

COSMAS NYAMBARA
versus
THE CO-MINISTERS OF HOME AFFAIRS
and
THE COMMISSIONER GENERAL
and
DETECTIVE CONSTABLE MUUYA
and
DETECTIVE SEARGENT MUSEKIWA

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 29 October 2014, 17 and 28 Nov 2014 and 4 February 2015

Trial

K Masiye, for the plaintiff
R Hove, for the defendants

DUBE J: The plaintiff's claim is for damages he suffered as an outcome of an arrest that the defendants effected on him. The defendants are the Co-Ministers of Home Affairs, the Commissioner General and two arresting details. The claim against the first and second defendants is based on vicarious liability.

The brief facts of this case are as follows. On 13 July 2009 the plaintiff was at High-Glen Shopping Centre when plain clothes policemen who included the third and fourth defendants accosted him and arrested him. The plaintiff was shot and injured during the arrest. He was detained and charged with the offence of armed robbery and possession of a firearm and later acquitted. The plaintiff avers that the police were not justified in shooting him during the arrest as he did not resist and had not committed any offence. He claims \$1 521 400-00 for special and general damages.

The defendants defend the application. They refute that the arrest of the plaintiff was unlawful. Their position is that they shot at the plaintiff after he refused to comply with the instructions of the police to stop. The plaintiff ran away resulting in the police firing 3

warning shots in the air, followed by a shot in the leg after he failed to stop and take heed of the warning shots.

The following issues were referred to trial:-

1. Whether the plaintiff was unlawfully arrested
2. Whether the plaintiff was shot at while lying on the ground
3. Whether or not plaintiff was unlawfully detained
4. Whether or not the third and fourth defendant unlawfully took the plaintiff's Truimp Galaxy cell phone, \$168-00 and a line
5. Whether or not the plaintiff suffered damages and if so the quantum of damages thereto.

The plaintiff testified as follows. He is a farmer and resides in rural Rusape. On 13 July 2009 he was on his way to High Glen Service Station to pay for diesel to use in his farming activities. Diesel was in short supply. He had come from his rural home the day before. When he disembarked from a kombi he started walking towards the service station. Two men who he later discovered were police officers ordered him to stop. He complied and they ordered him to lie down and he complied. He was shot on his left leg whilst he lay down facing the ground. The men demanded that he produce a stolen Mercedes Belch he had allegedly stolen the previous night. They asked him about the whereabouts of Gift Tyres and Godzevhu whom he does not know. They searched him and recovered a Truimp Galaxy cell phone and 168-00 which he intended to use to pay for fuel.

He started bleeding and his leg was broken and dangling. The police officers squeezed him into a Toyota Corolla with 5 occupants. He recognised one of the occupants as Constable Muuya. He knows him from as far back as 1999 in connection with a matter that took place at his rural home in which he was the Investigating Officer. He was taken to Harare Hospital where he was admitted for four days. He was charged with armed robbery and placed on remand. The allegations were that he had committed an armed robbery at T.M Supermarket in Angwa Street, Harare.

He testified that there was no need for the police to shoot him as when they stopped him and ordered him to lie down he had complied. He did not see who shot him at him as he was lying facing downwards. The police never fired warning shots and he never tried to run away. The bullet that hit him entered through the back of the leg and exited at the front. The witness denies that he was in possession of a revolver. He produced a medical report

completed by Dr Vera. He was not immediately charged with possession of a firearm. The charge was proffered only 4 months later in December 2009.

The police did not charge him with that offence because he was never in possession of a gun. He was acquitted of the charge of possession of a firearm and the charge of robbery was withdrawn after plea.

