REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 23 of 2008

SAMSON JOHN NDERITU.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL.....DEFENDANT

JUDGEMENT

The plaintiff moved to this court, by way of a plaint dated 6th day of February 2008 and filed on the 7th day of February 2008. The main complaint in the same is that on the 18th day of June 2001, the defendant maliciously and without reasonable and probable causes preferred charges against the plaintiff of robbery with violence, contrary to section 296 (2) of the penal code and in the alternative, charged with handling suspected stolen property contrary to section 322(2) of the penal code, causing the plaintiff to be arrested and incarcerated at the remand prison for the entire period of the case.

The particulars of the false arrest, imprisonment and malicious prosecution have been given in paragraph 3 of the plaint as:-`

(a) The arrest was based on an substantiated report and rushed to detain the plaintiff before conducting any investigations.

(ii) The police later charged the plaintiff.

(b) The prosecution case was full of contradictions and the same fell below the required standards of proof.

(c) Him plaintiff was wrongly and unlawfully detained in police cells for two years, for an offence that never was as he was later discharged.

(d) The police failed to conduct sufficient investigation.

(e) The plaintiff was maliciously and without reasonable and justifiable cause committed to the high court, for trial which ended in an acquittal in his favour.

- Contends that by reason of the said prosecution, the plaintiff suffered in his reputation, suffered pain of body and mind,

and was put to considerable trouble, inconvenience, anxiety and expense and he suffered loss and damages.

In consequence thereof, the plaintiff prayed for the following reliefs:-

(a) Special damages arising from cost and expenses incurred in connection with the said prosecution to be proved at the hearing thereof.

(b) General damages for false imprisonment and malicious prosecution.

(c) Costs and interest.

(d) Interest in (a) (b) above.

The defence put in a defence dated 3rd April 2008 and filed on the same 8th day of April 2008. They put forward 2 defences.

- That they deny each and every allegation in the plaint save the one relating to the description of the parties.
- Assert that the suit is barred by the statute of limitation more particularly cap 39 laws of Kenya and contend that if any leave was given to file the suit out of time, then the same was irregular. By reason of the said assertion the defendant's contention is that the courts jurisdiction is limited.

The plaintiff was the sole witness herein. The sum total of his evidence is that he recalled while resident in Eldoret, a lady came and kept a paper bag in his house, whose content he did not know and he did not bother to check. The lady later on came with police and asked for the paper bag which the lady took from the sport where she had left it. It transpired that inside the paper bag there was some money in the said paper which was counted and PW1 told to write a note stating that the money had been taken from him. After doing so, the police told him that they were taking him along which they did. He was taken first to Pangani police station and locked up in the cells for one weak, then moved to centrol police station and also locked up for one weak and then informed that he was going to be charged with the offence of robbery with violence. The police then recorded statements from him and took his finger prints. A week later, he was taken to court and charged jointly with 9 other people whom he did not know with the offence of robbery with violence. Something he knew nothing about. All he knew was that the paper bag had been taken to his house by a certain lady and those details are what he recorded in his statement. It is his testimony that he was never taken to any identification parade in connection with the said robbery with violence.

At some point in time, a nole prosequit was entered in his matter, but they were later recharged with the same offence before Kibera court. The trial took over 2 years. The plaintiff was in court throughout, attended all the proceedings, witnesses gave evidence but none either mentioned him or put questions to him. He was later discharged under section 210 CPC due to lack of evidence.

He became aggrieved and moved to this court, seeking redress because:-

(i). He was not involved in the commission of the alleged offence or offences.

(ii). No investigation was ever carried out to link him to the offence before a decision was taken to have him

prosecuted.

(iii). It is his testimony that the prosecution was malicious because if they had carried out investigations they would not have had him prosecuted.

His reputation suffered as he was called a thief, he stayed in remand for long and contracted aliments. His wife changed her attitude towards him and lost respect and reputation in a church he was a founder member in. He produced the charge sheet as well as the proceedings and judgement as exhibits. It is his testimony that he was not aware that he could sue the government for wrong done to him. He learned of this through the radio and that is when he engaged counsel to issue notice and then file these proceedings on his behalf.

When cross examined, the witness stated that it is correct that he was released from prison and the proceedings in June 2003, but did not know that he could sue the government for damages. He learned of this later on and that is when he instructed counsel to file proceedings on his behalf, first to seek leave to file suit out of time and secondly present these proceedings after obtaining necessary leave that he was prevented by reason of sickness also for not presenting the application in time. It is his evidence that the reason for failing to present the case in time was because of sickness and ignorance.

