



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 34 OF 2008

FRED KIPROP.....APPELLANT

-VERSUS-

AMBROSE KIMUTAI.....RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. Innocent Maisiba, Resident Magistrate, delivered on 2 April 2008 in Eldoret CMCC No. 926 of 2004)

JUDGMENT

[1] The appellant was sued jointly with the Attorney General in **Eldoret Chief Magistrate's Civil Case No. 926 of 2004: Ambrose Kimutai vs. Fred Kiprop and Attorney General** vide a Plaint dated **1 July 2004**. The claim was for general damages, special damages and exemplary damages, together with costs and interest for false imprisonment. The respondent's cause of action was that on or about the **15 March 2004**, the appellant wrongfully caused police officers from Eldoret Police Station to arrest him and take him into custody on the false allegation that he had obtained the respondent's **Mitsubishi Lorry Registration No. KAM 573P** by false pretenses. He accordingly sued for damages for malicious prosecution and false imprisonment.

[2] Having heard the parties, the lower court was convinced that the respondent had a good case and found in his favour. Here is an excerpt of the impugned Judgment:

"I have considered the evidence in entirety. The 1st defendant clearly called the plaintiff to a police trap otherwise the police would have not known the plaintiff and about the transaction. The 1st defendant was to blame for allowing his vehicle into the hands of a third party without first receiving payment and for his mistake he caused the plaintiff to be arrested and be incarcerated for 5 days. The plaintiff was deprived of his liberty and his character was put into disrepute. His constitutional rights were taken away from him. He was not taken to court within 24 hours of his arrest. He is entitled to compensation. I would award the plaintiff general damages for false imprisonment in the sum of 150,000/= for false imprisonment.

No award is made for defamation as no witness was called to show that in regard to the plaintiff's character had been lowered in any way. I shall not make any order for exemplary damages. I would also award the plaintiff costs and interest of this suit..."

[3] Being aggrieved by the decision of the lower court, the appellant lodged this appeal on **9 April 2008** through the law firm of **M/s Limo R.K. & Co. Advocates**, citing the following grounds:

- [a] That the Learned Magistrate erred in law and fact by giving judgment against the appellant against the weight of evidence.
- [b] That the Learned Magistrate misdirected himself on law and fact to say that the respondent had proved his case as required by law particularly on the element of malice.
- [c] That the Learned Magistrate erred in law and fact when he faulted the appellant's action giving rise to the case.
- [d] That the Learned Magistrate erred in fact and law by not giving consideration to the pleadings filed and especially the appellant's and therefore arrived at the wrong judgment.
- [e] That the Learned Magistrate misdirected himself on a point of law and fact when he made a finding on constitutional rights of

the plaintiff when no material on the issues were placed before him and in any event lacked jurisdiction to determine the same.

[f] That the Learned Magistrate erred in law and fact by faulting the appellant on infringements of the respondent's constitutional rights.

[4] Thus, it was the appellant's prayer that the appeal be allowed with costs and that the lower court's judgment be reversed and be substituted with an order dismissing it with costs.

[5] The appeal was canvassed by way of written submissions pursuant to the directions issued herein on **4 February 2020**. **Mr. Kibii** for the appellant proposed two issues for determination in this appeal, namely:

[a] Whether or not the tort of false imprisonment was proved to the required standard; and,

[b] Whether the lower court's general damages award was appropriate.

[6] According to **Mr. Kibii**, it was the duty of the respondent to demonstrate that the appellant had no reasonable cause to have him detained. Counsel submitted that what the appellant did was what any right thinking member of the society would do if faced with the situation the appellant was faced with. He added that once the appellant reported the matter to the police he left the matter in their hands for purposes of investigation and appropriate action; including charging whoever they found to be the culprit. Thus, counsel urged the Court to find that the appellant had no role to play once the matter was reported to the police. He relied on Stephen Gachau Githaiga & Another vs. Attorney General [2015] eKLR; Socfinaf Kenya Ltd vs. Peter Guchu Kuria [2002] eKLR and Anthony Shiveka Alielo vs. Kenya Post Office Savings Bank & Another [2019] eKLR to support his argument that, in the circumstances, the appellant had reasonable and probable cause to file his complaint with the police.

[7] On quantum, **Mr. Kibii** faulted the trial court's award contending that it was inordinately high, given the facts of the case. He pointed out that, in the Anthony Shiveka Alielo Case (supra) an amount of **Kshs. 50,000/=** was awarded as general damages for false imprisonment. **Mr. Kibii** also relied on Kenya Fluorspar Company Ltd vs. William Mutua Maseve & Another [2014] eKLR in which **Kshs. 40,000/=** was awarded to the 1st respondent who had been detained for 5 days. He accordingly prayed that the appeal be allowed.

