REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAIROBI

CIVIL SUIT 661 OF 2007

CIVIL DIVISION

JACOB JUMA ....1ST PLAINTIFF

JUMA CONSTRUCTION COMPANY LIMITED.................2ND PLAINTIFF

VERSUS

COMMISSIONER OF POLICE.....................................1ST DEFENDANT

THE HON. ATORNEY GENERAL ....2ND DEFENDANT

JUDGEMENT

INTRODUCTION

By their amended plaint filed on 25th October 2007 the plaintiffs herein seek judgement against the Defendants jointly and severally for:

i) Kshs 5,000,000/= being Special Damages on account of the 1st Plaintiff's legal representation aforesaid.

iA) A sum of Kshs. 2,476,175,487.50 being the amount payable to the 2nd plaintiff in respect of idle time for machinery Plant and equipment as pleaded in the Plaint.

ii) General damages on account of the 2nd Plaintiff for loss of business the quantum thereof to be determined by this Honourable Court.

ii A) Special damages for Kshs. 3 Billion being loss of business on account of the 2nd Plaintiff from 1st February 2003 to 20th November 2006 when the 1st Plaintiff was acquitted under section 210 of the Criminal Procedure code.

AND/OR

iiB) In the alternative and without prejudice to (iiA) above, General Damages for loss of business on account of the 2nd Plaintiff from 1st February 2003 to 20th November 2006 when the 1st Plaintiff was acquitted Under Section 210 of the Criminal procedure code, the quantum thereof to be determined by this Honourable court.

iii) General damages for the 1st Plaintiff for malicious prosecution and wrongful confinement the quantum thereof to be determined by this Honourable court.

iv) Exemplary and or aggravated damages for malicious prosecution aforesaid and for breach of the 1st plaintiff's fundamental rights as enshrined in the Constitution, the quantum thereof to be determined by this Honourable Court.

v) Costs.

Vii) Such other and/or further reliefs as the Honourable Court may deem fit and just to grant in the circumstances of this matter.

The 1st plaintiff is the Managing Director and the majority shareholder of the 2nd defendant the other shareholder being his wife who owns 5% shareholding in the 2nd defendant. According to the said plaint police officers attached to the defunct Kenya Anti Corruption Authority without lawful reasons and acting on false and malicious information commenced investigations against the 1st plaintiff as a result of which the 1st plaintiff was arrested and charged with various charges ranging from Forgery to Uttering False Documents in ***Criminal Case No. ACC. 008 of 2003***. Resulting from the said charges the 1st plaintiff was incarcerated in Industrial Area Remand Home for 4 days due to his immediate ability to raise the bail in the sum of Kshs 10 million with surety of a similar amount. As a result of the said charges, it is pleaded that the plaintiff underwent a lengthy, arduous, agonising and stressful Criminal Trial attendances for a period of 66 days and suffered considerable expenses until 20th November 2006 when the 1st plaintiff was acquitted under section 210 of the Criminal Procedure Code. The said investigations, arrest and charge it is averred were not only unjustified and illegal but were malicious, spiteful, punitive and amounted to harassment and fundamental breach of the 1st plaintiff's Constitutional Rights. As a result of the foregoing it is pleaded that the 1st plaintiff suffered damages both special and general as well as loss of business as particularised in the plaint.

By his ruling dated 27th March 2009, **Waweru, J** allowed the defendant's application dated 14th October 2008 and granted leave to the defendants to file their further amended defence within fourteen (14) days of the date of the delivery of the said ruling. I have perused the record herein and I have not seen any filed further amended defence as ordered. From the submissions, it is clear that the defendants rely on their amended defence dated 7th November 2007 and filed in this Court on 9th November 2007 a clear confirmation that there was no further amended defence filed pursuant to the orders made by **Waweru, J** aforesaid.

In the said amended defence, the defendants denied the allegations made by the plaintiffs and averred that the 1st defendant has no capacity to be sued. They further contended that if the Plaintiff was arrested and charged as alleged the same was done on reasonable and probable grounds and was without malice and hence the particulars of the defendants' alleged illegalities or malice or spite were similarly denied. In the premises the defendants denied that the plaintiffs suffered any loss and averred that no demand or Notice of Intention to sue was served and hence the plaint ought to be struck out pursuant to section 13A of the Government Proceedings Act. The defendant further pleaded that the cause of action is statutorily time barred by virtue of section 3(i) of the Public Authorities Limitation Act. Accordingly liability to the plaintiff as claimed in the plaint was denied.

PLAINTIFFS' CASE

In support of the plaintiffs' case, one witness (**Jacob Juma**) the 1st plaintiff gave evidence as PW1. He adopted the contents of his statement filed herein on 15th February 2012 as part of his evidence in chief. According to the said statement, the 2nd plaintiff of which he the Managing Director and in which he owns 95% of the shares has over the years been involved in very lucrative road construction contracts with the Ministry of Roads and Public Works. According to him as the Managing Director and an

