

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**MOSHI DISTRICT REGISTRY****AT MOSHI****CIVIL CASE NO. 4. OF 2020****MARY PETER OTARU PLAINTIFF****VERSUS****ONESMO BUSWELU 1ST DEFENDANT****NAMSEMBA MWAKATOBÉ 2ND DEFENDANT****THE ATTORNEY GENERAL..... 3RD DEFENDANT****JUDGMENT**

23/11/2022 & 25/1/2023

L.M. Mlacha,J

The plaintiff, Mary Peter Otaru (70) seeks compensation for unlawful arrest and detention. She alleges to have been arrested and detained at Sanya Juu Police Station for 5 days on orders of the District Commissioner for Siha district, Kilimanjaro region and later discharged without being charged or sent to court. She thus filed a suit against Mr. Onesmo Buswelu (the District Commissioner), Namsemba Mwakatobe (the District Commanding Officer - OCD) and the Attorney General (hereinafter



referred to, where situation allows, as the first, second and third defendants) seeking damages for unlawful arrest and detention.

It was stated in the plaint that the plaintiff was arrested and detained for 5 days from 23/12/2019 to 24/12/2019 and from 27/12/2019 to 30/12/2019 unlawfully at Siha police station. That she was harassed and embarrassed during the arrest and detention thereby causing suffering and lowering her reputation as Managing Director of OTARU Manufacturing and Trading Company Limited, a company doing agricultural activities at Siha district. It was stated further that the first defendant called her in his office where she found several people who included the second defendant and officers of KNCU (1984) Ltd. She was then asked to answer questions about a lease agreement between OTARU Manufacturing and Trading Company Limited and KNCU 1984 LTD which she declined to answer because the matter was pending in court. Following the refusal, the first defendant ordered the second defendant to arrest and take her to the police station where she stayed for 5 days. The plaintiff regard the arrest and detention as unlawful and is praying for the following orders:

- i. A declaration that the acts of the defendants violated the law.



- ii. General damages for unlawful confinement/detention Tshs. 350,000,000/=.
- iii. An injunction against the defendants to stop harassment of the plaintiff.
- iv. Refund of USD 4,000 which was paid to KNCU 1984 LTD on the orders of the district commissioner
- v. Costs of the case and any other relief the court may deem fit.

The defendants filed a joint written statement of defence and denied the claim. It was stated that the first defendant under his official capacity wrote the plaintiff a letter as the Managing Director of OTARU Manufacturing and Trading Company Ltd requiring her to attend a meeting between her company and KNCU (1984) Ltd on 23/12/2019. The plaintiff arrived but refused to answer the first defendant's questions who responded by ordering the second defendant to take her to the police station for more interrogation because she had disobeyed a lawful order. They denied liability and put the plaintiff to strict proof.

The plaintiff was represented by Elidaima Mbise and Jacob Malik advocates while the defendants were represented by Yohana Marco,

state attorney. With the assistance of counsel, the court framed two issues namely;

1. Whether there was a false imprisonment of the plaintiff herein caused by the order of the first and second defendant herein jointly and severally.
2. What remedies are the parties entitled to.

It was the evidence of PW1, Mary Peter Otaru (70) that she was detained at Sanya Juu Police Station for 5 days on orders of the first defendant acting in his capacity as District Commissioner. She stayed at Sanya Juu police station for 5 days. She said that she received a letter from the first defendant dated 20/12/2019 requiring her to attend a meeting in his office. She came in response to the call but did not want to discuss the matter because the first defendant was not a party to the contract between her and KNCU (1984) Ltd. Further that, there was a case at the Court of Appeal between her and KNCU (1984) Ltd. The first defendant ordered the second defendant to take her to the lock up where she was detained on 23/12/2019, 27/12/2019, 28/12/2019, 29/12/2019 and 30/12/2019. She said that Josephat Ambrose Mushi, Lydia Francis

Shirima and Jesca Robert Otaru used to bring food to her and could prove this.

PW1 went on to say that the case between her and KNCU is still pending in court. To prove this she tendered a copy of the Notice of Appeal to the Court of Appeal which was received as exhibit P1. She proceeded to say that she did not receive any notice from Mangwembe 2011 company Ltd on the issue adding that she was never interrogated in the presence of her advocate. She went on to say that the District Commissioner forced her to pay USD 4,000/= which she paid. She never abandoned the farm as alleged. Neither did she receive the 30 days' notice. She stressed that she was detained by the second defendant on orders of the first defendant. She was detained up to 30/12/2019 at about 17:30 hrs.

PW1 went on to say that on 24/12/2019 she was called at the office of the OCD where she met the District Commissioner and KNCU (1984) Ltd Officers. The District Commissioner said that she should pay the rents. She told him that she had crops in the farm which could be used to pay the debt of KNCU (1984) Ltd but he could not hear her. She was ordered to go home to issue the cheque. The district commissioner directed her to write the cheque without indicating the debt. She went home and

wrote a cheque for USD 4,000 and addressed it to KNCU (1984) Ltd. She sent it to KNCU on the same date. A copy of the cheque was received as exhibit P2.

