



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Suit 207 of 2002**

**JAMES ORENGO ..... PLAINTIFF**

**VERSUS**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> DEFENDANT**

**WILLIAM WELOBA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

Section 13A(1) of the Government Proceedings Act, Cap 40, provides as follows:

*“No proceedings against the Government shall lie or be instituted until after the expiry of a period of 30 days after a notice in writing has been served on the Government in relation to those proceedings.”*

It is not in dispute that the notice pursuant to the above section was served on the Attorney General on 7<sup>th</sup> January, 2002, and the suit was filed on 5<sup>th</sup> February, 2002, ***before the expiry of 30 days stipulated in the said section.***

Counsel for the Attorney General, Mr. C.M. Mutinda, has submitted that the requirement of the 30-day notice being mandatory, this suit is incompetent, and should be struck out. He relies on the cases of ***Hudson Laise Walimbwa –vs- Attorney General*** (Nairobi HCCC No. 2714 of 1987 (Ringera, J)), ***Mary Waithera –vs- Attorney General and Another*** (Nairobi HCCC No. 3388 of 1985 (Unreported) (Khamoni’s, J) and ***David Njenga Ngugi –vs- Attorney General*** (Nairobi HCCC No. 3874 of 1994 (Unreported) (ANGAWA J.)

Counsel for the Plaintiff, Mr. G. Imanyara, has submitted that a claim brought under Section 84 of the Constitution is not subject to limitations imposed by the Government Proceedings Act. The Plaintiff’s claim here, in addition to a claim for damages for pain and suffering, false arrest and detention, and malicious prosecution, is also for damages for interferences with constitutional rights and liberties under Section 84 of the Constitution. According to him, the Limitation of Actions Act is inapplicable to cases brought under Section 84 of the Constitution. He relies on several decisions, as follows: ***Amollo v. Attorney General*** (HC Misc. Application No. 494 of 2003) [Unreported] where Hayanga, J held that the Limitation of Actions Act, Cap.22 was inapplicable to claims brought under Section 84 of the Constitution. He said:

***“The point to decide here is whether breach of fundamental rights and redress therefore can be***

***brought to Court at any time irrespective of the provisions of the Limitations Act. Like for example colonized persons seeking redress years after independence. To put it another way whether in interpretation of constitutionally entrenched provisions of Fundamental Rights, the Court is in any way circumscribed by legislative statutes like Limitation Act.”***

A three-Judge bench in ***Jackson Ekara Nakusa v. Paul K. Tororei*** (Election Petition No. 4 of 2003) approved the dicta of Hayanga, J. in the ***Amolo*** case.

Citing several passages from the writings of the Indian Emeritus Professor Dr. Pylee, and Professor Bora Laskin of Canada on the Canadian Constitutional Law, Mr. Imanyara argued that no legislation can bar access to the Court on an issue of human rights, and any law that sets a limitation period in seeking redress under Section 84 of the Constitution is ultra vires the Constitution, because not even Parliament can pass laws to curtail Constitutional rights.

He submitted, therefore, that the Plaintiff, whose claim before this Court is based partly on Section 84 of the Constitution, was under no duty or obligation to comply with Section 13A(1) of the Government Proceedings Act.

