



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 225 OF 2008

ROBERT KIGO NGARUIYA.....1ST PLAINTIFF

PETER NJOROGE GACHUHI.....2ND PLAINTIFF

VENATUS MUTUA NJAU MURIITHI.....3RD PLAINTIFF

VERSUS

ATTORNEY GENERAL1ST DEFENDANT

CITY COUNCIL OF NAIROBI.....2ND DEFENDANT

JUDGMENT

1. Vide a plaint dated 30th May 2008 and subsequently amended on 23rd July 2009, the plaintiffs Robert Kigo Ngaruiya, Peter Njoroge Gachuhi and Venantus Mutuanjau Muriithi instituted suit against the defendants the Honourable Attorney General and the City Council of Nairobi (as it then was) seeking for general damages for wrongful arrest, false imprisonment and malicious prosecution. They also prayed for special damages in the sum of shs 456,390.00, costs of the suit and interest and any other relief that the court may deem fit and just to grant.

2. The 1st plaintiff claimed that he was the Deputy Chief Internal Auditor in the 2nd defendant's City Treasurer's Department while the 2nd plaintiff was the Deputy Commercial Manager in the 2nd defendant's employment. That on or about the 2nd day of October 2002, the 2nd plaintiff's servants, agents or servants reported to the 1st defendant's agents and or servants that the two plaintiffs had committed an offence namely; Abuse of office contrary to Sections 101 of the Penal Code. It was alleged that on 30th August 1999 and 30th November 1999, the two plaintiffs issued certain local purchase orders and later passed or approved or made payments in respect of the said local purchase orders irregularly and without authority. That the plaintiffs were arrested by the police on diverse dates from 23rd October 2002 which arrest was alleged to have been unlawful, and without any reasonable cause or suspicion and that they were detained and charged before the Chief Magistrate's Court Criminal case No. 44 of 2002 with the offence of abuse of office contrary to Section 101 of the Penal Code.

3. It was further averred by the plaintiff that the actions by the 1st defendant were malicious to the extent that the arrest and prosecution of the plaintiffs was done without any proper investigations; was arbitrary and failed to consider the pleas and explanations by the plaintiffs that the said local purchase

orders were sanctioned and approved and regularly paid in accordance with the 2nd Defendant's Financial and Procurement Regulations. It was additionally averred that following the malicious prosecution, the plaintiffs were acquitted on 31st May 2007 under Section 210 of the Criminal Procedure Code and that during their prosecution, they incurred legal representation charges of shs 160,000/- and 150,040 respectively. Particulars of malice on the part of each of the defendants were particularized.

4. On 6th August 2008, the 2nd defendant City Council of Nairobi filed its defence and Memorandum of Appearance both dated 23rd July 2008 whereas the 1st defendant Attorney General filed his defence on 1st August 2008 dated 30th July 2008. Both defendants denied the plaintiffs' claims but nonetheless the 1st defendant stated that if at all there was an arrest and prosecution of the plaintiffs as alleged, then such arrest and or prosecution was done after reasonable and probable cause had been established and after meticulous investigations revealed that the plaintiffs had committed an offence punishable under the Laws of Kenya. The defendants also denied all the particulars of malice, loss and damage and maintained that mere acquittal did not amount to malice.

5. The 1st defendant also filed an amended defence dated 13th July 2010 denying particulars of special damages pleaded by the plaintiffs. The plaintiffs' witness statements were filed on 21st October 2011 and their list of documents filed on 11th July 2012. The plaintiffs essentially complied with the pretrial requirements and filed a pretrial questionnaire as well as a statement of issues and the suit was certified as ready for trial on 29th May 2013 by Honourable Justice Waweru.

6. The hearing commenced on 9th July 2015 before myself with the 2nd plaintiff Peter Njoroge Gachuhi testifying as PW1 and adopting his witness statement filed earlier on as his evidence in chief. The 2nd plaintiff testified that he had worked for the Ministry of Local Government (as it then was) from 1970 and was trained to become a Certified Public Accountant and appointed as a Local Government Inspector. After serving for 10 years, he was transferred to the Local Authorities Service and served in 10 different Local Authorities as a Chief Officer. He rose to become the Chief Officer and was transferred to Nairobi City Council as Assistant City Treasurer in 1997. His duties included signing Local Purchase Orders (LPOs) and that in 2001 he was transferred to the Water and Sewerage Department as Deputy General Manager. That in 1999 he had signed two Local Purchase Orders on behalf of the City Treasurer, in accordance with the City Council's Rules and Procedures; That on 17th October 2002 while working as Deputy General Manager, police officers from the then Kenya Anti-Corruption Authority (KACA) went to his office and alleged that the plaintiff had signed two Local Purchase Orders without authority. That the 2nd plaintiff advised them to take up the matter with the Town Clerk but the police officers were not willing to take his explanation so they frog marched him from his office in the public view to their offices at Integrity House. The said officers later released him on police bond and on 23rd October 2002 he was arraigned in court and charged with offence of abuse of office, jointly with his co-plaintiffs. He was released on bond of shs 500,000 and the story appeared in the Daily Nation of 24th October 2002. The allegations were that they had irregularly bought goods worth 1.5 million. He considered those allegations to be malicious and defamatory. His employer the City Council of Nairobi suspended him from employment. He had to engage a lawyer to defend him and that he incurred expenses involving valuing property for the bond terms and court fees all totaling to shs 150,040; The trial took for 5 years to be concluded. His health deteriorated. He suffered a heart attack in July 2004 and on admission in hospital he was diagnosed with diabetes and hypertension. He continues to attend medication. That on 31st May 2007 the 2nd plaintiff was acquitted by the trial court under Section 210 of the Criminal Procedure Code after the prosecution failed to establish a prima facie case against him and his co-accused persons; That the ruling exonerated him and his co-accused from any wrong doing but that he could not be reinstated to his job as his retirement age reached on 31st December 2004 while he was under suspension. He also complained that his employer, the 2nd defendant delayed paying him his dues. He prayed for damages as pleaded.

