



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**  
**CIVIL APPEAL NO.99 OF 2006**

**BONIFACE OCHIENG ONAM.....APPELLANT**

**VERSUS**

**BARNETT'S FURNISHERS LIMITED.....1ST RESPONDENT**  
**THE HON. ATTORNEY GENERAL.....2ND RESPONDENT**

**(Being an appeal from the judgment and decree of the Hon. Mrs. A.N. Ongeri P.M. in Nairobi  
Chief Magistrate's Court Civil Case No.4107 of 2002 delivered on 18th January, 2006)**

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

1. Boniface Ochieng Onam (hereinafter referred to as the appellant) was the plaintiff in the chief Magistrate's Court at Nairobi. He had sued Barnett's Furnishers Ltd and the Hon. Attorney General (hereinafter referred to as 1st and 2nd respondent), for damages for false imprisonment, unlawful arrest and confinement. The appellant's claim was denied by the respondents.

2. During the trial in the lower court, the appellant and one Caleb Ogoma testified in support of appellant's case. In short the appellant's case was that he went to the 1st respondent's premises on behalf of his girlfriend, to plead for more time for the girlfriend to make payments in respect of goods which had been sold to her on hire purchase terms. The 1st respondent detained the appellant at their premises for several hours during which he was threatened and intimidated to sign some document committing the appellant to payment. The appellant refused to sign any document. The police were later called and the appellant was escorted to Central Police Station where he was detained from 4th June, 2001, to 15th June, 2001 when he was released without any charges being preferred against him.

3. The 1st respondent did not call any evidence but the 2nd respondent testified through Job Niabo a police officer attached to Central Police Station. The witness explained that a complaint was made to the police station by one Charity Kioko an officer of 1st respondent. Acting on that complaint, the appellant was arrested from the 1st respondent's premises and taken to the police station where he was detained for investigations, in connection with the offence of fraud. The witness could not tell the court whether the appellant was taken to court.

4. Written submissions were duly filed on behalf of each party, each counsel urging the court to find in their client's favour. In her judgment the trial magistrate found that the appellant having admitted that his girlfriend had taken goods from the 1st respondent's shop, and not having called the girlfriend to testify, it was not possible to ascertain whether or not the appellant had any conspiracy to defraud the 1st respondent, and that the appellant needed to rule out criminal activity in order for the court to conclude that the respondents had acted without reasonable grounds. The trial magistrate further found that the 1st respondent was justified in calling the police, who were also justified in detaining the appellant pending investigations. The trial magistrate therefore dismissed the appellant's claim.

5. Being aggrieved by that judgment, the appellant has lodged this appeal raising 4 grounds as follows:

- (i) That the learned trial magistrate erred in law and in fact in finding that the appellant had not proved his case on a balance of probability whereas there was sufficient evidence in support of the appellant's case.
- (ii) That the trial magistrate misdirected herself on the law relating to false imprisonment, unlawful arrest

and confinement by wholly applying the law of malicious prosecution.  
(iii) That the trial magistrate erred in law by raising the standard of proof for the appellant. The trial magistrate erred in law by failing to evaluate and consider the appellant's evidence in its entirety.  
(iv) That the learned magistrate erred in law and fact by delivering a judgment that was against the weight of evidence.

6. During the hearing of the appeal, there was no appearance for 1st respondent. Counsel for the appellant reiterated that the trial court misdirected itself in considering the ingredients for malicious prosecution, whilst the appellant's claim, was for unlawful arrest and confinement. He pointed out that the appellant explained why he went to the 1st respondent's shop, and that there was no evidence that the appellant had committed any acts of fraud to justify his arrest. Nor was there any reasonable cause for the appellant being confined from 4th June 2001 to 15th June, 2001. Counsel for the appellant submitted that the trial court erred in shifting the burden of proof upon the appellant by faulting the appellant for failing to call his girlfriend as a witness, whilst not taking into account that the appellant's evidence stood unchallenged as 1st respondent did not call any evidence.

7. Counsel for the 2nd respondent conceded that the trial magistrate misdirected herself in applying the principles for malicious prosecution whilst the case before her was for false imprisonment, unlawful arrest and confinement. Counsel however maintained that the misdirection was not fatal. He submitted that the test was whether there was justification for the appellant's arrest. He submitted that the police had reason to arrest the appellant as a report regarding the commission of an offence was made to it. It was maintained that the police were entitled to hold the appellant while the investigations were ongoing. The court was therefore urged to dismiss the appeal.

8. I have carefully reconsidered and evaluated all the evidence which was adduced before the trial magistrate. It was not disputed that the appellant went to the 1st respondent's premises voluntarily. It is also not disputed that the appellant's mission was to seek indulgence on behalf of his girlfriend for more time to make payments in respect of goods the girlfriend had bought from 1st respondent on hire purchase terms. The 1st respondent appears to have taken issue with the fact that the appellant's girlfriend had moved the goods to an undisclosed destination. This was the basis of the alleged conspiracy to defraud.

9. I find that in the circumstances of this case, there was no evidence of any conspiracy to defraud, nor was there any evidence of the commission of a criminal offence. The 1st respondent had entered into a contractual relationship with the appellant's girlfriend. The appellant had approached the 1st respondent as an agent of the girlfriend to seek more time for making payment. If the intention was to defraud the 1st respondent, then no effort would have been made by the girlfriend to send the appellant to the 1st respondent to discuss repayment. I find that the trial magistrate misdirected herself in drawing an adverse inference from the appellant's failure to call his girlfriend as a witness. The evidence of the girlfriend was not necessary as it was not disputed that she had obtained goods from the 1st respondent on hire purchase, and that she had failed to pay within the agreed period, and further that she had sent the appellant to plead for more time to make payment.

10. As regards the allegation that the hire purchase goods were taken to an undisclosed destination, that was probably a breach of the contractual agreement. Nevertheless, it could not give rise to a criminal charge or penal sanctions. It is evident to me that this was a clear case in which the powers of the police were misused and abused in an attempt to enforce purely civil obligations using criminal sanctions. Moreover, even assuming that the police were investigating a charge of conspiracy to defraud, they had no reason to continue detaining the appellant for a period of more than 48 hours.

11. As regards general damages, I have taken note of the submissions that were made before the trial magistrate in this regard. I find that an award of Kshs.100,000/= would be appropriate compensation to the appellant for his unlawful arrest and confinement.

12. The upshot of the above is that I allow this appeal, set aside the judgment of the trial magistrate and substitute thereof a judgment in favour of the appellant as against the 1st and 2nd respondent's jointly for the sum of Kshs.100,000/=. I award the appellant costs in this appeal and costs of the lower court.

Those shall be the orders of this court.

Dated and delivered this 6th day of December, 2010

H.  
JUDGE

M.

OKWENGU

In the presence of:  
Omulama H/B for Owiny for the appellant  
Advocates for the respondents absent  
B. Kosgei - Court clerk