

THE REPUBLIC OF KENYA
THE KENYA NATIONAL COMMISSION ON HUMAN RIGHTS
COMPLAINTS HEARING PANEL SITTING AT NAIROBI, LENANA
ROAD, CVS PLAZA, 1ST FLOOR
COMPLAINT NO. KNCHR/CHP/1/2006

PETER MAKORICOMPLAINANT

VERSUS

- 1) THE ATTORNEY GENERAL**
- 2) THE PERMANENT SECRETARY OFFICE OF THE
PRESIDENT, PROVINCIAL ADMINISTRATION AND
INTERNAL SECURITY**
- 3) MR. ABDULLAHI LELOON, DISTRICT COMMISSIONER,
KISII**
- 4) THE COMMISSIONER OF POLICE**
- 5) CHIEF INSPECTOR (RTD) BENJAMIN MAK'ADWAR**
- 6) CORPORAL DICK (ALIAS JAMES) ODHIAMBO**
- 7) CONSTABLE BRUCE MACKENZIE**
- 8) INSPECTOR GERALD WANGILA**
- 9) CONSTABLE PHILIP SAMOEI**
- 10) INSPECTOR DAVID NGARE.**
- 11) CONSTABLE SAMUEL ROTICH.....RESPONDENTS**

Before Complaints Hearing Panel comprising:

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|----------------------------|-----------------------|
| Commissioner Lawrence Mute | – Presiding Panellist |
| Commissioner Tirop Kitur | – Panel |
| list | |
| Commissioner Godana Doyo | – Panellist |

DECISION OF THE COMPLAINTS HEARING PANEL

PROCEDURE

1. The complaint AT ISSUE was brought under the Kenya National Commission on Human Rights Act, 2002 (No. 9 of 2002) and the Kenya National Commission on Human Rights (Complaints Procedures) Regulations, 2005.
2. Upon receipt of the complaint, the Commission's Legal Services Department, in accordance with Regulation 20(1) of the Kenya National Commission on Human Rights (Complaints Procedures) Regulations 2005, conducted preliminary investigations of the alleged violations of human rights.
3. Based on the findings of the preliminary investigation (Investigation Report KNCHR/733/2004), the Legal Services Department recommended that the complaint should be brought before a Complaints Hearing Panel in accordance with Regulation 21(2) (b) of the Kenya National Commission on Human Rights (Complaints Procedures) Regulations, 2005.
4. The Complaints Hearing Panel established to hear this matter pursuant to Regulation 27 issued the concerned parties a notice informing them of its establishment and requiring them to appear in accordance with Regulation 28(2)(3) and (4).
5. The Panel invited and held a pre-hearing meeting for the parties and their representatives to fix hearing dates and for general directions in accordance with Regulation 28(5). The parties and their representatives were ordered to file with the Panel the list of issues for determination.

NATURE OF THE COMPLAINT

6. The complaint originated in a petition sent to the Kenya National Commission on Human Rights by the complainant, Peter Makori, on 20th December 2003. The Complainant, who then was held in remand charged with murder and awaiting trial, complained of torture by police officers serving in the Flying Squad Unit of the Police. Peter Makori, who described himself as a journalist, gave details of events alleging violations of his human rights by various Government officers, including a D.C and several police officers.
7. He explained that he had been arrested and although he was charged with murder and first arraigned before a lower court and later the High Court in Kisii, the trial was delayed and he was kept in remand for a very long period. In another letter to the Commission on 27th May

2004, the Complainant repeated his earlier claims about violations of his human rights by the Government and claimed compensation for wrongful confinement, torture and malicious prosecution for murder that he never committed.

8. The Complainant, Peter Makori, came before this Complaints Hearing Panel for further inquiry and determination of the alleged violations of his human rights in respect of the petition submitted to the Commission on the 20th of December 2003 and 27th May 2004.
9. In the pre-hearing meeting held by the panel on the 12th June 2006 and attended by: the Complainant's Counsel, Kennedy Gichana; Abdullahi Leloon, Respondent No.3; Rose Kibue (representing the Permanent Secretary, Provincial Administration and Internal Security (Respondent No.2); and Benjamin Mak'Adwar (Respondent No.5), it was agreed that the Complainant or his representative and the Respondents or their representatives would file with the Panel a list of issues for determination. The Complainant's advocates, Nyamweya Osoro & Nyamweya, filed a list of documents on the 16th June 2006. The Respondents did not file any list of issues or documents.
10. In the absence of agreed issues for determination by the parties, the Lead Counsel of the Panel, Mburu Gitu, filed issues for determination as follows:
 - Was the Complainant arrested and detained by some or all the Respondents or their agents on or about July 2003 in violation of the law and or his fundamental human rights?
 - Was the Complainant assaulted or tortured by some or all of the Respondents or their agents after his arrest in violation of the law or his fundamental human rights?
 - Was the prosecution of the Complainant for murder malicious and or in breach of his fundamental rights?
 - What loss or damage, if any, had the Complainant suffered and who was responsible for compensating him?

