

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO. 7 OF 2017

NICHOLAS **MBIYU** **KAMAU.....**
.....**PLAINTIFF**

-VERSUS-

THE **HONORABLE** **ATTORNEY**
GENERAL.....DEFENDANT

JUDGMENT

Pleadings

1. By a Plaint dated 18/06/2014, Nicholas Mbiyu Kamau (hereafter the Plaintiff) sued The Honorable Attorney General (hereafter the Defendant) seeking judgment as against the latter by way of-;

- a) Special damages in the sum of Kshs. 79,380,000/-*
- b) Interest on (a) above at Court rates from the date of filing this suit until payment in full.*
- c) Damages for false imprisonment.*
- d) Damages for malicious prosecution.*
- e) Damages for loss of business opportunities.*
- f) Aggravated damages for denial of constitutional rights, freedoms and degradation of personal character.*
- g) Costs of the suit.*

2. The Plaintiff avers at all material times relevant to the suit he was a Director of Mbo-I-Kamiti Ltd having been duly elected by shareholders of the company during an annual general meeting held on or about July 2002. That sometime between 2004 and 2005, the Defendant maliciously and without reasonable and probable cause laid false information before the Kiambu Chief Magistrates Court in Criminal Case No. 1522 of 2004 and Nairobi Chief Magistrates Court in Criminal Case No. 469 of 2005, as against the Plaintiff.
3. The Plaintiff goes on to claim that he was arrested in Kiambu and detained at Kiambu Police Station on 26/05/2004 wherein after being in custody for five (5) days, he was released on 31/05/2004 on a police bond of Kshs. 20,000/-. That on 29/07/2004, the Divisional Criminal Investigation Officer (DCIO) took the charge sheet to Court without the Plaintiff's knowledge that he was required to take a plea, to wit, warrants of arrest were issued and his police bond forfeited.
4. That on 06/08/2004, upon presenting himself to Court, the Plaintiff was remanded at Industrial Area Remand Prison for thirteen (13) days before being arraigned in Court on 19/08/2004 in respect of various charges in Kiambu Chief Magistrates Court in Criminal Case No. 1522 of 2004. The Plaintiff avers that despite attending to several mentions and hearings in respect of the case, he was discharged

under **Section 87A of the Criminal Procedure Code (CPC)** and re-arrested on the same day, and latter charged on 09/03/2005 in **Nairobi Chief Magistrates Court in Criminal Case No. 469 of 2005.**

5. The latter matter took close to ten (10) years to be heard and concluded thereby putting the Plaintiff's life in anxiety and embarrassment thereby leading to the collapse of his business, financial drain and suffering within his family. However, on 11/12/2014 he was acquitted of all charges.
6. The Plaintiff goes on to aver that by reason of the aforestated, he was wrongfully imprisoned, deprived of his liberty, was greatly injured in his credit, character, reputation, suffered mental, bodily pain & anguish and incurred expenses in defending himself, for which he claims loss and damages.
7. The Defendant filed a statement of defence on 18/07/2014 denying the key allegations in the plaint, and seeking dismissal of the suit.
8. The suit proceeded to full hearing during which only the Plaintiff called evidence in support of the averments in his pleadings.

Plaintiff's Case and Evidence

9. The Plaintiff testified as PW1. He identified himself as a businessperson and thereafter proceeded to adopt his witness statement dated 18/06/2014 as his evidence in

chief meanwhile adduced into evidence the documents appearing in his list of documents dated 18/06/2014, 07/11/2015 and 17/07/2024 as Pexh.1-16.

