

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
CIVIL SUIT NO. 133 OF 2002

MUGABI JOHN ::: **PLAINTIFF**

VERSUS

THE ATTORNEY GENERAL ::: **RESPONDENT**

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

J U D G M E N T

MUGABI JOHN (*hereinafter referred to as the “Plaintiff”*) brought this suit against the Attorney General of the Republic of Uganda (*hereinafter referred to as the “Defendant”*) seeking for the recovery, *inter alia*, of general and special damages, aggravated and exemplary damages for unlawful and malicious prosecution, and costs of the suit.

Summary of facts.

The Plaintiff was on 20/12/2000 charged and prosecuted in Lugazi Magistrate Grade 1 Court for the offence of **“obtaining goods by false pretence”** contrary to **Section 289 Penal Code Act (PCA)**, in that on 19/09/2000 at Bubajjwe Village in the Mukono District, with intent to defraud, he obtained one motorcycle Reg. No. UCX 740 Yamaha make, from one Katumba Godfrey by falsely pretending that he (Plaintiff) had already paid Shs. 850,000= for it whereas not. He was subsequently acquitted after the prosecution failed to prove its case beyond reasonable doubt, and the said motorcycle was then returned to him as the owner by court.

The said Katumba Godfrey sold the said motorcycle to the Plaintiff, and an agreement, *Exhibit P III*, was made witnessed, among others, by the LC 1 officials of Bubajjwe area on 18/09/2000. The purchase price was Shs. 850,000= which the Plaintiff paid to Katumba in presence of the said witnesses, and the motorcycle with its log book (card) were handed over to him.

After two months, the Plaintiff heard radio announcements on Central Broadcasting Service Radio (CBS) that he had stolen the motorcycle at gun-point, and that he should report at Mukono Central Police Station. He instead reported to Bugiri Police Station with all the documents pertaining to the motorcycle, and he was told by Police to go home as there was no case. Later when the Plaintiff was coming from Mayuge to Bugiri on the motorcycle Police stopped him at a road-block and arrested him for the theft of the motorcycle, which they retained and told the him to go and bring the documents for it.

The Plaintiff accompanied by Policemen from Bugiri and his brothers proceeded to Lugazi Police Station where they found the motorcycle kept, and presented the documents, and indeed, the Police there confirmed that the motorcycle rightfully belonged to him. He was, however, told to come back to collect it later because the District Police Commander (DPC) was not present to release it to him. He continued coming to Police for over twelve times until on 20/11/2000 when, instead, he was arrested and charged and prosecuted as stated above. He spent three months on remand before he was released on bail, and the case was heard in court and he was acquitted and got back his motorcycle.

The following issues were framed and agreed upon for this court's determination:

- 1. Whether the Plaintiff was prosecuted maliciously and/or without reasonable or probable cause.*
- 2. Whether the impounding of the Plaintiff's motorcycle UCX 740 from 28/10/2000 to 20/08/2001 by Officers of Lugazi Police Station was lawful.*
- 3. Whether the Defendant is vicariously liable for the Plaintiff's claim.*
- 4. Whether the Plaintiff is entitled to the reliefs sought.*

ISSUE I:

Whether the Plaintiff was prosecuted maliciously and/or without reasonable or probable cause.

The tort of malicious prosecution in law is duly constituted when the following essential elements are established:

- (i) the proceedings must have been instituted by the defendant;*
- (ii) the defendant must have acted without probable and reasonable cause;*
- (iii) the defendant must have acted maliciously; and*
- (iv) The proceedings must have terminated in favour of the plaintiff.*

See *Lutaaya v. Attorney General, HCCS No.147 of 1992; Alaudin Rahamtulla v. Uganda Bookshop Ltd. & A' nor [1973] HCB 90; Kabira Godfrey v. Attorney General [1975] HCB 199, Attorney General v. Farajara [1977] HCB 29 at page 30.*

“Reasonable and probable cause” was defined in *Attorney General v. Farajara(supra)* as:

“...an honest belief in the guilt of the accused based 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 any ordinary prudent and cautious man, placed in the position of the accused, to the conclusion that the person charged was probably guilty of the crime imputed.”

The Plaintiff's testimony does not substantially depart from the facts in the summary above; and it does well not to repeat them in detail. The salient features though, which bear on this issue are that he purchased the motorcycle from a one Katumba Godfrey at Shs. 850,000= as per *Exhibit P III*. The Plaintiff was also given a Log Book (Card) and he took possession of the motorcycle. Two months later announcements were placed on CBS Radio that he had stolen the motorcycle at gun-point; and that he should report at Mukono Police Station.

The Plaintiff instead reported to Bugiri Police Station with documents pertaining to how he acquired the motorcycle, and Police told him to just go back and wait at his home as there was no case. He was later arrested by Police from Lugazi while riding the motorcycle from Mayuge to Bugiri on allegations that he was a thief, who demanded of him the relevant documentary proof of ownership, which he did, and indeed Police confirmed he was the owner of the motorcycle. He was told to collect the motorcycle later because the DPC was not around, but he kept going to Police for over twelve times until on 20/11/2000 when he was instead arrested and charged and prosecuted in court, which later acquitted him.

The Defendant did not call evidence in rebuttal, hence the Plaintiff's testimony stand uncontroverted. Going by the facts in evidence, it is clear that Police in arresting, charging and having the Plaintiff prosecuted acted with reckless abandon. The offence for which the he was arrested is a creature of a statute, but they charged him without proper due reference to the particular law. Had

they consulted the relevant law; which it is their duty to do, they would evidently have found that the Plaintiff had not committed the offence.

The Plaintiff was asked to produce evidence to prove ownership of the motorcycle, which he did. The sale agreement, *Exhibit P III*, bears signatures of several witnesses before whom the transaction was concluded, who included the LCI officials of the area. These ought to have been the first reference point in investigations, and doubtless would have informed Police as to the true ownership. The Plaintiff also produced the Log Book of the motorcycle which was handed over to him in presence of the said witnesses. Therefore, proceeding to arrest, detain and charge him clearly demonstrates failure of the Police to conduct due consultations and investigations.

Had due consultation and investigation been conducted, any ordinary and prudent man placed in the position of the Police would not have come to a conclusion that the Plaintiff was guilty of obtaining goods by false pretence. The failure by Police to make use of such available information from the sale agreement or the statements of LCI officials and other witnesses to the sale transaction demonstrates a serious want of reasonable and probable cause on part of the Police.

It is noted that the Defendant's Counsel argued that Police acted on, or had reasonable and probable cause for arresting and prosecuting the Plaintiff. They relied on authorities of *Herniman v. Smith (1938) AC 305* where the English Court of Appeal held:

“It is not required of any prosecutor that he or she takes action. His or her duty is not to ascertain whether there is a defence, but whether there is reasonable and probable cause for prosecution. Circumstances may exist in which it is right before charging a man, and where a

person is satisfied, or as apparently sufficient evidence, that he has in fact been cheated, therein no obligation to call on the cheat and ask for an explanation, in as much as to ask for this may only have the effect of causing material evidence to disappear or be manufactured.”

Counsel also cited *Glinski v. McIver (1962) AC 726* where Lord Devlin held that:

“reasonable and probable cause means that there must be sufficient ground for thinking that the accused was probably guilty but not that the prosecutor necessarily believes in the probability of conviction...”

With due respect, the reading of the above cases does not show that they contradict the basic tenets which require that there must exist “sufficient evidence”, “sufficient ground”, and/or “general grounds of justice” before a charge against a person could reasonably be preferred. Needless to state that any ground for prosecution of a person should never be whimsical or premised on lackadaisical considerations, but ought to be 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 Police, to the conclusion that the person charged was probably guilty of the crime imputed. This court is left under no illusion that the Police in the instant case acted recklessly with no reasonable and probable cause to charge and have the Plaintiff prosecuted.

