

IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

CV 885 of 2007

BETWEEN: VILI HETI NASILAI

- Plaintiff

AND : SIAOSI TAIMANI 'AHO

- First Defendant

AND : THE KINGDOM OF TONGA

- Second Defendant

BEFORE THE HON. JUSTICE ANDREW

Counsel: Mr. Clive Edwards for the Plaintiff
Mr. 'Aminiasi Kefu for the defendant

Dates of Hearing: 19 & 20 August 2009

Date of Judgment: 30 April 2010

RULING

The Plaintiff seeks general and exemplary damages against the defendant in respect of the conduct, acts and omissions of the police for false arrest and imprisonment of the plaintiff at Central Police Station from Friday evening the 17th November 2006 until Tuesday the 21st November 2006 and thereafter prohibited from leaving his home at night after 8pm until 6am in the morning from the 21st November 2006

until the 6th day of June 2007 resulting in the loss of his liberty for a period of over 6 months.

It is at once apparent that the events alleged to have occurred took place on the day after the riots in Nuku'alofa and I think that it is necessary to consider the facts in that context.

The Plaintiff says that he was driving along Vuna Rd in the direction of central Nuku'alofa in the vicinity of the cemetery called MALA'E'ALOA beside the former British High Commission Residence when he was signaled to stop. He says he stopped and was asked whether he knew that the road was blocked and that this was broadcast over the A3Z radio. He said he did not know it was blocked and was taken to the Central Police Station where he was locked up without being informed of the grounds of his arrest or the offence he had committed.

The Plaintiff says that at Central Police Station his wallet and mobile telephone were removed from him and he was locked in the cell. He says he was not seen by a Police Magistrate until Monday the 20th November 2006 when he told the Magistrate that he was being charged in respect of his own money from his bingo business. [This was approximately \$600 and he says it was not stolen money]. The Magistrate apparently told the police to investigate his case properly and let him of. However the plaintiff says, at the request of the Police he was detained in custody for another 7 days without doing any further work on him until his interview on 22/11/2006 on which date he was released on bail.

The Plaintiff was locked up at the police station from the 17th November 2006 to 20th November 2006. He says:

- [1] He had not committed any criminal offence.
- [2] He was not informed or advised of the reason for his imprisonment.
- [3] He was not interviewed by the police after the arrest.
- [4] He was arrested without a warrant.

He says on the 20th November 2006 he was charged with receiving stolen property. On that date he was taken before the Magistrate who granted bail to appear on the 27th November 2006.

A condition of the Plaintiffs bail required that he be under home arrest from 8pm until 6am every day from 21st November 2006 until the completion of his trial which ended on 7th June 2007. The plaintiff says that the sum of \$649.55 which was alleged to have been stolen was his lawful property which derived from his Bingo business. On the 7th day of June 2007 the police offered no evidence and the charge was dismissed. He says the police returned his money but not his mobile phone which had also been taken from him.

The Plaintiff claims:

[1] The sum of \$8,000.00 general damages in respect of unlawful arrest and imprisonment

[2] The sum of \$27,000 general damages in respect of malicious Prosecution loss of liberty and inconvenience.

[3]The return of his mobile phone or the sum of \$400.00

1. THE ARREST OF THE PLAINTIFF

The plaintiff claims that he stopped at the check point when told to do so and that he was never told why he was being arrested.

The evidence before the court however is somewhat different. In cross examination he agreed that he believed he was being imprisoned for failure to stop at the check point. He agreed that he had failed to stop. This was on the 17th November 2006 i.e the day after the riots in Nuku'alofa when the national security situation was at its highest and when the situation was tense. The plaintiff agreed that the police, at the scene, told him he was being arrested for failing to stop. On balance, I am satisfied that he did not stop at the check point when signaled to do so. The simple fact is that he pleaded guilty to this charge at the Magistrates Court. I think it probable that when he failed to stop he hit a barrier. I think also that the accused had been drinking. It was

reported that he smelt of alcohol when arrested. His companion [his nephew] was known to be affected by alcohol. He said that he had raised a drink to his lips beforehand but then realized he must not drink. The unlikelihood of this story is more confirmation that he had in fact been drinking.