Engineer by training, he has been the brain behind not only the formation but also the success of the 2nd defendant and all the contracts awarded to it. Sometimes in February 2003 he was arrested by police officers under the command of the 1st defendant and was charged in Criminal Case No. 8 of 208, **Republic vs. Sammy Kiprotich Tangus, Ezekiel Machogu Ombaki, Samson Teela Akute and Jacob Juma** (hereinafter referred to as the criminal case) with 4 counts of forgery and uttering false documents was arraigned in court and locked up in **Kileleshwa Police Station** in his capacity as the Managing Director of the 2nd plaintiff. During the said period criminal trial he was unable to attend to his business and the 2nd plaintiff was unable to secure any road construction contracts from the Ministry to date. Due to the enormity of the bail that he was given, a sum of Kshs 10,000,000.00 with surety of similar amount he was unable to immediately raise the same with the result that he was incarcerated in Industrial Area Remand Prison for 4 days. After the said criminal trial which spanned 4½ years he was on 20th November 2006 acquitted under section 210 of the Criminal Procedure Code. According to him the Defendants were motivated by sheer malice in arresting him and arraigning him in court in the said criminal case with the result that his fundamental constitutional rights were breached. He contends that there was no complainant in the said case since the said Ministry which ought to have been the complainant absolved him and the 2nd plaintiff and the allegations levelled against him were denied and disapproved by the prosecution witnesses hence his acquittal under section 210 aforesaid after incurring a sum of Kshs 5,000,000.00 in his defence. After his acquittal the same Ministry paid the 2nd plaintiff a sum of Kshs. 51,000,000.00 which was part of the outstanding charges in respect of the same project undertaken by the 2nd plaintiff which gave rise to the said criminal proceedings and undertook to pay the balance of Kshs 8,000,000.00. According to him the transaction that gave rise to the aforesaid criminal case was a valid agreement between the 2nd plaintiff and the said Ministry for the re-gravelling of the **Kimaiti-Mungasti-Buyofu Road** (hereinafter referred to as the road) and hence there was no justification for the said criminal case. The said criminal case was the subject of a wide media coverage in the print media which adversely affected the 1st plaintiff and had a negative impact on the 2nd plaintiff’s business thus resulting into ridicule and stigmatisation of both plaintiffs taking into account the fact that the 1st plaintiff is a member of De La Rue Identity Systems through **Nectel (K) Limited**, a company whose membership are the 1st plaintiff and his wife. In his view there was no justification for the said criminal proceedings despite protesting that the same were being used by the plaintiffs’ business competitors to ruin their business, name and reputation as all previous road projects awarded to the 2nd plaintiff had been successfully executed and completed. Prior to his arrest the 2nd plaintiff through the initiative of the 1st plaintiff had a lucrative contract with the said Ministry for a sum of Kshs 166,400,028.00 which contract was due to the said proceedings forced to stall despite the fact that the 2nd plaintiff had certified outstanding certificates for payment amounting to Kshs 59,000,000.00 which were due for payment but were withheld pending the said proceedings. According to him his name was posted in Google search engine and was denied a visa to travel to the United States and United Kingdom to transact business for both himself and as a partner of the said De La Rue, a company which prints money both locally and internationally. He further contends that he lost the sum of Kshs 2,476,175,487.50 being the charge for contractual charge for Plant and Machinery and Equipment during the idle time as special damages spelt out in the agreement between the 2nd Plaintiff and the Ministry. In his evidence the Construction industry is guided by a principal called ***Federation Internatinale Des Ingenieus Concils (FIDIC) Regulations*** which define the contract and the time. From the said principle, idle time is defined as non productive time during which an employee and/or machines are still paid due to work stoppage for any cause. It is also called waiting time or allowed time or down time. In the instant case idle time is the time when the Anticorruption stopped the Construction, time when he was arraigned in court till his release during which period he could not remove the machineries. In his evidence the 2nd plaintiff which had over the years had a yearly turn over of Kshs 800,000,000.00 had its business going down as a result of the 1st plaintiff’s said arraignment in court and subsequent adverse publicity and was disabled from doing business from 1st February 2003 to 20th November 2006 and has been rendered technically insolvent as it has no business from the Government or any other public company since 2003 as a result of the said prosecution. In his view, the 2nd plaintiff is entitled to Kshs 3 billion in form of loss of business for the said period of 3.9 years. Further his professional colleagues and friends perceive him as a fraudster and has lost his integrity while his children are hounded and no amount of compensation can ever pay for this.

His company has therefore closed and his machines valued in the sum of Kshs 900,000,000.00 all gone to waste since companies have refused to do business with him. In support of his case he produced the two bundles of documents as exhibits 1A and 1B respectively.

