



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**CIVIL APPEAL NO. 21 OF 2015**

**(CORAM: J. A. MAKAU – J.)**

**KENYA POWER & LIGHTING CO. LTD.....APPELLANT**

**VERSUS**

**MICHEAL MUREWE.....1ST RESPONDENT**

**HON. ATTORNEY GENERAL.....2ND RESPONDENT**

**JUDGMENT**

1. The Appellant M/s. Kenya Power and Lighting Company Limited was the 1st defendant and the 2nd Respondent herein was the Second defendant. The two had been sued by now the 1st Respondent who was the plaintiff at the Lower Court. The 1st Respondent/Plaintiff had sued two defendants through a plaint dated 2nd August 2011, through a plaint dated 2nd August, 2011 through the firm of M/s. Charles Ochieng seeking judgment against the defendants jointly and severally for:-

- a. Special damages for loss of user from impounded welding machines at Kshs.10.000/= per day.*
- b. General damages for false imprison and malicious prosecution and defamation of character,*
- c. Costs of the suit.*
- d. Interest on (a) and (b).*

2. The Appellant filed memorandum of appearance and defence on 16th September 2011 through the firm of M/s. Wamaasa and Company Advocates averring that it lodged a complaint with agents and/or employees of the second defendant and that it was the duty of the 2nd defendant to independently investigate the matter and take necessary action and as such it was not responsible for the arrest, prosecution and detention of the plaintiff/1st Respondent. It denied liability and prayed for plaintiff's/1st Respondent's suit to be dismissed with costs.

3. The 2nd defendant/2nd Respondent filed Memorandum of appearance and defence on 31st October 2011 averring that the plaintiff/1st Respondent was arrested after a genuine report was made to the police, investigation commenced and reasonable cause established that the plaintiff had committed the alleged offence. It was further averred that the police officers acted in good faith and in due cause of their lawful duty of maintaining law and order. The particulars of malice were denied and particulars of deprivation of liberty, aggravated damages and special damages. The 2nd defendant prayed for dismissal of the

plaintiff's/1st Respondent's suit with costs.

4. The plaintiff/1st Respondent at the lower court was represented by Mr. Wakla learned Advocate whereas Mr. Wamaasa, learned Advocates appeared for Appellant/1st defendant, and Mr. Langat appeared for the 2nd defendant/2nd Respondent. The plaintiff gave evidence and closed his case whereas the Appellant/1st defendant and the 2nd Respondent/2nd Defendant opted to call no evidence.

5. The plaintiff's/1st Respondent's case is that he comes from Awelo in Siaya, and that he is self-employed as a "Jua Kali" welder. That on 11.11.2009 the defendant arrested him, took him to Police Station, and charged him on 20.11.2009 with an offence of stealing transformer oil. He denied the charge, and the matter proceeded to hearing and he was subsequently acquitted under **Section 210 of the Criminal Procedure Code**. He produced the court proceedings in Siaya **PMCRC 1343 of 2013** as P exhibit 1 (a) and court's Ruling as P exhibit 1 (b).

6. The Plaintiff/1st Respondent averred that he used an oil welding machine which belongs to him, and which he had bought at Nairobi. The said machine he testified was impounded at the time of his arrest. He averred that he used to purchase its oil from Lacheke Company in Kisumu. He contented the allegation that he was using oil stolen from KPLC was false claiming he had used the machine since 2003 and that he used to replace the oil as it runs for about 2-3 years. The plaintiff testified that he was acquitted by the trial court for lack of evidence. He stated that before his arrest KPLC never called him nor was he ever interrogated but only three (3) people in civilian clothes came and asked him whether the machine was his and upon confirmation so one of them identified himself as a police officer before arresting him. He testified the case against him terminated in his favour on 12.11.2010 and that between 20.11.2009 and 12.11.2010 all that time his machine was under the police custody. He testified that he used to use the machine to serve people who needed his services and they used to make payments to him and he would issue receipts on payments. He agreed that a government analyst came to court in the criminal case and confirmed it was transformer oil that was in the welding machine and he testified he had bought the oil from Lacheke Ltd, he produced receipt in the court case. He added that he used to work on all days and that he used to make about Kshs. 50,000/= per week and Kshs.200,000/= per month which he used to bank some of it. That during the pending period of the hearing and determination of the criminal case he stated he did not do any business using his machine but he used to hire a machine whenever he got some work. He said bought the machine he had at that Kshs. 7000/= and he was unable to purchase another as his money was committed. He concluded by stating that he still uses the machine that was given. On cross-examination the plaintiff/1st Respondent testified that police and workers of KPLC gave evidence but none of them used to ran welding business.

