



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 1982/2005

In the matter between:

PETROS MAHHWAYI

Plaintiff

And

**THE COMMISSIONER OF POLICE
THE ATTORNEY GENERAL**

**First Defendant
Second Defendant**

Neutral Citation: *Petros Mahhwayi v The Commissioner of Police and The Attorney General (1982/05) [2012] SZHC*

Coram: OTA J

Heard: 21st February, 2012

Delivered: 12th March 2012

Summary: *Plaintiff claimed the sum of E675,000=00 (Six hundred and Seventy five thousand Emalangeni) from the Defendants, for assault occasioned to him by servants of the Defendants in the course and within the scope of their employment. No medical report of the fact of assault and concomitant injuries or independent eye witness account corroborative of Plaintiff's claims. Claim dismissed. No orders as to costs.*

OTA J.

[1] By combined summons the Plaintiff claimed the following reliefs against the Defendants:-

1. Payment of the sum of E 675,000-00
2. Costs of suit
3. Further and or alternative Relief.

[2] The facts upon which this claim is predicated are contained in the particulars of claim to be found on pages 2,3 and 4 of the book of pleadings. The Plaintiffs case is that servants of the Defendants acting during the course and within the scope of their employment, assaulted him on the 20th August 2003. That the assault was without provocation or due and probable cause. In consequence of the alleged assault, the Plaintiff claimed damages in the sum of E675,000-00 as follows:-

Contumelia	E300,000-00
Pain and Suffering	E275,000-00
General Damages	E 95,000-00
Cost of Instructing attorney	<u>E 5,000-00</u>
Total	<u>E675,000-00</u>

(See paragraph 10 page 4 of the book)

The Defendants filed a plea denying the claim as demonstrated in pages 8,9 and 10 of the book. The Plaintiff's replication is contained in pages 11 to 12 of the book. I heard oral evidence from both sides in amplification of their pleadings on the 21st February 2012.

[3] In proof of the claim, the Plaintiff Petros Mahhwayi testified and called no witnesses. Plaintiff told the Court that on the day of the incidence he was parked outside Supreme Furnitures now Betta Parts. That this was necessitated because it was during the trade fair and his offices were located inside the trade fair centre which was closed. That it was whilst outside that two police officers approached him. That one of the police officers introduced himself as a Sergeant (who happens to be DW 1 in this case Sergeant Dlamini). That DW 1 inquired of him who owned the car that he was leaning against. Plaintiff stated that he informed the police officers that the car belonged to him. That he used it for driving lessons. That the trade name of his driving school at that time was Safe Driving School.

[4] It was further Plaintiff's case that DW 1 then enquired as to his nationality. That he told DW 1 that he was from Mozambique. That

DW 1 then asked him for his entry Permit. That Plaintiff produced a certified copy of his entry Permit which he had in his possession and gave it to DW 1. Plaintiff further testified, that DW 1 rejected the entry Permit saying that he wanted a resident permit. That whilst the Plaintiff was still trying to explain to DW 1 that he was given the entry permit by the Immigration and that he should read it, DW 1 – throttled the Plaintiff’s neck. It is Plaintiff’s case that he protested this state of affairs, telling DW 1 that he was being violent. That the throttling however persisted until, the other police officer who was then with DW 1, noticed the situation and came over to enquire what was going on. That it was this other officer that took his document and read it and then informed DW 1 that the document was a permit and that he should let the Plaintiff go.

[5] Plaintiff told the Court, that he then went to a call box and telephoned his lawyer who told him to go to the police station to report the incidence. That he got to the police station around 8.30am and was told to wait for one **Jomo Mavuso** now deceased, who was the police officer in charge. That he finally recorded a statement at around 2.00pm.

- [6] Plaintiff told the Court that the throttling took place in a public place with people moving around and that he was hurt because he was treated like a criminal. That DW1 did not give him any reasons for throttling him. That the day of the incidence was the first day he saw the two police officers.
- [7] Plaintiff further tendered the entry Permit which he alleges to be the one he gave to DW 1 on that day and it was admitted in evidence as exhibit A. Plaintiff informed the Court that this incidence took place in 2003 and the expiry date on Exhibit A is 25th January 2005.
- [8] It was further Plaintiff's case, that DW 1 did not ask for the original of his entry Permit which he could have easily produced from his home. Plaintiff further tendered the trading licence of the driving school which he was then operating. This was admitted in evidence as Exhibit B.
- [9] Plaintiff prayed for compensation from the Court because he was violated and humiliated by the police officers in public. That he was then a business man conducting the business of a driving school and did not exchange words with the police officers in anyway when they

asked for his entry Permit which he produced. But this was however rejected by DW 1. That up till date he has not been charged with being an illegal immigrant in the country or being in possession of a false permit.

