

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**CIVIL CASE NO. E073 OF 2023**

**HON. JUSTICE AGGREY MUCHELULE.....**  
**.....PLAINTIFF**

**-VERSUS-**

**THE INSPECTOR GENERAL OF POLICE.....1<sup>ST</sup>**  
**DEFENDANT**

**THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....2<sup>ND</sup>**  
**DEFENDANT**

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

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTION.....INTERESTED**  
**PARTY**

**JUDGMENT**

**Pleadings**

1. By a Plaint dated **18/04/2023**, **Hon. Justice Aggrey Muchelule** (hereafter the Plaintiff) **sued The Inspector General of Police, The Director of Criminal Investigations and The Honorable Attorney General**

(hereafter the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Defendant/Defendants) alongside **The Director of Public Prosecution** (hereafter the Interested Party) seeking judgment jointly and severally as against the Defendants for-;

- a) *A declaration that the Defendants violated the Plaintiff's Constitutional Rights to liberty, privacy and freedom from inhuman and degrading treatment.*
  - b) *Compensation for violation of Constitutional rights in (a) above.*
  - c) *General damages for false, unlawful and malicious search, arrest and detention.*
  - d) *General damages for defamation.*
  - e) *Aggravated and exemplary damages for false, unlawful and malicious search, arrest and detention.*
  - f) *Aggravated and exemplary damages for defamation.*
  - g) *Costs of the suit.*
  - h) *Interest on (b), (c), (d), (e) and (f) above*
  - i) *Any other further relief that the Court deems fit and just to grant.*
2. The Plaintiff avers that at all material times relevant to the suit he was serving as a Judge of the High Court of Kenya however has since been elevated to serve as a Judge of the Court of Appeal. That on 22/07/2021, police officers under the command of the 1<sup>st</sup> & 2<sup>nd</sup> Defendants stormed into his then Milimani Law Courts Chamber and proceeded to conduct a search therein, without a warrant of search,

alleging that he, the Plaintiff had been bribed or had received money through perpetuation of a corrupt transaction. Without the said warrant, the officers proceeded to conduct the search whereupon at the end and according to their own inventory failed to find anything that could incriminate him on the alleged illegal and corrupt activities.

3. That despite the forestated the 1<sup>st</sup> and 2<sup>nd</sup> Defendants agents arrested and escorted the Plaintiff to the former's headquarters along Kiambu Road where he was confined for hours while being subjected to interrogation and released to go home.
4. The Plaintiff further avers that as a result of the above activities by the Defendants agents and employees, he moved the Court vide **Nairobi JR Application No. E112 of 2021-Republic v ODPP&2 Others** ex-parte Hon. Justice Aggrey Muchelule wherein the Plaintiff sought orders of prohibition against the Defendants and their illegal actions.
5. Vide a judgment rendered on 11/11/2022, Hon. Justice Ngaah made findings that the 1st and 2nd Defendant's officers had acted illegally, arbitrarily, acted with procedural impropriety, acted irrationally, outrageously by arresting and interrogating the Plaintiff without any investigations or basis of suspicions thereby violating **Article 157(4) and 157(6) (a) of the Constitution.**

6. The Plaintiff avers that as a consequence of the 1st and 2nd Defendants actions, he was subjected to an illegal, malicious, false search, illegal arrest and confinement that resulted into desecration of his reputation, dignity & honour given the high public office he holds, violated his Constitutional right to liberty, freedom for inhumane and degrading treatment, for which he seeks damages.
7. In their statement of defence dated 25/05/2023, the Defendants deny the key allegations in the plaint meanwhile aver on without prejudice basis to the denials in the statement of defence, that the search and subsequent arrest was conducted within ambit of the statutory duties of the police pursuant to **Section 29 and 36 of the Criminal Procedure Code (CPC)** meanwhile the search and arrest were equally premised on reasonable and probable cause.
8. The Interested Party on its part filed a defence dated 14/10/2024 denying the key averments in the plaint, its joinder to the instant proceedings and jurisdiction of the Court.
9. The suit proceeded to full hearing during which the Plaintiff and Defendants called evidence in support of the averments in their respective pleadings.

### **Case and Evidence**

10. The Plaintiff testified as PW1. He began by adopting his witness statement dated 18/04/2023 as his evidence in chief meanwhile proceeded to adduce into evidence the documents appearing in his list of documents of even date as PExh.1-5. The gist of his evidence was that on the date in question he was arrested while in his official court chamber by more than four (4) police officers who in turn commandeered him into their vehicle and drove to Directorate of Criminal Investigation, (DCI) headquarters, despite requests to be allowed to drive in his vehicle which they declined.
11. On cross-examination, it was his evidence that when a judicial officer is being investigated the complaint must be brought to his attention in the first instance; however in the instant matter he was never notified of any investigation of any sorts against him. He stated that former Justice Chitembwe was forced into his chamber with another lady whereupon a search having been conducted by the said officers money was found on both their persons. He maintained that he did not know what purpose the money served or whether it was related to bribery.
12. Additionally, the Plaintiff testified that no warrants of search or arrest were ever taken out whereas to arrest a Judge without reason or a complaint was unfair and unwarranted . He went on to state that at the time of his arrest he was in

his official chamber at the law courts, and was after the event shoved into their vehicle with sirens blaring.

