REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO 530 OF 2012

JASTON ONGULE ONYANGO………………………………...PETITIONER

AND

THE HONOURABLE ATTORNEY GENERAL………….1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS…….2ND RESPONDENT

JUDGMENT

Introduction

1. The petitioner, Jaston Ongule Onyango, has filed the present petition alleging violation of his constitutional rights following his arrest and prosecution in Criminal Case No. 363 of 2010. He alleges violation of his constitutional rights to inherent human dignity, equal protection and benefit of the law, privacy, prohibition of arbitrary entry and search, personal freedom and liberty, and deprivation of property as was guaranteed under the former constitution of Kenya.

2. The petitioner is described in the petition as an old man, aged 92 and resident in Kawangware. He has no formal education and can neither read nor write. At the time the events complained of in this petition occurred, he was working as a daytime watchman with Kenya Shield Security Limited at a monthly salary of Kshs 7,800/= and was stationed at Stima Plaza in Parklands.

3. The petitioner has lodged his claim against the Attorney General (hereafter AG), the representative of the Government of Kenya in civil suits pursuant to Article 156 of the Constitution, and the Director of Public Prosecutions (DPP) who is vested with the constitutional mandate for all prosecutions in Kenya under Article 157 of the 2010 Constitution.

Background

4. The petitioner states that he was arrested in the wee hours of the night of 10th/11th February, 2010 at his house in Kawangware area in the outskirts of Nairobi. The arrest was effected by a team of officers led by Ag. Superintendent Violet Makhanu without any warrants of arrest. He was taken to Kabete Police Station, later transferred to Muthaiga Police Station, aand thereafter charged with the offence of robbery with violence in Criminal Case No 363 of 2010. The case was heard and after the close of the prosecution case, the Court ruled that he had no case to answer and

terminated the case under section 210 of the Criminal Procedure Code.

5. The petitioner thus brings this petition challenging the manner of his arrest, arraignment, detention and subsequent release from custody. He claims violation of his constitutional rights under sections 72, 74, 75, 76 and 77 of the former constitution, some of which are now guaranteed under Articles 28, 29, 31, 40, 49 and 50 of the 2010 Constitution, and seeks compensation under various heads from the respondents.

The Case for the Petitioner

6. The petitioner's case is set out in his petition dated 15th November, 2012 and his affidavit in support sworn on the same date. In his affidavit, he avers that in the wee hours of the morning of 11th February, 2010, whilst he was asleep in his one room house at Kawangware, a squad of more than 8 police officers led by the DCIO Ag. SP. Violet Makhanu, without warrants, stormed and broke into his house. They roughed him out of bed with many guns pointed at him, slapped and kicked him, hit him with gun butts, and pushed him with their rifles to a corner of the room while he was naked. They then conducted a search on him and his house, and throughout the search, the officers did not allow him to dress.

7. The petitioner states that he felt frightened, humiliated and violated at being stark naked in front of so many strangers, including women officers, all armed with firearms pointed at him.

8. According to the petitioner, the police officers made it clear throughout the search that they had not gone for him but for his adult son, one Moses Onyango Ongule. He states that his son does not and was not living with him, nor was he present at his house at the material time.

9. The petitioner states further that after the search, the police, without any justification or reasons whatsoever, took away and confiscated his personal belongings including his identity card, Equity Bank ATM card, and *rungu* which he claims to have possessed since the 1960s for self-protection and which is of sentimental value to him. He claims that the items had never been returned to him, nor did the police take an inventory of the said items.

10. The petitioner avers that he was, after the search, ordered to quickly dress up. He was then arrested and taken to the police station, and was informed that he would be released when his son turned himself in. Despite his protestation of innocence, he was forced out of his house at gun point and bundled into a police Land Rover overcrowded with youthful suspects and escorted to Kabete Police Station where he was briefly detained before being escorted to Muthaiga Police Station where he was detained in an overcrowded cell with a filthy foul smell and he could hardly sleep.

11. On the morning of 11th February, 2010 he was escorted to Gigiri Police Station and placed in a cell, where he was detained until 22nd February, 2010 without accusation of any crime being levelled against him, without being interrogated or questioned, but only being told that the police were after his son and he would only be released upon the arrest of his son or when his son turned himself in. He was thereafter, on 22nd February 2010, charged before the Chief Magistrate's Court at Nairobi in Criminal Case No 363 of 2010 with what he describes as an utterly false, trumped-up, fabricated and malicious count of robbery with violence contrary to section 296 (2) of the Penal Code.

12. The particulars of the charge were that "*on 31st January, 2010 at Westlands in Nairobi within Nairobi Area Province, jointly with others not before court while armed with crude weapons namely, axe, pangas, kitchen knife robbed Changanlal Ruparel and Ramila Vidodlal of their laptop computer make IBM, two Nokia phone and one LG phone, two golden rings, eleven bungles, ten chains, eight pendants, a wrist watch, driving licence, passport, 1,000 US dollars, 2,000 pounds and Kshs 250,000/= all valued at Kshs 2.5 million and immediately after the time of*

such robbery killed the said Vinodlal". This was the offence for which the police were seeking his son. He later learnt that on the same day that he was charged in court, the police charged five people, including his son who was not before the court, with, inter alia, the same offence in Criminal Case No 346 of 2010.

13. The petitioner alleges that for the thirteen days he was in custody, he was held incommunicado and denied access to his relatives, friends, lawyer or any other persons who could render assistance to him on the pretext that he was going to tip off his son to hide from the police. Following his arraignment, in accordance with the provisions of the former constitution, he was not eligible for pre-trial bail and was therefore remanded in prison custody awaiting trial. He alleges that the police continued to hold him unlawfully and prosecute him maliciously until 12th April, 2010, when they dropped the robbery with violence charge and substituted it with, two other charges, equally false, trumped up and malicious, of "*being in possession of papers intended to resemble and pass as currency notes contrary to section 367 (a) of the Penal Code*" and "*being in possession of narcotic drugs contrary to section 3 (2) (a) of the Narcotic Drugs and Psychotropic Control Act, No 4 of 1994*." The petitioner avers that the police dropped the earlier charge and substituted it with the latter charges after they had arrested his son on 30th March, 2010 and arraigned him in court on the charge of robbery with violence on 13th April, 2010 before the Chief Magistrate's Court in Nairobi in Criminal Case No 700 of 2010.

14. The petitioner states that he was subsequently granted bail of Kshs 100,000/= but could not afford it. He was therefore detained until 10th June, 2010 when the cash bail was reduced to Kshs 60,000/=. He spent a total of 127 days in custody on account of what he terms the unlawful, illegal and unconstitutional arrest and detention by the police and the trumped-up and fabricated capital charge of robbery with violence and unlawful possession charges.

15. It is his case therefore that the police unlawfully, maliciously and without any legal justification whatsoever maintained and continued to prosecute him on the unlawful possession charges until 17th March, 2011 when he was acquitted under section 210 of the Criminal Procedure Code for want of a case to answer.

16. The petitioner claims that after his release from remand, he lost his job as he had been replaced on account of his long absence. He has not been employed ever since, which has rendered him destitute and wholly dependent on others for his livelihood and survival. He also claims to have expended the sum of Kshs 250,000/= in hiring Counsel for his legal defence and Kshs 2,450/= for perusal of the court file and obtaining certified copies of the record of trial.

17. The petitioner also alleges that he was dehumanized, psychologically traumatized and has been assessed to be suffering from pseudo dementia which examination cost him Kshs2,500/=. He therefore asks the Court to grant him the following reliefs:

i. ***A declaration that the storming and breaking into the house of the petitioner on 10th/11th February, 2010, conducting a search of his person and his house at gun point whilst he was naked in the presence of women police officers and the kicking around and roughing up of the petitioner with gun butts without lawful cause or justification and without warrants of search or arrest were arbitrary, highhanded, excessive and oppressive violations of the fundamental rights and freedoms of the petitioner as to human dignity, privacy, prohibition from arbitrary entry and search and freedom against cruel, inhuman and/or degrading treatment or punishment guaranteed by sections 70 (a), (c), 74 (1) and 76 of the former Constitution.***

ii. ***A declaration that the arrest and incommunicado pre-arraignment police detention of the petitioner for 13 days between 10th/11th and 22nd February, 2010 on false and trumped-up capital charge of robbery with violence without any reasonable cause for detaining him for that period was excessive, oppressive and highhanded violation of the petitioner's fundamental right to personal freedom and liberty, the protection and benefit of the law and the freedom from***

cruel, inhuman and degrading treatment or punishment guaranteed by sections 70 (a), 72 (1), (3) (b) and 74 (1) of the former Constitution.

iii. ***A declaration that the period of 114 days that the petitioner was detained in remand custody between 22nd February and 16th June, 2010 on the pretended and trumped-up robbery with violence and unlawful possession charges was part of the chain of excesses of abuse of the law and process of court by the police to oppress the petitioner in violation of his fundamental right to personal freedom and liberty, the protection and benefit of the law and the freedom from cruel, inhuman and degrading treatment or punishment guaranteed by sections 70 (a), 72 (1) and 74 (1) of the former Constitution.***

iv. ***A declaration that the prosecution of the petitioner in Nairobi Chief Magistrate's Court Criminal Case No. 363 of 2010 on the false, pretended and trumped-up charges was an abuse of the criminal law and the process of court by the police, an oppressive, malicious prosecution and a violation of the fundamental rights of the petitioner as to human dignity and the protection and benefit of the law guaranteed by sections 70 (a), 74 (1) and 77 of the former Constitution and Articles 27 (1), 28 and 57 (c) of the Constitution of Kenya, 2010.***

v. ***A declaration that the confiscation of the petitioner's personal possessions by the police including his national identity card, Equity Bank ATM card and his rungu to date without just cause is oppressive, highhanded and a violation of the petitioner's fundamental right of privacy, the protection and benefit of the law and the protection against deprivation of property guaranteed by sections 70 (c), 75 (1) and 76 (1) of the former Constitution (now Articles 31 (b) and 40 (3) of the Constitution of Kenya, 2010).***

vi. ***A mandatory order compelling the respondents to release to the petitioner his national identity card, Equity Bank ATM card and rungu being held by police officers attached to Gigiri Police Station.***

vii. ***Special damages amounting to Kshs.254,950/=.***

viii. ***General damages as the Court shall assess consequent to the declarations of violations of fundamental rights and freedoms in prayers (i) to (v) above.***

ix. ***Exemplary, aggravated and/or punitive damages for excessive, oppressive and highhanded conduct of the police.***

x. ***Costs of the petition.***

xi. ***Interest on prayers (vii) to (x) above.***

The Case for the 1st Respondent

18. The office of the Attorney General filed grounds of opposition dated 29th November, 2012 in response to the petition. Reliance was also placed on the averments of fact contained in the affidavit sworn by Police Constable Mutembei Muriuki, Force No 71286, on behalf of the DPP.

19. In the grounds of opposition, the AG argues that the petition lacks clarity and precision in setting out the alleged violations, discloses no cause of action against his office, and had not demonstrated the basis for attributing the alleged violations on the government. It is his position, further, that the orders sought by the petitioner are not tenable against his office, which is wrongly enjoined as a party as the petitioner does not show how he failed or abdicated his duties under Article 156 of the Constitution.

20. The AG elaborates his position as set out in the Grounds of Opposition in his written submissions. With regard to the petitioner's arrest and arraignment in court, it is his case that section 70 of the

former constitution afforded the rights and freedoms of the individual but it also qualified them by making them subject to the rights and freedoms of others, and the public interest.

21. With regard to the petitioner's contention that his arrest on the night of 10-11th February 2010 violated his rights under section 72 (1) (e) which guaranteed personal liberty, it is the AG's submission that the arrest and subsequent detention were in accordance with the law as it then gave the police 14 days from the date of arrest within which to charge a person on suspicion of having committed an offence punishable by death. In this case, the petitioner was charged with robbery with violence, an offence punishable by death as provided under section 296(2) of the Penal Code. It was his case therefore that such an arrest and detention did not amount to violation of the petitioner’s right to personal liberty.

22. The AG further observes that the petitioner was put on trial and subsequently acquitted, under section 210 of the Criminal Procedure Code. However, in the AG’s view, having been arrested upon reasonable suspicion of having committed an offence, charged in court, pleaded not guilty, put on trial and acquitted for failure by the prosecution to establish a prima facie case, the petitioner cannot claim to have had his rights violated.

23. The AG notes that while the petitioner alleges that he was denied access to his relatives and a lawyer, he claims an amount of Kshs.250,000/= allegedly incurred as legal fees. In his view, the allegation and claim demonstrate that the petitioner had not approached the Court with clean hands, and cannot claim to be awarded what on the other hand he alleges to have been denied.

24. It is the AG’s submission therefore that the petitioner has failed to demonstrate how his rights under sections section 70(a), 72(1),(3),(b), 74(1) & 77 were violated, and prays that the petition be dismissed.

The Case for the 2nd Respondent

25. The DPP also opposed the petition. He filed an affidavit sworn by PC Mutembei Muriuki, No 71286 attached to the Criminal Investigations Department in Parklands, Nairobi, on 12th June 2013.

26. In his affidavit, Cpl. Mutembei states that on the night of 31st January, 2010, an incident of robbery with violence occurred within Westlands area along Westlands Road and a report was made at Parklands Police Station vide OB No 05 of 01/02/2010 by one Shilen Thakarer. Investigations led by the DCIO, Violet Makhanu, led to numerous arrests which included that of a guard, Erick Ingohi Luevo (the 1st accused person in Criminal Case No 346 of 2010) who was arrested on 10th February, 2010 within Kakamega and escorted to Nairobi. He then led police officers to various places in search of his accomplices.