**Is the Plaintiff right in that assertion? I do not think so.** I think the Plaintiff’s Counsel has completely missed the point. The point is that Section 13A(1) of the Government Proceedings Act does **NOT** impose any “**limitation**” to a person’s liberty, or his or her human or fundamental rights under the Constitution, nor does it whittle down any of those rights. All it does is to say **how** those rights might be invoked. It says, simply, that should you wish to invoke those rights against the Government, you **MUST** give the Government a 30-day notice, and you **shall not** file suit until those 30 days are over. Now, Parliament in its wisdom has decided that there should be a short waiting time – 30 days – to enable the Government decide what it wants to do about the proposed or threatened litigation. Does it really want to defend, or settle? Does it need to consult with other arms of the Government? Does it need a legal opinion? Does it need to investigate the circumstances leading to the alleged claim? The law simply says give the Attorney General those 30 days **before** you file suit. It does not say **don’t** file suit, or **don’t** make such and such a claim. It just says “we need 30 days notice.” That to me is not imposing any “limitation” to my rights, or curtailing them, or whittling them down. If anything it is imposing a “cooling down” period, which may be good for everyone, especially the Claimant who **could**, if the Attorney General so wanted, find a settlement **without** having to file action. Now, what can possibly be wrong with such a stipulation in law? I must, therefore, respectfully disagree with the proposition that Section 13A(1) imposes a “limitation” on a person’s fundamental rights, and is ultra vires the Constitution. In my view **it is not**. And further, in my view, it creates a mandatory obligation on every litigant to issue the required 30-day notice to the A.G. There are other Judges of the High Court who have taken a similar position, and I am persuaded to follow suit. These are Justice Ringera in the ***Hudson*** case (supra), Justice Khamoni in ***Mary Waithera*** (supra) and Justice Ang’awa in ***David Njenga*** (supra).

In the ***Hudson*** case, where the issue of the incompetence of the suit was not even pleaded in the Statement of Defence, Ringera, J (as he then was) stated:

***“Section 13A of the Government Proceedings Act is in clear mandatory terms that do not admit of any excuses or exceptions. Its plain meaning to my mind is that no proceedings against the Government under the Government Proceedings Act can lie or be instituted before the Statutory Notice has been given and expired.”***

In ***Mary Waithera*** case, Justice Khamoni said

***“Clear provisions of a statute should not be overlooked especially when the provisions are in terms as set out in section 13A....”***

Mr. Imanyara has also argued that “..... ***in accepting that Notice was given, the AG asserts that “he was not obliged to make good the claim” made in the Notice ..... the AG is (now) estopped from taking a different position.***”

I would reject this argument, as I do not believe that the **doctrine of estoppel** applies to a statutory obligation. **The AG cannot be “estopped” from invoking the law at any time, and at any stage of the proceedings.** As Ringera, J said in the *Hudson* case (supra), it is a matter of substantive law that may or may not be pleaded. It can be raised at any time, and the fact that it was not raised in the pleadings, is no bar to raising it later. It is the same thing as to say that because the Plaintiff did indeed give the required Notice (albeit short of 30 days), he is now “estopped” from arguing that Section 13A (1) does not apply to him. That argument would be as unfair to the Plaintiff, as it would be to the Defendant to say that because he did not plead Section 13A(1) that he is now “estopped” from doing so.

**I have, therefore, come to a clear (although unfortunate) conclusion that because the Plaintiff did not comply with the mandatory requirement of Section 13A(1) of the Government Proceedings Act, his suit before this Court is incompetent, and is hereby struck out with costs to the First Defendant.** It is with great regret and a heavy heart that I have had to come to this conclusion in view of my findings on other issues that I will outline below, but I am bound to follow the law as I understand it.

With regard to the suit against the 2<sup>nd</sup> Defendant, I accept the submissions of the Defendant that the 2<sup>nd</sup> Defendant, at all material times, was an officer, servant or agent of the Government acting in the course of his duty and the 1<sup>st</sup> Defendant was vicariously liable for his actions. This is acknowledged in paragraph 21 of the Plaintiff. Accordingly, this suit should have been brought only against the 1<sup>st</sup> Defendant, and is struck out also in respect of the 2<sup>nd</sup> Defendant.

Now, should I be held to be wrong in that decision, it is appropriate that I should make a determination of other issues relating to liability and damages in this case. This would clearly save time, and in the event of a successful Appeal, would obviate the need to remit the case back to me for my determination on issues of liability and damages.

