



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MAKHANDIA & OUKO, JJA)

CIVIL APPEAL NO. 315 OF 2010

BETWEEN

THE HON. ATTORNEY GENERAL.....1ST APPELLANT

MAJOR GENERAL HUMPHREY W. NJOROGE.....2ND APPELLANT

COMMISSIONER OF POLICE.....3RD APPELLANT

VERSUS

L.T. BENJAMIN MUEMA.....RESPONDENT

Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (J.B. Ojwang, J.) Dated 2nd June, 2006

in

Civil Suit No. 2230 of 2001

JUDGMENT OF THE COURT

The appeal arises from the Judgment of the High Court of Kenya at Nairobi (**J.B. Ojwang, J.**) (as he then was), dated 2nd June, 2006.

The background to the appeal is that the respondent filed a plaint dated 27th December, 2001 subsequently amended on 12th March, 2004, against the appellants averring *inter alia* that, he was recruited into the Armed Forces in the year 1995. He was subsequently granted a commission in the Regiment Territorial Force as an infantry Officer, granted a special contract as a helicopter pilot and instructor and posted to the defence staff college, Karen, established under the now repealed Armed Forces Act, Chapter 199 Laws of Kenya (the AFA). In March, 1993, while in the course of his duty at the said college, some police officers acting on instructions from the 3rd appellant raised complaints with the 2nd appellant against him. Without any investigations being carried out by the 2nd appellant as his immediate officer in-charge and as was required of the 2nd appellant by the provisions of the AFA, the 2nd appellant while in the company of police officers, armed with Rifles, pistols and revolvers prepared a letter of resignation and forced him to sign, which he did amid threats and intimidation. The appellants then framed several criminal offences against him, and caused him to be charged in Criminal Case Numbers 1989/93, 1996/93, 2286/93, 279/93, 1067/94, 732/2000, Revision 1/94 and Misc. CR. Application No.314/2000, all of which terminated in his favour as they were subsequently either dismissed at no case to answer stage of the trials or *nolle prosequi* entered by the office of the 1st appellant terminating them.

The respondent therefore sought against all the appellants jointly and severally, a declaration that his removal from his employment was unlawful, null and void; a finding that his arrest and subsequent

prosecutions were illegal, unprocedural and malicious; general damages for the illegal removal from office, promotion commensurate with that of his peers, damages for, illegal confinement, malicious prosecution and damage of reputation, damages for loss of use of his two (2) motor vehicles held by the police and the return of the same to him. Also sought were general damages for the unlawful termination of his employment, costs of the suit, interest and any other relief as the court may deem fit to grant.

In rebuttal, the appellants filed a defence dated 18th February, 2002, subsequently amended on the 15th day of February, 2005 contending *inter alia*, that, the respondent was non suited as the suit was not only bad in law and disclosed no cause of action against them, but was also statute barred by the Public Authorities Limitation Act Cap 39 of the laws of Kenya. In the alternative, that the respondent was arrested and charged in Civilian Courts following a reasonable suspicion that he had committed criminal offences; that proper investigations were carried out before the arrest and prosecution of the respondent hence allegations of malice and or illegality of the said prosecutions did not arise in the circumstances; that if indeed the respondent signed any resignation letter, then the same was done voluntarily and without any intimidation at all; that the respondents' suit as amended contravened the provision of order **VI Rule 8** of the Civil Procedure Rules (CPR). The appellants denied that the respondent was entitled to any of the reliefs sought against them and on that account urged for the dismissal of the suit against them with costs.

The cause was canvassed by way of oral testimony and written submissions orally highlighted by the respondent in person and learned counsel for the appellants.

The respondent was the sole witness in support of his claim. He basically reiterated the averments in the amended plaint, while the appellants tendered evidence in rebuttal of the respondent's claim through Major **Joseph Kosewe** based on the records held in the office as he was not privy to the events that triggered the litigation resulting in this appeal.

At the conclusion of the trial, the learned trial Judge assessed and analyzed the record, and variously made findings thereon, firstly, that no evidence was tendered by the appellant in support of any justification for the commencement of the prosecution process conducted against the respondent. In the Judge's opinion the entire process amounted to an abuse of the court process.

On the allegation that the suit was time barred, the Judge ruled that since the last *nolle prosequi* was entered by the office of the Attorney General, in respect of the last Criminal Case No. 1067/94 on 9th April, 2001, and the suit filed on 27th December, 2001, the suit was filed within the time limited for filing suits against the appellants. Secondly, that since the Judge had earlier rejected a preliminary objection raised against the validity of the suit on similar grounds in a ruling delivered on 22nd October, 2004, and against which no appeal was filed by the appellants, the suit was sustainable.

On the alleged respondent's own voluntary resignation from his employment, the Judge ruled that on the basis of the evidence tendered before him on the record, the respondent's resignation from his employment was obtained by means of coercion demonstrated by the undisputed existence of seven sets of criminal cases that were unsuccessfully preferred against him. Secondly, the Judge also believed the respondent's assertion as true that as at the time he appended his signature on the letter of resignation, he was surrounded by armed police. Thirdly, serious allegations levelled against the respondent were never subjected to an inquiry, the 2nd appellant ought to have conducted personally as the respondent's then commanding officer, cause an abstract of evidence prepared and served on the respondent and only if found culpable for the said allegations and upon satisfaction that these fell outside the redress procedures inbuilt in the AFA, is when the respondent could have been handed over to the police for prosecution in civilian court. This is the procedure the Judge found to be the correct procedure in law which the appellants ought to have invoked if they so desired to terminate the respondent's employment with them and which they did not and on that account ruled that the respondent's resignation was not voluntary and therefore unlawful.

On the mode of procedure adopted by the appellants for the removal of the respondent from his employment, the Judge construed **sections 69 & 115** of the AFA, and considering these in light of the

record and made findings that the appellants had no reasonable and or probable cause for forcing the respondent to resign both from his employment and the commission; that the appellants' intention of hastily removing the respondent from military service, and subjecting him to unsuccessful criminal prosecutions for criminal offences in Civilian Courts was meant to circumvent and therefore robbed him of the right of benefiting from the employment protective safeguards in built in the AFA.

In light of the above assessment and reasoning, the Judge found the respondent's claim, against the appellants proved to the required threshold of balance of probability granted declarations, that the respondents removal from both his employment and commission in the Armed Forces by the appellants was unlawful, null and void; that the arrest and subsequent criminal prosecutions mounted by the appellants against the respondent were all illegal and therefore without reasonable or probable cause, in violation of the provisions of the law considering that they were all subsequently terminated in his favour, they were actuated by malice.

On account of the above findings, the Judge therefore awarded general damages against the appellants jointly and severally as follows: Kshs. 400,000/= for wrongful arrest and illegal confinement of the respondent; Kshs. 400,000 for malicious prosecution together with interest at Court rates from the date of Judgment. For loss of career advancement, the Judge allowed a figure equivalent to the respondent's net income from his employment as a lieutenant-colonel for the whole period running from the beginning of April, 1993 to his 50th birthday, with appropriate adjustments made to reflect higher status to which he would have moved, in the normal course of military service, taking into account any compensations already paid to the respondent. It was directed that the correct figure of monies payable under this head be formulated by the parties and appropriate orders made by the Deputy Registrar with a rider that any further dispute on amounts payable under this head was to be resolved through applications before a Judge in chambers, in the Civil Division of the High Court. Also granted was an order for the release of motor vehicles, Isuzu Trooper Reg. No. KE70-014061 and Toyota Corona Reg. No. KAB 825Q; a sum of Kshs. 600,000/= for the unlawful detention of the said motor vehicles with interest at court rates effective from the date of the Judgment; an order that any applications necessary for the purpose of giving fulfillment to the decree to be made before a Judge in Chambers, in the Civil Division; and costs with interest at Court rates effective from the date of filing of the suit.

