REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

(CORAM: OJWANG, J.)

CIVIL SUIT NO. 2966 OF 1996

JAMES ALFRED KOROSO.....PLAINTIFF

-VERSUS-

THE HON. ATTORNEY-GENERAL.....DEFENDANT

JUDGEMENT

I. POLICEMEN PURPORTEDLY ON OFFICIAL DUTY VIOLATED MY CONSTITUTIONAL RIGHTS; ASSAULTED ME; SUBJECTED ME TO FALSE IMPRISONMENT AND MALICIOUS PROSECUTION; I SUFFERED INJURY, LOSS AND DAMAGE:

PLAINTIFF'S CASE

The plaintiff is a Tanzanian citizen and businessman, based at Moshi in the North of Tanzania. His suit was brought by virtue of s.4 of the Government Proceedings Act (Cap.40), against the Attorney-General as the legal representative of the Government of Kenya, and in respect of allegations attributing blame to the Commissioner of Police and the Permanent Secretary responsible for internal security matters, in the office of the Office of the President.

In the plaint dated 15th of November, 1996 and filed on 4th December, 1996 the plaintiff stated that, on 17th December,1993, Police officers from the Criminal Investigations Department at Kiambu in Central Kenya, had gone South, to the Kenya-Tanzania border, and, from Taveta Police Station which lies close to the Northern Tanzania boundary , arrested him and brought him into Kenya, an arrest which led to several violations of the plaintiff's constitutional liberties. The said Police officers, the plaintiff asserts, ''wrongfully and unlawfully, and without any, or any reasonable and justifiable cause, arrested the plaintiff and placed him in custody at Taveta Police Station without his consent, and completely deprived him of his liberty and freedom''. It is stated that, following the said arrest, ''the Police officers wrongfully and unlawfully detained the plaintiff in Police custody in various Police stations in Kenya and completely deprived the plaintiff of …..[all channels of] communication to the outside world''.

The plaintiff contends that the Kenya Police have subjected him to much more than a denial of his rights, ''the said Police officers wrongfully and unlawfully subjected the plaintiff to inhuman and degrading treatment and, wrongfully and in contravention of the Constitution of Kenya, physically assaulted the plaintiff and inflicted grave personal injuries upon his person''.

The plaintiff states that the said Kenya Police went even further, in committing wrong against him: ''the Police officers, without any or any reasonable and probable cause and/or justification whatsoever, wrongfully, unlawfully and maliciously caused the plaintiff to be arraigned in a Court of law and charged with the offence of robbery with violence in Kiambu Magistrate's Court Criminal case No.73 of 1993''. Although the said capital charge was later reduced to simple robbery and the plaintiff was consequently released on bond, on 29th May, 1994, the charge of robbery with violence was restored, the bond cancelled , and the plaintiff remanded at Kamiti Maximum Security Prison. After the prosecution case closed on 7th December, 1995 the trial Court found that the plaintiff herein had no case to answer, and acquitted him by virtue of the provisions of s 210 of the Criminal Procedure Code (Cap.75 , Laws of Kenya).

lt is the plaintiff's contention that the charges brought against him at Kiambu Law Courts were baseless, malicious , and lacked reasonable cause.

The plaintiff contends that, in all their actions which caused so much injury to him, the officers of the Kenya Police purported to be acting in the course of their employment, and within the scope of their authority, and hence the defendant is to bear liability for the actions of the said Police officers. The plaintiff asserts that the said actions of officers of the Kenya Police caused him personal injuries, loss and damage.

The plaintiff enumerates the injuries which he suffered at the hands of the Police, as follows:

(i) he suffered two broken ribs;

(ii) he lost business income;

(iii) he incurred legal expenses occasioned by Criminal Case No. 73 of 1993, at the Kiambu Law Courts.

The plaintiff seeks *special damages*, and *general damages* incorporating aggravated and exemplary damages for *wrongful arrest, false imprisonment, malicious prosecution, assault and battery*. He also seeks costs of the suit with interest.

On the particulars of special damages, the plaintiff had originally made the general statement that ''further particulars of special damages to be proved at the hearing'', and in her ruling on an unsuccessful preliminary subjection raised by the defendant, ***Lady Justice Gacheche***, on 11th October, 2001 remarked that ''the plaintiff should…. consider amending the plaint to specifically plead the special damages, if he were to succeed in the claim''.

II. POSITION OF THE DEFENCE

After the filing of the plaint, on *4th December,1996* there was no timeous response on the part of the defence; and on *7th May 1997* the plaintiff filed an application by Chamber Summons, seeking leave to have interlocutory judgement entered against the defendant. This application, however was withdrawn with costs to the plaintiff, before ***Githinji J*** (as he then was) on 24th September, 1997. The withdrawal of the plaintiff's application may well have been influenced by the fact that, two days earlier, on *28th September,1997* the defendant had filed a statement of defence. It is remarkable that, even with the statement of defence not yet filed, on *22nd January, 1997* the parties had filed a statement of agreed issues, duly signed for the Hon. The Attorney-General, and for M/s. Akhaabi & Co. Advocates who were acting for the plaintiff.

Equally remarkable is the content of the statement of defence, dated 11th September, 1997 and filed on 22nd September, 1997. This defence is denial *par excellence*, in all its paragraphs that address the non-formal sections of the plaint; this is true for para.2 of the defence, which denies the assertions in paras. 3

and 4 of the plaint; para.3, which denies para. 5 of the plaint; para. 4 which denies paras. 6 and 7 of the plaint; para 5 which denies para. 8 of the plaint; para. 6 which denies paras. 9 and 10 of the plaint; para.7, which substantially denies para. 11 of the plaint; and para. 8, which denies the contents of the plaint globally.

So the statement of defence is not a structured or focused statement that can be said to foreshadow any critical defence argument. Such a design of defence, in forensic perception, leaves the plaintiff's claim to move *on its own*, standing or falling by its own momentum.

III. THE LITIGIOUS ISSUES AGREED BY THE PARTIES

Counsel for the parties themselves enumerated the issues for resolution by this Court as follows:

> *(i) Was the plaintiff arrested and incarcerated by Police officers from the Criminal Investigation Department on 17th December , 1993?*
>
> *(ii) Upon his arrest, where was the plaintiff detained in custody, if at all?*
>
> *(iii) Was the arrest and detention wrongful or unlawful?*
>
> *(iv) Was the plaintiff subjected to inhuman and degrading treatment, during the said arrest and incarceration?*
>
> *(v) Was the plaintiff charged and arraigned in Kiambu Magistrate's Court Criminal Case No. 73 of 1993, with the offence of robbery with violence , or at all?*
>
> *(vi) Was the plaintiff acquitted of the said charge?*
>
> *(vii) In what capacity did the said Police officers arrest the plaintiff, and with whose authority?*
>
> *(viii) Did the plaintiff suffer injuries as alleged, or at all?*
>
> *(ix) Did the plaintiff suffer loss and damage as alleged, or at all?*
>
> *(x) Is the plaintiff entitled to the reliefs sought?*

Since the defendant had no assertions of substantive defence, it is bound to follow that the issues as framed, are constructed around the *plaintiff's* statements; and, subject to any qualifying rules of law such as may be pertinent, an affirmative answer such as may come through the evidence, for any of the ten questions above- enumerated, will constitute satisfactory proof of the plaintiff's case, on a balance of the probabilities.

