REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(CORAM: OJWANG, J.)

CIVIL SUIT NO. 2646 OF 1993

JOSPHAT MUREU GATUGUTA……..1ST PLAINTIFF

BEDAN IRUNGU MWANGI……..…2ND PLAINTIFF

NDUNGI KANGANGI……..……..3RD PLAINTIFF

-VERSUS-

HOWSE & McGEORGE LTD. ……....1ST DEFENDANT

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

JUDGEMENT

1. FALSE ARREST, MALICIOUS PROSECUTION, ACQUITTAL, FOLLOWED BY DISMISSAL FROM EMPLOYMENT, LOSS AND DAMAGE: PLAINTIFFS' PLEADINGS

The plaint in this case, dated 28th May, 1993 makes the assertion that the plaintiffs had at all material times been employees of the 1st defendant in various capacities and, as at January, 1990 were earning salaries in the sums of Kshs.7,590/=, Kshs.1,808/55 and Kshs.2,775/= over and above all other benefits respectively. It is stated that the three employees had throughout, up to the material time, served the 1st defendant with dedication and distinction, and had not at any time been punished or warned for any wrong-doing or insufficient performance of duty. It is asserted that, on or about 17th January, 1990 the 1st defendant falsely, maliciously, wrongfully and without justifiable cause, laid a claim with the Police that the plaintiffs had stolen drugs valued at Kshs.20,000/= from the 1st defendant; and upon that misrepresentation, the 2nd defendant "without any, or any proper investigations, falsely, maliciously and without justifiable cause, unlawfully arrested, falsely imprisoned, and maliciously prosecuted the plaintiffs (*Chief Magistrate's Court Criminal Case No. 424 of 1990*). The plaintiffs stood trial accordingly and were, on 17th November, 1992 *acquitted* of the charge of theft by servant.

It is asserted that by a memorandum dated *18th January, 1990* the 1st defendant, wrongfully terminated the plaintiffs' services for unspecified reasons. Consequently, it was asserted, the plaintiffs have suffered physical and mental anguish as well as expenses occasioned by the said unlawful arrest, false imprisonment and malicious prosecution and the loss of employment and its benefits; they have suffered loss of a livelihood and, consequently, have suffered loss and damage. The particulars of loss and damage were given as:

(i) loss of salary, and loss of employment and livelihood;

(ii) loss of house allowance;

(iii) loss of possible advancement by promotion on the job;

(iv) loss of medical benefits;

(v) Loss of Kshs.12,000/= each in the defence of Criminal Case No. 424 of 1990.

The plaintiffs prayed for judgement against the defendants, jointly and severally, for unlawful arrest, false imprisonment and malicious prosecution, and against the 1st defendant specifically, for wrongful dismissal. The prayers were for

(i) general damages;

(ii) special damages;

(iii) costs of the suit, with interest;

(iv) any other or further relief as the Court may deem fit to grant.

2. ARREST AND PROSECUTION LAWFUL; FOR GOOD CAUSE, AS SUSPICION EXISTED; AND SUIT IS STATUTE-BARRED: 2ND DEFENDANT'S DEFENCE

In the statement of defence, the 2nd defendant, while admitting that the plaintiffs had been arrested and charged, as averred in the plaint, deny that the arrests and prosecution were unlawful and malicious, and contend that the 2nd defendant's servants and/or agents had reasonable cause to suspect that a crime had been committed by the plaintiffs. Consequently the 2nd defendant further denies the plaintiffs' claims of injuries and for damages in respect of such alleged injuries.

The 2nd defendant also contends that the suit is bad in law, for being statute-barred.

3. REPORT TO POLICE WAS HONEST; TRULY WE LOST OUR GOODS; HOW COULD WE RETAIN SUSPECT EMPLOYEES? THEY HAVE SUFFERED NO LOSS: 1ST DEFENDANT'S DEFENCE

In its defence, the 1st defendant asserts that it had acted on an honest report, as regards lost drugs, and "there was no malice" in the termination of the service of the plaintiffs.

It was also pleaded that the evidence tendered in Criminal Case No. 424 of 1990 still showed that the 1st defendant's drugs had been lost.

The 1st defendant contends that "the dismissal [of the plaintiffs from employment] was not unlawful as it was not safe to continue keeping the plaintiffs in employment while these were serious discrepancies [?] due to their negligence and/or carelessness."

It is asserted that the 1st defendant is not aware of any damage or loss suffered by the plaintiffs, and that there can be "no compensation for the mental and physical anguish suffered by the plaintiffs." The 1st defendant denies any particulars of loss and damage listed by the plaintiffs in their claim.

