

TANZANIA / JUDGMENT

20140102 TZHC Dar es Salaam

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- If Y\t\l'1 VaJ-iOn IN THE HIGH COURT OF TANZANIA J__aAA/ !{ (DAR ES SALAAM DISTRICT
REGISTRY) AT DAR ES SALAAM CIVIL CASE NO. 118 OF 2007 LUCIEN IKILI
RASHID PLAINTIFF VERSUS MUSSA RUGANDA LEKI 1 ST
DEFENDANT 'JEROME MSEMWA 2ND DEFENDANT PERMANENT
SECRETARY, MINISTRY OF HOME AFFAIRS 3Ro DEFENDANT . TH ATTORNEY
GENERAL 4 DEFENDANT

JUDGMENT

MURUKE, J. The plaintiff Lucien Ikili Rashid claims against the 1st, 2nd and 3rd · defendants a sum of Tshs. 200,000,000/- being compensation for) unlawful detention and lowered reputation allegedly caused by the uncivilized acts of the defendants. He has also prayed for an award of punitive damages, interest and costs of the case. The plaintiff, a citizen of the Democratic Republic of Congo (DRC), alleged in his plaint that he successfully sued the 1st defendant in the RM's Court of Dar es Salaam at. Kisutu in Civil case no. 263/2005. The 1st defendant didn't settle the decretal amount as ordered thus; an · order for attachment of his vehicle was issued. Despite the attachment order, tne 1st defendant failed to pay the decretal sum 1 , 1.. an act that forced the plaintiff to apply for the 1st defendant to be summoned so as to show cause why he should not be detained as a civil prisoner. All this while the 1st defendant was under representation of the 2nd defendant, an advocate. The plaintiff averred that during hearing of this latter application, the defendants maliciously reported him to Immigration Department which is under the 3rd defendant. He alleged that after being shown by the 2nd defendant, the Immigration Officers arrested the plaintiff and took him to Central Police Station where he was detained for five days before he was taken to Court. The plaintiff was later taken to Segerea Prison where he was detained for thirteen days before he was released without being prosecuted and was ordered to leave the country within seven days. It was alleged further that while in prison, in search of bhang and money, the plaintiff was undressed by the prison officers in the presence of his two children namely Papi Rashid and Vicent Rashid. The plaintiff has contended that the defendants' act of maliciously reporting him to Immigration Officers that his stay in Tanzania was unlawful and his detention prevented him from engaging in his economic activities. He added that his reputation was lowered when he was undressed in the presence of his children. The defendants have generally denied all the plaintiff's claims and averments save for the plaintiff's nationality. The 1st defendant contended that he never did any act of disturbing the plaintiff. He

denied to have moved his advocate (2 nd defendant) to report the plaintiff to the Immigration Officers. On his part, the 2nd defendant denied to have involved himself with any immigration issue concerning the plaintiff. 2 .. In this case, the plaintiff, 1st defendant and 2nd defendant . appeared in person; the 3rd defendant was represented by Mr. Busimagu and Mr. Mlay Legal Officers from the Immigration Department while the 4th defendant had services of Mr. Mwakitalu learned State Attorney. The following issues were agreed and recorded:

1. Whether the plaintiff was maliciously and ill-treated by the defendants.
2. Whether the defendants were justified in declaring the plaintiff unlawfully in Tanzania.
3. What are the reliefs the parties are entitled to? The plaintiff (PW1) was the only witness in support of his case. He testified that he was doing a business of exporting sculptures to Europe. On the 1st defendant's request, he gave some sculptures worth Tshs. 2,150,000/- to the 1st defendant so that he could take them to Europe and send money to the plaintiff two weeks later. The 1st defendant didn't return as agreed and only US\$ 200 was sent to the plaintiff. On the 1st defendant's return from abroad, only Tshs. 100,000/- was paid to the plaintiff at Buguruni Police Station. PW1 decided to sue the 1st defendant at the RM's Court of Dar es Salaam at Kisutu, Civil case no. 263/2005 for a breach of contract. Judgment was entered on the 1st defendant's admission of the claim. However, only Tshs. 750,000/= was paid despite an order for attachment of the 1st defendant's car. PW1 applied for the 1st defendant to be summoned to show cause why he should not be detained as a civil prisoner. On 9/6/2006 when the application came for hearing, the 2nd defendant, an advocate who was representing the 1st defendant, came with Mr. Makoba, the 3 ,... Immigration Officer. After the case, the Immigration Officer was called to arrest the plaintiff. PW1 testified further that after the arrest, he was taken to the Regional Immigration Office and he was detained for five days. On the 6th day, he was taken to Court where he was charged as an illegal immigrant in Criminal case no. 765/2006 (RM's Court of Dar es Salaam-Kisutu) together with his wife and two children. After the case, they were taken to Segerea Prison where he was detained for thirteen days in the same cell together with his children. He stated that prior to the said detention; he was undressed in the presence of his wife and children, then the prison officers searched in between his buttocks. He contended that he wrote a letter of complaint to the President of the United Republic of Tanzania who directed the Minister of Home Affairs to investigate the matter. On the next date they were taken to court, the Immigration Officer informed them that they were to be expatriated to Congo. They were ultimately released and given seven days to leave the country. They went to see the ambassador of DRC in Tanzania who issued them with temporary passports and visas. PW1 contended that on 27/9/2006 when he appeared in court in relation to Civil Case no. 263/2006, Mr. Koga who represented the 1st defendant on that date came in court with the same Immigration Officers who arrested him on 9/6/2006. The plaintiff was arrested again and was detained for four days before the Director for Immigration Services ordered for his release so as he could follow-up his case. PW1 told the court that at some point the Minister for Lands sent auctioneers who took many of his belongings including documents relevant

to this case. He contended that he has right to live in Tanzania because he is 4 J ... making follow-up on his case and that the Immigration Officers promised to give him a permit after he gave them his documents and some money. PW1 testified that at the time of his arrest his residence permit was still valid. When being cross-examined by the 2nd defendant. PW1 stated that it was the 2nd defendant who ordered the Immigration Officers to arrest the plaintiff. The order was issued while in Court in the presence of Hon. Mutungi and Safari RMs as well as in the presence of a court clerk. When asked by Mr. Busimaga .whether he had a residence permit, PW1 replied that he had no document other than the copy of letter from the DRC Embassy in Dar es Salaam. When asked whether he had any proof that he was in Tanzania lawfully the plaintiff replied that the law allows him to stay in Tanzania because he is proceeding with his case. When being cross-examined by Mr. Mlay, PW1 conceded that he had no residence permit from the Immigration Department but maintained that his arrest was unlawful. He said he stayed in Tanzania without a residence permit because his pending case was a sufficient permit. Even during hearing the plaintiff had no residence permit. There were three witnesses for the defense side. DW1 was the 2nd defendant Jerome Msemwa. He introduced himself as a private advocate since 1996. He testified that in all years of his practice has never committed any professional misconduct. He disclosed that he was joined in this case simply because he defended the 1st defendant in civil case no. 263/2005. DW1 said he appeared only twice in that case which the plaintiff won and was paid Tshs. 700,000/-. He denied the plaintiff's contention that the 2nd 5 defendant sent the Immigration Officers to arrest him. He stated that he has no powers to order the Immigration Officers. He was never involved in the plaintiff arrest or imprisonment. DW1 testified that the plaintiff has not brought any evidence to prove his allegations and has failed to call witnesses like Hon. Safari. The proceedings in civil case no. 263/2006 were not produced. DW1 maintain during cross examination that he never came to Kisutu RM's court with the Immigration Officers and that on the date the plaintiff was arrested he never appeared in court. He insisted that if what the plaintiff alleges was true then Hon. Mutungi and Safari RMs would be called to testify as witnesses and the RM's court's proceedings would be produced in evidence. DW2 Eunice Kawanga is an Immigration Officer who was involved in the plaintiff's arrest. Her duties include investigation of illegal immigrants, the non Tanzanians living in Tanzania unlawfully i.e. without having legal documents enabling them to live in Tanzania. DW2 stated that in 2006, in the course of her duties together with other officers, they entered the house where the plaintiff lived at Buguruni and arrested his wife Adela Lucien and his two children namely Rashid Kazimoto and Vicent Rashid for living in Tanzania unlawfully. The plaintiff's family admitted that they were from DRC. During the arrest of the plaintiff's family, DW2 saw the plaintiff's photo hanged at the living room thus they started looking for him. After a week when on duty at the RM's Court of Dar es Salaam at Kisutu, DW2 spotted the plaintiff and, together with other Immigration Officers, managed to arrest him. During his arrest, the plaintiff had no document legalizing his stay in Tanzania. He contended that the same were lost. Statements of suspects after their arrest (the plaintiff's dated 12/6/2006; Adela's and that of 6 Vicent dated 2/6/2006) were collectively admitted as exhibit DE1. DW2 testified that the plaintiff didn't comply with the Immigration