7. That after trial the learned trial magistrate entered judgment for the plaintiff/1st Respondent for Kshs.240,000/= being special damages and general damages of Kshs.750,000/= jointly and severally against the defendants plus costs and interest at court rates.

8. The first defendant/Appellant aggrieved by the judgment of the trial court preferred this appeal setting out eight (8) grounds of appeal thus:-

*a. The Learned Trial Magistrate erred both in law and in fact by holding the Appellant liable for malicious prosecution contrary to the evidence on record.*

*b. The Learned Trial Magistrate erred both in law and in fact by failing to analyse the proceedings in Siaya Principal Magistrate Court Criminal Case Number 1343 of 2009 Republic -Vs- Michael Murewe & Another.*

*c. The Learned Trial Magistrate erred both in law and in fact by failing to consider the fact that the Trial Magistrate in Criminal Case had found as a fact that the welding machine which had been found in possession of the First Respondent contained transformer oil and therefore The first Respondent's prosecution could not have been malicious.*

*d. The Learned Trial Magistrate erred both in law and in fact by failing to consider the fact that*

***the First Respondent had failed to prove that the transformer oil found in his welding machine was legally obtained and that the old had not been obtained from the Appellant's transformers which had been vandalized.***

***e. The Learned Trial Magistrate erred both in law and in fact by shifting the burden of proof to the Appellant contrary to the rules of Evidence.***

***f. The Learned Trial Magistrate erred both in law and in fact by failing to consider the Appellant's written submissions together with the authorities relied.***

***g. The Learned Trial Magistrate erred both in law and in fact by awarding the First Respondent a sum of Kshs.240,000.00 special damages which had not been strictly proved.***

***h. The Learned Trial Magistrate erred both in law and in fact in awarding the First Respondent a sum of Kshs.750,000.00 general damages which was too excessive in the circumstances of this case.***

9. That on 25.5.2016 both counsel sought directions that this appeal be determined by way of written submissions supported by authorities and Counsel be at liberty to highlight on their submissions. The Appellant filed its submissions through the firm of M/s Wamaasa, Masese, Nyamwanga and Company Advocates on 9<sup>th</sup> June, 2016, together with supportive authorities, whereas the 1<sup>st</sup> Respondent/Plaintiff's submissions were filed on 30.6.2016 together with the supporting authorities.

10. I have very carefully considered the pleadings, proceedings, Judgment, counsel written submissions and highlights by the Counsel. I have also taken into account that the 2<sup>nd</sup> Defendant/2nd Respondent did not take part in their proceedings throughout.

11. The Appellant's appeal challenges the issue of liability and quantum which I propose to deal with starting with the issue of liability, then wind up with the issue of quantum of damages.

12. On issue of liability the Appellant contends that the trial court entered judgment jointly and severally against the Appellant and the Attorney General, who has not preferred any appeal and submitted in such a situation the 1<sup>st</sup> Respondent's is at liberty to execute and pursue payment of the entire decretal sum from the Honourable Attorney General whether or not the appeal succeeds or not. The 1<sup>st</sup> Respondent on his part urged that the judgment on record is against both the Appellant and the 2<sup>nd</sup> Respondent and by failing to oppose the appeal and taking the move suggested by the Appellant would be detrimental to the 1<sup>st</sup> Respondent's case, in case the appeal succeeds or not. The judgment in this case was entered jointly and severally against both the Appellant and the 2<sup>nd</sup> Respondent. The fact that it is only the Appellant who appealed and the 2<sup>nd</sup> Respondent has not, is not a basis for the Appellant to urge that execution should be taken only against the second Respondent, as the 1<sup>st</sup> Respondent is at liberty to seek execution against both the Appellant and the 2<sup>nd</sup> Respondent or any of them as the judgment is jointly and severally against the Appellant and the 2<sup>nd</sup> Respondent. The 1<sup>st</sup> Respondent has and shall, unless the judgment is varied and/or set aside on appeal, have liberty to choose between the two parties who should satisfy the judgment. I therefore find and hold the argument as raised by the Appellant is untenable in law and without merits.