7. In cross examination by Miss Thiga for the 1st defendant, PW1 responded that he did not know whether there was a complaint against him but that police arrested him and that they were performing their duties.

8. In reexamination, PW1 maintained that the police harassed him and never gave him a chance to explain himself yet he was a senior officer. He produced a ruling in the criminal case as receipts as P exhibit 2, Notice to sue Attorney General P exhibit 3, and to the Town Clerk P EX4 and charge sheet P EX5.

9. PW2 Robert Kigo Ngaruiya who is the 1st plaintiff testified on 22nd October 2015 that he resided in Limuru and had retired from Nairobi City Council as Deputy Chief Internal Auditor. That his duties included audit, verification of documents and certification of voucher payments and that he had retired on 31st December 2001 upon attaining 55 years after working for 28 years. PW2 adopted his written witness statement as his evidence in chief and relied on the documents filed in court dated 11th July 2012 as his documentary evidence which he produced as P Exhibit 7 as well as notices to the Attorney General and Town Clerk as P exhibit 8 and P exhibit 9 respectively. He stated that in October 2002 ten months after his retirement, he was wrongfully arrested by the police officers from the Kenya Anti-Corruption Authority and detained unlawfully and was charged with abuse of office contrary to Section 101 of the Penal Code and that the charge particulars stated that he committed the offence between August 1999 and November 1999 while employed as the Chief Accountant of the Nairobi City Council and that he had irregularly or arbitrarily authorized the payment of shs 1,469,000 to Broadlands Limited while knowing that the tender had not been awarded to the said Broad Lands Ltd to the detriment of Nairobi City Council; That one of the witnesses at his trial was a Mr Mwinzi who was the Chief Accountant. Pw2 was subsequently acquitted on 27th April 2007 under Section 210 of the Criminal Procedure Code. He blamed his prosecution on the malicious acts of the defendants. He claimed for general damages and special damages of shs 158,000/- being legal and court fees incurred by him during the trial. He stated that the trial caused him mental anguish and he has had to spend a lot of time in hospital; that the case was reported in the Daily Nation on 24th October 2002 causing him additional stress.

10. In cross examination by Miss Thiga for the 1st defendant the 1st plaintiff stated that he was not aware of any complaint made to the police by the City Council of Nairobi. That he was charged for allegedly authorizing payments. He admitted coming in contact with the documents used in the transactions because he had a role to play in the course of his duties. He stated that he sued the Attorney General because it was the Attorney General who authorized the Anti-Corruption Department to prosecute him which was wrong because he had committed no wrong. He denied that the police were part of the day to day operations at the Nairobi City Council but that they were performing their duties. He maintained that he was arrested in 2002 and filed suit in court in 2008 after 6 years. That the defendants were malicious for arresting and prosecuting him yet he had not committed any offence. He denied knowing the specific police officer who arrested him. He stated that the officer who authorized the payments was never charged in court.

11. In re-examination PW2 stated that the police had a duty to carry out proper investigations to ascertain who the Chief Accountant was and what his role was and not just relying on documents without verification otherwise they could not have availed the Chief Accountant to testify against him. That the trial court's verdict was clear that the investigating officer did not interview the accused. Further, that the evidence showed that the plaintiff was a Deputy Chief Internal Auditor and not the Chief Accountant.

12. The two plaintiffs closed their case. The 3rd plaintiff or his representative did not attend court on the date fixed for hearing and this court dismissed his suit/claim against both defendants under Order 12 Rules 3 and 4 of the Civil Procedure Rules for non attendance to prosecute. The 1st defendant did not offer any evidence. The 2nd defendant never participated in the proceedings or the hearing and their defences were closed. The 1st and 2nd plaintiff's counsel and the 1st defendant's counsel filed their respective clients' submissions and authorities and this court is now called upon to determine the claim herein on its merits.

13. In their submissions filed on 20th November 2015, and 18th December, 2015 respectively, the 2nd and 1st plaintiffs stated that they had proved that there was wrongful arrest, false imprisonment and malicious prosecution and that they had established all the ingredients for malicious prosecution as laid down in the case of **George Masinde Murunga V Attorney General [1979] eKLR** namely that:

1. The plaintiff was prosecuted by the defendant;

Under this element, the plaintiffs maintained that the charge sheet and the court proceedings in CM Cr 44 of 2002 were clear that the plaintiffs were prosecuted by the 1st defendant and with the authority of the Attorney General.

2. That the proceedings were resolved in the plaintiff's favour;

It was submitted that the criminal court proceedings produced in evidence clearly showed that the plaintiffs were tried and acquitted under section 210 of the Criminal Procedure Code with no case to answer as no prima facie case was established against the plaintiffs hence the prosecution was determined in their favour.

3. The proceedings were instituted without reasonable and probable cause;

On this element, the plaintiffs submitted, relying on the case of **Kagane v Attorney General (1969) EA 643** where the court set out the test of reasonable and probable cause. It was submitted that in the instant case, it could not be said that an ordinary and prudent and cautious man could have believed that the plaintiffs were guilty of any of the offences with which they were charged, having regard to the evidence that was adduced in the trial court by the prosecution witnesses.

4. The defendant instituted the proceedings maliciously;

The plaintiffs submitted that the defendants were malicious in that they did not carry out proper investigations in the matter to establish who the Chief Accountant was; they did not even call the Chief Accountant to give evidence; that the documents relied on to prosecute them were sanctioned by the higher authorities; the complaint was not credible;

5. The plaintiff suffered loss and damage.

It was submitted that the plaintiffs suffered loss and damage. Reliance was placed on **NRB HCC 1729 OF 2001 Thomas Mboya Oluoch & another v Lucy Muthoni Stephen and Dr Willy Kaberuka v Attorney General Kampala HCC 160 of 1993**.

The plaintiffs also submitted that in the absence of any evidence from the defendants justifying the prosecution which was malicious, the defence on record and submissions were mere statements not evidence. Reliance was placed on **Trust Bank Limited v Paramount Universal Bank Limited & 2 others HCC 1243 OF 2001 Milimani**.