Law that requires non Tanzanians to take their documents with them wherever they go. She deposed that according to the plaintiff's statement, he entered in Tanzania in 1993 using a Congo temporary travelling document. Adela entered the country as a refugee in 1999 but she didn't join the refugee camps and instead she came straight to her husband in Dar es Salaam and therefore had no any document. Adela admitted in her statement that she was living illegally in Dar es Salaam together with her husband (the plaintiff) and their seven children. DW2 testified further that Vicent used a temporary pass to enter Tanzania and he admitted in his statement that at the time of his arrest he had neither a valid passport nor a residence permit. She added that since the plaintiff and his family had only temporary documents or no document when they entered Tanzania, they were not legally required to do any business of their own or of any other person by way of employment in Tanzania. DW2 contended that the plaintiff and his family were doing business of selling cars and sculptures illegally. She stated that following their arrest, the plaintiff and his family were charged at Kisutu for staying in Tanzania illegally in Criminal Case no. 795/2006. She stated further that during pendency of the case, diplomatic discussion took over between the DRC Embassy in Dar es Salaam and the Dar es Salaam Regional Immigration Office that resulted into withdrawal of the case against the plaintiff and his family. According to DW2, the Embassy and the Immigration Office agreed that the plaintiff and his family be returned to the DRC as prohibited immigrants. A letter from the DRC Embassy dated 14/6/2006 addressed to the 7 Head Office, Immigration Services requesting release of the plaintiff and his family from detention on humanitarian reasons was admitted as exhibit DE2. DW2 deposed that the case against the plaintiff and his family was withdrawn the same date the letter from the Embassy was received i.e. on 16/6/2006. The plaintiff's wife and children left but the plaintiff was allowed to remain in Tanzania to pursue his case at Kisutu RM's Court. The plaintiff was given an extension of one week and later another short extension to stay in Tanzania up to 28/3/2007. He was advised in the meanwhile to apply for a resident permit class C. According to DW2, the plaintiff filled the application forms but didn't pay the required fees thus no permit was issued to him. The plaintiff's letter dated 16/3/2007 requesting to be given a residence permit and extension of one week was admitted as exhibit DE3. DW2 explained that the extension is usually stamped on the applicant's pass. The plaintiff's temporary pass stamped with an extension from 19/2/2007 - 19/3/2007; and again from 19/3/2007 - 28/3/2007 was admitted as exhibit DE4. DW2 testified that the plaintiff's time to stay in Tanzania was never extended again beyond 28/3/2007 and he has not paid for the residence permit to issue to date. She insisted that for a person to lawfully stay in Tanzania, he/she must possess a passport of his country, a visa and a residence permit class A, B or C. She said, a person holding a temporary pass can only be issued with a three months visa. DW2 revealed also that the plaintiff had been declared a prohibited immigrant with effect from 28/6/2006 through a notice of prohibited immigrant no. 00014819 dated 28/6/2006 -exhibit DES. DW2 maintained that the plaintiff is 8 staying in Tanzania illegally because having a case or a loss report does not give the plaintiff right to stay in country illegally. DW3 is the 1st defendant Mussa Rugandaleki, a businessman. He testified that his proper name is Mussa Juma Ruganda. He was introduced to the plaintiff by Mr.

