



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO.477 OF 2008

CHARLES MWAPAGHA PLAINTIFF

VERSUS

KENYA AIRWAYS LIMITED 1ST DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANT

JUDGMENT

1. The plaintiff filed suit through a plaint dated 29th October, 2008. He has sued 2 defendants. The first (1st) defendant is Kenya Air ways Limited. The second (2nd) defendant is the Attorney General who he claims is Chief Government adviser of the Republic of Kenya sued on behalf of the office of the President and especially the Commissioner of police.

PLEADINGS

2. The Plaintiff claims that at all material time he was in employment of the 1st Defendant as a security officer from January 1986 to August 2005. That on 28th January, 2005 and while in employment of the 1st defendant , the plaintiff together with other employees of the 1st defendant were arrested by the Kenya Police and later arraigned in Court in Criminal case no. 271 of 2005 (*Republic –versus- Moses Mbau Gachoka and 14 Others*) where the 1st defendant was the Complainant and were maliciously charged with the offence of stealing goods in transit contrary to section 279(c)of the Penal Code and whereby the case was heard and determined and the plaintiff was acquitted under section 215 of the Criminal Procedure Code; that on 22nd August 2005 whilst this case was pending the 1st defendant went ahead and terminated his employment contract actions the plaintiff claims were illegal and actuated by malice. He details the particulars of malice as follows;
 - i. 1st defendant falsely accused him of stealing goods on transit while clearly knowing the same was false.
 - ii. The Kenya police arresting and arraigning the plaintiff to the Court on information received from the 1st defendant without carrying out further and proper investigations on the issue.
 - iii. Illegally and falsely accusing the plaintiff of stealing while clearly knowing that the alleged goods were never in the custody of the plaintiff as the security officer of the 1st defendant.
 - iv. 1st defendant terminating the plaintiff's employment immediately after the arrest and before the case had been heard and determined.
 - v. Arresting and confining the plaintiff in the police custody for eight days before arraigning him to Court.

3. The plaintiff claims that as a result he suffered loss and prays for damages for;
 - i. The unlawful arrest, torture and illegal confinement at JKIA Police Station for eight days.
 - ii. Malicious prosecution
 - iii. The unlawful termination of employment together with loss of salary and other benefits incidental to his employment with the 1st defendant.
 - iv. The plaintiff further had to incur expenses in terms of Advocates fees and other incidental costs for the Criminal Case Number 271 of 2005 which costs shall be tabulated at the time of hearing.
4. In the plaint dated the 29th of October 2008 the plaintiff seeks judgment against the defendants jointly and severally for;
 - a. General damages for unlawful confinement and malicious prosecution
 - b. Damages for wrongful dismissal and loss of benefits and earnings for the duration the plaintiff has been out of service.
 - c. Special damages in terms of advocates costs and other incidentals costs incurred in attending criminal case no. 271 of 2005
 - d. Cost of suit
 - e. Interests on a), b) and c
 - f. Any other relief the Honorable Court may deem fit.

At the hearing of this suit on the Mr. Gachuhi for plaintiff chose to abandon the plaintiff's claim for damages for wrongful dismissal after the 1st defendant challenged this Court's jurisdiction in handling the said claim.