[8] On behalf of the respondent, **Mr. Kagunza** proposed the following issues for determination:

[a] Whether the respondent was deprived of his liberty as a result of being falsely imprisoned for 5 days, and if so was the respondent entitled to general damages?

[b] Whether the appellant's character was brought into disrepute;

[c] Whether the appeal herein is merited;

[d] Whether the award of **Kshs. 150,000/=** to the respondent as damages for false imprisonment is inordinately high.

[9] In **Mr. Kagunza's** submission, the respondent was unlawfully arrested following a baseless and malicious complaint by the appellant and was released after 5 days without any charges being preferred against him. Accordingly, he submitted that the arrest of the respondent was actuated by malice since there was no reasonable cause or justification therefor. **Mr. Kagunza** further submitted that, had the appellant acted more prudently by carrying out due diligence on the proposed buyer and confirming payment before releasing his motor vehicle, the loss and the ensuing investigations would have been averted. He further urged the Court to take into consideration that it was the appellant who called the respondent to Caltex Petrol Station and thereby set him up for arrest by the police. Hence, **Mr. Kagunza** defended the decision of the trial magistrate on both liability and quantum and urged for the dismissal of the appeal. He relied on Joseph C. Mumo vs. Attorney General & Another [2015] eKLR; Chrispine Otieno Caleb vs. Attorney General [2014] eKLR and Stephen Gachau Githaiga & Another vs. Attorney General [2015] eKLR to buttress his submissions.

[10] This being a first appeal, I am mindful that it is the duty of the Court to re-evaluate the evidence adduced before the lower court with a view of coming to its own findings and conclusions on the basis thereof; while bearing in mind that I did not have the advantage of seeing or hearing the witnesses. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was aptly expressed thus:

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

[11] Thus I have carefully perused and considered the pleadings filed before the lower court and the proceedings held in that respect. The proceedings show that the respondent testified as **PW1** on **10 February 2006**. He told the lower court that at the material time, he was earning living as a broker; and that it was in that capacity that the appellant, who is his village-mate, approached him and asked him to assist him find a buyer for his lorry **Registration No. KAM 573P**. With the help of others, who included **Hillary Koskei Kiboinett (PW2)**, he was able to identify a buyer who he introduced to the appellant. According to the respondent, he did not take part in the negotiations between the respondent and the buyer; though he got to learn that a deal had been struck. He also confirmed that he was present when the respondent handed over possession of the lorry to the buyer at about 4.00 p.m. on **13 March 2005**. He added that the respondent then assured them that he would pay their commission on Monday at 5.00 p.m.

[12] It was further the testimony of **PW1** that the appellant called him on **15 March 2005** and asked him to go to Caltex Petrol Station to collect his payment; and that on arrival, he was arrested by police officers on suspicion that he had colluded with others to steal the appellant's lorry. He was thus placed in custody where he remained in confinement for five days before being released. **PW1** added that he got to learn that the appellant parted with his lorry after being shown a bank deposit slip which turned out to be fake. He asserted that the appellant had no right to complain about him given that he willingly parted with the possession of his lorry before confirming payment; and that the appellant later admitted that he had made a mistake. He therefore told the lower court that the police had no basis for arresting him.

[13] In support of his case before the lower court, the respondent called **Hillary Koskei Kiboinett** as **PW2**. **PW2** confirmed that he was with the respondent and one **John Serem** on **15 March 2004** when they were arrested. He confirmed that he had accompanied the respondent in his search for a buyer for the appellant's lorry and was present when the appellant handed over the lorry to the buyer; one **Kariuki**. He therefore expected to be given a share of the commission; instead he was arrested along with the respondent and placed in custody for one week. **PW2** also confirmed that he got to learn that **Kariuki** was but a conman; and that he had presented a forged bank pay in slip to the appellant in exchange for the lorry. He however denied that he colluded with him or that he had reasons to suspect him.

[14] On his part, the appellant told the lower court that he was intent on selling his lorry **Registration No. KAM 573P** and that he had approached the respondent, **PW2** and others to assist him in looking for a buyer for a commission. He further confirmed that a buyer was ultimately identified and that they held negotiations and agreed on **Kshs. 3,000,000/=** as the purchase price. He then gave the buyer, one **Joseph Nderitu**, his account number for the funds to be deposited directly into his account. Thereafter, **Joseph Nderitu** called him on the phone and assured him that he had deposited the funds into his account. They later met and was given the bank pay in slip; whereupon **Joseph Nderitu** demanded the immediate release of the lorry. He conceded that, in the basis of the bank slip, he released the lorry but retained the log book pending verification of payment with the bank.