27. One of the places he led the police to was the petitioner’s house within Kawangware area. The police officers conducted a search and recovered eight rolls of *cannabis sativa* and 12 papers resembling US currency notes in denomination of US 100 each. This, according to the DPP, is what led to the arrest and booking of the petitioner at Muthaiga Police Station vide OB No 2 of 11/02/2010. He was charged, alongside Erick Ingohi Luevo and a Moses Vindolo, with robbery with violence and also being in possession of contraband items. The petitioner was also charged with being in possession of papers intended to resemble and pass as currency contrary to section 367 of the Penal Code and being in possession of cannabis sativa contrary to the Narcotic Drugs and Psychotropic Substances Control Act, No 4 of 1994.

28. The DPP avers that the petitioner was handled with outmost respect by the police officers, considering that he is a senior citizen and no excessive force was used against him as he co-operated with the police. He avers further that only the papers intended to resemble and pass as currency and the *cannabis sativa* were confiscated. He denies that the petitioner's Identification

card, ATM card or rungu were confiscated as alleged.

29. The DPP also avers that the petitioner was allowed, while in custody, to contact and communicate with his relatives without any interference. He further contends that the petitioner's detention was lawful as he had been charged with a non-bailable capital offence. He was detained for 11 days, which did not contravene the repealed constitution under which a person charged with a capital offence was required to be charged in court within 14 days of his arrest.

30. The case for the DPP therefore is that the petitioner was charged with offences known to law, based on the evidence on record, and the charges against him were in no way malicious. He relies on the decision in **Deepak C. Kamani and 4 Others, Criminal Appeal No. 152 of 2009** to submit that the enjoyment of fundamental rights and freedoms under the former constitution could be curtailed to ensure that the individual did not infringe upon the rights of others or harm the public interest.

31. The DPP observes that the petitioner seeks only one order against his office, regarding the petitioner's claim that his prosecution was an abuse of criminal law, oppressive and malicious. He submits, however, that the petitioner's prosecution was based on sufficient evidence and public interest, and the petitioner had not demonstrated how the said prosecution, which was sanctioned by the law, was an abuse of his fundamental rights. According to the DPP, the petitioner's acquittal was based on procedural lapses in the chain of custody of the narcotic drugs as the investigating officer had not complied with a section of the narcotic drugs and psychotropic substances Act, section 74A(1) in the manner of handling drugs. It was his submission that where an accused person has been discharged on account of a technicality the prosecution cannot be said to be malicious, oppressive, or an abuse of the criminal law.

The Petitioner's Rejoinder

32. In reply to the respondents' contentions, the petitioner denied, in his further affidavit sworn on 5th February, 2014, that he was aware that there had been a robbery in Westlands, or any of the respondents' contentions with respect thereto. He also denied any knowledge of his alleged accomplice, Erick Ingohi Luveko, asserting that he did not even know the said Luveko; that no contraband was found in his house, and that he was not charged alongside anybody else nor was he charged in two separate case files. He further reiterates his averments with respect to the forced entry into his house by police.

33. He asserts therefore that the respondents have not given any justification for his arrest and arraignment in. Court with the offence of capital robbery, or why the charge was subsequently dropped and substituted with the offence of possession of, inter alia, narcotic substances. It is his case that charging him with a capital offence, for which his son was a suspect, cannot be a legitimate, lawful or constitutional justification of his prolonged detention. Rather, it is clear evidence of abuse of the police powers, the criminal law and the Constitution.

Analysis and Determination

34. I have considered the respective pleadings and submissions of the parties which I have summarized above. In my view, the main issue for determination is whether there was a violation of any of the petitioner's rights guaranteed under the former constitution following his arrest, detention in custody and arraignment in court on a charge of robbery with violence.

35. The facts forming the basis of the petition are not disputed. The petitioner was arrested, and was held in pre- arraignment detention for a period of 11 days. He was then charged with the offence of robbery with violence. He was denied bail as capital offences were then not bailable. The charge against him was later substituted with one of possession of narcotic substances and papers resembling currency. He was admitted to bail, but could not raise the amount of Kshs 100,000 required. He later applied, through his Counsel, r. Mureithi, for its reduction, and it was reduced to

Kshs 60,000 and he was released. He was tried and the trial court, at the close of the prosecution case, found that he had no case to answer.

36. The police have not denied that they went to the petitioner's house and arrested him. They have also not denied the time that he alleges they arrested him. They concede also that his son was subsequently arrested and charged with robbery with violence.

37. What is in contention therefore is not the facts. Rather, it is the interpretation and implication of the facts, which should lead to one of two conclusions: that the respondents violated the petitioner's rights under the former constitution, or that the respondents' acts were a legitimate exercise of their constitutional and legislative mandates. Should I find in favour of the petitioner, then I shall consider what relief he is entitled to.

38. In considering this matter, I bear in mind two competing interests that I must balance. The first relates to the constitutional rights of the petitioner which he alleges were violated following his arrest, arraignment in court, prosecution and acquittal on the grounds that the state had not established a *prima facie* case against him to require that he be placed on his defence. The second relates to the societal interest in having offenders answer for their acts, which would justify the state in arresting and prosecuting the petitioner. I am therefore called upon to consider two matters: whether there was a violation of the petitioner’s constitutional rights, and whether the petitioner has established a case of malicious prosecution.

Violation of Constitutional Rights

39. The petitioner has alleged violation of his constitutional protection against unlawful detention guaranteed under section 72(1), (2) and (3) (b) of the former constitution. The section provided as follows:

> ***72. (1) No person shall be deprived of his personal liberty save as may be authorized by law….***
>
> ***(2) A person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.***
>
> ***(3) A person who is arrested or detained-***
>
> ***(a)…; or***
>
> ***(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty- four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offense punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.***

40. The constitution then did allow the detention of a person on suspicion of having committed an offence punishable by death for a period of up to 14 days. That being the case, on the assumption that the petitioner was “***arrested or detained upon reasonable suspicion of his having committed or about to commit an offense punishable by death”,*** then it can be argued that there was no violation of his rights under section 72(3)(b) as the police had the constitutional mandate to hold

him for the period that they did, a total of 11 days.

41. Similarly, the constitution did not have a provision, such as is now found at Article 49, permitting the release of a person charged with a capital offence, on bail. Section 72(5) provided as follows:

> ***(5) If a person arrested or detained as mentioned in subsection (3) (b) is not tried within a reasonable time, then without prejudice to any further proceedings that may be brought against him, he shall, unless he is charged with an offence punishable by death, be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.*** (Emphasis added)

42. On the basis that he was charged with an offence that carried a capital sentence, he was, properly so in the circumstances, not admitted to bail. There was therefore no violation of constitutional rights in this respect.