At the close of the entire case counsel for the plaintiff filed written submission and the points raised by them are as follows:-

1. The defence raised the issue of limitation under the public authorities Act cap 39 laws of Kenya, but called no evidence to back up that assertion and the same ruled upon.
2. The issue should have been argued and ruled upon before the trial, and since the same was not raised and the trial concluded, the same should be taken as an acquiescence on in the proceedings which cannot be attacked through submission.
3. on the issue of limitation may it be the limitation of actions Act or the limitation offered to the state by the provisions of cap 39 laws of Kenya, these were extensively explored and ruled upon by Waweru J whose decision has not been upset and as long as that ruling stands, the plaintiff is properly before the seat of justice.
4. By reason of what has been stated in number 3 above there is no serious challenge to the leave granted to file suit out of time.
5. That on the fact which are unchallenged as tendered by the plaintiff, there was no justification for arresting and arraigning the plaintiff in court. As such, the court, is urged to find that the defendants action was malicious and without any justification as the police acted on an unsubstantiated report and rushed to arraign the plaintiff in court, before conducting any proper investigation, before charging the plaintiff, the prosecution ended in favour of the plaintiff who was unlawfully detained in the police

cells for over 2 years and held to account for an offence that never was, according to him.

6. They contend that they have satisfied the ingredients for malicious prosecution in that they have demonstrated by reason of documentary as well as oral testimony in court that

(a) He was prosecuted;

(b) The prosecution was determined in his favour.

(c) That the same was without any reasonable or probable cause as no evidence has been tendered by the defence to justify the said prosecution.

(d) By reason of what has been stated in (c) above, the said prosecution can be said to have been malicious. This is further confirmed by the fact that no evidence was adduced against the plaintiff during the trial.

7. The court, is called upon to find that the plaintiffs' case is uncontested as the defence put forward is one which is a general denial and the only issue raised by them dealing with limitation was dealt with by the ruling of Waweru J and the same cannot be raised here more so when the leave has not been challenged.

8. On quontum, they rely on the case law cited, and the court is urged to allow Kshs. 2,000,000.00 as damages for false imprisonment and Kshs. 3,000,000.00 as damages for malicious prosecution.

The defendant also put in written submissions dated 23rd February 2009, and filed on the 27th day of April 2009, and the major points stressed by them are as follows:-

- That the A.G gave notice vide paragraph 4 and 5 of his defence that the suit was time/statute barred and therefore not sustainable and as such the courts' jurisdiction was limited to the determination of the sustainability of the suit
- Section 3 (1) of the public Authorities limitation Act cap 39 laws of kenya states specifically that suits found edon tort have to be presented to court within 12 months from the date of accrual where as the proceedings herein were presented to court nearly 4 years after the event.
- That in an attempt to remedy the delay, the plaintiff moved the court, ostensibly on the basis of injury and ignorance of the law.
- It is their stand that leave to file suit out of time should be supported by evidence.
- That since leave to file suit out of time is usually exparte, then challenge to the granting of that leave can only be done at the trial.
- That they rely on the case law cited chunned out by the law Lords of this jurisdiction which has demonstrated that in order for any grant of leave to file suit out of time to stand, the following must be present:-

(i). Leave to file suit out of time can only issue upon plausible reasons for the delay being proffered.

(ii). The said plausible reasons should conform with the stringent provisions of the relevant statute, and

(iii). Once leave issues, it can only be challenged at the hearing of the main suit.

(iv). That the reasons advanced by the plaintiffs at the time of seeking leave was injury and ignorance of the law. The excuse of injury does not hold because by his own testimony the plaintiff was unwell but was concious at all times, and never suffered any disabilities or malady that could have rendered the knowledge of the accrual of the cause of action outside his knowledge. For this reason, the injury that the court adopted at the trial of the exparte application for leave is not the one envisaged by the provisions of law relied upon.

(v). That as regards the issues of ignorance of law, this has been settled by the CA in the case law, cited to the effect that ignorance of the law is not one of the material facts envisaged by section 30 of the limitation of actions Act.

For the reasons given above the defence contended that the plaintiff stands non suited and as such there is no reason to go into the issue of quantum.

On case law the counsel for the plaintiff referred the court, to the case of **MURUNGA VERSUS THE ATTORNEY GENERAL (1979) KLR 138** where it was held interalia that:-

In proceedings for malicious prosecution, the plaintiff must show

1. *That a prosecution was instituted by the defendant or by someone for whose acts he is responsible,*
2. *That the prosecution terminated in the plaintiffs' favour,*
3. *That the prosecution was instituted without reasonable and probable cause, and*
4. *That it was actuated by malice.*

The test whether the prosecution was instituted without reasonable and probable cause is whether the material known to the prosecutor would have satisfied a prudent and cautious man that the plaintiff was probably guilty of the offence.

The case of **ZABLON MWAUMA KADORI VERSUS NATIONAL CEREALS AND PRODUCE BOARD MOMBASA HCCC NO. 152 OF 1997** decided by D.K. Maraga on the 29th day of July 2005.