The appellants were aggrieved. They are now before this Court on a first appeal raising twelve (12) grounds of appeal subsequently condensed into seven (7) grounds which may be paraphrased as follows: that the learned Judge erred both in law and in fact when: *he included the 2nd and 3rd respondents as parties in the primary suit; he failed to find that the respondent's suit was statutorily barred; he made findings that the respondent's arrest and confinement was unlawful; he held that the respondents' prosecution was actuated by malice; he held that the trial of the respondent before civil courts as opposed to a court martial was unlawful; he held that the respondent was illegally, unlawfully, unprocedurally removed from his employment; and lastly when he arrived at an erroneous award of damages.*

The appeal was canvassed by way of written submissions filed by learned counsel for the respective parties and fully adopted by **Mr. K. Onyiso** for the appellants without orally highlighting them; and learned counsel **Mr. Wambua Kilonzo & Nicholas Malonza** for the respondent which were orally highlighted.

Supporting the appeal, the appellant relied on the High Court case of **Gabriel M.G. Chandi, Sayyid Mrera and Mchomba Omar versus the Registrar of Societies, Mombasa HCCC No. 14 of 2005** in support of the submission that the 2nd and 3rd appellants were not necessary parties to the primary suit and that such joinder was in contravention of **section 12(1)** of the Government Proceedings Act Cap 40 of the Laws of Kenya which stipulates clearly that civil proceedings by or against the government should be instituted by or against the Attorney General.

The appellants relied on the case of **Benard Mutonga Mbithi versus Municipal Council of Mombasa and another Civil Appeal No. 3 of 1992** and the case of **Masulal Maganlal Rawal versus Maneklal Rawal Civil Case No. 128 of 1962** in support of the submission that the primary suit ought to have been dismissed as the same had been filed out of time.

Relying on **section 70** of the AFA, the appellants submitted that police had independently carried out their own investigations and found the respondent culpable of involvement in criminal activities before requesting the second appellant to hand him over to police for prosecution; and since one of the offences the respondent faced was robbery with violence, there was sufficient justification for his arrest without a warrant. The respondent's arrest and prosecution was lawful in the circumstances and therefore urged us to fault the Judge for holding otherwise.

The appellants relied on the case of **George Masinde Murunga versus the Attorney General [1979] KLR 138; Kagane versus Attorney General [1969] EALR 643 and Joseph C. Mumo versus Attorney General and another [2008] eKLR**, in support of their submission that police were justified in arresting the respondent and causing him to be variously prosecuted for criminal cases in Civilian courts as they had information in their possession, that he was involved in criminal activities. They also had in their possession two motor vehicles namely Izuzu Trooper Reg. No. KE70-014061 and Toyota Corolla Reg. No. KAB 825Q which they intended to use as exhibits, in addition to several complainants who had also come forward and whom the prosecution intended to call as witnesses to testify against the respondent. On that account they urged us to fault the Judge for holding that the prosecution was malicious.

Relying on **section 143 (1)** of the AFA, the appellants submitted that the criminal offences the respondent faced did not fall into the category of offences triable by a Court Martial. The Judge was therefore in error when he held that the respondent should have been subjected to a Court Martial before being prosecuted in Civilian Court and on that account maintained that the respondent voluntarily resigned both from his employment and commission with the Armed Forces.

Relying on the case of **Kenfreight (EA) Ltd versus Benson K. Nguti Mombasa CA No. 31 of 2016**, the appellants faulted the Judge for the failure to appreciate that there was no basis for an award of damages for false arrest and illegal confinement, malicious prosecution, loss of career advancement, as these were not provided for in **section 16** of the Employment Act, 1976. On the totality of the above, the appellants urged us to allow the appeal with costs to them.

