



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**CIVIL CASE NO. 1967 OF 1982**

**ABUBAKAR SIMBA ..... PLAINTIFF**

**VERSUS**

**STEPHEN NJOROGE WAMBARI .....DEFENDANT**

**JUDGMENT**

The Plaintiff, Abubakar Simba, is a licensed dealer in precious and semiprecious stones operating from Nairobi and has brought this suit against the defendant, Stephen Njoroge Wambari, a farmer who farms in the Trans Nzoia District of Kenya to recover both special and general damages for false imprisonment and malicious prosecution as a result of an incident that occurred in August 1979 and which culminated in the arrest and subsequent prosecution of the plaintiff in Kitale Resident Magistrate's court for an offence under section 313 of the Penal Code. (Cap 63) . The plaintiff claims that his arrest and prosecution was instigated by the defendant through malice and wicked motive of revenge. The defendant is alleged to have achieved his desired result by an infamous conception of an entirely false story supported by perjured evidence. Accordingly the plaintiff claims special damages of Kshs 24,500 particulars of which are given in the plaint, and general damages the quantum of which is to be assessed by this court.

By his defence, the defendant has denied the plaintiff's claim and has averred that if the plaintiff was arrested (which he, of course denies) the defendant cannot be liable for the actions of the police, thereby implying that the actions complained of were committed by the police. At this stage it is worth noting that the plaintiff did not sue the Attorney General and no party applied to have him formed as a party. Consequently the police are completely out of these proceedings.

Though the parties did not frame any issues it is clear from the pleadings that the two major issues for determination by this court are:

- (i) Whether the alleged arrest and imprisonment of the plaintiff was unlawful and the prosecution that followed malicious, and
- (ii) If the answer to (i) above is in the affirmative, whether the defendant was responsible for the initial arrest and subsequent prosecution. To put it in another way, did the defendant, as is said, set the law in motion against the plaintiff?

It is accepted that in an action for malicious prosecution the plaintiff cannot succeed unless he establishes the following essential ingredients of the tort known as malicious prosecution. These are:

- (i) That the proceedings were instituted or continued by the defendant;

(ii) That the defendant acted without any reasonable and probable cause;

(iii) That the defendant acted maliciously and

(iv) That the proceedings were terminated in favour of the plaintiff. (see *Salmond on the Law of Torts* 16th Edition, page 423)

The plaintiff gave evidence on his own behalf and did not call any other witness. He relied on his own oral evidence in court, the evidence in the civil proceedings in Kitale Resident Magistrate's Court in Criminal Case No 3175 of 1979 in which he was prosecuted for an offence under section 313 of the Penal Code, (cap 63) the judgment in the Court of Appeal, Criminal Appeal No 21/1981 which was an appeal against the decision of the High Court dismissing summarily the plaintiff's appeal against the decision in the Kitale case (copies of both cases which he produced in court as Exhibits 1(a) and 1 (b)) as well as on the doctrine of *res ipsa loquitur* which, according to his counsel, Mr Morgan always comes to the rescue of a plaintiff, even where it is not pleaded. As regards the doctrine of *res ipsa loquitur*, I must state at this stage that no attempt was made by the plaintiff to establish the basis of its application and in the circumstances of this case, I find it has no application whatsoever.

The plaintiff testified that on 10th August, 1979 at about 10.30 am (in the plaint the time is stated as 12.30 pm) he was walking, along Kimathi Street, Nairobi when he met the defendant. He knew the defendant quite well because in 1976 this defendant had attempted to sell some worthless stones to the plaintiff's boss, a Greek, by the unusual name of Tom. This attempt by the plaintiff to deceive the Greek had been frustrated, according to the plaintiff's testimony, by the plaintiff himself. Apparently the defendant did not like the plaintiff for that and he must have borne a strong grudge against the plaintiff for when the defendant met the plaintiff along Kimathi Street, outside the New Stanley Hotel, he touched his shoulder and started blaming him for having caused him a loss by having refused to buy the stones. The plaintiff further testified that he tried to explain that the stones could not have been bought as they were worthless but this effort on the part of the plaintiff did not seem to satisfy or mollify the still angry defendant who continued to shove, push and threaten the plaintiff causing him to stagger.

At that point the plaintiff decided to escape from the plaintiff and to run, presumably for safety, in the direction of the Central Solice Station. He therefore ran across the road with the defendant after him in hot pursuit.

