



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL SUIT NO. 696 OF 2009

G.B.M KARIUKI.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL.....DEFENDANT

JUDGEMENT

Plaintiff's Case

1. The plaintiff, a Judge of the Court of Appeal by his plaint dated 21st December, 2009 and filed on 22nd December, 2009 seeks general damages against the Defendant, who is sued in a representative capacity under the ***Government Proceedings Act***, Cap 40 Laws of Kenya on behalf of the Nairobi Area Provincial Criminal Investigation Officer and Director of Public Prosecutions.
2. According to the plaintiff, in or about October 2008 the Nairobi Area Provincial Criminal Investigation Officer, an office then held by one **J. F. Mwachai**, abused the powers of the office by directing the "Flying Squad" in Nairobi and police officers at Gigiri Police Station to wrongfully arrest in commando style and humiliate the Plaintiff for the alleged offences of attempted murder and causing grievous bodily harm that had not been investigated at all and in respect of which there was no evidence. To the plaintiff, in so acting, the Nairobi Area Provincial Criminal Investigation Officer abused the powers of his office acted beyond the call of duty; and without any basis in law as a result of which the plaintiff was arrested and arraigned.
3. It was pleaded that the Nairobi Area Provincial Criminal Investigation Officer wrongfully caused the Plaintiff to be publicly humiliated and occasioned considerable distress. As a result, the Plaintiff's name, character and reputation as a Judge and law abiding citizen were damaged.
4. Further, the Nairobi Area Provincial Criminal Investigation Officer together with or in consultation with the Director of Public Prosecutions caused the Plaintiff to be unfairly charged and prosecuted for alleged offences that had not been investigated and in respect of which there was no evidence to justify either arrest or prosecution on 20th October 2008 and thereafter or at any other time.
5. To the Plaintiff, the powers of the offices of Nairobi Area Provincial Criminal Investigation Officer and Director of Public Prosecutions were abused and used to subvert justice and violate constitutional rights of the Plaintiff which actions are actionable in tort hence the Defendant is liable to pay damages to the Plaintiff for the public humiliation, embarrassment and distress caused to the Plaintiff as a result of the wrongful actions of the Government officers concerned.
6. It was disclosed that on 15th October 2009 the Plaintiff was acquitted in Nairobi Chief Magistrate

- Criminal Case No. 1655 of 2009 of the charges of attempted murder and causing grievous bodily harm under sections 220(a) and 234 of the **Penal Code**, respectively, on the grounds, *inter alia*, that the evidence brought to the court was not credible and that there was no proof to prove such charges.
7. It was the Plaintiff's case that the actions of the Government officers concerned amounted to abuse of office and that the Government officers represented by the Defendant in this suit were actuated by malice and acted in bad faith and against the law and violated ethical standards enjoining him as a public officer not to abuse the powers of his office or to undermine or subvert the law or to kowtow to politicians as happened and as is borne out in the judgment of the court in NBI C.M CR. Case No. 1655 of 2009.
 8. The Plaintiff therefore claimed damages for the distress and public humiliation and defamation to which he was subjected to at the hands of the Government and its officers. He also prayed for the costs of the suit.
 9. According to the Plaintiff, who testified as PW1, he was an advocate of the High Court of Kenya and at the time of his testimony, he was a Judge of the High Court of Kenya attached to Milimani Law Courts as the Presiding Judge in the Family Division, having been appointed in May, 2003. In his evidence the plaintiff confirmed having issued a notice of intention to sue under section 13A of the **Government Proceedings Act** to the defendant herein.
 10. According to him, he was arrested on 20th October, 2008 kept in custody and on 21st October, 2008 was charged in Nairobi Criminal Case No. 1655 (hereinafter referred to as "the Criminal Case") with the offence of attempted murder contrary to section 220 of the **Penal Code** and was arraigned in Court on 21st October, 2008. The charge was that on 18th October, 2008 along Kabete Road in Spring Valley Area he unlawfully attempted to cause the death of **Robert Karori** by stabbing him in the stomach by a sharp object. In his view the prosecution against him was malicious, personal and spiteful and had no bearing to the public interest or the maintenance of the rule of law and order. The same, he testified hurt his feelings and placed him in bad light as a public officer.
 11. According to the plaintiff the said complainant was unknown to him and that he met him for the first time at the time of the accident. In his view there was absolutely no evidence to support the charge that he attempted to murder the complainant hence his inference of malice and ulterior motive. To the plaintiff the said complainant according to the judgement had not recorded his statement linking him to the charge laid against him. From the evidence, his arrest was on the instructions of **Mr Mwachai** before the completion of the investigations. According to the proceedings before the trial court, when PW9 took over the investigations there were only 3 statement including the plaintiff's hence the Court found that the complaint was never investigated.
 12. To the plaintiff despite having given his telephone contacts, his arrest was effected by police officers in not less than two vehicles who were armed with AK 47 rifles in the company of the press. Instead of ringing the bell the police officers climbed over the gate hence his contention that the arrest was conducted in a commando style. On being arrested the plaintiff was taken to Gigiri and thereafter to Kamkunji Police Stations. It was during his incarceration, he learned that the incident was instigated by the then Minister for Justice who sent her lawyer by the name of **Steve Njiru** to confirm that he was being humiliated in the manner desired by the said Minister who instructed the then Attorney General to ensure that a prosecution was mounted. Apart from that **Mr Mwachai** wrote to the Chief Justice requesting that action be taken against the plaintiff as a result of the said criminal charges. However no action was taken against him and though he did not lose his position as a Judge, he did not sit as such till he was acquitted.
 13. According to the plaintiff despite his complaints of assault against the complainant, the police declined to issue him with a P3 form notwithstanding that he had been treated for the same by **Dr Evelyne Okoth** thus confirming his belief that the prosecution was maliciously instigated. According to the plaintiff, he was made to understand that the PCIO was under pressure from both the Attorney General and the Minister for Justice and since the police admitted that by the time he was charged, the investigations were incomplete, the charge of attempted murder was a hoax and this was confirmed by the findings of the trial court.
 14. It was the plaintiff's testimony that one of the prosecution witnesses, PW5, **David Karori**, in cross-examination said that his testimony was based on what he had been told to say by the

- Complainant and PW2. It was on this basis that the plaintiff concluded that there was no evidence against him and that the concerned government officers abused their offices.
15. The Plaintiff disclosed that there was no appeal against his acquittal. He testified that when he was arrested the manner of his arrest attracted the attention of the neighbours, friends, family and colleagues in the profession and the incident was reported both in the electronic and print media right from the time his house was raided to the time of his acquittal. To him this was the most humiliating experience more so as he knew that the allegations made against him were not true.
 16. According to the plaintiff, while at the police station and when he was arraigned in Court, the police officers informed him that the said Minister instructed them to keep him in the cells till 9.00 o'clock.
 17. In the plaintiff's case, the complainant in his statement stated that he was stabbed in the stomach hence would have been expected to have bled profusely hence would not have been able to drive or engage in a fight. However during the trial the police failed to produce the clothes the complainant alleged to have been wearing. However from the judgement it appeared that the complainant had been injured earlier and was not stabbed. To the plaintiff the case against him was an exemplification of the height of impunity and abuse of power by the concerned public officers.
 18. In cross examination by **Mr Mutinda**, learned counsel for the defendant, the plaintiff explained that he did not sue the complainant because the prosecution was mounted by the State following a complaint by the complainant, **Robert Karori**. To him the State did not have to prosecute if there was no evidence. He however conceded that the complaint was made to the police by the complainant and that the complainant did give evidence in which he alleged that he had been stabbed. There were also other witnesses who testified before the trial Court and said that there was stabbing though PW5 said that he had been punched. He also admitted that he was placed on his defence and tendered his defence and the judgement was delivered after a full trial.
 19. The plaintiff however conceded that he informed the Court that the police officers informed the Court that they were instructed by **Mr Mwachai** to effect his arrest though he did not know and had never met **Mr Mwachai**. Similarly, he did not know the police officers but reiterated that the lawyer who went to Kamkunji Police Station told him that he was to confirm whether the Minister's instructions were being carried out by **Mr Mwachai**. The lawyer was however not called as a prosecution witness.
 20. Asked about the then Minister for Justice, the plaintiff disclosed that the Minister was his friend for many years and was getting at him for having walked away from her. Asked why he did not sue her, the Plaintiff said that she was the Minister and it was the State that mounted the prosecution. To him the Defendant should have refused to comply therewith. He however said that the instructions were given to **Mr Mwachai** and the Attorney General. Asked who the Minister was, the Plaintiff disclosed that she was **Hon. Martha Karua**. The plaintiff however explained that he did not write to her because she did not prosecute him.
 21. The Plaintiff insisted that he was arrested commando style by the police jumping over the gate. The day was Kenyatta Day, 20th October and the gatekeeper was not present as he had been laid off. According to the Plaintiff, during the trial, the police had no explanation as to why they did not summon him to the Police Station save for the fact that they were under instructions.
 22. The Plaintiff explained that his first contact with the complaint was at the scene of the accident and though the Plaintiff was the first to lodge the complaint the Plaintiff explained that he had not deemed it fit to sue the complainant for assault because he was being used in the prosecution. And the Plaintiff did not wish to drag himself into another litigation. And he was not interested in the complainant paying damages. The Plaintiff however reiterated that he neither knew the complainant before nor was he aware whether the complainant was known to the police or the Minister.
 23. According to the Plaintiff he defended himself not only against the complainant but also against the other occupants of the car. According to the plaintiff, as he was calling the police, the complainant went to his window and slapped him. Asked about the proceedings of the trial court, the plaintiff said that his lawyer might have thought that they were unnecessary though the reasons for the judgement were contained in the judgement which judgement depicted the entire picture.
 24. In re-examination by **Mr Mwenesi**, the Plaintiff said that he did not know the investigators before. He disclosed that people went into his compound and he later learned they were police