IV. KENYA POLICE LURED ME ACROSS INTERNATIONAL BOUNDARY, ARRESTED, ASSAULTED AND FERRIED ME INTO THE INTERIOR, INCARCERATED AND PROSECUTED ME WITHOUT CAUSE, OCCASIONING LOSS AND DAMAGE : PLAINTIFF'S EVIDENCE

Hearing of this case started before ***Rimita, J.*** on the 11th July, 2002 but is resumed *de novo* before me on 22nd February, 2005. On that occasion the plaintiff, ***James Alfred Koroso*** was sworn and gave his testimony as PW I. He testified that he is a Tanzanian businessman, owning a shop and engaged in beverage and cosmetics sales and distribution; he is a transport merchant plying the routes in the Moshi-Arusha areas of Tanzania; he is a provider of telephone services to the public, in Northern Tanzania; he sells mobile telephone cards for Vodacom Tanzania Ltd. The plaintiff had began his business set-up in 1980, when he established his Salama Cold Drinks & Supplies; then, in 1983, he established the Moshi-Arusha Tanzania Transport Company.

PW1 testified that his tribulations which have culminated in the instant suit, began between 3.00pm - 4.00pm on *17th December 1993* when he received a call from OCS, Taveta, in Kenya. This OCS, a ***Mr Amos Amuke Dao,*** who was well known to the plaintiff, asked him as he worked at his Moshi business, to drive to the Tanzania-Kenya border, and cross over to Taveta Police Station. The OCS when he called PW1, represented to him that the two were to hold a meeting for the purpose of talking about the beverage business. The plaintiff drove across to Taveta, arriving there at 6.00 pm. He found the OCS at the Police canteen, in the company of two persons who were not known to the plaintiff. After the OCS bought the plaintiff a drink and welcomed him, he *requested* the plaintiff to escort him to his office, and the two persons in the OCS's company also followed. It is from the time of entry into the OCS's office that, in the plaintiff's testimony, wrongful things began to happen to him, and these culminated in his being physically assaulted; his being deprived of his freedom of the person and of movement; his being falsely imprisoned; his being wrongfully detained; and his being maliciously prosecuted in a Kenyan Magistrate's Court.

The Taveta Officer Commanding the Police Station (OCS) introduced the two men in his company to the plaintiff; they were Police officers from Kiambu, tracing a lorry which allegedly had been stolen from Kiambu in Central Province, in Kenya. The OCS said the Kiambu Police Officers suspected that the said lorry had been purchased by the plaintiff. The plaintiff found this allegation strange, as he had not purchased any lorry; and he did not own one.

The OCS's introduction of the two Kiambu Police officers led to the *arrest* of the plaintiff. These two Police officers subjected the plaintiff to physical assaults, as they demanded he should admit to having purchased the lorry said to have been stolen. As the plaintiff made no admission, he was detained in the Police cells at Taveta, and he was not allowed to communicate with anyone. He remained in the cells until the following day, *18th December 1993* when he was taken out, chained, and put in a double-cabin Nissan motor vehicle and driven, in the company of five other people, to an interior Kenyan Police station, namely, Voi Police Station.

It was the plaintiff's testimony that he was detained at Voi Police Station overnight, and, while there, he was repeatedly assaulted, as he was being interrogated, by the two Kiambu Police officers whom he came to know as one ***Ireri*** and one ***Mwangi.*** On 19th December, 1993 the plaintiff was chained to the same Nissan pick-up truck, and driven off to Nairobi, the Kenyan capital. The Nissan motor vehicle stopped *en route*, at *Mtito Andei* where, the plaintiff testified, he was further thrashed by Police officers, in an attempt to extract a confession. The plaintiff said he had lost consciousness, due to the assaults, and regained consciousness only to find himself, on 19th December, 1993 at the confinement cells of Kiambu Police Station where he was chained to the ground. The plaintiff testified that he found himself covered with blood, and had pain on all parts of his body, when he regained consciousness. There was no response to his request that he be taken for medical care. The plaintiff remained at the Kiambu Police cells until 24th December, 1993,

when he was moved about between different Police stations in Kiambu District, and then returned to Kiambu Police Station.

The plaintiff testified that since he left Taveta on 17th December, 1993 he had been held *incommunicado*, and members of his family did not know where he was; and this remained the position until *Criminal Case No. 73 of 1993* was commenced against him, at the Kiambu Law Courts. The plaintiff's wife had in the meantime been conducting a search for her husband, and, with the aid of the Tanzania High Commission in Nairobi, she was able to speak to the plaintiff on 22nd December 1993.

On 24th December, 1993 a charge of *robbery with violence* was laid against the plaintiff in a Kiambu Court, and he was denied bail. The Court ordered treatment for the plaintiff, and he was then taken to Kiambu District Hospital, where several x-rays were taken on sections of his body on 14th April, 1994. The plaintiff testified that his state of health, on account of the injuries he sustained at the hands of the Kiambu Police officers, remained debilitating for several years, and this necessitated further x-rays on sections of his body, on 30th March, 2001. The plaintiff testified that, up-to-date, his health has been

poor; he has felt weak, especially in his ribs; he is not able to lift heavy items; and during the cold season he develops a stiff neck. He testified that beatings by Kiambu Police officers caused him scars at the back of his head and on his back, and he has whip-lash marks on his ribs. The plaintiff, as he testified, showed the Court some of the marks evidencing the assaults he suffered at the hands of Kiambu Police officers, and the Court made a record as follows:

> ***"Witness removed his jacket, shirt and vest; and I was able to verify that the marks alleged are actually [to be found] on the various parts of the body, as testified"***

Explaining these body-marks, the plaintiff testified as follows:

> "l was tortured by three people in the bush; the two arresting officers and the owner of the [motor vehicle said to have been stolen and sold to me]. Every object in sight was used to torture me. All these happened before l was charged in Court, in Kiambu Criminal Case No. 73 of 1993, on a capital charge"

In May, 1994 the said charge was *reduced* to simple robbery, and bail was granted; then this was *reversed* in August 1994, when the capital charge was reinstated, and bail cancelled. But on 7th December, 1995 the plaintiff was *acquitted*, without being put to his defence.

In the charge brought against the plaintiff, he was alleged to have been involved in a robbery along Thika-Naivasha Road on *3rd November,1993;* but it was his testimony that he had not been in Kenya in November, 1993, and the prosecution had brought no evidence showing otherwise . He produced his Tanzanian passport (plaintiff's exhibit No.6) which was valid during the month of November,1993 and which bore no indication of a visit to Kenya.

