



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL CASE NO 14 OF 2011

WELLINGTON SENERWA KALO.....PLAINTIFF

VERSUS

DIRECTOR KENYA WILDLIFE SERVICES.....1ST DEFENDANT

HON. ATTORNEY GENERAL.....2ND DEFENDANT

JUDGEMENT

The plaintiff seeks compensation from the defendants for allegedly unlawfully arresting and detaining him. He pleads that following his complaint that wild animals had destroyed crops at Bura Irrigation Scheme, the agents of the 1st defendant in Hola Office Branch, Tana River County unlawfully arrested and handcuffed him on 28th June 2011 and that he was harassed and molested. He pleaded that upon reporting the matter to the police they refused, failed and neglected to book the report for investigations. He pleads malice and negligence on the part of the agents of Kenya Wildlife Services (the 1st defendant) and Hon. Attorney General (the 2nd defendant). He pleads that his personal freedom and liberty had been illegally taken away for a whole day. He seeks general and aggravated damages, exemplary damages, costs of the suit and interest at court rates.

The defendants filed a joint statement of defence generally denying the allegations contained in the plaint. They further plead lack of malice and deny unlawfully confining the plaintiff and put him to strict proof. They plead that the plaintiff was being restrained from jumping out of the moving vehicle and injuring himself. They have asked the court to dismiss with costs the plaintiff's claim.

The evidence of the plaintiff is that following destruction of crops by wild animals the farmers of Pumwani Command met and discussed the matter. It was agreed that they report the matter to the District Commissioner who promised to contact the 1st defendant for a solution. When this was not done the plaintiff wrote to the then Secretary to the Cabinet and Head of Public Service with a copy to the 1st defendant's office at Hola (letter produced as exhibit 1) which he claimed annoyed the officer he presented the letter to; that following that report warders from the 1st defendant visited the farms on 18th June 2011; that the warders were armed and in uniform; that they put him in a vehicle to show them where destruction of crops had taken place and that they handcuffed him to the vehicle.

He testified further that they went round the farm while he was handcuffed until 5.00pm when they released him and left him 9 kilometres from his home. He stated that he stopped a vehicle with blue number plates and managed to get to Bura Police Station where he reported the matter; that the officer at the front office refused to take the report and chased him away. On cross examination the plaintiff claimed that he was criminally harassed. He admitted that he did not report the alleged arrest and

harassment to the 1st defendant. He further stated on cross examination that he was arrested from Bura market and told to show the warders where wild animals had destroyed crops; that after handcuffs were placed on him he realized that he was under arrest and that he was beaten by the warders and went to hospital. He claimed he did not have a P3 form because the police refused to issue him with one.

Rose Muhonja testified as plaintiff's witness. Her testimony is that on 18th June 2011 she was at the farm cultivating when she saw a vehicle belonging to the 1st defendant. In the vehicle were game warders and the plaintiff who was taken out of the vehicle. She claimed to have heard words that "Si wewe ulitushitaki. Si wewe uliandika barua". She said that she saw the warders push the plaintiff back to the vehicle and they left. Rose did not testify to the plaintiff being handcuffed in her testimony in chief but on cross examination she said that she did not know why the plaintiff was handcuffed although she states so in her statement. She also said in cross examination that she did not see the warders beat the plaintiff.

The second witness is John Ndevera Senerwa places the date as 12th June 2011. He testified that he had been hired by the plaintiff to spray the farm when he saw the vehicle belonging to 1st defendant; that the vehicle stopped and the plaintiff who was handcuffed was ordered out; that he was ordered back to the vehicle again and the vehicle drove off.

The defendants on the other hand called three witnesses in support of their case. The witnesses place the date of events leading to this matter as 19th July 2011. Abeid Muroa Gafo and Awadh Komora both game rangers with the 1st defendant testified as defence witness one and two respectively. Their evidence is that they were mandated to follow up on the complaint raised by the plaintiff; that they went to Bura on 18th July 2011 and spent the night there; that on 19th July 2011 the plaintiff went to where they were and introduced himself to them as the person who had complained about destruction of crops by wild animals; that they told him to get in the vehicle and show them where the destruction had occurred; that at the plaintiff's farm, they did not see any baboons; that they decided to take the plaintiff to Mr. Kivuva the chairman of village 5 but the plaintiff refused to go and threatened to jump out of the moving vehicle claiming that they intended to kill an animal and implicate him with it; that being apprehensive that the plaintiff would jump from the moving vehicle and injure himself, they handcuffed him to the vehicle.

Both testified further that they called Mr. Kivuva who told them that he was in Nairobi and they go to see the chairlady who referred them to the manager in Village Two. They took the plaintiff to the manager of Village Two and left him there. Both witnesses denied that they had arrested the plaintiff and that he was beaten. They stated that they were trying to stop the plaintiff from jumping from the moving vehicle and injuring himself.

James Irungu Mwangi testified as defence witness three. He stated that Abeid and Awadh asked him to accompany them to Bura to show them where animals had destroyed crops. He confirmed that on 19th July 2011 the plaintiff went to where they were and introduced himself; that they went to Village Ten where they did not find any baboons. They decided to go to Mr. Kivuva to find out about destruction of crops by wild animals. The plaintiff attempted to jump out of the moving vehicle. This witness confirmed that they left the plaintiff with the manager of Village Two. He stated that the plaintiff was not beaten. This witness told the court that Rose Muhonja is married to the plaintiff and was not at the farm as she stated and that John Ndevera Senerwa is the plaintiff's son and he too was not spraying the plaintiff's farm as they stated in their evidence.