At page 1 of the judgement, there is mention that the action was one for damages for malicious prosecution. On the same page, there is mention that the defence had put in a defence denying that it maliciously prosecuted the plaintiff and that the criminal proceedings were instituted by the attorney general after reasonable cause was established and that the defendant's role in the matter was bonafide and without malice. Further denied that the dismissal was unlawful and that the same was lawful, proper and procedural and after the notice was issued in compliance with the relevant regulations and the law. At page 2 line 5 from the top, the learned judge noted that the defence had agued that the arrest and the prosecution of the plaintiff was done by the state and the defendant had nothing to do with the same and further that the plaintiff in this case was flagging the wrong horse in response to that arguments the learned judge had this to say:-

" I cannot accept this argument. The defendant did not have, by its own officers to conduct the prosecution in order to be held as having instituted the proceedings. It is enough if it can be shown that it was actually instrumental in putting the law in force……"

At page 2 line 11 from the bottom the learned judge quoted with approval the decision in **HICKS VERSUS FAWKNER (1878) 8 Q.B.D. 167** at page 171 on reasonable and probable cause thus:-

"*Reasonable and probable cause is an honest belief in the guilt of the accused, based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would 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"*

On the same page there is quoted with approval, the decision in **KAGANE VERSUS ATTORNEY GENERAL AND ANOTHER (1969) EA 643** that:-

"*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 the 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 ordinary man to the extend of believing that the accused is probably guilty.*

At page 4 the learned judge made observation that he had come to the conclusion that the defendant was liable to the plaintiff in damages for malicious prosecution.

The learned judge drew inspiration from the decision of **ODONGO VERSUS ATTORNEY GENERAL HCCC NO. 1959 OF (1997) LLR 484 (HCK)** where Hayanga J as he then was, gave an award of Kshs. 150,000.00 as damages for malicious prosecution, and **NJUGUNA VERSUS ATTORNEY GENERAL AND OTHERS NAIROBI HCCC 2007 OF 2001 (2001) LLR 4948 (HCK)** where Ransley J as he then was gave an award of Kshs. 300,000.00 for malicious prosecution and Ksh.500,000 as punitive Damages.

The case of **SAMUEL MUCHIRI W. NJUGUNA VERSUS THE ATTORNEY GENERAL AND 6 OTHERS NAIROBI HCCC NO. 838 OF 2003** decided by Ojwang J on the 26th day of November 2004. At page 31 to 32 line 2 from the bottom, the learned judge made the following observations:- *"……the show of strength which the police under the charge of inspector Mathenge made at the plaintiffs Karen home, was an abuse of the instrument of state power, was illegal, was in bad faith and could well have been a demonstration of malice against the plaintiff. Bad faith by the police in the arrest and prosecution of the plaintiffs is further shown in the attempt, once they realized the law and the evidence were against them, to withdraw the charge without any explanation of their decision, but even then to seek to withdraw it under section 87 of the civil procedure code, so that they would continue to hold the plaintiff on a short leash with the threat reversed, that they could arraign him in court again. The learned senior principal magistrate did see through this mischief and acquitted the plaintiff out right under section 202 of the civil procedure code.*

The defendants on the other hand referred the court, to the case of **WECON LIMITED OTHERWISE KNOWN AS – CONTRACTORS LIMITED VERSUS SIRIKHANU SADRUDIN SAMANI NAIROBICA NO. 142 OF 1997** decided by the CA on 17th day of February 1998. The brief facts at page 1 reveals that "*the accident was on 11th June 1983, but it was not until on the 23rd day of February 1990 when the applicant was sued. Leave to file suit was granted 3 years after the accident.*

At page 4 line 8 from the bottom, it is observed that:- *" the respondents only reason for not instituting proceedings against the applicant in time was that she was an illiterate old woman and as she put it "not conversant with my rights under the law reforms Act cap 26 or any other provisions that safeguard my interests and rights"*. At page 5 line 7 from the bottom it is observed that:

"*We on our part, have no difficult, in holding that ignorance on the part of the respondent of the statutory period of limitation is not a material fact as defined in section 30 of the Act.*

At page 6 line 11 from the bottom there is observation made that:-

The grant exparte, of the extension of time within which the respondent could bring her action was challenged in the applicants pleadings and in the submissions made on its behalf during the trial. But the learned judge of the superior court, held that leave to extend time for the respondent to bring her actions had been properly sought and the same has now been justified.

At line 1 from the bottom:- "*that a judge can in a trial consider and accept or reject the exparte order granted by another judge for extension of time under the Act.*

The case of **THURANIRA KARAURI VERSUS AGNESS NCHECHA NYERI CA NO. 192 OF 1996**. At page 3 line 5 from the top it is observed thus:-

"*The plaintiffs answer to the defendant's plea that the claim was time barred was that she has obtained the necessary extension from the superior court……"*

The case of **CRISPINNES NGARI AND ANOTHER VERSUS CHURCHIL ODERO KISUMUCA 233 OF 1998** decided on the 26th day of November 1999. In this case, the defendant raised objection to the plaintiffS' suit because it was time barred. At page 3 line 1 from the top there is observation that although the issue of limitation was raised in the defence, the learned judge of the superior court, made no findings on the same.