- officers. He however did not see the reason for suing the complainant since the prosecution was mounted by the State.
25. PW2 was **Hellen Njambi Mbugua**. According to her statement, she was a Human Resource practitioner having graduated from the University of Nairobi graduate and had been employed in various corporate organizations at managerial level. At the time of her testimony, she was the Chief Human Resource Officer for the Rift Valley Railways Ltd. She admitted knowing the Plaintiff whom she first came to know when he used to feature a lot in the media as a member and later as chairman of the Law Society of Kenya. When she encountered some legal issues she engaged the professional services of the Plaintiff, then a private practitioner. To her, she found the Plaintiff's services as an advocate valuable as he was compassionate and took his work seriously and listened attentively to his clients. He had a good clientele from what PW2 could make out whenever she visited his offices and was impressed by the Plaintiff's preparation of documents for court. In the course of time, the two became good friends and shared much and commiserated with each another. According to her, it was as a result of this relationship that she was among the friends the Plaintiff telephoned to inform of the incident at his house in Lake View Estate on 18th October 2008.
26. PW2 recalled that the Plaintiff had travelled to Nairobi from Kericho on Friday evening the 17th October 2008 as he was then stationed in Kericho. She added they had shared a meal that Friday and the Plaintiff informed her that he was going to be in Nairobi for the weekend and also on Kenyatta Day, Monday 20th October 2008 after which he was to resume duty at Kericho after Tuesday 21st October 2008. The witness was however, surprised to get his call late on Saturday 18th October 2008 informing her that he had been involved in an accident involving his official Mercedes car and another smaller car. He told the witness that the driver of the other car had appeared drunk to him and there had been a scuffle and he had had to rush off from the scene for fear of his life. He had reported the matter to the police while the other person had been ordered to go for treatment at MP Shah Hospital. He was being required to surrender his vehicle to the Parklands Police station by OCPD Parklands and had recorded his statement at the Parklands police station. The OCPD had met him at MP Shah Hospital in the company of officers from Spring Valley Police Station and that the Spring Valley Police Station officers had asked the plaintiff to drive them to the Hospital to check on the other driver. While at the hospital the officers had called the OCPD and falsely told the OCPD a lie that the Plaintiff had already recorded a statement, an impression which the Plaintiff informed the witness that the Plaintiff had corrected. That is when the OCPD insisted that the Plaintiff should record a statement at the nearby Parklands Police Station. Since at the station he was required to surrender his vehicle, he requested the Plaintiff to pick him from the police station and drop him home which the witness did.
27. According to PW2, On Monday 20th October 2008 early morning before 9 am she received a rather panicky call from the Plaintiff informing her that his compound had been broken into by what appeared to be armed police officers and despite seeking help from various officers he neither got no help nor a response and therefore wanted the witness to report the incident. The witness then decided to drive to the plaintiff's residence in the company of the Plaintiff's cousin, one **George Stephen Muhoro** who was staying near her. On arrival at the Plaintiff's residence some minutes before 9 am, she found the compound was surrounded by armed policemen and the neighbours and other people were gathering. There also came a contingent of press people whom she recognized having previously worked with Nation Media Group. On inquiry was informed they had received information of arrest of a judge **Kariuki** and had in fact gone to the residence of **Mr. Justice Paul Kihara Kariuki** who had then directed them that the Plaintiff resided in Lake View Estate. Though the press did not inform her of the source of the information she suspected that the source was the police. At the residence she also observed that the police had a high stool which they had apparently used to scale the gate into the compound. On seeking information from one of the Senior Officers, one **Mr. Kiswii**, she was informed that he was following orders. She then called the Plaintiff and informed him that the people outside seemed genuine after which the Plaintiff co-operated with the police and he was arrested. According to her she was shocked at the spectacle as the Plaintiff who had co-operated with the police since 18th October 2008 evening and even driven police officers to the scene of the accident and then to MP Shah Hospital and

- voluntarily driven his car when required to the Parklands Police Station on 19th October when asked to do so, was now being hounded as if he was a most wanted criminal. To her the commando style arrest and bravado shown by the police was quite unnecessary.
28. During the trial, the witness said, it was embarrassing and painful to see the plaintiff unfairly treated and humiliated and at Kamukunji Police Station a police officer kept insisting that they were being pestered to have the judge photographed as he was led to the cells and that the police officer kept receiving calls on his cell phone. She was however, relieved when the Plaintiff was eventually acquitted by Chief Magistrate **Mr. Mutembei** one year later on 15th October 2009.
29. There were other materials contained in the statement which were clearly opinions and conclusions and had no evidential value.
30. In cross-examination, PW2 denied that her evidence was hearsay. Though she was not at the scene she insisted that she did read the judgement. She however witnessed what took place at the Plaintiff's residence. Although she was not at the scene of the accident she relied on what she had been told by the Plaintiff. She also reiterated that on the night of 19th October, 2008, the Plaintiff called her and requested her to give him a lift following the detention of his vehicle by the police. She reaffirmed that on 20th October, 2008, she saw a contingent of police officers at the plaintiff's residence and later learned that they had gone to arrest the Plaintiff. In her evidence they had guns and were in police uniforms and had a police vehicle. One of them **Inspector Kiswii** informed her that they had been sent to arrest the Plaintiff, though she had not known him before.
31. According to the witness one of the officers was receiving calls and when the witness and **Mr Muhoro** inquired from him, he disclosed that he was being instructed by his senior officers to take the Plaintiff to the cells to be photographed by the media. In her evidence she could discern the contradictions in the judgement of the trial court and though she was not an advocate, she was present in Court during the trial. According to her the Plaintiff was arraigned in Court before the investigations were complete. Although the Plaintiff was her friend, the witness insisted that she was just saying the truth.
32. In re-examination by **Mr Mwenesi**, PW2 conceded that the Plaintiff was her friend and that that they discussed the matter. She confirmed that she attended all the proceedings before the trial Magistrate. According to her although the police kept on referring to a Somali sword the same was never produced in evidence.
33. At the end of the evidence by PW2, the Plaintiff closed his case which apart from the oral testimony was supported by the documentary evidence produced before the Court.

