



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WAKI, NAMBUYE & OKWENGU, JJ.A.) CIVIL APPEAL NO.213 OF 2014**

**BETWEEN**

**LUCAS OMOTO WAMARI.....APPELLANT**

**AND**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTION.....2<sup>ND</sup> RESPONDENT**

***(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Majanja, J.), dated 31st March, 2014 in H.C. Constitutional & Human Rights Petition No.294 of 2012***

\*\*\*\*\*

**JUDGMENT OF THE COURT**

1. By a petition dated 12th July, 2012, filed in the High Court Constitutional and Human Rights Division, and subsequently amended on 17th September, 2012, **Lucas Omoto Wamari** who is the appellant herein sought judgment against the Hon. Attorney General and the Director of Public Prosecutions (herein the 1st and 2nd respondents respectively).

2. The reliefs prayed for were declarations regarding violations of the appellant's fundamental rights and freedoms, which included right to life; personal freedom, liberty and rights of an arrested person; rights to security and protection of law; right to dignity and protection from cruel inhuman and degrading treatment. The petitioner also sought special and general damages arising from the violations, and exemplary, aggravated and punitive damages for the oppressive and high handed violations of his constitutional rights by officers of the government.

3. In a nutshell, the appellant's petition was precipitated by an incident in which it was alleged that one Police Constable Osman Mohammed (P.C. Osman), an officer attached to Kwa Reuben Police Post, without any reasonable cause shot and injured the appellant on his right arm. This incident occurred on 4th April, 2010. Subsequently, the appellant was arrested on 14th April, 2010 at his home in Yala. He was detained until 26th April, 2010 when he was taken to Makadara Magistrate's Court where he was charged with the offence of escape from lawful custody contrary to **Section 36** of the Penal Code. On 28th April, 2010, the prosecution charged the appellant with two more offences that is, robbery with violence contrary to **Section 296 (2)** of the Criminal Procedure Code and preparation to commit a felony contrary to **Section 308 (1)(b)** of the Penal Code. On the 7th December 2010, the offence of robbery with violence was withdrawn. The trial proceeded with regard to the non-capital offences and ended in the appellant being acquitted under **Section 210** of the Criminal Procedure Code. The appellant maintained that his

fundamental rights and freedoms were violated as he was unlawfully shot and wounded, unlawfully arrested and unlawfully detained. The appellant also contended that he was maliciously prosecuted; and that he suffered general, and special damages.

4. The 1st respondent objected to the appellant's petition through a replying affidavit sworn by P.C. Osman. In his affidavit P.C. Osman stated that he received a report that three suspicious men had been spotted riding an unregistered motor cycle; that in the process of investigating that report, he arrested the appellant who was fleeing from the scene; that he took the appellant to the police station, but while in the process of booking him in, the appellant escaped; that P.C. Osman fired at the appellant in a bid to prevent him from escaping but nonetheless the appellant escaped. P.C. Osman therefore swore that he was justified in using his firearm.

5. The 2nd respondent filed grounds of objection in which he objected to the appellant's petition on two grounds. First, that the petition did not disclose any contravention by the 2nd respondent of the appellant's fundamental rights and freedoms as provided for under the Constitution. Secondly, that the petition was defective due to non-joinder of relevant parties.

6. Following the hearing of the Petition and the submissions made by the parties' counsel, the trial judge of the High Court identified the issues for consideration as follows: whether the shooting of the petitioner was unlawful in the circumstances; whether the detention of the petitioner was a violation of his fundamental rights and freedoms; and whether the prosecution of the petitioner was an abuse of the process.

7. The trial judge found that the appellant was unlawfully shot and injured and that he was detained for more than 24 hours and not brought to court within a reasonable time. He therefore declared that the appellant's rights under **Section 71** and **72** of the former Constitution of Kenya were violated, and awarded the appellant general damages of Kshs.500,000/=, future medical expenses of Kshs.120,000/= and special damages of Kshs.53,106/= plus costs of the suit and interests.

8. The appellant not being fully satisfied with the judgment of the High Court has lodged this appeal before us partly challenging the judgment on liability, and also award and quantum of damages. In brief the appellant has raised five grounds in which he contends that the trial judge erred in law and fact: in failing to appreciate and analyze the appellant's claim; in failing to award damages in regard to the violations of fundamental rights and freedoms; in misdirecting his discretion in assessing and fixing the awards of general damages and special damages; and in failing to award the appellant exemplary, aggravated and or punitive damages.

9. Following directions given by the Court and in concurrence with the parties' advocates, all the parties duly filed written submissions. The written submissions were orally highlighted by Mr. Mbugua Mureithi for the appellant, Ms Wambui for 1st respondent and Mr. David Ndege for the 2nd respondent.

10. The appellant's submissions were focused on three issues. On the issue of malicious prosecution it was submitted that the trial judge erred in finding that the prosecution of the appellant was not malicious. It was argued that the presence of *animus malus* was an issue to be deduced from the entire circumstances surrounding the prosecution, and that the absence of reasonable basis for a prosecution is a pointer to *animus malus*. In this regard reference was made to the finding by the trial judge at paragraph 33 of his judgment that there was no basis for the prosecution of the appellant.

11. Further, it was pointed out that the evidence on record showed that the appellant was maliciously prosecuted in regard to the offence of robbery with violence. This was because the evidence disclosed that the charges were preferred as an afterthought after the appellant had been subjected to a belated identification parade, which turned out negative; secondly, the prosecution failed to avail witness statements to the appellant; thirdly, no witnesses were called in support of that charge but instead, the charges were withdrawn on the ground that witnesses were not able to identify the appellant during the identification parade, and this was a fact that was all along within the knowledge of the prosecution.

12. Relying on *Chrispine Otieno Caleb v Attorney General [2014] eKLR* quoting *Mbowa v East Menago District Administration [1972] EA 352* and *James Karuga Kiiru v Joseph Mwamburi & 3 Others C.A No.171 of 2000*, it was submitted that the prosecution of the appellant was malicious as the criminal proceedings were instituted dishonestly with an improper motive. This was simply to cover up the unlawful use of the firearm by the police officer, the unlawful wounding of the appellant and the unlawful pretrial detention beyond the constitutional limit.

13. In regard to damages, it was argued that the trial judge, having declared the appellant's fundamental right to life and liberty, under **Section 71 and 72** of the former Constitution to have been violated, he ought to have awarded damages for the violations of the fundamental rights; that although in some cases the declaration of rights may suffice as a remedy for violation of fundamental rights, in the appellant's case, the declarations alone could not suffice as effective remedy for the egregious violations, and actual suffering visited upon the appellant; that the award of Kshs.500,000/= made in the appellant's favour was compensation for the personal injury suffered by the appellant from the gunshot wound and not compensation for the violations of the appellant's fundamental rights.

14. In addition, the trial judge was faulted for declining to award the appellant special damages of Kshs.250,000/= for his legal defence, it being argued that the appellant was entitled to recover the same as an expense arising from his malicious prosecution. Relying on various authorities the appellant submitted that exemplary, aggravated or vindictory damages, are awardable in a claim for enforcement of fundamental rights and freedoms where the violations are oppressive and high handed; and that the police acted against the appellant in an oppressive and high handed manner.

15. Finally, the appellant urged the Court to disturb the award of damages made by the trial judge as he failed to take into account or ignored relevant factors including the nature of the claims. The Court was urged to assess and award damages payable to the appellant for the violation of his fundamental rights and also award exemplary damages. Relying on *Jennifer Muthoni Njoroge & 10 Others v the Hon. Attorney General HC (Nairobi) Petitions Nos. 340-350 of 2009*; *Dominic Arony Amolo v the Hon. Attorney General (HC Misc. Application No.494 of 2003)*; *Benedict Munene Kariuki & 14 Others v the Hon. Attorney General HC (Nairobi) Petition No.722 of 2009 [2011] eKLR*; the Court was urged to award to the appellant a global amount of Kshs.4 million for the violations of his fundamental rights and freedoms and Kshs.500,000/= as exemplary damages for the oppressive and high handed violation of the fundamental rights of the appellant.

16. For the 1st respondent, it was noted that the petition was filed after the promulgation and coming into effect of the Constitution of Kenya 2010 that separated the office of the Attorney General and the Director of the Public Prosecutions and by virtue of **Article 156** of the Constitution of Kenya the Attorney General is now excluded from participating in criminal proceedings of any nature. The Attorney General was therefore not a necessary party in the petition and the appeal.

17. The 1st respondent identified two issues in the appeal. These were: whether the appellant proved malicious prosecution and secondly whether the award of damages made was in line with legal principles. It was submitted that the trial judge made a correct determination on the issue of malicious prosecution. The case of *Socfinaf Kenya Limited v Peter Guchu Kuria (HC Civil Appeal No. 595 of 2000)* was relied upon for the proposition that acquittal of a suspect in a criminal case is not sufficient ground for filing a civil suit to claim damages for malicious prosecution or false imprisonment; and that evidence of spite, ill will, lack of reasonable and probable cause must be established.

18. On the issue of damages, it was submitted that the threshold for disturbing the quantum of damages awarded by a trial court as set out in *Kemfro Africa Limited T/A Meru Express Services Gathogo Kanini v AMM Lubia & Another [1982-88] 1KAR 777*; and *Bhat v Khan [1991] KLR 349*, had not been met as the appellant had not demonstrated that the trial judge proceeded on wrong principles or misapprehended the evidence.

19. On the award of damages for constitutional violation of an individual's fundamental rights and freedoms, the Court was urged to be guided by *Civil Appeal No.98 of 2014 Hon. Gitobu Imanyara & 2*

***Others v the Hon. Attorney General***, and note that the relief sought by the appellant are public law remedies that should be distinguished from private or personal remedies in tort; that it was the State that bears the responsibility for the constitutional violations and not the individual who committed the atrocities; and that any damages awarded under public law violations of constitutional rights of individuals by State should not be punitive, but should only suffice to vindicate the victim. It was argued that the appellant was not entitled to any exemplary or aggravated damages as the violations suffered by him were not actuated by malice nor was there any brazen or high handed deliberate actions by the respondent. The Court was therefore urged to dismiss the appeal.

20. The 2nd respondent opposed the appeal. Counsel for the 2nd respondent argued that in regard to the mandate conferred by **Article 157** of the Constitution, the petition did not disclose any violations of the appellant's fundamental rights and freedoms for which the 2nd respondent could be held liable; that the police clearly explained the circumstances surrounding the arrest and prosecution of the appellant; and that the circumstances showed that in arresting the appellant the police acted within the law as they were exercising their constitutional and statutory mandate under **Article 244** of the Constitution, and **Section 28** of the National Police Service Act.

21. The following Court of Appeal decisions were cited in support of the 2nd respondent's submissions: ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others Civil Appeal No.290 of 2012***, for the argument that the appellant did not plead his alleged violations with precision as required in constitutional petitions, as he did not demonstrate with clarity how his rights were violated, nor did he demonstrate any malice; ***Nzoia Sugar Company Limited v Fungututi [1988] KLR 399***, for the proposition that acquittal *per se* on a criminal charge is not sufficient basis for grounding a suit for malicious prosecution, as spite or ill will must be proved against the prosecutor.

22. On the award of general and special damages and failure to award exemplary damages, it was maintained that the award of Kshs.500,000/= as general damages and Kshs.120,000/= as future medical expenses was adequate compensation to the appellant; that in light of his finding on malicious prosecution, the trial judge correctly rejected the claim for the special damages of Kshs.250,000/= for legal fees; and that the trial judge correctly declined to award exemplary damages as no case had been made out for awarding the same. The 2nd respondent therefore urged the Court to uphold and affirm the decision of the trial judge.

23. We have considered this appeal and the submissions made by the respective parties. As has been stated by this Court before, our responsibility as a first appellate court is to reconsider the evidence, evaluate it and draw out our own conclusions being mindful of the fact that we have neither had the opportunity of seeing the witnesses nor assessing their demeanour, and therefore should defer to the findings of fact by the trial court. (***Selle & another v Associated Motor Boat Company Ltd & others [1968] EA 123***). We re-evaluate the evidence with caution, but nonetheless, proceed as stated in ***Peters v Sunday Post Ltd [1958] EA 424***, that:

***“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide ...”***

24. There are two aspects of this appeal. The first is issues relating to liability, and the second aspect is issues relating to quantum. The first issue on liability is whether the 1st respondent was a necessary party to the appellant's suit. It was argued that in light of **Article 156** of the Constitution that excludes the Attorney General from participating in criminal proceeding of any nature, the 1st respondent was not a necessary party in the appellant's petition.

