



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**H.C.C.A. NO. 224 OF 2000**

**SOLOMON NDICHU MUIRURI .....APPELLANT**

**VERSUS**

**DAVID MUREBU WAIHARO .....RESPONDENT**

**JUDGMENT**

This is an appeal from the Judgment of the Resident Magistrate's Court in Kiambu SRMCC No. 1772 of 1996 (Hon. J.G. Kingori, RM) delivered on April 7, 2000. The Respondent/Plaintiff in the lower Court) had sued the appellant, a Chief of Githunguri Location, for unlawful arrest, assault, illegal confinement and gross inhuman treatment over what he described was a purely civil dispute between him and his mother. The lower Court found for the Respondent and awarded him shs150,000/= in general damages and shs10,000/= exemplary damages. Aggrieved by that decision, he has appealed to this Court, outlining three grounds of appeal which may be summarized as follows:-

1. The lower Court's decision was against the evidence adduced;
2. The Appellant could not be held vicariously liable where the primary tortfeasers were not enjoined in the suit; and
3. Damages awarded were grossly exorbitant.

I will consider each of these grounds separately:

1. Evidence Having examined the record of proceedings in the lower Court, I am satisfied that there is no basis to the Appellant's contention that the evidence adduced in the Court did not support the Court's conclusion that the Appellant was vicariously liable for the unlawful acts of his two Administration Police Officers who, acting on the Appellant's instructions and orders, unlawfully arrested, detained and assaulted, and subjected the Respondent to gross inhuman treatment. The Respondent had called four witnesses, and his evidence was supported by one independent eyewitness (P.W 2) as well as P.W.2 who was handcuffed with him by the APs. The learned Magistrate chose to believe these witnesses whose evidence was consistent, and strong. The lower Court found as follows:

“Having been unlawfully arrested, the plaintiff was unlawfully confined in a most inhuman way by being handcuffed to high window grills in a standing position for a good 9 hours. During this period, the Plaintiff excreted and urinated on himself – a thing, I agree, must have occasioned him

grave embarrassment as members of the public could watch him through the window. The humiliation continued as he was walked all the way to the APs Post. It was aggravated by being handcuffed to a drunk fellow who was later called to testify as P.W.3. They remained in that position throughout the night and on the following day were led to Githunguri still in handcuffs. At the office of the defendant the plaintiff remained confined to an embarrassing position of squatting from 9 a.m. to 2 p.m. when he was released. The plaintiff was not fed during this period which no doubt added to his suffering. Finally the plaintiff was released without any charges...”

The Magistrate went on to reject the Defendant (Appellant’s) testimony as “untruth and contradictory.”

I am satisfied that the lower Court acted properly in considering the evidence before it

### **. 2.Vicarious Liability**

The Appellant’s Counsel submitted that the Attorney General should have been sued, and should have been held vicariously liable for the acts of the Appellant, a Government Servant. This argument is not based on the grounds of appeal outlined in the Memorandum. There is no such ground of appeal, and cannot be relied at this stage. In any event, the plaintiff had the right to sue the defendant in his personal capacity (see **John Kamau Icharia v. Paul Njiru HCCC1774/94, Nairobi**) and it was for the defendant to enjoin the Attorney General if he so wished. Counsel also argued that the primary tortfeasers – the two APs – had not been sued, and hence, their boss, the Chief (Appellant) could not be held vicariously liable. He provided no authority to support his argument. There is no basis to that argument, the lower Court having correctly found that the Appellant was liable for the actions of his employees.

### **3.Damages**

In awarding the damages, the lower court considered the case of Icharia (Supra). I believe it was guided properly. I find no reason to interfere with the award.

Accordingly, and for reasons outlined, this appeal is dismissed with costs to the Respondent. Dated and delivered at Nairobi this 27th Day of April 2004

**ALNASHIR VISRAM**

**JUDGE**