



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
CIVIL CASE 59 OF 2008

SILAS MUGENDI NJERU.....PLAINTIFF

VERSUS

THE COMMISSIONER OF POLICE.....1<sup>ST</sup>DEFENDANT

THE HON. ATTORNEY GENERAL.....2<sup>ND</sup>DEFENDANT

**JUDGMENT**

The matter herein was instituted by way of a plaint filed in court on the 4<sup>th</sup> day of March, 2008, by **Silas Mugendi Njeru**, the plaintiff herein.

He averred that on the 22<sup>nd</sup> day of February, 2007, he of his own free will and volition presented himself to the police at Sagana police station, following a publication in local daily newspapers by the Kenya police of “ **MOST WANTED PERSON**” advert, which bore names of a person and which names were similar to those of the plaintiff.

The plaintiff further avers that his express intention, motivation and desire was that the first defendant by his agents and /or servants, namely the police at Sagana police station do clear him and clarify that he was completely innocent and had absolutely no connection whatsoever with “ **MOST WANTED PERSON**” referred to in the aforesaid police advertisement. He contended that he was never known, or in any manner whatsoever, related or associated with the said person and has never been involved in any criminal or anti-social behaviour.

The plaintiff avers that upon presenting himself at Sagana police station on the 22<sup>nd</sup> February, 2007 he was detained against his will and forcefully held at the said station and various other stations in totally inhuman and degrading conditions and was subjected to both mental and physical torture for a period of 12 days, after which he was released unconditionally and without any explanation whatsoever.

He contended that the actions by the 1<sup>st</sup> Defendant’s servants/agents were totally unlawful and in contravention of the plaintiff’s constitutional rights, the particulars whereof were set out in paragraph 11 of the plaint. He further averred that as a consequence of the 1<sup>st</sup> defendant’s actions, he suffered a lot of mental anguish, torture and psychological pain and emotional distress, the particulars whereof are set out in paragraph 12 of the plaint. He has prayed for general damages and costs of the suit.

The defendants filed a joint defence dated the 12<sup>th</sup>, June 2008 which generally denied the allegations levelled against both.

The matter came up for hearing on the 29<sup>th</sup> March 2017 where the plaintiff testified and called two witnesses in support of his case.

The plaintiff (PW2) stated that on the 29<sup>th</sup>/10/2010 he heard over the radio that the police were looking for someone bearing a similar name to his, and in the company of his brother, they proceeded to Sagana police station where he was locked in the cells and later on taken to Kiambu police station. He was interrogated and in the process, he was asked for a gun, where Matheri was, and where he takes the money after the robberies. He was also asked about a police officer who had died in that area. In total he was held for 12 days and eventually he was released without any charges.

In cross examination it was his evidence that the police asked for his identity card which he produced. That the police told him that the person they were looking for could be found between Makutano and Sagana area and by then, he was staying in the same area, at Sagana. He stated that at Sagana police station the OCS asked for the newspaper that bore the advertisement on the person that they were looking for and it had a photograph of the said person. He was later told he was not that person that they were looking for.

PW1, P.C Joseph Kisau, a police officer from Sagana police station produced the occurrence book for the incident which entry was about Silas Mugendi Njeru and that he is believed to be one of the most wanted criminals who was by then operating within makutano area. That the plaintiff was taken to the station by one Linus Mureithi (his brother) and was placed in custody. That on the 23/2/2007, he was collected by Corporal Njoroge from CID headquarters for further investigations.

The brother to the plaintiff by name Linus Mureithi Njeru testified as PW3. He stated that he accompanied his brother (the plaintiff) to Sagana police station on 22/2/2007 after they saw an advertisement in the newspapers that the police were looking for somebody whose name resembles that of his brother. The plaintiff was going to clear his name but he was detained by the police who said they wanted to do their investigations. He was eventually released and no charges were preferred against him. He told the court that though the police had promised a reward to the person who would take the said Silas Mugendi to the police, he did not take his brother so that he could get the reward of ksh 100,000. He confirmed that the advertisement in the newspapers carried a photograph for the person that the police were looking for.