Defendant's Case

34. According to the defendant, it was not correct that the plaintiff's arrest or prosecution was without basis or that the police abused their powers. To the defendant, the allegation that the Plaintiff's character or reputation as a judge was damaged was similarly not true. Further it was incorrect that the Plaintiff was charged or prosecuted for offences that had not been investigated or that there was no evidence to justify his arrest or prosecution and the Plaintiff is put to strict proof thereof.
35. To the defendant, the acquittal of the Plaintiff did not absolve him from liability in civil proceedings and hence this suit has no basis and the Plaintiff was not entitled to the orders sought.
36. In support of its case the defendant called, as DW1, **Patrick Kiswii**, who at the time of his testimony was a Commissioner of Police stationed at CID headquarters, along Kiambu Road.
37. According to his statement, on the 20th October, 2008, himself and **Sergeant Gitahi** took over the investigation of Cr. 162/90/2008 offence attempted murder, where the Plaintiff was a suspect and the complainant as one **Robert Karori** who was admitted at MP Shah Hospital with a stab wound on the abdomen. He averred that he tried to call the plaintiff through his mobile number to go to Gigiri Police Station but the number was disconnected. It was then that he together with his fellow officers, moved to the Plaintiff's house within Hill View Area where they were denied access to the compound. Even after accessing the compound the Plaintiff locked himself in the house and refused to open for them. However, the house was later opened when the Plaintiff's lawyers, relatives and other friends came. He was however the only officer allowed inside the house and after talking to him and explaining to him why they were there the Plaintiff was arrested him and escorted him to Gigiri Divisional Headquarters. On arrival they found many people outside the station including the media, relatives and lawyers. As a result of the interference, they

- decided to take him to Kamukunji Police Station where he recorded his statement. He was later taken back to Gigiri Police Station where he was detained and was arraigned in court the following day.
38. According to DW1, the Plaintiff was arrested pursuant to a complaint by the complainant one **Robert Karori**. After his arrest and recording of his statement, DW1 drew a charge sheet dated 21st October, 2008 and signed it on behalf of the Officer Commanding Station (OCS) Spring Valley Police Station. Further, the exhibits which included a pair of shears, rado wrist watch and a pair of eye glasses belonging to the Plaintiff were later taken to Government Chemist for necessary action.
 39. The witness also disclosed that on 18th November, 2008, the Plaintiff went to Gigiri Police Station and was issued with a P3 form and which was returned after one month. However, due to lack of cooperation from the Plaintiff in pursuing his complaint, the police could not act accordingly.
 40. Referred to the statement recorded by PW2, the witness said that he was the only person given access to the house apart from the Plaintiff's lawyer, **Muturi Kigano** and family members, and that PW2 was not present. In his view, PW2's statement appeared to be a fabrication. As a result of what was going on, DW1 said that many people including members of the press gathered outside and he instructed his officers to block them from interfering and it was agreed that they leave the compound in a private vehicle belonging to the Plaintiff's lawyer to avoid the press and were driven to Gigiri Police Station. However due to the presence of many people he decided that they should move to Kamkunji Police Station in order to record the Plaintiff's statement and after being informed of his rights the Plaintiff was arraigned before Court.
 41. To DW1, the police came into the matter following a complaint made by **Robert Karori** at Spring Valley Police Station. In his view, investigations were carried out and the matter was taken to Court. However, the Plaintiff was, according to him, acquitted on a technicality.
 42. According to DW1, the Plaintiff stated that he was driving on the road where the incident occurred when he hit somebody and reported the matter to the police. However, while the Plaintiff was reporting the incident, the Complainant appeared complaining of stab wounds in the abdomen and identified the Plaintiff as the one who had injured him on the road. To the witness the case was not a creation of the police but was based on a complaint who however was not a party to these proceedings. In his view, the defendant is the Government which investigated the complaint and it was not true that they took the Plaintiff to Court before completing the investigations which investigations started with the OCS Spring Valley Police Station before it was taken over by the witness by which time they had reasonable grounds to charge the plaintiff. The witness denied that they received instructions from **Hon. Martha Karua** to press the charges and averred that there was no other person involved. In his evidence, DW1 said that he had not met the Plaintiff before and had no grudge against him.
 43. In his evidence, he visited the complainant on 2 or 3 occasions and found that the complainant had stab wounds in the lower abdomen and was in great pain. On interrogation, the complainant informed him that he was stabbed by somebody along Kabete Road after a short scuffle and he identified the person at Spring Valley.
 44. In cross-examination by **Mr Mwenesi**, the witness said that he took over the investigations from the OCS Spring Valley Police Station on 20th October, 2008, the very same day he was at the Plaintiff's House. In his evidence, the investigations followed a complaint by **Robert Karori** which complaint must have been booked in the Occurrence Book (OB) though he could not remember the OB number. He admitted that it was an important matter but said the investigations file contains the details which he could not remember. According to him, he was investigating an attempted murder though he could not remember whether it was the same offence that had been recorded at Spring Valley. It was however his view that the evidence may change the charge. According to the witness the complainant complained that he had been injured by somebody he identified at the Police Station.
 45. The witness reiterated that he was the only person who had access to the Plaintiff's house and that when he arrived the gate was locked from the inside. He called the Plaintiff on mobile phone but the call was disconnected at which point he decided to climb over the gate and entered the compound with three officers leaving the other officers outside. He admitted that the police officers were many. He however denied that he gained access to the compound by climbing on a

- stool and further denied seeing PW2. Asked about the officers, he said he could not remember all the officers he was with. He said that he did not know the name of the plaintiff's wife. He however introduced himself and the plaintiff and the lawyer similarly introduced themselves as well as the wife and the daughter.
46. The witness confirmed that they are required to keep a diary if necessary and stated that the event was reported in the OB though he did not have the diary with him. Whereas there is an investigations diary, the witness said that it does not indicate the number of police officers who were present as well as the name of the plaintiff's wife. According to him, he climbed over the fence to effect the arrest of the plaintiff following the evidence he had collected in respect of the incident that occurred on 18th which he believed was a Saturday since 20th was a Monday, which was a public holiday. He reasserted that he took over the investigations on 20th from the OCS Spring Valley. On taking over the investigations he went through the file and visited the complainant at M P Shah Hospital on 20th morning though he could not remember the exact time. To him, he was investigating an attempted murder.
 47. He disclosed that at that time he was a Superintendent of Police which he admitted was an important person. According to him at that time he did not have the file but talked to police officers including **Inspector Gituku**, the Deputy OCS, who was his junior who was present when the Plaintiff reported and when **Karori** the complainant came. After talking to several witness at the Police Station and based on information from police informers, he formed an opinion to arrest the Plaintiff and investigate him further. He got his number and called him and went to Gigiri but the Plaintiff did not turn up. According to him he called the Plaintiff several times.
 48. According to the witness by the time he spoke to **Karori**, the complainant, at the Hospital, the complainant had not recorded the statement which he did record on 3rd November, 2008. He disclosed that on 20th October, 2008, the police had no statement from the complainant in the file due to the complainant's condition. By that time, he also confirmed that he did not have the Plaintiff's witnesses. However referred to the defence bundle, he confirmed that the Plaintiff's statement was recorded at Parklands Police Station on 18th October, 2008. He admitted that he saw that statement later on as he was going on with his investigations. He however said that by the time he went to the Plaintiff's house he had made up his mind to charge him with the offence of attempted murder after going through the statements and all the information required. However by that time he had not questioned the Plaintiff because according to him, the Plaintiff declined to avail himself despite request to do so. The complainant was by then admitted in Hospital and was not in a position to record statement though the people he was with did so. According to him, by 20th October, 2008, some of these statements were in the investigation file.
 49. He disclosed that the report and the file were at Spring Valley while the Plaintiff's Statement was at Parklands. He was however based at Gigiri and could not remember if the said Statement was in the file. Although according to him he cared about the investigations before arresting the Plaintiff, he did not have the time to find out if the Plaintiff had recorded a statement.
 50. According to the witness, the fact of recording of the statement by the Plaintiff was relayed to him by **IP Gituku** who informed him that had he known that it was the Plaintiff who had assaulted the complainant he would have arrested the Plaintiff then. According to him the matter was reported to Parklands Police Station Traffic Section as a traffic accident and was dealt with as such and not as an assault. In his evidence, he got the issue of bleeding from Spring Valley Police Station. When he visited the scene, he said did not find the vehicle. To him there was no reason to frame the Plaintiff. In his evidence the report from the Government Chemist on the items which were sent thereto was negative and they were unable to get the weapons as the Plaintiff declined to cooperate though according to the complainant, the weapon was similar to a Somali sword though this was never recorded. When he asked the Plaintiff the whereabouts the weapon the Plaintiff informed him that he was attacked and though he did not complain that he had been hit, he admitted having hit somebody and ran away.
 51. The witness disclosed that he obtained the plaintiff's number at Spring Valley Police Station from **IP Gitukus** when he went there personally. He stated that he did not know where the Plaintiff's house and had to seek information to get there through informers. According to him there were different diaries for 18th and 20th. On 20th he left Gigiri at 6.00 am and that the Plaintiff requested that he should not be driven in a Police car and **Mr Kigano** offered to use his car. He stated that

