

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT JINJA  
CIVIL SUIT NO. 116 OF 2012**

1. HANNINGTON MPALA
2. MIRABU MPALA
3. KALUUYA MOSES .....PLAINTIFFS

**VERSUS**

**THE ATTORNEY GENERAL.....  
DEFENDANT**

**JUDGMENT**

**BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA**

**A. Brief background**

In this suit, the plaintiffs seek special damages for loss of property, general damages for malicious and unlawful arrest, imprisonment and prosecution by agents of the defendant, interest and costs of the suit

It is claimed by the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs, Mr and Mrs Mpala that on 18/6/10, they were arrested and detained for two days in connection with the murder of one Nabirye Alice Kaluuya (hereinafter referred to as the deceased) and released on bond without any charge. They contend that they had no connection to the deceased's death and thus their arrest and detention was malicious and unlawful.

It is similarly claimed by Kaluuya Moses, the 3<sup>rd</sup> plaintiff, that he was on 20/02/2011 arrested, detained and charged in connection with the deceased's death. His prosecution was halted when the Director of Public Prosecution entered a nolle prosequi withdrawing the charges on 23/05/2011. He too deemed his arrest, detention and prosecution malicious and illegal.

That during the period of their illegal detention, the plaintiffs' houses and other property and crops were destroyed by a group of people with the full knowledge of the police, for which a claim of damages is made.

The defendant filed two written statements of defence on 7/9/12 and 25/5/15 respectively. The first filed in time will be considered.

They asserted that the plaintiffs' arrest and detention was carried out by the Uganda Police in good faith and under constitutional mandate with no malice. They therefore denied any liability in damages and all the other reliefs sought.

The case proceeded inter-parties with counsel Peter Walubiri Mukidi representing the plaintiffs and Ms. Adong Imelda representing the defendant. The Attorney General failed to present any witnesses and on 22/1/2018 closed their defence. Written submissions were filed for the plaintiffs only. Those, the pleadings and the evidence presented will form the basis of my judgment.

#### **B. Issues**

Three issues were framed for determination and I will resolve them with a minor amendment and to add one extra issue.

1. **Whether the arrest and detention of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs was malicious?**
2. **Whether the prosecution of the 3<sup>rd</sup> plaintiff was malicious?**
3. **Whether the defendant is liable for the actions that led to the loss suffered by the plaintiffs?**
4. **What reliefs are available to the plaintiffs?**

- a) **Whether the arrest and detention of the plaintiffs was malicious?**

#### **C. The law**

It was the decision in **Magezi Raphael Vs AG HCCS no. 977/2000** following

**Lutaaya Vs. Attorney General H.C.C.S No. 461/1989** that

*"...an arrest becomes wrongful when the same is carried out in the absence of a complaint before one is arrested and subject to some exceptions, in the absence of an arrest warrant"*

Under our laws, arrests in the absence of warrants are permitted only where the police or a private individual has reasonable cause to suspect that the person being arrested had committed or is about to commit a crime. Even then, such person when arrested must be presented before a police officer of an appropriate rank, the latter who can then release him on bond.

The right to personal liberty and powers of arrest are emphasized in our Constitution. It is provided under Article 23(4) (b) that:-

*Any person arrested or detained*

*Upon reasonable suspicion of his or her having committed or being about to commit a criminal offence under the laws of Uganda shall, if not earlier released, be brought to court as possible but in any case not later than forty- eight hours from the time of his or her arrest.”*

#### **D. The evidence**

It was stated by Hannington Mpala, the 1<sup>st</sup> plaintiff (PW1) that, on 18/6/2010 he was arrested together with his wife at their home in Butansi. They were both held in detention at the Kamuli and Nalufenya Police Stations for 20 days, after which they were released without ever being charged of any offence. PW2 Mirabu Mpala supported much of that evidence, adding that following police directives they continued to report to the police until when they were eventually set free on 4/7/2011.

It was equally the evidence of Kaluuya Moses, PW3 that he was arrested at Buwenge, Jinja District and detained at the Kamuli police station on a charge of murder of the deceased, his sister in law. He was subsequently detained in Kamuli Prison as remand prisoner No 069/2011.

