REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO. 181 OF 2007

SAMUEL KIPRONO CHEPKONGA..... PLAINTIFF

VERSUS

THE KENYA ANTI-CORRUPTION COMMSSION.....1ST DEFENDANT

HON ATTORNEY GENERAL.....2ND DEFENDANT

JUDGEMENT

Plaintiff's Case

1. The plaintiff, by an amended plaint dated 4th September, 2007 and filed on 10th September, 2007 seeks damages for malicious prosecution, aggravated damages for libel and slander, lost earnings as Director General of the Communications Commission of Kenya for 3 years and 8 months, aggravated damages for loss of prospects of promotion and loss of freedom to gainfully practice law for the 3 years he faced the trial. He also seeks the costs of defending himself in Nairobi CM Anti-corruption case no. 16 of 2003 and Chief Magistrate's Court Criminal Case No. 2177 of 2005 (hereinafter referred to as the Criminal Case Nos. 16 of 2003 and 2177 of 2005 respectively) as well as the costs of this suit.
2. According to the plaint, the plaintiff, an advocate of the High Court was the Director General of the Communications Commission of Kenya (hereinafter referred to as the Commission) till 6th March, 2003 when he was arrested at the instance of the 1st defendant and forced to abruptly resign as the Director of the said Commission. It was pleaded that subsequent to his arrest, the plaintiff was charged in the said Criminal Case with the offence of abuse of office contrary to section 101(1) of the ***Penal Code*** an act which the plaintiff claimed was malicious as he was arrested without warrant and neither allowed to record a statement nor afforded an opportunity to engage an advocate despite his request to do so.
3. During the trial which lasted 3 years none of the Defendants' witnesses connected the plaintiff with the alleged offence and the Investigating Officer admitted that the accused had not committed any criminal offence known to law and the plaintiff was eventually acquitted under section 210 of the ***Criminal Procedure Code*** on 28th February, 2006.
4. According to the plaintiff the Defendants' actions were actuated by malice, vendetta, and based on gossip and rumour and had no colour of truth.
5. It was the plaintiff's case that as a result thereof he lost Kshs 913,000/= in salary and Kshs 320,000/= in allowances per month which sum he claimed from the defendants as well as damages

enumerated hereinabove.

6. In support of his case, the plaintiff relied on his statement dated 15th March 2011 which was adopted as part of the examination in chief.
7. According to the plaintiff, who testified as PW1, he was an advocate of the High Court of Kenya having graduated from the University of Nairobi in 1987 and joined the Kenya School of Law after which he was employed by **Mereka, Musyoka & Co. Advocates** before being employed as a legal assistant by Kenya Planters Co-operative Union where he later became the Company Secretary. In 1995 he joined Kenya Posts and Telecommunications Corporation (hereinafter referred to as the Corporation) as the Assistant Corporation Secretary and was promoted to the position of the Corporation Secretary in 1995 during which he drafted Kenya Communications Act which liberalised telecommunications industry. On 9th February 199 he was appointed the Director General of the Commission for a period of 4 years which he served. On the expiry of his term on 22nd February, 2002 he was reappointed for a further term of 4 years and as at 16th December, 2002 he was earning monthly salary of Kshs 913,000/- and allowances totalling Kshs 320,000/=.
8. He testified that he served for 3 months when in 2003 a new Minister, the late **John Michuki** summoned him in his office and informed him that they needed a new Director General. Thereafter a lot of pressure was brought upon him to resign as the Director General of the Commission and on 6th March, 2003, he bowed to the pressure and tendered his resignation to the Minister which resignation was accepted the same day and one **Mr Aloyce Ochieng** appointed to take over the said office with immediate effect.
9. He further testified that he was arrested for crimes purportedly committed in 1991 but which crimes he never committed. Though a total of 27 witnesses were called for the prosecution in criminal case no. 16 of 2003 none of them except the Investigating Officer attempted to connect him with the offence. With respect to criminal case no. 2177 of 2005 despite the fact that 14 witnesses were called none of them said anything about him.
10. The plaintiff testified that as a lawyer his only tools of trade are his credibility and the two cases destroyed his credibility and integrity and during the pendency of the said proceedings he could not even apply for a job.
11. According to the plaintiff these cases arose when he was a junior officer in the Corporation for 3 years and 9 months. As the Director General of the Commission in his capacity as the Chief Executive Officer, he had the powers to approve payments and no one accused him of any wrongdoing when he acted in that capacity. According to him the State concocted evidence because there were extraneous pressures to remove him as the Director General of the Commission. In his view, the case was not brought in good faith since one of the accused persons who was later appointed as a Judge, **Paul Kosgey** was the one alleged to have failed to make the supplies yet the proceedings against him were terminated without full trial. Despite his attempts to put the record straight, the same did not ear any fruits. According to the plaintiff a **Mr Kamami** swore an affidavit during the investigations but was never called as a witness. However, this **Mr Kamami** was the Chairman of the evaluation committee who disqualified the lowest tenderer and awarded the tender to a company related to him without disclosing his interest therein and thereafter went ahead to reassign the contract to the lowest bidder. Despite these facts having been within the knowledge of the Defendants no action was taken and despite the fact that **Mr Kamami** was charged with the plaintiff he secured a consent order from the High Court halting his prosecution. In the High Court proceedings, the plaintiff testified **Mr Kamami** swore an affidavit in which he alleged that he had been instructed by his Superior one **Mr Augustine Cheserem** to make the payments. Despite the fact that the Investigating Officer, one Martin Kampala's affidavit in the same proceedings denying the allegations of receipt of instructions the case against the plaintiff was never withdrawn.
12. According to the plaintiff, the case against him was that the Corporation had lost Kshs 19 million yet all the witnesses said the generators had been delivered and invoices were produced. To him the Corporation was never a complainant in the case and this was confirmed by the investigating officer. In the end the trial court found that he had no case to answer.
13. It was the plaintiff's case that the prosecution was totally callous and malicious and sought to deny him his livelihood. In his view it is not easy to rise in one's career and be brought down by people with no regard to integrity at all.

