Hon. Justice J. Tsekooko JSC.

Cause of Action: Father suing for false imprisonment of Son.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

COR: (ODOKI, J.S.C., ODER, J.S.C., & PLATT, J.S.C.

Son missing

Unconstitutional detention

CIVIL APPEAL 2/93

YEKOYAKIMU MWENE HABYENE ..... APPELLANT

- VERSUS -

THE ATTORNEY GENERAL ..... RESPONDENT

(Appeal against the judgment of the High Court of Uganda at Kampala (Berko J.) dated 24th September, 1991

JUDGMENT OF PLATT, J.S.C.

The Appellant Mr. Habyene brought a suit of great importance, which was not articulated in the correct legal framework. It concerns the plight of a father who assiduously sought to safeguard his son, the latter having been arrested on a charge of capital robbery, and detained at Luzira Prison. The Appellant had travelled to Kampala from his home near Mbale on numerous occasions, first to try and see his son, and later to apply for bail, and, later on again to try and persuade the authorities to release his son. Finally the son was released; but the misery of the end of the story is that his son was killed after he left prison. Is there any cause of action, in which the son or his father (now Appellant), can claim for the three years that his son spent in custody, and for the travelling expenses of the Appellant incurred in trying to obtain the son's release? The trial Court thought not. The plaint was dismissed. The Appellant appeals to this Court.

The facts accepted by the trial Judge were perhaps difficult to ascertain, because this case followed that strange style of putting before the Court as little evidence as possible. The

Appellant did his best; but being a layman he neither knew fully what he was doing, nor did he receive any proper directions. The State called no evidence and put forward a defence of little merit.

In these difficult circumstances the facts pleaded were as follows. At first the Appellant brought the suit in his own name and that of his son Stephen Wanyama. They sued the Attorney General for damages, because Stephen had been wrongly arrested and falsely imprisoned, and in addition had been wrongly assaulted. The Plaintiffs protested that Stephen had been arrested by the Uganda Police, acting in the course of their duties, and detained unlawfully in custody from 6th May 1986 until he was released in September 1989. During all this long period the appellant had sought bail without success, and had travelled constantly from Mbale to Kampala every fortnight, to be present when his son was due to appear in Court. The appellant incurred great expenses for transport and subsistence in his travels to Court, and, in addition, the Plaintiffs had suffered fear and distress of mind, and their liberty had been infringed. For all of this, the plaintiffs claimed damages.

On 21st March, 1990, the Appellant amended the plaint. I do not know what had happened between the date of the release of Stephen, and the date of the first plaint namely 9th February, 1990, except that, the Statutory Notice was given on 27th October, 1989. I presume, without finding as a fact, that Stephen had disappeared or had died, before the plaint was amended on 21st March 1990. The amendment excluded Stephen Wanyama. But the body of the plaint remained the same. The detention of his son was alleged to be unlawful, and as a result, the Appellant claimed damages for loss in travelling and subsistence and damages for fear and distress.

The defence was a denial of every fact alleged; and alternatively, it was said that the Attorney General was not liable because the Police had not been acting in the course of their duties.

The plaintiff gave evidence. He recounted the facts that Stephen's wife had reported Stephen's arrest to the Appellant, and called upon him to go to Stephen's aid. The appellant responded. At first the Prison authority would not allow the Appellant to see his son. On the second visit that was possible. He applied for bail which was refused. He appealed. He studied the register in Mengo, and found the charge against his son. There may have been as many as six cases. But the one in particular in this case was K.Cr.c. 157 of 1986, concerning one Mwanga Kigongo and Stephen Wanyama. It was in relation to this case, that the Director of Public Prosecutions directed that there was no case against Stephen, and that he should be released. That was written on 19th April 1989 (Exh.P4). It appears that this did not take effect until later. Then when Stephen was released he disappeared and died. The learned Judge seems to have misunderstood the letter of the Director or Public Prosecutions, as the Appellant complains in his memorandum of appeal. The Director had directed that both the charge of robbery and the charge of receiving stolen property should be withdrawn against "A.2." From the D.P.P.'s letter, "A.2." would represent Stephen wanyama. It was Kigongo against whom the receiving charge was retained. The Director headed his letter as Uganda Vs A1. Mwanga Kigongo, A2 Wanyama Stephen. Then he continued:-

> "Evidence assembled is not sufficient to warrant the prosecution of A2 as charged or for any other offence on the bases of evidence available at all. You are hereby instructed to amend the charge against A.1 and charge him of receiving and retaining stolen property C/S 298 of the Penal Code act. Withdraw the charge against A.2 under section 119 of the MCA and set him at liberty forthwith, unless he is being otherwise lawfully held on other charges."

The learned judge understood that instruction as follows:-

> "Following the D.P.P.'s said letter to the Plaintiff Exh.4 the D.P.P. instructed the Director of C.I.D. to withdraw the charge of robbery against the son of the Plaintiff. The charge of receiving and retaining stolen property was allowed to stand."