Opposing the appeal, learned counsel **Mr. Wambua Kilonzo** relied on **sections 69, 81(1), 81 (3), 169 and 171** of the AFA, and **Rules 7 and 8** of the Armed Forces Rules of procedure, and submitted that the respondent's employment and commission in the Armed Forces was statutorily underpinned and protected under the AFA; that respondent's contention that he was forced to resign both from his employment and commission was proved to the required threshold of proof on a balance of probability as the appellants own witness admitted on oath that he was not privy to the circumstances surrounding the respondent's resignation. Counsel also relied on the proviso to **section 7** of the Government Proceedings Act and submitted that, the protection provided for in that section did not extend to absolving the appellants from liability for wrongs committed against the respondent as going by their own admission through the testimony of DW1, the 2nd appellant flaunted the provisions of the AFA, when he failed to carry out the necessary investigations, prepare an abstract of evidence, invite the respondent to respond to the same as was required of him by **section 80** of the AFA, make an informed opinion that allegations then leveled against the respondent fell outside the parameters provided for offences triable by courts Martial before taking a decision to hand him over to police for prosecution in civilian's courts.

Relying on the case of **Hassan Magiya Kiage versus Attorney General & another [2017] eKLR**, counsel submitted that **section 12(1)** of the Government Proceedings Act, which indicates that it was subject to other laws did not bar the joinder of the 3rd appellant to the primary suit. Secondly, that **Order 1 rule 3** of the Civil Procedure Rules as it was then permitted the joinder of parties to proceedings as defendants against whom any right to relief in respect of or arising out of the same act or transactions or series of acts or transactions was alleged to exist; that the respondent's claim against the 3rd appellant related to malicious prosecution arising from the numerous criminal charges the respondent faced in civilian courts at the instigation of the 3rd appellant's officers and which were subsequently all resolved in the respondent's favour. It was therefore necessary in the circumstances for the 3rd appellant to participate in the proceedings firstly, to respond to the respondent's allegations that the instigated criminal

prosecutions against him were in fact malicious.

On adequacy of pleadings on the tort of malicious prosecution, counsel referred to paragraphs **5, 8 and 9** of the amended plaint and submitted that the content of the aforementioned paragraphs were a clear demonstration that particulars of malicious prosecution were sufficiently pleaded. As for their proof, counsel relied on the undisputed existence of the numerous unsuccessful prosecutions against the respondent as sufficient proof that the respondent's arrest and subsequent prosecution was not justified and was therefore without probable and or reasonable cause as correctly found by the Judge, a position we were urged to affirm.

On the appellants contention that the respondent's claim against them was time barred, counsel relied on the case of **Mbowa versus East Mengo Administration [1972] 1EA 352** and urged us to affirm the Judge's well founded findings that, since proceedings in the last criminal case against the respondent terminated on 9th April, 2001 when the last *nolle prosequi* was entered by the 1st appellant, time for purposes of Government Proceedings Act for the laying of a claim for malicious prosecution, started to run on the same 9th April, 2001; and since the suit was commenced on 27th December, 2001 by a plaint in which malicious prosecution was pleaded, in paragraphs **6,7 and 9** of the said plaint, together with particulars attendant thereto, the suit was filed within time. That the subsequent leave of court granted to the respondent to join the 3rd appellant to the proceedings was for purposes of bringing into the proceedings the person against whom the claim for malicious prosecution had been sought. Such an amendment in counsel's view related back to the date of commencement of the suit.

We were therefore urged to find as did the trial Judge that the joinder of the 3rd appellant to the primary suit at that point in time did not therefore imply or mean that the cause of action against the 3rd appellant accrued at the date of joinder; that such a joinder was not contrary to **section 3(1)** of the Public Authorities Limitation Act as it was in line with the provisions of **order 1 Rule 10** of the Civil Procedure Rules as it was then which mandated a court at any stage of the proceedings and on such terms as may appear to the court to be just to order the joinder of a party to proceedings to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit especially when no prejudice was occasioned to the appellants as they were accorded corresponding leave to amend their pleadings in response to any new issues that may have arisen as a result of the respondent's amendment of the plaint.

Counsel also relied on the case of **Eric V. J. Makokha & 4 others versus Lawrence Sagini & 2 others [1994] eKLR** and submitted that the appellants flouted the provisions of the AFA when terminating both the respondent's employment and commission in the Armed Forces. They were therefore properly found by the trial court liable to pay him damages as awarded by the trial Court for the unlawful loss of the respondent's career especially considering that had the second appellant complied with the prerequisites in **section 77** of the AFA, these proceedings would have been rendered unnecessary. On that account counsel urged us to dismiss the appeal and affirm the trial Judge's finding.

This being a first appeal, our duty is as was aptly stated in the case of **Selle versus Associated Motor Boat Co. [1968] EA 123**: namely to:

“Reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E.A.C.A 270.”

We have considered the record in light of the rival submissions and principles of law relied upon by the respective parties in support of their opposing positions. We have identified the following issues for our determination, namely, Whether: *the suit was time barred; the Court was justified in joining the 2nd and 3rd appellants as parties to the primary suit; the respondent's prosecution was lawful or actuated by*

malice; the respondent's removal from office was lawful; and lastly the reliefs awarded by the trial court lay in law.

On the 1st issue, it is evident from the record that the trial Judge made a definite finding and correctly so in our view, that a *nolle prosequi* was entered by the Attorney General on 9th April, 2001 in Criminal Case No. 106/94 which was the last of the numerous Criminal cases the respondent faced in Civilian Courts; that the suit was filed on 27th December, 2001, and on that account, the Judge ruled that the suit was filed within time. The court also added that it had delivered a ruling on 22nd October, 2004 in which it dismissed technical impediments raised against the suit by the appellants and ordered the hearing of the suit to proceed, which in fact did proceed to hearing to its logical conclusion. In light of the above, the suit the suit was definitely filed within time for purposes of limitation which in our view and as correctly found by the Judge started running from the 9th of April, 2002 when the last *Nolle prosequi* was entered. The suit having undoubtedly been filed on 27th December, 2001 less than nine months from the date the cause of action accrued was filed within time. Secondly, and as correctly observed by the Judge, no appeal was filed by the appellants against the Judge's order sustaining the suit following rejection of a preliminary objection raised by the appellants against the validity of the suit. In light of the above reasoning, we affirm the Judge's finding that the suit was properly founded and was therefore not time barred.

On the 2nd issue, the record is explicit that the 2nd and 3rd appellants were joined to the suit pursuant by an order of the Court granting leave to the respondent to join proceedings as parties. The respondent's contention as at the time when the application for joinder was made and at this appellate stage has consistently been that **Order 1 Rule 3** of the Civil Procedure Rules as it was then, made provision for all persons against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions giving rise to proceedings before court was alleged to exist and who in the opinion of the court and as demonstrated on the facts on the record, before court to be necessary parties, the court had mandate to direct that such persons be joined as parties to the suit especially where there was demonstration of likelihood of joint and several liability arising. Secondly, where if separate suits were brought against such persons, any common question of law or fact would arise for consideration were amenable to be joined as parties to a suit.

We have revisited the said provision as it was then, construed it on our own and considered it in light of the rival submissions on this issue as set out above and make a finding that from the content of the opposing pleadings, there is no doubt that the 2nd and 3rd appellants were directly involved in the arrest and the various unsuccessful criminal prosecutions of the respondent in Civilian Courts. They were therefore in the circumstances necessary parties to the proceedings, firstly, to accord them an opportunity to respond to the respondent's allegations, that their acts and/or commissions occasioned damage to the respondent and in respect of which he had claimed damages from the 2nd appellant as his then immediate commanding officer and the person who undoubtedly handed him over to the 3rd appellant's officers for prosecution before the civilian courts even before subjecting him to inbuilt internal investigative procedures within the AFA. The 3rd appellant on the other hand was the person who undisputedly requested the 2nd appellant to allow his officers to arrest the respondent for prosecution in civilian courts. Further, the 2nd and 3rd appellants were alleged to have acted in excess of their lawful authority and in contravention of the AFA; to that extent, they were liable for the acts done in their official character but in excess of their lawful authority. See **Ethics and Anti-Corruption Commission V Judith Marylin Okungu & Anor**, Civil Appeal No. 183 of 2014 where this Court cited, with approval, the English case of **M V. Home Office & Anor** (1993) 3 ALL ER 537 where it was stated thus on personal liability;

