REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 250 if 2004

JOSEPH C. MUMO……...……...PLAINTIFF

VERSUS

ATTORNEY GENERAL……1ST DEFENDANT

JOSEPH N. GITAU……..…….2ND DEFENDANT

JUDGEMENT

The Plaintiff came to this Court vide a plaint dated 15th day of March 2004 and filed on 17th March 2004 against the defendants. The cause of action is that on or about 19th day of May 2001 the Plaintiff was falsely arrested on the basis of false information by the second defendant, that the Plaintiff as former assistant Chief of Gatundu North had falsely sworn a document. As a result of that false information he was arrested and falsely imprisoned for 5 days and then on 24th day of May 2001 he was arraigned in criminal case No. 1085 of 2001 (**REPUBLIC VERSUS JOSEPH CHWENI MUMO).** He was tried but acquitted due to lack of evidence.

It is his contention that as a result of the said false allegations of the 2nd defendant the plaintiff's reputation was defamed, he suffered mental anguish and credibility too. He attended court for 35 times over a span period of 2 years and 10 months. In consequence of which he claims general damages, costs incurred in the criminal proceedings, costs of the suit, interest and any other relief that the Court may deem fit and just to grant.

The first defendant has been joined to the proceedings on the basis of vicarious liability.

The defendants put in a defence dated 10th day of August, 2004 and filed on 16th August 2004. The salient features of the same is that they are strangers to the averments in the plaint. But alternatively over that the alleged arrest was done with due regard to law and the police officers were acting within the course of their duties. Further that allegations are far from truth as an acquittal does not anywhere imply that the police officers acted in any way maliciously in conducting their duties and will at the hearing hereof put the Plaintiff into strict proof thereof at the hearing.

The Plaintiff gave evidence and called two witnesses. The Plaintiff reiterated the content of the Plaint that he was arrested on the basis of false information, he was held in custody for a number of days, that it took the efforts of his family members to have him arraigned in Court of law. This was vide charge sheet exhibit 1. The offence indicated is false swearing contrary to Section 114 of the penal Code. The particulars of the offence are that on 30th day of April 2001 at City Hall Annex Nairobi within Nairobi

area, before Jarady Atuti Nyancora person authorized to administer an oath swore falsely upon a public concern document namely a supporting affidavit.

It is the Plaintiffs evidence that he denied the offence. He was prosecuted and tried in the CM's Court in Criminal case number 1085/2001, **REPUBLIC VERSUS JOSEPH CHENI MUMO.** The Prosecution called witnesses. P.W.1 was the first prosecution witness. In his evidence at page 10 of the proceedings, the witness described as number 218502 Chief Inspector John Mbege Gitau who had been previously attached to CID Head quarters recalled that on 3.5.2001 he read in the standard Newspapers that him the witness had incriminated a wanted criminal called Philip Kanene Kiboi. The affidavit had been sworn on 17.5.2001 and in it the plaintiff had accused the witness of having made certain utterances. He responded to that affidavit by a counter affidavit. That by the time the events complained of took place the plaintiff had ceased to be an assistant Chief. The witness denied accusing the plaintiff of harbouring criminals but he knew one Philip Kanene Kiboi as a criminal who had been charged with the offence of possessing firearms.

When cross-examined he denied investing both the Plaintiffs case and that of R.V. Philip Kiboi. He denied the suggestion that he came from the same village as Philip Kiboi. Conceded that the plaintiff was one of the Chiefs in his location. They knew each other. That he was the complainant in the case and the affidavit had been given him from the Attorney General' Chambers.

P.W. 2 recorded a statement of inquiry from the plaintiff basing on the information in the charge sheet which was before him the statement was voluntary. P.W. 2 in the trial within the trial escorted the plaintiff to P.W.1 for purposes of recording the statement under inquiry. Despite the objection the statement was ruled admissible in evidence.

Submissions were made after the prosecution closed its case. In her brief ruling the learned trial magistrate noted that the prosecution had falsely alleged that the Plaintiff falsely swore an oath before one Farady Atuti Nyangora who was not called to testify despite that he was a key witness as the alleged oath was allegedly taken before him and in the absence of his evidence the prosecution evidence could not stand. On that account the learned trial magistrate found the evidence weak, not sufficient enough to warrant the accused being put on his defence and on that account acquitted him as per the ruling in exhibit 2.