At page 4 the Law Lords of the Court of Appeal set out the provisions of sections 27 (2) and 28 (2) of the limitation of actions Act and then went on to make the following observations:-

"It can be seen straight away that the requirement of the two sections of the Act are stringent. If the court, is satisfied on the evidence before it that the said requirements are met it has no option but to grant the application. If those requirements are not met the court, must reject the application"

At page 5 line 9 from the bottom, the learned judges of the CA went on to state:- *"The judge has to be satisfied that the requirements of the three sections of the Act are satisfied before he proceeds to grant such leave"*

At page 7 line 11 from the bottom they went on thus;-

"It bears repetitions to state that all facts of adecisive character were fully known to both the next friend and Mr. Kasamani and that therefore the application for extention of time was an abuse of the process of the court, and such action cannot be countenanced by this court. The upshot of this, is that, leave to file suit notwithstanding that the three year limitation period had expired, was wrongly granted. This appeal must therefore be allowed with costs, with the result that the judgement of the superior court, is hereby set aside and substituted with an order dismissing the Respondents' suit in the superior court with costs"

There is also the case of **MARY OFUNDWA VERSUS NZOIA SUGAR COMPANY LIMITED KISUMU CA NO. 244 OF 2000**. The brief facts are that, the action of the appellant was based on a contract allegedly entered into in 1983. The action for a remedy was filed in 1990. A consent was entered on the application for leave to file suit which was presented in the suit, which had already been presented to court. The motion sought an order to have the suit to be deemed to be duly filed and the validation order to take effect retrospect fully to the filing which order was granted by consent by the superior court. On appeal at page 2 of the judgement, the learned Low Lords set out the provisions of section 27 of the limitation of actions Act, and then at line 9 from the bottom made observation that:-

"*This section clearly lays down the circumstances in which the court, would have jurisdiction to extend time. The action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort. The section does not give jurisdiction to the court to extend time for filings suit in cases involving contract or any other causes of action other than those in tort. Accordingly Osiemo J had no jurisdiction to extend time as he purported to do on 28th May, 1999. That the order was by consent can be neither here nor there, the parties could not confer jurisdiction on the judge by their consent"*

On the courts, assessment of the facts herein, it is clear that there are certain aspects of the case which are not in dispute, namely:-

1. That indeed the plaintiff herein was arrested by state Agencies and incarcerated and later charged in court with a criminal defence.
2. That the prosecution ended in his favour as he was discharged under section 210. Procedure of the criminal procedure code.
3. That upon release from custody, the plaintiff did not present his claim within the time stipulated for presentation of claims against the state.
4. That the Attorney General has been sued on behalf of the state.
5. That indeed the plaintiff realizing that he could not present his suit out of time without leave of court,

duly filed Nairobi HCCC MISC Application No. 490 of 2007 seeking leave of court, to file suit against the Attorney General out of time, which leave was granted hence the filing of the current proceedings.

6. It is common ground that the said application for leave was heard exparte and granted exparte. That case law from the court of Appeal cited herein stipulates that challenge to leave so granted is to be taken at the hearing in the main suit filed.
7. That though the Attorney General pleaded in his defence that the plaintiff was non suited, the point was not taken up as a preliminary point before commencement of the trial and this being the case, it means that this technical point has to be ruled upon before the merits of the case, because if upheld, then there will be no need for the court, to go into the merits of the case.
8. It is also to be noted that it is common ground that the Attorney General, has not tendered any evidence to dispute the arrest, prosecution and acquittal of the plaintiff in the criminal proceedings. They did not also appeal against that acquittal. They have placed reliance on the limitations law to resist the plaintiffs claim.

As mentioned, there is no dispute that the plaintiffs' claim against the defendant is affected by the limitation laws and that is why he sought leave to file suit out of time, which leave the defence asserts in their submissions is in consequential.

This court has been taken through a number of court of appeal decisions already cited on the record, on the pre-requisites for granting of such leave. Some of the guiding principles that this court, has to bear in mind when disposing off the issue of the validity or on validity of the leave granted are as follows:-

1. Application for such leave is usually exparte.
2. Though usually made and granted exparte, it should not be granted as a matter of course. The court, seized of the matter has to inquire as to the reasons advanced for seeking the said leave and be satisfied that the reasoning satisfies the ingredients set by the relevant provisions in the limitation of Action Act cap 22 laws of Kenya for granting the same, and then record reasons as to why the judge thinks those pre-requisites have been satisfied.
3. That the opposite party, has a right to attack the granting of the said leave, even on appeal.

The leave which paved the way for the filing of this suit was granted by Waweru J in a ruling delivered by Waweru J dated 22nd day of January 2008, and read on the 25th day of January 2008 which was produced by the plaintiff as exhibit 4. This court, has revisited the same, and finds that the learned judge noted that as at the time the application for leave was being heard, the plaintiff/applicant was about 3 ½ years out of time and that this was contrary to section 3 (1) of the public Authorities Limitation of Actions Act cap 39 laws of Kenya. At page 29 of the said ruling the learned judge demanded of the applicants counsel demonstration that the clients cause of action falls within those envisaged by

section 27 (1) (b) of cap 22, especially questions as to whether damages in respect of personal injuries include damages for unlawful arrest, false imprisonment and malicious prosecution. Then interrogated the definitions and found that in Blacks Law Dictionary 8th Edition "***Injury"*** includes violation of ones legal rights for which the law provides a remedys a wrong or injustice. ***"As for person injury" the definition covered "Any invasion of a personal right including mental suffering and false imprisonment"***