"...With us every official, from Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorize as is any private and unofficial person. (See Introduction to the Study of the Law of

the Constitution (10th edn, 1965) pp193-194.)” (Emphasis Ours)

In light of the above reasoning, it is our finding that there was need for both the 2nd and 3rd appellants to participate in the proceedings in the primary suit, and as correctly found by the trial Judge to explain the reasonableness and or justification of their actions. Further, considering that they did not appeal against the ruling of the trial court on joinder, there is no basis for them revisiting that issue on appeal in the absence of proof that they reserved their right to do so on appeal; in the event of any arising.

As for the 3rd issue, the principles that guide determination of a claim founded on malicious prosecution were laid down by **Cotran, J** (as he then was) in the case of **Murunga Vs. Attorney General [1979] KLR, 138** namely that the plaintiff must:

“show that the prosecution was instituted by the defendant, or by someone for whose acts he is responsible; that the prosecution terminated in his favour; that the prosecution was instituted without reasonable and probable cause and lastly that the prosecution was actuated by malice.”

We have applied the above threshold to the rival positions in this appeal on this issue. We are in agreement with the finding of the trial Judge that malicious prosecution was proved to the required threshold. Our reasons for affirming the trial Judge’s findings on this issue is firstly, because it is not in dispute that the prosecution was initiated against the respondent as opposed to subjecting him to Court Martial proceedings. Secondly all the criminal cases initiated against him were terminated in his favour which is sufficient proof that the said prosecutions were initiated without reasonable and or probable cause. Thirdly, the unsuccessful initiation of a large number of criminal cases based on the same facts and background leaves no doubt in our minds that there was malice, especially when no effort was made by the appellants to tender evidence in court to justify those prosecutions as the witness tendered in support of their case was categorical in oath that he was not privy to the events that led to those prosecutions and knew nothing about it.

On illegal 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”**.

While false imprisonment is defined in the same Dictionary 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.”

The arrest and detention of the respondent was not denied by the appellants. Instead, they pleaded justification for the said arrest and confinement without a warrant because, according to them, one of the offences the respondent was accused of was robbery with violence, there was justification for his arrest without a warrant. As already stated above and correctly found by the trial Judge, the offences levelled against the respondent were numerous, and involved the liberty, life and career of the respondent then a commissioned officer in the Armed Forces and therefore as opined by the trial Judge, a position we affirm, justice demanded that there be justification and or reasonable and probable cause for such arrest and prosecution. The appellants failed to justify the arrest and detention.

As to whether the respondent’s removal from office was lawful, it is evident from the record that the trial court believed the testimony of the respondent as a party who participated in the events that gave rise to his resignation. As opposed to the sole witness tendered in court to give evidence on behalf of the appellants and who as we have already stated above admitted on oath that he had no knowledge of events that led to the respondent’s resignation as he merely gave evidence from the records held in their office. We therefore find nothing to fault the Judge for believing the respondent’s testimony and arriving at the above conclusion, that he was forced to resign from his employment and commission with the Armed Forces.

Turning to issue as to whether the reliefs awarded to the respondent were well founded in law, the

appellants' contention on appeal with regard to those reliefs has consistently been that there was no basis for allowing them, because according to the appellant the law applicable then which according to them was the repealed Employment Act of 1976 made no provision for an award of general damages. We do not agree with the appellants' assertion that the law applicable to the issues before the trial court was the repealed Employment Act 1976, which provided for compensation for the period notice only. This is because the events that led to the resignation of the respondent from his employment and commission in the Armed Forces did not flow from a contract of employment executed under the said law and therefore subject to the provisions of the said Act, but a contract of employment executed by and a commission accorded to the respondent pursuant to the provisions of the AFA.

It is not disputed that the AFA made provision for an inbuilt court Martial procedures for officers alleged to have transgressed the provision of the said Act. The same Act also made provision for circumstances under which transgressions of provisions of the said Act may be proceeded with in Civilian courts as opposed to being subjected to Court Martial procedures. The findings of the Judge was that the above procedures were not invoked to determine whether the alleged offences were excluded from offences subject to Court Martial procedures before subjecting the respondent to Civilian Courts prosecution and therefore occasioned him an injustice that robbed him of the right to benefit from those provisions. The appellants have failed to controvert that position both at the trial and on appeal.