4. ISSUES FOR RESOLUTION IN THE CASE

Counsel for the plaintiffs and for the 1st defendant, on 25th April, 1994 filed their agreed issues for

resolution by this Court; and the same are as follows:

(i) Were the plaintiffs arrested, imprisoned and prosecuted?

(ii) Was the arrest, imprisonment and prosecution of the plaintiffs unlawful and malicious?

(iii) Did 1st plaintiff make an honest report [regarding theft of its drugs?]?

(iv) Did the 2nd defendant's agents have reasonable cause to arrest, imprison, and prosecute the plaintiffs?

(v) Was the defendant's dismissal from employment of the plaintiffs unlawful?

(vi) Is the plaintiffs' suit against 2nd defendant time-barred?

(vii) Have the plaintiffs suffered loss and damage?

(viii) Are the plaintiffs entitled to damages against the defendants? If so, what's the quantum?

(ix) What order should be made with regard to costs?

5. PRELIMINARY OBJECTION TO THE SUIT, AND THE COURT'S RULING

On 6th November, 1996 the State Counsel who represented 2nd defendant, gave notice that he would raise a preliminary objection to the suit ? "that this suit is bad in law as it offends the provision of section 13A of the Government Proceedings Act and order VI, rule 1 of the Civil Procedure Rules."

The matter was heard before ***E.M. Githinji, J***. (as he then was); and he ruled, in the most material part, as follows:

> **"The first objection is that the suit is time-barred by virtue of s.3(1) of the Public Authorities Limitation Act. By that section a suit in tort against the Government has to be instituted within 12 months from the time the cause of action arose. The 2nd defendant's counsel contends that the cause of action arose on 17th January, 1990 and that suit was filed on 31st May, 1993, more than [three] years after the cause of action arose.**
>
> **"In an action for malicious prosecution the cause of action does not arise until termination of the prosecution in favour *of the plaintiff: Mbowa v. East Mengo Administration [1972] E.A. 352.***
>
> ***"So, in this case the action for damages for malicious prosecution is not time-barred because the suit was filed within 12 months from the date of acquittal….***
>
> ***"…[The] arrest, detention and prosecution consists of one transaction which has given rise to the plaintiff's claim. In the circumstances of this case the cause of action for damages for unlawful arrest and false imprisonment arose only when the plaintiff was acquitted. I am satisfied that the plaintiffs' entire suit is not time-barred."***

The 2nd defendant also raised an objection in respect of the notice served upon the Attorney-General by the plaintiffs, in relation to the requirements of s.13A of the Government Proceedings Act (Cap.40). The plaintiffs had given the notice of intended suit on 23rd February, 1993; and it was now contended that the said notice does not comply with s.13A of the Government Proceedings Act. This notice states that the plaintiffs would sue the Attorney-General in his capacity as representative of the Commissioner of Police. The notice also stated the circumstances that gave rise to liability.

The Attorney-General apparently had taken instructions from the Commissioner of Police, for he proceeded to file a defence on 29th September, 1993 in which defence there was no plea that the said notice was in any respect inadequate or a nullity.

The learned Judge was not, in the circumstances, in agreement that the defect of form of the said notice would operate to defeat the suit itself, since *no prejudice* had been caused to the Attorney-General. The Court dismissed the preliminary objections which had been alluded to in the 2nd defendant's statement of defence.

6. TESTIMONIES IN SUPPORT OF PLAINTIFFS' CASE

PW1, ***Josephat Mureu Gatuguta*** was sworn on 24th February, 2004 and proceeded to testify as follows. Now a small-scale farmer in Murang'a, he had got into the employ of 1st defendant in March, 1970 and was at the beginning earning a salary of Kshs.450/= per month. By the time his employment was terminated, on 17th January, 1990 PW1 was on a salary of 7,590/= per month and held the grade of Store Supervisor. His payslip for March, 1988 showed that he had, during that month, been paid Kshs.6,060/65 as salary, and Kshs.909/10 as house allowance.

On 17th January, 1990 PW1 was arrested and held at Kileleshwa Police Station; when he was released from custody he was dismissed from his employment; a criminal case, No. 424 of 1990 was commenced against PW1 as well as the other two plaintiffs herein. In November, 1992 all the three were a*cquitted* and ordered to be released by a Court of law.

PW1 testified that he had not stolen drugs from his employer (1st defendant), contrary to the allegations in the charge. At no time had the employer complained about PW1's work, or his conduct.

PW1, while working for the 1st defendant, was part of a Collective Bargaining Agreement between employer and trade union – which agreement showed some of the agreed terms of service. By that agreement, any employee who had been in employment for one up-to *five years* was entitled to *one month's notice* before the termination of his employment. In PW1's case he had worked for *20 years*; and so he was entitled to *two months' notice* before the termination of his employment.