13. The Plaintiff further testified that he was arrested at 2.00pm, detained and released at 6.00pm without any formal charge being preferred against him. He added that since then no charges have ever been preferred against him or any communication rendered as pertains to his arrest.
14. It was his further evidence that upon filing Nairobi JR Application No. E112 of 2021 against the Defendants the Court found the search carried out and subsequent arrest and detention was illegal and unconstitutional, to wit, the Court stopped any further investigations. He maintained that, at no point during the incident was money found in his office or his person save for former Justice Chitembwe and the lady that was forced into his chambers. That as a consequence of the unwarranted incident, his liberty and privacy were violated, and the search arrest and detention were malicious. He added that the arrest was intended to ruin his career as a long serving Judge of the High Court as he then was, and at the time he had been nominated to serve as a Judge of the Court of Appeal, which position he holds to date.
15. In re-examination, PW1 reiterated that the Defendants officers upon entering his chamber did not offer any explanations or reasons for his arrest. He further

emphasized that police officers cannot move to arrest persons without any complaint having received none, whereas they ought to inform the person under arrest, the reason for his arrest. He concluded by stating that the findings in JR Application No. E112 of 2021 has never been challenged.

### **Defendants Case and Evidence**

16. On behalf of the Defendants, Sgt. James Mwangi - No. 63737 attached to DCI Headquarters Serious Crimes Unit, testified as DW1. He stated that he was an investigator with over 32 years' experience meanwhile proceeded to adopt his witness statement dated 10/7/2023 as his evidence in chief. He equally adduced into evidence the documents appearing in the Defendants list of documents dated 19/7/2023 as DExh.1 & 2.
17. The gist of DW1's evidence was that the police have powers to conduct searches without warrants and to arrest as is provided for in law. That on the date in question he, alongside five (5) other officers, had been assigned to the Judiciary Milimani Buildings concerning a brief that there was a judicial officer who was receiving a bribe in return for a favorable judgment. He added that at 2.00pm they were directed to Chamber 230 where they found former Justice Chitembwe who was walking out with a lady. Upon stopping him the judge resisted and they went inside his chamber

wherein they found PW1. Upon being queried on reasons why they were there, PW1 was informed that there was an intelligence report of a bribery exchange, to wit, they asked both PW1, former Justice Chitembwe and the lady to cooperate.

18. Upon being informed of the intended search, money in US dollar denomination was found in former Justice Chitembwe's pockets however, nothing was found in PW1's chamber or person. An inventory was taken of both judges' chambers of which they signed. He testified that he was unaware of PW1's arrest given that upon recording of his statement he was released. He emphasized that they were merely carrying out their duty whereas their actions were not motivated by any vendetta or malice.
19. On cross-examination, DW1 stated that they received the said intelligence reports from their seniors however were not specifically informed which judicial officer was receiving the bribe, who the complainant was or who made the report at DCI offices.
20. Conversely, DW1 added that they were only briefed on one judicial officer. He further stated that they did not have the details of the chamber number however their boss led them to Chamber 230 where they met former Justice Chitembwe leaving the said chamber whereas PW1 was seated inside the said chamber. He confirmed that upon search in the

Plaintiffs chamber and his person, nothing was found on PW1 or his chambers. He further confirmed that PW1 was whisked away in their vehicle meanwhile did not know why he was not allowed to use his own vehicle as he had requested.

21. In re-examination, DW1 maintained that he was unaware that PW1 was under arrest, adding that it is not always a prerequisite to have the name of the complainant.

At the close of the trial, both parties filed written submissions.

### **Plaintiff's Submissions**

22. Counsel for the Plaintiff, Mr. Brian Khahemba began his submissions by restating the history of the matter, pleadings and evidence by the respective parties meanwhile proceeded to condense his submissions into three (3) cogent issues thus-

- i. whether the Defendants actions were lawful and or violated the Plaintiff's constitutional rights.*
- ii. Whether the Defendants are liable for defamation and damages arising therefrom, and if so, quantum of damages.*

23. On whether the Defendants actions were lawful and or violated the Plaintiff's constitutional rights, counsel emphasized that there has since been a determination in favour of the Plaintiff by a Court of competent jurisdiction on the legality, propriety and rationality of the Defendants

conduct, which determination has not been set aside or appealed.

24. It was further submitted that in defence, the Defendants offered no justification and or rationale for their action, to wit, for the inescapable conclusion that they acted arbitrarily, illegally and in abuse of their investigative powers in violation of the Plaintiff's rights.
25. Counsel went on to submit that it is since settled that investigative authority must never be abused to harass, intimidate or oppress innocent citizens who are going about their business whereas this Court has the power and authority to intervene where such an abuse is manifest. The decisions in **Commissioner of Police & The Director of Criminal Investigation Department & Another v Kenya Commercial Bank Ltd & 4 Others [2013] KECA 183 (KLR)**, **Benson Mbeni Kibetu v Inspector General of Police & 2 Others [2017] KEHC 7992 (KLR)** and **Geoffrey Mwangi Githinji v Attorney General & 2 Others [2022] KEHC 2747 (KLR)** were cited in the forestate regard.
26. While calling to aid **Article 28, 29 & 31 of the Constitution**, the decisions in **Moses Tengeya Omweno v Commissioner of Police & Another [2018] KECA 344 (KLR)**, **Kipkebut v Simon Karuri, Chief Inspector (OCS) Mochongoi Police Station & Another; National Police**

