



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO.14 OF 1999

MOMBASA DEVELOPMENT 1ST PLAINTIFF

JOSEPH MBUGUA GICHANGA 2ND PLAINTIFF

- versus -

THE ATTORNEY GENERAL 1ST DEFENDANT

THE COMMISSIONER OF POLICE 2ND DEFENDANT

THE COMMISSIONER OF CUSTOMS & EXCISE 3RD DEFENDANT

J U D G E M E N T

This matter has a long history. It was a case brought by the two Plaintiffs against the Attorney General, the Commissioner of Police and the Commissioner of Customs for damages based on wrongful detention, conversion and or detainee and false and malicious prosecution.

The first plaintiff was trading in importation of motor vehicles from Japan and on such one importation of about 13 motor vehicles the third Defendant on 3-8-87 seized the same by issuance of seizure notices Numbers 5115, 5116, 5117, 5118, 1119 and removed them from Plaintiff's custody, care and management purporting to act under S.185 and S.196 of Customs and Excise Management Act. On same day under seizure Notice No.5120 they seized 2nd Plaintiff's 2 vehicles and removed them from his custody and on relying on S.185 and 196 of the Kenya Customs and Excise [1978] Act. This brought the total to 13 vehicles. After representation was made to the Permanent Secretary Treasury he agreed to release the two seized vehicles belonging to the 2nd Plaintiff on 11-11-87 and on 4-1-88 a similar waiver by the Permanent secretary was made in respect of the 12 motor vehicles seized under Seizure Notices Nos.5115, 5116, 5117, 5118 and 5120. There were some stoppages and releases made. Subsequently the Commissioner of Customs refused to release the vehicles in spite of rare step being taken by the Permanent Secretary Treasury to remind him of his powers under S.204 of the Customs and Excise Management Act Cap.486. The waiver of seizure Notice Nos.5115, 5117, 5118 and 5119 of 4-1-88 by the Director of Fiscal & Monetary Affairs Department to Commissioner of Customs and Exercise said:-

“In accordance with Section 204 of the Customs and Excise Act the Minister for Finance has agreed to release goods imported into the country by Joseph Mbugua Gichanga the MD of Mombasa Development Ltd. Which were seized by the Customs Authorities as uncustomed vehicles. The details are as follows:-

1. 12 motor vehicles (as per attached documents)

In cross examination by Miss Mbiyu Snr. State Counsel for the Commissioner, he confirmed that he got involved in motor sales in 1987 and that of the 13 vehicles detained in Kenya, 11 were on transit but to Uganda, but he said that by 21-8-87 the consignors stopped the transit of goods to Uganda and asked him to stop the transit receive, and sell them here in Kenya. They also gave him authority to hire them out, that he paid duty in 1989 in the amount of KShs.199,491/- between 20-1-89 to 26-3-89, that the contract with Koyei of Japan was terminated in July 1988 orally . He said that about May 1987 and the Motor Hire to Nilestar would have taken 8 months. Trading and incidental days provable total is KShs.664,893/- but witness said the difference of KShs.1,273,759/- which included (1) Transport to Nairobi by air (ii) Hotel Expenses, (iii) car hire charges KShs.228,810/-, (iv) Cost of authority to import KShs.60,000/- (v) Authority to transfer KShs.60,000/-. PW.2 David Wanjui, a tour operator confirms that Car Hires Services, a Car Hire firm he works for had agreed to hire 12 vehicles and pay KShs.73,000/- p.m. but they were never delivered.

PW.3 James Kibetu a taxi driver also corroborated PW.2's evidence that hire vehicles would be charged at KShs.3,000/- per day. PW.4 Hussein Husammudina car dealer purposed to buy the 13 cars for KShs.2,525,000/- but in the event they were not sold to him. He confirmed that KShs.73,000/- p.m. was reasonable. He examined them and found their condition as at 6-1-89 had deteriorated a lot.

2nd Defendants adopted evidence of PW.1 and staked their case on it.