On damages, the 2nd plaintiff claimed for sh 20,000,000 damages for malicious prosecution and Kshs 10,000,000 exemplary damages. He relied on several cases including **HCC 1774/94 John Kamau Icharia v Paul Njiru & another (UR); Martha Karuav Samuel Mutua** while the 2nd plaintiff claimed for shs 10,000,000 general damages relying on **Crispine Otieno Caleb v Attorney General [2014] eKLR, Thomas Mboya Oluoch (supra); Crispus Karanja Njogu v AG [2008] KLR; Thomas Mutsotso Bisembe v Commissioner of Police & another [2013] eKLR**. They also prayed for special damages as pleaded, costs and interest.

14. The 1st defendant framed 4 issues for determination:

i. Whether the plaintiff were unlawfully and wrongfully arrested and falsely arrested and

confined and or detained by the 1st defendant's agents and/or servants;

ii. Whether the plaintiffs were maliciously prosecuted;

iii. Whether the plaintiffs suffered any loss and damages warranting them compensation in the form of special and general damages?

iv.. Whether the plaintiff is entitled to the prayers they are seeking.

15. On whether the plaintiffs were unlawfully and wrongfully arrested and falsely arrested and confined and or detained by the 1st defendant's agents and or servants, it was submitted that the issue of the arrest by the police from Kenya Anti- Corruption Authority was not controverted. However, it was contended that the arrest was not unlawful and or wrongful in the circumstances. Reliance was placed on the decision in **James Karuga Kiiru V Joseph Mwamburi & 2 Others, CA No. 171 of 2000** as cited in **David Mungai Kinyanjui & 2 Others V Attorney General [2012] e KLR** where it was held, inter alia, that “ usually where there is a genuine complaint made to the arresting officer, usually a police officer, it can be said that the arrest was lawful.”

16. The 1st defendant also submitted, relying on **Simba V Wambari [1987] KLR 601** cited in **Musyoki Muthoka vs Peter Kimanzi & 7 Others Nairobi HCCC No. 1017 of 2005** where it was held that:

“ False imprisonment is the interference with the freedom of the individual without the due process of the law whenever, a person imposes restraint on the Liberty of another, he may only do so in strict accordance with the power conferred on him by law.....”

17. It was submitted that a complaint was made to the agents of the 1st defendant by the 2nd defendant leading to the arrest of the plaintiff hence the arrest was lawful. It was also submitted that the period for the detention of the plaintiffs was reasonable in the circumstances. Reliance was placed on **David Mungai Kinyanjui & 2 Others V Attorney General [2012] e KLR**.

18. Further, that the claims for unlawful arrest and detention is statute barred by virtue of Section 3 of the Public Authorities Limitation Act, Cap 39 Laws of Kenya which enact that “ No proceedings founded on tort shall be brought against the Government of Local Authority after the end of twelve months from the date on which the cause of action accrued.” Reliance was s placed on **Musyoka V Peter Kimanzi & 7 Others Nairobi HCC 1017/2005** (unreported) **Musambu V West Mengo District Administration [1971] EA 379** where the honourable court held that a claim for wrongful arrest and false imprisonment and malicious prosecution one year and seventeen days after arrest was barred by effluxion of time ; and **Kateregga V Attorney General [1973] EA 288** where the court held that the provisions of limitation period precluded the plaintiff from instituting proceedings to recover damages for unlawful detention where the plaintiff had not been filed within the statutory period of limitation respectively. That the cause of action for unlawful arrest and detention arose on a date of arrest and subsequent detention which is October, 2002 yet this suit was instituted in 2008 which was over 7 years.

19. On the issue of whether the plaintiffs were maliciously prosecuted, it was submitted that the plaintiffs must prove that:

i. The defendants must have instituted the criminal proceedings against the plaintiff;

ii. The defendant must have acted without reasonable or probable grounds;

iii. The defendant must have acted maliciously;

iv. The proceedings must have terminated in the plaintiff's favour.

20. On the first element, it was submitted relying on **Mbowa V East Meno District Administration**[1972] EA 352 cited in **David Kinyanjui** (supra) case that:

“ criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before the judicial authority who then issues a warrant for arrest of the plaintiff of a person arrests the plaintiffs and takes him before a judicial authority.....”

21. Further, it was submitted that in **Gitau V Attorney General** [1991] KLR 22 it was stated that:

“To succeed on that claim the plaintiff must first establish that the defendant or his agent set the law in motion against him on a criminal charge. “Setting the law of motion” in this context has not the meaning frequently attributed to it of having a police officer take action, such as effecting an arrest. It means being actively instrumental in causing a person with some judicial authority to take action that involves the plaintiff in a criminal prosecution.”

22. It was submitted that although it was an undisputed fact that the plaintiff's were charged in criminal case 44/2002 and the 1st defendant's agents were instrumental in setting the law in motion in the present case, but that the 2nd defendant's agents are the ones who lodged a complaint with the 1st defendant necessitating the arrest and subsequent prosecution of the plaintiffs on suspicion that the plaintiffs had committed an offence.

23. On whether the defendant must have acted without reasonable or probable grounds, reliance was placed on **Mbowa V East Meno District Administration** where it was held inter alia, that

“..... there must have been no facts, which, on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified. Relying on Gitau's case, it was contended that where an office is believed what the witness told him then he was justified in acting as he did Further reliance was placed on Kagane V Attorney General [1969] EA 645 where it was held inter alia thatwhether the evidential material on which the prosecutor was based was such that a reasonable prudent and cautious man could have honestly believed that it was sufficiently credible and cogent to justify the institution of a prosecution.....:”

24. The 1st defendant contended that there was material or grounds upon which the prosecution was instituted; that the Attorney General who sanctioned the prosecution of the plaintiffs believed what the witnesses told him to justify him acting as he did; that he did not act recklessly and indifferently and that there was genuine grounds for prosecuting the plaintiff and that the information or facts were capable of satisfying an ordinary prudent and cautious man that they were true and afforded a strong basis for prosecution.