[15] The appellant further testified that, upon visiting the bank to confirm payment, he found out that no money had been deposited in his account. On being told by the bank that the bank slip he had been given was fake, he caused the matter to be reported to the police for their further action. He further told the lower court that the lorry was later traced and found in Naro Moru; and that **Joseph Nderitu** was arrested and charged in **Eldoret Chief Magistrate's Criminal Case No. 3572 of 2004**. Thus, the appellant denied that he acted with malice in filing his complaint with the police. He also denied having identified the respondent and his companions to the police for purposes of arrest; asserting that he only confirmed their identities to the police after their arrest.

[16] The record of the lower court shows that the Attorney General, though served, did not participate in the hearing of the suit after filing a Memorandum of Appearance and a Defence.

[17] Thus, there is no dispute from the foregoing, that in **March 2004**, the appellant approached the respondent, among others, for assistance in finding a buyer for his lorry **Registration No. KAM 573P** at a commission; or that a buyer was found by the name **Joseph Nderitu**, with whom the appellant negotiated a purchase price for the lorry in the sum of **Kshs. 3,000,000/=**. It is also not in dispute that the appellant hastily released the motor vehicle upon being shown a bank pay in slip by the said **Joseph Nderitu** before confirming that the money had indeed been credited to his bank account. He admitted in cross-examination that:

"...We agreed on 3 million. Nderitu told me he deposited 3 million in the bank. He gave me a deposit. I gave him a lorry before I confirmed there was cash in the account. I made a mistake to release the vehicle. I was not forced to release the motor vehicle to the person called Nderitu...I wouldn't have released the lorry if I knew there was no money in the account..."

[18] The parties were further in agreement that upon realizing that he had been duped, the appellant reported the matter to the police and that, pursuant to police investigations, the respondent was apprehended along with others and placed in custody on suspicion that they had connived with **Joseph Nderitu** to obtain the appellant's lorry by false pretences. The assertion by the respondent that he was held in custody for a period of 5 days before being released was uncontroverted before the lower court. Indeed, the appellant conceded in cross-examination that he did not know how long the respondent and his colleagues spent in custody. That the respondent was never arraigned before court or prosecuted for the alleged offence is also not in dispute. Hence, the trial court cannot be faulted for coming to the conclusion that the appellant initiated the process that culminated in the arrest and incarceration of the respondent at Eldoret Central Police Station for 5 days.

[19] That notwithstanding, it was imperative for the respondent to also show that the arrest of the appellant was entirely unwarranted in the sense of being without reasonable or probable cause; and the test here is whether an ordinary prudent man would have acted as did the appellant. (see **Kagame & Others vs. Attorney General & Another** (1969) EA 643). A reappraisal of the evidence presented before the lower court leads me to the conclusion that the appellant was perfectly entitled to file a complaint with the police, given the circumstances in which he found himself. He was in need of funds and was constrained to put up his lorry for sale; he parted with his lorry in the belief that the purchase price of **Kshs. 3,000,000/=** had been deposited in his account; not knowing that the bank slip he had been given was fake. He may have acted imprudently; but the fact is that he had no reason to suspect foul play. He was not to blame for the fact that the respondent was one of the suspects arrested by the police, granted that the fraudulent purchaser was introduced to him by brokers who included the respondent.

[20] Indeed, the respondent conceded in cross-examination before the lower court that it was perfectly in order for the police to question them about the sale of the lorry. **PW2** was more expressive. He told the lower court that:

"...I know that the lorry disappeared. He only paid Ksh. 2000-. Kariuki had a pay slip which was fake. I would also have reported the matter to police if I would have lost the vehicle..."

[21] It is therefore my finding that the arrest of the respondent was warranted in the circumstances. I find succor in **Socfinac Kenya Ltd vs. Peter Guchu Kuria (supra)** wherein it was held that:

“When there is a case of suspected theft the first step is to report the matter to police who, in their own way find out how to carry out investigations. And it is up to the police to take further steps like taking a suspect to court if they have sufficient evidence against such suspect to warrant such action. This then is the action by police and the state should be involved or joined in such suit and that the complainant should not be blamed for making such report to police. What is of great significance in such a case is whether or not there is reasonable and or probable cause for the arrest and or prosecution of the culprit.”

[22] Having found that the respondent’s arrest was justified, the next question to pose is whether the respondent was subjected to false imprisonment. According to Halsbury’s Laws of England, 4th Edition page 606, false imprisonment is:

“Any total restraint of the liberty of the person, for however short a time, by the use or threat of force or by confinement, is an imprisonment. To compel a person to remain in a given place is an imprisonment, but merely to obstruct a person attempting to pass in a particular direction or to prevent him from moving in any direction but one is not. The gist of the action of false imprisonment is the mere imprisonment. The plaintiff need not prove that the imprisonment was unlawful or malicious, but establishes a prima facie case if he proves that he was imprisoned by the defendant; the onus lies on the defendant of proving a justification.

