REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Civil Appeal 93 "B" of 200

ALFRED SHITSIMI ……....……...…PLAINTIFF

VRS

DISHON MUKONABI ……...…..… 1ST RESPONDENTS

PATRICK JUMA ……..…… 2ND RESPONDENTS

JEREMIAH JAMES …….…….. 3RD RESPONDENT

JUDGEMENT

The respondents herein had sued the appellant, on the grounds that they had been wrongfully arrested, falsely imprisoned and deprived of both their constitutional and legal rights to freedom and liberty. The respondents did claim aggravated and /or punitive general damages against the appellant because, in their view, the appellant had made an unlawful and malicious report, which culminated in the respondents unlawful arrests, unlawful confinement and false imprisonment.

As a consequence of the said arrest and confinement, the respondents asserted that they suffered mental anguish, degradation and deprivation of their constitutional and legal rights.

After a full trial, the appellant was found liable. He was ordered to pay compensation to the respondents, and the said compensation was assessed in the sum of Kshs. 75,000. The appellant was also ordered to pay costs of the suit.

In his appeal to this court, the appellant submitted that the claim against him ought to have been dismissed because the Attorney General had not been made a party to the case, yet, the matters complained of were within the province of the police. He said that it was the police who had arrested and confined the respondents.

Secondly, the appellant faulted the jud gement against him because in his view, the respondents' plaint did not comply with the provisions of Order 6 rule 8B of the Civil Procedure Rules. In particular, the plaint did not cite the particulars, if any, of the alleged malice which the appellant had ,when he made a report to the police.

In any event, the appellant believes that he cannot be said to have been malicious when he did disclose to the trial court, the sources of the information which he gave to the police. He submitted that DW2 and DW3 did confirm to the trial court that it is they that gave to the appellant the information. Therefore, the

appellant insists that the respondents failed to prove that the report made by the appellant was malicious.

The appellant also submitted that the police did carry out their own investigations, after they had received his report. In the circumstances, the appellant feels that he ought not to have been held accountable for the actions of the police.

When the appeal came up for hearing, the respondents and their advocate were not in court. However, as they had been duly served with the Hearing Notice, I allowed the appellant to proceed with his appeal, notwithstanding the absence of the respondents.

Regardless of the absence of any input from the respondents, I am obliged to consider the merits of the appeal. In other words, the appeal cannot simply be allowed because the respondents did not make submissions thereon.

In re-evaluating the evidence on record, I note that only the 1st respondent, Dishon Mukonambi, testified on behalf of the plaintiffs, during the trial. He was PW1.

In his evidence, PW1 said that the appellant herein reported to the police that he (PW1) was a suspect, in relation to the break-in and theft from the shop belonging to the appellant. As a result of that report, the 1st respondent was arrested and then held at the Kabras Police Post. He was held in the cells for 3 days, after which he and the other respondents were released without any charges being preferred against them.

PW1 testified that the allegations made by the appellant were false, as he, (PW1) had never before been a thief nor had he ever been arrested.

As a consequence, PW1 said that his reputation was dented. He also suffered psychological torture. He therefore asked the trial court to order the appellant herein to compensate him.

In his evidence, the appellant herein said that he reported to the police, ten days before his shop was broken into. He did so after DW2 and DW3 told him that he would receive “visitors”.

DW2, Nelson Shitoshe, said to the trial court that he did alert the appellant that he could be attacked at any time, if he continued to stop tractors from carrying sugar cane. According to DW2, he alerted the appellant after he (DW2) had declined the invitation of PW1, to be one of the persons who were supposed to attack the appellant.

DW3, Zakayo Avonde, testified that the 1st respondent, Dishon Mukonabi, had told him to attack the appellant because the appellant had stoped Dishon from carrying sugar cane from the shamba of the appellant’s neighbour. Instead of attacking the appellant, DW3 made a report to the Assistant Chief. He did so on 21st June, 1997.

DW3 also testified that on 10th July, 1997, he reported to the police, and he recorded a statement.

Those dates are significant because the appellants’ shop was broken into on the night of 10th/11th July, 1997.

DW4, WILLIAM MARK, was the Assistant Chief of Samitsi sub-location. He told the trial court that on 21st June, 1997, he received a report from the appellant, that his life had been threatened. The appellant told DW4 that he had received the report about the threat to his life, from DW2 and DW3.

DW4 summoned DW2 and DW3, who went and told him what they knew about the threats directed against the appellant. DW4 thereafter referred both DW2 and DW3 to the Police Station.

It is after that that the appellant’s shop was broken into. DW4 made a report about the break-in, to the police.

DW4 did confirm that both the appellant and DW3 wrote statements at the Police Station.

In the light of that evidence, I find that it was not only the appellant who made a report to the Police Station. DW3 and DW4 also made reports to the police.

And according to DW4, the police carried out their own investigations before they arrested the respondents. The respondents did not challenge DW4's said assertions. I therefore find no reason to doubt the contention that the police arrested the respondents simply because the appellant had reported that they were suspects.

I also find that on the basis of the information which DW2 and DW3 gave to the appellant, he had reasonable grounds upon which to lodge a report with the police, regarding the threat to his life.

As the appellant made the reports prior to the break-in into his shop, and as the respondents were not arrested until after about 20 days, I find and hold that the respondents failed to demonstrate that their arrest had any direct nexus with the report made by the appellant. On a balance of probability, I find it to be more probable that the police carried out their own investigations, in the intervening period, before arresting the respondents.

Another vital issue in this appeal is the responsibility, if any, of the appellant, for the actions of the police. I say so because the respondents clearly acknowledged that they were arrested by the police, and also that it is the said police who confined them in the cells at the Kabras Police Post.

As those actions were taken by the police, the respondents should have, but failed, to demonstrate how or why the appellant was liable for the same.

In *JEDIAL NYAGA Vs SILAS MUCHEKE, CIVIL APPEAL NO. 59 of 1987 (at Nyeri),* the Court of Appeal noted that the appellant before them had reported to the police, that his crop and his trees were damaged by the respondent. The Court then said;

"*The police investigated the complaint and arrested the respondent. The arrest by the police could not be attributed to the appellant. The position would have been different if the appellant had arrested the respondent himself or that the report was false.*

Police action cannot be attributed to the appellant who had no authority over them."

In effect, the appellant herein cannot have been liable for the arrest and confinement of respondents, because those actions were undertaken by the police.

But, did not the appellant make a false report to the police? Regrettably, the particulars of the report which the appellant made to the police are not available to this court. I therefore do not know if the appellant only reported that the respondents were suspects in the break-in into the shop.

And even if the appellant did report that he suspected the respondents to be suspects in the break-in, the respondents have not demonstrated that that report was false.

However, even if the said report had been shown to have been false, the respondents have not shown that their arrest was attributable only to the report made by the appellant. I so find because DW3 and DW4 also confirmed having made reports to the police. It is therefore possible that, apart from carrying out their investigations, the police actions were informed by the reports from DW3 and DW4.

Finally, the learned Trial Magistrate did not specify what the compensation he awarded was for. He appears to have been alluding to defamation, when he said;

"*Plaintiffs reputation was seriously injured because as an engineer that could affect his job as he would be treated with suspicion."*

If the compensation was for defamation that was an error of law, because the plaintiffs did not set out a cause of action under that head.

Furthermore, the respondents did not address the court on the issue of the quantum of damages they were claiming. And the learned trial court also did not give any indication, in the judgement, as to the manner in which the sum of Kshs. 75,000 was arrived at. That was an error.

For all those reasons, the appeal is allowed. The judgement dated 30th October, 2000 is set aside as a whole. In its place, I now order that the suit filed by the respondent herein be dismissed with costs. The appellant is also awarded the costs of this appeal.

Dated, Signed and Delivered at Kakamega, this 30th day of April, 2009.

FRED A. OCHIENG

JUDGE