

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT GULU
CIVIL SUIT NO 04 OF 2000**

KIDEGA ALFONSIO:::PLAINTIFF

VERSUS

THE ATTORNEY GENERAL::DEFENDANT

BEFORE: HON JUSTICE REMMY K KASULE

JUDGMENT

The plaintiff instituted this suit against the Defendant claiming general, exemplary and special damages for unlawful arrest, unlawful detention and malicious prosecution. The acts complained of are alleged to have started with the arrest of the plaintiff at Gulu Court premises on the 13.04.1995.

The defendant not only denied the claims of the plaintiff but also contended that the plaintiff's suit was time barred.

The issues framed at commencement of trial were:-

1. Whether the plaintiff's suit is time barred.
2. whether the plaintiff was unlawfully arrested and detained.
3. whether the plaintiff was maliciously prosecuted, and if so,
4. whether the plaintiff is entitled to the remedies prayed for.

As to the first issue, the evidence of the plaintiff is that he was arrested on 13.04.1995 at Gulu Court premises, was detained at Gulu Police station for 9 days, after which he was charged in court with the charge of murder in Criminal Case Number 275 of 1996. He was remanded in prison, subsequently committed for trial by the High Court and was tried and acquitted on 24.04.1999 by I. O. Malinga, J. On 09.02.2000 the plaintiff filed this suit in court.

In the torts of wrongful arrest, unlawful detention false imprisonment and malicious prosecution, the Law is that the time within which the plaintiff can bring an action

against the offending defendant begins to run as from the date of the release or acquittal of the plaintiff: see **Supreme Court of Uganda Civil Appeal Number 6 of 1990: ERIDAD OTABONGO WAIMO V. ATTORNEY GENERAL (1992) V KALR 10,**

: **MUSAMBU V. WEST MENGO DISTRICT ADMINISTRATION (1971) EA 379**

and

O'CONNOR V ISAAC (1956) 2QB 288 AT 328

Section 3(1) (a) of the Civil Procedure and Limitation (Miscellaneous provisions) Act, cap.72 provides that:

“ 3(1) no action founded on tort shall be brought against

(a) the Government; after the expiration of two years from the date on which the cause of action arose”

The cause of action of the plaintiff arose on 24.04.1999 when he was acquitted by court of the charge of murder. The suit was filed on 09.02.2000 before the two years expired from the date of cause of action. The plaintiff's suit is therefore not time barred.

The second issue is whether the plaintiff was unlawfully arrested and detained.

Plaintiff testified that he was arrested by one AIP Kibwota of Uganda Police on 13.04.1995 at Gulu Court premises, Gulu Town, where the plaintiff had come in connection with a case concerning his brother. He was taken to Gulu Police station where he was detained for nine(9) days. He was then taken to court where he was charged with murder and was remanded. He spent four (4) years on remand before being released on 21.04.99.

Since the plaintiff was subsequently charged with murder after his arrest, it is safe to infer that the reason for his arrest was because he was a murder suspect. There was thus reason for his arrest.

Plaintiff did not testify to court as to why he contended there were no valid reasons for his arrest by the police, given the admitted fact the he was, soon after his arrest, charged with a murder charge.

Plaintiff's counsel in his written submissions invited court to infer from the court proceedings and judgment of Criminal Session case No. 275 of 1996 where the plaintiff was charged and acquitted of murder, that the arrest, detention, charging and subsequent prosecution of the plaintiff were the result of malice and fabrication of evidence by one Oluma Godfrey, who

at the material time was involved in a civil dispute with one Oyat Tolit, brother of the plaintiff. The plaintiff had come to court at Gulu for the hearing of that dispute in Civil Suit No. MC. 92 of 1994 when he was arrested on 13.04.1995.

With respect to counsel for plaintiff, this court cannot make that finding in absence of direct evidence from the plaintiff and/or his witnesses on the matter being given in this case. To make that finding would be prejudicial to the defendant who was not a party and never participated in Criminal session case no. 275 of 1996, and therefore never had the opportunity to test the credibility of the witnesses giving the evidence on the matter either through cross-examination or otherwise. It was upon the plaintiff in this case to adduce the evidence of malice on the part of the defendant, including what was stated and transpired in a previous trial of Criminal Case No. 275 of 1996. Had this been done, the defendant would have had the opportunity to cross examined the plaintiff and/or his witnesses on the matter, the proceedings and what transpired in **Criminal Case No. 275 of 1996 inclusive: see Uganda vs Richard Mutumba, (1995) VI KALR 91: Berko. J, a decision of the High Court, Uganda.**

It follows therefore that on the evidence adduced plaintiff was lawfully arrested by the police as a murder suspect, a charge he was subsequently charged with within a period of nine(9) days. The police had the powers to arrest under section 10 of the Criminal Procedure Code Act, Cap.116.

