

PATRICK MAPIYE
versus
MINISTER OF HOME AFFAIRS
and
THE COMMISSIONER GENERAL OF POLICE
and
OFFICER MANYANE

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 1 February 2018 and 21 March 2018

N Matsvair, for the plaintiff
K Warinda, for the defendant

Civil Trial

DUBE J: This is an action for damages for unlawful arrest, torture, assault and detention. The plaintiff's claim is based on the following synopsis. On 3 February 2011, the plaintiff was arrested by members of the Zimbabwe Republic Police and taken to Warren Park Police Station. The arresting details advised him and other MDC supporters who he had been arrested with that they had been arrested for assaulting a Zanu PF supporter, Andrew Shambo. Whilst at Warren Park Police Station, he was locked up in the cells for the night. He claims that he was assaulted by the police with logs and an iron bar whilst in detention. The next day, he was transferred to Harare Central Police Station Law and Order Section where he was detained and released on 5 February 2011.

The plaintiff avers that the police officers were at the material time acting within the course of their employment with the first and second defendants thereby making them vicariously liable for the actions of the third defendant and other officers involved. He claims that he sustained serious injuries and his right to liberty unlawfully infringed upon. He was left with permanent scars all over the body, suffered *contumelia* as he was subjected to cruel, inhuman and degrading treatment by the third defendant and other officers. He claims damages in the sum of the US\$6000-00 for unlawful arrest, shock, pain and suffering, disfigurement, unlawful arrest, unlawful detention and *contumelia*.

The defendants do not deny that they arrested the plaintiff and other MDC supporters. They claim that the plaintiff and others were arrested after a person who had been guarding Zanu (PF) offices at Rugare Community Hall reported that he had been assaulted by MDC supporters. The defendants deny rounding up MDC supporters. The police arrested the plaintiff because they had reasonable suspicion that the plaintiff had committed an offence. They admit that the plaintiff spent the night in police cells but deny assaulting the plaintiff and or that the plaintiff's right to liberty was unlawfully infringed upon, was subjected to inhuman or degrading treatment by member of the police force. The defendants refute that the plaintiff is entitled to any damages.

The issues referred for trial are as follows:

1. whether plaintiff was unlawfully arrested and detained by the police.
2. whether plaintiff was unlawfully assaulted by the police
3. the quantum of damages if any sustained by the plaintiff.

The plaintiff testified in his own case. His evidence is as follows. He was arrested by the police whilst he was at his home and taken to Warren Park Police Station, [hereinafter referred to as Warren Park Police]. He slept in the cells with no blankets. He was arrested together with other MDC supporters who include Pemba Pemba, Kudakwashe Ngorima, and Irvine Salamba. During the night, they were called one by one into a room where they were assaulted. When he was being assaulted Tendai Sibanda, and Irwin Salami and others were present. He was assaulted under the feet, shoulders, buttocks and on the face above his brow. An iron bar and electric code was used to assault him under the feet and buttocks for about an hour. One of the assailants was said to be present in court.

They were taken to Harare Central Police Station the following morning where they were further detained. The complainant in the assault case was brought and he indicated that they were not the ones who had assaulted him and they were released. The complainant implicated Wiseman and Mudinhwa as his assailants. After their release, they made reports that they had been assaulted by the police at Harare Central Police Station and were given forms for medical examination so that they could receive medical attention. They were examined and treated at Parerinyatwa Hospital and at a clinic in the Avenues. He did not pursue his report of assault. After about a year they were taken to court but he was not prosecuted.

