



IN THE HIGH COURT OF SWAZILAND

Case no. 2351/2002

In the matter between:-

ZWELI GOODWILL LUKHELE

Plaintiff

and

THE COMMISSIONER OF POLICE

1st Defendant

THE ATTORNEY GENERAL

2nd Defendant

Neutral citation: *Zweli Goodwill Lukhele v The Commissioner of Police & another* (2351/02) [2013] SZHC 51(28th February 2013)

Coram: HLOPHE J

For the Plaintiff: Mr. M. Mkhwanazi

For the Defendants: Mr. S. Khumalo

Heard: 12th November 2012

Delivered: 28th February 2013

Summary:

Civil Proceedings – Plaintiff claiming damages for medical costs, hospital costs and other incidental costs; Pain and suffering as well as loss of income, enjoyment of amenities of life and permanent disfigurement all totaling E500 - 000-00 – Plaintiff shot at by police whilst driving a motor vehicle that had been used in committing a robbery – Police contend Plaintiff was fleeing an arrest — Whether shooting justified or not in the circumstances –Meaning and effect of section 41 (1) of the Criminal Procedure And Evidence Act 1938 –In the circumstance the police entitled to shoot at the car –Plaintiff’s claim dismissed with costs.

JUDGMENT

- [1] On the 21st February 1999, the Plaintiff who was at the time driving a 1984 Toyota Corolla, bearing registration no. SD 716 IS, was shot at by members of the Royal Swaziland Police.
- [2] It was contended they shot him because he would not heed their signaling him to stop after he was suspected of having committed or having been party to the commission of a robbery at a place called Tri – Cash Filling Station around Sidvokodvo area. On his side he denied that he had fled from the police. In fact he says he only saw a white car that drove at a high speed behind him with its bright lights on, from which he was fired at without any warning or notice.
- [3] Owing to the shooting incident and after his release from custody by the magistrate without having been tried, the Plaintiff instituted these proceedings, seeking reliefs in the form of damages for medical,

hospital and incidental costs; pain and suffering, loss of income, enjoyment of amenities of life and permanent disfigurement amounting in all to a sum of E500-000.00.

[4] When trial commenced in the matter, the Plaintiff led only one witness, being the Plaintiff himself. The Defendant also led one witness namely Magistrate Dumisa Mazibuko, who it was revealed in court, was at the time of the incident a police officer, based at Sidvokodvo police station, and the one who actually attended the report on the robbery incident in the company of a late colleague of his, namely 3437 Constable Mthunzi Nxumalo.

[5] Giving evidence, the Plaintiff said that he was employed as a driver of the motor vehicle described herein above as 1984, blue Toyota Corolla; registration no. SD 716 IS. The motor vehicle in question was operated as a taxi, whose base was Hlathikhulu Bus Rank. On the fateful day, he was lured, he said, by two gentlemen who pretended to be hiring his transport services to Manzini. He had accepted the hire concerned and embarked on the concerned journey when somewhere along the way, precisely at Salem area, he was stopped by his passengers who he alleges pointed a gun at him, dumped him in the boot of his car and subsequently drove off with him whilst he was locked in the boot of the car. In this state he could not tell where the motor vehicle was travelling to including the direction it had taken except that he could recall when the car stopped at a certain place after a long travel, where he heard some noise which was followed by a gunshot. Thereafter the car took off once again, and he was to realize his whereabouts as being a placed

called Zakhele Township in Manzini where he says the car stopped, its boot got opened and he was caused to disembark.

[6] It was then, he says, that his kidnappers, informed him that they were now freeing him to go back to Hlathikhulu including telling him not to drive to the police or anywhere else as he was being watched. It was by now dark he says. He drove away as directed taking the road to the Nazarene robot where he joined the Manzini – Matsapha highway before branching off at Mhlaleni to take the road called Yith'Abantu highway on his way to Hlathikhulu as directed.

