



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NUMBER 671 OF 2009**

**GEOFFREY M ASANYO. .... 1<sup>ST</sup> PLAINTIFF**

**MAKANA MOTORS LIMITED. .... 2<sup>ND</sup> PLAINTIFF**

**MULTIPLE SALES PROMOTERS LTD. .... 3<sup>RD</sup> PLAINTIFF**

**WAKAM ENTERPRISES CO. LTD. .... 4<sup>TH</sup> PLAINTIFF**

**VERSUS**

**THE HONOURABLE THE ATTORNEY GENERAL. .... DEFENDANT**

**J U D G M E N T**

The four Plaintiffs filed this suit against the Defendant by a plaint dated 3<sup>rd</sup> November, 2009. They amended their said plaint twice through an amended plaint dated 6<sup>th</sup> April, 2010 and a Further Amended Plaint dated 21<sup>st</sup> June, 2013.

In the Further Amended Plaint the 1<sup>st</sup> Plaintiff describes himself as an adult of sound mind working for gain in Nairobi, Kenya. He described the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs as his companies in which he owned a dominant share holding of 80% to 90%, the balance minority shares being held by his wife and in one company, by his wife and a brother.

The Plaintiffs describe the Defendant as the Attorney-General of Kenya and aver that he is being made a Defendant because the Kenya Anti-Corruption Authority which is alleged to have committed the tort upon which this claim is based, was a Unit of the Kenya Police Force, a department of the Kenya Government. Hence the Attorney-General is sued on behalf of the Kenya Anti-Corruption Authority, Police Unit pursuant to the provisions of the Government Proceeding Act.

The 1<sup>st</sup> Plaintiff averred, that on 28<sup>th</sup> June, 2002, the Kenya Anti-Corruption Authority, maliciously and without reasonable or probable cause preferred at the Nairobi Chief Magistrate Court, a criminal charge of corruptly giving one Zipporah Mbesa Wandera, the then Nairobi City Councils Town Clerk, a sum of Kenya Shillings 180,000/- as an inducement to persuade her to facilitate a settlement of funds or payments owned by the Nairobi City Council to the 2<sup>nd</sup> Plaintiff, Makana Motors Limited. The 1<sup>st</sup> Plaintiff further pleaded that the said criminal charge was filed against him Nairobi Chief Magistrate's Anti-Corruption Case No. 18 of 2002.

The 1<sup>st</sup> Plaintiff also pleaded that after answering the charge on the 28<sup>th</sup> June, 2002 he continued attending court for many mentions and later, part hearing of the charge, until the 21<sup>st</sup> November, 2008

when the Prosecutor, for lack of any/or proper evidence, withdrew the criminal charge against him under Section 87A of the Criminal Procedure Act.

The 1<sup>st</sup> Plaintiff for himself and on behalf of 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs' further and accordingly, pleaded that the preferring of the said criminal charge against him by the Kenya Anti-Corruption Authority Police Unit, was malicious and reckless and was without reasonable or probable cause and that the wide media publication or facilitation of publication of the Plaintiff's arrest and prosecution, was equally reckless, malicious and without reasonable or probable cause.

The 1<sup>st</sup> Plaintiff further pleaded that after the arrest and during the prosecution of the Criminal Case No. ACC No. 18 of 2002, he hired a lawyer to defend him and finally ended paying him a total of Ksh.15 million on account of legal fees. He also pleaded that he was wrongfully injured in his credit, character and reputation and suffered serious mental anguish and torture, considerable inconvenience, shame and anxiety; and that he was greatly injured in his and his companies' business which led to great financial loss and damage amounting to hundreds of millions of shillings in respect of which he and his companies, claim financial compensation.

The 1<sup>st</sup> Plaintiff on his own behalf and on behalf of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs, also pleaded that as consequence of his criminal prosecution as the Managing Director of the three companies and brain behind them in their day today Business Management, and due to the associated wide negative publicity relating and affecting the said 1<sup>st</sup> Plaintiff, the other Plaintiffs were jointly and severally greatly injured in their business credit, character and reputation. That they severally suffered huge losses in expected profits arising from cancelled businesses amounting to millions, thereby suffering loss and damage.

In the particulars of malice on the part of the Kenya anti-Corruption Authority, being a Unit of the Police Force, the Plaintiffs alleged: -

- a. That, the defendant maliciously and without reasonable cause preferred a criminal charge in Anti-Corruption Case No. 18 of 2002 against the 1<sup>st</sup> Plaintiff and without proper and adequate evidence.
- b. That, the Defendant had failed to properly and fully investigate the facts of the case before initiating the Criminal Case No. 18 of 2002.
- c. That, initiating and continuing to prosecute Criminal AC Case No. 18 of 2002 without proper and adequate evidence and for improper reasons or purposes was malicious.
- d. That, terminating the Criminal Case under Section 87A of the Criminal Procedure Act instead of doing so under other provisions which would finally determine the case, was malicious

In respect of particulars of loss and damage to the Plaintiffs jointly and severally, the Plaintiffs pleaded and claimed the following: -

- i. **Kshs.50,000,000/- on a contract to supply earth-moving equipment and dump trucks to Avellins Barford (UK), the 2<sup>nd</sup> Plaintiff.**
- ii. **Ksh.175,000,000/- on a contract to supply fertilizer to continental Marketing & Supplies (U.K) by the 3<sup>rd</sup> Plaintiff.**
- iii. **Kshs.115,000,000/- on a contract to supply water-meters (Domestic & Bulk) to ABB Kent Luton by the 3<sup>rd</sup> Plaintiff.**
- iv. **Kshs.87,000,0000/- on a contract to supply maize to Trans-Pacific Enterprises (U.K) by the 4<sup>th</sup> Plaintiff**

- v. **Ksh.15,000,000/- being legal fees spent by the 1<sup>st</sup> Plaintiff to defend the Criminal Case CC No. 18 of 2002.**

In their final prayers the Plaintiffs jointly and severally sought judgment against the Defendant for:-

- a. **General Damages for**
  - i. **unlawful arrest and detention**
  - ii. **Malicious prosecution.**
- b. **Aggravated and exemplary damages therefrom.**
- c. **General Damages resulting from cancelled contracts to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs calculated as follows: -**
  1. **To the 2<sup>nd</sup> Plaintiff Ksh.50,000,000/-**
  2. **To the 3<sup>rd</sup> Plaintiff Ksh.290,000,000/-**
  3. **To the 4<sup>th</sup> Plaintiff Ksh.87,000,000/-**
- d. **Special damages to 1<sup>st</sup> Plaintiff Ksh.15,000,000/-**
- e. **Interests and costs.**

The defendant filed a Defence which he finally amended and is dated 3<sup>rd</sup> July, 2013. He admitted paragraphs 1, 2, 3, 4 and 5 of the Further Amended Plaintiff. As to the Plaintiff's pleadings in paragraphs 7, 8 and 9 thereof, the Defendant denied the allegations of malice and lack of reasonable and/or probable cause in the 1<sup>st</sup> Plaintiff's arrest, detention and prosecution and sought strict proof thereof by the 1<sup>st</sup> Plaintiff. In the alternative, the Defendant repeated that the 1<sup>st</sup> Plaintiff was rightly prosecuted because he had corruptly given Ksh.180,000/- to Zipporah Mbesa Wandera as an inducement to facilitate a settlement of money owed the 2<sup>nd</sup> Plaintiff, M./S Makana Motors Limited, by the Nairobi City Council. The Defendant also pleaded that the arrest, detention and charging of the 1<sup>st</sup> Plaintiff with a criminal offence, was done after full and proper investigations were undertaken and the Defendant was honestly and reasonably convinced that a criminal offence had been committed by the 1<sup>st</sup> Plaintiff. The Plaintiff denied being party or privy to the wide publication by the local and international media of the arrest and criminal prosecution of the 1<sup>st</sup> Plaintiff.

The Defendant also denied that the 1<sup>st</sup> Plaintiff was wrongfully injured in his credit, character and reputation or that he has suffered considerable mental anguish or was put to considerable trouble, inconvenience, anxiety, exposure, or that he has been greatly injured in his business or has grossly suffered loss and damage. The Defendant further denied that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs were greatly injured in their credit, character and reputation so as to cause to them huge losses and damage by way of cancelled business orders or contracts as alleged and Defendant sought proof.