14. Wit respect to case no. 2177 of 2005, the substance of the charge was that the Corporation bought its own property in 1997 yet during that time the plaintiff was the Corporation's Secretary and the then Managing Director, **Mr Jan Mutai**, produced a document showing that the at a full Board meeting chaired by **Mr Ethangatta** in the presence of other Board Members, the Board approved the purchase of a plot within Malindi Municipality in the sum of Kshs 10 million and eventually the ownership of the plot was vested in the Corporation. During the said meting the plaintiff said he was just a secretary and that the witnesses said nothing about him. In the ruling the Court actually found that the decision to buy the property did not prejudice the Corporation and that the Corporation did not complain. The complaint, according to him was prompted by an anonymous person and the Court found he had no case to answer.
15. Despite the plaintiff seeking an amicable settlement f the case, the Defendants decline to do so and instead continued defaming him hence the orders sought in this case.
16. In cross-examination by **Mr Waudo** for the 1st Defendant, the plaintiff insisted that the charges of abuse of office in case no. 16 of 2003 were politically motivated after the change of government in order to replace him with someone who the government was comfortable with. He said that the first statement he wrote during the tenure of the KANU Government and thereafter the intended charges were terminated. He insisted that the investigations leading to case no. 16 of 2003 were instigated by the NARC Government to remove him from the office. Referred to his statement he said that case no. 2177 of 2005 was commenced and collapsed and he recorded his statement in the year 200 before the first case. According to him case no. 16 of 2003 was brought after the latter case failed. He however confirmed that he recorded his statement with respect to case no. 2177 of 2005 on 12th May, 2000 and the other statement was recorded on 5th February, 2003 and the 4th statement was recorded on 10th February 2003 in respect of case no. 2177 of 2005.
17. The plaintiff admitted that he was the corporation's secretary when the contract between the Corporation and the **Conventional and Exotic Power Generation Ltd** (hereinafter referred to as Conventional) was signed. He testified that the said contract was signed by the Managing Director and **Pamela Kosgey** on his behalf because at that time he was involved in the preparation of ***Kenya Communications Act*** and was on a journey to Finland and Hungary. According to him, it was the responsibility of the signatory to ensure the documents were in order and that the time of the execution of the documents, **Pamela Kosgey** was the acting secretary. It was this contract which the witnesses testified **Mr Kamami** awarded to his company and later assigned the same to a company that had not been awarded the tender vide an assignment between **Conventional** and **Royline Investments Ltd** (herein referred to as **Royline**) which assignment was authorised by the Corporation and the plaintiff though the contract was prepared by **Pamela Kosgey**. According to the plaintiff, at that time they assumed the tendering documents were in order and the payments were to be made to the supplier as and when delivery was made. While admitting that according to the original contract between the Corporation and Conventional 30% was to be made upon execution and 70% upon delivery, he said he neither knew when delivery was made nor when payment was made as by that time he had already left the corporation. He however said payment was made on 19th February, 1999 though he insisted that he was unaware when delivery was made as that was not his responsibility. Accordingly, he could not say whether the terms of the contract were fulfilled. Referred to the proceedings in the criminal case, he confirmed that according to the witnesses whereas delivery was made on 26th June, 2000, payment was made in February, 1999. Referred to the evidence of **Mr Kipkorir** the Manager in charge of investigations ranch, the said the said person said some of the generators had not been supplied though payments were made. According to the witness he was not involved in the processing of the Kshs 18 million.
18. When referred to a letter dated 10th February, 1999 by **Royline**, the plaintiff said the letter requested for payment for what had been delivered and not advanced payment. That was the letter **Mr Kipkorir** said he obtained from **Mr Kamami** and on the face of the letter was a note by the plaintiff asking for payment for what had been delivered since the contract allowed for payment of part delivery. According to him although **Mr Augustine Cheserem** the MD said that the plaintiff had authorised the payment that could not have generated the payment. The plaintiff reiterated that the witnesses said he had not committed any offence and that the matter was a civil matter.
19. According to the plaintiff the evidence of malice was that he was taken to court without evidence of loss and hence the defendants were malicious as they were acting at the behest of extraneous

forces.

