



REPUBLIC OF KENYA

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

**Civil Suit 2547 of 1998**

**DOUGLAS ODHIAMBO APEL .....1<sup>ST</sup> PLAINTIFF**

**EMMANUEL OMOLO KHASINO .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**TELKOM KENYA LIMITED .....1<sup>ST</sup> DEFENDANT**

**THE COMMISSIONER OF POLICE .....2<sup>ND</sup> DEFENDANT**

**THE ATTORNEY GENERAL .....3<sup>RD</sup> DEFENDANT**

**J U D G M E N T**

(1) Douglas Odhiambo Apel and Emmanuel Omolo Khasino, the Plaintiffs in this case, sued Telkom Kenya, the Commissioner of Police and the Attorney-General, to recover damages from unlawful arrest, false imprisonment and malicious prosecution.

(2) On the complaint of Telkom Kenya, the Plaintiffs were arrested by the Police and charged on five counts of Fraudulent Appropriation of Power contrary to Section 293 of the Penal Code. They were taken before the Chief Magistrate, Nairobi, on the 21<sup>st</sup> January 1996 for plea and they denied the charges. After a full trial before the Senior Resident Magistrate, the Plaintiffs were finally acquitted and discharged on the 3<sup>rd</sup> August 1998.

(3) After reviewing the evidence, the trial Magistrate said —

“Having weighed all these facts against the accused defence, I find that there is doubt in my mind as to whether the accused persons committed the offence or not. I will give them the benefit of doubt and acquit them under S.215 of the Criminal Procedure Code.”

Following their acquittal, the Plaintiffs instituted this suit claiming damages as I have already stated. Telkom Kenya filed a Defence and denied the Plaintiffs’ claim as did the Second and Third Defendants respectively.

(4) On the 19<sup>th</sup> October 2004, the case came before Aluoch, J and the learned Judge recorded the following Order by CONSENT:

“(1) Let the Second and Third Defendants herein be and are hereby WITHDRAWN from this suit.

(2) That judgment on LIABILITY be and is hereby entered as follows — i.e. 15% against the Plaintiffs and 85% against the First Defendant.

(3) That the matter be mentioned on the 1<sup>st</sup> November 2004 for recording quantum of damages.”

When the matter was mentioned before the same Judge on that date, no quantum was recorded and the case was stood over generally at the request of counsel for the Plaintiffs.

(5) The suit was then fixed for formal proof on the 11<sup>th</sup> April 2005 but the parties failed to attend court and on the 15<sup>th</sup> February 2006 when the case came up again for formal proof, the parties agreed to stand over the matter for mention on the 23<sup>rd</sup> February 2006 **“to record possible settlement.”**

(6) When the matter was mentioned before Visram, J on the 23<sup>rd</sup> February 2006, the learned Judge recorded the following Order by CONSENT:

**“Plaintiffs to file and serve submissions by the 28<sup>th</sup> February 2006 and Defendants to file and serve submissions by the 3<sup>rd</sup> March 2006. Mention on the 9<sup>th</sup> March 2006 to take judgment date before any Judge.”**

And on the 9<sup>th</sup> March 2006, counsel attended before Judge Visram and the learned Judge made the following Order:

**“Submissions having been filed, I nominate Justice Kariuki to write the Judgment. Mention before Justice Kariuki on the 9<sup>th</sup> March 2006 to take Judgment date.”**

(7) When counsel appeared before me later that day, Mr. Nyamogo, learned counsel for the Plaintiffs, informed me that since judgment had already been entered on liability, the parties had agreed to file submissions on the basis of which I was required to write judgment on quantum of damages. Mr. Nyamogo asked me to give a date for judgment, pursuant to Justice Visram’s earlier order, which I did. Mr. Koech, learned counsel for the Defendant, confirmed that that was the position.

(8) That being the brief history of the matter, I am now required, indeed expected, to assess damages on the basis of the pleadings, written submissions and the consent orders made by Aluoch, J. and Visram J., to which I have already alluded, notwithstanding that no evidence whatsoever has been adduced by either side. Not even the Plaintiffs were called to give evidence on their own behalf. Among the documents included in the Plaintiffs’ Advocate’s submissions are copies of two receipts in respect of legal fees alleged to have been paid by the Plaintiffs to the Advocates who defended them at the criminal trial. So as things stand, there is no evidence on record upon which I, as a court of law, can undertake an assessment of damages. There are averments in the Plaint that the Plaintiffs suffered loss and damage. The Plaintiffs must place before the court evidence to sustain those averments. Pleadings and written submissions are not evidence. That is the first difficulty I have in this case.

(9) The Second difficulty is that by the time the case came before me with a direction to write judgment, the claim against the Commissioner of Police and the Attorney –General had already been withdrawn leaving Telkom Kenya as the sole Defendant in the suit. The Plaintiffs were arrested and charged by the Police. And the prosecution was undertaken by the Attorney-General as the public prosecutor. Telkom Kenya was merely a complainant. The decision to charge and prosecute the Plaintiffs was taken by the Police and the Attorney-General. Telkom Kenya as a complainant would not have been involved in that process. Once Telkom Kenya had made a complaint to the Police, it was left to the Police to investigate the complaint and decide whether or not to charge the Plaintiffs. That is why in a claim for damages for unlawful arrest, false imprisonment and malicious prosecution, the proper defendant is always the Attorney-General.

(10) The dilemma I have here is that judgment has already been entered on liability and submissions have been filed and orders made, albeit by consent, by Judges of equal jurisdiction. I have no power to disturb or disregard those orders. I am bound by them and I must give them effect.

(11) Since evidence has not been adduced in support of the claim for general and special damages, I would in normal circumstances simply dismiss the claim. But if I did so, judgment on liability would still remain. In view of this, I hold that the Plaintiffs are entitled to nominal damages only which I assess at K.Shs.100/= for each Plaintiff. This sum has to be reduced by fifteen per centum (15%) to K.Shs.85/= for each Plaintiff in terms of the consent judgment entered by Aluoch, J. on the 19<sup>th</sup> October 2004. There will therefore be judgment for each Plaintiff for K.Shs.85/= and I so order but I make no order as to costs.

Dated and delivered at Nairobi this Thirty-first day of March, 2006.

P. Kihara Kariuki

Judge