The Defendant also denied the particulars of malice or loss or damage on account of cancelled business and pleaded that if there was such cancellation or consequential damage or loss arising, the same is too remote to attach to the Defendant.

The Defendant further denied that any demand notice of intention to sue was served and Defendant averred that he would raise a preliminary objection to want of compliance with the provisions of Government Proceedings Act, Cap. 40 of the Laws of Kenya.

The Defendant finally contended that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs had no locus standi in this suit and that the cause of action was bad in law.

When the suit came up for a hearing, the Plaintiffs called two witnesses to testify for them while the Defendant called one witness.

The main Plaintiffs witness was the 1<sup>st</sup> Plaintiff, Geoffrey Makana Asanyo. He adopted as his evidence his earlier statement dated 12<sup>th</sup> May, 2013 admitted as Plaintiff's Exhibit "PWs I" under Order 7 Rule 5 of the Civil Procedure Rules. He then stated that he owned the limited companies which are 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs. He said that he held 90% shares in Makana Motors Ltd, the 2<sup>nd</sup> Plaintiff, while his wife held the remaining 10%. He also held 80% of the 3<sup>rd</sup> Plaintiff, Multiple Sales Promotions Ltd while his wife held 15% and a brother-in-law Meshack Omwenga held the remaining 5%. He finally said he holds 90% of the shares of Wakam Enterprises Company Limited while his wife held the remaining 10% shares. He produced search certificates from the Registrar of Companies dated 19<sup>th</sup> July 2013 to prove that fact. The search certificates were introduced into the evidence as PW Exhibits P2, P3 and P4.

The witness also testified that as the dominant shareholder of the three Plaintiff companies, he had total control in the management and administration thereof day to day, more so since the other shareholder is his wife who mainly attended board meetings for the purpose of only of rendering its decisions lawful. That he accordingly run and directed the companies' day to day local and international business.

The 1<sup>st</sup> Plaintiff said also that the three companies are properly registered with the Registrar of Companies and have their registered office at Mpaka Plaza in Westlands, Nairobi.

The witness then defined what business each of the companies operated. Makana Motors, the 2<sup>nd</sup> Plaintiff, supplied to various Local Government County Councils, Town Councils and Municipalities across the Republic of Kenya, earth-moving equipment and machineries. The 3<sup>rd</sup> Plaintiff, Multiple Sales Promoters Limited supplied the same market with water meters and motor tractors. The 4<sup>th</sup> Plaintiff, Wakam Enterprises Company Limited, dealt in the supply of maize meal to the National Cereals Board and other individual millers across the country including major millers such as Unga Limited. The witness also testified that Wakam Enterprises Company Limited supplied water meters to Nairobi City Council as it then was and to the National Water Corporation.

The 1<sup>st</sup> Plaintiff as a witness also testified that his three business companies worked strictly under his control and directions. That he had created a marketing team of four marketing executives under his personal supervision who sourced some business products locally and internationally and also looked for and created the market for the sale of the sourced products, also both locally and internationally. That all the business carried out by the three companies were entirely under his personal supervision and any success in those companies business really depended on his personal ability, input and effort.

Turning to his other activities in life, the 1<sup>st</sup> Plaintiff, Mr. Geoffrey Makana Asanyo testified that he also carried on other businesses. That he carried on a hotel business in the Kenya Coast and also was a real property developer and dealer in several Kenyan urban areas.

The witness further stated that in the year 2002 he entered active politics, thus becoming an opinioned community and national leader who became respected as such political leader besides being recognized as a prominent businessman. That he was a Christian church leader and elder in Nakuru West Seventh day Adventist Church, where he was a member. That he was also a chairman of various secondary schools which he named and which are found in Nakuru and Kisii Districts.

In his political life, the 1<sup>st</sup> Plaintiff testified that he was the then District Governing Party Chairman for Kisii and Nakuru Districts. That he was the elected Nakuru Municipality Chairman and the Chairman of Finance, Education and Town Planning Departments of the Nakuru Municipality.

The witness further testified that with those offices stated above and his known position as a respected businessman in the country, he was, and was indeed regarded as a public prominent and respected leader in Kenya. That those positions gave him access, personal and otherwise, to virtually all high offices in the country. That such access assisted him and his three companies the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs in securing and doing business from and with, various Government Departments, Local Authorities, Parastatals and prominent business companies and individuals across the board. That in dealing with the above offices, he created good personal and business reputation as a person of high integrity.

The witness further testified that between the years 1994 and 1998 he and his companies aforesaid, carried on business contracts with majorly Nairobi City Council of worth more than Ksh.320,000,000/-. That they also carried on business with other various local authorities worth almost a similar amount across the country.

The witness further stated that it was when the things and prospects looked so good for him and his companies that on 26<sup>th</sup> June, 2002 the unexpected happened. He was in the entourage of the President of Kenya, Honourable Daniel Arap Moi in his visit to Nyanza Province. While at Kisumu State Lodge, he was confronted by some officers of Kenya Anti-Corruption Authority, which then had become a unit of the Kenya Police Department. That they ordered him to accompany them away from State Lodge. That he made inquiries and realized that the officers wanted to arrest him. He informed them that he would not accompany them then but would report to their Nairobi Office the next day. That the witness completed his journey with the President and returned to Nakuru the same evening with intention to travel to Nairobi the next day to report to the Anti-Corruption Unit.

That the next morning the witness went to his Nakuru Office before he prepared to travel to Nairobi. It was while outside at the parking area of his office when he was approached by those officers of Kenya Anti-Corruption Authority who roughly arrested him and bundled him into their car. The witnesses' entreats that he should travel in his own car accompanied by some of the officers was ignored. That he sought permission to telephone his wife and friends to inform them of his arrest but he was denied permission. That he requested the officers to handle him gently especially since many people going to their offices, had been attracted by the commotion to see the incident which created embarrassment to him. But the said officers, went ahead and threw him into their motor vehicle, took away his mobile phone and drove away to Nairobi, leaving his car parked and members of the public who knew the witness well, wondering what he had done.

The witness further testified that they arrived at the Kenya Anti-Corruption Authority offices at 10 a.m. on 27<sup>th</sup> June, 2002. That he was interviewed by two officers called Albert Ariada and Nyawida. That he was finally informed that he was arrested for committing a criminal offence of bribing the then Nairobi City Town Clerk, Ziporrah Wandera with a sum of Ksh.180,000/- to facilitate a payment to his company of the money owed to the company by the City Council of Nairobi. That he wrote a statement before the two officers denying the allegation because it was not true. That he was then fingerprinted and taken to Kileleshwa Police Station where he was detained overnight in a filthy and stinking cell which was full of criminals. That his request for bail/bond was refused. That his request to reach a lawyer or his wife or friends, as well was rejected.

The witness also testified of the events of the next day, the 28<sup>th</sup> June, 2002. He was taken to the Nairobi Law Court in the morning to have him answer to the criminal charge the officers had prepared. That he was shocked when he was being alighted from the police motor vehicle outside the Law Court because the whole place was full of the media members who were taking still and motion photographs of him. That the journalists were apparently properly informed of the fact that he was being brought to be charged with a criminal corruption offence that morning. That the media was both local and international. That the journalists took many photographs of him. That he had reasons to conclude that the Kenya Anti-corruption Authority had deliberately summoned or informed the media so that the event would attract maximum publicity. That he was first put in the police court cells which were also filthy and congested for three hours and was later taken to court and charged with one count of corrupting the Town clerk of Nairobi, Ziporrah Wandera, with Ksh.180,000/- as an inducement to her to facilitate payments due to M/s Makana Motors Ltd on 10<sup>th</sup> August, 1998. Ziporrah Wandera was jointly charged with him. The witness

further testified that he denied the charge which he regarded as false. That the court was fully packed, not only with journalists but with friends and other prominent people, who were curious about the event.

It was also his evidence that he sought and obtained a release on a bond of Ksh.200,000/- with a surety of a similar amount. That before being set free on the bond, he was once more taken to and stayed in the police underground filthy cells earlier described. That the prosecution announced in court that he would call 45 witnesses during the prosecution.