[10] It is further Plaintiffs case that the allegation in the defence, that after he showed the police officers the entry Permit that they let him go is not true. He stated that DW 1 only let him go after the other police officer told him that Plaintiff's permit was authentic.

[11] Under crossexamination Plaintiff insisted that DW 1 throttled him on the neck and even lifted him off the ground in the process. That the DW 1 used only one hand to throttle him and that the throttling lasted for sometime until the other police officer interjected. Plaintiff told the Court that he sustained injuries because his neck hurt him for sometime and he was also humiliated. He told the Court that he was not examined by any Medical Practitioner because he was too busy on the day visiting the police station and SWAGA (Swaziland Agency Against Abuse).

[12] Plaintiff further stated that DW 1 throttled him in full glare of the public and that the other police officer is a witness. He stated that this was also witnessed by passersby and people in their shops. He said that it is not true that he never recorded a statement at the police station. He said he was called to go to the police station by the Station Commander to explain what happened but that he asked them to talk to his lawyer. He denied ever being confronted with DW 1 by the Station Commander over this issue.

[13] At the close of the case for the Plaintiff, the Defence led two witnesses. DW 1 was 1793 Sergeant **Phillip Dlamini** who told the Court, that on the 20th August 2003, he was then on duty with woman **Constable 4644 Khumalo**. That they had the task of fishing out illegal immigrants. That when they got to Supreme Furnitures now Betta Parts, they saw the Plaintiff, **Petros Mahhwayi**. That on enquiry as to his nationality, Plaintiff told them that he was from Mozambique. That they then asked for his permit and Plaintiff gave them a photocopy of his entry permit. That they requested for the original entry permit because the picture in the photocopy was dark and they could not tell whether or not it was the Plaintiff in the picture. That Plaintiff told them that he would take the original

document to the police station and it was at that juncture, that they gave him back the photocopied copy of the permit and left to continue with their investigations.

[14] DW 1 further stated, that neither him nor **Constable Khumalo** strangled the Plaintiff. That they did not even charge him or arrest him because he had produced the permit. The problem was that the permit was dark. He denied ever strangling the Plaintiff in full view of the public. He said if that were so, the public would have said or done something. He denied ever touching the Plaintiff, saying that Plaintiff is only making up stories. It was also DW1's testimony that upon his return to the police station after the raid, he was confronted by the Station Commander in the presence of the Plaintiff whom he found in the Station Commanders office, and he denied ever throttling the Plaintiff. Nothing turns on the crossexamination of this witness.

[15] DW 2 was **Constable 4644 Gugu Khumalo**. She told the Court that on the day of the incidence she was on a raid with Sergeant Dlamini, DW 1, for illegal immigrants. That around 8.00am at the Supreme Furniture area, they met the Plaintiff. That they greeted him and from his response they could tell that he was not a Swazi. That they asked

him for his permit and he gave them a photocopy of his entry permit. DW 2 told the Court that they requested for the original copy of Plaintiff's entry permit because the photocopy was not certified. DW2 said that DW 1 did not strangle the Plaintiff because it was a public place and the reason that Plaintiff only produced the photocopy of the permit was not sufficient for DW 1 to do that. She said she never saved Plaintiff from strangulation by DW 1, after certifying the entry permit authentic. She said, that she and DW 1 did everything together on that day, so she witnessed everything that transpired. She said that as police officers they are trained and instructed not to ill treat people in public view, so if DW 1 had done what he is alleged to have done he could not have done it in public view. She said she does not know whether the Plaintiff went back to the station to report the incidence and had to wait until 2.00pm when he recorded a statement, because after the raid she went back to Malkerns where she is stationed. Nothing turns on the crossexamination of this witness.

[16] At the end of the Defence, I ordered written submissions. Plaintiff was ordered to file by the 27th of February 2012, whilst the Defendants

were ordered to file by the 28th of February 2012. It is on record that both parties filed written submissions.

