

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO. 961/89

FRED KAINAMURA

MUSA KABIRIZI

JOHN KAVUMBURA:.....PLAINTIFF

VERSUS

ATTORNEY GENERAL

E. KAFUREKA

MR.S KUCHUNDA

G.W. KAKURU:.....DEFENDANTS

BEFORE: THE HON. MR. JUSTICE G.M. OKELLO

JUDGMENT:

The Plaintiffs brought this suit against the defendants for punitive and general damages for unlawful arrest and false imprisonment. They also claim special Damages of shs. 15,600,000/= and cost of the suit. All the defendants filed their W.S.D. in which they denied the claim. But at the hearing, only the 1st defendant took part. The other defendants though were served with hearing notices, never appeared. So the hearing went in their absence.

As to the background to the case, the Plaintiffs were at the material time cattle traders. On 8/8/88_f they and the 5th defendant, one George William Kakuru, left Migera in Luwero District for Kampala with a lorry load of cattle to sell. After their sale at the meat packers that day, the Plaintiffs parted with the 5th Defendant. They left the 5th Defendant awaiting transport at the yard stage hoping to join them at the main taxi park. But they did not meet. The 5th Defendant did not join them.

The following Monday the 13/8/88, the Plaintiffs met the 2nd, 3rd and 4th defendant who are relatives of the 5th defendant. They were looking for the 5th Defendant whom they alleged had disappeared. The plaintiff's volunteered to these relatives information as to how they had separated from the 5th defendant on 8/8/88. But the 2nd, 3rd and 4th defendants who suspected the Plaintiffs to have caused the disappearance of the 5th defendant, were not amused. They reported the Plaintiffs to the police at Jinja Road Police Station. Consequently, the plaintiffs were arrested and detained at Jinja Road police station. The Plaintiffs claimed they were tortured during their detention and were denied police bond.

Ten days later, the Plaintiffs were taken to court where they were charged with Kidnap with intent to murder George William Kakuru, the 5th Defendant. This is a serious offence.

The Plaintiffs were not granted bail. When the relevant police file was later sent to the DPP for peruse and legal advice, it was found that there was no sufficient evidence to support the charge. It was therefore directed that the charge be withdrawn.

But this directive was not carried out until five months later.

The Plaintiffs complained that their arrest and subsequent detention was unlawful and without probable cause. Hence this suit.

At the commencement of the hearing, five issues were framed for determination of the court. They are:-

- (1) - whether there was reasonable and probable cause for the arrest of the plaintiffs.
- (2) - whether in arresting the Plaintiffs the Agents of the 1st Defendant were acting in the cause of their employment
- (3) - whether the Plaintiffs were unlawfully- imprisoned.
- (4) - whether the plaintiffs were assaulted by the Agents of the 1st defendant while in the custody of the Agent of the 1st Defendant,
- (5) - what damages if any, are the plaintiff's entitled to and if so against which Defendant.

On issue No.1 - whether there was reasonable and probable cause for the arrest of the plaintiffs by the agents of the 1st Defendant, Mr. Lwere submitted that from the evidence of Kabega PW1, there was no such cause. There was no evidence which implicated the plaintiffs to justify their arrest. The police acted on mere evidence of suspicion without cross-checking. They had bad faith and were bent on seeing the Plaintiffs behind bars.

They delayed for five months to withdraw the charge against the plaintiff from the time

they were directed to do so. There was no good reason for that long delay other than bad faith.

For the 1st defendant Mr. Turyasingura submitted that there was a reasonable and probable cause for the arrest. The offence alleged to have been committed by the Plaintiffs was serious and that justified the police action. He relied on *Senyingo Kasolo v. A*(1. H.C.C.S. No. 806/91).

Upon listening to the above arguments, I find it necessary to point out that the power of the police to arrest without a warrant is provided for under section 23 of criminal procedure code. That section sets out the circumstances in which the police can arrest without warrant. One such circumstance in which the police have power to arrest without a warrant is,

"Any person whom he suspects upon reasonable grounds of having committed a cognisable offence, an offence under any of the provision of chapter xvii of the Penal Code or any offence for which under any law provision is made to arrest without a warrant".

The police a power to arrest without a warrant is essentially based on his having reasonable ground to suspect that the person has committed a cognisable offence or offences relating to nuisance and offences against health and convenience (chapter xvii of the Penal Code). His suspicion must be supported by reasonable ground.

