REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO.85 OF 2012

ANDREW GUNYAMA …….APPELLANT

VERSUS

HASSAN MUSAMBAYI MBAUKU

(HON. ATTORNEY GENERAL) ……..……. RESPONDENTS

RULING

1. The plaintiff/respondent had sued the appellant and the Attorney General in the lower court claiming general damages for unlawful arrest and detention. The trial magistrate awarded the plaintiff/respondent Kshs.150,000/- in general damages against the appellant and dismissed the suit against the Attorney General. The appellant was dissatisfied with the decision of the trial magistrate and filed this appeal. The grounds of appeal are that:-

> *1. The learned trial magistrate erred in law and fact in entering judgment in favour of the respondent against the appellant yet the claim against the appellant was instituted out of time and the respondent had not brought himself within the stringent strictures of sections 27, 28 and 30 of the Limitations of Actions Act, Cap 22 Laws of Kenya and the respondent's claim was the statute barred, incompetent and a non-starter.*
>
> *2. The learned trial magistrate erred in law and or fact in holding that the appellant was liable when all the appellant had done was make a report to the police which report was justifiable and when the appellant did not direct or participate in the investigations by the police who carried out their investigations independently.*

The appeal was opposed by the plaintiff/respondent.

Case for appellant:

2. The appellant testified in the lower court that the plaintiff/respondent is his neighbour from whom he had bought a parcel of land some 18 years ago. They live on neighbouring parcels of land. That on the 16th April 2007 he was at his home when his watchman DW2 told him that the plaintiff/respondent had cut his (appellant's) trees on the boundary of their land. He went and confirmed that the tree had been cut. He went to the police station and reported. Policemen went and arrested the respondent. He was booked at the station at 5 pm. He, the appellant, was called at the station. He went there. The respondent apologized and he was released on bond. They reconciled. The respondent was not charged. The matter rested at that. After three years, the respondent sued him over this matter.

3. The appellant's evidence was supported by his watchman DW2 who testified that on the material day he was working for the appellant when he heard someone felling a tree. He went to check and found two people who were unknown to him cutting a tree that was on the appellant's side of the fence. He went and informed the appellant. The appellant said he will confirm. He went to report to the police. Policemen went to the land and saw the tree. They did not find the respondent. He went to the police station. The respondent went there. The respondent and the appellant failed to agree. The respondent was arrested for cutting the tree.

Respondent/Plaintiff's case:

4. The respondent testified that he had sold a portion of his land to the appellant. That on the material day he returned home at 11 a.m. and found the appellant's employees cutting a tree that was at their boundary. That the tree had grown naturally at their boundary and it was ¾ on his side of the fence. The appellant's employees told him that it is the appellant who had instructed them to cut the tree. He told them to inform the appellant to see him over the matter. The appellant did not go to see him. At noon he was arrested by two police officers. At 2 pm the appellant went to the police station. He insisted that the tree was his. They did not agree. The OCS released the appellant. He was put in the cells. He stayed there upto 10 pm when he was released on bond. The bond indicated that he was to be charged with theft. He was told to go back on the following day. When he went back his finger prints were taken for him to be taken to court. The appellant did not go back to record a statement. He was not charged. He later filed the suit against the appellant after obtaining leave from the CM's court to file suit out of time. He denied that he stole the tree. He said that he did not have a boundary dispute with the appellant.

Submissions by advocates for appellant:

5. The advocates submitted that the respondent's claim was time-barred at the time of institution of the suit vide ***sections 27***, ***28*** and ***30*** of the Limitation of Actions Act. That the respondent filed the suit after three years. That though the respondent obtained leave to file the suit he did not give a convincing reason why there was a delay of three years before filing the suit.

6. Secondly that the appellant only reported to the police after his tree was cut and it is the police who investigated the case and took action. That any deficiencies on their part should not be visited on the appellant. That the mere reporting to the police is not proof of malice.

7. Thirdly that the respondent did not prove that he suffered any loss. That the respondent was held for a very short time. That had he proved loss and damage quantum of Kshs.25,000/- would suffice following the decision in ***Gitau vs Attorney General*** (1990) KLR 13. That the sum of Kshs.150,000/- awarded was excessive, punitive, unwarranted and unconscionable.

For respondent:

Submissions by advocates for respondent:

8. The advocates submitted that the respondent's action was founded on tort. That the cause of action arose on 10th April 2007 and was filed in court on 8th February 2010 which was within 3 years of the cause of action. That all the same, leave to file the suit was sought against the 2nd defendant who never challenged the same. Further that the 1st respondent's claim is a tort arising from violation of his rights and time does not stop to run against violation of human rights. Further that the report was made out of malice and was framed up. That the police acted out of the appellant's report. Had he not reported the respondent would not have been arrested.

Further that there was no evidence that the parties reconciled at the police station. DW2 confirmed that the parties did not agree at the police station.

That there was no reason given as to why the award was said to be excessive.

The claim:

9. The claim by the 1st respondent was for general damages for unlawful arrest and detention.

In essence, the respondent was claiming general damages for false arrest and false imprisonment.

The Black's Law Dictionary, 8th Edition, defines false arrest as:

> *"an arrest made without proper legal authority."*

It defines false imprisonment as:

> *"a restraint of a person in a bounded area without justification or consent"*

In the case of ***Simba vs Wambari*** cited in – ***Robert Kigo Ngaruiya & 2 others vs Attorney General & Another*** (2016) eKLR, false imprisonment was said to be:-

> *"… the interference with the freedom of the individual without the due process of the law. Whenever a person imposes restrain on the liberty of another, he may only do so in strict accordance with the power conferred on him by law …"*

Questions for determination:

10. The questions before the court are:-

(1) Whether the claim is time barred;

(2) Whether the report to the police was justifiable;

(3) Whether the report was actuated by malice;

(4) Whether the police acted lawfully to arrest the Respondent;

(5) Whether the parties reconciled at the police station;

(6) Whether the respondent suffered any damage

(7) Whether the award was excessive.

DETERMINATION:

Duty of appeal court:

11. It is the duty of the first appellate court to analyse and re-assess the evidence on record and make its own conclusions bearing in mind that it neither saw nor heard the witnesses testify - see ***Selle vs Associated Motor Boat*** (1968) E.A.123.

This is what the court has to bear in mind when determining the issues raised in the appeal.

Whether the claim was time barred:

12. The respondent's claim as per paragraph 6 of the plaint was for damages arising out of unlawful arrest and detention. The claim was therefore based on the tort of false arrest and false imprisonment. ***Section 4(2)*** of the Limitation of Actions Act states that:

"An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued."

The cause of action in this matter accrued on the 16th April 2007. The suit was filed in court on the 8th February 2010. The suit was therefore filed within the three year statutory period. The suit was not time-barred as against the appellant.

The appellant's advocate argued in his submissions that the claim was based on slander which has a limitation period of 12 months under the Limitation of Actions Act. However that was not the case as it is clear from paragraph 6 of the plaint that the claim was for unlawful arrest and detention whose limitation period is 3 years.

13. However, ***section 3(1)*** of the Public Authorities Limitation Act Cap 31 Laws of Kenya states that:-

"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."

14. The 2nd defendant in this case was the Honourable the Attorney General. The plaintiff had pleaded in his averments that he had sought and obtained leave to file suit out of time against both the 1st and the 2nd defendants. During the hearing of the case the plaintiff produced an order of another court, PEx 6, in ***Kakamega Misc Application No.64 of 2009*** that indicated that the plaintiff was granted leave to file suit out of time against the defendants on 21st February 2010. The Attorney General has not appealed against the extension of time and I need not belabor the point. Even if the suit was time barred against the Attorney General, the respondent herein had the choice to proceed with his case against the appellant whose statutory period had not expired. The suit was thereby not time barred as against the appellant.

15. Whether the report to the police was justified:

The occurrence book where the police recorded the report made y the appellant indicated that he reported that he had sent his workers to cut trees and that they were chased away by the respondent. In his evidence in court the appellant stated that it is the respondent who cut down the tree. The respondent on the other hand stated that it is workers of the appellant whom he found cutting down the tree. The appellant's witness, DW2, initially stated in his evidence that it is the respondent whom he found cutting down the tree but when cross-examined, stated that it is two other people he found cutting the tree.How then did the police know that there were same workers so as for them to record in the OB that the appellant had sent his workers to cut down the tree?

16. It is apparent that it is the appellant's workers who cut down the tree. The appellant told the police that he sent his workers to cut down the tree. It appears that after the workers cut down the tree the respondent stopped them. When the appellant received the report he went straight to the police alleging that the respondent had stolen his tree. The appellant admitted in cross-examination that his report was that the respondent had stolen his tree. Though the appellant says that he had gone to the place where the tree had been cut, his witness, DW2, stated that the appellant went straight to report to the police as he said he did not want to confront the respondent. This supports the evidence of the respondent that he waited for the appellant to go and see him over the tree but he did not. How then did the appellant know that the respondent had stolen the tree when he did not go to where the tree had been cut down nor did he talk to the respondent about it?

17. It is further apparent that the appellant and his witness had conspired to say that it is the respondent who cut down the tree. The appellant's witness, DW2, stated in his evidence in chief that he found the respondent cutting down the tree. That in fact he talked to him and asked him why he was cutting down the tree and the respondent told him to go and call the appellant. That he then went to inform the appellant. When he was cross-examined, the witness changed his story and said that it is not the appellant he found cutting down the tree but it is two other people who were unknown to him who were cutting down the three. He however denied in cross-examination that the two people were not sent by the appellant. It is then clear that both the appellant and his witness gave contradictory stories as to who cut

down the tree. The appellant himself told the police that it is his workers who did so. In court he said it is the appellant who did so. The contradictions in the evidence of the two witnesses can only mean that the evidence was fabricted.

18. I find that it is the appellant who cut down the tree. He went and lied to the police that the respondent had stolen the tree. He fabricated evidence that the respondent had cut down the tree and stolen it. The matter involved a civil dispute that the appellant wanted to convert into a criminal matter. The report can only have been made out of malice with the intention that the police would arrest the respondent. The report was unjustified and made out of malice.

Whether the police had reasonable cause to arrest the respondent:

19. It is the duty of the police to investigate criminal cases when reported to them. In the case of ***James Karuga Kiiru vs Joseph Mwamburi & 2 others*** (2001) eKLR it was held that in claims for wrongful arrest and false imprisonment, the evidentially burden lies on the defendant to prove that they had cause for suspecting that the applicant had committed the offence. The police can arrest a suspect as long as they have reasonable and probable cause to suspect that the person has committed an offence. Reasonable and probable cause was defined in the case of ***Hicks vs Faulker*** (1878) QBD at page 171, 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 that 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 charged."*

20. The police in this case received a report of stealing. They went and saw the tree that was said to have been stolen. I would therefore say that they had reasonable ground to arrest the respondent. They were acting within the confines of the law. They cannot be blamed for the arrest. It is the appellant to be blamed for giving a false report to the police that gave rise to the arrest.

Whether the parties reconciled at the police station:

21. The responded stated in his evidence that they failed to reconcile at the police station. The appellant said that they reconciled and that that is why he did not take further action on the matter. However the appellant's witness, DW2, stated that the parties did not agree at the police station. The trial court found that no reconciliation took place at the police station and entirely agree with the finding.

Whether the 1st respondents suffered any damage:

22. The respondent was arrested and placed in the police cells as a result of the appellant's false report to the police. His freedom of movement was curtailed by the arrest and the detention. Under Article 29 of the Constitution of Kenya 2010, every person has the right to freedom and security of person including the right not to be deprived of freedom arbitrarily without just cause. This right of the respondent was infringed by unlawful acts of the appellant. The respondent was entitled to compensation in general damages.

GENERAL DAMAGES:

Whether the award of general damages was excessive:

23. An appellate court will normally not interfere with a quantum for general damages unless it is satisfied that the trial court took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is inordinately low or inordinately high that it must be a wholly erroneous estimate of the damage. See ***KeMfro Africa Ltd t/a Meru Express Services (1976) & another vs Lubia & another*** (No.2)(1985) eKLR.

The trial magistrate herein awarded Kshs.150,000/- because the respondent had been arrested at midday, taken to the police station where he was detained for a few hours before being placed in the cells at 5 pm and released at 6 pm. The magistrate stated that he had considered the authorities referred to him by the advocates for the parties but he did not consider why he preferred one authority to the other.

The advocates for the respondent had relied on the case of ***Joseph C. Mumo vs Attorney General & Another*** (2008) eKLR where Justice R.N. Nambuye (as she then was) awarded Kshs.300,000/- for defamation, unlawful arrest, false imprisonment and malicious prosecution in a case where the plaintiff had been imprisoned for 5 days before being taken to court.

The advocates for the appellant had relied on the case of ***Gitau vs Attorney General*** (1990) eKLR where the plaintiff was awarded Kshs.25,000/- for false imprisonment for detention in custody for 4 days.

The advocates relied on the same authorities in this appeal.

The evidence presented in court indicated that the respondent was detained for half a day from midday to 6 pm during which time he was placed in police cells for one hour. Though he stated in his evidence that he was locked up upto 10 pm, the entry in the occurrence book discounted this.

I have looked at other cases where awards for unlawful imprisonment were made. In ***Kenya Fluporspar Company Ltd vs William Mutua Maseve & another*** (2014) eKLR, Justice Ngenye - Macharia upheld an award of Khs.40,000/- for false imprisonment for a claimant who was detained in custody for 5 days. In the case of ***Janet Akunava vs Solomon Esau & another*** (2015) eKLR, Justice Kimondo upheld an award of Kshs.80,000/- for unlawful confinement for 6 hours.

In the case of ***Daniel Waweru Njoroge & 17 others vs Attorney General*** (2015) eKLR Justice J. Mativo awarded each of the claimants Kshs.100,000/- for unlawful arrest and false imprisonment. The claimants had been arrested, spent a night in police cells and released on the following day without charges.

In this case the magistrate awarded Kshs.150,000/- for unlawful arrest and imprisonment for 6 hours. The authority cited by the advocate for the appellant is more than 26 years old. Inflation has to be taken into factor. The authority relied on by the advocate for the respondent involved malicious prosecution which was not the case in this matter.

The trial magistrate in this case did not consider more relevant authorities in the matter as a result of which he came to an erroneous estimate of the damages. In the premises, I am bound to interfere with the award of the magistrate. I will reduce the award to Kshs.80,000/-. The judgment of the lower court is therefore set aside and replaced with an award of Kshs 80,000/-. The respondent to bear half of the costs of this appeal.

Orders accordingly.

Delivered, dated and signed at Kakamega this 3rd day of August, 2017.

J. NJAGI

JUDGE

In the presence of:

N/A……..…. for appellant

Rauto…….. for respondents

George……... court assistant

Respondent present

Akwala absent