

CYNTHIA FUNGAI MANJORO
versus
THE MINISTER OF HOME AFFAIRS
and
THE COMMISSIONER GENERAL OF POLICE
and
THE PROSECUTOR GENERAL

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 22 and 23 February 2018 & 21 March 2018

Civil Trial

J Bamu, for the plaintiff
E Mukucha, for the 1st & 2nd defendants

DUBE J: The Plaintiff's claim is for damages for malicious prosecution.

On 30 May 2011 the plaintiff was arrested by the police on allegations that she was involved in the murder of a police officer at Glen View 3 Shopping Centre on 29 May 2011. She was detained and charged with the crime of murder, prosecuted and acquitted at the close of the state case. The plaintiff claims that in spite of the fact that she had an alibi on her whereabouts on that day, she was arrested and detained under inhuman and degrading conditions. She was subjected to assaults during interrogations whilst in police custody. She avers that her arrest and detention was unlawful. She claims damages for unlawful arrest, malicious prosecution, medical expenses, *contumelia*, pain and suffering and loss of income during the period she was incarcerated.

The defendants defend the claim. They asserted in their plea that the plaintiff was arrested on reasonable suspicion that she had committed an offence of murder. The defendants deny that

the plaintiff was assaulted whilst in police custody or that she was denied access to food, blankets and ablution facilities whilst in detention. They maintain that her arrest and detention was lawful.

The court was requested to determine the following issues,

1. Whether or not the plaintiff's arrest, detention and prosecution was lawfully conducted based on reasonable suspicion or for malicious prosecution.
2. Whether the plaintiff was detained in defendant's offices and assaulted, ill-treated and tortured while in defendant's custody.
3. The quantum of damages to which plaintiff is entitled.

The plaintiff testified in her own case. Her evidence is as follows. On 30 May 2011, Inspector Makore and other police officers came to their residence looking for Stephen Tendai Manjoro, her brother in connection with a vehicle belonging to him whose registered address was her flat. They asked who had the car on that day. She told the officers that her car was being driven by her boyfriend; Darlington Madzonga on the day of the alleged murder .He dropped her at church in the morning and picked her from her friend's house later in the evening after a party. The police officers asked her and her brother to accompany them to the police station because they wanted to record statements from them. They informed them that a lawyer was not necessary as they were just recording statements. She was taken to Harare Central Police Station, (Harare Central) where she was interrogated about who had the car on the day. They were made to sit on the floor. She was asked if she knew about the death of a policeman in Glen View and she told them that she did not even know the area concerned. One of the police officers hit her with a button stick across her knees. He wanted her to confirm that Darlington had the car and was in Glen View on that day. She told him that she did not know where he had gone with the car on the day in question. Her brother tried to prevent the police from hitting her and he was asked to leave the room. The police officer continued to hit her across the knees with a button stick. He stopped hitting her after about 10 minutes and her brother was asked to come back into the room. Later they went to Darlington's house to look for him but they failed to find him. His phone was unreachable.

That night they slept on the floor in a room in the basement without blankets. The next morning she was told that she would not be released until Darlington was found. She was transferred to a police station in Mbare where she spent 3 nights. A statement was taken from her and the allegations were that she had been involved in an MDC gathering where a police officer

was killed. Whilst at Mbare, she was detained in a cell with a hole in the middle used as a toilet. It was not flashing and smelly. She was not given blankets. She was taken to court on 3 May and detained on remand at Chikurubi Prison. She was allowed to consult a lawyer on 2 May. Whilst at Chikurubi she was put in solitary confinement in a single room measuring 5 x 3 m. She was allowed to go outside only for an hour. She was granted bail at the end of July. She had to report to the police 3 times a week. She went to see a doctor after she was released from remand prison. The doctor found pass in her knees and had to operate on her to drain it. She was in crutches for about 3 months. She went for counseling and was seen by a psychiatrist. She incurred medical expenses for the treatment. She claims damages for loss of income, unlawful arrest and detention, contumelia, malicious prosecution and pain and suffering. She was not paid for the two months that she was detained and was not at work. When she came back from remand, her employment was terminated because her former employer did not want to associate with a person facing murder charges. Her knee gives her problems when it is cloudy and rainy and she has to buy medication to ease the pain. She has a scar on the left knee. She was tried and acquitted of the murder charge.