- he was communicating with his officers who were outside and they briefed him on what was taking place outside though he did not communicate this to the Plaintiff who requested to be driven in a private car. To the witness, it is the Plaintiff who locked himself in the house and refused them access though someone opened the door from the inside and they entered.
52. The witness however denied that he alerted the press. Instead he said that he made sure that his officers delayed the press by using **Mr Kigano's** car and driving to Gigiri Police Station next to UNEP. However on arrival at his office on the 1st floor, they found the press already there and decided to drive to Kamkunji Police Station. The Press however followed them there. According to the witness, they left Gigiri Police Station by the same means and though the Press were blocked they nevertheless found their way to Kamkunji. He however denied that the police placed the Plaintiff somewhere to be photographed by the Press.
53. DW1 confirmed that the Plaintiff was acquitted on both charges of attempted murder and causing grievous harm though he insisted the acquittal was on a technicality. Referred to the judgement, the witness confirmed that it was found that there were only two statements of **Kituku** and **Muthama**. The witness confirmed that they were in the team with **Veronica Gitahi** who took over from **IP Gituku** and while **Veronica** who was a Sergeant and hence many ranks below him was conducting the investigations, he was talking to witnesses. He however said that it was procedural to let her take over the file and by taking over it meant that he was to proceed from where the OCS had reached. Referred to the judgement, the witness denied that what was indicated therein that he had said was incorrect as he did not require instructions from any police officer to effect arrest. He insisted that he was the one who signed the charge sheet and that he was not under instructions.
54. According to DW1, the Plaintiff was taken to Court on 21st October, 2008 and that after his arrest he made a statement to the police who at the same time prepared a charge sheet though he was still trying to get evidence to include in the case, one of which was the Complainant's statement who was still hospitalised and could not record the same. In his view, before taking the Plaintiff to Court he had to ascertain that the complainant was still alive because he was in pain and had he died, they would have charged the Plaintiff with murder, though he did not put this to the Plaintiff. He however confirmed that being the Investigating Officer he could not take the Plaintiff's statement and so the Plaintiff's charge and caution statement was recorded by **IP Wahome** in which the Plaintiff said that he had nothing to say.
55. According to him, his statement was clear that the Plaintiff later opened the door and that he was initially denied access. He confirmed that from his statement he took over the investigations on 20th and gained access. He however denied discussing the matter with the DCIO, Nairobi as he just sent the file to the PCIO for onward transmission to the Director of Public Prosecutions. He was however unaware that the Plaintiff was suspended from his duties as a Judge and stated that he had no grudge against him.
56. Although the exhibits were taken to the Government Chemist, the witness confirmed that by the time they charged the Plaintiff, the analysis was not complete and he could not remember when they were complete though the results were negative. According to him, the witnesses stated that a Somali sword was used to stab the complainant though the sword was never recovered and he never got it when he went to the scene. He however said that he telephoned the Plaintiff to produce the sword but he did not. By the time he took over the investigations, he was told by the Base Commander that the car had been searched and there was nothing and that it was the Plaintiff, who drove the car to the Police Station on 18th October, 2008. According to the witness the Plaintiff omitted to state in his statement that he stabbed someone as opposed to hitting someone. To the witness it was not correct that he had no evidence to charge the plaintiff on 20th October, 2008 since he had the statements and other relevant information.
57. According to him, he was not sure whether the residences of judges are guarded though they are public officers and their residences are known. He however said that their residences are not necessarily known to the nearest Police Stations. He denied that he had any hand in getting the press to the plaintiff and station to be photographed by the Press. Asked about **Mr Mwachai**, he said he was the witnesses' PCIO and the witness as the DCIO reported to him and he forwarded the file to him for transmission to the DPP for perusal and advice. In his evidence the file was sent immediately after the Plaintiff was charged and the DPP's comment was that they proceed with the charge. He was however unaware that the PCIO wrote to the Chief Justice to take action

- against the Plaintiff as stated in the judgement.
58. It was his evidence that though he called the Plaintiff to go to Gigiri Police Station, the Plaintiff went into hiding after 18th. Although once the matter was in the hands of the police the Plaintiff cooperated, the witness stated that he did not do so when he went to his house but disconnected his phone severally. He however confirmed that he had several police officers and wanted to assure the Plaintiff of his security. He denied that he was accompanied by friends and relatives of the complainant but reiterated that the Plaintiff was acquitted on a technicality though in his view, he had a strong case but admitted that no appeal was lodged.
59. According to DW1, he was not aware whether the Hospital notes were produced though he visited the complainant severally and was discharged on 25th after 7 days. Although he did not question all the witnesses he went through the statements and at times the witnesses testified in his absence. He confirmed that there was a small boy who was with the complainant in the car though he was not present when the boy testified. Referred to the judgement, he confirmed that the boy admitted that he was coughed. He was however unaware that the complainant was injured at Kawangware.
60. In re-examination by **Mr Motende**, the witness said that he could not remember exactly the time he went to the Plaintiff's house because they had a problem locating the house. He however said that it was normal to transfer a suspect from one police station to another in case of difficulties in conducting interviews or where there are threats. He confirmed that before he went to the Plaintiff's residence, he was aware that the Plaintiff had reported though by the time he took over the investigations the Plaintiff had been released. According to him, he saw the complainant three or more times and was told the Complainant was still under treatment and was told to be given time to recover before talking his statement. According to him the Plaintiff drove himself to the Station after the accident and was accompanied to the scene by the police though the alleged weapon was not recovered.
61. According to the witness, when an offence is reported investigations are carried out and after compiling the evidence the matter is taken to court if a case is disclosed. In his view there was no reason to take the Plaintiff to Court without sufficient evidence. To him, he did not want the Press anywhere near the residence and he was under no instructions to arrest the Plaintiff as his power of arrest is derived from the Constitution and the **National Police Act**. To him unless there is a complaint, you cannot arrest people. To him, the PCIO does not have to consult the DCIO when doing his work and he was not aware that the Plaintiff would deny him access and did not know how his compound looked like. Since that was the first time he met the Plaintiff he had no personal interest in the matter. He however admitted that the matter had been highlighted in the media and the Plaintiff was a senior person and he wanted the officers to provide security. To him he had enough grounds though he was not aware that he was in the house. He was however aware that they were going to arrest a Judge. The names of the persons in the house were never given to him as in his view they were not important. In his view there was no malicious motive in arresting the Plaintiff.
62. The defence thereafter called Chief Inspector of Police, **Veronica Gitahi**, as DW2. According to her, she was attached to CID Kinango, Kilifi as Deputy DCIO performing general investigative duties and office administration. According to her statement, on the 20th October 2008 while on duty at Gigiri CID Headquarters, the then Divisional Criminal Investigation Officer Gigiri, **Mr. Patrick Kiswii**, instructed her to take over a case No. CR 162/90/2008, from Spring Valley Police involving a person named **Robert Kamau Karori** who was alleged to have been stabbed with a sword by **Justice George Benedict Maina Kariuki**. **Mr Robert Kamau Karori** drove himself to hospital and he was admitted at MP Shah, Hospital.
63. According to her, the complainant was not in a position to fill a P-3 Form by the time the criminal case No. 1655 of 2008 went for hearing.
64. In company of her boss and other fellow officers they proceeded to the Plaintiff's home at Hill View Lower Kabete Road but since they did not know the Plaintiff's home they relied on information from the informers and on arrival they were denied access to the house. **Mr. Patrick Kiswii** tried to call the Plaintiff so that he could give access or open the door but he kept disconnecting his phone. After getting access to the compound by climbing over the gate, **Mr. Patrick Kiswii** was the only officer who was allowed entry into the house after the Plaintiff's lawyer, **Muturi Kigano** arrived as the witness and the other officers remained outside though they were communicating. Although the witness did not know what transpired inside the house she