20. The plaintiff maintained that he was forced to resign but admitted he was not dismissed and that the State was malicious in replacing him immediately before serving his notice period. According to him, the Government was under a duty to pay him his terminal dues. According to him, the newspaper publications were caused by the defendants since the Government caused the press to come. The plaintiff denied that the basis of his acquittal was the non-production of MFI33. However, the Court found that the document examiner's report could not stand on its own.
21. Referred to the defendant's list of document he confirmed that document no. 40 was a letter of allotment allotting an un-surveyed plot to the Corporation for post office site in Malindi dated 7th May, 1992. He however was unaware whether it was the same plot that the Corporation was alleged to have bought. According to him, the allotment of the divided land to the Corporation was made on 11th September 1997 and payment was made on 7th October, 1997 though the plaintiff could not remember when the land was purchased. However the Board approved the purchase on 20th September 1997.
22. In cross examination by **Mr Munene** for the 2nd defendant, the plaintiff admitted that the company which qualified for the supply of generators was Conventional and that **Royline** came into the picture through an assignment though he denied having anything to do with the latter. The plaintiff confirmed that the endorsement made by him on the letter dated 10th February, 199 was based on confirmation of deliveries by the Manager.
23. According to the plaintiff he never knew that plot no. 1069 belonged to the corporation as the documents of the property were kept by the Manager Property. According to him, his role as the Company Secretary was to simply write what the MD presented to the Board. According to him plot no. 1069 came into existence in October 1997 and that he never saw the letter of 1992 since he was not the custodian of the documents or properties. Referred to the charge sheet in case no. 16 of 2003, the plaintiff admitted that the complainant was **Augustine Cheserem** the MD of the Corporation who was his junior though according to the plaintiff the MD said he had not complained hence the prosecution was malicious.
24. With respect to case no. 2177 the plaintiff said he could not remember who the complainant was. According to him he was defamed because he was charged with a crime he did not commit and that the defamation came about because it was caused to be published and the evidence f publication was the charge sheet. He however admitted that there was no difference between what was published in the newspaper and what was contained in the charge sheet though he maintained that he was defamed because he did not commit the offence.
25. The plaintiff testified that with respect to the first case he was acquitted on 18th June 2007 while with respect to the second offence he was acquitted on 27th February 2006 and he did not appeal. According to him, it is the state that applied for revision and the ruling was delivered in November, 2005.
26. In re-examination, the plaintiff admitted that the 1st defendant had the power to investigate. He however reiterated that the letter of 10th February, 2002 neither requested for full payment nor advance payment it for what was delivered and that that was the inquiry he was responding to on 30th June, 2002 and no charge was preferred against him till January, 2003 after his encounter with **Mr Michuki**. However between 12th May, 200 and 5th February, 2003 the defendants did not get in touch with him. According to him **Mr Augustine Cheserem** confirmed that his note would not trigger payment and that the only document that would trigger payment would have been the payment voucher.
27. According to the plaintiff there was no evidence that plot no 1069 belonged to the Corporation as there was no title and that the Corporation never complained about loss of money but the complaint was by an anonymous person. He insisted that the matter attracted publicity and was reported in the media which reported the charges and not the investigations and it was the decision to charge him which triggered the media reports.

1st Defendant's Case.

28. While denying the averments in the plaint the 1st defendant pleaded that the plaintiff's arrest was

not malicious or arbitrary but was based on reasonable and probable cause and that the plaintiff voluntarily resigned from his position as the Director General of the Communications Commission of Kenya before his arrest and was paid his entire terminal dues and other benefits.

