



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 378 OF 2010

GEOFFREY GITHIRI KAMAU.....PLAINTIFF

VERSUS

THE HON. ATTORNEY GENERAL.....DEFENDANT

JUDGMENT

The plaintiff Geoffrey Githiri Kamau instituted this suit on 23rd July 2010 against the defendant Attorney General claiming for general damages suffered when he was allegedly wrongfully and unlawfully and without any justifiable cause arrested, detained and assaulted by the agents, servants of the Attorney General namely, police officers attached to Magumu police station from 4th January 2010 to 6th January 2010. The plaintiff also claims for costs of the suit.

In his plaint dated 21st July 2010, the plaintiff alleges that the police officers from Magumu police station did arrest and detain him in their custody from 4th-6th January 2010 without any suspicion or justifiable cause and in the process they battered and assaulted him as a result of which he sustained injuries involving.

- a. Soft tissue injuries to the neck.
- b. Tenderness of the mid 1/3 of the spine.
- c. Bruises on the dorsal aspect of the fingers bilaterally.
- d. Tenderness scrotal area.

The plaintiff claims that he issued notice of intention to sue but the defendant had refused to admit liability or compensate the plaintiff in damages thereby rendering the suit necessary.

The Attorney General entered an appearance on 30th August 2010 and filed defence on 19th October 2010 denying the claim by the plaintiff in toto and putting the plaintiff to strict proof thereof. The defendant also denied that any notice of intention to sue was ever given. The defendant also averred that the suit was bad in law for contravening the mandatory provisions of the Civil Procedure Act.

The plaintiff testified as PW2 on 15th December 2014 and told the court on oath, adopting his witness statement recorded and filed on 6th September 2011 that on 4th January 2010 he was at Magumu Trading Centre in Nyandarua in a cyber café when his friend by the name John Mburu Kimani from the same locality as the plaintiff informed the plaintiff that he had a problem with his Mpesa transaction in the sense that he had received Mpesa money on 11th December 2009 from

Claydon Holdings in the sum of shs 10,000/-. The said Kimani asked the plaintiff to accompany him to the Claydon Holdings to confirm from them if they had sent Kimani the Mpesa transaction No. 10 in the schedule, after calling Safaricom customer care who advised him to go to the sender Claydon Holdings who were within the Mugumu Shopping Centre.

That on arrival at the Claydon Holdings, they were advised to proceed to the Mpesa shop to contact the owner of the Mpesa shop M/s Beatrice Wanyara who happened to be in Naivasha but that her employee called her and asked Kimani and the plaintiff to wait for her at her shop.

According to the plaintiff, the employee at the Mpesa shop also showed them the Mpesa transactions records for 11th December 2009 and they confirmed that the money had come from that Mpesa shop but the identity of the sender could not be recognized.

At around 11.00am, the said Beatrice Wanyara came and they explained to her the issue of which she called police officers who came armed with guns and Beatrice told them that the plaintiff and Kimani had been harassing her employee purporting to be from Safaricom. At that point, the police officers arrested the plaintiff and his friend Kimani without giving them an opportunity to explain themselves and escorted them to Magumu police station, booked and as they were surrendering their personal effects the plaintiff was calling his lawyer when one of the police officers grabbed the plaintiff's phone and all the police officers started battering (assaulting John Kimani and the plaintiff with kicks and blows. The plaintiff testified that one police officer held him by the neck and pushed him on the report desk. Another police officer hit the plaintiff by squeezing his scrotum and another police officer stepped on the plaintiff's fingers while he was on the ground. They were 5 police officers all beating up the plaintiff before throwing him in an isolated cell. John was beaten unconscious and was later brought in to join the plaintiff in the cell.

The police officers then detained the plaintiff for 3 days until 6th January 2010 saying they were waiting for the OCS to arrive from Meru.

The plaintiff's father followed up the matter and secured the plaintiff's release only after paying cash bail of kshs 5000/- for each the plaintiff and his friend who were then bonded to appear in court on 8th January 2010.

The plaintiff testified that before leaving the police station, he requested that his report of having been assaulted by police officers and sustaining of injuries be recorded but the officer in charge a Mr Wesonga refused. The plaintiff identified the officers who assaulted him as Corpral Mutai, Kibet, Mulu and Mutisya, Itulia and PC Yegon.