10. The gist of his evidence in the adopted witness statement was that on 26/05/2004 he was arrested and detained at Kiambu Police Station and released on 31/05/2004. That later on 29/07/2004, the DCIO Kiambu preferred charges as against him, to wit, he presented a charge sheet in Court without informing him of his required attendance.
11. That as a consequence of his non-attendance, a warrant of arrest was issued, to wit, his Kshs. 20,000/- paid to the state was forfeited. Upon presenting himself to Court on 06/08/2004, he was remanded in Industrial Area Remand whereinafter on 19/08/2004 he was presented in Court in Kiambu **Chief Magistrates Court in Criminal Case No. 1522 of 2004** for purposes of taking a plea. That he was released on bond and later on 04/03/2005 was discharged under **Section 87A of the CPC** and re-arrested on the same day and later charged on 09/03/2004 in Nairobi Chief Magistrates Court in Criminal Case No. 469 of 2005.
12. It was his further evidence that on his initial arrest, his motor vehicle was detained at Kiambu Police Station thus compelling him to hire a taxi at a cost of Kshs. 10,000/- per day as transportation costs for both himself and his family for 424 days. That his prosecution was published in the

newspapers thereby tarnishing his name whereas at the time he was a high-ranking member of the society, entrusted with the running of a company worth two (2) billion Kenya Shillings. As a consequence of his arrest he was thrown out as a director on 11/01/2005, thus losing his position, wages and prospective earnings as a director.

13. He went on to state that at the time, he had started various businesses among them being Juapen Investments, Nvibi Investments and Penimbi Agencies, all of which collapsed whereas he was tormented for close to ten (10) years while the matter was still pending before Court. That he convinced his wife to take out a loan and to sell her properties, to cater for his legal fees, to wit, the former at the time had a pending loan of Kshs. 2 million. He concluded that his political ambitions in 2007 and 2013 were hindered due to his tarnished name as a result of the criminal proceedings.
14. On cross-examination, it was his evidence that as a result of the criminal proceedings, for close to 9 years he lost his director's monthly salary of Kshs. 140,000/- however confirmed that he did not have any evidence of the aforestated fact. He further confirmed that he did not adduce any audited accounts in respect of loss of business opportunities or evidence of travel expenses in the sum of Kshs. 4,240,000/-. Concerning legal fees, he stated that he paid the same in installment as from 2004 until 2009. He

confirmed having been acquitted of the charges in Nairobi Chief Magistrates Court in Criminal Case No. 469 of 2005 on 11/12/2014.

15. In re-examination, PW1 reiterated that prior to his prosecution, he engaged in other business whereas the DCIO confiscated his motor vehicle as such he had to source for alternative transport.
16. At the close of the trial, both parties filed written submissions.

Plaintiff's Submissions

17. Counsel for the Plaintiff began his submissions by restating history of the matter, pleadings, evidence and anchoring the aforesaid on the decision in **Mbowa v. East Meno District Administration [1972] EA 352** meanwhile proceeded to condense his submissions into five (5) cogent issues.
18. On whether the criminal proceedings were instituted by the Defendant, counsel summarily posited that the Plaintiff's arrest, detention and subsequent charge were orchestrated by the police whose actions, the Defendant as representative of the state, is responsible for. Meanwhile, the Plaintiff was eventually charged in Nairobi Chief Magistrates Court in **Criminal Case No. 469 of 2005** at the behest of the Defendant.

19. Submitting on whether the Defendant acted without reasonable or probable cause, while calling to aid the decisions in **Samson John Nderitu v The Attorney General [2010] KEHC 3039 (KLR)** and **Kagane & Others v Attorney General & Anor (1969) EA 643**, counsel posited that the plaintiff's discharge in respect of **Kiambu Chief Magistrates Court in Criminal Case No. 1522 of 2004** was on accord of the fact that the Defendant's agents failed to conduct any investigations and or gather evidence leading up to his arraignment.
20. It was further submitted that none of the prosecution's witnesses in Nairobi Chief Magistrates **Court in Criminal Case No. 469 of 2005** testified that the Plaintiff had exceeded his authority or engaged in any illegality, to wit, the Court's finding was unequivocal that the Defendant acted without unreasonable cause. That the prosecution's failure to call a key witness, who was the Assistant Registrar of Companies at the time, further accentuated the Defendant's lack of reasonableness.
21. As concerns whether the Defendant acted maliciously, counsel posited that the Plaintiff was not accorded an opportunity to appear before a police station to defend himself; the prosecution's disregard of clear evidence was actuated by bad faith; the prosecution's failure to prove any evidence as to facts and circumstance upon which the

Plaintiff's arrest, detention and prosecution was effected constituted an abuse of the Defendant's agents authority.

