

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
CIVIL SUIT NO.164 OF 2011**

ARINAITWE FRED :::PLAINTIFF

VERSUS

ATTORNEY GENERAL :::DEFENDANT

BEFORE: HON.LADY JUSTICE ELIZABETH MUSOKE

JUDGMENT

The plaintiff was on the **11th November, 2008**, arrested by servants of the defendant, remanded on allegations of obtaining goods by false pretences, and was subsequently charged before the Unit Disciplinary Committee of the Uganda Peoples Defence Forces, with the offence of Personation contrary to **Section 381(1)** and **Section 22** of the **Penal Code Act, Cap 120**. The plaintiff was found not guilty of the offence of Personation and was thereby acquitted.

The plaintiff brought this suit against the defendant for unlawful arrest, unlawful detention and malicious prosecution by the agents/servants of the defendant, and seeks for payment of UGX 429,750,000/= being compensation for his merchandise and property lost as a result of the unlawful detention and malicious prosecution; special damages, punitive and general damages.

On the other hand, the defendant contended in his written statement of defence, that he could not be held responsible for the loss, if any, suffered by the plaintiff, and if the plaintiff was arrested, detained, and prosecuted as alleged, then it was done *bona fide* and on reasonable grounds that he had committed a criminal offence.

At the scheduling conference, the following issues were agreed upon for determination;

1. Whether the arrest, detention and consequent prosecution of the plaintiff were lawful and/or malicious.
2. Whether or not the plaintiff had in his possession merchandise prior to his arrest which entitled him to remedies in the pleadings.

3. Remedies available to the parties.

ISSUE 1;

Whether the arrest, detention and consequent prosecution of the plaintiff were lawful and/or malicious.

The plaintiff (PW1), testified that on the **11th November, 2008**, while he was on his way to clear his property from Paidah, Nebbi District, he was arrested by police officers and taken to Central Police Station, Kampala, where he found two of his customers from Fula Falls Company, claiming that he owed them **UGX 38,000,000/=**. It was his testimony that his company called Food Planet, had earlier had a contract to supply food worth **UGX 38,000,000/=** to Fula Falls Company Ltd. Upon supply, the food was rejected, and thereupon, the plaintiff made a proposal and forwarded it to Fula Falls Company on how the plaintiff's company was to effect the refund of the purchase price on the contract. Before the proposal could be responded to by Fula Falls Company, the plaintiff was arrested. While at the police station and when the police was considering to release the plaintiff, one of the Military Personnel informed Chieftaincy Military Intelligence (CMI) that police had refused to detain the plaintiff, and thereupon, two officers from CMI issued a letter to the police demanding that the plaintiff be handed over to them and he was accordingly handed over to CMI. It was the plaintiff's further testimony that he was taken to a safe house in Mbuya and detained there for 16 days without communication, and no visitors could access him. The plaintiff's lawyer subsequently applied for a writ of habeas corpus, and it was then that the plaintiff was charged with the offence of obtaining goods by false pretences which was later amended to the charge of Personation, before the Unit Disciplinary Committee. The plaintiff was then detained at Makindye Barracks, which is not a gazetted place, for a period of 8 months. The Unit Disciplinary Committee subsequently acquitted the plaintiff on the **30th July, 2008**, but he was again remanded/detained at Makindye Barracks until **30th August, 2008** when he was released.

PW2; RA171334 SDT Atwine Godwin, testified that on the **11th November, 2008**, he was incarcerated at Mbuya quarter guard as a suspect, where the plaintiff was also detained as a suspect on the charge of obtaining goods by false pretence. It was his testimony that since the **11th November, 2008**, he had been interacting with the plaintiff on a daily basis and the plaintiff was not produced or charged in any court of law for a period of 16 days, contrary to the provisions of the Constitution.

The defendant did not adduce any evidence to controvert the plaintiff's evidence in regard to his arrest, detention and prosecution. However, counsel for either side filed written submissions in support of and against the claim respectively.

