REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 2230 of 2001

LT. COL. BENJAMIN MUEMA…….....…….PLAINTIFF

-VERSUS-

THE ATTORNEY-GENERAL…..…….....…….....…1ST DEFENDANT

MAJOR-GENERAL HUMPHREY W. NJOROGE.....…..2ND DEFENDANT

COMMISSIONER OF POLICE…….....……3RD DEFENDANT

JUDGEMENT

I. ABSTRACTED FROM REGIME OF MILITARY LAW AND PROCEDURE AND SUBJECTED TO CIVIL COURTS: THE PLAINTIFF'S PLEADINGS

The original plaint was dated and filed on 27th December, 2001. On the basis of that plaint, trial commenced on 1st of March, 2004 and as the hearing progressed the plaintiff sought leave to join in the 3rd defendant, which application I did allow on 10th March, 2004. Consequently the amended plaint dated 12th March, 2004 was filed on the same day.

The plaintiff pleads that he had been recruited into the Kenya Armed Forces in 1975, and later granted a Commission in the Kenya Regiment (Territorial Force) as an Infantry Officer. After undergoing further training the plaintiff had a change of service and held a contract position as a helicopter pilot and instructor. The plaintiff was engaged in instructional duties at the Defence Staff College at Karen, Nairobi at the time of the occurrences leading to this suit.

It is pleaded that sometime in mid-March, 1993 certain officers from the office of the Commissioner of Police brought before the 2nd defendant allegations against the plaintiff. The 2nd defendant thereupon, it is pleaded, acted against the plaintiff by handing him over to the said police officers, so that he may face charges in civil Courts. In this way, the plaintiff pleads, the defendants wrongfully took leave of the applicable military law, and presumed to order the plaintiff to resign his commission in military service.

The plaintiff pleads that he was violently removed from the framework of military law and military service; he avers: "towards the end of March, 1993 the 2nd defendant and the police officers, armed with rifles, pistols and revolvers, prepared a letter of resignation for the plaintiff's signature." He further avers: "Fearing for his life, amid threats and intimidation, the plaintiff copied and signed the document."

The plaintiff pleads that upon succumbing to the intimidation and signing the letter of resignation of commission, a series of criminal charges were brought against him, to wit,

(i) Cr. 1989/93;

(ii) Cr. 1990/93;

(iii) Cr. 2286/93;

(iv) Cr. 2791/93;

(v) Cr. 1067/94;

(vi) Cr. 732/2000.

The plaintiff pleads that none of these copious criminal charges was justified, as witness the fact that they were, each and all, dismissed by the civil Courts.

The plaintiff pleads that he has been hard-done-by, and unjustly treated, by the defendants: the defendants had acted with alacrity on uninvestigated allegations prejudicial to him; by removing him from his commission in the military service, the defendants had wrongfully arrogated to themselves the functions of the President and Service Commander; the defendants had entered upon actions prejudicial to the plaintiff by presuming to prepare and issue unlawful retirement documents; and the effect of such actions was to subject the plaintiff to immense financial loss and damage.

The plaintiff pleads that he has suffered due to the 2nd defendants failure to investigate the allegations made against him even as the 2nd defendant acted on the same; that he has suffered the brunt of *illegal arrest;* that he has been subjected to *malicious prosecution*. The plaintiff avers that his demands made upon the defendants, for redress, have been overlooked by the defendants.

So the plaintiff prays for judgement against the defendants jointly and severally, for —

(a) a declaration that his removal from his employment was unlawful, null and void;

(b) a finding that the police arrests and prosecutions made against the plaintiff were "illegal, unprocedural and malicious.";

(c) general damages for illegal removal from office, loss of promotion, illegal confinement, malicious prosecution, injury to reputation; or general damages for unlawful termination of employment;

(d) damages for loss of use of the plaintiff's two motor vehicles held by the police, and return of the same;

(e) costs of this suit;

(f) interest on costs at Court rate;

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

II. ISN'T THE SUIT TIME-BARRED? WEREN'T ACTIONS TAKEN AGAINST THE PLAINTIFF LAWFUL? DIDN'T PLAINTIFF VOLUNTARILY RESIGN HIS COMMISSION? — DEFENDANTS' PLEADINGS

The 1st and 2nd defendants' original statement of defence, dated 18th February, 2002 and filed on 19th February, 2002 was amended on 1st February, 2005 and filed again on 3rd February, 2005. In its

amended form, the statement of defence is tendered in the name of all the three defendants.

It is pleaded that the plaintiff's suit is time-barred, by virtue of s.3(1) and (2) of the Public Authorities Limitation Act and on that account the claim is bad in law and ought to be struck out. It is pleaded that the plaintiff is non-suited as the suit is bad in law and discloses no cause of action.

The defendants plead that "if indeed the plaintiff was arrested and charged in Court then the said arrest and subsequent prosecution were founded on reasonable suspicion that the plaintiff had committed a criminal offence and proper investigations were done before the alleged prosecution was commenced hence any allegations of malice and illegality are denied *in toto.*"

The 2nd defendant pleads that "if indeed the plaintiff signed any resignation letter then the same was done voluntarily and without any intimidation at all."

The defendants contend that the plaintiff's suit contravenes the provisions of Order VI, rule 8 of the Civil Procedure Rules, and so the same is bad in law and should be struck out. It is pleaded that the plaintiff is not entitled to any of the reliefs being sought. The defendants plead that the plaintiff's claim does not disclose any reasonable cause of action against them, and so the suit merits being dismissed.

III. TESTIMONIES

1. The Plaintiff's Case

The plaintiff who conducted his own case, was sworn on 1st March, 2004 and embarked upon his testimony. He testified that he had joined the Armed Forces in April, 1975 as an Officer Cadet, and underwent early training within this country; but in September, 1975 he was further trained as an Officer Cadet at the military college at Sandhurst, in the United Kingdom. He graduated as Second Lieutenant, and returned to Kenya to take up appointment in the Kenya Army in that capacity. He thereafter served in various appointments until 1980, when he left the infantry and joined the Army Aviation Corps. He trained as a pilot and qualified in 1980, holding the rank of Captain. In 1982 the plaintiff took further training at the United States Army Aviation School in Alabama, and qualified as an instructor-pilot for two classes of aircraft – OH 58, and U.H.1. He also acquired instrument rating in instrument flight, before returning to Kenya. He was then asked to initiate the Kenya Army Aviation School, of which he became the Commandant in 1983. The plaintiff returned to the United States in 1984 for training as an instrument flight examiner, and he duly qualified before returning to Kenya to participate in the establishment of the instrument flight training curriculum at the Kenya Army Aviation School. The plaintiff returned to the United States in 1986 to pursue the Senior Aviators Course, and Training of Trainers Course, and he duly qualified. Upon his return, he was moved to the training of Officer Cadets at the Armed Forces Training College, at Lanet; and he remained there until 1989 when he proceeded to the Grade II Staff Course at the Defence Staff College at Karen, Nairobi; and thereafter he was moved to the Army Headquarters as Operations Officer; and then he was moved to the Nanyuki Air Base as a brigade Major. In *July 1992* the plaintiff was promoted to the rank of Lieutenant-Colonel, and posted to the Defence Staff College as an instructor.

It is in the short period of the plaintiff's assignment at the Defence Staff College that events came to pass which brought the problems lying at the root of the suit herein. In contrast to the position of the defendants, that it is the mischiefs perpetrated by the plaintiff which brought him into trouble, the plaintiff sees schemes deliberately orchestrated by politically-influenced officers, as having led to a distortion of legal processes, and to false imprisonment and malicious prosecution mounted against him, and he lays blame squarely at the doors of the defendants herein.

The plaintiff testified that in 1992, his father and mother (both now deceased) joined an Opposition party, the Democratic Party, during the multi-party euphoria which dominated political life in the country in that year. After his father, the late ***Samuel Muema*** allowed his premises at Mwala to be used as

Democratic Party offices, word got to Government about it — the plaintiff testified. The plaintiff received intimations from political personalities that he should dissuade his father against such political gestures; and he did, indeed, but his father refused, and he made a report back to the relevant politicians — the plaintiff testified.

Not long thereafter, on *24th March, 1993* one ***Col. Walter Vuvi*** (now deceased) called on the plaintiff at his office at the Defence Staff College, and asked him to leave that institution's premises, and report to one ***Col. Kunyiha***, who was in charge of the Military Police, at the Armed Forces headquarters. When he got to the office of ***Col. Kunyiha*** (now deceased) he found officers from the elite Police department known as the Flying Squad; and they took him to their headquarters at Pangani, in Nairobi. The plaintiff was soon thereafter relieved of his office-support services, such as his driver; and he found himself being interrogated about the theft of cars in Kenya. The police took him to his residence in the Riverside area of Nairobi; they searched his house; they kept him incommunicado and detained him, keeping on shifting him from one Police station to another. They kept the plaintiff in such a condition for six days, during which he had no food or change of clothing, and he had only the bare floor for a bed — he testified. It was not until 29th March, 1993 at the Railway Police Station that he was, for the first time, allowed to come out of confinement. The police now took the plaintiff to the Defence Staff College at Karen, and brought him before the Commandant (2nd defendant).

The Defence Staff College Commandant sought from the plaintiff a letter of resignation. On what account? The Commandant told him he (the plaintiff) was involved in criminal activities, and that such involvement in crime was destined to soil the good name of the Government. When the plaintiff declined to sign the resignation letter, he testified, he received threats from both the 2nd defendant and the police officer: the former to withdraw all benefits due to the plaintiff; the latter to inflict unspecified harm upon the plaintiff and his family. The two officers, the plaintiff testified, told him at that moment he "would be in Court for the next ten years"; in his words: "if I wanted to work I would have no chance to work." The plaintiff testified that he was denied counsel; he was asked to "draft my own resignation; and I began to write my own resignation. I did [Plaintiff's exhibit No. 8]. I wrote it under duress." Immediately thereafter the plaintiff was "released to the police" and, in his words, "the Armed Forces had no further business with me." He was taken back to the elite police headquarters at Pangani and was, for the first time, allowed visitors, a meal, and a change of clothing. He was also now allowed legal counsel, and came to learn for the first time what the claim against him was.

The plaintiff testified that on 30th March, 1993 he was taken to the Nairobi Provincial Criminal Investigations Officer, who asked him to sit down and write a statement incriminating himself as a "robber and a thief". His reaction, as he testifies: "I did not write it. He told me I would be kept in Court over the next ten years."

On 31st March, 1993 the plaintiff was arraigned before the Chief Magistrate's Court, in ***Criminal Case No. 1989 of 1993*** and yet another case, ***Criminal Case No. 1990 of 1993*** (plaintiff's exhibits No. 3 and No. 6). In the case of Criminal Case No. 1989 of 1993 the Attorney-General entered *nolle prosequi* on 24th February, 1994. In the case of Criminal Case No. 1990 of 1993 the plaintiff was acquitted under s.210 of the Criminal Procedure Code, on 30th August, 1994. On 4th May, 1993 yet another case was commenced against the plaintiff, ***Criminal Case No. 2286 of 1993*** (plaintiff's exhibit No.5); and then, yet another case, ***Criminal Case No. 2791 of 1993*** (plaintiff's exhibit No. 7) was also commenced against the plaintiff. In ***Criminal Case No. 2286 of 1993*** the charge was robbery with violence contrary to s.296(2) of the Penal Code; and the date of the offence was shown as 7 – 8 January, 1993; however, the plaintiff testified that he had during that period been in the company of the 2nd defendant, on duty abroad, in Dacca, Bangladesh; he was acquitted on 7th August, 1994, under s.210 of the Criminal Procedure Code (Cap.75). In the case of ***Criminal Case No. 2791 of 1993*** the plaintiff was acquitted on 6th September, 1995. He had also been charged in ***Criminal Case No. 1064 of 1994,*** on 10th March, 1994 – a charge which carried elements identical to those in the earlier charges. Repeatedly thereafter, the prosecution made substitutions to the charges in that case, and after a long break the plaintiff was, on 29th March, 2000 again arraigned before the Chief Magistrate's Court and remanded at Kamiti Prison. Two criminal

cases, No. 732 of 2000 and No. 1067 of 1994 remained on the books but were not prosecuted with the adduction of any evidence in Court; and on 9th April, 2001 the Attorney-General entered *nolle prosequi.*

The plaintiff recounted the injuries he suffered while held in custody to include: shock to his mother in 1993 who soon after died, to be followed soon by his father; his wife abandoning home, leaving his children behind; financial disruptions affecting him personally; loss of a military career and loss of opportunity as a pilot. The plaintiff averred that he had two motor vehicles which were the subject of several criminal cases, in respect of which the Attorney-General had entered *nolle prosequi;* and these are still in the custody of the state. The plaintiff testified that in the context of the number of abortive prosecutions which had been lodged and maintained against him for about a decade, he had suffered physically, emotionally and financially, and he urged that his prayers be granted.

The plaintiff was cross-examined on 10th March, 2004 by learned State Counsel ***Mrs. Kajwang***. The plaintiff further testified that it was the 2nd defendant who had ordered him to sign against the resignation file, and that this was not his own choice. In his words: "policemen accompanying me to the military camp and [the 2nd defendant] threatened me with dire consequences if I did not resign."

Of his standing as a military person, the plaintiff testified that he had been involved in defence combat, especially in the Shifta Campaign; he has served in the Buffer Zone in Ogaden, between Somalia and Ethiopia (1978 – 1980); and in 1984 he was a Squadron Commander in West Pokot, involved in the recovery of stolen animals from tribes living in Uganda.

Questioned on how he came to sign a letter of resignation from his commission in the Armed Forces, the plaintiff averred: "The idea of being kept in Court for over ten years scared me. I was helpless. I was surrounded by people with guns; I had no food, no water; it was very scaring." In these circumstances the plaintiff redrafted the resignation letter, and the officers having control over him agreed to have the letter typed, by the 2nd defendant's secretary; this was done on the letterhead of the Defence Staff College. The letter was addressed to the Defence Council, through the Army Commander.

The plaintiff testified that his said "resignation" took place after he had completed 18 years of military service; and upon "resignation" he was promptly made *persona non grata* at military camps. At the end of July, 1993 the plaintiff was escorted to the Defence Staff College to hand over everything which had been under his care and custody. He was informed verbally by the Chief Executive Officer at the Defence Staff College that "the Defence Council had met and decided that I voluntarily retired from the Armed Forces." But he, the plaintiff, had received no communication from the Defence Council which is an autonomous body and which takes decisions on behalf of the Chief of Defence Staff.

The plaintiff averred that he had not been accorded an opportunity to clear from the Armed Forces, and all that he was given was a record of service. He averred that he never resigned and never retired from the Armed Forces, as the process of retirement is defined and protected by statute law – and the same had not been followed in getting him out of military service. Such, he averred, remained true, even though he was given a lump-sum payment in 1994 and continues, to-date, to receive a monthly pension of Kshs.7,206/=.

The plaintiff testified that he was a commissioned officer in the Armed Forces. Section 169 of the Armed Forces Act (Cap. 199) empowers the Defence Council to grant any Kenyan a Commission in the name of the President; the matter is first considered by the Commissions Board (a statutory body); then the officer takes the oath of allegiance; and then one becomes a commissioned officer. Such a person first gets a short-service commission (five years), and during that period assessment and vetting takes place; following which the officer may serve for ten years before being accorded a regular-service commission; and thereafter the officer is permanently employed – and this was the plaintiff's status as at 1993. On that status, an officer, the plaintiff averred, is answerable, by s.69 of the Armed Forces Act (Cap. 199) for all acts public or private, so that even where such an officer is brought before the regular Courts, there would be a procedure to be followed under the Armed Forces Act.

The plaintiff averred that in ***Criminal Case No. 1989/93*** which had been brought against him, there was no complainant who alleged that the plaintiff had robbed him. So the "complainant" was the State itself, as was also the case in ***Criminal Case No. 1990/93***, in ***Criminal Case No. 2280/93***, in ***Criminal Case No. 2791/93***, in ***Criminal Case No. 1067/94***, in ***Criminal Case No. 732/2000***. The plaintiff had doubts whether the complainants in some of the criminal cases – Criminal Case No. 1067 of 1994 (***Kipyegon arap Mutai***); Criminal Case No. 732 of 2000 (***Kipyegon arap Mutai***); Criminal Case 2286 of 1993 (***James Harry Waithuki***) – were indeed genuine complainants. In Criminal Case No. 1989 of 1993 one ***Alnasir Gamur*** had been presented as a complainant; but when he was produced as a witness in Court he did not talk about the plaintiff herein. The plaintiff averred that he was not in prison now because none of the evidence the several State witnesses brought to Court, in any measure implicated him; and that by the time the Attorney-General entered *nolle prosequi* in all the criminal cases brought against the plaintiff, there had been no serious attempt to prosecute those cases. The State had called witnesses; none of them had any cogent evidence.

The plaintiff testified that the first time the charges brought against him were mentioned in Court, on 4th May, 1993 both his father and mother were alive; but they went into shock soon thereafter, and one died, followed by the other. He went on to aver: "I have now lost even my family." The plaintiff averred that he had had to face still other tribulations: "I have had difficulty in getting a job, in spite of my skills. I am a military specialist with aircraft operations experience. I have no licence to operate civilian aircraft. If you spend all your time coming to Court, nobody will employ you as a pilot. Pilot's work is full-time. I had four cases running in Court; I had to be in Court for mentions; I had to come to Court three-to-four times a week; I was not available to be employed."

The plaintiff testified that he had not voluntarily executed letters resigning from the Armed Forces; he had served with distinction, and had an exemplary record, and he had a testimonial given to him on discharge. The testimonial shows his Service No. as 17604, a Lieutenant – Colonel, with "Very Good" assessment; hard-working and intelligent officer; fully-trained helicopter pilot; qualified instructor; can be employed in civilian business as helicopter pilot or instructor; has served the army very well. From these statements in the testimonial the plaintiff remarked: "If the Department of Defence had no problem with me they would not have kicked me out." He further averred that the complainants in the several criminal cases commenced against him "had no proper evidence to produce in Court against me; and these complaints would not have had much to do with the Department of Defence."

2. Defendant's Interlocutory Challenge to the Suit during the Hearing

Even as the plaintiff testified before the Court, it had become apparent that notwithstanding his earlier indications to the office of the Attorney-General that in the intended suit the Commissioner of Police would be joined as a party, the suit as filed had omitted this intended third defendant. The need to include the third defendant as a party became apparent, leading the plaintiff to apply informally in Court for a limited amendment to the plaint to include the Commissioner of Police. The relevant part of the ruling which I made on that occasion, on 10th March, 2004 reads as follows:

"***In considering the [plaintiff's application] I have made reference to the plaint. It is quite clear that the claims of the plaintiff turn on his status as a Lieutenant – Colonel up to the termination of his service. The essence of his claims, therefore, turns on the Department of Defence and the Office of the Attorney-General, as the State Office responsible for prosecutions which conducted the prosecutions which have resulted in alleged harm to the plaintiff. The role of the Police would only have been in the form of keeping the plaintiff in custody and carrying out the decisions of the prosecutorial office, namely the office of the Attorney-General, as well as giving justifications to the Department of Defence for terminating the service of the plaintiff. However, ideally the Commissioner of Police should have been joined as defendant, because the plaint seeks certain declarations against Police activities***.

"***The justice of this case will come out of hearing the case as a whole. By virtue of section 3A of the Civil Procedure Act (Cap.21) which provides that 'Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice***

or prevent abuse of the process of the Court,' I now order that the plaintiff may at this stage join the Commissioner of Police as a defendant."

The Attorney-General, by Notice of Motion dated 31st March, 2004 sought "a stay of the [said] order made on 10th March, 2004 and further proceedings in HCCC No. 2330 of 2001 pending the hearing and determination of [the 1st defendant's] appeal."

After hearing both sides I gave a ruling on 22nd October, 2004 and the relevant passage runs as follows:

"***Even as the main suit by the plaintiff was in the course of being heard in the normal manner, the Attorney-General came by Notice of Motion seeking a stay of the proceedings. Why? Because, in the course of the hearing, the Court had in exercise of its discretion, allowed the plaintiff to include as a defendant a party all-along intended to be enjoined, but whose name was accidentally omitted, namely the Commissioner of Police. About 6 ½ months ago the Honourable The Attorney-General's representative filed a Notice of Appeal against the Court's decision to allow joinder of the Commissioner of Police. Neither conviction in giving that notice, nor serious intent to prosecute an appeal has been established; and the evidence on file would suggest that no valid appeal is about to be lodged. If this conclusion proves to be a valid one, then a major injustice would have been done to the plaintiff whose suit lodged by plaint in December 2001 against Government authorities for wrongful dismissal from a job in the Armed Forces, was already in the process of being heard.***

"***In the aftermath of the filing of the Notice of Appeal, the Attorney-General filed a Notice of Motion seeking stay of the suit proceedings, pending the hearing and determination of the said appeal. Now since I have serious doubts whether any valid appeal is being prosecuted, it must follow that allowing the application would have the effect of unwarrantedly delaying the attempt by the plaintiff to seek redress against what he perceives as wrongful acts against him by the public authorities. Counsel representing the defendants has argued that the Commissioner of Police, a public officer performing public duty and having little to lose as a private person, will suffer irreparably if the suit proceedings are not stayed during the pendency of the anticipated appeal. Bearing in mind that the plaintiff has a plaint which, in my assessment, clearly carries triable issues, considerations of justice must dictate that the Court does not impede or interrupt his search for redress, save for good cause. Good cause has not been demonstrated before this Court. The effect of the prayers sought by the defendants, if granted, would be interminable delay, and such delay will serve no purpose except to manifest abuse of Court process.***

"***Accordingly I hereby dismiss the defendant's Notice of Motion application of 31st March, 2004 with costs to the plaintiff/respondent."***

3. Evidence for Plaintiff arising from Cross-examination in the aftermath of joinder of 3rd Defendant

The plaintiff stated, on 9th February, 2005 that in one of the criminal cases brought against him he had been charged with handling stolen property, and in the alternative, processing a suspected stolen motor vehicle. He averred that he used to do business and had several cars, one of them being registration number KAB 825Q which was the subject of one of the charges brought against him. The plaintiff averred that he had bought the said car from a car sales yard, and that he was duly given its registration book when he completed making payments. The prosecution subsequently could produce no consistent incriminating evidence and, after as many as 18 witnesses testified, the Attorney-General entered *nolle prosequi* on 29th February, 1994.

4. The Defendant's Case

The one witness for the defence, ***Major Joseph Kosene*** (DW1) was sworn and embarked upon his testimony on 13th June, 2005. His evidence was of a formal kind, as he had not been witness to any of

the occurrences recounted in detail by the plaintiff.

DW1 testified that he is a records officer at the Defence headquarters. He had held that position for only nine months, and used to work earlier-on at the Air Force headquarters. He is a custodian of files, these files relating to officers' personal records, retirement matters and the like.

DW1 testified that he is aware of the employment record of the plaintiff. He produced as defence exhibit No. 1 a letter of 27th March, 1993 written by the plaintiff; it was addressed to the Defence Council through the Army Commander and through the Defence Staff College. This letter is concerned with resignation of commission, and by it the writer states he wishes to resign his commission "as a matter of principle." The Commandant records on the letter his recommendation; the letter is signed and dated. There then follows another letter, two days later (29th March, 1993) by the Army Commander addressed to the Chief of General Staff — and this *forwards* the earlier letter to the Chief of General Staff. In the forwarding letter it is stated that the Commandant has approved the plaintiff's resignation of commission and the Army Commander "has no objection" subject to the approval of the Chief of General Staff. A letter such as that of 29th March, 1993 goes to the Chief of Personnel or Chief of Staff, for forwarding to the Chief of General Staff. DW1 testified that such a letter receives Personnel Office comments and detailing, before it goes to the Chief of General Staff, with the Chief of Staff presenting "request for resignation of commission" (defence exhibit No.3). The Chief of staff prepares the necessary minutes to the Defence Council for approval. The Chief of Staff writes a response downwards after he receives the letter of request for resignation of commission (defence exhibit No. 4); he requests that steps be taken to discharge the officer.

DW1 testified that it is after the Defence Council's approval of the resignation that the Department of Defence issues discharge instructions – including calculations of any payments due; and this, it was averred, is what the record shows to have taken place in the case of the plaintiff (defendant's exhibit No. 5). Of the resignation in question, the witness testified: "All his due leave days were calculated, and then terminal leave was signed by ***Capt. J.K. Ikiara*** who was the Records Officer then." The plaintiff was given 90 days to clear, and return all military effects; and on 20th January, 1994 the Department of Defence received all the items required of the plaintiff.

On the basis of the clearance certificate issued in respect of the plaintiff (defence exhibit No. 8B); a declaration form under the Official Secrets Act, signed by the plaintiff (defence exhibit No. 8C); particulars of the plaintiff's contact address (defence exhibit No. 8D); medical examination report (defence exhibit No. 8E); income tax clearance letter (defence exhibit No. 8F); signed commutation of pension certificate (defence-exhibit No.9); and the assessment of pension form (defence exhibit No.10), the plaintiff's pension was worked out in two parts: lumpsum of Kshs.432,300/80, and monthly pension of Kshs.7,206/45. The moneys were forwarded to the Pension Department, with instructions to deduct Kshs.269,620/40 in respect of which the plaintiff was indicated to be indebted. Later the witness got a letter that the payments had been made to the plaintiff as directed. DW1 testified that the plaintiff was today earning a pension, just as he has done since 1993. He further testified that the plaintiff had been issued with a letter of discharge and a testimonial written by the Commandant of the Defence Staff College. Of this testimonial DW1 averred: "It is just like a recommendation letter."

The plaintiff cross-examined DW1 on 1st November, 2005 and further evidence was given as follows. The witness was commissioned on 3rd August, 1990 and became a recorder on 13th May, 2004 with responsibility for maintaining records on the personal and military life of officers. The witness testified that he was familiar with the official file kept on the plaintiff, and that the plaintiff had been commissioned on 1st August, 1975 and his last day of service, in accordance with retirement instructions, was 8th July, 1993. The witness acknowledged that the plaintiff had written a *letter of redress* to the Chief of General Staff (CGS) requesting that his retirement be rescinded; but the CGS in his reply rejected the request.

DW1 testified that he did not know if the plaintiff had been under arrest when he wrote a letter of resignation of commission, but acknowledged that the said letter was *on the letterhead of the Defence*

Staff College. DW1 also testified that he was not in possession of any warrant by a magistrate for the arrest of the plaintiff. He averred that he did not have any *abstract of evidence* against the plaintiff on file; he explained this on the basis that the criminal cases brought against the plaintiff had not been military cases, and so no abstract of evidence was served on the plaintiff.

DW1 testified that after the plaintiff's retirement, no order was made transferring him to the Kenya Army Regular Reserve; and this matter was governed by the terms of a restricted document – namely the Terms and Conditions of Service. Upon retirement, DW1 averred, the plaintiffs record of service was officially classed as "Very Good."

On re-examination (conducted by learned counsel ***Mrs. Kajwang***) DW1 confirmed that the plaintiff after being retired had written to the CGS a letter of redress. His remark on that initiative was: "It is not normal to seek redress when one seeks retirement; those who opt to retire do not seek redress." DW1 testified that the plaintiff's request for redress "was rejected," due to the fact of "your being *asked* to resign your commission."

DW1 testified that in the plaintiff's redress letter he averred that he had been "forced to resign", but "he did not state who forced him to resign." He averred that the resignation letter had been *circulated* to members of the Defence Council, and they had given their approval. He testified further that his records did not show that the 2nd defendant had called for the said letter of resignation, or that he had given approval to the resignation. He averred: "The offence was not within the service; it was an external criminal offence; and so there was no need for an affidavit sworn by the Commandant, or for a warrant by a Magistrate. An affidavit would be required only if the offence was against the service, and the same is the case with the record of evidence, in relation to court-martial. If the matter is not before a court martial, then it goes to the civil police and the Courts."

DW1 testified that "where a military officer commits an offence outside the Armed Forces, he will be *advised* to resign and sort out the matter……; if they are cleared they may be reinstated." DW1 testified hat he did "not know" how the criminal charges brought against the plaintiff had been disposed of; and he did not "know what [the plaintiff] is claiming." In DW1's view, the manner in which the plaintiff ceased to be employed was "not unlawful"; "he never applied to be considered for re-absorption; in his redress letter he was only complaining." DW1 further testified: "After one leaves the Armed Forces, one can rejoin only after a certain duration, and beyond that it is not possible; twelve years after [the plaintiff left employment] it is not possible to reinstate him."

IV. SUBMISSIONS

1. Background

After several mentions learned counsel ***Mrs. Kajwang*** indicated on 28th March, 2006 that she would not call any further evidence; she would close the defendants' case and look forward to an opportunity to address the Court on issues of law. The parties thereupon agreed to prepare written submissions, which they would file and serve.

2. Commissioned Officer Removable from Commission only after Compliance with Military Law: Plaintiff's Submissions

The plaintiff claims that he was unlawfully removed from the Kenya Army Regular Force as a commissioned officer. He contends that his employment in the Kenya Armed Forces was a protected position under statute law; that, therefore, this was a permanent position subject to statute law; but, he contends, his retirement was politically orchestrated, was malicious and mischievous and was effected outside the framework of the law.

The plaintiff contends that since his office was statutorily underpinned, "any attempt to remove him without observing the statutory requirement [of the] law [was] a nullity." He contends that the defendants had attempted to circumvent the applicable law in his circumstances, particularly the Armed Forces Act

(Cap.199), by dislodging him physically from the Act's protections, and handing him over to the Commissioner of Police, who was moved by ill-will in commencing groundless criminal charges run over a continuous period of eight years – and in the end all being dismissed by the civil Courts. The abortive prosecutions ran in parallel with the detention of the plaintiff's two motor vehicles, all through from 1993 to-date – and in spite of Court orders in the plaintiff's favour.

Of the defence testimony, the plaintiff submitted that only one witness, ***Major Joseph K. Kosene***, had been called; and the main part of his evidence related only to the production of the plaintiff's personal file since many of the documents in it are classified. The said file was incomplete and only portions were presented in Court. In the plaintiff's words, the defence witness "did not witness the events that are the subject-matter of the suit nor did he participate in any manner in the events that form the basis of the plaintiff's claim."

The plaintiff remarked a certain element in DW1's evidence: "He … told the Court that although the Chief of General Staff wrote to the Army Commander on 30th March, 1993 confirming that the Defence Council had approved the plaintiff's 'resignation', no formal meeting of the Defence Council took place at that time."

The plaintiff remarked an element in his own evidence: "…on 29th March, 1993 when [he] allegedly resigned he was indeed under arrest by the Kenya Police and …the letterhead [bearing the letter of resignation] was that of the Defence Staff College where the plaintiff worked prior to his arrest."

The plaintiff remarked another point in his own evidence: "At the time of handing over the plaintiff to the Kenya Police and subsequently to the Kenya Prisons, the 2nd defendant did not sign a written order to that effect and that he did not swear an affidavit to a Magistrate's Court to issue a warrant for the plaintiff's detention by either the Kenya Police or the Kenya Prisons."

The plaintiff made submissions on the nature of the "commission" granted to an officer in the Armed Forces, and urged that a commissioned officer, such as he was, is statutorily protected and cannot be alienated from his commission save in accordance with the law.

The Defence Council grants a commission in the Armed Forces, but does so only in the name of the President who by s.4 of the Constitution, is the Commander-in-Chief of the Armed Forces of the Republic. As the Defence Council does not, in that regard, act in its own name, it does not issue letters of appointment to commissioned officers. The plaintiff submitted that a commission under s.169 of the Armed Forces Act (Cap. 199) is different from other commissions; it is a commission vested in one person. Letters of appointment under the Armed Forces Act are issued by the Minister, but only when granting duties under s.3(2) of that Act; or by the President when making appointments of the Chief of General Staff (CGS) and Service Commanders under s.6(5) of the Act. This is precisely the reason, the plaintiff submitted, why the defendants could not have produced a *letter of appointment* in respect of the plaintiff. As a corollary, the plaintiff submitted, the plaintiff "can only lose his commission after he has been court-martialled and sentenced under s.102 of the Armed Forces Act" (Cap.199); and thereupon, the Defence Council or the President may exercise the powers conferred by s.171 of the Armed Forces Act, to terminate the plaintiff's commission. In that case the plaintiff would then lose his terminal benefits including pension and gratuity. This legal position, the plaintiff submitted, was departed from when the plaintiff was "retired" and granted his terminal benefits.

The plaintiff submitted that: "a commissioned officer in the Armed Forces [carries] the same legal status as the Judicial Service Commission, the Public Service Commission or the Electoral Commission [of Kenya]; he is an institution unto himself. He cannot be ordered to resign or retire nor can he be charged in a public subordinate Court but in a court martial, as he is not part of the public service. A Magistrate's Court may only conduct inquiry [leading to any] recommendation to face charges before either a court martial or the High Court, in accordance with (the provisions of ss.69 – 74 of [the Armed Forces Act] (Cap.199)." The plaintiff submitted that a court martial and a Magistrate's Court are both subordinate Courts having the same jurisdiction, under the supervision of the High Court. He urged that "The Armed Forces Act (Cap.199), s.69 does not envision a situation [wherein] a member of the Armed

Forces is tried by civilian Courts [rather than] the High Court."

The plaintiff relied on the Court of Appeal decision in ***Eric V.J. Makokha & 4 Others v. Lawrence Sagini & 2 Others***, Civil Application No. Nai 20 of 1994, in which the following passage appears:

…some employees in public positions may have their employment guaranteed by statute and could not be lawfully removed unless the formal requirements laid down by the statute were observed. It is possible this is the true meaning of what has become the charmed words 'statutory underpinning.' If this is correct, we can readily conceive of some of such public positions. For instance, under section 61 of the Constitution of Kenya, Judges are appointable by the President and removable by him. But he cannot lawfully exercise the power of removal [except] for specified misdoings and unless a tribunal appointed specifically for the purpose, after investigating such conduct recommends to him such removal. So it can accurately be said that the tenure of Judges was protected by the Constitution. The same applies to other constitutional office-holders such as the Attorney-General, [Comptroller and] Auditor-General and others. Even an ordinary office-holder can be protected by statute."

The juristic validity the same point can be seen too in English Court of Appeal decision in ***Gunton v. London Borough of Richmond upon Thames*** [1980] 3 All E.R. 577 (at p. 585 – ***Buckley, L.J***.):

"***This clearly implies that there may be circumstances in which a purported termination of a contract of service may not in law determine the contract. The Judicial Committee [of the Privy Council] could hardly have held otherwise in the face of the decision of the House of Lords in Vine's case, but they emphasised that in their view such a declaration should only be made in special circumstances. In Vine's case the special circumstance was the statutory nature of the National Dock Labour Scheme, which gave the plaintiff a statutory status over and above his rights under his contract of service, so that as the judgement in that case made plain, Vine's case was not just an ordinary master-and-servant case."***

It was the plaintiff's contention that the state of the law as represented by the two cases would have been known to the defendants, and this "explains why they went overboard, forcing the plaintiff at gunpoint to tender an illegal resignation and thereafter awarding him illegal pensions in the hope that this would induce the plaintiff to [adopt] perpetual silence."

The plaintiff submitted that there are certain statutory limitations to the powers of the Defence Council, and so certain decisions regarding his military service could not have been taken by the Defence Council. The Defence Council is not an employer, by the terms of ss.2 and 14 of the Employment Act (Cap. 226). S.6 of the Armed Forces Act (Cap.199) sets out the duties of the Defence Council; it can make regulations, but lacks the competence to enforce some of such regulations (s.227(2) of the Armed Forces Act). It has no power, it was submitted, to enforce regulations with regard to: authorising a regular commissioned officer to resign; awarding pensions or gratuities; issuing any instructions for retirement. Even where the Defence Council makes regulations regarding some of the foregoing items, it was submitted, the enforcing authority is the Minister for Finance.

The plaintiff submitted that the implementation of pension arrangements for a commissioned officer in the Armed Forces falls to the Ministry of Finance (s.227(2)(d) of the Armed Forces Act (Cap.199). And in this regard the Minister for Finance is guided by the provisions of s.6(1)(a)(iii) of the Pensions Act (Cap.189) and s.2 of the Armed Forces Pensions and Gratuities Act (Cap. 201). The two statutes provide that for a commissioned officer to be eligible for pension, he must have attained the age of 50 years, or must have suffered death, or sickness or disability rendering him unfit for military duties; and the Minister may not take a pension dispensation decision save in the case of those statutorily qualified. The moment the Minister has dispensed the payments, the Defence Council then invokes the provisions of s.170(2) of the Armed Forces Act (Cap. 199). If, however, the Minister for Finance does not dispense the pensions, the Defence Council is then left with the options of instituting court martial, or transferring the person concerned to *regular reserve*, with his salary as it stands (ss.182 and 227(1)(u) of the Armed Forces Act). The plaintiff noted from the medical report dated 21st December, 1993 and produced in Court by the defendant (defence exhibit No. 8E) that the plaintiff was aged *36 years* in 1993; and so he is

today 48 years old. The same report shows that the plaintiff was in good health in 1993. Consequently, the plaintiff submitted, he did not in 1993 and does not now, meet the conditions laid down for pension eligibility, in the terms of s.6(1)(a)(iii) of the Pensions Act (Cap.189) and s.2 of the Armed Forces Pensions and Gratuities Act (Cap.201); and thus, the defendants had unlawfully given him pension when they did.

The plaintiff further submitted that "retirement" for a commissioned officer in the Armed Forces, under the law, does not necessarily mean "termination of service": "What it means in the military is an open transfer to the Regular Reserve under sections 170(2), 182 and 277(1)(u) of the Armed Forces Act (Cap.199). The military contract merely goes to a dormant …state." In that state of dormancy, retired members come out for 28 days in a year, for the purpose of keeping themselves fit, trained and conversant with changing tactics; and this is the basis upon which they maintain their contracts of service under s.184 of the Armed Forces Act (Cap.199). The President may call up reserves to temporary or permanent duty, by virtue of the provisions of ss.185 and 186 of the Armed Forces Act (Cap.199). A reservist may resign, or may be released if his services are no longer required, by virtue of ss.189 and 190 of the Armed Forces Act.

The plaintiff submitted that under the law, he could not be said to have resigned his commission, as the defendants have claimed. This is because commissions in the Armed Forces are protected by statute law, and cannot be resigned or revoked, outside the prescribed statutory procedure. It was urged that in military law, "resignation" only applies to the Regular Reserve under s.190 of the Armed Forces Act, or to duty appointments, but not to *commissions.*

It was the plaintiff's contention that the criminal charges which the police had brought against him exemplied an abuse of enacted law. The applicable law in his case would have been the Armed Forces Act (Cap. 199), and by this statute the accusations would have been made as a charge before his Commanding Officer, who would conduct investigations in the prescribed manner (ss.80, 81 of the Act), and in accordance with the Armed Forces Rules of Procedure (rules 712). The Commanding Officer, it was submitted, is to hear the evidence himself from witnesses and from the accused (Rule 8), and then have such evidence reduced into writing in the form of *abstract of evidence* (Rule 9), which is then to be served upon the accused. In his own case, the plaintiff submitted, the 2nd defendant did not take evidence from any witnesses or from the plaintiff, nor did the 2nd defendant have an abstract of evidence prepared for his perusal and service upon the plaintiff.

The plaintiff submitted that there was good reason for the obligation placed on the Commanding Officer to have an abstract of evidence prepared: to enable him to appreciate the nature of the evidence available for or against the accused person. This will enable the Commanding officer to make informed decisions with regard to the accusing allegations; and in the absence of the same abstract of evidence, the quality of decision-making by the Commanding Officer will be compromised, because he will then be acting on mere rumours and innuendos which cannot be verified or ascertained.

On the foregoing principle, the plaintiff impugned the decision which was taken by the Commanding Officer (2nd defendant) to dislodge the plaintiff from his work station and his protected statutory status, and hand the plaintiff over to the civilian set-up, the Kenya Police, *without hearing any evidence or perusing an abstract of evidence*. The police methods had, in effect, been allowed to compromise the scheme and purpose of the military process; in the words of the plaintiff: "The Kenya Police merely called the Department of Defence and made allegations against the plaintiff. These allegations were accepted as fact by the second defendant without [any inquiry conducted with] due diligence. The second defendant then proceeded [casually] to hand over the plaintiff to the Kenya Police…"

The plaintiff submitted that such an informal approach to a serious question touching on the statutory commission, was contrary to law; and he relied on this point on a decision of the High Court (***Visram, J***) In ***Ronald Muge Cherogony v. the Chief of General Staff of the Armed Forces of Kenya & 2 Others***, Misc. Cause No. 671 of 1999. The learned Judge in that case ruled:

"***Where a statute lays down a particular procedure for the doing of an act, such a procedure may be***

construed to be [directory] or mandatory. If it is [directory], then it is meant to be a guideline and a departure therefrom is not necessarily fatal to the validity of the decision-making process. However, if it is mandatory then any departure renders the ultimate decision null and void. Where an act affects the rights of a person and that effect is penal in nature statutory conditions and procedure should be scrupulously adhered to. I am much influenced by s.86(2) of the Constitution which states that 'In relation to any person who is a member of a disciplined force raised under any law in force in Kenya, nothing contained or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in contravention of any of the provisions of this Chapter other than sections 71, 73 and 74.' Since the applicant cannot rely on, inter alia, s.77 of the Constitution which establishes the right to a fair hearing, it is imperative that whatever procedural safeguards… provided by the Armed Forces Act and rules made thereunder are strictly preserved. I therefore find the procedures laid down in the Act, Rules and Standing Orders to be mandatory, and departure therefrom [is] fatal."