The witness testified also, that the case hearing was adjourned many times by the request of the prosecutor until after about 6 years later, on the 23<sup>rd</sup> July, 2008, when the prosecution finally called their first two witnesses out of the 45 they had promised to call. That a 3<sup>rd</sup> witness was called on the 24<sup>th</sup> July when the prosecution found it difficult to proceed with the prosecution. That on the 21<sup>st</sup> November, 2008 after several other adjournments, the prosecution terminated the case under the provisions of Section 87A of the Criminal Procedure Act, which allowed withdrawal of the charge, citing difficulty in securing witnesses.

The witness in his further testimony blamed the prosecution for the collapse of the case. He testified that the prosecution failed to call the Anti-Corruption Officers and City Council Officers who had recorded their evidence statements and many of whom were always available including the Defence Witness who testified in this suit on behalf of the Defendant. The witness also stated that proper and reasonable investigation of the case was not carried out before charging him. That all the evidence that investigators collected about the payment of Ksh.180,000/- by 1<sup>st</sup> Plaintiff to the Nairobi City Town Clerk, in no way supported the charge of bribery. That the City Council of Nairobi was indeed indebted to the first Plaintiff and was in the process of settling the debt much of which had already been settled and the balance was in the process of being settled. That, therefore, to any honest and reasonable investigator, there was no necessity of inducing any officer in the City Council to pay the balance money which it had clearly arranged to pay or had paid.

The witness further testified that the prosecution team was entirely to blame in delaying the prosecution of the criminal case against the 1<sup>st</sup> Plaintiff. That the Prosecutor had no proper evidence to offer against the 1<sup>st</sup> Plaintiff for which reason, he numerous times sought and obtained adjournments for a continuous period of six years until he no longer had reason to seek more adjournments.

The Plaintiff's witness further testified that the prosecution against him was malicious because it was based on no reasonable evidence or cause. That it was intended to and indeed succeeded in humiliating and embarrassing him. That he was unfairly and roughly arrested in front of the members of the public who saw him being bundled into the Kenya Anti-Corruption motor vehicle. That he was uncommonly exposed to the local and international media as a corrupt person by the Kenya Anti-Corruption Authority which adversely affected him personally in his social public and political life and also adversely affected businesses being carried on by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs.

The witness then turning specifically to his personal, public and political life, testified that the unlawful arrest, detention at Kileleshwa Police Station and the start of his prosecution in Nairobi Law Courts with a criminal offence of corruption, led to various consequences against him in his social life. That he was removed from his church leadership upon the perception that he was corrupt and therefore unfit to lead the holy church functions or offices. That he was also removed from the chairs of school boards and Government Institutions in which he served as Chairman due to loss of faith in his leadership. The witness further testified that this loss of faith in him and his removal from the offices he held in the cited institutions, cost great grief and pain to him, to his family and to his friends and to the many people who knew and respected him. That the result was that he lost access to almost all public and government institutions and ministries which earlier supported him in his known and respected social, economic and political status.

The Plaintiff's witness also testified specifically on the adverse effects of his arrest, detention and criminal prosecution. He stated that at the time of arrest he, through his business companies, the 2<sup>nd</sup>, 3<sup>rd</sup>

and 4<sup>th</sup> Plaintiffs, had acquired large business contracts: -

a. **Makana Motors Limited : 2<sup>nd</sup> Plaintiff**

That through this company, the witness who is the 1<sup>st</sup> Plaintiff and the dominant shareholder with 90% shares, had an existing business contract to supply 4 dump trucks (Kamatsu) and 2 earth movers to Avellins Barford (UK). That the trucks and earth movers were being supplied from Kingsley Machinery Limited of Singapore. That the 4 dump trucks were to cost sterling pounds 591,844 at a unit cost of sterling pounds 147,961 each. The two earth-movers were to cost sterling pounds 339,580 at a unit cost of pounds 169,790/-. The witness said that the total purchase price between Makana Motors Limited and Avellins Branford (UK) was sterling pounds 1,556,460/-. That the gross profit would then have been sterling pounds 625,036 less agency fees of pounds 20,000/- and less travelling and accommodation cost of pounds 50504. That the expected profit would be pounds 374532 which with the exchange rate of the time would translate to Ksh.50,000,000/- claimed by the 2<sup>nd</sup> Plaintiff under this heading.

b. **Multiple Sales Promoters Ltd – 3<sup>rd</sup> Plaintiff**

The Plaintiff's witness also testified of two existing contracts for the supply of water meters to ABB KENT Luton, U.K. The witness said that the contract agreement was dated 12<sup>th</sup> May, 2002. He said that the details of the contract are on page 177 of the Plaintiffs Bundle of Documents.

He said that the 1st contract value was     £3,116,435

The Cost of procuring equipment was             £2,090,150

Total Gross Profit was                             £1,026,385

Less Travel and accommodation costs of   £84,962

Less Commission Agency of                     £80,000

The Expected Profit                                 **£861,423**

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Equivalent to Kshs. is **115,000,000/-**

The witness also described the 2<sup>nd</sup> contract with the same plaintiff company above for the supply of fertilizer to Continental Marketing Supplies (U.K). The witness said that the contract sum was £5,197,500 for 16500 metric tons of DAP fertilizer. That the contract was dated 8<sup>th</sup> May, 2002.

That the procuring cost was     £3,630,000

Deposit received up front was £259,000

Balance due was                     £4,937,625

Net profit would be                 **£1,307,625**

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**Equivalent of Ksh.175,000,000/-**

- c. The witness also described the then existing contract between the 4<sup>th</sup> Plaintiff Wakam Enterprises Co. Ltd. the 4<sup>th</sup> Plaintiff was to supply maize to Transpacific Enterprises (UK) of 14500 metric tons at a securing cost of £1,667,500. Maize was to be secured from Rolape Commercial, S.A. contract was dated 29<sup>th</sup> May, 2002.

The sale price was	£2,450,500
Travel and Accommodation was	£41,315
Agency Commission was	<u>£80,000</u>
Net profit would be	<b>£651,685</b>

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At the exchange rate at the time of Ksh.133.50

**The expected profit sum would be Ksh.87,000,000/-**

The 1<sup>st</sup> Plaintiff as witness for himself and for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs further testified that as a result of his arrest and detention and the eventual prosecution all of which he termed unlawful, malicious and intended to hurt him and that due to wide and bad national and international publicity given to the arrest and arraignment, the foreign partners in respect of those contract got information and News of the same and cancelled the contracts.

The witness testified further that the contracts were based on his personal integrity and honesty and that the moment the business partners learnt that he was alleged to be corrupt and unreliable, as the Defendant through the media portrayed him, they cancelled the contracts. The witness exhibited the Daily Newspapers contained on page 204 of the Plaintiff's bundle. The papers included the standard, The Nation and The Times which he claimed, must have been tipped and invited for coverage of the story by the Kenya Anti-Corruption Authority who he said alone knew of the arrest of the 1<sup>st</sup> Plaintiff before they were brought to court to be charged. The witness accordingly blamed the Anti-Corruption Authority for the bad publicity and the consequences that followed.

The witness further testified on how he hired a firm of Accountant called M/s Bironga & Associates on 15<sup>th</sup> September, 2009 to make a professional Report of the cancelled business contracts to bring out a profit and loss status. That the said firm made the said Report which the Plaintiffs introduced into evidence as Exhibit P5 and is in the List of Further Documents Bundle.

The witness further testified that before this case was filed he caused a notice of intended proceedings against the State in respect to the conduct of the Kenya Anti-Corruption Authority aforesaid. That the Notice was to be served upon the Attorney-General through his advocates, M/s Ngatia & Associates who served the same on the 2<sup>nd</sup> June, 2009. He further stated that he filed this case when the Attorney-General failed to respond in time. The witness stated that he sought General Damages for unlawful arrest and detention and for malicious prosecution seeking both the regular and the aggravated and exemplary damages. That he also sought special and related damages of Ksh.15 million being the legal fees he paid to defend the criminal case. The witness also stated that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs sought general damages for the cancelled contracts and the actual loss that arose from the cancellation. That the Further Lists of Documents Bundle Exhibit 17 contains the legal fees receipt or acceptance exhibit P6.

The 1<sup>st</sup> Plaintiff, repeated in his evidence in Chief and cross-examination that he held virtually all the shares in the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs, was the manager and controller day-to-day of the companies and that he was the brain behind the investment and operations of the companies. He also asserted that he filed the suit against the Attorney-General because the Kenya Anti-Corruption Authority was then a mere

unit of the Kenya Police Department.

