



**IN THE HIGH COURT OF SWAZILAND**  
**JUDGMENT**

Case No: 2351/03

In the matter between:

**NONHLANHLA SIMELANE**

**PLAINTIFF**

and

**THE COMMISSIONER OF POLICE**  
**THE ATTORNEY GENERAL**

**1<sup>ST</sup> DEFENDANT**  
**2<sup>ND</sup> DEFENDANT**

**Neutral citation** : Nonhlanhla Simelane v The Commissioner of Police and The Attorney General (2351/03) [2013] SZHC 135 (11 JULY 2013)

**Coram** : MABUZA J

**Delivered** : 11 JULY 2013

**Summary:** **Civil Law:** **Delict-damages claimed against the Defendant for unlawful arrest, unlawful detention, assault, humiliation, pain shock and suffering and medical expenses – Unlawful arrest and unlawful detention not proved – Unlawful assault proved – Damages for assault and the resultant humiliation, pain shock and suffering awarded in the sum of E50,000.00.**

**Human Rights:** **Plaintiff rights against arbitrary search or entry protected by section 22 (1) of the Constitution – Plaintiff's rights against torture or to inhuman or degrading treatment or punishment protected by section 18 of the Constitution.**

## JUDGMENT

### MABUZA J

[1] The Plaintiff was arrested on the 6<sup>th</sup> April 2012 by the Royal Swaziland Police for suspicion of theft of a mobile phone which belonged to one Happy Manana . She was taken into custody at 11:00 p.m. and released at 4:30 a.m. on the 7<sup>th</sup> April 2002.

[2] She claims that she was wrongfully and maliciously arrested and assaulted by the police during the five and a half hours while in police custody and detention.

[3] She has issued summons against the Defendants for damages that she suffered as a result of the arrest for pain, emotional shock, contumelia, loss of freedom and medical expenses. The breakdown of the damages suffered is as follows:

- (i) Medical expenses - E2,000.00
- (ii) Pain and suffering - E55,000.00
- (iii) Emotional shock - E20,000.00
- (iv) Humiliation - E25,000.00

(v) Loss of freedom - E20,000.00  
Total E122,000.00

She further claims interest at 9% per annum, costs and further and alternative relief.

[4] She claims that the Defendants are liable to pay the damages that she suffered and that notwithstanding statutory demand the Defendants fail, refuse and or neglect to pay the sum of E122,000.00 (One hundred and twenty two thousand Emalangeneni).

[5] The Defendants deny that they detained the Plaintiff and plead that she only spent a few hours at the police station where she was questioned about allegations which were made against her by her co-passengers. They further deny that she was assaulted handcuffed or suffocated and put the Plaintiff to the strict proof of these allegations. They further plead that the arrest was lawful and was in terms of the Criminal Procedure and Evidence Act of 1938. They deny that she suffered any damages, deny that they are liable to compensate her and refuse to pay the amount(s) that she has claimed in her summons. They have put her to strict proof of all her allegations against them.

[6] In order to prove her claim she led oral evidence of herself and the doctor who treated her after she was released from police custody. The Plaintiff a Swazi adult female who resides at Ezulwini and was at the material time employed by Ezulwini Filling Station which is owned by the Zeeman family. The Zeeman family run a transport business. They regularly transport vendors to the Republic of South Africa for purchase of goods for resale in Swaziland in a bus called Zulu Kayalami.

[7] The Plaintiff was such a vendor who had during the month of April 2002 travelled to Johannesburg in Zulu Kayalami Bus Service in order to do some shopping. She returned to Swaziland on the 6<sup>th</sup> April 2002. She was seated next to another female by the name of Happy Manana (the complainant). While travelling down Malagwane Hill, Happy informed the Plaintiff that she could not find her mobile phone. The Plaintiff after disembarking at Ezulwini Filling Station made her way home.

[8] At about 11:00 p.m. police knocked at her door and demanded that she open up; which she did and they entered her home. They accused her of having stolen Happy Manana's mobile phone and searched her home and the bag that she had been carrying while on the bus. She says that they had no

warrant to search her home. They ordered her onto the police van and drove with her to the Lobamba Police Station. The Plaintiff was accused by the police of theft of the complainant's mobile phone. She says that they had no warrant to arrest her.

- [9] She informed the police that she did not know where the mobile phone was. As soon as she had said this a police officer picked up a stick and assaulted her on the head and she saw stars through the pain. The other officers joined in assaulting her. She was kicked on her uterus which caused her to bleed. They handcuffed her hands behind her back and covered her face with a plastic bag (tubed her) so that she would be forced to confess that she had stolen the complainant's mobile phone. She complained that she was asthmatic and they ignored her and continued beating her up for some time.
- [10] After that they made her sit outside on some benches at the reception. It was now in the morning and she was exposed to the cold as she was scantily dressed. She asked the desk officer at the reception as to what would become of her and the officer made a phone call after which he ordered her to stand up and step out to a police car which would take her home. She was driven home at 4.00 a.m and presumably arrived home at 4.30 a.m.

[11] When she arrived at her home she was in pain which caused her to cry. She dressed and went to Matsapha to her sister-in-law so that the latter could help take her to hospital but the hospitals were closed because it was a Sunday. She suffered pain until Monday when she went to Philane Clinic at Matsapha where she was treated by Doctor Dlamini (PW2). She was treated and discharged. She was charged the sum of E121.00 (One hundred and twenty one Emalangeneni). She was in pain for a month after the assault and had to attend outpatient treatment after the first treatment.

[12] She says that the police searched her home without a search warrant and arrested her without a warrant. The police officers who assaulted her are the same police officers who arrested her. She was arrested at about 11.00 p.m. on the 6<sup>th</sup> April 2002 and was released at 4.00 a.m. on the 7<sup>th</sup> April 2002. Before her release she was made to sit at the reception at an ungodly hour of the night into the morning where she experience cold and discomfort of mosquito bites.

[13] She was ultimately not charged but the arrest embarrassed and humiliated her of itself and at work. She was a petrol attendant at work as well as a

cashier and each time the cash did not balance it would be assumed that she had stolen it because she was a cell phone thief. She did not produce any proof with regard to failing to balance the cash nor did she call any evidence to support the suspicion by her work mates that she was a thief.

[14] She stated that she did not steal the complainant's cell phone. She further stated that she was not the only one in the bus; the bus was full of passengers. The police suspected her because she was seated next to the complainant in the bus. The Plaintiff sat near a window and the complainant sat next to her.

[15] She says that as a result of the wrongful and malicious arrest, detention and assault she suffered damages in the amount of E122,000.00 (One hundred and twenty two thousand Emalangi) and that she suffered pain emotional shock, contumelia, humiliation, loss of freedom and incurred medical expenses. Her claim is set out in paragraph (3) hereinabove.

[16] When she was cross-examined it was put to her that she was not arrested, instead she was politely requested to accompany the police to the Lobamba Police Station. It was further suggested to her in cross-examination that the

reason the police had suspected her was because the passengers suggested that the number of the lost cell phone be called and it rang twice next to where the Plaintiff was seated.

[17] To prove medical expenses Dr. Michael Dlamini was called as a witness (PW2). He testified that on the 8<sup>th</sup> April 2002, he examined PW1 at Philane Clinic at Matsapha. He stated that PW1 was walking slowly due to body pain following alleged kicking and punching by the police. The skin on her head was sore on palpation of the occipital but he found no trauma. Her neck was sore but there were no bruises and abrasions. There was pain in her abdomen. Her urine was tested and he found traces of blood. She had a bruise on her left knee and on the left medial side of forearm; and a scratch on the right forearm dorsal part. He stated under cross-examination that the pain and bruises she had were consistent with assault.

[18] In rebuttal the Defendants led the evidence of Happy Manana and 2035 Sergeant Brian Sibusiso Maphanga. Happy Manana (DW1) testified that on her return from Johannesburg she was seated next to the Plaintiff in the bus Zulu Kayalami. When she arrived at Oshoek border gate (Swaziland), she switched on her phone and put it in a small pocket outside her bag.



When she arrived in Mbabane she realized that her cell phone was missing. When she arrived at Lobamba she proceeded to the police station where she reported the loss of her mobile phone. After lodging the report, the police drove to Ezulwini and picked up the Plaintiff and drove back to the police station. DW1 was also at the Lobamba police station. She testified under cross-examination that while seated at the reception the Plaintiff was with the police who were investigating her matter somewhere else on the premises. She heard a woman screaming and she thought that the police were beating up the Plaintiff because when she eventually came out into the reception, the Plaintiff looked as though she had been crying.

[19] 2035 Sergeant Brian Maphanga (DW2) testified that he was the investigating officer herein and that on the 6<sup>th</sup> April 2002 he received certain information through the police radio communication system regarding theft of a cell phone from DW1, he proceeded to the Plaintiff's home. Upon arrival, there he introduced himself as a police officer who was investigating the theft of a cell phone. He cautioned her before searching her home. After he had searched her home and not finding the cell phone he asked her to accompany him to the police station at Lobamba. This was to enable her to meet with Miss Manana for further investigations. She accompanied him to

the police station. He denies that she was insulted and roughened up. He recalled that at one time the Plaintiff was alone with the police officers in the CID room while Miss Manana went to record a statement. He denies that the Plaintiff was assaulted and that she was tortured by suffocation. After Miss Manana had finished recording her statement she was excused. The Plaintiff was also excused between 12.30 p.m. and 1.00 a.m.

[20] DW2 admitted during cross-examination that he searched the Plaintiff's home without a search warrant and requested her to accompany him to the police station without an arrest warrant. The arrest without a warrant is justified in terms of section 22 (b) of the Criminal Procedure and Evidence Act no. 67/1938 (The Act).

[21] Section 22 (b) of the Act 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

(a) ...

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

[22] The offence of theft appears in the Second First schedule as follows:

“Theft. Either at common law or as defined by any statute”.

[23] It is common cause that the police officers when arresting the Plaintiff were investigating the offence of theft of a cell phone which had been stolen from Happy Manana who had made a formal report of the theft at the Lobamba Police Station.

