



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 220 of 2011

THOMAS MUTSOTSO BISEMBE.....PLAINTIFF

VERSUS

COMMISSIONER OF POLICE.....1ST DEFENDANT

THE HON ATTORNEY GENERAL.....2ND DEFENDANT

JUDGEMENT

The plaintiff, by his plaint dated 17th day of June 2011 filed in this court on 21st June 2011 seeks special damages, general damages, punitive damages, loss of business costs and interests as well as any other relief the court deems necessary. The plaintiff's cause of action arises from the fact that on or about 25th January 2010 he was arrested and charged with the offence of intention to defraud and obtaining by false pretences which action he contends was based on false fabricated malicious charges by the police. He further avers that despite instructions from the office of the Attorney General for his discharge he was not released until after a further one month. As a result of the foregoing, his cereals and cosmetic business in which he was earning Kshs 5,000.00 suffered as well as his family. During the time he was in remand he suffered mental torture, stress, and loss of reputation, credibility and friends as his reputation was deformed, dented and destroyed.

The defendants on their part filed a joint defence on 15th August in which they denied the plaintiff's allegations but averred in the alternative that if the plaintiff was arrested and charged, the same was done after thorough investigation in the matter consequent upon which a probable and reasonable suspicion was drawn that the plaintiff had committed the alleged offence. In arresting the plaintiff it is therefore contended that the police were carrying out their duties. It is the defendants' contention that the plaintiff was granted bail and that the plaintiff's detention at the instance of the Court is lawful and to that extent the plaintiff's claim is misconceived and bad in law. Accordingly the plaintiff's claim with respect to his suffering, family's suffering and loss to his business are all denied. It is the defendants' position that no notice was served pursuant to section 13A of cap 40 and that the suit itself is time barred hence ought to be dismissed.

Suffice it to state that the plaintiff on 24th October 2011 filed a reply to the said defence in which he denied that proper investigations were carried out and averred that the notice was duly given while reiterating the contents of his plaint.

In his evidence, the plaintiff, **Thomas Butsotso**, who gave evidence as PW1, testified that he is a businessman selling cosmetics and stays in **Westlands**. According to him he has a family of one wife and 5 children. He blames the Attorney General and the Commissioner for having been arrested without any reason. According to his statement which he filed in court on 21st June 2011 and which he relied upon as

part of his examination in chief, he stated that on 25th January 2010 at around 10.30 am he was at Visa Place Upper Hill Area taking tea when three plain clothes police officers arrested him together with two other people who were unknown to him. On being arrested, they were taken to Crime Prevention Unit and later to Kilimani Police Station on allegations of obtaining money by false pretences from one **Peter Mwindi**. On 26th January 2010 he was taken to Nairobi Law Court at which point the Investigations Officer sought for two days to enable him conduct further investigations after which he was taken back to Kilimani Police Station. According to him no investigations were conducted and on 28th January 2010 he was taken to court and charged with the said offence of obtaining money by false pretences in Criminal Case No. 183 of 2010. He was charged and released on a cash bail of Kshs 1,000,000.00 with no surety and was thereafter remanded at Nairobi Industrial Area Remand Prison and Allocation. While in remand he applied for surety but was denied. Thereafter the matter was listed for mentions and hearings but was each time adjourned at the behest of the prosecution. On 11th August 2010 the Attorney General wrote to the Director of Criminal Investigations through the Director of Public Prosecutions advising that the case against him be withdrawn due to lack of evidence implicating him in the offence. Based on the said advice the case was withdrawn on 7th September, 2010 when the matter went for mention. According to him he was in custody from 25th January 2010 to 10th August 2010. He accordingly blames the police for arresting him without reason. As a result of the foregoing, the plaintiff testified that his children left school, his cereals and cosmetics business was adversely affected as his wife could not manage the business. According to him his said business was fetching Kshs 4,000.00 to Kshs 5,000.00 per month. Before his arrest he was self-reliant hence he sought compensation from the court. In his evidence although he had retired from the National Youth Service people saw him as a crook. In support of his case he sought to rely on the documents which he filed in court on 21st June 2011. On hearing objection from the learned counsel for the defendants, the Court admitted the documents filed save for the Annual Report and the Financial Statements. It follows that the Charge Sheet and Proceedings in Criminal Case No. 183 of 2010, the letter dated 10th August 2010 from the Attorney General, the demand letter dated 12th April 2011 as well as the letter dated 20th April 2011 from the Attorney General were admitted as exhibits.

