



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 252 of 2002

MACHARIA WAIGURU.....APPELLANT

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

I.P. ROBERT ONCHIRI.....2ND RESPONDENT

(Being an appeal from the judgment of the Principal Magistrate, Hon. Abdul El-Kindy delivered on the 2nd May, 2002 in SPMCC No.701 of 2002 at Murang'a)

J U D G M E N T

1. This appeal originates from a suit which was filed in the Magistrate's court at Muranga by Macharia Waiguru (hereinafter referred to as the appellant). He had sued the Attorney General and IP. Robert Onchiri (hereinafter referred to as 1st and 2nd respondents respectively). The appellant, who is an advocate claimed general damages arising from his unlawful arrest and false imprisonment.
2. The appellant contended that he was arrested by the 2nd respondent on 29th November, 2000, in MurangaTown. He was transferred to Muthaiga Police Station where he was detained in custody until the next day 30th November, 2000 when he was released. The appellant maintained that his arrest and confinement which was without justification, was actuated by malice or gross negligence.
3. The respondents filed a joint defence to the appellant's claim. Firstly, the respondents raised a preliminary objection to the appellant's suit, contending that no statutory notice was served on the 1st respondent before filing the suit as required under Section 13A of the Government Proceedings Act Cap 40. Secondly, the respondent denied that the appellant was arrested and or falsely imprisoned. In the alternative, the respondents maintained that the appellant's arrest was lawful and with a reasonable and probable cause. The respondents further averred that the appellant was arrested and taken to Muranga Police Station for interrogation and further investigation in respect to Criminal Case No.1714 of 2000.
4. The 2nd respondent maintained that he had a reasonable cause to believe that a criminal offence had been committed by the appellant. The respondents further maintained that the appellant was not arrested but was lawfully detained, and was released as soon as his statement was recorded, and that the appellant was bonded to testify and did testify in Criminal Case No.1714 of 2000. The respondents denied all allegations of malice attributed to them and urged the court to dismiss the appellant's suit
5. The appellant's suit came up for hearing on 26th March, 2002. There was no appearance for the

respondent. Hearing therefore proceeded ex-parte. The appellant testified that he was arrested from his office by CID Officers from Nairobi. He was taken to Muranga where he was placed in the cells for about an hour. Thereafter he was taken to Muthaiga Police Station where he was booked for giving false information. He spent the rest of the day and the night at the police station.

6. The following day he was taken to CID headquarters where he spent a whole day until 4.00 p.m. when he recorded a statement and was released to appear on 7th December, 2000. The appellant's bond was extended to 15th December, 2000 and then 3rd January, 2001. In May of the same year the appellant was bonded and he appeared in court as a prosecution witness. The appellant claimed that he was embarrassed and his character damaged as a result of the respondents' actions.
7. The appellant's counsel filed written submissions in the trial court in which he urged the court to find in favour of the appellant and award him general damages of Kshs.300,000/=. Counsel relied on the case of **John Kamau Icharia vs Paul Njiru** which was reported in the Daily Nation in which a sum of Kshs.520,000 was awarded as general and exemplary damages.
8. In his judgment, the trial magistrate found that the appellant was a suspect in a matter which was being investigated by the police, and that he was released after recording a statement. The trial magistrate found that the appellant's arrest was not unusual as it was done by the police in the cause of their normal duties. The trial magistrate further noted that the appellant did not plead or prove any harassment by the police, nor did the appellant plead any defamation. He therefore found that the appellant's claim was not proved and dismissed the appellant's suit.
9. Being aggrieved by that judgment, the appellant has lodged this appeal raising 4 grounds as follows:
 - (i) The learned principal magistrate erred in law in not considering that the burden of justifying an arrest and imprisonment is on the defendant and not the plaintiff.
 - (ii) The plaintiff having proved arrest and imprisonment and in the absence of the defendants the learned magistrate erred in law in not assessing damages.
 - (iii) The learned magistrate erred in law in not considering that in law, an arrest cannot be justified by suspicion. There must be reasonable and probable cause the burden to prove which is on the defendant.
 - (iv) The magistrate erred in not considering that arrest and imprisonment are harassment and an injury to one's character.
10. Parties agreed by consent to exchange and file written submissions on the basis of which the appeal was to be determined. For the appellant it was submitted that the respondent had the obligation to appear in court and justify the arrest and subsequent imprisonment of the appellant, and that the respondent having failed to do this, the trial magistrate ought to have found the appellant's arrest and imprisonment unlawful and awarded damages in his favour. It was noted that one did not need to be arrested in order for him to record a statement.
11. Further, it was maintained that one cannot be arrested in order to enable the police carry out investigations, and that a person can only be arrested on being suspected on reasonable and probable grounds to have committed an offence. It was further submitted that the trial magistrate misdirected himself in considering the appellant's case as one for defamation. The court was therefore urged to allow the appeal and award the appellant general damages.
12. For the respondents it was submitted that the appellant was briefly detained for questioning in connection with the commission of a criminal offence. He was later required to, and did testify for the prosecution. It was maintained that the onus of proof was upon the appellant who was alleging unlawful arrest and false imprisonment to prove his allegations. It was submitted that the evidence adduced by the appellant did not prove

