REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL CASE NO 80 OF 1985

JOHN HAYO OWUOR.....PLAINTIFF

VERSUS

ATTORNEY GENERAL & 2 OTHERS.....DEFENDANT

JUDGMENT

The plaintiff, John Hayo Owuor, filed this suit against the Hon Attorney General, the Officer in Charge GK Prison Kodiaga (Main) and the Deputy Registrar High Court of Kenya, Kisumu praying for judgment against the defendants generally and jointly for general damages for false imprisonment and unlawful confinement for one year including mental and physical suffering. The plaintiff also prays for costs of the suit.

Evidence has been adduced, that during 1980 the plaintiff was working as a clerk with Singer Sewing Machine and his duties included collecting cash from the public and being in charge of stores. In April 1980 he was charged with the offence of stealing by servant and was convicted and sentenced to four years (4) imprisonment. The plaintiff appealed against his conviction and sentence in Criminal Case No 785 of 1980 of the Senior Resident Magistrate's Court at Kisumu. The appeal case was No 878/80 in the High Court at Kisumu.

The High Court heard the appeal and reduced the sentence from four (4) years to two and half (21/2) years imprisonment on each count sentences to run concurrently. The plaintiff faced five counts. The High Court judgment was delivered on 13th February, 1981 and there is evidence from the relevant case file showing that action was taken on the same day to inform not only the prison authorities at Kodiaga of the outcome of the appeal but also to inform the trial Court and the office of the Attorney General. This was done in the High Court Criminal Appeals Registry.

Beyond that stage, however, there was no evidence to show how the letter conveying the result of the appeal was sent to the prison authorities at Kodiaga in Kisumu.

This Court has been told that the normal practice was and still is for the High Court Criminal Appeals Registry to send such letters to the mail registry for dispatch. The mail registry would then enter such a letter in a delivery book and an office messenger from the registry would take the letter with the delivery book to one of the prison officers who escort prisoners from prison at Kodiaga to Kisumu Court. The officer receives the letter while at Kisumu Court and signs the delivery book and carries the letter with him to Kodiaga.

The alternative method was by posting through the post office in the normal way. A second alternative method was where such a letter could be handed over to one of the prison officers present at the Court without requiring him to sign anywhere for it.

There was no entry in the delivery book in use on 13th February, 1981 to show that any letter was received by a prison officer then at the Law Courts Kisumu on 13th February 1981 or on the next day. There was therefore no evidence of how the letter was dispatched to Kodiaga Prison, if at all it was dispatched. By then the plaintiff had been transferred from Kodiaga Prison to Kitale Prison where he appears to have remained until discharged. Because the result of his appeal was not received, the plaintiff served the whole of the sentence of four (4) years imprisonment, of course with usual remission. He was therefore discharged on 26th May 1983 instead of 26th May 1982. This was after the plaintiff had been discharged from the prison and had come to the Court to claim the exhibits which belonged to him in the case that he learned of his appeal's result and was surprised to find that he had served one full extra year enduring prison life waking up every day at 6.00 am to take porridge and going to work in the maize plantations from 6.30 am to 6.00 pm without lunch under strict orders to work hard. The plaintiff decided to file this suit.

The facts are clear and there is no doubt that after the decision of the High Court reducing the term of imprisonment, there was a failure of communication somewhere between the High Court Criminal Appeals Registry and Kitale GK Prison. Of course the result of the appeal was to be communicated to Kodiaga where the plaintiff was when he appealed and it was Kodiaga to inform Kitale of the result as the Court had no information that the plaintiff was no longer at Kodiaga.

It may appear that the High Court Criminal Appeals Registry sent out the results as is shown in exhibit DI letter dated 13th February 1981 but the claim of the same letter having been dispatched to the prison at Kodiaga is not supported by concrete evidence. Maybe the letter was received at Kodiaga but since the plaintiff was then at Kitale, the information was not sent by Kodiaga to Kitale. I have had no evidence on that aspect of the case.

On the whole therefore I am satisfied that the plaintiff has established his case against the defendants jointly and severally. There was negligence on the part of the defendants although there has been no evidence to enable me to pinpoint the exact stage at which that negligence occurred as between the time the letter was sent out by the High Court Criminal Appeals Registry and Kitale Prison. Someone at Kitale Prison could still have received the information from Kodiaga and kept quiet. It was all along in the hands of Government servants.

As a result the plaintiff suffered unlawful imprisonment with mental torture and physical suffering for one full year – after serving the lawful imprisonment period. During that period the plaintiff lost the freedom which he should not have lost had there not been the negligence of the defendants.

I do not think it is sufficient to argue that the plaintiff should have made inquiries and insisted on the outcome of his appeal after he lodged the appeal. The plaintiff was a prisoner and it was the duty of the third and second defendants to have the plaintiff informed about the outcome of the appeal whether or not the plaintiff made inquiries. In fact, in the circumstances the plaintiff had no duty to make inquiries and it is neither law nor logic to argue, as the learned state counsel submitted, that since the plaintiff was not aware that the appeal had been heard and the sentence reduced, the extra one year he served in the prison was lawful.