In cross-examination by **Ms Nanjala**, learned counsel for the defendants, PW1 stated that he started doing business as a small time company in 1992 and was later registered in the same names. Initially they were two directors with Engineer **Charles Malenya**. Since then there have been changes in directorship of the company and currently the directors are himself and his wife. In 1998 the directors were PW1 and John **Walukhe Simuli**. The other director, **Mr Malenya** retired from the company. Before 1995 although the company was in road construction business it had not been registered until 1995 when it was registered with the Ministry in category E which was upgraded to Category B. In his evidence the company submitted when it tendered for the projects. By the time of the said tender the projects were almost complete and it was an 18 months project. According to him the procedure was that the project would either be advertised in the Dailies or through selective tendering. The **Lugulu** tender, he said, was a public tender. According to him he was charged because he was the majority shareholder and the Managing Director and further because he had appended his signature to certificate no. 1 and it was alleged that he had forged his own signature which was not true. He confirmed that he was charged together with **Sammy Tambus**, **Ezekiel Ombaki** and **Samson Akute**. **Sammy Tangus** was the District Works Officer in the Ministry stationed in Busia while **Ezekiel Ombaki** was the District Commissioner Busia District. He further stated that the letter was sent by Engineer **Tambus** and confirmed that **Ezekiel Ombaki** and **Sammy Tangus** were Government Officials. He however denied that he manipulated the process since he did not know the other people and had never met them. According to him the reason why he was being investigated was because he had gone to the former President’s daughter’s farm but he that was not in relation to this tender which was advertised in late 1997 and the execution of the work commenced in 1998. He, however denied any prior knowledge that the tender would come up. He testified that he made an application to be upgraded in April and that every year when evaluating the work done you upgrade your company as you grow. He however could not recall when his company was registered but on being referred to the documents he confirmed that the company was registered in 1997 while the tender must have been advertised in December 1997. He denied knowing **Kondole & Sons Ltd** although he heard about them when in Court. According to him once one applies for the tender you do not get the report of the winner but only receive a letter of the award. On being referred to the documents he said the letter was put in the tender documents and that there was a list of 10 companies with the first name being that of **Kondole & Sons**. He however stated that he was not dealing with the documents as the same were being dealt with by his manager although he admitted that the documents were important. He conceded that the letter was not clarified that the letter was not addressed to his company but was signed by the District Works Officer requesting for selective tender from the District Commissioner. The project according to him was procured in August 1998 and not 1997. He confirmed that the companies that were approved were 8. Once the projects are tendered the documents are taken to his officer for noting and must have gone to him for his attention. Referred to the list he stated that **Kondole & Sons** is no. 6 in the list and confirmed that his company got the bid and immediately thereafter the site was handed over to them by the District Roads Engineer although he could not remember who it was at the time. He confirmed that the three top construction companies were **Juma Construction, Hayer Bishan & Sons and Regional Consummate** with the lowest bid being that of **Regional Consummate** followed by his company. While admitting that he got the bid he denied that he got it because of connections. He said that it was alleged that the documents of **Kondole** originated from his company which was not the case. He admitted that the Kenya Anti Corruption conducted investigations and informed him about **Kondole** and that they were the same people who investigated the other officers. According to him the investigations were carried out after he was charged in Court. The contract was to conclude in 18 months from December 1998 and in 2001 they had done 95% of the work but in 2003 the 5% could not be completed because payments were suspended amounting to Kshs. 59,000,000.00. After the case he was paid Kshs 51,000,000.00 out of the said Kshs 59,000,000.00 and there was a balance of payment on retention of Kshs 8,000,000.00 which he has not been paid despite making follow up. He reiterated that his machineries remained idle and on site for more than 4 years between 2001 and February 2003 during which time they did not have the option to remove the equipment since the machinery cannot be removed before the works are complete. Although either party can request for the removal of the machineries he did not request for the said removal since you cannot remove the same without the consent of the

Engineer. He however did not request for the consent of the Engineer to remove the same. According to him he was earning Kshs 800 million a year from 1998 to 2001 in turnover. He however admitted that the profits vary with the period. In 1998/99 the profit was Kshs 7,258,000.00, in 2000 the profit was Kshs 22,712,000.00 while in 2003 the profits declined to 14,611,000.00. He stated that he knew the officers who arrested him before and that they had something personal against him. He confirmed that he was arraigned in court and the police gave evidence in court in his support. During the period of his arraignment, remedial business was going on. However the operations came to a standstill and nothing went on. Asked about the mileage, he stated payment was Kshs 23,000,000.00 although he was unable to remember the days they were on site and how much they were charging. According to him the Bills of Quantities are done by the District Works Officer and the rental book highlights the rates chargeable on machinery. The analysis according to him were prepared by his officer and was checked by the expert both of whom he said he was not calling. He stated that the contract was awarded through selective tendering although he could not say the reason why this was so. He similarly did not know who was to sign the tender although the documents were signed by the Permanent Secretary Roads. He reiterated that he was acquitted on no case to answer by which time he had paid Kshs 5,000,000.00 to his advocates in cash twice pursuant to an agreement between himself and the advocate. While admitting that the police have a duty to arrest and arraign, he asserted that the police were wrong since he did not manipulate the tender process.

In being re-examined by **Mr Havi**, learned counsel for the plaintiffs, PW1 stated that the company had been registered by the time of the award of the tender but denied that he colluded with **Engineer Tangus** to get the tender. He stated that although they were charged together the issues of collusion and corruption were not raised and they were acquitted of the charges. According to him there was no complainant against **Juma Construction Ltd** in respect of the charges that were preferred against them. He was unaware of any proceeding before the Public Procurement Tribunal in respect to the tender that was awarded to them. He further stated that as at 2004 when investigations were going on the Ministry suspended the works and the equipments remained on site during the period of the suspension and prosecution since you cannot remove the equipment without the consent of the client. According to him the suspension of the works was caused by the raising of certificate no. 9 by **Juma Construction**. However, on conclusion of the investigations 7 years latter he was paid for the same certificate. According to him the actual time payable is Kshs 2,476,175,485.50. referred to the Rental Book, he said it is a manual produced by the Ministry which forms part of the contract undertaken by the Government and that the figures of 2.5 billion was arrived at based on that computation and that no contrary computation has been given by the Ministry.

DEFENCE CASE

On the part of the defence, they called one witness **Carey Nyawinda** who testified as DW1. DW1 similarly adopted his statement filed in court on 21st September 2012 as part of his examination in chief. According to him he is a Superintendent of Police currently in charge of Insurance Fraud Investigations Unit of the CID. In 2001/2004 he was working at Anticorruption Unit and was tasked with investigation of certain cases. During the period between 2001-2003 together with other officers **Tom Amimo** and **Engineer Ouma** they were involved in an inquiry into allegations revolving around the award of tender for re-gravelling of the said road in Busia District. In the course of the investigations they found that the award of the said tender was through selective tendering instead of open tendering. According to him where the tender is in excess of Kshs 10 million like in the instant one the authority of the Permanent Secretary is required. According to him the award of the tender was therefore irregular. Further, they also found that the plaintiff prepared certificate of payment for the sum of Kshs 23,061,000.00 before the commencement of the work and before the site was handed to the contractor. Further the fee for the supervision of the vehicle was exaggerated at Kshs 2,596,000.00. The other finding was that the bid documents of **Kondole & Sons Ltd** were forged by the plaintiff. After the said findings they took the plaintiff to Court and the plaintiff was charged in court with counts of forgery and uttering false documents in case no. 8 of 2003. The matter proceeded to hearing and witnesses were called and at the conclusion thereof the plaintiff was acquitted under section 210 of the Criminal Procedure Code. According to him there was no malice at all. He did not know the plaintiff at the time of the arrest.