43. After the substitution of the charge against him, the petitioner was admitted to bail of Kshs100,000, which he was unable to raise. It was later reduced to Kshs60,000. In my view therefore, in the circumstances, his continued detention due to his inability to raise bail could not be deemed a violation of his constitutional rights: the court was entitled, on the material before it, to set bail for the petitioner. That he was unable to raise it and therefore remained in custody did not amount to a violation of his constitutional right to bail.

44. The petitioner has alleged that he was held incommunicado, without being accorded the opportunity to see his relatives, or have access to a lawyer to assist in the preparation of his defence. The record of proceedings before the trial court, however, as well as the petitioner's own claim before this Court, raises doubts about the veracity of this contention.

45. First, the trial court's record shows that the petitioner had the benefit of legal representation, by the same lawyer acting for him in the present proceedings, throughout the trial in the lower court. For instance, the record indicates that on 27th May, 2010, the petitioner was represented by his counsel, Mr. Mbugua Mureithi. At paragraph 24 of his affidavit, the petitioner states that:

> ***24. "As a consequence of the said unlawful trial on false, malicious and fabricated criminal charges I incurred the sum of Ksh250,000/- in hiring counsel for my legal defence and Kh2,450/- for perusal of the court file and obtaining certified copies of the record of trial."***

46. Secondly, as pointed out by the AG, how could the petitioner have incurred legal costs of Kshs250,000 if he had no legal representation? To whom was this amount, allegedly incurred in respect of legal fees and which the petitioner claims against the respondents, paid? It is, in the circumstances, impossible to give credence to the petitioner's claim that he was held incommunicado, and I therefore find no violation of his rights in this regard as alleged.

47. The petitioner alleges violation of his right to property under section 75 of the former constitution. He alleges that his identity and ATM cards and a *rungu* were confiscated during the search of his premises. He has not indicated who took the items, and there is no inventory or other documents to prove the existence or seizure of these items. There is some allusion to an inventory in the record of proceedings before the trial court which are annexed to the petition, though, from the record, little credence was placed on the said inventory. In the present case, three is very little before the court, other than the assertion by the petitioner and the denial by the respondent, that the alleged items were taken. However, as an identity card and ATM card can both be replaced routinely, and there being no evidence with respect to the existence and confiscation of the rungu as alleged, I will make no orders with respect to the alleged violation of the right to property guaranteed under section 75.

48.The petitioner has also alleged violation of section 74 which prohibited torture. He has, however, also conceded that there was no physical torture by the respondents. The allegation of torture as I understand it, is with respect to his arrest and incarceration during the period that he was unable to raise bail. While it is submitted on his behalf that the period of detention in remand was part of the chain resulting from the acts of the respondent in maliciously prosecuting him, I am not satisfied that the allegation of torture has been made out, or that the period during which he was in remand following his arraignment can be deemed to be a violation of constitutional rights.

49.Finally, the petitioner has alleged violation of his right to privacy in the search of his home that was conducted by the police at the time of his arrest. In this respect, I observe that police, in the exercise of their duties, have the right, in certain circumstances, to conduct searches without warrants. Section 14(1) of the Police Act (Chapter 84 of the Laws of Kenya, now repealed), which was in force at the time the events the subject of this petition took place, set out the powers and mandate of the police. It provided as follows:

> ***The [Police] Force shall be employed in Kenya for the maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and detection of crime, the apprehension of offenders, and the enforcement of all laws and regulations with which it is charged.***

50.Section 20 (1) of the said Act allowed police officers to conduct searches without warrants. It provided that:

> ***When an officer in charge of a police station, or a police officer investigating an alleged offence, has reasonable grounds to believe that something necessary for the purposes of such investigation is likely to be found in any place and that the delay occasioned by obtaining a search warrant under section 118 of the Criminal Procedure Code will in his opinion substantially prejudice such investigation, he may, after recording in writing the grounds of his belief and such description as is available to him of the thing for which search is to be made, without such warrant as aforesaid enter any premises in or on which he expects the thing to be and there search or cause search to be made for, and take possession of, such thing:***
>
> ***Provided that -***
>
> ***(i) the officer shall carry with him, and produce to the occupier of the premises on request by him, his certificate of appointment;***
>
> ***(ii) if anything is seized as aforesaid he shall forthwith take or cause it to be taken before a magistrate within whose jurisdiction the thing was found, to be dealt with according to law***.' (Emphasis added).

51.It is thus correct that the police had the mandate, in certain circumstances expressly provided for by law, to search premises without a warrant. In doing so, however, they were under a duty to observe certain conditions, In this case, they did not.

52.Does this, therefore, mean that there was a violation of the petitioner's right under the former constitution, section 70(c) of which guaranteed the right to ***"protection for the privacy of his home and other property***" and 76(1) of which provided that ***"Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises."***

53.I must express some disquiet about the conduct of the police in this case. From the material before me, it is apparent that the raid of the petitioner's premises in the wee hours of the night was linked to the fact that his son was suspected of having committed a capital offence. Other than the fact that he was the suspect's father, there appears to have been no other basis for raiding his house

without a warrant, and subjecting him to a search. That being the case, and while I acknowledge that the police do have power to conduct searches without warrants in certain circumstances, I am unable to find that the circumstances of this case fell within the exceptions then allowed by section 20 of the Police Act. In any event, the respondents have not demonstrated how they met the conditions stipulated in the said section.

54. In the circumstances, it is my view that the police should have obtained a warrant to search the petitioner's house as required under section 118 of the Criminal Procedure Code, which provides that:

> ***118. Where it is proved on oath to a court or a magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court or a magistrate may by written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and, if the thing be found, to seize it and take it before a court having jurisdiction to be dealt with according to law.***

55. It is my finding therefore, and I so hold, that there was a violation of the petitioner's right to privacy guaranteed under section 76 of the former constitution.

Malicious Prosecution

56. The petitioner has alleged that his arrest and prosecution was actuated by malice, and he seeks compensation in respect thereof. The question is whether the facts before me bear out this claim.