[23] Thus, in Daniel Waweru Njoroge & 17 Others vs. Attorney General [2015] eKLR it was held thus:

“The gist of an action for false imprisonment is unlawful detention, without more. The commonly accepted definition of false imprisonment defines the tort as:

1. The unlawful restraint of another;
2. Against their will; and
3. Without justification.

Proving the first element of false imprisonment involves looking at the facts whether there was any force or threat of some kind used in restraining the accusing party. It is important to note that actual force is not necessary. Proving the second element of false imprisonment involves applying ‘reasonable person’ standard. Thus, the court will determine whether a reasonable person in the same factual situation would believe that they have been detained against their will. The final element of false imprisonment involves determining whether there is a legal basis for the detention. Many legal bases for detention exist such as a lawful arrest by law enforcement. Determining whether probable or a legal basis for the detention exists is the key in false arrest cases.”

[24] Having found that the arrest of the respondent was in the lawful discharge of police duties, it would follow that his detention at Eldoret Central Police Station would also be lawful, if done within the confines of the law. This is because **Section 72(1)** of the retired Constitution recognized that a person could be deprived of is liberty on suspicion of his having committed a criminal offence under the law of Kenya. However, it was imperative, by dint of **Sub-section (3) of Section 72**, that the confinement be limited to no more than 24 hours, for that provision was explicit that:

(3) A person who is arrested or detained –

(a) for the purpose of bringing him before a court in execution of the order of a court; or

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.

[25] As no justification at all was proffered by the Attorney General, on behalf of the Kenya Police Service, for the respondent’s incarceration for 5 days, it is my finding that the same was unlawful; and therefore that the trial court was in order in so finding. It is further manifest that the appellant had no role to play in the unlawful confinement of the appellant; and therefore that the trial court erred in attributing liability to him for the respondent’s false imprisonment. I likewise find no basis in the argument that the trial court purported to exercise constitutional jurisdiction which it did not possess. The Constitution being the foundational law, must be taken into consideration in the determination of disputes, where necessary. Such reference does not, of itself, elevate a civil claim to a constitutional petition. The predominant issue before the lower court was a case of false imprisonment and I entertain no doubt at all that the learned trial magistrate had the requisite jurisdiction to deal with the matter while using **Section 72** of the retired Constitution as a reference point. In Kenya Fluorspar Company Limited v William Mutua Maseve & another [2014] eKLR for instance, it was held that:

“...Under **Section 72 (3) (b)** of the Old Constitution a suspect ought not to have been held in the remand for more than 24 hours without any justifiable cause. Having found that there was no justifiable cause why the 1st Respondent was incarcerated in the police cells for that long, it follows that he was entitled to a claim of false imprisonment.”

[26] On quantum, the guiding principle was restated by the Court of Appeal in Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited [2015] eKLR, thus:

"As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low. The Court must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages." (Also see Butt vs. Khan [1981] KLR 349)

[27] I note that the lower court awarded the respondent **Kshs. 150,000/=** for false imprisonment; which **Mr. Kibii** for the appellant took issue with. He relied on Anthony Shiveka Alielo Case (supra) in which an award of **Kshs. 50,000/=** as general damages for 3 days' confinement at a police station was upheld by the Court of Appeal. **Mr. Kibii** also relied on Kenya Fluorspar Company Ltd vs. William Mutua Maseve & Another (supra) in which **Kshs. 40,000/=** was awarded to the 1st respondent who had been detained for 5 days.

[28] On his part, **Mr. Kagunza** for the respondent relied on Joseph C. Mumo vs. Attorney General & Another (supra) in which an award of **Kshs. 300,000/=** was made in 2003 for unlawful arrest and false imprisonment for 5 days. It is however instructive that this award, as well as the awards in the other authorities cited by **Mr. Kagunza**, were global sums not only for unlawful arrest and false imprisonment, but also for malicious prosecution; and are therefore distinguishable from the facts hereof.

[29] On the basis of the lower court record, and taking into account the incidence of inflation on the Kenya Shilling, I find no reason to upset the lower court's decision. Thus, there is no justification for holding that the learned trial magistrate proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low. Likewise, it has not been demonstrated that, in assessing the damages payable, the learned trial magistrate took into account an irrelevant factor, or left out of account a relevant one. In sum, I am not satisfied that the amount awarded to the respondent is so inordinately high as to be a wholly erroneous estimate.

[30] In the result, save to the extent aforementioned, it is my considered finding that the appeal lacks merit and is hereby dismissed with costs. For the avoidance of doubt, the lower court's judgment and decree are hereby upheld, but only as against the Attorney General. The appellant is hereby absolved from liability in the matter.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 3RD DAY OF SEPTEMBER, 2020

OLGA SEWE

JUDGE