



**Datalogix Limited & another v Kenya Pipeline Company Limited & 2 others (Civil Case 354 of 2007) [2024] KEHC 167 (KLR) (Civ) (19 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 167 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
CIVIL CASE 354 OF 2007  
AN ONGERI, J  
JANUARY 19, 2024**

**BETWEEN**

**DATALOGIX LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**EUNICE WANGUI MBUGUA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**KENYA PIPELINE COMPANY LIMITED ..... 1<sup>ST</sup> DEFENDANT**

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

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

**JUDGMENT**

1. The plaintiffs in this case, Datalogix Limited And Eunice Wangui Mbugua (hereafter referred to as the plaintiffs only) have sued the defendants The Kenya Pipeline Company Ltd, The Commissioner Of Police And The Attorney General (hereafter referred to as the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants respectively) vide amended plaint dated 22/3/2017 seeking the following remedies;
  - a. General damages for unlawful arrest, false imprisonment, malicious prosecution, defamation and loss of reputation together with interest thereon with effect from 20/4/2006 at court rates until payment in full.
  - b. Special damages of Kshs.267,518,112.00.
  - c. Aggravated and exemplary damages for unlawful arrest, false imprisonment, malicious prosecution and publication of false allegations against the plaintiff together with interest thereon at court rates with effect from 20/4/2006 until payment in full.
  - d. Costs of this suit together with interest thereon at court rates.



- 2) The plaintiffs' special damages for loss and damages of Kshs.267,518,112.00 are made up as follows;
  - i. Loss of profits on contract performance 147,575,007.00
  - ii. Loss of expected profits for maintenance of contract 104,943,105.00
  - iii. Legal fees for CR case no. 390 of 2003 and Cr case no. 1693 of 2000 10,000,000.00

Total 267,518,112.00
2. The plaintiffs aver in the amended plaint that by a press release issued by the former police spokesman Mr. Gideon Kibunja on behalf of the then Director of Criminal Investigations (Mr. David Ndung'u) the 2 defendant advertised that the Plaintiffs were being sought by officers from the Criminal Investigations Department for an alleged offence of fraud which had allegedly been committed by the 1<sup>st</sup> Plaintiff against the 1<sup>st</sup> Defendant.
3. The Plaintiffs further stated that the said press release further alleged that the Plaintiffs were fugitives and were running away from the due process.
4. As consequence of the press release the 2<sup>nd</sup> Plaintiff presented herself at the Criminal Investigations Department Headquarters Milimani, Nairobi on the 17<sup>th</sup> February 2003 with a view of clearing the Plaintiffs' names against the false allegations and adverse publicity.
5. The 2<sup>nd</sup> Plaintiff was upon arrival at the station arrested and placed under police custody.
6. On or about the 19<sup>th</sup> February 2003, the 2<sup>nd</sup> Plaintiff was arraigned on her own behalf and on behalf of the 1<sup>st</sup> Plaintiff before the Chief Magistrates Court Nairobi in Criminal Case Number 393, *Republic versus Datalogix Limited & Eunice Wangui Mbugua* "(the first Criminal Case)" and Others (The 1<sup>st</sup> Criminal Case") and charged with the offences of
  - (i) Conspiracy to defraud Kshs.339,318,941 23 from the 1st Defendant.
  - (ii) Stealing Kshs.115.429.583:00 from the 1st Defendant.
7. The 2<sup>nd</sup> Plaintiff was later remanded at the Langata Women's Prison and later released on a bond of Kshs.10 Million and one surety of similar amount.
8. The Plaintiffs stated that they were prosecuted in the 1<sup>st</sup> Criminal case by Inspectors from the Department of Kenya Police and state counsels from the office of the Attorney General.
9. The Plaintiffs further stated that the Director of Public Prosecutions unlawful withdrew the proceedings in this case by entering a *nolle prosequere* on the 14th July 2003.
10. Further the Plaintiffs stated that upon withdrawal of the 1<sup>st</sup> Criminal case she was re-arrested by the 2<sup>nd</sup> Defendant and incarcerated in the police cells at the Basement, High Court of Kenya Central Registry and later in Criminal Investigations Headquarters, Milimani, Nairobi.
11. On or about the 10<sup>th</sup> July 2003 the Plaintiffs were re-arraigned Before the Chief Magistrates Court in Nairobi in Criminal Case Number 1693 of 2003 *Republic versus Datalogix Limited, Eunice Wangui Mbugua and Others* ("2<sup>nd</sup> Criminal case") and again charged with the same offences namely:
  - (i) Conspiracy to defraud Kshs.339,118,941.23 from the 1 Defendant.
  - (ii) Obtaining a total of Kshs.115,420 583.00 by false pretences from the 1st Defendant.