In his submissions, the plaintiff has reiterated his evidence that he was unlawfully arrested, detained and molested by agents of 1st defendant and that the 2nd defendant did not advise the 1st defendant on this dispute and both are liable to pay him compensation. He claims that his rights to freedom were contravened and seeks judgement in his favour.

As at the time of writing this judgement, the 1st defendant had not filed his written submissions. The court order allowed parties to put in written submissions by 14th October 2013. The 2nd defendant has filed submissions. The 2nd defendant has submitted that the plaintiff must prove that the defendants acted

without reasonable or probable cause; that they acted maliciously; that the proceedings were instituted by the defendant and that the proceedings were terminated in favour of the plaintiff. The 2nd defendant relied on the following cases:

- i. **Samba vs Wambari, High Court Civil Case No. 1967 of 1982**
- ii. **Katerrega vs Attorney General (1973) EA 289**
- iii. **Kagane vs Attorney General (1969) EA 643**

The 2nd defendant submitted that the plaintiff has not proved any of the above ingredients; specifically that he reported the matter to the police; that he did not produce the Occurrence Book where that report was recorded; that he did not prove malice or that the proceedings were instituted or continued by the defendant and that they were terminated in his favour. It is submitted that the plaintiff is not entitled to the damages he is seeking because he has failed to prove his claim.

I have noted that the above authorities deal with malicious prosecution and are not useful to the defendants. The plaintiff is seeking damages for unlawful arrest and detention. Being a lay person, he did not have the benefit of legal authorities to support his case. However, this court has looked **at Petition 163 of 2011 Pascal Kibet vs Commissioner of Police & another** where the Petitioner was awarded Kshs 350,000 for unlawful arrest and incarceration, seizure of Petitioner's property and costs of the Petition. In the above case the Petitioner had been arrested and detained incommunicado for seven days. The Respondents did not tender evidence in support of their defence.

In the case before me, I understand the issues to be two: whether the plaintiff was unlawfully arrested and detained; and whether the 2nd defendant failed to record the plaintiff's claim and to advise the 1st defendant.

I find the evidence of Rose Muhonja and John Senerwa contradictory. Rose did not state in her witness statement dated 14th December 2011 that she heard the game rangers telling the plaintiff "Si wewe ulitushitaki. Si wewe uliandika barua." John Senerwa stated in his witness statement that he saw the plaintiff crying. He also stated in the same statement that at the time the vehicle carrying the plaintiff arrived to where he was, he had been working as a casual labourer in the farm belonging to one Mahadi Digale. These contradictions lead this court to doubt if these witnesses witnessed anything in respect of this case.

Another contradiction is reflected in the date when the events of this case occurred. In this statement he puts the date as 18th July 2011. In his testimony in court he stated that he had been given work by the plaintiff to spray the plaintiff's farm. In court he testified that it was on 12th June 2011. He repeated this date on cross examination.

The date when the events leading to this case happened is also confused in the testimony of the plaintiff and in his pleadings. The Plaintiff cites 28th June 2011; the plaintiff's evidence cites 18th June 2011. The defendants' witnesses cite 19th July 2011. This issue is therefore not resolved and leads to more doubts on the circumstances surrounding this case.

I have carefully considered the evidence on both sides. I wish to state that this is not a case for malicious prosecution because there was no prosecution. Secondly, it is my considered view that the plaintiff has failed to establish that he reported the matter to the police and they failed to record his report and take action. The officer the plaintiff claims he reported to is not disclosed and even if this court were to believe the plaintiff reported the matter and one officer failed to act, a Police Station has an Officer Commanding the Station. There is no evidence that the plaintiff took up the matter with this officer or any other government agency like the District Commissioner or Officer. He claims he was assaulted and injured. There is no such evidence like a report from a medical officer. Again the plaintiff did not summon the person who referred him to the police to get a P3 form. Nor did he seek help of this court to summon any witness he may have wished to call to support his case.

Thirdly, the witnesses for the defendants have explained the circumstances leading to the handcuffing of the plaintiff. I find that this court has no reason to doubt that this action was taken to prevent the plaintiff from jumping out of the vehicle. The agents of the 1st defendant could have let him leave and report the matter to the manager but I do not doubt that their actions were not malicious especially when I have no evidence to the contrary. I am alive to the provisions of Article 29 of the Constitution 2010 on personal freedom and security of the person. It is my considered finding that the plaintiff has failed to prove that his personal freedom and security was infringed upon. He took himself to DW1 and DW2 and introduced himself upon which he was told to enter the vehicle and show them where the baboons had destroyed the farms. There is evidence to show that DW1 and DW2 surrendered the plaintiff to Manager of Village 2 and did not leave him in the bush as he claimed.

In conclusion I find that on a balance of probabilities, the plaintiff has failed to prove his case that he was unlawfully arrested, criminally harassed and molested and maliciously detained. He has failed to demonstrate that he is entitled to any of the prayers he is seeking in this claim. His claim must therefore fail. Consequently, I hereby dismiss the plaint dated 14th December 2011 and filed on 7th May 2012. I order that each party pays its own costs.

I make orders accordingly.

S. N MUTUKU

JUDGE

Signed, dated and delivered this 4th November 2013.