REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT 1729 OF 2001

THOMAS MBOYA OLUOCH…….……..……..….PLAINTIFF

AMOS ODHIAMBO OORO…….……..……..….PLAINTIFF

VERSUS

LUCY MUTHONI STEPHEN……....….....….DEFENDANT

THE HON. THE ATTORENY-GENERAL….....….DEFENDANT

JUDGEMENT

I. FALSE IMPRISONMENT, AND MALICIOUS PROSECUTION: THE PLAINTIFFS' PLEADINGS

The plaint in this suit, dated 8th October, 2001 was filed on 11th October, 2001. The suit is founded on the tort of malicious prosecution, and it is averred that on or about 23rd June, 1999 the 1st defendant falsely and maliciously lodged a complaint with the Murang'a Police, that she had been assaulted by the plaintiffs. Consequently the plaintiffs were arrested and detained at the Murang'a Police Station and later charged in Court for the alleged assault.

The plaintiffs sued the 1st defendant for alleged malicious complaint leading to their arrest, detention and prosecution, and sued the Attorney-General as the Chief Government legal representative representing the Office of the President, under which the Police and Prison Departments fall.

The plaintiffs averred that following on the 1st defendant's complaints, they were wrongfully tried, convicted and sentenced to imprisonment in Murang'a Criminal Case No. 1342 of 1999, ***Republic v. Thomas Mboya Oluoch & Another***. It is averred that the said conviction was founded on a false and malicious complaint, and the High Court, on 15th February, 2001 quashed the conviction and set aside the sentences imposed by the Murang'a Magistrate's Court.

The plaintiffs aver that upon the said complaint against them by the 1st defendant, the police had failed to conduct proper investigations to ascertain the truthfulness of the claims; they also aver that the whole prosecution and trial was founded on malice, and that their subsequent detention at the Muranga Government Prison for 28 days was illegal and wrongful.

The plaintiffs state the particulars of false arrest and malicious prosecution as follows:

> (i) the complaint made to the police by the 1st defendant was untrue and was a mere allegation the veracity of which was not investigated;

(ii) the Police acted on an unsubstantiated report, and rushed to detain the plaintiff before conducting any investigations; and the Police later charged the plaintiffs in Court, and they were wrongfully tried, convicted and sentenced;

(iii) the trial of the plaintiffs and their conviction and sentencing had no proper basis, and the trial Court was only moved by emotional sympathy created by the fact that the 1st defendant was known to be a heart patient who had been fitted with a pace-maker;

(iv) the prosecution case was marred by contradictory evidence, and the level of proof attained fell below the standards required by law;

(v) the lower Court's judgement and decree was subsequently quashed, and the quality of the trial was typified as wanting;

(vi) the 1st defendant was well aware that the report which he had brought to the police, regarding the incident in question, was false;

(vii) the police failed to conduct sufficient investigations into the 1st defendant's allegations;

(viii) the plaintiffs were imprisoned for 28 days for an offence that never was, as the High Court later found out.

The plaintiffs averred that as a result of the false and malicious prosecution and illegal imprisonment, they suffered both special and general damages. The special damages pleaded were:

(a) the cost of defending themselves in Murang'a Criminal Case No. 1342 of 1999 – ***Republic v. Thomas Mboya Oluoch & Amos Odhiambo Ooro;***

(b) the cost of appealing in Nairobi High Court Criminal Appeals Nos. 94 and 95 of 2001 (consolidated) – ***Amos Odhiambo Ooro v. Republic***, and ***Thomas Mboya Oluoch v. Republic,*** respectively.

The plaintiffs also claimed punitive and general damages for false arrest and malicious prosecution and for wrongful imprisonment.

The plaintiffs averred that the 2nd defendant was vicariously liable for the omissions and the commissions of the police and the prisons departments which bore direct responsibility for the false and wrongful imprisonment, in conjunction with the 1st defendant.

The plaintiffs averred that there was a pending suit at the Murang'a PrincipalMagistrate's Court (PMCC No. 91 of 2001 – ***Lucy Muthoni Stephen v. Thomas Mboya Oluoch*** and ***Amos Odhiambo Ooro***), in which the 1st defendant has sued the plaintiffs for damages linked to Murang'a Criminal Case No. 1342 of 1999, the decision which, subsequently, the High Court had quashed.

It is averred that the defendants have refused, failed and/or neglected the plaintiffs' demands for reparations and the plaintiffs' notice of intention to sue. The plaintiffs pray for judgement against the defendants jointly and severally, for –

(i) damages for false arrest, malicious prosecution, false imprisonment and costs of the criminal case defence;

(ii) costs of the instant suit and interest at Court rates;

(iii) any further relief deemed fit by the Court.

II. THE ATTORNEY-GENERAL'S PLEADINGS IN DEFENCE

The Attorney-General's statement of defence dated 14th January, 2002 and filed on 16th January, 2002 denied "every allegation contained in the plaint", and reserved "the right to raise and argue an objection on a point of law that this suit is statute-barred by the provisions of section 3 of the Public Authorities Limitation Act (Cap.39) …." It is averred that "the arrest and charge of the plaintiffs was founded upon a reasonable and probable cause in lawful exercise of statutory duty." The Attorney-General further avers that "quashing and/or setting aside of a conviction does not divest the police of the statutory duty of arrest on a reasonable and probable cause." The Attorney-General denies that the plaintiffs have suffered loss and damage.

III. THE 1ST DEFENDANT'S PLEADINGS IN DEFENCE

The 1st defendant's statement of defence was dated and filed on 3rd January, 2002. The 1st defendant denies having lodged a false and malicious complaint against the plaintiff. She then contends that "even if she lodged a complaint with the Murang'a Police…then it is denied that the subsequent arrest and detention, and trial of the plaintiffs was either wrongful or unlawful." She avers also that "the Police carried out their investigations diligently and properly ascertained the truthfulness of the matter" before prosecuting. The 1st defendant "denies that the plaintiffs have suffered in any way as erroneously alleged or at all…"|

IV. TESTIMONIES

1. The Plaintiffs ' Evidence

Hearing of this suit began before ***Rimita, J*** on 7th July, 2003. On that occasion the 1st plaintiff (PW1) was sworn and gave his evidence as follows. The 1st defendant had been his father's tenant in Murang'a Town. On 23rd May, 1999 the 1st defendant went to her rented shop, in the morning, to open her business. PW1 was sitting outside the building, in the company of his father and mother. It so happened that the police had ordered the 1st defendant not to open her business that morning, and the reason had to do with her character as a violent person. PW1 stopped her from opening her salon; but even though he did not touch the 1st defendant, she raised alarm, as she was in the company of her husband, and crowds began to form in the neighbourhood of the salon. PW1's father advised that a report be made to the police, and he left his father and mother at the scene and went to the police station. He was followed there by the 1st defendant and her husband. They came running, in the course of which she got exhausted and sat down. Her husband, by name ***Robinson Mukige,*** once he arrived at the Police Station, went to see the Officer Commanding the Police Division (OCPD). PW1 went into the Crime Office, where the 1st defendant came in and found him, and then started crying, avowing that PW1 had beaten her. In the meantime, her husband had also told the OCPD personally that PW1 had assaulted his wife. The OCPD reacted by summoning the Officer Commanding the Station (OCS); and it is the OCS who led PW1 to the Crime Office.

The OCS dispatched police officers to go and arrest PW1's father, ***Samuel Oluoch Ooro*** who was a councillor in the Murang'a civic authority. While at the Police Station, the 1st defendant began crying, and fell down. PW1 was one of those who took her to the Murang'a District Hospital for medical attention. The police interrogated him. A number of police offices were sent to the premises from which the complaint had arisen. PW1 was given a police bond and was required to report to the police station regularly. When, on the material day, PW1 visited the hospital to see the condition of the 1st defendant, he found that her husband had arranged for her to be taken to Kenyatta National Hospital in Nairobi.

