



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 116 OF 2003**

**DANIEL NJUGUNA MUCHIRI.....PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF KENYA LTD.....1<sup>ST</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

***CLAIM: damages for malicious prosecution; false imprisonment; abuse of legal process; defamation;***

1. By a plaint dated 5<sup>th</sup> February 2003 and filed in court on 6<sup>th</sup> February 2003 and re amended on 23<sup>rd</sup> April 2004, the plaintiff Daniel Njuguna Muchiri instituted this suit against the defendants Barclays Bank of Kenya Ltd and The Honourable Attorney General seeking for general damages, special damages, exemplary and punitive damages, costs of the suit, interest and any other or further relief as the court may deem fit and just to grant.

2. The plaintiff's claim against the defendants jointly and severally is premised on the allegation that on or about the 17<sup>th</sup> day of June 2000 the police, being agents or servants of the Attorney General on behalf of the Government of Kenya, acting on information provided by the 1<sup>st</sup> defendant's agent Charles Gathiru, maliciously, and without reasonable cause preferred before the Chief Magistrate's Court at Nairobi charges against the plaintiff accusing him of stealing Contrary to Section 275 of the Penal Code, obtaining money by false pretences contrary to Section 313 of the Penal Code, attempting to obtain by false pretences contrary to Section 313 as read with Section 389 of the Penal Code, uttering false document contrary to Section 353 of the Penal Code and handling stolen goods contrary to Section 322 of the Penal Code and that they caused the plaintiff to be arraigned in court and prosecuted for the said criminal offences.

3. It was further pleaded that during the process of the purported investigations and arrest, the police harassed and humiliated the plaintiff and denied him the right to legal representation by counsel when the plaintiff presented himself to the police on the 15<sup>th</sup> and 16<sup>th</sup> June 2000 and during his detention at Kamukunji Police Station from the evening of 17<sup>th</sup> June to 19<sup>th</sup> June 2000.

4. It was further alleged that the 2<sup>nd</sup> defendant maliciously and without reasonable and probable cause continued to prosecute the charges against the plaintiff before the Chief Magistrate's Court and caused the said court to commit the plaintiff for trial at the Chief Magistrate's Court for a period of

almost two years.

5. It was further averred that the 1<sup>st</sup> defendant's agents recorded statements with the police implicating the plaintiff of the charges and provided witnesses to give evidence against the plaintiff during the trial and that it is as a result of the complaints made by the 1<sup>st</sup> defendant that the plaintiff was charged and prosecuted by the 2<sup>nd</sup> defendant's agents/servants.

6. Further, the plaintiff averred in his pleadings that the 1<sup>st</sup> defendant acted unreasonably and was actively and maliciously involved and instrumental in investigating as well as supporting the prosecution against the plaintiff.

7. In addition, it was alleged that the two defendants collaborated to unlawfully and wrongfully arrest and detain the plaintiff for an unreasonable period of time during which the plaintiff suffered immense physical and mental torture, pain and anguish.

8. It is further alleged that the defendants acted jointly and fabricated the criminal charges against the plaintiff and proceeded to prosecute him without any reasonable basis and that on 6<sup>th</sup> June 2002 the plaintiff was acquitted of the said charges.

9. The plaintiff also claimed that on 20<sup>th</sup> June 2000 the defendants falsely, maliciously and wrongfully published or caused the publication of an article which is highly defamatory of the plaintiff in the Daily Nation of 20<sup>th</sup> June 2000 entitled ***“ man charged with theft” stating that: “A Firestone employee was yesterday charged with stealing three cheques worth over shs 2 million shillings from the Barclays Bank. Mr Daniel Njuguna Muchiri appeared before the Chief Magistrate Boaz Oloo and denied committing the offence on September last year in Nairobi. The accused was released on a shs 100,000 bond.”***

10. The plaintiff claimed that the above publication was in their natural and ordinary meaning calculated to mean and meant that the plaintiff is a thief, dishonest, a fraudster and unprofessional who is unworthy and unfit of the office of General Accounting Manager.

11. The plaintiff claims that he is a person of high moral and professional standing, enjoyed esteem and respect from his peers and socially, and that the article discredited his good way and reputation. That the publication was malicious and calculated to and did injure, disparage and lower his esteem among right thinking members of the society generally, since the publishing newspaper enjoys wide readership in Kenya, Uganda and all over the world including its distribution through the internet.

12. The plaintiff claimed that all the aforesaid matters greatly injured him in his credit, character and reputation and that he suffered severe mental anguish and pain, has been brought to public ridicule, scandal, contempt and that he incurred expenses in defending himself and suffered loss and damage. He claimed for

a. Legal fees shs 59,000

b. Travelling expenses shs 10,000

13. In the re amended plaint filed on 23<sup>rd</sup> April 2004, the plaintiff set out particulars of malice on the part of the defendants and also withdrew the claim for damages for defamation. He however pleaded for general damages for false imprisonment, malicious prosecution and abuse of the legal process, special damages of shs 69,000; and exemplary damages for false imprisonment, malicious prosecution and abuse of the legal process.

14. The 1<sup>st</sup> defendant filed a second further amended defence with leave of court on 15<sup>th</sup> November 2007 denying the plaintiff's claim that it maliciously and falsely and without any reasonable or justifiable cause made a false report to the Central Bank of Kenya Anti-fraud Police Unit alleging that

the plaintiff had indicated to the 1<sup>st</sup> defendant that he was holding the original cheques and would send them in due course through Charles Gathiru or at all.

15. The 1<sup>st</sup> defendant further contended that if at all it made any report aforesaid then it did so out of its civic duties to do so because it had reasonable cause to believe that cheques had been misappropriated. The 1<sup>st</sup> defendant also stated that in HCC 509/2001 it sued Owen Thiong'o Kariuki and Mike Thiong'o Kariuki for the amount value of the cheques and recovered the said money successfully.

16. The 1<sup>st</sup> defendant also contended that the 2<sup>nd</sup> defendant carried out its own independent investigations into the matters complained of and made an independent decision to charge the plaintiff and that it never instructed the 2<sup>nd</sup> defendant to instigate the charges against the plaintiff.

17. The 1<sup>st</sup> defendant also contended that as the trial magistrate in criminal case No. 437/2000 found that the plaintiff had a case to answer, then the report made by the 1<sup>st</sup> defendant could, in the circumstances not be false or malicious.

18. The 1<sup>st</sup> defendant further stated in its defence that it was under a civic duty to record statements and provide witnesses who had been bonded to attend court to give evidence during the criminal trial. It denied that the charging and prosecution of the plaintiff was occasioned by the complaints made by the 1<sup>st</sup> defendant.

19. The 1<sup>st</sup> defendant also denied ever publishing the article in the newspaper and further that in any event, the plaintiff's claim based on the alleged publications was statute barred under the Limitation of Actions Act.

20. The 1<sup>st</sup> defendant denied the particulars of special damages and maintained that the plaintiff is not entitled to general, special or exemplary and punitive damages. The 1<sup>st</sup> defendant prayed that this suit should be struck out for being bad in law.

21. The 2<sup>nd</sup> defendant Attorney General entered an appearance on 12<sup>th</sup> March 2003 and filed defence on 16<sup>th</sup> June 2003 contending that the suit herein is bad in law as it contravenes the mandatory provisions of Section 13A of the Government Proceedings Act Cap 40 Laws of Kenya. The 2<sup>nd</sup> defendant denied that the plaintiff was maliciously prosecuted but averred that if the plaintiff was arrested and charged which is denied then the same was done after a proper complaint had been made to the police, the complaint investigated and reasonable or probable cause established that he had committed a criminal offence. Further, that the police were carrying out their public and statutory duties.

22. The 2<sup>nd</sup> defendant further denied allegations by the plaintiff that the police harassed and humiliated him and or that they denied him the right to be represented by counsel. The 2<sup>nd</sup> defendant denied acting in collaboration with the 1<sup>st</sup> defendant to fabricate charges against the plaintiff. It also stated in the defence that a mere acquittal does not divest the defendants from carrying out their legal duties to arrest and prosecute probable offenders upon establishing a reasonable cause that an offence has been committed or is likely to be committed. They also denied publishing or causing to be published defamatory article of and concerning the plaintiff in the Daily Nation. The 2<sup>nd</sup> defendant further denied that the plaintiff suffered loss and damage or any special damages and prayed for dismissal of the suit with costs.

23. The plaintiff's counsel filed reply to the defendant's defence reiterating the contents of the plaint and maintaining that the arrest and prosecution of the plaintiff was actuated by malice and that it was without any reasonable or probable cause.

24. The suit proceeded to hearing on 1<sup>st</sup> March 2016 with the plaintiff Mr Daniel Njuguna Muchiri

testifying as PW1 that he was aged 52 years and works in the Jua Kali sector. He is a graduate with a Bachelor of Commerce in 1989 and has a Post graduate Diploma in Financial Management from Kenya School of Monetary Studies in 2000. That at the material time of this cause, he worked as a General Manager, Accounting and Finance with Firestone East Africa Company a subsidiary of Firestone and Water International Company. He was in charge of all financial transactions in the East African region which responsibilities included Data Management, payment of Dividends to shareholders and settlement of debts, among others.

25. The plaintiff relied on and adopted his witness statement filed on 22<sup>nd</sup> May 2014 as his evidence in chief. According to the plaintiff, Firestone EA, which was his employer had Bank Paribas which was a Swiss based shareholder from Geneva Switzerland, which had invested 4.5 million shares in the Firestone EA. The latter had its Registrars, Barclays Bank of Kenya, who maintained a Register of all shareholders with instructions to pay dividends to the shareholders. That in September 1999, Firestone EA declared dividends. Banque Paribas Suisse SA which was an international shareholder instructed Barclays Bank of Kenya to pay Banque Paribas Suisse SA in Swiss Francs since it was a foreign investor. Instead, Barclays Bank of Kenya send cheques to the foreign shareholder Banque Paribas in Kenya shilling currency who returned the said cheques for replacement with the cheques in Swiss Francs.

26. That the plaintiff received a letter from the Banque Paribas Suisse SA stamped 16<sup>th</sup> December 1999, being the second reminder from Banque Paribas Suisse SA alerting Firestone EA that a mistake had been made in paying them in Kenya shillings instead of Swiss Francs. That upon receipt of that letter, the plaintiff immediately wrote to the Barclays Bank of Kenya, the 1<sup>st</sup> defendant herein, forwarding the copies of returned cheques and asking the 1<sup>st</sup> defendant to ensure that Banque Paribas Suisse SA were paid in Swiss Francs. That upon receipt of the said cheques, the 1<sup>st</sup> defendant, through Mr Charles Gathiru called the plaintiff asking the whereabouts of the original cheques and the plaintiff informed Mr Gathiru that the letter he had received was a second request for payment in Swiss francs by the shareholders.

27. The plaintiff testified that he later received a copy of letter from the 1<sup>st</sup> defendant confirming that the 1<sup>st</sup> defendant had now paid the shareholder in Swiss Francs following the plaintiff's intervention.

28. That on 22<sup>nd</sup> February 2000, the plaintiff received a call from the Company Secretary of Barclays Bank saying that there was a problem in the dividends account and asked the plaintiff to see Mr Kivuva, the bank's internal auditor. That the said Mr Kivuva however visited the plaintiff at his place of work and inquired on the whereabouts of the original dividends cheques issued to the international shareholder.

29. According to the plaintiff, the 1<sup>st</sup> defendant being Registrars, they were to send the cheques directly to the shareholders. That Mr Kivuva informed the plaintiff that the dividends account had been overdrawn because some people had presented the original cheques meant for Banque Paribas Suisse SA and had been paid through Family Finance Bank.

30. That on 6<sup>th</sup> June 2000, the plaintiff was called from his office by the Human Resource Manager who informed the plaintiff that the Anti-Fraud Police Unit officers were present and wanted to interview the plaintiff. That the officers were Yegon and Wanjala. The two police officers invited the plaintiff to record his statement on 16<sup>th</sup> June 2000 regarding the suspected fraud. That when the plaintiff went to see the said police officers as scheduled at 5.30 pm on 16<sup>th</sup> June 2000, he was ushered into a room and told that he had been lying to Barclays Bank yet he knew where the original cheques were.

31. That after questioning and harassing the plaintiff, the Anti-fraud officers released him and ordered him to return for statement writing the following day. That the plaintiff became apprehensive and enlisted the presence of his lawyer Mr Wilfred Nderitu. When the officers saw Mr Wilfred Nderitu, they questioned the plaintiff why he had gone there with an advocate yet he was a prosecution witness. That Superintendent Muindi told Mr Wilfred Nderitu to leave which he obliged.

32. That no sooner had the plaintiff's lawyer left than the police officers changed their story and told the plaintiff that he was being charged with stealing. They took his finger prints, and told him that he was to be detained until Monday. The plaintiff called his family, friends, and his advocate Mr Wilfred Nderitu, instructing them to meet him at Kileleshwa Police Station on Monday since the police officers told him that he would be detained at Kileleshwa Police Station. That the officers confiscated the plaintiff's car keys and drove it into Ukulima Co-operative House Basement. They walked him down Haille Selassie Avenue and proceeded to Kamukunji Police station where they locked him up in the cells and took away his mobile phone so that he could not communicate with his family or his Advocate. That Mr Yegon told the OCS and police officers at Kamukunji Police Station that the plaintiff was a hardened criminal who should be disciplined as appropriate. That the plaintiff was locked up in a cell with over 10 people in a 10 x10 fit cell with no water, it was smelly and with no space to sit or sleep. That on the following day, street children were brought in the cells and kept with him.

33. The plaintiff testified that on 19<sup>th</sup> June 2000 morning hours, Yegon the police officer collected the plaintiff from Kamukunji Police Station and took him to Ukulima Co-operative House and told the plaintiff that he was being charged with stealing the 3 cheques. The plaintiff was then arraigned before the Chief Magistrate's Court at Nairobi where he took the plea, denied the charges and was bailed on a shs 500,000 bond. He was released at 7.00pm the same day. He went for his car keys at Ukulima Co-operative House and drove to his Buruburu House. The following day, the plaintiff saw the caption in the Daily Newspaper that "**man charged with theft**" which publication deflated the plaintiff who called his Director at Firestone EA and his mother.

34. That the criminal case took two years to be concluded. The plaintiff was finally acquitted but after suffering humiliation and lost reputation in the public. That when his contract at Firestone East Africa ended, it was never renewed since the company was uncomfortable with him especially with the new Japanese owners who took over the management and ownership from the American investors. That the plaintiff sought employment elsewhere since he was then only aged 34 years earning shs 150,000 and other fringe benefits but that it was not possible for him to get alternative employment with similar benefits. That the other people, Owen Thiongo and Mike Thiongo were also charged with the same offence after their case was consolidated with the plaintiff's case. He was acquitted in 2002.

35. The plaintiff further testified that Firestone East Africa never kept any records of clients' dividends and stated that this was not the first time the 1<sup>st</sup> defendant was acting as the Registrars for Firestone East Africa in the payment of dividends to Banque Paribas. He stated that he never knew the two Thiongos ( his co-accused) and that the 1<sup>st</sup> defendant never sued him for recovery of the money cashed through the three stolen cheques. The plaintiff lamented that the accusations by the defendants destroyed his career and dreams of becoming a Chief Executive Officer by age 40 hence he was forced to remain in the private sector. He maintained that if Barclays Bank had not made a false report that he had stolen the cheques, he could not have been arrested and charged and that despite the police promising him that he would be a prosecution witness, they charged him with a criminal offence that he had nothing to do with.

36. The plaintiff prayed for general damages for false imprisonment, malicious prosecution,defamation and abuse of legal process as well as special damages. He also sought for exemplary damages for the mistreatment, costs and interest. He produced as exhibits documents contained in his list and bundle dated 28<sup>th</sup> April 2014 and a supplementary list dated 25<sup>th</sup> February 2016 which are:

1. *Copy of excerpt from Daily Nation Newspaper of 20<sup>th</sup> June 2000 page 4 headed " man charged with theft."*

2. *Copy of a letter dated 16th December, 1999 signed by Daniel N. Muchiri of Firestone to Mr Charles Gathiru of Barclays Bank of Kenya Ltd.*

3. *Copy of letter dated 14<sup>th</sup> September 1999 from Paribas ( Suisse) SA to Firestone East Africa (1969) Ltd.*

4. *Copies of Dividend Notice of copies of cheques Nos. 1-3 in favour of Banque Paribas (Suisse) S.A. account dated 31st August 1999.*
5. *Copy of a letter from Paribas (Suisse) SA to Firestone East Africa Ltd received on 24th March 2000.*
6. *Copy of a letter dated 6th January 2000 from Barclays Bank of Kenya Ltd to Banque Paribas, Geneva.*
7. *Copy of a letter from Mr Daniel No. Muchiri of Firestone East Africa Ltd to the Manager Banque Paribas dated 22<sup>nd</sup> February 2000.*
8. *Copy of a letter dated 26th July 2000 from Donald B. Kipkorir for Kipkorir, Titoo & Kiara Advocates to the Financial Controller, Firestone E.A. (1969) Ltd.*
9. *Copy of a letter dated 20<sup>th</sup> July 2000 from Albert Ruturi of Barclays Bank of Kenya Ltd to Mr Fauzia B. Shah of Firestone E.A. (1969) Ltd.*
10. *Copy of a letter dated 25th July 2000 from Daniel Muchiri of Firestone E.A. (1969) Ltd to Mr Donald Kipkorir.*
11. *Copy of a fee note dated 13th June 2002 from Donald B. Kipkorir to Firestone E.A. (1969) Ltd.*
12. *Copy of a pay slip for January 2000 for Daniel N. Muchiri from Firestone E.A (1969) Ltd*
13. *Copy of a pay slip for May 2000 for Daniel N. Muchiri from Firestone E.A (1969) Ltd*
14. *Copy of surety bond by Peter Gitonga Mugambi, dated 19th June 200 for kshs 500,000.*

37. In cross examination by Mr Kimani counsel for the 1st defendant, the plaintiff responded that it is the police who informed him that he would be charged. He also stated that on 22<sup>nd</sup> February 2000 he received a call from Ms Mugeru that Mr Kivuva, the 1<sup>st</sup> defendant's internal auditor wanted to see the plaintiff. The plaintiff also stated that when he met Mr Kivuva, the latter told him that there were investigations ongoing in Barclays Bank to establish where the original cheques had gone and that Charles Gathiru was a witness for Barclays Bank.

38. The plaintiff denied that he told Charles Gathiru that he would send original cheques, insisting that that could not have been the position since the letter from Banque Paribas dated 8<sup>th</sup> December 1999 was clear that it was a second request on payment. He stated that his contract of employment was renewable but it was not renewed after it ended and there was change of management at Firestone E.A.

39. The plaintiff maintained that his prosecution was initiated by Barclays Bank and that the three cheques did not originate from Firestone East Africa. He stated that Mr Kivuva told him that the police were investigating the matter and that the police must have interviewed Barclays Bank Employees before interviewing the plaintiff on the lost cheques. He stated that the police must have been given false information that the plaintiff had the original cheques and that if he had the intention to steal the cheques, he could not have asked Barclays Bank to correct their mistakes. He also confirmed that the trial magistrate blamed the investigating officer and their superiors.

40. On being cross examined by Miss Kerubo counsel for the 2<sup>nd</sup> defendant, the plaintiff stated that it is Barclays Bank which complained to the police against him. He denied that investigating officers were known to him before 6<sup>th</sup> June 2000 when they visited Firestone East Africa and asked him to go to their offices on 15<sup>th</sup> June 2000. The plaintiff also stated that the investigating officers told him

that Barclays Bank had informed the police officers that the plaintiff had information as to the whereabouts of the original cheques.

41. The plaintiff maintained that there was malice in charging him since he had given a plausible explanation on the issue of the 3 cheques. Further, that the investigating officers had also interrogated other Firestone management and been informed that the cheques never originated from Firestone. E.A He maintained that he issued notice of intention to sue the Attorney General.

42. On being re-examined by Mr B.M. Musau, the plaintiff maintained that he served on the Attorney General notices of intention to sue which was dated 8<sup>th</sup> November 2002 and as received on 11<sup>th</sup> November 2002 by Office of the Attorney General and which was produced as PEX 16 without any objection. The plaintiff restated that by taking him to Kamukunji Police Station instead of Kileleshwa Police Station, the police were hell bent to make him suffer since they had initially told him assuredly that he was a prosecution witness.

43. Further, that the statements that the investigating officers made while at Kamukunji Police Station that the plaintiff was a dangerous criminal was malicious. He stated that court attendances affected his career progression because the new management at Firestone could not comprehend how a senior manager like him was a suspect in a theft case. He also maintained that he believed his contract would have been renewed had it not been for the criminal case.

44. Further, that Barclays Bank issued cheques in Kenya shillings knowing very well that those cheques could not be encashed in Geneva, Switzerland hence they are the ones who perpetrated the fraud .

45. The 1st defendant Barclays Bank of Kenya called one witness DW1 Mr Waweru Guandaru Mathenge, its Head of Legal and Secretarial Services. DW 1 stated that he was an Advocate of the High Court of Kenya. He had worked for Barclays Bank for 9 years and was aware of the matters relating to this case from their file records. He adopted his witness statement filed in court and signed on 19<sup>th</sup> February 2016 as his evidence in chief.

46. According to the 1<sup>st</sup> defendant's witness' corrected statement with leave of the court, the three cheques were sent to the intended beneficiary but were returned to Firestone and the 1<sup>st</sup> defendant Bank later learnt that they had been encashed. He admitted that the Bank provided Advisory Registrar Services for disbursement of dividends to Firestone East Africa. That upon discovery that the cheques has been cashed, the bank instituted internal investigations and upon confirming that the 3 cheques had been cashed through Family Bank, it complained to the police who instituted their own investigations. He denied that they complained against the plaintiff. He however conceded that the plaintiff was one of those accused of stealing the three cheques and later acquitted of the charges.

47. DW1 stated that the trial magistrate in his judgment castigated the investigating officers for acting maliciously and fabricating the case against the plaintiff without cause. He maintained that there was a sound basis for lodging a complaint against the plaintiff because the cheques were converted and it was upon the police to investigate. He also revealed that Barclays Bank sued Owen Thiongo Kariuki and Mike Thiongo Kariuki and recovered and all the money value of the stolen cheques.

48. On cross examination by Mr B.M. Musau counsel for the plaintiff, DW 1 stated that he had worked for the 1<sup>st</sup> defendant for the last 9 years and that he had familiarized himself with documentation relating to this case. He stated that it was possible for one shareholder to have 3 different accounts hence the issuance of 3 cheques to Banque Paribas Sussie SA although he did not know why the 3 cheques were issued to Banque Paribas in Kenya shillings. He also did not know if the Barclays Bank issued only one cheque to replace the 3 stolen cheques. He also confirmed that the stolen cheques were issued in Kenya shillings although the instructions were that the cheques should be issued in Swiss Francs or in US Dollars.

49. The 1<sup>st</sup> defendant's witness also confirmed that it was the plaintiff who alerted the 1<sup>st</sup> defendant Bank that the latter had made a mistake by issuing 3 cheques instead of one cheque and that it had issued the said 3 cheques in Kenya currency instead of foreign currency as instructed. DW1 also confirmed that at the time the plaintiff raised the issue with the Bank, the said cheques had not been cashed and so the bank issued a replacement cheque in Swiss Francs. He agreed with Mr BM Musau advocate that the Bank should have stopped the payment of the 3 cheques or called for and cancelled the original cheques.

50. DW1 further testified that from the records, the 3 cheques were replaced without being stopped for payment although he denied that there was a preconception of fraud. He confirmed that there was no evidence pointing specifically to the plaintiff as the person who perpetrated the conversion of the 3 cheques and that the bank does not know why the plaintiff was charged.

51. On being shown PEX9, a letter dated 29th July 2000 from A. Ruturi to Firestone the 1<sup>st</sup> defendant's witness stated that indeed it must have reached the top management of the Bank. He also conceded that the Bank sued two of the accused persons for recovery and recovered the money converted.

52. In cross examination by Miss Kerubo counsel for the second defendant, DW1 conceded that in the criminal case, Barclays Bank was the complainant and source of the information that led to the charges being brought against the plaintiff and two others, concerning the theft of the three cheques. He however stated that he could not tell if the police were malicious in charging the plaintiff.

53. In re-examination by Mr Kimani, DW1 stated that the Bank complained about the 3 cheques and their conversion. He stated that Firestone was the Bank's customer while Banque Paribas Sussie SA was the shareholder of Firestone. He also stated that the Bank owed a duty of prudence to Firestone, its customer and not to Mr Muchiri, the plaintiff herein. DW 1 could also not verify any negotiations between the Bank and Firestone to settle the criminal case against the plaintiff out of court.

54. The 1<sup>st</sup> defendant's witness maintained that the Bank had no powers to prosecute the plaintiff but only lodged a complaint for further investigations by the police. He also maintained that the Bank never made any specific complaint against the plaintiff. He concluded that the Bank sued the owners of the accounts at Family Bank.

55. At the close of the 1<sup>st</sup> defendant's case, the 2<sup>nd</sup> defendant's counsel closed her client's case with no witness to call, intimating that the police were not co-operating for the last 13 years.

56. Parties then filed written submissions to assist the court make its determination in this matter. The plaintiff's counsel filed his submissions on 25<sup>th</sup> April 2016; the 1<sup>st</sup> defendant's submissions were filed on 28<sup>th</sup> April 2016 whereas the 2<sup>nd</sup> defendant's submissions were filed on 25<sup>th</sup> April 2016.

57. In the plaintiff's lengthy but useful submissions, his counsel Mr B.M.Musau submitted setting out the following issues for determination:

1. *Whether the criminal proceedings were instituted by the Defendants.*
2. *Whether the prosecution was actuated by malice.*
3. *Whether there was reasonable cause and/or justification to make the complaint to the Police and prosecute the Plaintiff.*
4. *Whether the criminal proceedings terminated in the Plaintiff's favour.*
5. *Whether the Plaintiff suffered loss as a result of the malicious prosecution.*
6. *Whether the Defendants jointly and severally are liable to compensate the Plaintiff.*

58. The plaintiff's counsel commenced his submissions by answering the question on the elements of the tort of false imprisonment and as to whether the plaintiff had proved that those elements exist in this case. Counsel submitted that there are three elements required to be proved namely:

- a. *The unlawful restraint of another*
- b. *Against their will, and*
- c. *Without legal justification.*

59. The Plaintiff's counsel submitted that his client was without a justifiable and probable cause, held in Police cells for three days. That he was tricked and transferred to Kamukunji Police Station from Kileleshwa Police station where he could not be accessed by his friends and relatives. Reliance was placed on the case of **Samson Mugo Siiya v Ismael Suleiman Jama & 2 Others [2007] eKLR**, citing *Halsbury's Laws of England 4<sup>th</sup> Edition page 606* where the court stated that:

***“According to Halsbury's Laws of England 4<sup>th</sup> Edition page 606, the learned authors have described false imprisonment in the following terms:***

***“Any total restraint of the liberty of the person, for however short a time, by the use or threat of force or by confinement, is an imprisonment. To compel a person to remain in a given place is an imprisonment, but merely to obstruct a person attempting to pass in a particular direction or to prevent him from moving in any direction but one is not.***

***The gist of the action of false imprisonment is the mere imprisonment. The plaintiff need not prove that the imprisonment was unlawful or malicious, but establishes a prima facie case if he proves that he was imprisoned by the defendant; the onus then lies on the defendant of proving a justification.”***

60. The plaintiff's counsel also relied on ***Daniel Waweru Njoroge & 17 Others v Attorney General [2015] eKLR*** where the Court extensively discussed the elements of false imprisonment as follows:

***“The gist of an action for false imprisonment is unlawful detention, without more. The commonly accepted definition of false imprisonment defines the tort as:***

***a. The unlawful restraint of another***

***b. Against their will, and***

***c. Without legal justification.***

***Proving the first element of false imprisonment involves looking at the facts whether there was any force or threat of some kind used in restraining the accusing party. It is important to note that actual force is not necessary. Proving the second element of false imprisonment involves applying ‘reasonable person’ standard. Thus, the court will determine whether a reasonable person in the same factual situation would believe that they have been detained against their will. The final element of false imprisonment involves determining whether there is a legal basis for the detention. Many legal bases for detention do exist such as a lawful arrest by law enforcement. Determining whether probable or a legal basis for the detention exists is the key in false arrest cases.”***

61. The plaintiff also cited **Harper & James** in their book, **The Law of Torts** where the learned authors state that false imprisonment must include the following elements, namely:-

**a. There must be detention, i.e. unlawful restraint of a person's liberty or freedom of movement.**

**b. That the detention needs not be forceful. Threats of force by conduct or words coupled with the apparent ability to carry out such threats are sufficient.**

**c. Detention must be total, i.e. it must be within boundaries. The restraint must be total rather than a mere obstruction of the right to go where the plaintiff pleases. Imprisonment is something more than a mere loss of freedom to go where one pleases; it includes the notion of restraint within some limits defined by a will or power exterior to our own.**