his case and therefore his suit was properly dismissed.

13. From the pleadings it is evident that the appellant's claim against the respondent was for general damages for the tort of unlawful arrest and false imprisonment. It was clear from the appellant's evidence that he was arrested in Muranga by officers from the Criminal Investigation Department and that the appellant was detained by the officers until the following day at 5.30 p.m. when he was released after recording a statement. It is also evident that the appellant did subsequently appear in court and testified as a witness.
14. Under Section 107 of the Evidence Act,
***“(1) whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts, must prove that those facts exist.
(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”***
15. In this case, the appellant asserted that his arrest and confinement was without any reasonable cause and was in fact actuated by malice. Therefore, notwithstanding the fact that the respondents did not call any evidence in support of their defence, it was for the appellant to establish the ingredients of the tort upon which his claim was anchored. In his evidence, the appellant claimed that he was initially booked for giving false information. He produced a requisition to compel attendance under Section 22 of the Police Act, which showed that enquiries were being made by the police in connection with the offence of making a document without authority contrary to Section 357(a) of the penal code.
16. The appellant testified that he was bonded and did appear in court as a prosecution witness. The appellant did not however reveal in his evidence in the trial court, what was the charge in the criminal case, the identity of the accused, and what was the nexus between the appellant and the accused that necessitated the appellant having to testify in court.
17. An attempt was made to do this by the counsel for both parties in their submissions before this court, the appellant's counsel explaining that the appellant had prepared a power of attorney on instructions from his clients and that there was nothing unlawful about this. The respondent's counsel on the other hand, also introducing new facts by explaining that the police were investigating the commission of a criminal offence based on a power of attorney which was prepared by the appellant. These submissions were of course highly irregular and of no evidential value. The fact remains that on the evidence adduced before the trial magistrates, the appellant failed to adduce critical evidence upon which the trial court could have determined whether the actions of the police officers were reasonable or not.
18. The appellant appears to blame the respondents for failing to adduce evidence to show that the appellant's arrest was reasonable. Nonetheless, the evidence before the trial court clearly showed that the police were investigating a criminal offence, and that their investigations resulted in someone being prosecuted and the appellant testifying in court. The police have powers under the law to arrest and detain any person during the course of investigating a criminal offence. Therefore the mere arrest, confinement and interrogation did not prove any malice on the part of the officers who arrested the appellant. In the circumstances, the trial magistrate cannot be faulted for dismissing the appellant's suit. I find no substance in this appeal and do therefore dismiss it with costs.

Dated and delivered this 26th day of March, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Advocate for the appellant absent

Wairi Kamau for the respondent

Eric - Court clerk