22. Meanwhile, on whether the criminal proceedings terminated in favour of the Plaintiff it was summarily submitted that it is not in dispute that the Plaintiff and his co-accused were acquitted of the charges on 10/01/2014.
23. Penultimately, counsel argued that the Plaintiff was detained for a total of eighteen (18) days without arraignment. Further, for more than ten (10) years, the Plaintiff endured stress, anxiety, anguish, humiliation and reputational damage. While calling to aid the decisions in *George Ngige Njoroge v Attorney General* [2018] eKLR, the Ugandan decision in *Dr. Willy Kaberuka v Attorney General*, Kampala HCCS No. 160 of 1993 and *Charles Otieno Caleb v Attorney General* [2014] KEHC 8485 (KLR), the Court was urged to award damages in excess of Kshs. 2,000,000/-.
24. On the claim of special damages to the tune of Kshs. 79,380,000/= counsel submitted that the same was specifically pleaded and proved. In conclusion, it was posited that the Plaintiff has demonstrated on a balance of probabilities the constituent ingredients on a claim founded on malicious prosecution, and therefore ought to be allowed as prayed.

Defendant's Submissions

25. The Defendant's counsel filed brief submissions towards deflection of the Plaintiff's suit. Submitting on the claim of legal fees, counsel argued that despite the Plaintiff's evidence that he paid legal fees in installment, the receipt for Kshs. 10,000,000/- adduced as evidence of the latter is an attempt to hoodwink the Court without evidence of the payments in installment. That the Plaintiff ought not to be condemned to pay such purported exorbitant legal fees without proper supporting evidence.
26. On the claim for travel expenses, counsel summarily submitted that there was no evidence on record to substantiate the claim of having expended Kshs. 10,000/- for 424 days as purported. Counsel likewise submitted that the claim for loss of business of opportunity and wages ought to be declined for lack of sufficient evidence.
27. Submitting on the Plaintiff's detention, it was argued that on the backdrop of the Plaintiff's documentary evidence, he failed to prove that he was detained for eighteen (18) days whereas any detention was lawful and pursuant to a Court order, therefore the claim for false imprisonment is unsubstantiated. Counsel went on to posit that the Plaintiff having been put to his defence and later acquitted under **Section 215 of the CPC**, the police had reasonable and probable cause of the Plaintiff's guilt whereas the latter's mere acquittal does not entitle him to succeed on his claim. The decision in **West Kenya Sugar Co. Ltd v Aloice &**

Another [2025] KEHC 15880 (KLR) was cited in the latter regard. In conclusion, the Court was urged to dismiss the suit for want of merit.

Analysis and Determination

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

Issues for determination-

- a. Whether the Plaintiff has made out a case for malicious prosecution and false imprisonment?*
- b. Whether the Plaintiff is entitled to an award of special damages in the sum of Kshs 79,380,000/-, damages for loss of business opportunities and aggravated damages?*
- c. Who ought to bear the costs of the suit?*

Whether the Plaintiff has made out a case for malicious prosecution and false imprisonment?

29. At the heart of the suit is a determination whether the Plaintiff has established on a balance of probabilities that his prosecution as instigated was malicious by design, without reasonable and or probable cause, and whether his imprisonment was false.

Pertinent to the determination of the said issue are the pleadings, which forms the basis of the respective parties' case before this Court. See-; **Wareham t/a A.F. Wareham**

& 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91.