On cross examination by **Ms Ngania**, learned counsel for the plaintiff DW1 stated that the law at that time was that selective tendering was only allowed to tenders less than 10 million. He however conceded that he was unaware of any proceeding before the Procurement Tribunal challenging the award. He admitted that the charge of forgery was not sustained and the accused was acquitted under section 210 of the Criminal Procedure Code and he was unaware of any appeal. According to him the case was reported from the Treasury. Although he was aware of the existence of a specific complaint he could not tell the name of the complainant although it came from the Treasury. He, however, admitted that there was no complaint from the Ministry. A number of witnesses according to him recorded statements and some were charged in Court. Referred to the proceedings he admitted that **Kondole & Sons** were not called. In the proceedings, the forged document and the report of the document examiner was not allowed and **Kondole** was not called as a witness.

In re-examination he said that they were confident of the evidence that they collected. The document examiner's report was, according to him, rejected on a technicality and they had nothing personal against the plaintiff.

At the close of the defence case, both parties filed written submissions.

PLAINTIFF'S SUBMISSIONS

According to the plaintiff's submissions filed on 5th November 2012, the 1st Plaintiff's cause of action is the tort of malicious prosecution arising from the said criminal case while the 2nd plaintiff's cause of action is in respect of breach of contract. With respect to the issue of limitation, it is submitted that this suit was filed on 18th September 2007 within twelve months of the 1st plaintiff's acquittal on 20th November 20067 hence the 1st plaintiff's claim being in tort was instituted within time. On the 1st defendant's liability, it is submitted that since the Anti-Corruption Unit of the Police which arrested and prosecuted the 1st plaintiff was headed by the Police Commissioner, he is jointly and severally liable with the Attorney General for the malicious prosecution of the 1st Plaintiff. It is the plaintiffs' submissions that the Court having found that the case against the 1st plaintiff was not proved, based on **Crispus Karanja Njogu vs. Attorney General [2005] KLR** and **Ezekiel Machogu Ombaki vs. The Attorney General HCCC No. 581 of 2007 UR**, is proof that the criminal proceedings were instituted without reasonable and probable cause and could only have been malicious. It is further submitted that the 1st plaintiff proved that he spent Kshs 5,000,000.00 on his legal defence. Further there is no doubt that the 1st Plaintiff suffered substantial general damage within the period of 4½ years the trial lasted. The 1st plaintiff's arrest and prosecution, it is submitted was motivated by malice since there was no complainant in the criminal case as the Ministry absolved the 1st Plaintiff of the charges he faced and the Treasury could not have been the complainant since it approved the contract. As a result of wide publication of the 1st plaintiff's prosecution in local dailies, the 1st plaintiff suffered negative publicity and lost his reputation as an accomplished Engineer and a member of blue chip companies including ***De La Rue Identity Systems***. Since the arrest and prosecution was undertaken despite the 1st Plaintiff's protestation of innocence, this proves that the Defendants' actions were oppressive, arbitrary or unconstitutional and was objectionable and unwarranted hence the 1st Plaintiff suffered exemplary and aggravated damage. On the evidence it is submitted that the 1st and 2nd Plaintiffs were out of business for 4½ years and continue to be out of business to date hence they are entitled to Kshs 2,476,175,487.50 on account of idle time for plant, machinery and equipment as well as loss of business in the sum of Kshs 3,000,000,000.00. loss of business. Since the sums of Kshs 2,476,175,487.50 and Kshs 3,000,000,000.00 are losses that arose as a direct consequence of the arrest and prosecution of the Plaintiff, the total sum, in the plaintiff's view suffices both as a measure of special damage and general damage suffered by the 1st and 2nd plaintiffs jointly. With respect to quantum of special, general, exemplary and aggravated damages payable to the 1st plaintiff it is submitted on the authority of **Crispus Karanja Njogu vs. The Attorney General [2008] KLR** and **Otieno Mak'onyango vs. Attorney General & Another HCCC No. 845 of 2003** that a sum of Kshs 300,000,000.00 would be an adequate compensation to the 1st plaintiff on account of general, exemplary and/or aggravated damages as commensurate to his status and the loss he suffered in his name