It was the submission of Counsel for the plaintiff that the arrest and detention of the plaintiff for a period of sixteen days, without being taken before any court of law or military court was unlawful, illegal and unconstitutional. Counsel relied on the Provisions of **Article 23(1)** of the **Constitution of the Republic of Uganda, 1995**, where it is provided that a person arrested must be produced in court within 48 hours from the time of his/her arrest.

Counsel for the plaintiff contended that the plaintiff had also been maliciously prosecuted and the criminal proceedings were instituted without reasonable cause. Counsel relied on ***Herniman Versus Smith [1938] A.C 305***, where court approved and adopted the definition of reasonable or probable cause stated in ***Hicks Versus Faulkner (1875) 8 QB 167***, as follows;

“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 ordinarily 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.”

Counsel for the plaintiff made reference to the Judgment [EXH P4] of the Unit Disciplinary Committee, where court stated that the plaintiff's company and Fula Falls Company had entered a contractual relationship, and that it was virtually clear that the transaction was totally unconnected to the UPDF; it was a private dealing between the two companies. Counsel contended that no prudent and honest person would institute criminal proceedings based on the evidence canvassed in the Judgment [EXH P4] of the Unit Disciplinary Committee. Further, that by the defendant's servants charging the plaintiff with an offence of obtaining goods by false pretences, and later substituting it with the offence of personation, itself, pointed towards malicious prosecution.

On the other hand, Counsel for the defendant submitted that it was true that proceedings were instituted by the defendant, and they were terminated in the plaintiff's favour, and therefore, what was left for determination was whether there was probable or reasonable cause to believe

that the plaintiff had committed a crime and whether the defendant was driven by malice or ill will when he instituted these proceedings against the plaintiff. Counsel relied on the authority of *Attorney General Versus Hajji Adam Farajara [1977] HCB 29*, to state what amounts to reasonable or probable cause.

Counsel for the defendant contended that in the present case, the plaintiff was arrested after one of his clients/customers filed a complaint against him for failure to return its money after failing to satisfy the requirements of their contract. The police acted under reasonable belief that the plaintiff had actually committed a crime, and the prosecution basing on the law reasonably believed that the plaintiff/accused was guilty of the offence with which he had been charged, and that a conviction would be secured.

Counsel for the defendant further submitted that there was no ill will or spite whatsoever, in prosecuting the plaintiff. **Black's Law Dictionary**, defines malice as the intent without justification or excuse to commit a wrongful act, reckless disregard of the law or of a person's legal rights, ill will; wickedness of heart. In the present case, the intent to prosecute was not wrongful and neither was it without justification.

In rejoinder, Counsel for the plaintiff maintained that there was no probable or reasonable cause or honest belief in the guilt of the plaintiff, and there was no justification in the institution of the criminal proceedings against the plaintiff.

I have considered the evidence adduced as well as the submissions of Counsel and I have made the following findings;

With regard to whether the plaintiff was unlawfully arrested, it is my finding that plaintiff was lawfully arrested by police upon a complaint made by the plaintiff's client. In *Magezi Raphael Versus Attorney General, HCCS No.977 of 2000*, court held that;

“An arrest is an act that deprives one of one's liberty as a free person and is usually effected in relation to an investigation and/or prevention of crime. An arrest becomes wrongful, when the same is carried out in absence of a complaint before one is arrested and, subject to some exceptions, in absence of an arrest warrant.”

In the present case, the police arrested the plaintiff on a complaint being made, and on reasonable suspicion that he had committed an offence, therefore, the arrest was lawful.

The next issue to determine is whether the plaintiff was wrongfully detained by the defendant's servants/agents.

The evidence of the plaintiff that upon arrest, he was taken to a safe house in Mbuya and detained there for a period of 16 days without being charged or produced in any court of law has not been denied by the defendant. Under **Article 23(4)(b)** of the **Constitution of the Republic of Uganda**, a person arrested or detained shall, if not earlier released, be brought to court as soon as possible but in any case not later than forty eight hours from the time of his arrest. (*See Kainamura Patrick Versus Attorney General, HCCS NO.688 OF 2001*). It follows therefore, that the plaintiff's detention for a period of 16 days in a safe house, without being taken to court beyond the 48 hours, was unlawful and contrary to the provisions of the Constitution. Apparently, even after the plaintiff had been acquitted he was further remanded for a period of one month in an ungazetted place before being released. I find that this detention was also unlawful.