**d. Detention must be for an appreciable time, however short. In Prosser on Torts, it authoritatively stated that the tort is complete with even a brief restraint of the plaintiff's freedom.**

**e. The detention must be unlawful and must have been against the plaintiff's will.**

**f. Malice is not an ingredient in the tort of false arrest".**

62. The plaintiff maintained that it is Barclays Bank, the first defendant herein caused his arrest by filing a false and untrue complaint against him with the State agency, namely the Police, and that in satisfaction of the key elements for this tort, the Plaintiff had proved that he had been unlawfully restrained ; that he was subsequently locked up in the Court Basement Cells until 7 pm when his bond was eventually processed; that the restraint was quite unlawful because both Barclays Bank and the Police knew too well that the Plaintiff was innocent as he is the one who brought the offence to the attention of Barclays Bank through Mr. Charles Gathiru both in writing and through the telephone conversations; that the restraint was clearly against the Plaintiff's will in that he would not leave while he was locked up in the Wakulima Cooperative House Offices and the Police Station at Kamukunji and at the Court Basement Cells; that the restraint of the Plaintiff by the Defendants was without a legal basis in that both Defendants knew that he is the one who brought the attempted stealing to the notice of Barclays Bank; that the plaintiff was detained by the Defendants i.e. that they unlawfully deprived him of his liberty and his freedom of movement; that in order to prove the detention of the Plaintiff by the Defendants, the Plaintiff need not prove that the detention was forceful; that the Plaintiff has clearly illustrated that the detention was total, i.e. he was confined within the boundaries of Wakulima Cooperative House Offices and Kamukunji Police Station as well as the Court Basement Cells and the Police made sure that he could not be visited throughout that weekend at the Kamukunji Police Station when they deceived him that they were going to detain him at Kileleshwa Police Station. The restraint was total and it was not a mere obstruction of the right to go where the Plaintiff pleased. That the Plaintiff's particular imprisonment was something more than a mere loss of freedom to go where he pleased; it included the notion of restraint within some limits defined by a will or power exterior to the Plaintiff's own. That the will or power exterior here is that of Barclays Bank and the Police, the Defendants who are, therefore, responsible for this false imprisonment jointly and severally; that the Plaintiff has shown that the detention was for an appreciable time, and in fact not short, the whole weekend and the previous restraints and subsequent restraints at the Court Basement Cells.

63. It was further submitted that in law, the tort of false imprisonment is complete with even a brief restraint of the Plaintiff's freedom; that the detention was clearly unlawful and against the Plaintiff's will; and that malice is not an ingredient in the tort of false arrest and imprisonment.

64. According to the plaintiff, it is clear that he was arrested, without a justifiable cause, against his will and confined in the Police cells. He was, therefore, falsely imprisoned by the agents of the 2<sup>nd</sup> Defendants at the behest of the 1<sup>st</sup> Defendant.

65. **On the tort of malicious prosecution**, it was submitted by the plaintiff's counsel in extensor that the plaintiff had proved all the four elements of the tort of malicious prosecution namely that:

- a. *the prosecution must have been initiated by the Defendant or their agent;*
- b. *the proceedings must have been terminated in favour of the Plaintiff;*
- c. *there must be an absence of reasonable and probable cause; and*
- d. *there must be malice or a primary purpose other than that of carrying the law into effect.*

66. The plaintiff relied on the case of **Stephen Gachau Githaiga & Another v Attorney General [2015] eKLR** (“**Stephen Githaiga case**”) in which the Court ruled:

*“I find useful guidance in the wise words of Duffus V.P. in the case of Kasana Produce Store v Kato 1973} E.A. 190 at page 191, paragraph G-I where he laid down the ingredients for malicious prosecution as follows:-*

- a. *The plaintiff was prosecuted by the defendant in that the law was set in motion against him by the defendant on a criminal charge. The test is not whether the criminal proceedings have reached a stage at which they may be described as a prosecution but whether they have reached a stage at which damage to the plaintiff result.*
- b. *That the prosecution was determined in the plaintiff’s favour.*
- c. *That it was without reasonable or probable cause-On the evidence the defendant did not believe in the justice of his own case.*
- d. *It was malicious-The defendant had improper and indirect motives in pursuing the false charge against the plaintiff.”*
- e. *“An action for malicious prosecution is the remedy for baseless and malicious litigation.... The criminal defendant or civil respondent in a baseless and malicious case may later file this claim in civil court against the parties who took an active role in initiating or encouraging the original case.”*

67. The Plaintiff reiterated that he has established to the court that: He was prosecuted by both Barclays Bank as shown by results of the criminal case in the trial court; that the prosecution was determined in the Plaintiff’s favour; that the institution of the prosecution was clearly without reasonable or probable cause. That the Plaintiff is the one who blew the whistle. That the Police initially wanted him as a witness but that they changed their mind after Barclays Bank untruthfully alleged that the plaintiff had told them that he had the original cheques, which they had wrongly, carelessly, negligently or deliberately drawn in Kenya Shillings instead of the required USD\$ or Swiss Francs.

68. It was also submitted that on the evidence the defendant did not believe in the justice of his own case in that when Barclays Bank’s representative testified in court, he was unable to substantiate the complaint and information that the Bank had given the Police against the Plaintiff and that he could not justify why the Bank drew the cheques in the first instance in Kenya Shillings knowing too well that the cheques were going to a foreign investor, the Bank Paribas. It was therefore submitted that the plaintiff’s prosecution was malicious in that the Barclays Bank must have had improper and indirect motives in pursuing the false charges against the Plaintiff because they knew that the plaintiff did not have the original cheques as he had forwarded the Bank Paribas’s second request and that as at that time the Kenya Shillings cheques had not been cashed. Further, that infact the Bank issued one cheque in Swiss Francs to replace the three cheques, something they ought to have known long before issuing the three cheques.

69. It was further submitted that the Police must have been malicious as well because they had been carrying out the initial investigations and had assured the Plaintiff that they would only use him as a witness as he was the whistle blower. That their change of mind and the untruthful information they gave to the Officer Commanding Kamukunji Police Station that the Plaintiff was a hard-core criminal, which

they knew was untrue as the Plaintiff had never and has since never been involved in any criminal activities.

70. **On the tort of defamation (abuse of the legal process), the plaintiff's counsel submitted that Barclays Bank and the Police abused the legal process by maintaining criminal proceedings against the Plaintiff which no reasonable person would have maintained against the Plaintiff, and thereby seriously defamed his character. Reliance was placed on the decision by Lenaola J. in *Isaac Anyula Khatete v Joseph Khalwenyi Omwalo* [2010] eKLR where the court held that:**

***“The distinction between an action for malicious prosecution and an action for abuse of process is that a malicious prosecution consists in maliciously causing process to be issued, [while] an abuse of process is the employment of legal process for some purposes other than that which it was intended by the law to effect – the improper use of a regularly issued process. For instance, the initiation of vexatious civil proceedings known to be groundless is not abuse of process, but is governed by substantially the same rules as in malicious prosecution or criminal proceedings.”***

71. The plaintiff's counsel also relied on ***Samuel Roro Gicheru & another v O.C.S. Nanyuki Police Station & another***, where Mativo J. held that:

***“The leading case on the application of abuse of process remains *Bennet vs Horseferry Magistrates Court & Another*. The court confirmed that an abuse of process justifying the stay of a prosecution could arise in the following circumstances:-***

***a. Where it would be impossible to give the accused a fair trial; or;***

***b. Where it would amount to a misuse/manipulation of process because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.”***

72. Further reliance was placed on the decision by Odunga J. in ***Republic v Director of Public Prosecution & 2 others Ex-parte Francis Njakwe Maina & another*** [2015] eKLR cited with approval in ***Kuria & 3 Others vs. Attorney General*** [2002] 2 KLR 69 which provides the elements of abuse of the legal process as follows:

***“It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilized. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties.”***

73. The plaintiff's counsel maintained that there was no evidence upon which to charge the plaintiff in the criminal proceedings. That the criminal proceedings were a misuse or a manipulation of the legal process because they offended the court's sense of justice and propriety to be asked to try the accused in the circumstances that then prevailed indicating no link between the Plaintiff and the stealing of cheques. Further, that the plaintiff had proved that his arrest and prosecution was motivated by ulterior motives other than what the criminal law was intended. That the criminal proceedings were set in motion against him to deprive him of his liberty, which he was denied when he was incarcerated at Kamukunji Police Station from 16th June, 2000 to 19th June, 2000; to deny him the constitutional right to legal representation at the time of confinement at the cells; to disparage him by damaging his reputation and

good name. That his reputation and good name was damaged when a defamatory article was published in the Daily Nation newspaper of 30th June, 2000 as a result of the prosecution proceedings against the Plaintiff.

74. The plaintiff submitted that on the tort of defamation, the ingredients of defamation within the context of the abuse of the legal process are as set out in **Joseph Musyoka Kalii v Musyoka Kilatya [2014] eKLR** that:

***a. First, the words complained of, must actually refer to the Plaintiff;***

***b. Second, the words must be defamatory i.e. the words must tend to lower or actually lower the character or reputation of the Plaintiff in the eyes of right-thinking members of the society;***

***c. Third, the words must be published to a third party;***

***d. Fourth, the words must be false i.e. truth is an absolute defence to an action in defamation arising out of the abuse of the legal process; and***

***e. Fifth, for slander, there must be proof of resultant damage.***

75. It was submitted that the plaintiff had proved the tort of defamation in that: the words complained of, actually referred to him; that he illustrated in his evidence that the words were defamatory of him because they tended to lower and actually lowered his character and reputation in the eyes of right-thinking members of the society generally who included his own mother, family, friends, workmates and members of the Public Service Club and the other clubs that he was a member of; that he also showed that the words were published to third parties who included his own mother, family, friends, workmates and members of the Public Service Club and the other clubs that he was a member of and in the Court proceedings, which were open to all members of the public; and that he could not rise to his childhood dream of rising to the level of Chief Executive Officer or other advancement of his career and had to lose his employment at Firestone as the Japanese Bridgestone investors could not be amused by the charges and their publication; that he also established that the words were false as they were untrue and both the Defendants knew this *ab initio*; that none of the two Defendants took advantage of the defense that is available in law to countermand this element.

76. Further, that all those who read or were told about the article were made to believe that the Plaintiff was a thief, which is not true, and that no one would employ the Plaintiff after such disparaging attacks on his reputation which had been initiated into public odium and scandal with far-reaching implications to the disadvantage of the Plaintiff who had suffered immensely and immeasurably.

77. **On whether criminal proceedings were instituted by the Defendants the plaintiff submitted** that the evidence showed that the Defendants were actively instrumental in setting the law in motion and consequently led to the damage the Plaintiff suffered of loss of employment, career prospects and advancement. That the Police who are State agents and consequently the agents of the 2<sup>nd</sup> Defendant at the time acted on the complaint lodged by Barclays Bank and arrested the Plaintiff, arraigned him in court and charged with offences no reasonable person would have charged the Plaintiff with taking all the prevailing circumstances and evidence into account. That it is not in dispute, that Barclays Bank's witness admitted that they complained to the Police that the cheques were lost and they gave evidence which falsely implicated the Plaintiff in the criminal case and that it is this complaint that led Police Officers Yegon and Wanjala to arrest the Plaintiff. That therefore, the criminal proceedings in *Criminal Case No. 437 of 2000 (Republic v. Daniel Njuguna Muchiri and 2 Others)* were instigated and instituted by the Defendants jointly and severally.

78. **On whether there was reasonable and probable cause to prosecute the Plaintiff,** reliance was

placed on the decision by Rudd, J in **Kagane –vs- Attorney General (1969) EA 643**, as quoted in the Stephen Githaiga case, which set the test for reasonable and probable cause. Citing **Hicks vs. Faulkner**, [1878] 8 QBD 167 at 171 **Herniman vs. Smith [1938] AC 305** and **Glinski vs. McIver [1962] AC 726**, the learned judge stated thus:-

***“Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed...Excluding cases where the basis for the prosecution is alleged to be wholly fabricated by the prosecutor, in which the sole issue is whether the case for the prosecution was fabricated or not, the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of objective test. That is to say, 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 facts discovered by the prosecutor 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. If and insofar as that material is based on information, the information must be reasonably credible, such that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution...If it is shown to the satisfaction of the judge that a reasonable prudent and cautious man would not have been satisfied that there was a proper case to put before the court, then absence of reasonable and probable cause has been established. If on the other hand the judge considers that prima facie there was enough to justify a belief in an ordinary reasonable prudent and cautious man that the accused was probably guilty then although this would amount to what I call primary reasonable and probable cause the judge may have to consider the further question as to whether the prosecutor himself did not believe in the probable guilt of the accused, and this is obviously a matter which is to be judged by a subjective test. This subjective test should only be applied where there is some evidence that the prosecutor himself did not honestly believe in the truth of the prosecution...Inasmuch as this subjective test only comes into operation when there were circumstances in the knowledge of the prosecutor capable of amounting to reasonable and probable cause, the subjective test does not arise where the reason alleged as showing absence of reasonable and probable cause is merely the flimsiness of the prosecution case or the inherent unreliability of the information on which the case was based, because this is a matter for the judge alone when applying the objective test of the reasonable prudent and cautious man. Consequently the subjective test should only be applied where there is some evidence directly tending to show that the prosecutor did not believe in the truth of his case. Such evidence could be afforded by words or letters or conduct on the part of the prosecutor which tended to show that he did not believe in his case, as for example a failure or reluctance to bring it to trial, a statement that he did not believe in it and, I think possibly, an unexplained failure to call an essential witness who provided a basic part of the information upon which the prosecution was based.”***

79. The plaintiff submitted that having regard to the circumstances that prevailed particularly the fact that it was the Plaintiff who initially brought the matter to the top echelons of Barclays Bank and the fact that the Bank subsequently wished to withdraw the complaint against the Plaintiff even after he had suffered damages and ridicule, there was no reasonable and probable cause or an honest belief in the guilt of the Plaintiff that would lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed.

80. It was also submitted that a reasonable person would have used the Plaintiff as a witness and would never have come to the conclusion that the Plaintiff was probably guilty of the crime of stealing as imputed by Barclays Bank and the 2<sup>nd</sup> Defendant. In these circumstances, therefore, it was submitted that the question as to whether there was reasonable and probable cause for the prosecution which is primarily to be judged on the basis of objective test, does not arise and even if it arises, there was clearly no reasonable and probable cause for the prosecution of the Plaintiff.

81. It was submitted further that the Defendants failed to establish a prima facie case in the criminal proceedings and the Plaintiff was not even put to his defense and that therefore the subjective test should only be applied where there is the overwhelming and unchallenged evidence by the Plaintiff that the both Barclays Bank and the Police (as Prosecutors) did not honestly believe in the truth of the prosecution.