57. In its ruling delivered on 16th March, 2011, the trial court, in acquitting the petitioner, rendered itself as follows:

> ***"… A contingent of police officers raided the accused's house in the early morning of 12th February, 2010 with a view to arresting his son one Moses. It was after they failed to find Moses that they chose to arrest the accused persons. Hence the accused person was just but a victim of circumstances.***
>
> ***The police who arrested the accused alleged that they recovered the fake dollars and the bhang from his possession. The said exhibit was supposed to be forwarded for expert examination to ascertain their genuity*** **(Sic).** ***It took police officers exactly three months to forward the said exhibits to the experts for examinations. This raises eyebrows as to why the police took this long to do the needful. One cannot avoid doubting if police were certain that they had prepared the right charges against the accused. By this time 12th May, 2010, the accused had already been arraigned in court which means that investigations were going on simultaneously with the hearing of the case. Of course this amounts to hunting of evidence which is prejudicial to one accused person…"***

58. The trial court then examined the evidence before it and observed as follows:

> ***"It also begs questions why at the time the accused was being booked at Muthaiga Police Station, he was booked with only being in possession of 8 rolls of cannabis and NOT the fake dollars so where did these fake dollars come from. This only demonstrates traits of a very badly investigated case whose aim was to fix the accused at all costs… I do also note that the provisions of Narcotic Drugs and Psychotropic Substances Control Act No 4 of 1994 were flouted by the police who arrested the accused and investigation*** **[sic]** ***the case with impunity… Again under***

section 74A (1) the accused was not accorded the right to have his advocate and the drop was not weighed.

…..

It is also not clear why material witnesses to this case were not called. From this instance it was important that the DCIO-Gigiri Division who led the operators testify. She would have shed light on why the operation was necessary; she should have shouldered the responsibility of the need for raid and why [the] accused was finally implicated with the charges. PC Chweya whose name appeared on the inventory was also deliberately omitted are key witness (sic). He should have testified on how the recovery of exhibits was done and why his name appeared on the inventory. The failure to call such crucial witnesses only draws the impression that they would have such adverse evidence to the prosecution case.

***Finally the evidence tendered by the prosecution is so helpless, so scanty and inadequate such that if I put the accused person on his defence it would be tantamount to asking him to fill the gaps left by the prosecution.*”**

59.It must be acknowledged, from the findings of the trial court, that the prosecution of the petitioner was flawed in many respects, and the prosecution did not satisfy itself, before proceeding with the case against the petitioner, that it had sufficient evidence to justify the prosecution. As the trial court observed, the prosecution failed to adduce certain evidence which would have shed some light on why the petitioner was implicated in the offence in question, and it failed to follow some provisions of the law with respect to the charge of possession of narcotic drugs facing the petitioner. Indeed, the trial court took the view that the prosecution was trying to "fix" the petitioner at all costs, noting that while he was booked at Muthaiga Police Station with being in possession of 8 rolls of *cannabis sativa*, he was subsequently additionally charged with being in possession of fake currency, and the court wondered where these fake dollars came from.

60.Essentially, then, the claim before me is a claim for malicious prosecution. Two questions then arise in this regard. The first is whether a party can properly lodge a claim for malicious prosecution by way of a petition alleging violation of constitutional rights. The second is whether, in the present case, the petitioner has established a claim in malicious prosecution to warrant the grant of relief in his favour.

Competence of the Petition

61.The 2nd respondent submitted that as this was a claim for malicious prosecution, it should not have been brought by way of a constitutional petition but as a civil claim. A similar argument was raised before Lenaola J in the case of **C.O.M. vs Standard Group and Another High Court Petition No. 192 of 2011**. In that case, the respondents argued that the claim could not be lodged against them as it was a private law claim in defamation. In determining that the Court could proceed with the matter in exercise of its unlimited original jurisdiction, the Learned Judge expressed the following view:

[15]…However, whereas I subscribe to and generally hold the same view, I am also mindful of the edict that each case must be looked at in its specific and unique circumstances. If for example, the Respondent had raised the issue at the preliminary stage, I would have made the necessary orders. Having now allowed the parties to proceed to full trial, then it is important that the Court should deal with the issues raised in the wide context of its unlimited original jurisdiction under Article 165(3) of the Constitution and for the ends of justice to be seen to have been met, notwithstanding that the matter should ordinarily have been filed in the High Court under its civil jurisdiction although constitutional questions have also been raised.

In saying so, I am guided by the Court of Appeal decision in Rashid Odhiambo Aloggoh & 245 Others vs Haco Industries Ltd, Civil Appeal No.110 of 2001, where the Court dealt with an appeal in which the High Court had refused to deal with the issues because there were other lawful avenues through which the Appellant could ventilate them. The Court stated as follows;

> ***"...with respect to the learned judges of the High Court, they erred in holding that the Appellants had other lawful avenues in which they could go to ventilate their grievances.***
>
> ***What should the Constitutional Court have done? In our respective view, it should have considered whether or not the allegations made by the Appellants were true. It appears that the parties were prepared to have the factual issues which they raised to be determined on Affidavit evidence.***
>
> ***We do not know how the Constitutional Court would have gone about this, but since this was an Originating Summons, some assistance could have been derived from the provisions of Order 36 Rule 10(1) of the Civil Procedure Rules which allow the Affidavits to be treated as pleadings and there after the parties allowed to give viva voce evidence from which the Court would be able to make up its mind on which side of the divide the truth lays. The burden of Court, would have been on the Appellant to show the Court that the facts on which they based their claim were true. If the Court had found that the facts as put forward by the Appellant were not true, then that would have been the end of the matter...But if the Court found that the facts were as stated by the Appellants, the Court would have to move to the next stage namely, do the proved or admitted facts constitutes or amount to violation or contravention of the Constitution? In determining that issue, the Could would be entitled to consider the various statutory provisions relied on by the Appellants … the facts, if they were to be found to be as stated by the Appellants, amount to or constitute a contravention of Sections 73, 74, 80 of the Constitution as contended by the Appellants … then in that event the Court would move to the last stage, namely the remedy of remedies to which the Appellants would be entitled to ..."*** (Emphasis added)

62. I agree with the Learned Judge on this point. The present petition raises both constitutional claims, and also the civil claim for malicious prosecution which falls for determination under the civil jurisdiction of the High Court. It would not serve the interests of justice, however, were this Court at this stage to determine that it cannot deal with the question of whether or not the petitioner has established his claim against the state for malicious prosecution. In the circumstances, it is my finding that the matter is properly before me and I will now proceed to determine the question whether the petitioner has established his claim.

Essentials of a Claim of Malicious Prosecution

63. In his decision in **Homa Bay High Court Civil Appeal No.. 17 of 2014- Music Copyright Society of Kenya vs Tom Odhiambo Ogowl, Majanja J** observed that the elements that needed to be proved in a case of malicious prosecution had been stated in several cases, inter alia the case of **Kagane and Others vs Attorney General and Another [1969] EALR 643, Katerregga vs Attorney-General [1973] EALR 287, Mbowa vs East Mengo District Administration [1972] EA 352, Murunga vs Attorney General [1979] KLR 138**. He set out these elements as being:

a. ***"The plaintiff must show that prosecution was instituted by the defendant, or by someone for whose acts he is responsible;***

b. ***That the prosecution terminated in the plaintiff's favour***

c. ***That the prosecution was instituted without reasonable and probable cause;***

d. That the prosecution was actuated by malice."