Having heard evidence from four witnesses on behalf of the Plaintiff – the Plaintiff himself, Mr. Augustine Njeru Kathango, Honourable Paul Muite, and Thomas Odhiambo Nduku, I find the facts to be as follows:

### ***FACTS***

On 4<sup>th</sup> February, 2001, the Plaintiff went to Kisii Police Station in the company of several other people to give notice of intention to hold a public meeting. At the Police Station he met the 2<sup>nd</sup> Defendant who was quarrelsome, and who reluctantly accepted the notification of the meeting. The Plaintiff paid Kshs.30,000 for the registration of the meeting. He then notified the 2<sup>nd</sup> Defendant that he and his colleagues were going to proceed to the stadium to inspect the venue. Later, when the Plaintiff and his colleagues were leaving the stadium they were confronted by the 2<sup>nd</sup> Defendant who was leading a contingent of police officers in riot gear. The 2<sup>nd</sup> Defendant held him by the back of his trousers and accused him of holding a public meeting. The other Police Officers bounced on him and started beating him. The 2<sup>nd</sup> Defendant assaulted him with a club, prompting calls from the public “don’t kill him”. He was severely injured.

The Plaintiff was the only person arrested at this alleged unlawful assembly.

When the Police arrived, the Plaintiff handed the proforma form to the 2<sup>nd</sup> Defendant, who refused to read it, and instead assaulted and arrested him. He was cornered between two buses and further assaulted. He fell and when on the ground he was kicked and beaten with clubs. He was then frog-marched for a distance of 1000 yards. The Plaintiff claims that he did not resist arrest, and the 2<sup>nd</sup> Defendant failed to inform him that he was under arrest. The Plaintiff asked the 2<sup>nd</sup> Defendant if he was under arrest numerous times during the beating, but the latter ignored his question. He was harassed, intimidated and oppressed by the 2<sup>nd</sup> Defendant and other police officers.

At the Kisii Police Station he submitted a P3 medical form but the Police took no action, and instead brought fresh charges against him. Once in custody, the Plaintiff was refused contact with Counsel or his

family.

The Plaintiff claims that his fundamental rights of association and movement were breached. He was humiliated and locked up at the Police Station with 15 inmates until 1 a.m. with no medical attention. He wasn't allowed to walk to the Police Station, but was frog-marched. He wasn't given medical attention or first aid. He was held in confinement for 16 hours, charged with unlawful assembly and resisting lawful arrest.

As a result of the beatings, the Plaintiff suffered the following injuries: -

Bruises, swelling and tenderness of the scalp; fractures of left ring finger (swelling tenderness as well); swelling and tenderness of left wrist joint; tenderness and swelling of the right buttocks; bleeding and bruising of both knees; and loss of left fingernail. The Plaintiff had to attend physiotherapy for treatment of the left ring finger; and claims that it is permanently disabled. As a result of the injuries sustained the Plaintiff claims that he was unable to work for some time or perform his professional duties and functions effectively.

It seems clear from the evidence before me, that the incidents that took place on 4<sup>th</sup> February 2001 involving the Police Officers were unlawful. The Plaintiff has submitted evidence, which I find to be both sufficient and credible, that he was wrongfully assaulted, imprisoned, and prosecuted by the Defendants. The actions on the part of the Defendants were neither warranted nor acceptable, and the evidence they have presented does not convince me otherwise, nor does it in any way justify the violations committed against the Plaintiff. I will deal with each of the claims made by the Plaintiff individually below.

### ***Claim 1: Assault causing grievous harm/injury***

#### ***a) Is the claim for assault met?***

It is clear from the evidence that the Plaintiff was wrongly assaulted. Not only was he assaulted by multiple officers at the same time, with the public viewing and contesting his assault, but he was also subjected to inhumane treatment and suffered permanent damage to his left ring finger as a result of the assault. This Court finds that the actions committed by the Defendants cannot, as the Defendant's argue, be justified. Thus the resulting harm to the Plaintiff is also not justifiable. Furthermore, this Court finds ludicrous the Defendant's assertion that the injuries sustained by the Plaintiff occurred when he hid under a car, and during the process when Police Officers tried to remove him. The injuries sustained by the Plaintiff cannot logically have resulted from such an event.