Plaintiff's evidence is that he was kept at Gulu police station for nine (9) days from 13.04.95 before being taken before a court of law to be charged with murder.

Court notes that the plaintiff was arrested on 13.04.1995, before the 1995 Constitution became effective on 8th October, 1995. Therefore Article 23 (4)(b) requiring that a person arrested or detained shall, if not released, be brought to court not later than forty eight (48) hours from the time of arrest, had not yet become effective and operational.

The law then i.e. 13.04.1995 applicable was section 14 of the Criminal Procedure Code Act, Cap 116. The section required, without unnecessary delay a police officer making an arrest to take the person arrested before court.

The defendant adduced the evidence as to why the defendant had to be kept at Gulu Police station for a whole nine days before being taken to court.

This court, being guided by the provisions of Article 23(4) (b) of the 1995 Constitution, even though not applicable at the time plaintiff was arrested, holds that the plaintiff

should not have been held at Gulu Police station for more than forty eight hours(48). Plaintiff was thus detained contrary to the law at Gulu police station for the extra period of five (5) days, until when he was charged in a court of law.

The record of the proceedings of the trial court of Criminal Session case No. 275 of 1996 show that the plaintiff was charged and remanded on 24.04.1995. He remained on remand until the 21.04.1999 when he was acquitted of the charge of murder. He was thus on remand for a period of four(4) years.

According to Article 23(1) (b) and (c) of the constitution, a person in Uganda, may be deprived of personal liberty:-

“ 23.(1)

- (b) ***in execution of the order of a court made to secure the fulfillment of any obligation imposed on that person by law;***
- (c) ***for the purpose of bringing that person before a court in execution of the order of a court or upon reasonable suspicion that that person has committed or is about to commit a Criminal offence under the laws of Uganda”***

Article 23(7) of the Constitution entitles a person unlawfully arrested, restricted or detained to compensation from the person or authority that causes such arrest, restriction or detention.

The converse of Article 23(7) of the constitution is that one lawfully arrested, restricted or detained is not entitled to compensation.

Section 30 of the Prisons Act, Cap. 304 authorizes any one charged with a crime or offence, remanded to a prison by a court of law, in accordance with the terms of the warrant of commitment.

Section 53 of the Trial On Indictments Act, Cap. 23 and section 119 of the Magistrates Courts Act empowers the Magistrates court to remand by warrant an accused person to prison.

Article 128(4) of the Constitution protects any one exercising judicial power from being liable to any action or suit for any act or omission by that person in the exercise of judicial power.

The position of the law therefore is that the period as from the date of remand of the plaintiff to prison: 24.04.1995 up to the date of his acquittal and release: 21.04.1999, is not

actionable, since the plaintiff was being kept on remand pursuant to and in compliance of remand orders of courts of law in exercise of Judicial powers vested in the courts and the prison authorities pursuant to the provisions of the law set out herein above. Plaintiff adduced no evidence to prove that his remand was unlawful. Therefore the answer to issue number two (2) is that the plaintiff was lawfully arrested and detained for the period of 48 hours that is from 13.04.1995 up to 15.04.1995 but was unlawfully kept at the police station from the 16.04.1995 up to 24.04.1995, that is a period of nine (9) days. The plaintiff was in lawful detention for the whole of the remand period from the date of remand 24.04.1995 up to his acquittal and release on 21.04.1999, that is a period of four (4) years.

The third issue is whether the plaintiff was maliciously prosecuted.

In order to succeed in a tort of malicious prosecution plaintiff has to prove on a balance of probabilities that he was prosecuted, the prosecution ended in his favour, the prosecution was as a result of malice, with no reasonable and probable cause of such a prosecution, and that for the purpose of malicious prosecution, a person becomes a prosecutor when that person takes steps to set in motion the legal process that result in the eventual prosecution of the plaintiff: see **EDIRISA SSEMAKULA VS ATTORNEY GENERAL (1976) HCB 171.**

On the basis of the evidence adduced, court is satisfied that the plaintiff was criminally prosecuted for murder in High Court, at Gulu Criminal session case No. 275 of 1996, and that the said prosecution ended in his favour when he was required on 21.04.1999.

The plaintiff however did not testify as to why he contended that the prosecution brought against him had been done so maliciously, and /or without any reasonable and probable cause.