- confirmed that DW1 arrested the Plaintiff who was in the company of his relatives and was then escorted to their office at Gigiri. However before they got outside the house members of the Press arrived though she did not know who had alerted them. She informed DW1 of their arrival who directed that they should not be allowed to take pictures. According to her there was no discussion between her and the Press. After about half an hour DW1 left the house in a Toyota Prado driven by the Plaintiff's lawyer with the Plaintiff and they gave escort and blocked members of the Press who were chasing the vehicle but they overtook the vehicle. They then drove to Gigiri Police Station where the Plaintiff was booked in as a prisoner.
65. While at the station members of the press, his relatives and members of the public started gathering prompting his transfer to Kamukunji police station to avoid interference where his statement was taken as well as other procedures performed and he was later returned to Gigiri Police Station. He was upon receipt of the consent from the Attorney General as well as the evidence at hand charged in court the following day with the offence of attempted murder and grievous harm. According to DW2, his complaint was recorded in the occurrence book No. 34/18/10/08 at 20.35 and was issued with a P.3 form.
 66. According to the witness, some exhibits handed over to them from Spring Valley, a pair of shears, rado wrist watch and a pair of eye glasses were taken for analysis by her to the Government Chemist to be compared with some blood sample which was taken from the complainant. To her when they took over the investigations they visited the complainant at the Hospital severally but never went to the scene because it was being handled by Parklands Police Station. According to her it took them several hours to trace the Plaintiff's house since they had to interview witnesses and did not know the location of the Plaintiff's house.
 67. She reiterated that it was only DW1 who gained access to the house by climbing over after being denied access. To her they never had a stool. According to her she attended the trial and the incident occurred on 18th and they took over the investigations on 20th. She however said that they never got the exhibits though she was sure the Plaintiff was arrested. According to her she had never met the Plaintiff before and they were not under instructions from anybody else and were not under pressure from the Minister. According to her there are instances when a person can be arrested without a report though there was a report at Spring Valley by **Robert Kamau Karori**. She confirmed the contents of the defence filed by the defendant herein as true.
 68. In cross-examination by **Mr Mwenesi**, DW2 said that Spring Valley is within Gigiri Division though the Diplomatic Police is not within the Division. In his evidence as CID they cover all police stations within the Division. She confirmed that DW1 was the head of the criminal investigations at Spring Valley and they took over from the OCS. To her this was a high profile matter involving a Judge. At that time they did not know that the complainant was working with the United Nations though they later came to know this. According to her the matter had not been highlighted in the press but was in the internet. It was her evidence that the Press brought themselves to the scene as she was not aware how they came to know about the matter. She confirmed that the Plaintiff did not answer DW1's calls though she was not aware whether the Plaintiff knew DW1's telephone number though according to her many people knew his number.
 69. According to her she never attempted to call the Plaintiff because this was being done by DW1 and they were jointly investigating the matter. After she was told that they were taking over the matter she arranged for stationeries, police officers and instructed junior officers to leave after which they went to interview the OCS withy DW1 after which they decided there was enough evidence though by that time the complainant was admitted at the Hospital. They later visited him though there were some statements which had been recorded and there was evidence that the complainant was injured.
 70. Referred to the judgement she confirmed that the only statements that had been recorded were those of **IP Gituku** and the Plaintiff though according to the witness, in his statement he admitted that he hit the complainant. According to her they relied on the said statements and the report of the OB. Referred to the statement of **IP Gituku** she said it was indicated that the complainant identified the Plaintiff. According to her they identified **IP Muthanwa** later on but there was no further statement. She was however unaware whether DW1 checked the medical reports of the complainant though from the P3 form the harm was grievous and she was the one who issued it. In her evidence the admission that the investigations were incomplete was due to the fact that the P3 form had not been filled in and they had not recorded the complainant's statement. By the time

- they charged the Plaintiff as the statement was recorded on 3rd November, 2008 after he was discharged. To her he was still in pain and they do not record statements from persons who are about to die. This, in her view, was an attempted murder though the complainant was in a stable condition.
71. Dw2 reiterated that there was interference at Gigiri CID Headquarters since people had flocked the station including the media, relatives and members of the public hence they went to Kamkunji. According to her they did not want them to know where they were going. In her evidence the Plaintiff was not paraded and she did not see anybody photographing him. According to her they did not block them because they did not have enough personnel. Although they were not allowed in they were making a lot of noise
 72. She stated that they had gone to arrest the Plaintiff and he was booked in as a prisoner at Gigiri and was arraigned in Court the next day with 3 witness statements by which time the complainant had not yet recorded his statement though he had stated what had taken place. According to DW2 there was sufficient evidence to charge the Plaintiff. In her view the Plaintiff knew that if they had had the exhibit it would have implicated him though she did not know where the weapon was despite searching for it. According to her the Plaintiff knew that the sheers were not involved in the incident. According to her she did not see any wound as it was bandaged and she neither spoke to the doctor nor read the notes at the Hospital. She said that she was unaware that the wound was 3mm deep. She admitted having investigated many murder cases but said that she never checked the vehicle which the complainant drove himself in to the Hospital and was unaware whether the vehicle was at Parklands Police Station as the OCS only gave them the exhibits that were taken to the Government Chemist immediately. The results, she testified were negative which showed that they were not the ones used in the incident. According to her they had decided that the weapon used was a Somali sword and the Plaintiff knew where it was. In her evidence they recorded statements from 8 witnesses some of which were recorded before 20th being **Muthanwa's**, **Gituku's** and the Plaintiff's while the others were after 20th after the Plaintiff had been charged as well as the Complainant's which was recorded in November.
 73. According to DW2, she testified before DW1 but was not aware whether DW1 had been instructed to arrest the Plaintiff by the PCIO. She confirmed that there was a report by the Plaintiff about assault which she recorded and issued him with a P3 form which he never used. According to her the Plaintiff did not cooperate despite being told that they needed to investigate his claim.
 74. DW2 confirmed that there was no conviction. In her evidence they only wanted justice to be done and according to the Court justice was done though according to her there was still a case and the complainant did not get justice.
 75. In re-examination by **Mr Motende**, DW2 stated that they make arrest when there is a report. She however did not see the Hospital notes but saw the complainant after bandaging. She reiterated that by the time they went to arrest the Plaintiff, they had made up their minds that the weapon used was a Somali sword. Although they show respect and courtesy to VIPs, it was her evidence that they do not discriminate.
 76. After the evidence of DW2, the defence closed its case.

Plaintiff's Submissions

77. On behalf of the Plaintiff, it was submitted that the Plaintiff's pleadings and evidence before court was founded on the finding by the Chief Magistrate at page 12 of the Judgment that **Veronica Gitahi** who took over investigations of the case **"... admitted that investigations of the case were not complete by the time they charged the accused."** The Chief Magistrate had further found that: **"The evidence of Sgt. Veronica was corroborated by that of Sup. Patrick Kisui, who was the DCIO, Gigiri. He said that when he took over the case from the OCS, Spring Valley Police Station, he had been instructed by the PCIO, Nairobi to arrest the accused. Sup. Mutua of Flying Squad had similar instructions and they linked up in effecting the arrest of the accused. He also admitted in cross-examination that when they arraigned the accused in court investigations were incomplete. The police were yet to record the complainant's complaint and also investigate the accused's claim that he had been assaulted."**
78. The Chief Magistrate's judgment was not appealed and has never been set aside or quashed. The Plaintiff believed that he was justified to bring the claim before court based further on the Chief

Magistrate's finding that:

“The other aspect of this case that merits mentioning is the manner in which investigations were done. The investigating officers, Sup Patrick Kisui and Sgt Veronica Gitahi admitted in their testimonies that investigations were not complete before they arrested the accused on 20/10/08. PW1 Robert Karori said that he was stabbed at Lower Kabete Road whereas PW2, Samuel Kagone said that the stabbing was along Ngecha Road. No attempt was made by the investigating officers to reconcile these two pieces of contradictory evidence before charging the accused with committing the offence alleged along Lower Kabete road...The complainant was allegedly stabbed on the abdomen with a sharp object yet he managed to drive himself to the police station, attempt to fight the accused again at the police station then drove himself to hospital where he was put in the intensive care unit. The hospital records produced in court showed that the initial history of the case was that the complainant was stabbed while in a drinking spree. No attempt was made by the investigating officers to resolve these apparent puzzles. What comes through from the evidence of Sup Patrick Kisui and Sgt Veronica Gitahi is that they only carried out the instructions of the PCIO, Nairobi, to arrest and charge the accused.”