In the instant case, no police officer from Jinja road police station or from any police station at all was called to testify as to the reasons upon which they acted in the arrest of the plaintiffs. The only available evidence on this is that of Maodoeman Kabecra PW1 who as Deputy D.P.P. then had presented the relevant police file. He testified to the effect that he found no evidence to support the charge. The evidence in the file was based on mere suspicion. PW2 and PW3 on their part testified to the effect they were suspected to have caused the disappearance of the 5th defendant merely because they came with the 5th defendant to Kampala together from Migera on 8/888 and that the 5th Defendant did not return to his home by 1V8/88. (six days later). The 5th Defendant is an adult.

I find the above insufficient ground to justify the police action to arrest the plaintiffs. There was no evidence that a vain search was made for the 5th defendant among his relatives and friends. Six days delay to return home is not by itself sufficient ground to suspect that the person is kidnapped. According to the available evidence, the plaintiffs and the 5th defendant are from Migera in Luwero District. But there was no evidence of any grudge between them to provide motive to the Plaintiffs to kidnap the 5th defendant. Presence of a grudge would have provide

ground for suspecting the plaintiffs to have kidnapped the 5th defendant on account of that grudge.

Mr. Turyaeingura submitted that the seriousness of the offence alleged justified the police action in arresting the Plaintiffs, He relied on Senyingo Kasolo vrs. A.G. above .I have not been able to trace the text of that case despite intensive search. I checked with the High court library but without success. It was not available.

Be that as it may, each case must be decided on its peculiar facts. Allegation of commission of a serious offence alone is not enough to justify arrest of the suspect, it must be supported by facts that lead to a reasonable suspicion that the offence alleged was committed and probably by the suspect. Only then would the arrest be justified. This is not the case in this case. The facts given in this case could not reasonably lead to suspicion that the alleged offence was committed and probably by the Plaintiffs. For that reason I find that the police arrested the plaintiff without reasonable and probable cause.

On whether in arresting the Plaintiffs the police were acting in the course of their duty, it was conceded for the defendant that the police were acting in the course of their employment.

The next issue is whether the Plaintiffs were unlawfully imprisoned.

PW2 testified that he was arrested on 14/8/88 and was locked up in the cell at Jinja Road police station for ten days before he taken to court. From court he was charged with killing with intent to murder the 5th Defendant. After that he was successively remanded in custody by court until he was discharged when the charge against them was withdrawn for lack of evidence.

PW3 testified that he was arrested later on 18/8/88 and was detained at various police stations for a total of 30 days before he was taken to court. He was taken to court on 18/9/88 where he was added to the charge with which PW2 was charged. Then thereafter he too was successively remanded by court in custody until they were discharged

when the charge against them was withdrawn for lack of evidence.

It was submitted for the Plaintiffs that the detention of the Plaintiffs before they were taken to court was unlawful because there no reasonable and probable cause for their arrest. I have already found that the arrest of the Plaintiffs by the police was without reasonable and probable cause. Consequently their detention at the police before they were taken to court was unlawful. The power of the police to detain at their police station a person suspected of commission of a recognizable offence for 24 hours before being taken to court is confined to persons who are arrested on reasonable and probable cause. It does not cover persons arrested by police without any reasonable cause as it was in this case.

Mr. Lwere submitted for the Plaintiffs that even the detention of the Plaintiffs on the court orders, particularly after the D.P.P. had given instruction to the police to withdraw the charge against the plaintiffs was also unlawful. That the police had bad faith and were bent in having the plaintiffs longer in custody that was why they delayed for about 5 months to withdraw the case. I do not share that view because it is trite law that a detention on court's order is not unlawful. A delay by the police to withdraw the charge against the plaintiff does not turn an otherwise lawful detention on courts order unlawful. The police might have had bad faith but that does not turn the lawful detention unlawful.

The next issue is whether the plaintiffs were assaulted by the Agent of the 1st Defendant while in custody of the Agent of the 1st Defendant. Mr. Lwere submitted for the Plaintiffs that the Plaintiffs were assaulted by the police while the plaintiffs were in their custody. He relied on the evidence of PW2 and PW3.

For the defendant it was contended that there was no evidence to substantiate the allegation.