On 18th February, 1990 there had been a memorandum from the defendant's manager, to all branch managers of the organisation. It was telling *them* that the plaintiffs herein were *no longer employees* of the defendant – and so were not authorised to be on the premises or to conduct any transaction in the name of the defendant. This memorandum announcing the termination of PW1's employment was known to others, but not himself; he was served with the same only after his acquittal and release.

PW1 testified that he had been a good employee and, on this account, he had been paid an *enhanced salary* on 20th January, 1988 (pl's exh. No.7). He averred that he had suffered as a result of his arrest and loss of employment; and he prayed that he be paid damages for defamation, benefits and costs.

Upon cross-examination by learned counsel ***Mr. Rioba***, PW1 continued to testify as follows. Sometime in 1989 the 1st defendant had made a report to the Police that some medications had been stolen from the store. While it was true, theft had taken place from the stores, it took place in the night; but PW1 had always worked only during the day – and that is the only time when the doors to the store would be kept open. At night, only guards were in charge of the store premises. It was PW1's testimony that the Police, to whom the theft of medicine worth Kshs.17,700/= had been reported, had done no investigations before placing the witness under arrest.

To further cross-examination by learned counsel ***Mr. Ingosi,*** PW1 testified that while he was a Store Supervisor for the 1st defendant, he held an inferior position to that of Manager, and it was this manager who had custody of the store key, and who would open for PW1 and those serving under him. He averred that while it was true, a theft had taken place at the drug store, the employer had no reason for arresting

him or having him arrested.

On re-examination, PW1 affirmed that there had been many workers at the drug store, and that the manager, one ***Evanson Jema,*** was the holder of the keys to the said store. PW1 testified that no inspections were conducted regarding the stolen drugs, at the time of discharging him and his colleagues from employment; and the manager was not arrested or charged. The said Manager is the one who called the Police to arrest PW1, and he is the one who wrote the letter terminating PW1's service.

PW2, ***Bedan Irungu Mwangi,*** was sworn on 17th March, 2004 and led through the evidence-in-chief by learned counsel ***Mr. Chacha Mwita.***

PW2, 2nd plaintiff, had been employed by the 1st defendant on 2nd January, 1980 as a messenger, but by the time his service was terminated in January, 1990 he had been *promoted* up to the status of Assistant Stores Supervisor. His pay at the beginning was Kshs.470/= per month, but when his employment ended in 1990 he was earning Kshs.1805/55 per month.

At this point an argument arose among counsel, as to whether the plaintiffs may be allowed to *prove special damages* which they had not set out in the pleadings; and, after hearing learned counsel ***Mr. Rioba, Mr. Chacha*** and ***Mr. Khamati*** I made a ruling as follows:

> ***"This is an old case going back to 1993, when the plaint was filed on 31st May, 1993. Over the years the matter has briefly passed through the hands of different Judges and Deputy Registrars; but there was no opportunity for a full hearing to be conducted.***
>
> ***"It is not surprising in these circumstances, that certain shortcomings in the primary documents of pleading were then not noticed. Counsel now handling the matter are not the ones who had the conduct of the case ten years ago.***
>
> ***"The specific point raised by Mr. Khamati for the 1st defendant, which has necessitated an interruption to the taking of evidence, is that para.9 [of the plaint] on particulars of loss and damage fails to liquidate the heads of special damages. This objection is, in my opinion, valid. But, to uphold it without making other attendant orders is, in effect, to substantially limit the plaintiffs' capacity to pursue the remedies they seek.***
>
> ***"The basic principle guiding the Court in relation to the continuance or non-continuance of cases, is that the full flowering of litigation is essential in judicial dispute- settlement. Therefore the Court will do everything to enable suitors to proceed with their claims, of course, subject to the rules and principles set out in the laws guiding civil procedure.***
>
> ***"Acting in that spirit, and relying on the Court's discretion provided for in s.3A of the Civil Procedure Act (Cap.21), I now make the following orders:***
>
> **……**
>
> ***"(3) The plaintiffs are given leave to make suitable amendments to the plaint within the next 14 days…***
>
> ***"(4) As soon as the plaintiffs file and serve their amended plaint, the defendants shall have leave to make any necessary amendment to their defences, and to file and serve the same within the following 14 days…."***

This matter was mentioned on 6th May, 2004 when it was noted that amendments to the plaint had been effected, but the defendants had seen no need to make amendments to their pleadings. Further hearing was delayed until 16th March, 2006, owing to the learned counsel ***Mr. Rioba*** leaving the service of the Attorney-General's office, being replaced in the conduct of this matter by learned counsel, ***Mr. Rotich.***

PW2 resumed his testimony and averred that after he had been the 1st defendant's employee for some ten years, he was arrested by the Police on 17th January, 1990, in connection with theft of drugs from the store. He was prosecuted in Criminal Case No. 424 of 1990, but was, in the event, acquitted; he said the medicines lost were not under his care or custody, and he had not been involved in the theft of the same. *After his release*, PW2 saw a letter addressed to officers of the 1st defendant, from the Manager, dated 18th January, 1990 which *declared that he was no longer an employee* of the 1st defendant. No other letter was written to PW2 by the 1st defendant; and after his acquittal and release he was not allowed to return to work.