The witness denied that he had at any material time bribed the Nairobi Town Clerk, Zipporah Wandera to induce her to facilitate settlement of the City Council's debts to the 2<sup>nd</sup> Plaintiff. He conceded having authorized his bank at University Way Branch of Co-operative Bank to pay Mrs. Zipporah Wandera a sum of Ksh.180,000/- at the material time. He said that the Anti-Corruption Authority had during investigation, been explained that the payment was his Harambee contribution towards her child's education in the USA. He asserted that he and many other dignitaries had been approached by Mrs. Zipporah Wandera for a harambee contribution but since he was out of Nairobi, he had decided to avail his contribution to Mrs. Wandera through his bank. He said that Mrs. Wandera acknowledged receipt of the contribution in writing. He asserted that the contribution was openly made and acknowledged and could not carry the sinister interpretation of being a bribe to a reasonable investigator. He also asserted that at the time the City Council had already settled the outstanding sums owed to Makana Motors Limited up to the tune of Ksh.30,000,000/- and what remained did not require prompt payment by a bribe. That in any case, the City Council was under a legal obligation to pay and was in the process of paying.

The witness also testified that there was no good or reasonable cause for arrest and prosecution nor was there a reasonable cause for not calling the Anti-Corruption witnesses who had investigated the case to give evidence and yet they were near and available all through the six years period. That the case was finally terminated in the 1<sup>st</sup> Plaintiff's favour for lack of evidence or reasonable evidence.

The witness further testified that the business of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs was huge locally up to 320 million annually, and he had also opened also international business through the contracts which were cancelled due to bad publicity. That the companies were genuine business companies which paid taxes properly but which could not after his arraignment succeed due to the bad publicity deliberately or consequently instigated by the Defendants conduct of adverse publicity.

The witness further stated that to secure the above mentioned contracts, he himself went overseas severally to source and negotiate them. That the contracts were complete and properly signed and were waiting only for the letter of credit to be received before payments could be made. In respect to Multiple Sales Promoters Ltd the witness said that the purchasers of the fertilizer - the Continental Marketing & Supplies, had already deposited of a sum of £259,875 before the contract was cancelled. The witness testified that the cancellation of the contracts occurred between 10<sup>th</sup> and 13<sup>th</sup> July 2002 which was a few days or weeks after his arrest and arraignment in court. He denied the suggestion that the cancellation letters exhibited were not genuine.

The witness also testified that the complainant in the criminal case against him totally failed to produce reasonable evidence to show that there had been a conduct of corruption on the part of the 1<sup>st</sup> Plaintiff or even a reasonable semblance of corruption that could raise suspicion in a mind of a reasonable investigator that sum of Ksh.180,000/- could be a bribe or inducement. He concluded his evidence by stating that the evidence which had been recorded against him did not raise even a mere suspicion of corruption, a situation confirmed by the Defendant when he terminated the case for lack of evidence, six years down the line.

The Plaintiffs' called a second witness called John Omare. He was a Certified Public Accountant and Auditor who practices from the firm of M/s Bironga & Associates. He testified that his firm was in 2009, instructed by the Managing Director of Makana Motors Ltd to do audit and make a professional report of Makana Motors Ltd, Multiple Sales Promoters Ltd and Wakam Enterprises Company Ltd, in relation to specific business contracts between the companies and certain business partners overseas as named. That they carried out the audits and made a relevant report of which he identified copies in the Plaintiffs bundles of documents and produced the Report as Exhibit P5. This witness further testified that in arriving at the contents of the Report, his firm took into account the relevant documents signed and exchanged between the business partners here and overseas which included: -

1. Contract agreements

2. Price quotations
3. Proforma invoices and pin numbers
4. Sale invoices
5. Correspondences
6. Memorandums & Articles of Associations.
7. Travelling documents including tickets and receipts
8. Documents evidencing any payments or advance deposits

The evidence of this witness recorded as PW 2 effectively closely corroborated and supported the evidence of PW 1, the first plaintiff's witness. In summary he stated on how the Audit was done to arrive at the figures showing the net profits which each company expected to obtain if the contracts were not cancelled. He explained out that to arrive at the figure shown in the Reports, his firm took account of both documentary and oral evidence and instructions from the Plaintiffs. He further confirmed that as auditors they vouched the authenticity of the documents given to them including those given with the original instructions and other requested for later by the Auditor. That his firm confirmed through searches that the business partners overseas shown to deal with the Plaintiff companies indeed existed and the addresses shown in the documents were genuine. That in respect of travelling and accommodation, documents available authenticated each other, while in very few of them, they as auditors, made reasonable estimates. He said in such reports the auditor has room and discretion not to include every single document in the Report.

At the end of PW 2's evidence, the Plaintiffs closed their case and it was the Defendant's turn. The Defendant called one witness, No. 2016886 Senior Superintendent of Police, Bethwel Oburu.

The witness said that he was at the Kenya Anti-Corruption Authority Unit of the Police Department and took the leading part in investigating the facts that finally led to the arrest and arraignment in court of the 1<sup>st</sup> Plaintiff, Mr. Geoffrey Makana Asanyo, in relation to a corruption offence.

He testified that he had joined the Kenya Anti-Corruption Authority in 1999 and left it for Kenya Police College in 2004. Relying on the statement he had recorded in respect of the charge brought against the 1<sup>st</sup> Plaintiff, he testified that he had started the investigations by recording statements from Senior Officers of the Nairobi City Council who included the Town Clerk, Town Treasurer and other heads of departments. He said that he collected documents relating to Nairobi City Council finances, bankings and payments.

The witness further said that he perused documents relating to payments in and out of the Council's Bank Accounts in various transactions, and was persuaded that a criminal offence of corruption had been committed by the Town Clerk, Zipporah Mbesa Wandera and by the 1<sup>st</sup> Plaintiff, Geoffrey Makana Asanyo. That he sent the investigations file to the Attorney-General of Kenya to whom he recommended that the officers and the 1<sup>st</sup> Plaintiff be charged with an offence of corruption which recommendation was approved.

The witness in particular testified that there was evidence that the 1<sup>st</sup> Plaintiff had given an inducement of Ksh.180,000/- to the Town Clerk, Zipporah Wandera to facilitate a settlement of money owed to 1<sup>st</sup> Plaintiff's company, called Makana Motor Limited. The witness further testified that there was clear documentary evidence of the payment of the above sum to Mrs. Zipporah Mbesa Wandera, which the 1<sup>st</sup> Plaintiff did not deny making.

The witness also testified that at all material time, the 1<sup>st</sup> Plaintiff was indeed a prominent person and politician in Kenya. He said that he began investigations in the case in 2000 as an employee of the Kenya Anti-Corruption Authority which at that time was taken over as a unit of the Kenya Police Department, carrying into the department some of its earlier powers and functions.

The witness in his further testimony produced into evidence a copy of the charge sheet which showed that the charge was presented in court by the Republic of Kenya through the Anti-corruption Police Unit. He also said that he was personally involved in the arrest detention and the charging on the corruption

offence, of the 1<sup>st</sup> Plaintiff. The witness confirmed that they had arrested the 1<sup>st</sup> Plaintiff at Nakuru, outside the building which housed his office and that the arrest was not very friendly. That they threw him into their vehicle and brought him to their office in Nairobi at the Anti-corruption Centre where they interrogated him, took his statement, and finger printed him. That they took him to Nairobi Chief Magistrate's court where he was arraigned on 28<sup>th</sup> June, 2002.

The witness also testified that he did not recall how the many media personnel who attended the arraignment of the 1<sup>st</sup> Plaintiff became aware of the 1<sup>st</sup> Plaintiff's arrest and arraignment. He said that the awareness by the media may have been contributed by the unfriendly way by which they had arrested him at Nakuru where the members of public had shown surprise at his arrest.