[7] It was whilst he was driving towards Hlathikhulu and around the Sidvokidvo area that he says he observed on his rear view mirror a certain car that followed him with its bright lights on. He was still driving while concerned by this motor vehicle, particularly its bright lights, when without any warning, he says he heard the sound of the back window or back windscreen cracking and falling apart as something was hitting it. Without much hesitation he says he stopped the car but was only surprised when he saw a man pointing a long firearm at him and going on to shoot him on his groin. This man was in a white van which he says was now parked by his side.

[8] He was subsequently arrested and told he was part of the people who had robbed a filling station at Tri Cash using the car he had been driving. He claims to have been taken to Tri Cash Filling Station and produced to the employees in order to determine if they could identify him. They however could not identify him as such according to him. It

was put to him that the police were entitled to shoot at his car or even him as he was refusing to heed their signal to stop the vehicle which had been used in a crime commission. It was further put to him that the Tri – Cash Filling station employees did identify him as one of their assailants including that he was still wearing the same leather jacket he had worn during the alleged robbery.

[9] It was further put to him that the police gave chase to him using a blue police van. It was contended further that the police van had the blue police lights on as it gave chase to him. It was also put to him that the police had not directed the gun fire at him but had directed same at the car particularly its tyres one of which was eventually shot at. It was otherwise denied that he ever stopped the car but it was contended that the car had landed on a ditch on the left hand side of the road which made it impossible for it to move forward.

[10] This story he disputed claiming that the police had not had their blue lights on and that they were driving a white car not the usual blue police car. He had also maintained that he was shot at, at close range without anything having been said leading thereto. He claimed to have stopped the car of his own accord.

[11] Towards the end of his cross – examination, the Plaintiff made some crucial concessions in his answer to the questions put to him. He for instance conceded that owing to the fact that his motor vehicle or that the motor vehicle he was driving had been used in the robbery the police were investigating there was a reasonable suspicion that he had

been party to the crime commission. He also conceded that if he was not stopping whilst he was being stopped by the police they would have been entitled to shoot at him because of the reasonableness of the suspicion they were entitled to conclude.

[12] At the close of the Plaintiff's case, Mr. Khumalo for the defence moved an application for absolution from the instance contending that a *prima facie* case on the basis of which the court could find for the Plaintiff if no evidence was led in defence had not been made. He contended that the Plaintiff had in his own words acknowledged that there was a reasonable suspicion that his car had been used in the crime commission including a reasonable suspicion on his own involvement as its driver.

[13] It was further contended that he had himself conceded that if he had not stopped whilst the police tried to stop him the police were in the circumstances of the matter then entitled to shoot at him in order to effect an arrest. It was argued on behalf of the Defendants that the evidence of the Plaintiff was shaky and was not credible because there was no way the police could just open fire without having caused him to stop and furthermore that what he said could not be believed because the police had as a fact chased him for a considerable distance before they shot at him. It had to be remembered, so the argument went, that he had unreasonably failed to report to the police that he had been hijacked by criminals who he was aware had gone on to fire gun shots after some noise had been heard by him at an area he claimed not to know.

[14] Even though I had already observed that the Plaintiff's case was not proving to be a strong one after cross – examination, particularly after he had himself conceded there was a reasonable suspicion on the part of the police on account of his car having been used in the commission of a crime and that the police were entitled to demand that he stops his car and perhaps to even shoot at him if he did not stop, I was not persuaded to decide the matter at this stage. In exercise of the discretion I have in this regard, I considered it proper to hear what the other side had to say. I particularly considered the allegations by the Plaintiff that the police had shot at him at close range after he had already stopped his car and further that they had not flashed their lights and particularly the normal police blue light. I found it important to ascertain what it is that real happened vis-à-vis these allegations. In my view truth had to be established because if the police would shoot at people without signaling and at close range, such would call for condemnation should it be true. There was also the contention by the Plaintiff that the people at the scene of the crime, being Tri Cash, had cleared him as not having been part to the commission of the crime, the truth of which I needed to ascertain as well.

[15] I wanted to hear the evidence of the defence witnesses in this regard so I could be able to assess same through weighing it against that of the Plaintiff's witness's version.