and career as an Engineer. The claim in respect of idle time according to the plaintiffs is contractual since the contract incorporates the ***Federation Internatinale Des Ingenieus Concils (FIDIC) Regulations***, which contain principles for computing charges for idle time for plant, machinery and equipment as well as labour. With respect to the claim for Kshs 3,000,000,000.00 the same is justified on the basis of the 2nd plaintiff's annual turnover of Kshs 800,000,000.00 per annum for the years 1999 to 2003 which was the period preceding the 1st Plaintiff's arrest and prosecution. These sums, it is submitted are also due on account of general damages, being loss of user of the plant, machinery and equipment that remained on site for the period after the 1st plaintiff's arrest and prosecution which were detained by the defendants. Citing **Great Lakes Transport Co. (U) Ltd vs. Kenya Revenue Authority [2009] eKLR**, it is submitted that equity would not allow a wrong to be suffered without remedy. The plaintiffs also rely on **African Commuter Services Limited vs. Attorney General & Another HCCC No. 1208 of 2003** in which the Court awarded the plaintiff Kshs 918,412,066.50 comprising of loss of revenue, loss of aircraft, loss of goodwill and consequential loss. In addition the plaintiff was awarded Kshs 10,000,000.00 on account of aggravated, exemplary and punitive damages. In conclusion, it is submitted that the 1st plaintiff is entitled to special damages of Kshs 5,000,000.00 on account of legal costs, Kshs 2,476,175,487.50 on account of idle time for machinery, plant and equipment, Kshs 3,000,000,000.00 on account of loss of business from 1st February 2003 to 20th November, 2006, Kshs 300,000,000.00 on account of general damages on footing of exemplary and/or aggravated damages for malicious prosecution making a total of Kshs 5,781,175,487.50 claimed in the plaint with interest and costs.

DEFENCE SUBMISSIONS

On the part of the defendants it is submitted on the authority of the case of **Murunga vs. The Attorney General [1979] KLR 138** that for a plaintiff to succeed in a case of malicious prosecution four essential aspects need to be proved namely that the prosecution was instituted by the defendant or by someone for whose acts he is responsible; that the prosecution terminated in the plaintiff's favour; that the prosecution was instituted without reasonable and probable cause; and that this was actuated by malice. With respect to malice, it is submitted that the plaintiffs needed to show that the Defendant was motivated by other intentions other than to bring the 1st plaintiff to justice. From the evidence presented, it is submitted that there was no proof of malice by the defendant towards the plaintiff when the charges were preferred against him and citing **Kagame & Others vs. AG & Another [1969] EA 643**, it is submitted that malice means that the prosecution was motivated by something more than a sincere desire to vindicate justice and that the totality of the evidence must be considered in determining whether or not there was reasonable and probable cause. In the defendants' submission, the 1st plaintiff's imprisonment was done in accordance with the law and the police had reasonable suspicion that the Applicant had committed the offence. On the authority of **Simba vs. Wambiri [1987] KLR 601**, it is submitted that the 1st plaintiff cannot be granted damages when the court found that the prosecution was not actuated by malice. On loss of business it is submitted that the 1st plaintiff was a director of the 2nd plaintiff which was a limited liability company comprising of two directors, thus the allegation that the company was not in operation in the absence of the 1st plaintiff cannot be true while the contract between the 2nd plaintiff and the Ministry was exhaustive and would provide for remedies for idle machinery/plant and arbitration. Since the legal fees paid by the 1st plaintiff was an agreement between the advocate and his client, on terms agreeable to themselves, it is submitted the [plaintiff cannot claim the said fees from the defendant. The issue of violation of fundamental rights and freedoms on the other hand can be addressed by the relevant division of the High Court and further it is submitted that the plaintiffs rights and freedoms were not violated since the police followed the laid down procedure. In conclusion the defendants submitted that the defendant was not malicious in prosecuting the plaintiff and the suit ought to be dismissed with costs.

ISSUES FOR DETERMINATION

Having considered the pleadings, the evidence as well as the issues drafted on behalf of the plaintiffs it is my view that the following issues fall for determination in this suit:

1. **Whether or not the Plaintiffs' claim is time barred by Section 3(i) of the Public Authorities**

Limitation Act, Cap 39 Laws of Kenya.

2. Whether or not the 1st Defendant is properly joined in this suit.

3. Whether the arrest, arraignment in Court and prosecution of the 1st Plaintiff in the said Criminal Case was malicious.

4. Whether or not the Defendants are jointly and severally liable to the Plaintiffs in respect of the claim for malicious prosecution.

5. Whether the 1st Plaintiff suffered special, general, exemplary and/or aggravated damages as a result of his arrest, arraignment in Court and prosecution in the said Criminal Case.

6. Whether the 1st and 2nd Plaintiffs jointly suffered special damage as a result of the 1st Plaintiff's arrest, arraignment in Court and prosecution in the said Criminal Case.

7. Whether the 1st and 2nd Plaintiffs jointly suffered general damage as a result of the 1st Plaintiff's arrest, arraignment in Court and prosecution in the said Criminal Case.

8. What is the quantum of special, general, exemplary and/or aggravated damages payable to the 1st Plaintiff?

9. What is the quantum of general and special damages payable to the 1st and 2nd Plaintiffs jointly?

10. Who is entitled to the costs of this suit?

THE LAW

Before dealing with the foregoing issues it is important to set out the law relating to the tort of malicious prosecution. 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 not 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".

In **Egbema vs. West Nile Administration [1972] EA 60**, the same Court held:

"False imprisonment and malicious prosecution are separate causes of action; a plaintiff may succeed on one and fail on the other. If he established one cause of action, then he is entitled to an award of damages on that issue...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...There was no finding that the prosecution instituted by Uganda Police was malicious, or brought without reasonable or probable cause. The Uganda Police, unlike Administration Police, are not servants or agents of the respondent...The decision whether or not to prosecute was made by the Uganda Police, who are not servants of the respondents after investigation. There is no evidence of malice on the part of the respondent. The appellant was an obvious suspect as he was responsible for the security of the office from which the cash box disappeared. It cannot be said that there was no reasonable and probable cause for the respondent instigating a prosecution against the appellant. The actual decision to do so was taken by the Uganda Police. As the Judge has made no finding as to whether the instigation of the prosecution was due to malice on the part of the respondent, this Court cannot make its own finding. The circumstances of this case reasonably pointed to the appellant as a suspect and there was not sufficient evidence that in handing the appellant over to the Uganda Police for his case to be investigated and, if necessary, prosecuted, the respondent was actuated by malice".