The next issue for determination is whether the plaintiff was maliciously prosecuted. In *Attorney General Versus Haji Adam Farajara, HCCS No.35 of 1976*, court stated that for the tort of malicious prosecution to succeed, four essentials must be satisfied, namely;

- a) The proceedings must have been instituted by the defendant,
- b) He must have acted without probable and reasonable cause,
- c) He must have acted maliciously,
- d) The proceedings must have terminated in favour of the plaintiff.

It is not in contention that the proceedings were instituted by the defendant, and that the proceedings were terminated in favour of the plaintiff. The elements in contention are whether the defendant acted without probable and reasonable cause, and whether he acted maliciously.

As stated in *Attorney General Versus Haji Adam Farajara (Supra)*, reasonable cause means that there must be sufficient ground for thinking that the plaintiff was probably guilty of the crime imputed. It is undisputed that the plaintiff in the present case, was arrested when one of his clients filed a complaint against him for alleged failure to pay back the purchase price, on a contract that had gone bad. However, I do not find it believable, that a reasonable and prudent person would conclude that the above contractual relationship that had failed can give rise to the ingredients of an offence of Personation, which the plaintiff was charged with. Indeed, as was stated in the judgment [EXH P4] of the Unit Disciplinary Committee, it was virtually clear that

the transaction between the plaintiff's company and Fula Fills Company was totally unconnected with the UPDF, and was a private dealing between the two companies. I find that no ordinary, prudent, and cautious man if presented with a set of facts as those in the present case would have believed that there was a case/offence to be tried against the plaintiff.

I find that the decision to prosecute the plaintiff on a charge of personation basing on the facts as stated herein was wrongful and in reckless disregard of the plaintiff's rights, and was therefore malicious. I agree with Counsel for the plaintiff that the substituting of the original charge of obtaining goods by false pretences, with the offence of Personation, itself, pointed to the defendant's intention to prosecute the plaintiff at whatever cost, and all this points to malice.

Accordingly, I find that the plaintiff was maliciously prosecuted by the servants/agents of the defendant.

ISSUE 2.

Whether or not the plaintiff had in his possession merchandise prior to his arrest which entitled him to remedies in the pleadings.

It was the plaintiff's testimony that before his incarceration, he was running a profitable business, and that he had merchandise in his possession. The plaintiff presented three receipts and three invoices dated **26th October, 2008, 29th October, 2008, and 03rd November, 2008**, in order to prove that he had purchased maize grain from Paidha, Nebbi district.

PW2; Odaga Gilbert, who is a produce buyer, testified that around **August and September, 2008**, the plaintiff made payments for the supply of maize grain, and invoices and receipts were issued to him in that regard. Trucks of the goods were loaded and the plaintiff was informed to go and clear them at customs, and PW2 went to Congo to conduct his other business. Upon his return after one month, his secretary informed him that the trucks had left in the absence of the plaintiff.

During cross examination, PW2 testified that his secretary who had issued the receipts to the plaintiff had worked for him during the months of August and September, but had left thereafter

On the other hand, in order to disprove the authenticity of the receipts and invoices sought to be relied upon by the plaintiff, the defendant led the evidence of a Government analyst (DW1) to ascertain whether the signatures on the invoices and receipts were genuine. DW1 prepared a report which was tendered in evidence as EXH D1. It was indicated in the report that the

signatures on the invoices were more skillful than those on the receipts which appeared clumsy and crowded, and that there had been a deliberate attempt by the same author to alter the obvious features of the signature like the starting and finishing strokes.

Counsel for the plaintiff submitted that the plaintiff had adduced sufficient evidence to support the fact that the plaintiff had in his possession merchandise before his arrest. Counsel made reference to the Judgment of the Unit Disciplinary Committee [EXH P4], where it was stated that one of the prosecution witnesses who had lodged the complaint against the plaintiff stated that the maize flour he was interested in was in stock at the Food Planet store.