29. The 1st defendant called as DW1, **Samuel Magati Osero**, who at the material time was working with the 1st Defendant's Anti-Corruption Police Unit and was involved in investigating criminal case no. 2177 of 2005. Having taken over the same from the then Investigating Officer in respect of the allegations that the Corporation had bought a plot belonging to it. According to him the complaint was that the plaintiff was the Corporation's secretary and was involved in the sale transaction as he was supposed to sanction the sale agreement between the Corporation and the third party.
30. According to him, they conducted thorough investigations and established that the Corporation was in possession of the plot before it bought the same. The plot in question was un-surveyed Post Office site in Malindi Municipality which was allocated on 7th May 1992 vide allotment letter of the same date. On 20th May 1996, the plot was reallocated to Malindi Municipal Council as a result of an application made by the Council despite the fact that the allocation to the Corporation was not revoked. According to the witness, this was double allocation. The witness testified that during the investigations it was discovered that the management of the Corporation took the Public Investment Committee to the same plot and when the Council realised that its Town Clerk wrote to the Commissioner of Lands a letter dated 1st September, 1997 suggesting that the plot be shared.
31. According to him, during the investigations they found that it was not mistakenly allotted because the allotment to the Corporation was earlier so. However the Commissioner subdivided the land vide allotment letter dated 11th September, 1997 without revoking the original but simply issued another allotment letter and reallocated the land to 2 different parties after which the Commissioner issued a title to the Corporation. Prior to this the Town Clerk had approached the Corporation through an agent and proposed to sale the same property to the Corporation even before the same was subdivided and even before he wrote to the Commissioner and it was then that the Corporation approved the purchase of the land. It was thereafter that the Clerk wrote to the Commissioner and the sale agreement was dated 22nd October, 1997 in which the plaintiff as the Corporation Secretary was involved in. According to the witness he ought not to have bought the property which belonged to the Corporation since the title was in his custody. However the Corporation proceeded to pay Kshs 10 million for the land. According to the witness they compiled a report and forwarded the same to the Attorney General for perusal and advice and the Attorney General agreed with the Unit and gave consent to prosecute. However as at the time of the arrest and arraignment of the plaintiff in court, the witness had left the Unit though he was aware that a consent had been given.
32. In cross-examination by **Mr Munene**, DW1 stated that they were receiving anonymous reports through an unidentified whistleblower and that they carried out investigations through which they found that the allegations were credible and there was a reasonable cause to warrant the arraignment in court of the plaintiff and there was no malice since they did not even know the plainti9ff or other people personally. According to him the investigators, himself and **Ali Mwamariz**. According to him they were just doing their work and the result depended on them and not on the Attorney General. While he did not know how many witnesses testified, he said they were many.
33. In cross-examination by **Mr Kemboy**, learned counsel for the plaintiff, DW1 stated that he could not tell the exact date when the complaint was received because the complaint was received by a different department. He however was of the view that it was before the year 2002 and the offence was alleged to have taken place in 1997. When the plaintiff was taken to court he reiterated that he was nolonger in the unit as he left in 2002 and the charges were preferred some time in the year 2005. By the time he left the Unit they had not received the consent to prosecute from the 2nd Defendant. When he left he left the file with the Unit and the request had not been sent. According to him he did not know when the request for consent to prosecute was made.
34. The witness however confirmed that he was aware that there was a Board meeting at which a request for the purchase of the plot was made on 20th August 1997. Although he did not know all the members, he said the meeting was chaired by the Chairman, and in attendance were MD, the

plaintiff and the property manager. However the people charged were not the Board Members who approved the purchase and amongst the people who attended the meeting who were charged were the MD, **Jan Mutai** and the plaintiff, the Corporation Secretary.

35. According to him on 20th August 1997, the Corporation had allotment letter though there was neither a grant nor title to the property. In his view, the Corporation was purchasing its own property because the Corporation had a letter of allotment which had not been revoked. According to him once issued with a letter of allotment, one becomes the owner of the land. He however confirmed that the letter of allotment dated 7th May, 1992 did not identify the land reference though there was a plan. He confirmed that it was a conditional offer and he did not find the acceptance letter or remittance slip showing payment made though the plot had been identified to the Public Investment Committee and the plans had been drawn. He however did not look for a receipt but said the matter had not been pursued and there was no title deed or grant issued pursuant to the allotment letter.
36. According to him after the approval the Town Clerk informed the Commissioner of Lands that they wanted to surrender the allotment for subdivision and in 1996 a letter of allotment was issued to the Council in respect of the same land. According to him at the time of the letter it was the Council which was the allottee. The witness confirmed that he testified in the criminal case though he did not mention that there was a plot. He stated that though the Commissioner acceded to the subdivision he did not accede to the sale and issued a letter of allotment to the Corporation and a sale agreement was signed between the Corporation and the Council on 22nd October, 1997 and a lease issued in favour of the Corporation before 22nd October, 1997 and collected by **Chala**, who was acting on behalf of the Corporation. The witness insisted that the Corporation was buying a plot which belonged to it which had been allocated to it.
37. He admitted that he knew **Mr Ethangatta** as the Chairman of the Corporation's Board though he was not aware whether he testified. While aware that the plaintiff was not convicted he did not know the reasons thereof. He did not agree with the evidence that the plot did not belong to the Corporation. He admitted that they did not receive the complaint from the Corporation but denied that they mounted a needless prosecution though he was surprised that the MD and the Property Manager testified that the property did not belong to the Corporation. He confirmed that prior to the Board meeting there was no title but allotment letter. Referred to the proceedings he confirmed that **Mr Kahuhio**, the Assistant Commissioner of Lands informed the Court that the 1992 letter of allotment had been suspended in 1997. According to the witness, they had a prosecutable case and in his view, this being a criminal case, there was no limitation. He however denied that the case was brought in to prop up another case which was collapsing.
38. In re-examination by **Mr Waudo**, the witness maintained that the plaintiff committed the Corporation to pay for a plot the Corporation owned and ought to have informed the Board. He however reiterated that he did not know the plaintiff and had no reason to prosecute him and did not receive instructions to fix him.
39. DW2 was Martin Kampala who previously worked with The Vetting of Judges and Magistrates Board as well as the Anti-Corruption Police Unit (ACPU) and its successor the Kenya Anti-Corruption Authority (KACA) where he was attached to in 2000. According to him, in the course of his investigations when with KACA and the Unit he knew the accused in case no. 16 of 2003. In his evidence he received a complaint that full payment had been made for the delivery of diesel engine generators which according to the existing contract between **Royline** assigned contract by Conventional and the Corporation. According to him the deliveries were to be made to the Corporation's substation contrary to the terms of the contract which required 30%. Although **Royline** was among the bidders who had lost, it was assigned the contract by Conventional for the delivery of the generators valued at Kshs 27 million.
40. However, he testified that full payment was made against the requirement that 30% be made on presentation of a simple invoice and the balance be paid on final delivery, installation and commission of the total number of the generators. He added that at the time of the payment 5 generators had been delivered while 3 were outstanding though the 3 were the most valuable as they were the most powerful. The stations according to him were Kikambala, Langattta, Kerugoya, Nairobi South and others. In the course of his investigations he found out that the plaintiff was the Corporation's Secretary and after the initial delivery of the said generators which were half but accounted for Kshs 8 million **Royline** wrote to **Mr Kamami** the Manager in charge