PW2 gave further testimony on 4th July, 2006 during which he brought documentation to prove his claim to *special damages*, in line with the amended plaint filed on 30th March, 2004. PW2 also averred that at the end of the criminal trial brought against him and the other plaintiffs, they were *acquitted,* and there was *no appeal* from the Attorney-General who, therefore, must have been satisfied with the trial Court's decision.

PW3, ***Ndungi Kang'ang'i*** was sworn on 4th July, 2006 and gave his testimony as follows. He had been employed by 1st defendant on 2nd January, 1964 as a cleaner; but in 1990 he had already been promoted to the rank of storeman; and his work was to fetch medications as ordered, and place the same on the table. On 17th January, 1990 PW3 had come to work at 8.00 a.m., and the manager then called him, along with two others. PW3 found three people already in the Manager's office, and the Manager asked PW3 and his other colleagues to go with the three to the Industrial Area Police Station, for the purpose of recording statements. When the plaintiffs got to the Police Station, each was held in custody in a different cell. Two days later, PW3 was taken to the Criminal Investigations Department headquarters, and interrogated. PW3 was set free on bond, pending the trial of Criminal Case No. 424/90 at the end of which he was *acquitted.* He was not allowed to resume his work, as the 1st defendant kept him and his co-plaintiffs out of the premises.

PW3 prayed for compensation in respect of 17 days; for two-month's notice required to precede termination of service – which had not been given; 12,000/= which he had paid in advocates' fees in the criminal case; general damages; costs of the case.

This marked the close of the plaintiffs' case; and it turned out that the defendants were calling no evidence; so on 12th October, 2006 the Court gave directions on the taking of submissions by counsel.

7. NO LAWFUL GROUND, BUT MALICE LED TO ARREST, IMPRISONMENT AND PROSECUTION RUNNING IN PARALLEL WITH DISMISSAL WITHOUT PAYMENT OF DUES; A CASE FOR SPECIAL AND GENERAL DAMAGES – SUBMISSIONS FOR PLAINTIFFS

Learned counsel ***Mr. Chacha Mwita*** stated that the plaintiffs were claiming general and special damages for unlawful dismissal and malicious prosecution. On 17th January, 1990 Police officers arrested the plaintiffs on allegations of stealing drugs valued at Kshs.20,000/= from 1st defendant. The plaintiffs were charged in the Chief Magistrate's Court, Nairobi in *Criminal Case No. 424 of 1990*; a case which was heard on 17th November, 1992 after which the plaintiffs were *acquitted*. On the day following the arrest of the plaintiffs, on 18th January, 1990 the 1st defendant, by conduct, dismissed them; and they have challenged the lawfulness of the dismissal.

The trial Court in Crim Case No. 424 of 1990 "*found that the [plaintiffs herein] were not to blame because they did what had been authorised by the manager who was PW1 in the criminal case. In fact the [trial] Court found that if anyone was to blame it was the manager*."

The plaintiffs herein, in defending themselves in the said criminal case, engaged the services of M/s. D.K. Thuo & Co. Advocates which represented them throughout the trial. PW1 herein had produced the

Collective Bargaining Agreement which prescribed *the procedures to be followed by the employer* (1st defendant) *when terminating the services of unionised staff;* and these terms were *not complied with* in the employer's memorandum of 18th January, 1990 by which the plaintiffs' services were terminated. The plaintiffs have typified the said memorandum as unlawful.

Counsel urged that if the 1st plaintiff's employment had been lawfully terminated, then under the various lawful heads of entitlement, he would have been entitled to the sum of Kshs.107,381/=. Had the 2nd plaintiff been lawfully discharged from his employment, he would have been entitled to the sum of Kshs.25,684/70, under various lawful heads of claim. Had the 3rd plaintiff's employment been lawfully terminated, he would have claimed the sum of Kshs.55,197/50, under various lawful heads of claim.

