

IN THE HIGH COURT OF SWAZILAND

Andile Nkosi Thandi Tsabedze

V

Attorney General

(Civ. Case No, 264/97)

Coram

S.W. Sapire, CJ

For Plaintiffs

Mr. Mamba

For Defendant

Mr. Simelane

JUDGMENT

(16/04/99)

This is an action in which the first plaintiffs sue the Government for damages arising from what is alleged to be the unlawful killing of one "No-name Ngomane". (The Deceased) The first plaintiff sues in her capacity as guardian for her minor child who she says was fathered by the deceased and who owed and complied with an obligation to support the child. The second plaintiff is the deceased's mother. With regard to her I was informed by Mr. Mamba who appeared for the plaintiffs that her case was not being proceeded with.

The parties had agreed that the issue of liability by the defendant was first to be determined before the question of damages was tried. As it appeared convenient to deal with the trial in this matter, I have heard evidence only on the question of whether the killing of the deceased was lawful or not.

The evidence for the Defendant was that the police at whose hand the deceased died were attempting to effect an arrest. The question for decision is whether the circumstances justified the killing.

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I heard evidence of how the Police received a tip-off that the deceased would be visiting the Why - Not entertainment centre at a particular time. There was evidence that the deceased was a wanted man and that for some time the police had tried to find him and arrest him in connection with serious offences. An ambush was prepared for the deceased at the Why Not which was at that time and before the completion of the new Manzini Mbabane highway on the main road between the two towns.

The Police did not have a warrant for the arrest of the deceased but relied on their having reasonable grounds for suspecting that the deceased was responsible for a number of offences which would have justified an arrest without warrant. In this case there is little evidence to suggest that the intended arrest of the deceased was in fact lawful. It is unnecessary for me to come to a conclusion either way in regard thereto. It seems to me that the test really is whether the Police in the course of their arrest had sufficient grounds for firing a gun and killing the deceased. To justify firing on the deceased it is the defendant's case that the police, fired a volley to forestall themselves becoming victims of fire from the deceased

The evidence is how the Police waiting in ambush saw the deceased arrive at the Why — Not. He left the car, in which he had come and went to a shop facing the parking ground. As he was returning towards the car in which he had arrived the Police, their pistols drawn advanced upon him.

What followed has been described by several of the people who were there and there is not any acceptable degree of consistency in their accounts. One of the telling differences in the Police evidence is that Inspector Ndlovu gave evidence that the deceased had drawn a pistol and had such pistol in his hand as the Police advanced upon him. The police opened fire. He said that the pistol fell

to the ground after the deceased had been shot.

On the other hand Constable Kunene and Sergeant Dlamini testified that the deceased only reached for his pistol which he had in his waistband. They were clear that the pistol had not been completely drawn when the fatal shots were fired.

There is evidence that the pistol removed from the deceased's body was still concealed in his waistband. In view of this telling discrepancy as to what happened at the critical time it is difficult to accept either version so as to come to the

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conclusion that the defendant has discharged the onus of showing that the killing was necessary in self-defence or otherwise justified.

While appreciating that the Police have a difficult and unenviable task in risking their lives in arresting dangerous criminals suspected of serious offences it is also necessary to bear in mind that their duties in this regard must be carried out professionally and accordance with to recognized regulations. In this case there is no evidence of any regulations or other guideline, which have been laid down for the Police to follow in circumstances such as the present.

I would however have expected that they would have chosen a better venue for effecting their arrest. If they expected a shoot-out they should not have made their ambush in a public place, having regard for the safety of bystanders.

The officers who formed the arresting party should have been better trained and practiced in the use of firearms. Evidence discloses that the officers concerned hardly if ever practiced on the range in the use of their firearms.

After the deceased had been shot the officers concerned should have cordoned off the area and called in independent police officers, possibly the "Scenes of Crime" unit, not concerned in the arrest to do the scene — of — crime investigations.

The pistol said to have been found in possession of the deceased should not have been removed in such a manner to obliterate any fingerprints, which may have been thereon. In fact the body should not have been touched at all save perhaps to ascertain if the deceased was still alive, until the independent police officers had come to the scene and taken photographs of what was there found. The deceased's body should not have been dumped into the boot of the police car and so transported to Mbabane and back Better care should have been be taken of the exhibits to prevent the inexplicable disappearance of the alleged pistol from the exhibits room.

An Inquest for other public enquiry should have taken place. Had these procedures been followed the defendant may have been in a better position to prove the lawfulness of the killing and to refute the allegations that the killing was as a result of negligence, or even worse. The evidence reveals a far too casual approach to the killing of a human being.

As the matter stands, however, this onus resting on the Defendant has not been discharged and I find that the defendant is liable for any damages suffered as a result of the killing of the deceased.

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I reserve the question of costs for final judgment on the case as a whole,

S.W. Sapire CJ