I do not think the provisions of section 4(5) of the Government Proceedings Act (cap 40 Laws of Kenya) shield the defendants respecting the acts or omissions the plaintiff is complaining about in this case. The subsection states:

> "No proceedings shall lie against the Government by virtue of this section in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him or any responsibilities which he has in connection with the execution of judicial process."

In the same way I do not think section 6 of the Judicature Act (cap 8) shields the defendants in this case. The section states:

> "No Judge, magistrate or justice of peace and no other person acting judicially, shall be liable to be sued in any Civil Court for any act done or ordered by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided he, at the time in good faith believed himself to have jurisdiction ---------- and no officer of any Court or other person bound to execute the lawful warrants, orders or other process of any judge or such person shall be liable to be sued in any Court for the execution of any warrant order or process which he would have been bound to execute if within the jurisdiction of the person issuing the same."

To begin with section 6 of the Judicature Act, it states clearly that the officers referred to are protected when "acting judicially." Those are Judge, magistrate or justice of peace and any other person acting judicially and who at the time of acting he acted in good faith believing he had jurisdiction to act. The section then goes on to protect other officers of the Court or other person who are bound to execute the lawful warrants, orders or other process of any judge or such person.

To my mind that means that when a Judge, for example, acting judicially does something which is outside his jurisdiction but does it in good faith believing that he has the jurisdiction, he is protected under section 6 of the Judicature Act. If an Executive Officer of the Court or any other person like a Court Broker who is bound to execute the lawful warrants, orders or other process of the judge, does such execution in a situation where the Judge acted without jurisdiction as stated above, that Executive Officer or Court Broker is protected under section 6 of the Judicature Act.

Such a situation does not exist in the case before me. In the case before me the Judge acted judicially when he heard the appeal of the plaintiff and reduced the sentence from 4 years imprisonment to 21/2 years imprisonment. That was the order of the judge which was to be executed and anybody bound to execute it protected by section 6 of the Judicature Act.

On the contrary that order of the judge was not executed. Instead there was an act of omission to execute the order of the judge. It was therefore not something those who made the omission were lawfully bound to do in accordance with the order which had been made by the Judge. Those who made the omission are not therefore protected by section 6 of the Judicature Act. These are the defendants.

The same reasoning may be employed with respect to section 4(5) of the Government Proceedings Act. For the officer to be protected he must have acted or omitted to act while discharging or purporting to discharge responsibilities of a judicial nature vested in him or any responsibilities which he has in connection with the execution of judicial process. Negligence cannot be said by any stretch of imagination to be the responsibility of a judicial nature or responsibility had in connection with the execution of judicial process.

The expression "responsibilities of a judicial nature" is not defined anywhere in the Government Proceedings Act. Not even in the Interpretation and General Provisions Act. Mr Hawala has submitted that section 4 of the Government Proceedings Act was borrowed from section 2 of the Crown Proceedings Act 1947 of England and has referred to the case of *Royal Aquarium and Summer and Winter Garden Socy –vs- Parkinson* (1892) 1 QB 431.

In that case the Court had to consider whether proceedings at a meeting of the London County Council convened to determine what music and dancing licenses should be granted (a jurisdiction transferred by the Local Government Act, 1888, from the local justices to the County Council) were "judicial proceedings", so that absolute privilege could be claimed in respect of remarks made there in proceedings taken for defamation. Lopes L J (said at p 452)

> "The word judicial has two meanings. It may refer to the discharge of duties exercisable by a Judge or justices in court, or to administrative duties which need not be performed in court, but in respect of which it is necessary to bring to bear a judicial mind that it is a mind to determine what is fair and just in respect of matters under consideration. Justices for instance act judicially when administering the law in Court, and they also act judicially when determining in their private rooms what is right and fair in some administrative matter before them, as for instance, levying a

rate".

Nothing but administrative business was transferred by statute to the council in this case, and the application for licenses which have to be determined judicially. It was therefore held that the proceedings were not an occasion to which absolute privilege would apply.

In the case before me the appeal had been heard and sentence reduced and what was left was to communicate the Court's decision to the prison authorities who would communicate the same to the plaintiff and have the plaintiff released on 26th May 1982. That act cannot be said to be "a responsibility of a judicial nature" as what was left to be done was an administrative act and the privilege conferred by section 4(5) of the Government Proceedings Act therefore cannot come into play.

All the authorities quoted by the learned state counsel are distinguishable from the case before me because, unlike the case before me, those authorities fall in the category of execution of judicial process where the officer executing is bound under law to execute the process.

In the case of *Attorney- General- vs- Oluoch* [1972] EA 392, claims of damages were brought against two police officers and two magistrates for unlawful confinement and false imprisonment. The former had executed a warrant of arrest against the appellants and the latter were the ones who issued such warrant. It was held by the Court of Appeal that no suit lies against the Government in respect of acts done in the discharge or purported discharge of judicial functions.

