



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 60 OF 2015

FREDRICK MWANIKI MUSEE.....1ST CLAIMANT

DERRICK LUHAGO MUTHAMA.....2ND CLAIMANT

DANIEL MBUITU.....3RD CLAIMANT

NICHOLAS MUREITHI.....4TH CLAIMANT

DANIEL GICHUKI.....5TH CLAIMANT

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

CHIEF INSPECTOR CHRISTOPHER NDEI...2ND RESPONDENT

COMMISSIONER OF POLICE.....3RD RESPONDENT

JUDGMENT

INTRODUCTION

1. The Claimants were Police Officers employed by the Kenya Police Force and stationed at Marsabit Police station on 3/10/2001. The first Claimant was a Sergeant –in- Charge of the armoury at the station while the rest of the Claimants were deployed to guard the station. On 4.10.2001 they were arrested together on allegation that a break in had occurred at the armoury and a sum of Kshs.1,400,000 forming part of the Police station pay roll had been stolen. Thereafter they were allegedly detained and tortured for 15 days in an effort to force them to admit the offence and before charging them in Court with Criminal Case Number 2125 of 2015 in Meru.

2. The trial ended with an acquittal on 25.1.2003 and they brought this suit at the High Court on 23.1.2004 claiming the following:-

(i) Damages for malicious prosecution

(ii) A declaration that the Plaintiffs were duly subjected to inhuman, degrading or other treatment contrary to section 74(1) of the Constitution.

(iii) A declaration that the Plaintiffs are entitled to their unpaid salaries and other benefits from October, 2001 to 30th September, 2003 and to arrears of new salary scale effected from 1st July, 2003.

(iv) Damages under Section 84(2) of the Constitution.

(v) Damages for unlawful and unfair termination of employment or in the alternative reinstatement to the police force.

(vi) Costs and interest of this suit.

3. The respondents filed defence on 27.2.2004 denying all the allegations and reliefs sought in the plaint, and averred that if any arrest, detention and prosecution was made on the Claimants, the same was lawful and within the mandate of the police. They further denied the alleged torture and unfair dismissal of the Claimants from employment and prayed for the suit to be dismissed with costs.

4. On 24.7.2007 the suit was transferred from the High Court Civil Division to the Constitutional Division of the same court because it raised a Constitutional question. However, on 21.5.2008, Nyamu J, then sitting in the Constitutional Division, referred the file back to the Civil Division with the direction that issue of violation of the Claimant's Constitutional rights to be separated from the rest of the Claims and filed by way of a petition in compliance with rules made under section 84(6) of the Constitution (*now repealed*).

5. The said directions were never complied with and the suit went into a limbo until 26.2.2015 when it was dismissed for want of prosecution by Majanja, J. after service of Notice to Show Cause. It was however reinstated by Serگون J. on 31.7.2017 following an application by the Claimants which was not opposed by the defence. On the same date the suit was transferred to this Court after jurisdiction to determine employment matters was shifted to this Court by dint of Article 162 (2) (a) and 165(5) of the new Constitution of Kenya, 2010.

6. The suit was heard on 19.11.2018 when the 2nd, 3rd, and 4th Claimants testified on behalf of the other Claimants as C.W.1, C.W.2 and C.W.3 respectively. The respondents called no witnesses but after close of the hearing Counsel for both sides filed written submissions.

Claimant's Case

7. Mr. Derrick Luhago (C.W.1) testified that he was employed by Kenya Police Force, a department under the office of the President as Number 77235 and attached to Marsabit Police Station. That on 3.10.2001, he and the other Claimants herein were assigned the duty of guarding the armoury at the station and they executed their duty diligently and professionally. However on 4.10.2001, they were all arrested and detained at the same station on the allegation that a break in had occurred at the armoury and a sum of Kshs.1,400,000/= forming part of the Police Station Pay roll stolen.

8. What followed thereafter was torture, thorough beating and death threats using guns while stripped naked and handcuffed. That they were also dipped in cold waters of river Uaso Nyiro and detained in waterlogged cells over the night. That after 15 days of torture and detention they were charged at Meru Law Courts with Criminal Case No. 2125 of 2001 on 18.10.2001 when they obtained a Court Order to be taken to hospital on 19.10.2001. The trial continued upto 25.1.2003 when they were acquitted by the Court.

9. C.W.1 further testified that during the trial of the Criminal Case, they were interdicted on half salary and the interdiction was lifted by the letter dated 24.6.2003 but they were never paid their half salary withheld during the interdiction. He was instead served with another letter dated 3.6.2003 informing him of the intention of removing him from the police force and he responded thereto defending himself.

However, by the letter dated 12.8.2003, the Provincial Police Officer (PPO), Eastern Province dismissed him from the Police force with effect from 30.9.2003. He appealed against the dismissal to the Police Commissioner but the appeal was never responded to.

10. C.W. 1 termed the dismissal unfair and prayed for the damages set out in the plaint contending that he sustained physical and psychological injuries as a result of being subjected to the degrading and inhuman treatment.

11. On cross-examination he contended that the Judgment of the trial Court in Criminal Case No. 2125 of 2001 is his evidence of arrest and detention by the police. He further contended that his evidence of termination was treatment notes which were retained by the Prison. He added that the Occurrence Books at the Police Station contains evidence that he was detained for 15 days. He further stated that he gave his lawyer the interdiction letter and the termination letter. He however did not have in Court his pay slips.

12. C.W.1 further contended that his infringed rights were pleaded in the plaint. He also contended that the officers who assaulted him included Deputy Director of Criminal Investigation Embu. He further stated he lodged complaint with the Kenya National Commission on Human Rights (KNCHR) and some documents were addressed to the Attorney General.

13. Mr. Daniel Mbuitu (C.W.2) testified that he was employed as Number 42113 in 1982 and was also removed on 30.9.2003. He stated that as at that time he was attached to Marsabit Police Station earning about Kshs.10,000 per month. He further testified that on 4.10.2001 he and the other Claimants herein were arrested on the alleged break in at the armoury and theft of Kshs.1,400,000. That thereafter they were detained for 15 days during which they were tortured by being stripped naked and beaten while handcuffed by armoury other officers, superintendent Maritim and Inspector of Police Odhiambo. That on 14.10.2001 they were transferred to Isiolo Police Station. Again they were stripped naked, handcuffed and hanged between hand and legs while suspended between 2 tables and then viciously beaten and threatened with death.

14. On the same day they were again drowned in cold waters of Uaso Nyiro river until he lost consciousness. That thereafter on the same night they were detained in water logged cells overnight.

15. After the 15 days ordeal they were charged in Meru Law Court with Criminal Case Number 2125 of 2001 on 18.10.2001 where they obtained orders to be taken to hospital on 19.10.2001. The case ended on 25.1.2003 with an acquittal and his interdiction which was imposed after the arraignment in Court was lifted by the letter dated 24.6.2003. Thereafter he was served with an information of intention to remove him from the force and he wrote a response but by the letter dated 12.8.2003 he was removed from the force with effect from 30.9.2003.

He appealed against the dismissal to the Commissioner of Police but no response was made to the appeal.

16. He prayed for the damages set out in the plaint contending that he was injured both physically and psychologically by being subjected to the said degrading and inhuman treatment.

17. On cross-examination he stated that he gave his lawyer both the interdiction letter and the dismissal letter but the treatment notes were retained by the Meru Prison where he was remanded. He admitted that he was found with a case to answer but after defence he was acquitted. He further stated that despite the torture they never admitted the offence.

18. Mr. Nicholas Mureithi testified as C.W.3. His evidence is just a repetition of the testimony by C.W.1 and C.W.2. I will not repeat the same herein. The rest Claimants never gave evidence since according to their Counsel, they would also repeat the same story.

