REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO 686 OF 1986

MOSES WAITHANJI MINGIRE.....PLAINTIFF

VERSUS

ATTORNEY GENERAL.....DEFENDANT

JUDGMENT

August 28, 1989, Bosire J delivered the following Judgment.

The plaintiff, Moses Waithanji Mingire, a retired police officer, and presently a farmer and businessman, brought action by plaint, claiming damages based on the torts of false imprisonment, malicious prosecution and assault. The defendant is the Attorney General, sued on behalf of the Government of Kenya as its legal representative.

The plaintiff was arrested on 22nd October, 1985, on an allegation that he was brewing "changaa", a spirituous liquor, on his farm at Ukunda in the South Coast of Kenya. He was on the next day presented before the District Magistrate's Court, at Kwale, on a charge of brewing changaa. He was arraigned on it. He denied the charge. He was later tried for the offence. Two people who were jointly charged with him pleaded guilty, were convicted and sentenced. Upon trial the plaintiff was acquitted under section 210 of the Criminal Procedure Code, which section donates the power of a court to acquit an accused person at the close of the prosecution case if a prima facie case has not been made out against him for the offence charged or any less cognate offence.

The plaintiff considered that his arrest and subsequent detention in police custody was wrongful and ill motivated. He blamed the officer in charge Diani Police Station as having been instrumental in his arrest, beating and subsequent prosecution.

In his plaint and testimony the plaintiff contended that he was arrested at 9 pm on 22nd October, 1985, on the orders of the OCS, Diani Police Station, was marched to his farm from where some 'changaa', and 'changaa' manufacturing instruments were found, was beaten up by the police officers who had custody of him in the course of which his spectacles broke, and he sustained bodily injuries; was subsequently detained overnight at Diani Police Station after which he was marched while shackled to Kwale District Magistrate's Court and charged, that his request for police bond was refused; and that he was neither a brewer of 'changaa' nor did he have possession of it. It was his evidence that his arrest and what followed thereafter was motivated by spite. He did not however, indicate the basis for whatever ill-feelings which provoked his ill treatment as he called it.

The defendant appeared and filed a written statement of defence admitting that, the plaintiff was arrested,

detained overnight at Diani Police Station, and, was subsequently charged, and that his prosecution terminated in an acquittal. However the defendant denied the actions of the police were ill-motivated or that they were unfounded. Evidence was called to the effect that the plaintiff had prior to 22nd October, 1985, sent two drums to his farm in question, which drums were among the items seized from his farm on the material date of his arrest, that he was among the people who had been manufacturing changaa on his farm the same day, and that he was not beaten up at all. Evidence was also led to the effect that just before the time of his arrest he was seen coming from his farm where a few minutes later "changaa" and "changaa" making apparatus were recovered.

That the plaintiff was arrested, charged and tried, was not disputed. That he was acquitted for the charge of either manufacturing or possessing "changaa" was also not in dispute. The dispute centred on, firstly, whether the arrest and subsequent prosecution was wrongful and ill motivated, and, secondly, whether the plaintiff was assaulted by the police. There was also a dispute as to whether the plaintiff sustained any injuries. The first and paramount issue is whether there was a legal reason for arresting the plaintiff. The plaintiff contended there was none. The defendant contended otherwise. The time of arrest was 9 pm. The complaint which provoked the plaintiff's arrest was made by William Nganga Muchunu (DW 1). He was and still is a police officer attached to Security Intelligence, Mombasa. He owned and still does own a farm quite close to that of the plaintiff at Ukunda. It was his testimony that on 22nd October, 1985, he was on leave, and was at his farm at about 7.15 pm While there he saw the plaintiff leaving his farm on a bicycle. Shortly later he was followed by two people, a man and a woman. The man was pushing a bicycle. They had "changaa" in their possession. He apprehended them and escorted them to Diani Police Station. The evidence is not clear whether they were the people who were jointly charged with the plaintiff. At the time of handing them over at the Diani Police Station he reported that "changaa" was being brewed at the plaintiff's farm, and that the plaintiff was involved. The report prompted the arrest of the plaintiff. He was arrested outside the police station when, according to the defence, he came there to inquire about the two people who had been arrested by DW 1.

DW 1 and PC Joseph Lena Sieku (DW 2) were among the police officers who accompanied the plaintiff to his farm. From there "changaa" and "changaa" making implements were recovered. They were on the plaintiff's land near the river. His land had a river frontage. The plaintiff, as indicated earlier, admitted "changaa" and "changaa" making apparatus were recovered on his farm but he denied he was responsible for their presence there. It was his evidence that he had not been to his farm for long and that anybody could have and someone probably took advantage of his absence and used his land for making the illicit brew. He may have told the truth. However the circumstances of the case do not support his charge that his arrest was wrongful and motivated by spite. There was recovery of "changaa" and "changaa" making apparatus on his farm which made him an obvious suspect. There was no allegation that those things were planted there by the police. In those circumstances the arrest of the plaintiff cannot be said to have been wrongful. Coupled with that there is the evidence of DW 1 to the effect that the plaintiff was seen by him leaving his farm on the material day and shortly before his arrest. That evidence stands uncontroverted. Even without it the police were entitled to treat the plaintiff as a suspect in absence of any evidence as to who was responsible for the brewing of "changaa" on his farm.