The plaintiff called Pemba Pemba as his next witness. He was arrested together with Tendai Sibanda in Westwood and taken by car to Rugare where the plaintiff was picked up. Already in the car were Tarisai Zheke and Clemence Sibanda. They were taken to Warren Park Police. He did not know why the plaintiff was arrested. At Warren Park Police, they were told that there was a member of the Zanu PF party who had been assaulted in Rugare and that they were the suspects. They were detained in the cells and slept without blankets. At around 3 a.m. in the morning, they were instructed to crawl one by one into an office. He found the plaintiff being assaulted whilst lying on the ground face down. He was also assaulted and later taken back to the cells. The following morning they were taken to Harare Central Police Station. The complainant was brought into a room in which they were and asked to identify the individuals who had assaulted him. He did not identify anyone in their group. They were then released together with the plaintiff. They were given medical forms so that they would get medical attention after they reported that they had been assaulted by the police at Warren Park Police. He went to Parerinyatwa with the plaintiff for treatment and saw a doctor who observed injuries they had sustained. They later went to another clinic in the Avenues for x-rays. They were treated and went home and Wiseman was arrested and stayed at Remand Prison for some time.

Kudakwashe Ngorima also testified in support of the plaintiff's case. He supports MDC together with the plaintiff. He and the plaintiff were arrested and taken to Warren Park Police Station where they were detained. He was told that the reason why he had been arrested is because they had held a meeting without authority. At around 3 am in the morning they were taken from the police cells and assaulted. They were released the following morning and taken to Harare Central where they were told that they had assaulted Andrew Shambo, a Zanu PF member. Shambo told the police that the witness had been present at the time of assault but that he had not participated in the assault. He did not implicate the plaintiff. He remained in the cells when the others were released. He was taken to court with others for trial and the state failed to prove that he had assaulted the complainant. He made a report of assault against the police.

The plaintiff's witnesses gave a clear and straight forward version of their arrest. They corroborated each other in every material respect. I believed their version of events.

Collen Manyame was called in support of the defence case. He was based at Warren Park Police. They received a report of an assault which was politically motivated which had

been made by Andrew Shambo at Rugare Police Post. The docket was transferred to Warren Park Police for investigations. He arrested the accused together with Sergeant Moto and Sergeant Muchangwe. The plaintiff was arrested after one of the suspects Tarisai Zheke admitted that she was part of the gang that assaulted the complainant. She implicated the plaintiff as one of the assailants. The plaintiff was arrested together with other MDC supporters. They had reasonable suspicion that the plaintiff had committed the crime of assault based on the complainant's statement and the indications of a witness who was present when the complainant was assaulted. The plaintiff and others were detained for verbal interrogations. The suspects were referred to CID Law and Order Harare Central for further management. He denied that the plaintiff was assaulted whilst at Warren Park Police. The police are not permitted to assault suspects.

Sergeant Moto also testified on behalf of the defendant's case. His testimony is as follows. He arrested the plaintiff together with the last witness after he had been identified as one of the suspects who had assaulted implicated him as one of the assailants who was involved in the assault of Andrew Shambo by Tarisai. When they arrested him they advised him that they had information that he had committed a politically motivated assault. They formed reasonable suspicion that the plaintiff and others had committed the offence when they were told that the plaintiff was one of the assailants. After the arrest they left the plaintiff and other suspects who were MDC supporters at the charge office for detention and further actioning. They went back to Rugare to look for other suspects since it had been indicated that there were close to 40 suspects but did not make further arrests. They went back to station around 4 pm for verbal interrogation of the suspects. The interrogation lasted about 30 minutes. He went off duty and does not know what happened that night in the cells when he was away. The witness maintained his version under cross examination. The court found the evidence of the police details to be too general, it lacked detail.

It is common cause that the plaintiff and other MDC supporters were arrested in connection with the assault of Andrew Shambo. They were detained at Warrant Park Police Station and later taken to Harare Central Police Station where the plaintiff was exonerated from any involvement in the assault and was subsequently released without appearing in court. The plaintiff challenges the arrest and subsequent detention on the basis that it was not lawful. The

issue for consideration is whether the plaintiff was unlawfully arrested and detained and whether the plaintiff is entitled to any damages arising therefrom.