82. **On Whether the criminal proceedings terminated in favour of the Plaintiff** it was submitted that the proceedings and judgment in the trial court clearly attest to the fact that the prosecution of the plaintiff was terminated in his favour when the trial magistrate declared that:

*“The Accused are found, therefore, not guilty of the offences facing them and are acquitted under section 215 of the Criminal Procedure Code.”*

83. On **Whether the prosecution was actuated by malice** it was submitted that Barclays Bank reported the Plaintiff to the Police when they knew too well that he was innocent, as admitted by the 1st defendant's witness at page 71 of the handwritten Court proceedings that: *“From the records, it is the Plaintiff who alerted Barclays Bank that it had made a mistake by issuing 3 cheques instead of one and in Kshs. instead of foreign currency as instructed.”*

84. It was submitted that it is therefore, clear that Barclays Bank's turn around and reporting the Plaintiff to the Police for the theft of the three cheques was maliciously done for reasons that:

- a. *Barclays Bank gave a false report and information to the Police without any reasonable basis.*
- b. *Barclays Bank launched investigations against the Plaintiff instead of launching investigations against its own officers.*
- c. *Barclays Bank refused, neglected and failed to conduct proper investigations into its own officers and internal departments which were involved in the disappearance of the cheques and instead launched investigations and complaints against the Plaintiff who was in no way involved in the stealing.*
- d. *Barclays Bank ignored and disregarded the Plaintiff's instructions governing the payment of dividends to Paribas Bank, to pay in US\$ or Swiss Francs instead of Kenya Shillings.*
- e. *Barclays Bank failed to stop payment instructions for the three Kenya Shillings cheques before issuing the replacement cheque in Swiss Francs so that the original cheques and this failure actually ensured that the three cheques would be honoured on presentation notwithstanding the replacement.*
- f. *Barclays Bank orchestrated the Plaintiff's prosecution and involved its officers or agents namely Ruth Mugera and Paul Kivuva as well as Charles Gathiru in the arrest.*
- g. *Barclays Bank provided selective evidence which was tailored and calculated to protect the failures of its own servants, employees or agents.*
- h. *Barclays Bank acted unreasonably, negligently and was propelled by some other motive other than to bring the culprits to justice and to resolve the stealing, which it would simply have resolved by stopping the three original Kenya Shillings' cheques.*
- i. *Barclays Bank failed to act honestly and in good faith in these circumstances.*

85. In the alternative, it was submitted that even if the Bank did not adversely mention the Plaintiff, which is clearly against the evidence available, then Barclays Bank should have taken steps to inform the Police that the Plaintiff was innocent having believed so. It was submitted that Instead, they let the Plaintiff go through the whole trial process without uttering a word in support of the Plaintiff's innocence to exonerate him from blame hence they were actuated by malice in prosecuting the Plaintiff.

86. It was also submitted that Barclays Bank caused the Plaintiff to suffer for their own mistakes as admitted by its witness at page 72 of the handwritten Court proceedings that: *“The bank should have stopped the payment of the 3 cheques or called for and cancelled the original cheques. From the record, the 3 cheques were never stopped.”*

87. The plaintiff’s counsel further submitted that Barclays Bank having made a complaint to the Police, they were duty-bound, as the complainants, to represent to the Police that they honestly believed that the Plaintiff was innocent and that the charges against him should not have been initiated at all. That Barclays Bank owed a duty of care to the Plaintiff to disclose the information that they genuinely believed in the innocence of the Plaintiff including the correspondence and telephone conversations. They did not and, therefore, breached that duty.

c. Reliance was placed on **Blyth v The Company of Proprietors of the Birmingham Waterworks** cited by the Court in **Kenya Power & Lighting Co. Ltd v Mathew Kabage Wanyiri [2016] eKLR** where it was held *inter alia*:

***“Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.....”***

88. The plaintiff’s counsel also relied on **Halsbury’s Laws of England** to indicate what the Plaintiff must prove, which he had proved above, as follows:

***“The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which the breach of duty a casual connection must be established.”***

89. The plaintiff also relied on the trial court’s assessment of the evidence to urge this court to find malice on the part of the 1<sup>st</sup> defendant as stated on page J11 of the criminal case proceedings that: *“...the prosecution has failed to give any evidence linking the third accused to the case at all. His charging amounts to nothing but an act of malice on the part of investigating officer. The officer fabricated this case against him without a basis. This kind of behavior should be stopped by the investigating officer’s superiors.”*

90. It was submitted that the existence of malice is intertwined with the element of reasonable and probable cause and the prosecution of the Plaintiff without reasonable and probable cause betrays malice and demonstrates that the instigator of the prosecution was motivated by malice. Reliance was placed on the **Stephen Githaiga** case where the court held that:

***“The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the Police or any other prosecution arm of the Government is not a mere conduit for complainants. The Police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect... However, where the Police deliberately decide not to take into account the version of the suspect and acts on a story that eventually turn out to be improbable and which no ordinary prudent and cautious man would have relied upon that failure may constitute lack of reasonable and probable cause for the purposes of malicious prosecution.”***

91. It was submitted that had the Police Officers carried out their investigations diligently and aggressively, they would have found that the Plaintiff had no reasonable connection to the offense and they would have used him as a witness. Further reliance was placed on the **Stephen Githaiga** case where the court stated that the absence of evidence upon which a reasonable Prosecutor would charge the

Plaintiff renders the subsequent prosecution as actuated by malice. The court articulated this as follows:

***“In the absence of any evidence as to the facts and circumstances upon which the second Respondents’ relied, the court can only conclude that there was no probable and reasonable cause for charging the first Respondent and that constitutes malice for the purposes of the tort of malicious prosecution.”***

92. It was also submitted by the plaintiff’s counsel that by maliciously prosecuting the Plaintiff, the Prosecution abused the process of Court. The case of **Thomas Mboya Oluoch & Another v Lucy Muthoni Stephen & Another Nairobi HCCC No. 1729 of 2001 Ojwang, J** (as he then was) was cited, approving the **Stephen Githaiga** case that:

***“Unless and until the common law tort of malicious prosecution is abolished by Parliament, Policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense...I do not expect that any reasonable Police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State’s prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes”.***

93. **On Whether the Plaintiff suffered loss**, it was submitted on behalf of the plaintiff that he suffered a great deal of loss resulting from the malicious prosecution. That the Plaintiff proved through his unchallenged evidence that he was subjected to humiliation, ridicule, desecration of reputation, mental and physical torture when he was subjected to deplorable conditions during his confinement in the Police cells. That he also incurred expenses in defending the criminal charges against him, he suffered fear, his contract was not renewed by the Japanese Bridgestone investors who took over the Firestone E.A company, he could not find alternative employment because of the taint and dent on his reputation, his dreams of rising up the ladder of his career were shattered and that no one could trust him when the newspapers reported to all and sundry that he was a thief.

b. It was averred that the Plaintiff lost employment benefits that he used to earn which was Shs.150,000 per month while enjoying insurance, medical, entertainment and membership to clubs.

94. **On Whether the Defendants are liable** it was submitted that both Barclays Bank and the 2<sup>nd</sup> Defendant are liable for the losses, injuries and damages suffered and inconvenience occasioned by the false imprisonment, malicious prosecution and publication of a defamatory article. That Barclays Bank made the false complaint and failed to act to stop the prosecution of the Plaintiff; whereas the 2<sup>nd</sup> Defendant’s agents failed to carry out proper investigations into the link between the stealing and the Plaintiff; and that they prosecuted the Plaintiff based on no evidence at all occasioning the Plaintiff great loss and realigning his life to the negative by ruining his dreams and shattering his vision.

95. It was submitted that the 2<sup>nd</sup> Defendant had failed completely to adduce evidence to controvert the evidence adduced by the Plaintiff and is equally liable and that the evidence by the Plaintiff against both Defendants in the material particulars is uncontroverted. Reliance was placed on the **Stephen Githaiga** where the court stated that:

***“In the case of Interchemie EA Limited v Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000 Mbaluto, J. held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted. If one is still in doubt as to the legal position reference could be made to the case of Drappery Empire v The Attorney General Nairobi HCCC No. 2666 of 1996 where Rawal, J (as she then was) held that where evidence is not challenged and stands uncontroverted due to the failure by the defendant to adduce evidence, the standard of proof in civil cases (on the balance of probabilities) has been attained by the plaintiff.”***

96. Further, the plaintiff's counsel cited **Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others** Nairobi (Milimani) HCC No. 1243 of 2001 where the learned judge stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein, it was submitted that the failure to adduce any evidence by the second defendant in this case means that the evidence adduced by the Plaintiff against both Barclays Bank and the 2<sup>nd</sup> Defendant is uncontroverted and, therefore, unchallenged. Further reliance was placed on the Ugandan case of **Dr. Willy Kaberuka vs. Attorney General** Kampala HCCS No. 160 of 1993 the Court held, as quoted in the Stephen Githaiga case that:

***“The plaintiff suffered injury to his reputation. ....He must have suffered the indignity and humiliation. He is also entitled to recover damages for injuries to his feelings especially the possibility of serving a sentence...There are no hard and fast rules to prove that the plaintiff's feelings have been injured or that he has been humiliated as this is inferred as the natural and foreseeable consequence of the defendant's conduct. The plaintiff's status in Society is also a relevant consideration and for all these reasons the plaintiff is entitled to damages...A plaintiff who has succeeded in his claim is entitled to be awarded such sum of money as will so far as possible make good to him what he has suffered and will possibly suffer as a result of the wrong done to him for which the defendant is responsible”.***

97. On what damages the plaintiff is entitled to, it was submitted that in **Peter M. Kariuki v Attorney General [2014] eKLR**, the Court of Appeal cited the Supreme Court of Uganda decision in **Cuossens v Attorney General, (1999)1 EA 40**, where the court held that

***“The object of an award of damages is to give an injured party compensation for the damage, loss or injury that he has suffered and that the general rule regarding the measure of damages is that the injured party should be awarded a sum of money as would put him in the same position as he would have been if he had not sustained the injury. Where the injury in question is non-pecuniary loss, assessment of damages does not entail arithmetical calculation because money is not being awarded as a replacement for other money; rather it is being awarded as a substitute for that which is generally more important than money, and that is the best that a court can do in the circumstances.”***

98. The same court of Appeal held that:

***“Turning to the ground of appeal relating to damages, it bears repeating that assessment of quantum of damages is a matter for the discretion of the trial judge, which must be exercised judicially and with regard to the general conditions prevailing in the country and to prior relevant decisions.”***

99. in the same case, the Court of Appeal quoted Madan JA in holding that:

***“Madan, JA again, aptly observed that an award of general damages should not be miserly, it should not be extravagant, it should be realistic and satisfactory and therefore it must be a reasonable award. In the same judgment, he addressed an argument similar to the one before us, tying the quantum of damages to an appellant's station in life:***

***“It is not always altogether logical that general damages should be assessed in relation to the station in life of a victim. There must be some general consideration of human feelings. The pain and anguish caused by an injury and resulting frustrations are felt in the same way by the poor, the not so rich and the rich. Again inflation is also no respecter of persons.”***

1. The plaintiff further relied on **Daniel Waweru Njoroge & 17 Others v Attorney General [2015] eKLR**, where the court held that:

**“On quantum of damages the court has to bear in mind the following cardinal principles in the assessment of damages namely:**

**a.Damages should not be inordinately too high or too low.**

**b.Should be commensurate to the injury suffered.**

**c.Should not be aimed at enriching the victim but should be aimed at trying to restore the victim to the position he was in before the damage was suffered.**

**d.Awards in past decisions are mere guides and each case depends on its own facts.”**

100. The Plaintiff prayed for damages as follows:

a. **General damages**

1. **False Imprisonment**

i. **General damages** relying on the case of **Daniel Waweru Njoroge & 17 Others v Attorney General** [2015] eKLR, where the plaintiffs claimed that they were taken to Mukurweini Police Station where they were placed in an over-crowded police cell which was littered with urine and human waste and poorly ventilated and that they were detained in the said cell for one night, were forced to stand for long hours and those who were not able to stand were forced to sit on the floor littered with urine and human waste. The court awarded **Shs. Kshs.100,000/=** The plaintiff prayed for **sh 600,000 general damages for false imprisonment.**

ii. **Exemplary and punitive damages relying on Chrispine Otieno Caleb v Attorney General** [2014] eKLR, where the Plaintiff was arrested by police from his place of work, City Hall, Nairobi and maliciously and without regard to his liberty kept in police custody for four days under degrading conditions and charged in court in Nairobi Criminal Case No. 1009 of 2006 with trumped up charges which were subsequently dismissed on no case to answer on 13<sup>th</sup> June, 2007. Odunga J awarded **Shs.500,000** exemplary damages. The plaintiff prayed for similar amount.

2. **Malicious Prosecution**

i. **General damages** based on the case of **Naqvi Syed Omar v Paramount Bank Limited & another** [2015] eKLR, where the Claimant as arrested after the Paramount Bank’s Internal Auditor, reported to the Police that the he had stolen KShs.9,000,127 from the Paramount Bank’s Mombasa Branch, in which he was Chief Manager. He was suspended on 3rd pending finalization of the investigation. He was later summarily dismissed. The Claimant was charged with the offence of stealing by servant in the Chief Magistrate’s Court at Mombasa Criminal Case Number 3199 of 2012. It was reported in the Daily Nation Newspaper on 9th November 2012, and the Nation TV News of 8th November 2012. The case was later withdrawn. Rika J awarded **KShs.2,500,000**. *The plaintiff herein prayed for an award of **Shs.2,500,000** for malicious prosecution to be paid by the Defendants jointly and severally.*

ii. **Exemplary and punitive damages.** the plaintiff prayed for **Shs. 500,000** because “ *the defendant’s action was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff.*”

2. **Defamation (abuse of the legal process)** General damages for deprivation of liberty. It was submitted that this is awarded under false imprisonment

ii. **General damages for denial of right to legal representation and access to family and**

friends. It was submitted, relying on Standard Newspapers Limited & another v Attorney General & 4 others [2013] eKLR, that in most cases relating to violation of human rights and fundamental freedoms the court awards Shs.5 million. The plaintiff sought **shs 10,000,000** based on the claim that he was denied legal representation. In the above decision where the Respondents' agents 'raided' the Petitioners media houses and seized their equipment and publications thus violating the Petitioners' fundamental rights. Mumbi Ngugi J awarded the Petitioners KShs.5 million.

iii. **General damages for Defamation . the plaintiff relied on Naqvi Syed Qmar v Paramount Bank Limited & another** where Rika J held:

***“He shall be paid by the 1st Respondent 6 months’ salary in compensation for unfair termination at KShs.1,800,000 and general damages for employment related defamation at KShs.2,500,000.”***

101. That the Plaintiff was 35 years when his employment was not renewed and was therefore jobless in 2000 as General Accounting Manager. His net earnings were Shs.130,000 (including a company maintained car) and that from 2000 to 2002 he would have earned  $130,000 \times 12 \times 2 = \text{KShs.}3,120,000$ .

