REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 1511 OF 1979

GITAU……..……. PLAINTIFF

VERSUS

ATTORNEY GENERAL…...……DEFENDANT

JUDGMENT

The 18th / 19th February, 1978 were unfortunate days for the plaintiff in this case, and he is unlikely to forget them for a long time. The nightmare commenced on his way back to Nairobi from Nakuru when his car developed a puncture. On commencing to change the wheel the plaintiff found the spare wheel was deflated. After some delay he got a lift back to Nakuru where the puncture was mended and the spare wheel inflated. From there he had to hire a taxi to take him back to Lanet where his car was. As a result of all that he arrived into Nairobi around 1.00 am. The plaintiff wanted to see his brother-in-law in Ngong but on calling at his home he was told he was not in and he was directed to the Florida Night Club.

The plaintiff said he entered the Night Club but immediately he did so he realized he had left his cigarettes in the car so he went out to fetch them. He said he was in the act of unlocking his car door when someone pulled him from behind shouting “Come here, you are drunk and you are driving your car.” He said he turned and saw two men in plain clothes who pushed him into a Land Rover and drove him to Ngong Police Station where they arrived about 1.30 am. He said, there he was ordered to hand over the contents of his pockets and take off his shoes and he was then taken to the cells. About 10 minutes later he was taken from the cells, told to put on his shoes and was taken in a Land Rover, accompanied by two police officers, to the Police Doctor in Nairobi. He said that after a few tests, such as standing on one foot or picking things off the floor, the doctor said he did not think the plaintiff was drunk and he was told to leave. The plaintiff could not remember if a blood sample was taken from him. The plaintiff was taken back to Ngong Police Station where once again his shoes were removed and he was locked up in a cell with 10-12 other people. It was early Sunday morning when the plaintiff was brought back to the cell and he spent the rest of the day there.

On Monday morning, the 20th February, the plaintiff said he was taken to the Oficcer-in-Charge of the Police Station. He said that officer told him that a charge of driving a car under the influence of alcohol would be preferred against him, but as investigation had not been completed he would be charged with being drunk and disorderly. He was given a notice of intention to prosecute which was exhibited. The notice was produced and it referred to:-

“(i) Careless driving

(ii) Under the influence of drink.”

The plaintiff was taken before a magistrate at Kibera where he was charged with being drunk and disorderly to which charge he pleaded: Not guilty. The learned magistrate allowed the plaintiff bail. The plaintiff said he had not enough money in his possession to deposit the Kshs 100 security so he was detained in custody in the court cells and in the evening he was taken with others in the prison van to Nairobi Prison.

The plaintiff said he asked for permission to contact his father at his place of work, the National Public Health Laboratories, where the plaintiff also works, but he was refused. He said that as a result of enquiries she made his wife traced him on 22nd to Nairobi Prison. The plaintiff said that his wife went to Kibera Magistrate's Court and deposited the Kshs 100 as security. He said she returned with the receipt and he was released at 2.30 pm.

The plaintiff said that during the time he was in custody, he had no change of clothes. He said that for food he got a mug of tea and a piece of a loaf in the morning and that was his food for the day; for bedding there was a mat on the floor.

On being released the plaintiff went to Ngong Police Station to procure his car. He was told that it could not be released until he paid a towing fee of Kshs 450. He borrowed that sum from his brother-in-law, paid it in the police station and recovered his car.

On the 8th March, 1978 the case of being drunk and disorderly was tried before the learned magistrate of the Third Class, J S W Wanjala Esq who, in rather trenchant tones, dismissed it without calling on the defence. That was the case for the plaintiff in support of his claim for damages for assault and battery, false imprisonment and malicious prosecution. How different was the case for the defence.

Superintendent Stephen Gitau on the 19th February, 1978 was the Officer Commanding Police Division, Kajiado Division. He said that about 12.45 am he was in the Florida Night Club when a disturbance developed and the situation was getting out of control. He said that as he was in plain clothes he left and went to Ngong Police Station where he gave instructions that the incident he dealt with. He said that he returned to the Night Club and saw a number of people in the yard of the Club still making a lot of noise. He said he took no action but when the police in uniform came they arrested those causing the trouble. He did not identify the plaintiff. PC John Nicholas Munene was the first witness for the defence and I shall refer to him as DW1. He said that at around 1.00 am on the 19th February, 1978 he was in the police lines when an alarm was sounded. He said he dressed in uniform and went to the police station, from where he and Corporal Leornard Gakui and "other police officers" were sent to the Florida Night Club where people were creating a disturbance. He said that on arrival they found people, some inside and some outside the Club, "shouting because of drunkenness".