Regarding the element that the Defendant must have acted maliciously, one needs to look at the test enunciated in principles in the decided cases on similar matter, particularly, as they apply to the facts of the instant case. In the case of *Attorney General v. Farajara (supra)* “malice” was defined as:

“...indicating that a party was actuated either by spite or ill-will towards an individual or by improper motives.”

Blacks' Law Dictionary (8th Ed) defines "malice" as

"The intent, without justification or excuse, to commit a wrong act, reckless disregard of the law or person's legal rights."

It is my view that malice has been established as can be inferred from the Police' failure to consult the law and/ or to act as a prudent and cautious person would do, and also in acting without reasonable cause. The Police officers at Lugazi Police Station failed even in the simplest of the investigative tasks of retaining copies of the sale agreement *Exhibit P III*, which would have helped in ascertaining from the witnesses thereto the ownership of the motorcycle. Instead, they kept the Plaintiff reporting to Police for over twelve times without bothering to investigate until when they eventually arrested, detained and subsequently had him prosecuted. This is a manifestation of malice as it was a reckless disregard of the law and the Plaintiff's legal rights.

It is not lost on a keen observer that the arrest came fast on the heels of *Exhibit P IV*; a letter dated 04/12/2000 to the Officer-in-charge CID Lugazi Police, in which the Plaintiff's lawyers threatened legal action to enforce his rights and to recover the impounded motorcycle. In the evidence at the criminal trial, PW4 the investigator therein (at page 11 of the typed proceedings) stated that when he visited Kayunga Police Station, he found out that the case had not even been reported there, because according to the O/C Kayunga Police Station the matter was purely civil in nature and did not require Police intervention.

Then PW4 further stated that he established from the "scene" that there existed an agreement which was similar in content to *Exhibit P III* which Police now had on the Police file. Surely, after establishing the facts as narrated by the investigating officer, any reasonable prudent person in position of the Police would not have proceeded to have the Plaintiff charged and prosecuted.

Knowing of the true and correct facts, yet proceeding against the obvious sense of correct judgment that they warranted no prosecution is nothing short of malicious prosecution. It was carried out as if in retribution against the Plaintiff for threatening legal action to enforce his rights and to recover his motorcycle.

Regarding the element that proceedings must have terminated in favour of the Plaintiff, the record of proceedings and judgment of the trial court (*Annextures "A2" & "A3" to the plaint respectively*) evidently shows that the Plaintiff was acquitted. Worthy of note are the apt observations of the trial court's judgment (on pages 27-28), while acquitting the Plaintiff that the matter was purely of a civil nature. By necessary implication the case did not warrant the criminal prosecution, and the Plaintiff should not have been charged in the first place.

At page 28 of the judgment (from top), the court states:

"...police and LCs ordered the complainant to hand over the motorcycle to the accused. The accused had no powers over police to allege influence on the way the matter was determined. Failure to comply with terms of the agreement cannot constitute a criminal offence. The denial made by the complainant that he did not receive the Shs. 850,000= does not constitute an offence nor does the claim by the accused that he paid off the money amount to an offence."

Clearly, the above extract shows that even in the criminal court singled out the fact that the Plaintiff should not have been criminally prosecuted in light of glaring evidence that the matter was purely of a civil nature. It is this court's finding that the Plaintiff has established to the required standard the tort of malicious prosecution, and *Issue No. I* is answered in the affirmative.

ISSUE NO. 2:

Whether the impounding of the Plaintiff's motorcycle UCX 740 from 28/10/2000 to 20/08/2001 by Officers of Lugazi Police Station was lawful.

This particular issue concerns the lawfulness of impounding the motorcycle by Police. In *paragraph 4 (a) and (b)* of the plaint and in his evidence (as PWI) the Plaintiff states the circumstances under which the motorcycle came to be impounded. The details have already been summarized above, and it is not necessary to repeat them.