By handing over the plaintiff to the Police Force to be tried before civil Courts, the plaintiff urged, the defendants had ensured that the plaintiff's protection under the fundamental rights and freedoms provided for in the Constitution, were denied; and for the eight years that he was continually tried in the civilian Courts, he did not have the benefit of the protections set out in s.84 of the Constitution. It was not possible for the plaintiff, in those circumstances, to seek protection under the subsidiary legislation relating to the fundamental rights of the individual (L.N. No. 72 of 2001).

The plaintiff submitted that the defendants had failed to comply with the law relating to the holding of military personnel in civilian custody. Where such action has to be taken, the Commanding Officer is required by s.77 of the Armed Forces Act (Cap.199) to sign and present a written order to the superintendent or other person in charge of the civilian prison, or to the person in charge of any police station, to the intent that such superintendent or other person may receive the military personnel and detain him for a period not exceeding 15 days. Alternatively the Commanding Officer may swear an affidavit or other document for the use of a Magistrate of the first class, for the grant of a warrant to hold the military personnel in remand for a reasonable period, not exceeding 21 days at any given time, in a civil prison or police station.

The plaintiff noted from the defendants' evidence (DW1) that the plaintiff had been in the Kenya Army Regular Force from ***14th April, 1975*** to ***27th July, 1993.*** But he was in Police custody from ***24th – 31st March, 1993***; and in prison from ***4th May, 1993 – 30th May, 1993***; and during both periods of confinement he was still under the Armed Forces, as a member of the Kenya Army Regular Force and therefore subject to the provision of s.77 of the Armed Forces Act (Cap.199). DW1 had confirmed in his evidence that the 2nd defendant did not prepare a written order to the persons in charge of the various police stations where the plaintiff was held between 24th and 31st March, 1993; nor did the 2nd defendant obtain a warrant from a Magistrate's Court of the first class authorising the plaintiff's detention in the relevant police stations. No order or warrant had been presented to the Superintendent of Kamiti Maximum Prison on 4th May, 1993 validating the confinement of the plaintiff in that prison. On these grounds, the plaintiff submitted that the handing over of him to the Kenya Police and later to the Kenya Prisons, "was illegal, and the confinement was also illegal."

The plaintiff submitted that his "resignation" of his commission was a nullity, being vitiated by threats, intimidation and duress. In his words, "a person resigning should be in a state of mind free from physical and mental distress, anguish or torture." But in his case, on the day he is said to have resigned he had been in the custody of the Kenya Police for six days "in deplorable conditions and had not been allowed to consult legal counsel."

The contention regarding forced resignation is buttressed by the fact that the plaintiff had subsequently written a "*letter of redress*" to the Defence Council, through the Chief of General Staff. He was "pleading his innocence and requesting that he be allowed to continue serving in the Kenya Army." The evidence of DW1 was that the request was refused, and the plaintiff duly informed so. The plaintiff urged: "if a person resigns voluntarily it is incomprehensible that [he] would turn round and immediately write a letter of redress wanting to return to work", and DW1 too had acknowledged this

fact.

The plaintiff contests the language of "discharge" used in relation to the mode of termination of his service with the Armed Forces. He submits that the word "discharge" would apply to servicemen (members of the Armed Forces other than commissioned officers) but not to commissioned officers; and this position would contradict the letter relating to him from the Chief of General Staff, of 30th May, 1993 addressed to the Army Commander which instructed: "Please take necessary steps to *discharge* the officer from the service accordingly." Even the testimonial given to the plaintiff by the defendants had borne the heading: "Copy of Testimonial on Discharge." The plaintiff submitted that it is illegal to discharge a commissioned officer from the Armed Forces.

The plaintiff submitted that the retirement process to which he had been subjected was flawed in law. From the evidence, the letter of resignation was written on ***29th March, 1993***. Recommendation for resignation had been made in the Army Commander's letter to the Chief of General Staff of the same date, ***29th March, 1993***. The Chief of General Staff wrote to the Army Commander on *30th March, 1993* informing him that the Defence Council had approved the resignation of the plaintiff. DW1 testified that the Defence Council did not hold any formal sitting during the relevant period; hence, the plaintiff urged, there could not have been a valid Defence Council approval to his resignation. On ***31st March, 1993*** the plaintiff was arraigned in the Magistrate's Court, on criminal charges.

The plaintiff submitted that the defendants must have assumed that after forcing the plaintiff to resign, he thereby ceased to be a member of the Armed Forces; but DW1 testified that even as at ***27th July, 1993*** the plaintiff was a member of the Armed Forces and that he only ceased to be so on that date. The plaintiff submitted: "the fact that the plaintiff's retirement was rushed through in a record two days and that he was charged in Court on the third day proves malice on the part of the defendants."

DW1 had testified that the plaintiff had not been transferred to the Kenya Army Regular Reserve. Section 170(2)(b) of the Armed Forces Act (Cap.199) provides:

"**An officer holding a regular commission who retires with a pension or gratuity shall thereupon be transferred to the reserve and shall serve in it until the age of fifty years in the case of a person retiring with the rank of Lieutenant-Colonel or corresponding rank or below."**

The plaintiff submitted that since his date of birth is on record as ***15th May, 1957,*** at his purported last day of service he was ***36 years old,*** and even now he has not yet attained the age of 50; and therefore he met the conditions for mandatory transfer to the regular reserve, especially as the defence evidence is that the plaintiff's military conduct had been assessed as ***Very Good*** at the time of his departure from service. He urged that Regular reserves are mandatory components of the Kenya Army, the Kenya Air Force and the Kenya Navy, as stipulated in the Armed Forces Act (Cap.199) s.4(a),(b)(i) and (ii):

"**The Kenya Army, Kenya Air Force and Kenya Navy shall each consist of —**

(a) the regular force;

(b) the reserve consisting of —

(i) the regular reserve and

(ii) the volunteer reserve if the Defence Council decides that there shall be one…"

The plaintiff thus submitted, quite rightly in my view, that the three services of the Kenya Armed Forces are incomplete in the absence of the regular reserves.

The plaintiff submitted that his transfer to the regular reserve was mandatory if he met the conditions specified in s.170(2) of the Armed Forces Act. And besides, s.182 of that Act affirms the point:

"**Every officer and every serviceman who is liable to be transferred to the regular reserve shall until transferred remain subject to this Act."**

Section 7(1)(a) of the Act indeed specifies the categories of personnel who are subject to the Act:

"**The following persons are subject to this Act —**

(a) officers and servicemen who are not reservists…"

That, as submitted by the plaintiff, means that members of the regular force under s.4 of the Act are subject to the Act.

The plaintiff submitted that he remains subject to the Armed Forces Act (Cap.199) until he is transferred to the regular reserve; and this would mean that he is still serving in the regular force of the Kenya Army; and so he would still be entitled to payment of allowances until he is transferred to the regular reserve. However, the plaintiff acknowledged that he "has not enjoyed these rights since 27th March, 1993."

The plaintiff submitted hat his removal from office was illegal; and to buttress the contention he relied on the English House of Lords decision in ***Vine v. National Dock Labour Board*** [1956] 3 All E.R.939. In that case the plaintiff's employment with the National Dock Labour Board was regulated by a scheme set up under the Dock Workers (Regulation of Employment) Order, 1947. The National Board could delegate its functions to local boards; and local boards could give seven days' notice of termination of employment to any registered dock worker who failed to comply with any provisions of the scheme. The National Board at some stage approved the delegation of powers to disciplinary committees set up by the local board. One of such committees terminated the plaintiff's employment after giving seven days' notice. The plaintiff claimed damages for wrongful dismissal and a declaration that his purported dismissal was illegal, *ultra vires* and invalid. An appeal and a cross-appeal were later brought before the House of Lords. It was held that the plaintiff's purported dismissal was a nullity since the local board had no power to delegate its disciplinary functions. ***Lord Cohen*** thus remarked (p.944):

"…***it follows from the fact that the plaintiff's dismissal was invalid that his name was never validly removed from the register, and he continued in the employ of the National Board. This is an entirely different situation from the ordinary master and servant case. There, if the master wrongfully dismisses the servant, either summarily or by giving sufficient notice, the employment is effectively terminated, albeit in breach of contract. Here, the removal of the plaintiff's name from the register being, in law, a nullity, he continued to have the right to be treated as a registered dock worker with all the attendant benefits which, by statute, that status conferred on him. It is, therefore, right that, with the background of this scheme, the Court should declare his rights."***

The plaintiff draws on the principle in the ***Vine*** case, and urges:

"…the plaintiff's employment herein is protected by statute. The plaintiff cannot be removed from his employment unless the statutory provisions are fully complied with. If they are not, then the plaintiff continues to have the right to be treated as any other commissioned officer with benefits which by statute [he is entitled to]."

The plaintiff submitted that the Oath of Allegiance which he had subscribed upon being commissioned as an officer of the Kenya Armed Forces, constituted the contract between him and the State, through the President as Commander-in-Chief of the Armed Forces whose part entailed upholding the law of the land. He urged; "Since the Oath of Allegiance is not a written contract but a consummation of a commission, the commission cannot be retired or resigned [from] unless the statutory provisions are scrupulously [adhered to] [, and this includes] publishing the necessary legal notices."

The plaintiff contended that owing to breaches of military law perpetrated by the defendants herein, he had lost out significantly in career prospects; and judging by the current career stations of his peers and

even his juniors when he joined the Armed Forces, barring the hardships he has had to sustain, he would by now be a Major-General in the Armed Forces. Indeed he makes the plea that he be awarded precisely that rank. And he finds a persuasive authority from the High Court which he urges, favours grant of his prayer. In ***Captain J.N. Wafubwa v. The Hon. The Attorney-General***, HCCC No. 674 of 1993 ***Hayanga, J*** thus ruled:

"***The question whether the plaintiff should have been promoted by the Defence Council is a question to be answered. [The] defence says that it is [a] prerogative of the Defence Council under section 225 [read with section 5] of the Armed Forces Act (Cap.199), but I do not think the High Court is excluded, [and] besides, it is my view that whatever the Defence Council does in relation to [the] employment of any person must not flout the principles of natural justice….***"

The learned Judge went on to rule:

"***I find that the plaintiff deserved being promoted to the rank of Major and if he had been so promoted at the time of his being retired he should have earned [a] Major's salary up to the age of 44 years. I, therefore, decided that the plaintiff is entitled to [a] Major's salary for five years from [the] date of retirement to the time he attained the age of 44 years.***"

The plaintiff relies on the ***Wafubwa*** case to urge that "the plaintiff…should be awarded the rank of Major-General, just like his peers."

