



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Suit 318 of 2009**

**DAVID MUNGAI KINYANJUI.....1<sup>ST</sup> PLAINTIFF**

**TERESIA NJERI MUNGAI.....2<sup>ND</sup> PLAINTIFF**

**DORCAS WAMBUI KANGETHE.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**THE HON ATTORNEY GENERAL.....DEFENDANT**

**JUDGEMENT**

The plaintiffs, by a plaint dated 11<sup>th</sup> day of June 2009 and filed on the same day through the firm of Kamere & Co advocates seeks Kshs. 180,000.00, general and exemplary damages for malicious prosecution and wrongful arrest as well as costs and interests and any other relief that Court may deem fit to grant. The cause of action is that on or about 8<sup>th</sup> October, 2007, the plaintiffs were maliciously and without any reason of probable cause arrested by officers from Kibichoi police station in Kiambu District and kept in police custody until 15<sup>th</sup> October, 2007 when they were arraigned in court and charged with the murder of one Abel Momanyi in Nairobi High Court criminal case No.77 of 2007 (**Republic –v- David Mungai Kinyanjui, Teresia Njeri Mungai and Dorcas Wambui Kangethe**). The plaintiffs state that they were remanded in custody for a period of 9 months, tried and acquitted under Section 210 of the Criminal Procedure Code. The plaintiffs contend that the said arrest, confinement, and arraignment in court was unlawful and informed by no reasonable or probable cause and no proper investigations were done by the defendant’s agents, the police.

As a consequence of the foregoing the plaintiffs state that their businesses collapsed and their properties lost and/or damaged and their families disintegrated as a result of which they suffered loss and damage.

The defendant on 14<sup>th</sup> September 2009 filed a defence dated 2<sup>nd</sup> September, 2009 whose salient features are that the defendant denied the arrest, confinement and charge in court of the plaintiffs but alternatively averred that the said arrest, confinement and charge in court was done with a plausible and reasonable cause. Further, the defendant denied that the plaintiffs suffered any humiliation, embarrassment and mental anguish and state that if ever the plaintiffs suffered any humiliation, embarrassment and mental anguish the same was occasioned by the plaintiffs’ conduct. The defendants deny the particulars of special damages and aver to put the plaintiff into strict proof thereof.

The hearing commenced on 05/07/12 before me. The 1<sup>st</sup> plaintiff **David Mungai Kinyanjui** who testified as PW1 stated that he is a business man from Gachie in Githunguri. With the court's leave he adopted his witness statement dated 29/06/12 and filed on 03/07/12 as part of his evidence. PW1 testified that prior to his arrest on 8<sup>th</sup> October 2007 he was managing his two public transport motor vehicles popularly known as *matatus* registration numbers KAS 598A and KAP 972P plying Githunguri – Nairobi route. He stated that he had purchased the *matatus* through a loan from Barclays Bank and he was getting a daily profit of Kshs. 3,000/- . He testified that from the day he was arrested and detained at the police station his *matatus* stopped operating and they were sold after two months as he could not afford to continue servicing the loan while in custody. He stated that he had 3 dairy cows from which he was getting 18 litres of milk per day and selling the same to Gatamaiyu Dairy farmers Co-operative Society. He produced as exhibit a letter from the said Co-operative Society to show he had received Kshs. 3,500/- for the month of July 2007; the letter also shows that he had received 1,687.50/- for the month of February 2008. He stated that he also used to pluck tea from his farm from which he was getting Kshs. 6,000/- per month. He testified that during the time he was in custody together with his wife, the 2<sup>nd</sup> plaintiff, his businesses collapsed and the cows died due to lack of maintenance while their 5 children among them 2 minors aged 7 and 14 years were left alone; consequently, one dropped out of school while the other one was taken in by neighbours. One child finished form 4 but was unable to proceed to college while another got confused and got married. He stated that by the time they were released the children had scattered but he looked for them and tried to return them to school. He further produced in evidence the ruling of the aforementioned criminal case and the proceedings thereof and receipts for the costs of the advocates fee the plaintiffs had incurred in the said case totalling Kshs140,000/. The documents were marked as Prosecution Exhibit -1. He was in custody for 9 months during which time he faced the charge of murder in Nairobi High Court Criminal Case No. 77 of 2007 of one **Abel Momanyi**. According to his statement, he did not commit the said murder and was acquitted on 12<sup>th</sup> June 2008 after the Court found that he had no case to answer. According to PW-1, the police were malicious, negligent and/or reckless in prosecuting him as there was no probable or reasonable cause for instituting the said prosecution. He testified that he suffered humiliation, mental anguish and the resulting damages. In his evidence PW-1 reiterated that he had lost 3 cows valued between Kshs. 60,000/- and Kshs. 70,000/- each and his tea bushes had grown to trees due to lack of maintenance.