12. The Plaintiffs defended themselves against the said criminal charge and at the conclusion of the prosecution case they were on the 20<sup>th</sup> April 2006 found to have no case to answer and were accordingly acquitted under Section 210 of the Criminal Procedure Code.
13. The Plaintiffs stated that it is the 1<sup>st</sup> Defendant together with officers and or agents of the Government of the Republic of Kenya who with maliciously intent and without any excuse reasonable and or probable cause or excuse instituted a complaint against the Plaintiffs with the 2<sup>nd</sup> Defendant and as a consequence whereof the 1<sup>st</sup> and 2<sup>nd</sup> Criminal cases were preferred against them.
14. The Plaintiffs stated that as a consequence of the said complaint and investigations officers from the 2<sup>nd</sup> Defendant caused the 1<sup>st</sup> Plaintiff's account number with Standard Chartered Bank to be frozen. The Plaintiffs could not as a consequence thereof operate the account, its cheques were returned and they have suffered loss, embarrassment and injury to their business reputation.
15. The Plaintiff further stated that they attended trial in the second criminal case where the Defendants actively participated by providing witnesses, prosecutors and Advocates to hold watching brief.
16. The Plaintiffs further stated that press release and the publication thereof by the Directors of Criminal Investigations, their arrest, detention and interrogation by the said officers, their prosecution was illegal and had no basis at law and were effected without proper or any investigations.
17. The Plaintiffs further stated that their arrest, detention, Interrogation and prosecution was without any lawful excuse whatsoever; was falsely and widely publicized by the Defendants as a major corruption case and a breakthrough in the fight against corruption in both public offices and state corporations.
18. The Plaintiff's further stated that the said publication had no basis, was wrongful malicious and calculated to inflict and did inflict upon the Plaintiff's grave mental anguish, embarrassment, injury to business reputation, contempt, ridicule and hatred in the eyes of the Plaintiffs business associates and the general public.
19. The 3<sup>rd</sup> defendant filed a statement of defence dated 8/4/2019 denying the plaintiff's claim.
20. The 3<sup>rd</sup> defendant avers as follows in the said statement of defence
  1. The 3<sup>rd</sup> defendant denies that the 2<sup>nd</sup> plaintiff was wrongfully arrested, placed under police custody and arraigned in court on her own behalf and on behalf of the 1<sup>st</sup> plaintiff in Nairobi CMCR Case no. 393 of 2003 and charged with the offence of conspiracy to defraud Kshs.339,318,941.33 from Kenya Pipeline Company, and the offence of stealing Kshs.115,429,583.00 from Kenya Pipeline Company and puts the plaintiffs to strict proof thereof.
  2. The 3<sup>rd</sup> defendant denies that the Director of Public prosecutions unlawfully withdrew proceedings in the above quoted case by entering a *nolle prosequi* on the 14<sup>th</sup> July 2003 and puts the plaintiff to strict proof thereof.
  3. The 3<sup>rd</sup> defendant avers that the re-arresting of the 2<sup>nd</sup> plaintiff and confinement in police cells was undertaken lawfully and with a reasonable and probable cause that the plaintiff was guilty of commission of criminal offences.
  4. The 3<sup>rd</sup> defendant denies that the plaintiffs were re-arraigned and charged in Nairobi CMCR Case no. 1693 of 2003 with the same offences and puts them to strict proof thereof.



