



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL SUIT NO. 934 OF 2004**

**EMMANUEL KURIA WA GATHONI.....PLAINTIFF**

**VERSUS**

**1. THE COMMISSIONER OF POLICE.....1<sup>ST</sup> DEFENDANT**

**2. THE ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**J U D G M E N T**

1. This is a claim for malicious prosecution and false imprisonment. The Plaintiff's claim is as follows. That on 14<sup>th</sup> February, 2001 on learning through print and electronic media houses that he was being adversely mentioned in connection with the murder of one Charles Yaw Sosah (the deceased), he presented himself to the police with a view of clearing his name. He alleged that instead, the 1<sup>st</sup> Defendant illegally and maliciously caused him to be arrested and detained at Kileleshwa police station on false, malicious and unfounded allegations that he had along with others murdered the deceased. That upon arrest and detention, he was subsequently charged with the said murder. That he was tried in High Court Criminal Case No. 70 of 2001. That he was during the hearing and pendency of the said case remanded at Kamiti Maximum prison until 8<sup>th</sup> September, 2009 when he was acquitted of the said charge under Section 306 of the Criminal Procedure Code. He claims that his arrest, prosecution and incarceration from 14<sup>th</sup> February, 2001 to 8<sup>th</sup> September, 2009 was illegal, unlawful and malicious and a grave abuse of the process of this court since the Defendants knew that he had not committed the offence.

2. The particulars of illegality, falsehood and malice were outlined among others; arresting the plaintiff for the alleged offence of murder before carrying out proper investigations; acting on rumours and/or propaganda circulated both through the print and electronic media that the plaintiff was involved in the murder of the deceased; arresting and detaining the plaintiff for the alleged offence so as to please and/or appease certain quarters when there was no basis whatsoever for his arrest and detention; arresting and charging the plaintiff of the said murder so as to please and/or appease the general public and in particular the residents of Woodley Estate who had all along waged a hate campaign against the plaintiff owing to the decision by the City Council of Nairobi (his then employer) to sell and/or dispose of the houses comprised therein to individuals; arresting and arraigning the plaintiff in court for the said offence so as to downplay the hue and cry that followed after the murder of the deceased who was an official of the Woodley Welfare Association which was agitating against the sale of the said houses; failing to appreciate and/or consider at all that the sale of the said houses which the deceased was agitating against could not have been a motive for the plaintiff to commit and or participate in the said heinous act; that the action of the Defendants in arresting and arraigning the plaintiff in court for the said offence without any evidence whatsoever was oppressive, arbitrary, highhanded and unconstitutional; rushing to arrest and arraign the plaintiff in court for the said offence so as to cover up for their incompetence, inefficiency, laxity and lack of diligence in investigating and apprehending the real culprits; arresting and detaining the

plaintiff in custody for no good reason whereas he is the one who presented himself to the police so as to assist them in investigations of the said murder after he learnt that he was being mentioned.

3. The Defendants filed a statement of defence in which they denied the Plaintiff's claim. The Defendants contended that the said arrest and subsequent prosecution was lawful and justifiable. That they had reasonable and probable cause for preferring charges and for taking and causing to be taken the said proceedings against the plaintiff and that in so doing they acted without malice.

4. Only the plaintiff and his witness testified in court.

5. PW1, Gilbert Kibe Njuguna testified that he knew the plaintiff before he became the director of city planning. That he wrote a letter to the plaintiff offering him a position at his firm but that the plaintiff did not report for the reason that there were news about his involvement in the murder of the deceased. The package offered was a basic salary of KShs. 300,000/- from 30<sup>th</sup> March, 2001, house allowance of KShs. 80,000/-, entertainment allowance of KShs. 50,000/- and a company car. That the position would earn him annual leave of 48 working days and this was subject to review after 6 months. That in the year 2004, the plaintiff requested to be given the job but he could not be given since he had been accused of murder. That the clients could not have felt comfortable with him. He stated that the amount offered was subject to tax. He stated that the review of terms after 6 months was an upward review.