He prayed for judgment against the defendant for malicious prosecution, wrongful arrest and detention and costs.

In cross-examination, PW1 stated that he was arrested because it was alleged that someone was killed. While admitting that there was somebody who was killed, he was unaware of the reason why he was arrested. He, however, admitted that the person died nearby although, according to the witness, no one reported. Although he was arrested at 3.00 am he was not told that the offence with which he was charged was bailable. He admitted that he neither knew the police who arrested him before nor did he have any problem with them. He however stated that when such a problem arises investigations are normally conducted but was unaware whether in the instant case the police conducted any investigations.. He reiterated his evidence in chief about his two *matatus* one of which was registered in the name of his wife from which he used to earn Kshs. 3,000/= per day and which he was forced to sell to repay a loan and the death of his 3 dairy cows. He stated that he did not bring the notebook in which he was recording his said earnings whose estimate was based on the production of milk. He reiterated that he did not know the police who arrested him and there was no disagreement between him and the said police officers.

On re-examination, he stated that he had borrowed Kshs. 800,000.00 loan from the bank. This was later increased to Kshs. 1.m million which he utilised towards the purchase of the vehicles and other developments. According to him he would sometimes get Kshs. 5,000.00 plus. According to him being remanded in custody forced him to sell his *matatus* to repay the loan.

The 2<sup>nd</sup> plaintiff, **Teresia Njeri Mungai**, who testified as PW2 stated that she is the wife of the 1<sup>st</sup> plaintiff. With the court's leave, she adopted her witness statement dated 29<sup>th</sup> June 2012 and filed on 3<sup>rd</sup> July 2012 as part of her evidence. She testified that she was arrested on 8<sup>th</sup> October, 2007, taken to Kigumo police station and later charged in court with murder of one **Abel Momanyi**, an offence she did

not commit; she pleaded not guilty and was remanded in custody till 12<sup>th</sup> June, 2008 when she was acquitted. She corroborated PW1's evidence that they had 3 dairy cows which died due to lack of maintenance while their 2 minor children aged 7 and 14 years were left alone where one got married while the other one was taken in by neighbours and their tea bushes got wasted. PW2 testified that while in remand she developed arthritis on both hands and legs and would experience a lot of pain during the cold season and now cannot work in her farm due to the said health problems. While in police custody her children went through a lot of suffering which also caused her mental anguish. According to her, the police had no cause to arrest her and she was acquitted on the basis that there was no case to answer as the police had not investigated the matter properly. She averred that she did not know the person who was killed. According to her she was maliciously and wrongfully subjected to criminal prosecution in Criminal Case No. 77 of 2007 at the High Court Nairobi. The police, according to her, were malicious, negligent and/or careless in prosecuting her as there was no probable or reasonable cause for instituting the said prosecution. She prayed for compensation for pain and suffering.

On cross-examination, she stated that she was arrested at 3.00 am and at the time of the arrest they were informed that they were arrested due to the fact that someone had been killed. She, however, did not know the police who arrested them and had no problem with them. She said the body of the person who had been killed was on the road in the neighbourhood and not in her home. Although aged 45 years she denied that her arthritic condition was caused by old age. In further cross-examination she admitted that the police carried out investigations.

In re-examination, the witness said that to date she does not know why she was arrested.

