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IN THE HIGH COURT OF UGANDA AT MBALE

HCT-04-CV-CA-0021 OF 1999

(From Mbale CS no. 51 of 1989)

1. **BOSCO WABENDO** }
2. **MALISA MUKUWA** }
3. **MUKUWA** } **.....APPELLANTS**
4. **TSOLOBI BIGALA** }
5. **MUTSUMA BIGALA** }

VERSUS

ISSA NAMARA..... .....RESPONDENT

BEFORE: THE HON. MR. JUSTICE RUGADYA ATWOKI

JUDGMENT

The respondent sued the appellants in the Magistrates court of Mbale for special and general damages for unlawful arrest, false imprisonment and malicious prosecution. The Magistrate GI gave judgment in his favour, and awarded him special damages of sh. 130,000/-, general damages of sh. 500,000/- interest and costs of the suit. The appellants being dissatisfied with that decision appealed to this court.

The background to the suit is as follows. The appellants were related to a young man who was allegedly assaulted and later died. When they learnt of the assault, they went to check on the assault victim, and discovered that the suspect, a former co wife of their relative had been released from custody of the respondent, in his capacity as the LCIII Chairperson on bond.

Unfortunately, later the assault victim died and the suspect was now sought on a murder charge.

The appellants or some of them reported to the police that the respondent was responsible for the escape of the suspect, and he was arrested. He was detained in police custody for three days and later charged with aiding a prisoner to escape. He was acquitted of the charge. He sued the appellants with the results as stated above.

Three grounds of appeal were set out in the memorandum of appeal as follows.

1. the trial magistrate erred in law and fact when he held that the defendants/appellants had not acted with reasonable and probable cause when they made their report to police and were actuated by malice whereas not.
2. the trial magistrate erred in fact when he held that the defendants/appellants reported the mater to police before the death of the child whereas not. The defendants/appellants reported the matter to police after the death of the child and wanted assistance in (a) having the suspect who had escaped re arrested and (b) getting a post mortem report of the deceased child done by the doctor.
3. the trial magistrate erred in awarding the respondent excessive damages to the respondent/plaintiff.

Court directed both parties to file written submissions. Only the respondent complied. The respondent agreed with the reasoning and conclusions of the trial magistrate. He asked court to uphold the judgment of the lower court and confirm the orders therein.

This is a first appeal. The cases of *Pandya v. R.* [1957] EA. 336, and *Bogere Moses & Kamba v. Uganda* SC. Cr. App. No. Of 1999, (unreported) set down the duty of a 1st appellate court to give the evidence a fresh and exhaustive scrutiny, and arrive at its own conclusions bearing in mind that it has not seen the witnesses or observed their demeanour. The above principle applies equally in civil suits such as the present one.

The suit was based on unlawful arrest, false imprisonment and malicious prosecution. In a case of unlawful arrest and false imprisonment, it must be shown that there was no reasonable and justifiable cause for the arrest and detention of the plaintiff. Where the detention or imprisonment is proved, the onus shifts to the defendant to show that it was reasonably justifiable. See *Sekaddu v. Sebaduka* [1968] EA 213 at 215.

The sequence of events did not come out clearly from the record. There appeared to be some inconsistencies in the chronology of events, and this was not resolved by the trial court. I did my best I could to put the sequence down from the record of proceedings.

The evidence on record as accepted by the trial court was that the plaintiff/respondent was the LCIII Chairperson of the area where a young boy was seriously assaulted. According to PW2 Lukuya Stephen the Defence Secretary, the suspect a stepmother was arrested and handed over to the plaintiff as the LCIII Chairperson. The plaintiff/respondent PW1 told court that he released the suspect into the custody of her brother, the 1st defendant/appellant herein, and that she was thereafter aided to escape. It was not disputed that the boy the victim of the assault later died in hospital.

The 4th and 5th defendants/appellants learnt of the assault and subsequent death of their grandson. From the evidence of the 4th appellant, he approached the respondent on the whereabouts of the suspect. The respondent was not co operative. The witness tried to have the body examined by a doctor, but the doctor advised that the police ought to be informed first, before a post mortem examination could be carried out. The witness sought a letter from the respondent so he could proceed to the police as is the standard practice in the villages but the respondent refused to give it to them. The result was a report to the police, which led to the eventual arrest of the respondent.

The issue then would be whether the arrest and detention of the respondent was justified in the circumstances. The report to the police was not that the respondent was a suspect to murder. It had to do with the escape of the murder suspect. In my view, it was justified. The evidence on record was that the respondent was not co operative with the investigation as to first, the whereabouts of the suspect, who had reportedly escaped, having been in the custody of the respondent.

Secondly, the respondent was reluctant to have the body examined by a doctor prior to its burial. Indeed according to the evidence of the 4th appellant, by the time the doctor eventually came to carry out the examination, the body had completely decomposed, thanks to the dillydallying of the respondent.