5. The 1st and 2nd defendant filed their defence dated 2nd December, 2008 and 29th December 2008 respectively. The 1st defendant denied the charges of malicious prosecution and allegations of paragraph 5 of the plaintiff's plaint and added that it only made a complaint to the police as to the existence of complicity on part of various employees in the loss of certain cargo and it was only after investigations that the plaintiff was arrested and charged together with the others; it argued that the police are agents of the Government under the office of the president and does not consist of its employees and were not at any material time acting as agents or servants under its supervision, management or control; that the alleged arrest, arraignment, and prosecution of the plaintiff was instituted and carried out by or on behalf of the State or Republic of Kenya through or under the direction of the Public Prosecution; that the defendant reported the said theft soon as it discovered its loss of Cargo belonging to its clients and that the same was done without any ill will motive and the defendant acted in the bona fide belief that it was discharging its duty. The 1st defendant denied any liability flowing from the arrest, arraignment and charge in relation to the criminal proceedings complained of by the plaintiff, it denied the particulars of malice set out in paragraph 6 to 11 of the plaint, the allegations of loss and damages at paragraph 8 and put the plaintiff in strict proof thereof.
6. The 2nd defendant in their defence argued that it was a stranger to the alleged contract of employment between the plaintiff and 1st defendant and makes no admission; it further denies that the plaintiff was maliciously charged as alleged in paragraph 5 of the plaint and that the said prosecution in criminal case no. 271 of 2005 was premised on reasonable cause that the plaintiff had committed an offence; the defendant further denied the particulars of malice in paragraph 7 (a) to (e) and put the plaintiff to strict proof thereof.

PLAINTIFF'S CASE

7. PW1, Charles Mwapagha the plaintiff relied on his statement dated 4/7/12. He testified that he was employed on 18th March 1986 as a security assistant in the security division and was promoted after 4 years. He was a trained police officer he applied for the advertised position and he joined the 1st defendant and was placed at the passenger terminal at JKIA. His work was to

prevent harmful acts against civil aviation, taking care of the safety of the aircrafts safe passage of those joining and disembarking. That there were a number of security agencies and there was Kenya Police based at entry and exits at the airports, Kenya Airways Authority and the Kenya Airways also. Every agency worked independently depending on the area of operation and that theirs was called the security coverage of aircraft. That on the night of 27th and 28th January 2005 he reported to work on shift B in the evening at the passenger terminal. At about 4.00 am and 5.00 am a colleague walked and reported to him that a container of cargo with the passenger's baggage was missing. The same was under the custody of Mr. Ndivo. He had not seen such a thing before so he took it as unique. Mr. Kali reported to him that Mr. Ndivo had reported to him that he had not seen a container under his custody. He asked Mr. Kali to go out and check if Ndivo was looking for the baggage as it could have been misplaced. Since it was not under his care. He asked Mr. Kali to ask Mr. Ndivo the container number. The baggage was next to the baggage hall in the cargo area. He reported the incident to the CID since they could not get the cargo. Mr. Ndivo was not under his supervision but under Mr. Francis Kalo. The matter was a security case but the said area was not under his care that night. He called his head of department Mr. Jackobam. Mr. Ndivo was eventually arrested. He continued with his normal job on the 28th, 29th and 30th. They reported on duty as usual. On the 29th he reported on duty but at this time the police were investigating the matter. They were asked to report to CID to write statements, as they were the person on shift. On 30th they were asked not to report on duty as the police were there. They stayed in police custody for 7 days and on the 8th day they were taken to Court and charged with Stealing Goods in Transit. He was however released on bond and went back to work. On the roster it showed he was a hero. He kept reporting but had no specific duties but was being paid his salary. The case was heard and he was acquitted and others were convicted. He was not able to work anywhere else; that he tried to go to Qatar but couldn't cause he had a court case and the same was determined on the 2/1/07. He was served with a termination letter. He was not happy with the verdict and on the advisement of the MD he sought an appeal but he was not reinstated. He had hired a lawyer and paid legal fees. He was 45 years old then. He lost the employment and benefits. He testified that the prosecution was malicious because the police knew who had lost the baggage one Moses Mbau who was arrested and convicted. He added that while in custody they heard the goods were found. He testified that JKIA was a high security place with CCTV and one could not easily get out with a metal box. He reaffirmed that he wasn't in charge of the place where the baggage was stolen and that the in charge was Francis who was not arrested nor charged. He added that his innocence was evident that he wasn't a party to the theft and that he was unlawfully terminated and that he was seeking for damages for malicious prosecution and damages.