The witness insisted under cross-examination that he was coming from his rural home and had not committed any armed robbery. He insisted that he had in his possession public transport tickets for the previous day which confirmed that he had travelled from his rural home. He later gave the tickets to his lawyer. He maintained that he was shot whilst lying down and never resisted arrest. He thinks that the reason why the police shot him is because he was mistaken for Gift Tyres because they kept on asking where the Mercedes I had stolen the previous night was. He denied that the police would look for him in town when they knew his rural home. The defence called Constable Muuya as its first witness. He was with CID Homicide at the time of the plaintiff's arrest. He was the Investigating Officer of an armed robbery that had occurred at T.M Supermarket Angwa Street. There had been a spate of armed robbers and he was tasked to investigate these. He received information that the plaintiff and Gift Tyres and Godfrey Godzevhu and others were involved in the robberies. On 13 July 2009 he received information that the plaintiff was supposed to meet his accomplices at High Glen Shopping Centre. He together with other officers went to the centre and when the plaintiff arrived they identified themselves as police officers. The plaintiff immediately took to his heels. He fired three warning shots and the plaintiff did not stop. A fourth bullet was fired by another officer identified as Madende and it hit him on the left thigh of his leg. They were able to arrest him and they searched him and recovered a Taurus revolver from him. He had no money. They took him into a vehicle they had and admitted him at Harare Hospital. He had sustained injuries as a result of the shooting. Later that day, they pursued his accomplices whom they caught up with at Snakepark. Four of his accomplices were killed after they resisted arrest. The plaintiff was later placed on remand for armed robbery which occurred at T.M Supermarket. The facts of the offence outlined on the request for remand revealed that he had been found in possession of a firearm. He was the Investigating Officer in the robbery charge. He was subsequently acquitted on the charge of possession of a firearm. The charge of armed robbery was withdrawn before plea.

The witness insisted under cross examination that the plaintiff ran away when the police identified themselves. They fired three warning shots and the fourth shot hit him. The

police had received intelligence that the plaintiff was armed. A high degree of alertness was required from them otherwise they were going to be shot by the plaintiff first.

The witness insisted that he fired warning shots only and that the fourth shot which hit the plaintiff was fired by Constable Madende. His explanation for the shooting is that the plaintiff was running away from the police. The witness gave his evidence well and remained consistent with his story.

The second defence witness Detective Sgt Musekiwa is the fourth defendant. His evidence is similar in every material respect to that of the first defence witness. He was in a team of police officers that pursued the plaintiff to High Glen Shopping centre. As soon as they spotted the plaintiff, they called out to him to stop. He took to his heels. He was shot at after he ran away. Three warning shots were fired and the fourth shot hit him. Later they rushed him to hospital. The police officers who testified on behalf of the defendants gave their evidence well and they corroborated each other on every material respect. The police officers who testified on behalf of the defendants gave their evidence well and they corroborated each other on every material respect.

It is common cause that the plaintiff was shot and injured during the course of an arrest. The issue is whether the plaintiff's arrest and detention is unlawful and whether the plaintiff is entitled to any damages.

THE LAW

In *Muyambo v Ngomaikarira* HH 138/11, PATEL J defined the delict of unlawful arrest and detention as follows,

“The delict of unlawful arrest and detention is committed when a person, without lawful justification, restrains the liberty of another by arresting or imprisoning him. See *Macheka v Metcalfe & Anor* HH 62-2007 (at pp. 6-7) and the authorities there cited. As is explained by *Feltoe: A Guide to the Zimbabwean Law of Delict* (2nd ed.) at p.48, the plaintiff need only prove that the arrest or imprisonment was illegal and not that there was intention to act illegally or to cause harm. In our law, unlike South African law, *animus injuriandi* is presumed and, therefore, intention is not a requirement for this delict.”

The judge went on to state that a defendant facing claims of unlawful arrest and detention has the onus to show that when he arrested the plaintiff he had probable or reasonable cause for doing so. The suspicion that the suspect has committed an offence must be based on reasonable suspicion and not be based on wild suspicion. In *A Guide to Administrative and Local Government Law in Zimbabwe* 2007 by G Feltoe the author states

that the delict is not available if the arrest and detention is lawful in terms of the Criminal Procedure and Evidence Act.