Fortunately for the plaintiff he spotted a police patrol car and stopped it. After explaining to the police officers in the patrol car what had transpired between him and the defendant, both parties were taken to Central Police Station where, according to the plaintiff, the defendant made further allegations against the plaintiff that the plaintiff had stolen money from him at Kitale by selling to him bad stones. Although the plaintiff says that he denied the allegation the police do not appear to have believed him for they searched him and found some stones with him, arrested him and locked him up in cells for 10 days after which he was moved to Kitale and charged with the offence of obtaining money by false pretences contrary to section 313 of the Penal Code (Cap 63) the particulars of the offence being that in May, 1976 at Kitale he sold to the defendant stones to the defendant representing the same to be diamonds which (said stones) were later discovered to be not diamonds.

After trial, at which the defendant (then the complainant) and his wife gave evidence for the prosecution, the plaintiff was convicted of the offence as charged and sentenced to pay a fine of Kshs 400 or to serve 2 months in default. His appeal to the High Court having been dismissed summarily under section 352(2) of the Criminal Procedure Code (cap 75) he appealed to the Court of Appeal which court allowed his appeal holding that the appeal to the High Court ought not to have been dismissed summarily and in all the circumstances the case against the appellant fell short of establishing his guilty beyond all reasonable doubt.

The story described by the defendant in his evidence and supported by his wife is totally different from what the plaintiff said. Briefly what the defendant said was that in May, 1976 he was visited at his shop in Kitale by the plaintiff . Prior to that visit he had not known the plaintiff. The plaintiff informed the

defendant that he had diamonds which he could sell to the defendant. The defendant who had no experience in diamonds and apparently could not distinguish them from other stones, refused the plaintiff's offer and the plaintiff left the defendant's shop without selling any diamonds to him. However, the plaintiff returned later and pleaded with the defendant to help him as he was in financial problems. The defendant says that partly out of concern for the plaintiff's professed problem and out of desire to make money, he agreed to buy one of the stones with the plaintiff for Kshs 300 having been told by the plaintiff its real value was about Kshs 2,000. The following day at the defendant's house outside Kitale town the defendant after having entertained the plaintiff to a dinner cooked by the defendant's wife, the defendant bought another stone for another Kshs 300. The conversation relating to the sale of the second stone between the plaintiff and the defendant was in the presence of the defendant's wife who testified as to what happened on the day the two parties ate dinner at her house.

After selling the second stone to the defendant the plaintiff was driven back to town and dropped there. The following day the plaintiff took the stones to a jeweller who on examining them confirmed that the two alleged diamonds were worthless, and on realizing that he had been swindled the defendant reported the matter to the police who assisted him to trace the plaintiff in Kitale but without any success.

It was not until 1979 that the defendant was lucky enough to have two chance meetings with the plaintiff. The parties first met by pure coincidence at a night club in Ngara, Nairobi known as Wairarako. When the defendant saw the plaintiff he demanded the refund of his Kshs 600 paid for the bad stones at Kitale. According to the defendant the plaintiff pleaded that he had no money and would take it to the defendant at Kitale as soon as he was in a position to do so. The defendant was not convinced by the plaintiff's pleas and he went out of the night club to search for a police man but failed to get one. He returned to the club late only to find that the plaintiff had disappeared. Again on 10th August, 1979 the defendant met the plaintiff by chance along Kimathi Street, Nairobi outside the New Stanley Hotel. This time the defendant did not give the plaintiff any chance for he grabbed him and demanded his money back. The plaintiff tried to escape but the defendant held him firmly. As happens when such incidents occur in Nairobi, a mob soon gathered around the two parties and immediately thereafter a police patrol car stopped at the scene where upon both the plaintiff and the defendant were taken to the Central Police Station. At the police station the defendant explained what had happened, the plaintiff was searched and some stones which according to the plaintiff were similar to the ones sold to him in 1976 found with the plaintiff.

Thereafter the plaintiff was arrested by the police, placed in cells and the defendant permitted to go home. Later the defendant was summoned to give evidence at the trial of the plaintiff at Kitale and he did so together with his wife. The defendant produced in this court the Police Notification of the date of hearing of the Kitale case against the plaintiff (Exb D2) and the Police Bond requiring him to attend the court (Exb D1).