The witness said they arrested those who were "outside". He said that at first they arrested three people but another drove off before they could get hold of him. He said he and the other police officers had gone to the Club in a Land Rover and when the driver of the Land Rover saw the car being driven off he gave chase and stopped it after 50-60 yards.

The witness said that he ran after the car and on arrival at where it had been halted he told the driver to stop the engine. The driver did so and gave the keys to the Corporal who was present. He said they told the driver to get out of the car which he did. He said they took the driver to the Land Rover during which time he was shouting and abusive. I think it might be opportune at this stage to refer to the cross-examination of this witness.

The witness was asked if his evidence in the Magistrate's Court when the plaintiff was charged was true and he said that it was. Counsel then read from a certified copy of the proceedings.

"On the 19th February, 1978 at about 1.20 am I and together with other police officers were on the night duty round at Ngong Township. During that time we went near the Florida Night Club, and there we met the accused person in this case who shouted and abused people who were going in and from the club. I heard what the accused said, accused person told one man who I can't recall to "shut-up". Accused then

stopped another person who was also passing. When this man asked the accused as to what he was talking about, accused said he didn't want to see him there. Accused then went to his car. He opened it. By then we had approached, we ordered him to stop the engine of his vehicle. Accused had already started it. We arrested him and took him to Ngong.

His condition was that he was drunk and disorderly. We then charged him with this offence. We also preferred another additional charge to that of being drunk and disorderly. It was! (sic) Driving a motor vehicle under the influence of drink. The first count was being drunk and disorderly. Accused had at that time not renewed his licence. At the Ngong Police Station I took the accused to a doctor to confirm that the accused was drunk. We are still awaiting the results. I left the matter to the Officer-in-Charge. I didn't give a notice of intention. We are awaiting for the result for the offence we have not preferred against him. Accused merely started the engine but never moved."

I have quoted the whole of the witness's evidence because the crossexamination of the witness on it was extensive.

The witness gave a rough description of the Club. He said it was inside a wall and one left the road and went inside the wall to enter the club. He said that when he used the word "inside" he meant inside the wall and "outside" meant outside the wall. The witness was referred to that part of his evidence where he said that he went "near" the Florida Night Club and met the plaintiff and he was asked if he admitted that the plaintiff was outside. He said he did not because he was inside. It was pointed out to him that in the lower court he had said the plaintiff was abusing people going in and out of the Club. The witness gave the explanation that the plaintiff was inside the wall but not in the roof portion of the Club. (It might be mentioned that both counsel had agreed that from outside the wall one entered on to a patio which had to be crossed to enter the club building.)

The witness was asked if the plaintiff was arrested when he started the engine of his car and he said that it was after he had started the engine and had driven for some yards when he was arrested. He was asked why he did not tell that to the court below and he replied that he had clearly told that to the court. The witness said that the plaintiff drove 50-60 yards along the road. He said nothing about his evidence in the Magistrate's Court as recorded that the accused merely started the engine but never moved. It is only fair, however, to say that he was not asked. The witness was asked if he agreed that the plaintiff was not arrested in the Club. His answer this time was not quite so categorical, in fact it could well be described as evasive. He said "We had four prisoners and we were three police. When we were struggling with the three the plaintiff had a chance to drive off".

I would like here to refer to the evidence of the Corporal, Corporal Leonard Gakui with regard to what happened leading up to the arrest of the plaintiff that night and his arrest. I shall refer to him as DW3.

He said that about 1.05 am he was in the police lines when he was called by the station sentry. He denied hearing any alarm being sounded. He said that on the instructions of Superintendent Gitau, he, with DW1 and two other constables, went to the Florida Night Club. He said that when he entered he found some people making a lot of noise, abusing people and calling them stupid. One of those found, he said, was the plaintiff, and Superintendent Gitau told the police to arrest them. He said they arrested three of them but the plaintiff ran away. He said "we" took the three to the Land Rover and at the same time chased the plaintiff. He said that he chased the plaintiff on foot but the plaintiff entered a nearby vehicle and started to drive off. The witness continued: "We followed him in the Land Rover. After driving some 50-60 yards – not very far, we managed to stop him. I took the ignition keys. The plaintiff was so drunk he started nodding."

As I heard that evidence it occurred to me that the plaintiff must have been a very agile drunk if the Corporal, who according to his evidence and that of his colleague must have been close to the plaintiff, was unable to overtake him. What occurred to me then was emphasized when I heard that the plaintiff was so drunk that he started nodding in the car. The witness substantially corroborated the evidence as to what took place thereafter up to the time the plaintiff was taken to the doctor.