The evidence of the police officers who are the arresting details reveals that they had received information that the plaintiff was involved in an armed robbery case that had occurred at a local supermarket. They had received information that the plaintiff and members of his gang would be convening at High Glen Shopping Centre with members of his gang. They were given a description of the clothes that he was wearing. They laid ambush on him and when they saw him arrive at the centre they shouted his name and asked him to stop. He did not comply and started to run away resulting in him being shot and arrested. One of the officers fired three warning shots but the plaintiff did not stop. Another officer fired a fourth shot which disabled the plaintiff. He was shot in the leg resulting in him falling down to the ground. He was immediately arrested.

This court was simply told that the plaintiff was suspected to have been involved in the armed robbery, and had been identified as the suspect. It was not suggested that there was any evidence that led the police to believe that he was linked to the commission of the offence. It appears that the informant told them that the plaintiff had been involved in the commission of the robbery and other offences but the basis for such suspicion was not given. There was no evidence led to support the fact that he had indeed been involved in any robberies. The defendants seem to have arrested and shot at him simply because he was classified as a dangerous and armed criminal and was suspected to have been involved in the robbery. The basis of the suspicion is not known. The court is not satisfied that the police officers who arrested the plaintiff had reasonable suspicion that he had committed the offence in issue.. The plaintiff was later acquitted of the armed robbery charge as well as the charge of possession of a firearm. This supports the assertion that the police had no reasonable suspicion of commission of an offence. I am not satisfied that the defendants had reasonable or probable cause for arresting the plaintiff.

Where an informant gives information to the police involving commission of an offence, the police are only expected to act on the information and cause an arrest where they are satisfied that the information given is reliable and discloses that a suspect has committed the offence. The persons effecting the arrest should first be satisfied that there is reasonable suspicion of commission an offence before they effect an arrest. In a claim based on an unlawful arrest, the person who effected an arrest must show that the arrest was lawful and that he had reasonable and probable cause for doing so. The arresting detail is expected to

furnish sufficient details linking the suspect to the particular offence. He is expected to give a basis for formulating the impression that an offender had committed an offence. It is not good enough to arrest a suspect purely on the basis that a finger has been pointed at him and based on simply an indication from formation that a suspect was linked to a syndicate in the habit of committing offences of a similar nature in the neighbourhood.

CLAIM FOR GENERAL DAMAGES

The plaintiff claims general damages for pain and suffering, *contumelia* and loss of amenities of life and permanent disability and disfigurement in the sum of \$1500000-00 and \$21 000-00 for special damages. Under the category of general damages, he claims for pain and suffering, *contumelia*, loss of amenities of life and permanent disability and disfigurement. A cell phone, \$168-88 and a line, loss of income, compensation for loss of revenue from the plaintiff's farming activities are claimed under special damages. The total claimed in damages is \$1 521 400-00.

The plaintiff is entitled to general damages. General damages are not meant as punishment but are compensatory in nature. The rationale is to replace the injured party as far as possible in the position he would have occupied if the wrongful act causing injury to him had not been committed, See *Union Govt v Warneck* 1911 at 651 for that approach. In *Law of Delict*, PQR Boberg vol 1 1984 at p 15 the author states the following about pain and suffering,

“Compensation may be awarded not only for actual pain but also shock, discomfort and mental suffering, disfigurement, loss of amenities of life and disability and loss of expectation of life for convenience we speak simply of “pain and suffering”. But the concept embraces all those non pecuniary misfortunes-past and future of an injured person. Nor is the list a closed one.”

The claim for permanent disability and disfigurement is for \$200 000-00. The plaintiff produced a report from Dr Vera which shows that he suffered damages and his percentage disability is 35 per cent. The report describes the injuries he suffered but does not suggest that he was permanently disfigured. By the time this matter was tried, the wound had healed the court was shown a scar on his left thigh that remained as a result of the shooting. He still walked well and was not limping. There were no indications that he has any permanent disability that ensued. I find no justification for an award under this category.

The plaintiff has suggested a figure of \$100-00. In considering the appropriate award, the court has considered the sentiments expressed in *Minister of Defence v Jackson* 1990 (2) ZLR (1) 7 where at p8 the court remarked thus,

“It must be recognized that translating personal injury into money is equating the incommensurable; money cannot replace a physical frame that has been permanently injured. The task therefore of assessing damages for personal injury is one of the most perplexing a court has to discharge. This is not withstanding certain broad principles that have been laid down which govern the obligation.”

The court went on to lay out the considerations the court has to take into account which may be summarised as follows,

1. That the damages are not a penalty but compensation
2. Compensation must be assessed as to replace the injured party as far as possible in the position he would have occupied if the wrongful act had not been committed.
3. No scales exist by which pain and suffering can be measured and the quantum of compensation can only be determined by the broadest general consideration.
4. The court is entitled and has the duty to heed the effect an award may have upon the course of awards in the future.

In assessing damages the court has considered that the plaintiff was deprived of his personal liberty for 14 months whilst he awaited the finalisation of his trial. He also had to nurse a gunshot wound while on remand..I have considered awards granted in cases of a similar nature. In the *Muyambo case (supra)*, an award of \$3000-00 was made for damages for unlawful arrest and detention. An award for both special and general damages was made in *Nyandoro v Minister of Home affairs HH196\2010*. I am satisfied that award of \$2000-00 for general damages will meet the justice of this case.

CLAIM FOR SPECIAL DAMAGES.

Where a court is being called upon to assess the quantum of monetary damage sustained, sufficient evidence to support the claims should be placed before it. In *Hershman Shapiro & Co* 1926 TPD367 at 379-80, the court remarked thus,

“....monetary damage having been suffered , it is necessary for the court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the court is very little more than an estimate ; but even so ,if it is

certain that pecuniary damage has been suffered, the court is bound to award damages.....”

The plaintiff claims that he lost his job after the incarceration. He claims for loss of income in the sum of \$5 400-00. It is unclear how this figure was arrived at. The plaintiff alleges in his closing submissions that he was employed as a sales representative at Tynserve earning \$450-00 a month. No evidence was led to prove that he worked at Tynserve. His earnings were not proved as no payslips were produced. Instead he testified that he was a farmer in rural Rusape and that if the police had wanted to interview him in connection with this offence, they would have found him there if they had looked for him there. He claims compensation for loss of revenue from farming activities. The exact nature of the income generating activities he was involved in at the farm are not known. No evidence of how much he earned and the justification for the amount claimed is not known.. The claim of \$16 000-00 has no support on the evidence. It is not good enough to claim that you are a farmer then pluck figures to support a claim for loss of revenues from the air and hope that the court will find in your favour. I am not satisfied that he has proved that part of the claim.

The plaintiff has not proved that he incurred any medical expenses in treating his wound.

The police testified that after the arrest, the police searched the plaintiff and found a Nokia 5110 cell phone on him and a Taurus revolver. The plaintiff did not suggest in evidence that he lost a cell phone line. His evidence was simply that he lost \$168-00 and a cell phone. The police deny that they recovered that type of cell phone from plaintiff or any money. I believe the third and fourth defendants when they testified that they recovered a Nokia and not a Trium Galaxy phone. I see no reason why the defendants would say that they recovered a Nokia when they recovered a Trium Galaxy cell phone. No motive for lying that they recovered a Nokia was suggested. No value was placed on that cell phone and hence its value is not known. The defendants did not rebut the plaintiff's assertion that he had money on his person which the police recovered during the search. The plaintiff is entitled to the \$168-00 that he lost during the arrest. The plaintiff also claims the cost of a cell phone line. It is expected that the cell phone would be having a line. However, the plaintiff has not placed a value of the line. That claim fails. I am satisfied that the plaintiff had proved part of his claim on a balance of probabilities.

In the result it is ordered as follows.

The defendants are ordered jointly and severally, the one paying the other to be absolved, to pay the following,

1. The sum of \$2000-00 as general damages
2. Payment of \$168.00
3. Costs follow the event.

Zimbabwe Lawyers for Human Rights, applicant's legal practitioners
Civil division of Attorney General's Office, defendant's legal practitioners