



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1088/2012

In the matter between:

ROSE MAGAMENI LUKHELE (NEE FAKUDZE

Plaintiff

And

THE COMMISSIONER OF POLICE

1st Defendant

THE ATTORNEY GENERAL

2nd Defendant

Neutral citation: *Rose Magameni Lukhele (nee Fakudze) v The Commissioner of Police & Another (1088/2012) [2015] SZHC 170 (9th October 2015)*

Coram: **M. Dlamini J.**

Heard: **26th August 2015**

Delivered: **9th October, 2015**

– The proper legal meaning of the expression ‘cause of action’ is the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim.

Summary: The plaintiff's claim is for damages arising from a firearm injury inflicted by first defendant. The first defendant denies the plaintiff's claim.

[1] The plaintiff, under oath, gave oral evidence. She testified that she is a married woman. On the 3rd of February 2012 there was a march organized by women who sell their wares at the market. She also sells at the market. She joined the march which started from the market. They went passed the police station heading for the new market where Municipal Town Council had gathered. Along the way, near the library, she, together with her companion decided to take a rest under a tree. Police came and ordered everyone to go back. A group that was standing nearby heeded to the call. They proceeded to the new market where they waited until the noise subsided.

[2] They headed back to the old market. As they were going back they passed a group of police officers talking to a woman. They heard a sound of a firearm. They walked faster. They heard another sound. She felt something hitting her. She walked faster. She then heard a man shouting saying to her the police have injured her. She looked at her hand and noticed that the police had injured her. She turned to look and found a police just behind her. She enquired from the police as to why he injured her. The police replied saying that he was fixing her. She did not notice the said police as he was wearing a hat. She proceeded with her journey to the police headquarters. As she was bleeding heavily, she fell. She regained consciousness when in hospital. She was admitted for four days and was taken to the theatre for operation. After her discharge from hospital, she had to attend hospital for about three times in order to do wound dressing. The injury finally healed in June/July 2013. She returned

to work in December and lost business while attending to the injury. She was making E400-00 per day at the market. She lost about E5000-00.

[3] The plaintiff was cross examined at length. The cross examination revealed that the first defendant was armed with a court order to prevent the march. The first defendant never fired any shots on that day but threw stun grenades and due to its loud explosion, the plaintiff's group ran helter skater thinking that firearms were opened against them. As a result plaintiff fell and injured her right tiny finger. The plaintiff disputed first defendant's version when put to her.

[4] The next witness on behalf of plaintiff was **Fikile Dlamini** (PW2). She was together with plaintiff and other women who decided to march to the new market on 3rd February 2012. She joined plaintiff under a tree to take a rest. Police threw something and it emitted smoke. They stood up and ran towards the new market where they waited until they thought everything was quiet. They then left for the old market. Along the way, they met a group of police. They avoided them. When they had passed them, they heard two gun shots. They took fast steps. Another man who had joined them enquired if plaintiff had not realized that she had been shot. They were shocked as plaintiff was now full of blood. They went to the police headquarters. They found the main gate locked. The plaintiff fell down. A certain Mr. Fakudze conveyed her to hospital. Cross examination of this witness was on similar lines as that of plaintiff.

[5] PW3 was **Nhlanhla Vusi Dlamini**. He informed the court that on 3rd February 2012 there was a strike at Siteki. They were being removed from the old bus rank to the new one. They were toy-toying. While by the library women came and they joined them. They heard gun shot. They

were shocked. They heard a second shot and a third one. They then saw one woman injured. They tried to assist her by stopping the bleeding. They enquired from the police whether they realize that they had injured someone. The police passed them. They then proceeded to the police headquarters but the police blocked their entrance. They enquired what they should do with the injured person and someone assisted them to take her to hospital.

[6] This witness was cross examined. I shall refer to his cross examination later.

[7] The fourth witness on behalf of plaintiff was **Musawenkhosi Cyprian Sifundza**. He informed the court that on 3rd February 2012 he left work at about 12.00 noon and went to look for something to eat. He discovered that there was a march in town. He purchased the food and drove back to work. He followed the procession that was demonstrating. As it was moving at a snail pace, he decided to park by the road. When the road cleared, he drove on. He heard a gun shot. He stopped and realized that many people were running helter skater. There were also many police. He waited for the pandemonium to subside. He then proceeded with his journey. While by the four-way, taking the road to Good Shepherd Hospital, a group stopped him. They were carrying someone who had been injured. It was a woman. He conveyed her to Good Shepherd hospital. He then pointed at plaintiff who was seated in the gallery as the person he conveyed to hospital.