6. The plaintiff, PW2 testified that he is currently a business person and a farmer. He stated that on 12<sup>th</sup> February, 2001 a person by the name Jossah was killed. That it was mentioned in a television coverage that he was watching that he was one of the persons involved in the deceased's murder. He reported to Kilimani police station and he was immediately arrested together with one Kimani Kongo. That they were charged with the murder of the deceased. He however stated that he did not know the deceased and had never heard of him. He produced a charge sheet to that effect as P. Exhibit 1. They were then remanded at Kamiti Maximum Prison. That they were prosecuted and later acquitted under Section 306 of Criminal Procedure Code. He stated that he filed this suit because the police stated that they had no evidence against him and initially an inquest had been recommended. He produced letters dated 18<sup>th</sup> April, 2001, 20<sup>th</sup> April, 2001, 11<sup>th</sup> May, 2001, covering report, ruling dated the 28<sup>th</sup> September, 2012 as P. Exhibit 2a, 2b, 2c, 2d and 3. He also produced the proceedings in the criminal case Number 70/2001, **R Vs Emmanuel Kuria Gathoni and David Kimani Kongo** as P. Exhibit 4. It was his evidence that even the investigating officer recommended that he should not be charged. He stated that he stayed at Kamiti Prison for three years and it was the worst experience he has ever had. That he used to sleep on the floor and eat junk food. He stated that he was once involved in an accident when they were being ferried from court. He further told the court that his stay at Kamiti Prison had a bearing on his health in that he suffered mild asthma and ulcers which worsened when he was taken to Kamiti Prison. He stated that he had been offered a job with a salary of KShs. 430,000/- per month but when he was prosecuted the company declined to give him the job saying that their clients would not be comfortable with him because he had been charged with murder. He further testified that he spent KShs. 6 Million as advocate fee in the criminal case. He produced receipts dated 23<sup>rd</sup> February, 2001, 17<sup>th</sup> May, 2001, 5<sup>th</sup> November, 2002, 27<sup>th</sup> March, 2003, 26<sup>th</sup> February, 2002, 15<sup>th</sup> May, 2003 and 14<sup>th</sup> August, 2003 as P. Exhibits 8a to 8g. On the reliefs that he is seeking, the plaintiff stated that he seeks KShs. 6 Million as special damages, KShs. 18 Million for loss of income for the period from 1<sup>st</sup> March, 2001 to 31<sup>st</sup> August, 2004 being 42 months at the rate of Ksh.430,000/- per month for the lost job opportunity with PW 1, when he was remanded at Kamiti Prison. A copy of the demand letter and a reply thereto dated 28<sup>th</sup> May, 2004 were produced as P. Exhibits 9 and 10 respectively. He stated that the correct figure of damages he seeks is that appearing in his statement and not in P. Exhibit 9 which is the demand letter.

7. In his submissions on whether he had proved his case on a balance of probability, the plaintiff cited in the case **Murunga v. the Attorney General [1976-80] 1KLR 1251** and **James Alfred Koroso v. Attorney General [2008] eKLR** and submitted that all the ingredients laid down in the above cases that are required to sustain a claim for malicious prosecution have been satisfied in the case at hand. The said ingredients are that the prosecution did take place; that the prosecution was terminated in the Plaintiff's favour; that the prosecution was instituted without reasonable and probable cause; and that the

prosecution was actuated by malice. It was further submitted that the fact that the prosecution was instituted without reasonable and probable cause and that it was actuated by malice was borne out of the ruling in the criminal case where the judge held *“in view of PW4’s evidence to the effect that no new evidence was obtained in compliance with the Attorney General’s directions, I am tempted to agree with PW11’s observation in defence Exhibit D6, D7 and PW34’s recommendation that there was no adequate evidence availed by the prosecution to support the charge. I am not surprised that PW34 was candid enough to recommend that the matter be dealt with by way of an inquest. Although PW34 is unwilling to openly admit in this trial that he still stands by his recommendations perhaps due to fear of victimization by his bosses; it would appear that he was not ready to have the accused charged with murder but for “later instructions that I hold the two in connection to the murder as I continued to investigate.” One openly wonders where did such instructions come (sic) from and who issued them? Could the two said persons have been charged because of the “hue and cry” that rose after the murder, as PW34 states in his statement? It is my considered view that the two accused persons would not have been charged with murder, if PW11 and PW34 had a choice in this case. Both have admitted as much in their evidence before this court”*.

