



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CIVIL SUIT NO.464 OF 2001**

**JORAM AGOLA .....PLAINTIFF**

**VERSUS**

**GEORGE OGINGO OMULO.....1<sup>ST</sup> DEFENDANT  
KONOIKE VEIDEIKE MURRAY ).....2<sup>ND</sup> DEFENDANT  
ROBERTS JOINT VENTURE INSPECTOR MBAE.....3<sup>RD</sup> DEFENDANT  
POLICE CONSTABLE ONYANGO.....4<sup>TH</sup> DEFENDANT  
ATTORNEY-GENERAL.....5<sup>TH</sup> DEFENDANT**

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

The plaintiff **Joram Agola** moved the court by way of a plaint filed on the 20<sup>th</sup> of December 2001. The plaint was amended on 15<sup>th</sup> of May, 2003. The plaintiff's complaint is that on or about the 21<sup>st</sup> of June, 2000 the 1<sup>st</sup> and 2<sup>nd</sup> defendant through its employees and agents caused the arrest of the plaintiff, who was charged with the offence of stealing. The plaintiff avers that the defendants action were actuated by malice. He claims for damages for false imprisonment, malicious prosecution, defamation, loss of earnings, special damages, costs of the suit and interest.

The 2<sup>nd</sup> defendant filed its statement of defence dated the 23<sup>rd</sup> of January 2002 denying that it was ever an employee of the Government of Kenya; having caused the arrest and detention of the plaintiff or caused the plaintiff to be charged for stealing diesel or at all. The 2<sup>nd</sup> defendant denied that its actions were actuated by malice. It denied the particulars of malice particularized in the plaint and the claims of defamation.

On their part the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants filed their defence on the 21<sup>st</sup> of November 2008. These defendants admitted that the plaintiff was arrested but denied the alleged 20 days confinement as alleged in the plaint and stated that the plaintiff was arrested by the 1<sup>st</sup> defendant acting as area chief, together with other public officers, as he was caught red handed siphoning fuel from a vehicle belonging to the 2<sup>nd</sup> defendant.

They denied the particulars of malice, loss or damage as claimed by the plaintiff, they contended that if indeed he suffered any such loss or damage he was the author of his own misfortune and they are not liable.

The plaintiff was the sole witness to his case. The 2<sup>nd</sup> defendant called one witness **DW1** also testified.

Briefly the plaintiff's case is that on or about the 21<sup>st</sup> of June, 2000 the first defendant caused his arrest on suspicion of stealing diesel. That he was confined in the cell for 2 days. He claimed further that on the strength of the false allegations by 1, 2, and 3<sup>rd</sup> defendants he was charged in Nyando Criminal Case No.460 of 2000 where he was later acquitted under Sections 87(a) of the Criminal Procedure Code. That subsequent to the acquittal he was later charged in Kisumu with the same offence in criminal case No.127 of 2001 but since no witnesses showed up he was acquitted under Section 202 of the Criminal procedure Code on 17<sup>th</sup> August, 2001.

As a result, he now claims for damages of Kshs.250,000/= for false imprisonment for 2 days as the two days stay in custody were not justified or legal. He also claims damages for malicious prosecution in the two cases referred above and for this he claims Kshs.750,000/=. His other claim is for defamation of character and he seeks for compensation of Kshs.500,000/=. For loss of income from his posho mill he claims Kshs.95,000/= and loss of other business at Kshs.392,000/=.

On their part the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants deny the claim of false imprisonment in that the plaintiff stayed in custody for a day and was released on bail and that indeed if there is any such claim it is time barred as the plaintiff was arrested in June 2000 and the suit filed in December 2001. They cited Section 3(1) of the Public Authorities Act, Chapter 339 of the Laws of Kenya. On defamation it is their argument that the 2<sup>nd</sup> defendant was caught red handed siphoning fuel from the 2<sup>nd</sup> defendant's truck. They contended that if his reputation was tainted as a result, it is of his own making. They further argue that the plaintiff did not adduce any evidence to prove that his standing in society had been lowered.

On malicious prosecution, it was contended by the said defendants that the police had reasonable and probable cause to charge the plaintiff which they did.

On special damages they contend that the plaintiff failed to prove that the posho mill and the motor vehicle were running on diesel that was confiscated and that since he was out on bail he ought to have continued in business. Further that the plaintiff's acquittal was not proof of innocence. They also argued that special damages as particularised in the amended plaint were not proved.

The 2<sup>nd</sup> defendant on its part contended that it did not cause the arrest of the plaintiff nor did 2<sup>nd</sup> defendant make any complaint and therefore it cannot be blamed for the arrest and any consequences following the same. Further that the plaintiff did not establish any malice on the part of the defendants. That evidence clearly show that an offence had been committed; that the circumstances disclosed a reasonable and probable cause for which the plaintiff was arrested.