He also testified that he was released on instructions of Sergeant Wesonga. The plaintiff produced police OB extract as P exhibit 4. The plaintiff testified that he was arraigned in court charged with criminal case No. 65 of 2010 before Naivasha Senior Principal Magistrate's Court, with the offence of attempt to extort by threats contrary to Section 300 of the Penal Code and personating contrary to Section 382 of the Penal Code Cap 63 Laws of Kenya. The said criminal case was heard and concluded on 11th November 2011 wherein the plaintiff was acquitted, with the trial magistrate observing that the charges against the plaintiff were framed up as the complaint was made after his arrest. The plaintiffs produced copy of judgment in the criminal case as P exhibit 5.

The plaintiff also testified that he obtained a P3 from the police station. He was treated for swollen scrotum which developed a wound on and off. His fingers also hurt. He suffered back pain and pain in the neck. He was examined by Dr. Wainaina. He later instructed his lawyers to issue notice to the Attorney General which he produced as P exhibit 6.

The plaintiff urged the court to award him damages for physical torture and unlawful detention that he underwent for 3 days in the hands of police officers. He also sought aggravated damages and costs of the suit.

In cross examination by Miss Ngelechei counsel for the defendant, the plaintiff responded that he worked as the CEO in Mirera, Naivasha and that he got names of the police officers who tortured him through the investigation diary. He also stated that albeit the investigation diary stated that they did not make any complaint but that they complained of the injuries they had sustained and that he attended Naivasha District Hospital where he was treated.

He stated that he was examined by Dr. Wainaina who prepared a medical report. Further, the plaintiff stated that he was strangled on the neck, suffered injury on the spine, a squeezed scrotum and fingers injured as a result of being stepped on. That the police officers hit him on the chest up to stomach area albeit he had now healed after sometime and that what he sought was for compensation for battering and torture. The plaintiff also stated that he also seeks for damages for unlawful arrest and detention in paragraph 3 of the plaint. Further, that the investigation diary did not state what complaint he had and that the officers who released them are the ones who tortured him. He stated that they requested that their complaint of torture be recorded but were instead minuted ‘**without a complaint**’ Further, that when they returned and complained, a P3 form was issued to them by the officer in charge.

The plaintiff’s witness PW1 was Dr. Margaret Wainaina testified that she holds a Bachelor Degree in medicine (Surgery) from the University of Nairobi and currently pursuing a Masters Degree and working as a Medical Doctor at Kenyatta National Hospital.

PW1 testified that in January 2010 while she was working at Naivasha Hospital and running a part time medical clinic in Naivasha town, she received and examined the plaintiff herein on 8th January 2010 and filled his P3 form. She stated that the plaintiff Geoffrey Kamau Githiri presented with complains of soft tissue injuries on the neck and a hoarse voice. He also had injuries on his spine, and tenderness in the scrotal area with bruises, the injuries were one week old from date of injury and that the probable weapon used to inflict the injuries was a blunt object.

She further testified that the plaintiff had previously been attended to and given analgesics. She assessed the degree of injury as harm, filled his P3 form on 8th January 2010 and later on 26th April 2010 she examined and prepared a medico-legal report for the plaintiff reflecting the injuries sustained while in police custody. Doctor Wainaina testified that nonetheless, the said injuries had healed although the plaintiff had suffered psychological trauma. She produced the medical report for the plaintiff as P exhibit 2 and a receipt for kshs 2000 for preparation of the medical report.

In cross examination by Miss Ngelechei PW1 responded that she first saw the patient (plaintiff on 8th January 8th January 2010 when she filled his P3 form although she did not treat him but that she had treatment notes which the plaintiff brought to her on the said date. She also answered that the injuries sustained had healed but he still had complaints.

The defendant had no witness to call so they closed their case and both parties were directed to file and exchange written submissions. Todate, despite this matter coming up on 4th March 2015 and 4th May 2015, the defendant has not filed any written submissions.

The plaintiff filed his written submissions on 27th February 2015 and framed 5 issues for determination. He also relied on the case of **Leonard Ataro Peter Ajaro v Attorney General (2008) e KLR**.

On issue No. 1 of whether the plaintiff was arrested and detained by the defendant’s servants ie police officers and if so, whether they had lawful excuse or cause or reasons to do so, the plaintiff submitted that the fact of arrest can be discerned from the testimony by the plaintiff. It was submitted that the plaintiff was starved for 3 days. He was beaten, throttled and choked on his private parts kicked and squeezed. It was further submitted that the trial magistrate in the criminal case found that the evidence relating to extortion and personation was made up as the plaintiff was arrested before a report a complainant was lodged hence there was no good reason to arrest, detain and torture the plaintiff and or prosecute him on whether the court has jurisdiction the plaintiff’s counsel submitted that this court has unlimited jurisdiction as provided for under Article 15 3 (a) of the Constitution .