**Service Commission & Another (Interested Party) [2025] KEHC 5516 (KLR) and Miguna Miguna v Fred Matiangi, Cabinet Secretary Ministry of Interior and Co-ordination of National Government & 8 Others [2018] KEHC 7733 (KLR)** it was posited that from the evidence adduced before this Court, the Defendants not only arbitrarily stormed into the chambers of the Plaintiff, proceeded to search his person and property without any reasonable cause but also arrested and detained him without any justification whatsoever, in violation and contravention of the Plaintiffs constitutional rights.

27. On whether the Defendants are liable for defamation, while acknowledging the constituent ingredients on a claim founded on defamation as addressed by the **Court in Reiya & Another v Kioko [2024] KEHC 14399 (KLR) and Amina Mohamed v Standard Media Group Ltd & 6 Others [2020] eKLR**, counsel submitted that the Plaintiff's arrest was published in newspapers of nationwide circulation. That the Defendants' illegal conduct and subsequent publication concerning the same gravely injured the character and reputation of the Plaintiff who has offered years of distinguished service to the public as a Judge, enjoys high regard and esteem among his peers, members of the public and legal profession. It was further posited that had the Defendants not acted recklessly the Plaintiff would

not have suffered damage to his character and reputation occasioned by publication of the incident.

28. On whether the Plaintiff is entitled to the reliefs sought, while placing reliance on the decisions in **Havi v Director of Public Prosecution & 2 Others [2023] KEHC 26399 (KLR)**, **Miguna Miguna (supra)** and **Moses Tengeya Omweno(supra)** counsel argued that an award of Kshs. 10,000,000/- would be fair, just compensation for violation of the Plaintiff's constitutional rights.
29. On the award for general damages for false, unlawful and malicious search, arrest and detention, counsel cited the decision in **Geoffrey Mwangi Githinji v Attorney General & 2 Others [2022] KEHC 2747 (KLR)** and **MWK & Another v Attorney General & 4 Others; Independent Medico-Legal Unit (IMLU); The Redress Trust (Amicus Curiae) [2017] KEHC 1496 (KLR)** meanwhile urged the Court to award Kshs. 10,000,000 as being fair and just compensation under this head.
30. Concerning the award of aggravated and exemplary damages for false, unlawful and malicious search, arrest and detention while calling to aid the decisions in **Nelson Havi v Headlink Publishers Ltd [2018] KEHC 10136** and **G.B.M Kariuki v Attorney General [2016] KEHC 7276 (KLR)** counsel submitted that the Defendant actions was actuated by malice and improper motive. Given the Plaintiffs stellar

legal and judicial career spanning over four (4) decades, an award of Kshs. 5,000,000/- would be sufficient compensation under the said head. In conclusion the Court was urged to allow the claim as lodged.

### **Defendants Submissions**

31. On the part of the Defendants, equally restating the events leading hereto, the pleadings and evidence by the respective parties' counsel, Deputy Chief State Counsel, Elizabeth Mutsoli, itemized five (5) issues for the Court's consideration to wit-
- i. whether the search conducted by officers of the Defendants was unlawful and in violation of the Plaintiff's constitutional rights.*
  - ii. whether the subsequent arrest and detention were unlawful, illegal and conducted without just cause.*
  - iii. Whether the tort of false and malicious arrest and detention were proved.*
  - iv. Whether the Defendants are liable in damages*
  - v. who ought to bear costs of the suit.*
32. While calling to aid the **Constitution, National Police Service Act, Criminal Procedure Code and Police Standing Orders**, counsel posited that police have powers to enter premises of any person who is reasonably suspected of having committed a cognizable offence. That a police officer may demand that the person residing in or in charge

of such premises allow him free entry and afford him all reasonable facilities for a search of the premises, and if, after notification of his authority and purpose, entry cannot without unreasonable delay be so obtained, the officer may enter such premises without warrant and conduct the search.

33. That in the instant matter, the Defendants had credible intelligence that there was about to be an exchange of money involving judges thus given the seriousness of the allegations there was reasonable cause for the Defendants to act swiftly. The decisions in **Republic v Sospeter Odeke [2012] eKLR, Okiya Omtatah Okoiti v Communication Authority of Kenya & 8 Others [2020] eKLR and Gitobu Imanyara & 2 others v Attorney General [2016] KECA 557 (KLR)** were cited in the forestated regard.
34. Concerning whether the arrest and subsequent detention of the Plaintiff was unlawful, illegal or conducted without just cause, while calling to aid the definition of arrest as captured in **Section 21 of the Criminal Procedure Code, Section 52(1) of the National Police Service Act, Section 26(2)** of the Office of Director of Public Prosecution, the decisions in **Daniel Ogwoka Manduku v Director of Public Prosecutions & 2 Others [2019] eKLR, Isaac Tumunu Njunge v Director of Public Prosecutions & 2 Others [2016] eKLR and Pauline Adhiambo Raget v. DPP & 5**

**Others [2016] eKLR** counsel argued that the Plaintiff was never arrested, but agreed to proceed with officials of the Defendants for purposes of interrogation and recording of a witness statement. It was further submitted that the Defendants were only doing their jobs as mandated of them by the Constitution and statute as such there was nothing unlawful or malicious of the Defendant's actions.

35. As to whether the tort of false/malicious arrest or illegal confinement was proved, counsel anchored his submissions on the decisions in **Egbema v West Nile Administration [1972] EA 60**, **Harriet Karimi v Attorney General [2005] KEHC 5 (KLR)**, **Fred Kiprop v Ambrose Kimutai [2020] KEHC 2997 (KLR)** and **Njoroge & 17 others v Attorney General [2015] KEHC 1154 (KLR)** to submit that there was reasonable and probable cause for the lawful interrogation for a few hours on the basis of an intelligence report received by officials of the Defendants on an alleged bribery exchange that was to take place.
36. On whether the Plaintiff's constitutional right was violated, while placing reliance on the decisions in **Anarita Karimi Njeru v Republic (1979) 1 KLR 154**, **Trusted Society of Human Rights Alliance v Attorney General & 2 others [2012] eKLR**, **Crispus Karanja Njogu v Attorney General [2006] eKLR**, **Anyango v Attorney General & 2 others [2024] KEHC 254 (KLR)** and **Gitobu Imanyara & 2 Others v The Attorney General [2016] KECA 557**

**(KLR) counsel posited that by dint of Section 24, 35 & 51 of the National Police Service Act, Section 29 & 30 of the Criminal Procedure Code,** the Defendants action were lawful, required urgent intervention whereas the Plaintiff was never detained beyond what was reasonably necessary for lawful investigations.

37. In response to the Plaintiff's submission concerning the decision in **Nairobi JR Application No. E112 of 2021**, counsel submitted that the decision merely restrained prosecution of the Plaintiff to prevent possible abuse of the process and not a finding that the Defendants action was unlawful. Therefore, the Plaintiff is not entitled to any form of constitutional relief or compensation.
38. Submitting on whether the Plaintiff was defamed, counsel summarily submitted firstly the Defendant did not author, utter or publish any defamatory publication; secondly, the defamatory words were not pleaded or set out in the plaint; thirdly the Plaintiff did not prove reputational injury; and fourthly, the Plaintiff failed to establish an actionable claim for defamation therefore the claim ought to be dismissed in its entirety. The decisions in **John Ward v Standard Ltd [2006] eKLR Wycliffe A. Swanya v Toyota East Africa Ltd & Another [2009] eKLR, Phineas Nyagah v Gitobu Imanyara [2013] eKLR and Kennedy Nyakundi v Jackson Ongubo & another [2016] KEHC 3108 (KLR)** were called to aid in the forestated regard.

39. Penultimately, without prejudice to the earlier submission, counsel placed reliance on the decisions in **Harriet Karimi v The Attorney General [2005] eKLR and Daniel Waweru Njoroge & 17 Others v Attorney General [2015] KEHC 1154 (KLR)**, to submit that should the Court find the Defendants liable for wrongful arrest, a sum of Kshs. 100,000/- would be sufficient compensation whereas a sum of Kshs. 50,000/- would be commensurate for the two (2) hours the Plaintiff was in custody. In conclusion, the Court was urged to dismiss the Plaintiff's suit with costs.

#### **Analysis and Determination**

40. The Court has carefully considered the respective parties' pleadings, the evidence adduced by respective witnesses, and the parties' written submissions.

#### **Issues for determination:-**

- a) *Whether the Plaintiff has made out a case as against the Defendants for breach of his constitutional right to privacy, liberty and freedom from degrading treatment when the Defendants unlawfully searched, arrested and detained him?*
- b) *Whether the Plaintiff has made out a case for defamation against the Defendants;*

*c) Whether the Plaintiff is entitled to an award of damages, and if so, the quantum.*

41. As a preliminary issue in limine, the Court proposes to address the question of defamation before proceeding to address the other issues it has coined for consideration and determination.

***Whether the Plaintiff has made out a case for defamation against the Defendants?***

42. In so far as the tort of defamation is concerned, the rationale behind the law of defamation was spelt out by the Court of Appeal in **Musikari Kombo v Royal Media Services Limited [2018] KECA 801 (KLR)**, wherein it was stated that;

*“The law of defamation is concerned with the protection of a person’s reputation. Patrick O’Callaghan in the Common Law Series: The Law of Tort at paragraph 25.1 expressed himself in the following manner:*

*“The law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation: ‘As a general rule, English law gives effect to the ninth commandment that a man shall not speak evil falsely of his neighbour. It supplies a temporary sanction ...’*

*Defamation protects a person's reputation that is the estimation in which he is held by others; it does not*

*protect a person's opinion of himself nor his character. The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit' and it affords redress against those who speak such defamatory falsehoods..."*

43. Further, according to **Black's Law Dictionary, 9th Edition at Pg. 479** defamation is defined as:

*"The act of harming the reputation of another by making a false statement to a third person."*

