

BETWEEN: JENECK SAMUEL PATUNVANU
Claimant

AND: THE REPUBLIC OF VANUATU
Defendant

Coram: *Mr. Justice Oliver A. Saksak*

Counsel: *Kiel Loughman fo the Claimant
Hardison Tabi for the Defendant*

Date of Hearing: *10 and 16 December 2014*

Date of Judgment: *13th February 2015*

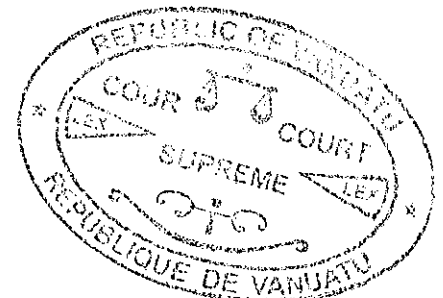
JUDGMENT

Introduction

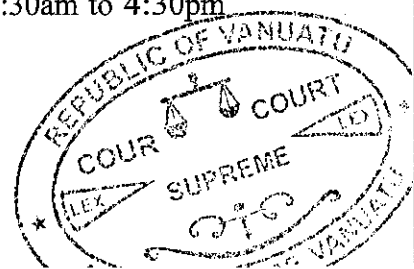
1. The claimant is a Ni-Vanuatu qualified sea captain for 30 years in Port Vila and carrying on business under the name "Marine Safety Vanuatu".
2. The defendant is the Republic of Vanuatu.

Background Facts

3. Sometimes in January 2011 the claimant signed a lease agreement with Carl Belden regarding two vessels, namely the MV Christine Leigh and MV Kaona. Subsequent to that signing the claimant went to the Solomon Islands to bring the two ships to Vanuatu with the help of some crew members from the Solomon Islands.
4. The Claimant captained the MV Christie Leigh and sailed from the Solomons on or about 14th January 2011 arriving in Port Vila on or about 20th January 2011 at 2100 hours.
5. The MV Kaona was captained by Captain Billy Mamaloni which sailed from the Solomons on the same date and arriving in Port Vila at Mid night on 20th January 2011. Both ships were anchored off Malapoa Point on arrival.



6. On 24th March 2011 Abel Kone made a formal complaint statement against the claimant alleging misappropriation, theft and forgery.
7. On 18th and 19th May 2011 Abel Kone made an additional complaint statements against the claimant and further alleging theft of VT 75.000.
8. On 6th April 2011 the Harbour Master, Captain Luke Beandi made a formal complaint statement to the Police alleging that the claimant and Captain Billy Mamaloni had breached section 5(a), (b), (c), (d), (e), and (f) of Ports (Operations in Port Vila) Regulations Cap.26.
9. Following the complaint of Captain Luke Beandi, the Police arrested the claimant at the Vila Mall at about 12'oclock noon on 21st April 2011. The Claimant was having lunch with a member of Parliament at the time. Four Police Officers in uniform arrived and arrested the claimant and put him in the metal cage at the back of the Police Vehicle. They then drove through town back to the Police Station.
10. At the Police Station the claimant was told to get out of the cage and go into the office. He was told he would be locked up in a cell. He was then locked up.
11. The claimant being asthmatic and on medication had difficulty breathing inside the dirty and smelly cell. He asked the Police Officers to retrieve his spray from his wife at the family home at Tagabe. After about an hour, the Police returned with the claimant's spray.
12. Later on 21st April 2011 at around 3:30pm the Police took the claimant before the Magistrate Court. He was formally charged in Criminal Case No. 72 of 2011 for breach of section 5 of the Ports Regulations Cap 26 on 8th April 2011.
13. Also during his appearance in the Magistrate Court on 21st April 2011 Mr Loughman sought bail on behalf of the claimant. Bail was granted on conditions that-
 - a. He must not leave Efate,
 - b. He must not interfere with Prosecution witnesses,
 - c. He reports to the Prosecution Office every Friday between 7:30am to 4:30pm(Sic)



- d. He appears on 13th May 2011 at 8:30am for plea,
- e. Any breach of conditions would result in his arrest and detention.