The Court accepts the testimony that the Plaintiff was brutally beaten by the officers of the Defendants who kicked him and used clubs to wound him. It is accepted that the Plaintiff was beaten so badly that on-lookers pleaded with the Police not to kill him. I accept the testimony that the 2<sup>nd</sup> Defendant frog-marched the Plaintiff to the Police Station and this Court is satisfied that the Plaintiff did in fact suffer the aforementioned injuries. Since the Defendants' action have been determined by this Court to be unjustifiable, and the Defendants have been found responsible for the Plaintiff's injuries, this Court will be guided by the principle from ***Icharia v. Attorney General (2001) KLR 573 (a decision of this Court)*** that **"once the swinging into action of the police is found to have been unjustified all probable and reasonable consequences of the unlawful act must be attributed to them."** As such the Defendants are liable for damages for assault causing grievous harm/injury.

#### ***b) What is the quantum of damages?***

Although I do not propose to quantify damages for each of the claims separately, as I will award a global sum, I will nonetheless outline the submissions made, and the authorities referred to me, and I will apply the same to arrive at the global award. The Plaintiff suffered fairly severe personal injuries, including the left side of his head, laceration on knees which required six weeks of medical care, permanent disfiguration and loss of dexterity on left ring finger (fractured and nail removed), he was operated on

the wound on his head, and he had to attend physio for finger with no success.

Let me now consider some of the authorities that were referred to me. In *Icharia v. A.G.* (supra) the Plaintiff claimed damages resulting from personal injury inflicted during disturbances that followed a political rally. In that case the Attorney General was held responsible on the grounds that the injuries were caused by unlawful police action. The Plaintiff was hospitalized, suffering from severe pain. He suffered lacerations and bruises, and was given stitches and other treatment. As in that case, the Plaintiff before me was hospitalized only for a day, but had been forced to undergo prolonged treatment for his injuries. Notably, however, in that case, as opposed to the case at bar, the Plaintiff did not suffer any permanent injury. The Plaintiff, in that case was awarded **Kshs.150,000** for **general damages** for pain, suffering and loss of amenities and **Kshs.300,000** in **exemplary damages**.

The facts in *Bencivega v. Amin* (1986) KLR 269 differ dramatically from the case at bar, and notably the injuries suffered were, in my opinion, much less serious. The Plaintiff's injuries resulted from a motor vehicle accident. He had sued the driver of the car which collided with the motorbike he had been traveling on. As a result of the collision, he suffered fractures of several bones, a torn knee ligament, various soft-tissue injuries and post-hemorrhagic shock and was awarded **Kshs.200,000** in damages. There was no permanent injury.

In *Tynes v. Barr* (1994) 45 WIR 7 the facts were similar to the case at bar. A lawyer was subjected to a body search including a patting through his private parts; he was taken and handcuffed in an open jeep clearly visible to the public; and at the Police Station he was forcibly strip-searched, put in a cell, and denied the use of a telephone. The Plaintiff succeeded in his action and was awarded **\$75,000 for assault, battery and false imprisonment, \$100,000 for malicious prosecution** and **\$40,000 for breach of constitutional rights**. The Court expressed the view that "in relation to the sum paid for breach of the Constitutional rights of the Plaintiff, the Court expresses the view that the conduct of the Defendant fell precisely in the category of oppressive, arbitrary or unconstitutional action by "Servants" (of the Government) giving rise to exemplary damages. In assessing exemplary damages the Court should include the injury the Plaintiff has endured to his dignity and pride, mental suffering and loss of reputation."

The Defendants submit that an award of Kshs.180,000 would be appropriate. The Plaintiff has not submitted separately on each claim, but has made a global recommendation.

## ***Claim 2: Wrongful arrest and false imprisonment***

### **a) Issue**

Whether or not the Plaintiff was engaged in any unlawful assembly/meeting pursuant to Section 78 of the Penal Code and Section 5(11) of the Public Act.