Steven Tendai Manjoro was called as the plaintiff's next witness. The plaintiff is her sister. The police looked for him using the car registration number of his vehicle. The police were able to locate him using the registered address for the vehicle which was his sister's flat. When they got there they enquired where the vehicle had been the previous day. On that day, the plaintiff had asked to use the vehicle and his cousin was supposed to drive her as the plaintiff did not drive. The plaintiff told the police in his presence that the vehicle had been with Darlington. He was taken to Harare Central for statements together with his sister.

Whilst at Harare Central, they were advised that a police officer had been killed the day before in Glen View and that his vehicle had been seen at the scene of the murder. They told the police that Darlington had been in possession of the vehicle and that his sister could not drive. His sister was struck on the leg with a button stick. He was taken out of the room when he protested. He was allowed back into the room after 10 minutes. They were detained for the night in an office. They were later taken to a police station in Mbare and he was later released. His sister was later taken to court and he was turned into a state witness. The plaintiff was prosecuted for murder and acquitted. The police did not catch up with Darlington.

Detective Constable Makore testified on behalf of the defendants. His testimony is as follows. He received a report that some MDC supporters had held an illegal gathering at Makomva Shopping Centre in Glen View on 29 May which resulted in the death of a police officer. They had information that a Damio ACA with supplied registration numbers had been seen at the scene and was used as a gateway car. They identified the owner of the car who is Stephen Manjoro and the registered address where the vehicle was being kept. They located the plaintiff and the vehicle and established that the vehicle was being used by the plaintiff. They went to the address and Stephen Manjoro told them that he was the owner of the vehicle but that it was being used by the plaintiff on the day in question. They took the plaintiff and her brother to CID Law and Order at Harare Central and advised them that the reason they were taking them to station was that the vehicle had been seen at the scene of the murder and was used as a gate away car. He handed them over as his role was just to make follow ups of the suspects.

Under cross-examination he testified that they had no information regarding the identity of the driver of the vehicle on the day in question .The plaintiff did not indicate to them who the driver of the vehicle was. He cannot remember if he asked the plaintiff if she was driving. He had reasonable suspicion that the plaintiff had committed the offence until he handed over the suspects. The name of Darlington only emerged during the trial. The court directed that they follow up Darlington but they could not find him. He insisted that the name of Darlington was not mentioned to him but only emerged at court. He denied the assertion by Stephen that he was present when his sister told them about Darlington. He said that the plaintiff was not co-operative and said that she would only answer their questions in the presence of her lawyer.

Chief Inspector Ntini testified for the defense. He was the investigating officer in the criminal matter. He attended at the scene of the murder case and picked up information that a Damio Registration AC 5099 was seen leaving the scene of the murder and was being used by some of the murder suspects. He gave the details to one of his teams to follow up. The team picked up Stephen and the plaintiff. They were told that the vehicle was with the plaintiff on that day. The plaintiff and her brother were interviewed by another team. Her statement was recorded in the presence of her legal representative and she was placed on remand. The plaintiff did not say who was driving the vehicle on that day. She just denied the charge. There were reasonable grounds to believe that she was involved in the murder. He has no idea of the conditions of her detention as

she was detained at Mbare. He does not know if she mentioned the name Darlington during investigations. He relies on information given to him by his teams. He relied on her statement which does not mention Darlington. She failed to dissociate herself from the crime. If he had mentioned the name Darlington, the police would have looked for him instead of focusing on her. He concluded after investigations that there were reasonable grounds to believe that she was involved in the murder because she failed to dissociate herself from the scene of the murder. He only learnt of the involvement of Darlington during the trial after her defense told him that he was the one using the vehicle. They failed to locate him because she simply gave a name without further particulars. He has no idea of the conditions of the detention.

It is common cause that the plaintiff was arrested and taken together with her brother to Harare Central where they were detained. They were later detained at Mbare. The plaintiff's brother was released and the plaintiff was placed on remand and remanded in custody. She was prosecuted of murder charges and acquitted. The issue that this court is called upon to decide is whether the arrest and detention of the plaintiff was lawful. Secondly, whether she is entitled to damages arising from the arrest and detention.

