

UGANDA / JUDGMENT

Khanbhai v O'swald and Co. and Another (C.C. 35/1932 (Mombasa).) [1933] EACA 7 (1 January 1933)

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COURT

East African Court of Appeal

BEFORE

Dickinson, J

CASE / FILE NUMBER

C.C. 35/1932 (Mombasa).

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ORIGINAL CIVIL.

Before DICKINSON, J.

YUSUFALLI A. KHANBHAI (Plaintiff)

1, WILLIAM O'SWALD AND CO.; 2, HANS MULLER (Defendants).

C. C. 35/1932 (Mombasa).

- Malicious prosecution—Reasonable and probable cause—Failure of complainant in criminal prosecution to disclose material fact within his knowledge-Improper motive-Presumption of malice-Special damage-Costs of defence in Criminal Court.
- **Held** (30-9-32).—That to invoke the criminal law for the purpose of recovering a civil debt is an improper motive such as to establish malice.
- **Held Further**.—That where the Magistrate does not order payment of costs under section 166 (2), Criminal Procedure Code, the plaintiff's special damage in respect of his defence in the Criminal Court is not limited to £25.

Christie for Plaintiff.

Atkinson for Defendants.

Atkinson referred to Bullen and Leake, 8th Ed., under notes, "False imprisonment." There was no suggestion that defendants gave plaintiff in charge. The signing of a charge sheet is not sufficient to support an action for wrongful arrest. *Sewell v. The National Telephone Co., Ltd.* (1907), 1 K. B. D. 557 at 560. Addison on "False Imprisonment" at p. 170. Referred to *Warner v. Riddiford*, 4 C. B. (N. S.) 180; *Hewlett v. Cruchley*, 128 E. R. 696.

Christie replied.

JUDGMENT.—The plaintiff claims damages for unlawful arrest and malicious prosecution against the three partners of the defendant firm and against the second defendant as the manager of their Mombasa branch.

The case has been contested with great vigour, but the facts are simple.

Defendants are a firm of Hamburg merchants carrying on business in East Africa at various places, including Mombasa and Dar es Salaam.

The plaintiff is an Indian merchant carrying on business at Tanga in Tanganyika Territory.

Some three years ago, the plaintiff became a sub-agent of the defendants' Dar es Salaam branch, selling defendants goods, "Continental" tyres and tubes, on an agreement.

The terms of this agreement were that plaintiff was supplied with a stock of tyres and tubes at his three places of business at Tanga, Mongo and Kisongwe.

These he was to sell as a del credere agent to his customers, and as soon as he had effected a sale he was to send an "Account Sales" to defendants office at Dar es Salaam, and to pay therefor 90 days later.

The defendants stocked the plaintiff's shops, and the plaintiff commenced to sell the goods, and continued to send "Account Sales" to defendants at Dar es Salaam, and to pay up in 90 days regularly, after deducting from the amount of the "Account Sales" his commission and certain allowances agreed upon.

The defendants had no place of business at Tanga; but had certain customers or agencies at places up the railway line from Tanga.

As a convenience, the Dar es Salaam office of defendants asked the plaintiff at Tanga to clear goods, required for these businesses or customers up-country, through the Customs at Tanga, and to pay the Customs duty and landing charges thereon and to place these goods when cleared on the railway and despatch them "carriage forward" to their respective destinations.

This the plaintiff continued to do.

The defendants also, as a convenience, told the plaintiff to pay all necessary dues and charges on these goods out of moneys which he received in respect of the "Continental" tyres and tubes he was selling for defendants, and they would credit him with all such moneys disbursed on their behalf, and would debit him with the amount of the "Account Sales", less commission and allowances.

After acting as defendants' forwarding agent at Tanga for some time gratis, plaintiff requested that he might be paid something for his trouble, and he was accordingly allowed certain fees, for which also he was entitled to credit.

At some time in February, 1931, the defendant firm decided to place Tanga under the control of their Mombasa office instead of the Dar es Salaam office.

Stocks were taken, and after that the plaintiff carried on receiving stocks from Mombasa or shipped direct from Europe to him at Tanga, and sending his "Account Sales" to the Mombasa office, upon the same terms as he had been doing when under Dar es Salaam.

The Mombasa branch opened a ledger account in which the same debits and credits were made as had formerly been made in the defendants' books at Dar es Salaam.

The plaintiff continued to send his "Account Sales" to the defendants at Mombasa, and to send them cash at 90 days for some time, and then began to fall behind with his cash payments.

The reasons he gave for getting into arrears was the bad state of business and the difficulty he had in getting cash from his customers.

At one time he asked the defendants to assist him to bear the loss of certain bad debts which he had incurred, and the defendants refused, telling him that if he gave credit it was "on his own account".

In September, 1931, the defendants decided to discontinue the sub-agency of the plaintiff, and sent a German assistant, a Mr. Rosen, to Tanga and the other stores to take stocks and hand them over to a successor of the plaintiff. Accounts were settled except for a few small items.