It's further the stand of the Plaintiff that he is a law abiding citizen. He was employed in the civil service as an assistant chief as shown by exhibit dated 19th January l986 and confirmed vide exhibit 4 dated 24th July 1992. The defence called no evidence.

Against that background information the plaintiff's counsel put in written submissions. He revisited the evidence adduced on record by the plaintiff as outlined above. He also urged the court to note that the defence called no evidence to counter the plaintiff's evidence. At page 2 of the written submissions set out the ingredients for malicious prosecution that this client is required by law to establish namely:-

(1) That he was prosecuted by the defendant.

(2) That the proceedings were resolved in the Plaintiff's favour

(3) That the proceedings were instituted without reasonable and probable cause.

(4) That the defendant instituted the proceedings maliciously.

(5) That the Plaintiff suffered loss and damage.

Counsel applied the afore mentioned ingredients to the facts herein, he submitted that all the ingredients have been satisfied by the Plaintiff because:-

(a) The Plaintiff has proved that his arrest was as a result of the second defendant making a false

report against him.

(ii) The second defendant falsely referred to himself as the complainant when the charge read that the complainant was alleged to be one Farady Atuti who never gave evidence.

(b) The first defendant cannot be absolved from blame because it acted on the allegations of the 2nd defendant.

(c) The Plaintiff has satisfied the ingredients established by the case of **KASANA PRODUCE STORE VERSUS KATO (EA) 1973** which established the principle that in order to succeed on an action for false imprisonment one must show that there was imprisonment without an order of Court which the Plaintiff has proved by showing that the was arrested on 19th May 2001 and arraigned in Court on the 20th May 2001.

(d) The Plaintiff has shown that the proceedings were resolved in his favour by producing both the rulings and proceedings of the lower Court as exhibit 2 for criminal case number 1085 of 2001.

(e) The defendants did not show reasonable cause or any cause in that matter to warrant the arrest of the Plaintiff on the offence of false swearing affords the presence of malice.

(f) The Plaintiff has proved that he suffered loss and damage as he has shown that:

(i) He was illegally imprisoned for 6 days.

(ii) He was maliciously prosecuted for almost 2 years.

(iii) He incurred expenses in hiring Counsel to defend him in the criminal proceedings.

(g) The police officer who preferred changes did not give evidence to show on what facts he preferred those charges against the Plaintiff.

On case law, the court was referred to the case of **MOSES KHAEMBA WASIKE VERSUS THE ATTORNEY GENERAL, NARIOBI HCCC NO. 2993 OF 1995**. In this case the Plaintiff sought damages for torture and false detention for a period of 45 days. He alleged to have been severely, physically tortured, beaten and detained in inhuman conditions. After due consideration of the evidence the court awarded Kshs.7,000,000 as special damages and Kshs.700,000.00 as general damages.

The defence though they called no evidence they filed written submissions and case law. The main points relied upon are:-

(i). In order to succeed the plaintiff must show that the defendant instituted the prosecution.

(ii). The prosecution was actuated by malice.

(iii). The proceedings terminated in the acquittal of the Plaintiff.

(2). It is their stand that the plaintiff has not satisfied the ingredient of malice. Malice means prosecution for a reason other than the vindication of justice. What the Plaintiff has presented to Court is evidence of acquittal in a criminal trial. It is their stand that the mere fact that the Plaintiff is prosecuted and acquitted is not evidence of malice.

(3). The Plaintiff did not comply with the provisions of order VI rule 8(1) (b) as regards pleading of particulars of malice. What was pleaded in paragraph 7 of the Plaint does not constitute particulars of malice but particulars of breach of duty.

(4). The Plaintiff cannot take refuge under the acquittal because the same was not based on lack of evidence.

(5). The Plaintiff and his witness blamed one John Gitau who they claim had a grudge with them for the prosecutions. On this account they claim the Plaintiff ha snot proved his case on a balance of probability because:

(i) The Plaintiff has not proven malice in law.

(ii) The ingredients necessary to discharge the onus of proof on balance of probability has not been satisfied.