For their part the Defendant adduced no evidence, but only averred in the *paragraph 6 of the amended WSD* that the motorcycle was lawfully seized as it was subject of Police investigations and an exhibit in the criminal case; and that the Plaintiff was lawfully charged and remanded as a criminal suspect and lawfully prosecuted, and that the motorcycle remained in lawful custody until it was returned to the Plaintiff when he was acquitted.

In ***Uganda Commercial Bank v. Kigozi [2002] 1 EA. 305***; it was held that where there is no justifiable cause for impounding or seizing and detaining the property; and where there is no logical explanation as to why police would, given the entire set of circumstances, take action to seize and detain the property such seizure and detention was not only wrongful but also unlawful; and calls for atonement in damages.

In the instant case, the evidence of the Plaintiff is that after Police impounded the motorcycle and asked him to bring documents to prove ownership; which he did and Police informed him that he had no case, but asked him to come later because the DPC was not around to hand over the motorcycle. The Plaintiff kept going to Police for a record twelve times, only later to be arrested, charged and prosecuted.

The moment the Plaintiff proved ownership of the motorcycle as was required by Police that should have been sufficient ground to have it released to him, because as at that time no case lay as against the Plaintiff to warrant the continued seizure of the motorcycle. It emphasized that Police should not seize or impound property or arrest persons only to investigate later. It should be existence of reasonable basic evidence that should inform investigations upon which seizures and arrests should be done; for to do otherwise would tantamount to a fishing expedition, where at the end unwarranted damage is occasioned to innocent parties.

It is also strange that the Police did not take the Plaintiff's statement as regards the facts in issue, and such an omission led to their failure to appreciate the essence of *Exhibit P III* that vested ownership of the motorcycle in the Plaintiff. All these factors make a compelling case against Police for having unlawfully impounded and detained the motorcycle. *Issue No. 2* is also answered in the affirmative.

ISSUE NO. 3.

Whether the Defendant is vicariously liable for the Plaintiff's claim.

The position of the law is that where a servant acting in the ordinary course of his or her employment does or omits to do an act which leads to damage or loss on part of another the employer or master is liable. See ***Christopher Sebuliba v. attorney general, S.C.C.A No.64 of 1992, Nyombi Clementia v. East African Railways [1974] HCB 35; Mugenzi v. Attorney General [1984] HCB 64.***

The Police officers in the instant case were servants and employees of the Defendant acting in the ordinary course of their employment. Even if they

acted unlawfully or contrary to what; and how they should have acted, still it attracts liability on part of their employer - the Defendant. *Issue No. 3* is answered in the affirmative.

ISSUE NO. 4:

Whether the Plaintiff is entitled to the reliefs sought.

The Plaintiff prayed for special, general, exemplary and aggravated damages, interest, and costs of the suit. Counsel submitted that the Plaintiff specifically pleaded special damages (*paragraph 5 of the plaint*) and gave evidence as to the lost income consequent upon his arrest and detention. He also testified that income from his business as a native doctor and “boda boda” business was between Shs. 100,000= and shs. Shs 200,000= per day all together. Counsel for the Plaintiff opined that a lesser sum of shs. 100,000= per day was proved and should be awarded.

Counsel for the Defendant opposed the award of special damages arguing that the Plaintiff has not strictly proved them. Counsel relied for this proposition on ***W.M Kyambadde v.Mpigi District Administration (1983) HCB 54*** that special damages must be strictly proved. Counsel maintained that the Plaintiff did not produce books of accounts nor did he show that he was paying taxes; hence special damages should be denied.

The law relating to special damages is settled. ***W.M Kyambadde v.Mpigi District Administration (supra)*** and ***Bonham Carter v. Hyde Park Hotel Ltd (1948) 64 TL P 177*** the guiding principle is that special damages must be specifically pleaded and strictly proved. See also ***Hassan v.Hunt [1964] EA 201; Kainamura Melvin Consultant Engineering & 7 Or’s v. Connie***

Labada, S.C.C.A No. 61 of 1992; J.B. Semukima v. John Kaddu (1976) HCB 16.

