

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 1255/06

In the matter between:

ERNEST RAPHAEL SHIMENI

PLAINTIFF

AND

THE COMMISSIONER OF POLICE
THE DIRECTOR OF PUBLIC
PROSECUTION

1st DEFENDANT

2ND DEFENDANT

THE ATTORNEY GENERAL

3rd DEFENDANT

CORAM: MAMBA AJ

FOR PLAINTIFF: MR. S.C. SIMELANE

FOR DEFENDANTS: MS NDZIMANDZE

JUDGEMENT

16th AUGUST, 2006

[1] The plaintiff, Raphael! Ernest Shimeni was arrested by members of the Royal Swaziland Police Force on the 14th day of March 2005 and charged with the crime of Rape. He appeared in the Magistrate's Court on several occasions and was periodically remanded into custody until on the 1st day of

September 2005 when he was released upon the charges being withdrawn against him by the 2nd defendant.

[2] At the time of his arrest, the plaintiff was self employed as a Panel beater and spray painter. He was arrested at his workshop and was told in the presence of some of his customers or clients that he was being arrested for the rape of a young girl. He immediately protested his innocence.

[3] At all times material hereto the members of the Royal Swaziland Police Force and the second defendant were all acting during the course and within the scope of their employment as servants or agents of the Government of the Kingdom of Swaziland herein duly represented by the 3rd defendant.

[4] The defendants have not filed a plea in this action and the proceedings were virtually unopposed. The plaintiff averred in his summons and in evidence in court, that his arrest and detention was unlawful and without any probable or reasonable cause whatsoever. His aborted prosecution, he stated, was unlawful and or malicious.

[5] The plaintiff spent just 13 days short of six months in detention. It is disturbing, to say the least, that it took the second defendant this long to realize that it had no case against the plaintiff and thus it had to withdraw the charges against him.

[6] The plaintiff has sued the defendants for general damages in the sum of E350 000-00 resulting from his alleged wrongful arrest, detention and malicious prosecution on a false charge of the rape of a young girl. He gave evidence that he did not commit this crime. There is nothing to gainsay this and perforce I make the following findings of fact ;

Namely :

- (a) The arrest of the plaintiff on the 14th day of March 2005 by members of the Royal Swaziland Police Force was wrongful;
- (b) The detention or incarceration of the plaintiff from the 14th day of March 2005 to the 1st day of September 2005 on the application of the 2nd defendant was without any justification and unlawful;
- (c) There was no probable or reasonable cause upon which the plaintiff could have been prosecuted on the charge of raping the young girl. That the 2nd defendant applied on two occasions for a trial date on which to start the trial of the plaintiff when there was no evidence upon which to prosecute the plaintiff is proof of malice. The inordinate delay by the second defendant in withdrawing the charge against the plaintiff is also indicative of a malicious prosecution by the 2nd defendant.

[7] The plaintiffs claim for damages as stated above is broken

down as follows;

- (i) Loss and deprivation of liberty E200 000-00
- (ii) Impairment of dignity and reputation
E50 000-00
- (iii) Discomfort E50 000-00
- (iv) Contumelia E50 000-00

It is immediately observed that what is claimed is general damages. P.J. VISSER and J.M. POTGIETER in the book LAW OF DAMAGES (1993 EDITION) at page 426 state that;

"The non pecuniary damage caused by malicious prosecution (and malicious civil proceedings) consists primarily in the impairment of the plaintiffs good name, physical liberty and feelings of dignity. Satisfaction is assessed **ex aequo et bono**. Factors influencing the amount are, for example, the seriousness of the crime for which the plaintiff was prosecuted and the severity of the penalties in the case of a conviction, the period of incarceration, the period during which the charge hung over the plaintiffs head, ...the fact that the charge had not been withdrawn but proceeded with until the plaintiff was acquitted at the end of the state case, malice on the part of the defendant, the plaintiff has the right to be compensated for personal insult, indignity, humiliation and ...inevitable defamation, the absence of an apology on the part of the defendant, and previous awards in comparable cases (taking

inflation into account)." (I have omitted all foot notes).

[8] The plaintiff was deprived of his liberty for a period of about six months. He stated in evidence that he suffered immense or acute discomfort in jail. He was grossly humiliated by the arrest and incarceration. His business crumbled as a result of his detention. He has, however, not claimed for the loss of his business or earnings arising from his detention. He was arrested and told of the charge against him in public and in the presence of his clients at his business premises. The defendants have not offered any apology to the plaintiff for their actions. The crime of rape is a very serious one and the plaintiff faced the prospects of a very substantial term of imprisonment if he were to be convicted. The plaintiff is a middle aged married man with one wife and ten children. He told the court that one of his children suffered a fatal stroke when he learnt of the reason for his incarceration.

[9] I have not had the benefit of comparable cases in preparing this judgement. I bear in mind also the effect which this award may have on future comparable cases in this jurisdiction. I am not unmindful of the fact that it is not possible to quantify in monetary terms the damage that a litigant suffers as a result of pain and suffering, deprivation of liberty, discomfort and contumelia.

[10] Bearing in mind all the above factors, I am of the considered view that a globular award of E120 000-00 for general damages

would meet the justice of the case herein.

[11] For the foregoing,

(a) Judgement is granted in favour of the plaintiff in the amount of E120 000-00 (as general damages),

(b) Interest on the sum of E120 000-00 at the rate of 9% per annum with effect from the 30th day of August 2006.

(c) Defendants are ordered to pay the costs of suit, jointly and severally, each paying the other to be absolved.

MAMBA AJ