[17] Now, the Plaintiff alleges that he was assaulted and injured, both in his person and his dignity by servants of the Defendants acting within the scope of their employment. It is a trite principle of law, that since the act complained of, the assault, involves interference with the Plaintiff's bodily integrity, once the Plaintiff establishes such assault, the Defendants bear the onus or burden of proving that the assault was lawful or excusable.

[18] **See Prince Khumalo V Terence Everzard Reilley N.O. 83 Others Civil Case No. 244/07, Makhosana Dlamini V Radio Shop Civil Case No 3118/05, Minister of Law and Order V Horley, 1986 (3) SA 568 (A), Mabaso V Felex 1981 (3) SA 865 (A).**

[19] The Standard of proof required of the Plaintiff in establishing the fact of the assault and the resultant injury, is proof on the balance of probabilities. This standard of proof was exploded by the Court in the case of **Ramakulu Kusha V Commander Venda National Force 1989 (2) SA 813 at 815**, as follows:-

“ It is said that in civil matters the onus of proof is discharged upon a balance of probabilities, but this simplistic statement must be used with care, since even if the onus bearing party puts into his “pan of the scale of probability” slender evidence as against no counter-balance on the part of the opponent and although the scale should therefore automatically go down on the side of the onus bearing party, the Court may still hold that the evidence tendered was not sufficiently cogent and convincing----. It is not mere conjecture or slight probability that will suffice----”.

[20] Now, the evidence led by the parties is largely common cause on the activities of the day of this incidence. The major part of divergence or disagreement is whether the Plaintiff was assaulted and injured or not by DW 1. Whilst the Plaintiff says he was assaulted and injured the Defence witnesses say that he was not assaulted as alleged.

[21] By reason of this divergence, the Defendants contend in their written submissions, that the two versions before Court are mutually destructive, thus the standard of proof laid down by **Eksteem AJP, in the case of National Employers General Insurance Co. Ltd V Jagers 1984 (4) SA 437 at 440 D-G**, should be invoked.

In the National Employers case supra, the Court declared as follows:-

“ It seems to me--- that in any civil case, as in any criminal case, the onus can ordinarily be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the Plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable and that the other version advanced by the Defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not, the Court will weigh up and test the Plaintiffs allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with or consideration of the probabilities of the case and, if the balance of probabilities favours the Plaintiff then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the Plaintiff's case any more than they do the Defendant's the Plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the Defendant's version is false”

[22] The foregoing position of the law was amplified by the Court in the case of **Ramakulu Kusha V Commander, Venda National Force (supra)** in the following words:-

*“---On the other hand the test laid down in **National Employers Manual General Insurance Association V Gany** --- that “where there are two stories mutually destructive, before the onus is discharged the Court must be satisfied that the story of the litigant upon whom the onus vests is true and the other false” has been somewhat attenuated in the later case law. The reason is not far to seek, for it may be that in certain cases the Court may not be able to demonstrate the falsity of one or other version, and yet find on all the probabilities that the onus – bearing party has succeeded in weighing of the scales of probability with sufficiently cogent evidence in his favour”*

[23] The only poser which begs for answer at this juncture is:- Has the Plaintiff proved his case on the balance of probabilities?

[24] Let me say it straight away here, that after a very careful consideration of the entire matrix of evidence tendered, I find that the Plaintiff has failed to prove the alleged assault and its concomitant injury, on the balance of probabilities. I say this because the evidence of the defence seems to be more weighty and convincing.

[25] There is no doubt that the fact that the Plaintiff has alleged being assaulted, can generate the question why he should make such an allegation if such assault never took place, especially when there is

nothing to show that he is capable of being motivated by malice aforethought. This is however the extent to which the evidence of the Plaintiff led the court. He did not call any other evidence in support of his own. If the Defendants had called no evidence, the court would have been compelled to determine the case on the basis of the Plaintiff's testimony. But the Defendants did call evidence in defence. As the case lies, the court is duty bound to weigh the evidence on each side against each other to ascertain for itself which one is weightier and more convincing. Having undertaken this task, I have come to the conclusion that the scale of probabilities is firmly tilted against the Plaintiff.