In cross examination by **Ms Ndeda**, learned counsel for the defendants, he confirmed that he was the plaintiff although he did not have his ID Card with him as he had forgotten the same at home. He, however, informed the Court he was in possession of his driving licence. The reason for bringing the suit was due to his being subjected to suffering after he was arrested without a reason and being kept in custody. According to him even the Investigations Officer informed him that he was just told to arrest him by his superiors. According to the charge sheet, he stole Kshs 18,000,000.00 yet he did not know the complainant. He reiterated that he was arrested while taking tea. He was unaware if there was a complainant though the charge sheet indicated that the complainant was **Peter Muindi**. He confirmed that he has a wife with children and though they got married in church he did not carry his marriage certificate with him as well as the birth certificates. Although he had receipts from educational institutions, he said he did not carry them with him although one of his children was chased from school. He stated that the hearing of the case did not start as what was being done was just mentions until the day he was released. Although he did not have documentary evidence in support of his business he reiterated that he was carrying out cosmetics business. He admitted that the work of the police is to assist whenever there is a problem. Although the police did not know him before his arrest he maintained that his arrest was not justified.

On re-examination by his learned counsel **Mr Bosire**, he said that the police are supposed to investigate and that it was the Attorney General who advised for his release since there was no evidence implicating him in the offence. According to him he has not been re-arrested since his release and that he does not know **Peter Kirimi** and has never seen him before. In his evidence he was doing a legal business taking care of his family which relied on him and that it was wrong for him to have been arrested.

The defendant chose not to call any evidence at the close of the plaintiff's case.

In his submissions, **Mr Bosire** stated that the plaintiff has established his case since he was arrested, charged and released under section 87A of the Criminal Procedure Code. In the absence of any evidence to the contrary counsel submitted that the plaintiff has proved his case. Taking into account the fact that

the plaintiff was in custody for 8 months the Court ought to award compensation to the plaintiff.

On behalf of the defendants **Ms Ndeda** submitted that the plaintiff has not proved his case on a balance of probabilities. The fact that he was discharged under section 87A shows that he can be re-arrested. Counsel submitted that the plaintiff admitted in cross-examination that there was no malice. According to counsel the police were merely doing their duty since there was a charge sheet. According to her there was no evidence that the family suffered any loss and likewise there was no evidence of payment of fees, earnings or loss of business. In as much as the plaintiff was arrested, counsel submitted that there was reasonable and probable cause hence the plaintiff is not entitled to any damages and the suit ought to be dismissed.

In my view having considered the pleadings, the evidence and submissions of counsel the following are the issues that fall for determination in this suit:

1. **Whether the suit is time barred.**
2. **Whether a notice was issued.**
3. **Whether the plaintiff was arrested and charged.**
4. **Whether the criminal proceedings were instituted by or on behalf of the defendant.**
5. **Whether there was reasonable cause and/or justification to make the complaint to the police.**
6. **Whether the said prosecution was actuated by malice.**
7. **Whether the criminal proceedings terminated in the plaintiff's favour.**
8. **Whether the defendant is liable to compensate the plaintiffs and if so what should be the award of damages.**
9. **Who should bear the costs of the suit?**

The law surrounding the tort of malicious prosecution is well settled in this country. In **Mbowa vs. East Menjo 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”.

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”.

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.”.

What amounts to reasonable and probable cause for the purposes of malicious prosecution was explained by **Rudd, J** in Kagame & Others vs. AG & Another [1969] EA 643. 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 judged 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”.

Although the issue of limitation was not vigorously pursued, since it forms part of the defence the court ought to deal with it. 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 discharged on 7th September 2010. This suit was filed on 21st June 2011 and that was within one year of the said discharge. 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 plaintiff’s discharge, since the suit was instituted within twelve months of the said acquittal, his suit was not time barred.

On the issue of the notice, the plaintiff produced a copy of a letter dated 12th April 2011 addressed to the Attorney General headed Notice of Intention to sue . There is no particular format of notice provided under the Government Proceedings Act. In *Grace Ndegwa & Others vs. Hon. Attorney General* Civil Appeal No. 228 of 2002 the Court of Appeal expressed itself as follows:

“As clearly spelt out in section 72 of the Interpretation and General Provisions Act Cap 2 Laws of Kenya, in a case where a form is prescribed by written law, all instruments or documents which purport to be in that form shall not be void by reason of a deviation from the form if the same document does not affect the substance of the document or is not calculated to mislead. The courts have a duty to look into the spirit of the document and whether the document served its purpose”.