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".

What amounts to reasonable and probable cause for the purposes of malicious prosecution was explained by **Rudd, J** in **Kagane and Others vs. Attorney-General and Another** (supra). Citing **Hicks vs. Faulkner [1878] 8 QBD 167 at 171**, **Herniman vs. Smith [1938] AC 305** and **Glinski vs. McIver [1962] AC 726** the learned judge stated:

"Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed...Excluding cases where the basis for the prosecution is alleged to be wholly fabricated by the prosecutor, in which the sole issue is whether the case for the prosecution was fabricated or not, the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of objective test. 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 consisted 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 reasonable prudent and cautious man to the extent of believing that the accused is probably guilty. If and insofar as that material is based on information, the information must be reasonably credible, such that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution...If it is shown to the satisfaction of the judge that a reasonable prudent and cautious man would not have been satisfied that there was a proper case to put before the court, then absence of reasonable and probable cause has been established. If on the other hand the judge considers that prima facie there was enough to justify a belief in an ordinary reasonable prudent and cautious man that the accused was probably guilty then although this would amount to what I call primary reasonable and probable cause the judge may have to consider the further question as to whether the prosecutor himself did not believe in the probable guilt of the accused, and this is obviously a matter which is to be judges by a subjective test. This subjective test should only be applied where there is some evidence that the prosecutor himself did not honestly believe in the truth of the prosecution...Inasmuch as this subjective test only comes into operation when there were circumstances in the knowledge of the prosecutor capable of amounting to reasonable and probable cause, the subjective test does not arise where the reason alleged as showing absence of reasonable and probable cause is merely the flimsiness of the prosecution case or the inherent unreliability of the information on which the case was based, because this is a matter for the judge alone when applying the objective test of the reasonable prudent and cautious man. Consequently the subjective test should only be applied where there is some evidence directly tending to show that the prosecutor did not believe in the truth of his case. Such evidence could be afforded by words or letters or conduct on the part of the prosecutor which tended to show that he did not believe in his case, as for example a failure or reluctance to bring it to trial, a statement that he did not believe in it and, I think possibly, an unexplained failure to call an essential witness who provided a basic part of the information upon which the prosecution was based".

DETERMINATION

The first issue for determination is whether the claim herein is time barred. As was held in **Mbowa vs. East Mengo District Administration** (supra) 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 since the plaintiff cannot 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. In other words the action does not lie until the plaintiff has been acquitted of the charge and he cannot maintain an action after he had been convicted. His right to bring the action only accrues when he secured his acquittal of the charge or on appeal after which he then has the right to bring this action for damages. Time, for the purposes of limitation must begin to run as from the date when the plaintiff could first successfully maintain an action and the cause of action is not complete until such a time, and in this case

this was only after he was acquitted on 20th November 2006. This suit was filed on 16th September 2007. Under section 3(1) of Cap 39 aforesaid, proceedings on tort against the Government or a local authority must be brought before the end of twelve months from the date on which the cause of action accrued. Since the "cause of action" has been held to mean "every fact which is material to be proved to entitle the plaintiff to succeed, every fact which the defendant would have a right to traverse", it does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. See **Cook vs. Gill [1873] LR 8 Cp 107 at 114** and **Read vs. Brown [1889] 22 QBD 128 at 131.**

As every material to be proved to entitle the 1st plaintiff to succeed in the tort of malicious prosecution cannot be said to have been in existence until after the 1st plaintiff's acquittal, since the suit was instituted within twelve months of the said acquittal, his suit was not time barred.

The second issue is whether or not the 1st Defendant is properly joined in this suit. The 1st defendant is the Commissioner of Police and he is sued in his capacity as the Head of the police Force in the Republic of Kenya. From the plaintiffs' evidence it is clear that he is sued because the Anticorruption Unit was within his command. In other words his office is sued in vicarious capacity. The law as I understand it is that there is nothing inherently wrong in suing both the tortfeasor and the person who is vicariously liable for his actions or omissions. However, under section 12(1) of the Government Proceedings Act, Cap 40 Laws of Kenya it is provided that subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney-General, as the case may be. Therefore whereas there would have been nothing wrong if the plaintiff had sued the actual officer whose action led to the acts complained of, it was in my view inappropriate to join both the Commissioner of Police and the Attorney General in this suit since liability cannot attach to both. The law, however, is that misjoinder or non-joinder is not necessarily fatal to a suit and save for the fact that no liability attaches to the 1st defendant nothing substantially turns on this point.

The next issue is whether the arrest, arraignment in Court and prosecution of the 1st Plaintiff in the said Criminal Case was malicious. The plaintiffs hinge their claim that the prosecution was actuated by malice on *inter alia* the fact that there was no complainant in the criminal case; that the defendants acted on unsubstantiated anonymous letters from nowhere; that the defendants acted recklessly and in haste; that there were no proper and/or any meaningful investigations before arraignment in court; that the defendants failed to take into account the fact that the Ministry that would have ordinarily complaint confirmed that the 2nd plaintiff had executed the contractual works as per the contract; that the defendants failed to take into account the plaintiffs' version that the 1st defendant was being used by the plaintiffs' competitors; that crucial witnesses were not called to give evidence.