[8] I shall refer to PW4's cross examination later in this judgment. The plaintiff closed her case.

[9] The defence called a number of witnesses in rebuttal. DW1 Superintendent **Zandile Mnisi** testified that on 3rd February 2012 she was holding the reins of a station commander. Around 7.00 a.m. a protest march by women from the market convened. She deployed police officers to maintain peace and order. At around 11.00 a. m. Mr. Magongo, Acting Town Clerk, together with Mr. Thwala, the Attorney for Town Council – Siteki came with a court order stipulating that the march was unlawful and the protesters should be interdicted and restrained. Paragraph 4 of the order was directed to the police to ensure compliance with the order. She then called certain officers who were in charge of the various group of police officers deployed around town and showed them the court order. She also gave them the court order to go and serve it to the respondents cited therein. Sgt. Kunene (DW2) was in charge. At about 11:30 a.m. they returned to inform her that the order had been served to the respondents. Kunene reported that the respondents and their marchers were in defiance of the court order. She left the office to inspect for herself. She found that the protest was vigorous. She also found police negotiating with them to comply with the court order by stopping the march. However, their pleas fell on deaf ears.

[10] She called Sgt. Mavuso and ordered him to restrain the protestors. Sgt. Mavuso was in charge of the platoon, a group of officers who were carrying shields and stun grenades. She returned to the office.

[11] At around 1:30 p.m., she received a report that there was a certain woman by the name of Rose Fakudze who was injured and they had taken her to hospital. She left the office and proceeded to hospital. She found that the said Rose Fakudze was being attended to by doctors at the emergency ward. She decided to leave.

[12] The next witness for the defence was **Sgt. Thabo Kunene** who has since retired from the police service having been in service for thirty two years.

[13] On the 3rd of February 2012 he was on duty. He received instructions from the Station Commander, DW1, to go to town to maintain peace and order following a protest march. This march consisted of bus and taxi drivers, conductors, market sellers and vendors. At around 10:00 a.m., DW1 came to him in the company of Mr. Maziya, the Deputy Sheriff who was armed with a court order. He looked at the court order and found that it was declaring the march unlawful. There were six respondents. They then proceeded to the marchers who were by then approaching the main gate of the police headquarters. They stopped them and introduced themselves. The deputy sheriff, Mr. Maziya, produced a court order. He called for the first respondent who was Patricia Mdluli to receive the court order. She refused to accept the court order stating that her colleagues advised her not to accept anything from a deputy sheriff. The deputy sheriff attempted to read the contents of the order to Patricia but she was pulled away by her colleagues. The march then moved to Siteki library leading for the new market. While they were toy-toying around the library, he heard a noise of stun grenade. This was thrown by the Royal platoons who were carrying stun grenades shields, rubber bullets, tear smoke and batons. Before the sound of the stun grenades, Sgt. Mavuso shouted, telling protestors to stop toy-toying. It was further his evidence that only stun grenades were used that day. The protestors moved in different directions trying to get cover as they thought they were being shot at. As he was observing this, he noticed a group near the police headquarters. He thought that the marchers had regrouped. He approached the group and discovered that a woman had been injured.

[14] He called for a van. Four police vans approached. He then learnt that the group had organized their own transport to convey her to hospital. The woman had been injured on the right small finger and blood was oozing out. He did ask for the name of the injured woman and he was told that it was Rose Fakudze of Makhewula area. He also followed her to hospital where he found her undergoing treatment and was advised that she would be admitted. He did request the nurse for permission to inspect the injury in order for him to report to his superiors. He discovered that she was injured in the right forefinger. It was, at the time full of blood and dusty. The doctors had not started cleaning the wound. As she was admitted, he went to check her the following day.