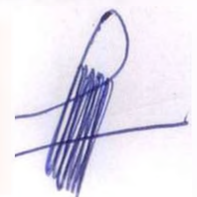
PW1 proceeded to tell the court that she was bailed out on 24/12/ 2019 directed to report at the police station on 27/2/2019. She came and went to see the OCD. Josephat Ambrose, Lydia Francis Shirima and Jesca Robert Otaru accompanied her. She entered in the office and met KNCU officials, officials of Mangwembe 2011 Company Ltd and an official from Dodoma. The OCD directed her to see Afande Hassan. Hassan referred her back to the OCD saying he did not know the issue. The OCD called a female police who sent her back to the lock up. KNCU officials said that the amount in the cheque was too small. She said that was the only money she had but they could not agree. She stayed in the lock up from 27/12/2019 till 30/12/2019 when she was bailed out by Lydia Francis and another person. She said that the lock up was very cold and crowded. There were a lot of mosquitoes and a bad smell due to feaces and urine in the buckets. Her health was affected. She could not eat in the lock up.



PW1 went on to tell the court that her farm was invaded on 31/12/2019. She was also called by the PCCB who interrogated her on a direction of the District Commissioner.

PW2 Josephat Ambrose Mushi (73) told the court that the first defendant called the plaintiff in his office and ordered the second defendant to detain her. She was detained at Sanya Juu police station. She was detained for 5 days, that is, on 23/12/2019, 27/12/2019, 28/12/2019, 29/12/2019 and 30/12/2019. He was the one who was taking food to her. He was bringing food in the morning, noon and evening. He was with Lydia Francis Shirima and Jesca Robert Otaru.

PW2 proceeded to say that he escorted the plaintiff to the office of the District Commissioner on 23/12/2019. He was present when the order of arrest and detention of the plaintiff was made. Other people in attendance were KNCU officials, Mangwembe 2011 Company Ltd officials, Ms Maua from the office of registrar of Co-operatives and the OCD of Siha. The District Commissioner asked her questions. The plaintiff said that she had a case before the Court of Appeal and was unable to answer questions. She admitted to be indebted to KNCU (1984) Ltd. The District Commissioner said that she was stubborn and regarded him as



stupid. The plaintiff said that she was respecting the flag, the office and people in attendance. The District Commissioner ordered the OCD to put her under arrest. He said that there was death and life but the plaintiff had chosen death. The OCD questioned the plaintiff on whether she had a case at the Court of Appeal. She said yes. She took her to the police station. PW2 escorted her. They entered in the office of the OCD. KNCU officers, Mangwembe 2011 Company Ltd officers and the registrar of co-operatives entered inside. The District Commissioner came and asked about the progress of payments. The OCD replied that there was no progress. He ordered that the plaintiff should be detained. The plaintiff was sent to the lock up.

PW2 went on to say that he took food to her on 23/12/2019, 27/12/2019, 28/12/2019, 29/12/2019 and 30/12/2019. They attempted to bail her but the district commissioner refused.

On 24/12/2019 the plaintiff was released so that she could write a cheque. She wrote the cheque. She was required to report at the police station on 27/12/2019. He and the plaintiff came at the police station on 27/12/2019. The District Commissioner came in the company of KNCU officials and Mangwembe 2011 Company. He said that the amount of

money paid was little like a drop of water. He ordered the plaintiff to be taken back to the lock up where she stayed up to 30/12/2019. She was released on this date but was thereafter summoned at the PCCB offices. The matter is still pending with the PCCB. She is still reporting there to date.

PW3 Ms. Lydia Francis Shirima (54) and PW4 Jesca Tadei Ndibalema supported the evidence of PW1 and PW2. They all said that the plaintiff was arrested and detained at Sanya Juu police station on orders of the District Commissioner. PW1 was recalled to tender two letters; the letter from the office of the District Commissioner calling her to attend the meeting, exhibit P4 and a complaint letter from her advocates addressed to the Judge In charge, exhibit P5.

It was the evidence of DW1, Joseph Paschal Mabiti (41), the District Administrative Secretary (DAS) for Siha district that he has been there for 4 years now. That, on 23/12/2019 he was on duty attending a meeting which had been called by the District Commissioner to discuss a complaint which had been lodged by people against the plaintiff in respect of her farm which had been left as a bush without any activity. He went on to say that the plaintiff was also indebted to the tune of Tshs

277,000,000/= by KNCU 1984 Ltd in terms of rent. This was seen in the eviction notice from Mangwembe 2011 Company Ltd who had been assigned to collect the debt. That the district commissioner saw it proper to call the parties for a reconciliation. They sat in the meeting for that purpose. The District Commissioner asked the plaintiff when she was going to pay the debts but the plaintiff refused to answer the question saying there was a case in court. The District Commissioner made a phone call to the KNCU lawyer who said that there was no case in court. He came back to the plaintiff who said that she was not ready to say anything. He tried to talk to her friendly but she refused. He handled her to the OCD for a discussion. She was a woman and he expected that they could agree. The OCD picked her.

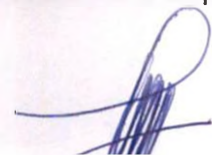
DW1 went on to say that the farm remained without any activity. It was bushy. People needed the land but could not enter due to the contract between the plaintiff and KNCU (1984) Ltd.

DW2 SSP Namsembe Mwakalobe (47) was the OCD of Siha district in 2019. She told the court that she attended a meeting of the Defence and Security Committee at the office of the District Commissioner on 23/12/2019. It was discussing complaints of deserting a farm which had

turned bushy and dangerous security wise. There were also complaints that rents could not be paid. The plaintiff had been summoned to pay the debt and speak about the status of the farm. The plaintiff said that she was not ready to speak anything in the absence of her lawyers. She was asked to speak but refused. It was decided that she should be taken to the police station to speak to her lawyers. They stayed with her up to the evening but her Lawyers could not come. She was then put in the lock up until 24/12/2019 when she was bailed out. She was put on the lock up again on 27/12/2019 but DW1 did not recall when she was released.

DW2 proceeded to tell the court that she put her to the lock up because she disobeyed the lawful order of the District Commissioner who demanded explanation as to why she was not developing the land or paying rent. She was not ready to say anything in the absence of her Lawyers. She received an order to send her to the police station which she complied. She obeyed it because it was a lawful order from the District Commissioner. She admitted that the plaintiff was bailed out on 24/12/2019 but returned back to the lock up on 27/12/2019.

DW3 Godfrey Masawe (46) is an employee of KNCU [1984] LTD in the capacity of Commercial Manager and Acting General Manager. He said that KNCU (1984) Ltd has an agreement with OTARU Manufacturing and Trading Company Ltd for farming and livestock development in the farm. On 23/12/2019 he attended a meeting at the office of the District Commissioner because they had engaged a broker to evict OTARU Manufacturing and Trading Company Ltd. They had issued a notice to evict the company and the District Commissioner needed to know what had happened. They told him that OTARU Manufacturing and Trading Company Ltd was in rent arrears. He needed to know if OTARU was aware of the debt. The plaintiff said that she was not ready to speak because the matter was in court. She was also not ready to speak without her lawyers. She remained silent. KNCU Lawyer told the District Commissioner that there was no case in court. DW3 reminded them that there was a case, Land Case No. 21/2017 between OTARU Company and Independent court Brokers and KNCU (1984). The court had dismissed the case. He tendered a copy of the decision, exhibit D1. He tendered a copy of a ruling on an application for extension of time, exhibit D2. It involved OTARU Company and KNCU (1984) Ltd. He also tendered a copy



of the contract between KNCU [1984] Ltd and Mangwembe 2011 Company Ltd who were assigned to evict the plaintiff, exhibit D3.

DW3 proceeded to say that Mangwembe was assigned to collect the debt but the District Commissioner prevented them and called the meeting. Mangwembe started their job again on 30/12/2019. He added that the OCD picked the plaintiff for some discussions (on 23/12/2019). She remained with her. OTARU Company paid USD 4,000 on 24/12/2019.

DW4 Onesmo Mkuya Buswelu (50) was the District Commissioner of Siha district in 2019. He told the court that on 23/12/2019 he had a meeting with KNCU (1984) Ltd, OTARU Company and Mangwembe brokers. He called the meeting after receiving a copy of a notice of eviction from Mangwembe brokers who needed to evict OTARU Company from the farm. He had earlier received complaints from people who said that OTARU Company had failed to develop the farm which had turned to be a bush, a home for wild animals. He called the meeting to ensure peace and payment of KNCU money. The plaintiff told her that there was a case in court and was not ready to talk. She said that she was not ready to talk without her advocates. She declined to give co-operation. Wisdom lead him to believe that the plaintiff did not bother about his authority or



the economy. He directed the OCD to send her to the police station. The OCD complied. She remained with her up to 24/12/2019 when she was given bail. He said that his order started on 23/12/2019 and ended on 24/12/2019. He never gave any other direction to the OCD or any other person. He added that there was no base to sue him personally while he acted as the District Commissioner for Siha.

Counsel had a chance to make final submissions. They all had the opinion that the court should examine section 14(1) (2) and 15 of the Regional Administration Act Cap 197 R.E 2002 to see if the arrest and detention was lawful or not. I am in agreement with counsel but I think there is also need to examine the Co-operative societies Act to see if the District Commissioner has a role in collecting debts and or enforcing contracts of cooperative societies. I will examine the law but I think there is need of pointing out some facts which are admitted directly or indirectly thus requiring no discussions. I have the following facts.