At page 3 of the ruling the learned judge went on to quote with approval a passage from Clark and Lind sell (Indsel) on Torts 16th Edition chapter 19 paragraph 19-02 on the topic "**nature of damages thereby caused** (that): "*An abuse of the right to put the law into motion may of necessaty be injurious as involving damage to character or crime in any particular case bringing about damage to person or property. There are according to Holt CJ three sorts of damage to a plaintiff, any one of which is sufficient to support an action of malicious prosecution. First damage to his fame if the matter thereof he be accused be scandalous. Secondly to his person, whereby he is imprisoned. Thirdly to his property, where he is put to charges and expenses"*

After due consideration of those definitions of the terms ***"injury"*** and "***personal injury"*** the learned judge was satisfied that damages in respect of personal injuries include damages for unlawful arrest, false imprisonment and malicious prosecution.

Upon so establishing that the complaint of the plaintiff/applicant fell within the type of injuries covered by section 27 of the limitation of Actions Act cap 22 laws of Kenya, the learned judge went onto inquire whether the explanation given for the delay satisfies the requirements of section 27 (2) of the same Act. Due consideration was made by the learned judge of the content of paragraph 8 of the supporting affidavit whereby the applicant had deponed that "*he was not a aware of his rights until a programme was aired on the electronic media about the right to sue the government on account of violation of ones right.* Then at the same page 4 line 13 from the top the court had this to say:- "*Does this satisfy the requirement that the applicant do prove that material facts relating to the cause of actions were or included facts of a decisive character which were at all times outside his knowledge actual or constructive?. I think the fact whether or not one has a cause of action is one of a decisive character given the state of legal awareness, or lack of it in the general population in our country today, it is not surprising that the applicant did not know that he had a cause of action against the government.*

I am also satisfied that there is evidence before the court, that if the intended action had been brought in time, and such evidence, adduced, the same would in the absence of any evidence to the contrary, be sufficient to establish the cause of action apart from any defence of limitation". On that note, the learned judge found that sections 27 and 28 of cap 22 had been satisfied and on that account granted the applicant leave to file suit out of time.

From the above reasoning of the learned judge, it is clear that the following were and still stand demonstrated in favour of the plaintiff:-

1. That he has a genuine complaint that legal right was infringed by malicious prosecution and false imprisonment.
2. That he did not know that it was within his right to sue the government for the infringement of the said legal right.
3. That considering the prevailing circumstance in this nation of ours namely Kenya concerning legal awareness what the plaintiff was asserting was not remote.
4. That besides, the plea of limitation there is evidence to support the infringement of the plaintiffs legal right.

As mentioned when setting out the un disputed aspect of the case, the state does not dispute the infringement of the plaintiffs legal right. All they rely on is the plea of limitation. The question to be determined by this court, is whether that plea of limitation ousts the plaintiffs right to seek redress to an infringed legal right in the absence of that plea having been taken up as a preliminary point before trial and in the absence of evidence being tendered by the state to justify the infringement of the plaintiffs legal right whether the state can get away with it. This will be determined by the courts construction of the legal provisions under which the state through the office of the Attorney General moved to arrest, incacerate and prosecute the plaintiff. This is none other than section 26 of the constitution of Kenya. This reads:-

"*Section 26 (1) there shall be an Attorney General whose office shall be an office in the public service.*

(2) The Attorney General shall be the principal legal adviser to the government of Kenya.

(3) The Attorney General shall have power in any case in which he considers it desirable so to do.

(a) To institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed by that person.

(b) To take over and continue any such criminal proceedings that have been instituted or undertaken by another person or authority; and

(c) To discontinue at any stage before judgement is delivered any such criminal proceedings instituted or undertaken by himself or another person or authority.

(4) The Attorney General may require the commissioner of police to investigate any matter which in the Attorney Generals opinion, relates to any offence or alleged offence or suspected offence and the commissioner shall comply with that requirement and shall report to the Attorney General upon the investigation.

(5) The powers of the Attorney General under subsections (3) and (4) may be exercised by him or by officers subordinate to him acting in accordance with his general or special instructions.

(6) The power confered on the Attorney General by paragraph (b) (c) of subjection (3) shall be vested in him to the exclusion of any other person or authority.

Provided that where any other person or authority has instituted criminal proceedings, nothing in this

subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the court.

(7) For the purposes of this section an appeal from a judgement in criminal proceedings before any court on a question of law, reserved for the purposes of those proceedings to any other court, shall be deemed to be part of those proceedings.

Provided that the power conferred on the Attorney General by subsection (3) (c) shall not be exercised in relation to an appeal by a person convicted in criminal proceedings or to a question of law reserved at the instance of such a person.