SUMMARY OF THE RELEVANT EVIDENCE

11. The complainant testified before the Panel: That on 8th July 2003 while sleeping in his house, the Chairman of the Kenya National Union of Teachers in Kisii, Mr. Geoffrey Mogire, telephoned to inform him that murder incidents had taken place in Suneka Township where a chief and his assistant had been attacked and killed in their respective homes. The caller wanted him to go to the scene to cover the incidents. That after receiving the call, he tried to call Mr. Abdullahi Leloon (the then DC Kisii, Respondent No. 3, to confirm the report, but he was told that Mr. Leloon was not in his house. He was later picked from his house by Mr. Mogire and some three people who were in Mr. Mogire's car and they drove to the scene of the incidence where they found a primary school teacher being bludgeoned by a mob (he had

allegedly participated in the killing of the chief and assistant chief) while the DC, DCIO- Mr. Mak'Adwar, Respondent No. 4, and other officers stood watching. That the Complainant photographed the teacher being beaten, at which point Mr. Leloon instructed a police officer to remove him from the scene. That the officer approached him and told him that the DC had instructed that he be taken to the DO's office so that he could have a word with him. That assuming it was a friendly invitation, he obliged and accepted to be driven to the DO's office. When they reached there, they heard a gun shot that seemed to have come from the scene where the teacher was being beaten. One officer suggested that they get out of that place. They drove to Kisii Divisional CID Headquarters and the Complainant was taken to the DCIO's office where he was received by one inspector John Wafuba and given a newspaper to read. That shortly afterwards, the DCIO – Mr. Mak'Adwar called Inspector Wafuba and instructed him to book in the complainant for having participated in incidences of robbery with violence in Suneka. He was booked in. That that night, he, together with some of his cell mates, were taken from the cells in a white land rover and driven to Kitutu Chache where they were locked in the cells of Rioma Police Station.

12. The Complainant stated that the next morning, he saw a white Toyota Corolla car pull up at the police station; the three occupants walked into one of the offices carrying a rope and wooden truncheons. One of the suspects with whom he had been brought to the police station was called out and beaten for more than an hour, after which the complainant was called by police officers who he later found out were PC Rotich, PC Kivuva and PC Khaemba from Kisumu. They questioned him about his occupation and also asked whether he was a member of Kisungusungu (an alleged vigilante group in Kisii, according to the Complainant, authorised by the Provincial Administration to ensure that law and order prevailed in the area and which was suspected to have participated in the killing of the chief and assistant chief). He told them he was a journalist but not a member of the Kisungusungu group. They told him that he was lying about not being a member of the group. They ordered him to remove his clothes, sit down and spread his legs. He obliged. They then tied his feet with the rope and repeatedly beat him up with the truncheons. That night, he was taken to Kisii Police Station where he requested to be taken to the hospital but the OCS declined. He was ordered to record a statement on the incidents that occurred in Suneka; he recorded a statement to the effect that he was not aware of what had taken place at Suneka. That night he was tied up and thrown into a white Landover and driven to a forest. In the forest, Corporal Dick Odhiambo, Respondent No. 5, and PC Philip Samoe Respondent No. 7, asked him to tell them what he had been writing in the newspapers about the Police. He told them that he had not written anything but facts, at which point Corporal Odhiambo got his gun out, lit a cigarette and said "Makori, can you say something, this is the end of your life, say your

last prayer". However, they did not shoot him. He was taken back to the car and then driven to Kosele Police Station in Rachuonyo where he could not be lodged because the cells were under renovation. He was taken to Kendu Bay where he stayed for the next 11 to 12 days after which he was taken to Kisii Police Station and locked in the cells.