It is noted that the Defendant's Counsel faults the Plaintiff for not availing receipts, books of accounts or evidence of paying tax as proof of the special damages claimed. My understanding of the phrase; "specifically pleaded and strictly proved", from the above cited authorities is that proof needs not necessarily be documentary or physical in nature.

In practice, where a party claims that he or she has suffered special damages or injury of a kind that may not be proved by documentary or physical evidence, the duty lies upon him or her to plead full particulars to show the nature and extent of the damage claimed, that is; the amount he or she claims to be recoverable. This operates fairly to inform the Defendant sufficiently of the case he or she is to meet so that he or she is not taken by surprise. ***See Shah v. Mohamed Haji Abdalla [1962] E 769.***

The stated position confirms that for as long as there is sufficient proof of the loss actually sustained which is either a direct consequence of the Defendant's action/omission or such a consequence as a reasonable man would have contemplated, this would suffice in place of physical and/or documentary evidence. ***See Byekwaso v. Mohammed [1973] HCB 20.***

In the instant case the Plaintiff (*in paragraph 5 of the plaint*) specifically pleaded and by his testimony (*both examination in chief and cross-examination*) showed what his income per day as a native doctor from "boda boda" business as being between Shs. 100,000= and Shs. 200,000=, and that this amount was not constant, but would fluctuate at different times. In such a scenario, court would be entitled to award a lesser figure than that pleaded, if it is satisfied that the lesser amount had been proved. See ***Uganda Commercial Bank v. Kigozi (supra)***. Accordingly, court awards Shs. 100,000= (*one*

hundred thousand) per day as special damages to the Plaintiff; computed from the date of the Plaintiff's arrest, i.e. 20/12/2000 up to 21/01/2001 when he was given bail, which totals to Shs. 3,000,000= (*three million only*).

Regarding loss of income as a result of impounding the motorcycle, the same consideration as special damages above applies *mutatis mutandis*. The Plaintiff pleaded and proved daily income of Shs. 75,000=. A lesser amount of Shs. 25,000= per day is, however, awarded from 28/10/2000 to 20/08/2001, when it was released; which totals to Shs. 7,425,000=(*seven million four hundred twenty five thousand*) which is awarded.

On the item of expenses at Lugazi Police Stations under ***Police Ref. No. CRB 505/2000***, and ***Mukono Chief Magistrate's Court Criminal Case No. 486/2000***, the Plaintiff attached proof of evidence as contained in *Exhibit P6 and P7*, and these were not rebutted, hence are taken accepted. ***See Uganda v. Ntungura [1977] HCB103***. Accordingly, Shs. 3,678,000= (*three million six hundred seventy eight thousand*) is awarded in that regard.

On the issue of the award of general damages, the guiding principle is that they are within court's discretion, and are awarded to put the Plaintiff in the position before the wrong. ***See James Fredrick Nsubuga v. Attorney General, H.C.C.S No. 13 of 1993; Kananura Joseph & Or's v. Mbarara District Local Government & Or's, H.C.CS. No. 98 of 2008; Annet Zimbiha v. Attorney General, H.C.C.S No.109 of 2011(unreported)***.

Counsel for the Plaintiff argued that the Plaintiff's reputation was injured and pointed out several instances where and how the injury occurred. First was a radio announcement on CBS that he had stolen a motorcycle at gun-point and that he should report to Mukono Police, and that this humiliated him. When he was stopped on road from Mayuge back to Bugiri by Police; that this too he claims humiliated him and scared him and the taking of his motorcycle onto

Police vehicle also humiliated him and inconvenienced him as he had to get alternative transport; and several others instances. The cross – cutting nexus in all of them is the inconvenience and humiliation.

Counsel for Defendant responded that to award general damages when the Plaintiff claimed the award for loss of income as a result of impounding the motorcycle as special damages and loss of earnings would amount to double payment.