Counsel for the defendant, on the other hand, submitted that basing on the report of the Government analyst, the receipts and invoices were a forgery. Further, that PW2, had testified during cross examination that his secretary who is alleged to have signed on the receipts had left the employment by October, 2008. Counsel contended that if the said secretary did not sign the receipts, this would imply that the receipts were forged, the merchandise in question was neither sold, nor purchased as alleged, and the plaintiff was never at any time in the possession of any merchandise.

In rejoinder, Counsel for the plaintiff submitted that the expert report [EXH D1], did not tell whether a person's handwriting changes after a short period of time, or whether a person can forge his/her own signature. Further, that after a period of about 6 years, a witness would ordinarily be expected to forget a month during which he parted ways with his former employee.

From the expert evidence of the Government analyst, the receipts and invoices sought to be relied upon by plaintiff were a forgery; and I agree. I find that the evidence of PW2, who's secretary allegedly prepared and issued the said receipts and invoices, was full of contradictions which could not be attributed to lapses in time, but pointed to an intention to mislead court. While he testified during cross examination that the secretary who signed and issued the receipts and invoices worked for him for the months of **August and September, 2008**; the receipts she alleged to have signed were dated **26th October, 2008, 29th October, 2008, and 3rd November, 2008**. This would essentially mean that by the time the receipts were signed and issued, the secretary had already left PW2's employment. During re-examination, PW2 changed his testimony and stated that the secretary had been in his employment for the months of **September and October, 2008**. However still, one of the receipts was signed and issued in **November, 2008**. It is my finding that the said receipts and invoices cannot be relied upon.

The above notwithstanding, I find that the plaintiff's company was indeed carrying on a profitable business of the supply of food stuffs before his arrest and detention. I also believe the testimony of the plaintiff that he had merchandise in stock before he was incarcerated by the agents/servants of the defendant. It is trite law that proceedings in a criminal case cannot be used to prove a cause in a civil case. (See ***Milly Masembe Vs Sugar Corporation and Kagiri Richard Civil Appeal No 1 of 2000***). However it is my opinion that the said proceedings can be relied upon as *prima facie* evidence in a civil matter. In the present case, I find that the evidence of PW1, who was a complainant in the criminal case before the Unit Disciplinary Committee, is relevant in determining the issue at hand. It was stated in the Judgment of the Unit Disciplinary Committee [EXH P4] that, PW1 (Luatte Martin) had testified that the maize flour he was interested in was in the stock in the Food Planet store. This implies that the plaintiff's company/business had some merchandise in stock prior to the arrest and detention of the plaintiff.

I, therefore, find that the plaintiff had in his possession merchandise prior to his arrest and detention/remand.

ISSUE 3

Remedies available to the parties.

The plaintiff claimed for payment of **UGX 429,750,000/=** being compensation for his merchandise and other property lost as a result of his unlawful detention and malicious prosecution, punitive damages, special damages, general damages and costs of the suit.

Special damages;

The plaintiff claimed for special damages amounting to **UGX 429,750,000/=**, and particularized the above amount in the plaint as follows;

- i) 1000 bags of maize flour returned as rejected by Fula Falls Ltd UGX 39,000,000/=.
- ii) 1,261,000 kgs each valued at UGX 117,000,000/= maize grains purchased on 29th October, 2008.
- iii) 180,000 kgs of maize grains each kgs 750 purchased 26th October, 2008 UGX 135,000,000/=.
- iv) Maize Grain 185,000 kg purchased 3rd November, 2008, each kg 750 value at UGX 138,750,000/=.

With regard to **Item 1**, it was the testimony of the plaintiff that he was arrested after supplying 1000 bags of maize flour, worth **UGX 38,000,000/=**, to Fula Falls Ltd, but the bags of flour were confiscated by the defendant's agents/ servants allegedly as exhibits on the charge of obtaining goods by false pretences; the said goods have never been returned, nor has the **UGX 38,000,000/=** ever been paid to the plaintiff. No documentation/receipts were produced to prove the said transaction between the plaintiff and Fula Falls Ltd.