It was learned counsel's submission that, the plaintiffs had clearly shown that they were *arrested, imprisoned* and *prosecuted;* but the prosecution evidence fell short of proving the plaintiffs guilty. The trial Court *exonerated* the plaintiffs from any wrong-doing, and placed blame squarely at the doors of the manager and the pharmacist. It was the plaintiffs' complaint that the Police had not conducted *proper investigations,* before laying charges against them. In these circumstances, the bringing of charges against the plaintiffs could not be *justified*; they had suffered imprisonment and prosecution for no reason.

When the plaintiffs were acquitted, they were *not reinstated* in their jobs; and they were *not paid their terminal dues*. It was urged that the dismissal of the plaintiffs was unlawful, since there was no reason to dismiss them; and even were there a right to dismiss the plaintiffs, they would have been entitled to their terminal dues.

Mr. Chacha submitted that the testimonies of the three plaintiffs had not at all been controverted by the defendants. The defendants called no evidence in rebuttal. The plaintiffs showed that they were employees of the 1st defendant; and they have shown how all of them were *dismissed* – by an o*ffice memorandum not even addressed to them*, as such. The 1st defendant did not justify the dismissal, or the failure to pay to the plaintiffs their terminal dues. Counsel asked for *special damages* as pleaded by the plaintiffs.

Learned counsel also prayed for *general damages* for *unlawful arrest, false imprisonment* and *malicious prosecution*. He urged that the plaintiffs had done no wrong, and there were no reasonable grounds upon which serious investigations would justify their arrest and prosecution.

Learned counsel urged the Court to impute *malice* to the 1st defendant, from the perception that the plaintiffs were charged with a criminal offence to cover the mistakes of their seniors.

Counsel urged that malice be attributed to the 1st defendant too, arising from the casual manner in which the dismissal was being effected, and from the unreasonable and unlawful resolve on the part of the 1st defendant not to pay *accrued terminal dues*. In counsel's submission, *"there was no desire to secure ends of justice but to do away with the plaintiffs."*

Counsel prayed for the sum of Kshs.300,000/= in general damages, for each of the plaintiffs. In this regard he relied on the persuasive authority of ***Samuel Muchiri W'Njuguna v. The Hon. The Attorney-General & Others***, HCCC No. 2007 of 2001 in which ***Ransley, J*** had held that the Police had acted without reasonable and probable cause in arresting and charging the plaintiff; and the award of general damages in that case was Kshs.300,000/=.

8. PLAINTIFFS WERE RIGHTLY DISMISSED FOR FAILURE OF DUTY; INVESTIGATION AND PROSECUTION NOT OUR RESPONSIBILITY; IN ANY CASE, THEY LODGED NO APEPAL AGAINST CASE-TO-ANSWER RULING: SUBMISSIONS FOR 1ST DEFENDANT

Learned counsel ***Mr. Mwendwa***, representing M/s. Khamati Minishi & Co. Advocates for 1st defendant, contended that the plaintiffs have not proved their case against the 1st defendant for unlawful dismissal

and malicious prosecution. This contention rested on the ground that *"all the plaintiffs in this suit were dismissed following the loss of drugs at the plaintiffs' premises. The theft of drugs occurred at the stores or department where the plaintiffs worked."* To strengthen this argument counsel invoked s.17(c) of the Employment Act (Cap.226) which stipulates:

> ***"If any employee wilfully neglects to perform any work which it was his duty to have performed or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract to have performed carefully and properly…,"***

then such an employee would be liable to dismissal.

Mr. Mwendwa urged that such was the state of affairs, as between the 1st defendant and the plaintiffs; and that, consequently, the plaintiffs are not entitled to any damages general or special as enumerated in the plaint.

It was urged, besides, that it is trite law that where an employee is summarily dismissed, if it is shown such dismissal was unlawful, then an award of damages is limited, and is *equivalent to the salary commensurate with the notice-period before terminatio*n; and if such notice is not provided for in the agreement, then the parties are to be guided by the *Employment Act (Cap.226*), which provides for *28 days' notice* before termination. In the instant case, however, learned counsel urged, "*the plaintiffs were lawfully relieved of their duty by the 1st defendant."*

Learned counsel urged that gratuities were not payable to the plaintiffs – firstly because these just don't apply, and secondly, because, were gratuities ever to be applicable, then there hasn't been any proof of them.