102. In this case it was submitted that the Plaintiff was young, energetic and was due for promotion to Financial Controller in 2 years' time and his salary would have risen to KShs.225,000. He would have worked for another 8 years on this higher pay earning him  $225,000 \times 12 \times 8 = \text{KShs.}21,600,000$ . **that** the Plaintiff would have worked up to age of 55 in a senior executive position and would have been entitled to KShs.10,000,000 as employer contribution [7.5% of gross pay] for his retirement in the employer provident/pension scheme. **The court was urged to award** the Plaintiff **KShs.34,720,000** as general damages for abuse of the legal process which led to defamation and this is the cause for the Plaintiff's subsequent failure to secure employment and the directly resultant loss of retirement benefits.

#### **b. Special Damages.**

103. It was submitted that the Plaintiff incurred legal fees of KShs.100,000 in defending the criminal proceedings against him. That he made 22 trips to and fro the Law Courts for two years for mentions and hearings over 20 kilometers at Shs.35 per kilometer. That the travelling cost was, therefore,  $20 \times 35 \times 22 = \text{KShs.}15,400$ . A sum of **KShs.115,400** as special damages for defending the suit and travel costs were prayed for all **totaling Kshs 48,935,400 general, exemplary and special damages.**

104. The plaintiff also prayed for costs of the suit and interest at court rates from date of judgment until payment in full.

#### **SUBMISSIONS BY THE 1<sup>ST</sup> DEFENDANT**

105. Relying on the decision of the Court of Appeal in the case of **Robert Okeri Ombeka v Central Bank of Kenya** [2015] eKLR, the first defendant urged the court to dismiss the plaintiff's case with costs. In the above case, the court held, inter alia:

***“The fact is that the respondent bank made a report to the police who investigated and chose to charge the appellant. All that the respondent did was to report the fraudulently obtained certificates to the police. That is the duty of every citizen including public and private institutions. The rest was up to the police who conducted their own independent investigation and formed the basis of the criminal proceedings.”***

106. The 1<sup>st</sup> defendant framed the following issues for determination:

a. *Whether the 1<sup>st</sup> Defendant made a complaint to the police specifically against the Plaintiff?*

b. Whether the 1<sup>st</sup> Defendant initiated and continued the criminal proceedings against the Plaintiff?

c. Whether the 1<sup>st</sup> Defendant acted maliciously against the Plaintiff?

107. According to the 1<sup>st</sup> defendant, the plaintiff did not prove that the 1<sup>st</sup> defendant lodged any complaint against it to the police and that instead, the Plaintiff had unsuccessfully made desperate attempts to link the 1<sup>st</sup> Defendant to the investigations. Further, that although the Plaintiff alleged that he had lost his job due to the investigations, on cross examination, he stated that his contract had actually expired and was not terminated as he had earlier stated. Further, that in any event, jurisdiction to entertain complains of unlawful termination, if any, vests exclusively with the Industrial Court.

108. The 1<sup>st</sup> defendant also maintained that the Plaintiff had in his evidence confirmed the finding of the Court in the criminal case where the trial Magistrate blamed the police investigating officer for acting with malice in preferring charges against the Plaintiff and that in reaching that decision, the Honourable Magistrate was well informed of the mandate of the investigating officer being the sole person with power to investigate and prefer charges.

109. The 1<sup>st</sup> defendant also submitted that no evidence was placed before this Court that the 1<sup>st</sup> Defendant directed the course of the said investigations. In addition, it was contended that the police conducted their own independent investigations and preferred the charges against the suspects. Further, it was submitted that the 1<sup>st</sup> Defendant also did not participate in preparing the charge sheet and that any employees of the 1<sup>st</sup> Defendant who were interrogated by the Police as a witnesses did so in their individual capacity and not as the agents of the 1<sup>st</sup> Defendant.

110. The 1<sup>st</sup> defendant also submitted that in any case, it did not participate in preparing summons for witnesses as that was the preserve of the Prosecutor and that at no time did the 1<sup>st</sup> Defendant have control over how the witnesses were listed or called during trial.

111. The 1<sup>st</sup> defendant maintained that:

- i. It did not institute criminal proceedings against the Plaintiff.
- ii. The 1<sup>st</sup> Defendant reported the alleged crime which is constitutional right of every citizen and this right cannot be fettered.
- iii. The Plaintiff was not an employee of the 1<sup>st</sup> Defendant nor did the 1<sup>st</sup> Defendant owe the Plaintiff any duty of care.
- iv. The Police and office of Director of Public Prosecution have a monopoly over criminal investigations and prosecution and in executing the constitutional mandate, those institutions are independent and not under any direction of a third party.

112. The 1<sup>st</sup> defendant further relied on the case of **Catherine Wanjiku Kariuki vs. Attorney- General & Another [2011] e-KLR**, where the court held that:

*“it is the duty of every Citizen to report to the Police any crime suspected, upon reasonable ground, to have been committed, or being committed, or about to be committed. Once that civic duty is done, it is the business of the Police to independently investigate the matter and arrive at their own conclusion... whether to charge anyone with such crime.”*

113. Further reliance was placed on the case of **Douglas Odhiambo Apel & another v Telkom Kenya Limited Civil Appeal no 115 of 2006** where the court held, *inter alia* that:

***“The Plaintiffs were arrested and charged by the police. And the prosecution was undertaken by the Attorney-General (now DPP) as public Prosecutor. Telkom Kenya was merely a complainant. The decision to charge and prosecute the plaintiffs was taken by the police and the Attorney-General. Telkom Kenya as a complainant would not have been involved in the process. Once Telkom Kenya had made a complaint to the police, it was left to police to investigate the complaint and decide whether or not to charge the plaintiffs. That is why in a claim for damages for unlawful arrest, false imprisonment and malicious prosecution; the proper defendant is always the Attorney General.”***

114. The 1<sup>st</sup> defendant submitted that in the above case, the Court was emphatic that any claim for false imprisonment and malicious prosecution, the proper Defendant is the Attorney General (now the Director of Public Prosecutions (DPP) under the new Constitution), and that the 1<sup>st</sup> Defendant was thus wrongly enjoined by the Plaintiff. In addition, the 1<sup>st</sup> defendant submitted that the responsibility for setting the law in motion rests entirely on the police as stated in **Gitau Vs. Attorney General [1990] KLR 13**, where Trainor J. that:

***“...The responsibility for setting the law in motion rests entirely on the Officer-in-Charge of the police station. If the said officer believed what the witnesses told him then he was justified in acting as he did, and the court is not satisfied that the plaintiff has established that he did not believe them or alternatively, that he proceeded recklessly and indifferently as to whether there were genuine grounds for prosecuting the plaintiff or not. The Court does not consider that the plaintiff has established animus malus, improper and indirect motives, against the witness.”***

115. The 1<sup>st</sup> defendant further relied on **James Karuga Kiiru vs. Joseph Mwamburi and 3 Others, Nrb C.A No. 171 of 2000**, cited in **Chrispine Otieno Caleb v Attorney General [2014] eKLR** where the court held that:

***“The mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect....It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but whether there is a reasonable and probable case for a prosecution. Circumstances may exist in which it is right before charging a man with misconduct to ask for an explanation but no general rule can be laid down.”***

116. It was therefore contended that the 1<sup>st</sup> Defendant cannot be victimized for exercising its duty and that this suit is misplaced and an abuse of the court process as it is akin to criminalizing the action taken by a citizen to report alleged violation of its right to police who then carry out their independent investigations and then forward the file to the prosecutor for further action. Further, that the test of whether there was ‘**a reasonable or probable**’ cause’ to initiate criminal proceedings lies to the office responsible for prosecution and not the person who made the complaint as was held by the Court of Appeal in **Robert Okeri Ombeka v Central Bank of Kenya [2015] eKLR** that:

***“Aganyanya, J (as he then was) in the case of Socfinaf Kenya Ltd V Peter Guchu Kuria, (supra), observed as follows: “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. 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 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.**

**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."**

117. The 1<sup>st</sup> defendant also relied on **Music Copyright Society of Kenya vs. Tom Odhiambo Ogolla [2014] eKLR** where the Court was unequivocal that:

***"Whether there was reasonable and probable cause is to be determined from the nature of the charge preferred by the police."***

118. And in **Simba vs. Wambari (1987) KLR 601** as cited in **David Mungai Kinyanjui & 2 Others v Attorney General {2012} eKLR**, where the Court explained what constitutes a reasonable and probable cause and held that:

***"The Plaintiff must prove that the setting of the law in motion by the inspector was without reasonable and probable cause....if the inspector believed what the witnesses told him then he was justified in acting as he did and I am satisfied the plaintiff has not established that he did not believe them or alternatively that he proceeded recklessly and indifferently as to whether there were genuine grounds of prosecuting the plaintiff or not."***

119. According to the 1<sup>st</sup> defendant, all ingredients for malicious prosecution must be fully proved as was emphasized in **Mbowa v East Mengo District Administration** (cited in **Music Copyright Society of Kenya vs. Tom Odhiambo Ogolla (supra)**).

120. It was submitted that malicious prosecution claims are not instituted against a Complainant who gave the information to the police to carry out their investigations and establish whether there is a prima facie case. That the 2<sup>nd</sup> Defendant acting through the police prosecutors is the only officer with monopoly to institute criminal prosecutions. The 1<sup>st</sup> defendant invited the court to follow the precedent set by the Court of Appeal in **Robert Okeri Ombeka v Central Bank of Kenya (supra)** where the learned judges stated follows:

***"Public policy favors the exposure of crime, and the cooperation of citizens possessing knowledge thereof is essential to effective implementation of that policy. Persons acting in good faith who have probable cause to believe that crimes have been committed should not be deterred from reporting them by the fear of unfounded suits by those accused. This view is in accord with the decision of the South African case of BECKENSTRATER V ROFFCHER & THEUNISSEN, 1955 1 SA 129 (A) 135D-E, and carried forward in the case of RELYANT TRADING (PTY) LTD V SHONGWE, 2007 1 ALL SA 375 (SCA) para 14 where Malan JA stated that:***

***"... the requirement of reasonable and probable cause "is a sensible one" since "it is of importance to the community that persons who have reasonable and probable cause for a prosecution should not be deterred from setting the criminal law in motion against those whom they believe to have committed offences, even if in so doing they are actuated by indirect and improper motives."***

121. According to the 1<sup>st</sup> defendants, it is not in dispute that three cheques had been wrongly and fraudulently converted and therefore the 1<sup>st</sup> defendant was justified and had the constitutional right to

lodge a complaint to the police for investigations to be instituted to establish the person responsible for the loss of the three cheques. That as the 1<sup>st</sup> Defendant was not a party to the criminal case, he cannot be held liable for exercising its civil duty to report alleged acts of breach of law. The 1<sup>st</sup> defendant therefore urged the court to dismiss the plaintiff's suit against it with costs.

### **SUBMISSIONS BY THE 2<sup>ND</sup> DEFENDANTS**

122. The 2<sup>nd</sup> defendant framed the following issues for determination by the Court:

1. *Whether the Plaintiff was unlawfully confined and whether he is entitled to damages as a result of the same*
2. *Whether the Plaintiff was defamed by the publication on the Daily Nation and whether he is entitled to damages as a result of the same.*
3. *Whether the prosecution against the Plaintiff was malicious and whether he is entitled to damages as a result of the same.*
4. *Whether the Plaintiff is entitled to special damages.*

123. **On Whether the Plaintiff was unlawfully confined and whether he is entitled to damages as a result of the said confinement**, it was submitted, relying on the case of **David Mungai Kinyanjui & 2 Others versus Attorney General (2012) eKLR Nairobi High Court Civil Case no. 318 of 2009; citing James Karuga Kiiru versus Joseph Mwamburi & 2 Others Civil Appeal No. 171 of 2000**; that so long as the police take reasonable measures after the arrest, they are important adjunct to the administration of justice and are not to be faulted. And that it may well be that the Appellant was innocent all the time, but there is no reason in the absence of necessary evidence for making a police officer liable when he had only done his duty in investigating an offence. Further, that whether a person arrested is arrested in accordance with the law or whether it is unlawful to arrest him depends on the circumstances of his arrest.

124. **It was** further submitted that the court in the above cited cases observed that where there is a genuine complaint made to the arresting officer, usually a police officer, it can be said that the arrest was lawful. And on the claim for false imprisonment, it was submitted that the Courts in the above cited cases held that when a constable has arrested a person suspected of an offence he can do what is reasonable to investigate the matter to see whether the suspicion are supported or not by further evidence. In the premise, the 2<sup>nd</sup> defendant contended that as long as the measures taken by the police during the investigation period are reasonable and is important adjunct to the administration of justice, a claim for false imprisonment and unlawful arrest cannot suffice.

125. **On the issue of whether the Plaintiff was defamed by the publication in the Daily Nation and whether he is entitled to damages as a result of the said publication, the 2<sup>nd</sup> defendant** submitted that the first ingredient in the claim for defamation namely, that the publication was false has not been met. That the statement complained of was not false but a fair comment on what had happened and the same cannot amount to falsehood. Further, that the allegations against the Plaintiff were made innocently. It was also submitted that the said publication was made innocently without the intent to causing any harm to the Plaintiff and that it is the duty of the media to disseminate information to the public so that the public is kept abreast on the happenings of the day.

126. The 2<sup>nd</sup> defendant submitted that the Plaintiff was an accountant at Firestone East Africa, an International Company which was established in Kenya in 1969 between the Firestone Tyre and Rubber Company of the United States of America and the Government of Kenya, and that Firestone was always in the limelight and as such there is no way that the 2<sup>nd</sup> Defendant would have stopped the publication. Further, that the Plaintiff did not prove in any way that he suffered any loss as a result of the publication. That the plaintiff should have called a witness who could have shown the respect the public had for the

Plaintiff which had been lowered and or that the Plaintiff was viewed as a criminal and a dishonest person who could not get employment anywhere. It was also submitted that the plaintiff did not prove the extent of damage suffered by him as a result of the said publication.