13. The circumstances under which a party can be held liable for an action founded on the law of tort of false imprisonment and malicious persecution is now well settled. The plaintiff is obligated to prove the following:-

***a) That the prosecution was instituted against the plaintiff by the Defendant.***

***b) That the prosecution was terminated in favour of the plaintiff.***

c) *That the prosecution was instituted against the plaintiff by the Defendant.*

d) *That the prosecution was instituted without reasonable and probable cause and*

e) *That the prosecution was actuated by malice.*

14. I have very carefully perused the proceedings and the annexure, P exhibit 1 (a) and 1 (b) and submissions by both Counsel and there is no dispute that the arrest, detention and prosecution in Siaya Principal Magistrate Criminal Case No. 1343 of 2009 being the Criminal case which lead to institution of the instant Civil Suit, subject of this appeal, were instigated and carried out against the 1<sup>st</sup> Respondent, by the Appellant and the Kenya Police, as agents of the 2<sup>nd</sup> Respondent. Secondly the prosecution thereof terminated in favour of the plaintiff/1st Respondent herein (**see the case of Peter Nagweya Chagome Vs. The A.G. (2006) eKLR**).

15. The contention is whether the said arrest, detention and subsequent prosecution was undertaken **without reasonable and Probable cause and/or by malice?** (the underlining is more to emphasize the ingredient which are in contention). The Appellant contention is that the prosecution was instituted with reasonable and probable cause. The 1<sup>st</sup> Respondent thinks otherwise. To answer this question I will have to refer and quote at length from both the criminal and civil proceedings considered before the trial magistrate's courts.

16. The 1<sup>st</sup> Respondent in his plaint dated 22<sup>nd</sup> August 2011 from the particulars of malice under paragraph 6 and 7, it is stated in the plaint, that the 1<sup>st</sup> defendant (appellant) procured the arrest and prosecution of the plaintiff (1<sup>st</sup> Respondent) out of spite and without probable or reasonable cause, pressing on the subsequent sabotage case to proceed realizing that the same was bound to collapse due to lack of evidence, failing to attend court on several occasions to facilitate a long torture to the plaintiff, procuring the said arrest and prosecution of the plaintiff and confiscating his welding machine while knowing so well that there is no evidence at all to support the charge, arresting and imprisoning the plaintiff in absence of sufficient evidence. The 1<sup>st</sup> Respondent's Counsel in brief submitted that there was no investigation conducted against the 1<sup>st</sup> Appellant prior to his arrest and prosecution for the alleged offence, that the Appellant and the police miserably conduct a random police operation or swoop in which the 1<sup>st</sup> Respondent was arrested together with other welders in Siaya town, that there was no basis for the Appellant and Police Officers to conclude that the oil found in the 1<sup>st</sup> Respondent's welding machine was siphoned from the Appellant's transformers and that the type of oil found in the 1<sup>st</sup> Respondent's welding machine could, only be used by the Appellant's transformer and no other machine and lastly that the said operation by the Appellant and Police Officers targeted only a section of welders in Siaya town which by itself was clear evidence of premeditated malice. The Appellant's Counsel on his part submitted that it was very clear that the 1<sup>st</sup> Respondent was arrested and charged after he was found with a welding machines which was containing transformer oil soon after a transformer had been vandalized within Siaya Town and which oil was subjected to analysis by the Government Analysis who confirmed that the oil was transformer oil, that there was a thorough investigation before arrest, charging and prosecution, that the 1<sup>st</sup> Respondent did not give an explanation as to how he came into possession of the transformer oil and why transformer oil was being used to run a welding machine instead of a transformer.

17. Mr. Wamaasa, Learned Advocate for the Appellant submitted that "Reasonable and probable cause" was defined in the case of **Zablon Mwalumba Kadori Vs. National Cereals and Produce Board [2005] eKLR** where Hon. Justice D. Maraga, as he then was state as follows:

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

The Appellant therefore submitted the 1<sup>st</sup> Respondent having been found in possession of a welding

machine running on transformer oil soon after a transformer had been vandalized and having failed to provide evidence as to how he acquired it, the Appellant was therefore entitled to reach a conclusion that the 1<sup>st</sup> Respondent was probably guilty of the crime imputed and therefore Appellant had a reasonable and probable cause to have the 1<sup>st</sup> Respondent arrested, charged and prosecuted in court of law.

