



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No: 2758/2004

In the matter between:

WILSON NGIDI

PLAINTIFF

and

SWAZILAND GOVERNMENT

DEFENDANT

Neutral citation: Wilson Ngidi v Swaziland Government
(2758/2004) [2012] SZHC 141 (13/7/12)

Coram: MABUZA J

Heard: 10/01/2012

Delivered: 13/7/2012

Summary: **Criminal Procedure - Arrest for crime of robbery without warrant - Upon reasonable suspicion - Arrest without warrant sanctioned by Section 22 (b) of the Criminal Procedure and Evidence Act No. 67/1938 - Crime of robbery mentioned in Part II of First Schedule of Act - Arrest lawful.**

Civil Procedure - Onus of proving reasonable suspicion shifts to Defendant

- Consequently Defendant leading evidence first: Rule 49 (9) and (5) applicable.

Delicit - Wrongful detention - Damages claimed - Suspect detained after arrest for 17 hours at police station - Section 30 (1) and (2) of the Criminal Procedure and Evidence Act No. 67/1938 applicable - Detention lawful.

- [1] The Plaintiff Wilson Ngidi sued the Defendant who is the Swaziland Government for payment of the sum of E50,000.00 (Fifty thousand Emalangeni) interest thereon at 9% a *tempore morae*, costs and further and alternative relief.
- [2] The Plaintiff's claim is for damages for unlawful arrest and detention of the Plaintiff by the police for the offence of robbery. The Plaintiff in his particulars of claim alleged that on or about the 23rd March 2004 at or about 10:30 p.m. at or near Nkoyoyo two police officers unlawfully assaulted him all over the body with fists and kicks and pointed a gun at him. Thereafter he was unlawfully arrested and detained at the Mbabane police station for about sixteen (17) hours. The police it is alleged were acting in the course and scope of the Defendant's employment.
- [3] In its plea the Defendant after admitting receipt of the statutory demand denied liability in respect of the claim for damages.

- [4] In his summons the Plaintiff claimed that he sustained several bruises and lacerations as a consequence of the assault. The Defendant denied any knowledge of the personal injuries; and because these were not alluded to nor proved at the trial hereof, the court shall not make any finding in regard thereto.
- [5] The Defendant in its plea admitted striking the Plaintiff because the latter was evading an arrest. The Defendant further admitted that one of the police officers was in possession of a firearm but denies that the officer pointed the gun at the Plaintiff. The Defendant further admits that on the material day, the Plaintiff was arrested as a robbery suspect and denies that the arrest was unlawful. The Defendant further admits that the Plaintiff was detained for 17 hours and that this period was reasonable.
- [6] In order to discharge the onus placed upon the Defendant in section 22 (b) of the Criminal Procedure and Evidence Act no. 67/1938 (the Act) the Defendant called the arresting officer 4014 Constable Nathi Owen Nhlengethwa (DW1) to give evidence. The aforesaid section states that:

“Every peace officer and every other officer empowered by law to execute Criminal Warrants is hereby authorized to arrest without warrant every person -

(b) whom he has reasonable grounds to suspect of having committed any of the offences mentioned in Part II of the First Schedule.”

[7] Part II of the First schedule is titled offences referred to in respect of which arrests may under Part II, be made without warrant. The offence of “robbery” for which the Plaintiff was charged is included in Part II of the First schedule. The complaint therefore that the Plaintiff was arrested without a warrant is answered by the above provision which states that suspects may be arrested without a warrant for *inter alia* the offence of robbery which offence falls under Part II of the First schedule.

[8] In terms of section 2 of the Criminal Procedure and Evidence Act 67/1938 which is the interpretation section, “peace officer” includes a police officer who carries out under any law the powers, duties and functions of a police officer in Swaziland.

[9] 4014 Constable Nathi Owen Nhlengethwa (DW1) therefore had the onus to inform the Court as to what the reasonable grounds were that made him suspect that the Plaintiff had committed an

offence. Consequently he gave evidence first instead of Plaintiff as he was the police officer who effected the arrest of the Plaintiff. In allowing this departure from usual practice I am guided by Rule 39 (9) of the High Court Rules which provides that:

“If the burden of proof is on the Defendant, he or his Counsel shall have the same rights as those accorded to the Plaintiff or his Counsel by Sub-rule (5)”.