It was the plaintiff's testimony that his business in Northern Tanzania had collapsed during the period he was incarcerated and subjected to criminal trial at Kiambu in Kenya. There was nobody left behind who could keep the said business running. The plaintiff returned home to find that his buses were grounded; his children were out of school , and some were now involved with drugs; one of his wives had died, and another had gone astray, as a family member.

The plaintiff produced as exhibits about a dozen *trade licences* showing his standing as a businessman when his tribulations began at the hands of the Kiambu Police, in 1993. He testified that his daily earnings from his business transactions had stood at some Tshs.150,000/= to 200,000/=; but these were estimates, as his documents of audit were destroyed in a fire at his business premises in Moshi. Since regaining his liberty, with the acquittal by the Law Courts at Kiambu, the plaintiff has established a new business outfit at Moshi, known as Quick Telecommunication Services Ltd, with a daily turnover of some Tshs.150,000/= - 180,000/=. He also conducts many other businesses in the Kilimanjaro and Arusha regions which bring substantial cash collections every day.

The plaintiff testified that his imprisonment in Kenya had caused him much mental anguish and economic loss. He had used substantial credit lines in his business transactions, and these were disrupted, with considerable consequential loss, during his incarceration in Kenya. He returned to Tanzania to find that he had to deal with huge accrued interests, on the credit schemes which he had been granted. The plaintiff produced letters of legal correspondence (plaintiff's exhibits 9A, 9B, 9C, 9D) showing demands which were being made of him, regarding the accrued interests on the credits.

Pw2, ***John Fredrick Njau***, testified that he works at Kiambu Law Courts, as Executive Assistant. He said he has access to the official records of the Court at Kiambu, and he had seen the register of cases which shows Kiambu Law Courts Criminal Case No. 73 of 1993. There were seven accused persons in that case, namely (i) ***Joel Thuo Gatwe***; (ii) ***James Nyanjira***; (iii) ***Peter Kamau Gature;*** (iv) ***Charles Ngure Kibe***; (V) ***Wilson Mwangi Muturi;*** (vi) ***Kenneth Thuku Kirengo;*** (vii***) James Alfred Koroso*** [the plaintiff]. Pw2 had not met the plaintiff; all he knew was that the 1993 case had been a criminal case.

At the end of the Kiambu Court trial, the 1st and 2nd accused were each sentenced to three year's

imprisonment; 3rd accused was acquitted under s.215 of the Criminal Procedure Code; and all the rest (including the plaintiff herein) were acquitted under s. 210 of the Criminal Procedure Code.

Apart from the Court Register (plaintiff's exhibit No.14), from which PW2 gave the information, he had no other record on the criminal case of 1993; he had been unable to locate the proceedings of that trial.

PW3, ***Dr Manasse Ndakalu***, testified that he, and one ***Dr. Maina,*** had examined the plaintiff on 2nd April 2001. The plaintiff had on that occasion, presented with a history of assault, to which he had been subjected between 18th December, 1993 and 23rd December, 1993 within Kiambu District, and in the course of which the patient had suffered injuries to the right chest, to his head, and to his back. The two doctors made reference to the old out-patient record book at Kiambu District Hospital, and confirmed that the plaintiff had been seen at the hospital on 28th December, 1993 – his out-patient number being 35364/93. The plaintiff had come to the two doctors with an old x-ray film, dated 14th April, 1994, and he had complained of chest pains when he lifted heavy loads, and pains in his right ribs when he slept.

PW3 and his fellow doctors examined the plaintiff, and noted the following scenario: (i) fair general condition; (ii) vital signs – temperature, blood pressure, pulse, respiration ? normal; (iii) a two-centimetre-long scar at the back of the head; (iv) two prominent scars in the back ? one below the right scapula, the other below the left scapula; (v) the scars were healed, and had no swellings or tenderness. The two doctors ordered a chest x-ray to be done; and this was carried out on 30th March, 2001. The x-ray was taken for a radiologist's report; and the report showed that there was no active lung lesion, but the right ninth rib was irregular. This report was considered in relation to an earlier medical report of 14th April, 1994 which indicated the existence in the plaintiff's body of a healing fracture in the same rib section and which suggested recent trauma. PW3 confirmed that there was *evidence of physical injury* to the plaintiff – though he and his fellow doctor could not ascertain how the injuries were sustained. The witness produced (plaintiff's exhibit No.5) a signed medical report, together with the x-ray report.

On cross-examination by learned State Counsel ***Mr. Rotich***, PW 3 testified that he was not the doctor who had initially treated the plaintiff at Kiambu District Hospital; but he was able to trace a physiotherapy form which had been filled in, in respect of the plaintiff. This form had a diagnosis of post-trauma pain in the chest, and an old case of fracture in the right rib.

In PW3's testimony, *fractures* take long to heal, and so, in his words, "if [the] patient says he has pain, I would not doubt it."

PW 4, ***Kibwana Majidi***, a superintendent of Police from Moshi, Tanzania testified that the plaintiff had gone to see him on 18th February 1999 asking for a loss report, in respect of his business at the Moshi Bus Park which had been destroyed by fire. The said fire had broken out on 6th February, 1997; and he had a Police Report Book which recorded the incident. The report (plaintiff's exhibit No. 15), which was dated 18th February, 1999 indicated the items that got damaged in the said fire. Those items had a value of Tshs.1,110,200, and included documents such as trading licences.

On cross-examination by learned State Counsel ***Mr. Rotich,*** PW4 testified that the fire which destroyed the plaintiff's business unit had also consumed as many as 11 stalls located in the same place in Moshi; and the whole incident had been recorded before the Moshi OCS, a ***Mr. Makalu*** who later retired, and has since died.

PW 5, ***Mrs. Elizabeth James Koroso***, testified that she is a housewife, but got into business after her husband, the plaintiff, was arrested in Kenya in 1993. It took some time after the plaintiff's arrest for PW5 to be called from Taveta and be informed of the incident. It was night time then, and it was not possible to travel into Kenya to follow up on the matter. PW5 was later able to travel to Nairobi and, with some help, gained access to her husband who was being held by the Police at Kiambu. It was her testimony that her husband was in bad health, having been severely assaulted during arrest and confinement.

PW5 testified that the arrest and confinement of the plaintiff, led to the collapse of their family business which had normally brought quite significant turnovers: as much as Tshs.200,000/= ? 300,000/= per day from the shop; and something in the order of Tshs.100,000/= per day from the transport business. It became necessary to ground the transport business; the shop business substantially declined; and schooling for their children was negatively affected.

PW5 testified that she was compelled to travel to Kenya on many occasions, to be present at the hearing of the criminal case against her husband; and many times she travelled to Kenya only to be told that the trial would not proceed on the appointed occasion; and she incurred considerable expense on that account. The family had incurred considerable losses when the plaintiff was arrested, as the transport business in particular, had been run on substantial loans, which had to be repaid.

PW6, ***Alexander James Koroso***, the plaintiff's son testified that he was 11 years old in 1993 when his father had been arrested and detained in Kenya; and he had to leave home as a result, to go and live with his uncle who could care for him. His father's absence led to shortage of money, and to considerable hardship for the family, leading to the witness and his siblings dropping out of school. His uncle, ***Hussein Koroso,*** in effect, adopted PW6 as one of his own children, and took PW6 back to school.

Due to a *stigma* which attached to the plaintiff's family, following his arrest and charge in a Kenyan Court, for a serious felony, ***Hussein Koroso*** had to give PW6 a *new name*, for social comfort; this name was ***Abdi Hussein Koroso*** and PW6 returned to school under that name. ***Hussein Koroso*** took care of PW6 until 2001, when the witness was restored to the care of his own father, the plaintiff.

It was PW6's testimony that his family had suffered much, during the plaintiff's incarceration in Kenya. His five siblings could not keep up with their schooling; and his mother was unable to cope with the burdens of family care, and she was much of the time absent, traveling to Kenya to be present at the trial of the plaintiff.

PW6's elder brother, ***Bruno James Koroso***, had dropped out of school, as did also his younger brother, ***Benedict James Koroso.*** Since the return home of the plaintiff, ***Bruno James Koroso*** has resumed schooling. Since the plaintiff's return to Tanzania, it has been possible to send PW6's youngest sibling to the Great Britain, to study information technology.

It was PW6's testimony that the plaintiff, before he was arrested and detained in Kenya, had been driving his children to school in the mornings, and caring for them and guiding them. After the plaintiff's arrest, life became uncertain and insecure for PW6 and his siblings, as they were mostly alone, as their mother had to travel to Kenya many times; and those travels had entailed considerable cost. One of PW6's siblings, ***Benedetta James Koroso,*** fell ill during those difficult times, and, for lack of proper medical care, she died in 1995.

V. NO RESPONSE TO PLAINTIFF'S EVIDENCE

Learned counsel, ***Mr. Khamati***, closed the plaintiff's case on *16th November, 2006* and the respondent's learned counsel, ***Mr. Rotich,*** then sought adjournment up to a clear day, when he would call his witnesses. This request was allowed, as ***Mr. Khamati*** raised no objection. Two dates in the new term, *7th and 8th February, 2007* were set aside for the hearing of the defence case. But on 7th February, 2007 ***Mr. Rotich*** asked for further adjournment, as his intended witnesses had become unavailable. Counsel sought adjournment for a period of *two months*, for the reason, in his words, that "some of the Police officers have been the subject of transfers…I need time to reach these Police witnesses." ***Mr. Khamati,*** on that occasion, expressed concern about further delay in the disposal of a case which dated back to ***1996***. Learned counsel was concerned that witness summons had not timeously been sought by the respondent; and he asked that if adjournment was granted, this should be for the last time.

The Court granted an adjournment as the *last* adjournment in principle, and new dates were reserved for defence hearing: *19th April 2007* and *23rd April 2007*. Witness summonses were also ordered at the request of ***Mr. Rotich,*** in respect of the DCIO Kiambu, *Superintendent* ***Mugweru; Sgt. Moses Mwangi***

(Police Force No.35340) and ***Col. Charles Ireri*** (Police Force No. 33292).

On 19th April 2007 ***Mr. Rotich*** appeared in Court, only to state that he had not seen any of his witnesses. Learned counsel, again, sought adjournment, and asked that this, if granted, be the *last* adjournment. Indeed, adjournment was granted up to *Friday, 25th May, 2007.* On that day when it fell due, learned counsel ***Mr. Rotich*** came to say he had had difficulty in *serving* witness summons, but had communicated with the Commissioner of Police, on the matter; yet still, counsel had not established contract with his witnesses.

It was not clear why Police witnesses were not submitting themselves to instruction on this matter in which the State, it must be assumed, had a significant interest. Learned counsel ***Mr. Rotich*** attempted to place the burdens of getting the respondent's Police witnesses upon *the Court,* with its imperative orders. In the words of learned counsel:

> *"This touches on the integrity of the Court. Orders carry instructions which ought to be obeyed. If not obeyed, then legal sanctions have to be directed at those who are supposed to obey. It isn't just a matter of the defendant proving a case, it's also about the dignity of the Court. I leave this matter to the Court. If the Court orders that I close the defence case, I will not have been heard. The Court has machinery to get the Police to explain why they haven't come to Court."*

To the foregoing submission, learned counsel ***Mr. Khamati*** did not focus his attention on the *merits* of the general point being made: but he proposed an optimal course which the Court could adopt, where a witness in a civil case, in respect of whom summons issued, had not come to testify on the side of a particular party. Learned counsel thus proposed:

> *"One of the sanctions a party suffers for [its witness] disobeying Court orders, is to face the consequences of [that witness] not being heard. [On this basis,] the defendant ought to suffer the consequence, and rightly so, since the witnesses in question [have failed to turn up in Court on three separate occasions*].

On this point, the state of the *law* needs to be clarified. It is a recognized principle of judicial dispute settlement, that a Court of law *does not act in vain*; and on that basis, Court orders have to be in judicious measure, and designed for *enforcement.* What is the implication, for the *summonses* which this Court had issued, at the request of the State Law Office, in a civil case, and in aid of the defendant's case?

The law is stated in standard works of procedure in civil litigation, such as ***Mulla: The Code of Civil Procedure***, 16th ed., Vol.1 (by ***Solil Paul***) (Butterworths, 2001), see p. 502, or ***The Supreme Court Practice***, 1999, Vol.2 (sections 1 – 21) (London: Sweet & Maxwell, 1998). The Court may issue summonses to persons whose attendance is required either to give evidence or to produce documents; and the Court *may compel* the attendance of any person to whom a summons has been issued. However, the Court will not put in motion any enforcement measures in respect of witness summons unless it is shown that such summons was *"served on the witness personally a reasonable time before the day fixed for his attendance*" (***The Supreme Court Practice***, *op. cit.*, p. 1030). Besides, a witness properly served with summons shall be entitled to "*conduct money and payment of expenses and loss of time."*

Learned counsel ***Mr. Rotich*** did not even mention before this Court that *personal service* had been effected upon his intended witnesses, and the question of "*conduct money*", if it would have been applicable, was simply not raised. It follows that the Court, in this instance, could not properly, as a matter of law, be *made responsible* for the failure of the respondent's witnesses to come and testify. I do not, therefore, agree with ***Mr. Rotich*** when he seeks to raise the standing of his argument thus: *"It's [all] about the Court causing witnesses to appear, to assist the Court to dispense justice. The witnesses are mine…..[But] the Court has powers to ensure these witnesses come…."*

In these circumstances the Court's ruling given on 25th May, 2007 was (in part) as follows:

"This is a civil case filed in 1996. It was mentioned several times between 7th May, 1997 and 11th July, 2002 before hearing started before *Mr. Justice Rimita. Rimita, J.* heard the matter from that date to 1st October, 2003, after which *Nyamu, J* as Duty Judge, ordered hearing *de novo* on 4th November 2003. From that time the matter was mentioned from time to time up to 21st February, 2005. It came up before me for fresh hearing on 22nd February 2005.