The witness was aware that the case was fixed for a hearing but he was never summoned to give evidence even though he was still with Anti-Corruption Unit. Even later when he had joined the Police College, he was never called. He did not know how many witnesses managed to give evidence before the case was terminated six years later on 21<sup>st</sup> November, 2008 but now noted that three witnesses did. He noticed that when the hearing of the case started on 23<sup>rd</sup> July 2008, he had left the Anti-Corruption Police Unit but did not know why as the investigating officer of the case, he was not summoned to testify although his whereabouts were known. He confirmed that he was a major and important witness. His colleague in the investigation of the case of, Police Inspector Ariada, retired after the case had been terminated but was not to his knowledge, summoned to testify in the case.

The witness also testified that he formed the opinion that the Ksh.180,000/- which the 1<sup>st</sup> Plaintiff had given to Zipporah Wandera the Nairobi City Town Clerk, was an inducement to the City Council Town Clerk to persuade her to pay the balance debts to the 1<sup>st</sup> Plaintiff's companies. He also however conceded, that at the time the money was paid to Zipporah Wandera, the City Council was in the process of steadily settling the outstanding debts to 1<sup>st</sup> Plaintiff's companies and did not require an inducement. The witness also agreed that the statement made by Zipporah Wandera, explained the payment of Ksh.180.000/- by the Plaintiff as his contribution, among other people, towards a harambee which would send her child to the USA for education.

The witness also testified that at that time in the social history of Kenya, harambee system was a recognized social method of assisting an individual who needed financial assistance. Friends, relatives, politicians and others took part to give donations in accordance with a person's willingness and riches. The witness conceded also that the 1<sup>st</sup> Plaintiff's donation for Zipporah Wandera was documented and was not hidden but paid openly through his bank account. He said, he came across the transaction because of its openness due to available connected documentation.

The witness in conclusion also stated that the media coverage of the 1<sup>st</sup> Plaintiff's arrest, detention and arraignment, was widespread but he could not recall how and why it was so wide.

The above evidence from both sides is the evidence upon which the plaintiffs sought judgment, while the Defendant asked the court to dismiss the suit with costs. The parties had filed bundles of documents they relied upon and they filed a joint statement of issues which the court will consider and determine, relying on the evidence brought on record.

The court will record each agreed issue and follow it up with the analysis of evidence on record concerning the same before making its finding on the same.

**1. *Whether the 1<sup>st</sup> Plaintiff was the Managing Director and consequently, the driving force and mind of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs.***

PW I, Geoffrey Makana Asanyo, who also is the 1<sup>st</sup> Plaintiff, testified that he was the dominant shareholder of each of the three companies, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs. He produced official search certificates (CR 12) in respect of the companies – Exhibits 2, 3 and 4. In the 2<sup>nd</sup> Plaintiff, Makana Motors

Limited, he said he owns 90% shares, while the remaining 10% is held by his wife – Tabitha Moraa. In the 3<sup>rd</sup> Plaintiff- Multiple Sales Promoters Limited, the 1<sup>st</sup> Plaintiff is shown to own 80% shares while 15% is held by Tabitha Moraa and 5% by Meshack Omwenga, a brother in law. In the 4<sup>th</sup> Plaintiff – Wakam Enterprises Limited, the 1<sup>st</sup> Plaintiff is shown to hold 90% of the issued shares while 10% is held by his wife. This information about the shareholding was not disputed or controverted. The court accepts the shareholding in the three companies as testified by the 1<sup>st</sup> Plaintiff.

The 1<sup>st</sup> Plaintiff also testified that he was the Managing Director and driving force and mind of the companies. That he virtually single handedly sourced the companies’ business both locally and internationally and directed, managed and supervised all the activities of the companies and their staff. He also said that his wife was a non-executive director who only attended formal statutory meetings of the companies for the purpose of formalizing them. The foregoing evidence was not also challenged nor controverted. This court, accordingly, accepts the same and concludes that the 1<sup>st</sup> Plaintiff was indeed the brains of the three companies and that he sourced and directed and managed the business of the companies through a marketing team of four people under him.

***The second issue was whether or not the 1<sup>st</sup> Plaintiff was prosecuted by the Defendant in Anti-corruption case No. 18 of 2002 for allegedly corruptly giving Ksh.180,000/- to one Zipporah Mbesa Wandera as an inducement to facilitate a payment to the 2<sup>nd</sup> Plaintiff by the City Council of Nairobi.***

In his evidence the 1<sup>st</sup> Plaintiff produced the charge sheet in Criminal Case Acc No. 18 of 2002 as Plaintiff exhibit P7. It shows clearly that the 1<sup>st</sup> Plaintiff was indeed charged with the said criminal offence. A certified copy of proceedings of the case was as well produced. It shows that the 1<sup>st</sup> Plaintiff was the 2<sup>nd</sup> accused and that the prosecution lasted from the 28<sup>th</sup> June 2002 to 11<sup>th</sup> November, 2008. The Defence witness DWI also confirmed these facts.

The conclusion is, therefore, that the 1<sup>st</sup> Plaintiff was indeed prosecuted by the Defendant in Anti-corruption Case No. 18 of 2002 for allegedly giving Ksh.180,000/- to one Zipporah Mbesa Wandera as an inducement to facilitate a payment to the 2<sup>nd</sup> Plaintiff by the City Council of Nairobi.

***The third issue is whether the arrest, detention, charge and prosecution of the 1<sup>st</sup> Plaintiff was malicious and without reasonable or probable cause.***

The Principle of law applicable to answer this issue were defined by Hawkins, J in the case of **Hicks Vs Faulkener [1878] 8 QBD 167** at page 171 and were adopted, inter alia by Maraga, J as he then was in **John Ndeto Kyalo Vs Kenya Tea Development Authority & Another [2005] eKLR** – Reasonable and Probable cause was defined as: -

***“... an honest belief in the guilty of the accused based upon a full conviction founded upon reasonable grounds of the existence of circumstances which assuming them to be true would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser that the person charged was probably guilty of the crime.”***

In the view of the court, the full circumstances and facts available and which were within the knowledge of the Kenya Anti-Corruption Authority’s investigator at the time when he decided to recommend the arrest, charge and prosecution of the 1<sup>st</sup> Plaintiff, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man that the 1<sup>st</sup> Plaintiff was probably guilty of inducing the Nairobi Town Clerk, with the sum of Ksh.180,000/- to facilitate a settlement of the debt owed by the City Council to the 1<sup>st</sup> Plaintiff’s company. Put differently, there must have been available to the investigations officer, reasonable evidence and reasonable grounds that the sum of the Ksh.180,000/- could not be reasonably explained other than that it was an inducement to the Mrs. Zipporah Wandera, the Town Clerk of the City of Nairobi. What facts or circumstances prevailed in respect of this case?

The 1<sup>st</sup> Plaintiff testified that he was arrested in the morning of 27<sup>th</sup> June, 2002 at Nakuru outside his offices and that the arrest was far from friendly. It attracted people going to work in the morning because it was violent. The 1<sup>st</sup> Plaintiff was then driven to the Anti-Corruption Authority offices in Nairobi where he was fingerprinted and wrote a statement after which he was charged after being informed, that he would be arraigned in court the next morning. The criminal charge brought against the 1<sup>st</sup> Plaintiff, was that he, on 10<sup>th</sup> August, 1998, at the Co-operative Bank Ltd, University Way Branch, paid Ksh.180,000/- to Mrs. Zipporah Mbesa Wandera, the Town Clerk of the City Council of Nairobi, as an inducement for her to facilitate due payments to M/s Makana Motors Limited. The 1<sup>st</sup> Plaintiff testified that the evidence available to the Anti-corruption Authority investigators which evidence is what they considered in deciding to charge the 1<sup>st</sup> Plaintiff as aforesaid was totally inadequate to sustain the charge. That the Anti-Corruption Authority, therefore, should not have relied on such evidence to charge him. That, the prosecutors were maliciously driven by other reasons, other than the available evidence, to charge him with the anti-corruption offence. The 1<sup>st</sup> Plaintiff testimony further stated that the payment of the Ksh.180,000/- to Mrs. Zipporah Mbesa Wandera, was not hidden but done in the open and was documented. That Mrs. Wandera herself, on being confronted to explain the payment at the earliest time, stated clearly that the amount was made to her among many others as an harambee from different people answering her request for a financial assistance to help her send her son to the United States of America for further education. She had from the onset denied the insinuation of a bribe and had explained clearly what the payment was.