In this case there is a notice that substantively complies with the requirements and there is a letter dated 20th April 2011 acknowledging the receipt of the notice.

The next issue is whether the plaintiff was arrested and charged. The plaintiff has given evidence on oath how he was arrested while taking tea and taken to Kilimani Police Station and later arraigned in Court. He has produced a certified copy of part of the proceedings. No contrary evidence has been adduced to controvert the fact of his arrest and arraignment in court. Accordingly, I find on a balance of probability that the plaintiff was arrested and charged in the said Criminal case.

The next issue is whether the criminal proceedings were instituted by or on behalf of the defendants. Again apart from the plaintiff's evidence there is no evidence at all showing on whose behalf the criminal charges were instituted. Whereas the charge sheet indicates the name of the complainant as **Peter Kirimi Muinde** there was no evidence whether there was any such complainant in the first place. The plaintiff's evidence that he did not know such a person remained wholly unchallenged. In the absence of any evidence of the existence of the complainant, the Court based on the evidence on record finds that the criminal proceedings were instituted on behalf of the defendants.

The next issue is whether there was reasonable cause and/or justification to make the complaint to the police. Reasonable and probable cause has been defined to mean the existence of facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified. As was said in **Kagame's Case** (supra) 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 which 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. To constitute reasonable and probable cause therefore 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. In this case, the information that was received, if any, is unknown to the Court. Whether this information was ever considered before the plaintiff was arrested and charged is also unclear. 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”.

Without any evidence emanating from the defendants on how the decision to arrest and charge the plaintiff was arrived at the Court has no option but to find that there was no probable and reasonable cause.

The next issue is whether or not the said prosecution was actuated by malice. 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 the burden of proving that the prosecutor did not act honestly or reasonably being 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 the present case as already held hereinabove the circumstances from which the court can deduce that the arrest and arraignment of the plaintiff was probably justified have not been disclosed to the court. Was for example the plaintiff's version sought with regard to the complaints, if any, made against him? In the absence of any evidence as to the facts and circumstances upon which the defendants relied, the court can only conclude that there was no probable and reasonable cause for charging the plaintiff and that constitutes malice for the purposes of the tort of malicious prosecution.

The next issue is whether the criminal proceedings terminated in the plaintiff's favour. There is no doubt that the criminal proceedings were terminated in favour of the plaintiffs. 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. Accordingly the withdrawal of the case under section 87A of the Criminal Procedure Code without further charges being brought amounts to termination in favour of the accused for the purposes of malicious prosecution. See **Egbema vs. West Nile Administration** (Supra).

Having found that the plaintiff was maliciously prosecuted the next issue is whether the defendant is liable to compensate the plaintiffs and if so what should be the award of damages. The plaintiff's uncontested evidence is that he was kept in custody from 25th January 2010 when he was arrested till 7th September 2010 when he was released. It is true that detention resulting from a Court order does not amount to false imprisonment. See **Katerregga vs. Attorney-General Kampala [1973] EA 287**.

However, it was held in the Uganda case of **Dr. Willy Kaberuka vs. Attorney General Kampala HCCS No. 160 of 1993** 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”.

The mere fact that the plaintiff was released on bail but was unable to meet the bail terms is no excuse. If the defendants put into motion a wrongful legal process that leads to the plaintiff being deprived of his freedom due to the plaintiff’s ability to meet the bail terms the defendant must be responsible for the consequences of his action. Accordingly I find that the 2nd defendant is liable to compensate the plaintiff in damages for malicious prosecution. The reason why the finding is only against the 2nd defendant is due to the fact that 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. 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 provides 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 is in my view inappropriate to join both the Commissioner of Police and the Attorney General 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 for determination is the quantum of damages. The plaintiff claims general and punitive damages as well as loss of business. With respect to loss of business as the documents relating to the financial statements of the plaintiff were not admitted in evidence there is no basis upon which an award under this head can be awarded. With respect to punitive or exemplary 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.

On general damages, 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, the status of the plaintiff, the age of the said awards as well as the period spent by the plaintiff in custody, I award the plaintiffs Kshs 800,000.00 general damages

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 plaintiff is accordingly

awarded the costs of this suit.

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

(a). Kshs 800,000.00 general damages.

(b). Interest at court rates from the date of this judgement till payment in full.

(c). Costs of the suit.

Dated at Nairobi this 7th day of February 2013

**G V ODUNGA
JUDGE**

Delivered in the presence of Miss Nyamolo for the Plaintiff