**25. Article 156(4)** of the Constitution of Kenya 2010 provides the mandate of the Attorney General as follows:

**“(a) the principal legal adviser to the government;**

**(b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceeding; and**

**(c) shall perform any other functions conferred on the office by an Act of Parliament or by the *President*.”**

26. It is apparent from the descriptive paragraph of the petition that was filed by the appellant in the High Court, that the 1st respondent was sued in his capacity as a principal legal adviser to the government of Kenya, vested with legal authority to defend any suit against the national government. The Kenya National Police Service against whom the appellant’s complaints were directed falls under the national government. Although the circumstances leading to the appellant’s petition were criminal proceedings, the petition was a separate proceeding instituted by way of a constitutional petition, seeking redress for violation of human rights. The proceedings were addressing civil liability and are not criminal proceedings as envisaged under **Article 156(4)(b)** of the Constitution. Therefore, the Attorney General was properly sued as a party on behalf of the national government that is responsible for the actions of its officers in the National Police Service.

27. As regards the 2nd respondent, **Article 157(6)** of the Constitution mandates the Director of Public Prosecution to exercise state powers of prosecution pursuant to which he may:

***“(a) Institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.***

***(b) Take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and***

***(c) Subject to clauses 7 and 8, discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecution or taken over by the Director of Public Prosecution under paragraph (b).”***

28. The 2nd respondent was thus responsible for the prosecution of the appellant. Although under **Article 157(4)** the Director of Public Prosecutions has powers to direct the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct, this does not give the 2nd respondent general oversight powers over investigations conducted by the National Police Service. The power is a discretionary power that may only be invoked by the 2nd respondent in appropriate circumstances.

29. No evidence was laid before the trial judge to show that the Director of Public Prosecutions was party to the investigation of the appellant’s alleged criminal conduct, or that he had reason to exercise his discretion under **Article 157(4)** of the Constitution. In the circumstances, the 2nd respondent’s liability only extends to the prosecution of the appellant.

30. The 2nd issue regarding liability is whether malicious prosecution was established. In this regard, the trial judge came to the following conclusion:

***“The petitioner has charged that his prosecution in Criminal Case No. 1657 of 2010 which ended in an acquittal was malicious and an abuse of the court process. Malicious prosecution is a well-known cause of action founded on the abuse of legal process. In *Murunga v Attorney General* (1979) KLR 138 the court stated that in order to prove malicious prosecution the following ingredients must be established:***

***a. The plaintiff must show that prosecution was instituted by defendant, or by someone for whose acts he is responsible;***

**b. That the prosecution terminated in the plaintiff's favour;**

**c. That the prosecution was instituted without reasonable and probable cause; and**

**d. That the prosecution was actuated by malice.**

***I am prepared to hold that the ingredients (a), (b) and (c) above required to establish a claim for malicious prosecution have been proved by the petitioner. The ruling by the learned magistrate that led to the petitioner's acquittal under section 210 of the CPC shows that there was no basis for the prosecution in the first place. What I fail to detect in this matter is animus malus, that is, actual malice. I therefore dismiss this claim.***

31. Thus, the trial judge made a finding that the appellant's prosecution was instituted without reasonable and probable cause, but proceeded to dismiss the claim for want of *animus malus*. The respondents have not filed any cross-appeal. This means that the finding regarding the absence of reasonable and probable cause for the appellant's prosecution remains unchallenged. In ***Kagane v the Hon. Attorney General [1969] EA 643***, it was held that:

***"(i) whether there was reasonable and probable cause for the prosecution is primarily to be judged on the objective basis of whether the material known to the prosecutor would satisfy a prudent and cautious man that the accused was probably guilty (Hicks v. Faulkner (1) adopted);***

***ii. the fact that the prosecution was instituted on the advice of State Counsel did not if (sic) itself constitute reasonable and probable cause. The material must be fairly put to counsel and the prosecutor must still believe in his case;***

***iii. once the objective test is satisfied, it may be necessary to consider whether the prosecutor did not honestly believe in the guilt of the accused; but this subjective test should be applied only where there is evidence directly tending to show that the prosecutor did not believe in the truth of his case (Glinski v. McIver (3) adopted);***