The plaintiff testified that the arresting details had no legal basis for arresting him. The arresting details testified that they arrested the plaintiff and others after the complainant in an assault case had made a report to the police. The police witnesses testified that the plaintiff had been implicated by Tarisai Zheke who claimed that the plaintiff had been present during the assault and assaulted the complainant. They maintained that they had reasonable suspicion that the plaintiff was part of a group of people who had assaulted the complainant. The plaintiff did not dispute that what led the arresting details to arrest him was a report made by Shambo or that had the plaintiff been implicated in the assault. The defendants failed to call either Andrew Sambo or Tarisai to confirm that such a report had indeed been made. The contents of the statement of the complainant in the assault case are not known. It is not known if Shambo actually implicated the plaintiff. I find that the reason why the plaintiff was arrested is because he was implicated in an assault case by Tarisai. The plaintiff was released after he was exonerated of the crime by the complainant.

The plaintiff testified that after they were arrested they were detained in cells and slept without blankets. The defendants did not dispute this allegation. The plaintiff alleges that he was assaulted whilst in detention at Warren Park Police using an iron bar and an electrical code. He claims that he sustained some injuries and was given a medical report form and examined medically. The arresting details denied assaulting the plaintiff. The evidence of assault was corroborated by the other two witnesses called by the plaintiff. The witnesses gave a detailed account of the assault. They corroborated the plaintiff's evidence that an iron bar and electric code had been used to assault the plaintiff by the police. The plaintiff's witnesses all failed to identify any of their assailants. The plaintiff was content to say that one of the assailants was present in court but he did not pin point him nor did he identify him by name. The plaintiff's witnesses all said that they subsequently made a report of assault against the police and were given forms to be medically examined. This averment was not denied by the defendants. Although the plaintiff did not identify his assailants by name, I find the evidence of the witnesses that they were assaulted at Warren Park Police by police officers convincing. The fact that the plaintiff made a report of assault at Harare Central is consistent with an assault. If they had not been assaulted and had no visible signs of assault, the police would not have

accepted their reports and referred them for medical examination. It is probable that the plaintiff was assaulted whilst in police cells.

The plaintiff failed to outline in his evidence the nature of injuries he sustained if any. It is only in his closing submissions that he says that he sustained severe injuries to his face and body. The evidence of injuries was not tested. He submitted that these injuries are highlighted in his medical report and treatment records from Parirenyatwa Hospital. The medical report and treatment cards were not produced as evidence. Plaintiff's legal practitioner led the plaintiff in evidence in chief and did not produce the report or medical cards. She attempted to produce the medical report when she was re-examining the plaintiff but ended up withdrawing the attempt.

It is unprocedural to produce an exhibit in one's case at re-examination stage. The mischief behind this rule is that the witness has already given evidence in chief and has already been cross examined. The other side is deprived of an opportunity to test the exhibit or evidence contained in the document sought to be produced. Having failed to produce the medical report through the plaintiff the best course open to the plaintiff was to call the doctor who examined him to give evidence on his findings. This was not done. The plaintiff cannot rely on a medical report that was not produced.

The plaintiff submitted in his closing submissions that the medical report was part of the bundle which had been filed of record and became part of evidence. A lot of legal practitioners labour under the misapprehension that after they have filed a bundle of documents in the record of proceedings, its contents become part of evidence and there is no more need to produce it as an exhibit. The fact that a bundle of documents had been filed in the record of proceedings before the trial commences does not make its contents part of evidence. Where a party prepares a bundle of documents and files it for use at a subsequent trial, the documents therein only became part of evidence when the bundle has been produced in evidence as an exhibit either as a bundle or when individual documents have been produced separately. Some of the documents contained in the bundle may be challenged and hence the bundle has to be formally produced either through a witness or by consent of the parties.

The mere fact that the bundle had been filed in the record did not make its contents part of evidence until the bundle of documents is produced as an exhibit. The plaintiff was required to produce the medical report to be able to rely on it as evidence. There was no evidence of the

actual injuries sustained by the plaintiff led in this court. Where a party omits to lead evidence on injuries sustained in an assault and in addition fails to produce a medical report showing the injuries sustained in a case, he ultimately fails to prove the extent of the injuries sustained. A medical report produced in support of injuries sustained in a damages case, has a bearing on the nature of the injuries sustained and the quantum of damages claimed.

In the case of *David Muyambo v John Ngomaikarira and Ors* and HH 138 /11 the court stated that 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. In *Bull v Attorney General* 1986 (1) ZLR 117 (S) the court made it succinctly clear that reasonable grounds for suspicion of commission of an offence is essential for all arrests.

Section 13 (2) (e) of the Constitution permits deprivation of a person's liberty on the grounds of commission of an offence only if there exists reasonable suspicion of commission of an offence charged by the accused. Section 25 (b) the Criminal Procedure and Evidence Act, [Chapter 9: 07] empowers a peace officer to arrest a person where he has reasonable suspicion that the person has committed an offence and reads as follows,

“25 Arrest without warrant by peace officer or other officer

(1) Any peace officer and any other officer empowered by law to execute criminal warrants is hereby authorized, subject to the general or specific directions of a superior officer or person placed in authority over him, to arrest without warrant—

- (a) any person who commits any offence in his presence;
- (b) any person whom he or she has reasonable grounds to suspect of having committed any of the offences mentioned in the First Schedule or the Ninth Schedule:”

An arrest without reasonable suspicion is rendered unlawful. See *Duncan v Ministry of Law and Order* 1986 (2) ALL SA 241 (A) also *Attorney General v Blumears & Anor* 1991 (1) ZLR 118 (S). It is not necessary to establish the guilt of the accused beyond a reasonable doubt or even on a balance of probabilities, see *Smithe v Ushewokunze and Anor* 1997 (2) ZLR 544 (S). In this case, the court remarked that there had to be sufficient information to warrant a prudent person to suspect that the accused had committed the alleged offence.

The requirement for reasonable suspicion of commission of an offence has its genesis in the Constitution of the country. Section 25 of the CP& E Act requires a police officer who effects an arrest to be satisfied that a suspect has committed an offence. The test for reasonable suspicion of an offence is objective. All that is required of the arresting detail is that he has

suspicion and not certainty that an offence has been committed. The requirement being that the suspicion must be based on solid grounds. Thus, the reasonable suspicion must be founded on reasonable grounds. A police officer who arrests a suspect must only arrest him where he has reasonable suspicion that the suspect is about to or has in fact committed an offence. He need not show that there is overwhelming evidence against the suspect nor must he prove suspicion beyond a reasonable doubt. What a defendant needs show is that the information given to the police was adequate to trigger in the mind of a reasonable person suspicion that an offence had been committed. An arrest becomes wrongful where a person is arrested and arrested without proper legal sanction and where he is arrested without just cause. The fact that a suspect was subsequently not charged with any crime or acquitted is not on its own proof that there was no reasonable suspicion of an offence at the time of arrest.

There are cases where a suspect is arrested and later released because of the emergence of new evidence after an investigation. Such an arrest is lawful for as long as the arresting detail can show that he had reasonable suspicion of commission of an offence at the time of arrest. Where an arrest does not result in a conviction, the enquiry is still whether the arresting detail had reasonable suspicion of commission of an offence at the time of arrest. If not, the arrest may not constitute a lawful arrest and is invalid. If a suspect can show that the police had no reasonable suspicion of an offence, he is entitled to claim damages for malicious prosecution and unlawful arrest and detention.

Unlawful detention occurs when a police officer detains a suspect for an unreasonable amount of time and without good cause. Any assault perpetrated of a suspect is perpetrated without lawful authority. Such an assaulted person is entitled to damages even though the injuries he sustained may be slight.