44. The Court of Appeal in the case of **Wycliffe A Swanya v Toyota East Africa Ltd & another [2009] KECA 379 (KLR)** rendered that in a suit founded on defamation the plaintiff must prove the following elements -:

- i. That the matter of which the plaintiff complains is defamatory in character.*
- ii. That defamatory statement or utterance was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.*
- iii. That it was published maliciously.*
- iv. In slander, subject to certain exceptions, the plaintiff has suffered special damage.*

45. Later, the Court of Appeal in **Selina Patani & another v Dhiranji V. Patani [2019] KECA 480 (KLR)** while addressing itself to the purport of the law of defamation stated that: -

“In rehashing, we note the ingredients of defamation were summarized in the case of **John Ward v Standard Ltd. HCC 1062 of 2005** as follows:

- i. The statement must be defamatory.*
- ii. The statement must refer to the plaintiff.*
- iii. The statement must be published by the defendant.*
- iv. The statement must be false.”*

46. Here, it is undisputed that the Plaintiff's cause of action gyrates around the events of 22/07/2021 when police officers under the command of the 1<sup>st</sup> & 2<sup>nd</sup> Defendants stormed into the Plaintiff's chamber to conduct a search without a warrant purporting bribery or receiving money through perpetuation of a corrupt transaction. That as a result of the forestated, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants agents arrested and escorted the Plaintiff to DCI headquarters where he was confined for about four hours while being subjected to interrogation.

47. As earlier noted, the law of defamation or, more accurately, the law of libel and slander, is concerned with the protection of reputation, central to the aforestated is publication, as rightly acknowledged by the rival parties in this suit. The

undisputed facts concerning the suit have earlier been restated herein. The Plaintiff's contention, as I gather from his pleadings, is that as a result of the Defendants agents' actions, the same occasioned desecration of his reputation, dignity and honour given the high public office he holds from which he suffered serious defamation of character given that the incident was highly published both in main and social media.

48. Having set out the above, indubitably, the law on defamation is well settled within our jurisdiction and I do not intend to reinvent the wheel. Ex facie from the set of facts presented before the Court, at the heart of the Plaintiff's defamation claim, the Plaintiff did not demonstrate any publication. As observed in **Wycliffe A Swanya (supra) and Selina Patani (supra)**, it is the Court's reasoned deduction that the Plaintiff's suit does not on all fours encapsulate as a defamatory claim.

49. Firstly, the Plaintiff did not evince the impugned publication(s) that he deemed was defamatory of his character, of which, had the effect of harming his reputation by making a false statement to a third person.

Secondly, it is trite that in a claim founded on defamation, the claimant ought to set out in the plaint, the specific words referring to him that he considers were defamatory. The latter is a requirement of **Order 2 Rule 7 of the Civil**

**Procedure Rules (CPR)** whereas the aforestated requirement was recently buttressed by the **Court of Appeal in Onchieku v Kwayera & another [2025] KECA 520 (KLR)** wherein it was observed that -;

*“37.In an action for defamation the actual words or the part complained of must be pleaded by specifically setting them out in the declaration. It is not enough to describe their substance, purpose or effect. See the decision in **Veronica Wambui v Michael Wanjohi Mathenge [2015] eKLR** to which we were referred by the respondent.*

38.....

*39.It was therefore, imperative for the appellant to set out in the plaint, the specific words referring to him. The appellant’s failure to quote in the plaint, the defamatory words that specifically referred to him was fatal to his suit. The import of the failure is that the court had no words to subject to the test of a “reasonable man” to determine whether or not they were injurious to the appellant’s reputation.” [Emphasis mine]*

Thirdly, the Court of Appeal in **Musikari Kombo (supra)** stated that: -

*“The test for whether a statement is defamatory is an objective one. It is not dependent on the intention of the publisher but on what a reasonable person reading the statement would perceive. In Halsbury’s Laws of*

*England 4<sup>th</sup> Edition Vol. 28 at page 23 the authors opined:*

*“In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense.”*

50. Lastly, concerning whether it was imperative to call a third party to prove defamation the **Court of Appeal in Selina Patani** (supra) succinctly addressed itself to the same. Compounding the above, it must be observed that it was fatal on the part of the Plaintiff when he failed to prove publication, plead the defamatory words in his suit and failed to call a witness(es) who perceived the purported defamatory publication as defamatory of the plaintiffs reputation and character.
51. While I am cognizant of the Plaintiff’s submissions on the issue, I am not convinced by the same. As stated in **Hezekiel Oira v Standard Limited & Another [2016] eKLR** the successful claimant in a defamation cause must tender evidence not only that the publication complained of bore falsehoods, but also that the published words tended to

lower his reputation, causing right thinking members of society to shun or avoid him or to treat him with contempt.

52. At the risk of repetition, equally on this front, the Plaintiff's evidence did not seriously address the question. Thus, in the absence of proof of the defamatory publication, never mind the false nature of the alleged purported offensive publications, it is difficult to see how a claim founded on the tort of defamation can succeed without compliance with the statutory requirements, to wit, **Order 2 Rule 7 CPR**. The same is accordingly declined.