14. The case was listed and called for plea on the following dates-

- a. 13 May 2011, the prosecutor did not appear
- b. 30th May 2011, the prosecutor did not appear again.
- c. 24th June 2011, the prosecutor did not appear
- d. 6th July 2011, the prosecutor did not appear
- e. 22nd August 2011, the prosecutor did not appear and the Court dismissed the case for want of prosecution.

On each of those dates, the claimant appeared in Court.

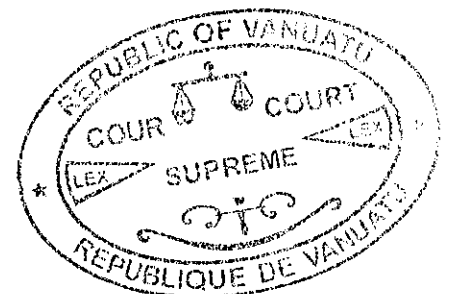
15. On or about 20th June 2011 the defendant commenced the second criminal proceeding against the claimant in Criminal Case no. 173 of 2011 Public Prosecutor .v. Jenneck Samuel.

16. The charges preferred and laid against the claimant were misappropriation (Count 1), theft (Count 2) and forgery (Count 3).

17. On 14th July 2011 the claimant appeared in Court and pleaded not-guilty to all the charges. The Court adjourned the case for trial to 21st July 2011.

18. On 21st July 2011 the claimant appeared in Court however, the prosecution entered a nolle prosequi in respect of all three charges laid against the claimant.

19. The claimant was detained for 3 ½ hours at the cell in the Police Station.

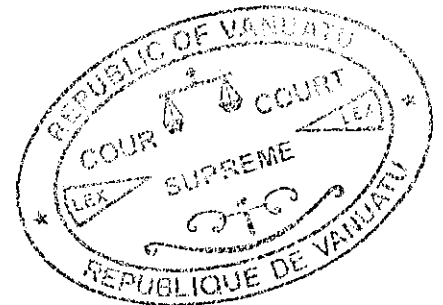


Claims

20. The claimant claims that- (a) his arrest was unlawful as it was carried out without a bench warrant.
- a. His detention for 3 ½ hours was unlawful imprisonment, and
 - b. His prosecution in Criminal Case 72 of 2011 and in Criminal Case 173 of 2011 were for reasons other than to prosecute him as an offender, therefore those amounted to malicious prosecutions.
21. The claimant claims compensation as follows:-
- a. Damage for humiliation and share- VT 500.000
 - b. For false imprisonment- VT 1.000.000
 - c. For malicious prosecution in Criminal Case no. 72 of 2011- VT 2.000.000 and in Criminal Case no. 173 of 2011, VT 2.000.000,
 - d. Interests at 5% per annum, and
 - e. Costs

Defence

22. The defendant denied liability on the basis of the complaints of Abel Kone and Captain Luke Beandi. They claimed in their defence that the complaint of Abel Kone showed that forgery and theft were presumed to have been committed. They claimed that these being cognisable offences, the police did not need a warrant of arrest prior to arresting the claimant. They further claim that the subsequent detention of the claimant was not unlawful. Further they claim that the prosecutions of the claimant in Criminal Cases no 72 of 2011 and no. 173 of 2011 were done in good faith. Finally the defendant claims that the claimant has not suffered any loss or damage and that he is not entitled to any of the reliefs or damages he claims.



Evidence

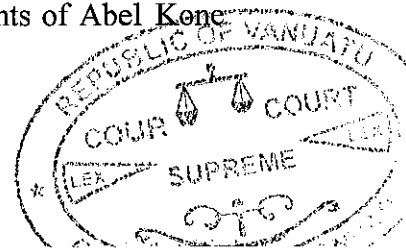
23. The claimant relied on his evidence by sworn statement filed in support of his amended claims on 27th November 2014. He was cross-examined by defence counsel. His statement was tendered as exhibit C1.
24. The defendant relied on the evidence of Inspector Allan Row Bani dated 30th October 2014 (Exhibit D1), on the evidence of Senior Sargeant Wycliff Tarilenga dated 16th December 2014 (exhibit D2) and on the evidence of the then Acting Public Prosecutor Mr Leon Malantugun dated 16th December 2014 (exhibit D3). All these witnesses were cross-examined by Mr Loughman.