5. The 3<sup>rd</sup> defendant avers that the arrest, confinement and prosecution of the plaintiffs in Nairobi CMCR Case Nos 393 of 2003 and 1693 of 2003 was done after the police officers received a valid complaint from the Kenya Pipeline Company against the Plaintiffs which upon thorough Investigations revealed a reasonable and probable cause that the plaintiffs were guilty of commission of the offences they were charged with.
6. The 3<sup>rd</sup> defendant denied that the plaintiffs were acquitted of the offences they were charged with.
7. The 3<sup>rd</sup> defendant denies that police officers were actuated by malice without reasonable and probable cause in charging the plaintiffs.
8. The 3<sup>rd</sup> defendant denies that the alleged freezing of the 1<sup>st</sup> plaintiff's account number with Standard Chartered Bank was done illegally, unprocedurally, without any justifiable reasons and puts the plaintiffs to strict proof thereof.
9. The 3<sup>rd</sup> defendant denies that the arrest, detention, interrogation and prosecution was illegal and effected without proper or any investigations and puts the plaintiffs to strict proof thereof.
10. The defendant denies that the plaintiffs were defamed, or embarrassed or suffered by being arrested, detained and interrogated and puts the plaintiff to strict proof thereof.
11. The 3<sup>rd</sup> defendant denies that the plaintiff was defamed by the alleged press release and publication by the police, who were executing their duties in so doing, and puts the plaintiffs to strict proof thereof.
12. The 3<sup>rd</sup> defendant denies that the arrest, detention, prosecution and the release and publication in respect to the plaintiff was malicious, wrongful, unreasonable and were in the circumstances oppressive, contrary to law and has caused grave prejudice and injury to the plaintiffs business, business image and standing and the plaintiffs have thus suffered loss and damage and puts the plaintiffs to strict proof thereof. Accordingly, the particulars of malice and illegality serialized as paragraph 23 (a) to (o) of the Amended plaint are denied in toto and the plaintiff put to strict proof thereof.
13. The alleged loss of reputation, legitimate expected earnings, business and other damages and the special damages are denied and the plaintiffs put to strict proof.
14. The 3<sup>rd</sup> defendant denies that the plaintiffs are entitled to damages for unlawful arrest, false imprisonment, malicious prosecution and defamation and puts them to strict proof thereof.
21. The case proceeded by viva voce evidence. The plaintiff called two witnesses, PW 1 John Njaaga Gitau And PW 2, Eucine Wangui Mbugua.
22. The cases against the 1<sup>st</sup> and 2<sup>nd</sup> defendants were withdrawn. The 3<sup>rd</sup> defendant did not call any witnesses.
23. PW 1 John Njaaga Gitau adopted his witness statement dated 5/6/2023 and further statement dated 14/6/2023 as his evidence in chief.
24. PW 1 also adopted another witness statement dated 14/6/2023 and a bundle of documents dated 17/10/2018.
25. He also adopted a further bundle of documents dated 18/10/2018 and a summary of workings of losses filed on 13/6/2013.



26. A summary of PW 1 evidence was that he was the Operations Manager of the 1st plaintiff, Datalogix Limited.
27. PW 1 said in his written statements that the 1st plaintiff is a limited company incorporated in Kenya under the Companies Act Cap 486 Laws of Kenya to carry on business in the Information and Communication Technology (ICT) sector of the economy.
28. By letter dated 16/10/2002 the 1st defendant wrote a letter to the 1st plaintiff informing the 1st plaintiff that it had been short listed to participate in a KPC tender process for the supply installation and commissioning of KPC communications backbone.
29. That on the 17th of October 2002 the 1st Plaintiff herein Datalogix Ltd obtained the tender document upon payment of a non-refundable fee of Kshs. 20,000/= (See Exhibit 2).
30. That the tender document identified the scope of the works that KPC intended to be executed by the tenderers as the "Supply, Installation, Commissioning and Maintenance of the KPC AVVID (Kenya Pipeline Company Architecture for Voice Video and Integrated Data) communication backbone system. This system would include Local and Wide Area Networks, Cabling Infrastructure, Assorted Communications Equipment, Communication Links, and IP telephony equipment and accessories.
31. That the tender document clearly detailed that these works were to take place at all KPC offices and pump stations including, PSI (Mombasa Area Headquarters) KOSF, Moi Airport, PS3, PS5, PS7, Embakasi, Nairobi Terminal, Sinendet Bifurcation, Eldoret Terminal and Kisumu Terminal.
32. That the 1st Plaintiff duly evaluated the works to be done and engaged in the preparation of its tender bid and formally submitted it on the 7th of November 2002. (See Exhibit 3)
33. That KPC invited all the tenderers to the public opening of the tenders which was done on the 7th of November 2002 in the presence of the bidders representatives.
34. That seven (7) companies responded to the Invitation to participate in the tender and submitted tender bids as follows: -
  - Alpha communication Ltd Usd 6,586,771.12
  - Marson Electronics Ltd Usd 5,998,617.17
  - Samura Engineering Ltd Usd 6,299,838.20
  - E.P Communications Ltd Usd 6,493,531.31
  - Metrocomia East Africa (K) Ltd Usd 6,182,437.17
  - Vinkam Kenya Ltd Usd 6,358,602.18
  - Datalogix Ltd Usd 5,838,475.21(see exhibit 4)
35. That the bids were discussed by KPC Tender Committee and subjected to a detailed evaluation process and the 1st Plaintiffs bid emerged the lowest at a bid price of Usd 5, 838,475.21. The bid was evaluated as the most technically suitable with the shortest project completion period of 48 weeks. (See Exhibit 5)
36. That KPC immediately initiated contract negotiations with the 1st plaintiff and asked them to adjust the scope of the project and have the contract sum revised downwards. (See Exhibit 6)