Subsequently the Police asked PW1 to appear in Court. He did not go to Court under arrest, and neither his father nor mother was interrogated by the Police. A charge of assaulting the 1st defendant was brought against PW1. Charged with him, in Murang'a Criminal Case No. 1342/99, was his paternal uncle, ***Amos Odhiambo Ooro*** who had not been present at the commercial building where the 1st defendant's salon is located, on the morning of 23rd June, 1999 when the gravamen arose. The 1st defendant was the complainant; she gave evidence in which she testified that PW1 and his uncle had assaulted her. As a result, PW1 was convicted and fined Kshs.50,000/= or, in default, he was to serve a prison term of three years and be subjected to a stroke of the cane. He remained in prison for 28 days.

During the trial in the Magistrate's Court at Murang'a the two accused had used the services of an advocate, and had called three witnesses while the prosecution had six witnesses. They paid their advocate Kshs.80,000/=; and they paid Kshs.300,000/= for their appeal in the High Court, in High Court Criminal Appeal No. 94/2001 and No. 95/2001. They had been released on bail pending appeal, and their appeal was successful. Even with this acquittal on appeal, the 1st defendant filed a civil case at the Murang'a Magistrate's Court seeking damages for assault. This case was dismissed. PW1 produced in Court the proceedings and judgement in the Magistrate's Court (Plaintiffs' Exhibit No.1) and the judgement of the High Court on appeal (Plaintiff's Exhibit No. 2). PW1 was praying for damages and costs.

On cross-examination, PW1 testified that he had been charged with the offence of assault, on the 1st defendant. On the material morning, all PW1 did to the 1st defendant was to stop her entering her rented shop. The first time she fainted was at the police station. PW1 testified that the 1st defendant had been advised by the doctor not to un, for reasons of health. The 1st defendant's screams on the material morning, PW1 testified, were not because of injuries; and he was one of those who helped to carry the 1st defendant to hospital; and later she was taken to Kenyatta Hospital. It was not known to PW1 whether at Kenyatta Hospital, 1st defendant was admitted to the intensive care unit. PW1 said he had not at all kicked the 1st defendant, at his father's building in Murang'a Town, on the morning of 23rd June, 1999. But she was the complainant whose representations led to his prosecution and imprisonment.

On re-examination, PW1 testified that ***Lucy Muthoni Stephen,*** was the cause of his prosecution. He testified that DW1 had told lies; and that even the witnesses she brought to Court had not seen the alleged morning assault incident:

"*They wanted me to be charged. Some were not residents of Murang'a"*.

PW2, ***Amos Odhiambo Ooro***, was sworn and gave his evidence before ***Rimita, J.*** on 23rd September, 2003. He said he lives and works at Murang'a, and is in the business of selling clothes. He said he did know the 1st defendant. On 23rd May, 1999 he went to see his brother in the morning. His brother was unwell, and sent him to buy medication. He was able to find the medication at about 12.00 noon, and returned home before 1.00 p.m. He then heard from some of his fellow tenants that there had been a struggle between the 1st plaintiff and the 1st defendant. There had been an exchange of nasty words between the two, he was told. He went to his brother's building but did not find the 1st plaintiff or the 1st defendant. He did not even find them at the Police Station. The 1st defendant later found him at home, after she had left the police station. She did not talk to him. The following day the 1st plaintiff was required to go the Court in Murang'a, and the 2nd plaintiff and others also went to the Court, to follow the happenings there. But the 2nd plaintiff was then arrested. The 1st plaintiff was charged with assault, on a Sunday. Then the 2nd plaintiff was also charged. The accusation was that the plaintiffs had jointly assaulted the 1st defendant. It is the 1st defendant who made the complaint against the two plaintiffs; but the 2nd plaintiff had not been present when an altercation arose between the 1st defendant and the 1st plaintiff. The charge, in Murang'a Criminal Case No. 1342 of 1999, ended in conviction; and the two accused were fined Kshs.50,000 each, or in default, imprisonment for a term of three years, and in addition each would have a stroke of the cane inflicted upon him. They were not able to pay the fine, and so they were imprisoned at Murang'a Prison. They remained in prison for one month. They appealed in High Court Criminal Appeals 94/2001 and 95/2001, which appeals were successful. They paid an advocate Kshs.80,000/= to represent them in Court, in the criminal cases at the Magistrate's Court. They also paid fees to advocates who handled their appeal: first they paid Kshs.100,000/=, then Kshs.30,000/=, then Kshs.10,000/=, and then Kshs.150,000/= (Plaintiffs' Exhibit No.5).

There had been no grudge on the part of the plaintiffs, against the 1st defendant. But there had been a tenancy dispute, and there was a tribunal case between the 1st plaintiff and the 1st defendant, which took place at Nyeri. The 1st defendant lost, in this tribunal matter.

On cross-examination, PW2 said he had known the 1st defendant for a long time; and the 1st defendant was a tenant of the 1st plaintiff. The charge brought against the two plaintiffs, in the Murang'a Magistrate's Court, was "doing grievous harm" to the 1st defendant. The two plaintiffs were convicted,

but they won on appeal in the High Court.

PW2 had been arrested by the Police, in the presence of the 1st defendant's husband. He did not know why the 1st defendant wanted him arrested; she caused the police to arrest the 2nd plaintiff. PW2 testified that he did not assault the 1st defendant, and he "did not know why [the 1st defendant] wanted me arrested. She made the crime Police to arrest me." He said that the 1st defendant had told lies against him.

That would have been the close of the plaintiffs' case; but on 5th October, 2004 when this case came to me to complete the hearing, ***Rimita, J.*** having gone on retirement, learned counsel for the 2nd defendant, ***Mr. Muiruri,*** indicated that he wished to have PW1 recalled for the purpose of further cross-examination. On that occasion ***Mr. Ngala*** for the plaintiffs was represented by ***Mr. Waiganjo,*** while ***Mr. Onuong'a*** represented the 1st defendant.

PW1 was sworn again, and cross-examined by learned counsel, ***Mr. Muiruri.*** PW1 said his claim against the Attorney-General (2nd defendant) was for damages in respect of the criminal case to which he had been wrongfully subjected, and for costs. He said he believed he had been falsely imprisoned, and the criminal case brought against him had amounted to an abuse of his rights. PW1 restated that he had, on 23rd May, 1999 walked freely to the Police Station in Murang'a, and he was not arrested or detained when he got there; and he was placed on bond throughout, during the pendency of the trial. He was, however, sent to prison when the learned Magistrate at Murang'a pronounced him guilty on 18th January, 2001. He said his advocate in making the mitigation address in Court, had turned against him, as he believes he was prosecuted unjustifiably and he had pleaded not guilty. He did not have personal knowledge of the police officers who had handled him, and he had no history of conflict with these policemen.

On re-examination, PW1 testified that when he went to the police station following the incident of 23rd June, 1999 he was at the reporting office while PW1's husband was closeted with the OCPD in a different office. PW1 said that the complainant's report to the police made on that morning, of 23rd June, 1999 was not truthful. The 1st and 2nd plaintiffs were arraigned in Court two weeks later, but in the meantime the 1st plaintiff had been required to report regularly to the police. He was surprised that he was being prosecuted; and the charges were laid by the Police, with 1st defendant as complainant. He and the 2nd plaintiff remained in jail for 28 days; the part of the Court sentence which ordered walloping against the plaintiffs had not yet been implemented. They did not pay the fine. They appealed, and were set at liberty by the High Court.