One, that the plaintiff is the Managing Director of OTARU Manufacturing and Trading Company Ltd which has a lease agreement with KNCU (1984) Ltd in respect of the farm. OTARU Company and KNCU had a case in this court, Land case number 21 of 2017 which was decided in favour

of KNCU. OTARU were not happy with the decision have lodged a Notice of Appeal to the Court of Appeal. **Two**, that, KNCU (1984) Ltd engaged Magwembe 2011 Company Ltd to collect the debt and evict OTARU. **Three**, that the District Commissioner called a meeting at his office on 23/12/2019 to discuss issues of the farm with special attention to none payment of rent. KNCU (1984) Ltd officials, the plaintiff, an officer from the office of registrar of cooperatives and Mangwembe Company attended the meeting. **Four**, that the District Commissioner asked the plaintiff to say when she was going to pay the debt who refused to answer the question saying the matter was in court. She also needed the attendance of his advocate. The District Commissioner found her to be stubborn in disrespect of his authority and directed the OCD to take her to the police station where she stayed till 24/11/2019 when she was bailed out after paying USD 4,000. It is also agreed that she was returned to the lock up on 27/11/2019 but the District Commissioner decline to have made this second order. The OCD agree that she was sent back to the lock up on 27/12/2019 but could not recall when she was released. He said that she was taken to the lock up in compliance with lawful orders



of the District Commissioner. Eye witnesses say that she was released on 30/12/2019 as alleged by the plaintiff.

The first question to be resolved is whether the District Commissioner made the second order and whether the plaintiff remained in the lock up from 27/12/2019 to 30/11/2019. To resolve this question, I will revisit the evidence with some details.

PW2 Josephat Ambrose Mushi (73) was an eye witness all along. He had this to tell the court:

"I escorted the complainant. We arrived about 08:00 hours. We signed visitors' book..... In the office of the District Commissioner we found members of KNCU Council including John Boshe the chairperson of KNCU, Mr. Apolo Maruma the advocate of KNCU, Mangwembe Company personnel, Ms. Maua from office of the Registrar, the OCD of Siha. The first defendant was seated in his office..... the District Commissioner alleged that the complainant was owed by the appellant house rents. The complainant replied that she had a case at the court of Appeal He then said that she was stubborn and regarded him as stupid.....the first defendant ordered the OCD to put the complainant under arrest. Then he said there are two things, death or life and that the complainant had chosen

death..... **she was taken to Sanya Juu Police Station. I escorted her** The District Commissioner came there and asked about progress of payment. The OCD replied that nothing was done. **The district Commissioner ordered that the complainant should be detained.....**she was locked in the lock up. I took food to the complainant on 23/12/2019, 27/12/2019, 28/12/2019, 29/12/2019 and 30/12/2019. **We wanted to bail the complainant but the first defendant refused....** The complainant was required to report on 27/12/2019. The complainant reported at the police station. I escorted her. **The district Commissioner came at the police station in the company of KNCU members and Mangwembe court broker. The District Commissioner said that the amount of money (USD 4,000) was very little like a drop of water. He ordered that the complainant should be taken to the lock up, she was released on 30/12/2019"** (Emphasis added).

DW2, SSP Namsemba Mwakatobe had this to say about the arrest and detention:

"The director (plaintiff) said that she was not ready to say anything in the absence of his lawyers. She was argued to speak but refused It was ordered that we should go to the police station so that she could talk to her lawyers. We stayed with



her to the evening but her lawyers. We stayed with her to the evening but her lawyers could not come. **We decided to put her in the lockup up to 24/12/2019 when she was bailed out.** **She was put on the lock up on account of another case on 27th** I took her to the lock up because she disobeyed a lawful order of the DC who demanded her to explain why she was not developing the land or paying rent. The KNCU debt was one of the agendas..... **It is true that an order was issued to send her to the police station.** That was a lawful order. I obeyed it..... **I also recall that she was put on the lock up on 27th.** I cannot recall when she came out. (Emphasis added).

PW3 Lydia Francis Shirima said

"Mama Otaru was detained on 23/12/2019, 27/12/2019, 28/12/2019, 29/12/2019 and 30/12/2019..... I was taking breakfast and lunch to her..... we tried to bail out Mama Otaru but were denied. We were told that it was an order of the District Commissioner of Siha district. She was released on 30/12/2019 at 17:30hrs. (Emphasis added)

PW4 Jesca Tadei Ndibalema had this to say

"She was locked up again on 27/12/2019 up to 30/12/2019. My mother was weak and crying very muchthe DC ordered that she should be locked up. I was there" (Emphasis added)