of the contract at the Corporation requesting that full payment be made despite the fact that 100% delivery, installation and commissioning had not taken place which letter reached the plaintiff's office and he recommended on the letter instructing the Manager to pass for payment on the strength of an explanation that the remaining generators were in the High Seas. Pursuant to the said instructions payment was made and he concluded that the payment was done outside the contract and was prejudicial to the Corporation. According to him there was an irregular certification later on that delivery had been made and arbitrary instructions for payment. In his view the payment was supported by falsified documents by **Mr Kamami** who was a co-accused in the same case.

41. DW2 testified that the plaintiff abused his authority by instructing a junior manager to pass payment based on requests which flew on the face of the provisions of the contract. Upon the completion of the investigations he submitted the matter to the Attorney General and received an advice to proceed and take action against the accused who included the plaintiff.
42. According to him, he was later informed that the plaintiff was acquitted though he testified in the case as the investigating officer and the person who prepared the exhibit memo and submitted the same to the document examiner. According to him the examiner found the known signatures sent consistent and the report was produced though the document was not and the copy that was presented to the court was rejected. According to him, he was unable to trace the original document because the plaintiff and **Mr Kamami** were in possession of the document.
43. In cross-examination by **Mr Munene**, said they never found any relationship between the plaintiff and **Royline** though **Royline** had been disqualified at the initial stage and was not awarded the contract. He said that he did not know the circumstances of the assignment of the contract. In his opinion there was a reason to prosecute the plaintiff since it was due to his instructions that the payment was passed based on delivery of documents. According to him, prior to the case he did not know the plaintiff.
44. The witness testified at KACA they used to receive complaints in various ways and one would not be able to trace how they came though they would investigate the same and in this case he went ahead to investigate and came across the contract with a provision that 30% payment was to be made on presentation of simple invoices and 70% on delivery, installation and commissioning of the generators. According to him 30% was paid and it was at that time that a case was brought against the plaintiff. In his evidence payment for the full amount was made in 1999 and the complaint came in 2000 and investigation was started by KACA which was later declared to be an illegal outfit and it took a year or more before further investigations were proceeded with by KAPU. According to him, they had to re-investigate and do a confirmation before forwarding the case afresh to the Attorney general and the matter went to court in the year 2003.
45. According to the witness the deliveries were not made at Extelecoms House though he confirmed that in the intervening period the deliveries were made. He however proceeded with the case because the deliveries had been made after payment and investigations. He insisted that it was purely on the basis of their findings that they recommended that the plaintiff be charged and he was not motivated by any malicious ill will or any political pressure from any quarter.
46. In cross-examination by **Mr Kemboy**, DW2 confirmed that he was the one who investigated case no. 16 of 2003 and that the origins of the complaint was within KACA system though he could not remember meeting any particular individual lodging a complaint. According to him the investigators do not have to disclose their sources of information. He however testified that he could not remember receiving any complaint from the Corporation. In his view there was a complaint from the Corporation though he could not remember who signed the complaint and he could not remember producing the complaint.
47. In his evidence he cons that the plaintiff was not a director of **Royline** as the directors were **Mr Githinji**, **Mr Kandie** and another person. He reiterated that he did not know the circumstances under which **Royline** was given the tender and was not aware that the procurement proceeded without the input of the plaintiff. He further did not come across any document showing the plaintiff's relationship with the transaction leading to the tender and could not remember interviewing one **Alfred Kirei** due to time lapse. He however could remember the one of **Joseph Chengo**.
48. Referred to the plaintiff's document he confirmed that he charged the directors of **Royline** and testified against them though he was unaware of the result of the case since by then he must have

been outside the Authority. However the witness was aware that the proceedings were challenged in the High Court but was unaware of the conclusion thereof. Referred to the plaintiff's documents he conformed that there was a consent letter terminating the proceedings against the directors of **Royline**.

