



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 4271 OF 1994

EDWARD KAMANDE MUIRURI1ST PLAINTIFF
RUTH WAMBUI KAMANDE2ND PLAINTIFF
PAUL KARANJA BEN3RD PLAINTIFF

VERSUS

DEL MONTE KENYA LIMITED.....1ST DEFENDANT
EDWARD MUTAKAKOWA KYUNGUTI2ND DEFENDANT

JUDGMENT

Three Plaintiffs have filed this suit to claim damages for trespass to land, slander, false imprisonment and of course costs of the suit.

It is not in dispute that on 21st September, 1994 between around 10.00 am and 11.00 am., the 2nd and 3rd Plaintiffs were arrested and thereafter at around 5.00 pm., the 1st Plaintiff was also arrested along Naivasha Road and placed in cells. The 1st and 2nd Plaintiffs are husband and wife and the third Plaintiff is their neighbour who was working at the material time with Delmonte Kenya Ltd. (1st Defendant). The 1st and 2nd Plaintiff had a shop at Githunguri and owned three motor vehicles at the material time.

On the material date, 2nd Plaintiff was in the shop around 10.00 am and four people came out from a motor vehicle bearing registration No. KAC 676 F, two of them carrying guns. She opened the shop on their asking when she had a customer named Joyce Njoki Kinuthia (PW5). The two unnamed people shouted in Kiswahili ‘*yule bwana wako na Karanja Ben ni wezi wa magari ya Delmonte*’ meaning “*your husband Karanja Ben is thief of Delmonte vehicle*’.

They searched the shop, their house and then went to a store nearby which was broken open as she did not have its key. They removed all the motor spares found in the store and loaded them in the said vehicle. I may note here that it is not in dispute that the vehicle belonged to 1st Defendant and it had the registration no. stated by the witnesses.

After that, they asked for the 1st Plaintiff. When she told them she did not know where he had gone for his business, she was taken directly to the Thika Police Station and placed in cells and was released the next evening at about 6.00 pm.

PW2 the 3rd Plaintiff was on leave from duty on 21st September 1994 and, at about 11.00 am, was with

one Kamande (PW3) at Kabati Trading Centre. He saw the vehicle of Delmonte having six people, two of them were employees of 1st Defendant. He recognized them as Captain Kuinguti (DW1) and John Awema the driver with 1st Defendant who had since died (3rd Defendant).

I may note here, that this event took place after the 2nd Plaintiff was taken and kept in the cells of Thika Police Station.

According to this witness, there were six people in the vehicle and it stopped where the two were. One of them said '*Kumbe mwizi was magari ndiyo huyu*' and he was arrested. He was taken to his house which was searched all entered into house except the driver, the said Awema (now deceased). They searched the house and his shamba. Nothing was recovered, but he was taken to Thika Police Station and kept in the cells at about 6.00 pm. Next day, he saw 2nd Plaintiff in the cells and at about 6.30pm of that day the 1st Plaintiff also was brought. The two were released on 23rd September, 1994 at about 6.30 pm. They were asked to come back which they did but no charges were leveled against them. He later resigned from his service which was not voluntary.

According to him, out of six people, two were police officers and others were from Delmonte – two of them were named by him. The other two were the watchmen.

PW3 was the 1st Plaintiff, who according to his evidence was arrested on 21st September 1994 around Naivasha. The Delmonte vehicle had four people out of which two police officers were named by him. He was arrested on the complaint of security of Delmonte that he with others had stolen their motor vehicles. He saw the other two Plaintiffs in Thika Police Station and was released on 23rd September, 1994. On 26th September, 1994, he went back to Police Station as required and his two lorries with their cargo and his spares were also returned to him.

PW4 and PW5 were the persons who were with 3rd Plaintiff and 2nd Plaintiff when they were arrested. PW4 almost corroborated the evidence of PW2 upto his arrest. Though he did not give the number of people who were in the vehicle of the Defendant. PW5 also in all material terms corroborated the evidence.

PW6 is 3rd Plaintiff's neighbour and saw some people entering his compound and banana plantation. He said he saw five people in the vehicle and four came out.

The above in short is the evidence from the Plaintiffs.