***Whether the Plaintiff has made out a case against the Defendants for breach of his constitutional right to privacy, liberty and freedom from degrading treatment when the Defendants unlawfully and illegally searched, arrested and detained him?***

53. Here, the Court proposes to contemporaneously deal with the constitutional questions alongside the purported false, unlawful and malicious search, arrest and detention. That said, by dint of **Article 165(3)(b) & (d)(ii) of the Constitution**, this Court is conferred with jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened and or determine the question whether anything said to be done under the authority of this

Constitution or of any law is inconsistent with, or in contravention of, this Constitution.

54. With the above in reserve, it necessitates mentioning that the applicable law as to the burden of proof is found in Section 107, 108 and 109 of the Evidence Act. The duty of proving the averments contained in the plaint lay squarely upon the Plaintiff whereas the converse duty lay on the Defendants concerning the averments in the statement of defence. That said, in the case of **Karugi & Another v Kabiya & 3 Others (1987) KLR 347** the Court of Appeal stated that:-

*“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”*

55. Pertinent to the determination of issue at fore, are the pleadings, which formed the basis of the parties' respective cases before the trial Court. Concerning the latter, the **Court of Appeal in Wareham t/a A.F. Wareham & 2 Others v**

**Kenya Post Office Savings Bank [2004] 2 KLR 91**

observed that-

*“We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.”*

56. Having set out the above, the gist the Plaintiff’s suit is that on the backdrop of the Defendants actions on 22/07/2021, the latter breached his constitutional right to privacy, liberty, freedom from degrading treatment when Defendants agents unlawfully searched, arrested and detained him for more than three (3) hours, all without any purported reasonable

and probable cause. In the converse, the gist of the Defendants case is that the Plaintiff's arrest was within the statutory powers accorded to the police whereas the resultant search and arrest were premised on reasonable and probable cause.

57. **Article 28 of the Constitution** guarantees a person's right to inherent dignity and right to have that dignity respected. Article 29 guarantees a person's right to freedom and security which includes among others the right not be - deprived of freedom arbitrarily or without just cause, whereas Article 31 on its part guarantees a person's right to privacy, which includes the right not to have, among others - their person, home or property searched; and their possession seized.
58. The above notwithstanding, it is trite that rights and freedoms under the Bill of Rights, subject to **Article 25** can be limited under Article 24, on the premise of written law and to the extent that it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.
59. At the risk of repetition the facts leading to the suit have been set out earlier in this judgment. Therefore, at this juncture, it is pertinent to determine whether the Defendants actions were justified in the circumstance of the matter.

60. To the foregoing end, while it is constitutionally and statutorily provided for in the Criminal Procedure Code and the National Police Service Act that the Defendants agents/police officers may arrest a person without a warrant in respect of cognizable offences or enter premises and search the same without warrants in specific circumstances, there are limitations to the said actions.
61. By DW1's evidence, it is apparent their actions, though asserting that it was premised on an intelligence report of ostensible bribery in return for a favourable judgment, no such evidence was evinced before the Court, from whom the intelligence was obtained (save for DW1's superiors) or whom relayed the said intelligence to warrant their actions.
62. DW1 equally confirmed that they were informed of one judicial officer in respect of the purported intelligence that they had received. However, there was no indication as to whether the Plaintiff was the subject person of the said intelligence report, which would thus necessitate their action.
63. While I concede to the fact it is the duty of the police service to investigate and prevent crime, in **Monari & another v Commissioner of Police & another; Abubakar & another** (Interested Parties) [2012] KEHC 4595 (KLR),

this Court concurs with the underscored duty espoused therein as thus:-

*“The Police have a duty to investigate on any complaint once it is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court..... As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene”.*

64. Notably, the Court of Appeal in the case of **Abdulkadir Anod Dole v Republic [2020] KECA 99 (KLR)** while addressing itself to a similar issue observed that-;

*“The right to privacy and respect for personal property are key principles of the Constitution. Powers of entry and search should be fully and clearly justified before use because they may significantly interfere with an individual’s right to privacy. Less intrusive means must be considered before resorting to searching a private dwelling house. To the question we have posed; whether Article 31 was breached, in view of the law, from what we have set out in the foregoing paragraphs, we think not. There were reasonable grounds to believe that the trophies were in the appellants’ house and indeed trophies were found hidden therein. There were*

*also exceptional circumstances that justified the action of raiding the appellants' house.*

*Under the law reproduced above, we respectfully hold the view that the reasonableness requirement, the appropriateness of every search without a warrant is decided on a case-by-case basis, weighing the accused person's privacy interests against the reasonable needs of law enforcement under the circumstances. In the matter before us, the exigencies of the situation made the course taken to search without a warrant imperative and in the circumstances, permissible."*

65. While DW1, testified that once they entered the Plaintiff's chambers, the latter was informed of their purpose, in my view there was no reasonable cause to ingress the said Plaintiff's chamber despite having found former Justice Chitembwe and a lady exiting the said chamber. While the power to search without warrant in special circumstances is specifically provided for in Section 60 of the National Police Service Act, without any evidence of the fact that the Plaintiff was the subject of the purported investigations and or reasonable ground that he was involved in the alleged bribery, there was no reason for the said search without warrants.
66. In any event even after ingress and a search being conducted in the Plaintiff's chamber and person, nothing was found, as confirmed by DW1 and Dexh.2. I am therefore

inclined to find and hold that the Defendants agents actions were in breach of the Plaintiff's right to privacy & arbitrary search, as there was no reasonable and/or probable cause from the purported intelligence report to carry out the same.