13. On the 22nd of July 2003, the Complainant was brought before the Senior Resident Magistrate, Kisii, on charges of the murder of the Assistant Chief for Bokione and the Chief of Bomorenda. He did not take a plea that day. He requested to be taken to hospital and the request was granted by the court but he was not taken to hospital. Instead, a clinical officer attached to Kisii Prison gave him pain killers. Eventually, he was taken to the hospital and issued with a P3 Form, which he tendered in evidence before the Panel as exhibit 1. After several mentions, on the 21st May 2004, the lower court ordered the matter to be transferred to the High Court for the complainant to take a plea. Eventually, while awaiting trial at the High Court in Kisumu, the Complainant was released after the Provincial State Counsel entered a *Nolle Prosequi* on the 21ST OF May 2004.
14. To illustrate that his rights had persistently been violated by the Government and its officers for close to ten years, the Complainant narrated to the Panel the various times he had been arrested and charged with offences since the year 1994. The Complainant testified that in the year 1994 he was arrested twice. The first time he was arrested when he went to report about the tribal clashes in Nakuru and charged with engaging in subversive activities against the Government. This case was later withdrawn by the state for lack of sufficient evidence. He was later arrested the same year and charged with publishing alarming reports and just like in the first case, the case was later withdrawn for lack of sufficient evidence. In the year 1995 the Complainant was again arrested after a documentary he had done on deforestation was aired on KTN. It was alleged that he had defamed an Assistant Minister; this case also was eventually withdrawn. In the year 1996 while at a meeting that was being addressed by a Cabinet Minister and an Assistant Minister, the Minister complained of bad publicity and wondered why his supporters had not dealt with the people who were writing the bad stories about him. The Complainant testified that the Minister's supporters immediately assaulted him right in front of the Minister. He was then arrested and held at Keroka Police Station and released the next day without any charge being preferred against him. He sought medical attention and was diagnosed with severe physical trauma. Again in the year 1996 he was arrested by officers from Kisii Police Station and charged with defaming three ministers from Kisii; the case dragged on for one year after which it was withdrawn for lack of sufficient evidence. In the year 1998, when he heard that there was an upsurge of lynching of suspected witches in Bonchari, the Complainant left Nairobi for Bonchari to cover the incidents. When he arrived at the scene, he took photographs of smouldering bodies of the suspected witches which photos were

published on the front page of the following day's newspapers. When he went back to the scene the next day to follow up the story, he was arrested, allegedly under the instructions of the then DC Mr. Joseph Mutemi and taken to Kisii Police Station. The following day, he was arrayed in court and charged with the offence of having been found in possession of 120 litres of kangara, a crude form of chang'aa. The Court later acquitted him for lack of sufficient evidence. In the year 2002 he was again arrested and locked up under the instructions of the then OCS Kisii; no reason was given for his arrest. He was released the following day unconditionally. In the last two incidents, the Complainant testified that he sued the State and the Court ordered that he be compensated for wrongful arrests and malicious prosecution.

15. The Complainant testified that as a result of all these arrests, detentions and prosecutions, he had suffered not only physically but psychologically as well and that he was still seeing a psychologist in New York and he attended Truman Medical Centre for Behavioural Health in Kansas City. He testified that he is also receiving treatment for enlargement of his heart, a condition that is associated with post traumatic stress disorder. The Complainant testified that prior to going to the USA, he had been attended to by various doctors provided by the Independent Medico Legal Unit.
16. The Complainant testified that the costs towards these treatments have been quite enormous, running into millions of Kenya Shillings. He received a total of US \$ 9000 from the Committee to Protect Journalists, US \$ 1000 of which was towards his domestic medical bills and US \$ 8000 paid to his psychologist Dr. Laurie Nadel who is based in New York. The Complainant also testified that the Independent Medico Legal Unit incurred Kshs. 25,210 towards his treatment soon after he was released from prison. The Complainant further testified that since the Committee to Protect Journalists only pays for treatment undertaken in New York, he is paying for costs of his treatment at Truman's Hospital in Kansas City. Per session, the Complainant testified that he pays US \$ 600 which is equivalent to Kshs. 44,400 and he attends two sessions per week.
17. The Complainant testified that he never recovered his camera and mobile phone which he alleged had been detained at Kisii Police Station when he was arrested in 2003. He alleged that the two items were worth about Kshs. 124,000.
18. In addition to the medical expenses, the Complainant testified that he incurred legal fees of about Kshs. 600,000 in defending the 2003 murder case brought against him. The Complainant further testified that because of his frequent arrests and detentions, he stopped receiving assignments from the Associated Press, Reuters and BBC, for whom he had previously worked and would be paid an amount ranging from US\$ 2000 to US \$ 3000 per article. He also testified that he had on occasion reported for the Standard Newspaper and the

Kenya Television Network but as a result of the frequent arrests and run-ins with Government agencies his contracts were ended. The complainant testified that he had never been quite able to correct the image the murder case painted of him before the public.