30. Akin to pleadings is evidence in support of the pleadings. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the Evidence Act. In **Karugi & Another v Kabiya & 3 Others (1987) KLR 347 the Court of Appeal** stated that:-

“ The 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.”

31. As stated earlier, the Plaintiff's cause of action was founded on malicious prosecution and false imprisonment. At this juncture, I propose to address the first limb of the Plaintiff's cause. It is trite that the conjunctive elements to be proved in an action founded on malicious prosecution are well settled since **Mbowa** (supra), where the East African Court of Appeal summarized the law 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 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 other words, the defendant must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, he must have had, "an intent to use legal process in question for some other than its legally appointed and appropriate purpose" **Pike v.***

Waldrum [1952] 1 Lloyd's Rep. 431 at p. 452;
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..."

See also **Murunga v Attorney General (supra)**

32. The above ingredients must be established for a claimant to succeed in a cause of action founded on malicious prosecution. The undisputed events leading hereto are that the Plaintiff was at all material times relevant to the suit a director and later treasurer of **Mbo-I-Kamiti Ltd. On or about 06/06/2004** he was arrested and later charged alongside others of various offences in Kiambu Chief Magistrates Court in Criminal Case No. 1522 of 2004. It is equally undisputed that the Plaintiff was discharged in respect of the offences in the latter matter.
33. However, he was subsequently arrested and charged alongside others with four (4) offences in Nairobi Chief Magistrates Court in Criminal Case No. 469 of 2005. Despite the aforesaid he was eventually acquitted under Section 215 of the CPC of the four (4) offences on 10/01/2014 thereby leading up to the instant proceedings.
34. As such, it is not in dispute that the criminal proceedings were commenced by the Defendant's agents and later

terminated in favour of the Plaintiff wherein the latter was acquitted of all charges preferred against him. The forestated in essence resolves ingredients (1) and (4) in Mbowa (supra).

35. Having established the above, what presents for consideration at this interval is whether the Defendant's agents acted without reasonable or probable cause; and acted maliciously thus leading to the prosecution of the Plaintiff. According to Halsbury's Laws of England, 4th Edition - Reissue, Vol.45 (2) -:

“Reasonable and probable cause for a prosecution has been said to be an honest belief in the guilt of the accused person based on a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of an accuser, to the conclusion that the person charged was probably guilty of the crime”.

36. In **Murunga v Attorney General [1979] KLR 138** the Court applied the test in **Kagane (supra)**, namely that, whether there was a reasonable and probable cause for the prosecution, is primarily to be judged on the objective question whether the material known to the prosecutor would satisfy a prudent and cautious man that the accused was probably guilty.

37. At the outset, it necessitates reminder that the Defendant did not call any evidence to shore up the averments in its statement of defence nevertheless as observed in **Karugi & Another (supra)**. The Plaintiff must adduce evidence which, in the absence of rebuttal evidence by the Defendant convinces this Court that on a balance of probabilities, the latter acted without reasonable or probable cause.
38. Here, the Plaintiff's evidence had earlier been set out in this judgment. That said, from the undisputed facts and at the risk of repetition, what I garner from the Plaintiff's evidence, particularly Pexh.13 - being the judgment in Nairobi Chief Magistrates Court in Criminal Case No. 469 of 2005 - is that, the Plaintiff was at all material times relevant to the suit a director and later treasurer of **Mbo-I-Kamiti Ltd.** A cursory perusal of the Pexh.1 - the charge sheet in Kiambu Chief Magistrates Court in Criminal Case No. 1522 of 2004 - the Plaintiff was charged with the offence conspiracy to defraud contrary to **Section 317 of the Penal Code** and stealing by director contrary to **Section 282 of the Penal Code**. Notably, the Plaintiff did confirm that he was discharged of the aforestated offence pursuant to **Section 87A of the CPC**.
39. Which then brings me to the proceedings in Nairobi Chief Magistrates Court in Criminal Case No. 469 of 2005. Here,

the charges preferred as against the Plaintiff consisted of-; obtaining registration by false pretenses contrary to **Section 320 of the Penal Code**; giving false information to a person employed in the public service contrary to **Section 129(a)** of the Penal Code; false statement by official of a company contrary to **Section 329** of the **Penal Code**; and stealing contrary to **Section 275** of the **Penal Code**.