In answer to me DW3 said he next saw the plaintiff on the 20th when he escorted him to court adding "where he pleaded not guilty and was discharged." That answer suggested to me that the witness was confusing the ultimate result of the case with what happened on Monday the 20th. He agreed but volunteered that after the plaintiff was charged and pleaded not guilty he was set free, adding that later that day he saw him at the police station where he came to collect his car. He was so specific as to say that he saw the plaintiff enter the office of the Officer-in-Charge. He said he never saw the plaintiff after that until he saw him in this court.

When I told the witness that the plaintiff had said he had not been able to obtain Kshs 100 for bail and had been taken from court to Nairobi Prison he then said he might have been confusing the dates and did not see the plaintiff collect the car. Despite that the witness was prepared to reply to a question in cross-examination if he knew when the plaintiff collected his car; "as I said before on the 20th February, 1978 after taken for plea." When asked if the plaintiff came the same day he answered with indifference.

"It has been a long time. The 20th or 21st".

In cross-examination DW3 repeated that he had been awaked by the station sentry. He told me that he had not heard any alarm although DW1 had said that that was how he had been awakened. DW3 said the sentry went from house to house.

The witness was asked who had arrested the plaintiff and he said he and the others. He was asked how far had the witness run and he said 50-60 yards but then added: "Could be more than that, could be 1/4 of a mile," and pointed out the Kenya Commercial Building as being 1/4 mile from the witness-box. He was asked by me if he ran that distance and he corrected himself to say he was in a vehicle.

As this witness was also cross-examined on what he said in the Magistrate's Court in contrast with what he had said before me, I think part of his evidence in that court must be quoted as his replies:

"On the 19th February, 1978 at 1.20 am I was the night round with (DW1) and another police officer within the Ngong Township." To that the witness said that he was "probably" misquoted. "During that time we found the accused person outside the Florida Night Club." He was asked if he had said that and he said he had added that that was the time he had followed the plaintiff when he ran away.

" ..... When the accused person noticed the police were around, accused person ran into his vehicle. Before he could start off I got hold of his ignition key and arrested him." To that DW3 replied "That is a misquotation. He drove off and we arrested him at a distance."

What I have quoted is taken from the direct evidence of DW3 in the Magistrate's Court, but he was also referred to his answer to the learned magistrate and cross-examined on them.

"I found the accused person shouting outside the Florida Night Club." To that he replied. "When we followed the accused from the Club outside he was still abusing people and he appeared to be so drunk."

That reply struck me as being unusual, to put it mildly, as I understood the witness to have said to me that the plaintiff had run off from inside the Club and was pursued by the police witness.

Counsel continued his quotation from the magistrate's examination. "When the accused realized the police officers were coming he ran into his vehicle"; and asked the witness for his comment. DW 3 replied "He knew the police were coming is misquoted. Some of what I said is misquoted. That is an example. The accused had realized the police had arrived before, inside the Club, and he ran away."

Counsel read further: "This is possible – that although the accused person was drunk and disorderly, he could realize that the police were coming and could then run away." To my question, he said he meant that the police were coming out of the Florida Night Club. Continuing, counsel read: "Accused ran into his car and before he could start it I took his ignition keys." The witness said " I did not say that." I drew his attention to the fact that that was the second time that the magistrate, according to the witness, had

misquoted him and he replied “Yes. Accused started and we followed him.”

If what DW1 and DW3 told me was true then the learned magistrate was utterly incapable of recording evidence. Worse then that, while the witnesses were giving evidence he was allowing his imagination to run riot and recorded things that the witnesses did not say and, occasionally, the very opposite to what they did say. For example the magistrate recorded both witnesses as saying that the ignition keys were removed from the car before it could be driven off while they told me that they said it had been driven, 50-60 yards, according to DW1 and upto 1/4 of a mile according to DW3, before the car was stopped and the plaintiff arrested.

I do not for one second think the learned magistrate was recording his imaginings. I am certain from the very careful consideration that he gave to this case that he carefully recorded what DW1 and DW3 told him and nothing else. I am satisfied that when the witnesses said that they told the magistrate what they told me and the record differs, or denied telling the magistrate what they were recorded as having told him that they deliberately and callously lied to me. Not that that makes their evidence in the court below evidence in this case but it establishes that these two men, men who are paid to protect the people of this country, are liars and prepared to lie in order to embarrass and prejudice a citizen.

There were other examples of contradictions and evasions on the part of those two witnesses but I feel that the instances to which I have referred demonstrate how unacceptable their evidence was.