19. In support of some all his claims, the Complainant produced documents, including four receipts from Zablon Mokuwa & Company Advocate amounting to Kshs. 530,000; medical reports covering initial assessment and summary sessions indicating the symptoms that he suffered; a psychological assessment report of his health prepared by Doctor Laurie Nadel costing his treatment as US\$ 8000; documents from Truman Medical Centre indicating that he is undergoing treatment; a document from Independent Medico-Legal Unit indicating that he had undergone treatment; and proceedings for the case of murder charged against him in the year 2003 and photocopies of payment Vouchers from various health service providers currently attending to the complainant.
20. On the reasons for enjoining particular respondents, the Complainant stated that Inspector Wangila, Respondent No. 8, had been enjoined because he was the police officer who arrested him and handed him over to his torturers; while Inspector David Ngare, Respondent No. 10, was enjoined because he was at the police station where the Complainant was assaulted and did nothing when the complainant reported to him about the assault and he refused to take him to hospital. Constable Mackenzie, Respondent No. 7, was the driver of the white Land Rover that drove the Complainant to the forest where he was tortured, but he did not participate in the torture; in fact, according to the Complainant, he was very sympathetic and even gave him Kshs. 20 to buy some food. The Complainant thus testified that the 9th defendant ought not to have been enjoined as a defendant.
21. Lead counsel for the Panel, Mburu Gitu, in terms of Regulation 6(8) of the Kenya National Commission on Human Rights (Complaints Procedures) Regulations, 2005, applied to the Panel to strike out Constable Mackenzie as a respondent in this matter and also to enjoin Constable Rotich, Constable Kivuva and Constable Khaemba as respondents. The Panel ruled that Constable Mackenzie's name be struck from the list of respondents and that the three constables be enjoined as respondents and be served with all the proceedings and all the relevant documents. The Panel also ordered that the Commissioner of Police be enjoined as a respondent since he is the principal officer responsible for the officers who were named in this matter and also that the proceedings be served on the Attorney General once more as the officer in charge of prosecutions.
22. At the close of the evidence of the Complainant, no other witnesses were called. The Lead Counsel brought to the attention of the Panel the fact that Inspector David Ngare, Respondent No. 10, had called from Malindi and indicated that he had been unable to attend the

proceedings as he was held up on official duties. The Panel adjourned for two weeks with directions that service be served as had been determined by the Panel.

23. During the subsequent mention, the Lead Counsel reported that it had been impossible to serve two of the police officers who had been enjoined - Inspector Kivuva and Constable Khaemba - as only one name had been given for each of them. Constable Rotich had been served.
24. When despite being properly served no Respondents presented themselves before the Panel for the defence hearing, Counsel for the Complainant proceeded to make his closing submissions.
25. In his closing submissions, Counsel for the Complainant, Mr. Kennedy Gichana, contended that the Complainant had proved his case on a balance of probabilities. He argued that in view of the fact that the Respondents had failed to defend themselves, the evidence adduced before the Complaints Hearing Panel should be accepted since it was neither rebutted nor challenged. He submitted that the respondents be jointly and severally held liable for the violations of human rights suffered by the Complainant. He summarised the relevant issues as follows:

Unlawful and malicious arrest and prosecution and confinement

26. The Counsel for the Complainant submitted that the Respondents had jointly and severally breached the fundamental freedom of liberty of the Complainant by wrongfully and unlawfully arresting and confining him for a period of 319 days. He referred to S.72 (6) of the Constitution which provides for compensation for unlawful arrest. He also cited the case of Samuel muchiri Vs Attorney General & Six Others HCCC No. 838 of 2003 where J.B. Ojwang (J) awarded the plaintiff a sum of Kshs. 2 Million for wrongful arrest and malicious prosecution. The Counsel further argued that that because the Complainant was arrested on several occasions, specifically five times, he should be awarded Kshs. 5 Million as compensation.

Damages for physical and psychological torture

27. Counsel claimed that the Complainant had suffered both physical and psychological torture, contending that the Complainant had been and continue to receive treatment for physical and psychological ailments arising from assault and torture meted out on him by some of the Respondents. The Counsel prayed for compensation of treatment related expenses (see paragraph 14 of this Decision) at the conversion rate of Kshs.73 per dollar. The Counsel produced further documents showing that the Complainant spent a sum of US \$ 10,0002.15 (an

equivalent of about Kshs. 730,000) and he prayed for the same to be refunded.