40. Revisiting Pexh.13, the Plaintiff rendered an unsworn statement before the criminal Court wherein he confirmed that he had initially been co-opted to act as a director of Mbo-I-Kamiti Ltd vide a general meeting held on 06/12/2001 and later vide another general meeting held on 18/07/2002 and later appointed by the board of directors of the company as its treasurer.
41. He equally confirmed that there were wrangling factions within the said company wherein one of the wrangling factions held a meeting on 23/10/2002 and registered its leadership with the registrar of companies at the time. Further there was a subsequent election held on 21/03/2003 presided by an officer of the Registrar General Office wherein he presented himself for election, to wit, the elected persons were registered on the same day. That the validity of the said elections, were further the subject of the suit in Nairobi HCCC No. 333 of 2003.

42. Meanwhile, the trial Court upon reviewing the evidence presented, analysed the same whereas it linked and de-linked the evidence alongside the charges preferred as against the accused, among them being the Plaintiff, to wit, it eventually established that the prosecution had failed to establish any case beyond reasonable doubt as against the plaintiff and his co accused persons.
43. Reading the trial court's judgment, it arrived at the determination that the Plaintiff was duly elected as an officer holder of Mbo-I-Kamiti Ltd notwithstanding the prosecution's failure to call one George Mola, - Assistant Registrar General - as a witness. Therefore, in light of the Plaintiff's position, in Mbo-I-Kamiti Ltd, and with the above facts in reserve, the question that begs is whether there was reasonable or probable cause for the several charges being preferred as against the Plaintiff.
44. In my estimation, even in the absence of the defence calling any evidence, reviewing Pexh.13- judgment in Criminal case no. 469/2005, alongside the charge sheet, premised on the above it was not is dispute that the Plaintiff by dint of the office he held would have been in a position to perpetuate the offences he was charged with. As to whether, he actually perpetuated the said offences, he was exonerated by the criminal Court upon being put on his defence, given the prosecution's failure to discharge its

burden of proof beyond reasonable doubt, and to wit, he was acquitted of the charges.

45. To the forestated end, the question that arises is whether the Plaintiff proved that the Defendant's agents acted without reasonable or probable cause, in light of the above facts?

46. As to what constitutes reasonable or probable cause, the Court of Appeal in **Mukonya v Equity Bank Limited & another [2025] KECA 1720 (KLR)** observed that-;

“What amounts to reasonable and probable cause is the existence of a state of circumstances that would reasonably lead a prudent and conscious accuser or prosecutor to the conclusion that the suspect is probably guilty of the crime he is accused of. The four elements are conjunctive so that even in the absence of reasonable and probable cause, still, the plaintiff must prove that the prosecution was actuated by malice. In this regard, while the absence of reasonable and probable cause may be indicative of the presence of malice, the plaintiff needs to do more to demonstrate that the prosecution was actuated by malice or motivated by some ulterior reason other than a genuine pursuit of justice for the victim or in public interest...”

47. From the evidence tendered, I believe that I have reasonably addressed myself to the fact that there was reasonable and probable cause leading up to the Plaintiff's arrest and subsequent arraignment, given his position. The state through the prosecution held a reasonable and probable cause in the existence of a state of circumstance that would reasonably lead to the conclusion that the Plaintiff was probably guilty of the crime he was accused of. Thus, leading to the Plaintiff's arrest and charges being preferred as against him. This notwithstanding his discharge with respect to charges in Kiambu Chief Magistrates Court in Criminal Case No. 1522 of 2004, it is a trite that a discharge pursuant to Section 87A of the CPC is not a bar to subsequent prosecution over the same set of facts.

48. Notably, reasonable or probable cause ought to be considered alongside the question of malice. Here, the **Court of Appeal in Commissioner of Customs & Excise v Hasmukh Shamji Halai & 3 others [2018] KECA 669 (KLR)** pronounced itself as follows; -

"31. The final element for proof was malice. For it would not matter that there was an acquittal of the two respondents; that the commissioner was the instigator of the prosecution; and that there was no probable or reasonable cause for it, if it is established that there was no malice. All the elements must

dovetail in order to establish a cause of action. As this Court stated in **Nzoia Sugar Company Ltd vs Fungututi [1988] KLR 399:**

“Acquittal per se on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor.”

32. In the Githaiga case (*supra*) the court explained as follows:-

“The malice requirement is the key to striking the balance that the tort was designed to maintain: between society’s interest in the effective administration of criminal justice and the need to compensate individuals who have been wrongly prosecuted for a primary purpose other than that of carrying the law into effect.”

Referring to the element of malice, the former East African Court of Appeal in the **Mbowa case (supra)** stated:-

“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 purpose other than its legally appointed and appropriate purpose.” (sic)

49. The same Court in **Hassan Magiya Kiage v Attorney General & another [2017] KECA 203 (KLR)** cited with

approval the words of the **Supreme Court of Canada in Nelles vs. Ontario [1989] 2SCR 170** to the effect that:

“Finally, the initiation of criminal proceedings in the absence of reasonable and probable grounds does not itself suffice to ground a plaintiff’s case for malicious prosecution, regardless of whether the defendant is a private or public actor. Malicious prosecution, as the label implies, is an intentional tort that requires proof that the defendant’s conduct in setting the criminal process in motion was fueled by malice. The malice requirement is the key to striking the balance that the tort was designed to maintain between society’s interest in the effective administration of criminal justice and the need to compensate individuals who have been wrongly prosecuted for a primary purpose other than that of carrying the law into effect.”

50. Was there a demonstration of malicious collusion either out of spite or ill will, by the prosecution, to prosecute the Plaintiff?

In this case, from the evidence both before this Court and the criminal trial Court the Plaintiff failed to lay any foundation basis that there was an improper and wrongful motive or collusion either out of spite or ill will to prosecute the Plaintiff. As observed in the aforestated decisions, malice is the cornerstone towards succeeding on a claim

founded on malicious prosecution whereas no basis has been laid that the Plaintiff's prosecution was an intended use of the legal process in question for some purpose other than its legally appointed and appropriate purpose.

51. The fact that the Plaintiff was detained prior to his prosecution; the prosecution disregard of evidence; failure to call pertinent witnesses; and or failure to prove any evidence as to facts and circumstance upon which the Plaintiff's arrest, detention and prosecution was initiated, in my considered view cannot be synonymous with malice. Abuse of authority can equally not be tantamount to malice in the context of a suit founded on malicious prosecution. The former is a claim in itself that the Plaintiff can litigate on, if facts present. Further, shoddy investigations do not connote malice as such onus was on the Plaintiff to visibly and identifiably demonstrate malice.

52. Therefore, as earlier observed, there was a reasonable and probable honest belief in the guilt of the accused persons that would reasonably have led any ordinary prudent and cautious man, placed in the position of an accuser, to conclude that the persons charged were probably guilty of the crime, hence the Defendant's agent's actions. Even where the Plaintiff was acquitted of the charge, it was incumbent upon him to discharge the burden of proving the various ingredients required in a successful suit for malicious prosecution. Thus, in my own evaluation, the

Plaintiff's case did not rise to the standard of proof on a balance of probabilities of the ingredients necessary to establish a case of malicious prosecution against the Defendant.

53. On the second limb of false imprisonment, the Defendant's agents' power to arrest and detain is statutorily provided for in **Section 29 and 36 of the CPC**. Nevertheless, such power ought to be exercised with reason and probable cause. **Black's Law Dictionary, 7th Edition**, defines '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."

54. 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 v. Attorney General of Uganda, EACJ Reference No. 5 of 2011** wherein it expressed at Paragraph 108;

"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."

55. **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.”

56. Here, it is notable that the events leading up to the Plaintiff's arrest and detention transpired during the dispensation of the old constitution. The frailties of the old constitution with respect to the rights of an arrested person have since been cured and codified in **Article 49 of the 2010 Constitution**, to encompass stringent edicts.
57. The Plaintiff states that he was falsely imprisoned for a total of eighteen (18) days. Particularly, by his evidence he stated that he was arrested on 26/05/2004 and released on 31/05/2004 on a police bond of Kshs. 20,000/-. By dint of Section 29 & 36 of the CPC and the **Section 72(3) of the repealed Constitution**, the Defendant's agents acted within their purview to detain Plaintiff for the five (5) days pending investigation and or his arraignment in Court.
58. Concerning the thirteen (13) days in which he was remanded at Industrial Area police station, the Plaintiff contended that charges were preferred against him on 29/07/2004 however; he was not informed of the said date. When he appeared in Court on 06/08/2004, he found that his police bond had been forfeited and warrants of arrest issued whereas he was eventually released on 19/08/2004.
59. The Plaintiff by his evidence equally confirms that he was bonded and required to attend to the station DCIO every

day therefore it is unfathomable that charges were preferred against him without his knowledge. In all probability, it appears that charges were preferred against the Plaintiff however; he failed to attend Court as at when required. His failure to attend Court was the legal basis for his imprisonment for the said thirteen (13) days therefore his claim on false imprisonment for thirteen (13) days, is not justifiable.

60. It would be remiss if the Court were not to note that upon the Plaintiff's arrest on 26/05/2004, he states that his vehicle was detained at Kiambu Police Station and appears to only have been released upon the latter obtaining a Court order on 22/07/2005. It is apparent the detained motor vehicle was not the subject of the charges preferred as against the Plaintiff or criminal proceedings.
61. As such, there was no basis for the vehicle's detention in my estimation. I equally note that the Plaintiff claimed in his pleadings, an award of a special damage on travel expenses to the tune of Kshs. 4,240,000/-, which I agree ostensibly must have been occasioned during the period in which his vehicle was detained. However, no receipts were adduced to justify the costs of Kshs. 10,000/- as taxi expenses whereas the Plaintiff did not seek damages for unlawful detention of his vehicle.

62. In light of the above, it is trite that special damages when pleaded must be specifically proved whereas it is equally settled that parties are bound by their pleadings. . Thus, the Plaintiff having failed to specifically prove the claim on travel expenses and or plead damages for unlawful detention of his vehicle, this Court is hamstrung to award any form of recompense, in light of the above.
63. Meanwhile, the Plaintiff having failed to establish on a balance of probabilities his claim on malicious prosecution or unlawful imprisonment, it follows that his claim for special damages in the sum of Kshs 79,380,000/-, damages for loss of business opportunities and aggravated damages, cannot sustain.
64. In the end, I believe I have reasonably addressed myself to the Plaintiff's claim in arriving at the conclusion that he has failed to discharge his burden of proof on a balance of probabilities. Or stated another way, under **Section 107 of the Evidence Act**, the burden of proof lay with the Plaintiff and because his evidence did not support the facts pleaded, he failed as the party with the burden of proof.
- 65. Consequently, this Court finds that the Plaintiff's suit lacks merit and is accordingly dismissed with no orders as to costs.**
- It is so ordered.**

**Delivered Dated and Signed at Nairobi this 16th day of
April, 2026.**

**JANET MULWA
JUDGE**

ORIGINAL