



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Omolo, Lakha & Owuor JJ A)

CIVIL APPEAL NO 171 OF 2000

JAMES KARUGA KIIRU APPELLANT

VERSUS

JOSEPH MWAMBURI

SAMMY HUKO

ATTORNEY GENERAL.....RESPONDENTS

(Appeal from the Decree of the High Court of Kenya at Nairobi (Justice Khamoni) dated 3rd day of October, 1997 in HCCC No 3445 of 1988)

JUDGMENT

This is an appeal from a judgment of the superior court (Khamoni J) given on 3 October, 1997. He dismissed a claim for damages for false imprisonment, malicious prosecution and loss of business made by the appellant, James Karuga Kiiru, against the first two defendants as police officers in the Department of the Commissioner of Police and against the third defendant as the Attorney-General.

In October 1987 the second defendant was stationed at Garsen Police Post together with other police officers with the purpose of gathering information thought to be useful for revisiting both poachers and would be buyers of those trophies, collaborators or sympathisers and generally people involved in the illegal business of trophies. Information was received from which the defendants believed the appellant was involved in poaching activities. The appellant was arrested on 6 October 1987. He was detained at Malindi Garsen and Hola Police Station during the 14 days he was in police custody while he was being investigated under interrogation.

At the hearing before the learned judge the appellant gave evidence in support of his claim. The defendants did not appear and were not represented although they had filed a joint defence. The learned judge found for the defendants and concluded his judgment as follows:-

"It is my humble opinion that, in the circumstances of this case, the plaintiff is not entitled to the claim because this is merely one of the criminal cases where the accused is discharged or acquitted but cannot succeed in a suit against the Government for damages resulting from the arrest and prosecution because the arrest and prosecution complained of were based on a reasonable suspicion that a criminal offence had

been committed and were lawfully carried out by officers entrusted with maintenance of law and order.....

From the above therefore, the plaintiff's case herein is dismissed in its entirety."

Although the learned judge dismissed the damages claim, he did not assess the plaintiff's damages in case he should succeed on appeal. As was said by Law, JA (as he then was) in the Court of Appeal for East Africa in *Selle v Associated Motor Boat Co & Another* [1968] EA 123 at 131:-

"It is always desirable, in a suit for damages, for the trial judge to make a finding as to the amount to which he thinks the plaintiff would be entitled if successful, even though he gives judgment for the defendant. Much time and expense can be avoided if this course is followed."

We now turn to consider the issues canvassed before us.

(A) *False imprisonment*. Two points were raised on false imprisonment.

(i) Was the first defendant at fault in making the arrest? (ii) Was he at fault in taking the appellant to Garsen and Hola before taking him back to Malindi?

(i) *The arrest*. The burden was on the defendants to prove that they had reasonable cause for suspecting that the appellant had committed an offence. The evidence on this point was all one way. When the first two defendants went to Malindi to arrest the appellant they had trustworthy information that the appellant was involved in offences related to poaching. The evidence was overwhelming that the first two defendants had received information which they reasonably believed. The learned judge was entitled to act on that evidence; and to hold, as he did, that it afforded reasonable cause for them to suspect that the appellant had committed an offence. The defendant was, therefore, not guilty of false imprisonment in making the arrest.

(ii) *The taking of the appellant to Garsen and Hola*. The appellant's advocate next said that, even if the arrest was justifiable, nevertheless it was not lawful for the defendant to take the appellant to Garsen and Hola.

This raises an interesting point as to the power of the police in regard to a man whom they have in custody. A constable, however, has a greater power than an ordinary man. When a constable has taken into custody a person reasonably suspected of an offence, he can do what is reasonable to investigate the matter and to see whether the suspicions are supported or not by further evidence. He can, for instance, take the person suspected to his own house to see whether any of the stolen property is there, else it may be removed and valuable evidence lost. He can take the person suspected to the place where he says that he was working, for there he may find persons to confirm or refuse his alibi. So long as such measures are taken reasonably, they are an important adjunct to the administration of justice. The measures must, however, be reasonable. In this case it is plain to us that the measures taken were reasonable. Indeed, the appellant himself willingly co-operated in all that was done. He cannot complain of it as a false imprisonment. We hold, therefore, that the learned judge was right in rejecting the claim of false imprisonment.

(B) *Malicious Prosecution*. To prosecute a person is not *prima facie* tortious, but to do so dishonestly or unreasonably is. Malicious prosecution thus differs from wrongful arrest and detention, in that the onus of proving that the prosecutor did not act honestly or reasonably, lies on the person prosecuted.

In the present case, the appellant has not unfortunately discharged this onus as there is nothing to show that the prosecutor did not act honestly and reasonably.

It will be evident that we also think that there is no merit in the final and faintly argued submission that there was no reasonable and probable cause for the prosecution. It may well be that the appellant was innocent all the time, but there is no reason in the absence of necessary evidence for making a police

officer liable when he had only done his duty in investigating an offence.

For the reasons above stated, this appeal fails. It is accordingly dismissed with costs.

Dated and Delivered at Nairobi this 9th day of March, 2001

R.S.C OMOLO

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL