



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KERICHO

CIVIL APPEAL NO. 47 OF 2004

KENNEDY OMAE BABUAPPELLANT
VERSUS
HAJI ABDI KADIR.....1ST RESPONDENT
ATTORNEY GENERAL2ND RESPONDENT

(From the judgment of the Senior Resident Magistrate, Hon. A G Kabiru, delivered on 9th November, 2004 in Civil Suit NO. 26 of 2003 between Kennedy Omae Babu versus Haji Abdi Kadir and the Attorney General)

JUDGMENT

The Appellant was aggrieved by the judgment of the Senior Resident Magistrate, Hon. A G Kabiru, delivered on 9th November 2004 in suit no. 26 of 2003 in Kericho P. M. Court dismissing the Appellant's suit with no order as to costs.

The Appellant put forward four grounds of Appeal as follows against the said judgment.

1. **THAT** the learned trial Magistrate erred in law and fact in dismissing the appellant's suit against the weight of the evidence adduced.
2. **THAT** the learned trial Magistrate erred in law and fact in failing to consider all the issues in controversy.
3. **THAT** the learned trial Magistrate erred in law and fact in considering extraneous matters to dismiss the suit.
4. **THAT** the learned trial Magistrate erred in law and fact in by putting to much wait on the Defendant's evidence as against the Plaintiff's.

The Appellant had instituted the dismissed suit against the 1st and 2nd Respondents claiming general and aggravated damages for false imprisonment and wrongful confinement for seven days in Kericho Police Station. He attributed the wrongful arrest to the 1st defendant who, he alleged, had informed the police that he was one of the robbers who had struck at his business premises and stolen cash. It was common ground that the Appellant was a former employee of the 1st Respondent.

The Plaintiff's evidence in the trial Court clearly shows that he suspected that the 1st Respondent called the police to arrest him when the Appellant went to his business premises to collect a testimonial. But the Plaintiff had nothing tangible by way of evidence on the basis of which he could prove that the 1st

defendant called the police or lodged a complaint against him. Nor does the evidence adduced at the trial Court show that the circumstances combined to lead to the inevitable conclusion that the 1st defendant could not but be the one who called the police and caused the arrest of the Appellant. The long and short of the evidence adduced is that it was the appellant's word against the 1st Respondent's. Under **Section 107 (1)** of the **Evidence Act, Cap 80**, "*whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist*". In this case, the burden of proving that the 1st Respondent had caused the arrest of the Appellant reposed on the Appellant. The standard of such proof was on the balance of probabilities.

I have carefully perused the record and the evidence given by the Appellant and the 1st Respondent and his witness, and I have come to the conclusion that the evidence does not on the balance of probabilities prove that the 1st Respondent directed or procured the police to arrest the Appellant on 26/6/2002 much less take him to the Police station at Kericho as alleged by the Appellant. The Appellant had a strong suspicion that the 1st Respondent played a role in his arrest but he had no evidence to prove it.

As this is the first appellate Court, I am cognisant that the appellant is entitled to a fresh reconsideration of his case and I have therefore perused the record of appeal and the evidence adduced at the trial with circumspection with a view to making my own inferences, deductions and conclusions. I am satisfied after doing so that the evidence adduced does not support the allegations in the plaint nor does it establish any tortious liability on the part of the 1st Respondent. It is my finding that the trial Magistrate came to the right conclusion that the Plaintiff's case was not proved.

As regards the Appellant's claim against the 2nd Respondent, the same was a non-starter on account of the Appellant's failure to comply with **Section 13A (1)** of the **Government proceedings Act, Cap 40** of the laws of Kenya which states.

13A. (1) No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing has been served on the Government in relation to those proceedings.

In the result I uphold the judgment of the trial Magistrate and dismiss the appeal with costs to the 1st Respondent.

DATED at KERICHO this 17TH day of March, 2011

G B M KARIUKI, SC
RESIDENCE JUDGE

COUNSEL APPEARING

Mr. D. O. Akinyi, Advocate, for 1st Respondent
Mr. P. C. Mitey, Advocate, for E. M. Orina, for the Appellant
Mr. N. Bett, Court clerk