REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(CORAM: R MWONGO, J)

MILIMANI LAW COURTS

CIVIL SUIT NO. 528 OF 2009

JACOB MBUGUA NJAGI & 36 OTHERS.....PLAINTIFFS

VERSUS

THE HON ATTORNEY GENERAL.....DEFENDANT

JUDGMENT

Background

1. On 28th January, 2008, the plaintiffs were at an alleged birthday party for plaintiff No 37, Ann Njoki Karani, at her house at a place called Muthama in Waithaka, Nairobi. There were about forty or so people at the party. Suddenly, at about 7.00pm, Administration Police officers swooped in and arrested many of those gathered there. On 30th January, 2008, thirty eight of the party-goers were arraigned in Kibera Chief Magistrates Court at Nairobi, and charged with the offence of taking part in an unlawful assembly.

2. After hearing the prosecution's case comprising four witnesses, the trial magistrate on 13th October, 2008, found that the accused persons had no case to answer. Accordingly, he acquitted all of them under Section 210 of the Criminal Procedure Code. The accused persons are the plaintiffs in the present suit against the state for malicious prosecution.

3. This matter first came to trial before Mabeya J on 4th June, 2016, and he proceeded with taking the evidence of two plaintiffs namely, Samuel Muturi Ngigi (PW1) and Ann Njoki Karani (PW2). Their written witness statements were adopted as evidence in chief. The Attorney General was not present despite being served. The third witness was to be the Executive Officer of the lower court that tried the criminal case. Eventually that officer did not attend court to produce the lower court's record. Thus, at the instance of the plaintiff's counsel, this court allowed the lower court's proceedings filed by the plaintiffs to form part of the record. The court also allowed the two plaintiffs' witnesses to be recalled to be cross-examined by the defence. The record shows that Accused No 24, Peter Githanga Gitari, passed away before conclusion of the lower court trial.

4. The plaintiffs' suit is for damages for malicious prosecution on alleged trumped up charges, arbitrary arrest and detention without justification. They seek damages on grounds of violation of their fundamental rights to peaceful assembly and subjection to needless prosecution for ten months. They also seek special damages of Kshs 609,000/= in costs for all attendances at Kibera Chief Magistrate's Court in Criminal Case No 161 of 2008, and legal fees for their defence, general damages and exemplary and aggravated damages..

5. The defendant's defence is that the police acted with reasonable and justifiable cause to enter the premises and arrest the plaintiffs for the offence of unlawful assembly; they denied the particulars of malice; that the search and arrests were pursuant to a genuine criminal complaint and that they were acting in execution of their statutory mandate. The defence did not call any witnesses.

Issues

6. The agreed issues for determination are as follows:

a). Whether the plaintiffs were kept in police custody incummunicado for more than twenty four (24) hours

b) Whether the police officers had a reasonable and lawfully justifiable cause to conduct a search and arrest the plaintiffs

c) Whether charging and prosecuting the plaintiffs for taking part in an unlawful assembly was actuated by malice.

d) Whether the plaintiffs are entitled to damages.

Analysis and Determination

7. PW1, the 9th plaintiff testified that he was peacefully enjoying the party at PW2s residence where they had slaughtered a goat for her birthday, when the raid and arrests by Administration Police officers occurred. They were detained incommunicado for twenty four hours at Gigiri Police station, then charged in court for unlawful assembly contrary to **section 79** of the **Penal Code**. He and the other plaintiffs had to hire three public service vehicles to attend court from Kawangware to Kibera, spending 2,000/= per person for nine trips to court.

8. In cross examination PW1 testified that he was inside PW2's house when the police arrived. He denied that the house had only two rooms and that there were over one hundred people in the compound. He stated that the party was called to celebrate the fourth birthday of PW2s son, and he was one of the persons preparing a goat for slaughter in the compound. He said that when the police arrived they beat the people in the party, took everything from them and detained them for about three days. He denied that they had spears or *rungus* in their possession, despite the evidence of the police the criminal case in the lower court.

9. PW2 testified that she had hosted a party at her home when the incident occurred. Her witness statement was a replica of that of the 1st plaintiff, save for the statement that it was she who had hosted the party. She further testified in cross examination that: she had thrown a party for herself, not for her child; that her house had six rooms not two; that there were no bows and arrows or *rungus* in the premises as alleged by the police in the lower court trial; that there was a knife for butchering the goat; that when the police arrived the beat them up, took things from them, and arrested them without giving any explanation.

10. In summary, during the trial in the lower court, four police officers gave evidence as follows: PW1 said that the received information that the accused persons had gathered at the house where they were taking an oath. They arrested them and recovered slaughtered lamb ram and that he did not know exactly which activity was taking place. PW2 testified that they, the police officers:

> ***"…were walking when we got a tip from a member of the public who told us in a certain house not far from where they were; he told us he suspected some people up to no good. He showed us the house where we proceeded and I was ahead of my colleagues***
>
> ***…. I entered inside; went into the kitchen and to the sitting room where 36 people were congested in one room. It was like a house which was not habited before. The three men outside escaped. The 36 people sat on the floor"***

According to PW2 the accused persons were participating in an unlawful assembly.

11. PW3 testified that the arrests were made because the accused persons were holding a meeting without a permit. They were arrested with paraphernalia including bows and arrows. He stated that they were asked if they had a permit for the meeting which they did not. They then searched the house and arrested the accused persons. Finally, PW4 the investigating officer, testified that the accused persons were at the police station when he saw them, having been arrested the night before. From his investigations, he found out that the accused were arrested whilst participating in an unlawful assembly without a permit, and that the security agencies were not aware of the meeting

12. After hearing the prosecution case, the trial magistrate found that the particulars of the charge sheet did not disclose any offence under **section 78** of the **Penal Code** and therefore the charge sheet was fatally defective. He further found the evidence on record to be inconsistent and insufficient to satisfy the ingredients of the offence of unlawful assembly. The trial magistrate finally found that even if the exhibits produced wine position of the accused persons the court could not assume or construe what was the intention of the accused persons as that was the duty of the prosecution to prove. Consequently, the trial magistrate acquitted all the accused as no prima facie case had been established against them.

13. I now deal with teach of the issues for determination

Arrest and detention for more than twenty four hours

14. The plaintiffs complain that their constitutional rights were violated by the delay in their arraignment. **Section 72(3**) of the **repealed constitution** provided that :

> ***" A person who is arrested or detained -***
>
> ***(a) for the purpose of bringing him before a court in execution of the order of a court; or***
>
> ***(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 <u>within twenty-four hours of his arrest</u> 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."***

15. It is not in dispute that the plaintiffs were arrested some-time after 7.00pm on Monday 28th January, 2008 and were arraigned in court

on Wednesday 30th January, 2008. Pursuant to **Section 72** of the repealed constitution, the plaintiffs should have been taken to court within twenty four hours. Thus, the latest time of arraignment should have taken place at 7pm on Tuesday 29th January 2008. Instead, they were arraigned in court on the morning of Wednesday 30th January, 2008, over fourteen hours after the latest arraignment time.

16. Asserting the violation of their rights, the plaintiffs cited the case of **Salim Awadh Salim & 10 Others v Commissioner of Police & 3 Others [2013] eKLR** where Ngugi J stated:

> ***"[69]…. I believe that there is no longer any room for dispute with regards to section 72 of the Constitution. For the estates to hold any person beyond the constitutionally prescribed period is to violate the right guaranteed therein, unless the state discharges the burden imposed by section 72(3)(b) that: 'the burden of proving that the person arrested or detained brought before a court as soon as is reasonably practicable shall rest upon the person alleging that the provisions of this subsection have been complied with'"***

17. My view is that any arrest or detention for whatever reason that can be shown to have resulted in the complainant being held for more than twenty four hours and where there is no reasonable explanation as to why the complainant could not be brought before a court before the expiry of such time constitutes a violation of the constitutional right. Irrespective of other claims or acts in respect of which damages may be claimed, the violation of the guaranteed right to freedom must be recognized. In appropriate cases the violation must, in its own right, also be remedied by an award of damages.

18. In the present case the state did not even bother to address itself in any serious way to the actual fourteen-hour delay in presenting the plaintiffs to the court following the arrest and expiry of time. Their submission was merely that:

> ***"We submit that during the said period they were lawfully held and that they are not entitled to damages as a result of the same…..***
>
> ***In the case of David Mungai Kinyanjui &2 Others v Attorney General [2012]eKLR the court relied on the case of James Kiiru Karuga v Joseph Mwamburi & 2 Others Civil Appeal No 171 of 2000; which held that so long as the police take reasonable measures after arrest, they are an important adjunct to the administration of justice and are not to be faulted"***

19. The state's above submission does not, in my view, explain the reasonable actions taken by the police which resulted in the fourteen hour delay. There is no indication as to whether the police were overwhelmed by the large numbers of accused persons arrested in one swoop, and the consequent difficulties of conducting the investigations instantly in respect of each accused, or whether there was a shortage of officers to deal with the large number of arrested persons in a small police post. Nothing is stated by the police on this. Indeed, not a single officer was called to give evidence concerning the delay.

20. Accordingly, I have no basis to reach any conclusion other than that the delay in arraigning the plaintiffs was unexplained and cannot be rationally excused. I therefore take the view that the delay amounted to a violation of the plaintiffs' constitutional rights, and in the absence of an explanation, the plaintiffs succeed on this ground. I so find and hold.

21. Although the pleadings assert that the plaintiffs were denied police bond before being arraigned, no evidence was led on that point. I am therefore unable to make any finding on that point. I further note that at the hearing on 30th January 2008, the trial court on entering a plea of not guilty directed that each accused person:

> ***"…be released on a bond of Kshs 20,000/- with similar security or cash bail of Kshs 20,000/- or remain in custody"***

The freedom of the plaintiffs was thereby secured after plea taking.

22. In the case of **Kenya Fluorspar Company Limited v William Mutua Maseve & Another [2014] eKLR** the court (Ngenye J) affirmed the awarded damages of Kshs 40,000/= for false imprisonment of the claimant who had been detained in police cells for five days. Similarly, I find the plaintiffs are entitled to damages.

Whether the arrests, search and prosecution of the plaintiffs was justified or actuated by malice

23. The plaintiffs' case is essentially that they were lawfully and peacefully gathered at the home of PW2 for the purpose of celebrating a birthday party, when they were arrested for no good reason. Thereafter they were maliciously prosecuted when the police knew that they had no such provable case.

24. Malicious prosecution has been well defined by Kenyan courts. Cotran, J, laid down the principles that govern a claim founded on malicious prosecution the case of **Murunga v Attorney General (1979) KLR, 138** as follows:-

(a) The Plaintiff must show that the prosecution was instituted by the Defendant, or by someone for whose acts he is responsible.

(b) The Plaintiff must show that the prosecution terminated in his favour.

(c) The Plaintiff must demonstrate that the prosecution was instituted without reasonable and probable cause.

(d) He must also show that the prosecution was actuated by malice.

The four principles have been adopted in similar matters over many years.

25. On the first two of the above four principles the evidence in the present case, is undisputable that: the prosecution was instituted by the defendants; that the prosecution in the lower court was terminated on the grounds that there was no case to answer. The question is whether the prosecution was instituted with reasonable and probable cause or actuated by malice.

26. The defendants' explanation was that the arrests were justified and they denied malice of any sort. Their only evidence, however, is that which was given in the lower court, which I have recited in part above. The arrests according to the prosecution witnesses, was that they were walking in the area near PW2s house. They then received "*a tip from a member of the public"* who told them that in a certain house not far from where they were, he suspected some people were *"up to no good"***.** He showed the police the house where we went and found the plaintiffs. They searched the house, took some items, arrested the plaintiffs and prosecuted the plaintiffs.

27. In the case of **Hicks v Faulkner (1878), 8 Q.B.D. 167 at Pg 171** Hawkins J. defined probable and reasonable cause as follows;

> ***"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." (See Hawkins J. ibid. See also D.K Maraga in Zablon Mwaluma Kadori vs.National Cereals and Produce Board [2005] e KLR)"***

28. The forgoing definition was adopted by Rudd, J. in **Kagane v Attorney General & Another (1969) EA 643** in which the learned Judge reiterated that: -

> ***"...to constitute reasonable and probable cause the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of the facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty."***

29. What was the information upon which the police arrested the plaintiffs? It was a tip from a member of the public that they were up to no good. No further details appear to have been availed about the accused's actions. The lower court was not satisfied that the plaintiffs were up to no good as far as the charge of unlawful assembly was concerned.

30. Likewise, I am not persuaded from the available evidence that there was reasonable and probable cause; or that he had an honest belief in the guilt of the accused, or a conviction on the part of the prosecutor that the totality of facts in his possession were capable of reasonably satisfying a finding of guilt. What the prosecution in the lower court was required to prove was the following under **section 78** of the **Penal Code** as follows:

> ***"78(1) When three or more persons assemble with intent to commit an offence, or, being assembled with intent to carry out some common purpose, conduct themselves in such a manner as to cause persons in the neighbourhood reasonably to fear that the persons so assembled will commit a breach of the peace, or will by such assembly needlessly and without any reasonable occasion provoke other persons to commit a breach of the peace, they are an unlawful assembly***
>
> ***(2)It is immaterial that the original assembling was lawful if, being assembled, they conduct themselves with a common purpose in such a manner as aforesaid.***
>
> ***(3) When an unlawful assembly has begun to execute the purpose for which it assembled by a breach of the peace and to the terror of the public, the assembly is called a riot, and the persons assembled are said to be riotously assembled.***
>
> ***79 Any person who takes part in an unlawful assembly is guilty of a misdemeanour and is liable to imprisonment for one year"***

31. Thus, the prosecution had to prove: intent to commit an offence; being assembled with intent to carry out some common purpose; or execution of common purpose. What did the evidence show?

32. In the lower court the record shows that the prosecution witnesses did not quite appreciate the crime under **section 78 Penal Code**. Indeed, the evidence of PW1exemplifies their understanding. He said that he did not know the nature of the meeting taking place. The items he recovered were a maasai rungu, a panga, an iron bar, seven empty oil bottles, a knife, a big mug, two pairs of scissors, a nokia phone charger and a receipt book. I cannot fathom that the mere existence of such items in a house, without more, would be expected to prove intent to commit an offence, or to carry out a common purpose, or to commit a breach of the peace.

33. Both PW2 and PW3 said that in addition there were bows and arrows and also stated that the plaintiffs did not have a permit for a meeting. PW4, the investigating officer, also testified that:

> ***"I commenced investigations and I found out that they (the accused) were taking part in an unlawful assembly <u>because when I interrogated them no permit for the gathering had been issued to them and none of them produced any…. The security agencies never knew of the illegal meeting</u>"*** (emphasis supplied).

In cross examination, PW4 testified that he:

"…decided to charge them (the accused) with the offence in court. The APs who arrested the accused did not know of the meeting. They only got a tip off, up to now nobody knew or knows the purpose for that meeting"

In re-examination, he stated:

"Between three and more people should get a permit for a meeting."

34. Clearly, the investigator misunderstood the meaning of unlawful assembly to mean an assembly without a permit. Unlike the **Public Order Act, Cap 56**, the **Penal Code** offence of unlawful assembly does not require absence of a permit. What requires a permit is a public meeting which under **section 2** of the **Public Order Act** which is defined as follows:

"public meeting" means any meeting held or to be held in a public place, and any meeting which the public or any section of the public or more than fifty persons are or are to be permitted to attend whether on payment or otherwise; (emphasis supplied).

35. A permit is issued for public meetings under **section 5** of the **Public Order Act** which provides in part as follows:

"5(1) No person shall hold a public meeting or a public procession except in accordance with the provisions of this section.

(2) Any person intending to convene a public meeting or a public procession shall notify the regulating officer of such intent at least three days but not more than fourteen days before the proposed date of the public meeting or procession…

……

(10) any public meeting or public procession held contrary to the provisions of subsections (1) and (5) shall be deemed to be an unlawful assembly"

36. An unlawful assembly under the **Public Order Act** involves a public meeting of no less than fifty people, yet there is no evidence that there were fifty people at the plaintiffs' meeting. Accordingly, the prosecutor should not have taken this matter any further once the investigator found there were only thirty eight people at the meeting, and that no one knew the purpose of the meeting.

37. Under all the above circumstances, there was no basis for the case to be prosecuted, and the prosecutor had no basis to continue it. To that extent, I do find that there was no good faith in the prosecution or reasonable and probable cause to prosecute. Hence the matter falls into the class of malicious prosecution. In the case of **Thomas Mboya Oluoch & Another v. Muthoni Stephen & Another [2005] eKLR** the learned Ojwang, J(as he then was) stated as follows:

"Unless and until the common law tort of malicious prosecution is abolished by Parliament, policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice, in initiating prosecution and in seeking conviction against the individual, cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense

38. I therefore find and hold that the plaintiffs are entitled to damages for malicious prosecution. The case was terminated on 13th October, 2008, about nine months after the arrests.

Compensation

39. The plaintiffs seek damages of Kshs 7,500,000/= made up as follows:

-For general damages - Kshs 1,000,000/= for the 37th plaintiff whose house was raided, ad Kshs 700,000/- per plaintiff based on **Samura Engineering Ltd & 10 Others c Kenya Revenue Authority [2012] eKLR.** Here, the petitioners complained of a breach of their rights to privacy and seizure of their property, and were each awarded between 600,000/- to 1,200,000/-.

-For damages for arbitrary arrest and unlawful detention Kshs 2,500,000/= for each plaintiff based on **Law Society of Kenya & 2 Others v AG & 2 Others [2018]eKLR.** This, however, is a case concerning a suit filed against the AG in connection with the promulgation of Rules for appointment of Senior Counsel and is not about malicious prosecution.

-For damages for malicious prosecution Kshs 4,000,000/= per plaintiff based on **Emmanuel Kuria wa Gathoni v Commissioner of Police & Another [2012]eKLR,** where the clainmant was charged with a capital offence and prosecuted over a period of almost three years.

-For aggravated damages Kshs 1,500,000/= per plaintiff based on the **Emmanuel Kuria wa Gathoni case** (supra).

-Or a global award pursuant to the case of **Jaston Ongule Onyango v Attorney General & another** [**2015**] **eKLR.** This was the case of a 92 year old man arrested and detained for eleven days and lost his job.

I have perused all these authorities.

40. In this case I am inclined to award a global amount of damages. The object of damages was well stated by Omollo JA in **R.R.Siree & Another V Lake Turkana El Molo Lodges LLD CA Civil Appeal No 229 of 1998** where he said:

"It must be noted that damages in whatever name are awarded to put the Plaintiff to a position in which he would be had the tort not occurred. It is not for enrichment". (emphasis supplied).

41. The plaintiffs were denied their liberty for about fifteen hours and I would grant them 50,000/= each for that violation. I was not convinced by the plaintiffs' oral testimony that were beaten and everything taken from them. That evidence was not contained in their witness statements. I noted that their evidence was a replication of one another's evidence based on a generic template of their written witness statements. In addition, neither of the two witnesses indicated what was taken away from them, nor the nature of the alleged beatings. At no stage of the proceedings in the lower court did any of the plaintiffs raise the issue of alleged beatings, theft of their property or any police mistreatment, despite having counsel on record acting for them as early as 5th March, 2008.

42. For malicious prosecution I would award the amount of kshs 250,000/= to each plaintiff given the circumstances of the case

43. Special damages were not contested by the defence. The only statement made thereon in the submissions of the defence was that they must be pleaded and proved, and that they are payable if the court finds that the plaintiffs were maliciously prosecuted. The court has found that to be the case. The plaintiffs attached receipts for the special damages which were not questioned by the defence. I award the special damages in the amount of 607,000/= as I note that receipt No 59987 dated 17/7/2008 on Page 27 of the Plaintiffs' Exhibit does not indicate any figure paid.

Disposition

44. Given all the foregoing, I enter judgment for the plaintiffs in the following terms:

a) Special damages: Kshs. 607,000.00

b) General damages of Kshs 50,000/= plus 250,000/= (Kshs 300,000/- per plaintiff) .

Total Kshs 10,800,000.00

Total award Kshs 11,407,000.00

45. Interest shall accrue on special damages at court rates from the date of filing suit.

46. The plaintiffs shall also have the costs of the suit

Orders accordingly.

Dated and Delivered at Nairobi this 29th Day of January, 2019

_____

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Mr. Gikonyo holding brief for Mbugua for the Plaintiff

2. No representation for Attorney General

Court Clerk Mr. Adika