Looking at the evidence of the OCD and that of PW2 it is clear that the District Commissioner made both the first and the second order. He is just denying the obvious. The OCD said clearly that she was returned to the lock up on 27/12/2019 adding that she was implementing lawful orders of the District Commissioner. The orders were not his but the District Commissioner. PW2 said that the District Commissioner came at the police station twice. In both situations, he ordered the plaintiff to be sent to the lock up. In the second trip (27/12/2019) he said that what had been paid, i.e USD 4,000, was too little making it the base for sending her to the lock up again. PW3 and PW4 supported PW2. It is thus my finding based on the evidence of PW1, PW2, PW3, PW4 and that of DW2 (the OCD) that the plaintiff entered the lock up twice, first from 23/12/2019 up to 24/12/2019 when she was bailed out to go and write a cheque, for which she wrote the cheque of USD 4,000 and second on

27/12/2019 where she remained up to 30/12/2019. She was taken to the lock up in both cases on orders of the District Commissioner which were implemented by the OCD. The OCD said that she is not aware when she was released but I think she was just trying to avoid liability. My look of her credibility on this this aspect speak otherwise. Again given the tense situation about the issue, the name of the plaintiff and her position as the OCD, she must have known the fact. Further, PW1, PW2, PW3 said clearly that she was released on 30/12/2019 and her farm was invaded soon thereafter. In conclusion therefore, there is good evidence to show that the plaintiff was sent back to the lock up on 27/12/2019 where she stayed till 30/12/2019.

The second question for consideration is whether the arrest and detention was lawful. Both the District Commissioner and the OCD say it was lawful so to do. The plaintiff has taken it as an act of breach of the law and abuse of power calling for damages. This takes us to the law.

Functions and powers of arrest and detention of the District Commissioner are contained in section 14 and 15 of the Regional Administrative Act, cap 97 R.E.2002. They include securing the maintenance of law and order in the district, determining the specific

direction of efforts in implementing government policies and other functions and duties as conferred up on him under the law. They have also a special role in the facilitation of local government authorities in the discharge of their responsibilities. Neither the Regional Administration Act nor The Cooperative Societies Act, 2003 has provisions giving him mandate to control the day to day activities of cooperative societies.

In the course of his duties, the District Commissioner can make an arrest. That is provided under section 15 of the Act which is reproduced in full for easy of reference as under:

*15. (1) For purpose of the effective and better exercise of his functions and duties under this Act, a District Commissioner shall have **power to order or cause to be arrested any person who in his presence commits, or to his knowledge has committed**, any offence for which a person may be arrested and tried.*

*(2) Notwithstanding subsection (1), where a District Commissioner has reason to believe that any person is **likely to commit a breach of the peace or disturb the tranquility**, or to do any act that may probably occasion a breach of the peace or disturb the public tranquility and that breach cannot be prevented in any way other than by*



detaining that person in custody, he may order a police officer verbally or in writing to arrest that person.

*(3) A person arrested under the powers conferred by this section shall, as soon as practicable, and in any case within **not more than forty-eight hours**, after he is taken into custody, be taken before a magistrate empowered to deal with the case by the law for the time being in force in relation to the institution and prosecution of criminal proceedings.*

*(4) If a person arrested pursuant to an order of a District Commissioner under powers conferred by this section is not brought before a magistrate within forty-eight hours after he was taken into custody, he shall, upon the expiration of that period, be **restored to freedom and shall not again be arrested under an order of that District Commissioner pursuant to this section for the same cause.** (Emphasis added)*

Section 15 (1) gives the district commissioner power to order or cause a person to be arrested who *commits an offence in his presence* or to his knowledge has committed an offence. So, there must be a person who commits an offence in his presence or whom he has knowledge that *he has committed an offence* previously. He is not expected to order an arrest if there is no offence committed by the person so arrested. There



must be an offence committed before him or which was committed previously. Subsection (2) gives him power of arrest where he has reason to believe that the person is likely to commit the *breach of peace or disturb the public tranquility* or has done any act which may probably occasion a breach of peace or disturb the public tranquility and further that, the breach cannot be prevented in any way other than by arresting that person. The powers of arrest under subsection (2) are exercisable on two conditions. One, the person so arrested must be in a position of causing a breach peace or public tranquility and two, there must not be any other way of preventing the breach other than by arresting that person. It means that, if there is another means of preventing the breach of peace, let us say by talking to the public or people affected, there should not be an arrest.

Subsection (3) puts a limit to the detention period. The person so arrested must not be under restraint for a *period exceeding 48 hours*. The law has it that he must be sent to a magistrate at the expiration of 48 hours. It means that if he not been taken to a magistrate, the arrest which might have been legal turns to be illegal. Subsection (4) state that if he is not taken to a magistrate after 48 hours, he must be *set free* and



must not be arrested again on the same cause by the District Commissioner.