49. While confirming that the letter passing the payment was not part of the payment it was his evidence that it originated the payment process. While admitting that he talked to one **Fatuma Birai Oyando** who set out the procedure for payment, the witness said that she did not say that any letter from the plaintiff was used for the payment. He also confirmed that the evidence of **Alice Yator**, **Virginia Hiuko Irimu** and **Peter Kipngetich Sawe** all of whom were witnesses in the criminal case did not make reference to the said letter passing payment. With respect to the evidence of **Augustine Kiptoo Cheserem**, the Corporation's Managing Director, he confirmed that he said that their investigations found that **Kamani** had signed that the items had been received and was charged with falsifying documents and that the MD confirmed that the letter does not trigger any payment. He averred that there was no witness who said that the payment was made on the basis of the letter from the plaintiff. To the witness, it was **Kamani** who prepared the documents showing that the goods had been received and the plaintiff indicated "pay". He confirmed that the generators were received by the Corporation and that the Corporation did not lose any money though the delivery was in 2003 following their intervention in 2000. However by the time they took the plaintiff to Court, the goods had been delivered and the Court found that there was no case warranting placing the accused on defence. The witness however said that he was not present at the time of the arrest of the plaintiff and was unaware that the plaintiff was made to write a resignation letter and that **Mr Michuki** acknowledged receipt of the resignation letter. He was however aware that a **Mr Aloyce Ochieng** was appointed to act in place of the plaintiff the same day of the resignation. While denying that he was part of the conspiracy the witness said he was happy about the efficiency of the appointment and denied that he got anything out of it since he gets satisfaction from the course of justice.
50. According to him, his stamen in the criminal case that the Kshs 19 million was paid unprocedurally was based on the contract. He however admitted that if it had been merely breach without arbitrary use of office, it would have been purely a contract. The witness however said that he was not aware that there were two criminal cases.
51. On re-examination, DW2 reiterated that he was not part of the conspiracy and that the complaint was received in the year 2000 at which time **Mr Michuki** was not in the government. Referred to the letter, he said it was requesting for full payment pursuant to which the Manager Powerplant was requested to pass for payment which payments were supported by forged documents.

2nd Defendant's Case

52. The 2nd defendant while denying the allegations made in the plaint averred that the charges against the plaintiff were undertaken pursuant to a reasonable and probable cause in execution of a statutory duty after a complaint was lodged and a probable criminal offence punishable in law established and that the plaintiff's acquittal did not entitle the plaintiff to any damages in malicious prosecution.
53. With respect to the tort of defamation the 2nd defendant pleaded justification.
54. It was further pleaded that the plaintiff's cause of action was time barred under the ***Public Authorities Limitation Act***, Cap 39 Laws of Kenya.
55. The 2nd defendant did not call any evidence since he relied on the witnesses called by the 1st Defendant.

Determinations

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

1. **Whether the criminal proceedings were instituted by the defendant.**
2. **Whether there was reasonable cause and/or justification to make the complaint to the police.**
3. **Whether the said prosecution was actuated by malice.**

4. **Whether the criminal proceedings terminated in the plaintiff's favour.**
5. **Whether the plaintiff was defamed.**
6. **Whether the defendant is liable to compensate the plaintiffs and if so what should be the award of damages.**
7. **Who should bear the costs of the suit?**

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

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

58. In **Gitau Vs. Attorney General [1990] KLR 13**,**Trainor, J** had this to say:

"To succeed on a claim for malicious prosecution the plaintiff must first establish that the

defendant or his agent set the law in motion against him on a criminal charge. 'Setting the law in motion' in this context has not the meaning frequently attributed to it of having a police officer take action, such as effecting arrest. It means being actively instrumental in causing a person with some judicial authority to take action that involves the plaintiff in a criminal charge against another before a magistrate. Secondly he who sets the law in motion must have done so without reasonable and probable cause…The responsibility for setting the law in motion rests entirely on the Officer-in-Charge of the police station. If the said officer believed what the witnesses told him then he was justified in acting as he did, and the court is not satisfied that the plaintiff has established that he did not believe them or alternatively, that he proceeded recklessly and indifferently as to whether there were genuine grounds for prosecuting the plaintiff or not. The Court does not consider that the plaintiff has established *animus malus,* improper and indirect motives, against the witness".