37. That after intense negotiations KPC and the 1st plaintiff mutually agreed to the revised contract figure of Usd 4,746,795.26 (equivalent to Kshs. 339,318,941.23) that amounted to a reduction of approximately 18.7% of the original contract sum.
38. That consequent to the negotiated reduced scope of works the project was sub- divided into three major-Phases. It was agreed that Phase I & II would run between December 2002 to June 2003 while phase III would start from July 2003 and be completed in December 2003. The project was also renamed as the supply, installation and commissioning of the KPC ETP Networking infrastructure. (See Exhibit 7)
39. That upon the successful completion of the negotiations aforesaid KPC by a letter dated the 29th of November 2002 awarded the tender to the 1st plaintiff herein and further required the 1st plaintiff to indicate its acceptance of the award of the tender by returning a duly executed copy of the letter of award to KPC. (See Exhibit 8)
40. That further by a letter dated the 1st of December 2002 the 1st plaintiff duly acknowledged receipt of and acceptance of the tender award and further requested a 50% down payment of the project value being mobilization fees to enable it commence the works. (See Exhibit 9).
41. That KPC then required the 1st plaintiff to provide security for the required advance payment and the plaintiff obtained and submitted the required advance payment guarantee issued by an insurance company guaranteeing the payment of Kshs. 92,000,000. (Ninety Two Million) in case of default by 1st Plaintiff. (See Exhibit 10).
42. That upon submission of the guarantee aforesaid KPC made advance payments to the 1st plaintiff as follows:-
  - 3rd December 2002 Kshs 50,661,270.65
  - 5th December 2002 Kshs 28,000,000.00
  - 6th December 2002 Kshs 23,000,000.00
  - 8th December 2002 Kshs 13,368,312.00
  - Total Kshs 115,029,582.65
43. The total of which comprised 34% contract sum. (See Exhibit 11).
44. That the 1st plaintiff then at the request of the KPC submitted its projected plan of implementation together with the details of its Key staff that would carry out the implementation of the project on 11th of January 2003. (See Exhibit 12).
45. That the 1st plaintiff subsequently engaged in the procurement of materials, equipment and services in readiness to carry out the project works. The 1st plaintiff identified and communicated with the following main suppliers of equipment and services: (See Exhibit 13a-13e).
  - a. Azlan-France was identified to supply the main networking and communications equipment items.
  - b. Peersoles Enterprises Limited was identified and contracted to supply additional networking and communications equipment.
  - c. Coast-Data Limited was identified to supply cabling components.