[15] DW3 was **Conet Bhekani Khumalo**. He testified that he was part of the Royal platoon. On the 3rd February 2012 they remained on standby at the Police headquarters. At about midday their Commander came to them and read a court order to them. He then ordered them to disperse the crowd. At a talking distance in respect of the marchers, their Commander read the court order to the protestors and urged them to abandon the protest. The protestors did not listen but continued to protest. The Commander warned them that force would be applied if they failed to comply with the court order. The marchers shunned the warning. They continued to block the four way stop leading to the library. He then instructed them to throw a stun grenade. They complied. When the stun grenade busted, the protestors ran into all directions. Some fell on the road and injured themselves. He did see PW1 as among those who fell and injured herself. She was escorted to police headquarters in order to be conveyed to Good Shepherd hospital. While awaiting for a van, another motor vehicle took her.

[16] The next witness **DW4** was **Dr. Hallemarian Mengistu**. His evidence was that he attended to the plaintiff on 3rd February 2012. He filed exhibit A1 as he identified his signature. The patient, at Ex. A1 was the plaintiff aged 49 years. She informed the doctor that she had been shot at. The doctor diagnosed her as having a soft tissue injury on the right index finger. Her condition on the date of admission was stable.

[17] DW4 then read into the record a second report filed by his colleague. DW4 did not admit the plaintiff but it was the other doctor. She was taken for X-ray examination. Exhibit A2 was admitted as evidence. She was discharged on 7th February 2012.

[18] The last witness was **DW5, Mvila Vincent Dlamini**, a resident of Siteki. In 2012 he was Councilor at Siteki. They, as Councilors, moved the old bus rank to a new location. The people were resisting. They approached the police to assist. The police shot something and the people stumbled. They then heard that one of the people was shot. It was his duty to establish the cause of the injury. He went to hospital and found her in ward 7. He enquired from her as to what happened. She said when the police shot, she fell and she showed him the injury.

[19] The defence closed its case. The defendants' witnesses were cross examined. I shall refer to their cross examination under determination herein.

Determination

Common cause

[20] It is common cause that the plaintiff was among the protestors on 3rd February 2012. Although there is a dispute as to when exactly she sustained the injury, that is, whether it was during the march or thereafter. It is also not in issue that the plaintiff sustained an index right finger injury.

Issue

[21] The question for determination is, What caused the injury? Plaintiff says it was a gun shot fired by first defendant. First defendant on the other hand submits that it was due to a fall.

Evaluation of evidence

[22] My duty at this juncture is to weigh the evidence adduced by putting it on the imaginary scale of justice. In other words, has the plaintiff established her cause of action. Cause of action was defined by **Watermayer J** in **Evins v Shield Insurance Co. Ltd. 1980 (2) S.A. 814 at 838** as:

“The proper legal meaning of the expression ‘cause of action’ is the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not ‘arise’ or ‘accrue’ until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action.” (underlined my emphasis)

[23] In establishing her cause of action, plaintiff testified:

“As we were going, we met a group of police officers talking to a woman, we passed them. We heard a sound of a firearm. We walked faster. We heard another sound of gun shot and I felt something hitting me on my hand. I walked faster as I was shocked.”

She further proceeded:

“I heard someone shouting at me saying, “don’t you notice that the police have injured you? I looked at my hand and discovered that I was injured.”

[24] Plaintiff then handed to court a copy of the doctor’s report which was marked as exhibit A1, hospital admission document, A2 and two hospital payment receipts each reflecting a sum of E10.00 marked Exhibit A3.

[25] Plaintiff called PW2 to corroborate her evidence. She testified:

“When we approached the place near the library, we found that many police were still there. We avoided them and they did not speak to us. While we had passed them, we heard something like gun shot. We took quick steps as we were unable to run. The gun shot was heard for the second time. Another man nearby who had followed us and we were not aware of his presence said, ‘do you see Mrs. Lukhele that they have injured you’. We were shocked and we looked at her and we discovered that her hand was full of blood.”

[26] Similarly, PW3 testified:

“I was by the library and toy-toying was over. The police were by the library. Women came and we joined them. We heard a gun shot. We were shocked. It went for the second time and the third time, we saw one of the women injured on the hand.”

[27] On the question of when the fire shot was opened against the plaintiff, plaintiff testified:

“While marching and when we were next to the library I went to sit under the tree while others stood by the road. Police approached us and stood next to the women who were by the road. I and others were seated down near the library. The police said ‘where are you going to? Go back’. The women did not respond. They then fired a tear gas and the women ran away going back to the old market. I, together with others proceeded to the new market place and waited. We waited for a long time until the noise subsided.”