It was urged that the plaintiffs were not entitled to general damages; but "*even if the plaintiffs were to be entitled to general damages.. then they ought to have mitigated their status after dismissal by securing [other jobs] because the employment with the defendant was not a birth-right."*

Counsel urged that the prosecution mounted against the plaintiffs was not "*malicious*": "*The fact that the plaintiffs were acquitted does not mean that an honest report was not made by the 1st defendant to the 2nd defendant.*" It was the Police themselves, it was urged, "as represented by the 2nd defendant", who "*upon investigation found that there was evidence.. as against the plaintiffs [such] as would qualify the plaintiffs to stand a charge in Court."* Counsel contended that the 1st defendant "*is not charged with a duty to prosecute and neither is it an entity that concerns itself with investigation*." Counsel attached considerable significance to the fact that the trial Court had at some stage, found the plaintiffs to have a *case to answe*r; but against that finding the plaintiffs *did not appeal.*

9. ARREST AND IMPRISONMENT WERE FOR GOOD CAUSE; MERE FACT OF ACQUITTAL PROVES NOT BAD FAITH, LEADS NOT PERFORCE TO CIVIL LIABILITY: SUBMISSIONS FOR 2ND DEFENDANT

Mr. P.K. Rotich, learned counsel for 2nd defendant, submitted that upon the complaint lodged by 1st defendant, "the Police…investigated the matter and…arrested, charged and prosecuted the plaintiffs in Nairobi [Chief Magistrate's Court] Criminal Case No. 424 of 1990." Notwithstanding the acquittal decision, ***Mr. Rotich*** still endeavoured to find merits in the conduct of the prosecution case; in his words:

"In the criminal case the prosecution called several witnesses who testified on the theft and their evidence strongly implicated the plaintiffs…The trial Magistrate evaluated the evidence against the plaintiffs and found they had a case to answer on 17th June, 1992 and put them [to] their defence."

From his own assessment that the prosecution had indeed had a strong case against the plaintiffs, learned counsel proceeded to submit that "*the plaintiffs' claims for unlawful arrest and false imprisonment herein, therefore, have no basis in law and fact and the same must fail."* He urged that there was

reasonable suspicion that the plaintiffs committed the crimes they were charged with.

Learned counsel, on the question whether the prosecution itself was justified in the first place, called in aid the persuasive authority of ***Murunga v. The Attorney-General*** [1979] KLR 138, in which ***Cotran, J*** held that (p.138):

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

Mr. Rotich laid store by the fact of the plaintiffs having been *put to their defences* by the trial Court; in his words:

"The lower Court order putting the plaintiffs [to] their defence herein sealed the fact [that] the arrest, imprisonment and prosecution of the plaintiffs were reasonable and proper."

Learned counsel contested the ascription of *malic*e to the prosecution of the plaintiffs in the criminal Court; in his words:

> "Malice is a condition of the mind and, under the provisions of Order VI, rule 8(1)(b) of the Civil Procedure Rules, any pleading having allegations of malice must contain the necessary particulars, for the claim to be sustained."

He urged that the plaintiffs ought to have shown that the Police prosecuted them *dishonestly* and *unreasonably;* and on this point he invoked the Court of Appeal decision in ***James Karuga Kiiru v. Joseph Mwamburi & Two Others,*** Civil Appeal No. 171 of 2000.

In ***James Karuga Kiiru v. Joseph Mwamburi & Two Others***, the Court of Appeal thus pronounced itself, in respect of alleged wrongs attendant upon the act of prosecution:

> "***To prosecute a person is not prima facie tortious, but to do so dishonestly and unreasonably is. Malicious prosecution thus differs from wrongful arrest and detention, in that the onus of proving that the prosecutor did not act honestly or reasonably, lies on the person prosecuted."***

By contrast, the Court held, the *initial burden of proof* falls on the one who a*rrests*, to show *reasonable suspicion* as the basis of the same. In the Court's words:

> "***The burden was on the defendants to prove that they had reasonable cause for suspecting that the appellant had committed the offence. The evidence on this point was all one way. When the first two defendants went to Malindi to arrest the appellant they had trustworthy information that the appellant was involved in offences relating to poaching."***

On the facts of that case, the Court rejected the appellant's claim; and the following passage in the judgement may be quoted:

> "It will be evident that we also think that there is no merit in the final and faintly-argued submission that there was no reasonable and probable cause for the prosecution. It may well be that the appellant was innocent all the time, but there is no reason, in the absence of necessary evidence, for making a Police officer liable when he had only done his duty in investigating an offence."

In the instant case, learned counsel ***Mr. Rotich*** submitted that the *plaintiffs ought to prove* that the institution of proceedings against them was *actuated by spite, ill-will and improper motives.* On this point learned counsel relied on the persuasive authority of the Uganda High Court case, ***Katerregga v. Attorney-General*** [1973] E.A. 287 in which ***Mead, J*** held (at p.289):

> ***"Although the lack of reasonable and probable cause may be taken as some evidence of malice***

the plaintiff cannot rely solely on the defendant's failure to show reasonable and probable cause. The cases to which I have referred indicate the necessity for the plaintiff to prove malice in fact. I find no evidence by or led for the plaintiff from which malice either by spite or ill-will against the plaintiff, or by indirect or improper motive has been proved."