- d. Medium Electricals was identified and contracted to supply cabling and civil works installations.
  - e. D.T Dobie & Company Limited was identified and contracted to supply the project vehicle.
46. That the first project meeting between the 1st plaintiff, KPC and their project consultants was held on the 14th of January 2003 to discuss the implementation of the ETP Networking infrastructure. (See Exhibit 14).
  47. That at the meeting it was discussed and agreed that the 1st plaintiff would arrange for and provide, KPC with the following insurance policy covers and securities during its mobilization process before embarking on the actual works:
    - 48. A performance bond equivalent to 10% of the contract value i.e Kshs.33,931,894.00.
    - 49. An all risks insurance cover equivalent to 100% of the contract sum. i.e Kshs. 339,318,941.00
    - 50. An employer's liability insurance cover (Group Personal Accident) for all the 1st plaintiff's employees to be deployed on the project.
  51. That the foregoing requirements were to be provided by the 1st Plaintiff to KPC prior to the execution of the formal contract document by the parties as they formed part of the said contract document. It was hence agreed that the KPC Project Engineer would communicate the project commencement date to the 1st Plaintiff once it had fulfilled the said three requirements.
  52. That in readiness to commence the project works the plaintiff made a down payment of Kshs. seven million (7,000,000.00) to M/s Peersoles Enterprises Limited on the 18th December 2002 for the supply of various networking and communications components. These were to be delivered within 60 days. The total price was Kshs. 28,019,978.00. (See Exhibit 15).
  53. That the plaintiff also obtained the project vehicle from M/s D.T Dobie & Company Limited for Kshs. 2,922,000.00 and made a down payment of Kshs. 140,721 to M/S Gachichio Insurance Brokers for the project vehicle insurance cover. (See Exhibit 16).
  54. That following the agreements reached at the first ETP project meeting , the 1st plaintiff paid Kshs. 1,710,000.00 to M/s Gachichio Insurance Brokers who obtained the following insurance policies from M/ s Intra-Africa Insurance Co. Ltd: (See Exhibit 17a-17c).
  55. A performance bond equivalent to 10% of the contract sum i.e Kshs.33,931,894.00 value in favor of the defendant.
  56. An all risks insurance cover equivalent to 100% of the contract sum of Kshs. 339,318,941.00.
  57. An employer's liability insurance cover (Group, personal accidents) for the 1st plaintiff's employees to be deployed on the project.
  58. That the foresaid policies were forwarded by the 1st plaintiff to KPC on the 28th of January 2003. (See Exhibit 18).
  59. That the second project meeting was held on the 31st of January 2003 in Mombasa to introduce the 1st plaintiff to the KPC Mombasa depot project team as well as familiarize all the parties concerned with the scope of the works to be carried out at the Mombasa site. (See Exhibit 19).
  60. That the formal contract between the 1st plaintiff and KPC was signed on the 31st of January 2003 and the 1st plaintiff awaited the formal communication from KPC to commence works and the handing



over of the 1st site in Mombasa for the execution of works in accordance with the conditions of contract. (See Exhibit 20).

61. That on various days during the first week of February, 2003. It was widely reported in the local print, radio, television and the internet media that the directors of the 1st Plaintiff had committed a fraud at KPC and that they had left the country to escape arrest. The then Kenya Police Spokesman was quoted in the local press to have requested the citizens of the Republic of Kenya to report and volunteer information on the whereabouts of the individuals being sought whose names were published in the local press reports. (See Exhibit 21).
62. That on various dates between 5th February 2003 and 18th February 2003, the Directors and management staff of the 1st Plaintiff were repeatedly summoned to the Criminal Investigation Department Headquarters where they were asked to record statements regarding the alleged fraud at KPC. All this activity received extensive coverage in the local media. The individuals were on several occasions detained in various police stations in Nairobi and these incidents received extensive coverage in the local print and electronic media.
63. That during the course of the investigations conducted by the police officer, the bank account of the 1st Plaintiff at Standard Chartered Bank was frozen.
64. That on 19th February, 2003, the 1st and 2nd Plaintiffs were charged with the offences of conspiracy to defraud Kshs.339,318,941/=. Stealing an amount of Kshs. 115,429,583/= from KPC in Criminal Case Number 393 of 2003. The accused persons were released on severe bail terms of Kshs. 10 million each and one surety of the same amount. (See exhibit 22).
65. That the case proceeded to trial before the Nairobi Chief Magistrate's Court until June 2003, when the Hon. Attorney General entered Nolle Prosequi and released the accused persons. (See exhibit 23).
66. That on the same day the Hon. Attorney General entered a Nolle Prosequi, the accused persons were in a dramatic manner immediately re-arrested by police officers outside the Nairobi Law Courts and driven to the Criminal Investigation Department Headquarters where they were detained.
67. That the accused were subsequently charged with fresh charges before the then Nairobi Chief Magistrate's Court in Criminal Case No. 1693 of 2003. The charges were conspiracy to defraud KPC of Kshs. 339,318,941/= and obtaining from KPC by false pretense a total of Kshs. 115,429,583/= . (See exhibit 24).
68. That the plaintiffs attended trial in both cases where the defendants actively participated by providing witnesses, prosecutors and advocates to hold watching brief.
69. That in an affidavit sworn by the first defendant in High Court Nairobi Misc. Civil Application Number 1107 of 2003 the 1st Defendant confirmed its active participation in the Criminal proceedings (see exhibit 25).
70. That the 2<sup>nd</sup> plaintiff's arrest, detention, interrogation and prosecution was effected without any lawful excuse, false, widely publicized by the Defendant as a major corruption case and a breakthrough by the Defendants in the fight against corruption in public offices and state corporations (See Exhibit 26).
71. That the arrests, detention, prosecution, freezing of accounts was wrongful, malicious and unreasonable and were in the circumstances oppressive, wrongful and caused grave prejudice, injury to the plaintiff's business and standing in public domain.



