THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA, AT MBARARA

HIGH COURT CIVIL SUIT NO.42 OF 1995

FRED HERERI…….. PLAINTIFF

VS

THE ATTORNEY GENERAL…….. DEFENDANT

BEFORE: THE HON. JUSTICE V. F. MUSOKE-KIBUUKA

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JUDGMENT

In this suit, the defendant was sued in his representative capacity, by virtue of section 11 of the Proceedings Against The Government Act, Cap. 69. In his plaint filed in this honourable court on 29th December, 1995, the plaintiff presented a claim against the defendant for special, general and extemporary damages, for wrongful arrest and false imprisonment.

Summons to enter appearance were issued on 9uhi January, 1996. The defendant filed a memorandum of appearance on 16th April, 1996. He then kept quite. On 18th November, 1999, the case was called for scheduling conference. On that day, the plaintiff and his counsel appeared in court. There was evidence of proper service to both parties. A hearing date was fixed for 27th January, 2000. The defendant was duly served with a hearing notice for that date. Again the defendant did not appear in court and no reason was given. It so happened coincidentally, that the trial judge was also on leave. The hearing of the case was, therefore, adjourned to 28thi February, 2000. The defendant was again duly served.

Mr. D. B. Bireije, Commissioner, Civil Litigation, appear to have received the hearing

notice, on behalf of the defendant. That was on 24th February, 2000. He inscribed a note on the original copy of the hearing notice. Below the note he appended his signature and title. The note reads as below:

"Late service accepted. The service is late. We cannot prepare to come to Mbarara to defend. We need to requisition for money from Finance which cannot be done now. Let a new date be given and communicated to us well in time for us to prepare."

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It is not quite clear as to whose attention that note was intended. If it was intended for the court's attention, then I must state that it was of no effect. For this court held in *Byamani (Uganda) Ltd. v. L. Sserwanga, (1975) HCB 86, that* seeking adjournment by telephone, letter or a note such as the one in the instant case does not constitute an appropriate method of applying for an adjournment. An adjournment could not be granted on the basis of such a note. In the instant case, the defendant had three clear days between the date of service and the hearing date. Even if he could not arrange for a State Attorney to travel to Mbarara within three days, he, certainly, had the means of briefing an advocate at Mbarara to seek an adjournment on his behalf.

Besides, from the time of entering appearance, on 18th April 1995, up to the date of service of the relevant hearing notice, on 24th February, 2000, nearly four years had passed and the defendant had not filed any defence in the matter. The defendant had effectively placed himself out of court. *Attorney General vs. Ssengendo (1972) E. A. 356* and *Ssebunya vs. Attorney General (1980) HCB. 69.*

In these circumstances, I ordered that the case proceed ex-parte in accordance with Order 9 rule 17(a) of the Civil Procedure Rules.

The plaintiff gave evidence as PW1. He called two other witnesses. PW2 was Alleluya Agnes, a copy typist with the Judiciary and attached to the Chief Magistrate's Court at Mbarara. PW3, Rose Kategyesa, was the wife of the plaintiff.

In brief, the uncontraverted evidence of the plaintiff and his witnesses is that he and his wife, PW3, lived at Ahakabare, Kyengando, Nyamarebe, Ibanda in Mbarara District. He had some long standing land dispute with his brother called Yonasan Bikade and the plaintiff had won a case, in the LC Court of the village over that land dispute. The LC Court was about to execute its judgment against Yonasan Bikade.

On July, 1995, at about 8.00 a.m. Yonasan Bikade appeared at the home of the plaintiff. He was accompanied by four soldiers belonging to UPDF, then called N. R. A. The four soldiers were in uniform and each was armed with a gun. The soldiers ordered the plaintiff to sit on the ground, which he did. Then they led him to the LC I chairperson of the village. They informed the chairperson that they had arrested the plaintiff and that they were taking him to their barracks at Bihanga.