[16] I must emphasize that I was very much alive to the fact at that stage of the proceedings the consideration was as put by *Erasmus* in his book,

Superior Court Practice at page B1 - 292 when he put the position as follows:-

“When absolution from the instance is sought at the close of the Plaintiff’s case, the test to be applied is not whether the evidence established what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the Plaintiff.”

[17] The case of ***Gascoyne v Paul and Hunter 1917 TPD 170 at 173*** is authority for this proposition. I nonetheless decided against upholding the absolution from the instance because I noted that as stated in ***Ardecor (PTY) LTD v Quality Caterers (PTY) LTD 1978 (3) SA 1073 (N) at 1076***, the power to grant an absolution from the instance was a discretionary one.

[18] Having dismissed the application for absolution, the defendant led only one witness namely, Dumisa Mazibuko, the current Manzini Magistrate, who, as stated herein above, was at the time a police officer based at the Sidvokodvo Police Station, and attended to the report of a robbery that had been committed at Tri – Cash Filling Station.

[19] After taking the oath, Mr. Mazibuko informed the court that during the evening of the 21st February 1999, he was detailed to attend to a report of an armed robbery said to have occurred at a place called Tri Cash Filling Station around the Sidvokodvo area. He said he attended to the incident in the company of the late 3437 Constable Mthunzi Nxumalo. He was the driver of the Police Motor Vehicle used, namely SG 187 PO

and was armed with a 9mm pistol. His aforesaid colleague was a passenger in the motor vehicle concerned while armed with an R4 rifle.

[20] They established at the scene of the crime that two people had robbed the people there, one of which assailants was a gentleman wearing a black leather jacket. They established that the robbers in question were driving in a blue Toyota Corolla Sprinter bearing registration numbers SD 716 IS. They established as well that the car concerned had taken the Manzini direction after the robbery.

[21] They had set out looking for the motor vehicle concerned, when after a few kilometers from Tri Cash, at a place called Riders Ranch, they came across a car befitting the description pound for pound, driving in the opposite direction towards Nhlanguano. He said they tried flashing or flicking lights signaling to the car to stop to no avail. Instead of stopping he says the motor vehicle accelerated on the opposite direction. According to Mr. Mazibuko, they then turned the car around and gave a chase. As they did so they continued flashing lights for it to stop whilst having turned on the police blue light. The car would however not stop but drove past Tri – Cash Filling Station whilst having accelerated so much that they finally caught up with it when it was about to reach the Mkhondvo River. All the other methods of signaling to the car to stop having failed, they fired in the air still to no avail. It was not until after the car lost control and plunged into a ditch on its left hand side that it came to a halt. By this time they had shot at it aiming for its tyres and not necessarily the occupants. He denied

having shot at the stationery car and precisely by aiming at the driver as alleged by the Plaintiff.

[22] They eventually took the Plaintiff from the car after they noted he had a difficulty to stand up because he had been shot at on the right hand side buttock. He said they then took the Plaintiff to the scene of the robbery commission where they asked from the people there if they could identify him in connection to the robbery. He said that the Plaintiff was positively identified as one of their assailants. Furthermore, they themselves had found him in possession of the black leather jacket worn by one the robbers.

[23] From there the Plaintiff was taken to the Sidvokodvo Police whereafter he was transferred to the Raleigh Fitkin Memorial Hospital in Manzini. There at the Plaintiff was admitted for some two weeks or so. He was eventually charged with the robbery that had occurred at Tri Cash on the 21st September 2009. He was however released without having been prosecuted, he said by the Magistrate, who he alleges found him to be having no case to answer which Defendant's witness denied.

[24] The version put forth was disputed under cross – examination as it was put to him that the police had not used a police van bearing the normal police colour, they had never signaled to the car to stop and had not used the police blue lights to signal to the car driven by Plaintiff to stop. Instead it was contended that the police had, without any signal or notice of whatever nature, shot at the Plaintiff's car destroying its back window in the process. When the car stopped as a result, the police had

without saying more allegedly shot at the Plaintiff at close range using what was described as a big longish gun. The defence witness however had stuck to his version.