79. It was submitted that the mode of charge and arrest, the testimonies of the investigating officers and evidence of the key witnesses – the eye witnesses more than justify the Plaintiff's case for malicious prosecution hence the Chief Magistrate had relied on **R. vs. Hussein [1990] KLR**. According to the Plaintiff, the officers followed irregular and illegal orders of the PCIO and inflicted harm on the Plaintiff and put him through a lot of stress, lowering his standing, esteem and reputation.
80. According to the plaintiff the material contradictions in the evidence of the key eye witnesses in the criminal trial as found by the Chief Magistrate rendered the prosecution of the Plaintiff without any basis in fact and law. To the Plaintiff the defence was a bare denial, despite the fact that the Plaintiff pleaded that the Defendant was actuated by malice and acted in bad faith and contrary to the law and the ethical standards governing police investigations, arrest and arraignment of suspects in court. In support of this submission the Plaintiff relied on Order 6 rule 9(1) and (3) of the ***Civil Procedure Rules*** as interpreted in **Pharmaceutical Manufacturing Co vs. Novelty Manufacturing Ltd. [2001]2EA 521 at 526.**
81. It was submitted that in order to succeed in the tort of malicious prosecution, the plaintiff must prove four elements: (1) that the original case was terminated in favour of the Plaintiff, (2) that the Defendant played an active role in the original case, (3) that the Defendant did not have probable cause or reasonable grounds to support the original case, and (4) that the Defendant initiated or continued the initial case with an improper purpose. He relied on **Mbowa vs. East Mengo Administration [1972] E.A. 352.**
82. The Court in ***Mbowa's Case*** went on to observe that the plaintiff also has to prove that he has suffered damage and is then able to claim damages with **Lutta JA** holding that, “the damage that is claimed is in respect of reputation but other damages might be claimed, for example, damage to the person or damage to property – see **Saville vs. Roberts, 91 E.R. 14.**”
83. It was submitted that it was a material fact of the Plaintiff's case that the Nairobi PCIO directed other police officers to go and arrest the Plaintiff on Kenyatta Day October 20, 2008 (a public holiday) and to have him charged in court before the “complainant” in the case had even recorded a statement or been interviewed to determine the veracity of any complaint. It was the PCIO who ordered arrest and charge of the Plaintiff without giving a hoot about the Plaintiff's complaint of assault. To the Plaintiff, that material fact is not specifically traversed and denied or at all in the Statement of Defence. The two Defence witnesses were either intimidated by the seniority of the colleague the PCIO who had ordered them to carry out the nefarious acts or they were embarrassed that the Judgment in the criminal trial recorded them as having admitted that it was the PCIO who had directed the botched and disastrous arrest and trial. Although the two Defence witnesses alleged that the Plaintiff was acquitted on technicality, they were unable to specify what technicality that was. They acknowledged the fact that the Plaintiff was charged, tried and acquitted for lack of evidence. They admitted the fact of the Chief Magistrate's judgment and all that was written in it. They were hard pressed to explain away the fact that the trial was a botched

- one and had been instituted and directed by the PCIO without proper or due investigations. They did not deny that the Plaintiff is a Judge who was then Judge of the High Court and now is Judge of Appeal. They did not show any probable cause why the Plaintiff had been arrested and charged and tried, and they could not explain why the Plaintiff's complaint that he had been as.
84. To the Plaintiff, it was instructive that the Plaintiff was arrested "commando style" with the notorious "flying squad" in tow. The Learned Chief Magistrate's finding that the alleged victim of the Judge's stab had only a superficial wound and was admitted to ICU at MP Shah Hospital on 18th October, 2008 following an unexplained telephone call recorded in the hospital admission notes, also stands uncontroverted. It was a fact, the Plaintiff submitted, that no evidence of stabbing by the Plaintiff was led either at the criminal trial or in the course of these proceedings so as to show that there had been some good reason to charge the Judge. No weapon or other implement with the Judge's fingerprints on it, for instance, was produced. According to the Plaintiff, the fact that the PCIO wrote to the Chief Justice to relieve the Plaintiff of his duties was evidence that the whole arrest, charge and public trial (the press having been "tipped off" to be at the arrest, trial and 'hopeful conviction') were for motives other than for which the criminal trial system is established in Kenya.
85. It was therefore the Plaintiff's submissions that all the ingredients required to prove a case for malicious prosecution were laid and proved in that the criminal trial was decided in favour of the Plaintiff. He was acquitted; that the defendant (the State of Government and its officers represented by the Attorney General) was responsible for the institution and continuation of the baseless case in the Chief Magistrate's Court; that the Defendant did not have probable cause to support the original case; it was all made up. There was failure to fully investigate the facts of the alleged attempted murder and alleged causing grievous harm; this is sufficient to prove a lack of probable cause; and that there was malice. The PCIO directed arrest and charge before the Plaintiff's complaint of assault by **David Karori** had been investigated. The Plaintiff was the first to arrive at Spring Valley Police Station to report the incident involving him and **Robert Karori** yet his statement was never recorded at that station. A statement was only recorded at Parklands Police Station. The Plaintiff's damaged vehicle which would have been evidence in his own case was taken from him on 18th October, 2008 and returned to him on 19th October, 2008 repaired as if it had not been involved in the accident that led to the trial – probably in an attempt to destroy or weaken the Plaintiff's case. As the Court of Appeal observed in Mbowa's case, a lot seems to have been done by the state *with an improper and wrongful motive*, and thus the State must have had "an intent to use the legal process in question for some other than its legally appointed or appropriate purpose". This comes out clearly when the PCIO who had no role in the Judges' removal process under section 62 of the former Constitution wrote to the then Chief Justice literally requiring the Chief Justice to commence the process of removal of the judge as a *puisne judge*. Instead of ordering proper and due investigations into the complaints by the Plaintiff (and the said **Robert Karori**, if indeed there was a complaint lodged) the PCIO ordered hasty charge of the accused on Kenyatta Day 2008 and arraignment in court with maximum publicity with a view to persuading the Chief Justice to have the Learned Judge removed from office. To the Plaintiff nothing would have been more malicious than this. In support of his case, the Plaintiff relied on Mbowa v East Menjo Administration [1972] E.A. 352, Kagane vs. Attorney-General [1969] E.A. 643, Murunga vs. The Attorney-General [1979] KLR 138, Glinski vs. McIver [1962] A.C. 726 and Jacob Juma & another vs. Commissioner of Police & another [2013] eKLR.
86. On quantum of damages, it was submitted that it is trite that the plaintiff in an action for malicious prosecution can recover money from the defendant for certain harms suffered and that typical injuries include loss of reputation and credit, humiliation, and mental suffering. Where the original action was a criminal case, additional harms often include discomfort, injury to health, loss of time, and deprivation of society with family. This submission was based on the decision of **Omolo, JA** in R.R. Siree & An. vs. Lake Turkana El Molo Lodges L.L.D C.A. Civil Appeal No.229 of 1998 where he observed thus:

"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."

87. It was submitted that based on the evidence of **Hellen Njambi Mbugua** the Plaintiff "was a good

lawyer, a good family man, a good friend to so many of us his friends, a most sympathetic human being who I have known as always striving to keep within the limits of the law” and “a man who tangibly contributed to the second liberation of Kenya when he was chairman of the Law Society of Kenya, sometimes under very dangerous situations of the One Party days. ... This is a good judge who has since been found worthy by the Judicial Service Commission of Kenya to be appointed to the Court of Appeal...The Judges and Magistrates Vetting Board has cleared him as suitable to continue to serve in the Judiciary.”

88. The Plaintiff also relied on the decision of **Hayanga, J.** in **Mombasa Development & Another v The Attorney General & 2 Others**, Civil Case No.14 of 1999 where he noted that:

“.....Generally damages must be geared to relate to the general financial position prevailing in the jurisdiction in which courts exercise their power to award damages. They must be a reflection of the general monetary and economic ability of the country of jurisdiction.”

89. The Plaintiff, it was submitted was not just a Judge but also a Senior Counsel, a past Chairman of the Law Society of Kenya and a famous Kenyan. The actions of the State and the officers of the State and the public trial demeaned the Plaintiff. The State and its officers were fully aware of the judge’s status and what that entailed concerning his dignity and reputation. This is not to say that the Plaintiff seeks preferential treatment when in police custody. However, according to the Plaintiff all of us do not have equal status and reputation in society and so we deserve to be assessed differently and according to the rank and status we hold and reputation we enjoy or command.

90. It was submitted that the Plaintiff was suspended from performing the duties of his office of Judge once the trial was instituted and had the case hanging over him for a year with adverse publicity. In this respect, the Plaintiff relied on **Murunga** Case (supra) in which **Cotran, J.** had this to say about assessing damages:

“Damages are always a difficult matter in cases such as this. I must consider the plaintiff’s position in Bungoma. He was, as I indicated, the treasurer of the county council. I consider too that he spent four nights in the police cells, which must have been (to say the least) a most unpleasant experience. Although he was on bail until acquitted on 26th July 1977 the charge was hanging over his head for four months. Having regard to all the circumstances, I would award a total sum of Shs 17,000 in general damages. There is also a claim for 3,000 as special damages for the legal expenses involved in defending the prosecution...Accordingly there will be judgement for the plaintiff for Shs 20,000, plus interest and costs.”

