



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CIVIL APPEAL NO 89 OF 2010**

**Daniel WaweruNjoroge & 17 Others.....Plaintiffs**

**Versus**

**The Hon. Attorney General.....Respondent**

**JUDGMENT**

By a plaint dated 29<sup>th</sup> July 2010 supported by the verifying affidavit of the first plaintiff herein sworn on his behalf and on behalf of the other plaintiffs, the plaintiffs herein instituted these proceedings against the honourable Attorney General under the Government Proceedings Act[1] seeking general damages, costs and interests and any other relief that the court may deem fit and just to grant. The claim is premised on an alleged tort of malicious arrest, illegal confinement, trespass to their persons and alleged defamation of characters and reputation.

The plaintiffs aver that on 23<sup>rd</sup> December 2009 at 9.30pm they were enjoying their drink at “MutuuriMunoNdagaga” bar situated at Tambaya Shopping Centre within Mukurweini Division, Nyeri County when a contingent of Policemen from Mukurweini Police Station surrounded the said bar and arrested them, hand cuffed them and loaded them into a waiting Police vehicle.

The plaintiffs further aver that they were taken to Mukurweini Police Station where they were placed in an over-crowded police cell which was littered with urine and human waste and poorly ventilated and that they were detained in the said cell for one night, were forced to stand for long hours and those who were not able to stand were forced to sit on the floor littered with urine and human waste.

It's the plaintiffs' case that on 24<sup>th</sup> December 2009 at around 11.45 am they were released without any explanation as to the reason of their arrest and no charges were preferred against them and that at the time of the said arrest no explanation or reason was given to them why they were being arrested. The plaintiffs have also complained about excessive brutality meted upon them at the time of the said arrest including use of brutal force, being handcuffed, body search, and being loaded into the vehicles like commodities in an inhumane manner.

The plaintiffs further aver that the acts complained of above were unwarranted, illegal, unlawful and unconstitutional and that they were subjected to degrading inhuman treatment, mental torture and suffering and as a consequence they suffered loss and damage.

It's the plaintiffs' case that the arresting officers acted maliciously, illegally and without any lawful justification and that they violated the plaintiffs' legal and constitutional rights and that they were also subjected to illegal body searches.

The plaintiffs aver that as a result of the acts complained of their reputations were destroyed in the eyes of members of their communities in that the acts complained of portrayed them in bad light, as criminals and unworthy members of the society.

The Honourable Attorney General filed their defence on 13<sup>th</sup> September 2010 and sought to have the suit dismissed on grounds that the suit is bad in law and denied the contents of the plaint and averred that the plaintiffs were arrested after the police had received some complaints and that the arrest and detention was pursuant to a legal and statutory duty.

The plaintiffs filed their list of documents among them notice of intention to sue the Hon. Attorney General dated 18<sup>th</sup> January 2010 and a response from the Hon. Attorney general dated 28.1.2010 and witness statements. In the said statements all the plaintiffs reiterate how they were arrested, mistreated and confined until the following day at 11.30 am when they were released without any charges.

The defendant did not file any list of documents nor did they file list of documents. They also never called any witnesses but counsel for the defendant participated in the proceedings and even filed final submissions at the close of the case.

**PW1Mr. Richard KaniniMacharia** testified on his behalf and on behalf of all the plaintiffs. He adopted his witness statement filed on 22.6.15. On cross-examination PW1 confirmed that they were arrested on 23.12.2009 at 9.30pm and that they were released on 24.12.2009 at around 12.00pm and no criminal charges were preferred against them.

Both counsels filed written submissions. On his part, counsel for plaintiffs identified the issues for determination, analysed the evidence cited several authorities in support of his position and urged the court to find in favour of the plaintiff while counsel for the defendant submitted that the plaintiff did not give sufficient particulars of the malicious arrest, illegal confinement and the alleged defamation and urged the court to dismiss the case on this ground. Counsel submitted that the right to liberty under the previous constitution was not absolute and that the plaintiffs had not proved the case and urged the court to dismiss the suit.

The issues for determination in this case are:-

- i. *Whether the tort of false/malicious arrest & illegal confinement was proved.*
- ii. *What failure by the defence to adduce evidence to rebut the allegations made by the plaintiffs left the plaintiffs evidence unchallenged?*
- iii. *Whether the plaintiffs are entitled to the reliefs sought in the plaint and if so what is the quantum of damages?*

False arrest which is a civil wrong consists of an unlawful restraint of an individual's personal liberty or freedom of movement by another person purporting to act according to the law. The term *false arrest* is sometimes used interchangeably with the tort of false imprisonment, and a false arrest is one method of committing a false imprisonment. A false arrest must be perpetrated by one who asserts that he or she is acting pursuant to legal authority, whereas a false imprisonment is any unlawful confinement. Thus, where a police officer arrests a person without probable cause or reasonable basis, the officer is said to have committed a tort of false arrest and confinement. Thus, false imprisonment may be defined as an act of the defendant which causes the unlawful confinement of the plaintiff. False imprisonment is an intentional tort.

The terms false imprisonment and false arrest are synonymous. In *Price vs Phillips*<sup>[2]</sup> it was held that "*they are different names for the same tort.*" The gist of an action for false imprisonment is unlawful detention, without more.<sup>[3]</sup>

The commonly accepted definition of false imprisonment defines the tort as:-

- i. *The unlawful restraint of another*

- ii. *Against their will, and*
- iii. *Without legal justification.*

Proving the first element of false imprisonment involves looking at the facts whether there was any force or threat of some kind used in restraining the accusing party. It is important to note that actual force is not necessary. Proving the second element of false imprisonment involves applying 'reasonable person' standard. Thus, the court will determine whether a reasonable person in the same factual situation would believe that they have been detained against their will. The final element of false imprisonment involves determining whether there is a legal basis for the detention. Many legal bases for detention do exist such as a lawful arrest by law enforcement. Determining whether probable or a legal basis for the detention exists is the key in false arrest cases.

*Harper & James* in their book, *The Law of Torts*<sup>[4]</sup> authoritatively state that false imprisonment must include the following elements, namely:-

- i. *There must be detention, ie unlawful restraint of a person's liberty or freedom of movement.*<sup>[5]</sup>
- ii. *That the detention needs not be forceful. Threats of force by conduct or words coupled with the apparent ability to carry out such threats are sufficient.*<sup>[6]</sup>
- iii. *Detention must be total, i.e it must be within boundaries. The restraint must be total rather than a mere obstruction of the right to go where the plaintiff pleases. Imprisonment is something more than a mere loss of freedom to go where one pleases; it includes the notion of restraint within some limits defined by a will or power exterior to our own.*
- iv. *Detention must be for an appreciable time, however short. In Prosser on Torts,*<sup>[7]</sup> *it authoritatively stated that the tort is complete with even a brief restraint of the plaintiff's freedom.*
- v. *the detention must be unlawful and must have been against the plaintiffs will,*
- vi. *Malice is not an ingredient in the tort of false arrest*

Turning to the facts of this case, it is the plaintiffs case that they were rounded up by the police and arrested on 23<sup>rd</sup> December 2009, at 9.30 pm, that they were arrested without any lawful justification, that they were subjected to demeaning or cruel treatment, threats and that they were held in a dirty cell at the police station, at the time of the said arrest they were not told the reasons why they were being arrested and that the following day they were released without any charges being preferred against them.

As pointed out earlier, the Hon. Attorney General never filed any witness statements, nor did they call witnesses in this case. The only evidence before the court is the statements and evidence tendered by the plaintiffs which remains unchallenged.

I have also considered the submissions by both parties. I am not persuaded that the arrest complained about and the confinement was lawful. On the contrary I find that the acts complained of were illegal and a violation of the plaintiffs' right and that the tort of false arrest and confinement was committed by the police against the plaintiffs. I also find that all the ingredients of the tort of false imprisonment and false arrest as enumerated above have been proved.

I am satisfied that from the evidence adduced, the plaintiffs were arrested, taken to the police station, confined and released the next day without any charges being preferred against them. I am persuaded that on a balance of probabilities the plaintiffs have proved their case against the defendant. I therefore find that the answer to issue number one and two above are in the affirmative.

On quantum of damages the court has to bear in mind the following cardinal principles in the assessment of damages namely:-

- i. *Damages should not be inordinately too high or too low.*
- ii. *Should be commensurate to the injury suffered.*
- iii. *Should not be aimed at enriching the victim but should be aimed at trying to restore the victim to the position he was in before the damage was suffered.*
- iv. *Awards in past decisions are mere guides and each case depends on its own facts.*

This court has applied the above principles to the facts herein and it makes a finding that the action of the defendant was high handed and an award of **Kshs.100,000/=** will be an adequate compensation for **each of the plaintiff herein** as general damages for unlawful arrest and false imprisonment. The awards are as follows:-

- i. First Plaintiff.....Ksh.100,000/=
- ii. Second Plaintiff.....Ksh. 100,000/=
- iii. Third Plaintiff.....Ksh. 100,000/=
- iv. Fourth Plaintiff.....Ksh. 100,000/=
- v. Fifth Plaintiff.....Ksh. 100,000/=
- vi. Sixth Plaintiff.....Ksh. 100,000/=
- vii. Seventh Plaintiff.....Ksh. 100,000/=
- viii. Eighth Plaintiff.....Ksh. 100,000/=
- ix. Ninth Plaintiff.....Ksh. 100,000/=
- x. Tenth Plaintiff.....Ksh. 100,000/=
- xi. Eleventh Plaintiff.....Ksh. 100,000/=
- xii. Twelfth Plaintiff.....Ksh. 100,000/=
- xiii. Thirteenth Plaintiff.....Ksh. 100,000/=
- xiv. Fourteenth Plaintiff.....Ksh. 100,000/=
- xv. Fifteenth Plaintiff.....Ksh. 100,000/=
- xvi. Sixteenth Plaintiff.....Ksh. 100,000/=
- xvii. Seventeenth Plaintiff.....Ksh. 100,000/=
- xviii. Eighteenth Plaintiff.....Ksh. 100,000/=

The said sum shall attract interests at court rates from the date of the judgement. The defendant shall also pay the costs of this suit and interests thereon at court rates.

Right of appeal 28 days

Dated at **Nyeri** this 30th day of **November** 2015

**John M. Mativo**

**Judge**

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[1] Cap 40, Laws of Kenya

[2] 90 N.J Super 480 {App. Div. 1966}

[3] Jorgensen vs Pennsylvania R.R., 38 N.J Super 317 {App. Div. 1955}.

[4] 1 Harper & James, The Law of Torts, {3<sup>rd</sup> Edition} at page 226

[5] See Pine vs Olzewski 112 N.J.L. 429 {E.A. 1933}

[6] Ses Jorgensen vs Pennsylvania R.R., 38 N.J Super 317 {App. Div. 1955} Supra

[7] Prosser on Torts, (3<sup>rd</sup> ed.) at P 55