REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 627 OF 2019

MALACHI BOB MWANGO.....APPELLANT

-VERSUS-

SAROVA HOTELS LIMITED .....1ST RESPONDENT

DENNIS NADIMO.....2ND RESPONDENT

(Being an appeal from the judgment of D.W. Mburu ,SPM delivered on 4th October, 2019 in Nairobi Milimani CMCC No. 2265 of 2016)

JUDGMENT

1. This appeal emanates from the judgment delivered on 4th October, 2019 in **Nairobi Milimani CMCC No. 2265 of 2016**. The suit was commenced by a plaint filed on 15th April, 2016 by **Malachi Bob Mwango**, the plaintiff in the lower court (hereafter the Appellant) against **Sarova Hotels Limited** and **Dennis Nadimo**, the defendants in the lower court (hereafter the 1st and 2nd Respondents, respectively). The claim was for general damages for unlawful arrest and false imprisonment. It was averred that on or about the on 27th March, 2015 the Appellant visited the 1st Respondent's business premises namely, Sarova Stanley Hotel and ordered a cup of tea which he duly paid for; that as he was leaving the said premises the Appellant was accosted by the 2nd Respondent, who referred to him as an idler, busy body and prevented the Appellant from leaving the premises and detaining him at the hotel lobby; that the Appellant parted with the sum of Kshs. 500/= under duress to secure his release, which actions caused him great pain, loss, ridicule and distress as a respectable businessman and a senior citizen. The Appellant pleaded that the 1st Respondent was vicariously liable for the actions of the 2nd Respondent who was acting on its behalf .

2. The 1st Respondent filed a statement of defence denying the key averments in the plaint and any liability, whereas interlocutory judgment was entered against the 2nd Respondent who despite being duly served with summons failed to enter appearance within the prescribed time. The suit proceeded to full hearing during which the Appellant and the 1st Respondent adduced evidence. In his judgment, the learned magistrate found that the Appellant had failed to prove his claim on a balance of probabilities and thus dismissed the suit with costs. Aggrieved with the outcome, the Appellant preferred this appeal challenging the finding of the lower court based on the following grounds in his memorandum of appeal:-

> **"1.THAT the learned magistrate erred in law and in fact in finding that the Appellant had not proved his case on a balance of probabilities.**
>
> **2. THAT the learned magistrate erred in law and in fact by failing to properly analyse the evidence on record.**
>
> **3. THAT the learned magistrate erred in law and in fact in failing to appreciate the Appellant's evidence that he consumes services at the 1st Respondent's restaurant.**
>
> **4. THAT the learned magistrate erred in law and in fact in acknowledging and believing without proof, hearsay evidence by the 1st Respondent's witness that the Appellant had previously visited the premises five times to use the toilet facilities.**
>
> **5. THAT the learned magistrate erred in law and in fact by failing to appreciate that the 1st Respondent was vicariously liable for the actions of the 2nd Respondent.**

6. THAT the learned magistrate erred in law and in fact by failing to establish that the 2nd Respondent was working as a security guard within the premises of the 1st Respondent and therefore could only act under the instructions of the 1st Respondent.

7. THAT the learned magistrate erred in law and in fact by failing to recognize that the 2nd Respondent in his employment as a security guard is answerable to the 1st Respondent and that the actions of the 2nd Respondent herein emanated from the 1st Respondent.

8. THAT the learned magistrate erred in law and in fact in observing that the incident complained of lasted for just a couple of minutes contrary to the witnesses accounts.

9. THAT the learned magistrate misdirected himself by failing to take the Appellants submissions into account while arriving at his findings.