Gabriel (now deceased) in 2005 when he wanted to buy sculptures. DW3 stated that he went to Buguruni where the plaintiff resided and did his business. The sculptures the plaintiff had were valued at Tshs. 1,780,000/-. The 1st defendant had no money to pay and therefore he paid Tshs. 150,000/- on the date of transaction and the balance was to be paid after sale of the sculptures in Europe. By way of Western union money transfer, DW3 paid to the plaintiff from the United States of America (USA) a sum of USD 220.401 on 21/6/2005. DW3 revealed that he came back from the USA in 2008, he called the plaintiff so as to pay the remaining amount of Tshs. 852,000/- but he was informed by the plaintiff that the matter had already been taken to court (civil case no. 263/2006). The plaintiff won the

- case. The 1st defendant was ordered to pay Tshs. 752,000/- which he paid. DW3 said with payment of Tshs. 752,000/- the matter ended but the plaintiff filed another suit claiming a sum of Tshs. 200,000/-; the suit was dismissed. Thereafter this case was filed. DW3 testified that he has never been involved in any of the plaintiff's arrest. He added that he has done business of buying and selling sculptures with several people from Congo,
- Mozambique and Zambia but has never inquired on their permits. He maintained during cross examination that he never arrested the plaintiff or reported him to Immigration Officers. 9. I now turn on the first issue whether the plaintiff was maliciously and ill-treated by the defendants. Looking at the facts set out in the amended plaint as well as in DW1's testimony, it cannot be denied that the plaintiff tries to establish a tort of false imprisonment or wrongful detention which is defined by Winfield in his book *Tort*, 1971, 9th edn, at page 35 as: "the infliction of bodily restraint which is not expressly or impliedly authorized by law." A lowered reputation as alleged by the plaintiff is one of the effects of false imprisonment thus cannot be considered distinctly. Mr. Justice Lawrence observed in *WALTER v ALLTOOLS LTD* [1944] Vol. 61 LTR 39 that: " ... A false imprisonment does not merely affect a man's liberty, it also affects his reputation." In any wrongful detention claim, it is for the plaintiff to establish a prima facie case that he was imprisoned or arrested and that it is the defendant who imprisoned or arrested him or authorized the plaintiff's imprisonment or arrest. Thus, *HALBURY'S LAWS OF ENGLAND*, Vol. 38, 3rd edn, page 765, paragraph 1266 says: "The gist of false imprisonment is the mere imprisonment; the plaintiff need not prove that the imprisonment was unlawful or malicious, but establishes a prima facie case if he proves that he was imprisoned by the defendant." The following holding by the Court of Appeal of Kenya in *KASANA PRODUCE STORE v KATO* [1973] 1 EA 190 though of persuasive value, is relevant to the case at hand and I will therefore adopt it. It was held at page 192 that: 10 "On the false imprisonment claim the respondent must first establish that he was arrested and that the defendant authorized the arrest." In the instant case, there is no doubt that the plaintiff was arrested, charged and detained by the Immigration Officers, DW2 being one of them. PW1 testified that the Immigration Officers arrested him within the Kisumu RM's Court's premises after being pointed by the 2nd defendant. The 3rd defendant through DW2 conceded that they arrested the plaintiff from the court premises, charged him, detained him and released him after some diplomatic negotiations between the DRC Embassy and Dar es Salaam Regional Immigration Office. Although the plaintiff has

forcefully tried to show that the Immigration Officers arrested him after some sort of authorization and information from the 1st and 2nd defendants, there is absolutely no proof that the 1st and 2nd defendants arrested or authorized the plaintiff to be arrested by the Immigration Officers. There is no proof that the Immigration Officers worked on the information given to them by the 1st and 2nd defendants before they arrested the plaintiff. In fact, it is in DW2's testimony that the plaintiff was arrested when the Immigration Officers were in their normal course of investigating illegal immigrants. In the result, I am of the opinion that the plaintiff has succeeded in establishing a prima facie case that the Immigration Officers, and vicariously the 3rd defendant, arrested and detained him. The plaintiff has failed to establish that the 1st and 2nd defendants were at all involved in his arrest and detention. That leads me to the questions whether the plaintiff's arrest and detention by the 3rd defendant was malicious and whether the arresting officers ill-treated the plaintiff. 11 f According to Lord Diplock in *HOLGATE-MOHAMMED v DUKE*

[1984] 1 ALL ER 1054 at page 1057, a police officer will not be liable for the tort of false imprisonment of an arrested person, unless his exercise of discretion to arrest was ultra vires in the sense that it contravened the principles set out in *Associated Provincial Picture Houses Ltd v Wednesbury Corps* [1948] 1 KB

