



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL SUIT NO. 27 OF 2010**

MAKKA J. KASSIM.....1<sup>ST</sup> PLAINTIFF  
NATHAN KIPROP.....2<sup>ND</sup> PLAINTIFF  
CHARLES CHESIRE.....3<sup>RD</sup> PLAINTIFF  
KIBET KIBAROR.....4<sup>TH</sup> PLAINTIFF  
ISAAC CHEBOI.....5<sup>TH</sup> PLAINTIFF  
JOB KIGEN.....6<sup>TH</sup> PLAINTIFF  
OBADIA BARGOGE.....7<sup>TH</sup> PLAINTIFF  
RICHARD K. KAMNGOROR.....8<sup>TH</sup> PLAINTIFF

-VERSUS-

THE ATTORNEY GENERAL.....1<sup>ST</sup> DEFENDANT  
TIMON OTIENO MBOGA.....2<sup>ND</sup> DEFENDANT  
PATRICK KIITA.....3<sup>RD</sup> DEFENDANT  
ANN NYAOGE.....4<sup>TH</sup> DEFENDANT  
PHILEMON K. KEMBOY.....5<sup>TH</sup> DEFENDANT

**JUDGEMENT**

1. The background to this case is fairly straightforward. The plaintiffs claim to have been members of Sabatia Community Forest Association, registered under the **Societies Act in 2008** in an effort to protect the forest from destruction, the local communities formed associations known as Community Forest Associations who would work with the Kenya Forest Service, the 6<sup>th</sup> Defendant and its officers to keep away illegal timber merchants and saw millers from illegal logging and harvesting of wood within the forests, and thus were actively involved in forest conservation, in conjunction with Kenya Forest Service guards and foresters.

2. During the period 19<sup>th</sup> January, 2009 and 5<sup>th</sup> February 2009, the plaintiffs having been selected by their Association to represent them, claim to have been subjected to abitarly and malicious assaults, beatings and unwarranted detentions and malicious prosecutions under the hands of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants being employees of the Kenya Forest Service.

They therefore sued the 1<sup>st</sup> defendant as the legal representative of the Government under whom docket the Kenya Forest Service falls for compensation resulting from their illegal activities.

3. By a **plaint dated 25/01/2010 and Amended by leave of Court on the 19/3/2013**, the plaintiffs state that the Defendants actions were

malicious and illegal, and as a result, they suffered loss and damages and therefore claim damages from the 1<sup>st</sup> defendant being the legal representative of the Government and the 6<sup>th</sup> Defendant as the employer of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> defendants, for the illegal arrests, wrongful confinement, battery, assault, and malicious prosecutions.

#### 4. Particulars of Malice and Illegality are that:

- (a) *The defendants assaulted the plaintiffs when they had not done anything wrong to warrant such assault.*
- (b) *The defendants actions were prompted by the plaintiffs viquor in protecting the interests of the community within Sabatia Community Forest Association.*
- (c) *That the officials of the Kenya Forest Services acted outside their mandate and the relevant provisions of the law, the Forests Act, in assaulting and battering the plaintiffs when they had not committed any offence to warrant the assault.*

5. The plaintiffs therefore pray for judgement against the defendants for;

- (a) *General damages.*
- (b) *Exemplary/Aggravated damages*
- (c) *Costs and interest.*

6. **The defendants filed a joint defence dated 2/5/2015 and filed on the 22/5/2015.** They denied assaulting the plaintiffs nor exceeding their powers and mandate under the Forests Act. They however state that in arresting the plaintiffs, it was within their mandate and their duty of protecting the forest and keeping away intruders, as the case was with the plaintiffs. Together with the statement of defence, the Forester in charge of Eburu area, one Patrick K. Kiita recorded and filed a witness statement stating the events that lead to this suit.

7. Three plaintiffs testified on behalf of themselves and the other five. The defendants called two witnesses. Upon closure of the case, both parties filed written submissions.

#### 8. Issues For Determination.

- (1) *Whether the plaintiffs were brutally assaulted, illegally detained and maliciously prosecuted.*
- (2) *If the answer to the above is in the affirmative, whether the plaintiffs are entitled to the damages they seek in their Amended plaint.*
- (3) *Costs*

#### 9. Analysis findings and Determination

I have considered the evidence adduced before the court by the plaintiffs as well as the defendants.