In the circumstances, the arrest of the plaintiff could not be said to have been unjustified. It was carried out by the officers of the State who are authorised to effect arrests. It could not be said to have been unlawful.

The evidence from the plaintiff/respondent was that he was detained at the police for three days before he was taken to court and charged. This was not disputed. The law allows the police to hold persons suspected to have committed criminal offences for up to 48 hours before releasing them unconditionally or on bond, or taking them before a court of law, under Article 23 (4) of the constitution. Holding a person beyond 48 hours in police custody was certainly illegal. It offended the provisions of the supreme law of the land. It was unconstitutional. The arrest was not unlawful. The detention for three days was by and the hands of the police. It was not by the appellants. The appellants could not therefore be held liable for the illegal acts of the police.

That leaves the matter of malicious prosecution. In a claim for malicious prosecution, it must be proved that,

1. the proceedings were instituted or continued by the defendant.
2. the defendant acted without reasonable and probable cause.
3. the defendant acted maliciously.
4. the proceedings terminated in favour of the plaintiff.

There was no dispute that the criminal prosecution was instituted by or at the instigation of the 4th and 5th appellants. They conceded as much in their testimonies in court.

The criminal prosecution of the plaintiff/respondent on the charge of aiding a prisoner escape terminated in an acquittal. That means proceedings ended in favour of the plaintiff/respondent.

The next question would then be whether the appellants acted without reasonable and probable cause. Reasonable and probable cause was defined as,

> 'an honest belief in the guilt of the accused based upon full conviction, founded on reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any 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 imputed.'

See *Edirisa Semakula v. A.G.* [1776] HCB 171.

In the present case, the 4th and 5th appellants were informed of the assault of their grandson. They rushed to him. The suspect had been arrested, but released. They tried to secure a letter from the responsible local council official in the area to try and proceed to the police, to no avail. This same official was reported to be the one to whom the suspect, when first arrested was brought, but he released her, apparently to the custody of her brother from where she escaped. Ordinarily local council officials do not release criminal suspects on bond. They do not have such authority. Their role would be to forward them to the police, who would should they see fit, give the bond.

In the mind of any prudent and cautious man placed in those circumstances, it would only be reasonable to suspect that this official did not wish to have the suspect apprehended, and so could well be party to her escape. The young man died in hospital possibly from the assault, and this then became a possible murder inquiry. It was only reasonable and proper that the 4th and 5th appellants reported the matter to the police.

Lastly it must be shown that the defendant acted maliciously. To act maliciously is to act with improper motives, not based on good faith. In a suit for malicious prosecution, the plaintiff has to prove that the prosecution was for a purpose other than to vindicate the ends of justice.

The plaintiff/respondent stated that the 4th and 5th appellants ought to have gone to the LCI and asked for the suspect. They instead went to the police and reported. It was not useful to go the LCI when it was common knowledge that the suspect had escaped, having been arrested by the LCI officials in the 1st place. She escaped because she was granted 'bond' by the plaintiff, an improper and possibly illegal manner of dealing with suspects. That she escaped as a result, and there was a subsequent prosecution of the person who was seen as having aided the suspect escape, that could not be said to be a prosecution actuated by ill motives or malice.

The plaintiff/respondent told court that he spent a lot of money looking for the suspect. Why did he have to do so, if he was not a party to her escape in the first place? After all, the matter was by then in the hands of the police. All this to me shows that there was no malice in instituting the prosecution of the plaintiff/respondent. That answers the 1st ground of appeal.

Having disposed of the 1st ground of appeal in favour of the appellants, that also answers the 2nd ground of appeal. The 3rd ground of appeal on quantum becomes academic and I will not bother with it.

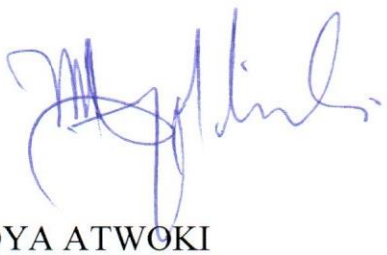
In the result, this appeal succeeds. The judgment and orders of the lower court are hereby set aside.

I noted from the record that the 1st, 2nd and 3rd appellants did not appear. Judgment was entered against them after such failure to enter appearance. From the evidence on record, there was absolutely no connection between them and the arrest and prosecution of the plaintiff, which was the cause of this suit. The plaintiff/respondent and his witness, and even the appellants' evidence all pointed to only the 4th and 5th appellants as the people who had anything to do with the arrest and prosecution of the plaintiff/respondent. Even if I had found for the respondent, I would have absolved the 1st, 2nd and 3rd appellants from liability in respect of this suit.

Having so said, the 4th and 5th appellants, who were the people who appeared in the suit, filed defences, and were in court all the time during proceedings both in the lower court and during the hearing of the appeal, they shall have the costs of the suit here and in the lower court.

RUGADYA ATWOKI
JUDGE
06/03/2009.

Court: The D/Registrar shall deliver this judgment to the parties.



RUGADYA ATWOKI

JUDGE

06/03/2009.