia) is charged in this court. Njeru knows. Njeru will come and adduce his evidence…"

54. All this goes to show that although there may have been valid or justifiable reasons for arresting Mr Macharia, on suspicion, it was never going to be possible to prosecute him without the evidence of the relevant investigating officers.

55. The final nail in the coffin of the prosecution was when Inspector Wambua conceded that **section 74** of the **Narcotic Drugs and Psychotropic Substances Act** was not Followed. He testified as follows at PB Vol 2 page 360-361:

"Yes, I know the implication of the [A]ct. Yes I am aware of section 74 of the [A]ct. When the provisions of section 74 are not followed in their totality….there were no analysts present. The examiner is in the Netherlands. The whole cocaine was not

weighed in the accused person's presence….i don't know that the drug found in Holland isn't a drug as per our law….CIP Njeru had not gone to Netherlands on investigations…"

56. As earlier stated, Mr Macharia was charged with several counts of trafficking drugs and aiding in the trafficking of 295 kgs of drugs with a street value of Kshs 1.695 billion. The penalty was a fine of kshs one million, or three times the street value of the drugs, or life imprisonment. To establish such crimes, it was mandatory to comply with **section 74** of the Narcotic Drugs Act, which provides for the following mandatory procedures:

"74A. Procedure upon seizure of narcotic drugs

(1) Where any narcotic drug or psychotropic substance has been seized and is to be used in evidence, the Commissioner of Police and the Director of Medical Services or a police or a medical officer respectively authorized in writing by either of them for the purposes of this Act (herein referred to as "the authorised officers") shall, in the presence of where practicable—

(a) the person intended to be charged in relation to the drugs (in this section referred to as "the accused person");

(b) a designated analyst;

(c) the advocate (if any) representing the accused person; and

(d) the analyst, if any, appointed by the accused person (in this section referred to as "the other analyst"), weigh the whole amount seized, and thereafter the designated analyst shall take and weigh one or more samples of such narcotic drug or psychotropic substance and take away such sample or samples for the purpose of analysing and identifying the same.

(2) After analysis and identification of the sample or samples taken under subsection (1), the same shall be returned to the authorized officers together with the designated analysts' certificates for production at the trial of the accused person.

(3) Upon receipt of the designated analyst's certificates and the samples analysed in accordance with the foregoing subsections the authorized officers shall, where the drug is found to be a narcotic drug or psychotropic substance within the meaning of this Act, arrange with a magistrate for the immediate destruction by such means as shall be deemed to be appropriate of the whole amount seized (less the sample or samples taken as evidence at any subsequent trial or any contemplated trial particularly where the accused person's identity is not yet known or the accused person is outside the jurisdiction of Kenya at the time of taking such samples)."

57. Thus, to charge a suspect and commence a prosecution without having complied with the aforesaid procedures, would amount to acting in bad faith in such prosecution. In the case of **Thomas Mboya Oluoch & Another v. Muthoni Stephen & Another [2005] eKLR** the learned Ojwang, J (as he then was) clearly stated that prosecutors who fail to treat prosecutions with the seriousness they deserve or who initiate prosecutions without utmost good faith, will find no comfort in the law when seeking judicial immunity from compensation claims. The learned judge stated as follows:

"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."

In the case of **Githunguri v Republic KLR [1986] 1** the court stated as follows:

"A prosecution is not to be made good by what it turns up. It is good or bad when it starts"

58. Indeed, the proceedings of the criminal trial in the lower court show that the Director of Public Prosecutions himself attended the hearing, confessed that the prosecution had committed errors and apologised, stating as follows:

"…a file was sent to my office yesterday with a brief raising circumstances about what the court has talked about i.e the law specifically section 74 of the Narcotic act which he was compliance and hence was non compliance(sic)….

….In the circumstances I had been unfair to seek any further postponement of this case and my instruction to the prosecution evidence (sic) in this case is to tender whatever evidence they have left without any further delay and close the case forthwith….

….I therefore tender an apology to the defence and the court and the accused person. Let's not take the matter further. I apologise further for the prosecution…

…I apologise to (sic) the embarrassment and inconvenience caused to the court and the defence" See PB Vol 2 pages 375-377

59. The lower court in its ruling on whether the accused had a case to answer stated, inter alia:

"From what I have summarised and from the evidence on record I find that the only evidence that the prosecutor has adduced is

that the 2 containers came into the country and they were suspected to have drugs. As to whether they had drugs there is no evidence at all to show that the said containers had drugs when they were in the country, nor was there evidence adduced that they were even found with drugs at their final destination ."