The defendants called one witness, inspector John Njoroge who was attached to the flying squad, Nairobi. It was his evidence that at the material time, he was looking for Silas Mugendi who was a suspected criminal whom they were looking for in connecting with murder and robbery but he later came to learn that there was another person bearing the same name. He stated that the plaintiff in company of his mother and brother, took himself to Sagana police station after he saw the advertisement in the newspaper.

That Inspector Njoroge was told to go to Sagana police station after the plaintiff had reported there and he was bearing the names Silas Mugendi Njeru. It was his evidence that they have not had incidences of suspects taking themselves to the police station. It was his evidence that when he talked to the plaintiff his answers were not adding up and he took him to Kiambu police station for further investigations and in the course, they carried out identification parades but the plaintiff was not identified by any of the complainants. That they later arrested the right person and released the plaintiff with no charges. He testified that it took time to carry out investigations because the witnesses were from far.

In cross examination, he said the police could not invoke the provisions of Section 22 of the police Act because you cannot be sure with criminals. That the plaintiff did not explain to them that he was not the true person that the police were looking for. He further stated that he could not have taken finger prints because they do not do that with serious crimes. He denied that his actions were unreasonable and callous.

In re-examination, he told the court that they have had incidences where criminals share names with other people and in such cases, they conduct identification parades and also take finger prints. For the plaintiff, when they were about to do so, they came across the right Silas Mugendi Njeru that they were looking

for.

The court has carefully considered the evidence on record and the submissions by the respective parties. The plaintiff herein has sued the defendants for wrongful arrest and confinement. In my view, the issues for determination are

1. Was the arrest and confinement of the plaintiff by the 1<sup>st</sup> defendant wrongful?
2. If so, is he entitled to damages and how much?

In his submissions, the plaintiff submitted that in law, every person is presumed innocent until proved guilty even in a situation as obvious as a person being apprehended in the act of breaking the law. He contends that his constitutional rights were contravened and his confinement was not only wrongful but also illegal. The events herein took place before the promulgation of the constitution 2010. Section 72(1) of the repealed constitution provides that

**“No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases;**

**e) Upon reasonable suspicion of having committed a criminal offence under the law of Kenya;**

Further

Section 72(3) provides;

**“A person who is arrested or detained-**

**a) For the purposes of bringing him before a court in execution of the order of the court,**

Or

**b) Upon reasonable suspicion of him having committed, or being about to commit a criminal offence, and who is not released, shall be brought before a court as soon as reasonably practical and where he is not brought before a court within twenty four hours of his arrest or from the commencement of his detention or within 14 days of his arrest and detention where he is arrested or detained upon reasonable suspicion or 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 practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.”**

From the evidence on record, the plaintiff, an innocent Kenyan, on his own volition and in a bid to clear his name presented himself to the police upon hearing from the print media that a person bearing a similar name to his, was being sought by the police. He was accompanied by his mother and brother.

He was detained for a good 12 days as the police were carrying out investigations and latter released without any charges being preferred against him after the police found out that he was not the person that they were looking for.

In his testimony, DW1, is on record as having stated that they have not had incidences of suspects taking themselves to the police station. He also stated that when he interrogated the plaintiff, his answers were not adding up and he entertained some doubts as to whether he was the Silas Mugendi that they were looking for. Considering the above piece of evidence, one would have expected the police officers to be more cautiously while dealing with the plaintiff especially after DW1 entertained doubts about the plaintiff being the true Silas Mugendi, the “most wanted person” that they were looking for. The said doubts were entertained very early in the investigations when the plaintiff had just been arrested and was being detained at Sagana police station.

The police should have noted the conduct of the plaintiff of presenting himself to the police. More often than not, this would not be conduct that can be attributed to a most wanted person like the one the police were looking for. He casually walked into a police station in the company of his brother and mother to explain himself but unfortunately he ended up being detained for 12 days.

Though DW1 attempted to give an explanation for the detention of the plaintiff, in my opinion, the same fell short of a plausible explanation in the circumstances of this case.

Why do I say so?

One of the reasons given was that the witnesses were far and it took time to get them for purposes of carrying out identification parades. While that could have been the case, the police ought to have applied the provisions of Section 22 of the police Act which provides as follows:

**22(1) A police officer may by writing under his hand require any person who he has reason to believe has information which will assist him in investigating an alleged offence to attend before him at a police office in the district in which such person resides or for the time being is”**

No good reason was given to this court why this was not done. On being asked why he could not release the plaintiff under this Section, DW1 stated that he could not have done so because one cannot be sure with criminals. With all due respect, this is wrong proposition because the provision relates to all suspects and it does not provide for any exceptions and it is the law.

The defendants through the evidence of DW1 put forth the defence that the plaintiff bore the same name with the Silas Mugendi, that they were looking for. There is also evidence on record that the plaintiff hails from the same area with the said Silas Mugendi, that is, Sagana. I fully concur with them to that extent, but among the plaintiff's list of documents is the standard newspaper of 2<sup>nd</sup> March, 2007 that carried the notice of “Wanted persons” by the Kenya police. Among the people whose photographs appear on the said notice is one “Las Mugendi Njeru” alias Patrick Irungu. It is noted that the name in that notice is different from that of the plaintiff herein in that the plaintiff's name is Silas Mugendi Njeru and that in the notice is “Las Mugendi Njeru. In law, the names are different and the police ought to have verified that they belong to the same person before venturing further into their investigations.

Secondly, with the photograph appearing on the notice, they ought to have compared the image on the same and the appearance of the plaintiff with a view to ascertaining that it was the same person that they were looking for.

They failed to do so and continued to hold the plaintiff while they carried on with their investigations.

Thirdly, the police ought to have taken the plaintiff's finger prints to rule out the fact that they were dealing with the wrong person. In his evidence, DW1 did not give a good reason why this was not done. In cross examination, he stated that he did not take finger prints because they do not do so in serious crimes but in re-examination it was his evidence that when he was about to do so, they came across the real Silas Mugendi. If the finger prints of the plaintiff had been taken on time, immediately after he presented himself to the police, they could have established early enough that he was not the person that they were looking for.

Having said that, I find and hold that the arrest and subsequent confinement of the plaintiff was not only wrongful but also unlawful. The police acted unreasonably in the circumstances and I find that the plaintiff is entitled to general damages.

Before I embark on the issue of damages, let me point out that the defendants deviated from the substance of the claim in that Counsel submitted on malicious prosecution rather than wrongful arrest and detention. The cause of action was not that of malicious prosecution as there was no prosecution that took place.

On the quantum of damages, the court has considered the submissions by the plaintiff in that regard. The defendants did not address the court on the issue of quantum but rather asked the court to dismiss the claim. The plaintiff has urged the court to award him ksh 7 million and has relied on the case of **Justus Mike Kativo Versus The AG HCCC no 336/2008 (Nairobi)** where the court awarded a total of Ksh. 6,700,000. The court has noted the facts of the case relied on and the circumstances. The same are different from the case at hand in that the plaintiff in the case of Justus Mike lost his employment with Tana/Athi River Deal Authority and he was arraigned in court with a criminal offence of stealing by a person employed in the public service and abuse of office.

In the case herein, I find that a sum of Ksh 500,000/= is reasonable being guided by the cases of

**a) Geoffrey Githiri Kamau Vs The Hon. Attorney General Hccc No. 378/2010** where a sum of Ksh 400,000 was awarded as damages for unlawful arrest and false imprisonment after the plaintiff was wrongfully, unlawfully and without any justifiable cause arrested, detained and assaulted by the agents, servants of the Attorney General namely police officers attached to Magumu police station.

**b) Wamae Njenga & Another Vs Embu Gatari housing five society Limited Hccc no 22/2014 (Embu)** where the case of **Thomas Mutsotso** was cited in which the court made an award of ksh. 600,000 as general damages for mental torture, stress and anxiety.

In the end, Judgment is hereby entered for the plaintiff against the defendants jointly and severally for Ksh. 600,000 in general damages. The plaintiff will also have the costs of the suit.

It is so ordered.

Dated, Signed and Delivered at Nairobi this **13<sup>th</sup>** Day of **October, 2017**.

.....

**L. NJUGUNA**

**JUDGE**

**In the Presence of**

..... for the Plaintiff

..... for the Defendant