The plaintiff testified that when the police approached her she told them that she is not the one who had been driving the vehicle. Her boyfriend had taken the vehicle and driven it away and dropped her at church and picked her up at her friend's house in the evening. She had never been to Glenview and denied being involved in the murder. She took the police to her boyfriend's place and they failed to locate him. The police had always known of his involvement. The arresting detail and the I.O testified that she never told them that the plaintiff's boyfriend is the one who drove the vehicle. They only got to know of his involvement during the trial when it was intimated that by the plaintiff's defense counsel that Darlington had driven the vehicle on that day.

The plaintiff's version was corroborated by her brother who told the court that he was present when the plaintiff gave this explanation. The plaintiff and her brother gave their evidence well. The plaintiff's testimony that after she told the police about Darlington they actually went with the police to try and arrest him at home and at his work place was not disputed by both the investigating officer and Detective Makore. I believed the plaintiff and her brother when they said that they told the police at the time of arrest that the vehicle was being driven by Darlington who had dropped her at church and picked her up at the end of day after a friend's party. Further, that

the interrogation at Harare Central was about who had the car on that day. The police's explanation regarding why they did not include information of alleged use of her motor vehicle in her warned and cautioned statement in their warned and cautioned was not satisfactory. I find therefore that the police were told by the plaintiff that Darlington is the one who drove the vehicle on that day and that his sister could not drive. Having established that she had the vehicle on that day, one would have expected the police to ask her if she drove vehicle to Glenview. Detective Makore was asked under cross examination if he asked her if she drove the vehicle and he said he does not remember. The police witnesses did not particularly refute the assertion that they went to Darlington's house with the plaintiff in search of him but could not find him. The reason why the police would follow up on Darlington is because they had been told about him. Having been told about Darlington the police were required to pursue the plaintiff's alibi and they did not meaningfully do that. They failed to follow up the indications by the plaintiff that she had been at a friend's house. The police realized that Darlington had fled and detained the plaintiff as bait to arrest Darlington. I did not believe the police version that they established that the vehicle was being used by the plaintiff and that the name of Darlington only emerged at the murder trial. The police had no justification in arresting and detaining the plaintiff.

The plaintiff testified that the police assaulted her at Harare Central using a button stick across her left leg. Her brother tried to intervene and was taken outside the room to another office. The assaults continued after her brother had left the room. Her brother found her crying after more assaults. The evidence of the assault was corroborated by Stephen Manjoro, an eyewitness to the assault. The police witnesses Detective Makore and Detective Chief Insp Ntini could not confirm or deny these allegations. Inspector Ntini conceded under cross examination that at the initial remand proceedings several assault and ill treatment complaints had been raised against the police. He was unsure whether the plaintiff is one of the accused who had made such a complainant. The defendants did not cross examine the plaintiff over these allegations. I find therefore that the plaintiff was assaulted whilst in the custody of the police. Her evidence on the injuries she sustained was not meaningfully challenged. The plaintiff testified that she was denied medical treatment whilst in police custody and only received pain killers later after she was lodged at Chikurubi Prison. She later received treatment when she was released. She had accumulated pass in her knees and was operated on and the pus drained and she received counseling and psychiatric

attention. She requires pain killers and her operation becomes painful in bad weather. I find that the plaintiff is entitled to future medical expenses due to the injuries she alluded to. She sustained permanent injuries as the operation remains a constant source of pain.

The plaintiff testified that she was detained in an office where she spend the night at Harare Central and that she slept on the floor without blankets. She also told the court that she was transferred to Mbare where she spent three nights. Whilst in detention, at a station in Mbare, she had no access to food and blankets. She was detained in a small cell with a toilet on the middle which was rarely flashed. The cell reacked of human waste. Whilst on remand at Chikurubi Prison she was put in solitary confinement. She was made to use empty Mazoe drink containers as a chamber and a plastic when she had a running tummy. She had to wash the plastic bag using her bare hands. This evidence went unchallenged. Both witnesses of the defense were unable to comment on the allegations. I find therefore that the plaintiff was over detained and ill-treated whilst in detention.

Her evidence that her employer did not pay her for the period when she was in custody was not disputed. She says she lost income amounting to \$2 075.00. She lost her employment due to the fact that she was required to report three times a week at Glen View Police Station. The plaintiff's employer asserted that it could not work with a murderer. This evidence was not refuted. The plaintiff's medical expenses were not challenged and I find that she incurred the said bills.

The onus is on the person who effected an arrest to justify the lawfulness of that arrest. See *Stambolie v Commissioner of Police* 1989 (3) ZLR 283. He must only arrest a suspect where he has reasonable suspicion of commission of an offence. See *S v Purcell-Gilpin* 1971 (1) ZLR 241, *AG v Blumears* 1991 (1) ZLR 118 (S).