18. On the issue of whether the prosecution of the 1<sup>st</sup> Respondent was actuated by malice, it was submitted on behalf of the Appellant that the same was not actuated by malice at all and in support of the proposition cited the case of **Charles Opondo Vs. Dilvary Singh Bhul and Another (2013) eKLR** in which case Hon. Justice Chemitei while quoting the **Black Law Dictionary, 5<sup>th</sup> Edition** defined Malice in the following terms:-

***“Reckless disregard of the law of a person’s Legal rights”***

He further cited the case of **Nzoia Sugar Company Limited Vs. Fungutati C.A. No. 7 of 1987 KLR 2002** and state thus:-

***“Acquittal per se on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor. The mental element of ill-will or improper motive cannot be found in an artificial person like the appellant but here must be evidence of spite in one of its servants that can be attributed to the company.”***

The Appellant submitted therefore in the instant case there was no evidence of any spite in any of the Appellant's employees at the time the 1<sup>st</sup> Appellant was arrested as none of them was known to the 1<sup>st</sup> Respondent.

19. I will now turn to the trial courts proceedings both the Criminal and civil proceedings for the answer whether the prosecution was undertaken with reasonable and probable cause and whether it was actuated by malice as contended by the 1<sup>st</sup> Defendant/Respondent.

20. The Learned trial magistrate **Mr. S. O. Temu (R.M.) in Siaya PMCRC 1343 of 2009** had the following to say before acquitting the 1<sup>st</sup> Respondent on no case to answer:-

***“Upon hearing the evidence adduced, it is clear that none of the accused persons was found stealing or sabotaging the said K.P.L.C. transformers. All that led to the arrest was the fact that the four were found using welding machines which had in them transformer oil.”***

21. The learned trial magistrate in the Civil Case M/s. C.A. Okore (SRM) reviewed the evidence in the Criminal Case extensively and made the following important findings in her judgment thus:-

***“In the criminal proceedings and the Ruling produced as plaintiff's exhibit 1 (a) and (b), it is clear that the oil found inside the welding machines belonging to the plaintiff herein and the other accused person, was transformer oil. The question then is “what is the link on connection and/or nexus between the oil found in the welding machines mentioned herein and the 1<sup>st</sup> defendant herein (KPLC). The prosecution witnesses did not give any special feature that would exclusively distinguish the said oil from any other Transformer oil, but KPLC transformer oil.***

***Failure to link the said oil KPLC Transformer oil makes the prosecution instituted to be without reasonable and probable cause. There was no basis for prosecution, since there are so many other industrial machines which use the same oil. Besides the defence has not demonstrated that the transformer oil cannot be purchased form any other source. Whether abroad or locally. The 2<sup>nd</sup> issue for determination is whether the prosecution was actuated by malice. The defence having NOT established the linkage between the oil found in the welding machines herein and the KPLC transformer oil, had no basis to mount any prosecution against the plaintiff herein. And any such prosecution could easily be described as ill motivated or***

***malicious. 1<sup>st</sup> defendant could have established in the first instance that the said oil is their property, and shown proof before involving the 2<sup>nd</sup> defendant in making the arrests. The 2<sup>nd</sup> defendants action at the behest of the 1<sup>st</sup> defendant amounted to reckless disregard of the law or of a person's legal right do business without interference. To add on that, if it was a swoop as intimated herein, then the defence ought to have rounded up all machines operators, and not only the welders. So that after proper analysis only those machines found with transformer oil and the operators could have been presented to court. The fact that only 4 welders were arrested could be interpreted to mean that they were the only ones targeted. That violates their rights to operate as welders. It basically amounts to discrimination. I do find that the action of the 1<sup>st</sup> and 2<sup>nd</sup> defendants was interwoven with ill will and bad faith."***

22. Whether the Appellant proved that transformer oil cannot be available to other consumers and is exclusively meant for KPLC transformers and not any other transformer? (*Collins English Dictionary* (5<sup>th</sup> Ed.) defines "transformer" to mean:-

