REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 118 OF 2010

KENYA FLUORSPAR COMPANY LIMITED.....APPELLANT

VERSUS

WILLIAM MUTUA MASEVE.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

(Being an appeal from the Judgment of Hon. I. Maisiba (Resident Magistrate) delivered

on 9th June, 2010 in Eldoret Chief Magistrate's Civil Case No. 447 of 2008)

JUDGMENT

The 1st Respondent, William Mutua Maseve was the Plaintiff in the trial court. He filed the suit against the 2nd Respodnent (1st Defendant) and the Appellant (2nd Defendant). His claim was for general damages for illegal arrest and detention and for injury of reputation together with costs of the suit.

The learned trial Magistrate entered judgment on liability for the Plaintiff and made the following awards;

(a)	General damages for false imprisonment	Ksh. 40,000/=
(b)	Exemplary damages	Ksh. 10,000/=
(b)	General damages for defamation of character	Ksh. 200,000/=
	T O T A L	**KSH. 250,000/=**

He was also awarded costs of the suit plus interests at the court rates.

The Appellant was dissatisfied with the Judgment and it filed this appeal. It listed eight (8) grounds of appeal which I duplicate as under.

1. That the learned trial Magistrate erred in law and fact in finding the Appellant and the 2nd Respondent both jointly and severally liable to the Plaintiff contrary to the evidence tendered.

2. That the trial Magistrate erred in law and fact in finding the appellant liable for illegal arrest and detention when the appellant was not responsible for the arrest and detention of the 1st Respondent.

3. That the learned trial Magistrate erred in law and fact in finding the 2nd Defendant liable in damages for illegal arrest and detention, injury to reputation and defamation of character contrary to the evidence on record.

4. That the learned trial Magistrate erred in law and fact in making a finding on defamation of character and injury to reputation when the same was neither properly pleaded nor was it specifically proved.

5. That the trial Magistrate erred in law and fact in failing to consider the evidence and the submissions by the Appellant.

6. That the trial Magistrate erred in law and fact in pronouncing a decision that was contrary to the provisions of Order VI Rule 4 (1) and XX Rule 4 of the Civil Procedure Rules.

7. That the trial Magistrate erred in law and fact in making an award of damages that was manifestly excessive.

8. That the trial Magistrate erred in law and fact in making an award for damages when the same was not specifically proved.

The appeal was argued by filing of written submissions. The court directed the parties to appear before it on 6th March, 2014 to take a date for Judgment. Come this date, all parties except the 2nd Respondent had filed their submissions. As the date had been given in the presence of all parties, the court had no alternative but to give a date for Judgment.

The Appellant's submissions were filed on 9th April, 2014 by the law firm of M/s. Nyaundi Tuiyott & Co. Advocates. It was submitted as follows;

One, that it is the police officers who were in control of arresting and detaining the 1st Respondent and as such, the Appellant cannot be held liable for the actions of the police. Court was referred to the case of **GICHANGA -VS- BAT (1989) KLR 352**.

Two, that the trial Magistrate failed to consider the submissions of the Appellant consequent which the award of damages was excessive in the circumstances.

Three, the trial court gave an award on defamation of character and injury of reputation yet the same had not been pleaded. The counsel relied on the case of **COSMAS M. NZAU -VS- A.G. HCCC AT NBI, CIVIL SUIT NO. 714 OF 2000** in which it was held that where the Plaintiff's claim is of damage of character and reputation he must provide some evidence tendering prove of such damage.

Four, that the award on exemplary damages ought not to have been made when the same was not specifically pleaded.

Five, that if this court finds that damages for false imprisonment ought to be awarded, then, it should find that an award of Ksh. 25,000/= would suffice. Court was referred to the case of **SAMUEL NDIRANGU -VS- PATRICK WACHIRA NDERITU HCCA. NO. 88 OF 2001 – H.C. AT NYERI**.

On behalf of the 2nd Respondent, the learned state counsel, Mr. Wabwire submitted as follows:-

One, that it was in order for the police to arrest and detain the 1st Respondent as they acted on credible evidence. That in this respect, the defence witness had explained the circumstances surrounding the detention of the 2nd Respondent for several days. The case of **JAMES KARUGA KIIRU -VS- JOSEPH MWAMBURI & TWO OTHERS (2001) e KLR** was cited in which it was held that when a constable has taken into custody a person reasonably suspected of an offence, he can do what is reasonable to investigate the matter and see whether the suspicions are supported or not by further evidence. He further cited the case of **DAVID MUNGAI KINYANJUI AND 2 OTHERS -VS-**

ATTORNEY GENERAL (2012) e KLR, H.C. AT NAIROBI CIVIL SUIT NO. 318 OF 2009 in this respect.