Issues

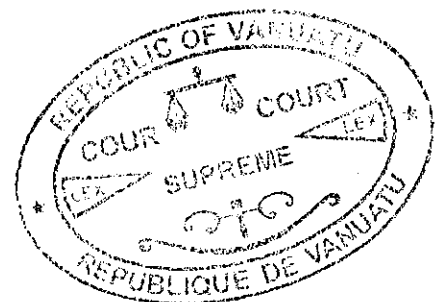
25. The defendant raised the following four issues in their written submissions filed on 26th January 2015-
- a. Whether the claimant's arrest on 21st April 2011 amounted to unlawful arrest?
 - b. Whether the claimant's detention in custody on 21st April 2011 constituted false imprisonment?
 - c. Whether the prosecution of the claimant in Criminal Case no. 72 of 2011 amounted to malicious prosecution?
 - d. Whether the prosecution of the claimant in Criminal Case no. 173 of 2011 amounted to malicious prosecution?

Discussions

26. I now consider and determine together the issues in (a), (b) and (c) above. From the evidence it is clear that the claimant was arrested by the Police on 21st April 2011. That is not in dispute. Further it is the evidence that the claimant was arrested without a warrant of arrest. Again that is conceded by the defence. However the defendant argued in their submissions that the arrest on 21st April 2011 was made relying on Section 12(1) of the Criminal Procedure Code Act Cap 136 (the CPC Act). This section provides discretion to a police officer to arrest a person whom he suspects on reasonable grounds of having committed a cognisable offence. And the defendant argued in their submissions that forgery is included in the schedule to the CPC Act as a cognisable offence. They argued that on the basis of the complaints of Abel Kone



28. It is also interesting to note that Captain Luke Beandi complained about breaches of Section 5 of the Ports Regulation also against Captain Billy Mamaloni who brought in the MV Kaona. However no charge was laid against him on 7th April 2011.
29. The evidence of the claimant which is not disputed was that he was arrested on 21st April 2011 without a warrant, detained for 3 ½ hours in a cell at the Police Station and brought to Court in the afternoon of the same day. The charge for which he was brought to Court was that signed by the Public Prosecutor dated 8th April 2011. He was later released on bail on strict conditions. He was not interviewed in relation to the offence charged until six days later on 27th April 2011 at 13.36 hours. The Record of Interview is annexed to his evidence (Exhibit C1) as "JSP2".
30. It is interesting to note from the Record of Interview that the claimant was interviewed only in relation to the complaint of Captain Luke Beandi and not in relation to the Complaint of Abel Kone, despite that that complaint was made first in time on 24th March 2011.
31. From those evidence it is clear that a day after the Harbour Master had lodged his complaint on 6th April 2011, a charge was laid on 7th April 2011, but the claimant was only interviewed 6 days later on a mere complaint without the necessary evidence to support the charge. And further no charge was laid against Billy Mamaloni who brought in the other vessel. Do those evidence show any malice in this prosecution in Criminal Case No.72 of 2011? The answer is in the affirmative.
32. In conclusion, I am satisfied on the evidence before the Court-
- a) The arrest of the claimant on 21st April 2011 was in relation to complaints of breach of section 5 of the Ports Regulation which is not a cognisable offence. As such a warrant of arrest was required prior to his arrest. As there was no such warrant, that arrest was unlawful. Section 12 of the CPC Act does not provide any protection to the Police under the circumstances.



