



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI MILIMANI COMMERCIAL COURTS**  
**Civil Case 1078 of 2005**

**SIMON KAMERE.....PLAINTIFF/APPLICANT**

**VERSUS**

**THE ATTORNEY-GENERAL.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**THE RESIDENT MAGISTRATE**

**GITHUNGURI LAW COURTS.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**P.S.PROVINCIAL ADMINISTRATORS &**

**INTERNAL SECURITY.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**JUDGMENT**

1. The plaintiff herein **Simon Kamere** is a prominent advocate of the High Court of Kenya practicing as such in the name and style of Kamere & Company Advocates. He instituted this suit by way of plaint dated the 31/08/2005 and filed in court on 1/09/2005.

2. The plaintiff avers that on or about 5/03/2004, while he was going about his official duties at the Githunguri Law Courts Registry the 2<sup>nd</sup> Defendant, in the company of an A.P. wrongfully and forcibly arrested the plaintiff frog-marched him to the police landrover which was waiting outside the Githunguri Law Courts and drove him to the District Officer's office where the plaintiff was detained and interrogated for several hours thereby causing the plaintiff to suffer loss and damage. The plaintiff also avers that his arrest and detention and subsequent interrogation were actuated by spite and malice on the part of the Defendants and in particular by the 2<sup>nd</sup> defendant:?

**(i) *Suspiciously enquiring the Plaintiff's business when he was lawfully in the Civil Registry premises.***

**(ii) *Intentionally and deliberately harassing the Plaintiff despite the Plaintiff identifying himself and his business in the Civil Registry.***

- (iii) *Failing to heed to the Plaintiff's explanation without any reasonable ground of rejecting the same.*
- (iv) *Failing to heed to the explanation given by the registry staff concerning the Plaintiff's innocence.*
- (v) *Colluding with the District Officer to have him illegally arrested and molested.*
- (vi) *Failing to apologize and/or offer explanation.*

3. The plaintiff also says that the 3<sup>rd</sup> defendant was malicious by reason of:?

- i. *Arresting the Plaintiff when he had not committed an offence to warrant his arrest.*
- ii. *Arresting the Plaintiff when he was going about his lawful duties.*
- iii. *Humiliating the Plaintiff.*

and he says that as a result of the malicious, wrongful and forcible actions of the Defendants, the plaintiff has suffered loss and damage, reasons wherefore, the plaintiff prays that judgment be entered against the Defendant (sic) for:-

- (a) *General damages for pain and suffering and loss of amenities.*
- (b) *Exemplary and/or aggravated damages*
- (c) *Cost of the suit*
- (d) *Interest on (a), (b) and (c) at court rates*
- (e) *Any other relief that the Honourable Court may deem fit to grant.*

4. The plaintiff gave evidence and told the court that he became an Advocate of the High Court of Kenya on 5/9/1979 having been admitted to the Bar of England and Wales in November 1976 through Lincoln's Inn and that since 15/05/1979, he has been practicing law in Kenya and principally in Nairobi and Nakuru and also in all other major towns within the Republic except Kisumu.

5. The plaintiff recalled how on 5/03/2004, he went to the Githunguri Law Courts with instructions from his client, one **James Njenga Kuria** to peruse the court file in **Probate and Administration Succession Cause No. 9 of 1996 – In the matter of the Estate of Kiarie Waikuyu**. The plaintiff stated that it was necessary for him to peruse the said court file because his client had no papers concerning the matter and accordingly and in Order to facilitate the perusal, he wrote a letter to the Githunguri Law Courts and paid the perusal fee of Kshs.50/=. The letter of request dated 5/03/2004 was produced as PExhibit 1 while the original receipt for the perusal fee being receipt No. M254722 dated 5/03/2005, (not 5/03/2004) was produced as PExhibit 2. The plaintiff explained that the receipt should have been dated 5/03/2004 but not 5/3/2005 and that he did not notice the error until the date of hearing of his case.

6. The plaintiff further stated that at about 1.45 pm on the 5/03/2004, he was ushered into the court registry by the Executive Officer and given a chair to sit on as the Executive Officer looked for the relevant file and that it was then that he heard a female voice from behind him demanding to know who he was and who had given him authority to enter the registry. The plaintiff said he stood up from the chair, identified himself to that enquiring lady and also said by whose authority he was in the court

registry. He said that apart from the oral identification he also handed his business card to the lady before the lady left; and that the lady did not identify herself to the plaintiff, but according to the plaintiff, he thought the lady was a person of high standing.

7. The plaintiff went on to state that after he paid the perusal fee, and as he now perused the file an Administration Police (AP) man in full uniform and armed with a rifle, accompanied by a man in civilian clothes entered the registry and also demanded through the man in civilian clothes, to know who the plaintiff was and what he was doing inside the court registry. Though somewhat surprised by the question, the plaintiff said he identified himself to the two men but not before both the AP and the civilian had asked him to stand up, and grabbed the file the plaintiff was perusing. The plaintiff also stated that when he sought to know what wrong he had committed, the AP became agitated and harshly ordered the plaintiff to stand up.

8. The plaintiff explained that this exchange between himself and the AP and companion drew the attention of the clerical staff who had all streamed back into the registry after lunch and that despite the clerk's pleas to the AP to leave the plaintiff alone, the plaintiff was taken to a waiting white GK landrover, ordered to enter the same as members of the public stared in disbelief and surprise at what was happening. He also stated that the registry staff actually came out of the registry to watch the unfolding drama.

9. In his further testimony, the plaintiff stated that he was then driven to the offices of the District Officer (DO) nearby and on arrival, there were some two or three people talking outside the DO's office. That further, one of the three or so people outside the DO's office introduced himself to the plaintiff as the area DO and also informed the plaintiff that the plaintiff had been arrested on the instructions and at the request of the Githunguri Law Courts Magistrate who had informed the DO that the plaintiff who was found in the court registry had not only refused to identify himself to the Magistrate but that he had also refused to leave the registry on being asked to do so.

10. The plaintiff also told the court that after he identified himself to the DO and also disputed the story given to him by the Magistrate, the DO softened somewhat, though of course according to the Plaintiff, the damage had already been done since the plaintiff was interrogated outside the DO's office and in the full glare of members of the public. The plaintiff said that after this interrogation, he drove together with the DO back to the magistrate's chambers where he (plaintiff) tried to exonerate himself from the accusations made by the magistrate, and showed her PExhibits 1 and 2 but that the magistrate only said she would take action against the staff who had allowed the plaintiff into the registry. That the magistrate offered no apology whatsoever for the humiliating treatment accorded to the Plaintiff. The plaintiff was thereafter set free.

11. It was also the plaintiff's evidence that immediately he left the magistrate's chambers, he went back to the court registry in order to complete perusal of the court file in P & A Succession Cause No. 9 of 1996 and that as he walked between the magistrate's chambers and the registry, all the clerks, the EO and the Court Prosecutors were all out there seeking to know why he had been arrested. The plaintiff produced as PExhibit 3, handwritten notes he made as he perused the file. Later the plaintiff said he made a complaint about the magistrate to the Judicial Service Commission vide his letter dated 15/03/2004 and produced as PExhibit 4. The response to that letter, dated 26/03/2004 was written by the Hon. the Chief Justice, Hon. Mr. J.E. Gicheru. The reply produced as PExhibit 5 and addressed personally to the plaintiff read:-

***“Mr. Simon Kamere***

***Advocate***

***P.O. Box 72372***

**NAIROBI**

*Dear Sir,*

***COMPLAINT AGAINST MS C.V. GOMBE***

***RESIDENT MAGISTRATE, GITHUNGURI***

*Your letter Ref No.SK/15/2004 dated 15<sup>th</sup> March, 2004 on the above subject refers.*

*Action has already been taken against the Magistrate complained against.*

*Yours faithfully*

*Signed*

***J.E. GICHERU***

***CHIEF JUSTICE***

12. The plaintiff stated that he was greatly embarrassed and humiliated before members of the public and suffered mental anguish as a result of the experience of the events of the afternoon of 5/03/2004. He said that the only reason why he was allowed into the court registry was because of his long and well known record as an advocate of the High Court of Kenya and also because of his age which he gave as 58 years as at time of hearing of this case on 2/04/2008. The plaintiff also explained that in his long practice as an Advocate of the High Court of Kenya, he was not aware of any rules barring an advocate from entering any court registry, including the security registry at the High Court here in Nairobi. To confirm that indeed he had instructions to deal with P & A Number 9 of 1996, the plaintiff produced in evidence as PExhibit 6 a copy of the Certificate of Confirmation of Grant issued on 9/05/1996.

13. The defendants did not adduce any oral evidence but had filed defence on 28/10/2005 and admitted that the plaintiff was indeed arrested and escorted to the DO's office for questioning, but denied that they acted wrongfully, or that they frog marched the plaintiff to the DO's office. The defendants also denied any malice or spite on their part during the arrest and escort of the plaintiff to the DO's offices and averred that since the plaintiff had failed to properly identify himself and for the fact that he was a stranger in a prohibited area, namely the court registry at the wrong time made it lawful and reasonable for the plaintiff to be arrested and escorted to the DO's office for interrogation. The defendants also averred that the plaintiff's suit was bad in law and time barred, having been commenced outside the limitation period under Chapter 39 of the Laws of Kenya and in particular section 3(1) thereof. The relevant section provides that:?

***“3(1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.”***

14. The parties' advocates also made written submissions. In their submissions, Counsel for the defendant said that the names of the 3<sup>rd</sup> and 4<sup>th</sup> defendants ought to be struck out from the proceedings by virtue of section 12(1) of the Government Proceedings Act, Chapter 40 Laws of Kenya which reads:-

***“12(1) Subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney General, as the case may be.” (Emphasis is***

mine).

15. It was also submitted that the plaintiffs suit must fail by virtue of section 3(1) of the **Public Authorities Limitation of Actions Act, Cap 39 of the Laws of Kenya**, details whereof have already been set out above. The defendants submitted that whereas the cause of action herein allegedly arose on 5/03/2004, the plaintiff did not file suit until 1/09/2005. That the suit should have been filed by 6/03/2005. The defendants submitted that having timeously given notice of intention to sue, there is no excuse, and that none has been given by the plaintiff for the six months' delay in filing suit.

16. In her written submissions, Mrs. W.G. Wambugu contended on behalf of the plaintiff that the plaintiff had proved that following the unlawful and/or false arrest, the plaintiff who is an advocate of the High Court of Kenya was not only embarrassed, but was humiliated in front of members of the public without any probable, reasonable and justifiable cause, and urged the court to award exemplary damages; especially because the plaintiff was eventually released without charge.

17. Counsel for the plaintiff cited a number of authorities in support of their client's case. The one from Halisbury's Laws of England 4<sup>th</sup> Edition Volume 45(2) paragraph 442 at page 299 which sets out the gist of the claim of false imprisonment says:?

***“The gist of the claim of false imprisonment is the mere imprisonment. The claimant need not to prove that the imprisonment was unlawful or malicious, but established a prima facie case if he proves that he was imprisoned by the defendant. The onus then lies on the Defendant of proving justification.”***

On this issue of justification and the burden of proof, the plaintiff's counsel also cited two other authorities.

- ***Sekaddu –vs- Ssebadduka [1968] EA 213 and***
- ***West Nile District Administration –vs- Dritoo [1969] EA 324***

18. In the **Sekaddu case**, the appellant who, after being released, sued the respondent for damages for false imprisonment. In defence, the Respondent said he was not responsible for police actions, but made no attempt to justify the arrest. On appeal, the court held, *inter alia*, first that if a person sets the law in motion and causes another to be detained by the police it is no defence that the police thereby become responsible for the continued detention and secondly that once the detention or imprisonment is established the onus shifts to the defendant to show that it was reasonably justifiable.

19. In the **West Nile case**, the appellant unlawfully arrested and falsely imprisoned the respondent between July 6 and August 24, 1966. In the Uganda High Court, the respondent was awarded damages (see [1968] EA 428). On appeal, the issue that arose for determination was whether the appellant could be held vicariously liable for the torts of the Chief of Police. It was held that the Chief of Police was an agent of the Administration and the Administration was thus responsible for the acts of the Chief of Police. In my view, the principles set out in the **Sekudda case** are the law, and I shall apply the same in determining this case.

20. On quantum of damages, the plaintiff, through his counsel, asked for Kshs.5,000,000/= made up as follows:-

- a. ***General damages.....Kshs.3,000,000.00***
- b. ***Exemplary/Punitive Damages.....Kshs.2,000,000.00***

***Total.....Kshs.5,000,000.00***

The proposal for Kshs.5,000,000 was supported by two authorities:?

(i) *Nairobi HCCC No.838 of 2003 – Samuel Muchiri W’Njuguna –vs- The Hon. the Attorney General and*

(ii) *HCCC No. 134 of 1998 – Caleb Gwahono Nanganers –vs- The Attorney-General.*

21. In the **W’Njuguna case**, the defendant, who was a businessman filed suit seeking damages for unlawful arrest, wrongful imprisonment and malicious prosecution. An award of Kshs.2,000,000/= as General Damages and a further Kshs.2,000,000/= as aggravated damages was made. In the **Gwahona case**, the court set out the principle to be applied in awarding punitive or exemplary damages, and this is that

**“--- the party to be subjected to this should be shown to have been reckless and outrageously negligent or has misconduct himself in such a manner as to attract punishment in damages.”**

22. In the instant case, the court will carefully consider whether indeed the defendants are guilty of reckless and outrageous and negligent conduct so as to attract punitive damages. As earlier pointed out, the defendants do not deny the arrest and escort of the plaintiff to the DO’s office from the Githunguri Law Courts, but they deny that the arrest was unlawful. The defendants also aver that the arrest was lawful because the plaintiff had refused to properly identify himself to the Githunguri Magistrate when he (plaintiff) was found in the court registry.

23. Though issues were agreed and filed in court on 30/06/2006 broadly I think that from the pleadings, the evidence and the submissions, the following are the main issues for determination:-

**a. whether the plaintiff’s suit is bad in law for the reason that it was time barred by the provisions of section 3(1) of Cap 39 of the Laws of Kenya,**

**b. whether the inclusion of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in this matter is superfluous in view of section 12(1) of the Government Proceedings Act and**

**c. if the answers to (a) and (b) are in the negative has the plaintiff proved his case on a balance of probabilities and if so, what is the quantum of damages payable to him.**

24. In dealing with the three issues, it is to be noted that the plaintiff did not reply to the defendant’s contention that his suit was time barred. The issue was not taken up either in evidence in chief or in the written submissions. The court however notes that in his Reply to Defence dated 14.11.2005 and filed in court on 17/11/2005, the plaintiff stated at paragraph 4 thereof that the plaintiff’s suit was properly before court because the Defendant agreed to extend the time for filing of the suit. Although the plaintiff averred that he would tender documents at the hearing of the suit to prove such agreement by the defendant, no such document(s) was (were) adduced in evidence nor are they available on the court file. It is clear to me therefore that, without the evidence that the defendant either agreed to the suit being filed out of time or the plaintiff obtained leave of the court to file suit out of time, this suit is time barred. The suit ought to have been filed on or before 5/03/2005, but this did not happen until 1/09/2005. No explanation whatsoever is given for this delay of six months. For this reason, I find and hold that the plaintiff’s suit is improperly before the court and the only option left for me is to strike out the suit.

25. As regards the issue of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, I do agree with counsel for the defendant that it was sufficient for the plaintiff to sue the Attorney General in accordance with section 12(1) of the Government Proceedings Act, Cap 40 Laws of Kenya. The detailed provisions of the subsection have already been set out above. The provisions are in mandatory terms. Both the Resident Magistrate,

Githunguri and the P/S are officers of the Government working under the Judiciary which is the third arm of the Government. It was therefore not necessary to include the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in this matter.

26. What is the position of the plaintiff's claim had been properly and timeously instituted? There is no doubt in my mind that the arrest of the plaintiff was not justifiable. The plaintiff clearly stated on oath that when the magistrate found him in the court registry and asked him to identify himself, the plaintiff graciously did so and even gave her his business card. Such an explanation which has not been rebutted by the defendant was, in my view proper identification by the plaintiff, and the said magistrate ought not to have gone ahead to ask the DO to send AP's to arrest and humiliate the plaintiff. Further, the fact that disciplinary action was taken against the magistrate by the Judicial Service Commission after the plaintiff raised his complaint with the Hon. the Chief Justice in writing, is a clear indication that the magistrate's conduct which led to the arrest of the plaintiff and subsequent detention in the car and appearance before the DO was capricious, reckless and outrageously negligent. The court believes that an advocate of the plaintiff's standing could not have been a stranger to the magistrate at Githunguri and more particularly after the plaintiff said who he was and also gave out his business card to the magistrate. My conclusion that the magistrate was capricious reckless and outrageously negligent is supported by the fact that even when the DO, the plaintiff and the AP's went to the magistrate's chambers where the plaintiff tried to show that he was at the court registry in the course of duty, the magistrate did not apologize to the plaintiff. There was therefore in my view, bad faith in the plaintiff's arrest even when it was clear that he had committed no wrong.

27. As to damages, the defendant made no proposals on what the plaintiff should be paid if his suit were to succeed. I have considered the proposals made by the plaintiff's counsel and the authorities in support thereof, and I am persuaded that if this suit had succeeded, I would have awarded costs as follows:-

**a. General damages.....Kshs.3,000,000.00**

**b. Exemplary/Punitive Damages.....Kshs.2,000,000.00**

**Total      Kshs.5,000,000.00**

28. I would also have awarded the plaintiff costs of the suit and interest on damages and costs at court rates.

30. In the result, the plaintiff's suit is struck out but with no orders as to costs. Right of Appeal within 28 days.

Orders accordingly.

Dated and delivered at Nairobi this 9<sup>th</sup> day of May 2008.

**R.N. SITATI**

**JUDGE**

Delivered in the presence of:?