Sub-Rule (5) provides that:

“Where the burden of proof is on the Plaintiff, he or Counsel for the Plaintiff may briefly outline the facts intended to be proved and the Plaintiff may then proceed to the proof thereof.”

[10] 4014 Constable Nathi Owen Nhlengethwa (DW1) testified that on the 23/3/2004 at about 10:00 p.m. he received an emergency report through the police emergency line 999 of a robbery that had taken place at Total Garage, Mbabane. Two women had been robbed at knife point

[11] He together with 3848 Constable Ntfuba Dlamini made haste to Total Garage where they found two men who informed them that

the suspects had escaped in the Nkoyoyo direction and that the complainants were pursuing them in an ambulance. The police officers also gave chase. At Nkoyoyo the police found the ambulance and parked next to it. Inside the ambulance were the driver and the complainants. The police requested the two women to join them in the police car. One of the women was called Khanyisile Nompumelelo Simelane (DW2). He could not recall the name of the other woman. When DW2 testified she named the other woman as Zandile Ntshangase.

[12] The police officers drove away with Zandile while DW2 remained in the ambulance. After driving a short distance the police came upon a blue car which was stationery. Zandile advised the police officers that the blue car was the suspects get away car. DW1 who was driving the police car stopped and parked behind the blue car. The lights of the police car lit the car ahead. Two men alighted and the car drove away. One of the men wore a blue top. DW1 drove closer to the two men, and Zandile identified the two men as the assailants. The police vehicle inched towards the two men and when they were near 3848 grabbed one of the suspects by his belt through the open window. The second suspect ran away into the bush. DW1 alighted went round to the passenger side and held the remaining suspect. 3848 alighted

carrying a gun and chased after the suspect who had run away with a lady's white handbag.

[13] DW1 introduced himself as a police officer and advised the suspect that he was investigating a robbery case which had occurred at Total Garage and that he had been identified as one of the assailants. He further cautioned him by advising him that he had a right to remain silent and that if he said anything such would be reduced to writing and used as evidence at his trial. The suspect gave his name as Wilson Ngidi, the Plaintiff herein. The time was 12:00 midnight, there were street lights and visibility was clear. Furthermore the car lights were on. 3848 returned alone without the second suspect.

[14] DW1 denied having assaulted the Plaintiff. He admitted having searched the Plaintiff and drove with him to the police station at Mbabane together with the two women complainants. Upon arrival at the police station DW1 charged the Plaintiff and placed him in the police cells.

[15] When DW1 was cross-examined he confirmed that after he received the report of a robbery he and another officer proceeded to Total Garage where they met two men who gave

them a description about the get away car and the direction it had gone and the ambulance that had followed with the two women complainants. The two men also confirmed having lent the two women mobile phones with which to telephone the police in order to report the robbery. It was the two men found at the garage who informed the police that one of the suspects was wearing a blue top. The witness stated that the two men refused to assist further with the investigations hence they were not recorded as witnesses.

[16] DW1 further stated that the complainants whom he found in an ambulance at Nkoyoyo told him that they could identify the suspects and they gave DW1 a description of the suspects. DW1 described the suspects' car as a blue private car. He had forgotten its registration number. He stated that when the suspects alighted from the blue car one alighted from the passenger seat and the other from the back seat. DW1 did not speak with the driver of the blue car because Zandile identified the two men alighting from it as the suspects. When he interviewed the complainants at the police station they informed him that the suspects had gotten a lift from the blue car and it was not a getaway car. The witness repeated that the suspect that they apprehended was wearing a blue top and was the

Plaintiff and that the one who escaped was carrying a white handbag.

[17] It was put to the witness that the Plaintiff who was arrested at Nkoyoyo was wearing a shirt with brown and green spots and a brown trousers and shoes but no blue top. The witness replied that he could not recall the colour of trouser the suspect had worn but was sure that he had worn a blue top. The witness confirmed that when the Plaintiff was arrested, he was searched. There was nothing found on him that connected him to the robbery, except the identification by Zandile and the subsequent corroboration by DW2.