If the inference to be drawn from that statement is that the charge of receiving stolen property was allowed to stand against the plaintiff's son, then that is a serious misdirection. Later on the learned judge commented that the D.P.P only withdraw the charge of robbery in which there was not sufficient evidence to warrant prosecution. Consequently it is clear that the learned judge misunderstood the position of Kigongo for that of Stephen Wanyama, on the basis of the D.P.P.'s letter (Exh.4). That is what the Appellant contends.

But there is the further complication of some five other charges remaining against the Appellant's son. The learned judge made this further finding:-

> "The evidence shows that only the charge of robbery was withdrawn for lack of sufficient evidence. The other charges of receiving and retaining stolen property are still pending. Since some of the charges are still pending the plaintiff cannot be heard to say that the proceedings have terminated in his favour."

It appears therefore that the learned judge's attention had gone on to the document from the assistant registrar to the Chief Magistrate Buganda Road Court. Its date is uncertain, as far as the copy of the exhibit goes. It lists five cases in which "S. Wanyama" was accused. They are cited as 400/87, 162/88, 667/88, 1289/89. This letter was put in by consent. The appellant explained as follows:-

> "I have applied for copies of the case files, but I have not got them. They were about five cases. The case numbers are listed on the letter dated 11/1/91,that I received from the Assistant Registrar High Court. I wish to tender the said letter.

Court. Tendered without objection and marked P3."

This letter is of course valueless. It is a request from the Assistant registrar who never gave evidence for case files to be produced as exhibits but which were never produced in court, nor to the Appellant. Upon what basis is that letter

(Exh.P3) proof of the existence of charges against the son of the Appellant? The Appellant was good enough to acknowledge that he had some information about them; but when trying to ascertain the truth, the Court never provided him with exhibits. The letter (P3) is simply an administrative request for the exhibits: it is not warrant of any sort that the writer knew that the exhibits existed, or that he represented, in truth, that the charges had been preferred against the son of the Appellant. Ex. P3 is merely a hearsay statement for another Court to act upon. As far as the Appellant is concerned it merely showed that he had asked the authorities for evidence, and they had refused. That was no guarantee of truth of the allegations of charges against his son; otherwise the Court or the defence would have produced the files. He was therefore fully entitled to rely upon his son's release in Ex. P4 as being a complete release.

It is to be noted that the charge which the D.P.P attended to was one of 1986. The son of the Appellant was in custody thereafter. The other alleged charges were filed in 1987, 1988, 1989. It is difficult to believe that these offences could all have been committed before 1986 and then came to light after Stephen had been remanded in custody from 1986 to 1989. It was not possible for Stephen to have committed these offences while he was in custody. No explanation was given to resolve this difficulty.

However, if the State wished to rely upon these charges from 1987 to 1989, then the State could have proved them. The State called no evidence at all. Hence, the proper inference was that there were no charges in fact, and the only one which was operative was the one which the D.P.P. ordered the release of the Appellant's son. If such other charges were so important and were in existence, why was the Appellant released in 1989 without any trial of any sort? The learned Judge was quick to point out that the Appellant's son was released, subject to any other lawful cause to hold him. Why then was he released?

The inescapable conclusion is that the Appellant's son was not held upon any serious charges, and for a long time - three

years. That is not to say that there was no reason at all to arrest him. The State, however, called no evidence on that point. Hence as the D.P.P. decided that there was no evidence at all against the Appellant's son, all that can be said now is, that no reason was proved to arrest him. The allegation in the affidavit of the Appellant when pleading for bail, as the Judge noted, was that the Police wanted a bribe to release Stephen. The fact was not gone into at the trial, and I say no more about it.

The main complaint of the Appellant in his long memorandum of appeal, was that his son was kept in custody for a long time without any good cause. In my opinion, the Appellant is correct on that point. Article 15 of the Constitution provides for fair trials within a reasonable time. According to the affidavits on the record, the son of the Appellant had purchased a travelling bag which had been suspected to have been stolen. The seller was named and found and also arrested. If those facts are true, then the investigation had been completed within a few weeks. It cannot surely have been necessary to keep the Appellant's son in custody after the arrest of the seller of stolen property, and certainly not for three years. Supposing that the affidavits should not be looked at, then three years without trial for a capital robbery, or alternatively receiving stolen property, cannot, in my opinion, even without reference to authority, be a reasonable time. In the normal run of things, three months more than sufficient to investigate those charges. There were apparently no complication, which would extend the time. The State's view of this aspect was not made clear.

But from opinions in other jurisdiction, including Zimbabwe, the factors to be considered are:-

(a) The actual length of delay in the circumstances of the case;

(b) the reason given by the prosecution to justify delay;

(c) the accused's insistence on a speedy trial.

As against these, they are:-

(d) the prejudice to the accused assessed in the light of his interests which the trial was designed to protect, for example,

(1) the prevention of oppressive pretrial incarceration;

(2) to minimise anxiety and concern;

(3) to limit the possibility that the defence will be impaired.

