



SWAZILAND HIGH COURT

Lecule Armando
Plaintiff

Registrar of The High Court
1st Defendant

Attorney General
2nd Defendant

Civ. Case No. 2885/99

Coram

Sapire, CJ

For Plaintiff

MR. S. NKOSI

For Defendant

MR. P. MSIBI

JUDGMENT

(21/02/2001)

The plaintiff has sued the Government on a most unusual cause of action. The claim is framed in delict and based on an alleged wrongful act on the part of the individual or individuals holding the post of Registrar of the High Court during the relevant period. The Registrar at the time of the commission of the offence was not the same person who occupied that position at the time the summons was issued. Moreover I doubt whether the Registrar is an office, which as a persona may be sued.

The Government, which is the Second defendant, is joined on the basis that the Registrar was “duly appointed by the Government of the Kingdom of Swaziland” This falls short of alleging that the Government is to be held vicariously responsible for whatever

wrongful act are alleged to have been committed by the Registrar as servant or agent of Government, acting in his capacity as such within the scope of his authority.

The Plaintiff alleges that on 27 May 1988 he was convicted on several charges of armed robbery by Mbabane Principal Magistrate Court under case number 213/1988 and sentenced to 21 years imprisonment. He further alleges that on appeal to the High Court the sentence was reduced to 14 years imprisonment.

On the 24th October 1989 the plaintiff was convicted for *inter alia* the committing the offence of escaping from custody under case no. 663/89. For these offences he was sentenced to 7 years imprisonment. Against this conviction and sentence he also appealed. His sentence was reduced to 3 years consecutive to the previous 14-year sentence. This allegation is not strictly correct as the evidence is that the sentence of 7 years by the Magistrate was ordered to run concurrently with the previous sentence save for a period of 3 years. The effect of course is the same.

The next allegation is that at all material times plaintiff wished to appeal against conviction and sentences in the two matters referred to. It is to be observed that at that stage in both matters any further appeal laid only to the Court of Appeal, but only with leave of the High Court, or in the event of such leave being refused with the leave of the Court of Appeal itself.

The plaintiff states that “on or about June 1988” the plaintiff “wrote a notice of appeal” against his conviction and sentence under case 213/1988. to which there was no response whatsoever from the office of the Registrar of the High Court nor was the notice of appeal noted and filed by the Registrar. There is no evidence of this having taken place. Plaintiff has not produced his own copy of the document or documents dating earlier than March 1991, which would substantiate his claim to have taken any step to Appeal against either of the judgments of the High Court dealing with his appeals from the magistrate’s court. .

The particulars of claim also recite that from the 13 March 1991 to 13 March 1997 plaintiff “wrote further notices of appeal” against the aforementioned cases to the Registrar of

the High Court. Again there was no response. “True copies” of these notices are annexed to the particulars of claim marked AL1 to AL10.

The notices of appeal were written, so it is alleged, to the registrar in terms of and in accordance with the Court of Appeal Rules of 1971 as amended. The plaintiff alleges that there was a duty upon receipt of the notice of appeal to date and file them in terms of rule 63 of the Court of Appeal Rules. It was also the duty of the Registrar, so the plaintiff says, in terms of rule 23(2) of the Court of Appeal Rules 1971 to prepare the record of the cases against the plaintiff and to supply copies thereof to each party to the appeal. In spite of the foregoing the Registrar, wrongfully, negligently and in breach of the legal duty neglected and failed to file plaintiff’s notices of appeal for a period of 9 years. The plaintiff alleges that the Registrar was negligent in a number of respects. These allegations have to be considered bearing in mind that there is no averment that the Plaintiff had been given leave to appeal to the Court of Appeal by either the High Court or the Court of Appeal itself.

As a result this negligence the plaintiff claims that he has suffered damages in an amount of E3 000.000.00.

This is an extraordinary case for which no precedent was quoted or found by me in my own researches. I can find no authority or decided case dealing with a similar claim on comparable facts. The particulars of claim are not borne out by the evidence.

It is true that the plaintiff was convicted as he says. He has admitted that the conviction for armed robbery took place on a plea of guilty subsequent to a confession by him of the crimes with which he was charged. He has claimed in this court that the confession and the plea of guilty were as a result of unlawful pressure brought upon him. If this were so it was a matter which should have been brought to the notice of, and considered by the Magistrate’s court in the first instance or at least by this court when the appeal was heard.

The plaintiff in the witness box admitted that he had escaped from custody thus justifying the conviction for escaping from custody. It is clear that he was originally charged and convicted before Magistrate Mr. Maphalala now a judge of this court. These

proceedings were set aside on review by Mr. Justice Rooney and he was retried before another Magistrate. Against the conviction by the second Magistrate plaintiff appealed and his appeal was heard by the late Mr. Justice Dunn who varied the sentence as I have outlined above. It would seem that the appeal was on sentence alone.

Although the plaintiff claims to have wished to appeal against these judgments of this court, to the Court of Appeal as early as 1988 there is no evidence that any document indicating such a wish to appeal in either case was ever received before March 1991. Of the letters to the Registrar attached to the summons, the earliest date from the 13th March 1991. That letter which is AL1 deals with a notice of leave to appeal for case No. 213/88. The plaintiff stated in that letter that he was appealing against the sentence. There is no mention of an appeal against the conviction. This is not surprising, as he had pleaded guilty in the Magistrate Court. The reasons for the appeal are stated to be: -

1. That the sentence is too punitive as he the plaintiff was the first offender and the second accused.

2. Accused no. 1 was serving only 8 years although we committed similar crimes. (*My own underlining to emphasise that plaintiff must be seen for what he is, a convicted self-confessed criminal*).