***iv. on the facts, no reasonable person could honestly have believed that the prosecution was at all likely to succeed; and the second defendant was actuated by malice."***

32. It is not disputed that the appellant was initially charged with the offence of escape from lawful custody contrary to **Section 36** of the Penal Code, and preparation to commit a felony contrary to **Section 308 (1)(b)** of the Penal Code, and that two days later, the charge sheet was substituted and two counts of the offences of robbery with violence contrary to **Section 296 (2)** of the Criminal Procedure Code, were added. It is also evident from the certified copies of the criminal proceedings that were produced in the trial court, that the offences of robbery with violence were subsequently withdrawn on the prosecution's application on the grounds that the witnesses were not able to identify the appellant.

33. The trial judge made a finding that there was violation of the appellant's constitutional rights as he was held in custody beyond the maximum period, before being charged with the initial offences. This finding has also not been challenged. In the circumstances, the following extract from the judgment of the trial judge is important:

***"What I infer from the circumstances of the case is that there was no basis to hold the petitioner and in order to justify his detention on the robbery with violence charge which I believe was added to the charges to validate the detention period.(sic) My inference is supported by the fact that the identification parade, which presumably was to support the robbery with violence charge, was conducted on 27th April, 2010 which is a day before he pleaded to the capital charge. Why the identification parade could not be carried out between 18th and 26th April, 2010 is unexplained. Furthermore none of the witnesses, who testified in the criminal case, gave any evidence to support the charge of robbery with violence."***

34. Thus, the prosecution did not lay any evidence before the court that could justify the prosecution of the appellant for the offence of robbery with violence. To the contrary, it was conceded that they had no evidence against the appellant, hence the withdrawal of the robbery charges. As intimated by the trial judge, the decision to charge the appellant with the capital offences of robbery with violence was not motivated by a desire to vindicate justice, but, a desire to cover up the violation of the appellant's constitutional rights.

35. In coming to the conclusion that there was no actual malice in the prosecution of the appellant, the trial judge ignored his earlier finding that the charge against the appellant was motivated by an ulterior motive which was to cover up the appellant's unlawful detention. The circumstances established before the trial judge clearly proved that no reasonable and honest person could have believed that the prosecution against the appellant for the offence of robbery with violence was likely to succeed. More so, since the appellant was charged immediately after an identification parade and no witness identified him.

36. With respect, the trial judge erred in finding that there was no *animus malus*. The evidence, not only established the absence of reasonable and probable cause, but showed the absence of honesty and a deliberate attempt by the police to fix the appellant by introducing the capital charges, this was clear malice. In light of the undisputed findings of the trial judge in regard to the institution of the prosecution by the 2nd respondent, the termination of the prosecution in the appellant's favour and the institution of the prosecution without probable and reasonable cause, and the actual malice in the prosecution, all the ingredients for the offence of malicious prosecution were established. We find the 2nd respondent liable to the appellant for malicious prosecution.

37. In regard to damages, the issue is whether there is justification for this Court to interfere with the award that was made by the trial judge. The principles upon which this Court is to proceed were restated by Kneller J.A. in *Kemfro Africa Limited T/A Meru Express Services Gathogo Kanini v AM Lubia & Another* (Supra):

***“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”***

38. The trial judge made declarations that the appellant's fundamental rights and freedoms were violated. The question that arises is whether the trial judge awarded any damages in regard to these violations. It was posited that the award of general damages of Kshs.500,000/= that was made by the trial judge was an all inclusive figure. Our perusal of the judgment (at paragraph 37 and 38), reveals that the award of Kshs.500,000/= was in regard to the personal injuries suffered by the appellant from the gunshot wound, as well as Kshs.120,000/= for future medical expenses for the same injuries, and Kshs.53,106/= being special damages incurred as medical expenses again for the same injuries. Except for declining to award exemplary damages, the trial judge did not make any reference to the violations relating to the appellant's fundamental rights and freedoms in his assessment on the issue of damages.

39. In his prayers in the plaint the appellant not only prayed for declarations but at prayer (vi) & (vii) specifically prayed for general damages for violations of his fundamental rights and freedoms. Mere declarations without any specific award of damages do not vindicate the appellant neither do they convey a deterrent message regarding the sanctity of the Constitution and the need for protection of fundamental rights and freedoms. Therefore, the omission to make a specific award for these violations, was an error that justifies the intervention of this Court.