On defamation, it contends that the 2<sup>nd</sup> defendant did not utter, print or publish any defamatory information against the plaintiff and that the charging of the plaintiff by the state cannot constitute defamation.

On the special damages it submitted that the same was not proved and since notice of intention to sue was not given the same disentitles the plaintiff from recovery of costs.

The plaintiff drafted issues for consideration and filed the same. The 2<sup>nd</sup> defendant also raised the same in its submissions. Considering the submissions by parties and the issues raised by the plaintiff and the 2<sup>nd</sup> defendant I find issues for consideration to be as follows:

- 1. Was the plaintiff arrested by the police and subsequently charged?**
- 2. Did the plaintiff's incarceration by the police after his arrest amount to false imprisonment?**
- 3. Was the arrest and arraignment in court actuated by malice on the part of the defendants?**

4. Was the plaintiff defamed by the actions of the defendants?

5. Does a claim lie against the state?

If the answer to 2, 3, and 4 is positive what sum of damages should he be awarded.

6. Did the plaintiff suffer any special damages?

7. Who pays costs of the suit?

All parties are in agreement that on the 21<sup>st</sup> of June, 2000 the plaintiff was arrested by the chief of Thurdiboro Location in the Company of the District Officer and administration Police. However there is a conflict of ho the arrest was done. The plaintiff's version is that he was arrested from his house on the 21<sup>st</sup> of June, 2000, that he was confined at the Chief's camp for an hour, at the D.O.'s office for 3 hours, after which he was handcuffed and taken to his house where the police searched his home. He was later taken to Ahero Police Station where he remained for a day and he was later released on cash bail.

The defence version by **DW1 George John Omulo** Chief of Thurdiboro Location stated that on the material day at about 8.30 p.m. as he was on Patrol along Kendu-Nyakwere road in the company of the District Officer **Mr. Simiyu**, and administration police (AP) Inspector **Charles Okindi**, Officer-in charge Police Division (OCPD) and other officers, when they got information from a community policing member that a truck No.**KAL 664Z** that belonged to the 2<sup>nd</sup> defendant was outside the plaintiff's house. They headed to the scene and found the plaintiff and a driver of the said vehicle drawing fuel from the vehicle. They arrested the two. He stated further that the fuel was being drawn was 3 km away from a store where they found 3 drums and 30 jerricans of diesel belonging to the plaintiff which they confiscated.

In cross-examination he denied having gone to the plaintiff's home in the company of a village elder.

**DW2 Robert Cheruiyot** stated that at the time of the incident he worked as an administrator with the 2<sup>nd</sup> defendant. That on the material day he was woken up on the said date at 9.30 p.m. by **DW1** and the District Officer. He first accompanied them to the chief's camp and thereafter to where the company vehicle was at Nyakwere 5 km away from the chief's camp.

**Did the plaintiff incarceration amount to false imprisonment?** In his evidence the plaintiff claims that he was imprisoned for 2 days; specifically for three hours and one day before being released on cash bail. This was not disputed by the defence. However does this confinement amount to false imprisonment? Was the arrest legal and justified for the court to find that the incarceration amounted to false imprisonment it must consider whether the arrest was justifiable and legal?

The plaintiff was initially detained at the chief's camp before his home was searched. He was thereafter detained at the chief's camp and the police station and thereafter arraigned in court. **DW2** who is a law enforcer and who was chairman of security committee in his area gave evidence as to how the plaintiff was found siphoning diesel from the 2<sup>nd</sup> defendant's vehicle. He was a suspect and arrested in connection with his action and confined as investigations were ongoing he was thereafter released on cash bail and later charged. This in my view does not amount to false imprisonment in that he was a suspect and held for purposes of investigation and being arraigned in court his arrest and confinement was justifiable and within the law.

**Was the arrest and confinement in court actuated by malice?**

The enforcement officers allege that they found the plaintiff stealing. Was there malice in their action? The notable case of **Murunga versus the Attorney-General [1979] KLR 138** sets the test for malicious prosecution as follows:

- (1) that a prosecution was instituted by the defendant or by someone for whose action he is responsible;**
- (2) that the prosecution terminated in the plaintiff's favour;**
- (3) that the prosecution was instituted without reasonable and probable cause;**
- (4) that it was actuated by malice.**

The court further stated:

**“That the test whether the prosecution was instituted without reasonable and probable cause is whether the material known to the prosecutor would have satisfied a prudent and cautious man that the plaintiff was probably guilty of the offence.”**

The 1<sup>st</sup> and 3<sup>rd</sup> defendants were employees of the Government and the 4<sup>th</sup> is sued as the legal advisor of the Government that is responsible for the actions of the 1<sup>st</sup> and 3<sup>rd</sup> defendants who purportedly arrested the plaintiff while in their cause of duty.