25. It was further contended that the mere assertion by the plaintiffs that there were no investigations conducted was neither here nor there since the trial magistrate acknowledged the efforts made by the investigators. In addition, it was submitted that the plaintiffs' admission that they handled the LPOs raised suspicion as to them being accomplices in what the 2nd defendant reported as a disregard of procurement procedures and regulations.

26. Further, it was submitted that the mere fact that the plaintiffs were acquitted does not necessarily mean that the prosecution was unjustified bearing in mind the fact that the said acquittal was based on the failure of the prosecution to call the City Treasurer to admit or deny his role in the whole process as well as failure to state which procurement procedures and regulations said to have been flaunted by the plaintiffs. It was submitted that the acquittal was largely pegged on the gaps in adducing evidence before the trial court which in itself does not negate the existence of such evidence.

27. It was submitted that the prosecution was not obliged to ascertain whether there was any defence

or to ask for an explanation from the plaintiffs before preferring charges as was held in **David Njuguna's** (supra) case. That the gaps in the criminal trial does not negate the existence of a reasonable and probable case for prosecution and that the trial magistrate acknowledged that there was evidence against the plaintiff just that the same was scanty, which fact should not be used against the 1st defendant as it would open a flood gate of cases for compensation as noted in **David Mungai Kinyanjui and 2 others v AG [2012]Eklr; and Gitau v AG [1991]KLR.**

28. On whether the defendant acted maliciously it was submitted that there was no evidence or malice adduced. That no bad blood existed between the plaintiffs and police officers who arrested and framed charges against the plaintiffs. Reliance was placed on the case of **Katerega Vs Attorney General [1969] EA. 645.** It was also submitted that the proceedings terminated in favour of the plaintiffs.

29. On whether the plaintiffs suffered any loss and damages warranting compensation in the form of damages it was submitted that the plaintiffs must prove special damages as pleaded.

30. On the claim for general damages for unlawful arrest, detention and malicious prosecution, It was submitted that there was no evidence for such loss or damage since there was no evidence of letters of termination of employment and or medical report and that after all they were vindicated by their acquittal and that since they maintained their innocence they did not have to worry so much as to cause grave impact on their health or mental well being. Further, that it was not demonstrated how their prosecution affected their standing in society. It was therefore submitted that the plaintiffs did not deserve the prayers sought but that nonetheless, should the court find in their favour, a sum of shs 300,000 is sufficient in the circumstances based on the authority of **John Ngari Vs Mbeere County Council & Another [2010] e KLR.**

DETERMINATION.

31. I have carefully considered the evidence before this court by the two plaintiffs in support of their claims. I have also carefully considered the exhibits produced which include the charge sheets and ruling in ACC CR44/2002 by Honourable R.E. Ougo Senior Principal Magistrate (as she then was), delivered in 2007 acquitting the plaintiffs under Section 210 of the Criminal Procedure Code.

32. I have given equal and serious consideration to the submissions by the two plaintiffs' counsels and the very detailed but useful submissions and authorities relied on by the 1st defendant's counsel. I note that the 3rd plaintiff opted not to prosecute his suit which this court dismissed. I also note that the 2nd defendant never participated in the hearing of this suit despite entering an appearance and filing of their defence on record and being served with a hearing notice for the hearing of the case. I further note that the 1st defendant did not call any witness or evidence to controvert the testimonies of the two plaintiffs on oath despite cross examination of the two plaintiffs.

33. The law is clear that he who alleges must prove that which is alleged. See Sections 107-109 of the Evidence Act. In other words, in the instant case, the burden of proof was cast upon the plaintiffs to prove their respective claims against the defendants jointly and severally on a balance of probabilities, in order for this court to enter judgment in their favour, even if the defendants did not defend the suit or adduce any evidence to controvert the plaintiff's evidence.

34. On the other hand, the law is equally clear that submissions and answers in cross examination cannot built a defence case, since they are not a substitute for evidence in defence of a suit. This is so; notwithstanding the fact that the defendants have no obligation to adduce evidence if the evidence adduced by the plaintiff does not point to the defendant's wrong doing or fault in any way.

35. However, where there is evidence as to the fault or wrong doing by the defendants, it is important and for the benefit of the defendant to adduce evidence which controverts the plaintiff's evidence in order to escape liability. Thus, failure adduce any evidence means that a party's pleadings remain mere statements of fact or allegations since in failing to adduce evidence, a party fails to substantiate its pleadings. Further, it means that the plaintiffs' evidence as adduced against the defendants is

uncontroverted and therefore unchallenged and the court would, on the evidence available in the circumstances of each case, not fail to find that the standard of proof on a balance of probabilities has been attained by the plaintiff. See **Linus Nganga Kionga & 3 Others V Town Council of Kikuyu [2012] e KLR** by Odunga J,

36. As to what a balance of probabilities is **Lord Denning J in Miller V Minister of Pensions [1947]** stated that:

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: We think it more probable than not,” the burden is discharged, but if the probabilities are equal, it is not. Thus, proof on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties explanations are equally (un) convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

37. Under Sections 107 and 108 of the Evidence Act,

1. Whenever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108- The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

38. Applying the above legal principles to this case, in my view, and as earlier stated, the burden of proof lies on the plaintiffs. In this case, I reiterate that the plaintiffs adduced evidence which was not controverted or at all by the defendants since answers in cross examination or submissions by the defendants are not a substitute for defence evidence. For the above reasons, the main issue for determination in this is whether, on a balance of probabilities, the 2 plaintiff's have proved their cases against the defendants jointly and severally on:

a) Liability for wrongful arrest, false imprisonment and malicious prosecution.

b) General damages on (a) above.

c) Special damages as pleaded;

d) Costs and interest ; and

e) Any other relief that this court may deem fit to grant.