[18] It was put to the witness that he pointed a gun at the Plaintiff when he arrested him. He denied having a gun and admitted that his partner Constable Dlamini had a gun but had run off with it while chasing the suspect who got away. It was further put to the witness that DW2 and Zandile were never at the scene of arrest but the witness denied this. The witness further denied that the Plaintiff was assaulted by him and Constable Dlamini. The Plaintiff did not resist arrest.

[19] DW1 confirmed that after arresting the Plaintiff he placed him in the police cells at the police station at Mbabane and recorded statements from the two women complainants. Thereafter, the matter was taken over and investigated by Gabriel Tumeletsi who subsequently released the Plaintiff citing insufficient evidence to prosecute a case of robbery in a letter dated 25/3/2004 (Exhibit "A") and addressed "to whom it may concern". DW1 was unaware of the said letter but he maintained that he had reasonable suspicion to arrest and detain the Plaintiff which was based on the positive identification of the Plaintiff by the complainants.

[20] DW2, Khanyisile Nompumelelo Simelane was the next defence witness. She testified that on the 23rd March 2004 at about 7.45 p.m. she was at Total Garage in Mbabane. She was with Zandile Ntshangase. Zandile was seated while she remained standing. Two men arrived, one took out a knife and put it to Zandile's throat and demanded their handbags. The suspects took the two women's handbags and disappeared into the nearby bush with them.

[21] She was unable to describe the assailant's physical features because the incident had occurred a long time ago. She did

recall that the man who came to her wore a blue shirt. She testified that at the time Zandile owned a mobile phone which they had used to call the police emergency number 911 and reported the incident. The police response was that they had no transport so they would have to wait a while. While they were waiting the two men re-emerged from the bush and boarded a motor vehicle: a van which drove off towards the Nkoyoyo direction.

[22] After the van had left with the two assailants, two more cars passed followed by an ambulance which stopped for the two women. They related to the driver what had occurred and he gave them a lift and they drove after the van. They caught up with the van which had stopped in the Nkoyoyo palace vicinity. Their headlights picked out two men who alighted from the van still carrying the handbags. While the ambulance was stationery at Nkoyoyo the police telephoned wanting to know where they were as they were following them.

[23] When the police arrived, DW2 alighted from the ambulance and boarded the police van and followed the assailants whom she described to the police. The police caught one and the second one ran away. The police placed the arrested man in the police

van and took him to the police station. DW2 stated that the arrested man was wearing a multi-coloured shirt. When she had boarded the police car, she left Zandile in the ambulance. After the one suspect had been arrested and placed in the police van she returned with the police and the suspect to the ambulance. The police asked Zandile if she knew the suspect and Zandile agreed and confirmed that he was one of the people who had robbed them. Thereafter the police, the two women and the suspect drove to the police station at Mbabane.

[24] DW2 stated that the suspect was not assaulted by the police. When they arrived at the police station, the police recorded statements from the complainants. The following day when the complainants returned to the police station, they were attended to by a different police officer from the criminal investigation department who informed them that he would contact them after the investigations were completed but he never did so. The complainants were never called to an identity parade.

[25] When cross-examined DW2 confirmed that the suspects held them up with a knife and that one wore a blue shirt otherwise she was too shocked to notice any identifying features. She further stated that when the two suspects re-emerged from the

bush she and her friend did not raise an alarm due to fear. She was able to state that the motor vehicle that the suspects boarded was a white van SD 164WH which evidence she did not give when she gave her evidence in chief. Generally DW2 was not an impressive witness as she could not recall most of the evidence understandably because this incident occurred during March 2004 and she was giving evidence during 2011. The defence case closed after this witness had given evidence.