Compensation for loss of productivity

28. The Counsel submitted that the Complainant had lost contracts as a stringer or correspondent for several media houses and, therefore, his earnings. He attributed loss of contract to his damaged reputation following his arrest and prosecution. The Counsel contended that as a result of arrest and incarceration he had lost his professional reputation as a journalist. The contracts he lost would have on commission basis fetched between US \$ 2000 and US \$ 3000 per month whenever he filed news items for international media houses like British Broadcasting Corporation (BBC) and Associated Press (AP). He was also said to have worked for Local news media like KTN and the Standard Newspaper.
29. The Counsel further prayed for compensatory damages for loss of the Complainant's good reputation and job contracts of Kshs. 10 Million, basing this claim on Section 16 of the Defamation Act which provides that where a person is defamed in relation to an offence whose sentence is death or life imprisonment, the damages should not be less than Kshs. 1 Million; no upper limit is provided for. Counsel also relied on the case of Kipyator Nicholas K. Biwott vs. George Mbugguss and Kalamka Ltd, HCCC No. 2143 of 1999, in which the complainant was defamed for having been involved in a murder and the court awarded damages of Kshs. 10 Million.

Special, general, exemplary or aggravated damages

30. The Counsel for the Complainant also made a case for special, general, exemplary or aggravated damages. Special damages claims made by the Counsel were:
 - Legal fees amounting to Kshs. 530,000;
 - Medical treatment amounting to US \$8000-9000(Kshs.584,000-657,000);
 - Medical treatment US \$10002.15 (Kshs.730,156);
 - Medical treatment by IMLU Kshs. 25,210;
 - General damages amounting to Kshs. 1.5 million for injuries, pain and loss of amenity; and
 - Other exemplary or aggravated damages.

Findings and Remedies

31. The Panel, upon considering the evidence adduced before it by the Complainant and submissions made by his Counsel, proposes to deal with the issues raised here in the following manner, taking into account any relevant information and general human rights principles:

Matters of procedure

32. At the onset, the Panel is well satisfied that all the Respondents were adequately informed about the complaint at issue and served with notices as appropriate for appearance and hearing. Except a brief appearance on the first day of hearing by Mr. Abdullahi Leloon, Respondent No. 3, and Ms. Rose Kibue, representing the Permanent Secretary, Office of the President, Provincial Administration and Internal Security, Respondent No. 2, the Respondents neither responded to the allegations as stated in the notification nor defended themselves during the hearings conducted on the 26th and 27th of June 2006 and the 10th of August 2006. Quite clearly, the Respondents chose to disregard the Panel hearing since the returns of services for notices were properly filed. In light of our above view, the Panel proceeds to make determination on this complaint in terms of Regulation 29(6) of the Kenya National Commission on Human Rights (Complaints Procedures) Regulations, 2005.
33. Four substantive issues are at the heart of this complaint, and the Panel now proceeds to consider each of those matters as follows:

Illegal confinement

34. The Counsel for the Complainant presented the matters at issue to be of unlawful and malicious arrest. Counsel for the Complainant submitted that the Respondents had jointly and severally breached the Complainant's fundamental right to personal liberty by wrongfully and unlawfully arresting and confining him for a period of 319 days.
35. We shall first address ourselves to the matter of illegal confinement. The right to personal liberty is protected under Section 72(1) of the Constitution which prohibits deprivation of personal liberty, before stipulating exceptions pursuant to which liberty may be taken away constitutionally. Accordingly, one's liberty can only be lawfully taken away in terms of the exceptions listed under Section 72(1). Any action which takes away the liberty of a person but falls outside these exceptions would constitute a violation of the right to liberty. The relevant exception for purposes of this complaint is S.72(1)(e) which provides that: "No person shall be deprived of his personal right to personal liberty save as may be authorised by law ... upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law of Kenya."
36. Given this understanding of the meaning of the right to personal liberty, does the evidence before the Panel support the allegation that the Complainant's right to liberty was violated?
37. We have no doubt in our mind that the Complainant was indeed arrested by the Police some time on the 8 of July 2003, and accept his testimony to that effect. This was also established during the