All these plaintiffs denied any link to the deceased's murder and argued that there was no evidence implicating them at all, and none was even produced by the police.

#### **E. My Decision**

No evidence was adduced to rebut the above facts. There was neither a complaint recorded before the plaintiffs' arrest nor a warrant of arrest presented to authenticate the arrest. I would agree with the plaintiffs' counsel that there was no reasonable cause to justify the plaintiffs'

arrest and detention and the inexorable conclusion would be that the arrest by the officials of the defendant was carried out with malice.

It was stated in the written statement of defence that the arrest and detention was carried out under the constitutional mandate of the police. I would respectfully disagree because nothing was adduced in evidence to show that the plaintiffs were the natural suspects in the alleged murder of the deceased which could explain or justify the actions of the police that arrested the plaintiffs.

I would accordingly agree with plaintiffs' counsel that the arrest and detention of the plaintiffs was wrought with malice. The definition of malice given by Black's Law Dictionary, 10<sup>th</sup> Edition at page 1100 and 1101 paras 14(c) and 17(c) is instructive. It is defined in law to mean any wrongful intention. It may include any intent which the law deems wrongful and which therefore serves as a ground of liability. It can also entail the absence of all elements of justification, excuse or recognized mitigation, and will be inferred from a person's conduct.

Also instructive is the decision of Justice Mugamba in **Henry Munyanganizi Vrs AG HCCS No. 659/1996** citing **Clerk and Lindsell on Tort (12<sup>th</sup> Ed)** that, acting maliciously is akin to lack of probable cause "*accompanied by zeal to accomplish the task any cost*"

Basing on the above authorities, I would agree with plaintiffs' counsel that there was no probable cause for the arrest and detention for Mr and Mrs. Mpala. They were arrested, detained and then released without any complaint or arrest warrant. Mr. Kaluya received the same unjustified and unlawful treatment until he was arraigned in Court. The actions of the police were a flagrant violation of the plaintiffs' constitutional rights to liberty and due process under the law. The defence failed to substantiate their answer to the claim that the arrests and detention was properly carried out with no malice.

I would accordingly resolve the first issue in favour of the plaintiffs.

**b) Whether the prosecution of the 3<sup>rd</sup> plaintiff was malicious?**

The tort of malicious prosecution has received considerable attention in our jurisdiction. The authority of **Mbowa Vrs East Mengo District Administration (1972) EA 352** at 354, quoted by plaintiff's counsel, explained the gist of the tort to entail the abuse of the criminal

justice system for personal or spiteful purposes other than for public benefit. Four essentials of the tort were set out to be:-

- i) The criminal proceedings must have been instituted by the defendant, that is, he/she was instrumental in setting the law in motion against the plaintiff. It suffices if he /she lays information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes them before a judicial authority.
- ii) The defendant must have acted without reasonable or probable cause. Thus, there must exist facts, which on reasonable grounds, the defendant genuinely believes that the criminal proceedings are justified.
- iii) The defendant must have acted maliciously. In other words, the defendant must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that he must have had “an intent to use the legal process in question for some other than its legally appointed and appropriate purpose”. **Pike v. Waldrum**, (1952) 1 Lloyd’s Rep. 431 at p. 452.
- iv) The criminal proceedings must have been terminated in the plaintiff’s favour that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge.

**i) Was the defendant responsible for the institution and continuation of criminal proceedings against the 3<sup>rd</sup> plaintiff?**

The testimony of Kaluuya is that he was arrested on 20/02/11 at Buwenge, Jinja District and detained in Kamuli Police Station ostensibly for the murder of the deceased, his sister in law. A murder charge was preferred against him on 17/06/2010. The unrebutted evidence is that officers of the Uganda Police Force engaged in his arrest, detention and as mandated, furthered his prosecution through their investigations, leading to his indictment. I agree with Kaluuya’s counsel that police officers acting in the course of duty are servants of the defendant. There was no evidence that the officers were acting beyond or outside their scope. Indeed it was on their advise that the police file would ordinarily lead to a charge and indictment against Kaluuya as a suspect.

The defendant would accordingly be responsible for institution and continuing with proceedings against the 3<sup>rd</sup> plaintiff.

ii) **Did the defendant act with reasonable and probable cause?**

The authority provided by plaintiff's counsel on the above principle is crucial. Rudd J of the High Court of Kenya in **Kagane & Ors Vrs Attorney General & Anor (1969) EA 643 at 646** gave the following definition which is an adoption from the House of Lords decision in **Herniman VS Smith (1938) AC 305** that:-

*“Reasonable and probable cause is 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 an 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.”*

His Lordship further expounded on the objective test as follows:-

**“Excluding cases where the basis for the prosecution is alleged to be wholly fabricated by the prosecutor, in which the sole issue is whether the case for the prosecution was so fabricated or not, the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of an objective test.**

**That is to say, to constitute reasonable and probable cause, the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty. If and insofar as that material is based upon information, the information must be reasonably credible, such that an ordinary reasonable, prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution.” (Emphasis added)**

Our Courts have routinely followed the above definition and I would have no reason to depart from it. See for example **AG Vrs Farajara (1977) HCB at 30**.

It was the testimony of Kaluuya that he was arrested on allegations that he had murdered the deceased. At his arrest, he was not informed of the basis or source of that allegation. His prosecution was subsequently halted by a nolle prosequi filled by the DPP, on indication that there was no valid evidence against him. Again, there was no rebuttal to those facts and the

defence failed to produce any witness to explain on what basis and under what prevailing circumstances Kaluuya was arrested and prosecuted.

I would conclude that the defendants by his agents acted without reasonable and probable cause.

**iii) Did the defendant act maliciously?**

According to the Court in **Mbowa Vrs East Mengo Adminitstration (supra)** criminal proceedings are deemed to be malicious where they are instituted “...with an improper.....purpose”. And according to Clerk and Lindsell on Tort (supra) followed in **Munyanganizi Vrs AG (supra)** it refers to prosecution “actuated by improper and indirect motives”

I have found that the arrest of Kaluuya was baseless and unreasonable. He was unjustifiably subjected to a prolonged period of detention when there was no evidence linking him to the offence of which he was charged. The result is that the DPP thought it fit to discontinue his prosecution and I would agree with his counsel that the combination of all those facts is a clear manifestation of malice by the officials of the defendant. They applied the criminal legal process to their improper and indirect motives, and not in pursuit of justice.

**iv) Where the proceedings terminated in favour of the plaintiff?**

It is an undisputed fact that the *nolle prosequi* to terminate the criminal proceedings against Kaluuya was filed on 23/05/2011. The charge was never reinstated. It is correct as stated by plaintiff’s counsel that Kaluuya’s prosecution was terminated in his favour, and there is authority to that effect. The Court of Appeal of Eastern Africa in **Egbema Vrs West Nile District Administration (1972)** EA 60 held that withdraw of a charge without fresh proceedings being brought is sufficient to establish that prosecution of an accused person has been brought to an end. The Learned Justices quoted Lindsell on Torts 12<sup>th</sup> Ed para 1707 that

**“It is enough that the criminal proceedings have been terminated without being brought to a formal end. The fact that no fresh prosecution has been brought, although five years have elapsed since the appellant was discharged, must in my opinion be considered equivalent to an acquittal, so as to entitle the appellant to bring a suit for malicious prosecution. (emphasis added).**

Kaluuya's facts would squarely be categorized as an equal and he would be entitled to sue for malicious prosecution. The submission that the criminal proceedings were terminated in his favour would be correct.

The third issue is also resolved in favour of the plaintiffs.

**c) Whether the defendant is liable for the actions that led to the loss suffered by the plaintiffs?**

All the plaintiffs conceded that they did not see the people who attacked and destroyed their homes. Mr. Mpala testified that while in custody, police reported to him that his home had been destroyed and his property looted.

Kaluuya was like wise absent during the two times his property was destroyed in 2011 and 2014. The plaintiffs asserted however that the mob destroyed their property under the watch of police or at least, the police did nothing to prevent the vandalism.

By their pleadings, the defendant conceded that the arrest of the plaintiffs were by police officers, with a rider that their actions were in the line of duty. They admitted no liability to the losses claimed.