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"…the fact that the state admitted that they did not comply with section 74A of the Narcotic Drugs and Psychotropic Substances Act No 4 of 1994 is very fatal. I find that provisions of the said sections are very mandatory and must be complied with. One wonders why the state brought this case to court knowing that they had not complied with the said provision.

60. In this case, the linkage between the finding in the Netherlands of containers allegedly loaded with cocaine, the ascertainment, analysis and measurement of the substance as cocaine, and the linkage of the said substance with the accused, could never have been made from the outset without compliance with section 74 of the Narcotic Drugs Act. It was a prosecution doomed to fail from the outset without such compliance.

61. Enough has been said. I find that, overall, Mr Macharia was prosecuted under circumstances where it would have been impossible to convict; that the prosecution was aware of the inadequacy of the case they were pursuing against him; and that it was improper to prosecute him knowing fully well that unless they complied with the law, the prosecution would be hopeless. I agree with the plaintiff and find and hold that this prosecution amounted to malicious prosecution as legally defined.

Personal Injury to Plaintiff's career, health and reputation

62. As in all claims, it is for the plaintiff to show injury to his career, reputation and health. In his written witness statement dated 14th June, 2012, Macharia stated at paragraph 20 that as a result of his malicious prosecution:

'…I was deprived of my liberty, greatly injured in my career and reputation, suffered considerable mental, bodily pain, anguish, anxiety and expense…"

63. In the Ugandan case of **Dr Willy Kaberuka v Attorney General Kampala HCCS No 160 of 1993**, the court stated as follows with regard to compensation for injury to reputation, humiliation and feelings, which I am inclined to adopt:

"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 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 will be 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"

64. As earlier stated Mr Macharia was visibly emotional and broke down when testifying about how the case affected him. He said:

"Its been very hard to be accused of a crime that would have had me in jail for the rest of my life. I lost my job, my standing in society. I have tried to make a living to feed my family…it remains an uphill task…. I was not a shareholder of Pepe Ltd. I was just the General Manager"

65. I take the view that the plaintiff di suffer emotional distress, indignity and humiliation throughout the ordeal he underwent, and is entitled to damages in compensation for the same.

Special Damages

66. The plaintiff has sought special damages of Kshs 1,432,120/= made up as follows: Advocates legal fees for defence Kshs1,000,000/=; Medical Expenses Kshs 357,876/=; Prison Expenses Kshs16,000/= and travelling expenses and research costs Kshs 58,244/=

67. With regard to the legal fees paid by Macharia in the criminal case, he provided original receipts from Messrs Pravin Bowry & Company Advocates. The proceedings in the lower court show that Mr Bowry acted for Macharia. I will therefore allow Kshs 1,000,000/=.

68. With regard to medical expenses, the receipts availed were for various dental services: fillings, crowns, dental services, replacement of lost teeth. In addition, there is a receipt for a cardiologist's services and various receipts for purchase of medicines. I have carefully considered the evidence availed by Macharia. He alleged that:

"I cracked a tooth in custody that necessitated a root canal. I went to Kenyatta Hospital. I still have wires in my teeth up to date"

The proceedings disclose at PB Vol 2 page 259 one request for hospitalisation of Macharia on 22nd August, 2005 at Kenyatta Hospital:

"Mr. Bowry: the 6th accused person has a dental problem. He has a personal dentist and needs to be examined. He can be seen at KNH if need be.

Court: accused No 6 to be taken to KNH for a dental checkup."

69. No evidence is shown of this dental check-up having occurred. The receipts for dental services produced in court are instead all from Nairobi Hospital and are for periods in 2006 and 2007, well after the termination of the criminal proceedings against the plaintiff. It therefore appears that the dental services arose in the usual course of Macharia's health management and are not necessarily related to Macharia's prosecution or custody. As earlier stated, the dental receipts show fillings, two crowns, replacement of lost teeth and bite re-alignment. There is no connection made between the medical treatments and Mr Macharia's prosecution or custody. In other words, no justification is given as to why the medical treatment should be attributed to and compensated by the respondents. I thus reject the medical claim of Kshs 357,876/=.