8. On cross examination by Miss Oduor for the 1st defendant, the plaintiff admitted the letter outlining his job description. He indicated that if what happened was a crime above him he would have reported to the Kenya Police and that is what he did on the said day, although they initially thought that it was misplaced but when they didn't get it they reported to the police. He stated that the Kenya Airways and the Police did their own investigations as the same was a police issue. He added that the security officers worked independently. He stated that he enjoined Kenya Airways in the suit should not because they referred to the incident in his termination letter yet he was not involved resulting him to sue for unlawful termination and malicious prosecution.
9. On being cross examination by Mr. Siro for the 2nd defendant, the plaintiff affirmed that he enjoined Kenya airways because they cited the incident in the termination letter; that as a trained officer he could arrest and then profile but there had to be suspicions and allegation against a person to be arrested. He reaffirmed that he reported the matter to the police and was arrested the 3rd day after the alleged incident hat when he went to the police Inspector Nzioka told him that they were writing his statement but his boss insisted he be left out.
10. On re-examination by Mr. Gachuhi he re-affirmed that he reported the matter to the police over the lost container; that he did not report any suspects; that Mr. Ndivo was in charge of the container and that the police relied on the complainant's evidence or whoever is complaining. He

indicated that Mr. Michael Jacobam was the complainant as per the charge sheet. He added that if it wasn't for what they did he would still be working with them. He admitted to having a claim against Kenya Airways.

1st DEFENDANT'S CASE

11. DW1, Lucy Wangare Muhiu, an employee of Kenya Airways in the human resource department adopted her statement dated 4/6/12. She testified that the plaintiff was employed as a senior security officer tasked with the role of detection and prevention of crimes. That a container containing 34 pieces of luggage got lost and the plaintiff reported the same to the police and made a report; that Kenya Airways availed the witnesses; that the police found out what transpired and made up their minds that there was no malice on their part; that there were bags missing and the Company was faced with claims of up to 8972 USD which translated to KShs. 7, 183,414/-.
12. On cross examination by Mr. Gachuhi for the plaintiff she indicated that she joined Kenya Airways on the 14/11/05 as a Human Resource Manager but denied having worked with the plaintiff as he had been terminated; she admitted that the plaintiff was the supervisor of shift B and there was a theft at the passenger terminal. She indicated that had the plaintiff done his work he could have detected and prevented the crime. She clarified that there were two terminals passenger and cargo terminals, that the container terminal was at the passenger terminal and the baggage one was outside the security office and that the security team was to ensure that the baggage does not leave the area; that the Police got information from the plaintiff who was the key person; that the police relied on witness information and not all could have been from Kenya Airways, that the first accused in the criminal case was not even a Kenya Airways employee and therefore the police could have had other sources.
13. On cross examination by Mr. Siro for the 2nd defendant she confirmed that Kenya Airways was the complainant in the case and that the alleged baggage was in Kenya Airways hands on behalf of the customers; that the security officers were to ensure that the 34 bags were safe and guarded; that they had availed witnesses as requested by the police.
14. In re-examination she stated that she based her evidence on the records they have; that the cargo port was about more than 2kms from the passenger's terminal however, the baggage was in the passenger terminal and within the area the plaintiff was based and he was expected to guard the baggage.

2ND DEFENDANT'S CASE

15. DW2, No. 52822 Sgt Paul Waweru testified that he is currently attached to CID Nakuru County but prior to his transfer he was working at CID JKIA in the years 2005 up to 2009. His statement made on the 20th September 2012 was adopted as his evidence in chief. He stated that on the 31st of January 2005 he was detailed to link up with PC Nyaga of Anti-Narcotics Nairobi unit JKIA who had information on some stolen goods from JKIA while on transit to Lusaka Zambia. He did so and on receiving information they laid an ambush at Githurai 44 and arrested Moses Mbau. They managed to recover assorted items which were later confirmed to be amongst the stolen goods, by the owners who went to the airport. They later arrested other perpetrators of the crime and amongst those arrested who could have aided and abetted in the crime were 3 Kenya Airways security staff namely Abednego Ndivo, Charles Khali and Charles Mwapagha (the Plaintiff). That the plaintiff was in charge of security and upon interrogation the 3 could not explain how the container left the transit cage without their knowledge. The 3 were charged with Moses Mbau in a Court of law with the offences of Stealing Goods in Transit and in the alternative Neglect to Prevent a Felony; that the case was heard and on the 1/11/07 Moses Mbau was sentenced to 9 months imprisonment, Abednego was fined KShs. 25000/- and the other 2 accused persons the plaintiff being one of them was acquitted. He concluded by saying that thorough investigations were done and they had no malice against any of the accused persons.