[28] Her evidence was that they thereafter decided to go back to the old market. It is then that she was shot while on her way to the old market. PW2 and PW3 supported this piece of evidence.

[29] During cross examination of plaintiff, PW2 and PW3, the defence asserted that the plaintiff was injured during the firing of a stun grenade where a large crowd on the sound of it ran helter skater.

[30] The defence stated on cross examination of plaintiff:

Ms. Q. Zwane: “Were you part of this march?”

Plaintiff: “I was present but I was not part of the march.”

Ms. Q. Zwane: “You were part of the march blocking traffic on the four way stop?”

Plaintiff: “I was seated near the library and there were women standing near the road.”

Ms. Q. Zwane: “witnesses will say you were part of the march, participating in the march?”

Plaintiff: “There are people who can give evidence on my behalf.”

[31] Indeed plaintiff called PW4 who stated in this regard:

“On the 3rd of February 2012 at Siteki, I left work around 12.00 looking for something to eat. I found that in town there was a march. I purchased whatever I needed and went back to work. I followed the procession that was demonstrating. This was at a slow pace so I decided to park by the road. When the road cleared, I then drove to work. I heard a gun shot. I stopped and realized that many people were running helter skater. I saw many police. I waited for the pandemonium to silence down and then proceeded with my journey. I saw a four way stop which I had to pass and take the road to Good Shepherd and a group of people stopped me. They were carrying someone who had been injured. I waited for them. I saw a woman who was bleeding. I opened the car and put her at the back.”

[32] It is common cause that PW4 conveyed plaintiff to hospital. From the analysis of PW4, plaintiff’s very own witness, it is clear that, when there were “*many police*” contrary to plaintiff’s evidence that a group of police, a “*sound of a gun shot*” was heard and the marchers who were moving at a “*slow pace*” ran “*helter skater*” until he had to wait for the “*pandemonium to subside.*” He drove and saw a group carrying an injured woman. This evidence coming from plaintiff’s own witness shows that a sound of gun shot was fired once and chaos erupted amongst the marchers. The next incident PW4 witnessed was an injured woman (plaintiff) whom he conveyed to hospital. It was his evidence under cross examination that the group with plaintiff came from the direction of the police headquarters. PW4 did not say that there were further shots thereafter. He narrated clearly to this court that it was after the chaotic dispersation of the protesters that he saw plaintiff as injured. This evidence supports the version of the first defendant as put to plaintiff’s witnesses. Further, it is no wonder that DW5, a neutral person in these proceedings and an astute Councilor who decided to check on plaintiff at the hospital, informed the court that at the hospital:

“I enquired what happened, and she said that they were running protesting against going to the new market when the police shot, she fell and many fell as the road was narrow.”

[33] DW5 was cross examined by plaintiff’s counsel:

Mr. X. Mthethwa: “Plaintiff did not tell you that she had been injured after she had fallen?”

DW5: “She told me.”

[34] PW4, the medical practitioner’s evidence does not assist the court in any way because he stated:

Mr. X. Mthethwa: “Given the nature of the injuries to the tissue, the patient’s history is true (patient’s history is that she sustained wound through gun shot)” (words in brackets my own)

PW4: “We cannot say true or false. I cannot conclude if a small bullet or she could have fallen.”

[35] No wonder plaintiff’s Counsel did not know whether the entire documentary evidence of the doctor should be admitted or not as in one instance he objected to their admission and when the doctor was out of the witness box stood up to argue that it should be admitted. Of course the court rejected Counsel’s stance of blowing hot and cold.

[36] The end result of the analysis of the evidence as demonstrated above, is that the scales of justice tilt in favour of defendants.

[37] When the matter adjourned, plaintiff’s counsel undertook to file heads of argument on the 25 August 2015 and defendants on 26 August 2015. Plaintiff’s counsel did file but defendants’ counsel failed to do so. This was

despite telephonic reminders by the Registrar. Looking at the time lapse, this court was compelled to write the judgment without defendants' heads of argument. To show its disapproval, this court is not inclined to grant defendants any costs.

[38] In the result, I enter the following orders:

1. Plaintiff's cause of action is dismissed.
2. No order as to costs.

M. DLAMINI
JUDGE

For Plaintiff: Mr. X. Mthethwa of Bhembe Attorneys

For Defendants: Ms. Q. Zwane of the Attorney General's Chambers