The 2nd defendant's case was marked closed at this stage, as there were no witnesses. Hearing of DW1 took place on 16th November, 2004 when she was led through her evidence-in-chief by learned counsel, ***Mr. Onuong'a.***

2. The 1st Defendant's Evidence

DW1, the 1st defendant, was sworn and testified that she lives at Murang'a Town, and runs a salon business. Her father had rented business premises for her on a building owned by the plaintiff's father. At 8.00 am on 23rd June, 1999 she left her house to go to her salon. As she entered the corridor within the building which led to her salon, she met the landlord who was carrying a stick. He would not allow DW1 access to the salon. DW1 went on to say as follows:

"I said I wanted to take my things. The 2nd plaintiff was responsible for the building. The 2nd plaintiff spoke in Ki-Jaluo, and I do not know what he said. The two came together. The 1st Plaintiff held one of my hands. The 2nd Plaintiff held the other. They pulled me out. When we got to the corridor, [the 1st Plaintiff] hit me on the right. [The 2nd Plaintiff] hit me on the other side.[The 1st plaintiff] hit my head on the concrete wall. He hit me. I screamed and my husband came. [The 1st plaintiff] hit me. My husband said we proceed to the Police. There were many people around. The two dispersed and disappeared. I felt giddy. We met a woman who was [the 1st Plaintiff's] friend".

DW1 further testified that when she got to the police station she "found my husband and [the 1st plaintiff]

at the claim office". Then, she averred, she "fell down unconscious". She testified that it is the Police who took her to the hospital in their Landrover, while the 1st Plaintiff "came following". In the evening, she averred, "an ambulance was brought and I was taken to Kenyatta Hospital". She said that once at the Kenyatta National Hospital, she was admitted into the intensive care unit. A criminal case was then commenced at the Murang'a Magistrate's Court, and the Plaintiff's were tried, convicted and sent to jail. On the strength of this conviction, she lodged a civil claim against the plaintiffs herein (in case No. 91/2001), which she lost. From that loss in her suit, she appealed to the High Court in H.C.C.C. No. 280 of 2002, which she now won and was to be paid damages and costs.

DW1 testified that a ***Dr. Olaya*** at the Murang'a District Hospital had written a medical report, on the basis of which she was admitted to Kenyatta Hospital. At this point learned counsel for the Plaintiffs, ***Mr. Ngala,*** requested that ***Dr. Olaya*** be availed sothat he could cross-examine the doctor. To this request ***Mr. Onuong'a*** proposed that he be allowed to exclude ***Dr. Olaya's*** report from the defence evidence.

On cross-examination, DW1 said that she was a tenant of the plaintiff's father, at her salon business in Murang'a. The tenancy had been taken out in her husband's name even though she owned the business. She said she had had no conflicts with her landlord before, and she had received no notices or warnings concerning the manner in which she exercised tenancy. She said that on the morning of 23rd June, 1999 she was proceeding to work in the normal manner and was accompanied by her husband, when the incident leading to the instant dispute occurred. She had not gone to her business premises for two days – but not because she had received any notice not to go there.

DW1 testified that she knew the 2nd plaintiff who was on an upper floor of the building when the incident leading to the instant dispute occurred. She testified that the 2nd plaintiff came down from the upper floor to the scene of conflict, then escaped; he was then found, and the two plaintiffs were charged together in the Magistrate's Court. She said that when she was being assaulted by the two plaintiffs, there were people who witnessed: her husband; one ***Dan Wacira;*** one ***Maureen Wanjiku***; and one ***Kimani. Maureen Wanjiku*** was her salon student, while Kimani was a photographer at Murang'a. She testified that the plaintiffs had hit her on both cheeks, kicked her back, hit her head against the wall. She said she had head injury and internal bleeding in the head, and her head was swollen. DW1 acknowledged that she has, and had at the time of the incident in question, a pacemaker to sustain her heart; but she denied that this had anything to do with her health plight on 23rd June, 1999. She said: "I am able to do my work very well; it is only my head they injured." She said of the pace-maker:

> "The pace-maker has been with me far very long. It was a birth defect being rectified. I have no problem in this regard."

She said she fainted "soon after arriving at the Police Station." She said she has no doctor's notes on the incident, from the Murang'a District Hospital or from Kenyatta National Hospital where she had received attention. She said it was not by her initiative or that of her husband that she was moved to Kenyatta National Hospital from Muranga District Hospital. She went on to say:

> *"My husband was around, and he saw even when I was being kicked. I was beaten by the 1st and 2nd plaintiff. There was a newspaper report showing me in hospital. It said I had been assaulted by a councillor, but this was not so. I was beaten by his children."*

DW1 said he knows that the plaintiffs did appeal to the High Court and were acquitted. But she had filed civil suit against the plaintiffs in Murang'a and when she lost this one, she appealed successfully to the High Court. She said she was not aware of any appeal which the plaintiffs may have lodged in the Court of Appeal, against a decision in the High Court, in her civil matter, favouring her. She averred that she had "made no pretence in relation to this case."

On re-examination, DW1 now endeavoured to account for her failure to report for work at her salon two consecutive days prior to the incident of 23rd June, 1999:

> "*Before I was beaten I had not gone to work for two days; the owner [of the premises]*

was being difficult, as he wanted my friendship."

DW2, ***Joseph O. Oraya***, was sworn and gave his evidence on 25th November, 2004. He testified that he is a doctor working at the Kenyatta Hospital. On 9th March, 2000 one ***Robinson Mukigi Muchoki*** asked the Director of Kenyatta National Hospital to have a medical report on ***Lucy Muthoni Stephen*** (the 1st defendant). The Director passed this responsibility to DW2. From the Hospital record DW2 found the following account:

"Ms. Lucy Muthoni Stephen had been admitted at the Ward 5B on 24th June, 1999 at about 12.10 am., through the Casualty Department. She had been brought with a history of suffering an assault at Murang'a – by a Mr. Mboya who hit her head against a wall, slapped her and she lost consciousness and collapsed for four hours. She had rigidity of the limbs and was not talking. She later stabilized. She was an old patient of Kenyatta Hospital, and that is the reason she was brought there, from Murang'a.

"When admitted at Kenyatta National Hospital, ***Lucy Muthoni Stephen*** *was in fair general condition. She showed no signs of heart trouble. Her cardio-dynamic status was normal. She had minor bruising on the anterior chest wall. She was five months pregnant. She had been admitted at the Hospital for observation and treatment.*

"On 26th June, 1999 ***Lucy Muthoni Stephen*** *had severe chest-pain complaint, and was breathing fast. The Intensive Care Unit was informed, and the ICU doctor came to the ward to view her condition. She was not admitted to the ICU at this stage. On 27th June, 1999 she needed ICU monitoring, and she was sent to ICU where she was kept on oxygen by mask. Her pace-maker was tested, but found intact and in good order. She remained in ICU from 27th – 30th June, 1999, after which she was transferred to the ward. She was discharged on 2nd July, 1999.*

"*Lucy Muthoni Stephen was 16 months pregnant and was then assaulted. She had paroxysms of breathlessness. All tests were within normal limits. She was managed conservatively and there was no need for an operation. She settled down and was eventually discharged.*

"On examination, all systems were within normal limit, except that there was bruising on the anterior chest wall. Her state of loss of consciousness may be attributed to injury to the brain. She had her head hit against the wall."

DW2 said injury to the brain can result without injury to the external walls of the head, because brain tissue was very soft. He tendered his medical report which was marked Defendant's Exhibit No.4.