The defendants by the evidence of **DW1 Philemon Kipkemoi** (5<sup>th</sup> Defendant) admitted to having arrested the plaintiffs together with the other defendants during the material times, and specifically the 2/2/2009 and 4/2/09 for what he termed as obstructing authorized licensed saw millers from harvesting trees and clearing the Visoi – Sabatia road, upon information from the District Forest office at Koibatek. He further admitted that the plaintiffs were transported and booked at the Ravine Forest Offices, and later at Molo Police Station and later charged with the **Offence of Obstructing Officers in the exercise of their duties contrary to Section 54 (1) of the Forests Act.**

He however denied that the defendants assaulted the plaintiffs.

10. **DW2 Patrick Kiita** the Forester in charge of Eburu area also admitted that on the 2nd and 4<sup>th</sup> February 2009, together with the other named defendants they arrested the plaintiffs, upon information from the District Forest Officer, for preventing saw millers from clearing the said road, and for taking photographs of the forest without authority from Kenya Forest Service. He further confirmed that the plaintiffs were detained at Molo Police Station before being charged. On cross examination, these witnesses denied assaulting the plaintiffs. They did not produce any authority or licences to the alleged and authorized saw millers. Further no evidence was adduced or exhibits produced of the alleged photographs, that they alleged the plaintiffs were taking without authority. No evidence was adduced as to how the plaintiffs were obstructing officers in exercise of their duties.

11. On the part of the plaintiffs, it was their collective evidence that they were members of **Sabatia Community Forest Association**, registered in 2008 – Certificate PExhibit 1. Their role was to work with the 6<sup>th</sup> defendant, Kenya Forest Service to prevent illegal logging and harvesting of trees and conservation of the forest. They testified that their names had been presented to the 6<sup>th</sup> defendant and the Forest rangers who knew them as they had worked with them for a long period. No challenge was mounted to this evidence by the defendants.

12. It was their evidence, which was not rebutted that the Foresters and the rangers had allowed illegal activities to be undertaken in conjunction with the illegal and unauthorized saw millers who they were protecting and guarding. That as a result, bad relations had ensued and the defendants resulted to arresting, harassing and assaulting the plaintiffs as they tried to protect and guard against the illegal harvesting

of trees from the forest.

13. I have seen letters produced by the plaintiffs showing reports of illegal activities in the forest under the watch and guard by the Forest rangers – Pexhibit 7.

The chairman of the Sabatia Community Forest Association – the (8<sup>th</sup> plaintiff) had complained by the said letter (Pexhibit 7) to the District Commissioner, giving details of the vehicles and times when the illegal activities and harvesting was taking place during the period when a logging ban in the country was in force.

14. The defendants alluded to the reasons for arresting the plaintiffs as stopping and obstruction of licensed saw millers from clearing the Sabatia – Visoi road claiming that they had been authorized by the Road Engineer. Other than stating so, the defendants did not produce any authority or licence given to any of the saw millers or by the Road Engineer to authenticate their claim, and in support of their evidence.

15. It was the defendants evidence that the Officer Commanding Station (OCS), Ravine Police Station refused to detain the plaintiffs when they were arrested forcing the defendants to ferry them to Molo Police Station. One would wonder why the OCS – Ravine Police Station, in whose jurisdiction the Forest lies and where the alleged offences are alleged to have been committed would refuse to detain and prefer charges against the plaintiffs, if indeed the alleged offences had been committed by the plaintiffs.

16. Among the eight plaintiffs, the 1<sup>st</sup> plaintiff Makka J. Kassim was not arrested, assaulted nor prosecuted. The 4<sup>th</sup> plaintiff was not charged with any offence, though he had been assaulted and arrested together with the other plaintiffs.

17. I have considered the P3 Forms and medical notes produced by the plaintiffs – as Pexhibit 2 & 3. They are dated 6/2/2009 and 15/9/2009. They relate to the plaintiffs. They state injuries sustained by the plaintiffs as cut wounds on lips, faces and bruises occasion by blunt objects. These are minor soft tissue injuries. The defendants testified that the action they took in arresting the plaintiffs, was in line with the officers mandate and in line with the relevant provisions of the law in keeping away any intruders, as was the case of the plaintiffs. I have doubts whether assaults were within their mandate.

18. There is no doubt that the plaintiffs were assaulted, arrested falsely imprisoned and later charged, which charges were later withdrawn.