(8) In the exercise of the functions vested in him by subsection (3) and (4) of this section and by section 44 and 55, the Attorney General shall not be subject to the directions or control of any other person or authority"

This court, had occasion to rule on a similar situation in its ruling delivered on the 15th day of August 2008 in the case of **SAMUEL CHEGE GITAU AND 20 OTHERS VERSUS THE ATTORNEY GENERAL NAIROBI HCCC NUMBER 548 OF 1995**. At page 1-6 of the said ruling, it is on record that the Attorney General was challenging the granting of leave to the plaintiffs to file suit out of time case law on the subject are discussed at pages 5-9. At page 9 line 3 from the bottom, it is observed that the action therein had been presented a period of 10 years later. At page 13 line 5 from the bottom, the court, was informed that the issue in the said own decided ruling had arisen in the matter during an application to join other parties to the suit and Ojwang J ruled on the same ruling the objection.

At page 29 of the said ruling, line five from the bottom the court made the following observations:-

"*This will call into play consideration as to whether limitation laws can deny a litigant the exercise of his/her right to access justice. And secondly whether the defendant as a representative of the state, can also take refuge under the limitation laws to escape its responsibility to its citizen so far as guaranteeing them due process in the right to disciple them and or withhold the citizens right to earn a living within its borders"*

At page 30 line 1 from the top, this court, went on thus:-

"Under the constitutional veil, access to justice falls under what has became popularly known as basic human rights recognized by the state. At the national level there is section 77 (9) of the Kenya constitution which provides thus:-

"*A court or other adjudicating authority prescribed by law, for the determination of the existence or non existent of a civil right or obligation shall be established by law, and shall be independent and impartia*l *and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time"*. There is no mention that the exercise of that right is subject to the claim not being time barred, or that such a claim is subject to success by the law affecting them.

Section 3 of the Kenya constitution provides:- *This constitution is the constitution of Kenya and shall have the force of law, throughout Kenya and subject to section 47, if any other law is inconsistent with this constitution, this*

constitution shall prevail and the other law shall to the extent of the consistence be void. " This means that should the court, rule that the right of a litigants' access to justice for purposes of litigation is superior to limitation laws, then that holding will prevail irrespective of whether the conditionalities required to be met by a litigant in section 27, 28 and 30 of cap 22 laws of Kenya shall have been met or not."

At page 35 under item 4, this court, went on thus:-

" (4) the 4th fold was simply to demonstrate that when it comes to matters of litigation, where a state is involved as a party it stands on equal footing before the seat of justice. It does not enjoy any privileged position and in this courts', opinion, it is entitled to be called upon to justify its actions to the plaintiff. In other words, the right to be heard and be refuge under the limitations laws to block the plaintiff claims"

This court, also revisited this issue in a judgement delivered by this court, on the 18th day of December 2008 in the case of **AFRICAN COMMUTER SERVICES LIMITED VERSUS THE ATTORNEY GENERAL AND THE KENYA CIVIL AVIATION AUTHORITY NAIROBI HCCC NO. 1208 OF 2003**. At page 278 of the said judgement this court, set out the provisions of section 26 of the Kenyan constitution which reads:-

"*Section 26 there shall be an attorney general whose office shall be an office in the public service.*

(2) The Attorney General shall be the principal legal adviser to the government of Kenya"

Line 8 from the top this court, made the following own construction of the said provision:-

"*In this court's, own construction of that provision, the intention of the legislature in creating the Attorney Generals' office as a public office under subsection 1 and then making it as the chief legal advisor to the Kenya government under subsection (2) was to create a double role in the said office, one for looking after the public good of the entire nationals of Kenya, and whatever is for its benefit, and then advise the government appropriately. It was never intended to create an institution whereby if a citizen of this country either by himself or herself in his/her human form, or through a jurisdic person pitches himself/herself/itself in a legal battle against the state or vice varsa, the office of the Attorney General was to provide its shoulders for the government and its institutions to perch themselves on, or its bossom for any to hide in, to the detriment of the weaker party. In such circumstances, the Attorney General is expected to come out and play its double role both as defender of the government interests, and protector of the citizens' rights. Indeed, it is trite and this court, has judicial notice of the fact that it is a states right to require its citizens to obey the laws, established and comply with the organizational structures established for the common goal of the entire nation and where breaches allegedly occur, the state is entitled to take appropriate action to remedy the situation also for the common good, which remedy include punishing those committing breaches. There is however in this courts', view a corresponding state responsibility to that right which requires the action taken by the state against its citizens to be responsible, not harsh, selective, excessively punitive or bordering on impunity"*

At page 279, this court, cited with approval and associated itself with the decision of Ojwang J in the case of **B**

VERSUS ATTOENEY GENERAL (2004) IKLR 431 where the learned judge held interalia that:-

"The Attorney Generals office is the state law office, a core instrumentality of the process of legality in the conduct of the business of the government of Kenya. Not only is the office expected and required to assist the court, in upholding the supremacy of the law in Kenya, it is required to advise all departments of government and all ministries competently if not efficiently and in good faith on the correct path of decision making in compliance with the law of the land"