[26] The Plaintiff (PW1) next gave evidence. He stated that on the material date hereto he resided at Nkoyoyo and was employed at Matsapha. On the 23/3/2004 after he had knocked off he headed for Mbabane. It was late when he arrived at Mbabane and there was no public transport to Nkoyoyo. He decided to hitchhike home from Total Garage. He hooked up with another male hitch hiker. A white van gave them both a lift and they both sat at the back. There were two men in front. He did not see any robbery or disturbance taking place while at Total Garage. He only heard about the robbery later.

[27] After alighting from the van and while walking towards his home a police van stopped behind him and the man he was walking with. Police officers alighted and ordered them not to make any

move. The driver of the police van grabbed the Plaintiff, kicked and punched him and he fell down. He was searched and told to release the money and a bag that had been robbed off the ladies. He had none of these items. The other man ran away upon seeing the police van. The Plaintiff was thereupon arrested at about 10:00 p.m. He did not notice any ambulance.

[28] Upon his arrest, he was placed at the back of the police van while two police officers sat at the front. He did not see the complainants. At the Mbabane Police Station, he was placed in the police cells after being ordered to take off his shoes where he spent the night. He stated that he wore a whitish shirt with brown and green spots and brown trousers with no jacket. He did not recall what the other man was wearing. He recalled that his companion was a Matsebula and that he lived at an Earnshaw homestead.

[29] The following morning the Plaintiff was removed from the cells and taken to an office where his fingerprints were taken. Thereafter he was taken to a holding cell from where he was fetched at about 3:00 p.m. He was taken to another office where he found two elderly women. The police asked these women if they knew him and they replied in the negative stating that their

assailants were younger men. The police apologized and released him without charging him. He further testified that he had never seen DW2 before today. He handed in Exhibit "A" which is a letter from the Mbabane police station addressed to "Whom it may concern".

[30] The contents of Exhibit "A" are reproduced hereunder:

"This letter serves to inform you that Wilson Gwaza Ngidi was on Tuesday the 23rd March 2004 arrested and detained into police cells for C15 1626/04 and C15 1627/04. His arrest No. was 526/2004. Upon our investigation there was no sufficient evidence to prosecute. He was then released on 24/03/2003.

We regret for the inconvenience that might have been caused.

Investigator : Gabriel Tumaletse
Force Number : 3997"

[31] When the Plaintiff was cross-examined he denied that when the police arrested him at Nkoyoyo a woman (one of the assailants) had accompanied the police.

It was put to him that the police did not assault him at the time of his arrest but he was adamant that they had assaulted him. The Plaintiff closed his case.

[32] Having outlined the evidence above I must now decide whether Constable Nhlengethwa had any “reasonable suspicion” to enable him to effect an arrest of the Plaintiff. The first stage of the enquiry is to determine what is meant by a “**reasonable suspicion**”.

In the case of **Mabona and Another v Minister of Law and Order and Others** 1988 (2) SA 654 at 658 discussing a section similar to ours Jones J states:

“The section requires a suspicion not certainty. However, the suspicion must be based upon solid grounds. Otherwise it will be flighty or arbitrary and not a reasonable suspicion.”

In **Timothy Bhembe v The Commissioner of Police and Another** Appeal case no. 55/2004 (unreported) at 8 Beck J said:

“It is not the duty of a police officer to elevate a reasonable suspicion to the level of certainty before a suspect may

lawfully be arrested without a warrant. It is the function of a trial court, and not of the arresting authority, to reach a conclusion as to the reliability and sufficiency of the evidence gathered by the police, as the authorities show”.

[33] In *casu*, at the time of the Plaintiff’s arrest DW1 had the following information:

(a) A radio message from the police emergency line that an offence of robbery had been committed;

(b) That there were two suspects who had fled the scene in a motor vehicle in the Nkoyoyo direction;

(c) There were two female victims of the offence who pursued their assailants in an ambulance;

(d) One of the occupants of the ambulance DW2, identified two men who were on foot as their assailants.

[34] Armed with the above information DW1 caused the arrest of the Plaintiff. A lawful arrest in terms of the subsection under discussion can be made upon a reasonable suspicion as it was aptly put by Lord Devlin in the Privy Council in **Shaaban Bin**

Hussein and Others v Chong Fook Kam and Another 1969

(3) All ER 1626 at 1630:

“Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; I suspect but I cannot prove. Suspicion arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end”.