(iii) The Plaintiff by his own admission was aware of the charges facing him.

(iv) There is also evidence of a reasonable and probable cause to institute a prosecution for false swearing contrary to the penal code.

(v) The acquittal of the plaintiff does not in itself constitute malice as it would be contrary to public policy to place a burden upon the prosecution agencies to prosecute for the sole purpose of conviction as the cardinal responsibility to vindicate justice would be severally contravened.

(6). They contend the plaintiff is not entitled to the releifs sought because the essential ingredients or requirements in a claim for damages for malicious prosecution have not been proved and so the suit ought to be dismissed with costs to the defence.

(7). The claim for defamation and false arrest is statutorily barred by the provisions of the public Authorities Act Cap.39 (Section 3) and the defamation Act Cap.36 Section 20 thereof both which require that such claim be presented to court within 12 months from the date of the arrest.

(8). Should the court find for the Plaintiff then they suggest an award of Kshs 100,000.00 as general damages.

(ii). No special damages are awardable as none has been proved.

On case law the court was referred to the case of **NZOIA SUGAR CAMPANY LIMITED VERSUS FUNGUTUTI (L988) KLR 399.** In this case the facts were that following a report made to the police by a security officer employed by the appellant, the respondent who was also an employee of the appellant was arrested and charged with the offence of stealing by servant. The court found that he had no case to answer acquitted him under section 210 Civil Procedure Code. On appeal it was held inter alia that:-

(1). The respondent appeared to claim damages for both defamation and malicious prosecution. He could not have been properly awarded damages for defamation because at the time he brought the suit, his cause of action for defamation had expired – deformation Act Cap. 36 Section 20.

(2). Acquittal perse on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecution. The mental element of ill-will or improper motive cannot be found in an artificial person like the appellant but there must be evidence of spite in one of its servants that can be attributed to the company.

(3). The respondent gave no evidence from which it could be reasonably inferred that the security officer of the appellant company made his report to the police on account of hatred or spite.

The case of **KATEWEGGA VERSUS THE ATTORNEY GENERAL (1973) E.A. 287.** The brief facts of the case are that the plaintiff was arrested on 7th July l969 by a police officer and detained in a police cell until 13th July 1969 and there after he was remanded in custody by a magistrate until 13th

March l970 when he was discharged. On 11th February l971 he filed action against the defendant claiming damages for wrongful arrest, false imprisonment and malicious prosecution. The defendant contended that the proceedings were barred by efflux ion of time, not having been brought within one your. The police officer who brought the charge did not testify. It was held inter alia that:-

(1). The imprisonment for which the defendant could be liable ended on 13th March l970 and the claim for false imprisonment was time barred.

(2). A person instituting legal proceedings is not responsible for imprisonment which is the result of an order of the Court.

(3). The Plaintiff has to prove that the person instituting the proceedings was actuated by spite, ill-will or improper motives.

(4). Lack of reasonable and probable cause cannot be relied upon by itself to show malice.

The case of **JAMES KANGA KIIRU VERSUS JOSEPH MWAMBURI, SUMMY HUKO AND THE ATTORNEY GENERAL, NAIROBI CA. NO. 171 OF 2000.** It was an appeal against dismissal of a claim for damages for false imprisonment, malicious prosecution and loss of business by the appellant against the first two defendants as police officers in the department of the commissioner of police and the 3rd as the Attorney General. The brief facts are that the appellants was alleged to be involved in poaching activities. He was arrested on October l987. He was detained for 14 days at Garsen and Hola police stations while being investigated. He gave evidence. The defendants did not appear, they were not represented although they had filed a joint defence.

The superior court had dismissed the claim for damages resulting from the arrest and prosecution because the arrest and prosecution complained of were based on a reasonable suspicion that a criminal offence had been committed and were lawfully carried out by the officers entrusted with maintenance of law and order.

On appeal after due consideration of the evidence and the law on false imprisonment the Court of Appeal upheld the superior Courts' finding because when the respondents agents went to Malindi to arrest the appellant, they had trust worthy information that the appellant was involved in offences relating to poaching which information was overwhelming and which the defendants reasonably believed which afforded reasonable cause for them to suspect that the respondent had committed an offence. On that account the court ruled the defendant was not therefore guilty of false imprisonment in making the arrest.