"[The proceedings have run] as follows:

> **(a) 22nd February 2005 – hearing; (b) 11th May 2005 – hearing; (c) 29th June 2005 – learned counsel for the defendant, *Mr. Rotich* sought a brief adjournment; (d) 29th June, 2005 – hearing proceeded; (e) 11th October, 2005 – learned counsel for the defendant requested adjournment, which was granted; (f) 28th November, 2005 – hearing proceeded; (g) 5th July, 2006 – hearing proceeded; (h) 25th October, 2006 – counsel for the defendant was absent; (i) 16th November, 2006 – hearing proceeded; (j) 7th February, 2007 – plaintiff's case closed, and defence case was to begin; (k) 7th February, 2007 – counsel for defendant stated that his witnesses were not available; (l) 7th February, 2007 – counsel for defendant asked for witness summons to issue – and this was done; (m)19th April, 2007 – defendant's case did not start, for lack of witnesses; counsel sought adjournment, which was granted.**

"It is against this background, that the defendant's failure to put witnesses in the witness stand today, 25th May, 2007 is to be seen. Learned counsel for the plaintiff, *Mr. Khamati,* urges that it has become clear the defendant is not able to prosecute their defence; and therefore their case should be ordered closed, so that this trial moves on to the next stage.

"Learned counsel *Mr. Rotich,* for the defendant, by contrast, urges that by the witnesses not turning up, they are flouting the orders of summons emanating from the Court itself; and so, the Court's coercive powers should be applied against [the witnesses]. *Mr. Rotich* urges that the defendant's problem herein has a greater significance, and has come to coincide with the issue as to the authority of the Court. In effect, *Mr. Rotich* indirectly seeks adjournment: that the defendant be not immediately required to prosecute their case, but instead, the Court be engaged in the enforcement of its authority through contempt-related orders.

"I have carefully considered the background to this trial, and addressed my mind to the age of the proceedings, and to the fact that the process of litigation must, as a matter of public policy, come to an end. Civil litigation is always a private matter between the parties – and each party, once conciliation or mediation has not been resorted to, and instead the parties come to Court, must act diligently to prosecute his or her case, and to unclog the judicial process, so it may also serve others.

"I am not minded, therefore, to invoke the coercive powers of the Court in this instance, in aid of the defendant placing their own witnesses before the Court.

"The Court, besides, has already allowed an amount of time which I consider enough, for the parties to prosecute their case.

"I will, therefore, now order as follows:

> **(1) The defendant shall forthwith close their case.**
>
> **(2) Within a period of 21 days, counsel for each side shall file and serve written submissions.**
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> **(3) I will assign a date for oral highlighting of the submissions in Court, on which**

occasion I will then give the date for delivery of judgement; the date is 13th July, 2007 at 2.30 pm.

VI. A CASE FOR GENERAL AND SPECIAL DAMAGES AND COSTS OCCASIONED BY INHUMAN AND DEGRADING TREATMENT, FALSE IMPRISONMENT, MALICIOUS PROSECUTION: SUBMISSIONS FOR PLAINTIFF

(a) There was no Defence

Learned counsel ***Mr. Khamati*** made submissions regarding the fact that the defendant called no evidence to meet the plaintiff's case; in counsel's words:

> "…we are humbly submitting that the defendant had no defence and the matter would have been treated as though the case was heard *ex parte*. [As] the defendant made no defence whatsoever on the claim, it goes without saying that the plaintiff has proved his case, and [has proved his] claims against the defendant, and we…pray that judgment and decree against the defendant be entered…"

(b) Plaintiff suffered actionable Wrong at the hands of the Kenya Police, and is entitled to Damages

Learned counsel urged that it was clear from the plaintiff's evidence, that he had been wrongfully arrested after being called by the officer in charge of Taveta Police Station, on 17th December, 1993; and that after the plaintiff's arrest he was continuously subjected to inhuman and degrading treatment, up to the time he was charged in Kiambu Law Courts Criminal Case No. 73 of 1993, and up to the time he was acquitted under s.210 of the Criminal Procedure Code (Cap.75).

The truthfulness of the evidence in that regard, it was submitted, could not be doubted: in the first place because, in the written statement of defence, there was no particular denial of the allegations made by the plaintiff; the defendant "did not raise any averment disputing the claims by the plaintiff; all [that] is in the…statement of defence is a general denial and there is no denial in particular to the claims …." Counsel urged that the defendant had failed to disprove the plaintiff's allegations.

(c) Submissions for the Plaintiff on matters of Evidence

Mr. Khamati submitted that the Kenya Police officers from Kiambu, had on 17th December, 1993 arrested the plaintiff without cause. The said arrest, counsel urged, was the foundation for other actionable wrongs against the plaintiff; in his own words:

> "…we submit that had the Police carried out their duties properly they would not have charged the plaintiff with the offences, and this failure to do what they were supposed to do led to the plaintiff being wrongfully and unlawfully prosecuted."

Learned counsel urged that the prosecution process against the plaintiff had been guided by *malice;* and the evidence for this was in the reduction of the charge from capital robbery to simple robbery, on the basis of which bail was granted on 30th May, 1994 only to be followed by a reinstatement of the capital charge and the cancellation of bail barely three months later: and it all ended up in acquittal for the plaintiff. Counsel urged that the prolonged detention in police cells and in prison remand, of the plaintiff, constituted *false imprisonment.*

The foregoing foundations for the claim of damages, ***Mr. Khamati*** submitted, have been established by evidence, which the defendant did not disprove. The plaintiff had brought forth evidence of *injuries* which he sustained from Police brutality, supported by exhibits which included medical evidence. The nature of the damages sought in this regard, is described by learned counsel:

> "We submit that these inhuman and degrading assaults and injuries warrant this Court [awarding exemplary damages] to the plaintiff."

Learned counsel submitted that this Court should award damages to the plaintiff for the exceptional losses he suffered *in person* and *through his family*. It is worth setting out the contention here, given its unusual *social,* rather-than-*individual,* dimension of damage-claim:

> *"[The plaintiff's wife (PW5)]…. suffered a great deal even when trying to see her husband, while the criminal case [was continuing]….She had to travel to Kiambu…This surely calls upon [the Court] to take into account that the family of the plaintiff greatly suffered…It is evident that one of his wives died and he could not attend …her funeral. Had the defendant not done what he did, the plaintiff might have been able to save the life of his wife. [More seriously still] the relationship [between] the family of the plaintiff and the community, broke down, as people shied away from the family of the plaintiff…[The plaintiff's] children missed the services they used to get from their father…"*

(d) The Question of Special Damages

Learned counsel urged that, it was plain from the exhibits produced in Court, that the plaintiff was a famous businessman in Tanzania and beyond, and that he plied several kinds of trade. Although it is the case that accounting documentations relating to the plaintiff's business undertakings during his incarceration in Kenya are incomplete, learned counsel made a *depiction* of the plaintiff's business scenario as follows:

> "…it is on evidence that the plaintiff used to earn…a profit of not less than Shillings One Hundred and Fifty Thousand (Tshs150,000/=) per day out of his businesses. The evidence which is not challenged shows that even at this time his….business under the name, Quick Telecommunication Services [earns] not less than …Tshs.180,000/= per day… and this is [because] his net business per day [enables him to] deposit at the Bank… Tshs.10,000,000/= per day. It is pertinent …..to calculate the loss of profit for all the time he was under the unwarranted acts of the defendant. We …submit that a considerable award should be made to him to put him in the position in which he would have been, had the defendant not done what he did."