The defence called one witness namely Edward Kyanguti who was employed as a security officer with Delmonte. He testified that on 20th September, 1994 he received a letter (P Exhibit 3), through post, written in Kikuyu language with sketch map. When the letter was translated to him, he was made aware that a homestead at Githunguri village was harboring motor vehicle spare parts from lorries stolen from Delmonte. On getting instructions from his superior, he took the letter to Thika Police Station as the 1st Defendant was loosing lorries from the Anglo-French plantation. On presenting the letter, the police asked for transport which he provided. He drove the vehicle to the place as per the map enclosed in the letter. The police officers were in civilian dress as he also was. They were from CID Division. He parked the vehicle outside the place on arrival. The two officers went inside while he waited. After a while, one officer came out and asked him to reverse the vehicle which he did and the police officers loaded the motor spares in the vehicle. The police took the 2nd Plaintiff with them to the Thika Police Station. On arrival they off loaded the spare parts and the 2nd Plaintiff was placed in custody of the Police Station. The officers then indicated that they would go back for further investigations. He under the instructions of his supervisors, allowed the police to use the vehicle of Delmonte to be used by the police. He was later informed of arrest of other Plaintiffs. He also produced the letter he received with English version and agreed that the 1st and 3rd Plaintiffs were given P22 Forms requiring them to appear before the police.

He further agreed that the police immediately took over the matter and asked him to give the transport. He was not aware whether his complaint was recorded in O.B. or whether the police had any search warrant before they entered the houses of 2nd and 3rd Plaintiffs. He denied uttering the words which are testified by the 2nd Plaintiff. He also stated that he could not identify the parts recovered from the house of the 1st and 2nd Plaintiff.

He denied that he was present when the 3rd Plaintiff was arrested and he was the one who uttered the words as testified by him.

He also denied that he was the one who asked the police to come with him and they did what he told them to do. According to him he just followed the directions from the police after he gave them the letter (P exhibit 3).

Considering the evidence, it is quite clear that when DW1 showed the letter (P Exhibit 3) to the Officer of Thika Police Station, the police in an unprecedented speed embarked upon the acts as have been mentioned by the Plaintiffs and their witnesses and not denied by the DW1. The Plaintiffs' version of the entry into the Plaintiffs' house and land without search warrant, and that of forcible opening of the store of the 1st and 2nd Plaintiffs and removal of their goods from their premises without any order to support those actions, are sufficiently proved by the evidence on record and also admitted by DW1. He is the person who received the anonymous letter, carried it to the police station and assisted the police in transporting them to the Plaintiffs' places, loading the goods removed and taking them to the police station after their arrest.

It is also on record that by 26th September, 1994 the police released the goods taken and terminated the P22 Forms issued to the three Plaintiffs. It is also indisputable that all the three Plaintiffs were kept in custody at least for one night in respect of 2nd Plaintiff and two nights in respect of the 1st and 3rd Plaintiffs.

I shall tend to accept the evidence of the Plaintiffs that DW1 led the police to their respective places and was instrumental to their respective arrest and custody. I shall find so, irrespective of being aware that the police sometimes asks for the assistance in transporting them. I would also note that the DW1 was accompanied by two armed police officers in respect of the events of theft of lorries that have been happening for some time. What was the urgency in this matter then? DW1 has not given any evidence whether the previous thefts of lorries and recovering them in cells have been ever reported. The DW1 only relied on an anonymous letter which was apparently written by a disgruntled accomplice!!! Moreover, nothing could have been easier to follow the 3rd Plaintiff who was an employee of the Defendant company whose whereabouts could easily be traced even though off-duty that day.

Obviously, the Defendants through DW1 wanted to take action straightaway. The police received complaint from a retired Army officer who is trained in strict Discipline and urgent action. I cannot accept the testimony of DW1, that he remained in vehicle while the police were embarking on their job.

In the circumstances of this case, I shall definitely cite with approval the observation made in the case of **Zablon Mwaluma Kadari –vs- NCPB (HCCS No. 152 of 1997)** at page 2 namely:-

***“Regarding the institution of the prosecution, counsel for the Defendant submitted that the arrest and prosecution of the Plaintiff was done by the state and the Defendant had nothing to do with it suggesting that the Plaintiff in this case is flogging the wrong Horse. I cannot accept this argument. It is enough if it can be shown that it was actively instrumental in putting the law into force*”**

I shall also tend to agree that in claims for wrongful arrest and false imprisonment, the evidential burden lies on the defence to prove that they had cause for suspecting that the applicant had committed the offense. The 2nd Plaintiff apparently had not been named by the informer who was in any event a purported accomplice.

The fact remains that the spare parts recovered were given back to the Plaintiff which would thus be presumed to be their properties and they were released to them with no charges made against any of the Plaintiffs. Moreover, DW1 agreed that he did not identify the spare parts seized by the Police, which were taken away without any lawful order.

