

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

Civil Case No. 108 of 2004

PROTACE MUGONDO..... APPLICANT

versus

ATTORNEY GENERAL.....1ST DEFENDANT

THE REGISTRAR OF THE COURT OF APPEAL 2ND DEFENDANT

Date of last Order: 26/11/2014

Date of Ruling: 25/03/2015

RULING

Twaib, J:

The Plaintiff herein is suing the Attorney General and the Registrar of the Court of Appeal for general damages, special damages amounting to Tshs. 640,000/=, interest and costs on grounds of unlawful arrest, unlawful confinement, battery and torture.

After closure of pleadings, the Plaintiff testified in support of his case. He was the only witness. Two other witnesses that he said he would want to call did not turn up.

In his testimony, the plaintiff ("PW1") narrated the circumstances in which, in his view, the cause of action arose. To be fair to him, I will reproduce the whole of his evidence in chief. He told the court the following:

"On 14th February 2003 at about 08.30 Hrs, I was at the High Court Dar es Salaam. I had come to follow up on two of my cases. I was refused entry into the building. But I had been told to come at 8:00 Hrs in order to see the Jaji Kiongozi before he commenced hearing cases. It was on Civil Case No. 429 of 2001 before Kimaro J. which had been pending for three years. I wanted the JK to follow up for me. The other case was Civil Case No. 430 of 2001, which was also pending ruling. The JK should have enquired as to why the rulings had not been delivered. Both Judges had adjourned their respective rulings since 2001. I wanted to be given an exact date, so that I knew when the rulings would be delivered. I did not want to be coming to court back and forth.

"The day before (13th February 2004) I had come here and was told to come early. I forced my way through the court premises. I had a gate pass. But I did not attach it [to my pleadings]. I went to Mrs. Shuma, the JK's clerk. As I was talking to her, she called some security guards who came to arrest me. I was then locked up from that time until a quarter to 1:00 (12:45 Hrs). That is when they released me, and I demanded that I be given a gate pass to show when I left the building. They beat me up when I was in custody.

"I thus sent a demand notice to the Attorney General. But they did not heed. That is why I sued the Government. I pray for compensation for all the injury caused to me. They tortured me and almost killed me."

Answering questions in cross-examination from Ms. Makondoo, learned State Attorney who appeared for the defendants, PW1 said that he did not receive any treatment from any hospital, nor did he report the matter to the Police. He did not see the need to do so. He did not have a PF3 or any document to show for

his injuries. He also said that he was refused entry at the gate by guards who were working for the court. As for a gate pass, he said: "I think I was given a gate pass. It was probably lost during the commotion."

PW1 admitted that the gate pass that he had annexed to his plaint shows that he entered at 12.45 Hrs. But he insisted that that was not the time he entered the court premises that day, but the time of exit. He said the guards deliberately wrote 12.45 even though he had asked them to write the time of his entry in the morning. He admitted having no document to prove his injuries, but that "the mental pain is obvious [and] common sense will tell you that I suffered due to the act of putting me in lock up."

PW1 had asked the court for time to enable him call two other witnesses, the said Mama Shuma and one Flora, whom he said are court employees. However, despite having taken out summonses and presumably having served them, they were not willing to come and give evidence. He decided to abandon them and close his case.

Mr. Gabriel Malata, learned Principal State Attorney who took over from Ms Makondoo and represented the defendants in later proceedings, prayed for leave to file submissions on no case to answer. A schedule for filing submissions was fixed, and the defendants duly filed theirs. The plaintiff, however, did not file any in response and never appeared in court thereafter. The court made another schedule for filing submissions. Still, the plaintiff did not file any. This ruling is thus based solely on the pleadings, the plaintiff's evidence and the defendants' submissions.

In their written submissions, the defendants, through Mr. Malata, contended that it is trite law [citing section 110 (1), 110 (2) 112 and 115 of the Law of Evidence Act, Cap 6], that he who alleges must prove, and that the plaintiff has failed to

prove his case. Learned counsel repeated what the plaintiff had told the court in his testimony and argued that the plaintiff did not obtain a gate pass, something that was contrary to procedure, which procedure he knew existed as he had the previous day entered the court premises with a gate pass, but in this particular instance deliberately decided to breach the procedure. This, according to counsel, justified the plaintiff's arrest. The gate pass for the previous day was part of the plaintiff's letter constituting his notice to sue.