10. THAT the learned magistrate erred in law and in fact in failing to rely on the Appellant's authorities which contain similar facts to those encountered by the Appellant in suggesting the award and therefore arriving at a figure that was too low in the circumstance." (Sic)

3. The appeal was canvassed by way of written submissions. Counsel for the Appellant relied on the oft-cited decision of **Selle & Another v Associated Motor Boat Company Ltd (1968) 1 E.A 123** and the dicta in **Kenya Power & Lighting Company Limited v EKO & Another [2018] eKLR** concerning the principles to be observed by an appellate court on a first appeal. Counsel contended that the trial court erred in acccepting hearsay evidence by the 1st Respondent's witness to the effect that the Appellant had previously visited the premises five times to use the washrooms. He argued that evidence by the 1st Respondent's witness confirmed that the 2nd Respondent was acting on instructions of 1st Respondent in ejecting the Appellant from the premises having compelled him to pay the sum of Kshs. 500/-. Placing reliance on the decisions in **Ndegwa v Republic [1985] eKLR**, and **Sonia Kwamboka Rasugu v Sandalwood Hotel & Resort Limited t/a Paradise Beach Resort & Another [2013] eKLR** among others, counsel submitted that the Appellant's detention by the Respondent's was unlawful and in breach of his freedom of movement, right to liberty and security all fundamental rights protected under Article 28, 29 and 39(1) of the Constitution. That the trial court's finding that the act complained of lasted a few minutes was immaterial on account of the foregoing.

4. Further, it was argued that the Respondents' actions occasioned humiliation, embarrassment and mental anguish to the Appellant who was a well-known businessperson. In conclusion while calling to aid the decisions in **KL v Standard Limited [2014] eKLR** and **Winfred Njoki Clarke v Hotel Intercontinental Nairobi & Another [2018] eKLR** it was submitted that the Respondents' arbitrary, oppressive and unconstitutional conduct amounted to unlawful imprisonment. The Court was urged to set aside the trial court's decision and to substitute it with an award of Kshs. 1,500,000/- in damages to the Appellant.

5. The 1st Respondent in defending the trial court's findings anchored its submissions on the principles to be observed by an appellate court on a first appeal. Relying on the provisions of Section 108 of the Evidence Act and the decision in Evans **Nyakwana v Cleophas Bwana Ongaro [2015] eKLR** counsel submitted that the Appellant was unable to prove that he indeed was a guest of and consumed any services within the 1st Respondent's premises and that the trial court properly analyzed the evidence before it. Citing the definition of vicarious liability in Black's Law Dictionary, 9th Edition at page 998, counsel stated that a master-servant relationship did not exist between the Respondents and the trial court rightly found as much. The court was thus urged to dismiss the appeal.

6. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in **Selle –Vs- Associated Motor Boat Co. [1968] EA 123** in the following terms: -

"An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

7. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See **Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [1982 – 1988] IKAR 278.** The court having considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties is of the view that the appeal turns on a singular issue, namely, whether the findings by the trial court that the Appellant failed to prove his case on a balance of probabilities was well founded.

8. Pertinent to the determination of issues, are the pleadings, which form the basis of the parties' respective cause before the trial court. Hence a review thereof is apposite before dealing with evidentiary matters. In Wareham **t/a A.F. Wareham & 2 Others Kenya Post Office Savings Bank [2004] 2 KLR 91**, the Court of Appeal stated in this regard that: -

"We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail." (Emphasis added).

9. The Appellant by his plaint averred at paragraphs 5, 6, 7, 8 and 9 that:-

"5. On 27th March, 2015, the Plaintiff avers that he visited the 1st Defendant's premises namely Sarova Stanley Hotel for their restaurant services and ordered a cup of tea which he duly paid for before leaving the restaurant.

6. As he was leaving from the 1st Defendant's premises, the Plaintiff was accosted by the 2nd Defendant, who referred to the Plaintiff as an idler and a busy body and prevented the Plaintiff from leaving the premises ostensibly detaining him at the hotel lobby.

7. The Plaintiff avers that the 2nd Defendant's actions were without justifiable cause or any basis in law or at all amounting to unlawful arrest and false imprisonment for which the Plaintiff claims damages.