The 3<sup>rd</sup> plaintiff, **Dorcus Wambui Kangethe**, (PW3) testified that she was arrested on 8<sup>th</sup> October 2007 at night. She was picked up by police from her house and taken to the police station. She was not informed of the reason for her arrest. It was not until the following day that she was questioned about the death of a person who had been killed. She recorded a statement and was detained, arraigned in court and charged with murder of one **Abel Momanyi** in Nairobi High Court Criminal Case No. 77 of 2007. She testified that she did not know **Abel Momanyi** and was not at all involved in his death. She testified that she was remanded at Langa'ta women prison until 12<sup>th</sup> of June, 2012 when the court ruled that they did not have a case to answer after hearing the evidence from the witnesses. PW3 testified that as a result of the cold and bad sanitary conditions in custody, she developed chest problems which resulted from the fact that they used to sleep on a cold floor and the urinal was at the same place that they slept hence were subjected to foul smell emanating therefrom. She further testified that she used to stay alone and had two milk cows as well as poultry. While she was detained, there was nobody to look after her home as the hand-help also declined to work therein. Eventually milk cows were sold by her son for Kshs. 20,000/- though according to her they would have fetched Kshs 40,000/-. She said that the cows were producing 5 to 7 litres of milk in the morning and evening daily and she sold the milk at Kshs. 23/- per litre to Uplands. She also stated that she used to grow tea on about 1 acre piece of land from which she was earning Kshs. 1,500/- per month. When she left the remand the homestead and the tea-bushes had developed into thickets yet the police had no reason to arrest her. She said that as a result of the health problems she developed in remand she is unable to perform her duties such as tea picking like before. She testified that the prosecution exposed her to shunning by people who see her as a murderer. With the court's leave she adopted her witness statement filed in court as part of her evidence. According to her, she was maliciously and wrongfully subjected to the said prosecution. The police were, in her view, malicious, negligent and/or careless in prosecuting her as there was no probable or reasonable cause for instituting the said prosecution. She prayed for compensation for suffering and damage to reputation as well as costs of the suit.

On cross-examination, she said that the 1<sup>st</sup> plaintiff is his younger brother while her other brothers do not reside nearby. She admitted that though initially the police had denied her the opportunity to give out her keys she was eventually allowed to do so. She said she was removed from the cell and informed of the murder in the morning. She was then taken to court where she was charged and thereafter remanded without being informed that the offence was bailable. She had not seen the police officers who arrested her before and had no problem with them. She was however unaware that any complaint was lodged. She however confirmed that she knew **Joyce Gathoni Kiarie** (a prosecution witness in the murder case) as

the employer of the deceased. When cross-examined on the fees they paid to the advocate in the criminal case, she said that the advocate was hired by the family and the money was raised by the family members through a fundraising. She said that although she had heard that the fee was more than Kshs. 100,000/-, she was not sure of the actual amount. According to her there seemed to have been malice in her arrest but was not sure who was behind the malice that resulted into her prosecution and did not know why she was arrested but she knew about the killing the next day.

There was no evidence adduced on behalf of the defence and the parties duly filed written submissions.

According to the plaintiffs apart from reiterating the contents of the plaint, their evidence in court and the ruling by Mutungi J, evidence of malice can be discerned from the finding by the Judge in the said criminal case that the deceased was unknown. Accordingly, reliance by the defendant on the said criminal proceedings does not assist the plaintiffs' case at all. Relying on the decision in **Kagane & Others –vs- Ag & another [1969] Ea** and **Murunga –V- AG [1982-88] KLR 133**, the plaintiffs contended that they had satisfied the salient elements for them to succeed in the action for malicious prosecution which elements are (i) the prosecution was instituted against the plaintiff by the defendant; (ii) that the prosecution was terminated in favour of the plaintiff; (iii) that the prosecution was instituted without reasonable and probable cause; and (iv) that the prosecution was actuated by malice. With respect to the test on whether there was reasonable and probable cause for their prosecution, the plaintiffs relied on the same decision and submitted that whether there was reasonable cause for the prosecution is primarily to be judged on the objective basis of whether the material known to the prosecutor would satisfy a prudent and cautious man that the accused was probably guilty. According to the plaintiffs they have proved their case and are entitled to Kshs. 1,000,000.00 each as general damages and Kshs. 3,000,000.00 each as exemplary damages.

The defendant restated their statement of defence and submitted that the 1<sup>st</sup> plaintiff had not provided any documentary evidence to prove ownership of the two *matatus*, the loan from Barclays bank he claimed to have taken to purchase the *matatus*, and there is no evidence to prove that he was receiving a total of Kshs. 3,000/- from the said *matatu* business and Kshs. 6,000/- from his tea plantation. Further, the defendant submitted that the 1<sup>st</sup> plaintiff had not produced evidence to prove that he had disposed off the said vehicles following his detention in police custody. The defence also contended that the 1<sup>st</sup> plaintiff did not produce evidence from his area Agriculture Officer to prove that he had lost his dairy cows after his detention. Likewise, the defence submitted that the 3<sup>rd</sup> plaintiff had not adduced any evidence to prove her claim that she earning Kshs. 1,500/= from her farming prior to her prosecution. In the same line, the defence submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs had not adduced evidence to prove they had developed arthritis and coughing problems respectively as a result of bad conditions in remand.