Learned counsel, ***Mr. Ngala*** cross-examined ***Dr. Oraya*** who in response testified as follows. He is a surgeon and not a cardiologist. He had treated ***Lucy Muthoni Stephen*** in his ward after she was hospitalised on 26th May, 1999. The letter which had accompanied the patient from Murang'a District Hospital had referred her to a cardiologist. In preparing his report, ***Dr. Oraya*** was relying on the available records. ***Lucy Muthoni Stephen*** had been admitted to Ward 5B which is his ward, in which he serves with other doctors. All patients in Ward 5B are DW2's patients, he averred. In that ward there are about 60 patients. Of ***Lucy Muthoni Stephen, Dr. Oraya*** said: "I had the records of ***Lucy Muthoni.*** So I know I saw her." File No. 0425565 contained records on ***Lucy Muthoni***. He went on to testify: "Ward 5B is not my private ward; there are some 10 doctors there." ***Dr. Oraya*** said of the manner in which he came to write his medical report on ***Lucy Muthoni Stephen: Robinson Mukigi Muchoki*** is the one who requested me to write the report. I do not know him. ***Robinson Mukigi Muchoki*** wrote to the Director; I was asked to do a report by the Director. We work for the Director. I was directed to write the report."

DW2 said L***ucy Muthoni Stephen*** had been admitted in Ward 5B at night, in his absence. He said: "I have to speak from the records; she came on a stretcher. There is physical injury – bruises in the anterior chest wall. It would be consistent with a fall; consistent with collapse." On whether ***Lucy Muthoni Stephen's*** head was banged on the wall, ***Dr. Oraya*** said:

"*Banging the head against the wall would require force, and thus, physical injury would be*

shown. The report shows no physical injury on the head."

DW2 said it was quite possible to lose consciousness even without physical impact, indeed, "even when one is just sitting inside a car." He said the patient in this case had been given conservative treatment – for *loss of consciousness*; for *bruising*; for *head injury.*

DW2 testified that in the treatment of patients, there may be *co-morbid states,* and there is a danger of treating one element and forgetting another. The fact that ***Lucy Muthoni Stephen*** had been fitted with a pace-maker implied that she had a heart problem. Physical exertion could have an effect on that condition. DW2 had written his report on *9th March, 2000,* and since then there has been no further health-care follow-up on ***Lucy Muthoni Stephen.***

On re-examination by learned counsel, ***Mr. Onuong'a,*** DW2 said he was the author of the report which he had just produced in Court, and he had duly signed it. He said he sees so many patients per day, and ***Lucy Muthoni Stephen*** had been brought to his ward. In his report he had used the medical notes prepared by those doctors who had seen the patient in his absence.

DW3 was sworn and gave his evidence on 25th November, 2004. This was ***George Kimani Njoroge*** who said he lived at Maragwa and was a photographer. He said he came to know the plaintiffs for the first time on 23rd June, 1999. He said he had accompanied one ***Wachira,*** now deceased, to Murang'a Town. They had gone there to see ***Robinson Mukigi,*** and went up to his wife's salon. The two of them, at the said salon, met *three people* in the corridor – a woman (who DW3 later learned was ***Mukigi'***s wife) and two men. One of the men was short and slender; the other was tall and stout; and he was seeing them for the first time. The following account may be rendered verbatim:

"The woman was walking backwards held by the two men; they were beating her. I came back out of the corridor. One man hit her on the wall, and she fell. Then one of the men left; the other returned into the building. Then Robinson, who apparently had been in the house, came out. He tried to lift up his wife. They walked uphill. I was told they went to the police station."

DW2 testified that he visited Murang'a District Hospital while 1st defendant was admitted there, for the purpose of seeing her. He said 1st defendant was not talking when he saw her at the hospital. He also visited Kenyatta National Hospital, in the company of ***Robinson Mukigi Muchoki,*** for the purpose of seeing ***Lucy Muthoni Stephen,*** when she was admitted at the Intensive Care Unit there. He said he was a witness in the criminal case which was brought against the plaintiffs in Murang'a. He was aware that the plaintiffs were imprisoned, even though, as he learned later, they were released on appeal.

On cross-examination, DW3 said although he came from Maragwa, he used to live in Murang'a. He had gone to the 1st defendant's salon on 23rd June, 1999 for the purpose of finding ***Robinson Mukigi Muchoki***, with whom DW3 was to travel to Nairobi, and in Nairobi they were to deal with matters relating to the Green Belt Movement. He said he used to work with ***Robinson Mukigi Muchoki,*** but he was not related to the 1st defendant. He went on to say:

"I had known her [1st defendant] for about a year, before the day of the incident."

He testified that ***Robinson Mukigi Muchoki*** kept his records at the 1st defendant's salon;and he and ***Muchoki*** were to take these, on the morning of 23rd May, 1999 before leaving for Nairobi.

Did DW3 help the lady when, as he testifies, she was being beaten up? No: *"I could not have helped the lady. I was shocked."* After that incident, DW3 testified, 1st plaintiff went back into the building; "the other went out." Where was ***Robinson Mukigi Muchoki*** when his wife was being subjected to violence? "Robinson found his wife felled. He did not see her being assaulted."

DW3 testified that he was summoned by the police one week after the incident, to go and write a statement. The request had been made earlier as well, when DW3 had visited Murang'a District Hospital:

"When I went into the casualty ward at Murang'a Hospital, there was a policeman there, and he asked me if I would write a statement."

On the alleged assault on 1st defendant, DW3 said:

> *"I saw the slap, and the lady being thrown down. I do not know what other things they did. It is Mboya [1st plaintiff] who slapped her on the face. I did not tell the Murang'a Court a different story. She was being beaten before I came; so I do not know which parts had been beaten. At the Murang'a Court I said she was boxed in the chest, and kicked. There is a difference. This took place a long time ago. I have not been revising."*

DW4, ***Robinson Mukigi Muchoki*** was sworn and gave his evidence on 7th July, 2005. He testified that he lives in Murang'a Town and is a teacher at a technical school. His wife was running a salon business at premises owned by the father of the plaintiffs. At about 9.30 am on 23rd June, 1999 his wife, her trainee, by name ***Lucy Wanjiku*** and he, himself, "*went to open our salon business."* They met *four* people: the Councillor (proprietor of the building in question), his two sons and their mother. The four were sitting close to the salon door. In the witness' words:

> *"When I tried to open, the Councillor stood up, and said I would not open the business. There was a tribunal matter [regarding the premises] in Nyeri. I suspected this was the reason he was not allowing me to open…I opened and I was searching for documents. In the meantime....they started pushing my wife. When I came out I was told they had pushed her outside the building. I locked the salon door and followed. I saw [1st plaintiff] kicking my wife against the building. I found him holding my wife, kicked her again at the back. This threw my wife out of the building. I moved to the place where my wife was leaning. We went straight to Murang'a Police Station and reported the assault matter."*

On cross-examination DW4 re-stated that on the morning of 23rd June, 1999 when the incident leading to the suit occurred, the councillor, his two sons and his mother were hanging around 1st defendant's salon. He said ***Mboya*** [1st plaintiff] was the eldest son of the Councillor while ***Odhiambo*** [2nd plaintiff] was son to the Councillor's brother. He said he knew ***Odhiambo***, and that ***Odhiambo*** had been the caretaker at the building where the suit premises was located.