16. On cross examination by Mr. Gachuhi, he confirmed that they were 2 investigating officers and he was called when the investigation was in progress; that they carried out their duties collectively as a team. He refuted being involved in the security setup as he was hardly a month old there. He testified that there were police at the exist gates but some gates weren't manned by Kenya Airways Security. He confirmed that the luggage was at the yard on the outside the side where the planes are parked or offload their goods; that the stolen goods were inside a container and were on transit and were guarded by Kenya Airways security officers; that Mr. Charles Mwapagha was the one in charge with 2 other officers while Abednego Ndivo was the one guarding; that the duty roaster showed that the in charge of was Ndagha and not the plaintiff. He admitted to not having any documents to show that the shift was not changed and indicated that he got the information from the senior officers at JKIA; that the MD Mr. Jakobam was the complainant he was the overall security but Charles was the security in charge of the goods in transit at the yard that night and the goods were stolen were at Kenya Airways Security yard; that he does not recall the specific dates the plaintiff was in custody but they were quite same days as it took long to enable them complete our investigations.
17. DW2, on cross examination by Mrs. Oduor for the 1st Defendant testified that the luggage was there and they confirmed that through the cargo manifest; that there was nothing malicious in reporting the theft; that the complainant had to come from Kenya Airways; that the passengers must have reported to Kenya Airways officials; that any complaint must be investigated; that the police decided the people be charged; that he was not aware that Mr. Jakobam stated the plaintiff must be charged; that he was not influenced in my decision to charge the plaintiff.
18. In re-examination he stated that I did not prepare the duty roaster, that the personnel at Kenya Airways headquarters did so.

SUBMISSIONS

Parties filed written submissions.

PLAINTIFF'S SUBMISSIONS

19. The plaintiff submitted that the defendants' action to arraign him in court was illegal and actuated by malice reason he was acquitted under section 215 of the Criminal Procedure Code. Counsel referred to the case of *Mbowa –vs- East Menngo District Administrator (1972) EA 352 by the East African Court of Appeal*, where it was held that,

“that an act of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings and it suggests existence of malice and distortion of truth and its essential ingredients are;

- i. ***Criminal proceedings must have been instituted by the defendant (s)***
- ii. ***The defendant(s) must have acted without reasonable cause or probable cause***
- iii. ***Defendant (s) must have acted malicious with wrong motives***
- iv. ***The criminal proceedings must have terminated in the plaintiff's favor***

He submitted that it was not in dispute that the criminal case was instituted against the plaintiff by the defendant, the case was determined in the plaintiff's favor he was acquitted under section 215 and that the plaintiff has satisfied requirements 1 and 2; that on ingredients 2 and 3 going by the evidence recorded the prosecution had no probable cause and hence the prosecution was malicious as the stolen goods were found at Kahawa west in custody of the 1st accused and that it was clear that the police did not have anything to link the plaintiff to the said theft or being in possession or even being mentioned by any witness of having participated in the theft. On the charge of neglect of duty it had been proved that the plaintiff was not in charge of supervision of the security cage while the person in charge of the security Mr. Abednego who is the same tribe as Mr. Micheal Jakobam which confirms the act of the defendant were actuated by malice; that the police officers manning the exit point from Jomo Kenyatta airport were not charged and no explanation was not done; that the plaintiff was arrested on 31st January 2005 and was