It is trite law that special damages should be specifically pleaded and proved. (See *Adonia Tumusiime Versus Bushenyi District Local Government and AG HCCS No 32 of 2012*). However it is also trite that proof of special damages depends on the circumstances of each case and in some instances, it might not be possible to prove the special damages with documentation. In *Gaaga Enterprises LTD Versus SBI International Holdings & NV Uganda & Anor Civil Suit No. 0019 of 2005*, it was held that;

“...Counsel for the plaintiff cited to this court the case of Kyambadde VS Mpigi District ADM.[1983] HCB 44 where Masika C.J, (as he then was) held that special damages must be strictly proved but need not be supported by documentary evidence in all cases. I agree with the above position of the law and add that it depends on the circumstances of the case and position of the party finds itself in.”

In the present case, there is sufficient evidence to prove that the plaintiff indeed entered into a contract with Fula Falls Ltd, for the supply of maize flour, and the maize flour was supplied but was rejected by Fula Falls for allegedly being of poor quality. The defendant did not make any effort to counter the plaintiff's evidence that the defendant's agents confiscated the said flour as an exhibit and did not return the same to the plaintiff. This head of special damages therefore succeeds, and I award the plaintiff **UGX 38,000,000/=**, as the purchase price for the maize flour that was confiscated as an exhibit by the defendant's agents/servants.

Items 2, 3, and 4.

As was stated under issue 2 above, the plaintiff failed to prove that the purchases in items 2,3 and 4 had taken place. I find that the receipts which the plaintiff sought to rely upon in order to prove these claims were a forgery, and PW2's testimony could not be relied upon because it had material contradictions. These claims therefore must fail.

General damages.

Counsel for the defendant also prayed for general damages, owing to the mistreatment, embarrassment and humiliation the plaintiff was subjected to at the hands of the defendant's servants/agents. Further, that it was inhuman for the defendant's servants to deny the plaintiff food for the 16 days when he had been detained at Mbuya, before he was produced and charged before the Unit Disciplinary Committee.

The object of an award of damages is to give the plaintiff compensation for the loss he has suffered as a result of the defendant's actions, and are intended to place the aggrieved party in the same position in monetary terms, had the act complained of not taken place. (*See Robert Cuossens Versus Attorney General, SCCA No.8 of 1999*).

I find that the plaintiff was indeed subjected to unnecessary inconvenience and humiliation owing to his unlawful detention and the malicious prosecution at the hands of the defendant's servants, and is therefore entitled to compensation in damages.

Accordingly, I award the plaintiff **UGX 40,000,000/=** as general damages for the unlawful detention and malicious prosecution.

Exemplary damages.

It was the submission of Counsel for the plaintiff that the arrest and unlawful confinement of the plaintiff, denying him food for 16 days and the re-arresting of the plaintiff after his acquittal and confining him for a further 30 days demonstrates arbitrariness, oppressiveness and the unconstitutional behavior on the part of the defendant's servants.

In *Obong Versus Municipal Council of Nairobi [1971] EA 91*, court held that;

“...exemplary damages for tort may only be awarded in two classes of case ...: these are, first, where there is oppressive, arbitrary or unconstitutional action by the servants of the government and, secondly where the defendant's conduct was calculated to procure him some benefit ...”

In the present case, I find that the behavior of the defendant's servants of unlawfully detaining the plaintiff for a period of 16 days, and later on confining him for a further period of 30 days after his acquittal was arbitrary and unconstitutional. I therefore award the plaintiff **UGX 10,000,000/=** as exemplary damages.

In conclusion, the suit against the defendant succeeds and awards to the plaintiff are made as follows:

1. Special damages _____ UGX 38,000,000/=
2. General damages _____ UGX 40,000,000/=
3. Punitive damages _____ UGX 10,000,000/=
4. 10% Interest on the award (1) above from the date of filling the suit till payment in full.
5. Interest at court rate on awards in (2) and (3) above from the date of judgment till payment in full.
6. The plaintiff is awarded costs of the suit.

Orders accordingly.

Elizabeth Musoke

JUDGE

30/09/2015