DW4 said his wife [1st defendant] was a *heart patient*, and there was a time she had to undergo an operation; and during that time he took leave to manage her salon business. He testified that he had been accompanied by a pupil, ***Maureen Wanjiku Mwangi*** and his wifewhen he went to the salon on the morning of 23rd June, 1999. He said thee had been a *dispute between his wife and the landlord;* and it is his wife and not him, who was being prevented, on 23rd June, 1999 from entering the salon. DW4 testified that the Press had taken his photograph on 30th June, 1999 when he visited Kenyatta National Hospital for the purpose of seeing his wife [1st defendant] who was hospitalised there; and the press photograph bears the caption "woman assaulted by a Murang'a Civic Leader." He testified that *no charges were brought against the Councillor* himself. He said he is not the one who gave the information to the Press, and he "did not know if the caption is correct." He said: "I did not give the information, and I could not have asked them to correct it." When asked *whether his wife had any cuts or bleeding* as he went with her to the Police Station on the morning of 23rd June, 1999 DW4 said:

> **"She was following me as we approached the Police Station. *I could not assess whether she was bleeding*. At that time she had a heart condition; but it has been treated…On the way [some 300 – 500 metres uphill] my wife felt unwell, so I was always checking on her. It is not possible that my wife was handicapped by the heart condition; only the doctors can say."**

Where was DW4 when his wife was being assaulted on 23rd June, 1999? He said:

"When they were pushing her I intervened. I had to remove my document from the salon, itwas an important document."

Asked whether his account before the Court was the truth, DW4 said:

> *"She [1st defendant] was not screaming I saw Mboya hitting her; Amos [2nd plaintiff] was in front. Mboya is the one who kicked her out of the building. What the doctor stated about the injury is what should be taken. We never cooked any story. She gave her statement, I gave mine.*

On re-examination DW4 said his wife [1st defendant] had not been due for an operation, and was not admitted at Kenyatta National Hospital due to heart condition. He said:

"The Councillor directed the son to do the assault. I saw him use the stick to direct the assault."

V. SUBMISSIONS ON LAW AND EVIDENCE

Counsel agreed to prepare written submissions, and directions were given to this effect on 7th July, 2005. I will review the submissions in the sequence in which they were filed in Court: first, those for the 1st defendant; secondly, those for the plaintiffs; and lastly, those for the 2nd defendant.

1. ***False Arrest and Malicious Prosecution: Assessment on the Basis of Prosecution Process, or of Subsequent Civil Decision Favouring Complainant? — Submissions for 1st Defendant***

Learned counsel, ***Mr. Onuong'a,*** began from the foundation that the plaintiffs' claim has arisen from a criminal case, ***Republic v. Thomas Mboya Oluoch & Another***, Criminal Case No. 1342 of 1999, in which the 1st defendant was the complainant, at the Senior Principal Magistrate's Court at Murang'a. In that trial the plaintiffs were found guilty and convicted of the offence of causing grievous harm contrary to s.234 of the Penal Code, and each was fined Kshs.50,000, and in default, ordered to serve three years in jail and each to receive one stroke of the cane.

The 1st defendant then moved the same Court at Murang'a by suit against the plaintiffs herein, in Civil Suit No. 91 of 2001 – ***Lucy Muthoni Stephen v. Thomas Mboya Oluoch & Amos Odhiambo Ooro***. In the meantime, the plaintiffs herein appealed to the High Court, against their conviction and sentence; and their appeals were allowed, their convictions quashed, and the sentences set aside (Criminal Appeal No. 94 of 2001 consolidated with Criminal Appeal No. 95 of 2001, respectively, ***Amos Odhiambo Ooro v. Republic;*** and ***Thomas Mboya Oluoch v. Republic***). The 1st defendant's Civil Suit No. 91 of 2001 was dismissed with costs. Learned counsel summarised the burden of the 1st defendant's evidence thus: the 1stdefendant testified-in-chief that on 23rd June, 1999 the plaintiffs assaulted and battered her and roughly pushed her against the ground; and as a result of the said assault and battery she — 1st defendant — sustained severe bodily injuries and was subsequently rushed to Murang'a District General Hospital before she was transferred to Kenyatta National Hospital.

Mr. Onuong'a submitted that the dismissal of the 1st defendant's civil claim against the plaintiffs herein, at the Subordinate Court in Murang'a, had been subsequently reversed in the appeal in ***Lucy Muthoni Stephen v. Amos Odhiambo Ooro,*** HCCC No. 280 of 2002, in the judgement of ***Ransley, J*** dated 22nd January, 2004.

Although what came before me was a civil claim for damages for *false imprisonment* and *malicious prosecution*, made against the1st defendant and the Attorney-General, ***Mr. Onuong'a*** has apparently attached considerable significance to the fact that the 1st defendant's claim, whose foundation is the very prosecutions now being impugned as having been false and malicious, was on 22nd January, 2004 allowed by ***Mr. Justice Ransley*** who condemned the plaintiffs herein to pay damages to the 1st defendant. Strictly speaking there is no legal basis for learned counsel to attempt to denigrate the Magistrate's decision in ***Lucy Muthoni Stephen v. Thomas Mboya Oluoch*** and ***Amos Odhiambo Ooro,*** Civil Case

No. 91 of 2001, while applauding the successful appeal therefrom to the High Court in ***Lucy Muthoni Stephen v. Amos Odhiambo Ooro,*** High Court Civil Appeal No. 280 of 2002.

Learned counsel thus remarks:

> *(a) "By the judgement of the Senior Principal Magistrate sitting in Murang'a Law Courts, the 1st defendant's Civil Suit No. 91 of 2001 was dismissed…with costs on the mistaken belief that he was bound by a High Court decision in which a conviction against the current plaintiffs was overturned."*
>
> *(b) "The 1st defendant….testified that soon after the plaintiffs were convicted…she filed Civil Suit No. 91 of 2001 at Murang'a Law Courts against the present plaintiffs but her suit was dismissed with costs because the trial Magistrate mistakenly thought that he was bound by a High Court decision in which a conviction against the present plaintiffs was quashed and overturned."*

By those submissions, learned counsel leaves hardly any room for the High Court decision of 22nd January, 2004 reversing the Magistrate's Court decision, to stand on its own merits and to hold its own against an appeal which counsel for the plaintiffs stated in Court, had already been filed. If it is true such an appeal has been filed, then the merits of the High Court decision fall to be tested there, and not through legal argument before this Court, as a basic question of *jurisdiction.*

Learned counsel, ***Mr. Onuong'a***, has invoked the determinations of damage before ***Ransley, J,*** to challenge the plaintiffs' claim for *false imprisonment* and *malicious prosecution*. He thus submits:

> "In …HCCC No. 280 of 2002 ***Justice Ransley*** at page 2 said that there was ample evidence by the appellant who is the 1st defendant herein and her witnesses that she was assaulted by both the respondents who are the plaintiffs in this matter. The Judge further said that there was unassailable evidence that the 1st defendant suffered from injuries which were consistent with an assault and battery upon the 1st defendant."

The said statement in HCCC No. 280 of 2002 is clearly the reason underlying the 1st defendant's case herein; in the words of learned counsel:

> *"…in view of the foregoing, it is our humble submission that the 1st defendant was indeed assaulted and battered by both plaintiffs and that explains…why her Civil Case No. 91 of 2001 succeeded in High Court Civil Appeal No. 280 of 2002…"*

On that foundation, learned counsel makes a submission based on inference:

> *"The plaintiffs' claim that the 1st defendant lodged a false and malicious complaint at Murang'a Police Station that led to their arrest, prosecution and conviction holds no water and ought to be rejected. The complaint was genuine and that is why DW1's Civil Appeal No. 280 of 2002 succeeded."*

The logic of the foregoing submission, in my view, is that the determinations in the civil claim can be taken to establish the correctness of the anterior criminal matter. This is an important issue which ought not to be disposed of without proper guidance on *law*. Counsel urged no legal principles before me, and brought no authorities to my attention. Adverting to this on *first principles*, I would not consider that it is right in law to apply *the findings in a civil matter as proof that certain criminal acts had indeed been committed* by a named person. This is because the criminal law, for the reason that it impinges critically on *personal liberty,* demands *strict proof*, whereas civil claims require no more than proof on a *balance of probabilities.* I therefore now hold that the determinations in the Civil Appeal, HCCC No. 280 of 2002 are not a valid basis for challenging the plaintiffs' contest of the validity of the prosecution and trial to which they had been subjected, in Murang'a Criminal Case No. 1342 of 1999.