On the plea of detention the court of appeal ruled that when a constable has taken into custody a person reasonably suspected of an offence he can do what is reasonable to investigate the matter and to see whether the suspicion are supported or not by further residence. He can take the suspect to his house or place of work to see if he can get important evidence or confirm the suspects alibi. The Court went on to rule that so long as full measures are taken reasonably they are an important adjunct to the administration of justice. Applying that to the facts before them the Court of Appeal arrived at the conclusion that the measures taken were reasonable. It was also noted that the appellant cooperated in what was done and cannot be heard to complain, of false imprisonment. On that account held that the learned Judge was right in rejecting the claim for false imprisonment.

On malicious prosecution the Court of Appeal ruled that to prosecute a person is not prima facie tortious but to do so dishonestly or unreasonably is malicious prosecution which differs from wrongful arrest and detention in that the onus of proving that the prosecutor did not act honestly or reasonably was on the person prosecuted which onus the Court ruled had not been discharged by the appellant. Lastly that there is no reason in the absence of evidence for making a police officer liable when he had only done his duty in investigating an offence.

In this Court's assessment of the facts herein, it is clear that the defence has moved to attack the plaintiffs claim both on technical grounds and on merit. The technical grounds arises because of the

allegations that the claim was time barred by the effluxion of time and secondly the pleading did not comply with the format laid down by the rules. To resolve this the court has to turn to the Plaintiffs plaint. Paragraph 4 pleads that the arrest was on 19th May 2001 the acquittal under Section 210 Civil Procedure Code was on 7.4.2003. The Plaint is dated 15th March 2004 and filed on 17th march 2004. One year or 12 months from 7.4.2003 would run up to 6.4.2004 the plaint was therefore presented before one year lapsed since the acquittal. The state relied on the Uganda case of **KATERREGGA VERSUS ATTORENY GENERAL (supra)** where the discharge was on 13th March l970 and suit presented on 18th February l971 the reasoning of the trial judge is found at page 288 letter H where it is noted that the act of the police officer in detaining the plaintiff was from 7 to 13th July l969. The discharge was on 13th March l970 and by filing Plaint on 11.2.71 was deemed time barred. This Court has no quarrel with that finding because although the content of Section 2 relied upon has not been set out, the presumption of this Court of the said content is that the period of limitation is one year. From 13th July l969 one year would end on or about 12th July l9970. Since the Plaintiff therein had been discharged on 13th March l970, there was no impediment to him filing the suit upon discharge. The learned judge as he then was, was justified in declining to entertain the claim for unlawful imprisonment as a result of an act of police.

Applying the foregoing reasoning to the facts herein, it is clear that the unlawful arrest of the Plaintiff ran from l9th May 2001 and arraigned in Court on 24th may 2001. One year would therefore run from 24.5.2001 to 23.5.02 by which time the Plaintiff was incapacitated as the criminal proceedings were still going on. These ended on 7.4.2003. This Court takes judicial notice of the fact that the Plaintiffs disability ended upon discharge upon the discharge he was restored to the position he would have been in had he been discharged on 24.5.01. The one year period that would have run from 24.5.2001 shifted and started to run from 7.4.03. One year would then have ended on 6.4.04. The plaint was presented to Court on 17.3.04 long before time lapsed on 6.4.2004. The court therefore rules that the Plaintiff's claim is not time barred.

The second objection related to the lack of form of the plaint in so far as particulars of malice is concerned. It is alleged that what has been pleaded in paragraph 7 of the plaint is nothing but breaches of duty. The plaint being a pleading the officially recognized weapon for attacking it is a counter pleading. Paragraph 4 of the defence is the one which responds to paragraph 7 of the plaint. It reads "*the first and 2nd defendants aver that the contents of paragraph 7 of the plaint are far detached from the truth as an acquittal does not anywhere imply that the police officers acted in any way maliciously, in conducting their duties and will at the hearing hereof put the plaintiff in to strict proof thereof at the hearing*". There is thus no complaint about lack of particularization of malice. This being the case, it means that by the defence raising this issue in their submissions they are attempting to amend their defence through the back door. The general rule is that a party is bound by his pleadings. The defence is bound by their lack of complaint about lack of particulars. This Courts perusal of the said paragraph 7 of the plaint, the particulars of malice relied upon by the Plaintiff read:

"*Knew or ought to have known that the allegations contained in the aforementioned criminal case ie. Nairobi Criminal Case No.1085 of 2001 were false. Instead the second defendant chose not to thoroughly investigate the case occasioning to the false arrest and subsequent detention of the plaintiff. The second defendant did not withdrew the malicious complaint lodged. Against the plaintiff*" If the defence were not satisfied with that mode of pleading they should have raised a preliminary objection or filed a request for better and further particulars as the case may be as pre-trial procedures. That failure to do so fore closed their subsequent complaint more so when the same is raised in Counsel's submissions.

The afore going findings not withstanding the court is entitled to revisit the said particulars and then determine whether the content satisfied the ingredient for particulars of malice as required by order VI rule 8 Civil Procedure. This Court has done so and find that the averment that "*the 2nd defendant knew or ought to have known that the allegation contained in the afore mentioned criminal case i.e. criminal case No. 1085 of 2001 were false is sufficient to sustain the plaintiffs claim not withstanding that failure to investigate thoroughly and failure to withdraw can qualify to be a breach of duty or negligent performance of duty.*

Having ruled that the Plaintiffs claim is sustainable, the Court proceeds to examine the merits of the claim Prayer (b) of the claim relates to the cost of the defence in Nairobi Criminal case No. 1085 of 2001. This Court takes judicial notice of the fact that the law requires this claim to be firstly particularized and secondly to be proved. The Plaintiff has neither particularized the claim nor proved the same as the amount paid to the lawyer has not been pleaded, neither has the plaintiff produced receipts proving payment of the same to the lawyer.

Prayer (a) on the other hand deals with the following:-

(i) Unlawful arrest,

(ii). False imprisonment,

(iii). Malicious prosecution,

(iv). Defamation,

(v). Loss of credibility on loss of credibility no evidence was adduced on this sub head.

On defamation, the court takes judicial notice of the fact that the fact that imputation of a criminal offence is actionable perse without proof of damage, there is no doubt that preferring of a criminal charge of false swearing without proof of the allegation or without a sound basis for the same qualifies to be an imputation of a crime which is actionable perse.

In his submission, to court learned Counsel for the defence tended to shift the burden of proof on to the Plaintiff. Being a civil proceeding the burden of proof is on a balance of probability. Applying that to the facts herein, the plaintiff having pleaded and given evidence that there was no affidavit sworn before Farady Atuti Advocate which was false, the burden shifted to the defence to show that such an affidavit did in fact exist and either go ahead and produce the same or adduce evidence as regards its existence. What was in contest was not the affidavit the Plaintiff alleged to have sworn but that which was sworn before Farady Atuti whose falsehood was not proved either before the Criminal trial or herein. Lack of proof of existence of such an affidavit is sufficient proof of defamation.

On unlawful arrest false imprisonment and malicious prosecution this court is guided by the principles of case law cited. It agrees entirely with the prosecution that an acquittal on a criminal charge is not perse basis for a civil liability. This is so because the standard of proof in both jurisdictions is different in the first instance. In the second instance, the court seized of the Civil Jurisdiction may it be subordinate or superior is never bound by the decision of the court that had been seized of the criminal proceedings. As noted earlier on the standard of proof is different and the court seized of the civil proceedings is entitled to re-evaluate the evidence on its own and arrive at its own decision as to civil liability on a balance of probability. This court has done so and finds that allegations of unlawful arrest, false imprisonment and malicious prosecution are intertwined and so that assessment of evidence in respect of the same will be done concurrently.

As shown by case law cited when an alleged crime is reported to police, the police cannot be faulted for taking action as that is what they are mandated to do. Liability for wrong done attaches only where there is proof of spite, ill-will and improper motive as holding otherwise would paralyze police action to the detriment of vindication of justice. This being the position the duty of this court is to determine whether on the facts displayed herein spite, ill-will, and improper motive have been demonstrated.