Both PW2 and PW3 testified to their respective torture by the police while they were in custody at police station Describing his torture PW2 said,

"I was tortured-; by the police in order to extract from me information regarding the whereabouts of Kakuru. My legs were beaten and a table was put on my chest. I was told to lie on my back and the table was put on my chest - one leg of

the table rested on my chest and four police men sat on that table. This was being done twice in a day - in the morning and evening for 11/2 weeks,"

Testifying about his ordeal at the hands of the police, Moses Kabirizi (PW3) said,

"I was told that I was being shifted from police station to police station because they were looking for Kakuru. At these police stations, I was interrogated. At the various police stations I was treated very badly sometimes I could not get food. I went without food if my people did not bring me something to eat. We had no beddings. We slept on the bare floor which was very filthy. I was beaten at each and every police station to which I was taken. Each time I was beaten, it was alleged that we killed Kakuru and disposed of the body".

The above is the evidence of torture meted out by the police on the plaintiffs. It is true there is no medical evidence to support the evidence of assault as submitted by Turyasingura. But it is not requirement of the law that-every allegation of assault must be proved by medical evidence. I think cogent evidence can do. If a witness says "he boxed and kicked me", that is evidence of assault. You do not need a medical evidence to prove that he was boxed and kicked. That would not be the law. Medical evidence helps to prove the gravity of the Assault.

In the instant case, both PW2 and PW3 testified to the assault on them by the police while they were in police custody.

The above evidence has not been controverted. From that evidence, I find that the Plaintiffs were assaulted by the police while the Plaintiffs were in the police custody.

This now brings me to the question of quantum of damages to which the Plaintiffs are entitled.

Damages in cases of this nature are paid to attempt to compensate the Plaintiff for the discomfort he underwent as a result of the wrong committed against him by the Agent of the defendant.

Assessment of damages in previous cases are guides and serves as material for comparative basis as was stated in the case of Charles Katende v. Ag. (1971) IULR 26[^]-. These are good guides. But in the

final Analysis, each case must be decided on its peculiar facts.

In Patrick Kwarakunde v. The AG. (1984) HCB 60 to which counsel for the Plaintiff drew my attention, the Plaintiff was a police inspector. He was unlawfully arrested and assaulted brutally. He was detained in a military Barracks and later in a boys Quarters of a House on Nakasero Road. He sustained fractures on various parts of the body as a result of the assault on him. He was kept in custody for 124 days. He was awarded 300,000/= as general damages and 100,000/= as exemplary Damages.

The above case clearly differs from the instant one on their facts. The plaintiff in Patrick's case was an Inspector of police while in this case the Plaintiffs are cattle traders. The Plaintiff in Patrick's case received a much more severe torture than both plaintiffs in the instant case. He was detained for 124 days while both plaintiffs in this case were unlawfully detained for less 1st plaintiff for 10 days while (PW3) for 30 days. In view of the

above, even considering the diminishing value of our currency, the entire circumstances of the case show that the Plaintiff in this case received a much less torture. For those reasons I award each plaintiff Uganda shs. 150,000/= as general Damages.

The circumstances of the case do not justify award of punitive damage. It is not awarded.

Special Damages;

The plaintiffs claimed special damages which they pleaded in paragraph 7 of their plaint. It was argued for the plaintiffs that they were cattle traders at the time of their arrest. Evidence was led to show their weekly earnings

1st Plaintiff (PW2) 500,000/= per week,

2nd Plaintiff (PW3) 60,000/= per week.

It was argued that during their 24 weeks of detention, the plaintiff lost earning as underlet Plaintiff $500,000 \times 24 = 15m/=$

2nd Plaintiff $60,000 \times 24 = 1,440,000/=$

It was prayed that the above be awarded to the Plaintiff as their respective lost earnings. It was also prayed that interest at ho paid on the about from date of filing the suit until payment in full.

As I have stated earlier in this judgment, the defendant is not liable for the period when the plaintiffs were detained on court's order. The defendants are only liable for the loss of earning during the period of the plaintiff's unlawful detention. That is the period before they were taken to court,

1st Plaintiff (PW2) was detained for 10 days.

= $500,000 \times$ less 20% as above = shs. 411,440/=

2nd Plaintiff $60,000 \times 30/7$ Less 20% shs 205,714/=

I award the above as loss of earning by the Plaintiffs during their period of unlawful detention. I also award to the Plaintiffs cost of this action.

G.M. OKELLO
JUDGE

V,

12/10/94

**12/10/94: Judgment delivered in the presence of
Mr. Lwere for the plaintiff. No body for the AG.**

Mr. Ekwanyu Court Clerk.

G.M. OKELLO

JUDGE

12/10/94