On his part, the 1<sup>st</sup> Plaintiff testified that he had been requested by Mrs. Zipporah Mbesa Wandera, the Town Clerk, to join others to contribute to her son's education in the USA and that having known her for long and as a friend and colleague, he instructed his bank to pay her from his account the said sum while he was away upcountry. That with these facts before him, the 1<sup>st</sup> Plaintiff saw no basis upon which the Anti-Corruption Authority investigator would see the contribution as an inducement to the City Council of Nairobi to facilitate or pay the debt due to the 2<sup>nd</sup> Plaintiff, Makana Motors Limited.

The 1<sup>st</sup> Plaintiff also testified, that at the time of making the Ksh.180,000/- contribution to Mrs. Zipporah Wandera, the Nairobi City Council, which indeed owed the 2<sup>nd</sup> Plaintiff some millions of shillings for goods sold to it by the company, was and had been for a while, in a process of settling the debts. The 1<sup>st</sup> Plaintiff in his testimony gave the schedule for settlement which then existed. He showed that between the 8<sup>th</sup> April, 1998 when a payment of Ksh.5,000,000/- was first made to the 2<sup>nd</sup> Plaintiff by the City Council of Nairobi, other payments as below were also made: -

Kshs.5,000,000/- was made on 22/4/1998

Kshs.5,000,000/- was made on 20/5/1998

Kshs.7,000,000/- was made on 25/5/1998

Kshs.4,000,000/- was made on 23/7/1998

Kshs.5,000,000/- was made on 18/8/1998

Kshs.2,000,000/- was made on 1/9/1998

Kshs.8,000,000/- was made on 14/10/1998

Kshs.5,000,000/- was made on 23/10/1998.

The 1<sup>st</sup> Plaintiff, accordingly testified that he had made his contribution to the Town Clerk on 10<sup>th</sup> August, 1998 when the Council was in the middle of settling its debts with the 2<sup>nd</sup> Plaintiff which ruled out the contribution as an inducement to the Town Clerk to settle anything. He further testified that at that period in the history of Kenya, assisting others in the system of Harambee, was a popular social method

of raising funds for any purpose whatsoever. The 1<sup>st</sup> Plaintiff accordingly asserted that in the circumstances and facts stated above no reasonable investigator, not moved by malice or other irrelevant reason, would come to the conclusion that the contribution of Ksh.180,000/- aforesaid, was an inducement or a bribe to Mrs. Zipporah Wandera, to facilitate the settlement of the outstanding debts to the 2<sup>nd</sup> Plaintiff. He also referred to the testimony of the Anti-Corruption Authority's investigator who had recommended the criminal prosecution of the 1<sup>st</sup> Plaintiff and pointed out that the Defendants witness failed to explain and failed to support his such recommendation to prosecute the 1<sup>st</sup> Plaintiff, other than saying that he supported what he had decided. That he, therefore, failed to give any reasonable or probable cause for recommending the criminal prosecution in the circumstances and facts of the case above.

This court has considered the above facts. There is no denial from the Plaintiffs that the sum of Ksh.180,000/- was availed and paid to Mrs. Zipporah Mbesa Wandera by the 1<sup>st</sup> Plaintiff on 10<sup>th</sup> August, 1998. It is also without doubt that the money was paid openly and was documented. The 1<sup>st</sup> Plaintiff testified that he paid it while he was away upcountry and as a contribution to assist Mrs. Wandera to send her child to the USA for studies upon her request. The court considers the above explanation as reasonable and convincing because it is probable and reasonable in the circumstances of the case and was not contradicted or controverted. The court also noting that the payment and receipt of Ksh.180,000/-, was not hidden or paid under the table, concludes that the same was not made as an inducement to Mrs. Wandera to facilitate the settlement of the City Council's debts to Makana Motors Limited.

This court further notes that at the time the contribution was made, which was on 10<sup>th</sup> August 1998, the City Council of Nairobi was in the middle of the schedule of settling its debts with the Makana Motors Limited. It had already from April 8<sup>th</sup>, made five substantial payments of five million and one of seven million to the Makana Motors Limited. There is no evidence on record from the Anti-Corruption Authority investigator, DW I, that the City Council had indicated that it would renege in its programme to continue to settle the debts in the manner it was already doing it. The defence witness, DWI, had opportunity to explain why he thought the contribution of Kshs.180,000/- made by the 1<sup>st</sup> Plaintiff at that material time was an inducement to the Town Clerk. He failed to do so even when he knew, the whole Plaintiff's suit, depended on such an explanation. In the courts further view and conclusion, DWI failed to explain why he concluded that the contribution was an inducement to the Town Clerk even when he also knew or ought to have known, that the whole Defence to the 1<sup>st</sup> Plaintiff's case as well, depended on such explanation.

The court has also examined the evidence on record concerning the facts that prevailed at the time the contribution of Ksh.180,000/- was made to Mrs. Zipporah Mbesa Wandera. It finds no reasonable or probable ground upon which the investigator from the Kenya Anti-Corruption Authority who testified as DW I, based his recommendation to criminally arrest, detain and charge the 1<sup>st</sup> Plaintiff with the charge of corruptly giving Kshs.180,000/- to one Zipporah Mbesa Wandera, the Town Clerk of the City of Nairobi as an inducement. Indeed, in the court's view, settling the outstanding debts with Makana Motors Limited, was a legal contractual obligation of the City Council of Nairobi as the facts and evidence before the court shows. The City Council was in the process of doing the correct legal thing in making the payments. It had made several substantial payments. There was no reason for thinking that it required an inducement, financial or otherwise, to continue reducing the outstanding debt. To think so as thought by the Anti-Corruption Authority was clearly without basis and was without caution and was unreasonable in the circumstances.

There is no evidence on record from the Defence witness, Bethwel Oburu, DWI, that he relied on the reasonable evidence of any other person to decide and later recommend the charging of the 1<sup>st</sup> Plaintiff of the alleged corruption offence. He said that he and his Anti-Corruption officers, noticed a payment of Ksh.180,000/- by the 1<sup>st</sup> Plaintiff to the Town Clerk of the City Council of Nairobi, in the financial records of the Council. He then decided that the payment was an inducement for facilitating a settlement of a debt to the 1<sup>st</sup> Plaintiff's company. The witness completely failed to explain why he and other officers arrived at such a conclusion without a reasonable basis.

In the courts view, the DWI's decision above was recklessly and/or indifferently arrived at and the officer and therefore, the defendant did not care whether the decision to arrest and prosecute the 1<sup>st</sup> Plaintiff was based on genuine grounds or not. Such a decision cannot have been genuine but in the court's view and finding, establishes ***animus malus*** on the part of the Anti-Corruption Authority.

The court has also considered the circumstances of the 1<sup>st</sup> Plaintiff's arrest and detention. There is clear evidence on record from the 1<sup>st</sup> Plaintiff and from the only Defence witness that the Anti-Corruption Officers, who also investigated of the case, arrested the 1<sup>st</sup> Plaintiff on the morning of the 27<sup>th</sup> June, 2002, at Nakuru. The arrest was less than friendly as stated by both witnesses. It was done by the Anti-Corruption Officers themselves and not independently by Police Officers on any report recorded. The arrest accordingly was an independent act of the Defendant who alone will bear the liability if any arises. The Anti-corruption Authority in this case, investigated the case, as well as procured, instigated and actively carried out the arrest.

The court comes to the conclusion that the arrest of the 1<sup>st</sup> Plaintiff in so far as it was based on evidence that was unreasonable and improbable, was unjustified and false in the circumstances of this case. It would, therefore, be actionable without proof of damage. The 1<sup>st</sup> Plaintiff, in the court's view is entitled to recover general damages for the imprisonment and any physical and/or mental injury which occurred in the congested and filthy cell at Kileleshwa Police Station and at the court cells. It was so stated in the case of **Thompson Vs Metropolitan Police Commissioner [1998] QB 498**. The court notes and accepts that an unjustified arrest and detention as found in this case, affects both the liberty and the reputation of the claimant. The court accordingly answers the third issue in the affirmative.