Having come to the foregoing conclusion, the tort of malicious prosecution must of necessity fail. There was justification for the arrest, detention and prosecution of the plaintiff. The fact that his prosecution terminated in an acquittal did not make the plaintiff's case any sounder.

I must now turn to the tort of assault. The plaintiff testified that when he was taken to his farm in a police landrover, and thereafter to a neighbouring farm, he was all the time protesting his treatment. The farm was 6 km from Diani Police Station. At the neighbour's farm the police went with him to a house in which more "changaa" was recovered. There were two people in it. They were beaten up to confess ownership of the "changaa". They were ordered to sit on the ground and so was him. He protested and reused to comply on the ground that he was being treated as a prisoner when he had not been formally arrested, and told the reason for the arrest. The OCS Diani Police Station whose name he gave as CI Nganga, slapped him on the face. The spectacles he had on broke, and its lens pieces allegedly entered his eyes. Some cut his skin round the eye. He was also beaten up by the other police officers. That was his evidence.

Thereafter the plaintiff and the other two men were ordered to carry the "changaa" from that house to the police landrover but the plaintiff refused to comply. He was forced into the police landrover together with the two people. Therein they were doused with some of the "changaa" and were then taken to Diani Police Station as common criminals. There his request for bond was refused, and so was his request to go and close his shop which was opposite the police station and from near where he had initially been arrested.

It was the plaintiff's case and evidence that due to the assault his 5 teeth became loose and later came out, and his eye was damaged. Presently he cannot chew his food well, experiences chronic pain in the right cheek bone and the left jaws both the upper and the lower, so said he. Under cross-examination the plaintiff stated that CI Nganga slapped him on his right side and broke the left not the right hand side lens of his spectacles, which he produced in evidence. It was that blow, he said, which loosened his 5 teeth. It was his evidence that although the slap was on his right cheek it affected the left side as well. The teeth which came out, he said, were on the right side. The witness could not however remember which hand CI Nganga used to slap him.

The plaintiff's evidence as to his injuries was, to say the very least, incredible. He produced a P3 form which showed that he had sustained a "small cut on the lateral aspect of the left eye". One incisor tooth was found loose. In contradistinction with his oral testimony the medical evidence does not accord with it. There was no mention of any injury to his eye. It is also unbelievable that a blow which landed on his right cheek would not damage the right lens of his spectacles but do so to the left one. Coupled with that a medical report and oral evidence of the doctor who prepared it, Dr C Rouhani, (PW 2) is at variance with his evidence as to which side of his forehead the blow he received landed. The doctor said it was his left side, the same side the lens of his spectacles broke. He talked about 3 cuts around the left eye which were caused by the broken lens. The doctor examined the plaintiff on 12th October, about 2 years, after the alleged injuries were inflicted. That evidence is at great variance with what is contained in the P3 form.

There are peculiar aspects about Dr Rouhani's medical evidence. He talked about a blow on the mouth that the plaintiff underwent dental treatment because of 5 loosened incisor teeth, which were later extracted, and that at the time he examined the plaintiff he had severe pain in the left eye. While medical opinion is entitled to the highest regard, a court is not bound to accept it if from the outward appearances it is clear there is no basis or proper basis for the conclusion reached. The doctor examined the plaintiff and formed the opinion that his condition was as earlier described, and that those injuries were inflicted two years earlier, quite incredible, particularly when he said that there was severe pain in the left eye. How could severe pain persist for two years without the plaintiff showing concern about it any earlier? If the doctor noted the conditions as described in his report then it is possible they were sustained much later than 22nd October, 1985.

In the foregoing circumstances I am discinclined to find the plaintiff was assaulted as he alleged. In any case his witness John White Olilo (PW.3) testified that when he saw the plaintiff on 23rd October, 1985, he did not notice anything unusual on him. If he had been injured as alleged, it would have clearly become obvious to PW 3. I agree with Mrs Tutui, learned state counsel, that the plaintiff did not prove he was assaulted as pleaded in his plaint or at all.

Two legal issues were raised by Mr Adembesa, counsel for the plaintiff, both touching on defence witnesses. It was his submission that DW 1, having not testified in the criminal case against the plaintiff his evidence should be viewed with circumspection. There is no rule of evidence to that effect. There is in any case no evidence as to why he was not called to testify. There may have been a reason for it. Even if he had testified it would not have changed the result of the case. He did not find the plaintiff in possession of the changaa. The standard of proof in criminal cases differs from that in civil cases. In any case his failure to testify should not be held against him. His evidence should be considered in the light of other evidence adduced.

The second legal point is the failure to call as a witness the OCS, Diani Police Station as at the 22nd October, 1985, to testify in this case. In effect Mr Adembesa invited me to draw an adverse inference against the defence case on that ground, that had he testified his evidence would have been unfavourable

to the defence case. In the alternative, that the failure to call him was ill motivated. I do not think so. An application was made for an adjournment so that the defence could call him. The application was disallowed; so to that the failure to call him cannot be attributed to any deliberate withholding of a witness. In any case an adverse inference could only be raised if the evidence adduced by the defence in rebuttal of the plaintiff's case was barely sufficient. As the matter stands even if the plaintiff's case is taken alone it does not establish the torts upon which this action is based to the standard required in civil cases, namely on a balance of probabilities.

The suit fails and is dismissed with costs.

Dated and Delivered at Mombasa this 28th August, 1989

S.E.O BOSIRE

JUDGE