



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT

AT MOMBASA

CAUSE NUMBER 594 OF 2014

[Formerly Mombasa H.C.C No. 224 of 2008]

BETWEEN

GIBSON FIZULI MBHIGHO.....CLAIMANT

VERSUS

1.KENYA REVENUE AUTHORITY

2. ATTORNEY-GENERAL.....RESPONDENTS

*Rika J*

*Court Assistants: Benjamin Kombe & Andrew Mwabanga*

---

*Ms. Shariff & Company Advocates for the Claimant*

*Mr. Richard Ngari Advocate for the 1<sup>st</sup> Respondent*

*Ms. KIthi, State Counsel for the 2<sup>nd</sup> Respondent*

---

**JUDGMENT**

1. This Claim was initiated at the High Court in Mombasa on 22<sup>nd</sup> August 2008. It was transferred through an order of the High Court dated 17<sup>th</sup> November 2014, to the Industrial Court [currently Employment & Labour Relations Court] at Mombasa.
2. The Claimant states he was employed by the 1<sup>st</sup> Respondent as a Releasing Officer, stationed at Awanad Container Freight Station [CFS], Mombasa.
3. On 3<sup>rd</sup> August 2004, the Claimant states, the 1<sup>st</sup> Respondent lodged a complaint against him, with the Revenue Protection Section. He was arrested and charged in Mombasa Chief Magistrate's Court, Criminal Case No. 2256 of 2004, with the offence of conspiring to defeat, and/or prevent enforcement of the Customs and Excise Act, Cap 472 the Laws of Kenya, contrary to Section 395 of the Penal Code. The criminal case terminated on 23<sup>rd</sup> March 2006, after the 2<sup>nd</sup> Respondent entered *nolle prosequi*.
4. The 1<sup>st</sup> Respondent instigated immediate re-arrest of the Claimant. He was charged in the Chief Magistrate's Court Mombasa, with the offence of conspiracy to defeat and/or prevent the enforcement of Customs and Excise Act, Cap 472 the Laws of Kenya, contrary to Section 395 [a] of the Penal Code, in Criminal Case No. 1081 of 2006.
5. The Claimant avers, he was placed under false imprisonment at the 1<sup>st</sup> Respondent's longroom, without notification of reason; he was re-arraigned in Court, without notification of reason; there were several Custom Officers at Awanad, yet only 3 were charged; and the Claimant

had been in the employ of the 1<sup>st</sup> Respondent since 1995. He had previously worked with the East Africa Community from 1977, and his record was impeccable.

6. He was acquitted on 28<sup>th</sup> September 2007.

7. Owing to this malicious prosecution, the Claimant was suspended by the 1<sup>st</sup> Respondent on 6<sup>th</sup> August 2004. He was dismissed on 4<sup>th</sup> February 2005. He appealed internally. His Appeal was disallowed on 27<sup>th</sup> August 2007.

8. He avers that he was wrongfully imprisoned; his credit, character and reputation were injured; he suffered trauma, psychological pain, anxiety; and due to dismissal, suffered loss and damages.

9. He claims against the Respondents, jointly and severally, general, special and punitive damages for malicious prosecution and wrongful imprisonment. He claims terminal benefits. His prayers include: -

I. 5 months' salary, August to December 2004, at Kshs. 59,477 monthly..... Kshs. 297,385.

II. 12 months' salary for 2005, at Kshs. 62,237 monthly..... Kshs. 746,844.

III. 12 months' salary for 2006 at Kshs. 64,997 monthly...Kshs. 779,964.

IV. 12 months' salary for 2007 at Kshs. 67,737 monthly.... Kshs. 812,844.

V. 12 months' salary in 2008 at Kshs. 70,497 monthly.... Kshs. 845,964.

VI. 12 months' salary for 2009 at Kshs. 73,257 monthly.... Kshs. 879,084.

VII. 12 months' salary for 2010 at Kshs. 73,257 monthly ...Kshs. 912,204.

VIII. 2 months' salary for 2011 at Kshs. 78,777 monthly...Kshs. 157,554.

IX. Leave allowance, 2005 – 2011, at Kshs. 105,000.

X. Pension [personal contribution] at Kshs. 150,853.

XI. Legal fees in defending CM's Court Criminal Case No. 2256 of 2004.... Kshs. 150,000.

XII. Legal fees in defending CM's Court Criminal Case No. 1081 of 2006...Kshs. 150,000.

Total...Kshs. 5,997,696.

XIII. Interest at court rates.

XIV. Costs.

XV. Any further suitable relief.

10. The 1<sup>st</sup> Respondent filed its Statement of Defence on 28<sup>th</sup> September 2008. It is conceded that the 1<sup>st</sup> Respondent employed the Claimant. It is true that the Claimant was arrested and charged as stated. Investigations revealed he was involved in release of assorted goods, without payment of import duty. He engaged in acts of gross misconduct. He lacked integrity by releasing the aforesaid goods; he failed to discharge his duty in a manner, and to a standard acceptable to the 1<sup>st</sup> Respondent; and was negligent, dishonest and lacking in care, leading to loss of revenue to the 1<sup>st</sup> Respondent.

11. He was suspended and dismissed, in accordance with the 1<sup>st</sup> Respondent's Code of Conduct. He was implicated in irregular clearance of goods. He is not entitled to the sum of Kshs. 5,997,696 or terminal dues. He merits pension contributions, which he was advised to collect, after clearing with the 1<sup>st</sup> Respondent. He is not entitled to any form of damages. The 1<sup>st</sup> Respondent prays that the Claim is dismissed with costs.