64. The Learned Judge went on to observe that in the case of **Mbowa vs East Mengo District Administration (Supra),** the East Africa Court of Appeal had stated that in order to succeed, the plaintiff has to prove that the four essentials or requirements of malicious prosecution set out above have been fulfilled, and that he has suffered damage as a result. In the view of the Court:

> ***"….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."***

65. The Court went on to observe in the Music Copyright case that whether there was reasonable and probable cause is to be determined from the nature of the charge preferred by the police. This is in recognition of the fact that the police have the legislative mandate to ensure that law and order is maintained. It is also their mandate to investigate and prosecute for criminal conduct. However, such prosecution as is undertaken by the police, under the former constitution as directed by the Attorney General and currently under the direction of the DPP, must be done on a sound legal footing. As the Court observed in **Gulam and Another vs Chief Magistrate's Court and Another [2006] eKLR**:

> ***"… <u>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 institution of criminal proceedings, there must be in existence material evidence on which the Prosecution can say with certainty that they have a probable case.</u> A prudent and cautious prosecutor must be able to demonstrate that he has reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable… Prosecution aimed at securing private vengeance or vindictiveness must be stopped as contrary to public policy and the public interest. <u>The rationale for prohibiting such proceedings is that for a man to be harassed and put to the expense of perhaps a long trial and then given an absolute discharge is hardly from any point of view an effective substitute for the exercise by the Court (of its inherent power to prevent abuse of its process). On the score of cost alone, the exercise of the power will protect the accused person from expenditure on a trial on indictment which he or she cannot recoup.</u>"*** (Emphasis added)

66. A state agent exercising prosecutorial powers must at all times exercise diligence before instituting any criminal proceedings to ensure the proper ends of justice are to be attained. In the words of Lord Atkin in **<u>Herniman vs Smith, HL 1938</u> AC 305**:

> ***"I should define reasonable and probable cause to be an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed." and "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 cause for a prosecution."***

67. Echoing the words of Atkins, LJ in the above case, the High Court of Botswana in **Gaokibegwe vs Mokokong and Another (CVHLB-002355-06) [2009] BWHC 77 (20 March 2009**) pointed out, with respect to what amounts to reasonable grounds, that:

> **"[43] …** ***While a prosecutor is not expected to have tested every possible relevant***

fact before he takes action, where he has ample opportunity to investigate whether there was any justification for the charge and has failed to make any investigation, his failure renders any prosecution undertaken by him as one made without reasonable grounds.”

68. The court went on to observe, with respect to the role of the prosecutor in exercising the State’s prosecutorial powers, that:

> **“[48]** ***A public prosecutor, whether he appears in the customary court or elsewhere, acts on behalf of the Director of Public Prosecutions under delegated powers. <u>He has a solemn duty to fully consider the material placed before him before deciding to institute a prosecution, and to call for further investigation if this is necessary. His decision is made in accordance with powers conferred under the Constitution, and is a weighty decision, which will have serious consequences for the accused person. It subjects him to the public scrutiny of a criminal trial and to a degree of social stigma, even if he is ultimately acquitted</u>. It is a decision not to be taken lightly, and certainly not to obtain resolution of civil disputes between citizens. <u>In my judgment a prosecutor who recklessly proceeds with a prosecution without reading the docket, or in the face of clear evidence that there is no case to answer, does so without reasonable and probable cause, and is open to a claim for malicious prosecution.”</u>*** (Emphasis added)

69. Within this jurisdiction, in a claim for malicious prosecution, Maraga J (as he then was), in **Zablon Mwaluma Kadori vs National Cereals & Produce Board, Civil Suit 152 of 1997, expressed the view that:**

> ***“In a claim for damages for malicious prosecution like this, it is incumbent upon the plaintiff to prove on a balance of probabilities <u>that the prosecution was instituted by the defendant; that the prosecution terminated in his favour; that the prosecution was instituted without reasonable and probable cause and that in instituting the prosecution the defendant was actuated by malice</u>.”*** (Emphasis added)

70. As to what constitutes reasonable and probable course, the Learned Judge cited with approval the dictum by Hawkins, J, in **Hicks vs Falkner (1878), 8 Q.B.D. 167 at P.171** where it was held that:

> ***“Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances which, assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed.” This definition was adopted by Rudd J in Kagane vs Attorney General & Another (1969) EA 643 in which the learned Judge added that:“…to constitute reasonable and probable cause the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of the facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty.”***

71. A further element has to be considered: that the mere fact that a person has been acquitted of the criminal charge he faced does not necessarily connote malice on the part of the prosecutor. In **Nzoia Sugar Company Ltd vs Fungututi [1988] KLR 399**, the Court of Appeal held;

> ***“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 there must be evidence of spite in one of its servants that can be attributed to the company.”

72. Has the petitioner in this case established the necessary elements to support his contention that his prosecution was malicious? On the facts before me, I am satisfied that the prosecution was instituted for an improper motive on the part of the prosecution. It is true that they were investigating an offence recognised by law. As observed by the trial court however, the person they were seeking, and whom they suspected of having committed the offence of robbery with violence, was the petitioner’s adult son. Indeed, the very first prosecution witness, PC Solomon Waweru, testified that they went to the petitioner’s house as his son was said to be hiding there.

73. Thus, despite knowing that the person they wanted to answer charges of robbery with violence was the petitioner’s son, the police nonetheless arrested the petitioner and charged him with the offence of robbery with violence. After they had arrested his son, and a day before they charged his son with the same offence, they substituted the robbery with violence charge against the petitioner with a charge of being in possession of papers intended to resemble and pass as currency contrary to section 367 of the Penal Code and being in possession of c*annabis sativa* contrary to the **Narcotics Drugs and Psychotropic Substances Control Act, No 4 of 1994**. The police allegedly found these items in the petitioner’s house when they entered in the wee hours of the morning while searching for his son, having been led there by one of his son’s alleged accomplices in the robbery with violence offence.

74. In the circumstances of this case, I am satisfied that the prosecution of the petitioner was unjustified, there being no reasonable or probable cause for believing that he was involved in the robbery for which his son was sought by police. His prosecution, initially for the offence of robbery with violence, and subsequently with possession of narcotic drugs and fake currency, was therefore malicious.

Remedies

75. The petitioner has prayed for the grant of various orders and declarations, and has relied on various decisions in this regard, among them the cases of **Samura Engineering Ltd and 10 Others vs Kenya Revenue Authority, Petition No 54 of 2011; Jennifer Muthoni Njoroge and 10 Others vs The Attorney General, Petition Nos. 340 to 350 of 2009**; and **Dominic Arony Amolo (No 2) and Gitari Cyrus Muraguri vs The Attorney General, Misc Case No 494 of 2003**.