***"a device that transfers an alternating current from one circuit to one or more other circuits, usually with an increase (step-up transformer) or decrease (step-down transformer) of voltage. The input current is fed to a primary winding, the output being taken from a secondary winding or windings inductively linked to the primary."***

23. It follows from the aforesaid definition that any mechanical device which transfers an alternating current from one current to another or more circuits is a transformer. I believe that is what a welding machine and indeed many other electrical machines do and therefore it can safely be stated that a welding machine is a transformer and being a transformer, it has to use the transformer oil for its lubrication. The Appellant and the 2<sup>nd</sup> Respondent did not call any evidence to show that it is only the Appellant who has exclusive right of importation, and use of transformer oil in this country. The Appellant did not call evidence to show that transformer oil cannot be bought in Kenya as a commodity of trade and/or no one else has licence to import and use transformer oil other than the KPLC. The Appellant did not give any special specification for transformer oil used by KPLC and that whether the transformer oil found in the 1<sup>st</sup> Respondent's welding machine met such specifications. It is of great significance to note the allegedly KPLC oil found in the 1<sup>st</sup> Respondents welding machine was not produced as exhibit to confirm its existence leave alone that the transformer oil was property of KPLC that the 1<sup>st</sup> Respondent's welding machine was found containing.

24. The 1<sup>st</sup> Respondent gave evidence that the transformer oil found in the welding machine was lawfully acquired by him and he gave evidence that he used to purchase the transformer oil from Lacheke Company in Kisumu since he started using the machine in 2003 and used to replace the oil after 2-3 years. The Appellant and the 2<sup>nd</sup> Respondent opted not to give evidence. The 1<sup>st</sup> Respondents testimony was not controverted or challenged by the Appellant or rebutted by way of evidence. His explanation as to the source of his transformer oil was unchallenged and the trial court believed him. I find that no reason has been advanced for the court to find otherwise.

25. It is my finding from the evidence on record that the Appellant and the 2<sup>nd</sup> Respondent swung into action without carrying out thorough investigation or any at all, they acted in haste and recklessly without reasonable and probable cause in the arresting of the 1<sup>st</sup> Respondent. The arrest, charging and prosecution of the 1<sup>st</sup> Respondent would have been proper if proper investigation and verifying of the transformer oil was carried out and confirmed the oil could only be found exclusively in possession and use of KPLC and not any other individual or company in the country and further if there was evidence beforehand that the transformer oil found in the 1<sup>st</sup> Respondent's welding machine belonged to KPLC and that it had been stolen from KPLC transformer and could not be found from any other place. The operation which was hatched out and carried by the Appellant and the Police randomly against welders in Siaya town was in my view reckless and in disregard of the law and the rights of the welders who included the 1<sup>st</sup> Respondent. It was malicious and ill advised. I therefore find and hold that the 1<sup>st</sup>

Respondent has proved on balance of probabilities all the four ingredients for wrongful arrest, detention and malicious prosecution. The trial court evaluated and analyzed the evidence presented before it and came to the correct decision. I find the 1<sup>st</sup> Respondent proved the issue of liability against both the Appellant and the 2<sup>nd</sup> Respondent.

26. In the instant case it is of great importance to point out that the Appellant and the 2<sup>nd</sup> Respondent apart from filing their defences, they did not call any evidence to challenge the 1<sup>st</sup> Respondent evidence, and in a situation as in this suit, where the defendant fail to call evidence in support of their pleadings, the party's pleadings remain a mere statement of fact which remains unsubstantiated and which means the evidence being adduced by the plaintiff against the defendant is uncontroverted, unchallenged and that the standard of proof in Civil Case on balance of probability has been attained. That the evidence is credible and as there is no other evidence to the contrary the same should be acted upon (See cases of **Drappery Empire V AG (Nbi) HCCC 2666 of 1996, Interchemie EA Ltd V Nakuru Veterinary Centre Ltd (NRB) HCCC (1658 of 2000, Karuru Munyororo V Joseph Ndumia Murage & Another (Nyeri) HCCC 95 of 1988).**

27. On the issue of quantum of damages the Appellant urged that the learned trial magistrate awarded a sum of KShs.1000/= per day as a loss of income and that loss of income is a special claim which must be specifically pleaded and strictly proved. That receipts and documents produced by the 1<sup>st</sup> Respondent in support of the alleged loss of income were not sufficient evidence to strictly proof the claim. That the 1<sup>st</sup> Respondent did not file any tax Return neither pay income tax and that copies of the receipt produced did not even have revenue stamps in accordance with the relevant laws, urging that the claim for the loss of income was not strictly proved. On award of general damages of Kshs.750,000/= for malicious prosecution the Appellant submitted that the sum awarded was excessive in the circumstances, in view of the circumstances under which the 1<sup>st</sup> Respondent was arrested and prosecuted and further the trial court did not rely on legal authorities to satisfy the award of such a high award and urged the award should be reduced from Kshs.750,000/= to Kshs.200,000/=.