“ reasonable probable cause” imputes that:

“there must be sufficient ground for thinking that the plaintiff was probably guilty of the crime imputed. This does not mean that the prosecution has to believe in the probability of conviction. The prosecution has not got to test the full strength of the defence; he is concerned only with the question of whether there is a case fit to be tried. The prosecution must believe that the probability of the accused’s guilt is such that upon general grounds of justice, a charge against him it warranted:” see **GLINSKI VS MCIVER (1962) AC 726 AT 767, applied in H.C.C.S. No 11 of 1995, at Gulu 07.07.97 Owiny Kenneth**

v. Attorney General, and also in **H.C.C.S. No. 426 of 2003 at Kampala, 08.07.05, Lutwama Umar v Attorney General**, both cases unreported.

Julius Orach, Learned counsel for the plaintiff has in his written submissions filed in court, invited court to find that the prosecution was malicious from the evidence adduced and the holding made in the judgment in criminal case No. 275 of 1996, where the plaintiff was prosecuted and acquitted of murder.

For the reasons already given, this court, with respect, rejects learned counsel's such submission. It was incumbent upon the plaintiff to adduce evidence in this suit to prove the allegations that his prosecution in criminal case No. 275 of 1996 was motivated by malice, and was without any reasonable and probable cause. The plaintiff cannot be said to have discharged that burden merely by availing to court a record of proceedings and a copy of judgment delivered in Criminal Case No. 275 of 1996.

But even if court were to accept, and court has not, the submission of learned counsel for the plaintiff to look at the proceedings and judgment of Criminal Session Case No. 275 of 1996, with a view to ascertain that plaintiff's prosecution was actuated by malice, this court, after studying the proceedings and judgment in the Criminal Case, is unable to come to the conclusion that the plaintiff's prosecution in the case was actuated by malice and that there was no reasonable and probable cause for the same. This is so because the court proceedings show that prosecution witnesses PW2: Oluma Godfrey, PW3 Joska Amek and PW4: Livingstone Obote testified on oath in the case asserting that the plaintiff committed the crime and, according to PW4, plaintiff was physically seen committing the crime. It is thus safe to infer that the police and the prosecution, prima facie, had sufficient material upon which they took the decision to prosecute the plaintiff.

The burden of proof in civil matters lies on the one who alleges or asserts because it is that person who is interested in having court believe what is being asserted or alleged: see **SEBULIBA VS CO-OPERATIVE BANK (1982) HCB 129**.

The burden was upon the plaintiff to prove malice and lack of reasonable and probable cause. Plaintiff, in the considered view of this court, did not discharge that burden.

The answer to the third issue is that the plaintiff was not maliciously prosecuted.

The fourth issue is whether the plaintiff is entitled to remedies prayed for.

From the way the issues have been resolved so far, plaintiff is not entitled to any damages for unlawful arrest, for the period he was on remand and for malicious prosecution as he has not been successful on those issues.

Plaintiff is however entitled to damages for unlawful detention at Gulu Central Police station from 16.04.1995 when the period of 48 hours expired without being taken to court, to 24.04.1995, when he was charged in court.

Plaintiff testified that while at Gulu Central Police Station he was beaten so that he pleads guilty to the charges, he was kept in a room where there were too many people for the size of the room, there were no proper arrangements for one to ease oneself, there was only one meal a day and he was provided with no beddings. This evidence has not been rebutted by the defence.

In **Newman vs Attorney General (1988-1990) HCB 2009** general damages of shs 3,000,000/= were awarded for unlawful detention of 12 days; while in **APIRE MICHAEL VS ATTORNEY GENERAL, HC.C.S. NO. 92 of 2004**, Judgment delivered on 28.06.2007, general damages of shs 8,000,000/= were awarded for unlawful arrest and detention of four (4) months and one day.

Considering all the circumstances of this case court awards shs 2,000,000/= general damages for unlawful detention and mistreatment for nine days i.e. 16.04.1995 to 24.04.1995 at Gulu Central Police station

Plaintiff stated in his evidence that he was a farmer of groundnuts and cassava, which he sells to earn a living. He claimed that out of cassava alone he would have earned shs 8,000,000/= during the whole period of his arrest, detention and remand until his acquittal.

For reasons already stated plaintiff is only entitled to claim earnings lost for the period he was in unlawful detention, that is 16.04.1995 to 24.04.1995. court awards him, shs 200,000/= lost income. Both sums are to carry interest at the rate of 15% p.a. from the date of judgment in respect of the general damages, and from 16.04.1995 in respect of the special damages, till payment in full.

The plaintiff is awarded the costs of the suit.

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Remmy K. Kasule

Judge

27th June 2008.