



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 2450 OF 1993

ISAIAH NGOTHO KARIUKI PLAINTIFF

VERSUS

THE COMMISSIONER OF POLICE & ANO. DEFENDANTS

JUDGMENT

On the evening of the 10th of July 1990, Isaiah Ngoto Kariuki and others were picked up by the police from a certain bar situated in Dagoretti Corner. They were held as suspect for 14 days and later appeared in court on charges of holding an illegal meeting with seditious intention to overthrow the Government of Kenya.

A trial was held and after a year he was sentenced with others to a term of imprisonment of 4 years to 7 years imprisonment on the various charges against him.

Being dissatisfied with the conviction and sentence he appealed to the High court. When he and others came for hearing of the appeal and after having been granted bond on bail pending appeal, the D.P.P. appeared in court and stated that “the state does not intend to contest the appeal against conviction and sentences The net result of this would mean that subject to the decision of this court, the appeals should stand allowed.”

The Plaintiff and others, in the judgement of the two Hon. Judges, had their conviction quashed and sentence set aside. They were set at liberty unless otherwise lawfully held.

On the 19th of May 1993 Isaiah Ngoto Kariuki filed this suit later amended on the 17.7.98, against the Commissioner of Police and the Honourable Attorney General for malicious prosecution.

He prayed for the High Court to award him General Damages, Exemplary and aggravated damages, the cost and interest and any other or further relief the High Court may deem to grant.

The defendants filed a defence in which they stated that they were acting in pursuance to the duty imposed upon them by the law in a bid to preserve Public Security which was threatened. The duty being to ensure that law and order were maintained. To prosecute probable offences and to preserve public security.

The defendants denied having been malicious, acted unjustifiable or having brought against the plaintiff charges that are politically motivated.

There are six agreed issues before the court which I wish to answer as follows:- The Plaintiffs claim is not time barred by nature of the Public Authorities Limitation Act Cap.39 (Laws of Kenya). The state concedes that they were given notice on time on the filing of this suit.

2. Did the defendants arrest the Plaintiff without any cause or any reasonable cause?

The plaintiff narrated in his evidence the circumstances of his arrest. He had gone to a bar to have a drink. He was with others when the police came and apprehended him for no cause. He was taken to his house a search was made and after being in the police custody was taken to court on seditious charges .

The Plaintiff claim that his fundamental rights had been breached. That he was just sitting discussing with others when arrested.

The defendants tried to show that, due to the arrest, it was necessary and was done with reasonable cause at the time.

3. Did the defendant act maliciously in arresting, and detaining and arraigning the plaintiff before subordinate courts.? The defence stated they were not acting maliciously. In fact their witness “DW2” gave evidence of the very good condition that the plaintiff enjoyed in custody.

The plaintiff claimed there was malice. The whole procedure of his arrest was questionable. He was detained and was not permitted to see his family. He was held under some unfavourable conditions.

4. Were the plaintiffs charges politically motivated? This is most certainly so. The defence witness stated that the plaintiff had the intention of over throwing the Kenya government. That as a result the investigations into such allegations led to the change of sedition with such intention.

5. Is the plaintiff entitled to damages.

The plaintiff has told the court that prior to his arrest he was earning a substantial amount of salary and benefit from his then employer.

By Profession he was and still is an accountant and a former Dean of University. He was enjoying substantial benefit which he no longer is having due to his arrest. He lost his employment and the confidence of those around him.

During his detention at the police he was badly treated to the extent of being kept in a water logged cell with little to eat.

DW2 on the other hand stated his main task was to provide substantial amount food, beddings and other necessity for the plaintiff.

The plaintiff called PW2 a friend of his and also a medical officer who produced a medical report he had submitted dated the 10th of August 1992. He stated that after making specialised and clinical investigation he found that the plaintiff had a back pain due to scoliosis (tilting of the spine due to pain caused by the trauma inflicted whilst at the police cell.)

Acidity in the stomach due to anxiety.

Anal piles from constipation due to anxiety and pain arising from duodenal ulcers and poor dieting condition in prison).

He concluded to say that the plaintiff would live under the close supervision of an orthopaedic surgeon, neurologist a gastro-antology and a physiotherapist.

He was detained and ought to have been brought to court as soon as it was reasonably practical (see section 72 3(b) Constitution of Kenya).

The case of Wanyiri Kihoro

Attorney General. CA151/88**(Gachuhi, Masime, Kwach)**

In the judgment of Kwach, JA. He held that Section 36 of the Criminal Procedure Code provides that:

“suspects held on suspicion of murder or treason can be held in police custody indefinitely beyond the strict limits stipulated under Section 72(3) (b) of the Constitution before being taken to court. It is null and void and of no legal effect whatsoever

There is a conflict between a statute and a constitutional provision. The latter prevails over the former.”

It seems from this decision that the plaintiff wishes to state that his detention was unlawful as he ought to have been brought to court within 24 hours.

Once convicted of the charges after a trial for one year, the plaintiff on appeal was acquitted on the grounds that the state did not support the conviction. The advocate for the defendant stated that although the plaintiff was acquitted, he and the advocate for the plaintiff were not able to know why the state took that stand of not supporting the conviction and sentence.

On the issue of Damages he stated that in order to prove this the primary evidence should be followed under the Evidence Act. Section 66,67,68 and 69, on the production of documents. As this was not follow the allegations of damages had not been proved strictly.

I find that after three defendants had the plaintiff charged and convicted after a trial of one year that the very same defendants conceded to the appeal and as a result the plaintiff was acquitted on his changes.

It is of common knowledge that this was during the dawn of multiparty political system and this is not used as a reason for supporting the appeal.

I am satisfied and find that the plaintiff was maliciously prosecuted. That such prosecution was politically motivated. He has therefore suffered loss, ill treatment and torture.

In the words of Kwach, JA.

“The purpose of damages is not to punish a defendant but to afford a plaintiff a reasonable compensation or the loss or injury he has suffered.”

I hereby find that the plaintiff is entitled to Damages. I enter judgment for the plaintiff on the prayer for General damages. I believe that Kshs.2 million is a reasonable award in the circumstances.

I award costs of this suit and interest.

I make no award on exemplary and aggravated damages.

The Defendant is to pay Kshs.50,000/- adjournment costs as ordered by Mbogholi-Msagha J with interest as of to-days date.

Dated this 18th day of December, 1998.

M.A. ANG’AWA

JUDGE