Learned counsel also made submissions on losses which the plaintiff made in relation to *interests on credit* availed to him, occasioned by his incarceration at the Kiambu Police Station. Counsel stated:

> "…it is on evidence that being a businessman, [the plaintiff]…had creditors who used to supply him with business materials for him to sell and pay back the credit. The [demand letters exhibited in Court]…prove that the plaintiff failed to pay the credit which has now accrued due to bank interest (21%) per annum…and now stands at…Tshs.612,082,536/65. His creditors BAS-HEH & CO. LTD. Are demanding for that sum and as it stays unpaid the interest thereon will be astronomical. We submit that, as the defendant has made the plaintiff unable to pay the debt, this fountain of justice will award that sum accordingly, to enable the plaintiff [to] liquidate the debt."

(e) Costs

Mr. Khamati submitted that the plaintiff was entitled to costs incurred due to the acts of the defendant. The plaintiff had to instruct an advocate to defend him in the Kiambu Law Courts criminal case in which he was one of the accused, and in respect of which he won acquittal. Counsel also sought costs in respect of the instant proceedings, the same to include legal costs and other costs – such as transport, boarding and lodging of witnesses, most of whom travelled from Tanzania.

The plaintiff claimed the sum of US.$500,000 (i.e, approximately Kshs.33,500,000/=) as general damages.

The plaintiff prayed for punitive and exemplary damages, in view of the circumstances in which the injuries to him were caused.

VII. CONTESTING REPRESENTATION-FORMAT, TORT CLAIMS, CONSTITUTIONAL

CLAIMS, SPECIAL DAMAGES: SUBMISSIONS FOR THE DEFENDANT

(a) Order III, Rule 6, and the Question of Names of Advocates' Firms

The first point in the defendant's submissions is a technical one, about the format of representation of the plaintiff. In the written submissions filed on 13th July, 2007, the firm name of the advocates representing the plaintiff is given as Khamati, Minishi & Co. Advocates; but officially, the firm name Minishi, Akhaabi & Co. Advocates is on record. Insofar as there was no notice of change of advocates, to provide for the discrepancy, learned State Counsel ***Mr. Mutinda*** urged that the *written submissions* for the plaintiff be struck out, as offending Order III, rule 6 of the Civil Procedure Rules.

This is a purely technical point which, I think, does not go to the merits of the plaintiff's claim. I have taken both the written and the oral submissions as just one set of arguments; and on that basis, I would not allow learned counsel's contention to obviate this Court's quest for a just determination of the case.

(b) False Imprisonment, Malicious Prosecution: Allegations denied

Learned counsel contended that the defendant bore no liability, because the plaintiff had *lawfully undergone trial* on a charge of robbery with violence. Counsel urged that the claims of malicious prosecution, wrongful arrest and false imprisonment "have no basis in law and fact."

Mr. Mutinda urged that the claim of malicious prosecution was not sustainable, as no *particulars of malice* had been pleaded, as required by Rule 8(1) of Order VI of the Civil Procedure Rules.

Mr. Mutinda relied on the High Court decision, ***Murunga v. Attorney-General*** [1979] KLR 138, to show that a case of malicious prosecution had not been established. ***Cotran, J.*** in that case, held that four elements were required to sustain a claim in malicious prosecution (p.140): (i) that the impugned *prosecution did take place;* (ii) that the prosecution *terminated in the plaintiff's favour*; (iii) that the prosecution was instituted *without reasonable and probable cause;* and (iv) that the prosecution was actuated by malice. (See also: ***Katerregga v. Attorney-General*** [1973] E.A. 287 (***Mead, J***.)).

(c) Physical assault on the Plaintiff: Was it there or not? Can the Tanzanian Plaintiff claim a Right guaranteed by the Kenyan Constitution?

Although the plaintiff and his wife (PW5) gave considerable testimony about *physical injury* to the plaintiff occasioned by the Police officers from Kiambu, ***Mr. Mutinda***, though without bringing any testimony to the contrary, contested this. In learned counsel's words: "[there] is…no tangible evidence showing [that] the plaintiff was assaulted by the Police."

Learned counsel contested the plaintiff's contention about the suffering undergone by *his family* while he was incarcerated in Kenya, as having "no basis" and as being "too remote."

Mr. Mutinda urged that this Court should overlook the contention that the plaintiff had been subjected to *degrading and inhuman treatment* – for a certain technical reason, which was thus stated:

"The plaintiff's claim that he was subjected to degrading and inhuman treatment is an issue of constitutional interpretation which is outside the jurisdiction of this Court in this matter. Such [a] matter can only be tried and determined by a properly constituted Constitutional Court and in which case the plaintiff, who is a Tanzanian national, would only be entitled to diplomatic intervention."

(d) On Special Damages

Learned counsel ***Mr. Mutinda*** has objections to the substantial claim for *special damages*, being made by the plaintiff. Counsel notes that the learned Judge taking the proceedings herein at an earlier stage, ***Lady Justice Gacheche***, had on 11th October, 2001 ruled that the plaintiff's case for special damages had to be founded on *amended pleadings* – but no amendment was, in the event, made to the plaint, and there was

no appeal against her ruling. On that basis, counsel submitted, "the plaintiff's claims of special damages are misplaced, incompetent, and bad in law… They are not specifically pleaded in the plaint as required by law." In aid of this argument, counsel relied on the Court of Appeal decision, ***R.R. Siree & Attorney General v. Lake Turkana El Molo Lodges Ltd.,*** Civil Appeal No. 229 of 1998. In that case the Court re-stated (***Omolo, J.A.)*** the principle governing the award of special damages:

> **"…this Court has said time and again that when damages can be calculated to a cent, then they cease to be general and must be claimed as special damages. In this regard, loss of profits, which formed the bulk of the respondent's claim for damages, are in the nature of special damages and must be specifically pleaded *before* they can be strictly proved [emphasis original**]."

Mr. Mutinda urged that the plaintiff's claim for loss of income from businesses, and for legal expenses, must fail, for not having been specifically pleaded.

