



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL APPEAL NO.230 OF 2000**

**BYRUM KENNETH OLENJA.....APPELLANT**

**VERSUS**

**MICHAEL OPUNDO.....1<sup>ST</sup> RESPONDENT**  
**KENYATTA NATIONAL HOSPITAL.....2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment of Mr. Kanyangi SPM in CMCC No.5372 of 1995 delivered on 10<sup>th</sup> April, 2000)*

**J U D G M E N T**

1. This is an appeal arising from a suit which was filed by Byrum Kenneth Olenja (hereinafter referred to as the appellant) against Michael Opundo and Kenyatta National Hospital hereinafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> respondent respectively. The appellant had sued the respondents for general and special damages arising from his alleged wrongful arrest, false imprisonment, malicious prosecution and defamation.
2. During the hearing of the suit in the lower court, the appellant testified that he was employed at Kenyatta National Hospital in October 1991. On 10<sup>th</sup> November 1993 he was interdicted. He was required to report to the Director of the Hospital 3 times a week. On 7<sup>th</sup> March 1994 while still under interdiction the appellant was arrested from Kenyatta National Hospital where he had gone to report. He was locked at the Hospital's police post for a period of 8 hours. He was then transferred to Kilimani police station. He was subsequently charged with stealing an electrical heater belonging to the 2<sup>nd</sup> respondent. The appellant was tried and acquitted of the charge. The appellant denied having stolen the heater. He explained that the heater was assigned to him, and that the 1<sup>st</sup> respondent who reported the theft of the heater was actuated by malice. The appellant was in fact sacked by the 2<sup>nd</sup> respondent whilst his criminal case was still pending. He maintained that the criminal charge against him destroyed his career as it facilitated his dismissal from employment. The appellant produced copies of the criminal proceedings and judgment in which he was acquitted of the offence of stealing.
3. Under cross examination the appellant conceded that the heater was recovered in the car of one Margaret Nyokabi Muiruri and that he was the one who requested Nyokabi to put the heater in Nyokabi's car. He explained that he was to use the heater in a house allocated to him by the 2<sup>nd</sup> respondent. The house which was partly furnished was being repaired and had flooded. He needed the heater to use it for drying the water. The appellant maintained that the 1<sup>st</sup> respondent was the one who

identified him to the police at the time of his arrest. Two witnesses testified for the defence. These were Cpl. Fredrick Warutere a police officer attached to Kenyatta national Hospital, and the 1<sup>st</sup> respondent. Warutere testified that he received information acting on which he laid an ambush until the owner of motor vehicle registration No. KNY 955 who was Margaret Nyokabi appeared.

4. He interrogated Margaret but she denied having any hospital property. However, when her vehicle was searched an electric double bar heater was recovered. Upon further interrogation Margaret claimed it was the appellant who had put the heater in her car. The 1<sup>st</sup> respondent was the one who took over the appellant's office following the appellant's interdiction on 18<sup>th</sup> February 1994, 1<sup>st</sup> respondent received information acting on which he reported to the 2<sup>nd</sup> respondent's chief accounting officer about the heater which was missing from the office.

5. When the heater was recovered from Margaret's vehicle it was identified by 1<sup>st</sup> respondent as the same heater which was missing from his office. It was noted that there was no gate pass authorizing the removal of the heater from the 2<sup>nd</sup> respondent premises, nor had the appellant sought or received any authority to take the heater to his house. The appellant was therefore arrested and subsequently charged with the offence of stealing.

6. Counsel for the appellant filed written submissions in the lower court urging the court to find for his client. Relying on *Wanjiru Kihoro Vs The Attorney General HCCC No. 151 of 1988* and *James Muhuthia Ndwaro Vs The Attorney General & Another HCCC No. 1524 of 1989*. Counsel urged the lower court to award the appellant KShs.300,000/- as general damages for malicious prosecution, false imprisonment and defamation and KShs.31,850/- as special damages.

7. In his judgment, the trial magistrate found that the appellants arrest was not wrongful and that the appellant had not proved a case of false imprisonment or defamation. He therefore dismissed the appellant's suit. Being aggrieved by that judgment, the appellant has lodged this appeal citing 6 ground as follows:-

(i) That the learned trial magistrate erred in fact and in law in dismissing the appellant's suit when the appellant's evidence outweighed the respondents' evidence on a balance of probabilities.

(ii) That the learned trial magistrate misdirected himself and failed to give any consideration to the evidence adduced by the appellant in support of his case.

(iii) That the learned trial magistrate erred in fact and in law in disregarding the whole of the plaintiff's evidence thus arrived at an erroneous decision without giving adequate reasons for so doing.

(iv) That the learned trial magistrate erred in fact and in law in arriving at the wrong conclusion based on contradictory findings in his judgment.

(v) That the learned trial magistrate erred in fact and in law in overlooking and disregarding the role played by the 1<sup>st</sup> defendant in the arrest and prosecution of the appellant.

(vi) That the learned trial magistrate erred in fact and in law in failing to determine whether the appellant's arrest and a subsequent prosecution amounted to false imprisonment and defamation instigated by the defendants.

8. In support of the appeal counsel for the appellant has argued that the 1<sup>st</sup> Respondent did not establish the truth of the allegations against the appellant before he reported the matter to the police. He submitted that the appellant produced copies of the proceedings and judgment of the criminal court which confirmed that the appellant was acquitted of criminal charges. It was therefore argued that the appellant was all along innocent, and there was no justification for his being charged. It was submitted that the trial magistrate failed to give due consideration to the evidence before him. The court was therefore urged to allow the appeal.

9. For the respondents it was submitted that the trial magistrate rightly dismissed the appellant's suit as he failed to prove his case. It was contended that no malice was established. It was argued that the respondents were merely complainants in a criminal case, and that the prosecutor was the state and therefore since the Attorney General was not sued the appellant's case was unsustainable. It was pointed out that although damages were claimed for defamation, no particulars of the alleged defamation were given. The court was therefore urged to dismiss the appeal.

10. I have carefully reconsidered and evaluated all the evidence which was adduced before the trial magistrate. I have also considered the pleadings and the submissions made by counsels in the lower court as well as in this court. The appellant's suit was for damages and wrongful arrest, false imprisonment, malicious prosecution and defamation. It is not disputed that the appellant was arrested and charged with stealing a heater belonging to the 2<sup>nd</sup> respondent. It is also not disputed that the appellant was tried and acquitted of the charge. What the appellant had to prove to succeed in his claim was the fact that his arrest was without a reasonable or probable cause, but was actually actuated by malice on the part of the respondents. The appellant must also show that he was prosecuted at the investigation of the respondents.

11. From the evidence, it was apparent that the appellant was arrested by a police officer seconded to the 2<sup>nd</sup> Respondent. It is also clear that the appellant's arrest was triggered by a complaint made by the 1<sup>st</sup> respondent concerning an electric heater belonging to 2<sup>nd</sup> respondent which was missing from his office. The complaint does not however appear to have been unreasonable for the electric heater was indeed recovered from a vehicle where the appellant had placed it. The appellant had not sought any authority to remove the heater from the office where it was. Nor had he sought authority to take away the heater nor did he obtain any gate pass for taking the heater out of the 2<sup>nd</sup> respondent's premises. In the circumstances, the report that the appellant had stolen the heater was not unreasonable. Although the appellant alleged malice on the part of the respondents no particulars of malice were given, nor was any evidence called to establish malice on the part of the respondents.

12. As concerns the appellants claim of defamation the same lacked a basis as it was not properly pleaded as required under Order VI Rule 6A of the Civil Procedure Rules (now repealed by the Civil Procedure Rules 2010). Moreover the claim for defamation was in actual fact a duplication as the damages suffered were the same as that for false imprisonment and malicious prosecution.

13. The upshot of the above is that none of the grounds raised by the appellant in his memorandum of appeal has any substance. I find that the trial magistrate was right in dismissing the appellant's suit as it had no merit. Accordingly I dismiss the appellant's appeal with costs.

**Dated and delivered this 18<sup>th</sup> day of February, 2011**

**H. M. OKWENGU**  
**JUDGE**

In the presence of: -

Advocate for the appellant absent

Ms Onyango H/B for Mutubwa for 2<sup>nd</sup> respondent

Kosgei - Court clerk