On whether Notice of institution of suit was served upon the defendant it was submitted on behalf of the plaintiff and the plaintiff had produced P exhibit 5 Notice of Attorney General showing service as it bears stamp and signature of receiving officer at the Attorney General's chambers further, that the said notice out the cause of action and names of police officers who tortured him.

On whether the defendants servants or agents tortured the plaintiff, it was submitted that the plaintiff's testimony supported by P3 form and medical report attest to that fact on whether the defendant was a stranger to the claim, it was submitted that the plaintiff had shown that he was arrested, detained, prosecuted, acquitted and served notice of intention to sue.

On whether the plaintiff is entitled to damages, it was submitted that the plaintiff's evidence was uncontroverted and therefore he was entitled to damages, having proved his case on a balance of probabilities bases on the case of Leonard Atara Peter Ajaro v Attorney General (supra) where the plaintiff was awarded kshs 1,200,000 general damages and kshs 700,000 exemplary damages, the plaintiff urged this court to award him kshs 1,000,000 exemplary damages and kshs 1,500,000 general damages together with costs and interest.

I have carefully considered the plaintiff's case, the pleadings, testimony, submissions and authority supplied to court.

There are two issues for determination namely, whether the plaintiff has proved his claim against the defendant on a balance of probabilities and secondly, whether the plaintiff is entitled to damages and if so, how much.

On liability, the plaintiff pleaded and testified that he was unlawfully and unjustifiably arrested, detained, starved and physically assaulted by 5 police officers who kept him in the cells at Magumu police station for 3 days. He was then arraigned in court and charged with the offences of attempted extortion by threats and personating. He was prosecuted, the case lasted for two years in Naivasha court and he was acquitted of the offence on both counts. He produced copy of investigation diary from the police station, his friend John Kimani's Mpesa account statement A/C 3427556-16, outpatient identification slip from Naivasha District Hospital for 11th January 2010, P3 form OB 28 of 8th January 2010 and medical report by Dr Wainaina showing the injuries sustained by the plaintiff following the assault complained of and notice to the Attorney General to sue, giving him 30 days.

Thus on proof, albeit the Attorney General denied the claim in his defence filed on 19th October 2010, there is ample evidence from the investigation diary that the plaintiff was arrested on 4th January 2010, held until 7th January 2010 when he was released on cash bail of kshs 5,000/- There is also an entry on 8th January 2010 of a complaint by the plaintiff to the police station that he had been assaulted while in police custody but that he never reported the same during his release and that he did not produce treatment sheet. The police officer IP Rucho nonetheless issued the plaintiff with a P3 form with comments that he did not see any sign of injuries on the plaintiff. The P3 showed injuries on the neck, hoarse voice, tenderness of mid 1/3 of the spine, bruises on the dorsal aspect of fingers bilaterally and tenderness on scrotal area.

There is also evidence of court judgment from SPM's Court Naivasha Criminal Case No. 65 of 2010 wherein the plaintiff was jointly charged with John Mburu Kimani with the offence of threats contrary to Section 300(a) of the Penal Code on 4th January 2010 at Magumu Trading Centre (at Claydon Holdings Ltd) and separately charged with impersonating an official of Safaricom Ltd wherein PW2 Beatrice Wambui Henia conceded that the plaintiff did not demand any money and further, the trial magistrate found no evidence of threats or impersonation as such reports were only booked after the plaintiff had been arrested. The trial magistrate also observed that the complainant therein did not give any details of the threats made to her.

Although the plaintiff's testimony and submissions focus on unlawful arrest and malicious prosecution as well, this court holds that parties are bound by their pleadings. There is no pleading related to malicious

prosecution. There is however ample evidence that the plaintiff was arrested and detained in custody before a formal complaint was made as observed by the trial magistrate which I find to have been wrongful and unjustifiable. A report made to the police station require investigation. In this case, the arrest and detention preceded the formal report to police station. In addition there was no justifiable cause for the detention and torture of the plaintiff while in police custody. If the plaintiff had committed any offence, he deserved to be treated with dignity and arraigned before a court of law. Instead, the police officers took upon themselves the task of “punishing” the plaintiff for the alleged wrongdoing before arraigning him before court. This was totally uncalled for. I therefore find that the plaintiff has proved, on a balance of probabilities that he was unjustifiably arrested, detained for 3 days and viciously tortured while at Magumu police station. He sustained injuries contained in the P3 form and confirmed by Dr. Wainaina who examined him. The plaintiff’s evidence has not been controverted by the defendant.