223. "One of the principles is that the discretion must be exercised in good faith." The Immigration officers and police officers have powers under sections 8(1) and 12(1) of the Immigration Act, Cap. 54 R.E. 2002, without warrant, to arrest any person whom they reasonably suspects to be a prohibited immigrant or to have contravened or to be about to contravene any of the provisions of the Immigration Act. The sections read: 8(1) Any immigration officer may, without warrant, arrest any person whom he reasonably suspects to be a prohibited immigrant or to have contravened or to be about to contravene any of the provisions of this Act. 12(1) Subject to the provisions of this Act, any immigration officer or any police officer may prevent any prohibited immigrant from entering Tanzania and may, without warrant, arrest any prohibited immigrant or any person who he has reasonable cause to suspect of having entered Tanzania while being a prohibited immigrant otherwise than in accordance with the provisions of this Act. Under section 10(1)(h) of the Immigration Act, a prohibited immigrant includes a person whose presence in or entry into Tanzania is unlawful under any law for the time being in force. For a person's entry or presence in Tanzania to be lawful, he must 12 comply with the provisions of section 15(1) of the Immigration Act which provides: 15(1) Subject to subsections (2) and (3), no person to whom this section applies shall enter Tanzania from any place outside Tanzania or remain in Tanzania unless- (a) he is in possession of a valid passport; and
- (b) he is the holder of or his name is endorsed upon, a residence permit issued under the provisions of this Act; or (c) he is the holder of, or his name is endorsed upon, a pass issued under the provisions of this Act. Coming to the case at hand, at the time of his arrest even during hearing of this case the plaintiff had no valid passport, a resident permit or pass. Since the plaintiff alleged that his stay in Tanzania is lawful he was duty bound under

section 30(b) of the Immigration Act to prove the allegation. It is doubtful whether the plaintiff discharged that duty. The plaintiff admitted during cross examination that he had no residence permit at the time of his arrest. I will quote hereunder the questions posed and answers by the plaintiff: Q: Did you have a residence permit? A: None other than this letter. (Shows a letter from the DRC Embassy at Dar es Salaam) Q: Do you have anything to show that you are in Tanzania lawfully? A: The law allows me because I am proceeding with my case. Q: Did you have a residence permit from Immigration? A: No, but I had a letter from my Embassy. 13 , Q: Then why did you stay when you didn't have a permit? A: My case was enough permit. The plaintiff's admission is corroborated by DW2's evidence that when they arrested the plaintiff, he had no any document justifying his lawful stay in Tanzania; In such circumstances, the plaintiff's stay in Tanzania contravened the provisions of section 15(1) of the Immigration Act. The plaintiff, therefore, was and still is a prohibited immigrant within the meaning of section 10(1) (h) of the Immigration Act; no wonder he was declared so on 28/6/2006 according to exhibit DES. The Immigration Officers had discretion in that situation to arrest the plaintiff and detain him under section 8(1) and 12(1) of the Immigration Act. It follows that the plaintiff's arrest by the Immigration Officers hence the 3rd defendant was lawful. There is no indication that the Immigration Officers acted without good faith in arresting the plaintiff; thus it cannot be said that the plaintiff was maliciously arrested and detained. There is also no proof that the plaintiff was ill-treated or manhandled by the Immigration Officers. The plaintiff's answer in relation to the alleged ill-treatment was as follows: Q: You said the Immigration Officers mistreated you. How? A: They unlawfully arrested me. It has already been found that the plaintiff was lawfully arrested by the Immigration Officers. The plaintiff did not challenge DW2's evidence that the plaintiff and his family weren't mistreated during their detention; and that the Immigration department incurred costs in feeding and maintaining the plaintiff and his family while in detention. In the event, I answer the 1st issue in the negative. 14 The 2nd issue whether the defendants were justified in declaring the plaintiff unlawfully in Tanzania was well covered when considering the 1st issue. It is trite that once detention or imprisonment is established, it is for the defendant to show that his acts were reasonably justified. I am supported in that view by the decision of the court in *SEKADDU v SSBADDUKA* [1968] 1 EA 213 at page 215 where it was held: "Once the detention or imprisonment is established the onus shifts to the defendant to show that it was reasonably justified." Evidence has shown that the plaintiff's stay in Tanzania contravened the provisions of section 15(1) of the Immigration Act. The plaintiff failed to prove during his arrest and in court that he has a valid passport, residence permit or a pass. He relied on a letter from the DRC Embassy, which letter was not produced and admitted in evidence; and even if admitted, couldn't serve any useful purpose because the same cannot override the mandatory requirements of section 15(1) *supra*. The plaintiff's stay in Tanzania without a valid passport, residence permit or pass is unlawful. The 3rd defendant's declaration through the Immigration Department that the plaintiff's stay in Tanzania was unlawful had every justification. The 2nd issue is answered in the affirmative. Now, to what reliefs are the parties entitled? In this suit the plaintiff's claim is for compensation or damages at Tshs. 200,000,000/- for unlawful