8. The plaintiff further avers that upon being detained at the Defendant's premises, he was coerced into paying a sum of Kshs. 500/- under duress to secure his release in total violation of his rights.

PARTICULARS OF FACTS ON FALSE IMPRISONMENT BY THE 2ND DEFENDANT

a. Arrest of the plaintiff without any factual or legal basis;

b. Unlawful detention by the 2nd Defendant guard at the Hotel's lobby;

c. Unlawful and illegal interrogation of the plaintiff by the 2nd defendant;

d. Unduly coercing the Plaintiff to pay sum of Kshs. 500/- to secure his release from unlawful detention

9. Further, the Plaintiff avers that the confrontation by the security guard attracted a scene in the hotel area which caused the plaintiff to suffer great pain, loss ridicule and distress since he is a respectable businessman and senior citizen." (sic)

10. The 1st Respondent filed a statement of defence denying the key averments pleaded in the plaint and or being vicariously liable for the actions of the 2nd Respondent and stated at paragraphs 4 and 8 that: -

……"4. The 1st Defendant avers;

(i) The plaintiff on 27/3/2016 came to the 1st defendant's hotel purporting to be a guest and headed to the toilets.

(ii) The Plaintiff was accosted by the hotel security guards whereupon he paid a sum of Kshs. 500/- for the unauthorized use of the hotel toilet facilities while not a guest.

(iii) The plaintiff failed to give any viable reason for his presence in the hotel premises.

…8. The 1st Defendant denies being vicariously liable for any actions of the 2nd Defendant as the said 2nd Defendant as the said 2nd Defendant is not any employee or performs his duties with the directions of the 1st Defendant as he is employed by Fidelity Security Guards Ltd which company is contracted to give security services to the 1st Defendant as an independent contractor." (Sic)

11. During the hearing the Appellant testifying as **PW 1** asserted that he had visited the hotel as a guest and had ordered a cup of tea for which he paid but as he made to leave, was accosted by the 2nd Respondent who questioned his presence at the hotel; that the 2nd Respondent claimed that the sole reason for his presence was to use the hotel bathrooms; and that the said Respondent detained him, forcing him to pay the sum of Ksh.500/- in order to be released. And while he produced the receipt in respect of the latter payment, he did not produce a receipt indicating that he indeed had consumed any services while at the hotel.

12. Brodericks Mohamed who testified as **DW 1** on behalf of the 1st Respondent identified himself as the Chief Security Officer of the 1st Respondent. The gist of his evidence was that the Appellant had not consumed any services at the hotel but visited the premises for the sole purpose of using the washroom facilities and was stopped by the 2nd Respondent and penalized for the wrongful use of facilities in accordance with the hotel regulations. That the 2nd Respondent was an employee of Fidelity Security Ltd., an independent company contracted by the hotel to provide security services at the hotel. He denied that the Appellant was detained, asserting that the incident was

brief, and the Appellant left after paying the sum of Shs.500/-.

13. In its judgment the trial court accepted this evidence and made a finding as follows:

> **"…Though the plaintiff alleges that he had gone to the hotel as a patron and that he enjoyed a cup of tea, he did not table any evidence in the form of a payment receipt or his hotel bill to prove this allegation. The court notes that the plaintiff did not even issue any notice to produce to the 1st defendant requiring it to produce any such bill or evidence in its possession.**
>
> **The plaintiff would want the court to believe that he went to the hotel as a patron thereof and that he consumed a cup of tea before visiting the toilet…….In the premise, the onus was on the plaintiff to prove that indeed he consumed services at the hotel. It was also incumbent upon the plaintiff to establish that the 1st defendant was vicariously liable for the actions of the 2nd defendant. As a general proposition 'he who alleges must prove'.**
>
> **….I do hereby find and hold that the plaintiff has not proved either of the two allegations. I also note that the plaintiff did not make any complaint, say to the police for example, about the alleged illegal confinement. This finding alone is sufficient to dispose of this suit. I find that the plaintiff has not proved his claim on a balance of probabilities.**
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> **Had the plaintiff proved liability, I would have awarded general damages of Kshs. 100,000/= noting that the incident complained of lasted for just a couple of minutes." (Sic)**

14. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the Evidence Act. The duty of proving averments contained in the plaint lay squarely on the Appellant. In **Karugi & Another V. Kabiya & 3 Others [1987] KLR 347** the Court of Appeal stated that:

> **"[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof….<u>The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.</u>"** (Emphasis added)

15. The Appellant had before the lower court sought for damages for unlawful arrest and false imprisonment **Black's Law Dictionary, Tenth Edition**, **Page 543** defines detention as: -

> **"The act or instance of holding a person in custody, confinement or compulsory delay".**

16. False imprisonment constitutes unlawful detention and the above dictionary defines false imprisonment as: -

> **"The restraint of a person in a bounded area without legal authority, justification, or consent. False imprisonment is a common- law misdemeanor and a tort. It applies to private as well as governmental detention."**

17. That an incident involving the Appellant and 2nd Respondent occurred within the 1st Respondent's premises on the material date is not disputed. What the 1st Respondent contested were the circumstances leading to the incident and vicarious liability for 2nd Respondent's actions, who it asserted to be a security guard employed by a private company contracted to provide security services at the premises. The question to be considered is whether the Appellant proved on a balance of probabilities that he was unlawfully detained by the 2nd Respondent while acting on behalf of the 1st Respondent. **Aburili J** in **Daniel Njuguna Muchiri v Barclays Bank of Kenya Ltd & Another [2016] eKLR** cited with approval the decision in **Daniel Waweru Njoroge & 17 Others V Attorney General [2015] eKLR** as to the elements comprising the tort of false imprisonment as follows:

> **"The gist of an action for false imprisonment is unlawful detention, without more. The commonly accepted definition of false imprisonment defines the tort as:**
>
> **1. The unlawful restraint of another;**
>
> **2. Against their will; and**
>
> **3. Without justification.**
>
> **Proving the first element of false imprisonment involves looking at the facts whether there was any force or threat or some kind used in restraining the accusing party. It is important to note that actual force is not necessary. Proving the second element of false imprisonment involves applying 'reasonable person' standard. Thus, the court will determine whether a reasonable person in the same factual situation would believe that they have been detained against their will. The final element of false imprisonment involves determining whether there is a legal basis for the detention. Many legal bases for detention exist, such as a lawful arrest by law enforcement (agencies). Determining whether probable or a legal basis for the detention exists is the key in false arrest cases."**

18. The Appellant and 1st Respondent gave conflicting accounts as to what transpired on 27th March, 2015. The Appellant asserted that he

was legitimately at the hotel as a guest but could not substantiate the claim by tendering any receipt for the cup of tea he allegedly consumed. It is telling that he did not expressly deny the 1st Respondent's assertion that he had unlawfully used the bathroom facilities in the hotel, and in the absence of proof that the Appellant had indeed used any other hotel services at the time, including the alleged cup of tea, that may well be true. The receipt admittedly issued by the hotel was not for a cup of tea, and in all likelihood was not related to the Appellant's alleged "purchase" of his freedom. The hotel could not have been so foolhardy as to issue an official receipt for what, if the Appellant is believed, was essentially an illegal charge. Had that happened, the Appellant would have reported to the police; he did not.

19. Reviewing all the relevant matters, it seems to me that the security guards were entitled to stop and question the Appellant and to penalize or charge him for the unlawful use of the hotel bathroom facilities, not being a guest. Thus, whereas the Appellant may have been briefly restrained or delayed against his will, it is my finding that the actions of the security guards were justified. This after all was a private establishment which reserved the right of admission, and as the trial court found, the incident was brief. In the circumstances, the trial court cannot be faulted for concluding that the Appellant did not prove the allegations of unlawful arrest and false imprisonment.