[25] The question to answer in my view is whether it was reasonable for the police to shoot at the Plaintiff's car and even at the Plaintiff himself in order to effect an arrest in the circumstances of this matter? The Plaintiff says it was not whilst the Defendant says the opposite.

[26] An answer to this question lies in the proper interpretation of section 41 of the Criminal Procedure And Evidence Act of 1938. The said section reads as follows:-

“ 41(1) If any peace officer or private person authorized or required under this Act to arrest or assist in arresting any person who has committed or is on reasonable grounds suspected of having committed any of the offences mentioned in part II of the First Schedule, attempts to make such arrest, and the person whose arrest is attempted flees or resists and cannot be apprehended and prevented from escaping, by other means than by such officer or private person killing the person so fleeing or resisting, such killing shall be deemed in law to be justifiable homicide.

(2) This section shall not give a right to cause the death of a person who is not accused or suspected of having committed one of the offences mentioned in part II of the First Schedule.”

[27] It is not in dispute that the offence for which the police sought to arrest the Plaintiff was covered under Part II of the First Schedule as robbery

is mentioned thereat. The question is whether there was a basis or grounds for reasonably suspecting the Plaintiff to have committed the crime concerned? And whether there was an attempt to make such arrest together with whether the person sought to be arrested attempted to flee.

[28] The Plaintiff was driving the motor vehicle used during the commission of the crime and was refusing to stop when signaled to do so by the police, which means that he attempted to flee such an arrest. It has to be noted that I have accepted the version of the defence witness that they signaled to the car driven by the Plaintiff to stop through flashing lights (headlamps), switching on the police blue light and also shooting in the air. This I say because it is not only naturally probable but is also supported by the distance taken whilst the car was chased, and lastly by the fact that after eventually catching up with the Plaintiff the Police did no more than simply arrest the Plaintiff which is not what one would have expected if the version of the Plaintiff had to be believed as one would have simply expected them to simply shoot at the Plaintiff if it can be believed they were out to kill him as portrayed by Plaintiff.

[29] Furthermore the Plaintiff was found wearing the black leather jacket one of the culprits had been described to the police as wearing.

[30] In any event the version of the Plaintiff is inherently false in my view for it is not real for him to say after having been released by his hijackers, who he does not even say were following him, he would not drive to the several nearby police stations for help such as the Manzini

Police Station, the Matsapha Police Station, the Matsapha Police College and even the Matsapha Army Barracks or even the Sidvokodvo Police Station, which was on his way to Hlathikhulu far away from Zakhele Township.

[31] The argument by Mr. Mkhwanazi on behalf of the Plaintiff that the section of the Criminal Procedure And Evidence Act of 1938 as amended, relied upon by the defence as authorizing the shooting of the Plaintiff, does not allow the injuring of a fleeing suspect as it only allows the killing of such a suspect, I cannot accept. Killing of the fleeing suspect is the last resort. In my view when considering that the section itself allows the killing after all other measures, such as apprehending and preventing him from escaping shall have failed. I am of the view that the incapacitation of a fleeing suspect so as to effect an arrest, of which injuring him in the process is one, is allowed by the section.

[32] Faced with a similar situation in *Mzwandile Jele vs The Commissioner of Police and another civil case no. 463/2000*, this court found that the word ‘killing’ as used in section 40 (1) of the Act also includes wounding or injuring a suspect.

[33] Consequently I am of the considered view that in the circumstances of the matter, the injury sustained by the Plaintiff came about in the course of effecting a lawful arrest and was therefore justified in the circumstances. The Plaintiff himself observed as much in his answer to the questions posed by Defendant’s attorney Mr. Khumalo.

[34] Having come to the conclusion I have, it seems to me it is no longer necessary for me to determine whether or not a case was made in proof of the damages which would have been the next leg of my enquiry had I come to a different conclusion to the one above.

[35] I only pronounce, for the removal of doubt, that I have come to the result that the Plaintiff's claim be and is hereby dismissed and that the Plaintiff shall have to pay the costs of these proceedings at the ordinary scale.

Delivered in open court on this theday of February 2013.

**N. J. HLOPHE
JUDGE**