detention and his lowered reputation. It has already been held that the plaintiff's restraint was lawful and never wrongful. According to B.M. Gandhi in his book *Law of Tort*, 1987, Eastern Book Company Law Publishers, Delhi, India at page 417: 15 "Restraint may be lawful or otherwise; where it is lawful there is no false imprisonment but where it is unlawful, there is false imprisonment." When the arrest or detention being complained of turns out to be lawful, in the absence of malice, the plaintiff's claim must always fail i.e. the plaintiff cannot be awarded what he seeks from the court. It is a settled law that for one to succeed in an action for damages, unless it is a question of strict liability, the injury being complained of must have resulted from the wrongful act of the defendant. Thus, this court (Lugakingira, J. as he then was) held in *JANUARY MAYALA v. MAZIGE MKANGALA* [1983] TLR 268 at page 269: "Unless it is a question of strict liability . . . civil liability must be based on proven actionable faulty deviation from an expected and accepted standard of conduct by the defendant... " J.A. Taylor states at page 364 of his book *BINGHAM'S MOTOR CLAIM CASES*, 8th edn, 1980, Butterworths, London that: "The elementary principle is that it is for the plaintiff in an action for damages to prove his case; to show affirmatively that damage under any particular head has resulted from the wrongful act of the defendant." The defendants in this case succeeded in showing that the plaintiff's arrest and detention was lawful. It cannot be said, in the circumstances, that the plaintiff was injured by the wrongful acts of the defendants. The defendants did nothing wrong that could injure the plaintiff. In my considered opinion, this judgment will not be complete without making one general statement in passing. According to 16 ----- '._DW3 (1 st defendant) Mussa Ruganda Leki evidence, he has been doing business with illegal immigrants for more than 15 years. According to him, they normally meet at Kinondoni Manyanya, Buguruni or to his residence Mbezi Beach, within Dar es Salaam Region. Mussa Ruganda Leki communicate with illegal immigrants while in their own country. It is obvious that Mussa Ruganda Leki personal interests, motivated illegal immigrants to come to Tanzania. Although Tanzania is bordering the great lake countries in which there is countries political instability, our country borders should not be crossed, like crossing a stream by one step. Although we are opening up for Tanzania's economic growth, should not be at expenses of harbouring illegal migrants, who do not appreciate whatever hospitality that have been offered, including but not limited to be issued with temporary pass for them to wind up their affairs. Plaintiff herein being one of the illegal immigrant who was required by immigration department to apply for temporary permit, to stay in the country, for him to finalize his civil case pending at Kisutu Resident Magistrate Court but, did not finalize the process. To the plaintiff, to have case in court was an automatic permit. Plaintiff understanding is contrary to Tanzania Immigration Laws. Our country borders, should be seriously protected to ensure that only those with legal permits cross, be it, from Congo DRC or USA. Tanzania as a country deserve her dignity. Courts of law as custodian of justice, in the course of dispensing justice will not allow these. 17 I. .J' .,, This suit, against the defendants, is unfounded and is hereby dismissed. Since this is a legal aid a , there will be no order as to costs. Z. G. _____ JUDGE 02/01/2014 Judgment delivered in the presence of plaintiff in person and Mr. Shaidi and Mwakahesya State Attorney for the 3rd and 4th Defendant. ' , Z. . MURUKE JUDGE 02/01/2014 18

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