70. Prison expenses receipts were explained in the evidence of Macharia as being attributable to payments made to the Prison Welfare Office by his wife, Judy. In cross examination he admitted that they were not stamped by prisons authorities and there was no way of determining for what purpose they were issued. Further, he did not call his wife to give evidence as the person who made the alleged payments. I reject the same for inadequacy of proof.

71. The travel expenses and research costs were alleged by Macharia to have been incurred. However, there is nothing to support their incurrence and I reject them.

72. In the end, I accept compensation by way of special damages of Kshs 1,000,000/= for legal fees paid to Bowry and company. I note that these are all deposits on account, and presumably include VAT.

General Damages

73. Mr Macharia has sought damages for false imprisonment separately from general damages for malicious prosecution. For false imprisonment he seeks compensation of Kshs 25,000,000/= for being confined in custody from 28th December, 2004 to 7th January, 2005, and for false imprisonment for being held in custody without bail for over ten months from 7th January, 2005 until the case terminated with his acquittal in November, 2005. For malicious prosecution, Macharia seeks Kshs 5,000,000/= damages.

74. It must be remembered that damages are intended to stand as compensation for the injuries suffered by a plaintiff. Omollo JA put it well in **R.R.Siree & Another V Lake Turkana El Molo Lodges LLD CA Civil Appeal No 229 of 1998** where he said:

" It must be noted that damages in whatever name are awarded to put the Plaintiff to a position in which he would be had the tort not occurred. It is not for enrichment".

Damages must therefore always reflect the general economic conditions, the mores and relative financial situation of the jurisdiction in which the power to award damages is exercised. In other words a comparison of similar cases to achieve a like for like situation reflecting the expectations of the society is called for in the determination of the quantum of damages..

75. The Plaintiff cites **Michael Maina Kagoma v The AG [2012] eKLR** and **Geoffrey Asanyo & 3 Others v AG [2012] eKLR**. In **Kagoma** kshs 6,000,000/= was awarded for three separate arrests on 28th June 2001, 15th May,2002 and 12th October, 2004, detention and arraignment in court. In addition, **Kagoma's** case took eight years to be finalised. In **Asanyo** Kshs 10,000,000/= was awarded for malicious prosecution. The criminal trial there lasted over six years.

76. Mr Macharia has also cited **GBM Kariuki v AG [2016]eKLR** and **Samuel Kiprono Chepkonga v Kenya Anti-Corruption Commission and Another [2014]eKLR** in each of which the court awarded Kshs 5,000,000/= as general damages for malicious prosecution. In GBM Kariuki's case, which was concluded fairly recently, the prosecution of the Judge for attempted murder took one year to conclude.

Exemplary and Aggravated Damages

77. In his submissions, the plaintiff seeks exemplary and aggravated damages of Kshs 7,000,000/=. His argument is that exemplary damages serve a valuable purpose in restraining the arbitrary and outrageous use of executive power. Here, Macharia cites the case of **Simon Kamere v AG and 2 Others [2008] eKLR**, where Kamere was awarded Kshs 2,000,000/= as exemplary and aggravated damages.

78. In **Kamere's** case, the aggravated damages were awarded to Mr. Kamere for being arrested whilst in the court registry conducting lawful business there as an advocate. In **Chrispine Otieno's case**, the prosecution took one year to conclude, and Otieno was awarded 500,000/= as punitive and exemplary damages *"as the four days the plaintiff was kept in custody was not warranted"*.

Disposition

79. Given all the foregoing findings, the analyses of comparative suits and awards discussed herein and the circumstances of this case, I find in favour of the Plaintiff and award compensation as follows:

a. Special Damages proved in the amount of Kshs 1,000,000/=;

b. General Damages for malicious prosecution, false imprisonment and loss of esteem and dignity in the amount of Kshs 5,600,000/=

c. Aggravated damages in the amount of Kshs 800,000/=.

d. Interest on special damages shall accrue from the date of filing suit, whilst interest on general and aggravated damages shall accrue interest from the date of this judgment.

80. The plaintiff shall also have the costs of the suit.

Orders accordingly.

Dated and Delivered at Nairobi this 27th Day of September, 2018

_____

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. .....for the Plaintiff/ Applicant

2. .....for the Defendant/Respondent

Court Clerk.....