Analysis and Determination

19. There is no dispute that the Claimants were all police officers enlisted in the Kenya Police Force from diverse dates until 30.9.2003 when they were removed from the force by the Eastern Province Provincial Police Officer. There is further no dispute that before the said dismissal the Claimants were arrested and charged with criminal case related to theft of money from the Armoury at Marsabit Police Station where they were attached to. Finally there is no dispute that the Claimants were acquitted of the said criminal charges on 25.1.2003 and their interdiction on half pay was lifted on 24.6.2003.

The issues for determination are:

(a) Whether the Claimants were subjected to inhuman, degrading or other treatment contrary to Section 74(1) of the repealed Constitution of Kenya and therefore entitled to damages under Section 84(2) of the said Constitution.

(b) Whether the Claimants were maliciously prosecuted and therefore entitled to several damages.

(c) Whether the Claimants were unlawfully and unfairly dismissed from employment and therefore entitled to damages or reinstatement.

(d) Whether the Claimants are entitled to the withheld half salary and other benefits from October, 2001 to 30.9.2003 and to the salary arrears based on the new salary scale effected from 1.7.2003.

Inhuman treatment contrary to Section 74 of the repealed Constitution.

20. C.W.1, C.W.2 and C.W.3 have given a detailed account of how they were arrested and detained for 15 days before being arraigned in Court to face charges related to theft of Kshs.1,400,000/= from the Armoury at the Marsabit Police Station on 3.10.2001. They explained how for a period of 2 weeks they were tortured by being stripped naked, handcuffed, hanged using a rod between their hands and legs, beaten, dipped in cold river waters, threatened with death and being kept in waterlogged cells overnight. That purpose for the said torture was to force the Claimants to confess to the offence they did not commit. As a result of the said tortures, the Claimants suffered physical injury and denied access to medication until 18.10.2001 when they were arraigned in Court and obtained Court Orders to be taken to hospital.

21. The evidence by the Claimants under Oath was not rebutted by the defence because the respondent tendered no evidence. Although the Claimants produced no medical evidence in form of treatment notes, that in my view did not negate the consistent evidence given by the Claimants in oral testimony. I therefore find and hold that the Claimants have proved on a balance of probability that they were detained by the police after arrest for too long while investigating an offence that did not require to detain a suspect for more than 24 hours. The reason for the prolonged detention was to force the claimants to admit the offence which they had not committed.

22. The said detention and the unlawful torture that was done on the Claimant was a violation of their rights to liberty and freedom from torture and inhuman or degrading treatment and I so declare. Even if the police suspected the claimant of having committed the offence, they were bound to treat the Claimants with human dignity under Section 74(1) of the repealed constitution. The said violation entitled the Claimants to damages under Section 84(2) of the repealed constitution.

23. The Claimants proposed an award of Kshs.8000,000 each made up of Kshs.2000,000/= for false imprisonment, Kshs.5000,000 for pain and suffering and Kshs.1000,000/= as aggregated damages. They relied on *Harried Karimi –vs- Attorney General [2005] eKLR* where the High Court awarded kshs.1000,000 for false arrest . The respondent opposed the award for false imprisonment on ground that it was not pleaded and it was time bared because it ought to have been filed within one year after the alleged false imprisonment. They relied on *Katerrega –vs- Attorney General [1973] E.A. 289 and Kutima Investments Ltd. –vs- Muthoni Kihara and Commissioner of Mines and Geology [2005] eKLR* to justify the submission that the claim is founded on the tort of false imprisonment and was time barred for having been brought after expiry of 12 months after the cause of action arose.