8. The plaintiff referred this court to P. Exhibit 2a saying that the DCIO stated that the evidence in the file was short of the standard required to prove a murder case against the plaintiff. That the Director of public prosecution in P. Exhibit 2c admitted that there was no one who had placed the plaintiff at the scene of the murder but went on to instruct that the plaintiff be charged. That the covering report by the investigating officer reveals that the investigating officer cast doubt on the authenticity of the alleged death threats allegedly issued by the plaintiff to the deceased hence his recommendation that the matter be disposed of by way of an inquest. On whether or not the plaintiff suffered loss and whether or not he is entitled to damages it was submitted that the plaintiff established that he suffered some injury while being ferried from court to the prison, that he suffered mental anguish, was subjected to hardship and that he lost a lucrative offer of a senior architect/planner with the firm of Gilbert Kibe & Partners Architects. It was submitted that the plaintiff’s career as an architect and planner had been destroyed as he no longer had confidence even to face his professional colleagues and friends owing to the indelible moral stigma he suffered. It was argued that the plaintiff is entitled to damages since his prosecution was actuated by malice and without any justification. It was submitted that with the educational background the plaintiff holds, he ought to be awarded KShs. 75,000,000/- as general damages. A vast number of authorities were cited to back this argument among them; **Geoffrey M. Asanyo & 3 others v. Attorney General [2014] eKLR**; **Otieno Mak’onyango v. Attorney General & another [2012] eKLR** and **James Alfred Koroso (supra)**. On special damages, it was submitted that the plaintiff ought to be awarded KShs. 6 Million being the money he spent as advocates fee in defending himself in the criminal case he was charged with. The case cited in support is **Jacob Juma & Another v. Commissioner of police & another [2013] eKLR**. On loss of income, the court was urged to award KShs. 18,060,000/- being the salary the Plaintiff was offered by Gilbert Kibe & Partners Architects from 1<sup>st</sup> March, 2001 to 31<sup>st</sup> August, 2004. As for aggravated and exemplary damages, it was stated that aggravated damages ought to be awarded since the Defendants acted in malice and due to the oppressive and arbitrary way the plaintiff was treated and due to violation of his freedoms under Sections 70 and 72 of the repealed constitution.

9. The Defendants on the other hand contended that the salary offered was for 6 months and was subject to statutory deductions and there was therefore uncertainty to the exact amount of money he would be earning. That due to the alleged uncertainty, the plaintiff cannot be said to have proved his claim for KShs. 18,060,000/=. It was submitted that the plaintiff did not tender any documentation to confirm his medical condition and that the same deteriorated due to confinement at the correctional center. The Defendant cited **Simon Taveta v. Mercy Mutitu Njeru [2014] eKLR** to support their argument that the plaintiff needed to prove his case as to damages. That the difference in the figure in the demand letter and the pleadings raises questions as to the actual special damages suffered by the Plaintiff. That the demand for KShs. 6 Million should be treated with great caution. It was further submitted that since the plaintiff has not been deregistered from Architectural Association of Kenya he still earns a living with his professional qualification.

10. I have carefully considered the evidence tendered by the Plaintiff in the case before the court together with the submissions by the learned counsels. With respect to the tort of malicious prosecution, the law

surrounding the tort of malicious prosecution is well settled in this country. In the case of **Mbowa Vs East Meno District Administration (1972) EA 352** the East African Court of Appeal expressed itself as follows: -

***“The action for damages for malicious prosecution is part of the Common Law of England.... The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of prosecution should be personal and spite rather than for the public interest. It originated in the medieval writ of conspiracy which was aimed against combinations to abuse legal procedure, that is, it was aimed at the prevention or restraint of improper legal proceedings.. it occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth. It’s essential ingredients are: -***

- i. The Criminal proceedings must have been instituted by the Defendant, that is, he was instrumental in setting the law in motion against the Plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the Plaintiff or a person arrests the Plaintiff and takes him before a judicial authority.***
- ii. The Defendant must have acted without reasonable or probable cause i.e. there must have been no facts, which on reasonable grounds, the Defendant genuinely thought that the criminal proceedings were justified.***
- iii. The Defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question for some other than, than its legally appointed and appropriate purpose.***
- iv. The criminal proceedings must have been terminated in the Plaintiff’s favour, that is the plaintiff must show that the proceedings were brought to a legal and that he has been acquitted of the charge... the Plaintiff, in order to succeed has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must ‘unite’ in order to create or establish a cause of action.***

***In the case of Gitau Vs Attorney General (1990) KLR 2013 Trainor, J had this to say about the tort of malicious prosecution: -***

***“to succeed on a claim for malicious prosecution the Plaintiff must first establish that the Defendant or his agent set the law in motion against him on a criminal charge setting the law in motion in this context has not the meaning frequently attributed to it if having a police officer take action, such as effecting arrest. It means being actively instrumental in causing a person with some judicial authority to take action that involves the Plaintiff in a criminal charge against another before a magistrate.”***

***Secondly, he who sets the law in motion must have done so without reasonable and probable cause... The responsibility for setting the law into motion rests entirely on the officer-in-charge of the police station. If the said officer believed what the witnesses told him, then he was justified in acting as he did and the court is not satisfied that the Plaintiff has established that he did not believe them or alternatively, that he proceeded recklessly and indifferently as to whether there were genuine grounds for prosecuting the Plaintiff or not.***

11. The first and fourth elements named hereinabove have not been contested to by the Defendants. What is in contention is whether the prosecution was actuated by malice and secondly, if it was instituted

without reasonable and probable cause. The court in **Thomas Mutsotso Bisembe v. Commissioner of Police & Another (2013) eKLR** while dealing with these aspects had this to say:-

*"The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. ...Where the police deliberately decide not to take into account the version of the suspect and acts on a story that eventually turn out to be improbable and which no ordinary prudent and cautious man would have relied upon that failure may constitute lack of reasonable and probable cause for the purposes of malicious prosecution. ...But neglect to make a reasonable use of the sources of information available before instituting proceedings would be evidence of want of reasonable and probable cause and also malice."* (Emphasis mine)

12. The test in determining whether or not there was reasonable and probable cause for the Plaintiff's prosecution and whether it was actuated by malice was laid down in **Kagane & Others** (supra) where it was held:-

*"Whether or not there was reasonable and probable cause for the prosecution is primarily lodged 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. Once the objective test is satisfied, it may be necessary to consider whether the prosecutor did 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...The facts show that no reasonable person could honestly have believed that the prosecution was at all likely to succeed then malice would have been established and malice in that case meant that the prosecution was motivated by something more than a desire to vindicate justice."* (Emphasis mine)

What constitutes a reasonable and probable cause was also defined in the case of **Simba Vs Wambari (1987) KLR 601** as: -

*"The Plaintiff must proof that the setting of the law in motion by the Inspector was without reasonable and probable cause... if the inspector believed what the witnesses told him then he was justified in acting as he did and I am satisfied the Plaintiff has not established that he did not believe them or alternatively that he proceeded recklessly and indifferently as to whether there were genuine grounds of prosecuting the Plaintiff or not."*

13. Also in **Samson John Nderitu v. The Attorney General (2010) eKLR** it was held as follows:-

*"It is trite and this court, has judicial notice of the fact that before an accused person is taken to court, and arraigned in court for criminal prosecution, the prosecuting authority namely the police or whatever unit, whose functions fall under the office of the Defendant, usually carry out investigations, record statements from potential witnesses, analyze the facts to determine if the facts disclose an offence before arraigning such a person in a court of law."* (Emphasis mine)

14. In the case herein, there is un rebutted evidence that the police did not gather sufficient evidence before charging the Plaintiff. This is revealed by P. Exhibit 2a where the DCIO stated that the evidence in the file was short of the standard required to prove a murder case against the plaintiff; secondly, the Director of public prosecution in P. Exhibit 2c admitted that there was no one who had placed the plaintiff at the scene of the murder but went on to instruct that the plaintiff be charged and thirdly, the investigating officer cast doubts on the authenticity of the alleged death threats allegedly issued by the plaintiff to the deceased hence coupled with his recommendation that the matter be disposed of by way of an inquest as revealed in the covering report. On the issue of the Director of Public Prosecution's letter to

the effect that there was no one who placed the Plaintiff at the scene of murder, I am alive to the fact that a criminal case can be proven by circumstantial evidence but upon thorough perusal of the proceedings in the Criminal Case, I find no such evidence and no wonder the Plaintiff was acquitted for lack of evidence.

15. Taking the objective test outlined in the **Kagane and Samson John Nderitu** cases (supra), I draw an inference that there was no basis for charging and prosecuting the Plaintiff and further that the prosecution was actuated by malice considering the lousy way in which the prosecution conducted its investigations in that case.

16. On the issue of quantum, the Plaintiff submitted that as a result of the charge and prosecution which lasted three (3) years, he suffered loss. He stated that his reputation was tarnished, he lost a job opportunity, his health deteriorated and he spent a considerable amount of money as legal fees. It was submitted that the Plaintiff was subjected to stay in remand for three years under degrading conditions before he was acquitted.

17. On exemplary damages I am fortified by the holding of the Court of Appeal in **Obongo & Another v. Municipal Council of Kisumu [1971] EA 91** where it was held that in Kenya punitive or exemplary damages are awardable only under two circumstances, namely (i) where there is oppressive, arbitrary or unconstitutional action by the servants of the government; and (ii) where the Defendant's action was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff. Having made a finding that the plaintiff had been maliciously prosecuted, it follows that the action against him was arbitrary and unconstitutional. He was detained without probable cause thus infringing his rights under Sections 70 and 72 of the repealed constitution in which circumstances he is entitled to exemplary damages.

18. With regard to aggravated damages, I am fortified by **Francis Xavier Ole Kaparo v. The Standard & 3 Others, HCCC No.1230 of 2004 (UR)** where it was stated:-

*“Malicious and/or insulting conduct on the part of the Defendant will aggravate the damages to be awarded. The aggravated damages (distinguished from exemplary damages) are meant to compensate the plaintiff for the additional injury going beyond that which would have flowed from the defamatory words or statements above, caused by the presence of the aggravating factors...Damages will be aggravated by the Defendant's improper motive.”*

19. The Plaintiff stated that he underwent embarrassment, being denied a job position due to the said prosecution for the reason that clients would not feel comfortable with him. Bearing in mind the finding in **Dr. Willy Kaberuka vs. Attorney General Kampala HCCS No. 160 of 1993** that:-

*“He spent a period of over four months appearing in court on charges, which were hardly investigated by the Defendant's servants. He must have suffered the indignity and humiliation. He is also entitled to recover damages for injuries to his feelings especially the possibility of serving a sentence...There are no hard and fast rules to prove that the plaintiff's feelings have been injured or that he has been humiliated as this is inferred as the natural and foreseeable consequence of the Defendant's conduct. The plaintiff's status in Society is also a relevant consideration and for all these reasons the plaintiff is entitled to damages...A plaintiff who has succeeded in his claim is entitled to be awarded such sum of money as will so far as possible make good to him what he has suffered and will possibly suffer as a result of the wrong done to him for which the Defendant is responsible”.*

20. On quantum of damages, it is on record that at the time of arrest, the Plaintiff was an Architect and a Planner working with Nairobi City Council as the Director of City Planning and Architecture. I have given due consideration to the aforesaid facts and the cases cited by the Plaintiff. In his plaint, he has prayed for judgment against the Defendants jointly and severally as follows: -

1. Special Damages of Ksh. 6 Million.

2. Loss of income/earning of Ksh.18,060,000/-
3. General damages.
4. Aggravated and exemplary damages.
5. Loss of income, the quantum to be determined by the court.
6. Costs of the suit and interest.

