



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CIVIL CASE NO. 540 OF 1999

WINFRED NJOKI CLARKE.....PLAINTIFF

VERSUS

HOTEL INTERCONTINEAL NAIROBI.....1ST DEFENANT

THE ATTORNEY GENERAL.....2NDDEFENDANT

JUDGMENT

This very old case has passed through the hands of several judges. At last when I was seized of the matter, the plaintiff had already testified and closed her case. Hearing dates were then taken for the hearing of the defence case but on the date the defence was to proceed, both counsel for the defendants were absent. The court having confirmed that hearing notices had been served and having called out the matter, recorded that the defendants had lost their chance to be heard and the plaintiff was ordered to file submissions.

The plaintiff having complied, this judgment relates to the proceedings recorded but in the absence of the defendant's evidence.

By dint of a plaint dated 17th March, 1999 and filed on the same date, the plaintiff complained of unlawful imprisonment and defamation attributed to the two defendants. As a result she claimed general, exemplary and aggravated damages. She also claimed costs of the suit.

The facts as pleaded and based on the evidence adduced by the plaintiff and her witnesses are that on, or about 19th March, 1998 the plaintiff went to the premises of the first defendant as a potential paying customer but was denied service for no reason at all, except that she was not accompanied by a man. On asking why she was denied service, an employee of the 1st defendant stated in Kiswahili language but translated into English the following words, **“why don't you go ask your colleagues”**.

The words were uttered in the presence of other waiters and customers while the author was pointing at two unaccompanied women at the bar. It is the plaintiff's case that in their natural and ordinary meaning, the said words were understood to mean she was soliciting and that she was of questionable moral conduct and was a prostitute.

She pleaded that she is a respectably married woman and had gone to the hotel for no reason other than have a drink with her lady friend. As a result, her reputation was seriously damaged and suffered distress and embarrassment.

It is further the plaintiff's case in her pleadings that, the hotel security officers intentionally assaulted her by pulling her out of a taxi she had boarded upon being evicted from the premises. The 1st defendant's personnel also called and directed police officers to arrest her which was effected, and the plaintiff ended up at the Central Police Station where she was detained and subsequently released on bond without any charges being preferred against her. It was her case that the 1st defendant acted out of spite and malice, and her arrest in public subjected her to severe shock and mental anguish.

As against the police officers, she pleaded that their conduct was arbitrary, oppressive and or unconstitutional and amounted to unlawful imprisonment. The 1st and 2nd defendant filed defences denying the plaintiff's claims and called for strict proof thereof.

The first defendant in particular blamed the plaintiff for unruly behaviour which could have led to a breach of peace hadn't the police been called to intervene. It was the defence of the 1st defendant that it had every right to call for assistance due to the plaintiff's behaviour which was likely to cause a breach of peace.

As I have observed, it is only the plaintiff and her witnesses who gave evidence based on her pleadings. Following the testimony of the plaintiff and her witnesses, she confirmed that she was married to one Terence James Leonard Clark. She also confirmed that she went to the 1st defendant on the appointed date at about 6.30 p.m to meet her friend one Mary Waithera who had come from England. She was then accompanied by another friend called Jane.

On entering the hotel they went to a bar counter and asked for two bottles of beer while holding Kshs. 400/= in her hand, but instead of being served she was asked for cover charge. On saying that she did not understand what this cover charge was, she asked to see the manager. Instead the security officer approached and offered to help. It was when the turn of events pleaded came to pass. She was told that women who were not residing at the hotel could not be served at this hotel and that all women must pay cover charge.

When the plaintiff asked what about men, the security officer is said to have rudely said it was none of her business. Just then, two white women entered the bar and proceeded to the counter. They were served and when the plaintiff asked them where they resided, they said they lived in Westlands and not in the hotel.

The security man then pulled her outside the hotel because she could not sit there without a drink, and could not be served without paying cover charge. She was denied the opportunity to sit at the lounge and when she ended up outside and boarded a taxi the taxi driver was ordered not to carry her.

Police officers arrived, asked for the woman they had been called for, whereupon the security officer pointed at her. She was taken into the police motor vehicle and driven to Central Police Station where she was held for two days and two nights. The police refused to take her statement and her presence at the police station was never recorded in the Occurrence Book.

Her husband who visited her was not able to secure her release, but eventually she was given a free bond which she produced in court as Exhibit Number 1. On being released, she was to report to the police station every day for seven days after which she was told to stop as there was no complainant and that she was now free. Her demand letter to the 1st defendant elicited no reply or apology.

In the absence of any rejoinder from the defendants, the statements of the plaintiff and her witnesses remain uncontroverted. I did not have the advantage to see the plaintiff and her witnesses testify; however, her witnesses statement and evidence recorded is sufficient to determine the issues raised. Regardless of the admission and service regulations in the 1st defendant's premises, the treatment of the plaintiff pointed to discrimination which in the circumstances was embarrassing and humiliating. There was no notice displayed that unaccompanied ladies are required to pay cover charge for the drinks they wanted to take. It was therefore within her rights to ask what this cover charge was. Instead of an answer, she was dragged out of the hotel and ended up in a police station. Where she was held in custody.

This is a matter that should not have reached the courts had the 1st defendant's servants acted in a more civil manner towards the people who accessed its premises. Malice can be imputed from the language used and actions taken. Regrettably, the conduct of the plaintiff was put into question and she ended up losing her freedom for two days when she was locked up at the Central Police Station without any charge whatsoever.

Counsel for the plaintiff has filed written submissions and cited some authorities which include **KL vs. Standard limited (2014) e KLR, David Waweru Njoroge and 17 others vs. Attorney General (2015) e KLR and Peter Maranga Nyang'au vs. William Nyamweya (2010) e KLR.**

As stated in the case of **KL vs. Standard Limited**, a person's reputation and honour are not market place commodities. In fact, an award of damages, however high, cannot restore a damaged reputation. The defendants never offered any apology when demand letter were issued. That contempt in itself aggravated the humiliation visited upon the plaintiff.

The police arrived at the instance of the 1st defendant's servants. The defence filed alluded to the plaintiff's conduct as likely to cause a breach of peace. In the absence of any evidence to that effect, that allegation remains a hollow platitude. At the same time, the police should have recorded the presence of the plaintiff on booking her into the police station and the nature of complaint or offence against her. This was not done. Instead she was locked in for two nights and even the pleas by her husband could not secure her release.

The production of Exhibit 1 which was the police bond was confirmation of her presence at and subsequent release from police custody. My assessment of the evidence is that both the 1st defendant and the 2nd defendant are liable to the plaintiff for unlawful arrest and imprisonment.

The words uttered by the waiter referring to some two other lady customers fell short of the threshold of a defamatory statement. However, it is my finding that the plaintiff's reputation was tainted by the treatment of being dragged out of the premises of the 1st defendant leading to her arrest and unlawful detention. This amounted to discrimination, great humiliation and embarrassment. To that extent she has established that she is entitled to damages.

Doing the best I can under the circumstances of the case, I make an award of Kshs. 2,000,000 /= against the 1st defendant and Kshs.1,000,000/= against the 2nd defendant making a total of Kshs. 3,000,000/=.

Accordingly, there shall be judgment for the plaintiff against the two defendants jointly and severally in the sum of Kshs. 3,000,000/= plus costs and interest at court rates.

Dated, signed and delivered at Nairobi this 31st day of May, 2018.

A. MBOGHOLI MSAGHA

JUDGE