After leaving the chairman's home, the soldiers handcuffed the plaintiff. They then demanded from him a sum of Shs/= 5,000 which they said was their transport refund. The plaintiff did not have the money with him. He pleaded with the soldiers to take him back to his home so that he gets the money and gives it to them. He gave them the Shs. 5,000= at his home. They then walked the 7 miles distance from Ahakabare to the 19th Battalion barracks at Bihanga. The plaintiff later learnt that two of the soldiers who arrested him were called Han and Katambara.

The plaintiff was placed into custody within the barracks where he spent 41 days between 9th July, 1995, and 17th August, 1995.

On 17th August, 1995, following the issuance of a writ of habeas corpus ad subjiciendum by the High Court at Mbarara, by Karokora, J., as he then was, in Civil Miscellaneous Cause No. 27 of 1995, the plaintiff was moved from Bihanga barracks to the 2' Division's headquarters at Makenke, Mbarara. He was later, the same day, delivered to Mbarara Police Station by one Lt Noel, then a military Intelligence Officer. At Mbarara Police Station, the plaintiff was kept in police cells for about 24 hours until he was released by court on 18th August, 1995. After his release, owing to fear, the plaintiff abandoned his home and now lives in a distant place.

While in prison, the plaintiff was kept in communicado. He was forced to do hard labour such as collecting grass using his bear hands. He was starved as he was offered food not fit for human consumption and only once a day. He was beaten daily for the first 10 days. At night, he would be ordered to put off his clothes and spend the night lying upon the bear floor on which water would first be poured. To date, the plaintiff claims he cannot do a number of jobs as he used to do them. He has to be assisted in many respects as a result of his incarceration and the hardships to which he was subjected.

The issues for determination are:

a) whether the plaintiff was unlawfully arrested and illegally detained at Bihanga barracks by UPDF soldiers;

b) If so, whether the soldiers were acting within the scope of their duties rendering the defendant vicariously liable;

c) whether the plaintiff is entitled to the remedies which he seeks.

On issue number one, I accept the evidence of PW1, the plaintiff and that of his wife PW3. Their evidence neatly corroborates each other. Both of them were at their home. The time was bright morning. They saw the 4 soldiers, who were led by the plaintiff's brother called Yonasan Bikade, arrest the plaintiff and leading him away to the barracks at Bihanga. PW3 attempted to go to the barracks to see her husband during the time he was detained there but she failed to gain access. The plaintiff was only removed from Bihanga barracks following an order of habeas corpus issued by this court on 7th August, 1995, against the Commanding Officer, 21 Division, Mbarara. When the plaintiff was produced in court on 18th August, 1995, the OC/ID, who produced him told court that the plaintiff had been handed over to him by Lt. Noel who was an intelligence Officer with the 2' Division, Mbarara. That evidence leaves no doubt that the plaintiff was arrested and detained by the UPDF between 9 July and August, 18th 1995.

I will now determine whether or not the arrest and imprisonment was unlawful and false.

The position of the law is that the basis of the action of false imprisonment is the mere imprisonment itself. The plaintiff, in order to succeed, does not have to prove that the imprisonment was malicious or unlawful. His or her case is duly established once he or she makes a prima facie case and proves that he was imprisoned by the defendant. The burden then shifts to the defendant to justify the arrest and imprisonment. *Dumbell v. Roberts And Others (1944) 1 All E. R. 326* and *Sekaddu vs. Ssebadduka 1968) E. A. 213.*

In the instant case, as I have already concluded, the plaintiff has established a prima facie case that he was arrested by 4 servants of the defendant on 19th July, 1995. He has also established that he was kept in imprisonment from that date till 18th August, 1995, when he was ordered to be released by this court on the ground that his arrest and imprisonment had not been justified and he was charged with no offence. The defendant has not discharged the burden thrown upon him by law to justify either the arrest or the imprisonment. Accordingly, I have to find that the arrest was unlawful and the imprisonment false.

The second issue is whether the 4 soldiers who arrested the plaintiff were servants of the defendant and did so during the course of their duties.