12. The 2<sup>nd</sup> Respondent filed his Statement of Defence, on 18<sup>th</sup> November 2008. His position is that the Claimant was arrested and prosecuted based on reasonable and probable cause. He was reasonably suspected of having committed an offence, punishable under the Laws of Kenya. The 2<sup>nd</sup> Respondent had no control whatsoever, over the employment of the Claimant. He is not liable for loss alleged to arise from dismissal of the Claimant by the 1<sup>st</sup> Respondent. The 2<sup>nd</sup> Respondent prays for dismissal of the Claim with costs.

13. The Claimant gave evidence on 22<sup>nd</sup> October 2015. He called 1 Witness, retired Customs Officer, Joel Mbithi, who gave evidence on the same date, 22<sup>nd</sup> October 2015, closing the Claimant's case. The Respondent called 2 Witnesses- Investigator Elijah Kiprotich Too and

Employee Relations Manager Crispin Nyamwaya Agata. Agata gave evidence on 11<sup>th</sup> November 2019. Too gave evidence on 23<sup>rd</sup> July 2019, 11<sup>th</sup> November 2019, and 13<sup>th</sup> October 2020 when 1<sup>st</sup> Respondent closed its case. The 2<sup>nd</sup> Respondent adopted the evidence given by the 1<sup>st</sup> Respondent. Hearing closed on 13<sup>th</sup> October 2020.

### **Claimant's Case.**

14. The Claimant told the Court he was first employed as a Customs Assistant, by the East Africa Community. The Community broke up, and he was absorbed by the 1<sup>st</sup> Respondent, as a Releasing Officer. He was dismissed in 2005.
15. He was attached to Awanad Container Freight Station. Imported goods passed through the CFS for clearance. They were subject to payment of tax. They were examined, to verify compliance on tax obligations. The Claimant was accused of releasing goods, whose import duty had not been paid. He had a clean record. He worked for the Respondent throughout, having joined at the age of 22 years.
16. He was called by Revenue Protection Service on 3<sup>rd</sup> August 2004 and asked to report to Mr. Macharia, in charge, Revenue Protection Office, Mombasa. The Claimant availed himself and was locked up. Nobody clarified to him why he was being locked up.
17. He was charged in Mombasa CM's Court Criminal Case Number 2256 of 2004. The case was heard. On the date reserved for Judgment, the Trial Magistrate disqualified himself, and the matter was withdrawn, and replaced by Criminal Case Number 1081 of 2006. The Claimant told the Court that he paid Kshs. 150,000 in legal fees, to his Advocate Ms. Shariff, in each criminal case. He was acquitted in the second case in 2007. His salary was approximately Kshs. 60,000 monthly. He suffered and was denied his livelihood as a result of the criminal prosecution.
18. He was summoned for disciplinary hearing at Nairobi. He was asked about the procedure in release of goods from the CFS. He made it clear that he did not release the goods. The goods were containers of rice. Releasing Officer was one Solomon Muiga. Muiga was the chief witness in both criminal proceedings. He was not based at Mombasa, but came from Nairobi to give evidence. This was unusual. Custom Officers are stationed through staff orders. It was suspected there were high-value goods at the CFS being released. Plenty of rice was being imported.
19. The 1<sup>st</sup> Respondent suspected some of the import was sugar. The Commissioner General visited the CFS, to verify. No sugar was found. Solomon had visited the CFS earlier. The Claimant was subjected to disciplinary process which ended with his dismissal. He read malice, in that, no goods were released. The Commissioner General released a press statement, technically shutting down the CFS. The Claimant was charged alongside 2 Operator of the CFS, Messrs Bolo and Nyakiti. The Claimant worked with 2 other Customs Officers- Kanjagua and Wanda. The Claimant lodged an internal Appeal against dismissal. His Appeal was declined.
20. He told the Court that he seeks salary arrears. He had not reached the mandatory age of retirement. He did not contravene the Code of Conduct. Dismissal was not founded on valid reason. Disciplinary process was based on the first criminal case, which was withdrawn. The disciplinary panel did not consider withdrawal of the criminal case, in its proceedings. The Magistrate in the eventual criminal trial, concluded that the Claimant had not done anything contrary to his work description. Dismissal was unlawful. Claimant's reputation was damaged. 1 of the accused Employees was retired. 2, including the Claimant, were dismissed. The Claimant did not understand why there was different treatment. Bolo and Nyakiti had no case to answer. They challenged closure of Awanad. The CFS was reopened. The Claimant told the Court that he was 60 years old, at time of giving evidence.
21. Cross-examined by the Advocate for the 1<sup>st</sup> Respondent, he told the Court that the 1<sup>st</sup> Respondent has a Code of Conduct. He was familiar with the Code. He was Assistant Revenue Officer 2, at the CFS. He was Verification Officer, equivalent of a Releasing Officer. CFS is like a Port. Procedures are the same. Goods thereat are uncustomed. They are released once duty is paid. During verification, relevant Officers determine if proper duty has been paid. They examine the goods against the documents.
22. The Commissioner General said he had received intelligence about uncustomed goods, held at the CFS. It was not true that he said it was rice, with under-declared duty. He said it was sugar. The criminal case raised issues relating to discrepancy of manifests. It was on the number of containers. It was alleged shipper's manifests, did not tally with the number of containers. It was confirmed in the trial that there was discrepancy. 10 containers were omitted in the entries. Releasing Officer does not use manifests. He uses the entries and the goods themselves.
23. The Claimant was charged with others. They were Manifest Officers. Verification looks at goods declared on the entries. It is not possible to release more that is declared. There were 3 Custom Officers charged. 1 was In-Charge, the others including the Claimant, were Releasing Officers. The Claimant was asked to appear before Revenue Protection Service, which is 1<sup>st</sup> Respondent's Police Unit. The Claimant would not say tax evasion was involved. Suspicion was on the nature of goods, not tax evasion. The Claimant was taken to Court the same day he was arrested. He believed Police acted on instructions of the Commissioner General. They had not recorded any statement from the Claimant, at the time they charged him. He was immediately suspended by the 1<sup>st</sup> Respondent. Solomon Muiga was the Investigating Officer from Nairobi. Verification was done in the presence of the Claimant. He received suspension letter on 6<sup>th</sup> August 2004. It alleged that he conspired to take out containers without payment of duty. The letter specified sections of the Code of Conduct, the Claimant allegedly violated. He was asked to give an explanation. He responded. He was advised that disciplinary action was contemplated. He showed cause. He appeared before the disciplinary panel. The panel deliberated and made a decision. He lodged an Appeal which was declined. He faulted the 1<sup>st</sup> Respondent for malice.
24. He told the Court on cross-examination by the State Counsel, for the 2<sup>nd</sup> Respondent, that he was confined for about 4 hours before being presented before the Court. He was released on bond. Police Officers are supposed to investigate, and confirm the truthfulness of a complaint. He did not have proof that arrest was instigated by the Commissioner General. The dismissal letter is adequate proof that his character was injured.