20. Secondly, there was no evidence tendered by the Appellant to establish that a master and servant relationship existed between the Respondents, whereas the 1st Respondent had by its pleadings and evidence asserted that the 2nd Respondent was an employee of an independent contractor, namely, Fidelity Security Ltd. And that the said company had been contracted by the 1st Respondent to provide security services at its premises. The Appellant did not enjoin the said company as a defendant, nonetheless. The Court of Appeal while discussing vicarious liability recently explained the rationale and application of its predecessor's decision in Selle **–Vs- Associated Motor Boat Co. [1968] EA 123** in **Board of Governors St Mary's School V. Boli Festus Andrew Sio [2020] eKLR**.

21. The issue of vicarious liability of the driver of the bus in that case was at the heart of the appeal. The Court of Appeal stated:

> **"The central issue that we think we must determine in this appeal is whether the facts before the judge allowed her to reach the conclusion that the Appellant was vicariously liable for the acts of the owner or driver of the hired motor vehicle. It was not disputed by either party before the judge that the bus that was hired to transport students and staff to Mombasa did not belong to the Appellant but belonged to a person who was not named in the suit… by the Respondent. Although the driver of the bus was named in the witness statement filed by the Respondent the driver was not sued and his name does not appear anywhere in the plaint.**
>
> **Vicarious liability is defined in Black's Law Dictionary 10th Edition by Bryan A. Garner as <u>"liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties -also termed as imputed liability".</u>**

22. The Court of Appeal then restated the facts pertaining to **Selle'**s case which had been relied on in the judgment appealed from. The Court restated the holding in **Selle**'s case to be that where a party delegates a task or duty to another, not a servant, to do something *for his benefit or for the benefit of himself and the other*, whether that other person be called an agent or independent contractor, the employer is liable for the negligent actions of that other, in the performance of the task, duty or act.

23. The Court of Appeal proceeded to restate the *obiter dictum* in the **Selle** case by **De Lestang, VP** that:

> **"A person employing another is not liable for that other's collateral negligence unless the relation of master and servant existed between them at the material time; <u>the existence of the right of control is usually a decisive factor in deciding whether the relationship of master and servant exists".</u>**

24. The Court of Appeal then concluded that:

> **"What Selle & Another (supra) is saying is that a principal will be responsible for the acts of a servant where the servant is carrying out a task on behalf of the principal. This is not the same when the task involves employment of an independent contractor.**
>
> **This issue is well captured in Charlesworth on Negligence 4th Edition, Sweet and Maxwell.**
>
> **On the subject "Independent Contractors" the learned author declares that an employer is not liable for the negligence of an independent contractor or his servant in the execution of his contract. "**

25. The Appellant did not expressly plead vicarious liability in his plaint or demonstrate by evidence the existence of a master and servant relationship between the two respondents. It was incumbent upon the Appellant to prove his case on a balance of probabilities. In my assessment, he did not discharge that burden, as the trial court correctly found. In **Mumbi M'Nabea v David M.Wachira [2016] eKLR the Court of Appeal** discussed the standard of proof in civil liability claims in our jurisdiction and stated as follows:

> **"In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the Evidence Act, Cap 80 Laws of Kenya provides as follows:**
>
> > **"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts**

which he asserts must prove that those facts exist." <u>The above provision provides for the legal burden of proof.</u>

<u>However, Section 109 of the same Act provides for the evidentiary burden of proof</u> and states as follows:

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

26. I think I have said enough to demonstrate that this appeal has no merit. Accordingly, it is hereby dismissed with costs to the 1st Respondent.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 14TH DAY OF APRIL, 2022

C.MEOLI

JUDGE

<u>In the presence of:</u>

For the Appellant: MS. Wanyonyi

For the 1st Respondent: Mr. Ng'ang'a

C/A: Carol