127. Further it was submitted that the Plaintiff did not state in detail the particulars of the actual conduct of the Defendants that defamed him. That it was necessary for the Plaintiff to quote the actual words complained of and their context and that if the words so spoken were claimed to be false or malicious the same were required to be particularly stated. Reliance was placed on **John Otieno Obuya versus National Hospital Insurance Fund & Attorney General (2012) eKLR Nairobi HCCA NO. 799 of 2007.**

128. The 2<sup>nd</sup> defendant also relied on the case of **Byrum Kenneth Olenja versus Michael Opundo & Another (2011) eKLR Nairobi HCCA No. 230 of 2000** where the Court observed that the Appellants claim of defamation lacked a basis as it was not properly pleaded as required under order VI Rule 6A of the Civil Procedure Rules(now repealed by the Civil Procedure Rules 2010- Order 2 rule 7(1)), which stipulates that where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of such sense. In the present suit it was submitted that the Plaintiff did not specifically plead his claim for defamation as is required under Order 2 rule 7(1) of the Civil Procedure Rules 2010 and as such he is not entitled to damages for libel and slander.

129. It was also submitted that in the case of **Byrum(supra)**the Court further observed that the claim for defamation was in actual fact a duplication as the damages suffered were the same as those for false imprisonment and malicious prosecution hence the Plaintiff is not entitled to damages for defamation and malicious prosecution as the same amounts to duplication.

130. **On whether the prosecution against the Plaintiff was malicious and whether he is entitled to damages as a result of the said alleged malicious prosecution,** reliance was placed on the case of **Kagane and Others versus the Attorney General (1969) E.A 643 where Rudd J.** laid down the principles that the Plaintiff must prove in a case of malicious prosecution as follows:

- a. *That the prosecution was instituted by a police officer;*
- b. *That the prosecution terminated in the Plaintiff's favour;*
- c. *That the prosecution was instituted without reasonable and probable cause; the test for this condition is whether the material known to the prosecutor would have satisfied a prudent and cautious man that the Plaintiff was probably guilty of the offence.*
- d. *That the prosecution was actuated by malice; malice means that the prosecution was motivated by something more than a desire to vindicate justice.*

131. On the issue of the prosecution being instituted by the police officer, it was conceded that indeed the prosecution was instituted by a police officer and that it is also true that the prosecution terminated in the Plaintiff's favour.

132. On the issue of whether the prosecution was actuated by malice, it was submitted that the lack of reasonable and probable cause cannot be relied upon by itself to show malice. That in this case, the Plaintiff had not adduced any evidence of malice spite or ill-will or by indirect or improper motive. It was further submitted that the prosecution was not motivated by something more than a desire to vindicate justice. Reliance was placed on the case of **Katerega versus Attorney General (1973) E.A 289** where the Court observed that: -

***“It is well established that in a claim for damages for malicious prosecution, malice in fact must be proved showing that the person instituting the proceedings was actuated either by spite or ill-will or by indirect or improper motives.”***

133. In this case, it was contended by the 2<sup>nd</sup> defendant that the police had good intentions in that they were only performing their duties when the 2<sup>nd</sup> Defendant decided to investigate the allegations made against the Plaintiff. That the 2<sup>nd</sup> Defendant preferred charges against the Plaintiff because they had reason to believe that the offence that the Plaintiff had committed was one which could be tried in a Court of Law. That no evidence was adduced to prove that the 2<sup>nd</sup> defendant in discharging his duties was actuated either by spite or ill-will or by indirect or improper motives.

134. On whether the prosecution was instituted without a reasonable and probable cause, reliance was placed on the case of **Kagane versus Attorney General (1969) E.A 643** where the court held that:

***“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, reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed. If the material known to the prosecutor is based upon information, the information must be reasonably credible, such that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution. If a prudent and cautious man would not have been satisfied that there was a proper case put before the Court, then absence of reasonable and probable cause has been established. If a prudent and cautious man would believe that the accused was guilty then the Court has to consider the further question as to whether the prosecutor himself did not believe in the probable guilt of the accused, and this is obviously a matter which is to be judged by a subjective test. However, this subjective test should only be applied where there is some evidence that the prosecutor himself did not honestly believe in the truth of the prosecution.”***

135. The 2<sup>nd</sup> defendant submitted that the report made to the police officers and the investigations done thereafter made the police believe that indeed an offence had been committed. That the police believed in the report made by the complainant and hence the reason as to why they arrested, charged and prosecuted the Plaintiff. That the 2<sup>nd</sup> defendant believed that the information relayed to it by the complainant was credible and was enough to satisfy a prudent and cautious man that the Plaintiff was guilty of the offence and hence the reason he was charged.

136. On the acquittal of the plaintiff under section 215 of the Criminal Procedure Code, the 2<sup>nd</sup> defendant submitted that the court should take judicial notice that not every criminal prosecution must end up in a conviction. Reliance was placed on the decision by Hon Makhandia J (as he then was) in the case of **Joseph Gicheru Muchiri versus Moses Kimenju waigwa Nyeri High Court Civil Appeal No. 119 of 1999** wherein the learned Judge observed that:

***“If every time a prosecution ended in an acquittal and a party so acquitted reads malice in the police actions and follows it up with a civil claim, then there would be no need for the old adage that “ you are innocent until proven guilty...” There would be no need for criminal justice system at all. Indeed the Government and our civil system will be inundated with claims with the consequence that the treasury may even get broke making good those claims.”***

137. It was therefore submitted that the fact that the plaintiff herein was acquitted under Section 215 of the Criminal Procedure Code means that the trial Court weighed the evidence of the Prosecution and found that the Plaintiff had a case to answer and was subsequently put on his defence and that therefore this Court cannot fault the 2<sup>nd</sup> Defendant’s action in charging the Plaintiff. The 2<sup>nd</sup> defendant also urged the court to note that the missing money that gave rise to the criminal case was later recovered in full and that the 2<sup>nd</sup> Defendant should be credited for helping to recover the lost money.

138. The 2<sup>nd</sup> defendant submitted that having investigated a complaint lodged by the 1<sup>st</sup> Defendant as is required, the Police Officers’ actions were justified as was held by **Justice Trainor in Gitau vs. Attorney General [1990] KLR 13** where the learned judge observed thus;

*“To succeed on a claim for malicious prosecution 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 in motion” in this context has not the meaning frequently attributed to it of having a police officer take action, such as effecting arrest. It means being actively instrumental in causing a person with some judicial authority to take action that involves the plaintiff in a criminal charge against another before a magistrate. Secondly he who sets the law in motion must have done so without reasonable and probable cause...The responsibility for setting the law in motion rests entirely on the Officer-in-Charge of the police station. If the said officer believed what the witnesses told him then he was justified in acting as he did, and the court is not satisfied that the plaintiff has established that he did not believe them or alternatively, that he proceeded recklessly and indifferently as to whether there were genuine grounds for prosecuting the plaintiff or not.”*

139. Further reliance was placed on the case of **Mariko Mosegere Omariba v P.S. Ministry of Health & 2 others [2014] eKLR** where Justice D.S Majanja in dismissing a claim for malicious prosecution where the Plaintiff had been acquitted under section 215 of the Criminal Procedure Code relied on the Court of Appeal decision in **Nzoia Sugar Company Ltd v Fungututi [1988] KLR 399**, where the Court of Appeal held;

*“Acquittal per se on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor. The mental element of ill will or improper motive cannot be found in an artificial person like the appellant but there must be evidence of spite in one of its servants that can be attributed to the company.”*

140. **On whether the Plaintiff is entitled to special damages** it was submitted that special damages must be pleaded and proved. That the Plaintiff pleaded special damages in the sum of Kshs. 59,000/= as Advocate’s legal fees for representation in the criminal case and Kshs 10,000/= for travelling expenses. However, it was contended that the same is only available to him if the Court finds that the plaintiff was maliciously prosecuted and having proved the same.

141. On the whole, the 2<sup>nd</sup> defendant urged the court to find that the plaintiff had not proved his case on a balance of probabilities and dismiss it with costs to the 2<sup>nd</sup> Defendant.

## **DETERMINATION**

142. I have carefully considered the plaintiff’s claim, the defence, the evidence adduced and the documentary evidence produced in court. I have also considered the very detailed yet useful written submissions filed by all the parties’ advocates on record. In my humble view, the following issues flow for determination.

- 1. Whether the plaintiff’s was falsely imprisoned.*
- 2. Whether the plaintiff has proved that his prosecution was malicious.*
- 3. Whether the plaintiff has proved that his prosecution was an abuse of legal process.*
- 4. Whether the defendants are jointly and severally liable to the plaintiff in respect of the claims herein for false imprisonment, malicious prosecution and abuse of the legal process.*
- 5. Whether the plaintiff suffered special, general, exemplary and punitive damages for false imprisonment, malicious prosecution and abuse of the legal process.*
- 6. What is the quantum of damages payable to the plaintiff, if any*
- 7. what orders should the court make and*
- 8. Who should bear the costs of this suit?*

143. On the first issue of **whether the plaintiff was falsely imprisoned**, the plaintiff testified that on 6<sup>th</sup> June 2000 when he was at his place of work he was called by his Human Resource Manager who informed him that Anti-fraud police officers had come to the premises and wanted to interview him. The officers Wanjala and Yegon interviewed him and told him that he would be used as a prosecution witness in the fraud case. They invited him to their offices on 16<sup>th</sup> June 2000 which he complied, with a view to recording a statement concerning the alleged fraud. When he arrived, the police officers ushered him in a room and told him that he had been lying to Barclays Bank that he knew where the original cheques were. An agreement ensued and he was left to go but they instructed him to return on 17<sup>th</sup> June 2000 to record a witness statement. The plaintiff became apprehensive that the officers might victimize him so he called his advocate Mr Wilfred Nderitu to accompany him. When the officers saw the advocate, they questioned the plaintiff why he had taken along with him an advocate yet he was a prosecution witness. Superintendent Muinde instructed Mr Nderitu to leave which he obliged. No sooner had Mr Nderitu left than the police officers told the plaintiff that he was now being charged with stealing and they proceeded to take his finger prints. They told him that they were holding him at Kileleshwa police station until Monday. They took him to Kamukunji police station where he was locked up together with street children. They confiscated his phone so that he could not communicate with his lawyer or family on his whereabouts. He was never given any food. On 19<sup>th</sup> June 2000 morning, Yegon went for him, took him to Ukulima House and that when he was notified that they were charging him with stealing the three cheques. They took him to court, where the charges were read to him. He denied and was bailed out on a shs 500,000 bond which was processed and he left the cells at 7.00pm.

144. False imprisonment is described by **Halsbury's Laws of England 4<sup>th</sup> Edition page 606** as:

***“Any total restraint of the liberty of the person, for however short a time, by the use or threat of force or by confinement, is an imprisonment. To compel a person to remain in a given place is an imprisonment, but merely to obstruct a person attempting to pass in a particular direction or to prevent him from moving in any direction but one is not. The gist of the action of false imprisonment is the mere imprisonment. The plaintiff need not prove that the imprisonment was unlawful or malicious, but establishes a prima facie case if he proves that he was imprisoned by the defendant; the onus lies on the defendant of proving a justification.”***

145. In **Daniel Waweru Njoroge & 17 Others V Attorney General [2015] e KLR** the court set out elements of false imprisonment as follows:

***“The gist of an action for false imprisonment is unlawful detention, without more. The commonly accepted definition of false imprisonment defines the tort as:***

***1. The unlawful restraint of another;***

***2. Against their will; and***

***3. Without justification.***

***Proving the first element of false imprisonment involves looking at the facts whether there was any force or threat or some kind used in restraining the accusing party. It is important to note that actual force is not necessary. Proving the second element of false imprisonment involves applying ‘reasonable person’ standard. Thus, the court will determine whether a reasonable person in the same factual situation would believe that they have been detained against their will. The final element of false imprisonment involves determining whether there is a legal basis for the detention. Many legal bases for detention for exist such as a lawful arrest by law enforcement . Determining whether probable or a legal basis for the detention exists is the key in false arrest cases.”***

146. In my humble view, the question of whether or not there is false imprisonment is a question of fact which depends on the circumstances of each case. As was held in the case of **Daniel Waweru Njoroge & 17 Others V Attorney General** supra, that the term false imprisonment and false arrest are synonymous. The learned judge adopted the holding in **Price V Phillips**.....where it was held that:

***“ They are different names for the same tort and that the gist of an action for false imprisonment is unlawful detention, without more.***

148. Turning to the facts of this case as exemplified in the testimony of the plaintiff and as summarized above, the plaintiff, having brought to the attention of the 1<sup>st</sup> defendant the issue of the three cheques which had been wrongly issued in Kenya shillings to an international shareholder who had no local bank account; and there being no evidence or at all that the plaintiff received or retained the original cheques after they were returned by the Banque Paribas, in my humble view, there was absolutely no justification for the arrest and detention of the plaintiff in the filthy cells at Kamukunji Police Station where he was denied food, water and even access to his family and lawyer/advocate of his own choice for three days.

148. The plaintiff was at all material times known to the police officers as the Financial Director of Firestone East Africa which, as correctly submitted by the 2<sup>nd</sup> defendant was a big company in East Africa. The police could have recorded his statement and bonded him to attend court if at all they believed that there was reasonable suspicion to believe that he had committed a cognizable offence. They did not have to trick him, that he was going to be used as a prosecution witness only for them to command his advocate to leave after which they put him on a tortuous journey of walking him all the way through Haile Selassie Avenue to Kamukunji Police Station, after making him believe that he would be taken to Kileleshwa police station.

149. Although the 2<sup>nd</sup> defendants finally arraigned the plaintiff in court and charged him with the offence of stealing the three cheques, the charges, in my view, were not synonymous with the arrest. There is no reason why the plaintiff could not be released on police bond to attend court for plea taking since it appears that the police investigators had already made up their mind to charge him with the offences that they were investigating into. In my humble view, it appears that the police were motivated to arrest and detain the plaintiff because he talked to them badly to the effect that they were too junior to investigate him which statement infuriated them and so they had to teach him a lesson by confining him in the cells and which in my humble view was an abuse of power. In my view, the confinement of the plaintiff at Kamukunji police station was motivated by something much more than a sincere desire to vindicate justice. In the end, I find that the plaintiff was falsely imprisoned by the police who are agents of the state as represented by the second defendant.

150. However, I find that the plaintiff's confinement in the court cells on the date of plea taking, pending the processing of his bail is not false imprisonment since that is the only place where the plaintiff could wait while his release on bond was being processed by court officials and his relatives.

151. On the second issue of whether the plaintiff's prosecution was malicious, it is not in dispute that the criminal proceedings were instituted by the defendants in that the 1<sup>st</sup> defendant was the complainant as conceded by DW1 and that the prosecution was undertaken by the police prosecutors who were agents and or servants of the 2<sup>nd</sup> defendant/ Attorney General. It is also not in dispute that the criminal proceedings terminated in favour of the plaintiff who was acquitted of the charges. The only question therefore is whether there was any reasonable cause and or justifiable cause to make a complaint to the police, by the 1<sup>st</sup> defendant leading to the prosecution of the plaintiff.