59. The foregoing, in my considered view set out the law and the conditions to be satisfied in order for a plaintiff to succeed in the tort of malicious prosecution.
60. On the first issue whether the criminal proceedings were instituted by the defendant there is no dispute that the said proceedings were instituted on behalf of the defendant. Although the Defendants' case was that an anonymous complaint was received, they were emphatic that independent investigations were carried out with revealed that there was a prosecutable case disclosed against the plaintiff. Thereafter a consent was sought and obtained from the 2nd Defendant and the prosecution ensued. Accordingly I find that the plaintiff was prosecuted by or on behalf of the defendant.
61. With respect to the second issue whether the making of the said report was malicious, the Court is enjoined to consider that evidence in determining whether or not the action taken by the police was malicious.
62. In **James Karuga Kiiru –vs- Joseph Mwamburi and 3 Others, Nrb C.A No. 171 of 2000,** the court held:

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

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

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

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

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

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

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

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

66. Therefore where the police deliberately decide not to take into account the version of the suspect and acts on a story that eventually turn out to be improbable and which no ordinary prudent and cautious man would have relied upon that failure may constitute lack of reasonable and probable cause for the purposes of malicious prosecution. On the other hand it would be obviously absurd to make a defendant liable because matters of which he was not aware put a different complexion upon facts, which in themselves appeared a good case for prosecution. But neglect to make a reasonable use of the sources of information available before instituting proceedings would be evidence of want of reasonable and probable cause and also malice. It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but whether there is a reasonable and probable case for a prosecution. Circumstances may exist in which it is right before charging a man with misconduct to ask for an explanation but no general rule can be laid down.
67. The law as I understand it is that in order to succeed on the ground that the prosecution of the plaintiff was malicious, the plaintiff must show that the defendant or his servants were actuated by ill will or spite against him or an improper motive. The plaintiff has to show that the defendant had no reasonable or probable cause to prosecute him. The question of reasonable and probable cause depends in all cases not upon the actual existence but upon reasonable *bona fide* belief in the existence of such state of things as would amount to a justification of the course pursued in making the accusation complained of no matter whether the belief arises not on the recollection and memory of the accuser or out of the information furnished to him by others. In other words the person preferring the charge or laying a complaint before the court should have an honest belief in the guilt of the person charged based upon reasonable grounds depending on the state of circumstances which if they are true would lead any prudent and cautious man placed in the position of the prosecutor to the conclusion that the person he is charging is probably guilty of the crime imputed. The question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of an objective test and that is to say, to constitute reasonable and probable cause, the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution whether that material consists of facts discovered by the prosecutor or information which has come to him or both must be such as to be capable of satisfying an ordinary prudent and cautious man to the extent of believing that the accused is probably guilty. If and in so far as that material is based upon information, the information must be reasonably credible such that an ordinary prudent and cautious man could honestly believe it to be substantially true and to afford a reasonably strong basis for the prosecution. Malice means a wrongful act done intentionally without a just cause or excuse. So to prosecute anyone for an improper motive can be evidence of malice.
68. In this case, the Court is unaware of who the complainant was. DW2, **Martin Kampala** similarly did not know who the complainant was. This is therefore not a case where the complainant was known but his identity was concealed due to the need to protect the complainant. This is a case where no one could point with certainty who the complainant was and when the complaint was

made. The natural complainant would have emanated from the Corporation yet the evidence on record was to the effect that the Corporation did not complain.

69. In absence of clear evidence that there was in fact a complaint made by an existing complainant, the Defendants' only option was to show that there was credible evidence unearthed by themselves in the course of the investigation that led to a reasonable and probable cause not only that crimes were committed but that the plaintiff partook in the commission of the said offences. In Misc. Application No. 771 of 2003, **Mr Kampala** swore an affidavit in which he deposed that **Mr Kamami** did not act on anybody's instructions. It is this **Mr Kamami** who it is alleged to have falsified documents indicating that the goods had been received. If this evidence on oath is to be believed then one wonders on what basis the plaintiff was being prosecuted for actions of the said **Kamami** and who curiously was left off the hook by consent of the prosecution.

70. With respect to case no. 16 of 2003 there was no evidence adduced therein which connected the plaintiff with the offence as charged. Even DW1 who was the investigating officer therein admitted in these proceedings that in his evidence he never connected the plaintiff with the purchase of the plot in question. One wonders how the investigating officer could fail to deal with what was the crux of the charge facing the plaintiff. Apart from that there was evidence that the plot which it was alleged was purchased by the Corporation and which allegedly belonged to the Corporation had its allotment letter withheld by the Commission. Had the Defendants properly investigated this aspect they would have realised that the allegation of the Corporation purchasing its own land was untenable. Further the decision to purchase the plot was a decision of the Corporation's Board yet only a few people were charged instead of charging the members of the Board.

71. During the course of the trial attention of the 2nd Defendant was drawn to the inconsistency in the evidence before the Court and the 2nd Defendant seemed not to have appreciated this. As I have stated herein above neglect to make a reasonable use of the sources of information available before instituting proceedings would be evidence of want of reasonable and probable cause and also malice. Similar insistence to proceed with prosecution where it is clear that there is insufficient evidence to mount a successful prosecution would be evidence of malice. Where the prosecution witnesses themselves in the course of the prosecution give exculpatory evidence with respect to the plaintiff and the attention of the prosecutor is brought to the same yet no action is taken to terminate the prosecution, it is my view that the prosecution at least from that point in time become malicious.