67. As to whether the Plaintiff was unlawfully arrested and detained, this Court had earlier noted that the Defendants action notwithstanding being statutorily provided for in **Section 29 and 36 of the Criminal Procedure Code**, there ought to have been reasonable and upon probable cause for the Plaintiff's arrest and detention. **Black's Law Dictionary, 7th Edition, Page 459** defines detention as;-

*“Act or fact of holding a person in custody, confinement or compulsory delay”.*

*The same Dictionary goes on to define false imprisonment is defined as;-*

*“A restraint of a person in a bounded area without justification or consent. False imprisonment is a common law misdemeanor and a tort. It applies to private as well as government detention.”*

68. On the subject of deprivation of one's liberty the **Court of Appeal in Nderitu v Attorney General & another [2019] KECA 1006 (KLR)** cited with approval the **East African Court of Justice in Samuel Mukira Mohochi vs. Attorney General of Uganda, EACJ Reference No. 5 of 2011** wherein it expressed at Paragraph 108; wherein it rendered thus-

*“Detention is indeed deprivation of liberty and when it is illegal, it is not only an infringement of the freedom of movement, but also an act that undermines one’s dignity.”*

69. Aburili J in **Daniel Njuguna Muchiri v Barclays Bank Of Kenya Ltd & another [2016] KEHC 2049 (KLR)** cited with approval the decision in **Njoroge & 17 others v Attorney General [2015] KEHC 1154 (KLR)** wherein 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.”*

70. Here, the Defendants have made heavy weather of the fact that the Plaintiff was not under arrest and that he was merely taken to DCI headquarters for purposes of recording a statement. The Plaintiff was categorical that despite requests to follow the officers to DCI headquarters using his official vehicle the request was denied whereas he was commandeered into a police vehicle with blaring sirens and driven to DCI headquarters. The Plaintiff further stated that the incident was purposefully tainted with drama with the intent on ruining his career as a Judge and at the time had been nominated to serve as a Judge of the Court of Appeal.
71. DW1, on cross examination confirmed that nothing was found on the Plaintiff or his chamber however the latter was still whisked away in their vehicle without being informed of the offence if any nor why he was not allowed to use his own vehicle as a respected officer and Judge of the High Court, the judiciary and the public at large.
72. It is not in question that the Defendant’s agents’ action constituted an arrest (without a warrant) whereas the Plaintiff was detained at DCI headquarters in the guise of recording his statement on the matter. Firstly, as earlier

noted, there was no evidence that the Plaintiff was the subject of the alleged intelligence report that led to the search of his office and person. None was provided. Secondly, despite the search no monies or evidence was found in the Plaintiff's chamber or his person. Thirdly, on the backdrop of the unsuccessful search there was no reason to forcefully bundle the Plaintiff into the Defendant's agents police vehicle, arrest and or detain him on the backdrop of the above.

73. Fourthly, in light of Dexh.1, being search on former Justice Chitembwe and monies having been found on his person, alongside the lady found with him, if there were any further queries towards the Defendants investigation, all the police was required to do was to summon the Plaintiff to the DCI offices to record a statement or to the nearest police station or at least according him opportunity to following the officers using his vehicle, as he had requested. The Defendants agents' actions were rather unnecessary and unreasonable, and embarrassing to the Plaintiff in the circumstances with no reasonable and probable cause for the unnecessary drama at his chamber, arrest and detention for close four (4) hours in the guise of taking his statement.

74. This position was equally echoed by the Court in its decision in **Republic v Inspector General of Police & 2 others; Muchelule (Exparte) [2022] KEHC 18103 (KLR)** adduced

by the Plaintiff as Pexh.3 of which i wish to reproduce as hereunder -;

*“22. It is worth noting that the 1<sup>st</sup> and 2<sup>nd</sup> respondents never provided any basis why they suspected that the applicant had received money for corrupt purposes and which they suspected was in the applicant’s chambers.....*

*23. ....*

*24. Although their purported search yielded nothing, the 1<sup>st</sup> and 2<sup>nd</sup> respondents still arrested the applicant and subjected him to interrogations at the Directorate of Criminal Investigations offices.*

*25. I would agree with the applicant’s learned counsel that the storming of the applicant’s chambers and the purported search were unwarranted considering that no evidence has been provided of any conduct that may have led the 1<sup>st</sup> and the 2<sup>nd</sup> respondents to suspect that the applicant was involved in a corrupt conduct. And having not found anything suspicious either in the applicant’s chambers or on his person, his arrest and subsequent interrogation at the 2<sup>nd</sup> respondent’s headquarters was demeaning not only to the person of the applicant but also to the office which he holds.*

*26. In these circumstances, I have no hesitation in reaching the conclusion that the 1<sup>st</sup> and 2<sup>nd</sup>*

*respondent's conduct smacked of illegality, irrationality and procedural impropriety.*

27.....

28.....

29.....

20.....