I will not waste much time on this issue. The four soldiers were in uniform of the UPDF. Each one of them was armed with a gun. It is known practice that a soldier who is not on duty would not ordinarily be in uniform or carry a gun which are symbols of soldiering work. Besides, after arresting the plaintiff, the 4 soldiers took him to Bihanga barracks where he was imprisoned for 41 days and was treated as a prisoner within the barracks for all purposes. Those circumstances leave no doubt in my mind that in arresting the plaintiff and in leading him into the barracks where he was imprisoned, the soldiers were acting within the scope of their duties even though their actions were apparently unlawful.

Lastly, I have to determine whether or not the plaintiff is entitled to the remedies which he seeks.

The plaintiff seeks special damages in the sums of Shs.5,000 which he claims that the soldiers who arrested him forced him to give them purportedly as their transport charges. The plaintiff also claims Shs. 87,000 under the category of special damages. He states that the sum represents money which he would have earned if he had not been arrested and imprisoned. He testified that he used to earn 2,000= each day from selling milk and matooke from his own kibanja.

While special damages and general damages are compensatory in nature, special damages are only awardable in instances where they have strictly been proved. In the instant case, I accept that in the circumstances of this case it would be most probable that the soldiers would demand some money as, indeed, they did from the plaintiff. I, therefore, will easily award to him the Shs. 5,000, which the plaintiff claims was extracted from him by those who arrested him.

I, however, do not consider the claim of Shs. 87,000 to have been strictly proved as special damages. I cannot believe that after his arrest, with his wife at home, the milk and the matooke in the plantation were left to waste away simply because the plaintiff was in prison. Secondly, while milk could be sold on a daily basis, I do not believe that matooke could equally so be sold. The plaintiff has not led any evidence even to the fact that he owned any

cow or banana plantation. He has not led any evidence regarding what sales he used to make or what loss he incurred during his incarceration. Those facts cannot simply be assumed.

Accordingly, I do reject the claim, as special damages, of the sum of Shs. 87,000
The plaintiff claims general damages of Shs. 5,000,000. I do agree that owing to the extreme conditions and anguish, to which he was exposed, the plaintiff deserves compensatory damages in the form of general damages. He was imprisoned for 41 days. He was beaten, fed on food not fit for human consumption and was forced to do forced labour. I, however, consider the sum of Shs. 5 million to be a bid on the higher side considering all the circumstances of this case. I would award Shs. 3,500,000= as general damages in this case.

The last claim relates to exemplary damages.

Exemplary damages are only awarded in circumstances where the act complained of was oppressive, arbitrary or unconstitutional, if it is done by a servant of the government. *Rooks v. Bernard (1964) A. C. 1112*, *Nsaba Buturo vs. Munnansi Newspaper (1982) HCB, 134* and *Yakobo Oyaka And 4 Others vs. Attorney General HC Civil Suit No. 20 of 1990.* (Unreported)

Exemplary damages are, essentially, a punishment for the high-handedness of the conduct of the defendant or his servant or agent. It is not compensatory in nature.

In the instant case, the facts reveal oppressiveness, arbitrariness and unconstitutionality as the plaintiff was arrested by soldiers without due authority to do so. He was imprisoned in a military barracks for 41 days without any charges being preferred against him this breaching the plaintiff's constitutional right to liberty and to the security of his person. This, therefore, is a proper case in which such high-handed, arbitrary, oppressive and unconstitutional conduct must be punished by awarding exemplary damages.

In the circumstances, I award a sum of Shs. 1,500,000 as exemplary damages.
In the final result, I enter judgment for the plaintiff against the defendant. I make:

a) An order awarding Shs. 5,000 to the plaintiff as special damages;

b) An order awarding Shs. 3,500,000 as general damages

c) An order awarding Shs. 1,500,000 as exemplary damages, and

d) An order awarding the costs of this suit to the plaintiff.

V.F.Musoke-Kibuuka
Judge
22/02/20

Order:
The Deputy Registrar of this court to deliver this judgment on a date to be fixed by him.

V. F.Musoke Kibuuka
Judge
22/02/2001