The plaintiff prayed for damages assessed on the basis of the following considerations:

(a) the plaintiff lost Kshs.2.5 million which had been kept in a bank which became insolvent during his confinement by the defendants;

(b) the plaintiff lost the use of his two motor vehicles on ***31st March, 1993 —***

(i) a new Isuzu Trooper which earned in rental per day Kshs.5000/=, and later 15,000/=;

(ii) a Toyota Corona — earning per day Kshs.4,000/= in 1993 rising to Kshs.12,000/=;

(c) the plaintiff was held in confinement by the Kenya Police and the Kenya Prisons for a total of 11 months;

(d) the plaintiff was maliciously prosecuted;

(e) the plaintiff's reputation was injured;

(f) the plaintiff lost his opportunities for promotion;

(g) the plaintiff suffered mental, physical and emotional torture;

(h) the plaintiff lost earnings;

(i) the plaintiff lost career progression, promotion and social status.

The plaintiff prayed for a *declaration* that his removal from employment was unlawful, null and void; for a finding that his arrest by the Police and his prosecution were illegal and malicious. He sought damages for illegal removal from office, illegal confinement, malicious prosecution and injury to reputation; he prayed for promotion commensurate with the career progression of his peers; he prayed for damages for loss of use of his two motor vehicles, and for their restoration to him.

In the alternative the plaintiff prayed for general damages for the unlawful termination of his employment; costs of this suit; interest on the foregoing items at Court rate; and any such further or other

relief as the Court may deem fit to grant.

3. The Plaintiff is time-barred, and he has no Cause of Action: Submissions for the Defendants

Learned Principal Litigation Counsel ***Mrs. Kajwang*** made submissions for the defendants on the basis of the following issues which were dated 21st May, 2003 and had been filed on 9th June, 2003;

(i) Was the plaintiff 'removed' from his office by the defendants?

(ii) Was the alleged 'removal' unlawful, null and void?

(iii) Were the Police arrests and prosecutions illegal, unprocedural and malicious as alleged or at all?

(iv) Is the plaintiff entitled to general damages?

(v) Is the plaintiff entitled to damages for loss of use of the two motor vehicles allegedly held by the Police, and also entitled to the return of the same?

(vi) Is the plaintiff entitled to general damages for unlawful termination of his employment?

Learned counsel entered upon her submissions by considering whether a *cause of action* had been established. She submitted that the factual situation upon which the plaintiff relies to support his claim must be capable of being recognised under the law as giving rise to a substantive right capable of being claimed or enforced against the defendant.

Mrs. Kajwang contended that the plaintiff had not pleaded a right that is enforceable, because *contract* is likely to be his basis of claim but it was not specifically pleaded. In her submission, "The relationship between the plaintiff and his employer was *contractual"*, and the relevant contract was terminated in 1993. Of the plaintiff's contention that his removal from employment was "unlawful, null and void", learned counsel urged that no cause of action had been shown, because "There is no cause of action in the law of *contrac*t known as unlawful removal from employment." She urged that any right that the plaintiff could, in this matter, properly claim could only have been a *public right,* but, in her words, "public rights can only be adjudicated upon by way of *judicial review."*

Mrs. Kajwang further submitted that the plaintiff, in impugning the arrest and prosecution of him by the Kenya Police, "appears to be attempting to establish a cause of action in *tort."* She contended that "There is no tort in law known as "failing to carry out investigations"; and so it was only proper for the plaintiff to proceed, within the ambit of torts, under *malicious prosecution.*

Learned counsel did contend, however, that the plaintiff could not have been maliciously prosecuted. She submitted that "the pleadings as drawn do not demonstrate a cause of action in tort known as malicious prosecution."

Even at this stage learned counsel still pursued the argument that the plaintiff's claim was time-barred. She recounted the generous number of criminal cases which the Prosecution had successively brought against the plaintiff in the Subordinate Courts:

(a) ***Criminal Case No. 1989/93***: This carried three offences. A total of 18 witnesses were produced, but the State then entered *nolle prosequi* and the plaintiff was discharged by the trial Magistrate on 24th February, 1994.

(b) ***Criminal Case No. 1067/94***: The accused was arraigned on a charge of robbery with violence under s.292(2) of the Penal Code, and the plaintiff was remanded in custody. After nine witnesses gave evidence, the Hon. Attorney-General applied to the High Court against orders made by the trial Magistrate as the trial proceeded. There is uncontroverted evidence that *nolle prosequi* was entered in this case on ***9th April, 2001.***

(c) ***Criminal Revision No. 4 of 1995:*** This rather strange application in the High Court by the Attorney-General was never disposed of, and was last mentioned on ***12th July, 1999***.

In the meantime, ***Criminal Case No. 1067/94*** to which Criminal Revision No. 4 of 1995 related, was last mentioned in Court on ***25th March, 1996.***

(d) ***Criminal Case No. 732 of 2000:*** This was yet another criminal charge brought against the plaintiff during the unexplained pendency of both ***Criminal Case No. 1067/94*** and ***Criminal Revision No. 4 of 1995***. At the plaintiff's challenge — quite legitimate in my view — of such duplicity and irresolution in the prosecution of commenced criminal matters, the Court granted a *stay* of ***Criminal Case No. 1067/94*** and gave mention dates (for the purposes of hearing) for ***Criminal Case No. 732/2000.*** Strangely enough, the Prosecution showed no serious intent to prosecute ***Criminal Case No. 732/2000***; that case was *withdrawn* under s.87(a) of the Criminal Procedure Code (Cap.75).

There were yet other criminal cases brought against the plaintiff —

(e) Criminal Case No. 1990/93; and in this, the plaintiff has given uncontroverted evidence that he was ***acquitted*** on ***30th August, 1994;***

(f) Criminal Case No. 2286/93, and in this case the plaintiff gives uncontroverted evidence that he was **acquitted** on ***7th August, 1993;***

(g) Criminal Case No. 2791/93, and the plaintiff has given uncontroverted evidence that he was acquitted on ***16th September, 1995.***

It is a truly large number of criminal cases which the prosecution initiated against one man, and covering the same or cognate alleged offences. It is truly remarkable that a responsible prosecution could lodge such a surfeit of criminal cases against a man, only to fail to prove, or eventually to withdraw, each and all of them; and there is a *conclusion* to be drawn at this stage: no reason existed for the commencement of prosecution process, or, alternatively, criminal prosecution was being initiated *without evidence*. Such prosecution would be contrary to law, since it is a trite principle of the criminal law that there shall not be any conviction of an accused, without proof beyond reasonable doubt. I have to conclude at this stage that the prosecution must, and ought to have known that the prosecutions initiated *would not lead to conviction*. If, therefore, the prosecution still proceeded with such unsound prosecutions — as indeed they did between *1993 and 2001* — then the conclusion must be drawn that the purpose had ill-intent; the prosecution process had been annexed by persons who sought to hurt the plaintiff; Court process was being blatantly abused; the constitutional safeguards for the rights of an accused person were being denied. In all those events, a *wrong* was being committed, against the plaintiff, and against the judicial process.

From those conclusions, learned counsel's argumentation regarding the plaintiff's case being time-barred, I do hold, just will not stand up. Firstly it is difficult to see the relevance of the attempts by learned counsel to assess the validity of the plaintiff's claims on the basis of *common law classifications* — whether the claim is in *tort* or in *contract*. For certain, learned counsel is interested in those categories as a strategy for demonstrating that the plaintiff's claim by his plaint of 27th December, 2001 was time-barred. Such an approach although valid in forensic strategy, must be assessed in the context of the special facts of this case, to the intent that a just resolution be arrived at.

Mrs. Kajwang states: "It is our submission that this suit is time-barred, having been filed more than one year after the cause of action arose if the Honourable Court finds that indeed there was a cause of action." In the first place learned counsel doubts that the plaintiff has a cause of action at all; and then she attributes dilatoriness in the commencement of suit. As already noted, the plaintiff has given uncontroverted evidence that the last that was heard on the copious criminal cases lodged against him was *nolle prosequi* by the Attorney-General being entered, in respect of ***Criminal Case No. 1067/94*** on *9th April, 2001;* and the suit was filed on *27th December, 2001*. In that case the suit would have been filed

well within the time limited for filing suit. But *more importantly*, the instant suit has proceeded up to this stage on the basis that it is validly in Court, and at no time has a *preliminary objection* been successfully raised against its prosecution. And in a ruling which I had delivered on *22nd October, 2004* I had dismissed technical impediments to the suit raised by learned counsel, and ordered that the *hearing was to continue*. Where a case has overcome technical challenges, and assumed a momentum of hearing supported with orders of the Court, it should be considered that the rule relating to time-limits will already have figured in the Court's exercise of discretion, and so *in general*, the time-bar challenge will no longer be relevant. That principle applies in this case and I would not allow the time-bar argument being raised now, quite apart from the fact that it lacks a factual basis. Besides, the issues in this case are of such a *complex nature*, touching as they do on interplays between the *civil law* and the *military law*, and on *constitutional principles* attached to the criminal process, that it is not possible to determine them by technical interpretations of limitation periods. This is a case to be determined on the *merits* and not on mere technicalities.

Consequently I consider not relevant the several authorities on limitation period invoked by learned counsel***: Iga v. Makerere University*** [1972] E.A. 65; ***Katerrega v. Attorney-General*** [1973] E.A. 288.

On the question whether it is the defendants who removed the plaintiff from his office, learned counsel contended: "The evidence on record clearly shows that by a letter of 27th March, 1993 the plaintiff resigned his commission." I think the content of counsel's statement has not been denied by the plaintiff, who asserts that the defendants "went overboard, forcing the plaintiff at gunpoint to tender an illegal resignation and thereafter awarding him illegal pensions in the hope that this would induce [him] to [adopt] perpetual silence."

I was not able to understand why counsel endeavoured to confound that very clear resignation issue, capable of being assessed unambiguously from a legal standpoint, with *allegations* about criminality that failed signally to stand up in a series of criminal trials pursued by the 1st and 3rd defendants. ***Mrs. Kajwang*** contended: "It is clear from evidence tendered by both witnesses that very serious allegations of having committed criminal offences, namely stealing a motor vehicle and robbery with violence, had been made against the plaintiff. The plaintiff was a suspect in these offences and was required for interrogation and prosecution in connection with those allegations."