In their far reaching submissions all the 3 counsel discussed the issues thoroughly. I can only summarize them as follows: For 1st Plaintiff Mr. Gikandi, the case is only on quantum and as the Defendant has not produced any evidence to rebut plaintiffs evidence from 4 witnesses it means the facts stated by plaintiff are uncontroverted. That there is evidence that the Plaintiff mitigated his losses. Mr. Gikandi claims for wrongful detention of the vehicles for 14 months so they should be ordered to pay for each vehicle for each month (KShs.73,000 x 13 x 14 = KShs.132,860/-) for 14 months.

He said there was a waiver and yet the vehicles were wrongfully seized as from 3-8-87 to period of release in March 1989. The Courts and the minister had said the vehicles be released but the Commissioner ignored this. That the vehicles were badly kept and their conditions deteriorated, that 2 vehicles of the 13 belonged to PW.1 the second Plaintiff and 11 belonged to the company, the 1st Plaintiff. That Plaintiff lost the use of the 13 vehicles. That there be damages for wrongful prosecution. That para 36A (e) amended to read 13 instead of 11 motor vehicles. General damages claimed under false imprisonment, defamation and malicious prosecution (as the criminal trial was instituted when there was already a waiver).

They claim KShs.1.5 million under general damages and KShs.3.0 million for wrongful detention of vehicles and KShs.5 million for loss of user.

For Defendant Miss Mbiyu Senior State Counsel conceded that the Defence called no evidence but relied on law and on her cross examination but she denied that it meant admission of any claim besides she said the Defence's bundle of documents produced is evidence. She denied that there was case for detinue or conversion as the torts were not pleaded, and that court should not direct its mind to it. There was wrongful detention, but that it was not conversion. That the Plaintiff cannot claim damages for the period before he became an owner. She says Plaintiff failed to prove claim under 36A(b) Loss of agency as he has not shown how it was determined.

In my view however, claim as to ownership has been proved by circumstances and by letters and evidence by PW.1. I accept that under para 36A (a) she concedes KShs.895,649 being expenses for travel to Hong Kong and accommodation of KShs.268,893, court fees of KShs.485,000/-, fine 6,000/-, repairs KShs.90,756 she concedes these. Defence advocate has not accepted expenses for authority to import and letter of KShs.60,000. Local traveling and hire charges of KShs.228,810/- are not conceded. She argued that hire was done for family comfort and not for following up of the business affairs. Para 36A (d) & (f) of KShs.18,031,000/- she found too removed and speculative. It is not loss of profit. She said Plaintiff did not mitigate his losses and of exemplary damages, she said it was not pleaded but of malicious prosecution, however, counsel conceded KShs.500,000/-.

Of interest, she submitted that it should be normal court rate. All counsel produced many authorities to back their most formidable arguments and I am highly indebted to them for this. In my award on Special Damages, I must state the principle laid down firmly by the Court of Appeal in many cases and here I must rely on their decision in the appeal case of **Coast Bus Services Ltd v. Sisco E. Murunga Danyi & 2 Others Civil Appeal No.192 of 1992** (unreported). The Court said:-

“We would restate the position. Special damages must be pleaded with as much particularity as circumstances permit and in this connection it is not enough simply to aver in the plaint as was done in this case that the particulars of special damages were to be supplied at the time of trial. If at the time of filing the suit the special damages is not known with certainty then those particulars can only be supplied at the time of trial by amending the plaint to include the particulars which were previously missing. It is only when the particulars of Special Damages are pleaded in the plaint that a claimant will be allowed to proceed to the strict proof of those particulars.”

And those pleaded particulars must be proved as pleaded. Now with these principles I now come to the plaint and with regard to evidence and arguments of counsel. I make awards as follows:- OF PARAS (i) 36A (a) Unrecoverable business expenditure due to importation into Kenya – KShs.1,938,652.00.

