



REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL CASE NO 17 OF 1978

GEORGE MASINDE MURUNGAPLAINTIFF

VERSUS

ATTORNEY-GENERAL.....RESPONDENT

JUDGMENT

On 22nd February 1977 the plaintiff, who was (and still is) the treasurer of Bungoma County Council, purchased eight beds, eight mattresses and eight blankets from one Mansoor Mohammed. He paid by three postdated cheques, one payable on the following day, the second at the end of February, and the third (for Shs 2000) on 15th March 1977. The first two cheques were duly presented and paid. On 15th March 1977 H Mansoor Mohammed put the third cheque into his bank account. Shortly afterwards (on the same day) the plaintiff came to see him. He asked him to postpone presentation for a few days as he was in financial difficulty. Mansoor Mohammed refused; so, to avoid embarrassment because he had insufficient funds in the bank to meet the cheque, the plaintiff instructed the bank to stop payment. Mansoor Mohammed says that he went later to the plaintiff's house and demanded payment but the plaintiff "chased him away".

On the following day, 16th March, Mansoor Mohammed went and reported the matter to an inspector of police, Dismas Aloys Ouma. The inspector admits that he there and then sent a police constable to arrest the plaintiff and bring him to his office. The plaintiff was duly brought to the inspector's office and there followed between them a sharp argument. The plaintiff says that he was simply explaining to the inspector that this was a civil matter and had nothing to do with the police. The inspector says that the plaintiff was "rude and aggressive".

It appears that the inspector was unconvinced by the plaintiff's entreaties that this was a civil matter. To prove his *bona fides*, the plaintiff arranged with some friends to bring Shs 2000 to the police station. They did so that same afternoon and gave it to the inspector, but to no avail. The inspector decided to retain the money and he says that he kept it to use as an "exhibit" in Court.

There is a sharp controversy in the evidence as to what happened between 16th and 21st March. I shall revert to this later in the judgment. There is no dispute, however, that inspector Ouma decided that the plaintiff should be charged with obtaining goods by false pretences. On 21st March the plaintiff was released upon executing a bond in the sum of Shs 5000 to appear before the District Magistrate, Bungoma, on 22nd March.

The plaintiff duly appeared before the District Magistrate, Bungoma, charged as follows:

On 22nd February 1977 at Bungoma township in Bungoma district within the Western Province with intent to defraud obtained from Mansoor Mohammed eight beds, eight mattresses and eight blankets by falsely pretending that a certain cheque (No 314934) which he the said George Masinde Murunga then produced and delivered to the said Mansoor Mohammed was a good and valid order for the payment of Kshs 2000 upon the Standard Bank, Bungoma branch.

At the end of the prosecution case the magistrate found that the plaintiff had no case to answer and acquitted him under section 210 of the Criminal Procedure Code.

In this suit the plaintiff claims damages for unlawful arrest, false imprisonment and malicious prosecution against the Attorney-General by virtue of the Government Proceedings Act. It is not in dispute that Inspector Ouma is a servant of the Government and was acting in the course of his employment.

It is not necessary to decide whether the initial arrest by the police constable at the instance of the inspector was, or was not, lawful. It could be said that the plaintiff was brought for questioning and went voluntarily.

According to the plaintiff, as soon as he arrived at the police station the inspector ordered the police constable to place him in the cells. This was at about 11.00 am. In the afternoon he was brought back from the cells to the inspector and this is when there was the argument and the payment by his friends of the Shs 2000. The plaintiff says that he was then released, but asked to return on the following day. He was given a piece of paper entitled "notice to attend at a police station" signed by the inspector requiring him to attend on 17th March 1977 at 2.30 pm. He duly went on 17th March when he was again put in the cells from 17th to 21st March when he was given and signed another piece of paper, ie a bail bond to appear before a magistrate on 22nd March. In other words he says that he was falsely imprisoned by the inspector for a few hours on 16th and then again from 17th to 21st March.

In his evidence-in-chief the inspector said that when the police constable brought the plaintiff on 16th March, there was the argument in which the plaintiff was "rude and aggressive". He decided there and then that the plaintiff should be, charged with obtaining goods by false pretences because as he puts it, the plaintiff "had no money to pay". When the money was brought in the afternoon he decided to keep it as an "exhibit" because as he put it "I had already made up my mind to charge him". He continued that he gave him a police bond to appear in Court the next day and he never put him in the cells.

However, when the inspector was confronted in cross-examination with the notice to attend a police station and with the bail bond he inevitably had to change his story. His story in cross-examination was that he gave the notice to the plaintiff to return to the police station on 17th March but that he did not detain him on 17th March and let him go for "further investigations". Having completed his investigation he gave him the police bond on 21st March.

I regret to have to say that Inspector Ouma is not a man who has much respect for telling the truth. I found him an evasive, shifty witness. I accept entirely the plaintiff's version of what happened, fully supported as it is, by the notice and the bail bond: (1) that he was locked up in the cells for a few hours on 16th March; and (2) that he was asked to return the next day and was then locked up in the cells from 17th to 21st March and then released on police bond.

I hold that this imprisonment was unjustified, false and unlawful; and that the Government is vicariously liable for it on account of it having been committed by their servant, Inspector Ouma.

As to malicious prosecution the plaintiff must prove four things: (1) that the prosecution was instituted by

Inspector Ouma (there is no dispute as to this); (2) that the prosecution terminated in the plaintiffs' favour (there is also no dispute as to this); (3) that the prosecution was instituted without reasonable and probable cause; and (4) that it was actuated by malice.

With regard to item (3) I ask myself, within the test laid down in *Kagane v Attorney-General* (1969) EA 643, whether the material known to the prosecutor, ie Inspector Ouma, would satisfy a prudent and cautious man that the plaintiff was probably guilty. I have no doubt in answering this question in the negative. When the inspector decided to institute criminal proceeding all the material he had was the report from Mansoor and the explanation or "argument" with the plaintiff. All this amounted to was that the plaintiff had given three post-dated cheques for the price of goods bought of which two were cleared and the third was countermanded. No prudent or cautious man would possibly say that on those facts alone the plaintiff was probably guilty of the offence of obtaining goods by false pretences. Added to this is the fact that the Shs 2000 were brought and handed to the inspector. When asked in the criminal proceeding about the Shs 2000, the inspector said:

I kept it as an exhibit. If I gave the money to the complainant that would have settled the matter but I had already formed the opinion to charge the [plaintiff].

It seems to me that this answer also indicates that Inspector Ouma was actuated by malice. Looking at all the circumstances of this case and the behaviour of the inspector from beginning to end, including the untruths he told to this Court, I have no doubt in my mind that the inspector was motivated by something more than a sincere desire to vindicate justice. For all these reasons, I hold that the plaintiff has proved that his prosecution for obtaining goods by false pretences was a malicious prosecution.

Damages are always a difficult matter in cases such as this. I must consider the plaintiff's position in Bungoma. He was, as I indicated, the treasurer of the county council. I consider too that he spent four nights in the police cells, which must have been (to say the least) a most unpleasant experience.

Although he was on bail until acquitted on 26th July 1977 the charge was hanging over his head for four months. Having regard to all the circumstances, I would award a total sum of Shs 17,000 in general damages. There is also a claim for Shs 3,000 as special damages for the legal expenses involved in defending the prosecution.

Accordingly there will be judgment for the plaintiff for Shs 20,000, plus interest and costs.

Judgment for the plaintiff with costs.

Dated and delivered at Kakamega this 23rd day of April 1979

E. COTRAN

JUDGE



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