39. On the first issue of whether the plaintiffs have proved that they were wrongfully arrested, falsely imprisoned and maliciously prosecuted, I shall divide it into two sections:-

1. Wrongful arrest and false imprisonment.

40. The evidence adduced by the plaintiffs was that in October 2002, they were arrested, detained and arraigned in court on allegations that they had abused office. They were charged vide criminal 44/2002 before the Anti Corruption court then presided over by Hon R.E Ougo Senior Principal Magistrate and were acquitted on 31st May 2007 under Section 210 of the Criminal Procedure Code upon R.E. Ougo (Mrs) Senior Principal Magistrate (as she then was) finding that they had no case to answer.

41. On whether the arrest of the plaintiffs was unlawful, the charge sheet produced in evidence which is dated 22nd October 2002 shows that the plaintiffs were arrested on 16th October 2-002. They were detained in custody although the evidence on record does not show for how long the plaintiffs were detained in custody and therefore the question would be whether that detention was false imprisonment in the circumstances of the case. In **James Karuga Kiiru Vs Joseph Mwamburi & 2 Others s [2001] e KLR** it was held that when a constable has taken into custody a person reasonably suspected of an offence, he can do what is reasonable to investigate the matter and see whether the suspicious are supported or not by further evidence.

42. In this case, the 2nd plaintiffs testified that he was arrested in 17th October 2002, released on police bond and on 23rd October they were arraigned in court and released on bond of shs 500,000. It is therefore not clear whether the 2nd plaintiff was detained for how long upon being arrested; between the date of first appearance in court and being released on bond.

43. Nonetheless, the two plaintiffs aver that there was no legal basis for their arrest since they had not committed any offence. That they were frog marched to the Integrity Centre in the full view of the public and that the Nation media ran a story of their arrest.

44. The arrest of the plaintiffs by the 1st defendant's agents is not in dispute as the charge sheet is clear on the date of arrest. However, the claim for unlawful arrest and false imprisonment, it has been held forms the same transactions as the case for malicious prosecution. In **Josephat Mureu Gibiguta v Howse & MC George Ltd HCC 2646/93**, Githinji J (as he then was) stated that

“In my view, the arrest, detention and prosecution consist of one transaction which has given rise to the plaintiff's claim. In the circumstances of this case, the cause of action for damages for unlawful arrest and false imprisonment arose only when the plaintiff was acquitted.”

45. In this case, as the arrest and detention of the plaintiff materialized into a prosecution, the claim for unlawful arrest and false imprisonment do not exist on their own. The above position notwithstanding, it is the view of this court that on the plaintiff's own evidence on record that the defendants had the plaintiffs arrested, detained and prosecuted on suspicion that they had committed an offence of abuse of office, it cannot be stated that their arrest was unlawful and or that their temporary detention during interrogation or since they were released on police bond, and or pending the processing of their release on bail pending trial was unlawful and or false. I am fortified on this point by the case of **James Karuga Kiiru** (supra) where the court was clear and I agree, that when one is taken into custody for reasonably being suspected of an offence, whether the suspicions are supported or not, cannot amount to false imprisonment or unlawful arrest. I must however mention that there was an attempt to plead defamation of character by the plaintiffs' adduction of evidence of publication of their arrest in the Nation Newspaper and the allegations of being frog marched to integrity centre for interrogation in the public view.

46. However, this court is unable to find any proof of the independent claim for defamation of character which, in any event would have had no basis pursuant to Section 4 (2) of the Limitation of Actions Act Cap 22 Laws of Kenya that such a claim could only be brought within twelve months from the date when the cause of action accrued. In this case, the cause of action arose in October 2002 and the suit was filed in court in 2008, almost 6 years later by which time, the claim for libel was statute barred.

47. I would however not hold, in the circumstances of this case, that the claim for unlawful arrest or false imprisonment was statute barred since the said claims were made jointly with the claim for malicious prosecution which cause of action could only accrue after the determination of the criminal case and in this case on 31st May 2007.

48. The second question for determination under the first issue is whether on the evidence adduced, the plaintiffs proved on a balance of probabilities, that their prosecution was malicious. To found a claim for

malicious prosecution, one must prove the following elements:-

- a. That the prosecution was instituted by the defendant, or by someone whose acts he is responsible;*
- b. That the prosecution terminated in his favour.*
- c. That the prosecution was instituted without reasonable and probable cause;*
- d. That the prosecution was actuated by malice.*

49. The above four principles have been applied and adopted in several decisions some of which the 1st defendant's and plaintiffs counsels have cited. I will cite a few of those decisions namely: 1) **Thomas Mboya Oluoch & Another V Lucy Muthoni Stephen & Another [2005] e KLR** (ii) **Patrick Muriithi Kukiha V Edwin Warui Munene & 5 Others [2005] e KLR** (iii) **Kiragan V Muriva & Another [2004] e KLR** (iv) **Zablon Mwaluma Kadon V National Cereals & Prudence Board [2005] e KLR**.

50. That the plaintiffs were arrested, detained, arraigned in court and charged vide ACC 44/2002 jointly with others with the offences of abuse of office is clear from their testimonies in court and the charge sheet and ruling of Ougo (Mrs) Senior Principal Magistrate made on 31st May 2007. The plaintiffs also produced Authority of the Attorney General to prosecute them for the offences with which they were charged. The Authority is personally signed by the Honourable Attorney General S. Amos Wako on 25th September 2002. Therefore, it follows that the charge sheet dated 22nd October 2002 was only drawn charging the plaintiffs with the offence of abuse of office contrary to Section 101 of the Penal Code Cap 63 Laws of Kenya with the authority or sanction of the 1st defendant Attorney General. From the said sanction and particulars of the offence, it is clear that the complainant was Nairobi City Council and it was alleged that the plaintiffs between 30th August and 30th November 1999 arbitrarily and without regard to Local Government Procurement Procedure and Nairobi City Council Financial and Procurement Regulations procured goods worth shs 1,469,000 through issuance of LPO'S Nos 26622 and 266624 dated 30th August 1999 to Broadlands Ltd on behalf of Nairobi County Council an act which was prejudicial to the said city council. That the prosecution was instituted by the 1st defendants following a complainant by the 2nd defendant is therefore not in doubt.