In our case we are told that the plaintiff was called at the office of the District Commissioner and required to speak on issues of her contract with KNCU. She declined to respond to the questions putting forward two reasons. One, that, the matter was still pending in court and two, that she was not ready to speak anything in the absence of her advocate. The District Commissioner found her to be stubborn and ordered her to be arrested and detained at the police station. She was detained on 23/12/2022 and released on the next day, that is, on 24/12/2022. She was detained again on 27/12/2022 and released on 30/12/2022. In both situations, bail was at the domain of the District Commissioner not the police. He declined to give her bail.

Looking at what happened, I could not see any offence committed by the plaintiff calling for her arrest and detention for she had a case pending in court giving her a right to decline to make any comment on the matter. The appeal having been initiated by the Notice of Appeal, no one was allowed to discuss the matter anymore. In other words, pending proceedings are in the domain of the court and no one is allowed to

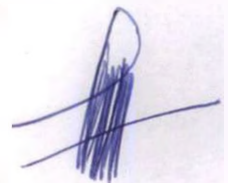
speak on anything which is pending in court. She was also justified to decline to say anything in the absence of her advocate.

There is another serious issue in the matter. The Cooperative Societies Act establish the Tanzania Cooperative Commission which is an independent government department under the Minister responsible for cooperative development. It is a body corporate with perpetual succession and a common seal. It has power to sue or be sued. Its functions are contained under section 8 which include to regulate and promote the cooperative sector. Subsection (2) has the functions and is reproduced in part as under:

"(2)... the functions of the commission shall:

a) For the purposes of regulating cooperative societies –

- i) Register and deregister cooperative societies;*
- ii) **Inspect and supervise cooperative societies***
- iii)*
- iv)*
- v) **Determine disputes and complaints arising from cooperatives societies;***
- vi) Collaborate with Regional Administrative secretaries on the implementation of regulatory functions of cooperative development;*



vii)" (*Emphasis added*)

Side with the commission there is the office of the registrar of cooperatives and his deputy. You also have the structure of cooperative societies as contained under section 9 of the Act. The whole of Part IV of the Act provides for the formation and organization of cooperative societies. Part V deals with registration of cooperative societies while part VI has the rights and liabilities of members.

Going through the Cooperative Societies Act, I could not see anywhere written that the District Commissioner has a role of supervising activities of cooperative societies or a provision which empower him to call them in his office for a discussion of any sort and or assist them in recovery of debts. Nether was it shown that the Commission delegated its functions to him. It is obvious that he assumed powers which were not vested in him but other people. He took powers which were not vested in him and used them wrongly. I will try to show.

The dispute between OTARU Manufacturing and Trading Company Ltd and KNCU (1984) Ltd was still pending in court. If the matter was still pending in court, the District Commissioner had no power to call a meeting to discuss it. The evidence show that he was informed of this

fact but did not care. Wisdom demanded that he should have adjourned the 'meeting' to call for documents and or advice from solicitor general who has an office in Moshi but he could not bother to do so. He was in a hurry to exhibit efficiency. He needed to enforce payment of the debts and recovery of the farm. He moved without legal advice leading to a serious interference of judicial functions. No wonder the plaintiff wrote a letter of complaint to the Judge In charge for this was beyond tolerance, for if anything, the debt and the farm could be recovered through execution proceedings of the this court not through an order from the District Commissioner.

And if the meeting was called based on public complaints that the farm had turned to be a bush attracting wild animals and endangering peace and security as alleged, it was not for the District Commissioner and DAS to speak for them. It was important to call any of the people to testify. None of them came before the court as a witness leaving the evidence of the District Commissioner and his DAS on this aspect hearsay and baseless. It is accordingly rejected.

What about breach of peace and public tranquility? The situation does not suggest that the plaintiff was arrested because her presence in the

office was likely to cause a breach of peace or public tranquility. She was arrested for refusing to speak on a matter which is pending in court and speaking without her advocate. She had a right to remain silent and doing so she did not commit any crime or cause any breach of peace.

There was also a requirement to inform the plaintiff of the crime against him before the arrest. This was in line with section 23 (1) and (2) of The Criminal Procedure Act, cap. 20 R.E. 2019. Subsection (1) require the person making the arrest to inform the person to be arrested of *the offence to which he is arrested*. Subsection (2) require him to inform the person to be arrested *the substance of the offence* for which he is arrested. So he must be informed of the offence and facts constituting the offence before the arrested. Instead of saying arrest and put him in the lock up (kamata weka ndani) as they usually say, he must tell the person to be arrested that he has committed a certain offence, let's say theft of public funds/ building materials or disobedience of a lawful order by doing ABC and therefore liable to be arrested. He will thereafter proceed to make the arrest and detention order. If the District Commissioner did not do so for any reason, the police officer must do so before making the arrest. Section 15 of the Regional Administrative Act



must not be read in isolation of section 23 of the Criminal Procedure Act. They must be read together and interpreted in the context of article 15 of the Constitution of the United Republic of Tanzania. For easy of reference article 15 is reproduce in Kiswahili as under:

"15.- (1) Kila mtu anayo *haki ya kuwa huru na kuishi kama mtu huru.*

(2) Kwa madhumuni ya kuhifadhi haki ya mtu kuwa huru na kuishi kwa uhuru, *itakuwa ni marufuku kwa mtu yeyote kukamatwa, kufungwa, kungiwa, kuwekwa kuzuizini, kuhamishwa kwa nguvu au kunyang'anywa uhuru wake vinginevyo, isipokuwa tu;*

a) katika hali na *kwa kufuata utaratibu uliowekwa na sheria; au*

b) *katika kutekeleza hukumu, amri au adhabu iliyotolewa na mahakama kutokana na shauri au na mtu kutiwa hatiani kwa kosa la jinai.*" (Emphasis added)

This literally means that every citizen of this country has a right to be free and live as a free person (otherwise known as freedom of movement). That it is forbidden for any person to be arrested, to jailed, to be detained or to be evacuated from any place by force or to be



curtailed of his freedom without following the law. He can only be treated so where there is a judgment or order of the court.

Looking at what was done to the plaintiff and admitted to be done, it is obvious that the order of the District Commissioner was fundamentally inconsistent with section 15 of the Regional Administration Act, section 23 of the Criminal Procedure Act and article 15 of the Constitution. It was against the law of the land which guarantee and safeguard freedom of movement of its citizen. It was against principles of good governance, including in particular, the principles of adherence to the rule of law and promotion and protection of human rights to which the nation is committed to safeguard. See also the decision of the East African Court of Justice made in **The Attorney General of Rwanda v. Plaxeda Rugumba**, Civil Appeal No.1 of 2012 on principles of freedom of movement and the right to personal liberty.

It is thus obvious that the District Commissioner acted without due regard to the law. His acts were *ultra vires*. Having formed the opinion that the plaintiff had committed an offence, which I have said she did not, he was supposed to act as provided under section 15 of the Regional Administration Act and section 23 of the Criminal Procedure Act. He failed

to comply with section 15 which gave him power to detain her for a period not exceeding 48 hours. He failed to write a report and handle her to a magistrate after the expiration of 48 hours. He detained her for a period exceeding 48 hours and released her silently. He failed to inform her of the offence with which she was being arrested. And more so, his act of moving from his office to the police station twice to make the orders and his act of taking away the powers of the police to grant bail was an abuse of state power of the highest order. He could simply call the OCD in his office or make a phone call and get what he wanted. He had no reason to go to the police station. He had no reason to refuse bail. He acted without due regard to the law and made an abuse of state power, not needed in a country like ours, which has a constitution which respect the rule of law. A constitution which he also took an oath to protect. In such a situation any affected person must be given a remedy by the court by way of an award for damages. The court must act in a way which will prevent the occurrence of such a thing in future.

I will now move to the assessment of damages. It is very well established that in cases where the award of damages is left to the judge, he can take into account the motives and conduct of the defendant and see if



there is injury done to the plaintiff. The court must take into account the malevolence or spite or the manner in which the wrong was committed, the sufferings and injury to the plaintiff's dignity and pride in assessing damages. See the decision of lord Devlin made in **Rookes v. Bernad** (1964) A.C. 1129, a decision of the House of Lords of England which was followed by the Court of Appeal in **Peter Joseph Kilibika and CRDB Bank v. Patrick Aloyce Mlingi**, CAT Civil Appeal No. 37 of 2009 (unreported).

Failure to observe the law in the manner indicated above caused suffering and injury to the plaintiff which attract damages. There is no doubt that the plaintiff being an elderly woman (70) must have suffered a lot at the lock up during the 5 days. She spoke of a cold situation which is very true because Sanya Juu is on the high side and very cold particularly during the night. She also spoke of faeces and urine in buckets which she was forced to live with them in the room for 5 days. She also said that the room was crowded. She also said she could not eat properly in the lock up. She must have suffered a lot health wise. Her reputation must also have been lowered.



Counsels for the plaintiff asked the court to award damages as prayed making reference to the case of **Peter Joseph Kilibika and CRDB Bank** (supra) where there is a general discussion of principles governing the award of general, specific and exemplary damages. They argued the court to hold the first and second defendants liable personally and award general and exemplary damages against them.

I agree that here is a situation calling for the award of damages. The basis for assessment of general damages was well explained by this court in **Hamis Abdalla v. Charles Nicholas** Civil Appeal No. 211 of 2017 (Luvanda J). The court had the view that general damages are gauged based up on pain and suffering of the plaintiff and the way he was affected by conduct or act the defendant. See also **Finca Microfinance Bank Ltd vs Mohamed Omary Magayu** Civil Appeal No. 26 of 2020 (High Court at Mbeya Karayemaha J) where it was said thus:

*"In general, one key consideration in all these propounded principles is that **general damages are awarded at the discretion of the court** after the plaintiff has averred that he has suffered such damage of the act he is complaining of and that wrong must be caused by the defendant but the*

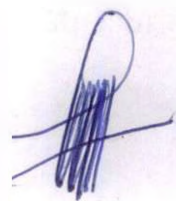
quantification of such damage is the court's question."(Emphasis added)

In view what has been said, I hold the view that, there is base for an award of general damages in this case. I will however add that, the abuse of state power which is exhibited here call for an award of both general and punitive damages. It is a situation calling for personal liability to Mr. Onesmo Buswelu on top of the liability of the government which is his employer. There must be some punitive damages directed to him personally if justice is to be seen being done.