Under this head the Plaintiff claimed for:-

(i) Air tickets to Hong Kong	KShs. 895,649.00
(ii) Accommodation	“ 268,893.00
(iii) Legal expenses	“ 485,000.00
(iv) Authority to import	“ 60,000.00
(v) Court fine	“ 6,000.00
(vi) Transfer letter	“ 60,000.00
(vii) Car Hire Charges	“ 298,785.00
(viii) Management expenses	“ 45,400.00

Miss Mbiyu conceded the following:-

(i) Air travel to Hong Kong	KShs. 895,649.00
(ii) Accommodation	“ 268,893.00
(iii) Legal fees	“ 485,000.00
(iv) Court fine	“ 6,000.00
(v) Management fees	“ 45,000.00
(iv) Cost repairs	“ <u>90,756.00</u>
Total	<u>KShs.17,912,980.00</u>

I have agreed with Miss Mbiyu in her arguments for rejecting:-

i) Authority to import charges	KShs. 60,000.00
ii) Car Hire charges	“ 298,785.00
iii) Transfer letter	60,000.00

These are not approved and are hereby disallowed.

ii) OF PARA 36A (B)

Prospective loss of yearly agency business commission and earning @ KShs.350,000/- per year from 1988 = KShs.2,450,000/-. I find this amply proved on evidence and I grant it.

iii) OF PARA 36A ©

Expenses incurred in repairing the car to resalable condition= KShs. 575,420/-

I reject the claim herein in part because I find this proved only

partly and I grant the proved part which is- Kshs. 90,756.00/-

iv) OF PARA 36a (d)

Prospective loss of user business profits and earnings @ KShs.73,000/-
Per month for 13 cars - = KShs.18,031,000/-

This lossof earning of profits are claims of a special nature and must be proved as pleaded. This was proved by evidence of PW.1, PW.2, PW.3 and PW.4. There were several documents produced for the proof of this large claim. It was proved that they were detained for 14 months and each day's loss was proved to be KShs.73,000/- per month. There was no evidence from defence challenging that although Miss Mbiyu put up a spirited argument as I have hereinbefore mentioned saying that it is remote and speculative but I do not support that argument. I am satisfied in the evidence on balance of probabilities that the plaintiff was engaged in motor sales business. The English cases quoted by Miss Mbiyu do not limit the period in which one is to be engaged in a particular trade, and although he did not show his previous losses there was evidence that the evidence adduced showedof the sale trend in the industry besides the vehicles had been found by Mbogholi J to belong to Plaintiff and in any case there is evidence that the Japanese company gave the plaintiffs the motor vehicles. The value of hire per month was not disputed. The burden to prove that damages are remote is on the defendant, but they have not discharged it. I however would deduct a reasonable time out of the 14 months when the vehicles severally would be unperforming due to mechanical maintenance. I would give a provision of ½ of one month for all vehicles being from the 14 months. I believe each vehicle could have been laid off for maintenance. However this was not brought up by any side in the disputeand I cannot bring it so I award the claimed KShs.18,031,000/-.

iv) OF PARA 36A (e)

Business loss incurred in trading deficit due to sale in Kenya of KShs.1,169,652/-. From evidence of Hussein PW.4 the vehicles were undersold at a difference of KShs.1.02 Million. I grant the said amount as proved by evidence of PW.4 instead of KShs.1,169,652/- claimed.

vi) OF PARA 36A (f): This was rightly abandoned. No award on it.

vii) OF PARA 36A(g): Loss of general change in value of money – abandoned.

GENERAL DAMAGES:

Under this head were arguments on claims under false arrest, malicious prosecution and defamation. It is admitted that Plaintiff No.2 was arrested and prosecuted. He was convicted. The arrest was done when duty in goods had been waived, the constitutional decision nullified, these seizure and consequently the criminal charges that were based on these actions, became unlawful. Mr. Gikandi has made the following claims –

- (a) KShs.1.5 million for unlawful arrest.
- (b) KShs.3 million for malicious prosecution.
- (c) KShs.5 million for wrongful detention of vehicles.