Applying that reasoning to the facts of this case, the court, is of the opinion, that it still holds the same opinion that the office of the Attorney General plays a double role of catering for the interests of both the state and its citizens. This double role enjoins the office of Attorney General to ensure that it exercise care and fairness in its handling of the citizens. It therefore follows that where a court of law is of the opinion that the office of the Attorney General abdicated its role towards the citizen and infringed a citizens right with impunity and then hope not to face the consequences of the actions of its officers by hiding under the limitation laws. The facts of this case falls into the category of cases whereby the defendants agents who arrested the plaintiff for no apparent reason, had him incarcerated, held in remand for a prolonged period never gave evidence against him for any offence never appealed against the acquittal decision, have not tendered evidence in the civil proceedings to justify their action, cannot be allowed to trample upon the plaintiffs rights with impunity. Waweru J was therefore right, in allowing the plaintiff leave of court, to file suit out of time. As observed, by this court, earlier on, the applicants right to access the seat of justice and get an effective remedy ranks paramount to limitation laws, especially when the guiding principles gathered from the case law emanating from the CA which crystallizing the law on the subject did not address the issue of the superiority or otherwise of the constitutional right of access to justice, right to an effective remedy, duty to face consequences for acting with impunity in trampling on other peoples rights.

Having established that the plaintiff is entitled to a remedy, and that leave to apply to file suit out of time was properly granted, the court proceed to assess the damages. The first head of damages to be assessed is the head of special damages. It is now trite law that this head of damages has to be pleaded, particularized and then proved see the case of **OUMA VERSUS NAIROBI CITY COUNCIL (1976) KIR 297**, The case of **SIREE VERSUS LAKE TURKANA ELMOLO LODGES LIMITED (2000) 2EA (CAK**). Applying the principles in the above quoted cases to the plaintiffs pleadings on the special claims herein, the court, is of the opinion that it does not satisfy the ingredients for establishing the same namely:-

"Pleading, particularization and proof." Herein though pleaded, the claim was not particularized and proved by production of documentary proof.

As regards the second claim of general damages for false imprisonment, and malicious prosecution, the case law on the subject is already set out herein, it is clear that in order to succeed on this head, the plaintiff has to bring his claim within certain ingredients that need to be established namely:-

1. That a prosecution was instigated by the defendant or by some one for whose acts he is responsible.
2. That the prosecution terminated in the plaintiffs favour
3. That the prosecution was instituted without reasonable and probable cause
4. That it was actuated by malice
5. The test whether the prosecution was instituted without reasonable and probable cause is whether the material known to the prosecution would have satisfied a prudent and cautious man that the plaintiff was probably guilty of the offence.

Due consideration has been made by this court, of those ingredients, and applied them to the facts herein, and the court is satisfied that these have been satisfied for the following reasons-

1. Exhibits 1, 2, and 3 demonstrate that indeed the plaintiff was arrested and arraigned in court, of some offences he had allegedly committed.
2. The prosecution tendered witnesses whose testimony never mentioned any wrong doing on the part of the plaintiff
3. It is trite and this court, has judicial notice of the fact that before an accused person is taken to court, and arraigned in court for criminal prosecution, the prosecuting authority namely the police of whatever unit, whose functions fall under the office of the defendant, usually carry out investigations, record statements from potential witnesses, analyze the facts to determine if the facts disclose an offence before arraigning such a person in a court of law. The assumption is that the same was followed before arraigning the plaintiff in court. Looking at the testimony given by the witnesses in the lower court, any prudent man analyzing those facts would have come to the conclusion that there was no offence disclosed against the plaintiff. It therefore follows that by the defendants agents proceeding to arraign the plaintiff in court, on the basis of no tangible evidence being disclosed against him, leave this court, to draw no other conclusion than to rule that the conduct of the concerned officers leave no doubt that the whole exercise was malicious and the lower court, rightly terminated the prosecution proceedings in favour of the plaintiff that they acted with impunity.

Having established the ingredients for damages for malicious prosecution, the court moves to assess the amount of damages payable. The guiding principles that this court, has judicial notices of a the yardstick to be used by the court in an assessment of damages are as follows:-

1. An award of damages is supposed to compensate the victim and restore him or her in the position they were in before the injury was occasioned.
2. It is not meant to enrich a victim.
3. Each case depends on its own set of facts
4. Damages should be commensurate to the injury suffered.

5. They should not be inordinately too low or too High.
6. The assessment is a matter of judicial discretion on the part of the court, which judicial discretion has to be exercised judiciously and with reason and within the applicable principles
7. If past awards are to be considered, these are to be taken as mere guides as leach case has to depend on its own set of facts.
8. Where past awards are taken into accounts, as in number 7 above, an account of inflation and the strength of the Kenyan shelling has to be taken into consideration.

On quontum the court, was requested to be guided by case law cited by the plaintiffs counsel. In the case of **ZABLON MWALUKA KADORI VERSUS NATIONAL CEREALS AND PRODUCE BOARD (SUPRA)** when assessing damages the learned judge, Maraga J took into consideration the following:-

At page 2 of the judgement line 11 from the bottom the learned judge took note with approval of the case of **HICKS VERSUS FAWKNER (1878) 8Q BD** which defined reasonable and probable cause as hereunder:-

"*Reasonable and probable cause is an honest belief in the guilt of an 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 placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed*.