Learned counsel, on the details of business arrangements said to have suffered while the plaintiff was under arrest, rendered a summary as follows:

> *"Even if for a moment, the plaintiff's claims for special damages were to be considered, they have no proof and [no] basis. The plaintiff claimed he was running telecommunication business, textile business, groceries…cosmetics, beer, and doing import and export business. He claims he was travelling around the world, and owned many vehicles. On being [asked] to prove …. these allegations the plaintiff only produced a few alleged trade licences, a partnership agreement and a passport. The plaintiff did not produce any accounting documents, [or] importation documents, and* his passport did not show he was travelling around the world."

Counsel submitted that the Plaintiff's claim for U.S. $500,000 and Tshs.612,028,536/65 as damages lacked a basis in law and fact; the claim for U.S.$500,000 was not particularized and had no authority in law to buttress it; and the claim for Tshs.612,028,536/65 was not supported by any accounts, and even the correspondence proffered to support it was not accompanied by any authenticating evidence. A further shortcoming was attributed to this latter claim: it is "too remote for any liability to attach" in respect of it.

VIII.

INJURY TO CONSTITUTIONAL RIGHTS AND IN TORT LAW, AND THE QUESTION OF DAMAGES: FINAL ANALYSIS

(1) Milestones in the Analysis

A landmark element in this suit, which has already been remarked, is that the defendant conducted the defence, in many respects, as a *pure formality*. The statement of defence itself was denial, and more denial; and thereafter, no witness was called to respond to the testimonies of the plaintiff's six witnesses. I have earlier-on observed that the defence strategy clearly left the plaintiff's case to propel itself by its own momentum, free of the constraint of defence challenges.

The burden of the plaintiff's case is founded on the *Constitution,* and on *tort law*. Specific assertions of claim have been made in the two spheres of law, and evidence has been adduced to support those claims. In principle, if proof is given on a *balance of probabilities*, in those spheres of law, then it will follow that this Court will award *general damages* in compensation, and the same may, in a proper case entail *exemplary* and *aggravated damages* which the plaintiff has prayed for. Once this dimension of damage-claim is dealt with, then the Court will have to address its mind to the subject of *special damages,* which has featured prominently in the submissions of learned counsel.

(2) The Plaintiff's Physical Injuries, and his invocation of the Constitution

The plaintiff gave testimony that after a ruse was employed to get him to leave his base in Tanzania, and

to *cross the international boundary* into Kenya, he was arrested and beaten up repeatedly, over a prolonged duration as he was forcibly transported deep into Kenyan territory. There is corroborative evidence for that testimony, even though counsel for the respondent denies it. Counsel for the respondent, however, does not stand in the position of a witness, and cannot properly, from the bar, make that denial. I hold, in the circumstances, that the events thus recounted by the plaintiff, did, indeed, take place.

The alleged assault and restriction upon the plaintiff was urged to be a violation of his *constitutional rights*, as such treatment amounted to *inhuman and degrading treatment.* This is a matter in respect of which s.74(1) of the Constitution of Kenya thus provides:

> ***"no person shall be subject[ed] to torture or to inhuman or degrading punishment or other treatment."***

Although this fundamental right, as judged from the *general character* of Chapter V of the Constitution (and in particular from the prefatory section (s.70) under that Chapter), is of general application to "*every person in Kenya,"* learned counsel ***Mr. Mutinda***, for the respondent, made the following contention:

> *"The plaintiff's claim that he was subjected to degrading and inhuman treatment is an issue of constitutional interpretation which is outside the jurisdiction of this Court in this matter. Such a matter can only be tried and determined by a properly-constituted Constitutional Court and in which case the plaintiff, who is a Tanzanian national, would only be entitled to diplomatic intervention*."

I think such a submission is not, in two respects, correct as a matter of law. From the content of s.74(1) of the Constitution, quoted above, the plaintiff who had been brought into Kenyan territory by Kenyan Police officers, was a "*person in Kenya*", and he was entitled to protection by Kenyan Courts of his constitutional rights, in that capacity. It follows that the plaintiff could maintain action in Kenya, in respect of "inhuman or degrading punishment or other treatment." Learned counsel, besides, did not state the foundation for his contention that the plaintiff, to redress wrongs against him turning on "inhuman or degrading punishment or other treatment," had recourse to *diplomatic* but not *judicial* process.

Even had learned counsel conceded that the plaintiff's claim on this point was a valid one, it was his contention that the said claim must be *severed from the plaint*, and prosecuted as a special matter before a *Constitutional Court*. With respect, that would neither be practical, nor right. My apprehension of the law on this point is that the Constitution and the laws of Kenya recognize the High Court, sitting *in any capacity*, as a competent Court with *unlimited jurisdiction in all criminal and civil matters*, whether such matters call for constitutional interpretation or not. It is on this basis that a High Court Judge, when determining *any justiciable dispute whatsoever* that comes before him or her, disposes of *the whole question even where it is composite* and carries differing causes of action including constitutional-rights claims. This point is repeatedly vindicated in the daily course of judicial work; and I have, in ***Ravinder Singh v. Attorney-General & Another,*** Misc. Crim. Application No. 668 of 2007, thus stated it:

> ***"From past experience, questions properly belonging in the field of the Court's criminal jurisdiction have come before me, which, however, also contain constitutional assertions here and there. This also happens when the High Court is exercising its jurisdiction in the resolution of other kinds of cases, such as civil cases.***
>
> ***"The Court, when determining a substantive claim in a normal sphere of legal disputes, does not abdicate its full and unlimited jurisdiction, just because the Constitution has been referred to.***
>
> ***"The Constitution as the fundamental law, is the medium within which all Judges of the High Court exercise their jurisdiction, regardless of the domain of law involved – probate and administration; commercial cases; torts; contracts, etc."***

From the evidence on record, a Kenyan Police officer caused the plaintiff to cross over from Tanzania, and as soon as he did so, he suffered incarceration, bodily assaults and battery, and complete restriction of

his freedom of the person, and of movement. In the first place, to so cause the plaintiff to depart from his pacific home and go straight into hardship and harm, was, I would hold, *wrongful,* and *actionable*. But beyond that, the plaintiff's *constitutional liberties* were severely compromised, as soon as he entered Kenya; this, too, was wrongful and actionable. The violations of the plaintiff's rights which are protected under the Constitution, too, were all r*edressible* in the High Court, and, in a proper case, *damages* may be awarded therefor.

(3) The Plaintiff's Claims in Tort

From the foregoing analysis, it follows that most of the claim in tort, under the heads of assault and battery and false imprisonment, have been supported with sufficient, unrebutted evidence which, therefore, proves the plaintiff's case at least on a *balance of probabilities*. The allegation that the plaintiff was continually *assaulted* and *battered* over a long period of time, has evidence to support it and no evidence against it. Similarly, the evidence of *false imprisonment* stands unchallenged through evidence to the contrary.