Making reference to the case of **Rookes v. Bernad** (1964) A.C. 1129, the Court of Appeal said in Peter Joseph Kilibika (supra) that punitive or exemplary damages may only be awarded in two cases (apart from where it is authorized by statute): where there is oppressive, arbitrary or unconstitutional action by the servant of the government and secondly where the defendant's conduct was calculated to produce him some benefit, not necessarily financial, at the expense of the plaintiff. See also the decision of this court made in **Anjela Mpanduji v. Ancilla Kilinda** (1985) TLR No.16 page 19 which quoted **Devias v. Mohanlal**

Karamshi Shah (1957) E.A.352 where it was held that punitive exemplary damages are, as their names imply, damages by way of punishment or deterrent. They are given as a punishment to the defendant to prevent the occurrence of future similar acts.

There are guiding principles in the award of exemplary damages. My research has lead me to the dictum of Lord Atkin made in **Levy v. Hamilton** (1935), 135 at LT 386 who said that when considering making an award of exemplary damages, three matters should be born in mind; a) the plaintiff cannot recover exemplary damages unless he is the victim of the punishable behavior, b) the power to award exemplary damages should be used with restraint and c) the means of the parties are material in the assessment of exemplary damages. The English common law which was received in this country under article 17 of the Tanganyika Order in Council 1920. It is applicable in our courts under section 2 (3) of the Judicature and Application of laws Act cap 358 R.E. 2019. Common law recognize the award of exemplary damages to punish the defendant and deter the occurrence of a certain behavior which is contrary to the law or public policy. It is mainly directed to an individual or a body corporate.



I have considered the freedoms and liberty of movement guaranteed by the constitution which were available to the plaintiff but violated by the defendants. I have considered the age of the plaintiff, the condition of the police lock up, the duration, the sufferings and status of the plaintiff as the Managing Director of OTARU Company. I have pointed out the abuse of power and shown the manner in which it was committed. I have shown the oppressive character of the District Commissioner particularly on the way he moved to the police station to make the orders and the way he controlled the grant of police bail. An arbitrary exercise of power without regard to human rights, the law and the constitutional values. Indeed, the plaintiff suffered a lot and deserve compensation by way of award of damages. It is a situation calling for the award of both general and exemplary damages. I think it is not proper to condemn the government to pay damages and leave first defendant at large. We must put him to task personally to control him and similar people in the government who do not want to follow the law in their conduct or who want to appear effective in their operations at the expense of others. He must pay something which will deter his conduct and that of men like him for as was said by the late Nyalali C.J.in **Hatibu Gandhi and**



another v. The Republic (1996) TLR 12 (Court of Appeal) this is not a *banana republic* which is run without domestic or international respect. A country where those in power operate without observing the law. All people who hold public offices must be guided by the constitution and law in their exercise of power. They must always recall their oath of office and the duty to act in accordance with the law. And the judiciary as a third arm of state has a duty to safe guard the constitution and the law.

All said and all factors weighed carefully, I will make the following orders:

1. I declare that the arrest and detention of the plaintiff done on orders of the District Commissioner of Hai District was contrary to the law and thus illegal.
2. I award Tshs 90,000,000/= as general damages and Tshs. 10,000,000/= as punitive/exemplary damages to the plaintiff, total Tshs. 100,000,000/=.
3. Punitive damages Tshs. 10,000,000/=, will be paid by the first defendant, Mr. Onesmo Buswelu, personally, while the rest will be paid by his employer, the Government of the United Republic of Tanzania.

4. I will not make any award of damages against the second defendant, Namsemba Mwakatobe, personally, for she was merely implementing orders of the District Commissioner which she was not in a position to oppose.

5. The plaintiff shall have the costs from the first and third defendants. The first defendant shall pay 10% of the costs while the rest shall be paid by his employer, the government of the United Republic of Tanzania.

It is ordered so.



A handwritten signature in blue ink, appearing to be "L.M. Mlacha", written over a faint watermark.

L.M. Mlacha

Judge

25/1/2023

Court: Judgment delivered online through the virtual Court. I am in the High Court at Kigoma. Right of Appeal Explained.



A handwritten signature in blue ink, appearing to be "L.M. Mlacha", written over a faint watermark.

L.M. Mlacha

Judge

25/1/2023