51. The other question is, was the prosecution terminated in favour of the plaintiff? The plaintiffs testified on oath and produced a copy of the ruling made on 31st May 2007 by Honourable Ougo Mrs which clearly show that the trial magistrate after hearing the prosecution witnesses and analyzing the evidence on record, she found that the plaintiffs had no case to answer and accordingly she acquitted them under Section 210 of the Criminal Procedure Code. Therefore, the second element or ingredient for proving malicious prosecution has been met.

52. On the third element and question of whether the prosecution was instituted without reasonable and probable cause, the 2nd plaintiff testified on oath which evidence was uncontroverted that he was at the material time serving as an Assistant Treasurer and that his duties included signing Local Purchase Orders and that in 1999 he had signed two Local Purchase Orders on behalf of the City Treasurer in accordance with the City Council's Rules and Procedures. At the time of his arrest on 17th October 2002, he was working as Deputy General Manager with the Water and Sewerage Department. That two Anti-Corruption Commission officers went to his office and claimed that the 2nd plaintiff had signed two Local Purchase Orders without authority. That he advised them to consult the Town Clerk but they were unwilling to listen so they frog marched him from his office in public view to their offices at Integrity Centre before releasing him on bond and charging him in court with abuse of office. The same evidence was adduced by the 1st plaintiff. In **Soc Finac Kenya Ltd v Peter Guchu Kuria (HCCA 595/2000)** (Unreported) Nairobi Aganyanya J (as he then was) held that:

“That a suspect was acquitted of a criminal case is no sufficient ground for filing a civil suit to claim damages for malicious prosecution or false imprisonment. Evidence of spite, ill will, lack of reasonable and probable cause must be established.”

53. **“Probable and reasonable cause”** was defined in **Hicks V Fawkers [1878] 8 QBD 167** at 171 by Hawkins J as:

“ 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 on the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed.”

54. The above definition was adopted in **Kagane V Attorney General & another** (supra) where Rudd J stated:

“.....to constitute reasonable and probable cause the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of the facts discovered by the prosecution or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty.”

55. In the **Socfinac Kenya Ltd V Peter Guchu Kuria** (supra), Aganyanya J further observed further that:

“Moreover, when there is a case of suspected theft, the first step is to report the matter to police, who in their own way find out how to carry out investigations. Like in this case, whether it was Patrick or Nandwa who made the report of theft of the shafts to Kirwara police, no issue should arise over this.

And it is up to the police to take further steps like taking a suspect to court if they have sufficient evidence against such suspect to warrant such action.

This then is the action by police and the state should be involved or joined in such suit and that the complainant should not be blamed for making such report to police. What is of great significance in such a case is whether or not there is a reasonable and or probable cause for the arrest and or prosecution of the culprit.

And the onus of proving that there was no reasonable and probable cause for the arrest and prosecution of the suspect lies on him/her who queries such arrest or prosecution. In the case subject to this appeal, did the respondents prove on a balance of probabilities that the report made to Kirwara police station about the theft of shafts was false and malicious? Who would dare design such a scheme to involve police that tractor shafts had been stolen when they had not? Did the respondents prove such design?

From the reading of the record of the lower court, there was no such proof.....

As to the prosecution of the respondents, the complainant could not force police to do so when there was no evidence to take them to court. Police carry out investigations before taking suspects to court and there are various incidents when police have declined to prosecute a suspect when investigations have disclosed no offence to warrant this. If the respondent's case fell in the latter category then I am sure they would not have taken to court. That a suspect was acquitted of a criminal case is not sufficient ground for filing a civil suit to claim damages for malicious prosecution or false imprisonment.

Evidence of spite, ill will, lack of reasonable and probable cause must be established.

56. In **Thomas Mboya Oluoch & Another Vs Muthoni Stephene & Another [2005] e KLR** Ojwang J (as he then was) stated:

“ Unless and until the common law tort of malicious prosecution is abolished by Parliament, policeman 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.”

57. With the above guidelines, I find that indeed there was nothing wrong with the Anti-Corruption Authority police arresting the plaintiffs since from the ruling of Honourable R.E Ougo, it was clear that there was a complaint that Procurement Procedures and Regulations as well as the Financial Management Regulations of Nairobi City Council had been flouted by the plaintiffs, who in their evidence before this court admitted that they were involved in the processing of the Local Purchase Orders and or vouchers relating to the subject procurement. However, the 2nd plaintiff in his testimony which is uncontroverted is clear that at the time of his arrest, he pleaded with the Anti-Corruption Authority officers to consult the Town Clerk on the issue, which proposal the police rejected, and proceeded to hound him out of the office, frog marching him to Integrity Centre. The 1st plaintiff on the other hand testified that he had retired 10 months prior to his arrest. That he had served as an auditor and not a Chief Accountant yet the police insisted on charging him as being the accountant. That he was alleged to have authorized payments as the Chief Accountant, which he did not and that in any event, he was not the Chief Accountant albeit he handled the documents used in the subject transactions. The 1st plaintiff maintained that the officer who authorized the payments should have been the one to be charged in court and not him. He also stated in cross examination that the police were under an obligation to carry out proper investigations to ascertain who the Chief Accountant was and what role he had played in the process; And that there was no reason why the Chief Accountant was not a witness to attest to the role allegedly played by PW2, the 1st plaintiff.

58. In the ruling on no case to answer by Honourable R.E.Ougo (Senior Principal Magistrate), the Learned trial magistrate observed that the impugned procurement process was sanctioned by the relevant Committee of the 2nd defendant and there were minutes/instructions of the City Treasurer to the 1st plaintiff to act. Further, that PW5 from Audit Department told the court that since all the documents were in order and verified, the payments were made with authority; and that that too was the evidence of PW6 as supported by the evidence of PW8.

59. The 1st plaintiff herein was found to be the purchasing officer of Nairobi City Council and that he signed documents on the instructions of the City Treasurer. The trial court found that he could not be held responsible for acts done on instructions of another officer. Further, that there was no evidence of his arbitrariness and neither were the alleged Regulations or Procurement Procedures that were flouted produced in court. The trial magistrate also found it strange that the officers of Nairobi City Council who were the witnesses said there was nothing wrong in the way the Local Purchase Orders were processed and that Nairobi City Council did not lose anything and that putting the accused on his defence would be asking him to fill the gaps in the prosecution case. The trial court noted that the prosecution should have called as a witness, the officer who minuted Exhibit 19 to accuse No. 1 and to show what Procedures or Regulations were flouted. She acquitted him.

60. On the 2nd accused who is PW1 hereto, the trial court found that he had signed Exhibit 6 and 3 on behalf of the City Treasurer and that no Regulations/Procedures allegedly flouted were produced and neither did the City Treasurer who authorized the transactions nor members of the relevant committees testify to show how PW1 acted without instructions as against the established procedures. The trial magistrate found the charge of abuse of office unsupported and acquitted PW1.

61. Concerning PW2, who was the 3rd accused, the trial magistrate also found that he was charged as the Chief Accountant yet the evidence on record showed that he was the Deputy Internal Auditor and that he could therefore not be liable for acts of the Chief Accountant. Further, the trial court found

that the scanty evidence on PW2 in that case was not clear as to what role the 3rd accused had played in the matter. Further, that as an internal auditor the 3rd accused did on the evidence available, act on the documents properly presented before him having been sanctioned by the relevant officers of Nairobi City Council. That it was also not shown what Regulations/Procedures he had flouted. That no minute was produced to prove that the tender had not been amended to Broadlands K Ltd by Nairobi City Council or whether accounts by Nairobi City Council were not right. She acquitted him.

62. From the above summarized evidence of the trial court produced in these proceedings, I find that indeed there was no probable or reasonable cause to charge and therefore prosecute the plaintiffs with the offence of abuse of office. If the evidence by the prosecution witnesses themselves which was supposed to nail the plaintiffs for abuse of office was, as stated by the trial magistrate that the Nairobi City Council officials testified that there was no procedure which was flouted, and that all necessary approvals had been received for the for the procurement, and the fact that the investigating officers never even questioned the City Treasurer and Town Clerk and neither did they find it necessary to procure evidence of what particular Rules/Regulations were flouted leading to their conclusion of abuse of office by the plaintiffs, this court is also left wondering why the plaintiffs were charged with abuse of office in the first place.

63. The conclusion I make is that there was an overzealousness by the Anti-Corruption Authority officers who went to arrest the plaintiffs. They did not give the plaintiffs an opportunity to explain out themselves. There is even no evidence that they ever recorded any statements under inquiry from the plaintiffs to show that the plaintiffs failed to explain the alleged “*suspicious transactions*” that could have amounted to abuse of office. The overzealousness by the investigators no doubt worked against the prosecution case since they ended up charging PW2 as the Chief Accountant when he was merely Deputy Internal Auditor at the material time of the transactions. The overzealousness of the investigators also made them not to record any statements from the Chief Accountant who did authorize the payments. Their overzealousness further made the Anti-Corruption Authority officers fail to record any statements from the City Treasurer on whose authority the plaintiffs acted since there was evidence that the City Treasurer minuted to the plaintiffs what to do hence the plaintiffs who worked under the Treasurer acted with authority and not arbitrarily as was alleged in the particulars of the charges that faced the plaintiffs. Further overzealousness of the Anti-Corruption Authority officers made them to haul the plaintiffs to court without gathering relevant documentation which was material to the success of such a case based on allegations of flouting of Procedures and Regulations. No one produced the Procedures/ Regulations allegedly flouted by the plaintiffs.

64. It is the above hazy conduct of the 1st defendant’s officers that persuades this court to find that the 1st defendant’s agents/servants acted recklessly and maliciously and perhaps with the intention of pleasing their master who had in writing authorized the prosecution of the plaintiffs, the Attorney General. It was upon the Attorney General, whose authority to prosecute was being sought, and being responsible for prosecution of the plaintiffs, to ensure that there was evidence that would link the plaintiffs to the offence with which they were being prosecuted. In this case, there was no scintilla of evidence linking the plaintiffs with the alleged offence which was no offence at all, from the trial court record’s findings that even the so called complainant’s witnesses testified that there was no procedure or regulation which was flouted and that in fact, all that the plaintiffs did were authorized by the relevant Committee.

65. The 1st defendant and especially its agents, the investigating officer did not testify before this court why investigations were carried out the way they were done. He has not come to inform this court how he conducted investigations in such a hazy manner and whether the prosecution witnesses who were employees of Nairobi City Council were hostile witnesses since they testified in favour of the plaintiffs herein that all procedures in the material transaction were complied with and authorization of the relevant committee and or persons received.

66. Although this court notes that the proceedings in a Criminal ACC 44/2002 were not produced, but the ruling by the trial magistrate on no case to answer is clear that it was not just the sufficiency of

evidence that was in question. There were many gaps that left sufficient doubt as to whether the accused persons/plaintiffs should in the first instance have been charged or prosecuted with the offence with which they were charged.

67. I find that the prosecution of the plaintiffs was unwarranted. It was without any reasonable or probable cause. It was preceded by deficient and reckless hazy investigations that in fact disclosed no offence capable of being committed by the plaintiffs. It was an unjustified prosecution. Proper investigations would have revealed that arbitrary procurement did not take place as there was authorization from the relevant persons including the City Treasurer and Chief Accountant who were neither treated as suspects nor as witnesses against the plaintiff.

68. For the above reasons, I find that on a balance of probabilities, I am satisfied that the prosecution of the plaintiffs was malicious and without any justifiable, reasonable or probable cause. The plaintiffs have in my view, proved all the elements necessary to establish the tort of malicious prosecution. I find the 1st defendants liable to the plaintiffs at 100%.

69. As against the 2nd defendant, I find that there is no evidence to show that in that establishment was malicious against the plaintiffs. It is not clear from the record as to who made the report concerning the abuse of office prompting the arrest and prosecution of the plaintiffs since the prosecution witnesses, as was found by the trial magistrate, testified that all procedures and regulations of the 2nd defendant were followed and all authorizations given before the alleged arbitrary procurement was done.