40. In addressing the quantum of damages, we take note of the authorities that were cited before us by the appellant. In particular, we find the following authorities relevant: *Jennifer Muthoni Njoroge and Others v the Attorney General [2012] eKLR*, in which four of the petitioners were each awarded general damages for amounts ranging between Kshs.1.5 million and Kshs.2 million for torture, cruel and

degrading treatment and unlawful detention for periods ranging between 7 days and 14 days; ***Benedict Munene Kariuki & 13 others v the Attorney General High Court Petition No. 722 of 2009***, where the plaintiffs were each similarly awarded general damages of Kshs.2 million for similar constitutional violations of torture, cruel and degrading treatment, and unlawful detention ranging from periods of 7 days to 72 days.

41. In this case, the appellant who was arrested on 14th April, 2010, and who ought to have been produced in court within 24 hours was not produced in court until 26th April, 2010. Although there was an explanation that he was transported from Siaya to Nairobi, it is clear that even giving allowance for this, he was held unlawfully for a period of at least 9 days, and this was a violation of his constitutional rights. In addition, the appellant suffered a fracture on his right arm as a result of a shooting that was unlawful, as unnecessary and unreasonable force was used.

42. The resultant gun-shot wound was part of the constitutional violations that were meted out to the appellant. The appellant's claim is not one for damages for personal injury in tort, but damages for constitutional violations including the shooting and wounding. In the circumstances, we are of the view that a global sum of Kshs.2 million would adequately compensate and vindicate the appellant for the constitutional violations. As regards the claim for exemplary damages, the trial judge addressed himself to this fact and exercised his discretion in declining to award any damages.

We do not find any reason to interfere with the exercise of this discretion.

43. On the issue of damages for malicious prosecution, this is a claim in tort. The tort was committed after the constitutional violations. It is therefore appropriate that a separate and specific award be made. As a result of being charged with the capital offences of robbery with violence, the appellant had to remain in custody from 27th April, 2010 when he was charged up to 7th December, 2010, when these charges were withdrawn. The prosecution continued for the non-capital offences and the appellant remained in custody until 18th March, 2011 when he was acquitted of these offences. In our view, a sum of Kshs.500,000/= would be appropriate compensation to the appellant for the tort of malicious prosecution. The appellant having incurred Kshs.250,000/= to pay his advocate for legal representation during the prosecution, and appropriate evidence having been produced, the claim for special damages of Kshs.250,000/= was proved and is therefore allowed.

44. The upshot of the above is that we allow the appeal on liability to the extent of setting aside the judgment of the High Court rejecting the appellant's claim for malicious prosecution, and substituting thereof a judgment in favour of the appellant as against the 2nd respondent on the issue of liability for malicious prosecution. We also allow the appeal on the issue of general damages to the extent of making an additional award of Kshs.2 million as general damages to the appellant for violations of his constitutional rights; Kshs.500,000/= as general damages for malicious prosecution; and an additional amount of Kshs.250,000/= as special damages.

45. The effect of the above is that in addition to the orders of the High Court that were not challenged, the judgment in favour of the appellant is now as follows:

- i. Declarations that the fundamental rights and freedoms of the appellant guaranteed under section 71 and 72 of the former Constitution were violated and the 1st respondent is liable to the appellant.
- ii. The 2nd respondent is liable to the appellant for malicious prosecution.
- iii. The appellant is awarded damages as follows:
  - a. As against 1st respondent, general damages of Kshs.2 million for violation of his Constitutional rights, and special damages of Kshs.53,106/=.
  - b. As against 2nd respondent, general damages of Kshs.500,000/= for malicious prosecution, and special damages of Kshs.250,000/=;

iv. The respondents shall bear costs of the suit in the High Court and costs of this appeal.

v. The appellant shall have interest on the general damages from the date of the judgment of the High Court and interest on special damages from the date of filing suit.

Those shall be the orders of the Court.

**Dated and delivered at Nairobi this 22nd day of September, 2017.**

**P. N. WAKI**

.....

**JUDGE OF APPEAL**

**R. N. NAMBUYE**

.....

**JUDGE OF APPEAL**

**H. M. OKWENGU**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**