The defendants did not take over the plaintiff's book debts. but held the plaintiff liable to pay them the balance of the account.

The difference between the plaintiff's and the defendants' version of the account between them was very small in comparison with the business done.

The defendants demanded payment of the balance due by the plaintiff, and in February, 1932, they sued him at the Court at Mombasa.

On the 3rd March, 1932, the plaintiff, together with his father and a cousin, came from Tanga to Mombasa, and on the 4th March they went to interview the defendants, to try and settle the claim.

I must say that Mr. Muller has stated that he does not remember seeing the cousin at any time at defendants' office, but I am not surprised, as this extremely tiny person (who could just look over the top of the witness-box when standing) could have easily escaped his notice when the other people concerned were of normal height, and this cousin being a youngster took no immediate part in the arguments or discussions, according to himself or the other witnesses for the plaintiff.

The evidence goes to show that the meeting on the 4th March was extremely short, and inconclusive, and that Muller told them he was busy with a mail, and to come again on the 5th.

The two parties disagree slightly in their recollection of what happened at this interview of the 4th March, but I do not think it important.

On the 5th March, the plaintiff and his father and cousin went to see Muller again, when the plaintiff submitted his own version of the account between them which Muller, after consulting with Rosen, who had taken stock, made a certain allowance to plaintiff in respect of two tyres about which there was a dispute, and for all practical purposes the accounts were agreed.

Plaintiff then offered to settle the amount of his debt by payment of some 40 per cent by instalments, and Muller got angry and refused.

It seems clear that plaintiff did make such an offer and that Muller did get angry and refuse, but the subsequent wrangle left rather different impressions on the plaintiff and his witnesses to those on Muller.

Plaintiff and his relatives all say that Muller threatened to prosecute plaintiff unless he paid up; Muller says he did not say that, but that plaintiff was not paying over the defendants' money, and that was a theft, and he agreed that he might have said, "I will run you criminally," and he admitted that in saying this he was trying to get his money.

The conversation took place in Swahili, which is not the native tongue of either party.

It appears to me, taking Muller's own evidence, that this is a threat to prosecute plaintiff if plaintiff does not pay the money due to defendants.

The plaintiff and his friends left Muller's office, and the father and cousin returned to Tanga on the 6th (a Sunday).

Next day, in the morning the plaintiff went with the witness, Taibali Mulla Daudji, and the defendants' broker, one Ravji, again to see Muller.

A further offer was made, slightly in excess of the offer made on the 5th.

About this offer, according to Taibali, Muller said he would telephone to the Dar es Salaam office, and told them to come back at 4 p.m.

Shortly after this interview, which took place about 8 to 8.30 a.m., Muller went to see his solicitor, Mr. Wright, and after a conversation with him they both went to the Resident Magistrate to file a complaint against plaintiff.

The Resident Magistrate ordered that the police should make further inquiries.

Inspector Griffin went to see Muller and had a conversation with him for about an hour.

The purport of this conversation is not given identically by Muller and Griffin.

According to Muller, he showed everything, the correspondence, the accounts, etc., to Griffin, and told him all the business relationships between plaintiff and the defendant firm.

Griffin states that Muller represented to him that plaintiff was their agent at Tanga, selling goods of theirs on a consignment basis, and that he had not paid up for goods he had so sold.

Griffin denies that Muller ever said a word about plaintiff being a clearing and forwarding agent of the defendants at Tanga, and that he was responsible to pay for clearing and Customs dues at Tanga on the defendants' goods passing through out of the moneys he received for the goods he was selling as a del credere agent. He states that Muller said plaintiff had stolen either their goods or the proceeds of their sale.

Griffin asserts that Muller, wittingly or unwittingly, deceived him, and led him by this deception to make the arrest of the plaintiff and that had Muller represented the full facts to him he would not have arrested plaintiff.

During this interview, plaintiff, who had been sent for, turned up at Muller's office, and was told by Griffin to wait outside in the clerks' office.

After that there are some differences in the various accounts given, but substantially what happened was as follows:-

Plaintiff went to the clerks' office, at first not having realized that Griffin was a police officer, but when he was told by Rosen that Griffin was a police inspector he got frightened, and demanded to see his friend, Taibali. He was going off to find Taibali when Rosen interposed and stopped him leaving. Plaintiff then asked a clerk in the office to fetch Taibali, and shortly afterwards Taibali came.

Then plaintiff and Taibali were called into Muller's office, and Griffin told plaintiff he was under arrest, and then Taibali wanted to see the warrant on which plaintiff had been held at the office.

Inspector Griffin said, "Wait; I'll have to take Mr. Muller's statement."

Shortly after this Rosen, Taibali and plaintiff went by car to the police station, and Griffin followed on his motor bicycle.

Plaintiff was detained at the police station from about 4.30 to about 7.30, when he was released on bail.