72. That as a consequence of arrest, detention, prosecution and publication to effect that the plaintiffs are criminals, the 2nd Plaintiff's image reputation and that of her family members, friends, business has been fatally damaged and she has suffered loss and damages.
73. That as a consequence of the 1st defendant's prosecution and publications to the effect that the 1st defendant has committed criminal offences, its image reputation and business has been fatally damaged and members of the public and other business organization have shunned it.
74. That on 20th April, 2006, The Nairobi Chief Magistrate's Court dismissed the case and acquitted all the accused persons with no case to answer. The following are key findings of the trial that were captured in the magistrate ruling:
75. That the KPC Tender Committee deliberated upon and awarded Datalogix Ltd a tender for the supply, installation and commissioning of ETP Networking Infrastructure at KPC at a tender sum of Kshs. 339,318,941/=.
76. That the Kshs. `115,429,583/= paid to Datalogix Limited as mobilization down-payment logically followed the tender committee's decision to award the tender to it and the payment was secured by an advance payment bond.
77. That Datalogic Ltd had already began the performance of the contract. (See exhibit 27).
78. That on 30th of May 2003, the 1st plaintiff requested KPC in writing to issue the project commencement date as per Clause 36 of the contract agreement so that the project installation works could begin but KPC in breach of the agreement failed and refused to commission the commencement of the works (see Exhibit 28).
79. That Plaintiffs then instructed its lawyers who issued notice and demand to KPC to allow the 1st plaintiff commence contractual works and further notified them of the plaintiff's losses but the said notice did not elicit positive response. (See Exhibit 29).
80. That KPC in response to the Plaintiff's letter and the Plaintiff's lawyers demand aforesaid, wrote on 7th and 15th July 2003 respectively stating that they could not proceed with the project owing to criminal charges of conspiracy. (See Exhibit 30).
81. That upon conclusion of the Criminal trial the 1st defendant did not allow the 1st plaintiff to the works it contracted it to perform. (See Exhibit 27).
82. That the 1st plaintiff suffered irreparable injury by way of:
83. Loss of reputation, credit and image.
84. Loss of business reputation and goodwill among its local and international partners and counterparts.
85. Loss of viability as a business undertaking within the Information and Communications Technology the telecommunications sector.
86. Loss of client and supplier confidence.
87. Loss of employee morale.
88. Legal fees paid in the sum of Kshs.10,000,000/= to advocates to defend itself in the two criminal proceedings.
89. That the 1st plaintiff in reliance on is contract with KPC:



90. Entered into supplies agreements with various suppliers resulting into actual and contingent liabilities.
91. Engaged additional qualified staff in readiness to execute components of the contract.
92. Obtained insurance policy covers and policies for the works.
93. Included information pertaining to its successful clinching of this tender in its marketing strategy already disseminated.
94. Forewent opportunities to tender for additional work in the market domain.
95. Generally conceptualized its immediate business plans on the income to be earned and reputation to be gained in the market upon successful execution of this contract.
96. PW 1 said in court that he bid for a tender at the 1<sup>st</sup> defendant's office and he was awarded the same.
97. After he bought vehicles and insurances he was arrested in a traumatic way with his wife.
98. PW 1 said they were charged in court and eventually acquitted under Section 210 of the *Criminal Procedure Code*.
99. He said he is claiming Kshs.147 million for lost profits and general damages for defamation.
100. In cross-examination, PW 1 said the contract between the 1<sup>st</sup> plaintiff and the 1<sup>st</sup> defendant stated that he 1<sup>st</sup> plaintiff was entitled 25%.
101. In cross examination, PW 1 said that the contract provided for advance payment of 25%.
102. He said the Directors of the 1st plaintiff were charged. He said after he was awarded the tender, they entered into negotiations and they agreed to forego certain preliminary items and they changed the mode of payment.
103. PW 1 said they asked for 50% down payment because the rules had changed. He said they held several meetings and the contract changed.
104. PW 1 said after the criminal case was heard, the magistrate found that the plaintiffs had no case to answer. He said the plaintiffs received Ksh.115,029,583.
105. PW 1 further said in cross-examination that it was the defendants who terminated the contract.
106. PW 1 said when he wrote to the 1st defendant he was told that the contract would not be actualized because there was a criminal case in court.
107. PW 1 said he has sued for breach of contract and the case is pending in court. He said he has also sued for defamation because the police spokesman told the press that the Directors of the 1st plaintiff had escaped from the country. The year was 2003.
108. PW 1 said the contract for maintenance was a separate contract. He said the maintenance was to arise from the tender for a period of 3 years. He said the maintenance for 3 years was to give them a profit of 35 million and they are claiming 104 million shillings in respect of the maintenance contract.
109. In re-examination PW 1 said there was no reason for terminating the contract. He said the criminal case was determined in their favour.
110. PW 1 also said that the 1<sup>st</sup> plaintiff received Kshs.115,029,582/= before the contract was terminated by the 1<sup>st</sup> defendant.



111. PW 1 said they were ready to go to site but the 1<sup>st</sup> defendant said they were told they would not go to site because there was a pending criminal case in court.
112. PW 2 said she is also a Director of the 1<sup>st</sup> defendant. She said she was charged with PW 1 and acquitted of the charges. She said she paid her lawyer Kshs. 5 million to defend her.
113. PW 2 adopted her written statement dated 5/6/2013 as her evidence in chief.
114. In cross examination, she said they were paid an advance payment of 34% and the contract provided for 25% advance payment.
115. I have carefully considered the evidence adduced by both parties together with the rival submissions filed by the plaintiffs and the 3<sup>rd</sup> defendant.
116. It is the duty of the plaintiffs to prove their case to the required standard in civil cases which is on a balance of probabilities.
117. The issues for determination in this case are as follows;
  - (i) Whether the plaintiffs proved their case to the required standard.
  - (ii) Whether the 3rd defendant had a reasonable or probable cause to have the plaintiffs charged with criminal offences.
  - (iii) Whether the plaintiffs are entitled to the remedies they are seeking against the 3rd defendant.
  - (iv) Who pays the costs of this suit?
118. On the issue as to whether the plaintiffs have proved their case to the required standard, the plaintiffs' evidence was that they had a valid contract with the 1st defendant when they were declared missing and arrested and charged in court.
119. The prosecution ended in favor of the plaintiffs and they are now seeking general damages for unlawful arrest, false imprisonment, malicious prosecution, defamation and loss of reputation and also special damages amounting to Kshs.267,518,112.00.
120. The 3rd defendant denied the allegations and submitted that the plaintiff changed the nature of the contract they entered into with the 1st defendant which was against Clause 56 of the contract on certificates and payments and therefore raised suspicion that they wanted to defraud the government.
121. Further, that upon being paid 34% as mobilization fee only a minimal amount was spent on mobilization.
122. I find that the 3rd defendant did not have a good reason to have the matter investigated and the plaintiffs charged in court.
123. The plaintiffs have proved that they had a tender that was awarded to them on a competitive basis.
124. The Defendants did not adduce any evidence to show that the plaintiffs committed any criminal offence.
125. There is undisputed evidence that the contract terms were negotiated downwards and that the down payment was secured by a bank guarantee of Ksh. 92,000,000.
126. I find that the plaintiffs have proved allegations of unlawful arrest, false imprisonment, malicious prosecution and defamation and also loss of reputation.