76. He has urged the Court to grant him exemplary, aggravated and/or punitive damages for excessive, oppressive and highhanded conduct on the part of the police, and has asked the Court not to follow the decision in **Benedict Munene Kariuki and 14 Others vs The Attorney General, Petition No. 722 of** 2009 in which the Court declined to grant both general and exemplary damages. Instead, he urges the Court to be guided by the decisions from outside this jurisdiction in, among others, **Peters vs Marksman and Another [2001] 1 LRC 1; Kuddus vs Chief Constable of Leicestershire Constabulary [2002] 2 AC 122; The Attorney General vs Ramanoop [2005] 4 LRC 301; Alphie Subiah vs The Attorney General of Trinidad and Tobago [2008] Privy Council Appeal No. 39 of 2007.**

77. It was submitted by Counsel for the petitioner that the proper practice, as was the case prior to the decision in **Benedict Munene Kariuki**, was to grant both general and exemplary and aggravated damages for violation of constitutional rights. Counsel also urged the Court to grant punitive damages to the petitioner, urging the Court to follow the decisions in, among others, **Kihoro vs Attorney General of Kenya [1993] 3 LRC 390; Dr Odhiambo Olel vs The Attorney General, Civil Case No 366 of 1995; Robert Kisiara Dikir and 3 Others vs Officer Commanding Kenyan General Service Unit (GSU) Posts and 3 Others, High Court Kisii, Petition No 119**

of 2009. He thus prays for separate awards under the separate heads as follows:

i. exemplary/vindicatory damages of Kshs 1,500,000/=;
ii. exemplary aggravated and punitive damages of Kshs 6,500,000/=;
iii. special damages of Kshs 254,950/=.

78. The petitioner also prays for the costs of the petition, as well as interest on the special damages from the date of filing the petition, while the awards of general, exemplary and/or aggravated/punitive damages should attract interest at court rates from the date of judgment until payment in full.

79. Counsel for the AG opposed the prayers for the award of exemplary damages. He submitted that this would amount to double damages or double punishment, and further, that such damages may be awarded if there is outright, glaring proof that someone has violated rights or values and principles, and it is so glaring that it does not need proof, which is not the case in this petition. It was also his submission that as was rightly held in **Benedict Munene Kariuki (supra)** and **Gitobu Imanyara (supra)**, such exemplary damages should not be awarded as to award such damages in addition to general damages would be to violate the rights of the respondent.

80. Counsel for the DPP agreed with the position of the AG with respect to the decisions in **Benedict Munene Kariuki** and **Gitobu Imanyara (supra).** His submission was that the petitioner's counsel has not come up with principles that would enable the court to depart from local decisions. He urged the Court to be guided by the **Benedict Munene Kariuki** decision which is good law.

81. I am inclined to agree with the submissions by the respondents with respect to the remedies available to the petitioner. First, with regard to the claim for special damages in respect of legal fees and perusal fees, our law is clear that such special damages must be specifically pleaded and proved. As was observed in the case of **Zacharia Waweru Thumbi vs Samuel Njoroge Civil Appeal No 445 of 2003**:

> ***"…The law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Law Reports and Text Books on Torts are replete with authorities on this, which need not be reproduced here. Suffice it to quote from the decision of our Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal – Kneller, Nyarangi JJA, and Chesoni Ag. J.A. – held: "Special damages must not only be specifically claimed (pleaded) but also strictly proved….for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The decree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."...If I were to explain, or define, special damages to a layman, I would say "they are a reimbursement to the Plaintiff/Victim of the tort, for what he has actually spent as a consequence of the tortuous act (s) complained of". This point cannot be overstressed: that the claimant of special damages must not only plead the claim, but also go further and strictly prove, usually by documentary evidence, that he has actually spent the sum claimed.*** (Emphasis added)

82. In **Haji Asuman Mutekanga vs Equator Growers (u) Limited (Civil Appeal No.7 Of 1995)** the Court stated that:

> ***"…Again, it is trite law that special damages and loss of profit must be specifically pleaded, as it was done in the instant case. They must also be proved exactly, that is to say, on the balance of probability."***

83. Counsel for the petitioner refers to receipts attached to the affidavit of the petitioner showing payments of Kshs 120,000 to the firm of Mbugua Mureithi & Co. Advocates on 24th May 2010. A

second receipt, issued on 27th January 2011, shows receipt of the sum of Kshs 130,000. There are also receipts issued by Dr. Owiti, as well as receipts from the court in respect of perusal fees. The total amount claimed as special damages is Kshs 254,950.

84. I must express some reservation with respect to the alleged payment of legal fees. First, I note that the petitioner avers that he was a night watchman earning a salary of kshs 7,800 per month. He was unable to raise the cash bail of kshs 100,000 that he was released on between 22nd February 2010 and 16th June 2010. He was released on 16th June 2010 when the cash bail was reduced to Kshs 60,000.

85. Yet, according to the receipts annexed to his affidavit, he paid Kshs 120,000 on 24th May 2010, while he was still in custody. While, as the petitioner submits, the respondents did not materially challenge the prayer for special damages, in light of my observations above, I am not satisfied that the petitioner has established his claim for special damages to the required standard as set out in the judicial authorities above, at least with respect to the legal fees.

86. The petitioner asks the Court to disregard the decisions with regard to exemplary and vindicatory damages following the decision in **Benedict Munene Kariuki**, among them the decision of Lenaola J in **Gitobu Imanyara & Others vs AG.** In this decision, with regard to exemplary damages, the learned Judge stated as follows:

> ***[54.] "Regarding the prayer for exemplary damages by each Petitioner, in the case of Obongo vs. Kisumu Municipal Council (1971) EA 91, the Court of Appeal referred to the English case of Rookes vs. Barnard & Others (1964) AC 1129 where it was held that exemplary damages in tort may be awarded in two classes of cases i.e.***
>
> > ***i) Where there is oppressive arbitrary or unconstitutional actions by the servants of the Government; and***
> >
> > ***ii) Where the Defendant's conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the Plaintiff***
>
> ***On that issue, I share the same thoughts as Majanja, J. in Benedict Munene Kariuki & 14 Others vs The Attorney General Petition Number 722 of 2009 (2011) eKLR, where he stated as follows;***
>
> > ***"I am constrained to depart, from the position taken by my learned brother. In my view, these cases under Section 84 of the Constitution are cases concerning the Constitution. It is unnecessary to consider the element of "unconstitutional action" when the relief is awarded for unconstitutional conduct. It is also clear that the principle in Obongo vs Kisumu Municipal Council (Supra) was a case in tort so that the issue of "unconstitutional action" was an additional factor the Court would consider in awarding exemplary damages. I shall therefore not award exemplary damages."***
>
> ***Further, in the case of Wachira Waheire vs the Attorney General HC Misc. App.No.1184/2003 (O.S.) the Court did not find it appropriate to award aggravated and exemplary damages and stated that;***
>
> > ***"In the light of the acknowledged change in the government, and the attempts at dealing with human rights violation, we find it inappropriate to award exemplary or aggravated damages."***

87. In declining to grant exemplary and aggravated damages, Lenaola J concluded as follows:

[55.] This holding encapsulates my position on awarding aggravated and exemplary damages in cases where unconstitutional action has been challenged in a changed and improving political environment. I must take judicial notice of that fact in today's Kenya and I am satisfied that no benefit was procured by the Moi regime in its obviously unconstitutional actions. Kenya's Government has learnt from its past and the deterrent effect is alive and obvious. I also agree with the Respondents that in the circumstances, exemplary damages are not properly awardable noting the burden to the innocent tax-payer."