[24] In my respectful opinion and I so hold that she was arrested because she was a suspect for the theft of Happy Manana’s cell phone as she had been sitting next to her in the bus on their return from Johannesburg when Miss Manana’s cell phone went missing. The circumstances surrounding the loss of the cell phone suspiciously pointed at the Plaintiff.

[25] Did the suspicion justify her detention from 11.00 p.m. to 4.30 a.m? The answer hereto is to be found in section 30 of the Criminal Procedure and Evidence Act No. 67/1938. The said section sets out the procedure to be followed after an arrest without a warrant.

Section 30(1) provides that:

“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) provides that:

“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.”

[26] Section 16 (3) of the Constitution provides that:

“a person who is arrested or detained –

- (a) ...
- (b) Upon reasonable suspicion of that person having committed ... a criminal offence, shall unless sooner released, be brought without undue delay before a court.

“Where a person arrested or detained pursuant to the provisions of subsection (3) is not brought before a court within forty-eight (48) hours of the arrest or detention, the burden of proving that the provisions of subsection (3) have been complied

with shall rest upon any person alleging that compliance.”

[27] In *casu* the Plaintiff was detained for four and one half (4½) hours and released thereafter before the deadline of 48 hours set by the Constitution which would have made any further detention without charge or remand unlawful.

It is my considered view and I so hold that the detention of the Plaintiff was not unlawful; because it fell within the parameters of the law cited in paragraphs 23 and 24 above. The Plaintiffs claim of E20,000.00 for loss of freedom must therefore fall away and I so hold.

[28] The Plaintiff led evidence that while in police detention she was assaulted and the pain of the assault caused her to cry out. The complainant (DW1) confirmed that she heard the Plaintiff cry out and concluded that this was because the Plaintiff was being assaulted. The complainant further stated that when the Plaintiff came out of the CID room she looked as though she had been crying. Dr. Dlamini who examined the Plaintiff corroborated the evidence of both the Plaintiff and the complainant with regard to the Plaintiff having been assaulted. I have outlined the results of Dr. Dlamini’s physical examination of the Plaintiff in paragraph 18 hereinabove.

[29] It has become common practice that police torture suspects into admitting crimes with which they are suspected of having committed; the present case is in my view no exception. I have had reason to express my disquiet in various cases that I have tried about this unacceptable police behavior which seems to go on with impunity. I believe the Plaintiff's evidence that she was indeed assaulted while in the custody of the police at Lobamba Police Station.

[30] I again express my concern and disquiet about torture meted out to suspects by the police; I set out hereunder Constitutional provisions which may be of assistance to the police service in executing their day to day duties.

Section 18 of the Constitution entitled: "protection from inhuman and degrading treatment" states:

- "18. (1) The dignity of every person is inviolable.
- (2) A person shall not be subjected to torture or to inhuman or degrading treatment or punishment"

Section 22 of the Constitution entitled:

"Protection against arbitrary search and entry" states:

22. (1) A person shall not be subjected –
- (a) to the search of the person or the property of that person except with the free consent of that person first obtained”

[31] In *casu*, the Plaintiff says that the police entered her house and searched without a warrant and without her permission. However, she did not claim for the wrongful search. She was further subjected to torture, inhuman and degrading treatment which is totally in violation of her rights as provided for by the Constitution. In order to uphold the Rule of Law and Respect for Human Rights it is incumbent upon the police service to familiarize itself with the provisions of the Bill of Rights (Human Rights) in our Constitution otherwise they shall be constantly sued for wrongful behavior by a citizenry which is becoming increasingly aware of its fundamental rights.

[32] In this particular matter it was the unlawful assault that caused her to be humiliated and was the cause of her pain, shock and suffering. I do not think it prudent therefore to split the claims as they flow from one wrongful act.

[33] I am satisfied that the Plaintiff has proved on a balance of probabilities that she was assaulted and that the assault not only humiliated her, it also caused

her shock, pain and suffering. However, she was not severely injured nor did she suffer any permanent injuries; her injuries are relatively minor.

[34] In my view it would therefore be appropriate to award her damages in the lump sum of E50,000.00 (Sixty thousand Emalangi) to encompass the whole sequence flowing from the unlawful assault, namely humiliation, pain, shock and suffering in respect of general damages. In respect of special damages she only proved expenses in the sum of E123.00 (One hundred and twenty three Emalangi) and did not prove the E2,000.00 (Two thousand Emalangi) that she claimed.

[35] The order I make is as follows:

- (a) The Defendant is ordered to pay the Plaintiff general damages in the amount of E50,000.00 (Fifty thousand Emalangi).
- (b) Special damages in the amount of E123.00 (One hundred and twenty three Emalangi) being in respect of medical expenses.
- (c) Interest at the rate of 9% a *tempora morae* from the date of judgment to the date of payment; and



(d) Costs of suit.

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**Q.M. MABUZA**  
**JUDGE OF THE HIGH COURT**

For the Plaintiff : Mr. L. Simelane

For the Defendants : Mr. Khuluse