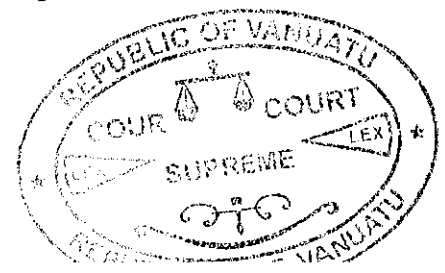
b) The detention of the claimant in the cell at the Police Station for 3 ½ hours on 21st April 2011 was false and unlawful imprisonment. The 2 ingredients of the fact of imprisonment and absence of lawful authority to justify the imprisonment established in the case of **R-V-Deputy Governor of Pankhurst Prison ex parte Hague** (1990) UKHL 8 adopted in **Willie –V-Commissioner of Police** [2012] VUSC 3 provide strong authority in favour of the claimant.

c) The prosecution of the claimant in Criminal case no. 72 of 2011 was simply bad. He was charged without the evidence to support the charge. He was charged prior to being interviewed. There was another captain who was complained against but he was not charged. Those are the facts what made this prosecution malicious. The test established in the case of **Martin.V. Watson** [1994] 2 All ER 606 was satisfied by the claimant.

33. The claimant was clearly humiliated and shamed in front of a member of parliament. He is an experienced seaman of 30 years, and a former Harbour Master. He clearly suffered in the Police cell and had to seek help in bringing up his spray. The defendant had no evidence to contradict all these evidence.

34. The evidence clearly shows that the claimant was remanded on bail on 21st April 2011 and remained on strict conditions until his first appearance on 13th May 2011. When he did appear, the Public Prosecutor did not. Subsequently the case was adjourned on 3 other occasions because the Public Prosecutor failed to appear on those dates. Finally on 22nd August 2011 the charge was dismissed for want of prosecution when the prosecutor failed for the fifth time in a row.

35. From 21st April 2011 until 22nd August 2011 the claimant's movements were restricted because one of his conditions was that he must not leave Efate. Further one of his conditions was that he report to the prosecution office every Friday between 0730 hours and 1630 pm. There is no evidence to the contrary that the claimant did not abide by these conditions. Having done so, it is more probable than not that the claimant suffered loss and damages during the period from 21st April 2011 to 22nd August 2011, to which he is entitled.



36. The only explanations given for failures to attend Court on 13th May 2011, 30th May 2011, 24th June 2011, 6th July 2011 and 22nd August 2011 were that-

- a) The claimant would appear as a witness in Criminal Case no. 71 of 2011 against Abel Kone and others, and
- b) The prosecution was having difficulty in proving ownership of the MV Christie Leigh.

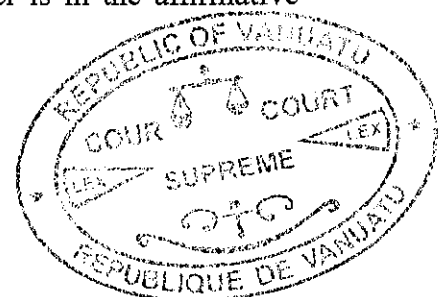
37. The claimant strenuously disputed any understanding between himself and the Public Prosecutor in relation to him and being a witness in another criminal proceeding. Mr Malantugun's oral evidence indicated that this proceeding was criminal case no. 71 of 2011. However there was no documentary evidence to show and confirm that-

- a) Formal complaints were lodged against Abel Kone and others,
- b) Formal charges were laid against Abel Kone and others, and
- c) Criminal case no. 71 of 2011 was filed and registered.

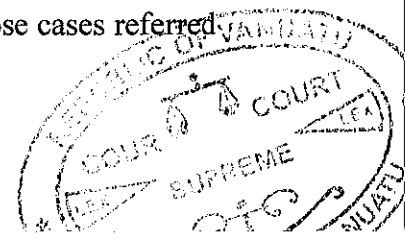
The claimant's submissions make references to this case and Criminal Case no.66 of 2011 but that the claimant was never called as a witness in either case.

38. The Court accepts the claimant's version as more credible because if indeed and in fact there was such understanding, the public prosecutor was obliged to attend Court on the first plea date being 13th May 2011 as an officer of the Court and inform the Court accordingly. Likewise, if the Public Prosecutor was having difficulty with his evidence as to ownerships his best option was to attend Court on 13th May and do the honourable thing; that is to invite the Court to enter nolle prosequi. Sadly that was not the case. There were simply no appearances without any explanations or cause to the Court on the first plea date allocated and on subsequent adjourned dates. Those non-appearances were non-excusable. And the Court is satisfied that the claimant suffered losses and damages as a result of those actions and/or omissions.