The position is that even where special damages are awarded to cover loss of earnings as a result of unlawful detention of his motorcycle, such would not cover other inconveniences or humiliation that the Plaintiff must have suffered as a result of detention of his motorcycle. In such a case the award of general damages for inconveniences suffered is usually justified. Similar position was taken in *Uganda Commercial Bank v. Kigozi (supra)* which this court fully adopts, and awards Shs. 3,000,000/= as general damages.

Concerning the issue of exemplary and aggravated damages, the position of the law is that they must be specifically pleaded together with the facts relied on. *See Kasule v. Makerere University [1975] HCB 76; Beatrice Nakaye v. Kampala Municipal Council & A' nor [1972] HCB 11; Esso Standard Ltd. v. Semu Amanu Opio, S.C.C.A No. 69 1993.*

It is necessary to plead a claim for exemplary damages so as to enable court to form a view of the flagrancy of the Defendant's acts or omission, and the Plaintiff should give an indication that such damages should be awarded on inquiry as quantum. *See Ongom v. Attorney General. [1979] HCB 267.*

In justifying the award of exemplary damages, the Plaintiff focused mainly on being arrested on allegations that he was a thief, removing a motorcycle from him, Police refusing to release the motorcycle despite finding his documents genuine, and keeping him reporting to Police for over twelve times before

formally charging him. Counsel for Plaintiff purposed Shs. 30,000,000= arguing that this should be punitive and deterrent enough to the responsible officers of Government to desist from taking the law in their hands the ways they did. To buttress this proposition, Counsel relied on *Attorney General v. Sengendo [1972] E.A. 356*.

In response, Counsel for the Defendant argued that the Plaintiff is not entitled to exemplary damages as this is not a case where they should be awarded; and that the Plaintiff was subjected to the due process of the law and when he was found innocent he was let free and motorcycle released to him.

With due respect to Counsel for the Defendant, the Police did everything wrong in the way they handled the matter from the on-set up to the time of the Plaintiff's release. It has been found that the Plaintiff was unlawfully arrested, detained and maliciously prosecuted. The Officials of Government acted in a fragrant, oppressive, arbitrary and unconstitutional manner. Even though exemplary and aggravated damages are exceptional awards, the circumstances of this particular case warrant the same being awarded. Court considers the sum of Shs. 15,000,000= million to be sufficiently punitive in circumstances and it is awarded.

The Plaintiff prayed for interest of 25% per annum on special, general, and exemplary damages from the date of judgment till payment in full. The reason advanced for it was that it would take into account the rising inflation and drastic depreciation of the Uganda currency. Counsel also prayed for interest at Court rate of 6% per annum on costs. There was no particular response from Counsel for Defendant on these prayers.

The principle is that interest is awarded at the discretion of court, but like all discretions it must be exercised judiciously taking into account all circumstances of the case. *See Uganda Revenue Authority v. Stephen Mbozi*,

S.C.CA No 01of 1996, Liska Ltd.v.De Angelis [1969] E.A 6; National Pharmacy Ltd v. KCC [1979] HCB 256; Superior Construction & Engineering Ltd v. Notay Engineering Ltd. HCCS No. 24 of 1992.

Whereas there is justification for interest on special, general and exemplary damages, I have not found any as regards interest on costs. Accordingly, an interest rate of 25% per annum is awarded on special, general and exemplary and aggravated damages, from the date of judgment till payment in full.

Regarding costs, ***Section 27(2) Civil Procedure Act*** is to the effect that costs follow the event, unless for some reasons court directs otherwise. ***See Jenniffer Behange, Rwanyindo Aurelia, Paulo Bagenze v. School Outfitters (U) Ltd., C.A.C.A No.53 of 1999(UR)***. There is no reason to deny the successful Plaintiff costs; which are accordingly awarded.

BASHAIJA K. ANDREW

JUDGE

25/02/2013