arraigned in Court on 7th February 2005, 8 clear days opposed to the 24 hours and also that no reason was given why they could not release the plaintiff on bond if they were not through with their investigations. Counsel submitted that the defendants were liable to the plaintiff's claim, the 1st defendant for lodging the complaint and supplying information to the police and the 2nd defendant for being in charge of investigation and prosecution; that due to the sensitivity of security work he has not been able to get any gainful employment as potential employers always want to know why he left Kenya Airways and the moment the criminal case comes up they always develop cold feet; Counsel urged the Court to award the plaintiff Kshs. 6,000,000/- as general damages and also for unlawful confinement and a sum of Kshs. 40,000/- as special damages as legal charges for defending the criminal. Counsel relied on the case of *Michael Maina Kagoma -versus- The Attorney General, Civil Suit no. 136 of 2011* which he argued was similar to the instant case and the plaintiff had been awarded Kshs. 6,000,000/- as general damages for unlawful confinement and malicious prosecution.

20.1ST DEFENDANT'S SUBMISSIONS

Counsel submitted that the issues for determination are;

Whether there was reasonable and probable cause for the first defendant to make a complaint; that it was reasonable for the 1st defendant the person whose property had been stolen to report such incidence to the police and that the plaintiff has admitted that indeed the theft occurred and that the plaintiff had failed to prove that there was no lawful reason for the 1st defendant to lodge a complaint with the police and that the plaintiff having reported the theft to the police cannot again claim that the said act was malicious.

On whether the report by the 1st defendant to the police was actuated by malice the plaintiff submitted that the plaintiff and 1st defendant in their testimony indicated that at the time they reported the incidence the said passenger's cargo had been stolen and the plaintiff was on duty and in charge of the shift of security guards on duty and that the plaintiff had failed to discharge the burden of proof of malice as against it; that the 2nd defendant's witness who was the investigating officer who confirmed during the hearing that the investigations conducted and the decision to charge the plaintiff was not influenced by the 1st Defendant who did not have power to issue such orders or influence the actions by the police and the plaintiff had himself testified that the police was an independent security agent and worked independently with the police and Kenya Airport Authority; that the plaintiff's claim that he had been informed by Inspector Nzioka that Mr. Jacobam of Kenya Airways had issued instructions for his arrest was hearsay and inadmissible as the said Inspector was not called to testify as a witness. He relied on the case of *Koech -vs- African Highlands and Produce Company Limited and Another (2006)2 EALR 148*, where it was held that;

“The discretion as to whether to charge a suspect or not lies with the police as well as stated by the Court of Appeal in Jediel Nyaga -vs- Silas Mucheke Civil Appeal No. 59 of 1987 (UR)”

On whether the acquittal of the plaintiff under section 210 of the Criminal Procedure Code entitles the Plaintiff to damages from the 1st defendant for malicious prosecution Counsel submitted that it is trite law that acquittal is not sufficient basis to ground a suit for malicious prosecution for this argument Counsel referred the Court to the case of *Nzoia sugar Company Limited -vs- Fungututu (1998) KLR 399*. It was further that no evidence was adduced by the plaintiff that the 1st defendant failed to attend the criminal proceedings and or give evidence and as such the plaintiff's claim cannot success; that the 1st defendant cannot be held responsible for actions of the police and liability; Counsel referred the Court to the case of *High Court Civil Appeal No. 47 of 2007 Board of Board of Governors Kenya Polytechnic -vs- Moses Okatch Owuor*

On whether the plaintiff is entitled to damages for malicious prosecution, special damages and costs of the suit; it was submitted that the plaintiff claimed to have been paid legal fees which is a special damage and as such it must be specifically pleaded and proved; that the plaintiff did not specifically

plead and particularize the same in terms of figures in the plaint and as such the same cannot be awarded. He relied on the case of **High Court Civil Suit No. 2547 of 1998 Douglas Odhiambo Opel –vs- Telkom Kenya and Others**. It was further submitted that the plaintiff has failed to prove his case thus is not entitled to any costs; that the amount of Kshs. 6,000,000/- the plaintiff claims as general damages for malicious damages is too high and that the case of **Michael Kagoma Maina –vs- AG** is distinguishable from the current circumstances in that the plaintiff in that case had been in service in 30 years and had been unable to educate his children which is not the case in this case; that the said criminal case took 8 years to finalized as opposed to this case which took 2 years; that in the instant case there was malice proved as opposed to the current case where the plaintiff reported the theft to the police and it was true that there was actual theft. The defendant indicated that should the Court find that there was malice proposes that the plaintiff be given Kshs. 300,000.00 as compensation and referred the Court to the case of **Joseph Mumo –vs- The Attorney General and Another**.

2ND DEFENDANT’S SUBMISSIONS

21. Counsel submitted that the plaintiff did not call any witness to corroborate his evidence; that no evidence has been advanced for malicious arrest detention and prosecution and special damages being for cost of paying the advocate for defending the plaintiff in criminal case no. 271 of 2005. On malicious prosecution the 2nd defendant argued that the plaintiff had to prove 4 ingredients;
- i. That the prosecution was instituted by the defendants or by someone for whose acts the 2nd defendants are responsible
 - ii. That the prosecution the prosecution was instituted without reasonable delay and/or probable cause
 - iii. That the prosecution was terminated in favor of the plaintiff
 - iv. That the prosecution was instituted with malice on the part of the prosecution

In regards to the 1st ingredient it was admitted that the plaintiff was prosecuted from the department of the police acting as agent of the 2nd defendant. On the 2nd ingredient, it is submitted that the test whether the prosecution was instituted without reasonable or probable cause is whether the material known to the prosecutor would have satisfied a prudent and cautious man that the plaintiff was probably guilty of an offence. Counsel relied on the case of **Murunga –vs- Attorney General (1979) KLR 139**. In respect of the 3rd ingredient it is admitted that the prosecution terminated in favor of the plaintiff. It is however, submitted that a mere discharge is insufficient ground to claim for malicious prosecution, malice in fact must be proved on the part of the prosecution. Counsel referred the Court to the criminal proceedings were terminated under section 215 of the criminal procedure code and that there was no malice and police did proper investigations. In respect of the 4th ingredient counsel submitted that to prosecute a person is not prima facie tortious, but to do so dishonestly or unreasonably is and that the burden of proving that the prosecution did not act honestly and reasonably lies with the plaintiff; that in a claim of damages for malicious prosecution, malice in fact must be proved showing that person instituting the proceedings, in the instant case the police officers. Counsel also relied on the case of **Katerregga –vs- Attorney General (1973) EA**. It was submitted that the plaintiff has failed to produce any evidence to prove that the prosecution in the criminal case acted unreasonable or dishonestly; that to sustain a claim for malicious prosecution one must prove that the prosecution was motivated by something more than just a sincere desire to vindicate justice; that no evidence has been advanced by the plaintiff to prove that the prosecutor or police had a grudge against him nor had any motive from the police officers that could possibly have had to make to falsely prosecute the plaintiff. They further referred to the case of **Ouma –vs- Nairobi City Council (1976) KLR 297**.

FINDINGS

I have considered the evidence on record, the submission and cases relied on. The plaintiff has sued the defendants’ for damages for unlawful confinement and malicious prosecution. In a case

of malicious prosecution the plaintiff must prove the following;

1. THAT the prosecution was instituted by the defendants or by someone for whose acts the 2nd defendants are responsible.
2. THAT the prosecution was instituted without reasonable and/or probable cause.
3. THAT the prosecution terminated in favour of the plaintiff.
4. THAT the prosecution was instituted with malice on the part of the prosecution.

