



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**CIVIL CASE NO. 57 OF 2006**

1. NEUBERGER REINHARD
2. JOHN FABAU.....PLAINTIFFS

**VERSUS**

1. THE ATTORNEY GENERAL
2. THE POLICE COMMISSIONER
3. JACKTONE SIMIYU LOKORITO
4. JAMES MAINA
5. CYRUS MIKUNU.....DEFENDANTS

**JUDGMENT**

Neuberger Reinhard, the Plaintiff, brought this suit seeking general and exemplary damages. The action is based on the tort of false imprisonment and defamation.

The defendants are the Hon. Attorney General, the Commissioner of Police, Jacktone Simiyu Lokorito, James Maina and Cyrus Mikunu. The latter three defendants are police officers, the 3<sup>rd</sup> defendant holding the rank of Chief Inspector of Police and the 4<sup>th</sup> and 5<sup>th</sup> defendants being Police Constables. During the material period, the said officers were based at Mpeketoni Police Station.

The defendants denied the plaintiff's claim but did not participate in the trial. The plaintiff through his pleadings and evidence presented the following case. That on 5<sup>th</sup> May, 2006, he was arrested on charges of selling "fake, defective or substandard Celtel lines and/or SIM cards". This occurred after one line serial No. 89 2540 308 205 001 2810 purchased by the 3<sup>rd</sup> defendant failed to start up on his handset. He ordered the 4<sup>th</sup> and 5<sup>th</sup> defendants to arrest the plaintiff and kept him in custody for about 24 hours. This, despite confirmation by Celtel Kenya Ltd the suppliers of the SIM card that the same was genuine. He complains that his reputation suffered due to his incarceration.

The court has considered the evidence of the plaintiff and submissions made by both sides. Starting with the question of defamation, in this case slander, it seems that the plaintiff's claim is based on the accusation that he was selling counterfeit SIM cards. As stated by Sitati J. in **Mwia Kisee vs Sinota Mbusi [2008] eKLR** the successful plaintiff in such a suit must prove:

- "a) that the matter of which he complains was published by the defendant**
- b) that it was published and of concerning him**
- c) that it is defamatory in character**

**d) that it was published maliciously**

**e) in slander, subjected to certain exceptions that he has thereby suffered special damage.”**

Reviewing the plaintiff's evidence, I agree with the defendant that the plaintiff did not prove that his character and/or reputation suffered or that he was exposed to hatred, contempt or ridicule by right thinking members of society as a consequence of the arrest and whatever accusations were leveled against him. No evidence of business or social injury occasioned to the plaintiff, was tendered hence the tort of defamation in particular slander has not been established against the defendants and must fail.

On the issue of false imprisonment it is evident from the oral and documentary evidence of the plaintiff, particularly P.Exh. 1 and 2 that the SIM card purchased on 5<sup>th</sup> May, 2006 could not function until 9<sup>th</sup> May, 2006 because it had been deactivated by Celtel Ltd. (See P.eXh.2). According to P.exh. 2 the request for activation was made on 6<sup>th</sup> May, 2006, a day since purchase and the line “recreated” on 9<sup>th</sup> May, 2006; some four days since the sale of the SIM card to the 3<sup>rd</sup> defendant. It is therefore admitted that the SIM card was not fit for use on the date of purchase.

In his oral evidence the plaintiff attempted to distance himself from the sale transactions of 5<sup>th</sup> May, 2006 claiming he was not in the shop at the time and that though the shop belonged to his wife, he was only an employee. However, in his letter P.Exh.1, to Celtel Kenya Ltd., the plaintiff asserted that he sold “the above serialized line to the Officer Commanding Station (OCS) of Mpeketoni Police Station after the said officer inserted the said line in his phone the line failed to function;K” (sic). It was further stated in the said letter that the plaintiff had purchased the Celtel lines “from his supplier in Malindi”.

From the foregoing, it is evident that not only was the plaintiff involved in the sale of the line but that the line failed to function upon purchase. In the case of **James Karuga Kiiru vs Joseph Mwamburi & 2 Others Civil Appeal No. 171** of the Court of Appeal upheld the decision of Khamoni J. as he then was, in a case whose circumstances are relevant to this case. The court stated that the burden of proving reasonable cause for suspicion and arrest lay with the defendants. The court stated inter alia:

***“The evidence was overwhelming that the first two defendants had received information which they reasonably believed ;K it afforded reasonable cause for them to suspect that appellant had committed the offence. The defendant was, therefore, not guilty of false imprisonment.”***

Although all the facts surrounding the arrest and subsequent incarceration of the plaintiff come from him, and was not controverted, it is not in dispute that the SIM card sold, admittedly by the plaintiff, to the 3<sup>rd</sup> defendant did not function until four days later.

The 3<sup>rd</sup> defendant may have overreacted to this malfunction and even threatened the plaintiff, but in truth, there was a basis for the suspicion that the SIM card sold to him was counterfeit or defective. The plaintiff stated that before arresting him the 4<sup>th</sup> and 5<sup>th</sup> defendants spoke to employees of Celtel Ltd in Nairobi but he did not understand the conversation conducted in Kiswahili. P.exh.2 shows that line could not work until 9<sup>th</sup> May, 2006, and that the request for reactivation was not received until 6<sup>th</sup> May, 2006. The letter itself dated 12<sup>th</sup> May, 2006 was confirming that the SIM card in question was genuine. In the circumstances of this case the police officers were entitled to take the plaintiff into custody while investigating the authenticity of the SIM card. As it turns out, he was released even before the line was activated by its suppliers Celtel Kenya Ltd. If anything the Plaintiff's complaint should have been addressed to them.

I find that the defendants had reasonable grounds to suspect the plaintiff had committed an offence in connection with the sale of defective or counterfeit goods and the arrest was justified. The tort of false imprisonment cannot be sustained. (See also **Simba v Wambari [1987] KLR 601**). The plaintiff's suit is therefore dismissed. Parties will bear own costs.

Delivered and signed at Malindi this **24<sup>th</sup>** day of **February, 2014** in the presence of Miss Mwangi holding brief for Mr. Ole Kina for the Plaintiff, No appearance for Defendants.

**C. W. Meoli**

**JUDGE**