The law is clear that the mere fact that a person has been acquitted of the criminal charge does not necessarily connote malice on the part of the prosecutor. As was held in **James Karuga Kiiru –vs- Joseph Mwamburi and 3 Others, Nrb C.A No. 171 of 2000,** 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 is on the person prosecuted. 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. However, 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.

In this case although DW1 testified that the complaint was received from the Treasury, no serious evidence was led as to the nature of the said complaint. To make matters worse, DW1 could not even identify the exact source from which the alleged complaint arose. On the face of the charges the alleged offences were purportedly committed at the Ministry of Public Works and Housing Busia. Whereas there would have been nothing wrong in the complaint coming from the Treasury, one would have expected that the immediate complaint would arise from the Ministry or that some evidence would be adduced by the said Ministry connecting the plaintiffs with the commission of the said offence. The evidence of Prosecution Witness Number 7 (PW7), **David Maganda,** who was the then Chief Engineer in the Ministry of Public Works was very telling. In his evidence he stated that as far as he was concerned the procedures were followed and there was no abuse of office and could not see any prejudice suffered by the government as a result of the tender and that by the Treasury Committee signing it was an indication that everything was in order and the contract became binding as the Treasury countersigns when fully satisfied that everything is in order. In his evidence there are cases where contracts can be signed after the work is done and it can take even 2 years. This was confirmed by PW8, **Billy Stephens Mwencha**, the Internal Auditor General at the Treasury. That there was no loss was confirmed by PW9, **Peter Maina Wakori**, the then Permanent Secretary in the Ministry of Public Works. That the evidence emanating from the said Ministry had the effect of exonerating the plaintiffs from any wrongdoing leaves a lot to be desired with respect to the nature of investigations, if any, that was carried out by the defendants. That the said Ministry went ahead to pay the sum of Kshs 51,000,000.00 that had been withheld does not make matters any better for the defendants. If the statements that were recorded from potential witnesses clearly showed that no offence could possibly have been committed and the defendants ignored the same and proceeded with the said prosecution recklessly without taking into account the chances of success of the said prosecution that would in my view amount to malice. In this case DW1 did not enlighten the Court on the source of the complaint, the actions taken by the Investigation Officers concerned to countercheck the said complaint as well as any exonerating material gathered from the said investigations in order for the court to find that there was probable and reasonable material upon which a successful prosecution could be mounted. To the contrary all the evidence presented exonerated the plaintiffs while some people who ought to have been called to adduce evidence were not called while such crucial evidence as the document examiner's report was due to lack of diligence on the part of the prosecution not admitted in evidence. The casualness with which the investigation and the prosecution of the said criminal case was conducted leaves the court in serious doubt as to whether the defendants honestly believed in the probable guilt of the accused and truth of the prosecution. Therefore under the subjective test enumerated above I am satisfied that a reasonable prudent and cautious man would not have been satisfied based on the material that the defendants had that there was a proper case to put before the court hence I find that no reasonable and probable cause has been shown. In the result I find that the prosecution of the 1st plaintiff was 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".

The next issue for determination is whether or not the Defendants are jointly and severally liable to the

Plaintiffs in respect of the claim for malicious prosecution. Having found that both defendants cannot be held liable it follows that only the 2nd Defendant can be held liable. Whereas I have no difficulty in finding that the 2nd Defendant is liable to the 1st plaintiff in respect of the claim for malicious prosecution, the evidence of malicious prosecution in respect of the 2nd plaintiff is not so direct. Section 23 of the Penal Code, Cap 63 Laws of Kenya provides:

Where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission.

It is clear from the charges that were preferred against the 1st plaintiff that he was charged in his capacity as a Director of **M/s Juma Construction Company Limited**, the second plaintiff herein. From the foregoing I have no hesitation in finding that the 2nd Defendants is equally liable to the 2nd Plaintiff in respect of the claim for malicious prosecution.

The next issue is whether the 1st Plaintiff suffered special, general, exemplary and/or aggravated damage as a result of his arrest, arraignment in Court and prosecution in the said Criminal Case. It is important to keep in mind that the claim herein is neither for damages for defamation nor for damages for breach of contract. Rather it is a claim for damages arising from the legal consequences of the tort of malicious arrest and prosecution.

That the plaintiffs retained an advocate to represent them in the said criminal case is not in doubt. The claim for Kshs 5,000,000.00 is supported by documentary evidence adduced before this Court. The defendants however contend that the arrangement between the plaintiffs and the advocates was contractual and hence the defendants ought not to be held liable for the same. Contractual or not the Defendants put into motion a legal process through which the plaintiffs suffered loss and damages. The damages sustained by the plaintiffs in defending themselves were as a direct result of the defendant's action and were foreseeable consequences thereof. The fact that the Court pegged the bail in the sum of Kshs 10,000,000.00 is an indicator of the seriousness with which the said offences were perceived even by the Court itself. Accordingly, I find that the plaintiffs are entitled to the said sum.

The plaintiffs further claim a sum of Kshs 2,476,175,487.50 on account of idle time for the machinery, plant and equipment. In his cross-examination, PW1 however conceded that either party could ask for the removal of the equipment as long as one sought the consent of the Engineer. He, however admitted that this consent was not sought. No explanation was offered as to why the plaintiffs did not in mitigation of their losses seek the consent of the Engineer to remove the equipments from the site. Had this consent been sought and declined that would have been another matter. Since this claim is in the nature of special damages in the absence of evidence of the actual period it would have required to remove the same from the site had the consent been sought I am unable to pluck a figure from air and use it as a basis for an award under this head. Accordingly this claim is rejected.