There is no dispute that the plaintiff was arrested on the 31st of January 2005 together with other employees of the 1st defendant and were charged, and that the plaintiff was acquitted of the said charges. The plaintiff has stated that the 1st defendant was liable for his arrest and detention at the police station. From the evidence that has been adduced it is the plaintiff who reported the theft that happened on the night of 27th January 2005. He did so as the supervisor who was on duty having received the report of theft from one Mr. Ndivo. In his plaint the plaintiff claims that the 1st defendant falsely accused him of stealing the goods on transit. The plaintiff in his evidence admitted reporting the theft. He has however failed to show that the 1st defendant falsely accused him as alleged. He sought to blame the officers of 1st defendant one Jackobam but failed to show how Jackobam participated in his arrest. DW2 sergeant Waweru testified that the arrest of the plaintiff was not engineered by the said Jackobam. What the 1st defendant did was merely to cooperate with police on the investigations that were being done on a report the plaintiff himself made as an officer of the 1st defendant. Having received the report from the plaintiff it was the duty of the police to investigate the case and proceed to charge the suspects they thought were responsible for the theft. I agree with the findings of Justice Musinga in the case of **Koech vs. African Highlands and Produce Company Limited and another (2006)2 EALR** where he held that;

“The discretion as to whether to charge a suspect or not lies with the police as well as stated by the Court of Appeal in Jediel Nyaga vs. Silas Mucheke Civil Appeal No. 59 of 1987 (UR)”.

I have not found any evidence that shows that the 1st defendant’s report to the police was actuated by malice nor did the 1st defendant cause the plaintiff’s detention at the police station. The plaintiff’s case is different from the case cited in their submissions of **Michael Kagoma Maina Vs. Attorney General(supra)** where the Court found that there was evidence of malice in the way the case was investigated and what happened thereafter upto the time the plaintiff in the said suit was charged. It was noted in the said case that it took 8 years for the case to be finalized. The evidence of malice in the case of Kagoma was so evident and the defendant was held liable. I find that it was not the duty of the 1st defendant to investigate the case or charge the accused person. The plaintiff has failed to prove the allegations of malice against the 1st defendant, therefore the plaintiff’s case against the 1st defendant fails and is dismissed with costs.

The role the 2nd defendant played was the arrest of the plaintiff together with other suspects after the alleged theft. It is evident that the plaintiff was arrested on the 31st of January 2005 after a report that the plaintiff made of the theft of the container on the night of 27th January 2005. According to Sergeant Waweru the plaintiff was arrested because he was a supervisor on duty and upon interrogation he could not account how the container left the Transit cage without their knowledge. The plaintiff was acquitted in the lower Court. Although he was acquitted the plaintiff has to show that his prosecution by the 2nd defendant was instituted with reasonable and probable cause and that it was actuated by malice. In the case of **Nzoia Sugar Company Limited vs. Collinus Fungututi Civil Appeal Number 7 of 1987 (UR)** the Court of Appeal held that;

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

The plaintiff evidence is that he was maliciously charged with the offence of stealing goods on transit contrary to section 279 (c) of the Penal Code and that he was held for 8 days before being arraigned in Court. Sergeant Waweru who testified could not explained why the plaintiff was held for that number of days even as the investigations went on. If it is that the goods were recovered as the case continued and a suspect was arrested with the goods, then the officers of the 2nd defendant ought to have reviewed their case as against the plaintiff. Further there is evidence that the plaintiff was not in charge of the area where the goods got lost. It is apparent that he was rounded up with the other suspects and charged. I find that the officers who investigated the case lacked reasonable cause to charge the plaintiff and held him in custody for unnecessary long period without a justifiable cause. The 2nd defendant officers acted maliciously in holding the plaintiff for such a long period, even though they had a right to charge the plaintiff if they considered him a suspect. I therefore find that the 2nd defendant is liable of the unlawful confinement of the plaintiff and the plaintiff is entitled to general damages for unlawful confinement. Considering that the plaintiff was held for 8 days, I award the plaintiff Kshs. 1,000,000/=. The plaintiff failed to adduce evidence to show that he has sought work in Qatar or other places . The plaintiff has failed to prove a special damage claim as it was neither particularized nor proved in the hearing. I enter judgment for the plaintiff against the 2nd defendant in the sum of Kshs.1,000,000/- together with costs and interest.

Orders accordingly.

Dated, signed and delivered this **24th Day of September 2014**

R. E. OUGO

JUDGE

In the presence of:-

.....For the Plaintiff

.....For the Defendant

.....Court Clerk