28. The 1<sup>st</sup> Respondent submitted on the other hand that special damages were specifically pleaded and proved for loss of user of welding machine from 19.11.2009 to 12.11.2010 when Criminal Case was determined. That the 1<sup>st</sup> Respondent produced records of his earnings, which though kept in rudimentary form, clearly show his earnings. That no objection was raised on its admissibility. That at the time of arrest of the 1<sup>st</sup> Respondent the welding machines was found in use, simply meaning the 1<sup>st</sup> Respondent was making some earnings form his work as a welder which the 1<sup>st</sup> Respondent stated was KShs.10,000/= per day but the trial court awarded Kshs.1000/= per day translated to Ksh.240,000 for the period the machine was detained. The Ist response urged that income Tax Returns are only evidence of payment of tax and urged that court to take judicial notice that the informal sector commonly known as "Jua Kali" in Kenya is still operating in a very rudiment way, with very poor if any, record keeping and still largely outside the Kenya Revenue Authority's tax bracket. The appellant therefore urged the court to find and hold Kshs.240,000/= awarded for lost income was reasonable. On the general damages for malicious prosecution the 1<sup>st</sup> Respondent submitted that sum of Kshs.750,000/= after considering the evidence adduced, submissions and authorities which were cited by the parties to find that the award reasonable and the court should uphold the same. The Appellant's counsel cited three authorities in support of his propositions.

29. Whether claim for loss of user for impounded welding machine as claimed by the 1<sup>st</sup> Respondent at Ksh.10,000/= per day is a claim for special damages? It is a trite law that claim for special damages must be specifically pleaded and strictly proved for it to succeed. The Appellant in its submissions submitted that loss of income is a special damage claim which must be specifically pleaded and strictly proved. This I would agree would be so if in the pleadings specific amount is pleaded but as in the instant case no specific amount is pleaded. The 1<sup>st</sup> Respondent's claim though stated is "special damages for loss of user from impounded welding machine at Ksh.10,000/= per day" "is in my view a claim for general damages to be assessed by court being on an income of Kshs.10,000 per day which the 1<sup>st</sup> Respondent was supposed to prove by production of documents as evidence or any other evidence which the trial court was not

bound to accept but could in view of the evidence apply any reasonable figure for the number of days which the 1<sup>st</sup> Respondent would have proved he was deprived the use of his welding machine.

30. In assessing damage for non-user of a chattel such as the welding machine in this case, the trial court evaluated and analyzed the evidence of the 1<sup>st</sup> Respondent, which evidence was not controverted by the Appellant and the 2<sup>nd</sup> Respondent, and which evidence the trial court took as credible. The same was unchallenged evidence, that the 1<sup>st</sup> Respondent's welding machine was used for in a gainful business. The receipt produced in support of the same were unchallenged. The failure to challenge the evidence by the defence, confirmed that the welding machine was used to render commercial services from which services the 1<sup>st</sup> Respondent used to make daily earnings. The trial court found that the 1<sup>st</sup> Respondent did not specifically prove daily earnings he was claiming, proving that income from business is seasonal and fluctuates from season to season depending on demand consequently the trial court ignored the income sought, but guided by the same, and considering that seasons do change preferred to take a flat rate of Kshs.1000/= even in bad days to be reasonable figure per day,, for 20 days in a month (average days per month) for 12 months, the period the welding machine was detained by the Appellant and the 2<sup>nd</sup> Respondent. The court then awarded a sum of Kshs.240,000/= as assessed damages for non-user of the welding machine.