[26] I say this because in the first instance, the Plaintiff alleged that he was throttled by the neck by DW 1 to the extent that DW 1 lifted him off his feet in the process of the said throttling. The Plaintiff could not however tell the Court how long the alleged assault lasted. Even though Plaintiff alleged that he felt some pain as a result of the alleged assault, he could not however demonstrate the degree or extent of the alleged pain. Most crucially, the Plaintiff failed to seek medical assistance in the wake of this assault and the alleged injuries. One would have expected that in the face of the alleged throttling to the

extent that Plaintiff was lifted off his feet by reason of same, that Plaintiff would have immediately sought some medical help as a result of the obvious injuries that would result from the nature of the alleged assault. However, the Plaintiff herein in his evidence admitted that he was too busy on that day going to the police station and SWAGA offices (Swaziland Agency Against Abuse) to concern himself with medical help. As a result, no medical report of the alleged assault and consequent injuries ensues in these proceedings. The presence of a medical report would have been tendered to establish the alleged injuries. However, the Court is not fortunate to be availed of such a document.

[27] More to the foregoing, is that it is common cause that the alleged assault took place in a public place, in the public view, and in broad daylight. It is also common cause that DW 1 and DW 2 were geared up in full police uniform at the time of the alleged assault, In these circumstances, I am inclined to agree with the Defendants in paragraph 12 of their written submissions that *“it is highly unlikely that two police officers a man and a woman in full uniform could assault Plaintiff in the manner alleged, regard being had (sic) that it was in a public place, in broad daylight and in the presence of*

members of the public. Therefore Plaintiff's story ought to be disbelieved''

[28] I am also inclined to agree with the Defendants that if the alleged assault had taken place in the way and manner it is alleged in such a public place, that the members of the public would have been interested. There is no evidence of any interest shown by the members of the public in the alleged assault. The Plaintiff has failed to call any of the passersby or people in the shops located around that area, whom he alleges witnessed this incidence as witnesses to lend sustenance to his claims. This is more so as the Plaintiff's office was located in the same area of the incidence, he was thus not a total stranger to the community. In the absence of any independent corroborative evidence either in the form of a medical report or an independent eye witness account, I cannot come to the conclusion that the Plaintiff has proved his case of assault and injuries on the balance of probabilities.

[29] In adopting this posture, I lean for support on the pronouncement of my learned brother Mamba J, in the case of **Dingani Mazibuko and**

two others V The Commissioner of Police and two others Civil Case No. 951/07, paragraph 21, as follows:-

*“ On the issue of being assaulted by the police, **Mr Langwenya** said he was kicked and insulted by the police at the Lobamba and Mbabane police station. This has been denied by the Defendants. There is no independent corroborative evidence in this regard e.g in the form of a medical report or eye witness. I am in the circumstances unable to hold that **Mr Langwenya** has established that he was assaulted by the police in this case”*

[30] In addition to the foregoing, is the evidence of DW 2, whom Plaintiff categorically told the Court witnessed the said assault and was the one who rescued him from it. DW 2 however sang a completely different song, which is that the alleged assault never occurred nor did she rescue the Plaintiff from same, as he alleged.

[31] It remains for me to stress here, that exhibit A does not also add any credence to the Plaintiffs case. I say this because Plaintiff alleged that exhibit A is the same certified entry permit which he gave to the police officers on the day of the incidence. It is common cause that this incidence occurred on the 20th of August 2003, however, a close reading of exhibit A shows that it was certified by the Deputy Prime

Ministers office on the 25th of August 2003, 5 days after the occurrence of the incidence. This fact tends to substantiate the case for the defence that Plaintiff gave them a photocopy of his permit which was not certified. Thus the request that Plaintiff produces the original permit. These factors lie to weaken the Plaintiffs credibility as a witness, thus diminishing his case in the face of the Defendants case.

[32] In the final analysis, I have put the Plaintiff's case and the Defence on an imaginary scale and weighed them, and the probabilities are heavily weighed against the Plaintiff.

[33] On these premises, I find that the Plaintiff has failed to prove his case on the balance of probabilities. The Plaintiff's claim thus fails and is accordingly dismissed.

[34] I make no order as to costs.

For the Plaintiff:

S. Magongo

For the Defendant:

N. Vilakati

**DELIVERED IN THE OPEN COURT IN MBABANE ON THIS
THE.....DAY OF.....2012**

OTA J

JUDGE OF THE HIGH COURT