In the end, I find that the defendant Attorney General is vicariously liable for the wrongful acts of agents/ servants of the Government-police officers who were on duty when they unlawfully and unjustifiably arrested, false fully imprisoned and assaulted the plaintiff thereby occasioning him not only physical injuries but also psychological torture.

The authority of **Leonard Ataro Peter Ajaro v Attorney General** cited by the plaintiff is inapplicable in the circumstances of this case as it related to a case of malicious prosecution which is totally different from this case wherein pleadings disclose false arrest, detention and torture. In a case for malicious prosecution, the plaintiff should have pleaded particulars of malice and proved the same at the hearing.

There was no such pleading related to a case of malicious prosecution and so I shall not belabor that point which only emerged in the plaintiff’s counsel’s submissions. I find that the plaintiff proved that his arrest, detention and torture by police officers who are tasked with protection of citizens was unjustifiable and unlawful and malicious since there was absolutely no evidence that the plaintiff who had merely escorted his friend to inquire on the Mpesa deposit ever issued any threats or even impersonated the investigators from Safaricom Ltd.

Malice of the part of the police officers can be inferred from the manner in which they high handedly manhandled the plaintiff. They denied him food, kicked him around without caring whether he would lose his eye or genitals. Those actions by the defendant’s agents were inhuman and degrading to the plaintiff. He suffered both psychologically and physically as shown by the P3 form and medial report and as was observed by the medical doctor Wainaina who examined him.

The plaintiff no doubt suffered humiliation as well as physical injuries which were pleaded and proved in court, as reproduced in this judgment.

In **Nahashon Mwangi Mwaura v Commissioner of Police & another HCC 163/2006 (2015) e KLR** – Mabeya J awarded kshs 800,000/- to the plaintiff who was unlawfully arrested, confined and maliciously prosecuted.

In **Joseph C. Mumo vs Attorney General & another (2008) e KLR** the court - Nabuye J awarded kshs 300,000 to a plaintiff for defamation, unlawful arrest, false imprisonment and malicious prosecution.

In this case, as the plaintiff did not plead and prove malicious prosecution, I award him nothing under that head.

He has however proved that he was unlawfully and unjustifiably arrested, confined and tortured. Under the heading of false and unlawful arrest and confinement for 3 days, I award the plaintiff a sum of kshs 400,000/-. On the claim for general damages for injuries sustained by the plaintiff upon being tortured, I note that the plaintiff sustained injuries on the neck, back, fingers, scrotum and in his throat upon being strangled. The injuries healed but he remains with pain in the lower back, horse voice and recurring wound in his scrotum. He suffered psychical trauma following the torture by police

officers who are government law enforcement agents and who are entrusted with the responsibility of protecting human lives. Arresting and torturing a suspect is not one of the police service functions or powers. There was no evidence that the plaintiff resisted arrest or was armed and was a threat to the police officers who were to arrest him. There is also no evidence that upon being arrested, the plaintiff was vicious. In my view, the force applied on him leading to the injuries that he sustained was unwarranted in the circumstances. This court is unable to comprehend what provoked the police officers to exert that amount of force or engage in the assault of the plaintiff. The assault on the plaintiff was not accidental. It was deliberate and the police officers being human beings themselves knew or ought to have known the consequences of assaulting another human being. The plaintiff is lucky that he sustained what is described as soft tissues. He however suffered psychological trauma. He conceded in cross examination that he had healed over time.

But before I decide on what amount of general damages the plaintiff should be entitled to, I must address the submissions on aggravated damages which were not pleaded. Aggravated damages are awarded in actions where damages are at large. That is to say where damages are not limited to the pecuniary loss that can be specifically proved. They are normally awarded in actions of defamation, intimidation, false imprisonment, malicious prosecution, trespass to land, persons or goods, conspiracy and infringement of copyright, among others.

Such damages are part of, or included in the sum awarded as general damages and are therefore at large. As such, they need not be specifically pleaded or included in the prayer for reliefs. See **Rookers v Banard (1964) 1A ER 367**. However, where the plaintiff relies on any facts or matters to support his claim for aggravated damages, it is desirable that he should plead those facts or matter. The matters that the court should take into account in awarding such damages include the defendant's motives, conduct and manner of committing the tort. The court has to consider whether or not the defendant acted with malevolence or spite or behaved in a high handed, malicious, insulting or aggressive manner. The court may also consider the defendant's conduct up to the conclusion of the trial including what he or his counsel may have said at the trial. If any of the defendant's acts will have worsened the plaintiff's damage by injuring his feelings of dignity and pride that may also be considered. In awarding aggravated damages, aggravated damages are therefore compensatory in nature (see **Abdulhamad Ebrahim Ahmed v Municipal Council of Mombasa (2004) e KLR** Maraga J.