Two, that the trial court erred in finding favourably for the Plaintiff on the claim for defamation of character and injury to reputation when the same was neither properly pleaded nor specifically proved as per law provided. He relied on the case of **HOSEA WILFRED WAWERU -VS- NATIONAL SECURITY FUND & ANOTHER – NAIROBI CIVIL SUIT NO. 172 OF 2004** in which the court held that where the Plaintiff claims that malicious prosecution has damaged his character and reputation, he must provide some evidence tending to prove such damage. He also relied on the case of **COSMAS M. NZAU & 2 OTHERS -VS- THE ATTORNEY GENERAL (Supra)**.

Three, that there was an error in awarding damages for false imprisonment and for defamation of character which would constitute double award. To buttress this point, he cited the case of **KARIUKI -VS- PROF. EAST AFRICA INDUSTRIES LIMITED & ANOTHER (1986) e KLR** – at page 4, paragraph 2 in which the court observed;

"Paragraph 7, 8 and 9 of the plaint are included in the language of a claim for defamation but no defamatory statement is pleaded. Indeed, no tort is alleged that has not been alleged in paragraph 6 of the plaint, and the attempt to present a claim for wrongful arrest, false imprisonment and malicious prosecution as also a claim for defamation must be condemned as an attempt to claim double damages. Consequently, there can be no separate award of damages to the Plaintiff under paragraph 7, 8 and 9, and no award of general damages for defamation."

In view of the foregoing, I summarize the issues for determination to be;

(a) Whether the Appellant and 2nd Respondent were liable for unlawful arrest/detention of the 1st Respondent.

(b) Whether the 1st Respondent was entitled to both claims of false imprisonment and injury to reputation.

(c) Whether all the 1st Respondent's claims were proved on a balance of probability.

(d) Whether the damages were awarded appropriately.

This being the first appellate court, its duty is to re-evaluate the evidence on record and come up with its own finding but always bear in mind that it has neither seen nor heard the witnesses and give an allowance for that. See the cases of **SUMARIA & ANOTHER -VS- ALLIED INDUSTRIAL LIMITED (2007) 2 KLR**; **SELLE & ANOTHER -VS- ASSOCIATED MOTOR BOAT COMPANY LIMITED & OTHERS (1968) 128,** as well as **JABANE -VS- OLIENJA (1986) KLR, 661.**

CLAIM FOR UNLAWFUL ARREST/DETENTION.

In the pleadings (plaint) the 1st Respondent averred that on the 27th August, 2007 under the instructions of one James Bogon (Personnel Officer with the 2nd Defendant), and its security officers arrested him and took him to Kaptagat Police Station where he was re-arrested on allegations that he together with one William Mutua Maseve had stolen a tool box containing spanners on 22nd August, 2007 from the workshop of the second defendant. That the Plaintiff was released by the Officer Commanding Station (OCS) on a police bond until such a time that he would be charged in a court of law. He averred that he continued to report to the station until he was informed that he would not be charged. He was thereafter suspended from duty on 30th August, 2007 by the 2nd Defendant pending investigations of the alleged theft and ordered not to leave the living quarters without the permission of the management, thus curtailing his liberty.

He further averred that one Mathew Kipkering Kipchumba was charged with the offence of the alleged theft and was convicted.

Hence, according to the 1st Respondent, his arrest by the 2nd Defendant's employees was without factual and legal basis and was actuated by malice. As well, there was no basis why the police detained him. As a result, his reputation was injured for which he claimed damages.