88. I have considered the submissions of the petitioner and his arguments that this Court should depart from the local decisions on exemplary and aggravated damages and be persuaded to follow the decisions from other jurisdictions such as those from Trinidad and Tobago in **The Attorney General vs Ramanoop** and **Alphie Subiah vs The Attorney General of Trinidad and Tobago (supra).** I am unable to find a basis for such departure. Indeed, I note that even from the West Indian jurisdictions from which Counsel for the petitioner draws a lot of the authorities he asks this Court to be persuaded by, there is no principle that exemplary or vindicatory damages should be granted in petitions in respect of violations of constitutional rights, as a recent decision of the Court of Appeal of Trinidad and Tobago, illustrates.

89. In their decision in **The Attorney General of Trinidad and Tobago vs Mukesh Maharaj Civil Appeal No. 67 of 2011** delivered on 25th March 2015, Archie, CJ, Bereaux and Rajnauth-Lee, JJA considered the question of damages in constitutional petitions and various previous decisions on the matter, among them the decisions of **Ramanoop** and **Subiah** relied on by the petitioner in this case. In his decision in the matter, Archie CJ observed as follows:

> ***[5]. "The second observation relates to the award of 'vindicatory damages' under a separate head. It has always been my view that this expression is somewhat misleading and that there should be a single award of damages to take into account all that is reasonable and just in the circumstances. I am fortified in this regard by the observations of Lord Toulson in the most recent Privy Council case of Alleyne & ors v The Attorney General (2015)UKPC3 paras 40,41 where he acknowledges that any award under section 14 of the Constitution, however described, has the character of a general award' and that does not change by virtue of the fact that it may be outside of what may be regarded as quantifiable pecuniary loss."***

90. After considering the decisions in **Ramanoop, Merson v Cartwright [2005] 67 WIR 17** and **Subiah**, he went on to observe as follows:

> ***[14]. "I make the observation here that the very raison d'être of constitutional relief, where there is a parallel common law remedy, can only be to 'vindicate' constitutional rights. I am therefore left, finally, with a short and somewhat puzzling passage in Subiah. I quote it verbatim:***
>
> ***"Having identified an appropriate sum (if any) to be awarded as compensation, the court must then ask itself whether an award of that sum affords the victim adequate redress or whether an additional award should be made to vindicate the victim's constitutional right. The answer is likely to be influenced by the quantum of the compensatory award, as also by the gravity of the constitutional violation in question <u>to the extent that this is not already reflected in the compensatory award"</u> [my emphasis]***
>
> ***[15] The highlighted words beg the question why is it necessary to consider a separate award if all of the relevant circumstances can be taken into account in the first place in assessing the quantum of compensation. How does one avoid overlap and an element of 'double compensation' otherwise by the most artificial intellectual gymnastics?"***

91.He concluded as follows:

> ***[18]. "In summary, therefore, the expression "vindicatory damages" in the sense of a separate award has a rather tenuous lineage. A careful reading of the authorities convinces me that it has never really been expressly approved by the Privy Council (at least as a requirement), and its use may be misleading in that it may tempt trial courts to artificially and doubly compensate claimants in respect of breaches that are properly compensable by a single and undifferentiated award of 'damages'. It is my hope that this expression will no longer trouble us in the future."***

92.It is my view therefore that the position taken in the case of Benedict Munene Kariuki is correct, and indeed accords with the position set out in the case of Mukesh Maharaj above.

93.Having found a violation of the petitioner's right to privacy as set out above, and in light of my finding that his prosecution was malicious, it is my view that he is entitled to an award in damages. Such an award should be such as will suffice, so far as possible, to vindicate both the violation of his constitutional right, but also compensate him for the malicious prosecution that he was subjected to.

94.With regard to the quantum of damages, I am guided by recent decisions of this Court in several decisions. In **Nairobi HCCC No. 1729 of 2001 – Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another,** the Court made an award of Kshs 500,000.00 to each of the petitioners as general damages for malicious prosecution. In the case of **Crispus Karanja Njogu vs. The Attorney General [2008] KLR** the Court (Waweru, J), in his decision on 1st February 2008 made an award of Kshs 800,000.00 in general damages for malicious prosecution. In its decision dated 7th February 2013. In yet another claim for damages for malicious prosecution in **Thomas Mutsotso Bisembe vs. Commissioner of Police & Another [2013] eKLR**, the Court awarded the plaintiff Kshs 800,000.00 for general damages for malicious prosecution. Finally, in **Chrispine Otieno Caleb vs The Attorney General High Court Civil Suit No. 782 of 2007**, the Court (Odunga J) awarded the plaintiff the sum of Kshs 2,000,000.00 general damages for malicious prosecution.

95.In the present case, as the evidence clearly shows, there was absolutely no basis for arresting the petitioner, let alone prosecuting him for the offence of robbery with violence. Yet, the police arrested the petitioner, an elderly man into whose house they broke in the week hours of the night, kept him in custody for 11 days, then charged him with the offence with respect to the commission of which they admit they were searching for his son. The petitioner was thus subjected to the arrest and prosecution, and suffered incarceration, for the sins of his son. It is apparent that the police substituted the offence with possession of drugs and fake currency to cover up for their wrongful actions against him. In the circumstances, the actions of the respondents were unjustifiable and the prosecution indefensible.

96.Taking the awards in the cases set out above into account and the circumstances of the petitioner's arrest and prosecution, I am satisfied that an award of **Kenya Shillings Four Million (Kshs 4,000,000.00)** is in the present case justified.

97.I therefore grant the petitioner the global sum of **Kenya Shillings Four Million (Kshs 4,000,000.00)**, such amount to be paid with interest at court rates from the date of judgment until payment in full.

98.The petitioner shall also have special damages in respect of doctor's and perusal and copying charges of Kshs **Four Thousand Nine Hundred and Fifty** (**Kshs 4,950**) as well as the costs of this petition.

Dated, Delivered and Signed at Nairobi this 28th day of October 2015

MUMBI NGUGI

JUDGE

Mr. Mbugua Mureithi instructed by the firm of Mbugua Mureithi & Co. Advocates for the petitioner.

Mr. Mohamed instructed by the State Law Office for the 1st respondent.

Mr. Ashimosi instructed by the Director of Public Prosecutions for the 2nd respondent.