In *Masawi v Chatata & Anor*, 1991 (1) ZLR 148 (HC), the court said the following of damages:

“As regards quantum, it must be borne in mind that the primary object of the action *injuriarum* is to punish the defendant by the infliction of a pecuniary penalty, payable to plaintiff as a *solatium* for the injury to his feelings. The court has to relate the moral blameworthiness of the wrongdoer to the inconvenience, physical discomfort and mental anguish suffered by the victim. Because of the various subjective aspects involved, which must necessarily be peculiar to the case, precedents can only be of general assistance.”

The damages claimed must be shown to be a direct consequence of the conduct complained against. A party who claims compensation for damages is required to plead and prove his damages by leading satisfactory evidence that assists the court in assessing the damages. Once proved they may be assessed by the court,

A peace officer who arrests a suspect on the basis that he was implicated in the commission of an offence is required to verify and find corroboration of the informant's statement before he arrests and detains a suspect. Looking at the circumstances of this case, the police were justified in securing the attendance of the plaintiff at station. Having brought him to station, they were entitled to interrogate the plaintiff and evaluate the information that they had. All they knew at the time of arrest was that the complainant had been assaulted and that the plaintiff had been implicated by Tarisai. The court was not told what Andrew Shambo had said in his report about the plaintiff. It appears that the report had been received by another station. The police needed to verify the involvement of the plaintiff with the complainant before they had formally arrested and detained the plaintiff. The police did not verify the authenticity of report made by Tarisai. The statement of Tarisai was not tested. The police needed to verify the involvement of the plaintiff with the complainant. If the arresting details had carried out an identification parade soon enough, they could have established that the plaintiff was not known to the plaintiff and released him without the need to detain him. The police needed to have interviewed the complainant before formally arresting the plaintiff and asked him to identify his assailants and hence sought corroboration of Tarisai's statement. It was wrong to arrest and detain the plaintiff solely on the basis of Tarisai's statement. Instead, they put the plaintiff in detention and unnecessarily so. The fact that the complainant exonerated the plaintiff well after the arrest and detention means that the police did not do their job properly. The arresting details had no reasonable grounds to suspect that the plaintiff was a suspect in the case at the time that they effected the arrest of the plaintiff. I am satisfied that the arrest was wrongful and unlawful and that the plaintiff was unreasonably denied his liberty. The police failed to exercise their discretion properly.

In any case where it is shown that a police officer had no reasonable suspicion to cause the arrest of a person, the arrest and detention that follows becomes unlawful. The acts of the police officers render the state liable for damages for unlawful arrest and detention to the plaintiff. The plaintiff was denied blankets whilst in detention. A police officer who detains a

suspect for whatever offence is not entitled to ill- treat him. I am satisfied that the act of denying the plaintiff blankets was humiliating to the plaintiff. The assault upon the plaintiff was perpetrated without lawful authority making the defendants liable for damages for the assault.

The plaintiff has not been able to show that he suffered any disfigurement because he did not lead evidence on the actual injuries he may have sustained. The extent of his injuries is not known and it is difficult to quantify the damages sustained in the absence of the medical report showing the extent of his injuries. The court accepts only that he was assaulted by the police. It is accepted that the plaintiff suffered pain and suffering and some degree of shock emanating from the assault itself. The damages sought went uncontested by the defendants who did not make any submissions concerning same.

In the result, it is ordered as follows:

1. The defendants are jointly and severally the one paying the other to be absolved to pay the sums of
2. US \$1000.00 for shock, pain and suffering
3. US \$1000 .00 for contumelia.
US 1000.00 for unlawful detention
4. US 1000.00 for unlawful arrest
5. Costs of suit.

*Zimbabwe Human Rights NGO Forum (Public Interest Unit), plaintiff's legal practitioners
Civil Division of the Attorney General's Office, defendants' legal practitioners*