In Zimbabwe an accused's application for a permanent stay was granted after a delay of 4 and half years, according to Chief Justice Gubbay, writing in the Nairobi Law monthly No. 52 of February 1995 p. 47. He cited several Zimbabwe Supreme Court decisions which have not yet been fully reported, (e.g. In Re Mlambo relying upon Justice Powell in BARKER V. WINGO, and comparing PRATT VS. A.G. AND JAMAICA (1993) 4 ALL. E.R. 769 (P.CO) a case of delay in carrying out sentence of death). (see also R. vs. Oxford City Justices (1982) 75 C.A.R. 200 - 2 years

I would think that these guidelines are eminently sensible, if not obvious, and while there is no real need to resort to them, they are of some general interest.

The result then is that there were grounds upon which the son of the Appellant might have sued the Attorney General. Of course the learned Judge pointed out that the son had withdrawn from the suit. He had died. What should the Court have done? There is a very valuable statement in the learned Judge's judgment as follows:-

> "It is the duty of the Courts to aim at doing substantial justice between the parties and not to let that aim be turned aside by technicalities. And as soon as any question arises as to the capacities of the respective parties, it is the duty of the Court to make any formal amendment on the claim which will make clear the capacity in which the Plaintiff sued, provided that can be done without any hardship to either party."

I propose to follow that advice. It is obvious that two main issues were at stake, the son's claim for damages for wrongful detention and possibly arrest and assault, and the father's constitutional claim arising from loss due to the son's unconstitutional detention.

On the first of these issues if the son had died, the father was entitled to continue the case on behalf of the son's estate, if he though fit. The pleadings were clearly affected by bona fide mistake. The father ought to have been allowed to amend the plaint to reflect the son's death. The notice given to Government specifically stated that the Plaintiff had been obliged to act on behalf of his son because of his wrongful detention. There was no problem there, that can be detected easily. A pretrial procedure would have rectified this mistake, and clarified the issues for trial.

The second issue whether damages can be sought for constitutional failure does not arise. The son of the appellant has been released. Compensation under the Constitution lies in the son, and that is also covered under the general law. At present, it does not lie in the father, for the father's loss, a matter which might need consideration in another forum.

The result of the appeal, in my opinion, is that the learned judge misdirected himself fundamentally on the facts, and failed to follow his own advice of seeing to it, that technicalities did not bar this claim. I would set aside the decree and proceedings in the High Court, and order a re-trial before another judge, the plaintiff suing, if so desired, on behalf of the estate of the deceased person. I would order that the costs in this Court be the Appellant's costs in any event, and the costs of the High Court be costs in the event of the re-trail. It is to be understood that in the re-trail, the judge is open to find any fact or facts warranted by the evidence before him or her, and come to any conclusion of law upon a proper consideration of the case in the trial de novo.

Dated at Mengo this .....12th....day ....of ...April,....1995.

H.G. PLATT,

JUSTICE OF THE SUPREME COURT.

I CERTIFY THAT THIS IS A TRUE
COPY OF THE ORIGINAL.
E.K.E. TURYAMUBONA,

DEPUTY REGISTRAR, THE SUPREME COURT.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

COR: (ODOKI, J.S.C., ODER, J.S.C., & PLATT, J.S.C.

CIVIL APPEAL 2/93

YEKOYAKIMU MWENE HABYENE .... APPELLANT

- VERSUS -

THE ATTORNEY GENERAL .... RESPONDENT

(Appeal against the judgment of the High Court of Uganda at Kampala (Berko J.) dated 24th September, 1991

JUDGMENT OF ODOKI, J.S.C.

I have had the advantage of reading in draft the judgment prepared by Platt, J.S.C. and I agree with it and the orders proposed by . As Oder, J.S.C. also agrees with the judgment and orders of Platt, J.S.C., the appeal is allowed , the decree of the High Court set aside, and a retrial ordered before another Judge. It is ordered that the costs in this Court be the Appellants's costs in any event and that the costs of the High Court abide the result of the retrial.

Dated this 12th day of April, 1995

B.J. ODOKI,
JUSTICE OF THE SUPREME COURT.

I CERTIFY THAT THIS IS A TRUE
COPY OF THE ORIGINAL.
E.K.E. TURYAMUBONA,

DEPUTY REGISTRAR, SUPREME COURT.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

COR: (ODOKI, J.S.C., ODER, J.S.C., & PLATT, J.S.C.

CIVIL APPEAL 2/93

YEKOYAKIMU MWENE HABYENE .... APPELLANT

- VERSUS -

THE ATTORNEY GENERAL .... RESPONDENT

(Appeal against the judgment of the High Court of Uganda at Kampala (Berko J.) dated 24th September, 1991

JUDGMENT OF ODER, J.S.C.

I have had the benefit of reading in draft the Judgment of Platt, J.S.C. I agree with the result and the reasons he gave.

The appeal should be allowed, the decree set aside, and the case should be remitted to the High Court for retial by another Judge.

Dated at Mengo this 12th day of April 1995.

A.H,O, ODER,

JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS IS A TRUE
COPY OF THE ORIGINAL.
E.K.E. TURYAMUBONA,

DEPUTY REGISTRAR, SUPREME COURT.