I thus find that it was at the behest of the Defendants that the three Plaintiffs were arrested and falsely imprisoned. It follows from this finding that the Defendants were accordingly liable to pay damages for these acts to the Plaintiff.

I shall reiterate the observations made hereinbefore and deal with the issues of trespass to land and trespass to goods.

The plain meaning of trespass as per Halsbury's Laws of England Vol. 38 page 734 is:-

“Trespass (a) is a wrongful act (b), done in disturbance of the possession of property of another against his will.”

It is adequately shown by the Plaintiffs that there was unlawful entry by the police at behest of the Defendants into their respective home, store and land. So far as the 3rd Plaintiff is concerned, there was no actual loss or damage done to his land or property, but it is trite law that although no actual damage is done the action in trespass lies. So far as the 1st and 2nd Plaintiffs are concerned, over and above unlawful entry into their land, their store was broken into and goods were removed and taken away without any justification. The actions of entry into the properties and removal of goods were evidently done in a high handed manner, caution in laws disregarded and thus were utterly unlawful. No explanation is given and obviously a search warrant was not obtained.

I would agree, with the evidence from the Plaintiffs, that DW1 was present when the trespass to land and to the goods of the 1st and 2nd Plaintiffs were undertaken. I shall also note that DW1 presented the anonymous letter in the hands of the police and the Defendant has also not shown that the complaint was recorded in Occurrence Book. However, the armed police officers were taken into his vehicle and driven away to the homes of the Plaintiffs.

I shall simply cite two passages from the Court of Appeal case of ***Simiyu –vs- Sinino (Civil Appeal 108 of 1984)*** page 5.

“It seems that at common law, it is an actionable trespass maliciously to set the law in motion so that the wrong person's goods are seized, or the wrong person is arrested. It is distinguishable from the tort of malicious prosecution, which necessarily involves there having been a criminal prosecution.” (underlining mine)

On page 11 of the said Judgment it is further observed:-

“The court broker was not joined in the suit against the respondents. The appellant could and was entitled to sue the respondents for trespass and wrongful attachment to which they were party. The attachment was not supported by a lawful or any warrant of the court and so the court broker had no authority to levy the attachment. He and those who led him to Simiyu's house to attach the property were trespassers and acted unlawfully.....”

The learned defence counsel has relied on authorities as regards malicious prosecution and with due respect to him, the Plaintiffs' case does not rest on the issue of malicious prosecution. They are claiming damages on unlawful arrest and false imprisonment as well as damages on trespass of land and goods.

As per the submissions made by the learned counsel for the Plaintiffs, no claim is also made as regards the slander. I shall thus not deal with those issues raised by the defence counsel as well as with the authorities cited.

The above leaves me with the issue of assessment of damages. It is rightly submitted that the court, while deciding the quantum of damages, shall consider the circumstances of the case and the principles of laws in respect of damages setting out the reasons for the determinations based thereon.

I do note that apart from the acts of trespass, the Plaintiffs have failed to prove any special damages or any loss from the acts of such trespass.

But the acts of trespass are actionable per se.

As per my observations and findings, the Defendants are liable for damages suffered by the Plaintiffs in trespass of land, goods and unlawful arrests and false imprisonment.

All the Plaintiffs, as evidence proves were arrested unlawfully and falsely imprisoned. Similarly, the entry into the land and search carried out is also found by the court totally unjustifiable and thus unlawful. Lastly, similar finding is made in respect to trespass of goods which is defined as:

“Trespass to goods is an unlawful disturbance of the possession of goods by seizure or removal or by direct act causing damage to the goods.”

I have sufficient evidence of unlawful seizure and removal of goods belonging to 1st and 2nd Plaintiffs.

The learned counsel for the Plaintiffs submitted that apart from general damages, the Defendants must be held liable for exemplary damages considering the circumstances of this case.

I have given my careful consideration and thoughts on the issue of assessment of the damages and have decided to award global damages in respect of three torts. The assessed damages are:-

(1) Kshs.600,000/= in respect of 1st and 2nd Plaintiff respectively.

(2) Kshs.450,000/= in respect of the third Plaintiff as there was no trespass of goods in respect of him.

The Defendants shall also pay costs of the suit and interest on the damages as per law.

Orders accordingly.

Dated, signed and delivered at Nairobi this 29nd day of **March, 2011**

K. H. RAWAL
JUDGE
29.03.2011