In this case, I find that indeed the defendant's acted in a high handed manner, arbitrarily, oppressively thereby aggravating the false unlawful/unjustifiable arrest as there was no formal complainant made to the made to the police against the plaintiff, and in falsely imprisoning the plaintiff the police officers went beyond arrest and confinement of a suspect by torturing him. (see **Bank of Baroda (K) Ltd v Timwood Products Ltd CA 132/2001; Obongo & Another v Municipal Council of Kisumu (1971) EA** (Court of Appeal).

In the circumstances, I award the plaintiff kshs 300,000 aggravated damages.

Back to general damages for the actual injuries that the plaintiff suffered, I note that the injuries sustained were soft tissue and had healed at the time of hearing this case, by the plaintiff's own admission in cross examination.

In the case of **Ugenya Bus Service v Gachuki (1976-1985) EA 575 page 579** the venerable Madan, J.A. (as he then was) aptly captured the difficulties that confront a judge in assessment of general damages in the context of personal injuries as follows:-

“General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculable. The imponderables vary enormously. It is a very heavy task. When pondering struggle to seek a reasonable award, I do not aim for precision. I know I am placed on an inescapable situation for criticism by one party or the other, sometimes by both sides. I also therefore do not aim to give complete satisfaction but do the best I can”.

In addition, the Court of Appeal has in several decisions that that in assessment of damages, it must be

borne in mind that each case depends on its own facts; that no two cases are exactly the same or alike, and that awards of damages should not be excessive (see **Jabane v Olenja ; (1986) KLR 1. In Mohamed Juma vs Kenya Glass Works Ltd, CA 1 of 1986 (un reported)** Madan JA aptly observed that an award of general damages should not be miserly, it should not be extravagant, it should be realistic and satisfactory and therefore it must be a reasonable award. In the same decision the Learned Judge of Appeal addressed an argument tying the quantum of damages to an appellant's station in life thus:

“It is not always altogether that general damages should be assessed in relation to the station in life of a victim. There must be some general considerations of human feelings. The pain and anguish caused by an injury and resulting frustrations are felt in the same way by the poor, the not so rich and the rich. Again inflation is also no respecter of persons.”

Damages are also not intended to enrich the victim but to compensate them for the injury suffered and as much as possible to restore them to the position they were in before suffering the injury. Past awards always guide the award to be made, considering each case on its merit and peculiar circumstances where past awards are taken into account, their age and rate of inflation and strength of the Kenyan shilling when he said awards were made and the time when the intended award is of paramount consideration.

In **Johnstone Ochieng v CC Ltd CA 309/98** Rimiita J awarded the plaintiff kshs 80,000/- for injuries that included bruises on the face, soft tissue injuries to the right leg: and soft tissue injury to the chest.

In the instant case, taking into account the fact of the age when the Johnstone Ochieng case was decided and rate of inflation, I award the plaintiff Kshs 200,000/- general damages for pain and suffering. The plaintiff's counsel nonetheless did not provide the court with any authorities for an award for personal injuries sustained by the plaintiff.

The plaintiff is also entitled to the costs of the suit and interest at court rates s from date of this judgment until payment in full.

Summary

- a. Defendant is found vicariously liable for the wrongful acts of the police officers.
- b. Plaintiff is awarded damages as follows:
 - i. General damages for pain and suffering kshs 200,000;
 - ii. Damages for unlawful and false imprisonment kshs 400,000 ;
 - iii. Aggravated damages kshs 300,000/-

c) Costs of the suit

d) Interest on a, b, and c at court rates from date of this judgment until payment in full.

Dated, signed and delivered in open court at Nairobi this 14th day of July 2015.

R.E. ABURILI

JUDGE

14.7.15

Coram: R.E Aburili J

CA: Samuel

Mr Jele holding brief Mwangi Chege for plaintiff.

No appearance for defendant

COURT- Judgment read and delivered in open court as scheduled at 3.00pm.

R.E. ABURILI

JUDGE

COURT- the judgment to be typed certified and supplied to the parties upon payment of requisite court fees.

R.E. ABURILI

JUDGE

14/7/2015