Of the said allegations, learned counsel urged:

"These serious allegations [of a] grave and scandalous nature… could not justify the plaintiff's continued retention in the service, particularly in view of his rank as a senior officer."

The clear suggestion here, as I see it, is that the defendants, on the basis of the said *allegations*, considered the plaintiff unfit to serve. If so, then, naturally, the defendants would move on to the stage of *removing* the plaintiff from service. It is paradoxical, then, when learned counsel contends that in those circumstances, the plaintiff "exercised the option to resign willingly." What was the alternative? There is no evidence given by the defendants that there were at least two *options*, so that the plaintiff opted in favour of *resignation.* I have to take it, therefore, that resignation and nothing else, is what the plaintiff had to take; and in which case learned counsel ought to — but did not — have addressed the *military law* applicable in the case of a commissioned officer such as the plaintiff. Moreover, the resignation is said to have been obtained by means of coercion by the defendants. And how could resignation have been willingly taken as an option, noting that thereafter, as many as *seven* sets of criminal cases were lodged against him literally preoccupying him for the ensuing period of eight years?

So unnatural is such a scenario that I must regard it as an invalid argument, bearing hardly any relation to the basics of legal reasoning. Such a flawed argument cannot be a valid basis for the moral principle now pleaded by learned counsel: "The plaintiff is well aware that a senior officer's character and conduct must be well beyond reproach."

Quite unlike learned counsel's conviction that mere allegations of impropriety should have shamed the plaintiff into excusing himself from his earned and duly awarded military commission, the plaintiff

conducting his own case, has argued, quite convincingly in every respect, that so serious an allegation absolutely had to be the subject of an *inquiry* by the Commanding Officer personally, and of an *abstract of evidence*, on the basis of which he would place the plaintiff squarely within the redressive measures of the statute law, and the plaintiff would not be able to escape, if the allegations turned out to be true. Such a contention makes eminent sense, in the lawyer's perception; and I will hold at this stage that that is the correct procedure in law which the 2nd defendant should have followed.

Mrs. Kajwang addressed the question whether "the alleged 'removal' [was] unlawful, null and void," though I think the analysis in the foregoing paragraph substantially answers that question already. Given the facts of this case the emerging issues as already recorded and analysed, I do not see the relevance of learned counsel's attempt to draw a distinction between the plaintiff's claims, on the one hand, and "public rights." In the words of learned counsel:

"…this is an issue which can only [be accommodated] in the realm of [public rights]. Public rights can only be adjudicated upon by way of *judicial review.*"

Learned counsel then makes a controversional, general contention: "We humbly submit that there is no protection [against] removal under the Constitution…There is no specific constitutional provision that prevents the removal of an officer." This is a strange submission. Firstly it entails the admission, in agreement with the plaintiff, that he had been *removed* from military service; and secondly it introduces the Constitution for the first time, albeit without developing the argument regarding the Constitution's terms. I must hold that the argument about the Constitution is an invalid one; for it is within the framework of the Constitution that the military law exists, and the military law lays down the governing procedure for dealing with the kinds of allegations which had been made about the plaintiff. I also now must determine as a fact that, indeed, the defendants had been responsible for removing the plaintiff from military service.

In the light of my earlier findings on the said allegations against the plaintiff, and on the criminal charges that had been brought against him and then dismissed or inexplicably withdrawn, I now find some of the points raised by learned counsel to be immaterial, such as: (i) did the defendants arrest the plaintiff upon reasonable and probable cause? (ii) was the prosecution based on reasonable and probable cause? It has emerged quite clearly already that the defendants had no reasonable or probable cause for arresting the plaintiff; and the cases lodged against the plaintiff were not brought with reasonable or probable cause. The whole process of arrest, detention and prosecution did not, I believe, comply with the governing law regarding the allegations made against the plaintiff. And this brings me to the most relevant area of the law for the resolution of the issues in this suit, namely the *applicable law in dealing with allegations against a commissioned officer such as the plaintiff.*

4. The Civil Law, the Military Law, and Allegations against a Commissioned Officer: Analysis

The term *civil law* is here used only in the very *limited sense* denoting all law, written or unwritten, that does not regulate ecclesiastical or military matters. In this sense civil law is the law regulating all matters private or public (including the criminal law) outside the operations of the Armed Forces or the religious institutions. The law laid down to regulate the Armed Forces and affairs therein, may be referred to as the *military law.*

To all the spheres of law just mentioned, in jurisprudential and functional terms there is *one foundation,* namely the Constitution of Kenya. The Constitution is the supreme law, and by section 3 thereof, any law — written or unwritten — in conflict with it stands to be declared null, by the High Court in the first place. Subject to this imperative, all enactments of Parliament, any subsidiary regulations made thereunder, and any applicable unwritten law, represent the law of the land; and as amongst the many statutes in force, none is superior to another, and the legislature's intent is that *each shall be regularly enforced* by the body or person charged with responsibility therefor.

If it were to be found that a civil law statute and a military law statute, applied simultaneously to a given matter, how would the two be enforced? In the first place the two sets of laws may specify how

such a potential conflict is to be resolved — in which case the prescribed procedure is to be followed. However, if the two statutes are silent on the matter, then the responsible officials must take proper advice from the State Law Office, or seek a judicial interpretation. Where advice is sought from the State Law Office there is a legal duty (subject to the superintendency of the High Court) to render it conscientiously, dutifully and truthfully, being guided by the established common law principle of "*general purpose* of the law"; selective design must in that case be avoided, as it would corrupt the configuration of the law.

The centrepiece of military law in Kenya today is the *Armed Forces Act (Cap. 199).* In the long title this Act describes itself as —

"***An Act of Parliament to provide for the establishment, government and discipline of the Kenya Army, the Kenya Air Force and the Kenya Navy and their reserves; to make provision in relation to seconded and attached personnel and visiting forces; and for purposes connected therewith and purposes incidental thereto."***

The plaintiff has argued that the *allegations* which precipitated his removal from military service fell, for purposes of consideration and appropriate action, squarely within the remit of the Armed Forces Act. This contention was not met with any response of significance from the defendants' side. And *ex facie* I would agree that the plaintiff is right, since that Act provides as already specified, and also stipulates that it is "for purposes connected therewith and purposes incidental thereto."

I am in agreement with the plaintiff's position also because a major strategic national institution such as the Armed Forces, entrusted with the fateful subject of national defence, and fully armed and empowered to repulse injuries to the Kenyan State and people, must be guided in its functioning at all stages by *written law*; and I have not seen any evidence of such express law in the civil legal instruments. That law is embedded in the Armed Forces Act (Cap.199) and in cognate statutes and regulations. Moreover, the defence side did not place before the Court any evidence of conscientious and dutiful advice to the defendants by the State Law Office that the allegations touching on the plaintiff should pass over from the ambit of military law to that of the civil law at the very beginning.

The plaintiff has argued persuasively, in my view, that the defendants, by removing him from military service, had attempted to circumvent the applicable law, in particular the Armed Forces Act (Cap.199), by moving quickly and extra-legally to dislodge him from the protections provided by that Act. Thus he was taken out of the military establishment and handed over to the Commissioner of Police (3rd defendant) who then initiated a series of criminal charges against him in the Subordinate Courts.

The plaintiff submitted that he could properly have lost his commission in the Armed Forces if he was court-martialled — a process which would start with the Commanding Officer (2nd defendant) personally taking evidence and having an *abstract of evidence* as the basis for his exercise of discretion. In this regard, s.69 of the Armed Forces Act (which relates to civil offences such as those which had been the basis of the charges against the plaintiff) stipulates:

"**(1) Any person subject to this Act who commits a civil offence…shall be guilty of an offence and, on *conviction by court martial* —**

(i) if the civil offence is treason or murder, shall be sentenced to death; and

(ii) in any other case, shall be liable to any punishment which a civil court could award for the civil offence if committed in Kenya, being one or more of the punishments provided by this Act, or such punishment, less than the maximum punishment which a civil court could so award, as is provided by this Act…"

It is clear then, that if the plaintiff had committed the offences which the 1st and 3rd defendants had brought against him, the first line of action against him, in the regular application of the law, would have been the process of *court martial* by virtue of s.69 of the Armed Forces Act (Cap.199).

Part V (ss.4 – 69) of the Armed Forces Act (Cap.199) relates to service offences and also covers *civil offences* (s.69). Part VII of the Act relates to "preliminary investigation and summary trial of charges Section 80, which falls under that Part, thus provides:

"**Where a person subject to this Act is accused of an offence under Part V [including *civil offences*], the accusation shall be reported in the form of a charge to the accused's commanding officer, and the commanding officer shall investigate the charge in the prescribed manner."**

It is clear that the Commanding Officer is to *conduct an investigation* before taking action and, in a case in which the person accused is an officer the position is as follows (s.81):

"**Where the commanding officer refers the charge to the appropriate superior authority, the appropriate superior authority shall either —**

(a) if the charge is one which he has the power to deal with summarily and he considers that the charge should be so dealt with, deal summarily with the charge; or

(b)* in any other case*, take the prescribed steps with a view to the charge being tried by court martial…"

Section 115 of the Armed Forces Act provides for appeals from court martial — to the High Court. It means that had there been a basis for the "serious allegations" made against the accused, the right starting point would have been *investigations* in accordance with the law, conducted by the *Commanding Officer* (2nd defendant), followed if necessary by *court martial*, and thereafter any appeal would have been brought before the *High Court.* That correct procedure was not followed; the Commanding Officer acted on *allegations without taking evidence;* he handed over the plaintiff to the Police; he facilitated the physical and institutional *removal* (through a "resignation", a processing of service papers, a payment of pension) of the plaintiff from his position as a commissioned officer in the Armed Forces. This, it is clear to me, was a do-it-yourself mode of terminating a statutory commission; it had nothing to do with the procedures of the law; it was illegal; it was harmful to the institutional bonds holding the military establishment as a stable and law-abiding unit; it was contrary to the public interest; it was damaging to an officer who even at this late stage, was being officially rated in his conduct and performance as "***Very Good***".

The plaintiff has disputed the claim that he could, under the law as it stands, as a commissioned officer just *resign* his commission and abandon his service-engagement. This point was not taken up by the defence; and it is possible that the plaintiff was right; but I will confine my finding to the position which emerges clearly from the evidence: the plaintiff took *no voluntary decision* to resign from his commission.