The principles that govern a claim founded on malicious prosecution were laid down by Contran, J in the case of **MURUNGA -VS- ATTORNEY GENERAL (1979) KLR, 138** as follows:-

> *(a) The Plaintiff must show that the prosecution was instituted by the Defendant, or by someone for whose acts he is responsible.*
>
> *(b) The Plaintiff must show that the prosecution terminated in his favour.*
>
> *(c) The Plaintiff must demonstrate that the prosecution was instituted without reasonable and probable cause.*
>
> *(d) He must also show that the prosecution was actuated by malice.*

The four principles were adopted in similar matters as follows:-

> (i) J. B. Ojwang, J (as he then was) in **THOMAS MBOYA OLUOCH & ANOTHER -VS- LUCY MUTHONI STEPHEN & ANOTHER (2005) e KLR**.
>
> (ii) Ruth N. Sitati, J in **PATRICK MURIITHI KUKUHA -VS- EDWIN WARUI MUNENE & 5 OTHERS (2005) e KLR**.
>
> (iii) Anashir Visram, J (as he then was) in **KIRAGU -VS- MURIUKI & ANOTHER (2004) e KLR**.
>
> (iv) D. K. Maraga, J (as he then was) in **ZABLON MWALUMA KADON -VS- NATIONAL CEREALS & PRODUCE BOARD (2005) eKLR**.

It is my view that the claim for unlawful arrest and detention/false imprisonment and injury of reputation is one and the same thing as malicious prosecution. This is so because when a person is arrested and detained and not prosecuted, he could claim that that arrest and detention that did not materialize into prosecution was actuated by malice – See the case of **JOSEPHAT MUREU GIBIGUTA -VS- HOWSE & MC GEORGE LTD e KLR H.C. AT NAIROBI CIVIL CASE NO. 2646 OF 1993** in which Githinji, J (as he then was) stated:-

> ***"In my view the arrest, detention and prosecution consists of one transaction which has given rise to the Plaintiff's claim. In the circumstances of this case the cause of action for damages for unlawful arrest and false imprisonment arose only when Plaintiff was acquitted."***

The Plaintiff in the present case was arrested and detained for five days and subsequently released without any charges being preferred against him. He was PW1 and he testified thus;

> ***"On 24th August, 2007 I was arrested on suspicion of having stolen a tool box. The tool box stolen was inside a store. The store was kept by the security man Kennedy Kosgei. He used to sign when taking anything from the store and when returning anything to the store."***

PW2 Badiah Sirengo stated that he was a player of the 1st Defendant's company. He confirmed that on 24th August, 2007 Elijah and William were arrested. He testified that on the same date one Kering had asked him to help him transport a tool box to his house on his motor cycle but had declined. On 26th August, 2007 he led them to Kering's place. He was informed that Ndegwa had been arrested on 27th August, 2007. He was sacked after he reported what Kering had done.

DW1 James Boking confirmed he knew the Plaintiff and Elijah Ndegwa. He stated that on 29th August,

2006 the company (1st Defendant) workshop was broken into and a tool box stolen from therein. He reported the matter at Kaptagat Police Station and police visited the scene. James Kosgei, William Masare and Elijah Ndegwa were questioned by the police. The latter two were the supervisors. James Kosgei was the security officer.

DW2 Inspector Omondi Ouko then of Kaptagat Police Station stated that he locked up in the cells the persons who were escorted to the police station as suspects by the security management of the 1st Defendant's company. He thereafter released the Plaintiff for lack of tangible evidence. He stated he did not know the suspects and he acted without malice.

DW3, Elijah Kahigi Ndegwa testified that he used to work for the 1st Defendant company but was suspended on allegations of having stolen a tool box. It was alleged that he had stolen it with one William Kering who had also been arrested. He was released on 29th July, 2007 without any charges being preferred against him. He further testified that another suspect was tried and convicted.

From the above summary of evidence, it is clear that the complaint was made by the Appellant through its security officers. Hence DW1's evidence lacked credibility when he testified that "***I did not expect the police to arrest the two Plaintiffs***". Indeed, it is the Appellant's own security officers who, after arresting the 1st Respondent, escorted him to Kaptagat Police Station. As such, it was proper to hold the Appellant responsible for the complaint leveled against the 1st Respondent as well as for his arrest.

As to whether the matter was terminated in the 1st Respondent's favour, it is factual that he was released without any charges being preferred against him. Although he was not arraigned in court, the police found no evidence to link him to the theft. Hence, that release is equal to a prosecution terminating in his favour.

So then, was he arrested and/or prosecuted without probable and reasonable cause?

I shall be guided by the following case law in determining this issue.

In the case of **SOCFINAFKENYA LTD VS. PETER GUCHU KURIA (H.C CIVIL APPEAL NO. 595 OF 2000, AT NAIROBI**) found at www.kenyalaw.or.ke., the learned judge Aganyanya J. (as he then was) noted as follows;

"That a suspect was acquitted of a criminal case is not sufficient ground for filing a civil suit to claim damages for malicious prosecution or false imprisonment. Evidence of spite, ill will, lack of reasonable and probable cause must be established."

In the case of **HICKS VS FAWKERS (1878), 8 Q.B.D. 167 at pg 171** Hawkins J. defined probable and reasonable cause as follows;

"Reasonable and probable cause is an honest belief in the guilty of the Accused based upon a full conviction founded upon reasonable grounds 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 imputed." (See Hawkins J. ibid. See also D.K Maraga in Zablon Mwaluma Kadori vs.National Cereals and Produce Board [2005] e KLR)

The forgoing definition was adopted by Rudd, J. in **KAGANE – VS – ATTORNEY GENERAL & ANOTHER (1969) EA 643** in which the learned Judge reiterated that: -

> ***"...to constitute reasonable and probable cause the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of the facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty."***

D.K.S Aganyanya, J. (as he then was) in the case of **SOCFINAFKENYA LTD VS. PETER GUCHU KURIA**, (Supra), observed as follows;

> ***"Moreover, when there is a case of suspected theft the first step is to report the matter to police, who in their own way find out how to carry out investigations.***
>
> ***Like in this case, whether it was Patrick or Nandwa who made the report of theft of the shafts to Kirwara Police, no issue should arise over this.***
>
> ***And it is up to the police to take further steps like taking a suspect tocourt if they have sufficient evidence against such suspect to warrant such action.***
>
> ***This then is the action by police and the state should be involved or joined in such suit and that the complainant should not be blamed for making such report to police. What is of great significance in such case is whether or not there is a reasonable and/or probable cause for the arrest and/or prosecution of the culprit.***
>
> ***And the onus of proving that there was no reasonable and probable cause for the arrest and prosecution of the suspect lies on him/her who queries such arrest or prosecution. In the case subject to this appeal did the respondents prove on a balance of probabilities that the report made to Kirwara Police Station about the theft of shafts was false and malicious? Who would dare design such a scheme to involve police that tractor shafts had been stolen when they had not? Did the respondents prove such design? From my reading of the record of the lower court, there was no such proof...***
>
> ***As to the prosecution of the respondents, the complainant could not force police to do so when there was no evidence to take them to court. Police carry out investigations before taking suspects to court and there are various incidents when police have declined to prosecute a suspect when investigations have disclosed no offence to warrant this. If the respondent's case fell in the latter category then I am sure they would not have taken to court. That a suspect was acquitted of a criminal case is not sufficient ground for filing a civil suit to claim damages for malicious prosecution or false imprisonment. Evidence of spite, ill-will, lack of reasonable and probable cause must be established."***

In the case of **THOMAS MBOYA OLUOCH & ANOTHER VS. MUTHONI STEPHENE & ANOTHER [2005] e KLR** the learned judge J.B Ojwang (as he then was) reiterated as follows;

> ***"Unless and until the common law tort of malicious prosecution is abolished by Parliament, policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice, in initiating prosecution and in seeking conviction against the individual, cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense."***

Given the above guidelines by the case law, it is my view that there was totally nothing wrong with the police re-arresting the 1st Respondent after he was frog-matched to the police station. However, they ought to have commenced their independent investigations forthwith and if they found that he was not culpable, released him forthwith. In lieu thereof, the police ought to have given him a bond pending their independent investigations. Instead, they detained him in the cells for five (5) days on mere allegations that he had stolen. That, to me was an unwarranted detention. There was no probable cause to do it and the conclusion I make is that it was actuated by malice as the police intended to please their master, the Appellant.

CLAIM OF FALSE IMPRISONMENT

The Black's Law Dictionary, 7th Edition, page 459 defines detention as **'*act or fact of holding a person in custody, confinement or compulsory delay*'.**

From my argument under the immediate foregoing head, it is obvious that the police had no justification of detaining the 1st Respondent for five days (24th to 29th August, 2007) without an iota of evidence that he was linked to the theft. And as the word false imprisonment was defined in the Black's Law Dictionary (Ibid) at page 618;

> ***"A restraint of a person in a bounded area without justification or consent. False imprisonment is a common law misdemeanor and a tort. It applies to private as well as government detention,"***

it fits very well in the actions and conduct of the police. Under Section 72 (3) (b) of the Old Constitution a suspect ought not to have been held in the remand for more than 24 hours without any justifiable cause. Having found that there was no justifiable cause why the 1st Respondent was incarcerated in the police cells for that long, it follows that he was entitled to a claim of false imprisonment.

Whether the 1st Respondent was entitled to both the claim of unlawful arrest/false imprisonment and injury to his reputation, and whether both were appropriately pleaded.

In his plaint dated 6th day of August 2008, the plaintiff in paragraphs 11 and 12 pleaded as follows;

> ***"The arresting and detention of the plaintiff in the police cells from 24th to 29th August, 2007 was without factual or legal basis, was malicious and without any probable or any reasonable cause and amounts to violation of his rights. In consequences of the matters aforesaid the plaintiff was injured in his reputation as a person and has been seriously injured, troubled, inconvenienced and suffered loss and damages."***

The plaintiff further made the following prayers;

> ***"REASONS WHEREFORE the plaintiff prays for judgment against the defendants jointly and severally for:-***
>
> ***1. General Damages for illegal arrest and detention and forinjury of reputation.***
>
> ***2. Costs of the suit." (See the plaint at pg 7 of the Record)***

In his testimony at the trial the plaintiff testified that the company (the appellant herein) had destroyed his reputation over school children who called him a thief. (***See Pw1's testimony at pg 20 of the Record***)

In his judgment the trial learned magistrate made the following findings;

> ***"The 2nd defendant's agent gave the police malicious false facts and caused his arrest and unlawful detention. No charges were preferred against the plaintiff. The plaintiff character was badly damaged in the eyes of right thinking members of the public including school going children who called him a thief. He had to resign from his employment after menacing messages were sent to his mobile phone. I am satisfied that the plaintiff proved his case on balance of probabilities..." (See judgment in the trial court at pg 27 of the Record)***

Consequently the trial court proceeded to award damages for both false imprisonment, Ksh. 40,000/= and for defamation of character, Ksh. 200,000/= and a further award of Exemplary Damages of Ksh. 10,000/= .

The appellant contests the foregoing judgment and has stated in his grounds of appeal that the said decision is contrary to the provisions of Order VI Rule 4(1) and Order XX Rule of the Civil Procedure Rules. (***See ground No. 6 of the Memo of Appeal)***.

Order VI Rule 4 of the Old Civil Procedure Rules provided;

> ***"(1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for***

example performance, release, payment,fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—

a) which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading. ”

(See Order VI Rule 4(1), of the Old Civil Procedure Rules, the current Order 2 Rule 4(1) of the 2010 Rules.)

This leads to the following question, ***Was the plaintiff entitled to both awards for false imprisonment and defamation of character***?

In J**UMA KHAMISI KARIUKI V EAST AFRICA INDUSTRIES LIMITED AND GEORGE OKOKO [1986] e KLR, H.C AT NAIROBI,** Butler-Sloss J. held as follows;

“Paragraph 7, 8 and 9 of the plaint are couched in the language of a claim for defamation but no defamatory statement is pleaded. Indeed, no tort is alleged that has not been alleged in paragraph 6 of the plaint, and the attempt to present a claim for wrongful arrest, false imprisonment and malicious prosecution as also a claim for defamation must be condemned as an attempt to claim double damages. Consequently there can be no separate award of damages to the plaintiff under paragraph 7, 8 and 9, and no award of general damages for defamation. ...The result is that the plaintiff is entitled to general damages only for wrongful arrest, false imprisonment and malicious prosecution.”

In **TEITA SISAL ESTATE V MIDIKA [2004] e KLR, H.C AT MOMBASA CIVIL APPEAL NO. 63 OF 2003** Maraga J. (as he then was), observed as follows;

“The complaint in ground 5 is against the award of Sh. 100,000/= general damages for defamation. There was absolutely no basis for this award. The Respondent did not in his plaint claim damages for defamation. He claimed general damages for malicious prosecution and unlawful dismissal. There was no evidence that the Respondent was charged and or prosecuted for any criminal offence. In his evidence he claimed without giving any particulars that he had been defamed but that was not pleaded.

A claim for defamation is a serious one. The law requires it to be pleaded with particularity and, of course, proved on a balance of probabilities. The court cannot grant a relief not pleaded and prayed for. See Kenya National Examination Council Vs Republic, Ex-parte Geoffrey G. Njoroge & others Civil Appeal No. 266 of 1996 (C.A.). Any evidence adduced on such unpleaded claim as was done in this case is therefore a wasted effort. Ground 5 of the appeal therefore succeeds and the award of Sh. 100,000/= is hereby se aside.”

In ***COSMAS M NZAU & 2 OTHERS V HONOURABLE ATTORNEY GENERAL [2013] EKLR.*** **H.C AT NAIROBI CIVIL CASE NO. 714 OF 200**, Waweru J., the learned judge held as follows;

“Issue No. 2: Whether the Plaintiffs have a good claim in defamation?

30. It is the Plaintiffs' case that the malicious prosecution caused injury to their credit, character and reputation, particularly because it was reported in newspapers. The Plaintiffs also alleged that they suffered considerable pain and mental anguish, trouble, inconvenience, anxiety and unnecessary expense during the trial. It must be borne in mind that this is not a case based on defamation. Defamation arises when false words of someone tending to injure his character and reputation are published. The publication may be oral (slander) or written (libel). **The** ***actual words complained of must be pleaded.***

31. In the present case, there is no plea of any words published by the Defendant that tended to defame the Plaintiffs. A plea such as is now made with regard to defamation will be germane only when considering what damages to award for malicious prosecution, if it comes to that. The claim per se in defamation must therefore fail."

The judge declined a claim of malicious prosecution and went further to give on award on malicious prosecution and noted as follows;

"Issue No. 10: What damages, if any, are due to the Plaintiffs?

43. It must be borne in mind that this is not a case based on defamation. But the Court will certainly take into account such proved damage to the Plaintiffs' characters, prospects or fortunes on account of the malicious prosecution. It is to be expected that any malicious prosecution will cause a certain amount of anxiety and distress to the person prosecuted. There will be attendant trouble and inconvenience. But if a plaintiff claims that the malicious prosecution has damaged his character and reputation, he must provide some evidence tending to prove such damage. The same applies to any alleged damage to his prospects or fortunes.

44. Apart from their saying so, the Plaintiffs did not lead or call evidence regarding damage to their character and reputation or to their prospects or fortunes. They did not call any family member or friend or professional colleague to testify to give credence to their testimonies in this regard.

45. I have taken into account that the prosecution of the Plaintiffs took about two years to complete. I also note that each of them spent some hours in custody before their bail was processed. I am also mindful of the anxiety, annoyance and other inconvenience that must have attended the prosecution. Doing the best that I can I will award each Plaintiff Kshs. 800,000/00 as general damages for malicious prosecution."

In **FIRESTONE EAST AFRICA [1969) LTD V ALPHONCE KYALO & ANOTHER [2014] e KLR, H.C AT MACHAKOS CIVIL APPEAL NO. 18 OF 2007**, the learned judge Mutende J. observed as follows;

"This brings in the issue whether the 1 st respondent was defamed?

18. It was pleaded by the 1 st respondent that the plaintiff was portrayed as a thief, a criminal, unfaithful servant who was unfit to be employed and trusted with any property. In his testimony the 1 st respondent did not adduce evidence of defamation of character. The duty was upon the 1 st respondent to prove that the act of the appellant which portrayed him as a criminal or an unfaithful servant who could not be trusted with any property was published to a third party. The statement was false; it was disparaging and injurious to the 1 st respondent. In his own words the respondent did not attempt to establish how defamatory the issue was. His only witness was an officer who produced the record of the criminal case. He did not call any third party in whose eyes his esteem was lowered.

And as aforestated, the allegation having been founded on some evidence, this court fails to comprehend on what basis the Lower Court reached a finding that he had been defamed."

In **HOSEA WILFRED WAWERU -V- NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES [2013] e KLR, H.C AT NAIROBI CIVIL SUIT NO. 172 OF 2004** the learned judge Waweru J. held as follows;

"33. It must be borne in mind that this is not a case based on defamation. It is a malicious prosecution case. But the court will certainly take into account such proved damage to the Plaintiff's character, prospects or fortunes on account of the malicious prosecution. It is to be expected that any malicious prosecution will cause a certain amount of anxiety and distress to

the person prosecuted. There will be attendant trouble and inconvenience. But if a plaintiff claims that the malicious prosecution has damaged his character and reputation, he must provide some evidence tending to prove such damage. The same applies to any alleged damage to his prospects and fortunes.

34. Apart from his saying so, the Plaintiff did not lead or call evidence regarding damage to his character and reputation or to his prospects or fortunes. He did not call to testify any friend or professional colleague who may have shunned him, or who may have known of others shunning him, on account of the malicious prosecution. The Plaintiff did not tender any evidence of any application he may have made for high office and rejection on account of the malicious prosecution.

35. But I have borne in mind that the Plaintiff was a very senior medical practitioner no doubt of good standing. The malicious prosecution must have caused him and his family much distress and inconvenience. There would probably be, at least initially, some uneasiness or awkwardness on his part and on the part of his friends and professional colleagues in socializing together while the prosecution was afoot. He suffered trouble and inconvenience, though this was mitigated somewhat by him being excused by the criminal court from attending mentions of his case (this is apparent from the proceedings produced). Upon being discharged, he could have publicized that fact himself and claim the attendant costs as special damages."

The foregoing decisions are persuasive and I find no reason to depart from the reasoning of my concurrent judges. The reasoning therein is consistent and it follows therefore that in the instant case a claim for injury of reputation must fail for the following reasons.

One, the plaintiff did no adequately plead the particulars of the alleged injury of reputation. It was not enough for the plaintiff to state in his plaint that "***In consequences of the matters aforesaid the plaintiff was injured in his reputation as a person and has been seriously injured, troubled, inconvenienced and suffered loss and damages.***" (***See para 12 of the plaint***). As noted by the learned judge Butler- Sloss J. in the case of **JUMA KHAMISI KARIUKI -V- EAST AFRICA INDUSTRIES LIMITED AND GEORGE OKOKO**, supra, and Maraga J. in **FIRESTONE EAST AFRICA [1969) LTD -V - ALPHONCE KYALO & ANOTHER**, supra, it was important for the plaintiff to plead the statements leading to the said injuries to his reputation. (See also Waweru J. in **COSMAS M NZAU & 2 OTHERS -V- HONOURABLE ATTORNEY GENERAL**, supra).

Two, the plaintiff did not sufficiently prove at the trial the alleged injury to his reputation. His own testimony that the school children branded him a thief following his arrest and subsequent detention in the police cells was not enough. In the case of **HOSEA WILFRED WAWERU V NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES**, supra, the learned judge Waweru J. observed that it was important for the plaintiff to call a colleague as a witness to confirm that indeed the plaintiff's repute was injured. This did not happen in this case. (See also Mutende J. in **FIRESTONE EAST AFRICA [1969) LTD V ALPHONCE KYALO & ANOTHER**, supra). The alleged text messages that the honourable trial magistrates alluded to as 'menacing' were not produced in court as evidence.

And **three,** as noted by Waweru J. in **HOSEA WILFRED WAWERU -V- NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES**, supra, and **BUTLER-SLOSS J. IN JUMA KHAMISI KARIUKI -V- EAST AFRICA INDUSTRIES LIMITED AND GEORGE OKOKO**, supra, the plaintiff is only entitled to an award for malicious unlawful arrest and false detention only and not to an award for defamation of character. However, in granting such award, the court should bear in mind that the plaintiff's character was imputed in being maliciously arrested and detained. (See also **WAWERU J. IN COSMAS M NZAU & 2 OTHERS V HONOURABLE ATTORNEY GENERAL**, supra)

Were approved damages awarded appropriately?

Finally, on the issue of quantum, an appellate court will only interfere with an award of damages if the same is either inordinately so high or so low, or the estimate is erroneous and is based on a wrong factor

or wrong principles of the law – See Court of Appeal in **OSSUMAN DHAHIR MOHAMED & ANOTHER -VS- SALURO BUNDIT MUHUMED** while relying on **KIGARAGARI -VS- AYA (1982-88) 1 kar 768** and **CHEGE -VS- VESTERS (1982-88) 1 KAR 1197**; **KIVATI -VS- COASTAL BOTTLERS LTD CA NO. 69 OF 1987**; and **SOKORO SAW MILLS LTD -VS- GRACE NDUTA NDUNGU (2006) e KLR** while citing **KMFRO AFRICA LTD & ANOTHER -VS- LUBIA & ANOTHER (NO.2 (1987), KLR, 30**.

General damages for false imprisonment

In the case of **SAMUEL NDIRANGU -VS- PATRICK WACHIRA NDERITU (2004) e KLR, HC AT NYERI CIVIL APPEAL NO. 88 OF 2001** – the Plaintiff was detained in the cells for two (2) days. Learned Okwengu, J. (as she then was) awarded him Ksh. 25,000/= under this head.

In **JUMA KHAMISI KARIUKI -VS- EAST AFRICA INDUSTRIES LTD & GRACE OKOKO (1986) e KLR, HC AT NAIROBI** the Plaintiff was awarded Ksh. 1,000/= for wrongful arrest, 1,000/= for false imprisonment and Ksh. 18,000/= for malicious prosecution.

In the instant case, the 1st Respondent was detained for five (5) days for which Ksh. 40,000/= was awarded. It is my view that that award was reasonable and I find no reason to disturb it.

Exemplary damages

While citing the case of **ROOKES -VS- BANNARD (1964) 1 ALL ER, 367,** Maraga, J (as he then was) in **ABDULHAMID EBRAHIM AHMED -VS- MUNICIPAL COUNCIL OF MOMBASA (2004) e KLR, HC. AT MOMBASA, CIVIL SUIT NO. 290 OF 2000** stated that "***aggravated damages are awarded in actions where the damages are at large, that is to say where the damages are not limited to the pecuniary loss that can be specifically proved. They are awarded in actions of defamation, intimidation, false imprisonment, malicious prosecution, trespass to land, person or goods, conspiracy and infringement of copy right. Such damages are part of or, included in, the sum awarded as general damages and are therefore at large. As such they need not be specifically pleaded or included in the prayer for relief."***

The learned Judge went to say;

> ***"However where the Plaintiff relies on any facts or matters to support his claim for aggravated damages, it is desirable that he should plead those facts or matters. The matters the court should take into account in awarding such damages include the defendant's motives, conduct and manner of committing the tort. The court should consider whether the defendant acted with malevolence or spite or behaved in a high-handed malicious, insulting or aggressive manner. The court may also consider the Defendant's conduct upto the conclusion of the trial including what he or his counsel may have said at the trial. If any of the Defendant's acts will have worsened the Plaintiff's damage by injuring his feelings of dignity and pride that may also be considered in awarding damages. Aggravated damages are therefore compensatory in nature. Exemplary damages on the other hand are damages that are punitive. They are awarded to punish the defendant and vindicate the strength of the law …."***

The facts of the instant case demonstrate that the police officers, who are under the 2nd Respondent acted at the whilms of the Appellant. They appeared to want to please it for reasons best known to them. The result was to embarrass the 1st Respondent. Such action must be punished as it was manifested by high-handedness.

The damages under this head of Ksh. 10,000/= were reasonable and I shall also not disturb them.

Damages for defamation of character

I have earlier on observed that the 1st Respondent did not sufficiently plead and prove them. The appeal

shall succeed under this head.

Before I conclude, it is important I address one other issue. That is, as relates to the form of the judgment. It was contended that the judgment of the trial court did not satisfy the provisions of Order XX Rule 4 of the old Civil Procedure Rules which is the equivalent of the current Order 21 Rule 4. It provided;

"Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision."

I have examined the Judgment prepared by the trial Magistrate. Despite the fact that it was short, it met all the requirements stipulated under the then Order XX Rule 4.

In the end, it is my view that this appeal shall partially succeed. I accordingly give the following orders.

(a) I uphold the award of general damages for false imprisonment and exemplary damages in the sum of Ksh. 40,000/= and Ksh. 10,000/= respectively.

(b) I set aside the award on general damages for defamation of character of Ksh. 200,000/= as the same was not proved.

(c) The damages under (a) above are payable by the Appellant and the 2nd Respondent jointly and severally.

(d) Since the appeal has partially succeeded, each party shall bear its own costs.

It is so ordered.

DATED and **DELIVERED** at **ELDORET** this 28th day of October, 2014.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

…..... for the Appellant

…..... for the 1st Respondent

…..... for the 2nd Respondent