91. On the amount to be awarded the Plaintiff relied on the following cases:

- i. **Samuel Kiprono Chepkonga v Kenya Anti-Corruption Commission & another** [2014] eKLR where this Court awarded Kshs.5, 000,000/= in January 2014.
- ii. **Jacob Juma & another v Commissioner of Police & another** [2013] eKLR where the Court awarded two Plaintiff’s, **Jacob Juma** one an individual person (an engineer of some repute) and the other a corporate entity – a legal person Kshs . Kshs.2, 000,000/= each as damages for malicious prosecution, totaling Kshs.4, 000,000/= in a judgment dated and delivered on 14th January, 2013.
- iii. **Gitari Cyrus Muraguri v The Attorney General** Nairobi High Court Misc Case No. 1185 of 2003(O.S.) (Constitutional Reference) in which Musinga J.(as he then was) on 21st July 2011 awarded Kshs.3, 500,000/= with additional Kshs.3 million as exemplary damages because the judge was *“satisfied that the conduct of the police officers who arrested and tortured the plaintiff at Nyayo House Torture Chambers before prosecuting him in a case where the state had no evidence at all acted in an oppressive and unconstitutional manner.”*
- iv. **Nation Media Group Ltd & 2 others v John Joseph Kamotho & 3 others** [2010] eKLR where a Cabinet Minister was been awarded Kshs.6, 000,000/= in 2005.

92. It was submitted that taking into account the higher status of the Plaintiff as a judge – a constitutional office holder – who deserves to be compensated as far as money can make good and

atone for the pain and suffering he endured, the injury to his dignity, the false and malicious accusations, all the negative publicity, and the recklessness with which he was arrested and charged, he ought to be awarded substantial damages. The Court was further urged to consider that the actions of the police and the Director of Public Prosecutions were in abuse of their powers as Government or State officers and were used to subvert justice and violate the constitutional rights of the Plaintiff – especially the right to inherent dignity and reputation that runs with office of Judge. It was therefore submitted that the Defendant is liable to pay damages to the Plaintiff for the public humiliation, embarrassment and distress caused to the Plaintiff as a result of the wrongful actions of the Government officers concerned and involved.

93. Therefore, to drive the message home most effectively this Court was urged to award a sum of not less than Kshs.20, 000,000/= taking into account the inflationary trends.

94. The Plaintiff also prayed for costs of the suit together with interest on the damages and costs till payment in full.

Defendant's Submissions

95. It was submitted on behalf of the defendant that on the issue malice, my lord it is our submission that the plaintiff must satisfy 4 things: that the prosecution was instituted by the defendant or by someone whose act is responsible; that the prosecution was terminated in the plaintiffs favour; that the prosecution was without reasonable and probable cause; and that it was actuated by malice.

96. According to the defendant, on the 1st issue it was a fact that the case was instituted by the defendant after receiving a complaint from the complainant one **Robert Karori** who is not a party in this suit. The defendant did move on its own to arrest the plaintiff. Since the police are statutory mandated to make arrest, charge and prosecute, it was submitted that the defendants were carrying out their lawful duties.

97. On the second issue, while it was admitted that it was terminated on the plaintiffs favour, it was contended that since the termination was after being put on his defence, this meant that there was a probable and reasonable cause to prosecute the plaintiff. To the defendant, referring the plaintiff was released on a technicality. To it, it is possible to be stabbed and drive yourself if it is minor and no other person in the vehicle can drive and both the plaintiff and his witness admitted that the complainant was stabbed and taken to M P Shah Hospital.

98. On the third issue, it was submitted that there was a probable cause since the plaintiff was put on his defence after the trial judge established that there was a case to answer. Although the plaintiff alleged that the arrest was instigated by one **Hon Martha Karua**, he did not state the reasons why he felt that the then justice Minister was behind his woes. He did not say why he could not personally sue the Justice Minister

99. It was submitted that contrary to the allegations that the then PCIO and Justice Minister were pushing for the Plaintiff to be arrested and prosecuted, there was nothing extra ordinary in the arrest and prosecution of the Plaintiff and that the police exercised due diligence in his arrest and prosecution since it is a public policy that all citizens deserve justice, whether mighty and the lowly, hence the actions of the police deserve an applause as they acted without fear of favour.

100. According to the defendant, the evidence of PW2 since it simply echoed that of the Plaintiff was so incredible that court should not rely on it. She is not a member of the plaintiff's family. What she told court is just hearsay. The plaintiff picked on her, coached her on what to write, she went further and commented on the judgment where she has no knowledge. The details were so personal and touched matters outside the court.

101. It was therefore submitted that the plaintiff had not established his case on a balance of probability and hence the suit should be dismissed to the defendant. The defendant submitted that the plaintiff had not succeeded in proving his claim against the defendant, therefore he was not entitled to any damages at all, the suit should be dismissed with

Determinations

102. Having taken into account the pleadings, the evidence adduced as well as the submissions made, the following are, in my respectful view, the issues that fall for determination in this suit:

1. Whether the criminal proceedings were instituted by the defendant.
2. Whether there was reasonable cause and/or justification to make the complaint to the police.
3. Whether the said prosecution was actuated by malice.
4. Whether the criminal proceedings terminated in the plaintiff's favour.
5. Whether the defendant is liable to compensate the plaintiffs and if so what should be the award of damages.
6. Who should bear the costs of the suit?

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

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

104. 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”.

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

106. On the first issue whether the criminal proceedings were instituted by the defendant there is no dispute that the said proceedings were instituted on behalf of the defendant. The arrest was carried out by the police who are represented by the defendant herein and the charge was preferred by the same police who sought and obtained the consent to prosecute from the defendant. Therefore I have no hesitation whatsoever in answering the first issue in the affirmative.

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

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

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

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

“Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances which assuming them to be true, would lead to an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed.”

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

“The plaintiff must prove that the setting of the law in motion by the inspector was without reasonable and probable cause....if the inspector believed what the witnesses told him then he was justified in acting as he did and I am satisfied the plaintiff has not established that he did not believe them or alternatively that he proceeded recklessly and indifferently as to whether there were genuine grounds of prosecuting the plaintiff or not.”

111. Malice, however, can either be express or can be gathered from the circumstances surrounding the prosecution. A prosecution can either be mounted based on an offence committed in the presence of law enforcement officers or by way of a complaint lodged by a person to the said officers or agencies. However, the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and

are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. I say ordinarily because the mere fact that the version of one of the parties is not considered does not make the subsequent prosecution malicious. As was held by **Ojwang, J** (as he then was) in **Nairobi HCCC No. 1729 of 2001 – Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another:**

“Unless and until the common law tort of malicious prosecution is abolished by Parliament, policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense...I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State’s prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes”.

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

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

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

“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal

proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable”.

115. Therefore criminal process ought to be invoked only where the prosecutor has a conviction that he has a prosecutable case. Whereas he does not have to have a full proof or watertight case, he ought to have in his possession such evidence which if believable might reasonably lead to a conviction. He does not have to have evidence which disclose a *prima facie* case under section 210 of the ***Criminal Procedure Code*** since a decision as to whether a *prima facie* case is disclosed is a jurisdiction reserved for the trial Court. He however must have evidence which satisfy him that his is a case which ought to be presented before a trial Court. He must therefore consider both incriminating and exculpatory evidence in arriving at a discretion to charge the accused. Unless this standard is met, the Court may well be entitled to infer based on the evidence that the prosecution was mounted without reasonable or probable cause in that there were no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified.
116. In this matter, it was uncontroverted that the Plaintiff was arraigned in Court before the complainant's statement was recorded. It was also not disputed that by the time the Plaintiff was charged with the twin offences of attempted murder and causing grievous harm, the P3 form had not yet been filled in and that apart from the Plaintiff's statement there were only two other statements recorded, one of which was **IP Gituku's**, the Deputy OCS, Spring Valley Police Station. It is common ground that the Plaintiff himself had lodged a complaint of assault against the complainant which complaint was pending investigations. The police however contended that based on the evidence that they had so far, they were convinced that they had a case against the Plaintiff.
117. If the complainant himself was yet to record his statement based on his state of health and other witnesses were yet to record their statements while the report of from the Government Chemist was still to be received one wonders why there was a hurry to arraign the Plaintiff when as admitted by DW2 investigations were not complete. The answer to this course of events however seemed to appear in the judgement of the trial Court. According to the Court, PW1 in these proceedings testified that when he took over the case from the OCS Spring Valley Police, he had been instructed by the PCIO, Nairobi to arrest the Plaintiff and since **Sup. Mutua** of Flying Squad had similar instructions, they linked up in effecting the arrest of the Plaintiff. DW1 similarly admitted that when they arraigned the Plaintiff in Court, investigations were incomplete as the police were yet to record the complainant's statement and investigate the Plaintiff's claim that he had been assaulted.
118. That the action by the police was anything but impressive was appreciated by the trial Magistrate who relied on the holding in **R. v Hussein [1990] KLR, 407**, to the effect that it is only after all evidence is obtained and properly collected that a police officer may decide to charge the accused. The Court therefore had no hesitation in finding that in this case the investigating officers failed the test. Clearly therefore the police had no reason to arraign the Plaintiff save for the fact that the PCIO had directed the investigators to arrest and charge the plaintiff. Although DW1 and DW2 denied that they were so directed, there was no appeal against this finding. Accordingly, the defendant is estopped by estoppel by record from denying that this was actually the case. Can it however be said that the actions of the police was justified by the subsequent events? In **Githunguri vs. Republic KLR [1986] 1**, it was held that:

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

119. The subsequent events however did not raise the case to a higher level. The alleged weapon with which the alleged offence was committed was never discovered. The exhibits submitted for analysis proved negative. One of the alleged eye witnesses admitted that he had been coached to give the testimony that he gave. The other witnesses were found to be so contradictory as to raise doubts as to their trustworthiness.
120. It is not lost to the Court that DW1 in his evidence before this Court stated that the file was

- transmitted to the DPP for perusal and advice after the Plaintiff was charged and the DPP's comment was that they proceed with the charge. It is therefore clear that the cart was put before the horse and one cannot help but conclude that the transmission of the file was just but a formality to buttress a decision that had already been made. That therefore there was an unusual haste in arraigning the Plaintiff in Court cannot be doubted.
121. In these circumstances one can only conclude as I hereby do that there was no reasonable and probable cause to arrest the Plaintiff and charge him with the offence at the time the same was done.
122. That leads to the issue whether the prosecution was actuated by malice. Malice, as stated hereinabove, can either be express or can be gathered from the circumstances surrounding the prosecution. Although malice means a wrongful act done intentionally without a just cause or excuse, to prosecute anyone for an improper motive can be evidence of malice and as was appreciated in **R vs. Attorney General exp Kipngeno Arap Ngeny** (supra) a criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose.
123. In this case it is clear from the above discourse that the arrest and arraignment of the Plaintiff was done in haste and prematurely and I daresay recklessly. Further from the evidence adduced by DW2, it would seem that the intention of the investigators was to "nail" the plaintiff. Though a final decision was made by the Court, according to DW2, justice was not done to the complainant. In her view, "justice" would only have been done by the conviction of the Plaintiff. From the prosecution's own evidence the investigations were incomplete, the condition of the complainant had not yet been ascertained, all the necessary evidence had not yet been gathered, both versions had not been considered and the decision to arrest and charge the Plaintiff was not made by the investigators but by a third party. According to the judgement of the trial Court, DW2 admitted that the arrest was conducted by a contingent of police officers, some from the Flying Squad, armed with AK 47. According to DW1, they were in at least two vehicles. No wonder the Plaintiff alleged that he was arrested commando style. It was not contended that the police officers camouflaged their presence. One therefore did not need to call the members of the Fourth Estate to alert them that a major operation was in the offing. Whereas this Court does not propagate special treatment of some members of the society, it is my holding that since we believe in the doctrine of presumption of innocence, the manner in which the police conduct their lawful duties including arrest must accord with the constitutional principles. Under Article 10(2)(b) of our current Constitution, one of the values and principles of governance which bind all State organs, State officers, public officers and all persons whenever any of them applies the law is human dignity. Under Article 19(1) of the Constitution it is expressly provided by the Supreme Law of the land that the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals. More importantly under Article 28 of the Constitution, every person has inherent dignity and the right to have that dignity respected and protected.
124. It is therefore my view that in effecting arrest, the same must be done in a manner that accords the suspect his right to dignity and unless there are reasons to believe that the arrest is likely to be resisted, to assemble a whole battalion in order to effect arrest of a Judge as opposed to a "most wanted criminal" or a terrorist, with the result that unnecessary publicity is thereby aroused may well be evidence of malice. In this case there is no evidence apart from the allegation that the Plaintiff had declined to take the telephone calls of DW1, a number which there was no evidence the Plaintiff knew, and that the Plaintiff declined to give access to the police before his lawyer arrived, that the police believed that the arrest was likely to be resisted. In fact the evidence on record is to the contrary. To the Defence witnesses, the reasoning for amassing such contingent and arms was for the Plaintiff's security. There, however, was no evidence that the Plaintiff had raised the issue of his security with the Police. The reason advanced by the police for conducting themselves the way they did cannot therefore be taken seriously.
125. In this case there was no evidence that, save for the day of arrest, when taking into account the manner in which the Plaintiff's house was raided, one may well have been justified to call his lawyer before giving access, that Plaintiff had earlier on shown a tendency not to cooperate with the Police. In fact he Plaintiff reported the accident immediately and furnished his telephone contact to the Police.
126. According to the trial Magistrate, there was no evidence of *mens rea* in order to warrant the

charge of attempted murder as preferred by the prosecution. There was also evidence that the PCIO, **J F Mwachai**, the very person who gave instructions for the arrest and charging of the Plaintiff, wrote to the Chief Justice seeking that the Plaintiff be relieved of his duties. This person was neither called before the trial Court nor before this Court to give his version of the story or to explain on what basis he decided to offer such “gratuitous assistance” to the Chief Justice. The Plaintiff contended that the prosecution was instigated by the then Minister for Justice, **Hon. Martha Karua**, with whom they had parted ways apparently acrimoniously. I however cannot make any adverse findings against the said person as she was never made a party to these proceedings hence to do so would amount to a violation of her rights to a hearing in disregard of the rules of natural justice.

127. However, looking at the totality of the evidence adduced both before the trial Court and before this Court, it is clear that the prosecution of the Plaintiff was at the very least instigated recklessly and as was held in **J P Machira vs. Wangethi Mwangi and Nation Newspapers Civil Appeal No. 179 of 1997**, malice can be inferred from a deliberate or reckless or even negligently ignoring of facts.

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

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

129. It follows that the contention by the defence witnesses that the Plaintiff was acquitted on a technicality is neither here nor there. It is conceded that no appeal was lodged against the acquittal and for purposes of malicious prosecution the acquittal was a determination in favour of the Plaintiff.

130. The next issue for determination is whether the defendant is liable to compensate the plaintiffs and if so what should be the award of damages. In the Uganda case of **Dr. Willy Kaberuka vs. Attorney General Kampala HCCS No. 160 of 1993** it was held:

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

131. In my view the considerations therein are to be taken in the context of the tort of malicious prosecution. In this case the Plaintiff was arraigned in Court on 21st October, 2008 and was acquitted on 15th October, 2009 nearly a year later. He obviously must have gone through trying moments. He said throughout the proceedings were covered by the media. However, it would seem that his employer did not think much of the prosecution since at the time he was giving

- evidence in these proceedings he was the head of Family Division of the High Court, Milimani and was subsequently elevated to the Court of Appeal.
132. It is however my view based on my findings hereinabove that the plaintiff is entitled to damages for malicious prosecution.
133. In **Jacob Juma & Another vs. The Commissioner of Police & Another Nairobi HCCS No. 661 of 2007**, this Court awarded to the plaintiff a sum of Kshs 2,000,000.00 for each Plaintiff in respect of general and aggravated damages for malicious prosecution on 14th January, 2013. The plaintiff was a private contractor. In **Samuel Kiprono Chepkonga vs. Kenya Anti-Corruption Commission & another [2014] eKLR** this Court awarded Kshs. 5,000,000/= in January 2014 to the Plaintiff who at the time of his prosecution was the Chief Executive of a State Corporation and was facing two criminal cases. I agree that the position of a Judge is held at a higher pedestal than that of either a private engineer or a Chief Executive of a State Corporation. The position of Judge depends on the trust that the public has in the holder of that office to dispense justice and where the holder himself is charged with a criminal offence that confidence is bound to be eroded. In this respect, the *Bangalore Principles of Judicial Conduct* states:
- “Propriety and appearance of propriety, both professional and personal, are essential elements of a judge’s life. What matters more is not what a judge does or does not do, but what others think the judge has done or might do.”**
134. However an award in respect of malicious prosecution ought not to be treated on the same pedestal as that in respect of defamation. Where in defamation, the tort has direct impact on the reputation of the Plaintiff, in malicious prosecution the impact is not as direct.
135. Therefore considering the Plaintiff’s position as well as the inflationary tendencies, the nature of the offence which carried life sentence, it is my view that an award of Kshs 5,000,000.00 for general damages for malicious prosecution is reasonable compensation in the circumstances and I award the same.
136. I also award the costs of these proceedings to the Plaintiff.
137. The general damages will accrue interest at Court rates from the date of this judgement till payment in full.

Dated at Nairobi this 14th day of January, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mwenesi for the Plaintiff

Cc Kazungu