preliminary investigations conducted on the 17th of January 2005 by the Legal Services Department of KNCHR. At Kisii Police Station, OB No. 23 of 8th July 2003 indicated that the Complainant was taken to Kisii Police Station by Inspector Wangila, Respondent No. 8, Corporal Odhiambo, Respondent No. 6 and Constable Bruce Mackenzie, Respondent No. 7, and booked on charges of robbery with violence in DCIO's case Cr. 614/445/2003 and 641/446/2003. There was also a record in the OB entry to the effect that "at 7.45 pm IP Wangila and PC Langat collect Peter Makori, he appears fit". At Rioma Police Station, OB No. 47 of 11th July 2003 at 17.20pm indicated that OCS of Rioma, IP Ngare and IP Nyaisufi booked Peter Makori and Henry Mokuia on murder charges. It also indicated vide OB 56 of 11th July 2003 at 7.45pm that under the instructions of DCIO Mak'Adwar, CPI James Odhiambo, PC Philip Samoei and Bruce Mackenzie, the Complainant was temporarily moved to another station to stop him from leaking information.

38. The Complainant testified that he was first taken to court on the 22nd of July 2003 after his arrest on 8th July 2003. By our calculation, in total, therefore, the Complainant remained in custody for 14 days before being brought before a court of law. Section 72(3) of the Constitution provides thus:
"A person who is arrested or detained- ... (b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with."
39. If the Complainant had not been brought to court within 14 days, it would have been incumbent upon the state to show that in fact Mr. Makori had been so brought to court as soon as was reasonably practical, failing which proof the state would have violated the Complainant's right to liberty.
40. All these matters considered, therefore, the Panel takes the view that the Complainant did not establish a case of illegal confinement and hence breach of his right to personal liberty since all the pre- conditions laid down under Section 72 of the Constitution for preferment of charges were duly followed. We do, however, find it necessary to note that the state waited for as long as possible in terms of the law before preferring charges and, in the course of our Decision, therefore, we will query the good faith of the state in prosecuting the Complainant.

Malicious prosecution

41. The second issue for determination by the Panel is whether the prosecution of the Complainant for murder was malicious and or in breach of his fundamental human rights. We have already found that

the Complainant was not confined illegally. We must stress here that the concern to which we are now turning our mind to is not the fact that the Complainant was either arrested or detained. Our concern is this: Was the Complainant's prosecution (whether such prosecution happened when he was in custody or not) malicious or not? Once the Complainant had been arrested, should endeavours by the Attorney General to prosecute him have proceeded?

42. In the case of Murunga Vs Attorney General (1979) KLR 138, the Court laid down the four ingredients or tests needed to establish a case of malicious prosecution. These are:
 - That a prosecution was instituted against the plaintiff by the defendant;
 - 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.
43. Regarding the first two tests, it is not in dispute that a prosecution was Instituted against the Complainant on the 22nd of July 2003, and terminated in his favour through a *nolle prosequi* on the 21st of May 2004.
44. In the case of Kagane & Others Vs The Attorney General & Another 1969EA 643, the Court laid down the test for determining whether or not there was reason and probable cause for the plaintiff's prosecution and the test on whether the prosecution was actuated by malice. In that case, Rudd J held that:

"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 prosecution 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.....if 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 sincere desire to vindicate justice."
45. Taking the objective test outlined by Rudd J into account, the Panel is satisfied that, based on the material evidence available to the prosecution, no prudent or cautious man would say the accused was probably guilty. Equally, the prosecution's conduct, for example, the fact that the Complainant was booked for robbery with violence but charged with a murder involving a death which had already occurred at the time of his initial arrest, shows that the whole proceeding was actuated by malice and that the intention was not to, in the words of Rudd (J), "vindicate justice". The Panel, then, finds that the Complainant's prosecution was malicious.

46. Further, the Panel finds that the Attorney General, both as the principal legal adviser of the Government and as the officer seized with the power of instituting, undertaking but also discontinuing, as necessary, criminal proceedings (Section 26 of the Constitution), is liable for this malicious prosecution. In making this further finding, the Panel notes that it is a cardinal responsibility of the Attorney General to foster respect for the rule of law. The public may have confidence in the administration of justice only when relevant procedures are enforced judiciously. The Attorney General is ultimately accountable to Kenyans for his actions. Once arrested by the Police on apparent capital charges, it would be incumbent on the Attorney General to determine expeditiously whether prosecution of such capital charges should proceed. Waiting 319 days to enter a *nolle prosequi* is totally unacceptable as a proper basis for fair administration of justice.
47. Finally, in this regard, we also find that Chief Inspector (Rtd) Benjamin Mak”Aduar, Respondent No. 5, is also liable since he had adequate opportunity to assess the merits of the prosecution case.