70. For the above reasons, I find the case of malicious prosecution not proved against the 2nd defendants to the standard required, that of on a balance of probabilities and I proceed to dismiss the plaintiff's suit against the 2nd defendant.

71. On whether the plaintiffs are entitled to damages and if so, how much, this court has found that the plaintiffs have on a balance of probabilities proved that their prosecution was malicious consequently, I find that they are entitled to general damages as well as special damages. The latter must, nonetheless have been specifically pleaded and strictly proven at the hearing.

72. Starting with special damages, each of the plaintiffs testified that as a result of the arrest and prosecution, they incurred costs which are pleaded in the amended plaint as:

1. 1st plaintiff – Robert Kigo Ngaruiya

i. Legal fees shs 158,000

ii. Court fees shs 2,100

Total sh. 160,000

2. 2nd plaintiff Peter Njoroge Gachuhi

i. Legal fees shs 139,000

ii. Court fees shs 6,040

iii. Valuation report in respect of LR NO. Mavoko/Block 12/229 shs 5,000.

Total 150,040.00

73. I have examined the receipts produced in court as exhibits and I am satisfied that each plaintiff has proved the special damages as pleaded. Accordingly, I award them the special damages as proved and pleaded.

74. On general damages for malicious prosecution, the plaintiffs relied on several decisions in their proposition. The 1st plaintiff relied on **HCC 1729 of 2001 Thomas Mboya & Another V Lucy Muthoni Stephen** where the court held that the defendants who failed to act in good faith or were led by malice must be made to account. He also relied on **Dr. Milly Kaberuka Vs Attorney General of Kampala** (supra) where the court found the plaintiff had suffered injury to his reputation as the news of his appearance in court was published in a newspaper. In the earlier case, shs 500,000 general damage was made in 2005 and in **Crispus Karanja Njogu V Attorney General [2008] KLR** Waweru J awarded shs 800,000 general damages to an Assistant Registrar for malicious prosecution. Further reliance was placed on **Thomas Mutsotso Bosembe V Commissioner of Police & Another [2013] e KLR** where the court awarded shs 800,000 general damage and **Crispine Otieno Caleb Vs Attorney General [2014] e KLR** where shs 2,000,000 was awarded for malicious prosecution. He prayed for shs 10,000,000 general damages, costs and interest.

75. The 2nd plaintiff prayed for shs 30,000,000 general damages costs and interest made up of shs 20,000,000 general damage and shs 10,000,000 exemplary damages. However, there was no pleading on exemplary damages. He relied on **HCC 1550/93- Martha W. Karua V Samuel Mutua & Another; Daniel Ole Nkoyo & 2 Others V Councillor Hassan Olle Kamwaro Another(Nairobi HCC1649/87(unreported) and Nairobi HCC 3464/94 Anthony Were Vs Lucas Odawal Okumu.**

76. The 1st defendant in its submissions maintained that there was no proof of damages and loss suffered hence no damages should be awarded to the plaintiffs. Nonetheless, he proposed shs 300,000 should this court find for the plaintiffs. Reliance was placed on **John Ngari V Mbeere County Council and Another [2010] e KLR.**

77. I have considered the proposed quantum for and against the plaintiffs. I am conscious that the 1st plaintiff PW2 had already retired when he was arrested and prosecuted. He testified and it was not denied that the 2nd defendant delayed paying his retirement benefits because of the prosecution which took about 5 years. In my view, the long period of trial in itself was very traumatizing for the plaintiffs. On the other hand, the 2nd plaintiff PW1 who was still in employment at the material time of arrest and prosecution was suspended and he reached his retirement age when the case was going on. He also suffered a stroke. The 2nd plaintiff appeared in court and this court did observe him. He was stroke stricken, with walking difficulties, speaking with difficulties and mumbling and that kind of obvious situation does not in my view require medical evidence. However, there is no evidence to relate his state of poor health and the impugned prosecution. This is not to say that any malicious prosecution will not cause a certain amount of anxiety and distress to the person prosecuted. There will be lots of inconvenience. See Hosea **Wilfred Waweru V National Social Security Fund Board of Trustees [2013] e KLR.**

78. Taking into account that the prosecution of the plaintiff's took about 5 years—from 2002-2007 to conclude, and the anxiety and annoyance and other inconvenience that were attendant to their prosecution, and doing the best that I can, I would in the circumstances of this case award each plaintiff a sum of kshs 800,000 general damages for malicious prosecution as against the 1st defendant alone. I also award the plaintiffs special damages as pleaded and proved.

79. Summary:

- a. Liability for malicious prosecution against the 1st defendant only at 100% in favour of the plaintiffs.
- b. general damages for the 1st plaintiff sh 800,000
- c. general damages for the 2nd plaintiff shs 800,000
- d. special damages for the 1st plaintiff – *Robert Kigo Ngaruiya*

iii. Legal fees shs 158,000

iv. Court fees shs 2,100

Total sh960,000

e. special damages for the 2nd plaintiff Peter Njoroge Gachuhi

iv. Legal fees shs 139,000

v. Court fees shs 6,040

vi. Valuation report in respect of LR NO. Mavoko/Block 12/229 shs 5,000.

Total 950,040.00

f. Costs of this suit are awarded to the plaintiffs to be taxed jointly and shared proportionately against the 1st defendant only.

g. I award to the plaintiffs Interest at court rates on special damages to accrue from date of filing suit until payment in full whereas interest on general damages at court rates to accrue from the date of this judgment until payment in full.

h. As the 2nd defendant did not participate in these proceedings, I make no orders as to costs in their favour for the dismissed suit.

i. The 3rd plaintiff's suit is dismissed for nonattendance to prosecute, with no orders as to costs.

j. I so order

Dated, signed and delivered in open court at Nairobi this 13th day of July 2016.

R.E. ABURILI

JUDGE

In the presence of:

Mrs Kinyanjui for the 1st plaintiff

N/A for 2nd plaintiff

N/A for 1st defendant

N/A for 2nd defendant

CA: Adline