As noted earlier on the defence did not give evidence in this civil proceedings but they gave evidence in the criminal proceedings. The second defendant gave evidence as P.W.1. At page 10 of exhibit 2 the second defendant testified on oath that he had seen in the standard news papers his name mentioned by the plaintiff that he 2nd defendant had incriminated a wanted criminal called Philip Kanene Kiboi. On 8.5.2001 he was called to the Attorney General's Chambers office for a rebuttal affidavit. At page 14 of the same exhibit the said 2nd defendant produced an affidavit made by the accused who is the Plaintiff

dated 17.5.2001 together with a rebuttal affidavit. In his cross-examination at page 15, the said second defendant stated on oath that he comes from the same village as the plaintiff who was the accused. That the Plaintiff knew him and the 2nd defendant also knew the Plaintiff. He admitted that he sent his boys to arrest the accused. He reiterated what he had stated at the start of his evidence in Chief that he had read in the papers that it was alleged that him 2nd defendant was the one incriminating the late Kiboi. He alleged that he got the alleged plaintiffs affidavit from the Attorney General's office and he swore a rebuttal to it. Added that he had no differences with the late Philip nor the accused and then concluded by saying that he was the complainant in the criminal proceedings.

The next witness in the criminal proceedings was the officer who took the extra judicial statement from the plaintiff. It is on record in exhibit 2 pages 19 – 26 that the Plaintiff who was the accused objected to the production of that statement, a trial within a trial was held and the trial lower court ruled in favour of the prosecution admitting the said evidence. It is to be noted that the proceedings were terminated before the Plaintiff gave his version of the story in the lower court where as the defence failed to give their version of the story in the civil proceedings. The Court was urged by the defence lawyer not to believe the Plaintiffs story based on the remarks made by the learned trial magistrate in the lower court that the plaintiff was not being truthful when he attempted to disown an extra judicial statement made by him. This courts observation of those remarks are that the learned trial magistrate made those remarks on the basis of the facts before her. This court is not faced with the same set of facts as it does not even have the said extra judicial statement before it. It has therefore to base its own remarks or observations on the facts before it.

The facts before this court are that the entire process was a fabrication and ill motivated as he was accused of falsely swearing on 30.4.01 when the evidence talked of an affidavit sworn on 17.5.01. This Court has applied the ingredients of spite, ill-will and improper motive to the facts herein and it has made findings that:-

(1). The basis for allegedly making a decision to arrest the Plaintiff was what the second defendant saw in the standard newspapers on 3.5.01. The contents of the said standard newspapers were not produced in evidence either in the lower court or in the current proceedings.

(2). It is on record at age 10 of exhibit 2 that the second defendant swore a rebuttal affidavit on 8.5.2001 and yet at page 14 of the same exhibit 14 he produced an affidavit alleged to have been sworn by the Plaintiff dated 17.5.01

(3). An affidavit dated 17.5.01 cannot be taken to be the basis of the 2nd defendants rebuttal of 8.5.2001. Neither can it be the basis of the charge sheet which talks of the false swearing of 30.4.01.

(4). It is evidence from the record both in the criminal proceedings and these civil proceedings that no explanation was given as to why Farady Atuti was not called as a witness. This is the person who would have shed light both on the existence of the affidavit and the date on which the oath was taken.

Once:-

(i) The existence of the standard newspaper contents linking the plaintiff to charge,

(ii) The possibility of an affidavit dated 17.5.01 not being the basis of the 2nd defendant's rebuttal of 8.5.01,

(iii) and lastly once an affidavit dated 17.5.2001 which was produced as evidence in the criminal proceedings is ruled not to have been the basis both for the second defendants rebuttal of 8.5.01 and the basis of the charge which related to an alleged false swearing of 30.4.01, there is no justification for the Plaintiffs arrest of l9.5.01, imprisonment for 5 days up to 24.5.01 before being arraigned in court. Once the events of 30.4.01, 3.5.01, 8.5.01 and 17.5.01 are destroyed, there is no basis upon which the 2nd defendant could base his reasonable suspicion or justification that an offence had been committed in order

to sent his junior officers to arrest and imprison the plaintiff. Indeed it is the duty of the police to apprehend and bring to book suspected law breakers but as shown by case law relied upon herein, there has to be some tangible evidence which confirms the basis of reasonable grounds for suspicion of the commission of an offence. Once the foundation of reasonable ground is destroyed what is left is bare ground on which spite, ill-will and improper motive flourish. The events outlined herein fit that description. Spite, ill-will and improper motive need not be express. They can be implied. Herein though 2nd defendant stated on oath that there existed no difference with the plaintiff, absence of justification for the arrest is proof of spite, ill-will and improper motive. As a CID officer, his duty was committed to apprehending and bringing to book law breakers on the basis of reasonable and probable cause. Acting outside those bounds exposes him to civil liability.