The plaintiffs also claim Kshs 3,000,000,000.00 on account of loss of business from 1st February 2003 to 20th November 2006 at the rate Kshs 800,000,000.00 per year. The defendants have on the other hand taken the position that since there was another director, nothing prevented the other director from continuing with the management of the 2nd plaintiff. The plaintiffs have however given evidence which evidence has not been seriously controverted that the 1st plaintiff was the force behind the management of the 2nd plaintiff. This fact is shown by the fact that in instituting the criminal proceedings the defendants only went for the 1st plaintiff. The evidence that was adduced clearly show that with the 1st plaintiff out of the scene, the 2nd plaintiff was rendered powerless in terms of the construction business which was its mainstay. This fact was clearly known to the defendants as shown by the fact of preferring the charges against the 1st plaintiff rather than against both directors. The Court cannot, have lose sight of the fact that

the Ministry was not under any obligation to award contracts to the plaintiffs. It would have perfectly been entitled to decline to award further tenders to the plaintiffs if it so wished without incurring any liability. The plaintiffs however contend that at the time of the arrest of the 1st plaintiff the plaintiffs had secured a lucrative contract with the said Ministry for a sum of Kshs 166,400,028.00. This evidence was not disputed. Therefore the plaintiffs legitimately expected that contract to proceed to the end had it not been for the malicious prosecution of the 1st plaintiff. However, in cross-examination PW1 admitted that the yearly profits were not constant. For example in 1998/99 the profit was Kshs 7,256,000.00, in 2000 the profit was Kshs 22,712,000.00 while in 2002 and 2003 the profit was Kshs 14,611,000.00 and Kshs 12,286,270.00 respectively. This was the time of his arrest. Therefore whereas the turnover might have been Kshs 800,000,000.00 it is clear that profit earned was not the same amount. In my view the last profit made would be a more appropriate figure to be taken as the basis for the loss of business. I will, however, limit the award to one year and award the plaintiffs Kshs 12,286,270.00 in respect of loss of business.

The plaintiff further claims Kshs 300,000,000.00 on account of general damages on the footing exemplary and/or aggravated damages. In **Bank of Baroda (Kenya) Limited vs. Timwood Products Ltd Civil Appeal No. 132 of 2001,** the Court of Appeal citing **Obongo & Another vs. Municipal Council of Kisumu [1971] EA 91** and **Rookes vs. Banard & Others [1964] AC 1129** held that in Kenya punitive or exemplary damages are awardable only under two circumstances, namely (i) where there is oppressive, arbitrary or unconstitutional action by the servants of the government; and (ii) where the defendant's action was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff. None of these allegations were made against the defendants and hence an award of punitive or exemplary damages is not appropriate in the circumstances of this case.

With respect to aggravated damages in **Francis Xavier Ole Kaparo vs The Standard & 3 Others, HCCC No.1230 of 2004 (unreported)** the Court expressed itself thus:

"Malicious and/or insulting conduct on the part of the defendant will aggravate the damages to be awarded. The aggravated damages (distinguished from exemplary damages) are meant to compensate the plaintiff for the additional injury going beyond that which would have flowed from the defamatory words or statements above, caused by the presence of the aggravating factors...Damages will be aggravated by the defendant's improper motive"

Aggravated damages, therefore, are meant to compensate the plaintiff for the additional injury going beyond that which would have flowed from the words complained of but for the presence of the aggravated circumstances.

With respect to general damages for malicious prosecution, the Court must take into account the fact that the plaintiffs have been awarded damages for loss of business. However as was held in the Uganda case of **Dr. Willy Kaberuka vs. Attorney General Kampala HCCS No. 160 of 1993:**

"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".

The 1st plaintiff testified that he is a member ofDe La Rue Identity Systems through **Nectel (K) Limited.** That the plaintiffs are entitled to damages is not in doubt. However, whereas the 1st Plaintiff has

contended that the 2nd plaintiff is technically insolvent, no statements have been produced to prove this contention. As already stated the damages claimed are neither for defamation nor for breach of contract. In **Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another** (supra) the plaintiffs were in 2005 awarded Kshs 500,000.00 each general damages for malicious prosecution. In **Crispus Karanja Njogu vs. The Attorney General [2008] KLR Waweru, J** on 1st February 2008 awarded the plaintiff, whose substantive office was Assistant Registrar though was Acting Senior Assistant Registrar in the Examinations Section of Kenyatta University, the second defendant, Kshs 800,000.00 general damages for malicious prosecution.

Taking into account all the circumstances of this case including the status of the plaintiffs as well as the age of the said awards, I award each of the plaintiffs a global sum of Kshs 2,000,000.00 general and aggravated damages

This determination takes care of 6th to 9th issues.

With respect to costs, the law is that costs follow event unless the conduct of the successful party led to litigation, which might have been averted. That is not the case in this suit. The plaintiffs are accordingly awarded the costs of this suit.

In the result I enter judgement for the plaintiffs against the 2nd defendant on the following terms:

(a). Kshs 5,000,000.00 being the sum spent on account of legal fees with interest at Court rates from the date of filing suit till payment in full.

(b). Kshs 12,286,270.00 on account of loss of business with interest at Court rates from the date of this judgement till payment in full.

(c). Kshs 4,000,000.00 general and aggravated damages for malicious prosecution with interest from the date of judgement till payment in full.

(d). Costs of the suit.

Dated at Nairobi this 14th day of January 2013

G V ODUNGA
JUDGE

Delivered in the presence of:

Miss Ngania for the Plaintiffs

Miss Nanjala for the Defendants