It is my persuasion, and holding, that the defendants have been in breach of the statutory law which protects the plaintiff in his position as a commissioned officer. Through such illegality the plaintiff was, as a dependable officer with good career prospects then aged 36, taken out of military service some ***13*** years ago. Such impropriety immediately affected the plaintiff's service in the ***Kenya Army Regular Force***; but it also reflected a confusion of roles in the military service, as the plaintiff would at some point in his career have been destined to join the *Kenya Army Regular Reserve*. From the evidence, a pension has been paid to the plaintiff; but what exactly is his status? Since the plaintiff is paid a pension, how does s.170(2) of the Armed Forces Act (Cap.199) apply in his case? That section provides:

"**An officer holding a regular commission who retires from the armed forces with a pension or gratuity shall thereupon be *transferred to the reserve*, and shall serve in it until the age of —**

(c) …***fifty years*** **in the case of a person retiring with the rank of lieutenant-colonel or corresponding rank or below**."

The evidence before the Court is that the plaintiff, if he were to be regarded as *retired* (considering that he

is earning a pension), would be standing in an irregular position not consonant with the law; for he is now just about 48 years of age, but he is ***not*** in the Kenya Army Regular Reserve. On what basis then is he earning that pension? And what is his status in relation to the operations of the Armed Forces Act (Cap.199). Obviously the plaintiff does not stand to blame, someone else does — and breaches of the law are quite apparent. The Court's task is to redress such wrongs, and this is to be done by considering the plaintiff's prayers individually.

5. The Plaintiff's Prayers

Firstly the plaintiff seeks a declaration that his removal from his employment in the Armed Forces was unlawful, null and void. I don't, in the light of my detailed review of this case, and with all due respect, see how a different conclusion could be arrived at.

Secondly the plaintiff prays for a finding that the police arrests and prosecutions made against him were "illegal, unprocedural and malicious." As I have already remarked, the arrest and prosecution of the plaintiff was illegal and certainly contrary to the procedures established by law. Were the arrests and prosecutions malicious? "Malicious" means actuated by ill-will, and self-serving, or designed to achieve tendentious purposes. As I have already remarked, the barrage of criminal cases founded on no credible evidence, and routinely kept within the purview of the Courts but with no serious purpose of prosecuting them to conviction, could only have been actuated by *mala fides* and most probably, malice.

6. Damages

The plaintiff, *in his plaint*, prays for damges — general damages for illegal removal from office; for loss of promotions in his career as a military officer; for illegal confinement; for malicious prosecution; for injury to reputation; or general damages for termination of employment. He seeks damages for loss of use of his two motor vehicles held by the police; and he prays for the restoration to him of the said two motor vehicles.

The plaintiff prays for costs of this suit with interest at Court rate. And he prays for such further or other relief as the Court may deem fit to grant.

These prayers for damages are opposed by counsel for the defendants. Learned counsel ***Mrs. Kajwang*** contended:

"It is not in dispute that the plaintiff is on pension. The same according to the records was assessed on 18 years and 105 days of service. The plaintiff's monthly pension is Kshs.7,206/45. He was paid a lump sum of Kshs.432,300/80. The plaintiff has been receiving pension from 1993 to-date."

So the defendants' position is that the plaintiff is happily retired and enjoying a pension — though counsel had made no attempt to show how, and by what *legal procedure*, an officer removed from the Armed Forces due to serious allegations still would be the beneficiary of a pension dispensed within the framework of the *military law*. Counsel had relied on paragraph 90 of the Terms and Conditions of Service for the Kenya Armed Forces (stated by DW1 to be a restricted document) which states:

"*Retirement benefits to be granted to officers who are retired…for any other reasons…than misconduct…"*

Although the defence have consistently taken the position that the plaintiff had misconducted himself in the military service (though no evidence shows this), learned counsel said: "We submit that following the plaintiff's resignation of his commission his retirement benefits were paid." Such a submission must confute, and would not, in my view, be in line with acceptable legal reasoning; but I would take it to mean that the defendants consider themselves to have *dispensed a favour*, for which the plaintiff should ever be truly thankful. I would reject such a perception; for to dispense personal favours out of public resources is irregular and is censurable.

Learned counsel submitted that were any damages to be payable to the plaintiff, "the only damages payable must be calculated on the *contractual period of notice* of three months." Such an argument, quite clearly, stands in contradiction to the principle well established in case law (***Eric V. J. Makokha & 4 Others v. Lawrence Sagini & 2 Others***, Civil Application No. Nai 20 of 1994); ***Gunton v. London Borough of Richmond Upon Thames*** [1980] AllE.R. 577; ***Ronald Muge Cherogony v. The Chief of General Staff of the Armed Forces of Kenya & 2 Others,*** Misc. Cause No. 671 of 199; ***Vine v. National Dock Labour Board*** [1956] 3 All E.R. 939), that a position of employment *underpinned by statute law* is a protected position the incidents of which do not flow from mere *contract*; the *terms of the statute* must in such a case be adhered to in terminating the service of an employee. Learned counsel's contention is thus, not supported by any provision or principle of law.

It follows that I cannot also accept learned counsel's argument formulated from the English case ***Addis v. Gramophone Company*** [1909] AC 488 and the Court of Appeal decision in ***Kenya Ports Authority v. Edward Otieno,*** Civil Appeal No. 120 of 1997, that "the manner of the dismissal could in no way affect the damages." ***Mrs. Kajwang*** quoted with approval the headnote to the ***Addis*** case:

"***Where a servant is wrongfully dismissed from his employment the damages for the dismissal cannot include compensation for the manner of the dismissal, for his injured feelings, or for the loss he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment."***

I would hold the foregoing principle to be most apposite in respect of *ordinary* contracts of employment, and to be inappropriate where the *manner of termination of service* is the very subject which has been laid down in *protective law* in favour of the employee. And so I would not accept learned counsel's contention, in the special circumstances of the case in hand.

Mrs. Kajwang urged that "the plaintiff is not entitled to payment of general damages [reflecting missed promotion in such a mode as to be] commensurate with [the benefits accruing to] his peers since these are enjoyed [only] by those in actual employment, and not those who have been retired." This contention, in its full import, still touches on the question whether the plaintiff had been *retired* in accordance with the law; I have already held in the negative. Therefore counsel's recommendation in this regard, with due respect, lacks materiality.

In disputing the plaintiff's claim for damages, counsel for the defendants returns to her earlier claim that the suit must be based on the tort of *malicious prosecution* — and so proceeds to contend that "No particulars of malice were pleaded or proven as by law required." I think this is a misunderstanding of the nature of the plaintiff's case, which it is quite clear from the evidence and from the plaintiff's submission, rests on the primary cause of action that *the defendants have violated the law by ignoring his statutory protections and illegally removing him from service as a commissioned officer in the Armed Forces*, and that the acts of the defendant, which were therefore null in law, have entailed *damage to the plaintiff* in the respects which he has named. False imprisonment and malicious prosecution are torts perpetrated by the defendants only in the course of pursuing their illegal course of action. The plaintiff comes to Court pleading specific wrongs committed against himself; he says those wrongs are known to the law; he asks this Court to redress those wrongs and order payment of damages in his favour. The cause of action is much larger than simply *false arrest* and *malicious prosecution*. Clearly, the plaintiff having shown the breaches of the law by the defendant, breaches which caused him much harm and loss, comes to Court on the basis of the recognised principle of judicial redress, *ubi jus ibi remedium* — where there is a right, there is a remedy.

Learned counsel for the defendants in her submissions did introduce, improperly in my view, much *evidentiary material*. This cannot be accepted, since the defendants had one witness only and he never spoke about such things — for instance, the circumstances attending the plaintiff's two vehicles — Isuzu Trooper Reg. No. KE 70 – 015061 and Toyota Corona Reg. No. KAB 825Q — which have been detained by the Police since ***1993*** and even after the series of criminal cases against the plaintiff had been terminated in ***2001***. I must take it that the said vehicles are the property of the plaintiff, and consequently the police had no colour of right to detain them especially since the last entry of *nolle prosequi*, in

Criminal Case No. 1067/94 on *9th April, 2001*.

7. Decree

It is clear to me that the plaintiff's suit must succeed, and I hereby give a decree in the following terms:

(1) I hereby declare that the plaintiff's removal from his employment in the Armed Forces was unlawful, null and void.

(2) I hereby declare that the arrests and prosecutions made by the Police against the plaintiff were illegal and in violation of the provisions of the law.

(3) I hereby declare that the several prosecutions lodged against the plaintiff and subsequently terminated in one way or another, were actuated by malice.

(4) I award general damages against the defendants jointly and severally for false arrest and illegal confinement of the plaintiff, in the sum of Kshs.400,000/= which will earn interest at Court rate with effect from the date hereof.

(5) I award general damages against the defendants jointly and severally for malicious prosecution of the plaintiff, in the sum of Kshs.400,000/= which shall bear interest at Court rate from the date hereof.

(6) I award general damages against the defendants jointly and severally for the loss in career advancement to which the plaintiff was subjected by their acts in contravention of the protective statue law, in a figure equivalent to his net income from his employment as a Lieutenant-Colonel for the whole period running from the beginning of April, 1993 to his 50th birthday, with appropriate adjustments made to reflect higher status to which he would have moved, in the normal course of military practice. This figure is to take into account any compensations such as may have already been paid to the plaintiff; and the up-to-date figure of monies payable under this head is to be formulated by the parties and appropriate orders made by the *Deputy Registrar*; any further dispute on amounts is to be resolved through application before a Judge in Chambers, in the Civil Division of the High Court.

(7) The defendants and in particular the Commissioner of Police shall, within fifteen days of the date hereof, restore to the plaintiff his two motor vehicles, Isuzu Trooper Reg. No. KE70 – 014061 and Toyota Corona Reg. No. KAB 825Q.

(8) For the unlawful detention of the plaintiff's said motor vehicles, I hereby award in general damages against the 2nd defendant, a sum of Kshs.600,000/= the same to bear interest at Court rate with effect from the date hereof.

(9) Any applications necessary for the purpose of giving fulfilment to the decree shall be made before a Judge in Chambers, in the Civil Division.

(10) The defendants jointly and severally shall bear the plaintiff's costs in this suit and the same shall bear interest at Court rate with effect from the date of filing suit.

DATED and DELIVERED at Nairobi this 2nd day of June, 2006.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Defendants: Mrs. N.A. Kajwang, instructed by the Hon. The Attorney-General

The Plaintiff in person.