I am persuaded that the evidence available does not point to any police officers being active participants in destroying and looting the plaintiffs' properties. However, it is admitted that the police arrested and kept the plaintiffs in detention and therefore away from their homes. Their arrest must have incited the mob to believe they had actually murdered the deceased yet being in custody, they were rendered helpless to protect their property. I have found the arrests to be unjustified and malicious. Thus, the police cannot extricate themselves from the plaintiffs' loss.

The police are regarded to be agents of the Government which the defendant represents. Their actions, although wanting, negligent and even malicious, were still actions carried out in the course of duties that they were ordinarily employed to carry out. See for example **Muwonge Vs. AG (1967) EA 17 followed in Magezi Raphael Vs. AG HCCS No. 977/2000**. The Attorney General would be vicariously liable for the actions of the police and therefore the loss incurred by the plaintiffs.

The third issue is also decided in favour of the plaintiffs.

**d) What reliefs are available to the plaintiffs?**

The plaintiffs have generally succeeded on their main claim and would be entitled to some relief. They prayed for special damages for loss of property and general damages, all with interest.

It was submitted for Mr and Mrs Mpala that during their unlawful arrest and detention, their houses were completely broken and razed by a mob and their property, animals and crops destroyed. Their loss was placed at Shs 149,305,000/=. That all this happened with the knowledge of police which failed to offer protection after the arrest carried out without any probable cause.

On the other hand, Mr. Kaluuya testified that during his detention, his homes in Buwenge and Butansi were attacked and the houses demolished and properties vandalized. That he lost property valued at Shs. 133,340,000.

**Special damages**

Plaintiff's counsel conceded that special damages must be pleaded and proved. See for example, **Hassan Vrs Hunt (1964) EA 201**. The plaintiffs did not include in the body of the plaint the items they claim to have lost. However, comprehensive lists were attached to the plaint. The items for the Mr. and Mrs. Mpala were admitted as PEX 3 and 4 and those of Mr. Kaluuya were admitted as PEX 8. In my view, that would be sufficient evidence of pleading of those special damages.

In practice, the most acceptable method of proving special damages would be documentary or physical evidence of proof of ownership or receipts of purchase. The bone of contention of the defendant in cross-examination appeared to be that none were available, and no professional evaluation was presented of how the plaintiffs arrived at the values presented.

The plaintiffs testified that receipts of the assets destroyed were lost in the destruction of their respective homes. That would be a legitimate assertion especially when it was not contested. Mr. and Mrs Mpala were released from police detention after two days. On the other hand Kaluuya stated that after his release from prison after nearly three months, he lodged a complaint with the Police Professional Standard Unit against the errant police officers responsible for his arrest and those who vandalized and stole his property but received no response.

Under the above circumstances, the alternative followed by Judge **Bashaijja in Mugabi John Vrs AG HCCS No. 133/2012** would then be useful. The plaintiffs would need to plead full particulars to show the nature and extent of the damage claimed. That evidence should be the kind that would fairly and sufficiently inform the defendant of the claim in order to eliminate surprise and give them a chance to prepare an adequate defence. See also **Shah Vrs Mohamed Haji Abdulla (1962) EA 769**. It is also important for the plaintiffs to show that the loss was incurred either as a direct or implied consequence of the defendant's omission or such consequence as a reasonable man would have contemplated. Such evidence would suffice in the absence of physical and/or documentary evidence. See for example **Byekwaso Mohammed (1973) HCB 20 followed in Shah Vrs Mohamed H. Abdulla (supra)**.

The sums presented were computed in lists admitted as PEX3, 4 and 8 respectively.

I note that PEX3 enumerating Mr & Mrs Mpala's losses was written in the Luganda language. The items lost were not given values. PEX4 presented as the translation had the values, with a total of Shs. 149,305,000/=.

I consider PEX3 the principle exhibit and that being the case, PEX4 would not be its fair translation. Mr. Mpala testified that he computed the figures himself and it is strange that he did not include them in the Luganda version. The values in PEX4 could be an important by his advocate.

I accordingly decline to be guided by those figures, which in fact I find exorbitant in some instances. The court will not entertain unjust enrichment, even in the face of a calamity.