31. In the case of **Jacob Ayiga Maraja and Francis Karani V Simeon Obongo (Suing as the administrator of the Estate of Thomas Ndenga Obonyo C.A. No. 167 of 2002 (Kisumu) the Court of Appeal** Stated thus:-

*“In our view, there was more than sufficient material nr record from which the learned judge was entitled to and did draw conclusion that the deceased was a carpenter and that his monthly earnings were about Kshs.4000/= per month. We do not subscribe to the view that the only way to prove the profession of a person must be by way of the production of certificates and that the only way of proving earnings is equally the production of documents. The kind of that stand would do a lot of injustice to very many Kenyans who are even illiterate, keeps no record and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that any documentary evidence can prove these things. In this case, the evidence of the Respondent and the widow coupled with the production of several reports was sufficient materials to amount to strict proof for damages claimed. Ground one of the grounds of appeal must accordingly fail on ground two, we known of no law or any other requirements that a self-employed compensator must retire at age 55.”*

32. From cases of **(Butler V Butler (1984) KLR 225, Mumias Sugar Co. Ltd V Francis Monolo C.A. 91 of 2003 [2007] eKLR)** I note the loss of earnings capacity are prospective financial loss which are awarded as part of the general damages arising out of direct consequences of accident that justifies an award in form of general damages. In my view therefore non-user of a chattel is not a claim of special damages as such but is a prospective financial loss which can be assessed based on evidence produced as a guideline and as such any general damages limited to non-user of the chattel arising out of direct consequently occasioned acts or omission, that justifies an award in form of general damages for non-user under its own sub-heading (see case **Terry Kanyua Vs. The Manager Wells Fargo Ltd HCCC 18 of 2013 (Meru)**).

33. In considering the 1<sup>st</sup> Respondent's evidence which was not challenged by the Appellant and the 2<sup>nd</sup> Respondent, I find sufficient material evidence on record from which the trial magistrate was entitled to draw conclusion that, indeed the 1<sup>st</sup> Respondent was in gainful business as a self-employed welder at Siaya Town from where the Appellant and the Police Officers deprived the 1<sup>st</sup> Respondent the use of his welding machine. The trial court after evaluation of the 1<sup>st</sup> Respondent's evidence concluded that as a welder daily earning of Kshs.1000/= was reasonable. The Appellant never in cross-examination challenged the 1<sup>st</sup> Respondent, evidence that he was a welder and/or his earnings. This court has taken judicial notice of the fact that the 1<sup>st</sup> Respondent was engaged in the informal Sector commonly known in Kenya as “Jua Kali” which operates in a very rudimentary way with very poor, if any, records keeping

and which sector is largely outside the Kenya Revenue Authority's Tax bracket. It is hard for people in such Sector to produce financial returns or income tax returns as proof of earnings as submitted by the Appellant. The income tax returns I would say with tremendous respect, to the Appellant's counsel submissions, are only evidence of payment of tax but not proof of earnings. I therefore do not subscribe to the view that the only way to prove ones earnings is by production of Income Tax Returns or production of evidence of payment of income tax or production of documentary evidence. The wrong doer should in my view take the victim as he finds him. The kind of stand taken by the Appellant would in my view if taken or adopted by court as the only any way to prove earnings, cause a lot of havoc or injustice to very many poor and illiterate Kenyans who do make earnings, yet they do not keep records. I agree where documentary evidence is available it is the best evidence but I do not agree as suggested by the Appellant that it is the only evidence that can prove earnings. I agree that the trial court had sufficient evidence placed before it from which it drew conclusions of the earnings and such evidence amounted to strict proof for damages claimed for non-user of the welding machine. There was the criminal proceedings, receipts of payments and such evidence was taken into court and furthermore the Appellant and the 2<sup>nd</sup> Respondent failed to call evidence to challenge or rebut the same. I therefore find no merit in the ground that the plaintiff's claim was not specifically pleaded and strictly proved for reasons stated herein above.

34. On award of general damages of Ksh.750,000/= for malicious prosecution, the Appellant submitted that the award was excessive in the circumstances. The appellant urged that the circumstances under which the 1<sup>st</sup> Respondent was arrested and prosecuted were such that an award in the sum of Kshs.750,000/= were too excessive and secondly that the trial magistrate did not rely on any legal authority. In the instant appeal the Appellant did not elaborate under what circumstances the 1<sup>st</sup> Respondent was arrested and prosecuted, that would have mitigated in favour of reduction of the sum awarded nor did he refer this court to any authority submitted but not considered. I have perused the three (3) authorities submitted by the Appellant in the appeal and none of them points to the fact that an award of KShs.750,000/= is too excessive as submitted. Similarly I have taken time to peruse the Appellant's and 1st Respondent's submissions dated 18.9.2015 and 10.3.2015 at the lower court and with all due respect the Appellant did not submit on quantum and specially on general damages nor did she attach any authority on the same. The 1<sup>st</sup> Respondent filed submissions on general damages and relied on the authorities.

35. In regard of authorities in this country the court of appeal has laid down guidance on when court can disturb an award on appeal. In the case **Shabani V County Council of Nairobi (1985) KLR 546** the Court of Appeal stated:-

***“The tests as to when an appellate court may interfere with an award of damages was stated by Law JA in Butt V Khan, Civil Appeal 40 of 1977 (a case referred to in another context by learned Judge) as follows:-***

***“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.***

***This direction has since been followed frequently by this court.***

***The assessment of damages is a question which we who have had the task of doing so have frequently found to be one of the utmost difficulty. As lord Morris said in H West & Son Ltd V Shephard (1964) AC 326, at P. 353:-***

***The difficulty task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of experience. IN a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what***

*award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment.”*

*“(Also see Kenya Bus Service Ltd V Jane Karambu and Another C.A. 241 of 2000, Mohammed Mohamoud Jabane V Highstone Butty Tongo, Olenja C.A.2 of 1986, Kemtro Africa Ltd T/a “Meru Express Services (1976) and Another V Lubia and Another (1987) KLR 30, Kitovi V Coastal Bottlers Ltd (1985) KLR 470).*

36. I have very carefully considered the amount awarded to the 1<sup>st</sup> Respondent, the authorities submitted in this appeal by the Counsel. In the cases of **Zablon Mwalimu Kadari V National Cereal and Produce Board (2005) eKLR** where an award for malicious prosecution in 2005 was made for KShs.500,000/=, in the case of **Michael Ocheing' Odera V. Attorney General (2012) eKLR** where an award of KShs.750,000/= was made for wrongful arrest and detention and further KShs.500,000/= for malicious prosecution in 2012, and in the case of **Chrisphine Otieno Caleb V. The Attorney General (2014) eKLR** where an award of KShs.2,000,000/= was made for malicious prosecution in 2014. In the instant case the 1<sup>st</sup> Respondent claimed general damages for imprisonment, malicious prosecution and defamation of character. The 1<sup>st</sup> Respondent was arrested on 11.11.2009, charged with stealing on 20.11.2009, and was acquitted on 12.11.2010. The cases relied upon by the 1<sup>st</sup> Respondent at the trial court were heard several years before the 1<sup>st</sup> Respondent case was heard. The awards given in those cases ranged between KShs.500,000/= for malicious prosecution. That the authorities submitted in the instant case awarded claimants sums ranging from KShs.500,000/= to KShs.2,000,000. In my view the correct approach that court should adopt in awarding of damages should be based on the following:-

- 1. That each case should depend on its own facts.*
- 2. Award should not be excessive for the sake of those who have to pay insurance premiums, medial fees or taxes.*
- 3. Comparable injuries or damages should attract compare awards.*
- 4. Inflations should be taken into account in assessing damages.*

35. In view of the aforesaid and considering the facts of this case the comparable awards I find that the trial court did not take into account a factor that it ought not to have or failed to take into account something it ought to have nor did I find the award to be so high that it amounts to erroneous estimate. I find the award was within the comparable awards and that inflation was considered. I therefore find no merits in the Appellants appeal against quantum of damages.

**37. The Upshot is that the appeal is without merits, the same is dismissed with costs to the 1st Respondent.**

**DATED AND SIGNED AT SIAYA THIS 29TH DAY OF SEPTEMBER, 2016.**

**J. A. MAKAU**

**JUDGE**

**DELIVERED IN OPEN COURT THIS 29TH DAY OF SEPTEMBER, 2016.**

**IN THE PRESENCE OF:**

Mr. Wamaasa for the Appellant.

Mr. Wakla for the Respondent.

C.C. – Kevin Odhiambo

C.C. – Leonida Atika

**J. A. MAKAU**

**JUDGE**