***The 4<sup>th</sup> issue in this case is whether the criminal charges brought against the 1<sup>st</sup> Plaintiff as aforesaid were terminated by the Defendant in favour of the 1<sup>st</sup> Plaintiff.***

The certified copy of proceedings of Criminal Case No. Acc 18 of 2002 found on page 150 of the Plaintiffs bundle was produced in evidence. It confirms that the prosecution terminated the case by successfully withdrawing it under Section 87A of the Criminal Procedure Act. The grounds given by the Prosecution for withdrawing the case was that it was unable to call more witnesses and that it would be futile to continue with prosecuting the case. The court notes from the perusal of the proceedings, that the three witnesses who testified, brought on record no evidence that would suggest that the 1<sup>st</sup> Plaintiff had corruptly given the Nairobi Town Clerk an inducement to facilitate a settlement of an outstanding debt by the council to the 2<sup>nd</sup> Plaintiff as charged. The court also notes that DW I who was the Defendant's officer investigating the criminal case, was not called to testify in the criminal case although he, in his testimony in this suit, confirmed that he was always around and available. He even added that he did not know what happened with the case after the arraignment of the 1<sup>st</sup> Plaintiff and that he was not ever again consulted in respect of the case or its termination until when he was recently summoned to come and testify in this suit.

The impression created in the court's mind by the evidence from DW I and from the manner the criminal charge was prosecuted and/or terminated, is that it had no chance of success from its inception. The investigations to it were, poor and without acumen. The prosecution of the charge was no better. While the prosecution had authority to terminate the prosecution under other provisions of the law which would have assured the 1<sup>st</sup> Plaintiff of no further reinstatement of the charge in future, it chose to withdraw the same under a provision which threatened a revisit to the case in future, a method which deliberately left the axe hanging against the 1<sup>st</sup> Plaintiff's neck. This latter conduct of the Defendant in the court's view, confirmed the probable malice with which the Defendant originally started the process leading to the arrest, detention and prosecution of the case against the 1<sup>st</sup> Plaintiff. There is no doubt in the courts mind therefore, that the Defendant through the Kenya Anti-Corruption Authority Unit, terminated the criminal charge against the 1<sup>st</sup> Plaintiff which was in the latter's favour.

***Issues five and six are as to whether the criminal charge and arraignment of the 1<sup>st</sup> Plaintiff aforesaid was locally and internationally deliberately publicized by and through the Defendant.***

The 1<sup>st</sup> Plaintiff produced newspaper cuttings of the local newspapers with screaming headlines concerning the arrest, detention and arraignment of the 1<sup>st</sup> Plaintiff. He testified that on the morning of 28<sup>th</sup> June, 2002 when he was driven to the Nairobi Anti-Corruption court he saw both local and international journalists waiting for his arrival for arraignment. They took many photographs of him and his colleagues who were to be charged jointly with him. That the journalist appeared prepared and waiting for the occasion. He concluded that since only the Kenya Anti-Corruption Authority officers knew officially of his arrest and detention at Kileleshwa Police Station, it must have been them who wanted the highest publicity of the arrest and arraignment of the 1<sup>st</sup> Plaintiff and his colleagues as that would prove that they were doing their job effectively.

This court has considered that piece of evidence and has come to the conclusion that the 1<sup>st</sup> Plaintiff's conclusion above was reasonable. The Defendant, although in its defence pleadings denied that it widely publicised the arrest and arraignment aforesaid, called no evidence to contradict or controvert the 1<sup>st</sup> Plaintiff's evidence on the point. DW I who testified for the Defence and who was the person who originally recommended the criminal charges against the 1<sup>st</sup> Plaintiff, admitted that the arraignment received wide publicity. He however, did not deny the 1<sup>st</sup> Plaintiff's testimony that it was the Anti-Corruption Authority as a unit of the police, who instigated the said wide publicity.

There was no direct evidence that the arraignment information was widely publicized internationally. However, it can be reasonably concluded that international journalists must have, as part of their job, sent the facts back to their countries through all available methods, including the internet. How it would be published in their countries would depend on the interests and international relationships the specific countries or institutions had with Kenya.

The conclusion this court reaches therefore, is that the Defendant was directly and indirectly responsible for the wide publication of the arraignment of the 1<sup>st</sup> Plaintiff to both the local and international media on the 28<sup>th</sup> June, 2002. They should accordingly be responsible and answerable for the foreseeable adverse consequences of the publicity and the resultant damage and loss arising therefrom to the extent it affected the reputation and credit, both social and business, of the 1<sup>st</sup> Plaintiff.

***The seventh issue was whether the arresting and arraignment and the subsequent attendant publicity to it, of the 1<sup>st</sup> Plaintiff, injured him in his credit, character, reputation and mental wellbeing.***

In that respect the 1<sup>st</sup> Plaintiff testified at length and without contradiction or challenge as to how he was a local and national leader. He testified that he chaired various educational, social, developmental and religious institutions including schools, both in Nakuru and Kisii District. He testified also that he was the governing party's chairman in both Kisii and Nakuru and because of those positions, he often accompanied the Republic's President in his country tours and functions. That he had access to high Government offices both in National and Local Governments which also placed him in a position to source local and international business for his business companies.

It was his further testimony however, that after he was arrested and arraigned in court with the said offence, he as a result lost all the these offices he held on the ground that the public thought, he no longer was fit or suitable to hold them. That he also lost access to high political and central government, as well as, local government offices which he used to access. That he also, therefore, lost business opportunities from those offices. He concluded his testimony on these issues by stating that he was now shunned by his colleagues, contemporaries, business partners and other leaders both in Government and in society, which hurt him mentally, socially and economically, a situation which he testified, still persists today.

The court has considered this averment in the pleadings and the evidence that the 1<sup>st</sup> Plaintiff gave to support the allegations. It has noted that the evidence was not challenged or contradicted in any manner by the Defendant. The court is persuaded that the evidence is true and that the arrest and arraignment in court of the 1<sup>st</sup> Plaintiff by the Defendant, injured the 1<sup>st</sup> Plaintiff in his credit, character and reputation and caused him mental anguish. The court also accepts the evidence that he lost the offices he held, lost

access to high offices in government and other institutions, and lost benefits and advantages that accompanied such access as tabulated in his evidence considered above. The court is persuaded also that the loss of access to the high institutions and government offices as testified by the 1<sup>st</sup> Plaintiff, led to or caused the loss of business opportunities which existed and which were available to him before his arrest and arraignment in court. The court is further persuaded on the evidence on record, that the 1<sup>st</sup> Plaintiff indeed suffered mental torture and pain arising from the fact of his arrest and arraignment in court for a criminal offence which he believed he did not commit. In the circumstances, the court would be prepared to grant him compensation comparable to his pain and suffering and damage or loss.

**Issues 8, 9 and 10 are whether as a consequence of the 1<sup>st</sup> Plaintiff's prosecution, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs, were greatly injured in their business, credit and reputation and whether they consequently suffered damage and loss attributable to the said prosecution.**

The court has considered the 1<sup>st</sup> Plaintiff's testimony on the issue. He said that he owned each of the three companies 90% of the issued shares except one in which he owned 80%. The remaining shares were owned by his wife who is a non-executive director and only attends the formal directors meetings to formalize the board meetings and minutes coming out of such meetings. That he was the engine, the mind and the heart of the companies. That he controlled the business activities of the companies and sourced virtually all the business contracts that were obtained by each company.

The 1<sup>st</sup> Plaintiff accordingly testified that when he was arrested and charged with a serious offence and thereafter was prosecuted for a period lasting six years negative or adverse consequences befell the three companies. That the companies, one by one, lost the then existing international contracts which had fully matured and were just waiting for a letter of credit before the delivery of the goods ordered. The letters cancelling the said existing contracts were exhibited (see page 154-203) of Plaintiff bundle) by the 1<sup>st</sup> Plaintiff who testified for the three companies. He concluded his evidence by stating that as a result of the cancellation of the contracts by the companies' international partners based on the fact that the 1<sup>st</sup> Plaintiff who was the dominant shareholder and virtually the only active director and controller, was corrupt and of little integrity. He stated that the companies thus lost the contracts and with them the net profits that were due from the contracts. He also said that the companies lost local business and the company's goodwill and reputation.

The court has considered the 1<sup>st</sup> Plaintiff's evidence on this issue. It notes that the evidence was not challenged nor controverted by the defence. Cross-examination on the said evidence did not create dents or doubts. The court has no reason not to believe it. The court accordingly accepts the evidence that when the companies' international partners got information that the 1<sup>st</sup> Plaintiff who was the brain and mind of the companies had been arraigned in court for corruption, they cancelled the contracts with the three companies. The court also accepts that by the said cancellation, the companies lost the probable profits that the companies would have made.