39. Now for the fourth issue of whether the prosecution of the claimant in Criminal Case 173 of 2011 amounted to malicious prosecution? The answer is in the affirmative also.



40. The evidence was that the charges of misappropriation theft and forgery were laid following the complaints of Abel Kone made on 24th March 2011 and on 18th and 19th May 2011. That is undisputed evidence. The difficulty is that when the police interviewed the claimant on 27th April 2011, six days after his arrest, detention, Court appearance and bail, the police did not raise any questions to the claimant about the allegations made against him by Abel Kone. And the defence did not produce any evidence showing (a) witnesses statements to support the allegations and (b) any suspect statement from the claimant as defendant or accused at the time.
41. Faced with that scenario the Public Prosecutor took decisions to prosecute the claimant and laid formal charges dated 11th July 2011. This is annexed to the sworn statement of Sgt. Wycliff Tarilenga (Exhibit D3). The case was then listed for a preliminary hearing on 21st July 2011. When the case was called by the Magistrate to assess the evidence and decide whether there was a prima case to commit the claimant as accused to the Supreme Court, the prosecution invited the Court to enter nolle prosequi. Their defence is that there was insufficient evidence against the claimant. Was that a malicious decision? In my view it was. That decision could and should have been made right at the beginning when considering the complaint, the witnesses statements and the suspects statement to assess whether on the basis of the material before her, a guilty plea and conviction could be secured or reached. To set a prosecution in motion without such consideration and assessment and to make that decision at a preliminary inquiry stage was simply malicious, if not a neglect of duty. In my view the test set out in Martin v. Watson were satisfied by the claimant in this case.
42. Having found as I have the final issue is whether the claimant is entitled to the damages and reliefs he seeks in his claims? The answer is in the affirmative.
43. Mr Loughman makes references to a number of Supreme Court cases which lend support to the claimant's claims for damages for unlawful arrest, unlawful imprisonment, anxiety and emotional stress and malicious prosecution. I accept those cases as authority for allowing the claimant's claims for damages for unlawful arrest, unlawful detention or imprisonment, malicious prosecution and damages for humiliation, anxiety and emotional distress. I note that in each of those cases referred



amounts of damages awarded vary according to the circumstances of each claimant and case.

44. In this case the defendant having denied liability has not made any submissions in response to the cases referred and/or the amount of damages. And I must accept that the amounts claimed by the claimant are adequate and sufficient to compensate him for all his losses and damages.

45. In my opinion the claimant's case differs in its circumstances from the circumstances of the claimants in the cases referred. These cases are:-

- a) **The Police v. Garae** [2009] VUCA 9, CC 34/2008.
- b) **Solomon Brenett v. The Government** [2004] VUSC 130, CC 2/2003
- c) **Benard v. Minister for Immigration** [2001] VUSC 20, CC 30/1997
- d) **John Reid Willie, Silas Willie & Mickie Sarginson .v.The State,** CC 152/2008
- e) **Claire Dornic & Others v. Republic & Others** [2012] VUSC 248 CC 18/2002 and CC 29/2003, and
- f) **Michel & Others V. Government** [2003] VUSC 133, CC 27/2000.

Conclusions

46. I therefore enter judgment in favour of the claimant and award damages as follows:-

(a) Unlawful arrest including shame and humiliation	VT1.000.000
(b) False Imprisonment	VT 1.000.000
(c) Malicious Prosecution (in two criminal cases)	VT 4.000.000
(d) Interests at 5% per annum from 21 st April 2011 to Judgment	VT 300.000 x 3 = VT 9.00.000
TOTAL	VT 6.900.000

47. The claimant is entitled to his costs of and incidental to the action on the standard basis as agreed or taxed.

DATED at Port Vila this 13th day of February 2015

BY THE COURT


OLIVER.A.SAKSAK

Judge