I have found that Mr. & Mrs Mpala's home was destroyed while they were both in custody of police. I am persuaded that it was a homestead with a fully furnished house with a live garden with crops, and supporting out houses for animals and poultry. All the items listed must have been well or fairly used, which would lower their market value. The couple may have even had vital documents like a will which are not easy to quantify.

Taking into consideration all of the above, and in addition, the fact that the Mpalas were of fairly advanced age and had thus had their home for long, their general station in life as peasant farmers and other relevant factors, I will award of Shs. 100,000,000/= in special damages to Mr & Mrs Mpala.

For Kaluuya, a sum of Shs. 133,400,000/= was made with an attendant list. He testified that he compiled the list himself. I also find that some items were exorbitantly valued.

That said, I would take into consideration the factors I considered while making an award to Mr. & Mrs Mpala.

Although Kaluuya is much younger and thus could have not been as entrenched in his home as his counterparts, he appeared to be more educated and thus would be earning a higher income. None the less he appeared to have lost a little less than the Mpala's. In my discretion, an award of Shs. 90,000,000/= would be appropriate to cover special damages in his case, and it is so awarded.

### **General damages**

The plaintiffs in addition prayed for general damages. It was submitted and I agree that it is a category of damages meant to cover unquantified injuries such as pain, suffering, ridicule, loss of esteem or physical inability.

The general principle for awarding this category of damages is that they are always within the discretion of the Court and are meant to reinstate the injured party into their position before the wrong. See for example **James Frederick Nsubuga Vrs Attorney General HCCS No. 13/1993.**

The plaintiffs testified that they suffered a total disruption of their way of life as result of the malicious detention and prosecution. Mr. and Mrs. Mpala were rendered homeless and unemployed and were forced to move in with their nephew Zubairi Waisswa in Bulenga, Wakiso District. Kaluuya also had to move to Jinja and has since struggled to regain his way of life by opening a grocery shop that cannot sustain him and his family. Kaluuya also lost vital academic and professional certificates which cannot be readily quantified.

I agree that the plaintiffs suffered much grief, fear, embarrassment and disorientation from being termed murderers of one who appeared to be a relative. They lost everything they had worked hard for in life and were rendered practically homeless. In counsel's estimation a figure of Shs. 100,000,000 for each plaintiff would suffice to atone for such loss and the period it had taken for them to attain justice.

I would agree that the plaintiffs' unquantified loss cannot be underestimated. They suffered the humiliation and apprehension of trumped up suspicions and charges of murder, lost their homes and livelihoods and had to leave the area. Mr & Mrs Kaluuya are of advanced age and their restful years are being lived in misery under refuge of a nephew. Kaluuya a man of considerable academic stature and means suffered the same fate. He has had to ilk out a very modest living and is struggling to sustain himself and his family. In my view, the fact that he had to undergo a longer period in detention and a bogus prosecution would entitle him to some more than his colleagues.

Thus after taking into consideration the facts as laid out, the circumstances of the loss, which have been long term and far reaching, I would in my discretion award Mr. and Mrs Mpala the sum of Shs. 30,000,000 each and Shs. 450,000,000 to Mr. Kaluuya in general damages.

In summary, I enter judgment in favour of the plaintiffs and make the following declarations and orders as follows:-

- (i) A declaration that the arrest and detention of the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs was malicious
- (ii) A declaration that the arrest, detention and prosecution of the 3<sup>rd</sup> plaintiff was malicious
- (iii) A declaration that the defendant is liable for the actions of the police officers at the Kamuli and Nalufenya police stations and thus the plaintiffs' loss.
- (iv) Special damages in favour of the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs in the sum of Shs. 100,000,000/=
- (v) Special damages in favour of the 3<sup>rd</sup> plaintiff in the sum of Shs. 90,000,000/=
- (vi) General damages to the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs in the sum of Shs. 30,000,000 **each**
- (vii) General damages to the 3<sup>rd</sup> plaintiff in the sum of Shs. 45,000,000
- (viii) Interest on the above sums at 18% per annum from the date of judgment until payment in full.
- (ix) The defendant shall meet the costs of the suit.

I so order.

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**EVA K. LUSWATA**

**JUDGE**

**03/04/2019**