25. Redirected, the Claimant told the Court that the finding of manifest discrepancy by the Magistrate, did not relate to the Claimant. He was a Releasing Officer, not a Manifest Officer. The Magistrate found that the Claimant was only guided through an entry which passed in the manifest. Discrepancy was not a reasonable ground to dismiss the Claimant. A co-accused was retired. The Claimant was discriminated against. He is entitled to feel aggrieved. Decision of the Employer was based on malice. He was arraigned without proper investigations. He was not questioned by anybody.

26. Retired Customs Officer, Joel Mbithi told the Court that the Claimant was his colleague at the 1<sup>st</sup> Respondent, for about 20 years. He was Claimant's co-accused on 2 occasions. They were acquitted. Mbithi was given early retirement, even as the criminal proceedings unfolded. The Claimant and other colleagues were dismissed. Mbithi was paid his pension.

27. Cross-examined by the 1<sup>st</sup> Respondent's Advocate, Mbithi told the Court he could not recall the respective criminal case numbers. He was accused number 5 in the last case. There were allegations of fraud, relating to containers of rice. It was alleged that the Employees were involved in tax evasion. He was aware about 'No Discrepancy' stamp. Stamping is done when the container and documentation matches. One stamps and lets the process continue. In all the manifests checked by Mbithi, there was no discrepancy. Judgment states there was discrepancy. Mbithi was Manifest Officer, the Claimant Release Officer. Entries are not prepared by Manifest Officers. Manifest Officers confirm quantity. Mbithi was retired early. He was taken through a disciplinary hearing at Nairobi. A decision was made to retire him. His dues were tabulated. He received a small pension. He appealed against the decision to retire him. The Appeal was rejected.

### **Respondents' Case.**

28. Elijah Kiprotich Too told the Court he is an Investigator working for Kenya Revenue Authority, in Investigations and Enforcement Department, based at Nairobi. He acknowledges that the Claimant was an Employee of the 1<sup>st</sup> Respondent. He served as a Police Officer seconded to the 1<sup>st</sup> Respondent. In 2004, the 1<sup>st</sup> Respondent received information that there was an under-declared consignment of rice at Awanad CFS, Mombasa. He gathered documents used in importation of the consignment. They included cargo manifest and bill of lading.

29. He studied the documents. He compared declaration with entries. There was under-declaration of about 300 bags per container. The entries had discrepancy. 1<sup>st</sup> Respondent's page 3 is cargo manifest indicating there were 520 packages. Page 4 to 10 has 500 packages. The bill of lading must correspond with cargo manifest. If there is no discrepancy, Officer stamps, and allows processing. If there is discrepancy, the process is halted.

30. The cargo manifest differed with what was declared by clearing agent. Entries are made by the clearing agents. At page 25 of 1<sup>st</sup> Respondent's documents, Habo Agencies was the clearing agent. Importer is indicated. There are 2000 bags indicated. The shipping and container numbers are disclosed at page 26. Page 33 contains the bill of lading. It shows import of 2000 bags, of long grain Pakistan rice.

31. Too sought further information from Global Container Limited. Global informed Too that the bill of lading did not originate from Global. Investigators confronted the importer and the clearing agent. They did not have a plausible explanation. Release Order No. 115832 from Awanad CFS indicated consignment of 2000 bags of rice, while the manifest showed there were 5000 bags. Importer proceeded to pay taxes based on a consignment of 2000 bags. There was an attempt to defraud.

32. Investigation focused on whose failure occasioned attempted fraud. Cargo manifest section has access to bills of lading. They indicated there was no discrepancy and signed the manifest. This was an anomaly. Second, investigation turned to verification section. This is where the goods are physically examined. Verification was done by the Claimant. [the Court noted that handwritten remarks on the verification form, were not on the copy of the documents exhibited in Court by the 1<sup>st</sup> Respondent, and copy served upon the Claimant]. Too charged the Claimant and prepared memo for the Management to take administrative action against the Claimant.