Learned counsel extolled the evidence of DW2, ***Dr. Oraya:***

> ***"…Dr. Oraya*** *who treated DW1 at Kenyatta National Hospital confirmed that DW1 was*

assaulted and developed pain in the left upper chest and neck with breathlessness a few hours after the assault."

He submitted that the injuries as found by ***Dr. Oraya*** are *consistent with an assault upon DW1*. He further submitted that DW2's evidence corroborated that of DW1 and confirmed that DW1 was indeed assaulted by the plaintiffs. In his words: "*DW1 would not have been rushed to Kenyatta National Hospital and taken to the Intensive Care Unit if she had not been brutally assaulted and battered by the plaintiffs*." It was submitted that the evidence of DW3 and DW4 was "similar to that of DW1 and corroborates [the earlier evidence] and confirms that DW1 was indeed assaulted and battered by the plaintiffs." He urged that the Court should find the evidence of DW1 to have been credible and truthful. Learned counsel contended that PW1's evidence amounted to bare allegations which should be dismissed; and that **"the Court should reject his case as of no merit and uphold *Justice Ransley's* findings in High Court Civil Appeal No. 280 of 2002**." This particular submission is disturbing; for the instant case is not to be perceived as an *appeal* from the judgement in the said decision. The said judgement was a *final judgement* of the High Court which can only be challenged in the Court of Appeal. The question falling before me for decision is a different one*: were the plaintiffs falsely and maliciously prosecuted?* The answer must be found in the legal criteria applicable in relation to false arrest and malicious prosecution; and so the reference-point in this judgement is only the *criminal proceedings* at the Murang'a Law Courts, and the circumstances leading thereto. If there would be a nexus between that scenario and the civil proceedings in High Court Civil Appeal No. 280 of 2002 it will be purely *coincidental* and will not be taken into account herein, in determining whether or not the plaintiffs had been falsely and maliciously prosecuted.

2. Deciding on False Imprisonment and Malicious Prosecution: Is the Referencepoint the impugned Criminal Process, or related Civil Suit Decision? - Submissions for the Plaintiffs

Learned counsel for the plaintiffs***, Mr. Ngala,*** contended that the submissions made for the 1st defendant had missed the point on issues to be considered in suits for false arrest, false imprisonment and malicious prosecution. The plaintiffs' case arose from a false and malicious complaint by the 1st defendant; and as a consequence they were arrested, and later maliciously prosecuted and imprisoned for a period of 28 days, before they were set at liberty after they appealed to the High Court. Counsel cited the High Court decision in *Murunga v. The Attorney-General* [1979] KLR

138 in which the criteria in resolving issues relating to malicious prosecution had been set out by ***Cotran, J:***

(i) the plaintiff must show that prosecution was instituted by the defendant, or by someone for whose acts he is responsible;

(ii) that the prosecution terminated in the plaintiff's favour;

(iii) that the prosecution was instituted without reasonable and probable cause;

(iv) that prosecution was actuated by malice.

Once there is a finding of malicious prosecution, then any imprisonment or arrest, in pursuance of such prosecution, automatically becomes *unlawful.*

In his pleadings the Attorney-General had averred that the plaintiffs' suit is barred under s.3 of the *Public Authorities Limitation Act (Cap.39*), but he then led no evidence at all on any aspect of the instant proceedings. To that pleading, counsel responded that, in suits of malicious prosecution, the cause of action *arises after an acquittal in favour of the plaintiff*; and the plaintiffs were acquitted on appeal on *15th February, 2001*; the suit was filed on *11th October, 2001* – within the prescribed one-year time-limit, as against the 2nd defendant.

Learned counsel submitted that the 1st defendant readily admitted having lodged a complaint against the

plaintiffs, and so the *first limb* of the Murunga principles is not disputed. There is, under the *second limb*, no dispute that the prosecution ended in the plaintiff's favour.

Under the *third limb* in the *Murung'a* principles, was the prosecution based on *reasonable and probable cause?* The test in answering this question was laid down in this Court's decision ***(Rudd, J.)*** in ***Kagane and Others v. The Attorney-General and Another*** [1969] E.A. 643 (at p.646 – taken from the decision of ***Hawkins, J in Hicks v. Faulkner*** (1978), 8Q.B.D. 167, at p.171):

> ***"Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed."***

Justice Rudd thus remarked (p.647):

> ***"Consequently the subjective test should only be applied where there is some evidence directly tending to show that the prosecutor did not believe the truth of his case. Such evidence could be afforded by words or letters or conduct on the part of the prosecutor which tended to show that he did not believe in his case, as for example a failure or reluctance to bring it to trial, a statement that he did not believe in it and, I think possibly, an unexplained failure to call an essential witness who provided a basic part of the information upon which the prosecution was based."***

Counsel drew the Court's attention to the fact that the 1st plaintiff had accompanied the 1st defendant to the Police Station on the date she lodged her complaint; but he was not placed under arrest, and was only bonded to appear in Court much later. It emerged from the criminal proceedings in the Murang'a Magistrate's Court, that the Police officers arrested the plaintiffs but then *made no investigations* on the circumstances surrounding the complaint by the1st defendant herein. The insistence by the 2nd plaintiff that he had not been at the scene of the incident on the morning of 23rd June, 1999 was simply not investigated. Several witnesses, namely PW2, PW3, PW6 and PW8 in the proceedings before the Murang'a Magistrate, had stated categorically that they had noticed *no visible injuries on the 1st defendant*. This was evidence that there was no basis for laying the charges of causing grievous harm to the 1st defendant, by the plaintiffs herein.

Learned counsel drew the Court's attention to the fact that the trial process against the plaintiffs in the Murang'a Magistrate's Court, had been squarely brought to the test in the High Court before a Criminal Appeal Judge; the Judge, ***Mitey, J***, examined the *propriety of the prosecution* and the criminal trial, and quashed the convictions and sentences. The appellate Judge in that case stated the position as follows:

> **"I have perused the record of the Lower Court. In my view there is *no sufficient evidence to sustain a conviction* for the offence with which the appellants were charged. The complainant (PW1) testified she was punched on the chest and slapped on the right cheek. She claimed the second appellant, *Thomas Oluoch* hit her head against the wall and kicked her in the back. She also testified she had had a heart operation before. PW2 who was at the scene at the material time stated that he *did not observe any injuries on PW1.* PW1 reported to PW6, Corporal Francis Irungu, on 23rd June, 1999. The *report she gave was of creating a disturbance, and not assault.* PW6 *too did not observe injuries on PW1.* PW8, P.C. Simon Ochengo, who was on duty with PW6, confirmed the testimony of PW6."**

Mr. Justice Mitey found *no evidence that the 1st defendant herein had suffered any injury at all on 23d June, 1999*. The relevant passage in his judgement thus reads:

> **"A P3 form respecting injuries on PW1 was produced by PW7. It was filled on 6th July, 1999 by Dr. Francis Njoroge (deceased). It indicates that the complainant sustained bruises on the upper limbs. The thorax and abdomen were tender. It further indicates**

that there was a head injury. ***With respect to the Doctor, the entries in the P3 form do not reflect the true position. No X-ray was carried out to confirm that PW1 sustained a head injury. The injuries if any, could not be assessed as grievous harm. But as earlier indicated, there was no sufficient evidence that PW1 sustained any injury at all."***

The learned Judge held that "the *conviction was unsafe*", and recorded the fact that even

"the learned State Counsel rightly conceded the appeal."