The 1<sup>st</sup> Plaintiff had produced as evidence a professional report compiled by a firm of Auditors concerning the losses the three companies incurred on the cancellation of the contracts. The court after a careful examination of the Report, concludes that it reflects the probable and accurate state of affairs. The report shows that

1. 2<sup>nd</sup> Plaintiff was purchasing earthmoving equipment and dump trucks from M/s Kingsley Machinery Ltd, Singapore to supply to Avellin Barford UK.

Expected Profits less expenses - GBP 374,532 = **Kshs.50,000,000/-**

2. (a) 3<sup>rd</sup> Plaintiff – 1<sup>st</sup> Contract – Water meters from

Metertek Schlumberg Ltd Malasya for

Sale to M/s ABB Kent Luton (U.K), expected profits

GBP 1026385, less expenses GBP 164,962 projected profit – GBP 861423 =  
**Kshs.115,000,000/-**

(b) 3<sup>rd</sup> Plaintiff, 2<sup>nd</sup> contract – supply fertilizer from M/s Bharat Fertilizer Industries to supply to M/s Continental Marketing Supplies – Paid down payment

of £259,875 – Projected Profit £1,307,725 = **Ksh.175,000,000/-**

3. 4<sup>th</sup> Plaintiff maize contract from M/s Rolape Commercial S.A Mexico to supply to Trans Pacific

Enterprises – Expected profits GBP 651,685 = **Ksh.87,000,000/-**

The court noted that in the assembling of the Audit report which assessed the projected profits shown above, the firm of Bironga & Associates took into account all relevant documents relating to the four international contracts. These included formal contracts, correspondences, invoices, receipts and others which are part of the Report produced in evidence as stated earlier and which the court examined and satisfied itself. The auditors who made the Report themselves gave evidence and explained how they arrived at the conclusions in the Report. They were cross-examined at length but came out convincingly. This court accordingly is persuaded on the balance of probability that the figures arrived at as above are probable and reliable.

The Defendant in his pleadings at paragraph 14 of Amended defence, denied the above claim of loss of profits by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiff on the basis that it was too remote for any liability to attach to the Defendant. He also pleaded that that claims head is bad in law as, according to him, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs did not have a locus standi in the suit.

The court has carefully considered the above issues. In his evidence the 1<sup>st</sup> Plaintiff demonstrated his relationship to the other Plaintiffs. He held virtually the entire shares of each company. He was the Managing Director and the mind and heart of each of the companies. He controlled day-to-day affairs and sourced virtually all the businesses these companies carried out both local and international. He travelled overseas to source and conduct business which according to his testimony included the business contracts which were cancelled when he was arrested and arraigned in court on corruption related charges.

The Defendant did not call evidence to challenge and disprove the above testimony of the 1<sup>st</sup> Plaintiff in favour of the three plaintiff companies. The Defendant could have reached the overseas companies stated to have signed the cancelled contracts to confirm or disprove the 1<sup>st</sup> Plaintiff's evidence. He could have gathered relevant information even through internet but he chose not to do so. Indeed the Defendant, at a very late stage during the hearing, filed an application attempting to show that the overseas companies did not exist in the exact form that was alleged by the Plaintiffs pleadings. However, the Defendant decided to withdraw the application on the ground that he had looked at the replying affidavit filed by the Plaintiffs to his application together with documentary evidence in relation to the existence of the said companies and had found that it was not prudent to proceed with the application, which he promptly withdrew. The court accordingly was left convinced that the evidence of the 1<sup>st</sup> Plaintiff in respect to the overseas contracts was true and proper. The Defendant's attacks of the existence or otherwise of the overseas partners was in addition, coming from the bar and without valid or any evidence. The court declines to admit the same as it amounts to hearsay.

The conclusion which the court reaches accordingly, is that the cancellation of the four overseas contracts by the overseas partners in the business on the basis that the 1<sup>st</sup> Plaintiff was involved in corruption, was indirectly but very closely connected with the wide publicity of the arrest and arraignment of the Plaintiff. The loss of profits could not have occurred, if the cancellation did not occur and the cancellation was caused as a result of the wide publication. The court having already found that the arrest and arraignment

of the 1<sup>st</sup> Plaintiff was malicious and wrongful, it follows therefore, that any damage and loss arising as a result thereof must attach to the person who caused the wrongful conduct of the unjustified arrest, arraignment and the wide publication thereof. The loss of the profits aforesaid are not in the courts view and finding, remote, bizarre or unusual. They indeed flow directly and closely from the arrest and arraignment of the 1<sup>st</sup> Plaintiff who was the driving force, Managing Director and source of all company businesses at the time.

The court is conscious of the fact that a company is a separate entity from its directors but where as in this case the shareholder, the Managing Director and controller of the company, merge in their personalities and functions, the court cannot fail to recognize the reality of the situation. In this case, the 1<sup>st</sup> Plaintiff appears to have been the engine, the brain and fuel that drove the engine. Any act that affected the 1<sup>st</sup> Plaintiff, similarly affected the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs. Were he to step out of the companies, the companies would likely collapse or require total restructure. In this case, in the court's view, the tort committed against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs by the Defendant, was the malicious arrest and arraignment of the 1<sup>st</sup> Plaintiff as well as the wide publication of the same.

The next issue which the court wishes to consider is whether the claims for loss of profits by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs were properly pleaded and proved. This claim was pleaded in paragraph 16 of the Further Amended Plaint dated 21<sup>st</sup> June, 2013. The particulars of malice that led to cancellation of the contracts are thereon properly pleaded. The particulars of the specific loss and damage to be claimed in relation to each cancelled contract were also pleaded.

For proof of the losses of each cancelled contract the 1<sup>st</sup> Plaintiff testified on each of the contract. He demonstrated how each profit figure for each contract was arrived at. He produced an Audit Report prepared by professional Accountants who had prepared the same taking into account the contract agreements between the Plaintiff's and the overseas companies, the correspondences between them, the travel documents and others items included in the Report. The Accountants testified and in the courts view, justified the Report and its contents.

Although the pleadings by the Plaintiffs showed the loss of profits claims as claims for general damages, the court's view is that the same were in the nature of special damages and required to be particularly pleaded and strictly proved. The court is however, satisfied that the loss of profits claims were properly and specifically pleaded and that they were strictly proved on the balance of probabilities, and the court will grant the claim as prayed.

### **Summary Findings and Awards**

**1 (a) The 1<sup>st</sup> Plaintiff claimed general damages for unlawful arrest and detention overnight before arraignment in the Anti-corruption court on 28<sup>th</sup> June, 2002, coupled with malicious prosecution which lasted for six years. Taking account of the status of the 1<sup>st</sup> Plaintiff in society as demonstrated by evidence herein and considering the awards in similar cases considered hereinabove and also taking into account the violation of his human rights, the court awards the 1<sup>st</sup> Plaintiff of General Damages of**

- i. Ksh.10,000,000/- for unlawful arrest and detention for a day.**
- ii. Ksh.20,000,000/- for malicious prosecution.**

**b. The court awards nothing for exemplary damages since the 1<sup>st</sup> Plaintiff was quickly released on bond by court.**

**(c) The court awards the 1<sup>st</sup> Plaintiff Special Damages of Ksh.15,000,000/- being the sum of legal fees he spent to defend the criminal charge over a period of six years.**

**2. The court awards the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs General Damages as follows: -**

**i. 2<sup>nd</sup> Plaintiff – Loss of profit of Ksh.50,000,000/-**

**ii. 3<sup>rd</sup> Plaintiff – Loss of Profit**

**a. First contract – Ksh.115,000,000/-**

**b. Second Contract Ksh.175,000,000/-**

**iii. 4<sup>th</sup> Plaintiff – loss of profit – Ksh.87,000,000/-**

**3. There shall be interest on the awarded sums at court rates with effect from the date of filing the suit in respect of the special damages in 1(c) above and with effect of today's date in respect of the other General Damages.**

**4. The Defendant shall pay the Plaintiffs costs of this suit.**

**Dated and delivered at Nairobi this 21st day of May, 2014.**

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**D A ONYANCHA**

**JUDGE**