In examining the probabilities of the memory of Griffin and Muller as to the conversation prior to the arrest, I have examined the signed statement that Muller made that evening at the

police station, which Griffin says is exactly the same as he told him in the afternoon. In that statement there is no word of the fact that plaintiff was the clearing and forwarding agent for defendants at Tanga, and I cannot help coming to the conclusion that Muller did not in reality put all the facts before Inspector Griffin at the time.

I have no reasonable doubt that Griffin placed the plaintiff under arrest as the direct result of the omissions Muller made in his statement of the dealings between plaintiff and Muller's firm.

Mr. Wright gave evidence as to the visit he and Muller paid to the Resident Magistrate to lay the complaint, but when pressed in cross-examination for the details of the conversation he (Wright) had with Muller, pleaded that this was privileged.

There is no doubt that this is a privilege of the client's, but it is one which can undoubtedly be waived by the client, and Mr. Muller was present in Court at the time and accepted the apparent benefit of the privilege.

When as at such a time the motive guiding a potential prosecutor is highly material, the refusal of a solicitor to disclose his client's behaviour and statements must presuppose that the motive of the client as disclosed by his behaviour and statements was not likely to redound to his benefit.

Mr. Muller has assured us that his motives were of the purest and most altruistic character, but this hardly seems to fit in with the threat made two days before that, unless he was paid, he would proceed against the plaintiff criminally.

I fear I cannot accept Mr. Muller's statement that he was moved solely by the desire to get a wrongdoer punished. It does not, to my mind, ring true.

More particularly am I forced to this conclusion when I examined Muller's statements as to how he came to the conclusion that plaintiff had converted the money he had received for defendants' tyres and tubes to his own use.

The impression left on my mind by the lengthy statements Muller made in this regard is that he had nothing but the vaguest suspicion, based on no solid material whatever, for believing that plaintiff had done any such thing.

I find as established beyond reasonable doubt that the plaintiff was arrested as a result of the omissions Muller made when reporting to Griffin and prosecuted by Muller as a means of obtaining payment for the debt plaintiff owed to the defendant firm, without reasonable or probable cause.

It is a fact that plaintiff was prosecuted, and that, at the third appearance before the Resident Magistrate, Mr. Wright who was conducting or assisting the prosecution, stated he was calling no further evidence (one witness, Rosen, having been heard), and the Resident Magistrate discharged the plaintiff.

It is necessary for a plaintiff in an action for damages for malicious prosecution to establish four things:-

- (1) That he was prosecuted.
- (2) That he was acquitted or discharged.
 - (3) That the prosecutor moved against him without reasonable and probable cause.
 - (4) That the prosecutor was moved by malice.

To prosecute anyone from an improper motive has been held to establish malice.

There is no doubt that to invoke the criminal law for the purpose of recovering a civil debt is an improper motive.

Therefore I find that plaintiff has established all four points which it was necessary for him to do in order to succeed in an action for damages against Muller for malicious prosecution.

Muller is the recognized attorney of the defendant firm in Mombasa, and Mr. Atkinson has agreed that his power of attorney is wide enough to bind his principals in such a matter.

I find therefore that plaintiff is entitled to recover damages. against all the defendants.

The plaintiff claims by way of special damages £25 for loss of time he was detained from his business. In this he has failed to satisfy me that he has lost any specific amount.

He has further claimed by way of special damages the amount of £50 which he paid to Messrs. Ross and Christie for defending him before the Resident Magistrate.

As to this, Mr. Atkinson has argued that he is only entitled to £25 and not £50, as by section 166 (2) of the Criminal Procedure Code a Magistrate is only entitled to allow £25 costs to a successful accused, and that by Wiffin v. Bailey only those costs allowed by a Magistrate can be claimed and not the whole of the solicitor's bill.

I cannot agree that this decision affects the present case.

The Magistrate, had he allowed costs, could it is true only have ordered the prosecutor to pay \$ £25\$, but he made no order at all, and it appears to me therefore that the plaintiff is entitled. to recover the full amount he has paid his solicitors for his defence.

In respect therefore of special damages, I find plaintiff is entitled to recover \$£50\$.

Plaintiff has also claimed £750 as general damages.

Such a matter is essentially one for a jury to decide, but I have to make the best effort a single man can do to arrive at a figure which will rehabilitate the plaintiff for the injury to his position as a trader which must necessarily have been adversely affected by a series of appearances on a charge of embezzlement.

-Plaintiff's living is largely made by acting as a commission agent.

He has certainly in the past been an agent for at least one other European firm, and such firms do not like to employ or continue to employ a man who has been so charged.

Further, one effect of such a charge being instituted is to cause creditors to press for payments, and it is in evidence that the plaintiff is not in such a strong financial position that he could stand such pressure.

The only real way of rehabilitating a trader who has been wrongfully charged in a criminal court is to give him exemplary damages.

I do not think I should be doing this if I gave the plaintiff a less sum than £150 as general damages.

I therefore give judgment for the plaintiff for £200 against all defendants, and the costs of the action.

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