Section 5(11) of the Public Act states that,

***"Any person who takes part in any public meeting or public procession deemed to be unlawful assembly under subsection (10) or holds, convenes or organizes or is concerned in the holding, convening or organizing of any such meeting or procession shall be guilty of the offence of taking part in an unlawful assembly under Chapter IX of the Penal Code and liable to imprisonment for one year."***

In *Kiiru v. Mwamburi* (2001) KLR 46 the Court held that, in claims for wrongful arrest and false imprisonment, the evidentiary burden lies on the Defendant to prove that they had cause for suspecting that the Applicant had committed the offence. In this case the Defendants have not discharged this burden. The Defendants have not presented any evidence that Mr. Orengo was in any way, at the time of his arrest, engaged in holding a public rally or resisted arrest, as they have claimed. The only claim that has been made by the Defendants, justifying the arrest, is that they believed a public meeting was taking place because the Kisii Municipal Stadium is next to a matatu terminus and a street with many hawkers.

The Defence argues that as a result there were many people in the vicinity who could have heard Mr. Orengo's political statements if they were made. This Court will not accept such a claim and finds the argument untenable. It would lead to the absurd conclusion that any time a group of people with particular opinions gathered around a public area they could be found guilty of unlawful assembly. **This Court is not willing to impose such a restriction on Kenyan people's freedom of movement.**

Also, the Plaintiff has demonstrated that he made every effort to comply with the Public Act. Mr. Orengo informed the correct authorities, within the proscribed time, in accordance with Section 3 of the Public Order Act, of his intention to hold a public meeting the following week. I am satisfied that Mr. Orengo informed the 2<sup>nd</sup> Defendant of his intention to inspect the venue that day, and once told of the Plaintiff's intention, the 2<sup>nd</sup> Defendant did not ask the Plaintiff not to proceed to the venue. **This Court is satisfied that the Plaintiff, at the time of his arrest, was indeed inspecting the venue, and not holding a public meeting.** It seems illogical that the Plaintiff would go to the trouble of complying with the requirements of the Public Act simply to violate them a few hours later. Given these reasons, and the Defendants' failure to discharge their burden of proof, **I find that the Plaintiff was not engaged in an unlawful assembly contrary to Section 78 of the Penal Code and Section 5(11) of the Public Act, and therefore his arrest was unlawful.**

On the issue of false imprisonment, the Defendants argue that because the Plaintiff was not detained in custody for more than twenty-four hours they have not committed an offence and the imprisonment was lawful. I reject this argument. The fact that the initial arrest was unlawful necessarily means that any subsequent imprisonment was also unlawful.

Time is not a relevant factor here, nor can it vitiate the Defendants' guilt. The Defendants have not submitted any suitable evidence to establish that they lawfully imprisoned the Plaintiff. **As such, I find the Defendants guilty of both wrongful arrest and false imprisonment.** The Plaintiff is entitled to damages for both these claims.

**b) What is the quantum of damages?**

The facts in *Kariuki v. East Africa Industries Ltd* (1986) KLR 383, referred to me by the Defence, differ very much from the case at bar. The Plaintiff was falsely imprisoned for giving out bad checks. Furthermore, the quantum of damages is very low, and not very helpful here. The Court awarded Kshs.1,000 for wrongful arrest and Kshs.1,000 for false imprisonment.

In *John Kamau Icharia v. Paul Nyiru*, (HCCC No. 1774 of 1994), the Plaintiff was a Member of Parliament. He was arrested without charges and detained for one day. The Court awarded Kshs.200,000 for unlawful arrest and Kshs.200,000 for false imprisonment. Furthermore, given the aggravating factors in this case (the manner in which he was arrested, the fact that he was denied food and medical care and detained) this case has a parallel with the case at bar.