In conclusion may I say how strange it was that the Officer in-Charge of the case in the Magistrate’s Court should have proceeded with a drunk and disorderly charge without producing the doctor who examined the accused after the alleged offence, or at least obtaining a statement from him. He was a police doctor.

I accept the evidence of the plaintiff without hesitation. I do so not because of the lies of DW1 and DW3 but because I considered his evidence to be truthful and reliable on all important aspects.

I find that on the night in question the plaintiff was wrongfully arrested, and thereby assaulted, without any justification whatever and that he was subject to a humiliating and frightful ordeal. He must succeed in his claim for damages for false imprisonment, assault and battery.

The plaintiff also claims damages for malicious prosecution. To succeed on that claim the plaintiff must first establish that the defendant or his agent set the law in motion against him on a criminal charge. “Setting the law in motion” in this context has not the meaning frequently attributed to it of having a police officer take action, such as effecting an arrest. It means being actively instrumental in causing a person with some judicial authority to take action that involves the plaintiff in a criminal prosecution. An example would be where a person prefers a criminal charge against another before a magistrate. Secondly he who sets the law in motion must have done so without reasonable and probable cause.

What then is the position in this case?

According to the plaintiff he was arrested on the 18th February, put in the cells, later taken to the Police Doctor, returned to the cells and kept there until the morning of the 20th. On that morning the Officer-in-Charge told him that a charge of driving a car while under the influence of alcohol against him was being investigated but in the meantime he was going to be charged with being drunk and disorderly. He said he was taken to court shortly after the charge. DW1 said that on his return to the Police Station with the plaintiff he handed him over to other officers there and later took him to the Doctor and then returned him to the cells. DW3 said that after the plaintiff was “booked” he had nothing more to do with him apart from driving him with other prisoners to the Magistrate’s Court. Evidence was given by an Inspector of Police, Paul Thuo Kimani, the Officer-in-Charge of Ngong Police Station. He said he came on duty at 7.30 am on the 20th of February, 1978 and for the first time, met the plaintiff. He said he was “briefed” by DW1 and DW3 who told him the plaintiff had been arrested for being drunk and disorderly and being in charge of a motor car while under the influence of alcohol. He said he ordered the plaintiff to be charged and he signed the charge sheet and he was satisfied the plaintiff was properly charged. He said he

honestly believed what the arresting officers told him; if he had had any doubt he would have released him.

The first question to be answered is: who set the law in motion? I have been told and I accept that the responsibility for that rests entirely on the Officer-in-Charge of the police station, and Inspector Kimani accepts that he is the person responsible. That then raises the second matter that I said the plaintiff must prove: that the setting of the law in motion by the Inspector, was without reasonable and probable cause. It is with some hesitation that I find that the plaintiff has failed to discharge the onus. I have summarised the evidence of the Inspector and what DW1 and DW3 told him. If the Inspector believed what the witnesses told him then he was justified in acting as he did, and I am not satisfied that the plaintiff has established that he did not believe them or alternatively, that he proceeded recklessly and indifferently as to whether there were genuine grounds for prosecuting the plaintiff or not. I do not consider that the plaintiff has established *animus malus*, improper and indirect motives, against the witness.

I have considered the possibility of the Inspector being in any way the agent of DW1 and DW3 only to discard the idea. The responsibility was entirely that of the Inspector and I do not think that in the circumstances of this case the fact that the witnesses may have lied to him alters the position, although I can visualize cases where it might be otherwise. The plaintiff's case for malicious prosecution must fail. There only remains for me to assess damages for false imprisonment.

The behavior of the two police officers who wrongfully assaulted, battered and falsely imprisoned the plaintiff was abominable. Here is the case of a man proceeding about his lawful affairs being suddenly arrested without a scintilla of justification. He was detained for about 30 hours and refused permission to contact his family. The mental anguish that alone caused him must have been considerable. But to that must be added the humiliation of the arrest, his enforced production to a doctor for medical examination and detention in a cell where his bedding was a mat on the floor.

In my opinion the behavior of DW1 and DW3 was "oppressive, arbitrary (and) unconstitutional action by the servants of the Government." (*Devlin L J in Brookes vs Barnard* [1964] A C at 1226, and see *Cassell & Co v Broome & Another* [1972] A C 1027 where the House of Lords by a majority, generally accepted the view of Devlin L J) and warrants an award of exemplary damages.

I award the plaintiff Kshs 25,000/= damages and Kshs 10,000 exemplary damages.

He is also entitled to Kshs 450 special damages.

The plaintiff will have costs based on the total award.

Dated and Delivered at Nairobi this 20th Day of December, 1982

J.P. TRAINOR

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JUDGE