The other case cited by the learned state counsel is *Davis and Shirtliff Ltd –vs- The Attorney General* [1978] KLR 272 where the Court Broker attached and sold the properties of a judgment debtor but failed to remit the proceeds to Court. It was held that all acts performed by the Court Broker in connection with the execution of judicial process before he actually pays over the proceeds to the judgment creditor are acts in discharge of his responsibilities.

Accordingly section 4(5)of the Government Proceedings Act precludes proceedings against the Government in respect of all such acts.

I have stated above that the two cases cited by the learned state counsel are distinguishable from the case before me. It is my view that to hold otherwise would be contrary to section 72(1)(a) as read together with section 72(6) of the Constitution of Kenya which is the fundamental law of our Country and the "grund norm" of our laws.

Section 72(1)(a) is as follows:

> "No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases:-
>
> (a) in execution of the sentence or order of a court, whether established for Kenya or some other country in respect of a criminal offence of which he has been convicted;"

Section 72(6) provides:

> "A person who is unlawfully arrested or detained by another person shall be entitled for compensation therefore from that other person".

The plaintiff's incarceration for a period of one year in prison after the 26th May 1982 was a breach of his fundamental rights as enshrined in the Constitution and the defendants are liable to him and cannot hide under the provisions of section 4(5) of the Government Proceedings Act or section 6 of the Judicature Act.

In *Halsbury Laws of England*, Third Edition Volume 38 at page 767 paragraph 1270, it is stated with regard to the liability of a person in the category of the second defendant as follows:

> " The governor of a prison is protected in obeying a warrant of commitment, valid on the face of it, addressed to him, and is not liable to an action for false imprisonment if he detains a person in pursuance with a warrant. He is, however, liable if he detains the wrong person or keeps a prisoner in custody without a sufficient warrant of commitment or for a longer time than is lawful, or if he treats a prisoner as a criminal who ought not to be so treated. It is no defence that in doing any such unlawful act the governor of a prison was obeying the order of a Secretary of State".

The learned state counsel concludes her submission by stating that under the Public Authorities Limitation Act, cap 39 Laws of Kenya, this action is barred by section 3(1) as read with section 5 in that the action was filed 36 months after the date of the cause of action. She says the action should have been brought in 1984. This point had been put in paragraph 3 of the written statement of defence. But when the hearing of this case started on 7th March 1991, the point was not taken up by the learned state counsel on preliminary argument or throughout the trial. That having happened the issue became of no consequence and therefore I do not see why the learned state counsel decided to raise the issue in her submission.

In any case, I do not know whether she considered the effect of section 26(b) and or (c) of the Limitation of Actions Act, cap 22. The provisions state:

> "Where, in the case of an action for which a period of limitation is prescribed, either:-
>
> (b) The right of action is concealed by the fraud of any such person as aforesaid; or
>
> (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:".

The plaintiff was released from prison on 26th May 1983. It was not until he went to the Court to collect his exhibits on 26th July 1984 that he discovered he served one year longer in prison than it was lawful. That matter had been concealed from the plaintiff earlier by fraud or by mistake of the second defendant and or the third defendant. The plaintiff filed this suit on 22nd May 1985. That was within 12 months from 26th July, 1984. In the circumstances, I do not see why this action should be time barred.

The outcome of what I have been saying above is that, in my opinion the plaintiff has established his case against the defendants. He has proved it. He is therefore entitled to damages from the defendants. By virtue of the fact that the plaintiff was in prison unlawfully for one year, he was obliged to do manual work which he should not have done and was therefore treated as a criminal during that period when he should not have been so treated. His freedom was curtailed and he was not able to do what he could have done at home, during that period, under freedom. He suffered mental anguish as a prisoner for that one year and spent in the prison the energy he could not have spent there for that one year.

I have not been able to come across recent authorities regarding the quantum of damages to be awarded in a case of this nature. In the case of *Mibui –vs- Oyer* [1967] EA 315 where the plaintiff had been shot while being arrested on suspicion of having committed a felony by a private person, the plaintiff was awarded Shs 10,000/- for false imprisonment.

In the case of *Nsubuga –vs- Attorney General* [1974] EA where the plaintiff was detained for 21 days unlawfully and was beaten and injured by the police and as a result he lost part of the hearing of one ear and had been kept in disgraceful conditions, he was awarded Shs 40,000/- damages for false imprisonment and Shs 60,000/- damages for assault.

Taking into account the present economic trend in the country and rampant inflation and the duration of time the plaintiff spent in prison and the labour he was obliged to do as well as mental torture and physical suffering, I would think that a sum of Shs 100,000/- would adequately compensate the plaintiff for false imprisonment, covering unlawful confinement, mental torture and suffering.

Accordingly, I hereby enter judgment for the plaintiff against the defendants severally and jointly, in the

sum of Shs 100,000/- plus costs.

Dated and delivered at Kisumu this 15th day of April 1991

KHAMONI

JUDGE