72. Taking into account the totality of the evidence before the criminal court the inescapable conclusion I come to is that the material known to the Defendants would not have satisfied a prudent and cautious man that the plaintiff was probably guilty. It is therefore my conclusion that the Defendants had no reasonable and probable cause for charging the plaintiff in the two cases hence their action to do so was actuated by malice. This answers issue number 2 and 3 in the affirmative.

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

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

74. The next issue for determination is whether the plaintiff was defamed. From the evidence it is clear that the plaintiff's only issue with the Defendants with respect to defamation was that the Defendants arraigned him in court and the press got hold of the story and published the same. It

was not contended that the publication was false. The publication was clearly a report of the court proceedings. The same was not occasioned by the Defendants or at their instance. It is my view and I so hold that the publication of the proceedings was clearly covered under the defence of qualified privilege. In **Josiah Abobo T/A Josiah Abobo & Co. Advocates vs. Kenya Commercial Bank Ltd & 2 Others Kericho HCCC No. 61 of 2002 [2005] 1 KLR 555** the court pronounced itself as follows:

"The fact that a citizen is charged in a Court of law in a criminal offence does not *per se* portray anything. In my understanding of the law, when a citizen of this country is charged in a court of law, he is being given an opportunity to defend himself before an impartial tribunal which will determine his guilt or innocence. The mere fact of charging a citizen does not imply that he has been defamed, even if it is established later, after due process of the Court, that such a citizen was innocent after all."

75. In any case as was held by **Waweru, J** in **Nation Newspapers Ltd vs. Gibendi [2002] 2 KLR 406** held on 29/05/02 as follows:

"But the appellant pleaded fair comment on a matter of public interest that is, qualified privilege. To defeat that defence the respondent needed to prove actual malice. Actual or express malice is ill will or spite or any indirect or improper motive in the mind of the defendant at the time of the publication...The trial court did not address this issue in its judgement. There was no evidence that in publishing the words complained of the appellant acted from an indirect or improper motive such as spite, ill will or jealousy. Even if it were to be accepted that the reporter was rash or negligent that would not be sufficient...From the evidence placed before the trial court the respondent failed to prove actual malice on the part of the appellant. The appellant's defence of fair comment on a matter of public interest therefore succeeded, and the trial court should have so held. That the matter was of public interest there cannot be doubt. This was a public school and there was evidence, on balance, that there had been some kind of disturbance and that some teachers in the school had staged a sit-in. The matter was serious enough to be investigated by the District Education Officer. The appellant had a social duty to write and comment on it...Upon the defence of fair comment on a matter of public interest therefore, the respondent's action should have failed."

76. Accordingly the claim in respect of defamation must fail. However this Court is aware of the holding in the Uganda case of **Dr. Willy Kaberuka vs. Attorney General Kampala HCCS No. 160 of 1993** to the effect that:

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

77. In my view the considerations therein are to be taken in the context of the tort of malicious prosecution and do not necessarily warrant an award of damages for defamation.
78. With respect to the loss sustained by the plaintiff as a result of his resignation, there was no sufficient material placed before this Court on the basis of which the Court can conclusively find that the plaintiff was forced to tender his resignation. The evidence on record was that the

investigation against the plaintiff started way before the NARC Government came into power. Accordingly, I am not satisfied that the investigations into the conduct of the plaintiff was informed by the need to have him give way to someone else. The plaintiff having resigned rather than being terminated there is no basis upon which I can find based on the material before me that the resignation of the plaintiff was due to pressure from the Government. Accordingly the claim relating to the plaintiff's loss of employment fails.

79. It is however my view based on my findings hereinabove that the plaintiff is entitled to damages for malicious prosecution.
80. In **Jacob Juma & Another vs. The Commissioner of Police & Another Nairobi HCCS No. 661 of 2007**, this Court awarded to the plaintiff a sum of Kshs 4,000,000.00 in respect of general and aggravated damages for malicious prosecution on 14th January, 2013.
81. I am of the view that the plaintiff herein is entitled to a similar award but taking into account the fact that the plaintiff faced two criminal cases, it is my view that an award of Kshs 5,000,000.00 general damages is reasonable compensation in the circumstances.
82. With respect to the costs of defending the criminal case no documents were produced to show how much if any the plaintiff paid for his legal representations. The costs of advocate in defending the criminal cases ought to have been proved by way of documentary evidence as is expected in claims for special damages. As there is no strict proof of the pleaded amount I decline to award the same.

Order

83. Accordingly I award the plaintiff Kshs 5,000,000.00 general damages for malicious prosecution. The plaintiff will also have the costs of this suit. The general damages will accrue interest at Court rates from the date of this judgement till payment in full.

Dated at Nairobi this 16th day of December, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Jakayila for Mr Kemboy for the Plaintiff

Cc Richard