Torture

48. The next substantive question for determination by the Panel is whether the Complainant was tortured or otherwise assaulted by some or all of the respondents or their agents after his arrest.
49. Section 74 of the Constitution provides that: “no person shall be subject to torture or inhuman or degrading punishment or other treatment”. Section 83 of the Constitution, in addition, prohibits derogation from the freedom from torture, inhuman or degrading treatment or punishment. This freedom, however, is not defined by the Constitution or any other law in Kenya.
50. The only legal instrument which defines torture, cruel, inhuman and degrading treatment or punishment, is the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 1984. Kenya is a party to this Convention which forms part of the core human rights obligations to which the country is bound. We are conscious that the Convention has not been domesticated; but in our view, Section 14A(2) of the Police Act provides a context within which the Convention’s letter and spirit may be effected when it provides that: “No police officer shall subject any person to torture or to any other cruel , inhuman or degrading treatment”.
51. On the basis of the foregoing, the Panel adopts and accepts the definition in Article 1 of the Convention which defines “torture” as:
“... Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

52. Applying this definition, it is the finding of the Panel that the Complainant was subjected to torture. The Complainant testified about how he was tied up and beaten with truncheons and mocked while at Rioma Police Station; hence, severe pain was applied on him. We are cognizant of the fact that the Complainant's evidence of physical torture was corroborated by information in the P3 form which noted Mr. Makori's injuries to include nagging lower backache, scar on lower forearm, tender bruise of small and ring finger, scar on right elbow, tender bruises on right lateral foot and tender bruise on right knee and deep palpation. This testimony was not rebutted by the Respondents who the Complainant says perpetrated the torture. The Panel considers it a reasonable view that Police officers inflicted pain on the Complainant with the aim of collecting evidence that could sustain the capital charges which they desired to and indeed did prefer on the Complainant. The Panel, on the other hand, is conscious that the Complainant's allegations of mental torture occasioned by police officers in a forest where they allegedly conducted mock execution on him have not been corroborated directly.
53. The Panel is, therefore, on a balance of probabilities, satisfied that the Complainant's freedom from torture was violated. The Panel decides that Respondent no. 4, the Police Commissioner, is liable for the said violation. In making this finding, the Panel finds it necessary to send the stern message to the Commissioner of Police that as a public servant, it is incumbent on him to ensure that his officers do not violate the law by using egregious means such as torture to wring information out of suspects.
54. Although the Complainant indicated that three police officers participated in torturing him at Rioma Police Station, no adequate evidence was adduced to enable the Panel to determine individual culpability on Constable Rotich, Respondent No. 11.

Loss of productivity

55. Counsel for the Complainant submitted that Mr. Makori had lost a host of contracts in his profession as a journalist owing to the loss of reputation he had suffered consequent to his arrest and prosecution on counts of murder. The Complainant's evidence was that because of his frequent arrests and detentions, he stopped receiving assignments from a variety of international and local media services. While the Panel may empathise with the claims of the Complainant, it deemed that this particular matter was in fact a sub-set of the other claims made by the Complainant, i.e. illegal confinement, malicious prosecution and torture. Furthermore, the Complainant did not furnish the Panel with adequate enough information on loss of reputation to enable it to arrive at a decision. No evidence was tendered to show whether the bulk of reputation if indeed lost was occasioned by the material prosecution and incarceration or by the arrests and

prosecutions which had happened in earlier years. In any case, the claim in question could also be entertained in civil courts. The Panel did not, therefore, make a finding regarding this claim.