3. "I cooperated fully" with the law enforcement agencies from the date of arrest to the end and made confession statement to the judicial officer and pleaded guilty to all counts except Arms and Ammunitions "*because they were not found in my possession*".

This negates Plaintiff's evidence that he acted under some improper pressure in confessing to his crimes and pleading guilty thereto.

This letter clearly indicates that there was no appeal against the conviction. The letter itself was written 2 years after the appeal had been heard by this court with the then Chief Justice Mr. Justice Hannah presiding. This is a long way out of time for an application for leave to appeal which is necessary for the matter may be heard on appeal by the Appeal Court.

There is a further letter dated 20 March 1991. It would seem as if the letter of 13th March accompanied the later letter. In this letter the plaintiff states that this is the first occasion that he writes to seek redress and permission that his appeal in the case, although

overdue should be transmitted and placed on record for hearing by the Court of Appeal. He refers to the document being a belated and “unprecedented” notice of appeal and he set out in the letter the reasons for the delay, which he says, were beyond his control. In the light of this letter, his claim in the witness box to have sent prior notices of appeal in the years between 1988 and 1991 is clearly contradicted. I cannot accept that. I cannot have regard to anything earlier than the letters of March 1991. It should also be noted that these documents related only to the case involving the armed robberies.

The next letter, which was received by the Registrar, was dated 21st September 1993. That is another 2 years after receipt of the first 2 letters. This letter apparently deals with a notice of appeal for case no. 213/88 and also of a notice of enquiry for case no. 663/89. In so far as this may be treated as an original application for leave to appeal from the judgment of Dunn J, it too, is well out of time. No application for condonation was made.

The next letter was one dated the 19th April 1994. This relates only to case no. 663/89 concerning the conviction for escaping. For the first time the plaintiff raised various issues, which do not seem to have been brought to the attention of any court before this.

The plaintiff’s complaints came to the knowledge of the Deputy Registrar of the High Court Mrs. Maziya on one of her visits to the prisons in 1996 and as a result of promises made by her to the plaintiff of her early investigation.

She investigated the matter and discovered that the records both in the Magistrate courts and in the High Court could not be found. When these records disappeared it is not clear. How they came to have disappeared cannot be ascertained. It was as a result of her efforts that Plaintiff’s letters to the registrar, which are attached to the particulars of claim, came to light.

Mrs. Maziya decided to place the letters before the Court of Appeal and the matter was enrolled before that court for hearing. The court of appeal delivered a judgment the outcome of which was to order the immediate release of the plaintiff from prison where he was serving the last few months of the second sentence.

It remains to be observed that the matter should not really have been before the Appeal Court at all because that court only has jurisdiction to hear an appeal with leave from the court *a quo* or should leave be refused on leave granted by the appeal court itself. In this case there was clearly no leave to appeal. Plaintiff's own documents on which he relied indicated that he, if at all, and at best for him, was seeking leave from the High Court. Moreover the appeals could hardly have been against the conviction, as the accused had pleaded guilty in the Magistrate court to the original charges and the evidence he gave to this court was that he had indeed escaped from custody. It is difficult in these circumstances to see how any appeal on the merits could have had any prospect of success. Appeals on sentence had already been considered. There is nothing to show that there was any prospect of success for a further reduction.

I have already indicated that the only evidence before this court is that the plaintiff first started upon his request for a further hearing in 1991 long after the appeals from the Magistrate court had been heard and well outside the period within which leave to appeal should have been sought. He had in fact no appeal as of right and has not shown that he had any prospect of success in any application for condonation or in an application for leave to appeal on the question of sentence alone.

The plaintiff has an insuperable difficulty in that he has not shown that if the Registrar had acted in accordance with what conceivably may have been the Registrar's duty, that is to place the obviously defective notices before the High Court, the result would have been the granting of condonation, leave to appeal and a reduction of one or other or both of the sentences. While it may be said that the Registrar was negligent, or acted unlawfully, or in some way failed in some duty to reply to the letters or in not placing the matter before the High Court, the contents of the letter of the 31st March make it quite clear that the reasons for the late application for leave would not have supported a successful application for condonation. Nothing is before the court to show if the lateness of application for condonation were condoned, an application for leave to appeal would have been successful. Even less is there any thing to show that there was any prospect of High Court's judgments on sentence would have been interfered with by the Court of Appeal so as to reduce the time the plaintiff was required to spend in prison

It follows that the plaintiff has not suffered any damage as a result of any negligence or other wrongful act there may have been on the part of the Registrar. The plaintiff's claim is in effect, to be paid for serving the sentences properly imposed on him in the subordinate court, and confirmed on appeal to the High Court. He has not shown that had the registrar placed any or all of the letters attached to the summons before the High Court, that his long delay in applying for leave would have been condoned, and that he had any prospect of success warranting the granting of leave to appeal.

The inspiration for this action was the judgment of the Court of Appeal a copy of which was attached to the particulars of claim That court found contrary to the evidence before me that the Plaintiff had been attempting to pursue an appeal or appeals since 1988. Demonstrably that was not so. The plaintiff's intimations of dissatisfaction with the judgments of the High Court commenced in March 1991, which as has been seen was long after applications for leave to appeal had to be made. I am satisfied that however remiss the registrar's office may have been, and however deserving of the criticism levelled by the Court of Appeal, no injustice has been occasioned to the Plaintiff thereby. I do not think it necessary to consider and to define what the Registrar's office is obliged to do with irregular and out of time missives from the prisons. On the other hand common sense dictates that they should at least be replied to, and the prisoner's attention drawn to the fact that effect cannot be given to what could amount to some sort of notice.

The plaintiff's claim is accordingly dismissed with costs.

SAPIRE, CJ