Mr. Rotich contested the rather bald claim by the plaintiffs herein, that the Police had proceeded against them before conducting proper investigations. In the words of counsel, "*this allegation does not hold water because the plaintiffs themselves are not trained crime- investigators and did not call an expert to demonstrate* how the case ought to have been investigated."

Learned counsel urged that the acquittal of the plaintiffs on benefit-of-the-doubt would not, *per se*, amount to civil culpability on the part of the prosecution. He contended that the Police had properly done their work as mandated by law, only that it was not practical for them to ensure that the plaintiffs were convicted.

Counsel urged that the plaintiffs had failed to prove their claims against the 2nd defendant; but the claims for terminal benefits by the plaintiffs did not apply in relation to 2nd defendant.

10. EVIDENCE AND LAW: A FINAL ASSESSMENT

The plaintiffs claim, in effect, that the Police – here represented by the Attorney-General ? acted dishonestly and in bad faith, in arresting them and laying charges against them before a Court of law. Such wrongful act on the part of the Police, the plaintiffs claim, amounted to *civil* wrongs, for which damages do lie.

The plaintiffs claim that the civil wrongs of the Police interlocked with the wrongs of their employer, 1st defendant, who used the process of arrest, imprisonment and prosecution as the launching pad for their dismissal from employment; and so the dismissal from employment was not just wrongful, as effected by 1st defendant, but was doubly wrongful, being occasioned by *both* defendants.

As far as the position of the 2nd defendant is concerned, the applicable law is clear, as has been discussed meritoriously by learned counsel ***Mr. Rotich***. When the Police arrest an individual, *ex facie* they limit the personal rights of that individual; and therefore they are required by law to have *reasonably susp*ected the individual arrested, of having committed an offence. The Police must have *good cause* for arresting and imprisoning an individual. From their findings during investigations, the Police may proceed to lay charges against a person whom they have arrested – provided only that they have *reasonable and probable cause* for so doing. The fact that a person is prosecuted on that basis but is later acquitted, will not place any civil liability upon the Police, *so long as they acted in good faith, and no malice* on their part is proved.

On the facts of Criminal Case No. 424 of 1990 which had been brought against the plaintiffs herein, it was established that the 2nd and 3rd plaintiffs while working in the 1st defendant's medications store, had released drugs without duly signing the invoices. The learned Magistrate had laid blame on the 1st defendant's management, rather than the 2nd and 3rd plaintiffs herein, for the failure to sign the invoices at the time of release of the drugs. There were, therefore, *internal irregularities* which may have led to the hand of suspicion being directed at the *plaintiffs* herein, though such details cannot be expected to have been fully known to the Police. The Police acted, apparently, on the single irregularity of medications being released against unsigned invoices; and they moved on to bring charges against the plaintiffs herein. Were they acting in bad faith? Had they no good cause for arresting the plaintiffs herein?

PW3 in his testimony herein said as follows:

> "I am claiming money from [the 1st defendant], not from the Government. I would like the Government to help me to recover my money from [1st defendant]…The Police did their work; but

the Court found that there was not enough evidence."

Would the plaintiffs have any cause for questioning the *investigations* conducted by the Police, as a basis for the prosecution undertaken? The answer may be found in PW2's testimony:

> "The case went on in court. Witnesses were heard. I don't know if the Police investigated the matter…In investigations, I think there was something improper. I am not trained in investigations. I have not said they did no investigation…I defended myself in Court. I was released by the Court because no culpability was found on my part…The Court said I had a case to answer…The Court gave me the benefit of the doubt…I don't see any reference to malice on the part of the prosecution, in the judgement; there is also no reference to failure to investigate properly, in the judgement."

From such a state of the evidence, I would not see justification in the contention made for the plaintiffs, that the Police had not carried out *proper investigations* before laying charges against them. The said contention does not, in my opinion, emerge from the testimonies, and, in its mode of expression, it comes as a rather bare claim, too general in character to incline this Court in any particular direction.

In the same way, hardly any evidence has been adduced showing *malice* as a fact, on the part of the Police as they commenced and proceeded with prosecution against the plaintiffs herein. The term *malice,* in law, has specific connotations that must, in principle, be established, in any claim founded thereupon. ***Black's Law Dictionary***, (8th ed., 2004) (p.976) thus defines the term:

> ***"1. The intent, without justification or excuse, to commit a wrongful act. 2. Reckless disregard of the law or of a person's legal rights. 3. Ill will; wickedness of heart…***
>
> ***"actual malice. 1. The deliberate intent to commit an injury, as evidenced by external circumstances. – Also termed express malice; malice in fact…."***

Malice in that signification, I would hold, has not been shown by the plaintiffs to have moved the Police.

