



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Appeal 114 of 2006

JOSEPH KAVINDU MUTETI APPELLANT

VERSUS

ATTORNEY GENERAL RESPONDENT

JUDGMENT

1. The Appellant was the Plaintiff in Mwingi SRM'S Court Civil Case NO. 81 of 2002. In his plaint dated 15/10/2002 and filed on the same date, he averred that on 23/8/2002 at 1.00 p.m he was arrested by police officers from Kyuso Police Station upon a complaint lodged by one Mbiti Ngombo that the Appellant **“was working upon or encroaching upon a piece of land belonging to the said Mbiti Ngombo.”** That the Appellant was thereafter detained at Kyuso Police Station until 2 p.m. on 26/8/2002 when he was released without any charges being preferred against him. That as a result thereof he suffered severe shock and mental anguish; that he was subjected to humiliation and disgrace and that he was brought into ridicule and contempt and further that he was injured in his credit, character and reputation and has been brought to public scandal, ridicule and contempt. He therefore claimed general damages for false imprisonment and costs of the suit.
2. The Attorney General in a Statement of Defence dated 19/11/2002 denied all the allegations contained in the Plaint including the alleged damage suffered by the Appellant. In the alternative, it was pleaded that the arrest and detention, if at all, was carried out with probable, reasonable and good cause as the Appellant had committed **“an arrestable offence without warrant of arrest as is expressly specified by law.”**
3. The hearing of the suit commenced on 8/6/2005 before Mr Odenyo Esq, SRM and PW1, the Appellant said that he was fencing off his land on 23/8/2002 when one Musee Mbiti Ngomo came and told him to stop doing so because the land belonged to the latter. The Appellant refused to do so and on his way to Kyuso market, he was arrested allegedly for fencing Ngomo's land and he was kept in custody for four (4) days. While in custody, he said that he was subjected to hardship as he slept on a bare floor; drew water for the police station and mopped floors and washed the station vehicle and yet there was no good reason why he was incarcerated. He wanted compensation for all his suffering while in custody as no charges were subsequently laid upon him after his arrest.
4. PW2, John Kabwere Kithome stated that on 22/8/2002 he was amongst persons who were assisting

the Appellant in fencing his land when Musee Mbiti Ngumo intervened and claimed that it was his land that was being fenced. He threatened the Appellant with dire consequences if he did not stop the fencing. The next day, the Appellant was arrested while in the company of PW2 but was released days later.

5. PW3, Agnes Kalundi Kavindu, wife of the Appellant confirmed that he was detained for 2 days before he was released.

6. The Respondent Attorney-General called no evidence and in a judgment delivered on 5/7/2006, the learned magistrate dismissed the suit because it had not been proved on a balance of probabilities. The Memorandum of Appeal lists the following grounds of appeal:

i. That the learned Senior Resident Magistrate erred in law in holding that malice on the part of the police was not proved yet malice is not a factor in the tort of false imprisonment.

ii. That the learned Senior Resident Magistrate erred in law and fact in holding that MBITI NGOMBO, the complainant in the matter leading to the arrest and detention of the appellant, was not made a party to the proceedings, yet the appellant's detention was by the police and not the said MBITI NGOMBO.

iii. That the learned Senior Resident Magistrate erred in law and fact in failing to find or appreciate that the appellant's liberty or freedom of movement was restrained by the police and the appellant was not in a position to leave the police station unless released by the police.

iv. That the learned Senior Resident Magistrate erred in law and fact in failing to find that the State, through the police, restrained the Appellant and denied him his freedom of movement or liberty for four days.

v. That the learned Senior Resident Magistrate erred in law and fact in failing to find that the Respondent did not lead any evidence to justify the said detention of the Appellant.

vi. That the learned Senior Resident Magistrate erred in law and fact in failing to find that the Appellant's evidence was incontroverted by the State Respondent.

vii. That the learned Senior Resident Magistrate's decision is against the weight of the evidence tendered by the appellant.

viii. That the learned Senior Resident Magistrate failed to appreciate the Appellant's case and the evidence adduced in support of the charge.

ix. That the learned Senior Resident Magistrate's decision was based on the wrong principles.

x. That the learned Senior Resident Magistrate erred in law and fact in failing to find in favour of the Appellant.

xi. That the learned Senior Resident Magistrate erred in law and fact in failing to find that the tort of false imprisonment had been proved by the Appellant against the Respondent.

xii. That the learned Senior Magistrate erred in law and fact in basing his decision on irrelevant and extraneous circumstances.

7. It is clear that the grounds of appeal can be summarized into one simple question; did the Appellant prove the tort of false imprisonment and was he entitled to any damages as a result thereof?

8. I have heard the submissions by Mr Muli for the Appellant and read the authority of Teresia Mwana Nyaga vs G.K. Mutunga & Others H.C.C.C No.1444/1997 as well as Anne Njogu & 5 Others vs R Misc.

9. It is admitted in the Statement of Defence that the arrest of the Appellant was made but with probable, reasonable and good cause. However, the Respondent failed to show that fact to counter the clear evidence on record that the Appellant was arrested without probable reasonable and good cause. As Githinki J (as he then was) stated in Teresia Mwana Nyaga (supra); in a case such as this one, the Respondents had to “**show that they had an honest belief founded upon reasonable grounds which if true would lead an ordinary prudent and cautious person placed in the position of defendants to conclude that plaintiff had committed...**” an offence. I agree.

10. In this case, the only evidence on record was that of the Appellant. The Respondent tendered no evidence and the learned magistrate in his judgment went to great lengths to speculate as to why the Appellant was released. He made a curious statement which had no basis in evidence. He rendered himself thus:-

“...Plaintiff admits that several of his relatives came to the police station and talked with the OCS. What could they have talked with the OCS? What could they have been talking about if not for the release of their kin?... I find that the Plaintiff has not proved any malice on the part of the police officers who arrested him.”

11. None of the above matters were canvassed by the Respondent in the way of properly admissible evidence and it was not open to the trial court to argue a case for an absent Respondent. The fact remains that on the record and the clear evidence is that neither the police nor Mbiti Ngomo had reason to have the Appellant incarcerated and his detention was unlawful. This explains why he was not arraigned in any court within 24 hours as is the law in Section 72 (3) (b) of the Constitution. Once the detention is unconstitutional, I do not see how it can be validated unless the detention is explained away in a lawful manner. In this case, no evidence has been tendered in that regard.

12. As the first appellate court, this court is entitled to examine and evaluate the evidence on record without regard to the findings of the trial court and so I have done and reached my own decision that on a balance of probabilities the tort of false imprisonment has been proved in this case. The Appeal has to be allowed because of that finding.

13. What is a proper award in damages? I have come across the decision of Khamoni J in John Kharia vs Paul Njiru & Ano. H.C.C.C 1774/94 where the learned judge awarded Kshs.620,000/= for unlawful arrest, wrongful confinement and exemplary damages. In Wanyiru Kihoro vs AG, C.A. 151/1988 the Appellant was awarded Kshs.400,000/=. Githinji J in Teresia Mwana Nyaga distinguished both authorities as I also do because the circumstances and periods of arrest and detention were wholly different. I would therefore follow Teresia Mwana Nyaga and award a global figure of Kshs.200,000/= as general damages. Costs of the suit in the subordinate court and on appeal shall be paid to the Appellant.

14. The Appeal is allowed in the above terms.

15. Orders accordingly.

Dated and delivered at Machakos this 2nd day of **December** 2008.

ISAAC LENAOLA

JUDGE

In presence of: Mr Makau Mutua h/b for Mr Musyoka for Appellant

ISAAC LENAOLA

JUDGE