152. In **Mbowa Vs Mengo District Administration [1972] EA 352**, the East Africa Court of Appeal stated that:

***“ The action for damages for malicious prosecution is part of the common law of England .....The tort of malicious prosecution is committed where there is no legal reason for***

*instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit. It originated in the medieval writ of conspiracy which was aimed against combinations to abuse legal process, that is, it was aimed at the prevention or restraint of improper legal proceedings. It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth. Its essential ingredients are (1) 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 says an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrest the plaintiff and takes him before a judicial authority; (2) the defendant must have acted without reasonable or probable cause i.e there must have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified; (3) the defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose; and (4) the criminal proceedings must have been terminated in the plaintiff's favour, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge. The plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must "unite" in order to create or establish a cause of action. If the plaintiff does not prove them he would fail in his action. the damage that is claimed is in respect of reputation but other damages might be claimed, for example, damage to property.....In other words, the damage results at a stage when the criminal proceedings came to an end in his favour, whether finally or not.....the cause of action is not complete until such a time, and in the case of an appeal, only after the plaintiff is acquitted on appeal."*

153. In *Egbema V West Nile Administration*, the same court held that:

*" False imprisonment and malicious prosecution are separate causes of action; a plaintiff may succeed on one and fail on the other. If he established one cause of action, then he is entitled to an award of damages on that issue ...For the purposes proof that the criminal proceedings have been terminated without being brought to a formal end. The fact that no fresh prosecution has been brought, although five years have elapsed since the appellant was discharged, must be considered equivalent to an acquittal, so as to entitle an appellant to bring a suit for malicious prosecution. There was no finding that the prosecution instituted by Ugandan police was malicious, or brought without reasonable or probable causes. The Uganda police, unlike administration police, are not servants or agents of the respondent. The decision whether or not to prosecute was made by the Uganda police, who are not servants of the respondents after investigation. There is no evidence of malice on the part of the respondent. The appellant was an obvious suspect as he was responsible for the security of the office from which the cash box disappeared. It cannot be said that there was no reasonable and probable cause for the respondent instigating a prosecution against the appellant. The actual decision to do so was taken by the Uganda police. As the judge has made no finding as to whether the instigation of the prosecution was due to malice on the part of the respondent, this court cannot make its own finding. The circumstances of this case reasonably pointed to the appellant as the suspect and there was not sufficient evidence that in handling the appellant over to Uganda police for his case to be investigated and, if necessary, prosecuted, the respondent was actuated by malice."*

154. In *Gitau V Attorney General [1990] KLR 13*, Trainor J stated that:

*" To succeed in a clam for malicious prosecution 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 in motion in this context has not the meaning frequently attributed to it having a police officer take action, such as effecting arrest. It means being actively instrumental in*

***causing a person with some judicial authority to take action that involves the plaintiff in a criminal charge against another before a magistrate Secondly, he who sets the law in motion must have done so without reasonable and probable cause. the responsibility for setting the law in motion rests entirely on the officer in charge of the police station. If the said officer believed what the witnesses told him then he was justified in acting as he did and the court is not satisfied that the plaintiff has established that he did not believe them or alternatively, that he proceeded recklessly and indifferently as to whether there were genuine grounds for prosecuting the plaintiff or not. The court does not consider that the plaintiff has established animus malus, improper and indirect motives, against the witness.”***

155. The above cases no doubt establish the conditions that must be satisfied for a plaintiff to succeed in a claim for malicious prosecution.

156. Having already found that the prosecution was instituted at the instigation of the 1<sup>st</sup> defendant as the complainant and investigated and prosecuted by the 2<sup>nd</sup> defendant's agents/servants and that the prosecution terminated in favour of the plaintiff, the next yet very important question is whether the making of the said report by the 1<sup>st</sup> defendant was malicious and whether the police, in charging and prosecuting the plaintiff acted with improper motive other than that for the achievement of the ends of justice. Lack of reasonable and probable cause may be evidence of malice.

157. According to the plaintiff, the 1<sup>st</sup> defendant Bank through its employee Charles Gathiru maliciously and without justifiable and probable cause made a false report with the police unit on 16<sup>th</sup> June, 2000 alleging that the plaintiff had indicated to the 1<sup>st</sup> defendant that he was holding the original cheques and would send them in due course after which the commissioner of police caused the plaintiff to be arrested and charged in criminal 437/2000 which culminated in the deprivation of the plaintiff's liberty and prosecution.

158. Further, that the bank had no reasonable and probable cause to report to police about the plaintiff having participated in any fraudulent disappearance of the cheques since DW1 Mr Waweru Mathenge stated that he did not know why the plaintiff was prosecuted when he said “*I am aware that there was no evidence pointing specifically to the plaintiff as the person who perpetuated the conversion of the cheques. We do not even know why he was charged.*”

159. Although the plaintiff's counsel strongly submitted that the bank must have specifically mentioned the plaintiff to the police as the person being responsible for the conversion of the cheques, I disagree. The plaintiff in his own defence evidence in the trial court stated that he received a mail from the shareholder Bank Paribas in Switzerland. That the letter was clearly stamped as second request dated 18<sup>th</sup> February 1999. Attached to that letter were copies of the three dividend cheques which the criminal trial court marked MF1-D2. He also stated that as the General accounting Manager of Firestone, he noticed that the shareholders complaint was genuine. He then added “*The shareholder did not know that the dividends originated from Barclays Bank. That is why they addressed the letter to Firestone.*”

160. From the above testimony of the plaintiff, and the conclusion by the trial magistrate that although the original cheques may have been sent to Firestone but that there was no evidence that it was the plaintiff who used to open the mails and that therefore there was no evidence that he accessed the original cheques that were later converted, this court infers that indeed it was reasonable and probable for the 1<sup>st</sup> defendant to believe that the cheques having been mailed to Firestone, then Firestone must have known where they were.

161. I also find no malice in the 1<sup>st</sup> defendant's reporting to police that the 1<sup>st</sup> defendant had lost original cheques which had been returned through Firestone. There is no evidence to show that the 1<sup>st</sup> defendant determined for the 2<sup>nd</sup> defendant the specific offences with which the plaintiff was to be charged.

162. Upon receipt of a complaint like in the instant case, that indeed, original cheques were lost and had been encashed at Family bank, it was upon the 2<sup>nd</sup> defendant to investigate thoroughly before deciding who to charge with the relevant statutory offences. There is no evidence on record that the 1<sup>st</sup> defendant insisted on a particular charge against the plaintiff. The fact that investigations by the police were shoddy does not mean that the 1<sup>st</sup> defendant had no reasonable or probable cause to complain against the plaintiff.

163. The only thing that I fault the 1<sup>st</sup> defendants for is their reckless/negligent manner of handling the transaction in that upon being reminded that the cheques as issued to the shareholders were in Kenya shillings and not in foreign currency; and even before stopping those cheques and without seeing the original cheques, the 1<sup>st</sup> defendants went ahead and paid the shareholder before stopping those other three cheques thereby exposing their accounts to risks of being accessed by fraudsters who had accessed the cheques.

164. Indeed, I find that there was no reason for charging and or prosecuting the plaintiff with the material offence since there was no evidence that he was in possession of the original cheques. But that decision to charge him lay with the police who investigated the complaint. It is for that reason that I agree with the trial court that *“ there was no evidence linking the plaintiff to the case at all and his charging amounts to nothing but an act of malice on the part of the investigating officer. The officer fabricated this case against him without a basis. This kind of behavior should be stopped by the investigating officers superior.”*

165. The conclusion by the trial magistrate at J9 demonstrate how any reasonable person investigating such a complaint could not have concluded that there was a prima facie case against the plaintiff linking him to the fraud and the police should therefore have used the plaintiff as a prosecution witness. But that decision could only have been arrived at after investigations since there was no evidence that the 1<sup>st</sup> defendant's servants/agents were criminally involved in perpetuating the fraud which led to the cheques being encashed by criminals. This court also fails to find that malice can be found on the part of the 1<sup>st</sup> defendant who made mistakes of issuing Kenya shillings cheques instead of foreign currency.

166. I reiterate that Barclays Bank made a report of the loss of funds from their account which loss was linked to the three cheques initially issued to the foreign shareholders of Firestone as dividends . But I refuse to find that the report as conveyed to the police was false. I also refuse to find that the cheques were received by Barclays Bank since the plaintiff made it clear that the shareholders send him the reminder letter with photocopies of the original cheques to his office and there was no evidence that the first letter returning the cheques was send to Barclays Bank. There was no evidence that the Barclays Bank officials must have received the said cheques and worked in cohorts with the fraudsters from whom the said sums of money were received by Barclays, to encash the cheques after the Banque Paribas Suisse SA had been paid the dividends in the correct currency.

167. In **James Karuga Kiiru V Joseph Mwamburi & 3 Others Nairobi CA NO. 171 of 2000**, the court held that:

***“ To prosecute a person is not prima facie tortuous, but to do so dishonestly or unreasonably is. And the burden of proving that the prosecutor did not act honestly or reasonably lies on the person prosecuted.”***

168. In the present case, the plaintiff's evidence was clear that when the investigators first called on him and he recorded a statement concerning the complaint, they told him that he would be a good prosecution witness. However, the police changed tact when he went there with his advocate Mr Wilfred Nderitu. They treated the plaintiff roughly and that is when he told them off that they were too junior to interrogate him. In my humble view, from the way the investigators treated the plaintiff, walking him to down Haille Sellasie Avenue to Kamukunji Police Station after making him believe that he was being taken to Kileleshwa Police Station, denying him access to his lawyer and family and

denying him food or water, the police were hell bent to teach the plaintiff some lesson, that after all they were not junior officers and that they were capable of doing anything to him. To that extent, the police acted dishonestly and unreasonably.

169. In **Kagane Vs Attorney General [1969] EA 649**, the court set the test for reasonable and probable cause in the following terms:

***“ 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 circumstance which assuming them to be true, would lead to an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed.”***

170. In the instant case, I do not find that the witnesses statements proved that the plaintiff committed the offence with which he was charged, but were useful in tracing the movement of the cheques from Switzerland to Kenya and how those cheques were encashed by fraudsters. Therefore, the 2<sup>nd</sup> defendant cannot succeed in claiming that its agents believed in the witnesses and that the investigators had genuine grounds of charging the plaintiff with the offences and his subsequent prosecution. In my view, the 2<sup>nd</sup> defendant’s agents proceeded recklessly and indifferently. In other words, in as much as the complaint was justified as it nabbed the two fraudsters, I do not think that the prosecution of the plaintiff jointly with the two fraudsters, in the absence of evidence on how the two fraudsters accessed the three cheques and encashed them was justified.

171. The evidence against the plaintiff was not only thin, but that it was an improper and wrongful motive for the 2<sup>nd</sup> defendant’s agents to have charged the plaintiff and prosecuted him in the circumstances of this case. In **Stephen Gachau Githaiga & Another V Attorney General [2015] e KLR** the court held that:

***“ The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complainant and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. However, where the police deliberately decide not to take into account the version of the suspect and act on a story that eventually turn out to be improbable and which no ordinary prudent and cautious man would have relied upon, that failure may constitute lack of reasonable and probable cause for the purposes of malicious prosecution.”***

172. I agree that charging the plaintiff and failing to call any evidence linking him to the offence amounted to malice on the part of the police. On the part of the 1<sup>st</sup> defendant, I am unable to find any malice since there is evidence that they even contemplated withdrawing the complaint against the plaintiff during the trial of the criminal case, an indication that on their part, they had not seen the reason why the police charged the plaintiff. This was also stated in this court by DW1 who stated that the Bank did not understand why the plaintiff was charged with the offence.

173. As was held in the Githaiga case, absence of any evidence as to the facts and circumstances upon which the 2<sup>nd</sup> defendants relied to charge and prosecute the plaintiff, the court can only conclude that there was no probable and reasonable cause for charging the plaintiff and that in itself constitutes malice for the purposes of the tort of malicious prosecution.

174. Furthermore, the 2<sup>nd</sup> defendant or its agents did not call any evidence in this case to challenge the plaintiff’s case against them. Instead, they filed very detailed and defensive submissions and attached authorities that are very useful to this case. However, pleadings and submissions however strong and well choreographed they may be, are not a substitute for evidence. Pleadings are only but

unsubstantiated claims whereas submissions are what is called marketing strategy of a party. (See **Robert Okeri Ombeka V Central Bank of Kenya [2015] e KLR** citing **Daniel T. Arap Moi V Mwangi Stephen Muriithi & others CA 240/2011**).

175. I find no evidence was adduced by the 2<sup>nd</sup> defendant to justify their decision to charge and or prosecute the plaintiff. In **Thomas Mboya Oluoch & Other Vs Lucy Muthoni Stephen & Another Nairobi HCC 1729 of 2001** Ojwang J ( as he then was ) stated that:

*“ Unless and until the common law tort of malicious prosecution is abolished by Parliament, policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense.....I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self serving. To deploy the state’s prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes”.*

176. This court refuses to accept the 2<sup>nd</sup> defendant’s counsel’s submissions that the police in prosecuting the plaintiff had good intentions and that they were only performing their duties by investigating a complaint filed by the 1<sup>st</sup> defendant, yet the same police refused to cooperate with the Attorney General for purposes of giving evidence in this case to shed light on why they arrested, charged and prosecuted the plaintiff. The 2<sup>nd</sup> defendant did not adduce any evidence of that good intention to rebut the evidence of malice on their part as evidenced by the conduct of the police officers at the time of interrogating the plaintiff.

177. Further, the fact that the plaintiff was acquitted under Section 215 of the Criminal Procedure Code does not mean that the police had reasonable and or probable cause to charge him. The decision to place the plaintiff on his defence for reasons that there was prima facie case established after hearing the complainants was in the discretion of the trial magistrate . nonetheless, that decision was not backed by any elaborate reasons, noting that the accused had been jointly charged with the actual fraudsters who were nonetheless acquitted.

178. I agree that not every prosecution that leads to an acquittal is malicious prosecution and add that the presumption that an acquitted person is completely innocent is rebuttable in that poor investigations or insufficient evidence will easily let off the hook a notorious criminal. I also take judicial notice that the presumption that every convicted person was properly convicted is a rebuttable one and that is why an appellate court may find such a conviction unsafe.