In *A.G. of St. Christopher v. Reynolds* (1979) 3AER 129 the Plaintiff had filed an action for compensation under the Constitution for unlawful arrest and detention. The Judge found the Plaintiff's allegations proved and awarded him \$5,000 in damages. On appeal, the Court increased the damages to \$18,000 which included 'a small sum as exemplary damages'. The state claimed that the Court of Appeal had erred in not quantifying the exemplary damages as a separate item. The A.G. acknowledged that if the Governor in this case had acted unconstitutionally the present case would fall into the first category of cases which the House of Lords laid down as justifying an award of exemplary damages, namely "oppressive, arbitrary or unconstitutional action by the servants of the Government" (see *Rookes v. Bernard*). The A.G. did argue, however, that the Court of Appeal erred in not quantifying that part of the \$18,000 which represented exemplary damages. The Court held that *Rookes v. Bernard* did not suggest "that if the jury gives exemplary damages it must necessarily specify the amount of damages separately from the amount of compensatory damages which it awards."

**Claim 3: Malicious Prosecution**

The Plaintiff cites *Van Heeran v. Cooper* (2003) ILC 419 which held that the object of the law of malicious prosecution is “to protect individuals against the use of criminal courts for purposes other than law enforcement. The core elements of the tort were improper purposes and lack of reasonable belief in guilt when instigating prosecution”. The test also set out in this case is as follows: “In an action for Malicious Prosecution the five elements to be proved are usually thought to be as follows:

1. *That the Defendant prosecuted the Plaintiff on criminal charge.*
2. *That the Criminal Proceedings terminated in the Plaintiff’s favour*
3. *That the Defendant had no reasonable and probable cause for bringing the proceedings*
4. *That the Defendant acted maliciously*
5. *That the Plaintiff suffered damage as a consequence of the proceedings*

In *Kiiru v. Mwamburi* (supra) the Court established that “to prosecute a person is not prima facie tortuous, but to do so dishonestly or unreasonably is. Malicious prosecution thus differs from wrongful arrest and detention, in that the onus of proving that the prosecutor did not act honestly or reasonably lies on the person prosecuted.” Thus the burden must be discharged by the Plaintiff, in this case Mr. Orengo, as measured on a balance of probability.

a) *Analysis of Test*

1. *That the Defendant prosecuted the Plaintiff on criminal charge*

The Plaintiff was in fact charged with taking part in unlawful assembly and resisting arrest.

2. *That the Criminal Proceeding terminated in the Plaintiff’s favour*

The Defendants contend that the Plaintiff’s claim of malicious prosecution is premature. They argue that because the prosecution had not terminated in the Plaintiff’s favour, that is because the charges for unlawful assembly against the Plaintiff had not been dismissed, on 5<sup>th</sup> of February, 2002 – the day on which the Plaintiff filed his suit against the Defendants, the claim for malicious prosecution is untenable. I disagree. On 28<sup>th</sup> June, 2002, the Plaintiff was acquitted of the charges, that is the prosecution was terminated in the Plaintiff’s favour. That being so, at the present time I will act upon this conclusion.

3. *That the Defendant had no reasonable and probable cause for bringing the proceedings*

The Plaintiff has established that he took all lawful steps to comply with the requirements of the Public Order Act. The Plaintiff informed the correct authorities of his intention to hold a public meeting on the day stipulated in the Notice, and paid the registration fee. Furthermore, the Plaintiff informed the 2<sup>nd</sup> Defendant that he would be proceeding to the Kisii Municipal Stadium to inspect the venue. The Plaintiff has established that he did not resist arrest; in fact the Defendants did not even inform him that he was under arrest during the attack. I am satisfied that the Plaintiff was assaulted and arrested when he posed no imminent danger to life, property or law and order. **I find that the Plaintiff has proven, on a balance of probability, that the Defendants had no reasonable and probable cause for bringing the criminal proceedings.**

4. *That the Defendant acted maliciously*

It has been established by the Plaintiff that the force used by the arresting officers was both excessive and reckless. I accept that Police Officers in full riot gear attacked the Plaintiff, and his colleagues, who were completely unarmed. I accept that the second Defendant frog-marched the Plaintiff 1000 yards to the Police Station despite the fact that he did not resist and was willing to walk. Once at the Station, the

Police acted maliciously by denying the Plaintiff much needed medical treatment and refused pleas by friends of the Plaintiff to provide him with medication. It has been established that when the Plaintiff filed complaints of assault against the Police, no action was taken, and instead, charges brought against him were amended to cover up for the assault. Furthermore, the Plaintiff was prosecuted at Kilgoris Court, instead of Kisii Court, where the offence allegedly took place, just to harass him further. As such the Plaintiff has discharged his duty to prove that the Defendants acted maliciously.