24. As a regards torture and/or subjection to inhuman, and degrading treatment, the defence submitted that no medical evidence on physical injuries or deformities caused by the torture were tendered and as such they are not entitled to any damages. However, they proposed an claim of Kshs.1,000,000 to each Claimant and relied on *Geoffrey Githiri Kamau –vs- Attorney General [2015] eKLR* to urge that general damages should not be extravagant but realistic, satisfactory, and reasonable. Considering the submissions, inflationary factors and the fact that there was no medical reports produced, I award each Claimant Kshs.1000,000 for the torture and inhuman treatment.

Malicious Prosecution

25. The claimants contended that they were maliciously prosecuted as sacrificial lambs to cover up their seniors. They therefore prayed for compensation of Kshs.3000,000 each. They relied on *Chripine Otieno Caleb –vs- Attorney General [2014] eKLR* where the Court awarded **Kshs.2,000,000**. They submitted that their prosecution was without reasonable cause and malicious after refusing to admit the offence after torture and detention.

26. The respondents submitted that the Claimants did not prove the ingredients of the tort of malicious prosecution established in *Kagame and Others –vs- The Attorney General (1969) E.A. 643* being

- (a) That the prosecution was instituted by a police officer.*
- (b) That the prosecution terminated in the plaintiff's favour.*
- (c) That the prosecution was instituted without reasonable and probable cause*
- (d) That the prosecution was actuated by malice.*

27. The respondents relied on the **Kagame Case** to urge that the Claimants are not entitled to damages for the tort of malicious prosecution. They submitted that in the said case, the Court held that reasonable and probable cause refers to an honest belief in the guilt of the accused upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary, prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime reported. They urged that in this case the police had reasonable and probable cause to believe that the plaintiffs committed the offence since they plaintiffs were the ones guarding the premises at the time the theft.

28. I am persuaded by the submissions by the defence that the circumstances of this case entitled the police to harbour reasonable suspicion, that the Claimants stole or failed to prevent the theft of the money from the armoury since they were the ones who were guarding the premises the night when the theft allegedly. I therefore dismiss the claim for damages for malicious prosecution.

Unlawful and unfair termination

29. The Claimants contended that they were informed of their dismissal by the letter dated 3.6.2003 and after responding to the same they were served with letter dated 12.8.2003 terminating their service effective from 30.9.2003. They never produced any evidence in the form of a contract to prove that the termination by a notice of more than one month was not permitted. I therefore find and hold that the Claimants have not proved on a balance of probability that they were dismissed from service unfairly and unlawfully.

Unpaid salary during interdiction

30. The Claimants contended that they were earning Kshs.10000 per month and during the interdiction they were being paid 5000 from October 2001 to 24.6.2003 when the interdiction was lifted. That after acquittal from the Criminal Case and lifting of the interdiction they were not paid the withheld half pay amounting to Kshs.115,000 each.

31. I have considered the time taken during the interdiction and it totals to 21 months multiplied by Kshs.5,000 withheld, the sum owing to each Claimant is kshs.105,000 which I grant. The Claimant contended that on 1.7.2003, there was a backdated salary review but the particulars were not provided. I therefore decline to award any backdated benefits.

32. The Claim for reinstatement is dismissed because under Section 12 of the Employment and Labour Relations Act, the Court is barred from reinstating an employee if 3 years have lapsed after the separation.

Conclusion and disposition

33. I have found that the Claimants' rights were violated by being detained for 15 days, tortured and subjected to inhuman and degrading treatment by the police. I have however found that the Claimants were not maliciously prosecuted and unfairly dismissed from the police force. I have also found that the Claimants were each entitled to damages from the violation of their constitutional rights and the half salary withheld during the interdiction.

Consequently, I enter judgment for each Claimant in the following terms

(a) General damages – Kshs.1000,000.

(b) Withheld – half salary – Kshs.105,000-

Total:Kshs.1,105,000

(c) Costs and interest at court rate from today.

(c) The award will be subject to statutory deductions.

Dated, Signed and Delivered in Open Court at Nairobi this 8th day of March 2019

ONESMUS MAKAU

JUDGE