The prosecution twice failed as there were no witnesses present at the time of hearing the cases against the plaintiff. However, the prosecution was instigated on a reasonable and probable cause as explained in **Murunga versus The Attorney-General [supra]**. **DW1** stated that they found the plaintiff drawing fuel. I doubt whether Senior Enforcement Officers would have looked for **DW2** in the night and for no good cause. I am convinced by the evidence of **DW1** and **DW2** as against the evidence of the plaintiff and for reasons I shall enumerate later in this judgment. Having been convinced that the plaintiff was found drawing fuel from the 2<sup>nd</sup> defendant's vehicle, and having no permit to store large amount of diesel. I am of the view that those who arrested him and those who later prosecuted him had a reasonable and probable cause to believe that he was guilty of an offence and therefore find that on a balance of probability the plaintiff has failed to prove malice on the part of the defendants. The fact that the two cases were terminated cannot in itself support the claim of malicious prosecution and as such the claim fails.

Was the plaintiff defamed?

In his evidence the plaintiff simply said he was defamed. He did not give particulars of how he was defamed or how his credit suffered in the eyes of right thinking members of the society, he failed short of proving this claim. The plaintiff's counsel submitted that the plaintiff was paraded, taken to the cells and given the tag of a thief. There was no proof of this assertion. Needless to say that under the laws of this country one is deemed innocent until proven guilty and even by assumption, the arrest and arraignment in court or the plaintiff therefore did not portray him as a thief!

This limb equally fails.

Is the plaintiff entitled to special damages?

The plaintiff gave the particulars of special damages in his amended pleadings as follows:

- (a) Loss of earning from the hardware- Kshs.12,000 a day.**

**(b) Loss of earning from the posho-mill Kshs.1000/= a day.**

**(c) House rent Kshs.1,500/= per month.**

**(d) Advocates fees Kshs.50,000/=.**

**(e) Loss of earning on motor-vehicle registration No.KAG 803V – Kshs.5,000/= a day for 1 year.**

In his evidence the plaintiff stated that he paid his lawyer Kshs.50,000/= to represent him in court. He produced a receipt issued by **Aduma Owuor and Company Advocates** dated 12<sup>th</sup> July, 2000.

He further stated that the diesel taken from him was 1950 litres and he recovered only 1350 litres. 600 litres were missing. This evidence was not rebutted. He produced receipts for the purchase of the same. He stated that before the arrested he used to earn kshs.2,500/= a day from the mill which did not work or function while the dispute ongoing. He produced a booklet showing income from the posho-mill He claimed the posho-mill was grounded for a year. He further stated that the vehicle gave him 5000/= a day and he used to work at his hardware where he earned Kshs.12,000/= a day. In his own evidence he earned millions in a year.

The evidence that the plaintiff owned a posho-mill, a motor vehicle registration No.**KAG 803V** and a hardware shop was not rebutted. However his evidence of income from the same remains wanting. Exhibit P1, 2 and 3 are receipts dated 28<sup>th</sup> May, 2000, 9<sup>th</sup> June, 2000 and 13<sup>th</sup> June, 2000 for diesel purchased for vehicle registration KAG 803V. It is not clear whether it was the vehicle that was fueled or the fuel was carried on the vehicle. Receipt dated 28/5/2000 has serial number 25800 yet the one dated 9<sup>th</sup> June 2000 has serial number 25535. The earlier receipt appears to have been issued after the 2<sup>nd</sup> receipt if one is to consider the serial number. The court doubts, the authenticity of the receipts for the reasons produced.

The profit analysis of the motor vehicle and the profit from the posho-mill produced do not appear to be contrary at all. It is not clear who made the same. They also do not appear to be a true reflection of the alleged income. The plaintiff should have had his books of account prepared by an independent auditor he could also have produced his banking records to prove the same. If indeed he made income as claimed he would be expected to have had a bank account which would have easily shown remittances of collection and profits per day. That goes for the hardware shop as well. This claim fails for lack of evidence.

Does the claim against the Attorney-General fail? The plaint was filed after 1 year and 4 months the same clearly is statutory time barred as against the 5<sup>th</sup> defendant.

For the reasons above mentioned the conclusion is that the plaintiff failed to prove all his claims on a balance of probabilities and as such his case is dismissed with costs to the defendants.

**Dated and delivered this 11<sup>th</sup> day of March 2011**

**ALI-ARONI**

**J U D G E**

**In the presence of:**

.....Counsel for the plaintiff

.....Counsel for the defendants