#### **5. That the Plaintiff suffered damage as a consequence of the proceedings**

The Plaintiff suffered numerous physical injuries as a result of the Defendants' actions. These have been outlined above. As a result of these injuries, the Plaintiff was unable to work for sometime; has been forced to undergo extensive medical treatment and therapies; and has lost functioning of his left index finger. In addition, the Plaintiff was publicly humiliated and degraded by the Defendants.

**I find that the Plaintiff meets the test for malicious prosecution and has discharged his evidentiary burden on a balance of probability.** The Plaintiff is therefore entitled to damages.

#### **(b) What is the quantum of damages?**

The Defendant has referred to the case of *Kariuki vs East Africa Industries Ltd.* (1986) KLR 383. In this case, the Plaintiff, an employee of the Defendant, was wrongfully charged with stealing. The Plaintiff was reprimanded for over three months following an order of the Court and after trial was acquitted of the charges. The Court awarded Kshs.18,000 for malicious prosecution. The Court notes that this is an old 1986 case.

#### **Claim 4: Contravention of Fundamental Rights and Freedoms**

##### **a) Facts:**

The following sections of the Constitution were breached as alleged by the Plaintiff: ss. 70(a) – refusal to take steps upon his complaint of assault, denied the Plaintiff protection of the law; 72(1) – denial of liberty, security of the person and protection of law, 74(1)- denial of protection from being subjugated to inhumane and degrading treatment, 78(1) – denial of right not to be hindered in the enjoyment and freedom of conscience, 79(1) – denial of right not to be hindered in the enjoyment of freedom of expression, 81 – denial of right not to be hindered in the enjoyment of freedom of assembly and association, 81(1) – denial of freedom of movement, 82(2) discriminated against because of propagating the ideals of democracy.

#### **(b) What is the quantum of damages?**

In *Tynes v Barr* cited in *Peters v Marksman* (supra) the facts were similar to the case at bar. A lawyer was subjected to a body search, including a patting through his private parts. He was taken and handcuffed in an open jeep clearly visible to the public, driven to the police station where he was forcibly strip searched, put in a cell, and denied the use of a telephone. The Plaintiff succeeded in this action and was awarded \$75,000 for assault, battery and false imprisonment, \$100,000 for malicious prosecution and \$40,000 for breach of Constitutional rights. “In relation to the sum paid for breach of the Constitutional rights of the Plaintiff, the Court expresses the view that the conduct of the Defendant fell precisely in the category of oppressive, arbitrary or unconstitutional action by “Servants” [of the government] giving rise to exemplary damages. (see *Rookes v. Benard*). In assessing exemplary damages the court should include the injury the Plaintiff has endured to his dignity and pride, mental suffering and loss of reputation.”

In *Dominique Arony Molo v. A.G.* (HC Misc. App. No. 494 of 2003) the Court noted as follows when assessing the quantum of damages for breach of Constitutional rights: “In approaching the assessment of damages in this case I am mindful that there is a dearth of authority on the principle or guidelines by which such damages are to be assessed. I am only aware of two decisions of the Privy Council that have

dealt with the assessment of damages for breach of constitutional rights.” Those cases are *Maharaj v. A.G. of Trinidad and Tobago* (1978) 2AER 670 where the Court awarded \$75,000 for damages of an exemplary nature and \$150,000 for the shackling and flogging and solitary confinement of the Plaintiff. In *Jorsingh v. A.G.* (1997) 3LRC 333 the Court awarded \$50,000 for loss of earnings and \$20,000 or distress and inconvenience where it was found that delay was a breach of Constitutional rights. Finally in *Fuller v. A.G. of Jamaica* (CA 91 of 1995) a sum of \$1,500,000 was granted where prisoners died in cells because of poor ventilation.

After citing the relevant authorities the Court in the *Dominique* case (supra) made an award of Kshs.2,500,000 for breaches of fundamental rights including continued imprisonment, the continued holding of the Applicant for nine days at a maximum security prison after his release was ordered, and for the holding of the Applicant in solitary confinement which amounted to “cruel and inhumane treatment”.

### ***Claim 5: Claim for Special Damages***

It is trite law that special damages must be specifically pleaded and strictly proved (see *Jivanji v. Sanyo Electrical Co.* (2003) KLR 452). I uphold the Defence submission that the claim for Shs.200,000 under paragraph 16 of the Plaint has not been proved. I also accept the submission that the claim for legal fees of Shs.750,000 was not specifically pleaded, nor was there an application to amend the Plaint to so plead. I, therefore, disallow the claims for special damages.

### ***Conclusion***

As I indicated earlier, I do not propose to quantify damages for each of the claims separately. I much prefer to award a global sum which I believe reasonably compensates the Plaintiff for all the pain and injuries suffered in respect of all his claims. The Plaintiff has suggested a global figure of Shs.50 Million, while the Defendant has broken the claims down to a total of Shs.510,000 for all the injuries. I believe both these figures are exaggerated, one on the high side, and the other on the low side, and I must come up with a figure that I believe is reasonable having regard to all the circumstances of this case.

I have taken into account the variety of case law relevant to the number of individual claims that have been made by the Plaintiff. More specifically I have taken note of the fact that the behaviour of the Defendants has clearly fallen into a category of actions held by many Courts in the past (firstly in *Rookes v. Bernard* and subsequently in many cases that have applied and upheld the principle then set out) to be “oppressive arbitrary and unconstitutional.” This behaviour warrants an award of exemplary damages whether or not it has been specifically claimed (and I believe that it has) and whether or not I will specify its amount separately from the claim for assault, false imprisonment and malicious prosecution.

Although the permanent injury to the Plaintiff may have been limited to his finger, this will not limit me in my award of damages. The case law is clear that damages are designed not only to compensate the Plaintiff, but also deter wrongful behaviour. In *Rookes v. Bernard* (supra) the Court elaborated on the use and importance of exemplary damages: “**it serves a valuable purpose in restraining the arbitrary and outrageous use of executive power.**” The Court emphasises the use of exemplary damages in cases such as this one:

***“There are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law and thus affording practical justification for admitting into the civil law a principle which ought logically to belong to the criminal .... The first category is oppressive, arbitrary or unconstitutional action by the servant of the government....where one man is more powerful it is inevitable that he will try to use his power to gain his ends...servants of the government are servants of the people and the use of their power must always be subordinate to their duty of service....”[Emphasis added].***

**Taking into account the need for deterrence of this sort of behaviour, especially by those in positions of power similar to the Defendants, and due to the lack of evidence and explanation provided by the Defendants, and the overwhelmingly innocent behaviour of the Plaintiff, I find that**

**the events that took place on 4<sup>th</sup> February, 2001 were unnecessary, unconstitutional, and malicious, and that the Defendants are fully liable for damages suffered by the Plaintiff under various heads outlined in this Judgment. Without breaking these down into different heads, I would award a global sum of Kshs.5,000,000 (Five Million) to the Plaintiff with costs and interest. That would be my Judgment in the event I should be wrong in my Judgment that this suit should be struck out for failure to comply with the mandatory requirement of Section 13A(1) of the Government Proceedings Act.**

Dated and delivered at Nairobi this 14<sup>th</sup> day of March, 2007.

**ALNASHIR VISRAM**

**JUDGE**