Damages

56. The final issue which the Panel needs to decide is the extent to which the Complainant should be compensated for loss or damage occasioned by the human rights violations which he suffered; and who should compensate him for the said damage. Section 19(2)(b) of the Kenya National Commission on Human Rights Act gives the Commission powers to order for payment of compensation if it is satisfied that there has been an infringement of a human right or freedom. In this complaint, it has been proved to the satisfaction of the Panel that some rights and freedoms of the Complainant were violated. He is, therefore, entitled to damages. The question is how much is he entitled to?
57. As we have already pointed out in this Decision, the Complainant did not establish a case for breach of his right to personal liberty. Accordingly, we shall not make any award in that regard.
58. Regarding the claim for damages for malicious prosecution, which we have found in the Complainant's favour, his Counsel cited the case of Samuel Muchiri Vs Attorney General and Six Others, HCCC No. 838 of 2003, where Ojwang (J) awarded the plaintiff a sum of Kshs. 2 million for wrongful arrest and malicious prosecution. Regarding our finding in the Complainant's favour on torture, we take note of the evidence adduced on the psychological consequences of the Complainant's torture. Mr. Makori will quite clearly require treatment or therapy for a long time. The Panel, therefore, awards the Complainant Kshs 1 million as damages for malicious prosecution and Kshs. 1.5 million for torture. Furthermore, wishing to send a strong message to all persons in public service that malicious prosecution and torture are egregious human rights violations, the Panel awards the sum of Kshs. 500,000 as exemplary damages to cover malicious prosecution and the sum of Kshs 1.5 million as exemplary damages against the torture perpetrated on the Complainant.
59. Our above awards are informed by the principle that awards should not be made for the purpose of unduly enriching the Complainant but rather so as to compensate for the quantifiable monetary losses suffered by him and to set examples of best practice by public or other institutions and officials. Further, the Panel's concern is the 2003 case and not the earlier cases in which the Complainant was involved.
60. In support of his claim for Kshs. 530,000 as legal fees, the Complainant produced four receipts drawn by Zablon Mokua & Company Advocates. Of the four receipts, three did not indicate whether the

amount paid was in cash or in cheque, causing doubt in our mind as to their authenticity. We, therefore, order that he be paid Kshs. 340,000, the sum total of authenticated receipts.

61. The Complainant produced documents indicating that the cost of his psychological assessment was US\$ 8000 which translates to Kshs. 5.84 million. He, however, testified that these costs were met by the Committee to Protect Journalists where he is a member. Communications on file from the Committee indicate that this service was offered on *pro bono* basis. On the basis of the principle of subrogation which is generally considered in legal systems to form part of the law of restitution by preventing unjust enrichment, i.e. preventing the subrogor from receiving funds from the subrogee and then still claiming the original sum of money from the tort-feasor/debtor, we shall not order any payment as compensation for this particular special damage.
62. The Complainant prayed for the cost of his current treatment and produced payment vouchers of US\$ 10,002.15 which translates to approximately Kshs. 730,000. Of this money, 7,075.15 dollars was paid by Global Benefits Insurance Co. We, therefore, order that the balance of 2,927 dollars, i.e. Kshs. 213,671 be paid as special damages for his current treatment.

Joint and several liability

63. The Panel finds it necessary to discourse on one further matter regarding this complaint. Violation of human rights is an egregious crime which must be punished firmly wherever it occurs. Institutions of state as well as persons serving in the public service must, therefore, be liable jointly and severally wherever violations happen. In the present complaint, the situation is compounded by the fact that apart from brief appearances by two of the Respondents, the Respondents chose not to contest the complaint. A clear message reminding all public institutions, officers in the public service and individuals generally of the Panel's jurisdiction under the law and the imperative of fighting impunity must be sent by the Panel. That is why we have decided that those found liable here should pay exemplary or punitive damages to the Complainant.
64. Yet, in sending a clear message, the Panel is constrained that in respect of certain Respondents, no concerted attempt was made by the Complainant or his Counsel to show their culpability. Indeed, in respect of some Respondents, the Panel is at a loss to understand why they were listed as such in the first place by the Legal Services Department of the Commission. This thinking informs the extent to which the Panel has opted to exercise the principle of joint and several liability only on some and not all respondents in this matter. Our understanding of the principle of natural justice informs us that the mere fact that a particular respondent fails to rebut an allegation should

not in and of itself mean that person's guilt particularly when no other reasonable circumstances point towards guilt.

SUMMARY OF FINDINGS

65. In summary, then, the Panel makes the following orders:
- That the Attorney General, Respondent No. 1, jointly and severally with Chief Inspector Benjamin Mak'Adwar, Respondent No. 5, pays the Complainant Kshs. 1 million as compensation for malicious prosecution and Kshs. 500,000 as exemplary damages for malicious prosecution;
 - That the Commission of Police, Respondent No. 4, pays the Complainant Kshs. 1.5 million as compensation for torture and Kshs. 1.5 million as exemplary damages; and
 - That the Attorney General, the Police Commissioner and Chief Inspector (Rtd) Benjamin Mak'Adwar, pay Kshs. 553,671 as special damages to cover legal fees and medical expenses; and

That interest at court rates be paid on the total sum of Kshs. 5,053,671 calculated from the date of this decision until payment in full of the total amount.

DATED at NAIROBI this ____ day of _____ 2006

LAWRENCE MUTE
Presiding Panellist

GODANA DOYO
Panellist

TIROP KITUR
Panelist