On the same page 2 the learned judge also quoted with approval the case **of KAGANE VERSUS ATTORNEY GENERAL AND ANOTHER (1969) EA 643** thus:-

"*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 the facts discovered by the prosecutor or information which has cause 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"*

When the learned judge applied the said ingredients to the facts before him he made observations at page 3 that:- "*He was satisfied that the defendant knew that the plaintiff and those charged with could not and did not steal the gunny bags, the defendant knew that the person who stole the gunny bags must have been one of those who had the keys to the store, and lastly that the plaintiff and his friend were scarified to protect the senior officers of the defendant who had the keys to the store"*

At line 15 from the bottom, on page 4, the learned judge cited with approval the case of **ODONGO VERSUS ATTORNEY GENERAL NAIROBI HCCC NO. 195/97 (1997) LLR 484 (HCK**) where Hayanga J as he then was awarded Kshs. 150,000.00 for malicious prosecution on 27th June 2000. And the case of **NJUGUNA VERSUS THE ATTORNEY GENERAL AND OTHERS NO. 2007 OF 2001 (2001) LLR 4948 (HCK)** decided by Ransley J where the learned judge as he then was awarded Kshs. 300,000/= for malicious prosecution and Kshs. 500,000.00 as punitive

damages. On the basis of that reasoning the learned judge awarded Kshs. 500,000.00 as general damages.

There is also the case of **SAMUEL MUCHIRI W. NJUGUNA VERSUS THE ATTORNEY GENERAL AND 6 OTHERS NAIROBI HCCC NO. 838 0F 2003** decided by Ojwang J on the 26th day of November 2004. At page 33 line 3 from the top the learned judge made the following observations:-

"I have to conclude that the defendants unlawfully and wrongfully arrested the plaintiff and that they acted unreasonably and maliciously in subjecting him to prosecution. For those kinds of violation to the individuals' liberty and personal safety, and especially when the abuse emanates from the very public officers entrusted with the maintenance of peace and tranquility and the protection of the individual, compensation must be made in the form of general damages…..

At line 8 from the bottom the learned judge went on:-

"I have no doubts in my mind that the police who are duly mandated custodians of peace, legality and good order, must not be allowed to engage in objectionable violation of person's rights such as came to pass in this case. Such a gross abuse of rights of the individual and such a grotesque distortion of the purpose of the instruments of state power must be discouraged……" On account of that reasoning, the learned judge awarded Kshs. 2,000,000.00 as general damages for malicious prosecution, and Kshs. 3,000,000.00 as exemplary damages.

The case law cited are all decisions of courts of concurrent jurisdiction and not binding on this court. But after due consideration of the conduct of the defendants agents in the circumstances of this case the observations made by the learned judges in those decisions concerning the high handedness of the state agents are attributable to the circumstances of this case as well. However a part from spending a long time in remand there was no other psychological trauma that he went through. The court, has considered the entire evidence in its totality and doing the best it can and bearing in mind the principles of law guiding making awards of damages the court proceeds to award Kshs. 1,500,000.00 as general damages for malicious prosecution.

For the reasons given in the assessment the court proceeds to make the following orders.

1. It is not disputed that the plaintiff sought leave and was granted leave to file suit out of time.
2. It is not disputed that Waweru J interngated the reasons fronted by the plaintiff for the plaintiffs' delay in issuing the statutory notice and presenting of the suit out of time, and his Lordship for the reasons given allowed the plaintiff to file suit out of time.
3. It is correct that case law on the subject emanating from the Court of Appeal as dutifully followed by the Superior Courts provide guidelines to the effect that challenge to such leave can only be raised by the defendants at the main trial.
4. Indeed the defendant though he offered no evidence, raised the issue of nullity of the proceedings in the defence and submissions.

5. It is correct that the Law Lords of the CA have provided guidelines as to what falls into the exceptions of the limitations laws and what is not.
6. It is not disputed that this court, interrogated those ingredients at length and arrived at the conclusion that the Law Lords of the CA did not consider the constitutional right of a litigant to have access to the seat of justice and the right to an effective remedy as ranking paramount or having supremacy over the rights of the state to flout the citizens rights with impunity and then take refuge under the limitation laws.
7. The court, has ruled that the circumstances demonstrated herein fall into the category of cases whereby the states cannot be allowed to hide under the limitation of actions laws and condone the trampling with impunity of the plaintiffs rights by the state agents. More so when the demonstration, exhibited by the plaintiff reveal that no witness gave evidence against the plaintiff and the state did not appeal against the acquittal neither did they give evidence in defence of the civil action.
8. By reason of what has been stated in number 7 above the state is liable to compensate the plaintiff with damages for malicious prosecution.
9. The ingredients for malicious prosecution were established by production of the charge sheet, proceedings and judgement in the criminal case.
10. The defence has no merit and the same stands dismissed. The plaintiff claim is allowed and the plaintiff is allowed an award of Kshs. 1,500,000.00 as general damages for malicious prosecution.
11. The plaintiff will also have costs of the suit.

DATED, READ AND DELIVERED AT NAIROBI THIS 12TH DAY OF FEBRUARY 2010.

R.N. NAMBUYE

JUDGE