21. On special damages, the Plaintiff produced a bundle of 7 receipts totaling to sum of Ksh.6 Million paid to M/s Kimondo Mubea & Co. Advocates who were defending him in the Criminal Case. The receipts were produced as P. Exhibits 8(a) to P Exhibit 8(g). In his submissions on this point, counsel for the Plaintiff relied on the case of **Jacob Juma & another Vs Commissioner of Police & another (2013) ECLR**, where the court allowed a sum of Ksh.5 Million as legal fees incurred by the Plaintiff in defending a criminal case.

22. In further support of his submissions on the same aspect, he quoted an extract from Halsbury's laws of England 4<sup>th</sup> Edition Vol. 12 thus: -

*“where costs have been incurred by the Plaintiff in defending previous criminal proceedings brought against him, question of public policy arises. If the Plaintiff is acquitted his costs, in so far as they were reasonably incurred will be recoverable from the Defendant.”*

He also cited the case of **Geoffrey M. Sanyo & 3 others Vs Attorney General (2014) eCLR** in which the Plaintiff was awarded a sum of Ksh.15 Million as legal costs incurred in defending a criminal case.

23. It is trite law that special damages have to be pleaded and proved. The Plaintiff herein has pleaded the said amount and produced receipts in support. Though counsel for the Defendant in his submissions has urged the court to take the amount with caution, my considered view is that what was stated in the demand letter is immaterial as the court is guided by the pleadings filed in court by the parties. In this case, the amount pleaded is Ksh. 6 Million and the same was proved.

24. On loss of income/earning at Ksh.18,060,000/-; counsel for the Plaintiff submitted that the Plaintiff had been offered a job as a Senior Architect/Planner at the firm of Gilbert Kibe & Partners Architects at a monthly salary of Ksh.300,000/-, house allowance of Ksh.80,000/-, entertainment allowance of Ksh.50,000/- and a company car making a total of Ksh.430,000/- per month but he could not take up the said offer as he was arrested immediately thereafter.

25. That as a result, the Plaintiff lost the income he could have earned from the said employment with effect from 1<sup>st</sup> March, 2001 to 31<sup>st</sup> August, 2004. In support of this claim, the Plaintiffs counsel relied on the cases of the owners of the steamship “**Gracie**” and the Owners of the steamship” **Argentino (1889) Vol. 14 Appeal Cases (HC) page 519** and that of **Peter Mr. Kariuki Vs the Attorney General (2014) eCLR**. The Plaintiff herein was arrested on the 13<sup>th</sup> February, 2001. The evidence on record is that he was to take up a new appointment on 1<sup>st</sup> March, 2001, but he could not do so as, he was detained in Kamiti Prison while the case was going on until the 8<sup>th</sup> September, 2003 when he was acquitted. PW 1 who had offered him the job confirmed the said offer and produced a letter dated 2<sup>nd</sup> February, 2001. The letter was produced as exhibit 11. It was his evidence that the salary offered to the Plaintiff was subject to review after six months and could only have been an upwards review. This court takes judicial notice of the fact that in the year 2004, the offence of murder was not bailable and an accused person had to be held in remand until his case was heard and determined. In these circumstances and as rightly submitted by the counsel for the Plaintiff, the Plaintiff was incarcerated the whole period between 13<sup>th</sup> February 2001 to 8<sup>th</sup> September, 2003 when he was acquitted. But in my considered opinion, his lost earnings commenced from the month of March, 2001 when he was supposed to take up the job until 8<sup>th</sup> September, 2003 when he was acquitted. This was a total of 30 months at a monthly rate of Ksh.430,000/- totaling to

Ksh.12,900,000/-

26. On general damages a sum of Ksh.75,000,000/- was suggested by the Plaintiff. In support thereof he cited the case of **Geoffrey M. Asango & 3 others Vs the Attorney General (2014) eKLR** where a sum of Ksh.20 Million was awarded. He also relied on the case of **Otieno Mak'Onyango Vs the Attorney General & Another (2012) eKLR** wherein a sum of Ksh.20 Million was awarded and the case of **James Alfred Koroso Vs the Attorney General** in which a sum of Ksh.10 Million was awarded.