33. Cross-examined by Claimant's Advocate, Too told the Court that he called the Claimant to Revenue Protection Services' Offices, and arrested the Claimant. Too informed the Claimant verbally, why he was placing him in custody. Investigators took cautionary statement from the Claimant. They collected evidence from Awanad. The cautionary statement was not included in 1<sup>st</sup> Respondent's documents exhibited before this Court. Given time, Too would exhibit the cautionary statement. It is not true, that Too locked up the Claimant and left him incommunicado. There is no cell at the Customs Office. It is a public area. The Claimant was taken to Court in the afternoon. The file was not ready in the morning.

34. The first criminal case was withdrawn. The charge sheet did not show entry 1263. The Court confirmed that the goods were at the CFS. It is not true that the charge was withdrawn for this reason. The bill of lading from Global is relevant. Consignees were shown in both bills of lading. Wanda had custody of the manifest stamp. The document was also signed by proper Officer, Ogalo. Ogalo was not charged. He was a prosecution witness. Nyakiti from Habo made the declarations. He too was charged.

35. Too decided to charge the Claimant on studying various documents. He endorsed entries at page 31 of 1<sup>st</sup> Respondent's documents. He did not make the declaration at page 30 of 1<sup>st</sup> Respondent's documents. It was made by an Officer named S. Muga. Joel Wanda, not the Claimant, was the custodian of the 'No Discrepancy' stamp. Muga was not charged with any offence. Too did not know if Wanda was retired and paid his benefits. The Claimant did not deny that he endorsed the document at page 31 of the 1<sup>st</sup> Respondent's bundle. He bore custody of the security stamp. It is not true that endorsement could have been made by any other officer. The second criminal case was initiated a day after *nolle prosequi* was entered. The facts were the same. There were 15 entries. Too did not have the list of 15 entries, which informed the charge sheet. The memo prepared for the Management take administrative action against the Claimant, is similarly silent on the 15 entries. The documents were presented before the disciplinary panel. The entries were captured in the Judgment made by the Magistrate. It was the same evidence the 1<sup>st</sup> Respondent had, in the withdrawn case. The Claimant asked for specific documents during his disciplinary hearing. Members of the panel found that his case was not exhaustively investigated. It was recommended that the Claimant is availed documents and further investigation carried out. This was in December 2004. Too did not know if the Claimant attended the second disciplinary hearing. Too was concerned with the criminal, not the administrative process. Judgment in the criminal proceedings states, at page 25, that the 2<sup>nd</sup> and

5<sup>th</sup> accused persons failed in their duty as Manifest Officers. It was concluded by the Court that the Claimant, did not breach his duty. There was a site visit at Awanad. The goods had been released. The goods were not intercepted. It was confirmed there was discrepancy. What is not declared cannot be documented.

36. Briefly cross-examined by the State Counsel, Too stated that the importer paid for the shortfall in duty. The Claimant was charged after investigations.

37. Redirected, he told the Court that he was seconded to the 1<sup>st</sup> Respondent. He conducted investigations under Revenue Protection Services. It was Claimant's duty to examine and verify goods. He was charged with conspiracy to conceal. Conspiracy cannot be committed by one person. 1<sup>st</sup> accused, Awiti Bolo, was Director of Habo Agencies and proprietor of Awanad CFS. There were several importers associated with Bolo. Too collected evidence. He salvaged revenue. His memo to the Human Resource Department was a brief, detailing the roles played by various Officers who were under criminal prosecution. The Claimant acted in collusion with others. Too did not know if the Claimant was called for a second disciplinary hearing. Acquittal was on the basis that evidence did not disclose breach of duty with regard to the Claimant. Too did not know the Claimant before, and had no interaction with the Claimant. The Claimant was charged with conspiracy to defeat a written law.

38. Crispin Agata confirmed that the Claimant was an Officer of the 1<sup>st</sup> Respondent. The Claimant was arrested on 3<sup>rd</sup> August 2004 for flouting Customs and Excise Act. Agata received memo and charge sheet from Too, which he forwarded to the Head Office. The Claimant was suspended.

39. He wrote to the 1<sup>st</sup> Respondent upon suspension, stating that the matter should be kept pending, until the criminal proceedings were complete. The 1<sup>st</sup> Respondent invited him for disciplinary hearing. He appeared and was heard. There were 2 meetings. The Investigating Officer gave evidence. The Claimant was subsequently dismissed on account of gross misconduct. He was found to have violated 1<sup>st</sup> Respondent's Code of Conduct. He appealed internally against dismissal decision. His Appeal was declined. He was informed of this decision. The 1<sup>st</sup> Respondent learnt about the decision of the Chief Magistrate's Court Mombasa, acquitting the Claimant.

40. On cross-examination by Claimant's Advocate, Agata told the Court, he was Human Resource Manager Southern Region, as of 3<sup>rd</sup> August 2004. The Claimant was arrested for violating Customs and Excise Act. Agata did not remember the criminal case number. He did not know if the Claimant was arraigned in 2000, after arrest in 2004. The charge sheet states he was arraigned in 2004.

41. He was invited to disciplinary hearing, on 25<sup>th</sup> November 2004. The disciplinary hearing minutes, capture Claimant's evidence. Members noted that the matter was not fully investigated. There was a subsequent hearing, in January 2005. Documents were availed to the Claimant. They included cargo manifests. There were discrepancies in the manifests, resulting in release of undeclared goods. It is not shown that the Claimant was availed these documents at the second meeting. The documents were exhibited in the criminal proceedings, by the Investigating Officer. The Claimant was suspended on 6<sup>th</sup> November 2004. It was before the disciplinary hearing. He was dismissed on 4<sup>th</sup> February 2005. He appealed. The Appeal was dismissed on 27<sup>th</sup> August 2007. Other Officers – Wanda and Kanjagua – were charged alongside the Claimant. Wanda was retired in 1<sup>st</sup> Respondent's interest. Kanjagua was dismissed. The Claimant was dismissed and paid pension. He was paid his contribution and would receive Employer's contribution on reaching 50 years. He was not entitled to other benefits. If he had been retired, rather than dismissed, he would have earned 3 months' salary in lieu of notice. He was entitled to salary for the period of suspension, regardless of his manner of exit. Agata did not know if this was paid. The Code of Conduct states that Staff shall not collude with Customers, to evade tax. The Claimant was the Releasing Officer. To understand his role, one has to look at the whole process. He was the final Officer in the chain. Agata was aware there was another Customs Officer at Awanad, Naomi Waihenya. She was not charged with the others. Human Resource Department was not aware about the type of goods that were involved. They were aware that the trader paid taxes after demand by the 1<sup>st</sup> Respondent, subsequent to the criminal charges. Agata did not know if any uncustomed goods were intercepted. He did not know if there was a site visit by the Court. He did not know about *nolle prosequi* entered in the first case. He did not know if dismissal was based on the case which was withdrawn.

42. On redirection, Agata told the Court that the 1<sup>st</sup> Respondent was not compelled to await the outcome of the criminal proceedings, to take administrative action. The Claimant was found guilty by the disciplinary panel, based on evidence presented before the panel.

43. The issues in dispute may be summarized as follows: -

- a. *Whether the Claimant was maliciously prosecuted and wrongfully and falsely imprisoned.*
- b. *Whether he is entitled to a total sum of Kshs. 5,997,696, payable by the Respondent.*

44. The Claimant does not plead wrongful or unfair termination. The Claim is centred on malicious prosecution, wrongful and false imprisonment.

**The Court Finds: -**

45. The Claimant served the 1<sup>st</sup> Respondent between 1977 and 2004, a period of 27 years. He first worked as a Customs Assistant, under the defunct East African Community. He was absorbed in the 1<sup>st</sup> Respondent, and rose through the ranks, holding the position of Releasing Officer, stationed at Awanad CFS in Mombasa, as at 3<sup>rd</sup> August 2004 when, he was arrested and charged at the Magistrate's Court Mombasa, on allegation that he had conspired with other Officers and Staff at the CFS, to defeat or prevent the enforcement of a written law.

46. The Claimant and his colleagues were first charged under Criminal Case Number 2256 of 2004. This case was withdrawn by way on

*nolle prosequi*, and fresh charges presented under Criminal Case Number 1081 of 2006. Charged alongside the Claimant were Awanad and Habo Agencies proprietor Hezron Awiti Bolo, his Staff Michael Nyakiti, and Claimant's colleagues in Customs and Excise Department stationed at Awanad CFS, Patrick Kanjagua and Joel Mbithi Wanda.

47. Bolo and Nyakiti were acquitted on 12<sup>th</sup> July 2007, by the Hon. Trial Magistrate T. Nzioki, having concluded that the prosecution had failed to establish a *prima facie* case, to warrant the 2 being placed on their defence. It was held on the same date that there was *prima facie* evidence, to warrant the 3 Customs Officers, to be placed on their defence. Specific to the Claimant, the Hon. Trial Court opined:

*“The 3<sup>rd</sup> accused person [Claimant] was identified as the Customs Official who was in charge of verification of goods and the documents for clearance...”*

48. The 3 accused persons were therefore heard on their defence and Judgment delivered on 28<sup>th</sup> September 2007.

49. In summary, the Trial Court held that the defence of Kanjagua and Mbithi was shaky. Their explanation that “No Discrepancy” stamp was merely to confirm the quantity of the containers, was faulted. Their role was found to be central in the clearance process. They were expected to cross-check the entry with the actual manifest received directly from the shipping agent.

50. With regard to the Claimant, the Trial Court found:

*“... he was only guided by an entry which passed through the manifest section...and was only expected to release goods upon verification as per already passed entry... the evidence on record does not disclose any breach of duty or fault, in the manner the 3<sup>rd</sup> accused person [Claimant] dealt with the 11 entries...”*

51. Other findings worth highlighting in considering the Claim before this Court include the following:

§ The goods subject to the import duty, which was not paid, were never disclosed.

§ The value of unpaid duty was not disclosed.

§ No specific provision of the Customs and Excise Act, was cited.

§ These matters only became known to the Claimant, during trial.

§ It was difficult for the 3<sup>rd</sup> accused person to prepare his defence at the initial stage of the case.

§ The heaping of 11 transactions in one charge constituted a defect which no doubt embarrassed the conduct of the defence

52. The Court in the end found that the charges against all the accused persons fell under the rule against omnibus charges, and were incurably defective. The accused persons were acquitted.

53. The Claimant was suspended through a letter dated 6<sup>th</sup> August 2004, following his initial arraignment in Court. He wrote to the 1<sup>st</sup> Respondent in response to the suspension letter, expressing the same view that was later endorsed by the Magistrate's Court in the Judgment of 28<sup>th</sup> September 2007: that he had been hauled before the Court without being availed particulars of his offence.

54. The Claimant was invited to the first disciplinary hearing, at 1<sup>st</sup> Respondent's Head Office in Nairobi, on 25<sup>th</sup> November 2004. The panel found, consistent with the Judgment of the Magistrate's Court [which came in 2007], and consistent with the Claimant's position in responding to the letter of suspension, that the Claimant's case was not fully investigated, and specific documents referred to by Revenue Protection Services, should have been availed to support the allegations. It was directed that the case is deferred before the next disciplinary panel; exhaustive investigation is carried out detailing and availing entries in question; and that it could be necessary to recharge the Claimant based on new information that emerges.

55. The second panel sitting took place on 20<sup>th</sup> January 2005. It is not indicated in the minutes of this meeting, if the concerns raised by the panel itself, in the previous meeting, were addressed. It is not known what fresh and exhaustive investigation took place, between 25<sup>th</sup> November 2004 and 20<sup>th</sup> January 2005. If such exhaustive investigation took place, it would be in the festive Christmas season, falling between the 2 panel sittings. It is not disclosed what investigation was done, and what documents were supplied to the Claimant. The minutes do not record the presence of the Claimant, or anything he said, if at all he was present. On cross-examination, Agata stated unequivocally, that the Claimant was not shown to have received any documents, at the time of the second panel sitting.

56. Investigating Officer alone, is recorded as presenting his report. Too was a common feature, in the administrative and criminal process. He is said to have presented example of entries. Rather than avail full entries as contemplated in the direction of the first panel sitting, Too exhibited example of entries. The panel concluded, based on example of entries, that the Claimant and Kanjagua were guilty of conspiracy as charged. The 3<sup>rd</sup> Customs Officer implicated in the conspiracy, Joel Mbithi, does not appear to have been included in the deliberations of the 2 panel sittings. It was recommended this time round, that he 2 Officers are dismissed for fraud.

57. The Claimant was summarily dismissed on 4<sup>th</sup> February 2005. The letter states that the panel, on the last sitting of 20<sup>th</sup> January 2005, deliberated on Claimant's representations as contained in his response to the suspension letter, *‘as well as your personal representations*

heard on 25<sup>th</sup> November 2004.’’ Notably, it is not indicated if there were personal representations, made by the Claimant before the panel, on 20<sup>th</sup> January 2005. The letter is silent too, on evidence gathered in the month of December 2004, to justify a change in the position taken by the panel, on 25<sup>th</sup> November 2004.

58. The Respondent advised the Claimant to appeal to its Commissioner General, in accordance with the Code of Conduct, within 30 days of summary dismissal. He did so on 4<sup>th</sup> March 2005. The Appeal was dismissed more than 2 years later, on 27<sup>th</sup> August 2007.

59. The Claimant was not paid any salary or allowance during suspension. He was deprived of annual leave. These deprivations are anchored on the Code of Conduct.

60. Against this background, was the Claimant maliciously prosecuted, wrongfully and falsely imprisoned?

61. There is a catena of judicial authorities setting out the elements the Claimant must establish, in pursuing remedy under malicious prosecution. Among prominent authorities on the subject are *Willers v. Joyce*, [2016] UKSC, *Murunga v. Attorney-General* [1983] KLR, and *Naqvi Syed Qmar v. Paramount Bank Limited* [2015] e-KLR. The elements include: -

I. *Proceedings had been brought against the Claimant by the Respondent.*

II. *Proceedings had been determined in his favour.*

III. *The proceedings were brought without reasonable and probable cause.*

IV. *The Claimant suffered loss and damage.*

62. The Claimant has satisfied the first 2 elements. Criminal proceedings were initiated by the Respondents at the Magistrate’s Court Mombasa. The Court has given an overview of those proceedings above. The proceedings culminated in the acquittal of the Claimant, as shown in the Judgment of the Magistrate, Hon. Nzioki.

63. Were proceedings brought without reasonable and probable cause? The fate of this Claim depends a lot, on whether the Respondents had a reasonable and probable cause, in instigating and continuing the prosecution of the Claimant.

64. As held in the decisions above, reasonable and probable cause means an honest belief, that the institution of the proceedings, and continuation of proceedings, is justified. It is about the honest belief of the Respondent, that the facts available at the time of commencing proceedings, disclose an offence, and a reasonable person would have concluded that the Claimant was guilty of such an offence.

65. In *Hicks v. Faulkner*, [1878] 8 Q.B.D. the Court defined reasonable and probable cause, as ‘*an honest belief in the guilt of the accused, based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would lead to any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged, was guilty of the crime imputed.*’

66. In *Naqvi Syed Qmar v. Paramount Bank Limited* [citation above], this Court held the view that the Court must be satisfied that the Respondent verified facts, through an enquiry, with the level of scrutiny commensurate with the charges against the Claimant.

67. The Courts have, in various decisions upheld the legal authority of the Police and other law enforcement agencies, to investigate crime and prosecute criminals. This responsibility is to be weighed carefully against the right of suspects to be prosecuted based on verified facts. In *Naqvi Syed Qmar*, it was suggested that Police Officers and Prosecutorial Authorities in general, are not immune from the tort of malicious prosecution. Investigations which are not carried out fairly, objectively and exhaustively, have led in some commonwealth jurisdictions, to a tort known as negligent investigation. Canadian Supreme Court, in *Hill v Hamilton- Wentworth Regional Police Services Board* SCC 41, [2007] 3 SCR 129, reaffirmed that Police Officers do owe a duty of care to suspects, and that they can be responsible for damages resulting from negligent investigation. Any negligent action by a Police Officer during an investigation is likely to cause damage to the suspect, either by wrongful investigation, detention or conviction, the Court held. The Claimant herein was subjected to negligent investigation, culminating in malicious prosecution.

68. He was summoned by Investigator Too to Revenue Protection Services, a Police Unit within the 1<sup>st</sup> Respondent. Too himself is a Police Officer, seconded to the 1<sup>st</sup> Respondent. He detained the Claimant at the Revenue Protection Services, in the morning of 3<sup>rd</sup> August 2004. He had not as of this time, officially communicated any complaint against the Claimant, to the Claimant. He was not able to exhibit any statement recorded from the Claimant at the time of the arrest. He told the Court there was no cell at the Revenue Protection Services. From the Claimant’s point of view, he was held without probable cause. The Court does not think that the absence of a holding cell, at Revenue Protection Services, would show that the Claimant was not wrongfully arrested. Wrongful arrest or false imprisonment comprises restraint or detention by one person of another, without lawful justification. Where that restraint occurs, whether a cell or a vessel, is not relevant.

69. Too held the Claimant for at least 4 hours, within Kenya Revenue Protection Services premises. He arraigned the Claimant before the Magistrate’s Court that afternoon. The Claimant was bonded by the Court. The fact that he regained his freedom about 4 hours after confinement, does nothing to affect the fact of his wrongful arrest.

70. The first case was withdrawn by the State, after 2 years of trial. The reasons are not given. The Prosecuting Authority is not bound in law to disclose reasons in entering *nolle prosequi*, but it is observed that the 1<sup>st</sup> Respondent’s disciplinary panel, held the view at its first sitting, that the matter had not been exhaustively investigated; the Claimant had not been supplied with requisite documents; and it was suggested by

the panel that Too should get his act together, exhaust investigations and if necessary redo the charges. Although there was a criminal process and an administrative process, it is clear that the 2 processes were based on the same facts, the same evidence, gathered and presented by Too, who is Police Officer and Employee of the 1<sup>st</sup> Respondent State Corporation.

71. The Trial Court itself, concluded that investigations were shoddy and that the Claimant was not be placed in a position to adequately defend the charges, without having details of the allegations.

72. It is also not clear why other Custom Officials involved in the suspect transactions were not charged. Importers of the suspect goods similarly were not charged. Too was hard pressed in explaining whether unaccustomed goods ever left the CFS. No goods were ever intercepted outside the CFS. The Claimant was not a Manifest Officer. Discrepancy was in the manifests. Importer of the goods subject matter of the investigation was not taken before the Court. At the time the Claimant was being taken to Court, he did not know what goods he was said have handled, in a manner amounting to a conspiracy to defeat or prevent enforcement of the Customs and Excise Act. Too was totally unable to lay a basis for reasonable and probable cause, justifying arrest and prosecution of the Claimant. Investigation did not link the Claimant to any cognisable offence. It amounted to a tort of negligent investigation. By summoning the Claimant in the morning, and arraigning him before the Court that afternoon, without affording the Claimant the slightest opportunity to know why he was arrested, and being charged, the Investigating Officer cannot be said to have acted reasonably.

73. Contrary to the submission of the 1<sup>st</sup> Respondent, that the Claimant was acquitted on technicality in the framing of the charges, and not on merit, the Trial Court made a specific finding that, **“the evidence on record does not disclose any breach of duty or fault in the manner the 3<sup>rd</sup> accused person [Claimant] dealt with the 11 entries.”** The Court fully absolved the Claimant of any wrongdoing.

74. Judicial Authorities such as *Cooperative Bank of Kenya Limited v. Sylvester Baraza Ojiambo & Anor [2019] e-KLR*, hold, acquittal of the Claimant, is not *per se*, sufficient in establishing the tort of malicious prosecution. In the view of this Court, acquittal must be looked into, with other aspects of the primary proceedings. It is important in this case to bear in mind the manner of arrest; the chequered history of the prosecution; the determination of the Trial Court on the allegations made against the Claimant and the lack of disclosure of evidence by the prosecution to afford the Claimant reasonable facility to defend the charges; and also, the concession made by the 1<sup>st</sup> Respondent in its own administrative process, that the facts defining both the criminal and the administrative process, gathered by the common Investigator Too, were insufficient. The acquittal, while not conclusive that prosecution was malicious, goes a long way, looked at in conjunction with other factors, in firming up Claimant’s position that prosecution was not founded on reasonable and probable cause.

75. Malice in prosecuting the Claimant is further readable in the treatment of other similarly positioned Custom Officers. It is accepted other Custom Officers implicated in the transactions were never taken before the Criminal Court. Even when the 1<sup>st</sup> Respondent reviewed evidence at the first panel sitting, and felt there was need for further investigations, it continued to prosecute the Claimant at the Criminal Court. The Claimant went on defending charges based on incomplete evidence. He was granted a brief respite through *nolle prosequi*, only to be recharged based on the same facts. In the end, he was engaged in an unnecessary criminal trial for 3 years. He ended up losing his job after 27 years of service. He states, was paid nothing on dismissal. In *National Bank of Kenya Limited v. Alfred Owino Bhalla [2017] e-KLR*, it was held that malice can be inferred from the hurried and flippant manner, in which prosecution acted.

76. The Court is satisfied that the Claimant was maliciously prosecuted and wrongfully arrested. The Respondents did not show reasonable and probable cause. They instigated prosecution and continued with prosecution, even when the 1<sup>st</sup> Respondent had formed a view that the actions against the Claimant, were founded on incomplete investigation. Prosecution ended in acquittal of the Claimant. The Court absolved him of the allegations made against him in full. The 1<sup>st</sup> Respondent did not explain why the Claimant was treated differently from other colleagues at Awanad, who were said to be involved in suspicious transactions. Even those charged alongside the Claimant, were treated differently. Joel Mbithi who testified for the Claimant, was retired and paid his benefits. The Claimant suffered loss and damage.

77. On cross-examination, Agata told the Court that the Claimant was entitled to his salary for the period of suspension, irrespective of the manner of termination. He did not know if this was paid. Agata is the Human Resource Manager, and his evidence must be taken seriously.

78. The Claimant was suspended on 6<sup>th</sup> August 2004, and dismissed on 4<sup>th</sup> February 2005. He would, according to Agata, be entitled to salary for this period of 5 months. His last pay slips of June and July 2004, indicate his gross monthly salary was Kshs. 59,477. **The Court awards salary for the 5 months under suspension, based on the evidence of Agata, at Kshs. 297,385.** This is payable solely, by the 1<sup>st</sup> Respondent who was Claimant’s Employer.

79. Other salaries claimed for the period 2005 to 2011 have no basis. The Claimant received his letter of dismissal dated 4<sup>th</sup> March 2005. The contract ended then. He does not explain why the year 2011 is significant to his Claim. If it was the year he expected he would retire, it never arrived. He was dismissed way back in 2005. He was not in employment between 2005 and 2011. He appealed against dismissal through his letter dated 4<sup>th</sup> March 2005. The Appeal was rejected about 2 years later, on 27<sup>th</sup> August 2007. Clause 3.4. 1 of 1<sup>st</sup> Respondent’s Disciplinary Code, states that disciplinary action is not suspended, pending appeal. Termination was therefore effective on 4<sup>th</sup> February 2005. The Claimant has not applied for reinstatement with back pay. His prayer for arrears of salary after termination, has no support in law and is declined.

80. He has similarly not shown that he merits leave allowance for the period 2005 to 2011.

81. The Claimant did not provide the Court with evidence of court fees amounting to Kshs. 300,000, paid to his Advocates under the criminal proceedings.

82. On pension, it was the evidence of Agata that the Claimant was paid his contribution and would be paid Employer’s contribution on reaching 50 years. The Claimant was 60 years at the time he gave evidence. He states he received nothing on termination. The Court was not provided clear documents on the status of Claimant’s pension. In the circumstances, and again relying on the evidence of Human Resource

Manager, *it is sufficient to give a declaratory order, that the Claimant was entitled to his pension contribution, and to the Employer's contribution, upon attaining the age of 50.*

83. On the quantum of damages under malicious prosecution, wrongful arrest and false imprisonment, the Court has taken into account the effect of Respondents' malicious prosecution on the Claimant. His career was ended after 27 years of untainted and uninterrupted service. The Court in *Naqvi Syed Qmar*, a banker, in the banking and financial services sector, who was maliciously prosecuted and career effectively ended, granted general damages at Kshs. 2,500,000. In the *National Bank Limited* decision above, the High Court upheld on appeal, a decision by the Chief Magistrate's Court, where an award of Kshs. 1,000,000 was made for malicious prosecution. In another High Court of Kenya decision, *Joseph Wamoto Karani v. Dorman Limited & Another [2018] e-KLR*, the Plaintiff received general damages for malicious prosecution at Kshs. 2,000,000. Not much has been written by our jurists, about principles applicable in quantifying damages for malicious prosecution. The starting point in the view of the Court must always be, an appreciation of the extent of damage and loss suffered by the Claimant, as a consequence of malicious prosecution. Circumstances of each case, must be evaluated carefully. The Claimant has shown that he was not only maliciously prosecuted; he was wrongfully arrested. The Respondents not only instigated prosecution, but continued with prosecution even when it was apparent, exhaustive investigation had not taken place, and the Claimant placed in a position where he could give a rational defence. He lost a long and unblemished career with the 1<sup>st</sup> Respondent. He had not, at the time of giving evidence in 2015, 11 years after he lost his job, found alternative employment. He did not recover from malicious prosecution. His lack of employment years after dismissal, would suggest his prosecution, affected his employability. A career spanning 27 years was ruined.

84. *The Court grants him general damages at Kshs. 2,500,000 for malicious prosecution, wrongful and false imprisonment. This is payable by the Respondents, jointly and severally.*

85. *Costs to the Claimant, to be paid by the 1<sup>st</sup> Respondent.*

86. *Interest allowed at court rate as prayed, from the date of Judgment.*

**IN SUM, IT IS ORDERED: -**

- a. *The 1<sup>st</sup> Respondent shall pay to the Claimant salary for 5 months under suspension, at Kshs. 297,385.*
- b. *The Respondents shall jointly and severally pay to the Claimant general damages for malicious prosecution, wrongful and false imprisonment at Kshs. 2,500,000.*
- c. *It is declared that the Claimant was entitled to his pension contribution on dismissal and to the 1<sup>st</sup> Respondent's contribution, on attainment of the age of 50 years.*
- d. *Costs to the Claimant, to be paid by the 1<sup>st</sup> Respondent.*

**Dated, signed and delivered electronically at Nairobi, under Ministry of Health and Judiciary Covid-19 Guidelines, this 5<sup>th</sup> day of February 2021.**

**James Rika**

**Judge**