Here Miss Mbiyu conceded partly by giving down graded counter suggestions as follows:- defamation and malicious prosecution KShs.500,000/-. She relied on the case of JOHN KAMAI KHARIA V. PAUL NJIRI & AN. HCCC NO.1774 OF 1994 (NBI) where Khamoni J. awarded for wrongful arrest and confinement of a prominent farmer and law abiding man an award of KShs.200,000/- and KShs.200,000/- for unlawful arrest and wrongful confinement. I agree with the suggestion of KShs.500,000/- as adequate and I also accept the authority of my learned brother Khamoni J. So for wrongful arrest I award KShs.200,000/-; for malicious prosecution KShs.200,000/- and defamation KShs.100,000/-. I grant a total of KShs.500,000/- for that head. The claim for wrongful detention of goods I think was special general damages in regard to conversion. Here the law is as stated in Halsbury's Laws of England 3rd Ed. Vol.38 pp 792 –

“In conversion Plaintiff sues in respect of the wrongful act of conversion so damages are the value of the goods at the time of the conversion and where goods have been restored to the owner after conversion the owner must give credit for their value at the time he received them and accordingly damages must be reduced by that amount”

Clerk and Lindsell on Torts 14th Ed. Para 1150 says:-

“Damages for Deprivation of goods – The damages to which a Plaintiff who has been deprived of his goods is entitled is prima facie the value of the goods together with any special loss which is the natural and direct result of the loss.”

I think this damage has been satisfied in the claims paid out under the special damages. However for the infringement generally of Plaintiff's right and any such anxiety caused by the detention I would award something and I grant KShs.50,000/- under this head. It must be noted that damages in whatever name are awarded to put the Plaintiff to a position in which he would be had the tort not occurred. It is not for enrichment. See per Omolo J.A. in **R.R. Siree & An. Vs. Lake Turkana El Molo Lodges L.L.D C.A. Civil Appeal No.229 of 1998.** I think here the special damages I have awarded the plaintiffs puts them to the general position they were in before the tort. Generally damages must be geared to relate to the general financial position prevailing in the jurisdiction in which courts exercise their power to award damages. They must be a reflection of the general monetary and economic ability of the country of jurisdiction.

Of mitigation: I think the facts and arguments rendered here have not persuaded me adequately to rule that the Plaintiff did not mitigate his damages.

Of interest on costs: Similarly I am not persuaded that this case deserves of special conversion interest rate on the costs on the ground that commercial interest must apply to commercial cases.

There was a claim for exemplary or aggravated damages. The principle with regards to this aspect of damages as currently obtaining has been drawn to this jurisdiction from the House of Lords decision of **ROOKES V. BARNARD [1964]AC 1129** and the facts of the case should bring it into the purview of

the three categories set therein by Lord Devlin C.J. That first it is awarded against tortious intrusions or trespasses that are profit motivated i.e. wrongful landlord evictions of their tenants or, secondly where there is oppressive conduct by Government agents and thirdly where the act of the defendant has caused distress and intolerable anxiety and to be awarded as a punishment.

The Commissioner of Customs in this particular case behaved with rough disregard to the interest of the Plaintiff, but I must be clear in my mind before awarding this class of damages to the plaintiff that the action was oppressive. Concise Oxford Dictionary describes oppress as to:-

(1) Keep in subservience by coercion or

(2) to govern or treat harshly or with cruel injustice or

(3) to weigh down and oppressive conduct is one which is harsh, or cruel or difficult to endure,

but reading the story of this case one would see the fact that the Commissioner at first was acting lawfully and it is the Minister's waiver that coming as it did after seizure had been effected that was not properly received by the Commissioner. Could be the Minister ought to have directed the Commissioner to effect the waiver perhaps the manner of communication was not properly passed to the Commissioner. By not following the instructions from the Minister the Commissioner committed defiance aimed at the Minister, but I would not say was aimed at the Plaintiff. I think governmental oppression should be one completely directed to the Plaintiff.

I am not able to say that the act attracted exemplary damages and I disallow it.

My award therefore are:-

(1) 36A(a) & (c)	KShs. 1,791,698.00
(ii) 36A(b)	“ 2,450,000.00
(iii) 36A(d)	“ 18,031,000.00
(iv) 36A(e)	“ 1,169,652.00
(v) General Damages	“ <u>550,000.00</u>

Total amount: KShs.23,992,350.00

Together with interest on the ordinary scale plus cost.

Dated this 31st Day of July, 2000.

A.I. HAYANGA

JUDGE

Read today the 31st Day of July, 2000 before:-

Mr. Musing holding brief for Mr. Gikandi for Plaintiffs and Miss Mbiyu for Defendant.

A.I. HAYANGA

JUDGE