The plaintiff was told that he would be taken to Central Police Station. The police had statutory power to put the plaintiff into custody without warrant.

When the plaintiff arrived at the Police Station he was searched and found to have over \$600 on his pocket. Given the widescale looting which followed the riots I do not think it surprising that the police suspected that the money was stolen.

Under S.2[a] of the Police Act, a police officer has the power to arrest without warrant if he suspects, on reasonable ground, that someone has committed a criminal offence.

In FAINGA'A .V. LELEA & ORS [2005], the ingredients of a lawful arrest were set out as follows;

- [1] There must be reasonable grounds for suspicion that a person has committed an offence.
- [2] The person arrested must be told that he is arrested; and
- [3]The person arrested submits to the physical powers of the Police.

I am satisfied that all three elements have been established and that it cannot be said that the plaintiff was falsely arrested.

2. FALSE IMPRISONMENT

The police had statutory power to put the plaintiff into police custody without warrant. He had been lawfully arrested. The plaintiff went in to custody on the night of 17th November. In the circumstances of the riot the Magistrate was not available to deal with the custody of the plaintiff until Sunday 19th November. He was before the court again on Monday 20th November. On both occasions the Magistrate made a ruling as to

the custody of the plaintiff and ordered that he be kept in custody until Monday 27th November. On Monday 20th November the police were aware of the plaintiff's complaint that the money found on the plaintiff was his own. The police had told the Magistrate that this explanation would be examined and on the 27th November the Magistrate granted bail having been satisfied that the plaintiff's explanation was correct. I am satisfied that police procedure was that a Chief Inspector had to consider and approve the intention to dismiss the charge. The plaintiff remained on bail albeit with strict conditions which confined him to a curfew at night. It seems to me that the plaintiff had a remedy in that he could have appealed against this decision which he did not do.

The tort of false imprisonment has two elements; the fact of imprisonment and the absence of lawful authority to justify it.

I cannot find that there was a lack of lawful authority in the circumstances even though I think that the curfew imposed was harsh. But that was the decision of the Magistrate and not of the police.

MALICIOUS PROSECUTION

I agree with the submission that ingredients of the tort of malicious prosecution are as follows.

[1] The plaintiff must identify the individual person or persons alleged to have mitigated the prosecution; and

[2] The person or persons instigated the prosecution based on malice, that is, there was an absence of reasonable and probable cause based on malice.

I think that the plaintiff was caught up in the events of the riot.. Firstly by driving through a road block and then being found in possession with a large amount of money at a time of large scale looting. But for all of the reasons already given and in all of the circumstances which transpired I cannot find that his prosecution was malicious, that is, I am not satisfied that there was an absence of reasonable and probable cause.

The plaintiff also claims the return of his mobile phone or alternatively

the sum of \$400.00. He alleges the phone was taken from him at the police station and never returned although the amount of money which was also taken was returned.

There is no record at the police station of a phone. The entry in the cell book which was completed shortly after he was taken into custody makes no reference to a phone. In his evidence he spoke of a different amount of money to that which was returned to him. But I think that it is generally agreed that the amount was always \$649.55. That was the amount in the statement of claim. But he has given evidence of about \$900 or \$800. I think the plaintiff is prone to exaggeration. Also he has changed his story by admitting that in fact he did drive through a road block. In these circumstances I have doubts about his credibility and in the absence of some credible evidence that he did surrender his telephone. I am not satisfied on balance that his phone was handed in at the police station.

For all of the above reasons the plaintiff's claim fails and I give judgment to the defendants.

ORDERS:

1. The plaintiff's claim is dismissed. I give judgment to the defendants.
2. Costs to the defendants as agreed or ^{TAXED} fixed.

NUKU'ALOFA: 30 April 2010


JUDGE