**In Mbowa Vs. East Mengo District Administration, Civil Appeal No. 6/1972 EACA (1972) EA 353**, the Court held that

*“The tort of Malicious Prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than of the public benefit”.*

19. The essential ingredients that ought to be proved for a claim of malicious prosecution to be sustained are

(1) *The criminal proceedings must have been instituted at the instigation of the defendant that is the setting of motion (of law) against the plaintiffs.*

(2) *The defendant must have acted without reasonable grounds or probable cause.*

(3) *The defendants must have acted maliciously in instituting the criminal proceedings with an improper and wrongful motive.*

The above are stated in the case **Charles Ondongo Vs. AG Kisumu HCC NO. 265/2001** See also **Stephen Gachau Githaiga & another Vs. AG (2015) e KLR**, among others.

20. On the matter of false detention, the **Court of Appeal in Jediel Nyaga Vs. Silas Mucheke – Civil Appeal NO.59 of 1987 (Nyeri)** rendered that

*“it is trite law that false arrest and false imprisonment may very well be found where prosecution is dismissed and the accused acquitted. Malicious prosecution may also be found where determination of prosecution was in favour of the accused i.e. in cases where the prosecution was withdrawn and the accused is not re-charged or----- false arrest may also be constituted where the matter of false report was actuated by malice”.*

21. **Halsbury’s Law of England, 4<sup>th</sup> Edition page 606** describes **false imprisonment** as

*“Any total restraint of the liberty of the person, for however short a time, by the use or threat of force or by confinement, is an imprisonment-----”*

In **Daniel Waweru Njoroge & 17 others Vs. AG (2015) e KLR** the court set out the elements of false imprisonment as

(a) *The unlawful restraint of another*

(b) *Against their will, and*

(c) *Without justification.*

The facts of the suit have been stated above. Determination of whether there was a probable or legal basis for the assaults, arrests and prosecution is key in this claim.

22. An action for malicious prosecution is the remedy for baseless and malicious litigation.

It is evident from the evidence that the defendants took a very active role in initiating the arrests of the plaintiffs, in assaulting them and lastly causing their prosecution which ended up in abandonment.

As a matter of policy, if reasonable and probable cause existed at the time the defendants initiated the malicious prosecution, starting with the assaults and arrests of the plaintiffs, the proceedings ought to be taken to have been properly initiated and instituted, regardless of the outcome – See **Daniel Waweru Njoroge Case (supra)**.

23. **DW1** testified that the plaintiffs were charged for the offence of obstructing officers in the exercised of their duties Contrary to **Section 54 (1) of the Forests Act**, and that the same was withdrawn. He did not expound on what duties the officers were being obstructed to perform, by the plaintiffs.

As stated above, unless there was probable and reasonable cause for the prosecution, a case for malicious prosecution is established. He who alleges must prove – **Section 107 of the Evidence Act, Cap 80, Laws of Kenya**. It is not enough to state. Evidence must be adduced to support the assertions and allegation a basic and elementary legal principle. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence – **See Section 112 of the Evidence Act**.

24. In my considered opinion the defendants have failed to lay sufficient grounds and basis for subjecting the plaintiffs to the assaults, arrests and the prosecution. They failed to show and proved that the plaintiffs were intruders in the forest by any evidence. They did not challenge their evidence that they were guarding against destruction of the forest, nor that they had no authority from their Association. The defendants knew the plaintiffs as members of the Sabatia Community Association, whose membership they knew and had. The existence of the Sabatia Community Forest Association was not challenged as the certificate of registration, and membership were provided to both the court and the defendants.

25. This was buttressed by the various letters and committee meetings between the Association's members and the public complaints committee established under Sections **31-36 of the Environment Management and Co-ordination Act (No. 8 of 1999)** whose mandate is to investigate complaints from the public regarding the condition of the environment or its degradation.

In particular is a letter in that regard dated 12/8/2013 by the chairman, and copied to the 8<sup>th</sup> plaintiff who was the chairman of the Sabatia Community Forest Association, the 8<sup>th</sup> plaintiff.

26. The defendants in their submissions tabulated the functions and mandate of the Kenya Forest Service, the 6<sup>th</sup> Defendant. Criminal activities by its employees is not one of its mandates. Under the Act, as observed by the defendants, the **Kenya Forest Services** has a duty to collaborate with communities in matters of forest conservation.

27. Evidence that was not challenged was that the defendants No. 2-5 were collaborating with illegal loggers and saw millers instead to destroy the forests as opposed to its conservation which the plaintiffs were enforcing at the time and periods they were arrested, assaulted and maliciously prosecuted.

**Kagame & Others Vs. AG & Another (1969) EA 643**, the court held that

*“Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed-----”*

28. I find no probable or reasonable cause that may have lead the defendants to assault, arrest and prosecute the plaintiffs. The prosecution ended into a withdrawal. They were not re arrested or charged afresh. This leads to the only conclusion that the plaintiffs No 2-8 were assaulted, falsely imprisoned and maliciously prosecuted.

I find that the tort of assault, false arrests and malicious prosecution proved against the defendants being servants of the 1<sup>st</sup> and 6<sup>th</sup> Defendants, and therefore entitled to compensation, by way of damages.

The 1<sup>st</sup> defendant, the Hon. The Attorney General, is held vicariously liable for the torts committed by its agents and servants, being employees of the 6<sup>th</sup> defendant.

29. **Quantum of damages:**

The defendants did not submit on the matter of damages or at all. The plaintiffs on their part proposed a sum of Shs.7,000,000/= to each of them; citing some four authorities. I have earlier stated that the injuries sustained by the plaintiff are minor soft tissue injuries as stated in the P3 forms.

An award of damages is a matter of discretion by the court. The discretion is unfettered, but ought to be exercised judiciously, with reason.

The award ought not be too high or too low but reasonable, in the circumstances of each case. Awards in past decisions are mere guides. Each case should be considered on its particular circumstances – **Kasio Matuku & Kenya Post Office Savings Bank Vs. James Kipkemoi Cheruiyot, Inspector of Police & A.G (2019) e KLR**

30. Exemplary /punitive damages are awarded in two circumstances,

(1) *Where there is oppressive arbitrary or unconstitutional action by the servants of the government.*

(2) *Where the defendants actions were calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff.*

The factors to consider in awarding damages are the age of the awards, the period spend in custody by the plaintiffs, and effect of the said proceedings on the plaintiffs in their status in Society.

31. The plaintiffs hereto were appointed to work together with the Kenya Forest Services by their duly registered Association in the conservation of the forest. They were therefore authorized to enter into the forest, and together with the forest rangers and foresters to protect against unlawful and illegal logging/harvesting of trees. They were not intruders. They did not deserve the unlawful and humiliating assaults, arrests and the malicious prosecution.

In the case **Stephen Gachau Githaiga & another Vs. AG (2015) e KLR**, a sum of Shs. 2 million was awarded to the plaintiff for false imprisonment, and malicious prosecution.

The **Court of Appeal in Lucas Omolo Wamari –Vs. AG. & another (2017)** awarded Shs. 2 million to the respondent for malicious prosecution and violation of his constitutional rights.

In the **Chripine Otieno Caleb Case (Supra)** the court awarded to the plaintiff a sum of Shs. 2 million for false imprisonment and prosecution, and Shs. 500,000/= as aggravated damages for the four days the plaintiffs were detained in custody.

32. Considering the circumstances under which the plaintiffs were arrested, assaulted and maliciously prosecuted, I find that a sum of Shs. 800,000/= shall be reasonable damages to each of the seven plaintiffs, **except the 1<sup>st</sup> plaintiff** who was neither arrested assaulted or prosecuted, but only testified in support of the other plaintiffs claims.

I am not persuaded to award aggravated/exemplary damages as the circumstances do not warrant such award.

33. Judgement is therefore entered for the 2<sup>nd</sup> to the 8<sup>th</sup> plaintiffs against the 1<sup>st</sup> defendant, the Hon. Attorney General, who is vicariously liable for the actions of its servants, having been employees of the 6<sup>th</sup> defendant.

Accordingly, I award the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> plaintiffs a sum of Kshs.800,000/= general damages against the 1<sup>st</sup> defendant. This sum shall accrue interest at court rates from the date of this judgment until payment in full.

35. The 1<sup>st</sup> defendant shall bear the costs of this suit to the 2<sup>nd</sup> to the 8<sup>th</sup> plaintiffs.

The 1<sup>st</sup> plaintiff's claim against the defendants is dismissed of prove with no orders as to costs.

Orders accordingly.

**Dated, signed and delivered this 20<sup>th</sup> day of February 2020.**

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**J.N. MULWA**

**JUDGE**