The above being in brief the evidence tendered in court on behalf of both parties, the issue I have to grapple with first is whether the incident of 10<sup>th</sup> August, 1979 outside the New Stanley Hotel was as is alleged by the plaintiff a stage managed affair on the part of the defendant calculated solely to put the plaintiff in trouble, the notice for it being the alleged desire by the defendant to exact revenge upon the plaintiff for having refused to join the defendant in the latter's attempt to deceive the plaintiff's boss three years earlier. Learned counsel for the plaintiff Mr Morgan submitted that the defendant was angry and full of spiteful and was not acting as a law abiding citizen impartially concerned with the enforcement of law he was rather an involved party determined to get his own back by putting the plaintiff in trouble. He further submitted that the defendant acted purely from a personal motive after having waited for 3 years. The question that naturally arises from their sort of argument is, if the defendant was as angry and spiteful as Mr Morgan submits he was the refusal by the plaintiff to assist him sell the worthless stones to the plaintiff boss, Tom, why wait for a good three years when he could have done what he did in 1976. Surely if the defendant was so minded to frame the plaintiff with a completely false story he could have done so easily in 1976 when his anger might have been expected to have been more intense immediately after the happening of the matter at Tom's office, instead of waiting for 3 years and possibly risking the disappearance of the plaintiff. And was the alleged grabbing of the plaintiff in the middle of one of the busiest streets of Nairobi and the alleged stoning by the defendant the action of a person who was in the coolly calculated his moves to put another in trouble or was it not more likely the action of a person who

suddenly seen a swindler who had earlier victimized him and does not wish him to escape.

Having carefully considered the evidence of both parties I believe that the explanation given by the plaintiff and the alleged reasons for the incident cannot be the correct version of events. In this respect I believe and accept the evidence of the defendant both of whom I found to be honest and with witnesses as opposed to the plaintiff whose evidence was given in an unbelievable and shaking manner. I therefore reject the plaintiff's attempt to sell worthless stones to the plaintiff's alleged boss in 1976. This in my judgment was a concoction by the plaintiff calculated to fit into the plaintiff's claim. I also find as a fact that the defendant never made any attempt to sell stones to the plaintiff's boss in 1976 as alleged or at all. I further find that the plaintiff, who claims to be a dealer in stones, precious and semi-precious, and always carries them about including during the trial of this case, sold two bad stones to the defendant at Kitale after which he disappeared. The allegation by the plaintiff that the defendant offered to pay him Kshs 50,000 as an inducement to drop this suit is also another spacious attempt to paint the defendant as the guilty party and I also reject it. I believe as testified by the defendant that no suit after was made.

Having made the above findings; it is now necessary to determine the issues as framed above. Was the alleged arrest and imprisonment of the plaintiff unlawful and the prosecution that followed malicious? False imprisonment is the interference with the freedom of the individual without the due process of the law. Whenever a person imposes restraint on the liberty of another, he may only do so in strict accordance with the power conferred on him by law. Section 29 of the Criminal Procedure Code (cap 75) empowers a police officer to arrest without warrant any person whom he suspects upon reasonable grounds of having committed a cognizable offence. The offence which the plaintiff was alleged to have committed ie obtaining money by false pretences contrary to section 313 of the Penal Code (cap 63) is a cognizable offence in terms of the first schedule to the Criminal Procedure Code (Cap 75). In the circumstances of this case, the police had reasonable grounds to suspect that the plaintiff had committed the offence alleged by the defendant. They searched the plaintiff and found stones which the defendant claimed were similar to those sold to him earlier. In my view therefore the police acted within the law and that the arrest of the plaintiff was in law justified. There was therefore no false imprisonment and his complaint on that score has no basis.

The police are alleged to have kept the plaintiff in police cells for about 10 days before taking him to Kitale where he was charged, but the initial arrest having been lawful and the plaintiff having failed to join the Attorney General as a party to these proceedings, he cannot now blame the defendant for the action of the police after the initial arrest.

As regards the claim for malicious prosecution, the law is, as stated earlier, clear. The plaintiff has to prove all the four essential elements of the text. Having considered the matter very carefully I have come to the conclusion that he has managed to establish only one element ie that the proceedings were terminated in his favour. He has wholly failed to establish that the proceedings were instituted or continued by the defendant, or that the defendant acted without reasonable or probable cause and, more importantly, the plaintiff has wholly failed to prove malice. This position naturally follows from my earlier finding that the plaintiff did sell to the defendant some two worthless stones at Kitale in 1976 for Kshs 600 and that in those circumstances the defendant was not only justified in arresting him when he next saw him along Kimathi street outside the New Stanley Hotel but also in handing him over to the police who re-arrested him and later charged him with the offence of obtaining by false pretences. The fact that the plaintiff later succeeded on appeal does not make the initial arrest unlawful or the prosecution malicious and in my view there was no case of false imprisonment or malicious prosecution established by the plaintiff.

For those reasons the plaintiff's claim against the defendant for special and general damages fails in its entirety and is dismissed with costs. Order accordingly.

Dated and Delivered at Nairobi this 10<sup>th</sup> Day of March, 1987

**T. MBALUTO**

.....

**JUDGE**