27. I have considered the Plaintiff's status, the position he held before his arrest and his academic qualifications but the amount suggested of Ksh. 75 Million is too high even going by the authorities that the Plaintiff has relied on. All considered, the court finds that a sum of Ksh. 5 Million is reasonable under this head.

28. The Plaintiff has also prayed for aggravated damages. In his submissions he has suggested a sum of Ksh.45 Million. Damages under this head are awarded where the Defendant may have acted with malevolence or spite or behaved in a high-handed, malicious, insulting or aggressive manner. In awarding damages under this head, the court may consider the Defendant's conduct upto the conclusion of the trial including what his or her counsel may have said at the trial. This court finds that the Plaintiff is entitled to aggravated damages taking into account the Defendants insistence on proceeding with the case when there was no sufficient evidence to sustain the trial. This is borne out by the letters exchanged between the Defendants which were produced as exhibits 2(a)-2d. The court awards a sum of Ksh.2 Million under this head.

29. The other claim is that of loss of income or what the Plaintiff has submitted as loss of future earnings. This has been claimed on the basis that after the prosecution, the Plaintiff's career as an Architect/Planner was completely ruined because his professional colleagues and friends would not want to associate with him. The court was also told that the offer to the Plaintiff for a job could not be revived as clients would not want to associate with somebody who had been charged with the offence of Murder. A sum of Ksh.59,340,000/- was suggested which has been based on the Plaintiff's age and a salary of Ksh.430,000/- which he had been offered. The court has considered this aspect of the claim. It is noted that no evidence was led in support of it and even if evidence had been offered I would not make any award under this head. As rightly submitted by the counsel for the Defendant, though the Plaintiff lost employment opportunity with PW 1, he still is a registered physical planner and an Architect. He is still registered as an associate member of Architectural Association of Kenya he could still earn a living with his professional qualification. This court is not persuaded by the submissions by the Plaintiff that the criminal proceedings affected him to an extent that he can longer earn a living from his profession. No evidence has also been adduced to show that after he was released from Kamiti he set up a practice as an Architect and it failed for lack of clients due to the effect the murder trial had on his reputation and to the court, that submission cannot stand as it is far fetched and speculative. This also explains why this court calculated loss of income up to the time when he was acquitted and not up to the year 2004 when the suit was filed. For the foregoing reason, I decline to award any sum under this head.

30. On the issue of costs, it is trite law that costs follow the events. The Plaintiff is hereby awarded the costs of the suit. Considering all the circumstances, I shall make the following orders: -

***a) There shall be judgment for the Plaintiff against the Defendants as hereunder.***

- |                                       |                                 |
|---------------------------------------|---------------------------------|
| <b><i>i. Special damages</i></b>      | <b><i>Ksh.6 Million.</i></b>    |
| <b><i>ii. Loss of earning</i></b>     | <b><i>Ksh.12,900,000/-.</i></b> |
| <b><i>iii. General Damages</i></b>    | <b><i>Ksh.5 Million.</i></b>    |
| <b><i>iv. Aggravated damages</i></b>  | <b><i>Ksh.2 Million.</i></b>    |
| <b><i>v. Loss of income – NIL</i></b> |                                 |

Total – **Kshs.25,900,000/-**

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Special damages to earn interest from the date of filing and the general damages from the date of this judgment.

Dated, signed and delivered at Nairobi this 2<sup>nd</sup> day of February, 2017.

.....

**L NJUGUNA**

**JUDGE**

*In the presence*

..... *for the Plaintiff*

..... *for the Defendant*