Mr. Malata reminded the court that the principles on "no case to answer" in civil cases were laid down in the case of *Mwalimu Paul John Muhozya v Attorney General* (1996) TLR 229. Samatta JK (as he then was) put it thus:

- (i) *In a civil case a defendant can, at the close of the plaintiff's case, submit that there is no case to answer, and a submission of no case to answer in a civil case stands on the same footing as a submission of no case to answer in a criminal case, save that there is a difference in the standard of proof;*
- (ii) *When dismissal of the plaintiff's case on the basis that no case has been made out is prayed for, the court should not ask itself whether the evidence adduced by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff;*
- (iii) *A submission of no case to answer cannot be upheld if there is sufficient evidence on record upon which a court might make a reasonable mistake and enter judgment for the plaintiff;*
- (iv) *The test to be applied at the close of the defendant's case is "what ought a reasonable court to do", while the test to be applied in determining a submission of no case to answer is "what might a reasonable court do".*

These are the guiding principles. The plaintiff's case must thus be weighed against the test whether, on the material adduced before the court, this court might reasonably find for the plaintiff.

The plaintiff's allegations, if proved, would have amounted to the tort of unlawful arrest and unlawful confinement. Not every arrest and confinement is actionable. To succeed in such a tort, the plaintiff must show that his/her arrest and confinement was not lawful. It is the plaintiff's own evidence that he was refused entry into the court premises and was told that it was still too early to enter. He however insisted, forced his way into the premises and went straight to the Principal Judge's (JK's) chambers. There, he was arrested after the JK's secretary called the security guards.

During his confinement, the plaintiff said, which lasted for some hours, he was beaten, tortured and was nearly killed. However, despite what one would conclude to be severe injuries, the plaintiff did not report the matter to the Police, and neither did he consult a doctor. He had no medical document or a Police Form 3 ("PF3") to prove his alleged injuries. Apart from his own testimony in court, he brought no other evidence to prove his having been beaten, tortured and/or injured to the point of almost losing his life. Indeed, even in his demand letter, he did not mention any torture or injury, a fact he admitted during cross-examination.

Is this evidence sufficient to raise the presumption, as Samatta, JK stated, that a reasonable court might find for the plaintiff? In the first place, it is trite law that false arrest or false imprisonment is an arrest without probable cause. It is a common law tort where a plaintiff alleges that he was held in custody without a probable cause, or without an order issued by the court of competent jurisdiction. The plaintiff's own evidence show that he was insistent and forceful. He forced himself into the court premises after being refused entry, and went

straight to the JK's chambers. It is not known what exactly happened there, but this statement, coming from the plaintiff himself, is self-defeating.

Moreover, although he said he had a gate pass, the plaintiff could not produce the same. He did not attach it to his plaint and the one he attached showed that it was issued to him at 12.45 Hrs. His evidence on this point is contradictory. He said he had a gate pass, but might have lost it "during the commotion", which meant that there was some struggle, probably between him and the court's security guards as he was forcing his way through the security cordons. He did not explain why he was given a gate pass and was still not allowed to enter. He said that after he was released, he demanded that he be given a gate pass "to show when I left the [court] building."

However, the gate pass showed that he *entered* the building at 12.45. It cannot, in any case, support his testimony that he left the building at that time. That said, however, considering the circumstances as a whole, I am inclined to conclude that the plaintiff did come to court at about 08.30 Hrs and that he was not long thereafter arrested when he was at the JK's Chambers. I am however far from being convinced that his arrest and confinement was unlawful. His conduct after he was refused entry is clear testimony that he was conducting himself within the precincts of the court in a manner that was inappropriate, to say the least, and that his arrest and internment was necessary and therefore lawful.

Lawful arrest and confinement, however, would not necessarily justify the torture of the person arrested. It is therefore possible to find liability in the tort of trespass to the person due to battery and torture, even though the arrest itself may be lawful. Is there evidence to that effect sufficient to find for the plaintiff on the standard set down in *Mwalimu Paul Muhozya's Case (supra)*? With respect, I find the plaintiff's allegation that he was tortured by his arresters and

nearly killed while in custody hard to believe. One would have expected him to mention this crucial fact in his letter of demand, but he did not. Moreover, his demeanour in court when giving evidence (especially during cross-examination), was far from convincing.

Besides, it is inconceivable that a person who had such a strong will that he forced his way into the court premises in order to get to the JK's chambers, would be injured so severely and simply walk away without reporting the incident to the Police. It is also unthinkable that a person who has been so seriously injured that he almost lost his life, would just go home without seeking any medical attention. I thus find that the plaintiff's allegation that he was beaten and tortured while in custody has been not proven to the standard required by law. Given the circumstances, the plaintiff's mere statement to that effect is not enough.

Having failed to prove the essential elements of the relevant torts he alleges, even on the lower standard required at this stage of the case, which is, in terms of applicable principles, below a balance of probabilities, the plaintiff's suit must fail. It is thus dismissed.

I have pondered over the issue of costs, a matter that lies within the court's discretion. In the end, considering that the plaintiff is a private citizen while the defendants are senior Government officials in their public capacities, and the suit having terminated at this stage, I would make no order as to costs.

DATED and DELIVERED at Dar es Salaam this 25th day of March, 2015.

F.A. Twaib
JUDGE