127. Although the plaintiff did not call any witness to support the allegation of defamation. I find that a press release was issued by the former police spokesman Mr. Gideon Kibunja on behalf of the then Director of Criminal Investigations (Mr. David Ndung'u) the 2 defendant advertised that the Plaintiffs were being sought by officers from the Criminal Investigations Department for an alleged offence of fraud which had allegedly been committed by the 1st Plaintiff against the 1st Defendant.
128. In the case of *J. Kudwoli vs. Eureka Educational and Teaching Consultants & 2 others* HCC. No. 126/1990 the elements of defamation were stated as follows;
1. The matter of which the plaintiff complains were published by the defendants
  2. The publication concerned or referred to the plaintiff
  3. That it was defamatory in character
  4. That it was published maliciously;
  5. That in slander, subject to certain exceptions, the plaintiff has suffered special damages.
129. In *Hulsburys Law of England 4th Edition* Volume 28 the learned author states as follows:
- “A defamatory statement is a statement which tends to lower a person in the estimation of the right thinking members of the society generally or to cause him to shunned or avoid or to expose him to hatred, contempt or ridicule or to convey any an imputation on him disparaging or injuries to him in his office, profession, calling, trade or business.”
130. On the issue as to whether the 3rd defendant had a reasonable and probable cause to have the plaintiffs and the other 8 people charged, I find that the answer is in the negative.
131. The defendants did not have any reason to have the plaintiffs arrested and investigated.
132. I find that as a consequence of the 1st defendant's prosecution and publications to the effect that the plaintiffs had committed criminal offences, its image reputation and business has been fatally damaged.
133. There is undisputed evidence on 20th April, 2006, The Nairobi Chief Magistrate's Court dismissed the case and acquitted all the accused persons with no case to answer.
134. Further, that the following were key findings of the trial that were captured in the magistrate ruling:
135. That the KPC Tender Committee deliberated upon and awarded Datalogix Ltd a tender for the supply, installation and commissioning of ETP Networking Infrastructure at KPC at a tender sum of Kshs. 339,318,941/=.
136. That the Kshs. `115,429,583/= paid to Datalogix Limited as mobilization down-payment logically followed the tender committee's decision to award the tender to it and the payment was secured by an advance payment bond.
137. That Datalogic Ltd had already began the performance of the contract when they were arrested.
138. That on 30th of May 2003, the 1st plaintiff requested KPC in writing to issue the project commencement date as per Clause 36 of the contract agreement so that the project installation works could begin but KPC in breach of the agreement failed and refused to commission the commencement of the works but the plaintiffs were denied access to the site on the basis of the criminal proceedings.
139. I find that the plaintiffs are entitled to the following remedies against the 3rd defendant;



- a. General damages for unlawful arrest, false imprisonment, malicious prosecution=4,000,000 for both plaintiffs.
  - b. General damages for defamation and loss of reputation=4,000,000 for both plaintiffs.
  - c. Aggravated and exemplary damages for unlawful arrest, false imprisonment, malicious prosecution and publication of false allegations against the plaintiffs=2,000,000 for both plaintiffs.
  - d. The plaintiffs are also awarded costs of this suit together with interest thereon at court rates from the date of this judgment until payment in full.
140. However, I find that the special damages the plaintiffs are claiming are speculative and grossly excessive and are not supported by any evidence.
141. I dismiss the plaintiffs' claim in respect to special damages with no orders as to costs.
142. Judgment be and is hereby entered in favor of the plaintiffs against the 3<sup>rd</sup> Defendant in the sum of Kshs. 10,000,000 together with costs of the suit and interest at court rates from the date of this judgment until payment in full.

Orders to issue accordingly.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 19<sup>TH</sup> DAY OF JANUARY, 2024.**

.....

**A. N. ONGERI**

**JUDGE**