I find, in the circumstances, that there is no basis for holding, firstly, that the Police had no good cause for laying charges against the plaintiffs, and secondly, that the Police had been moved by malice in prosecuting the plaintiffs. As against the 2nd defendant therefore, I do *dismiss* the plaintiffs' case; and I rule that any claim they may have, can only lie against the *1st defendant*.

As already noted from the facts of Chief Magistrate's Court Criminal Case No. 424 of 1990, ***Republic v. Josphat Mureu Gatuguta & Two Others***, the improprieties attributed to the plaintiffs herein, which were the cause, firstly of the complaint against them in the criminal case, and secondly, of their discharge from employment, were substantially occasioned by incompetent or erratic governance within the corporate body (1st defendant). What business had 1st defendant relying on *its own* shortcomings to terminate the plaintiffs' employment, without complying with *contractual procedures* of termination of service? While s.17(c) of the Employment Act (Cap.226), indeed, provided a lawful basis for the termination of the plaintiffs' services for any acts of carelessness or failure of duty, this opening remained subject to the principle of *bona fides*, as the law would not permit self-serving interpretations of it to suit eccentric perceptions of fact. The *fact*, as emerges from the criminal Court, is that the 1st defendant's management was conducting an *irregula*r drug-release procedure which did not show how responsibility for loss could be traced. Therefore, even the initial *complaint* made to the Police lacked merits, just as did also the act of *summary dismissal* of the plaintiffs, not to mention the erratic manner in which the dismissal was done by memorandum addressed to *persons other than those most affected*. The entire conduct of the 1st defendant in that regard, shows irregularity and impropriety; it was all unlawful, and could not, I would hold, nullify the plaintiffs' rights in *contract* and in the *law of employment*. Even as it exercised its right to rid itself of the plaintiffs as its employees, the 1st defendant had a *legal duty* to render unto them their dues in contract and in the law of employment.

Therefore, the plaintiffs are entitled to both *general* and *special damages* from the 1st defendant.

11. DECREE

(1) The plaintiffs' suit against the 2nd defendant is dismissed.

(2) The plaintiffs' suit against the 1st defendant is allowed.

(3) The 1st defendant shall pay general damages in the sum of (i) Kshs.30,000/= to 1st plaintiff; (ii) Kshs.30,000/= to 2nd plaintiff; (iii) Kshs.30,000/= to 3rd plaintiff – these to bear interest at Court rate as from the date hereof.

(4) The 1st defendant shall pay special damages to 1st plaintiff as follows: (i) Two months' salary in lieu of notice (amounting to Kshs.15,180/=); (ii) Salary for 17 days during which work was done, from 1st January, 1990 to 17th January, 1990 (amounting to Kshs.4,301/=); (iii) Gratuity calculated under CBA (Exh.5) – 15 days for every year completed (amounting to Kshs.75,900/=) – all sums awarded under this paragraph to bear interest at Court rate as from the date of filing suit.

(5) The 1st defendant shall pay special damages to 2nd plaintiff as follows: (i) Two months' salary in lieu of notice (amounting to Kshs.3,617/10; (ii) Salary for 17 days during which work was done, from 1st January, 1990 to 17th January, 1990 (amounting to Kshs.1,024/85); (iii) Gratuity calculated under CBA – 15 days for every completed year of service (amounting to Kshs.9,042/75) – all sums awarded under this paragraph to bear interest at Court rate as from the date of filing suit.

(6) The 1st defendant shall pay special damages to 3rd plaintiff as follows: (i) Two months' salary in lieu of notice (amounting to Kshs.5,550/=); (ii) Salary for 17 days during which work was done, from 1st January, 1990 to 17th January, 1990 (amounting to Kshs.1,572/50); (iii) Gratuity calculated under CBA – 15 days for every completed year of service (amounting to Kshs.36,075/=) – all sums awarded under this paragraph to bear interest at Court rate as from the date of filing suit.

(7) The 1st defendant shall bear the plaintiffs' costs in the suit herein; and the same shall bear interest at Court rate with effect from the date of filing suit.

(8) Any application, or any consequential issue whatsoever such as may arise from the Judgement and the Decrees herein, shall be heard and determined in Chambers by a Judge in the Civil Division of the High Court.

DATED and **DELIVERED** at Nairobi this 18th day of September, 2007.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Tabitha Wanjiku

For the Plaintiffs: Mr. Chacha Mwita, instructed by M/s. Chacha Mwita & Co. Advocates

For 1st Defendant: Mr. Mwendwa, instructed by M/s. Khamati, Minishi & Co. Advocates

For 2nd Defendant: Mr. Rotich, instructed by the Hon. The Attorney-General