The guiding principles of law laid down in **Eric V. J. Makokha & 4 others V. Lawrence Sagini & 2 others** (supra), is *inter alia* that a position of employment underpinned by statute law being a protected position, the terms of the statute must in such a case be adhered to when terminating the services of an employee whose employment is so statutorily protected. We find nothing on the record to compel us to depart from the trial Judge's finding that it was the 2nd appellant's hastily move of handing over the respondent to the 3rd appellant's officers for prosecution in civil courts before subjecting the claims levelled against him to Court Martial procedures that caused the respondent his career for which an award of compensation was inevitable. Secondly, that the claim had been laid in tort and therefore attracted an award of general damages for the tortious action whose commission against the respondents was attributed to the appellants. We find no error in the stand taken above by the Judge as in our view, it was well founded both on the facts and the law.

Turning to the specific heads of damages awarded, it is our finding that the award of general damages for false arrest and illegal confinement and malicious prosecution in the sum of Kshs. 400,000/- for each head, as well as Kshs. 600,000/-for unlawful detention and loss of use of the respondent's motor vehicles are affirmed as these were well founded both on the facts and the law.

As for damages for loss of future career prospects directed by the Judge to be worked out by the Deputy Registrar. The approach we adopt is similar to that taken by this Court in Nairobi Civil Appeal No. 108 of 2009 **Kenya Revenue Authority versus Manginya Salim Murgan**, where the Court when confronted with directions made by the trial Judge in the discharge of his judicial functions to assess damages, and, instead of doing so, delegated that function to the Deputy Registrar, the Court categorically stated as follows:

“Both the award and the level or quantum of damages is in our view, judicial function where the superior court cannot rightly delegate to a Deputy Registrar.”

Further that:

“...We consider the delegation of the assessment or quantification of damage a more serious Judicial function than the signing or delivery of Judgment by a Deputy Registrars and therefore we would allow the appeal on this ground as well.”

We associate ourselves fully with the above enunciation as stating the correct position in law. We therefore set aside the order directing the Deputy Registrar to assess damages for loss of employment, assume that mandate and proceed to assess an appropriate award. In deciding on an appropriate award, we bear in mind the guiding principle on assessment of damages which is now trite, namely, that damages

should not be inordinately too high or too low. Secondly, that an award of compensation by way of damages is not meant to facilitate an unjust enrichment of an aggrieved party, but to redress economic injustices suffered by the aggrieved party in appropriate circumstances as those demonstrated to exist in this appeal. See **Elizabeth Wakanyi Kibe versus Telkom Kenya Ltd [2014] eKLR.**

We also bear in mind the undisputed position on the record that the respondent received some payments from his employer and was also said to be on some form of pension. All in all, and doing the best we can, we find an award of Kshs. 5,000,000/= would in the circumstances be adequate compensation for the respondent's loss of his employment. It will carry interest at court rates from the date of Judgment in the lower court.

The appeal fails and we make the following orders:

- 1. Kshs. 400,000/= general damages for false arrest and illegal confinement.**
- 2. Kshs. 400,000/= general damages for malicious prosecution.**
- 3. Kshs. 600,000/= general damages for unlawful detention and loss of use of the respondent's motor vehicles.**
- 4. Kshs. 5,000,000/= as compensation for loss of employment.**
- 5. The amounts awarded under items 1, 2, 3 and 4 above to carry interest at Court rates from the date of Judgment until payment in full.**

With the exception of rewording and substituting the award of damages for compensation for loss of employment, we find no merit in the appeal. It is accordingly dismissed with costs to the respondent both on appeal and the court below.

Dated and Delivered at Nairobi this 30th day of August, 2019.

R.N. NAMBUYE

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JUDGE OF APPEAL

ASIKE- MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR