



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT HOMA BAY
CIVIL CASE NO.7 OF 2015

GEORGE ODHIAMBO RICHARD PLAINTIFF

VERSUS

PETER GACHIE 1ST DEFENDANT

JUSTINE MUNENE 2ND DEFENDANT

MINISATRY OF PROVINCIAL

ADMINISTRATION & INTERNAL SECURITY 3RD DEFENDANT

HON. ATTORNEY GENERAL 4TH DEFENDANT

JUDGMENT

1. GEORGE ODHIAMBO RICHARD (the 1st plaintiff) and **RURAL DEVELOPMENT SOLUTIONS** filed this suit against **PETER GACHIE** (1st defendant) **JUSTINE MUNENE** (2ND Defendant) and **THE HON. ATTORNEY GENERAL** (3rd defendant) seeking that Judgment be entered against the defendants jointly and severally for:-

- a) Special damages Kshs.68,000/=
- b) General damages for defamation of character, wrongful imprisonment and loss of business.
- c) Costs of the suit plus interest at court rates.

2. The background to this claim is that on 3rd November 2010, the 1st plaintiff was travelling from Homa Bay to Sori in a motor vehicle which he was using to ferry 1 box containing 10 solar panels of 5 walls and 2 boxes containing sola batteries together with their connecting gadgets. The 1st and 2nd defendants (who are police officers flagged down the vehicle, and without any justifiable cause, at the instance of the 1st plaintiff, claimed that he was conveying stolen goods.

3. The 1st plaintiff was taken to NDHIWA police station where he was briefly held at the cells before he was arraigned in NDHIWA court on the same day at 2.00 p.m in Criminal Case No.367 of 2010 (NDHIWA).

4. The plaintiff had the necessary documentation for the goods he was carrying, and the same belonged to the 2nd plaintiff who was his employer. His attempts to justify possession of the same were turned down,

and he was charged for the offence of conveying 10 unserialised Solar batteries reasonably suspected to have been stolen or unlawfully obtained contrary to **Section 323** of the **PC**. The matter proceeded to hearing before **B.O. OMWASA** (Resident Magistrate) and the plaintiff was acquitted under **Section 215 CPC** on grounds that the prosecution failed to prove their case beyond reasonable doubt.

5. The plaintiff was placed at Homa Bay remand prison for the night till 4th November when bond was posted. While at the police cells, and prison remand, the plaintiff lost business amounting to Kshs.68,000/= . He also claims that he suffered defamation of character and wrongful imprisonment.

6. The defendants deny liability saying they are not aware that the 1st plaintiff was held at Ndhiwa police station. They justify their actions saying 1st plaintiff was arraigned in court due to suspicion of being involved in illegal activities. The rest of the claim is described as being frivolous and vexatious and this court is urged to dismiss the suit with costs.

7. Incidentally this statement of defence is dated 12th February 2016 - the same date that Majanja J gave orders that:-

1) The notice of motion seeking ex-parte judgment had been duly served on 25th November 2015 and there has been no response from the Attorney General.

2) Judgment was entered for special damages of Kshs.68,000/= as against 3rd and 4th defendants.

3) The matter to proceed for formal proof.

8. It is also quite telling that the memo of appearance dated 12th February 2016 was filed on 15th February 2016 days after Majanja J had issued his orders.

9. Be that as it may, the matter proceeded on formal proof whereby the 1st plaintiff told the court that he is an employee of the 2nd plaintiff. This was confirmed by statements recorded by the 2nd plaintiff's director, **SVEIN RENE** as well as official documents. The 2nd defendant is a duly registered limited liability company under the Company's Act focusing on renewable energy solutions for rural areas of Kenya.

10. The 1st plaintiff was working for 2nd plaintiff as a Sales Representative and was transporting the solar panels, batteries and the connecting gadgets to Sori using a matatu. When the vehicle was flagged down and police arrested him on suspicion of conveying suspected stolen goods, he marshalled various company employees to support his explanation that he legally had the goods and that he was in legal employment, but this fell on deaf ears.

11. Police insisted that the goods did not meet Kenyan Standards and dismissed claims that he was authorised to convey the goods. Ultimately he was charged in court as demonstrated by the proceedings accompanying the pleadings.

12.. Apart from the company director who produced all manner of documents in an effort to prove to the police that what the 1st plaintiff was doing was legal, there is also the statement by **TONY OLANG**, the Managing Director of 2nd plaintiff, confirming that he'd met the 1st plaintiff and authorised him as the company's representative in Homa Bay area to transport the company's products for display or delivery to customers in the area.

13. He too tried to intervene on behalf of the 1st plaintiff in vain and he then requested the company's Ahero representative **Mr. FREDRICK MIGAN** to proceed to NDHIWA and verify the allegations against the 1st plaintiff but this too yielded nothing.

14. The 1st plaintiff stated that as a result of his arrest, the company lost a lot of business because in a day they could realize up to Kshs.5,000,000/= and the Kshs.68,000/= he sought as special damages was the advocate's fee.

15. From the evidence presented in this court and even at the criminal trial, there was clearly no justifiable reason for placing the 1st plaintiff in custody and subjecting him to criminal proceedings in court. Of course the police were within the scope of their duty to stop the 1st plaintiff and question him about the goods he had on suspicion that they were stolen or illegally obtained.

16. However, since the 1st plaintiff produced documents and even engaged his fellow staff members at the company to confirm that he was their employee and that he had the company's authority to transport the goods, then there was no rational explanation for rejecting the documents. Indeed it appears that the defendants were propelled by malice, to ensure that the 1st plaintiff spent some time in cells.

17. The plaintiff's counsel submitted that the second plaintiff lost business reputation to the tune of Kshs.40,000,000 (forty million). Is there any evidence to show that the company lost any business on the day the 1st plaintiff was arrested or during the period that the criminal matter was being prosecuted in court?

18. The 1st plaintiff was conveying the goods, and according to **TONY OLANG**, some were for delivery and some were for display. None of the witnesses have mentioned any specific client to whom delivery ought to have been made on that day or in the period between 3rd November 2010 to 8th December 2010. I however note that among the receipts produced in court at the criminal trial were receipts for **JIBRIL SHARIFF** who had made part payment in September 2010 and the balance was to be paid before delivery – the 1st plaintiff was the Sales Representative who handled the transaction, there was also delivery to be made to **SAMUEL OUKO** who had made part payment on 28th October 2010 and the balance was to be paid on delivery by the 1st plaintiff. The same applied to one **OMBUORO** who had made full payment on 21st September 2010 and was awaiting delivery.

19. In the statement by Fredrick Otieno Migan produced during the criminal trial, he explained that several clients who were expecting deliveries on the very day of the 1st plaintiff's arrest, called inquiring about their deliveries but:-

“George tactfully played the incident safe as an accident ... and to mart plan B ... aimed at winning back the confidence of the customers and entering up on the potential sales sooner rather than later ... in consultation agreed to have more units ... be picked from Ahero Depot to generate sustainable sales which RDs company hinges on finally ... to get 32 units...”

20. He however explained that the pressure to clear the units and have them delivered at once disorganized the cash flow. The earlier costs incurred so as to meet the customer expectations and save the 2nd plaintiff's business reputation, and also secure the 1st plaintiff's release was given a breakdown by **FREDRICK** as:-

- Taxi charges for replacement units being Kshs.9000/=.
- Pushing car stuck in mud Kshs.500/=.Meals Kshs.500/=
- Transport Ahero-Homa Bay-Ndhiwa Kshs.1,050/=
- Transport Money sent to Ben Shilibwa (A special branch officer to facilitate 1st plaintiff's release and release of goods Kshs.2130/=. I think the cash Kshs.13030/= sent to George forms part of the legal fees so I'll not include it – that would give a sum of Kshs.13800/=.

21. Did this incident affect the business reputation of the 2nd plaintiff? It appears to me that the employees quickly put in motion damage control measures and in **FREDRICK MIGAN's** summary:-

“confidence of earlier customers regained.”

22. During the criminal trial, **FREDRICK MIGAN** (the office administrator at 2nd plaintiff’s Ahero Office) attended court as a defence witness on 8th December. 30th November 2010 when the matter was adjourned for 6th December 2010 and he was cross examined on 8th December 2010. During those attendances, the Ahero RDs office remained closed. Fredrick claims that such closure plus the 1st plaintiff’s arrest dented the company’s image to the public especially because of the impending of the goods destined to clients.

23. With great respect, this cannot be true, because there is no evidence that any of the clients were aware of the criminal imputation on the company’s character or goods – they were shielded from such adverse explanation by the adeptness of the company’s employees.

24. What is formally proved is that as a result of the incident, the 2nd plaintiff had to incur extra costs so as to meet customers’ expectations. The Ahero depot also closed for three separate days when Fredrick had to attend court, and this affected their business. No evidence was tendered before this court to demonstrate how much money the Ahero depot work was realizing per day or how many sales and deliveries were being made by the depot on a daily basis.

25. It is with great respect that I say counsel cannot just pluck the figure of Kshs.40,000,000/= from the abacus, throw it to the court and say **“award that sum.”**

26. Counsel has suggested that the plaintiffs be awarded a further Kshs.12,180,000/= made up of:-

- a) Kshs.500,000/= for unlawful arrest.
- b) Kshs.500,000/= for exemplary damages.
- c) Kshs.500,000/= wrongful confinement.
- d) Kshs.10,000,000/= loss of business.
- e) Kshs.68,000/= legal fees.

27. From the evidence presented, the plaintiffs have formally proved that the 1st plaintiff was unlawfully arrested and wrongfully confined, at the instance of 1st and 2nd defendants. Summary judgment was already entered in favour of the plaintiffs for the sum of Kshs.68,000/= being legal fees. I have perused the decision by Musinga J in **HC Constitutional Petition No.119 of 2009 – In the Matter between ROBERT KISIANA DIKIR and OTHERS and THE O.C., KEIYAN GENERAL SERVICE UNIT (GSU) POST and OTHERS** where each petitioner was awarded General damages of Kshs.200,000/= for unlawful arrest, and a further similar amount for wrongful confinement and exemplary damages of Kshs.250,000/= each.

28. I also take into account remarks made by the court in the case of **PATRICK MBAKA MAJIWA – VS- OCS KENDU BAY POLICE STATION and THE AG (Constitutional Petition NO.75 of 2008)** to the effect that:-

“Damages awarded in a matter of this nature should reflect the seriousness of violation of a citizen’s constitutional right ...”

29. Although this is not a constitutional petition, the effect of the 1st and 2nd defendants’ abuse of power is no less in a civil matter than in a Constitutional Petition – the result is the same i.e. the 1st plaintiff’s constitutional rights were violated.

30. Parties are bound by their pleadings and counsel cannot become ambitious in his submissions and

include heads not pleaded – the prayers were for defamation of character which is not proved as all the witnesses did not believe that 1st plaintiff was a thief or that he was conveying illegal goods. However he was arrested and wrongfully confined in prison custody pending his release on bond. If he had sought damages for unlawful arrest and malicious prosecution as separate heads, I could have easily awarded damages. What is pleaded and formally proved is wrongful confinement and for this I award general damages of Kshs.300,000/= (three Hundred Thousand only).

31. I however recognize that the 1st and 2nd defendants acted recklessly and maliciously in arresting the 1st plaintiff and detaining the 2nd plaintiff's goods even after appropriate documents were produced and request for their release made. I am persuaded that they ought to be penalized for their reprehensive conduct so as to deter such abuse of power – I therefore award each plaintiff exemplary damages in the sum of Kshs.300,000/= each x 2 = 600,000/=.

- For expenditures proved by way of breakdown given by Fredrick Otieno Migan – I award Kshs.13,800/=.
- For loss of business on account of the company's employees having to leave work to attend to the criminal matter, I think a modest sum of Kshs.100,000/= carry the three days is sufficient.

32. For clarity judgment is entered in favour of the plaintiffs against the defendants jointly and severally as follows:-

- 1) General damages for unlawful arrest imprisonment of 1st plaintiff – Kshs.300,000/= (Three Hundred Thousand only).
- 2) General damages for wrongful confinement Kshs.300,000/= (Three Hundred Thousand only).
- 3) Loss of business and expenditures incurred by 2nd plaintiff – Kshs.113800/= (One hundred and thirteen thousand and eight hundred thousand only)
- 4) Exemplary damages for each plaintiff Kshs.300,000/= (Three Hundred Thousand x 2=600,000/= (Six Hundred Thousand Only).
- 5) Costs of the suit shall be borne by the 3rd defendant.
- 6) Interest shall be at court rates from date of judgment until payment in full.

Delivered and dated this **20th** day of **September, 2016** at Homa Bay.

H.A. OMONDI

JUDGE