REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 133 OF 2019

CHARLES KITHINJI …… APPELLANT

VERSUS

SHAM SATISH WASON ……..…….... 1ST RESPONDENT

O.C.S MERU POLICE STATION ……..……..….. 2ND RESPONDENT

THE PRINCIPAL SECRETARY

MINISTRY OF INTERIOR ….……..……..…… 3RD RESPONDENT

THE HON. ATTORNEY GENERAL ……. 4TH RESPONDENT

(Being an appeal from the Ruling and Order of the Hon. M.A. Odhiambo, RM delivered on 3/10/2019 in

Meru CMCC No. 126 of 2019)

J U D G M E N T

1. By a Plaint dated 9/4/2019, **Charles Kithinji** (the appellant), sued the respondents in the trial court seeking Kshs. 8,000/= and general damages for police harassment, extortion, false arrest and illegal imprisonment.

2. He contended that on 28/9/2013, the 1st respondent made a false and malicious report against him to the police at KIIRUA Police Station to the effect that he had stolen the 1st respondent's trees. Following the report and without any investigations, the police arrested him and placed him in custody. That by reason of the aforesaid arrest and detention, he had suffered loss and damage.

3. On 1st July, 2019, the 2nd to 4th respondent filed a Notice of Preliminary Objection contending that the suit was time barred by dint of ***section 3 (1) of the Public Authorities Limitation Act***. The 1st respondent supported the same.

4. By a ruling made on 3/10/2019, the trial Court sustained the preliminary objection and struck out the suit with costs for having been filed out of time.

5. Aggrieved by that decision, the appellant preferred this appeal raising seven grounds of appeal as follows: -

> ***a) The learned trial Magistrate erred in law and in fact by failing to invoke the overriding objective principle under the provisions of Section 1A of the Civil Procedure Act and Article 159 of the Constitution of Kenya.***
>
> ***b) The learned trial magistrate erred in law and in fact in failing to consider that after the judgment of the lower court in criminal proceedings the appellant had to wait for 14 days right of appeal and thereafter issued a notice on 9/1/2019.***
>
> ***c) The learned trial magistrate erred in law and in fact by filing to consider that the appellant's plaint was brought in court on 9/4/2019 but the appellant had difficulties in raising court filing fees.***
>
> ***d) The learned trial magistrate erred in law and in fact by failing to appreciate that the time doesn't run from the time of judgment but from the expiration of 30 days after the issuance of notice of intention to sue.***

e) The learned magistrate erred in law and in fact in invoking section 3 (1) of the Public Authorities Act when indeed the 1ST respondent was an employer of the appellant and as such the appellant's suit was not time barred.

f) The learned trial magistrate erred in law and in fact in failing to consider that after the issuance of notice resulted in a legitimate claim that is within time and the cause of action arose upon the lapse of 45 days excluding Saturday, Sundays and holidays when time does not run under Order 50 Rule 4 of the Civil Procedure Rules 2010.

g) The learned trial Magistrate erred in law and in fact in failing to consider that the appellant was a pauper.

6. The appeal was canvassed by way of written submissions. In his submissions, the appellant rehearsed the grounds appeal and cited the cases of **David Njenga Ngugi v Attorney General [2016] eklr** and **Kenya Bus Services Limited & Anor v. Minister for Transport & 2 others.**

7. On behalf of the 1st respondent, it was submitted that the plaint was poorly drafted. That as pleaded from the plaint, the cause of action arose from the date the first report was made on 28/9/2013. That since this was a tortious claim, it ought to have been brought within three years in terms of ***section 4 (2) of the limitation of Actions Act*** and therefore time lapsed on 28/9/2016. That with the absence of an order extending time, the suit was barred by the statute of limitation and therefore incurably defective.

8. The 2nd to 4th respondents did not file any submissions.

9. **Grounds a and f** of the appeal were to the effect that, the trial Court erred in failing to breath into the proceeding the overriding objective principle, popularly known as *the Oxygen Principle ('O2 principle')* and consider that the appellant was a pauper to have filed the suit within time.

10. I have carefully considered the record. At no point was the trial Court called upon to apply the overriding objective principle in the proceedings. The submissions filed in opposition to the Preliminary Objection did not invite the trial Court to apply the said principle.

11. In any event however, even if the trial Court was called upon to do so, I do not think that there would have been any room to apply the same. That principle as well as the impecuniosity of the appellant should have been raised in an application for extension of time within which to file the suit. There was no such application and the trial Court cannot be faulted for no having invoked the said principle.

12. In **Safaricom Limited V. Ocean View Beach Hotel Limited & 2 Others CA. No. 327 of 2009 (UR),** the Court of Appeal held of the Oxygen Principle: -

"It is therefore apt to throw in a word of caution concerning the 'O2 principle'. It should be regarded as a double edged sword in that it is a powerful enemy on those litigants bent on frustrating the cause of justice because it has the potential of stopping them at the earliest opportunity and it will also be a powerful ally of those litigants who want to attain justice in a manner that is just, quick and cheap. The 'O2' principle has not come to us as a packaged product for application in all situations. Instead, its application and management will depend on the circumstances of each case. …".

13. In the present case, I do not think that the principle had any room for application. Those grounds fail.

14. **Grounds b, c, d and e** invoke the time the suit ought to have been filed and whether the same was time barred. To address this, it is imperative to ascertain the cause of action pleaded by the appellant before the trial Court.

15. The cause of action was poorly pleaded in the plaint. The appellant only complained of a malicious report that resulted in his being arrested and placed in custody. The plaint in itself did not disclose any cause of action against the 2nd to 4th respondents. Even the witness statement itself did not disclose much.

16. From the judgment however, the trial Court was able to discern that the cause of action was meant to be the tort of false imprisonment and malicious prosecution. Nowhere in the plaint or the witness statement did the appellant plead any such cause of action. Probably he intended to mislead the Court from discerning the actual cause of action and therefore avoid the sharp edge of limitation.

17. In an action for false imprisonment and malicious prosecution, a claimant must plead that a malicious or baseless complaint was lodged against him, it resulted in his being placed in custody, that a charge was preferred against him resulting in a prosecution whose judgment was in his favour. This was neither pleaded or alleged anywhere in the present case.

18. Be that as it may, in the present case, the trial Court dealt with the matter as if the cause of action was properly pleaded. If the plaint would be considered as drawn, the cause of action was a malicious report made by the 1st respondent that resulted in the appellant being arrested. The report having been made on 28/9/2013, the cause of action arose then and expired three years later, 27/9/2016. As at the time the suit was being filed in April, 2019, the suit was hopelessly time barred.

19. However, going by the route taken by the trial Court, ie malicious prosecution, the cause of action arose on the date the judgment was made in favour of the appellant, 8/2/2017. Since the cause of action against the 1st respondent merged with the one against the 2nd to 4th respondent, the same run from 8/2/2017 to 7/2/2018.

20. In **Daniel Waweru Njoroge & 17 Others v Attorney General [2015] Eklr,** the court held: -

> ***"False arrest which is a civil wrong consists of an unlawful restraint of an individual's personal liberty or freedom of movement by another person purporting to act according to the law. The term false arrest is sometimes used interchangeably with the tort of false imprisonment, and a false arrest is one method of committing a false imprisonment. A false arrest must be perpetuated by one who asserts that he or she is acting pursuant to legal authority, whereas a false imprisonment is any unlawful confinement. Thus, where a police officer arrests a person without probable cause or reasonable basis, the officer is said to have committed a tort of false arrest and confinement. Thus, false imprisonment may be defined as an act of the defendant which causes the unlawful confinement of the plaintiff. False imprisonment is an intentional tort."***

21. In **John Ndeto Kyalo v Kenya Tea Development Authority & another [2005] Eklr,** the court was of the view that a claim for false imprisonment (wrongful detention), the cause of action would arise on the last day of the period of the alleged imprisonment.

22. In the **John Ndeto case (supra)**, the court observed: -

> ***"These claims by the plaintiff for damages for false imprisonment, malicious prosecution and wrongful dismissal are of course based on distinct causes of action and even though the evidence adduced by the plaintiff covers all of them that evidence must be able to prove each of them on a balance of probabilities.***
>
> ***As regards the claim for false imprisonment the cause of action arose on the last day of the period of the alleged imprisonment, which is 1st April 1997. This case was filed on the 10th November 1999. As against the second defendant I agree with Mrs. Umra, learned state counsel's submissions that the claim is by dint of section 3(i) of the Public Authorities Limitation of Actions Act statute barred…"***

23. The life of a cause of action against the government is well known. It is one year for obvious reason. The government runs its business on a year to year basis. Its liability requires to be documented and budgeted for within the year in question.

24. ***Section 3(1) of the Public Authorities Limitations Act ("PALA")*** provides: -

> ***"(1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued".***

25. Immediately after his arrest and incarceration, the appellant was charged in **Meru Criminal Case No. 1371 of 2013** with the offence of stealing contrary to ***section 275 of the Penal Code***. He was acquitted on 8/2/2017. The time therefore started to run on 8/2/2017 and ended on 7/2/2018. His suit was filed on 20/5/2019 by which time it was barred.

26. The appellant complained that the trial court failed to take into account Sundays, Saturdays and public holidays as provided for under ***Order 50 of the Civil Procedure Rules.*** The exclusion of these days are only applicable when the period for doing an act is less than six days.

27. In **Longinus Oroni Murunga v David Masika Mafumbo [2017] Eklr,** the Court of Appeal held: -

> ***"The excluded days are stipulated by provisions of order 50 which in sub-rule (2) excludes, inter alia, Sundays and public holidays, from computation of time only when the period for doing an act is less than six days. That means that had the High Court granted the appellant less than six days within which to file an application for judicial review, Sundays and public holidays would be excluded. The requirement by order 50 rule 2 CPR that Sundays and public holidays are not excluded in the computation of time where the time allowed for taking action is more than six days is a general provision in the laws dealing with computation of time. Section 57(d) of the Interpretation and General Provisions Act has an identical provision".***

28. In the premises, I find the appeal to be without merit and I dismiss the same with costs.

DATED and DELIVERED at Meru this 12th day of August, 2020.

A. MABEYA

JUDGE