179. In the cases cited by the 2<sup>nd</sup> defendant such as **Joseph Gicheru Muchiri V Moses Kimenhu Waigwa HCCA 119/1999; Mariko Mosegere Omariba V Permanent Secretary Ministry of Health and 2 Others[2014] e KLR** and **Nzoia Sugar Company Ltd V Fungututi,(supra)** where the learned judges found that the plaintiffs’ prosecutions were not malicious, it is clear that the learned judges also found that there was no evidence of ill will or improper motive or spite in the servants of a company and also that no evidence of malice was exhibited unlike in this case where I have found that the conduct of the 2<sup>nd</sup> defendant’s investigating officers who made a decision to charge the plaintiff pointed to malice.

180. I also agree with the 1<sup>st</sup> defendant’s submissions that their evidence was clear that the 1<sup>st</sup> defendant’s 3 cheques were encashed by Mr Owen Thiongo Kariuki and Mike Thiongo Kariuki who were not the intended beneficiaries and that it was therefore reasonable to report to the police to carry out investigations and that it was in the wisdom of the police to gather necessary evidence to identify the persons who were culpable, before prosecuting them with the offence. The 2<sup>nd</sup> defendant has not claimed that the decision to charge the plaintiff was informed by the incriminating evidence by the two fraudsters who stole the money from the 1<sup>st</sup> defendant.

181. In **Catherine Wanjiku Kariuki Vs Attorney General & Another [2011] e KLR** the court held that:

*“ It is the duty of every citizen to report to the police any crime suspected, upon reasonable ground, to have been committed, or being committed. Once that civic duty is done, it is the business of the police to independently investigate the matter and arrive at their own conclusion on whether to charge anyone with such crime.”*

182. I also agree that in the circumstances of this case, the decision in **Douglas Odhiambo Apel & Another V Telkom(K) Ltd CA 115/2006** is applicable. In that case, the Court held that:

*“ The plaintiffs were arrested and charged by the police. And the prosecution was undertaken by the Attorney General (now Director of Public Prosecution) as public prosecutor. Telkom Kenya was merely a complainant. The decision to charge and prosecute the plaintiffs was taken by the police and the Attorney General. Telkom Kenya as a complainant would not have been involved in the process. Once Telkom Kenya had made a complaint to the police, it was left to police to investigate the complaint and decide whether or not to charge the plaintiffs. That is why in a claim for damages for unlawful arrest, false imprisonment and malicious prosecution, the proper defendant is always the Attorney General.”*

183. The plaintiff in this case did not establish any malice on the part of the 1<sup>st</sup> defendant's witnesses. Furthermore, as was held in **James Karuga Kiiru Vs Joseph Mwamburi & 3 Others CA Nairobi 171 of 2000**;

*“ The mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words, the police or any other prosecution arm of the government is not a mere conduit of complaints.....”*

184. Moreover, as was observed by Aganyanya J in **Socfinac Kenya Ltd V Peter Guchu Kuria** that:

*“ 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. And it is upto 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 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.*

*As to the prosecution of the respondent, 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 thus. 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.”*

185. The above decision of the High Court was cited with approval in **Robert Okeri Ombeka V Central Bank of Kenya [2015] e KLR** a Court of Appeal decision, wherein the Court of Appeal further observed that:

***“ Public policy favours the exposure of crime, and the co-operation of citizens possessing knowledge thereof is essential to effective implementation of that policy. Persons acting in good faith who have probable cause to believe that crimes have been committed should not be deterred from reporting them by the fear of unfounded suits by those accused.”***

186. There was also no evidence of the 1<sup>st</sup> defendant insisting that the plaintiff must be charged or prosecuted, although there was evidence that indeed the three cheques issued to the shareholder in Switzerland were converted by some crooks who were nonetheless acquitted although they paid up the money when they were sued for recovery hence I find that there was reasonable and probable cause to report to the police to investigate. I therefore find that the tort of malicious prosecution had not been proved against the 1st defendant.

187. **On whether the plaintiff suffered any loss and damage as a result of being falsely imprisoned and maliciously prosecuted**, the plaintiff testified that he was humiliated, and confined in deplorable conditions, he incurred expenses in defending himself in the criminal case and that his contract with Firestone after new management the Japanese Investors Bridgestone took over and that he could not find alternative employment because of the dent and taint on his reputation. He also claimed for damages for defamation of character following the publication of the pendency of the charge against him in the newspaper.

188. Concerning the claim for damages for defamation of character, I must from the onset make it clear that that claim is not available to the plaintiff as against all the defendants for reasons that to succeed in a claim for defamation, such claim must be brought within 12 months from the date when the cause of action arose. It is not a claim that is necessarily hinged on the outcome of the prosecution of the plaintiff. This is pursuant to Section 4 of the Limitation of Actions Act Cap 22 Laws of Kenya.

189. In addition, the publisher of the article that reported that the plaintiff had been charged in court was not made a party to this suit. In addition, reporting the existence of a criminal charge against the plaintiff, which was in any event, was the truth, was in my humble view, not defamatory or at all. Consequently, that claim for damages for defamation of character must fail. Further, the claim was never pleaded as required under Order VI Rule 6A of the Old Civil Procedure Rules (see the case of **Byrum Kenneth Olenja Vs Michael Opundo & Another [2011] e KLR**).

190. However, as was held in **Dr Willy Kabenuka V Attorney General Kampala HCC No. 160/1998**, a plaintiff who has succeeded in his claim is entitled to be awarded such sum of money as will so far as possible make good to him what he has suffered and will probably suffer as a result of the wrong done to him for which the defendant is responsible.

191. In the instant case, I find that the plaintiff who was a Manager of Accounting Services at Firestone East Africa Limited was falsely imprisoned and maliciously prosecuted. On the basis of the authority of **Daniel Waweru & 17 Others V Attorney General [2015] e KLR** where the plaintiffs were taken to Mukurweini Police station where they were placed in an overcrowded police cell littered with urine and human waste and poorly ventilated and detained for one night, they were forced to sit on the floor, the court awarded them shs 100,000 each as general damage for false imprisonment. In the present case, the plaintiff's counsel submitted for shs 600,000. He also prayed for exemplary and punitive damages based on the decision of **Chrispine Otieno Caleb V Attorney General [2014] e KLR** where the Honourable Odunga J awarded the plaintiff shs 500,000 punitive and exemplary damages for being unlawfully held in custody for 4 days.

192. The 1<sup>st</sup> defendant made no submissions on quantum of damages whereas the 2<sup>nd</sup> defendant too urged the court to dismiss the plaintiff's suit and award him nothing.

193. In awarding the damages that I have been urged to make, I take cognizance of the established principles and as reiterated in the **Daniel Waweru Njoroge & 17 Others V Attorney General (supra)** that:

- a. Damages should not be inordinately too high or too low.
- b. Should be commensurate to the injury suffered.
- c. Should not be aimed at enriching the victim but should be aimed at trying to restore the victim to the position he was in before the damage was suffered.
- d. Awards in past decisions are mere guides and each case depends on its own facts.

194. Applying the above principles to this case, I would award the plaintiff a sum of shs 200,000 general damages, and shs 300,000 exemplary damages for the tort of false imprisonment. O

195. On the claim for malicious prosecution I would, on the strength of the authority of **Naqvi Syed Omar Vs Paramount Bank Ltd & Another [2015] e KLR** award the plaintiff shs 2,000,000 general damages. I would also award him shs 400,000 exemplary damages for reasons that the 2<sup>nd</sup> defendant's action was calculated to massage the ego of the police officers who had been told by the plaintiff that they were too junior to interrogate him at the expense of the plaintiff. I do not agree with the plaintiff that his prosecution was meant to shield employees of Barclays Bank from prosecution.

196. The plaintiff also claimed for damages for deprivation of liberty and denial of right to legal representation and access to family and friends. In my humble view, to award damages for false imprisonment, malicious prosecution and separately for deprivation of liberty will be to duplicate the awards, having found that the arrest and confinement of the plaintiff and his subsequent prosecution which are all done without reasonable or probable cause and or with malice was in essence, abuse of legal process.

197. Accordingly, I decline to make any separate award under the claim for deprivation of liberty as it is included in the award under false imprisonment.

198. On the claim for denial of legal representation, based on the authority of the **Standard Newspaper & Another Vs Attorney General & Others**, the Plaintiff submitted for a sum of shs 10,000,000 general damages. However, the plaintiff did not lay any basis for this claim which was not pleaded unlike in the cited decisions wherein the plaintiff specifically sought for damages for violation of the fundamental rights. That being the case, I find no ground upon which to award separate damages for denial of access to legal representation and access to family and friends.

199. The plaintiff claimed that he lost job prospects and prospects of his contract being renewed by the new management at Bridgestone who took over from Firestone East Africa. He also stated that he lost benefits. However, it is clear from the evidence that the plaintiff received a lot of support and empathy from the employer during the pendency of the criminal trial. Further, it was the plaintiff's own testimony that his contract formally came to an end and not that he was terminated prematurely due to the pending criminal trial. Renewal of an employment contract is in the discretion of the employer.

200. In the absence of any evidence that non renewal of his contract was due to the tainted image created by the criminal charges, I find that the plaintiff has not proved any such claim. Further, there was no evidence that the plaintiff lost prospects of getting any alternative employment at that young age with another employer. He did not produce any evidence of what alternative job was available that he could not be considered for employment because of the criminal case. Accordingly, I find that the claims for general damages related to employment related defamation are not proved and decline to grant them.

On special damages, the plaintiff claimed for shs 100,000 legal fees for defending the criminal proceedings and transport cost of 22 trips amounting 15,400. The law on special damages is that it must be specifically pleaded and strictly proved. In the instant case, the plaintiff pleaded for shs

59,000 legal fees and shs 10,000 travelling expenses. However, he produced PEX 11 fee note dated 13<sup>th</sup> June 2002 from Donald B. Kipkorir Advocate addressed to Firestone East Africa [1969] Ltd. A fee note is not a receipt or evidence of payment. It is equivalent to an invoice. Furthermore, the fee note which was discounted by 50% from sh100,000 to sh50,000 was addressed specifically to Firestone East Africa [1969] Ltd and not the plaintiff. There is no evidence that the plaintiff paid to Mr Donald Kipkorir Advocate legal fee of shs 59,000 or even shs 100,000 as pleaded and submitted. Firestone East Africa [1969] Ltd are not parties to this suit and neither did the plaintiff's employer testify and/or produce receipts seeking any reimbursement of the sums that it may have paid to the plaintiff's advocate.

In the **Great Lakes Transport Company(U) Ltd V Kenya Revenue Authority [2009] KLR 720**, the Court of Appeal considered how proof of payment in a claim for special damages may be established and distinguished an invoice from a receipt in the following manner:-

*“ Although the claim was pleaded at paragraph 7(b) of the amended plaint and prayed for in the prayers, the proof advanced in respect of it did not meet the required standard. There was no receipt produced to show that actual cash was paid, or any payment made for the alleged purchase of tyres. A mere invoice as the one produced in evidence was incapable of proving purchase. The claim could have been proved very easily by producing either a receipt from Ms General Tyres Sales Limited which was alleged to have supplied the alleged tyres or a witness from that company to confirm that indeed money changed hands when the alleged new tyres were acquired by and delivered to the appellant.....[There] was no evidence that the appellant bought new tyres for the subject vehicle. Mr Gikandi has endeavoured to show that an “invoice” is different from a “ proforma invoice” and has made effort to persuade us that an invoice should be treated as a “receipt” with respect, we see no merit in that argument and take cognizance of the fact that an invoice is not a receipt for goods supplied unless it is specifically endorsed to the effect that the goods for which the invoice was prepared were paid for. In such case the endorsement on it can be treated as receipt for payment. What we mean is that in case the goods for which an invoice is issued have been paid for, one would normally expect endorsement such as the word “paid” on the invoice and that would turn the status if the invoice into a receipt. Otherwise, on our minds, a proforma invoice is given in respect of an advise sought from a supplier as to what the cost of the goods wanted would be, ie quotation given on inquiry as to the price of the goods sought and an invoice is given in cases where an order for supply of goods has been made but payment is not yet made. In either case, neither of the two documents amount to a receipt.”*

201. Accordingly, I disallow that special damage for want of proof.

202. On the claim for travelling costs, equally, though shs 10,000 was pleaded, shs 15,400 was claimed in the submissions. No receipt or acknowledgement was produced to prove any of the two different figures. Accordingly, whereas I have no doubt that the plaintiff was defended in the criminal proceedings and that he must have travelled to attend court as per the court proceedings produced as exhibit, I have no evidence of the actual expenditure incurred on those two items. Accordingly I decline to make any award for special damages for travelling costs for want of proof.

203. The plaintiff also submitted that the court should award him interest at court rates from the date of filing suit until payment in full. No basis was laid for that prayer. Nonetheless, the law is clear that interest on general damages accrues from the date of judgment until payment in full whereas interest on special damages accrues, from date of filing suit until payment in full ( see **Miguna Miguna Vs the Standard Ltd & 4 Others [2016] e KLR**).

204. In the end, I find that the plaintiff has not proved his case against the 1<sup>st</sup> defendant on a balance of probabilities. I however find that the plaintiff's claim against the 2<sup>nd</sup> defendant is proved on a balance of probabilities, that the 2<sup>nd</sup> defendant set the law in motion and without reasonable or probable cause maliciously prosecuted the plaintiff and falsely imprisoned him as a result of which the plaintiff suffered

loss and damage as a consequence thereof.

205. Accordingly, enter judgment for the plaintiff on liability against the second defendant Attorney General and I award him general damages as against the 2<sup>nd</sup> defendant only as follows:-

- a. General damages for false imprisonment shs 200,000
- b. Exemplary damages for false imprisonment shs 400,000
- c. General damages for malicious prosecution shs 2,000,000
- d. Exemplary damages for malicious prosecution shs 400,000

**Total damages shs 3,000,000.** All other damages claimed are dismissed for want of proof.

206. I also award the plaintiff the costs of the suit and interest to be calculated at court rates from the date of this judgment until payment in full.

207. The suit against the 1<sup>st</sup> defendant is dismissed without costs for reasons that had the 1<sup>st</sup> defendant not been careless in the manner in which it handled the payment subject of the 3 cheques which were stolen, from the time of issuance in Kenya shillings instead of foreign currency leading to their return and interception by fraudsters to the time they were replaced without stopping them before replacing them, this case would not have arisen. For that reason the 1st defendant Equity Bank cannot be allowed to benefit from their own negligent acts. Accordingly, I order that they bear their own costs of this suit as dismissed against them.

Dated, signed and delivered in open court at Nairobi this 6th day of September, 2016.

**R.E. ABURILI**

**JUDGE**

**In the presence of :**

Mr B.M.Musau for the plaintiff

Mr Otieno h/b for Mr Kimani for the 1<sup>st</sup> defendant

Miss Kerubo for the 2<sup>nd</sup> defendant

CA: Adline