The defence further submitted that the plaintiffs assertion that they were arrested on 8<sup>th</sup> October, 2007 and put in police custody until 15<sup>th</sup> October, 2008 when they were arraigned in court was not supported by any documentary evidence and as such the defence contend that the plaintiffs were arrested on 15<sup>th</sup> October, 2008 and taken to court on 16<sup>th</sup> October, 2008.

Relying on **Simba vs. Wambari HCCC No. 1967 of 1982** and **Katterega vs. Attorney General [1973] 289**, it is submitted that it is well established that in a claim for damages for malicious prosecution, malice must in fact be proved showing that the person instituting the proceedings was actuated either by spite or indirect or improper motives. In this case, the defendant submits that the police had good intentions in arresting and subsequently charging the plaintiffs as no evidence was tendered to prove that the arresting and or investigating officers knew them prior to the arrest. To the defendant, the prosecution was not motivated by something more than the desire to bring to justice the men and women who had lynched one man accused of stealing maize instead of reporting the matter to the police.

On whether the defendant acted on reasonable and probable cause it is submitted that the defendant relied on evidence from eye witness accounts. Therefore it is the defendant's case that the plaintiffs have not proved improper and indirect motives of the defendant's officers against them. With respect of claim for injury to reputation, it is submitted that no witness was called to support the plaintiffs' case while the

claim for loss of business and legal charges cannot be sustained in the absence of specific proof thereof. Since the police had reasonable grounds upon which to arrest the plaintiffs it is the defendant's submissions that the claim for wrongful arrest and imprisonment cannot stand. As a result the defendant contends that the claim for general and exemplary damages cannot, similarly be sustained.

Having taken into account the pleadings, the evidence adduced as well as the submissions made, the following are, in my respectful view, the issues that fall for determination in this suit:

- 1. Whether the criminal proceedings were instituted by the defendant.**
- 2. Whether there was reasonable cause and/or justification to make the complaint to the police.**
- 3. Whether the said prosecution was actuated by malice.**
- 4. Whether the criminal proceedings terminated in the plaintiff's favour.**
- 5. Whether the plaintiffs were wrongfully arrested.**
- 6. Whether the defendant is liable to compensate the plaintiffs and if so what should be the award of damages.**
- 7. Who should bear the costs of the suit?**

The law surrounding the tort of malicious prosecution is well settled in this country. In **Mbowa vs. East Mingo District Administration [1972] EA 352**, the East African Court of Appeal expressed itself as follows:

**“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 procedure, 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) the criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests 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...The damage to the plaintiff results at the stage in the criminal proceedings when the plaintiff is acquitted or, if there is an appeal, when his conviction is quashed or set aside. 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 plaintiff could not possibly succeed without proving that the criminal proceedings terminated in his favour, for proving any or all of the first three essentials of malicious prosecution without the fourth which forms part of the cause of action, would not take him very**

far. He must prove that the court has found him not guilty of the offence charged...The law in an action for malicious prosecution has been clearly defined and in so far as the ordinary criminal prosecution is concerned the action does not lie until the plaintiff has been acquitted of the charge. In this case the respondent could have brought his action for malicious prosecution until the prosecution ended in his favour. He could not have maintained his action whilst the prosecution was pending nor could he have maintained an action after he had been convicted. His right to bring the action only accrued when he secured his acquittal of the charge on appeal, and he then had the right to bring this action for damages...Time must begin to run as from the date when the plaintiff could first successfully maintain an action. The cause of action is not complete until such a time, and in this case this was only after he was acquitted on appeal”.

In Egbema vs. West Nile Administration [1972] EA 60, the same Court held:

“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 determined in the appellant’s favour it is enough 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 Uganda Police was malicious, or brought without reasonable or probable cause. 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 a suspect and there was not sufficient evidence that in handing the appellant over to the Uganda Police for his case to be investigated and, if necessary, prosecuted, the respondent was actuated by malice”.

In Gitau Vs. Attorney General [1990] KLR 13, Trainor, J had this to say:

“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. The Court does not consider that the plaintiff has established *animus malus*, improper and indirect motives, against the witness”.

The foregoing, in my considered view set out the law and the conditions to be satisfied in order for a plaintiff to succeed in the tort of malicious prosecution.