[35] The above information gave rise to a reasonable suspicion. The power of arrest without a warrant is a valuable means of protecting the community. It should not be rendered impotent by judicial encrustations not intended by the Legislature. On the other hand the law is jealous of the liberty of the subject and the police in exercising this power must be anxious to avoid mistaking the innocent for the guilty. They often have to act on the spur of the moment with scant time to reflect, but they should keep an open mind and take notice of every relevant circumstance pointing either to innocence or to guilt see **Duncan v Minister of Law and Order** 1984 (3) 460 at p 466.

[36] In the light of the aforementioned facts Constable Nhlengethwa had at his disposal and which I have set out above the suspicion formed by him was in my view reasonable. The arrest of the

Plaintiff therefore fell squarely within the ambit of section 22 (b) of the Criminal Procedure and Evidence Act 67/1938. It is my finding that the arrest of the Plaintiff was lawful.

[37] The Plaintiff's particulars of claim allege that he was assaulted by the two police officers who arrested him. It is alleged that the police assaulted him all over his body with fists and kicks. In addition to this physical assault the two officers pointed a gun at him. In his evidence in chief he testified that the driver of the police van grabbed him, kicked and punched him and he fell.

[38] The evidence of the Plaintiff does not support the allegations in his summons and he correctly abandoned the issue of the assault during the hearing hereof. Consequently I shall disregard same.

[39] The second stage of the enquiry is whether or not the detention of the Plaintiff was unlawful.

[40] DW1 testified that after arresting the Plaintiff he took him to the Mbabane police station together with the two women complainants. The time was 10:00 p.m. After recording the

statements from the complainants, DW1 placed the Plaintiff in the police cells.

[41] The Plaintiff testified that at about 8:00 a.m. the following day he was removed from the cells and taken to an office where his finger prints were taken and returned to a holding cell. At about 3:00 p.m. on the 24/3/2004 he was taken to an office where he found two elderly women who were asked to identify him but they replied that he was not their assailant. The police released him thereafter.

[42] When Constable Nhlengethwa arrested the Plaintiff it was at night which was presumably during his shift. According to him police officer No. 3997 Gabriel Tumaletse took over the investigation the following day and Exhibit A written by him states succinctly that the Plaintiff was released because there was “no sufficient evidence to prosecute” (sic) The Plaintiff had been in detention for 17 hours.

[43] Section 30 of the Criminal Procedure and Evidence Act No. 67/1938 details the procedure after an arrest without a warrant as follows:

Section 30 (1) -

No person arrested without warrant shall be detained in custody for a longer period than in all the circumstances of the case is reasonable.

Section 30 (2)

Unless such person is released by reason that no charge is to be brought against him, he shall, as soon as possible and without undue delay, be brought before a Magistrates Court having jurisdiction upon a charge of an offence.

[44] Constable Nhlengethwa stated in his evidence that he was merely an arresting officer. He placed the Plaintiff in police custody to await further processing by the investigating officer who released him after he realized that there was no strong case against him which he could prosecute successfully. Officer Gabriel Tumaletse in my view complied with section 30 (1) and 30 (2) stated above. In other words the Plaintiff was not in custody for a period longer than was reasonable in all the circumstances when he realized that his case was weak he complied with section 30 (2) and released him before the requirement of the second part of section 30 (2) i.e. taking him to a Magistrate became effective.

[45] Between 10:00 p.m. on the previous night and 8:00 a.m. the following day nothing much could be done to process the

Plaintiff. But soon after 8:00 a.m. the Plaintiff was attended to by the investigating officer until he was released at 3:00 p.m. thereby complying with section 30 (1) of the Criminal Procedure and Evidence Act.

[46] It is my finding therefore that the detention was not unlawful. Having found that the arrest and detention of the Plaintiff were lawful I hereby dismiss the Plaintiff's claim with costs.

Q.M. MABUZA
JUDGE OF THE HIGH COURT

For the Plaintiff : Mr. A. Lukhele
For the Defendant : Mr. M. Vilakati