For the reasons given the court finds for the plaintiff on the basis of unlawful arrest, false imprisonment before 24.5.01 and malicious prosecution. The establishment of liability ushers in the assessment of damages. The defence suggested an award of 100,000.00 but did not base the figure on any authority. The Plaintiff based the suggested figure to an authority that dealt with long detention, 42 days in an human and degrading conditions coupled with both mental and physical torture in an in human and degrading circumstances which are absent in the scenario displayed herein. In addition to this, the Court has to bear in mind the following cardinal principles in the assessment of damages namely:-

(1). Damages should not be inordinately too high or too low.

(2). Should be commensurate to the injury suffered.

(3). Should not be aimed at enriching at entrenching the victim but should be aimed at trying to restore the victim to the position he was in before the damage was suffered.

(4). Awards in past decisions are mere guides and each case depends on its own facts.

This court has applied the above principles to the facts herein and it makes a finding that the action of the second defendant was high handed and an award of Kshs.300,000.00 will be an adequate compensation for the plaintiff herein as general damages for unlawful arrest, false imprisonment and malicious prosecution.

In view of the foregoing assessment the final orders of this court are:-

(1). Prayer (b) which is the claim for costs of the defence in the criminal case No. 1088 of 2001 is dismissed because:

(a) Being a special claim the law requires it to be specifically pleaded and proved. The said claim herein was not particularized as particulars of how much was paid to the lawyer as costs of defence in the criminal proceedings were not given. Neither were receipts proving payments of the alleged costs incurred ever produced.

(2). As for prayer (a) regarding damages for unlawful arrest, false imprisonment and malicious prosecution, the court has found these established because:

(i) The contents of the standard newspaper of 3.5.01 which prompted the arrest of the plaintiff and the subsequent imprisonment and eventual prosecution were not produced either in the criminal proceedings or these civil proceedings.

(ii) The possibility of an affidavit dated 17.5.01 being the basis of the content of the standard newspapers of 3.5.01 and a rebuttal affidavit by the second defendant sworn on 8.5.01 has been ruled out.

(iii) The possibility of the affidavit dated 17.5.01 being the basis of the charges in exhibit 1 which talked of an affidavit sworn on 30.4.01 has been ruled out by the court.

(iv) No explanation was given as to why the lawyer before whom the oath was taken, one Farady Atuti was not produced in Court to give evidence either in the criminal proceedings or in these civil proceedings.

(v) Once maters afore mentioned in numbers 1 – iv are ruled out or destroyed there is no basis upon which the second defendant could base his reasonable suspicion or justification that an offence had been committed in order to send his juniors to arrest the plaintiff and imprison him. Once the foundation of reasonable grounds is destroyed , what is left is bare ground on which spite, ill-will and improper motive flourish, which spite, ill-will and improper motive need not be express, it can be implied like in this case. Once existence of either express or implied ill-will, spite and improper motive are established, these go to destroy the second defendants veil of protection of being duty bound to apprehend and bring to book would be law breakers. The removal of the aforesaid veil of protection ushers in a firm base for civil liability like in this case.

(3). This is a proper case where a global award as general damages for defamation, unlawful arrest, false imprisonment and malicious prosecutions can be awarded. The Court has proceeded to award a sum of Kshs.300,000.00 as being adequate compensating for the wrong suffered by the plaintiff at the hands of the 2nd defendant.

(4). The said judgment is entered against the defendants severally and jointly with the Attorney General being held liable on account of vicarious liability for actions of its servant the 2nd defendant.

(5). The Plaintiff will also have costs of the suit.

DATED, READ AND DELIVERED AT NAIROBI THIS 22ND DAY OF FEBRUARY 2008.

R.N. NAMBUYE

JUDGE