The torts of false imprisonment and malicious prosecution are closely related, as is well brought out in the High Court decision in ***Murunga v. Attorney-General*** [1979] KLR 138: (i) the plaintiff is to show that prosecution was instituted by the defendant, or by someone for whose acts the defendant is responsible (on this point, all the evidence before this Court shows the defendant to be caught in the net); (ii) the prosecution terminated in the plaintiff's favour (from the evidence, yes, indeed); (iii) the prosecution was instituted without reasonable and probable cause (that is clearly the case, from the evidence: the plaintiff was drawn by unlawful ruse which led, in effect, to an abduction which, in its turn, led to detention and to prosecution); (iv) the prosecution was actuated by malice. Was prosecution actuated by malice?

"Malice" is thus defined in ***Osborn's Concise Law Dictionary*** (6th ed. By John Burke) (London: Sweet & Maxwell, 1976), p. 211:

> ***"Ill-will or evil motive: personal spite or ill-will is sometimes called actual malice, express malice, or malice in fact. In law an act is malicious if done intentionally without just cause or excuse***."

In this case, from the evidence, I would hold that the drawing into Taveta Police Station of a Tanzanian citizen, namely the plaintiff, then ill-treating and confining him, and later charging him with offences in a distant Kenyan Court, was both *intentional* and *wanting in just cause or excuse*. Those situations in which the Court will hold that there was *malice* in a prosecuting authority, will *vary* from one set of facts to another. In an earlier case, ***Thomas Mboya Oluoch & Another v. Lucy Muthoni Stephen & Another,*** Nairobi HCCC No. 1729 of 2001 I had, on that point, thus held:

> ***"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***."

Similarly in this case, I see *ulterior motives* and *bad faith*, as the factors which could lead to an invitation to the plaintiff to leave his abode in Tanzania, only to be accosted by lawless Police officers and forcibly ferried into the interior of Kenya, being tormented in the process. *Deliberate violations of the law* as the Police arrested the plaintiff, are themselves signals of bad faith. Since the plaintiff was in his own country and was leading his life peaceably there, the only way the criminal justice system of Kenya could bring him lawfully into Kenyan territory was through *extradition*. ***Rebecca M.M. Wallace*** in her work, ***International Law: A Student Edition***, 2nd ed. (London: Sweet & Maxwell, 1992) has thus stated the applicable law (p.114):

> **"If an alleged offender is in a territory other than the state seeking to exercise jurisdiction, the lawful method of securing his return to stand trial is to *request his extradition*. Extradition**

is the handing over of an alleged offender (or convicted criminal who has escaped before completing his prison term) by one state to another."

Since, from the evidence, the Kenyan law-enforcement authorities had made *no request* of the Tanzanian Government for the extradition of the plaintiff herein, in connection with any known offence, his removal from his country to be incarcerated and prosecuted in Kenya, must be held to have been guided by *malice*, for purposes of the law.

Consequently, I find the claims of false imprisonment and malicious prosecution, to have been sufficiently proved by the plaintiff in this case.

The findings dictate that the plaintiff is to be awarded *general damages* in compensation; and I believe the facts brought out in the evidence make a clear case for *exemplary damages*, to record the Court's concern to discourage the egregious conduct of the Police authorities.

Since the abuses to the plaintiff's constitutional rights took place as *part of the same course of conduct* on the part of the Police authorities which constituted the torts of false imprisonment and malicious prosecution, I will make a provision for all these wrongs as *one package*. I will, in that regard, bear in mind the elevated status of *constitutional rights*, on the national scale of civil goods; and accordingly, this will be weighted appropriately in my determination of exemplary damages.

Given, as I have already determined, that the plaintiff's case succeeds on a balance of probabilities, it follows that, if the relevant requirements of the law were met, then certainly, I would have awarded *special damages* in addition to general damages. However, the c*onditions* for the award of special damages, even though a party wins a suit, are much more closely defined by law than is the case with general damages.

Osborn's Concise Law Dictionary, *op. cit*. (p.309) defines *special damage* as "*Damage of a kind which is not presumed by law, but must be expressly pleaded and proved*." That principle is well settled in Kenyan law, as is exemplified by the Court of Appeal's decision in ***Coast Bus Service Ltd. v. Sisco Murunga Ndanyi & Others,*** Civil Appeal No. 192 of 1992:

"It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those [in] *Kampala City Council v. Nakaye* [1972] E.A. 446; *Ouma v. Nairobi City Council* [1976] KLR 297 and the latest decision of this Court on this point which appears to be *Eldama Ravine Distributors Ltd. & Another v. Samson Kipruto Chebon*, Civil Appeal No. 22 of 1991….

"We would restate the position. Special damages must be pleaded with as much particularity as the circumstances permit, and in this connection, it is not enough to simply aver in the plaint as was done in this case that the particulars of special damages were 'to be supplied at the time of trial'."

It is not possible in this Court to overlook such a clear statement of the law on special damages by the Court of Appeal; indeed I have had the occasion to make this very point in an earlier decision, ***Ruth Nthenya Kilonzo v. Standard Chartered Bank Kenya Ltd., Nairobi*** HCCC No. 517 of 1997.

As already noted, my learned sister ***Lady Justice Gacheche***, on the occasion of an interlocutory ruling on 11th October, 2001 had generously recommended an *amendment* to the plaint, to carry *specific pleadings on special damages*. This, however, was not done, even though counsel for the plaintiff still endeavoured to produce certain documents aimed at showing that the wrongs committed by the Police against the plaintiff, occasioned substantial business losses to him and his family. Insofar as such losses *had not been specifically pleaded*, it was not permissible in law to endeavour to *prove* them by evidence; insofar as the proof itself was *incomplete*, for lack of full accounting documents, it could not be the basis of lawful Court orders; and insofar as some of the claims related to *broad family interests*, and to *debts incurred* by the plaintiff, repayment for which had fallen due during the plaintiff's detention Kenya, they were too

remote from the immediate object of *compensation for torts*, and thus could not, on the basis of the law as it stands today, be incorporated into an award of damages by this Court.

It follows that this Court's award must be limited to *general damages*, in its various forms. Learned counsel for the plaintiff gave no comparative-assessment scales, but asked for general damages in the sum of US$ 500,000, which amounts to Kshs.33,500,000/=. It is not possible to make an award of general damages *in gross*, in those terms; there ought to be a point of reference in arriving at a particular figure.

From the analysis herein, the following are the heads under which I will award general damages:

(i) the torts of false imprisonment and malicious prosecution = Kshs.10,000,000/=;

(ii) violations of constitutional rights = Kshs.10,000,000/=;

(iv) exemplary damages = Kshs.1,000,000/=;

(2) The defendant shall pay the plaintiff's costs of the suit, which shall bear interest at Court rate, as from the date of filing suit.

(3) The prayer for special damages is refused.

(4) If any matter whatsoever shall arise relating to this Judgement, or to the decree extracted therefrom, the same shall be heard and determined under the direction of a Judge of the Civil Division of the High Court.

Decree accordingly.

DATED and **DELIVERED** at Nairobi this 22nd day of February, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Plaintiff: Mr. Khamati

For the Defendant: Mr. Rotich, Mr. Mutinda