31.....*the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' conduct can properly be described as irrational. It is irrational because even assuming that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were justified in storming and searching the applicant's chambers, they had no reason to arrest him and drag him to their headquarters when the outcome of their search vindicated the applicant of any crime that they suspected he may have committed. In these circumstances, the decision to arrest the applicant and take him to the 2<sup>nd</sup> respondent's headquarters can properly be said to have been so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."*

75. Having addressed myself to the above, I believe the Court need not belabor further on the question, given the affirmative finding in the JR applications afore stated.
76. As to whether the Plaintiff is entitled to the relief(s) sought, the **Court of Appeal in Imanyara & 2 others v Attorney**

**General [2016] KECA 557 (KLR)** pithily put it as follows concerning damages for constitutional violations-;

*“.....it seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is “appropriate and just” according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration. Public policy considerations is also important because it is not only the petitioner's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.”*

77. Addressing itself to the above decision, on appeal, the **Supreme Court in Imanyara & 2 others v Attorney General [2022] KESC 78 (KLR)** distilled the parameters for consideration in assessing damages for constitutional violations as follows-;

*71. From the foregoing, we are persuaded that the above-quoted decisions offer a good guide on the parameters to be considered in assessing damages for constitutional violations. They are:*

- i. The duration of the claimant's detention;*
- ii. The level of physical and mental suffering endured by the claimant;*
- iii. The degree of responsibility of the individual(s) responsible for the suffering caused to the claimant.*
- iv. The extent of the action or inaction complained of, and any other incidental rights that may have been violated as a consequence of the first breach(es).*
- v. Award is discretionary and will depend on the facts and the circumstances of each case and*
- vi. Award is not compensatory or punitive but a vindication of the violated rights.*

78. Here, given this Court's earlier discussion, the Defendant's agents violated the Plaintiff's constitutional right to liberty, privacy, freedom from inhuman and degrading treatment, unlawful & malicious search, arrest and detention. At the

time, the Plaintiff was serving as a Judge of the High Court however has since been elevated to the Court of Appeal where he serves todate. Further, the Court has considered the persuasive decisions cited by the rival parties in their respective submissions.

79. For the aforegoing, this court draws guidance from the decision in **Ondimu & another v Commissioner of Police & 3 others [2024] KESC 46 (KLR)** wherein the Court sustained an award of Kshs. 3,000,000/- for violation of the claimant's right under Article 31 and 40 of the Constitution and decision in **Omweno v Commissioner of Police & another [2018] KECA 344 (KLR)** wherein the Court awarded Kshs. 5,000,000/- on appeal for violation of the Appellants constitutional rights among other being unlawful arrest, search without a warrant and forcible removal from Kenya.
80. Keeping in mind the dicta in **Imanyara & 2 others (supra)**, and the decision of the **Court of Appeal in Omweno v Commissioner of Police (Supra) decided in 2018 among others**, I proceed to award the Plaintiff herein Kshs. 6,000,000/-(six million) for the various violations of his constitutional rights as pleaded in the suit.
81. As to whether the Plaintiff is entitled to aggravated and exemplary damages for false, unlawful and malicious search, arrest and detention, the **Court of Appeal in Bernard**

**Kihiu Matama v Attorney General [2020] KECA 647 (KLR)** noted that -;

*[20] On the issue of exemplary damages, the Judge was equally exercising judicial discretion. It is trite that exemplary or punitive damages, are only awarded in limited instances. The categories of cases in which exemplary damages should be awarded are set out, at paragraph **243 of Halsbury's Laws of England**, as follows:-*

*“Exemplary damages should be awarded only in cases within the following categories: -*

- i. Oppressive, arbitrary or unconstitutional action by servants of government;*
- ii. Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff; or*
- iii. Cases in which the payment of exemplary damages is authorized by statute.”*

*[21] We have also found some persuasion in the dicta stated in the celebrated case of **Rookes vs. Barnard [1964] 1 ALL ER 367**, where it was held that there are only two categories of cases in which an award of exemplary damages could serve a useful purpose, viz, in the case of oppressive, arbitrary or unconstitutional action by the servants of the government.*

82. Here, while the Defendant's agents' actions violated the Plaintiff's constitutional rights there has been no demonstration that the Defendant's agent actions were oppressive and actuated by malice and or demonstration of the propensity of the said violation being repeated. In any event, a further award under the head goes only to be visited upon innocent taxpayers. To the foregoing end, the claim is denied.

### **Final Disposition**

83. Accordingly, the Court finds and holds in favour of the Plaintiff as against the Defendants in the following terms-;
- a. A declaration is issued that the Defendants violated the Plaintiff's constitutional rights to liberty, privacy and freedom from inhuman and degrading treatment.**
  - b. General damages in the sum of Kshs. 6,000,000/-(six million) is hereby awarded against the Defendants jointly and severally for violation of the Plaintiff's constitutional right to liberty, privacy, freedom from inhuman and degrading treatment, false, unlawful and malicious search arrest and detention.**
  - c. Costs of the suit are awarded to the Plaintiff.**

- d. Interest on (b) above shall attract interest at Court rates from the date of this judgment until full settlement.**
- e. The other prayers as sought in the plaint are declined.**

**Orders accordingly.**

**Delivered Dated and Signed at Nairobi this 29<sup>th</sup> day of January, 2026.**

.....  
**JANET MULWA.**  
**JUDGE**