On the first issue whether the criminal proceedings were instituted by the defendant there is no dispute that the said proceedings were instituted on behalf of the defendant. Accordingly I find that the plaintiffs were prosecuted by or on behalf of the defendant.

With respect to the second issue whether the making of the said report was malicious, from the evidence on record, it comes out that a body was found within the neighbourhood of the plaintiffs. There was no evidence at all that there was any bad blood between the plaintiffs and the defendant. However, lack of reasonable and probable cause may be evidence of malice. Whereas it is true that there was no evidence adduced by the defendant in this suit, there is on record evidence by way of criminal case proceedings in which the plaintiff's were prosecuted. The Court is accordingly enjoined to consider that evidence in determining whether or not the action taken by the police was malicious.

In **James Karuga Kiiru –vs- Joseph Mwamburi and 3 Others, Nrb C.A No. 171 of 2000**, the court held:

**“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.”**

Rudd J. in **Kagane –vs- Attorney General (1969) EA 643**, set the test for reasonable and probable cause 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 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.”**

The defendant relied, correctly in my view, on **Simba –vs- Wambari (1987) KLR 601** to define what constitutes a reasonable and probable cause as:

**“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”**

In the present case, what comes out from the evidence of PW-4 in the criminal proceedings is that he saw the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs where the deceased had been tied to a post. When he requested the 2 plaintiffs to release the deceased, they responded that they had to wait for the 1<sup>st</sup> plaintiff to come. The presence of these plaintiffs at the scene was corroborated by the evidence of PW-1 who added the details that the 3<sup>rd</sup> plaintiff was holding a castrator which she was using on the deceased. According to this witness, the 1<sup>st</sup> plaintiff ordered them to go home that they would take the person who had been tied to the police. The incident was relayed to the 1<sup>st</sup> plaintiff by PW-2 in the said proceedings through a call. That the 1<sup>st</sup> plaintiff received a call is confirmed by PW-5. Thereafter the deceased was found dead and the PW-3 found the 1<sup>st</sup> plaintiff seated not far away from where the body lay.

The question that arises is whether based on the foregoing evidence the police had reasonable and probable cause to arrest the plaintiffs and charge them with the offence of murder. Whereas there is no direct evidence linking the 1<sup>st</sup> plaintiff with the death of the deceased, there is some allegation that the 3<sup>rd</sup> plaintiff did participate in inflicting injuries to the deceased. That the 2<sup>nd</sup> plaintiff was present would constitute her an accomplice while the presence of the 1<sup>st</sup> plaintiff thereafter could constitute him an accessory after the fact thereto. The fact that the plaintiffs were acquitted does not necessarily mean that the complaint was unjustified moreso when it is taken into account that the said acquittal was based, properly in my view, on the failure to identify the body of the deceased. If the position was otherwise it would open floodgates for those acquitted to file civil cases for compensation. The law as I understand it is that in order to

succeed on the ground that the prosecution of the plaintiff was malicious, the plaintiff must show that the

defendant or his servants were actuated by ill will or spite against him or an improper motive. The plaintiff has to show that the defendant had no reasonable or probable cause to prosecute him. The question of reasonable and probable cause depends in all cases not upon the actual existence but upon reasonable *bona fide* belief in the existence of such state of things as would amount to a justification of the course pursued in making the accusation complained of no matter whether the belief arises not on the recollection and memory of the accuser or out of the information furnished to him by others. On the other hand it would be obviously absurd to make a defendant liable because matters of which he was not aware put a different complexion upon facts, which in themselves appeared a good case for prosecution. But neglect to make a reasonable use of the sources of information available before instituting proceedings would be evidence of want of reasonable and probable cause and also malice. 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 and where a person is satisfied or has apparently sufficient evidence that he has in fact been cheated, there is no obligation to call upon the cheat and ask for an explanation in as much as to ask for this may only have the effect of causing material evidence to disappear or be manifested. In other words the person preferring the charge or laying a complaint before the court should have an honest belief in the guilt of the person charged based upon reasonable grounds depending on the state of circumstances which if they are true would lead any prudent and cautious man placed in the position of the prosecutor to the conclusion that the person he is charging is probably guilty of the crime imputed. The question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of an objective test and 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 consists 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 prudent and cautious man to the extent of believing that the accused is probably guilty. If and in so far as that material is based upon information, the information must be reasonably credible such that an ordinary prudent and cautious man could honestly believe it to be substantially true and to afford a reasonably strong basis for the prosecution. Malice means a wrongful act done intentionally without a just cause or excuse. So to prosecute anyone for an improper motive can be evidence of malice.