The law is that an arresting detail has a right to arrest and detain a suspect where he formulates reasonable suspicion of an offence. A person who arrests a suspect must have sufficient information justifying the arrest of an offender. It is the responsibility of an arresting detail to ensure that before he arrests a suspect, he has verified the information or reports he has. The information that he relies on must be sufficient so as to cause a reasonable person to believe that an offence was committed. If he does not properly exercise his mind and the report turns out to be false, the arrest becomes unlawful. Where a suspect raises the defense of an alibi, the alibi must be ascertained. An investigation of the alibi aids the police to ascertain the truthfulness of an alibi

and to eliminate possible suspects. The fact that the police have failed to disprove an alibi does not constitute proof that the suspect committed the offence. The alibi ought to be broken and proved to be false for an arresting detail to form reasonable suspicion of commission of an offence. An arrest should follow only when reasonable suspicion of an offence is formed.

A police officer should have an independent opinion of the matter before he arrests and detains a suspect. It is unacceptable for a police officer to arrest a suspect in order to investigate a matter. He should only effect an arrest where he has reasonable suspicion of commission of an offence. The police are entitled to arrest and briefly detain a suspect if they suspect that he has committed a crime. The detention becomes unlawful where the suspect is kept in custody for an unreasonable amount of time or where force is resorted to during the detention.

The police were aware of the alibi raised by the plaintiff. The plaintiff maintained her story. Her alibi was not proved to be false and she maintained her version even at the trial that it is Darlington who drove the vehicle on that day. Her alibi that she had been at a friend's party was not followed up. The police had no justification in prosecuting the plaintiff when they had not fully investigated her story and proved that she was lying that she is not the one who had been driving the vehicle on that day. After they failed to locate Darlington, they decided to keep her as bait in the hope that Darlington would give himself up to the police. When this did not happen, they still detained her being well aware that the plaintiff could not drive and could not have driven the vehicle on that day. There was no evidence at all to link the plaintiff to the commission of the offence. I am satisfied that the police had no probable cause to arrest the plaintiff.

The defendants did not dispute that the plaintiff was ill-treated whilst in detention. Deprivation of liberty is a serious infringement of fundamental rights *Botha v Zvada* 1997 (1) ZLR 415. The rationale of awarding compensation in cases such as this is so that the injured party is as far as possible placed in the position she would have been had the wrongful acts complained against not been committed. See *Union Gvt v Warnecke* 1911 AD 657 at 655. The purpose of general damages is to compensate the victim and not to act as a penalty to a defendant by punishing the wrongdoer.

Having found that the plaintiff lost some income during the two months that she was detained, I find that she is entitled to that claim which she proved by way of her pay slip. The plaintiff claims damages for pain and suffering. The court has considered the severity of the assaults. The plaintiff was assaulted with a button stick on the leg whilst she sat defenseless on a

chair. The plaintiff's evidence reveals that she suffered excruciating pain during the assault. She had to be operated on and was in crutches for 3 months. The award of \$300 000, 00 for pain and suffering made in *Mugwagwa v Minister of Home Affairs and Anor* HH 183/04 relied on by the plaintiff is not persuasive because the award made in that case was in Zimbabwe dollars. An award of \$2000.00 for assault and \$3 000.00 for pain and suffering and *contumelia* will meet the justice of the case. This figure includes the sum of \$1935.89 she paid for post medical attention.

The plaintiff's proved by way of receipts her past expenses at \$1935.89. She says she feels pain in the knee when the weather is bad. She will need to buy pain killers in the future. She is awarded \$2 000 for unlawful arrest, 5000.00 for malicious prosecution.

In the result it is ordered as follows,

1. The defendants shall pay to the plaintiff the following damages.
 - a) US\$3 000.00 – for unlawful arrest.
 - b) US\$2 000.00 – for damages for assault
 - c) US\$5 000.00 – for malicious prosecution
 - d) US\$ 3000.00 – for past and future medical expenses
 - e) US\$ 3000.00 – pain and suffering and *contumelia*
 - f) US\$ 2075.00 – for loss of income.

Zimbabwe Lawyers for Human Rights, plaintiff's legal practitioners
Civil Division of the Attorney General's Office, defendant's legal practitioners