It should be noted that the foregoing decision, on a *criminal appeal* which squarely addressed the *trial process before the Magistrate,* is eminently relevant to this suit, a civil suit contesting the *bona fides of the Police conduct and of the trial process* leading to the conviction of the plaintiffs by the Murang'a Magistrate's Court. And I do note the clarity of the judgement of ***Mitey, J,*** on the question whether the 1st defendant herein was indeed the victim of assault causing grievous harm, and entailing head injury and brain damage, caused by the plaintiffs herein.

Mr. Ngala submitted, and it appears to me, did so with clear justification, that *"an ordinary and prudent man, armed with the evidence [which was in the hands of the prosecution], could not institute criminal proceedings without any further investigations*." Counsel submitted that the averment that the Police carried out no investigations, remained unrebutted. PW6 who had laid the charges against the plaintiffs, had even testified in the Murang'a Magistrate's Court that he did not know how the charges came about. The *doctor at Murang'a* who had filled in the P3 forms whose medical validity were, for good cause, questioned by ***Mr. Justice Mitey***, had not, strangely enough, been produced at the criminal trial as a witness. This would raise serious doubts as to the *professional probity or good faith in medical practice*, that could be associated with that important document (the P3 form) used as a foundation for the charges laid against the plaintiffs herein. ***Mr. Ngala*** submitted, and quite meritoriously, I believe, that there was *no reasonable or probable cause for laying criminal charges* at the Murang'a Subordinate Court, against the plaintiffs. That being the case, counsel went further and submitted that malice in prosecution was to be automatically inferred – on the part of both defendants herein.

Learned counsel further imputed malice to the complainant in the criminal case, 1st defendant, on the basis of *her evidence in these proceedings,* which showed that the Press had been involved with her sojourn at the Kenyatta National Hospital, and the Press report had mentioned the name of the1st plaintiff's father as being involved in the alleged assault at Murang'a on 23rd June, 1999.

Counsel urged that the Court do find that the plaintiffs' case had been proved on a balance of probabilities as required in civil claims.

Counsel noted the relevance to the instant case of the High Court decision in *Criminal Appeals No. 94 and 95 2001*, in which ***Mitey, J*** had made final decisions from which there was no appeal. The decision, counsel submitted, fell within the terms of the

Evidence Act (Cap.80), s.44 as a decision that *was absolute against all persons*. It represented conclusive proof of the matters stated therein.

3. Are Unjustified Acts of the Prosecution Covered by Some Immunity? - Submissions for the Attorney-General

On 24th October, 2005 learned counsel representing the Attorney-General, ***Mr. Muiruri Ngugi***, filed his submissions. Firstly he raised the issue of limitation period, which he claimed ran against the plaintiffs' suit. But he noted that this issue was meant, in accordance with his pleadings, "to be determined *within the trial*". Quite clearly, if this issue was to be determined in the *course of trial*, then it means the Attorney-General had *acquiesced in the trial* itself proceeding; and the consequence is that the objection was not a basis upon which the suit could be terminated *in limine*. The objection, in effect, must be treated as no more than a *ground of opposition,* to be articulated *arguendo* as the trial runs its full course.

Learned counsel submits:

> *"The cause of action is said to have occurred on 23rd May, 1999. The plaintiff's claim being in the nature of a tortious liability, then the suit ought to have been filed within 12 months from that date, that is 22nd May, 2000. However this suit was filed on 14th October, 2001. The provision of section 3 [of the Public Authorities Limitation Act (Cap.39)] bars the institution of an action against the Government for an action of tort after a period of 12 months from that date of the action."*

It is apparent from the records that the frequent mention of ***23rd May, 1999*** is probably mistaken. This would be a clerical error which I hereby set right, for the purpose of the record: the date of the incident that led to the prosecution of the plaintiffs herein, should be recorded as ***23rd June, 1999.***

Learned counsel submitted that as regards the 12-month rule in the Public Authorities Limitation Act (Cap.39), time begins to run from the *date of the prosecution*, and it was not relevant that an *appeal* was being lodged. If such an argument were to apply to cases of malicious prosecution, it would, I think, nullify the availability of this tort to an aggrieved party – because a condition for succeeding in such a suit is that the plaintiff was *acquitted* of the charge in question. I will hold that where acquittal comes *through an appeal*, then so long as the tort of malicious prosecution retains its conventional character at common law, the limitation period must be taken to start running only from the *date of acquittal.* This principle leads me to reject the Attorney-General's submissions that the plaintiff's claim herein is time-barred.

Mr. Mururi submitted that there had been a reasonable and probable cause for prosecuting the plaintiffs. In his words:-

> "*It is not in dispute that there was a scuffle between the plaintiffs and the first defendant wherein the latter sustained injuries. A report of assault and bodily harm was lodged and the assaulted party was admitted in hospital…. The parties to the report were proximately placed as (landlord/tenant) to raise the probability that* ***physical contact could not be ruled out****. The plaintiffs are agreed on the fact that there was a disagreement between them and the 1st defendant."*

From the above contention, counsel submitted that the Murang'a Police acted *within their statutory duty* to apprehend the alleged offenders and subsequently arraign them before the Court.

Mr. Muiruri lauded the evidence on the basis of which the Plaintiffs had been prosecuted:

> *"…the credible and reliable evidence of the 1st defendant including a medical doctor put beyond doubt that the scuffle did occur whereby the plaintiff was injured. The learned Magistrate presiding over the criminal proceedings found so much and was convinced beyond doubt that the plaintiffs then accused were guilty. The police placed their evidence before the Court which evidence was relied upon to sustain the conviction".*

Learned counsel also lauded the actions taken by police in prosecuting the plaintiffs:

> "*The proceedings of the trial Court clearly evidence that the police acted with no other motive than to vindicate [the cause of] justice. The prosecution did not terminate in favour of the plaintiffs. The defendant submits that there was no malice. Does a reversal of the judicial order impute malice on the police?"*

Counsel submitted that all the defendant needs to satisfy is that *the trial resulted in a conviction.* "The mere reversal of the decision to convict by a Court sitting on appeal does not of itself impute malice" I think the principle in the above statement would be right; save that the findings of the Court of criminal appeal will give relevant perception and assessment on *the manner in which the criminal trial had taken place.* The appellate Judge is certainly in a position to see *bona fides* or lack thereof, in the manner in which the trial has been conducted; and such perceptions cannot be overlooked by this Court, as it

considers the presence or absence of *malice* in the prosecution and trial in the Subordinate Court. I cannot, therefore, accept in gross, learned counsel's suggestion that the appellate Court's observations are not a medium through which the conduct of the trial process may be viewed.

Learned counsel sought to attribute *immunity*, in relation to the claim in malicious prosecution, to the activities of the police and the prosecution; he would admit these agencies into the immunities of the trial Court, and assign trial and conviction responsibility *solely to the Court*. In his words:

> *"The trial Magistrate tried and sentenced the Plaintiffs in accordance with the law. It is the case that the defendant discharged his responsibility to arrest, arraign before the Court, and present evidence for the Court to adjudicate. The prosecution had the duty in law to present all evidence to vindicate the [cause] of justice and, having [discharged] ….. the duty they cannot be held responsible for a lawful judicial order."*

I would not, with respect, agree. Unless and until the common law tort of malicious prosecution is abolished by Parliament, policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice, in initiating prosecution and in seeking conviction against the individual, cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense.

VI. FURTHER ANALYSIS

What was the reason for the prosecution and trial of the plaintiffs herein? On 23rd June, 1999 the plaintiffs are said to have assaulted and battered the 1st defendant; and as a result of the said assault and battery she sustained severe bodily injuries, and was subsequently rushed to Murang'a District General Hospital before she was transferred to Kenyatta National Hospital.

The Plaintiffs aver that such allegations were untrue, to the knowledge of the 1st defendant and of the police, and the prosecution was actuated by malice and was founded on uninvestigated claims, and on a calculated design to hurt the plaintiffs and to take away their personal freedom.

From earlier analysis it has become to me quite apparent that no genuine case had existed for prosecuting the plaintiffs, on charges of assault against the 1st defendant. There is no doubt that, on the morning of 23rd June, 1999 there had been a misunderstanding between the 1st defendant, a tenant, and her landlord, over her rented premises. From the plaintiffs' evidence, this misunderstanding had begun earlier, and indeed a Rent Tribunal matter had already been determined, and this turned against the 1st defendant, at Nyeri Municipality. But from the 1st defendant's evidence, the dispute arose because her landlord wanted to befriend her, against her will.

What emerges clearly from the evidence is that an orchestrated prosecutorial process was set in motion, as from 23rd June, 1999 which created evidence hardly credible, as to assault and grievous harm to the 1st defendant having been wrought by the plaintiffs herein.

The 1st defendant, throughout her evidence, left a large cloud of mystery hanging over the happenings of the morning of 23rd June, 1999, and the only situation she would have the Court perceive, was the claim that *the two plaintiffs had assaulted and battered her*, causing her grievous harm; causing her *head injury* as well as *brain damage*. For two days she had not gone into her salon. Then suddenly, on 23rd June, 1999 at 8.00 a.m. she went there accompanied by her husband, ***Robinson Mukigi Muchoki*** and her student, ***Maureen Wanjiku Mwangi,*** only to find her landlord and his sons near her salon speaking in alien Dho-Luo. The landlord is supposed to have *given instructions* in that language, and gestured with his walking-stick, egging on the two plaintiffs herein to assault and batter her, hitting her head severely against the wall. And where was the husband then? He was in the salon, retrieving highly important documents which DW3 (a photographer) and himself were to travel with to Nairobi, for the purpose of performing works under the auspices of the Green Belt Movement. ***Robinson Mukigi Muchoki*** apparently never saw his wife being assaulted, but he later found her felled by the two plaintiffs herein, and ran off with the poor lady, a heart patient who had had a cardiac operation and who was expectant, over a distance of 300-500 metres uphill, to the Murang'a Police Station to report the incident.

The 1st defendant gave evidence that she had been held by the left and the right arm, each by one of the plaintiffs, slapped, and her head hit on the wall, as she screamed and her husband was not there to rescue her.

Is there any *colour of truth* in the claims by DW3, ***George Kimani Njoroge****?* At first he said he had travelled from Maragwa to Murang'a, on the morning of 23rd June, 1999 to meet ***Robinson Mukigi Mwangi*** at his wife's salon, so that the two may travel to Nairobi to do Green Belt Movement work. He had never met ***Mukigi's wife*** before. When he got to the building housing the 1st defendant's salon, this is what he saw:

> "*The woman was walking backwards, held by two men; they were beating her …., one man hit her on the wall, and she fell ……" And did he try to help his friend* ***Mukigi's*** *wife? No: "I could not have helped the lady. I was shocked ..…. I later learned she was* ***Mukigi's*** *wife". Later on* ***George Kimani Njoroge*** *says "I had known her for about a year before the day of the incident:" This witness clearly had nointerest in telling the truth, and he was in violation of the oath he took in Court to tell the truth, the whole truth and nothing but the truth. In Court, by demeanour, he looked indifferent, innocuous and hazy in every respect. He also said: "****Robinson Mukigi Muchok****i did not see his wife being assaulted" This is contrary to the testimony of the 1st defendant herself. She said: "[The 1st Plaintiff] hit my head on the concrete wall. He hit me. I screamed; my husband came".*

One witness whose evidence would have been of much value to the Court was DW2 - ***Dr. Oraya*** of Kenyatta National Hospital. But, with much respect, his evidence would stand to question on professional integrity. Firstly his evidence had much less *clinical data and account* than the *social tale* emanating from those associated with the 1st defendant; it even carried names of those who *did* assault and batter her in Murang'a. Although ***Dr. Oraya*** said his ward at the Hospital had given the 1st defendant conservative treatment for *loss of consciousness*, for *bruising* and for *head injury*, he had no explanation for the claimed *head injury.* He had conducted no tests at all that would show head injury – a condition which must be regarded as most serious. ***Dr. Oraya*** said:-

> *"Banging the head against the wall would require force, and thus physical injury would be shown. The report shows no physical injury on the head"*

Just as ***Dr. Oraya*** *found no physical injury on 1st defendant's head,* her own husband did not give evidence of any, and satisfied himself by passing responsibility to the doctors. Interestingly, when asked whether there was any bleeding experienced by the 1st defendant on the morning of 23rd June, 1999 her husband said, "*she fell behind as we approached the police station, so I could not see any bleeding*", or something like that. The only injury,

which ***Dr. Oraya*** was able to speak to objectively, was *"minor bruising on the anterior chest wall",* and no credible evidence had been adduced in Court to show *how that came about.*

I have set out and reviewed all the evidence in detail. This places me in a dependable position to draw certain conclusions. It is clear to me that, of the spinning of yarns of dubious evidence, this may be the apotheosis. I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so *questionable,* and so obviously crafted to be self-serving. To deploy the State's prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes. The prosecution in question was, in my view, *malicious prosecution,* and accordingly I must determine this suit in favour of the plaintiffs, and against the defendants.

VII REMEDIES

Counsel for the Plaintiff noted that both plaintiffs were imprisoned for 28 days pending the hearing of their appeal, after they were sentenced to three years imprisonment and one stroke of the cane each. As a result of the criminal proceedings they spent a total of Kshs.230,000/= in defending themselves. Their

prayer is for an award of Kshs.230,000/= for costs incurred in the criminal proceedings; Kshs.500,000/= for each plaintiff as general damages for false imprisonment for 28 days.

Learned counsel drew analogy with ***Murunga v. The Attorney-General*** [1979] KLR 138 in which Kshs.17,000/= was awarded for false imprisonment for three days, in April, 1979. Counsel urged that the Court do consider the difference in imprisonment period, as well as inflation over the last 25 years. The plaintiffs pray for a further award of Kshs.300,000/= for each plaintiff for malicious prosecution. They also pray for the costs of this suit.

For the Attorney –General it is submitted that if this case should turn in favour of the plaintiffs, then a reasonable all-inclusive compensation would be Kshs.40,000/=.

I would not accept the Attorney-General's proposition which, I think, has no authority in support, and fails to discourage abuse of the State's prosecutorial and judicial services for the comfort and pleasure of private individuals, as was clearly the case here. Such abuse is an objectionable dimension of corruption in public office, against which this Court must firmly set its face.

I will, therefore decree as follows:

(a) The 1st and 2nd defendants shall jointly and severally pay damages to the two plaintiffs as follows:

(i) a total of ***Kshs.230,000/=*** in respect of Murang'a Criminal Case No.1342 of 1999 and High Court Criminal Appeal Nos.94 and 95 of 2001;

(ii) ***Kshs.500,000/=*** for each Plaintiff as general damages for false imprisonment for 28 days.

(iii) ***Kshs.300,000/=*** for each Plaintiff for malicious prosecution.

(b) The Defendants shall jointly and severally bear the Plaintiffs' costs in this suit.

DATED and **DELIVERED** at Nairobi this 28th day of October, 2005

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Plaintiffs: Mr. Ngala, instructed by M/s. Rumba Kinuthia & Advocates

For the 1st Defendant: Mr. Onuong'a, instructed by M/s. Bw'Onuonga W.N. & Advocates;

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