Whereas I agree that the evidence was very thin, I am not prepared to hold that the police had no reasonable and probable cause for taking the action which they took under the prevailing circumstances.

The third issue for determination is whether the making of the said report was malicious. In other words whether the defendant, in instituting criminal proceedings, was actuated 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. There is no evidence that before the said incident there was bad blood between the plaintiffs and the police officers who arrested and instituted their prosecution. In fact, the plaintiffs denied having known the said police officers prior to the date of their arrest. On the evidence on record, I am not satisfied that the plaintiffs' prosecution was malicious.

The fourth issue is whether the criminal proceedings were terminated in the plaintiff's favour. There is no doubt that the criminal proceedings were terminated in favour of the plaintiffs. It is now trite law that acquittal whether after hearing both prosecution and defence witnesses or on a finding that there is no case to answer amounts to a termination in favour of the accused. The law is that for the purposes proof that the criminal proceedings have been determined in the appellant's favour it is enough that the criminal proceedings have been terminated without being brought to a formal end. See **Egbema vs. West Nile Administration** (Supra).

With respect to the issue whether the plaintiffs were wrongfully arrested, the Court of Appeal in **James Karuga Kiiru vs. Joseph Mwamburi & 2 Others Civil Appeal No. 171 of 2000** held that so long as the police take reasonable measures after the arrest, they are important adjuncts to the administration of justice and are not to be faulted. It was further held 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. 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. Usually where there is a genuine complaint made to the arresting officer, usually a police officer, it can be said that the arrest was lawful. In **James Karuga Kiiru –vs- Joseph Mwamburi** (supra), the appellant was detained for 14 days at Garsen and Hola police stations while being investigated. On the claim for false imprisonment, the Court of Appeal was of the opinion 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. Thus, the court found 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 cannot suffice. The plaintiffs in the present case were charged with murder, a capital offence and therefore in my view the 7 days they were detained in police custody were reasonable time for the prosecution to conduct investigations. It follows from my finding hereinabove that there is no basis for holding that the plaintiffs' arrests was wrongful or unlawful.

From the foregoing, it is my finding that the plaintiffs have not proved their claim on a balance of probabilities as required by the law and in answer to issue number 6, I find that the defendant is not liable to compensate the plaintiffs.

I have therefore found no merit in this suit.

However as the law requires me to assess damages despite the foregoing finding, I will proceed to do so. In this case the plaintiffs were charged with the offence of murder which carries a death sentence. Such charge necessarily causes a lot of anxiety and is capable of causing both physical and emotional distress and strain. Although there was no proof of the actual loss suffered by the plaintiffs in terms of documentary evidence, taking into account the circumstances of this case, I agree with the submissions filed on behalf of the plaintiff that they would each have been entitled to an award of Kshs. 1,000,000.00 as general damages for malicious prosecution and wrongful arrest. On special damages, I would have awarded Kshs. 147,000.00 being the total sum as per the receipts produced. With respect to exemplary damages, such damages may be awarded in two classes (apart from any case where it is authorised by statute). These are, first, where there is oppressive, arbitrary or unconstitutional action by the servants of the government and, secondly, where the defendant's conduct was calculated to procure some benefit, not necessarily financial, at the expense of the plaintiff. As regards the actual award, the plaintiff must have suffered as a result of punishable behaviour; the punishment imposed must not exceed what would be likely to have been imposed in criminal proceedings if the conduct were criminal; and the means of the parties and everything which aggravates or mitigates the defendant's conduct is to be taken into account. Although a case may fall within the two categories for which exemplary damages may be awarded, it does not necessarily follow that they must be awarded. They should only be awarded if the sum given as comparison is insufficient to punish the defendant for his conduct. Exemplary damages should not be used to enrich the plaintiff but to punish the defendant and deter him from repeating his conduct. See **Katende vs. Attorney-General Kampala HCCC No. 538 of 1970 [1971] EA 260.**

In the circumstances of this case I am not satisfied that the plaintiffs would have been entitled to an award of exemplary damages.

In the result the plaintiffs' case is devoid of merits, fails and is dismissed with costs to the defendant.

Dated at Nairobi this 9<sup>th</sup> day of October 2012

**G V ODUNGA**  
**JUDGE**

Delivered in the presence of Mr. Akech for the Plaintiffs