



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No.196/2013

In the matter between:

DUMSILE MAYISELA

Plaintiff

And

THE COMMISSIONER OF POLICE

1st Defendant

THE ATTORNEY GENERAL

2nd Defendant

Neutral citation: **Dumsile Mayisela v The Commissioner of Police and another 196/2013) [2017] SZHC 248 (14th December, 2017)**

Coram: **M. Dlamini J.**

Heard: **6th December, 2017**

Delivered: **14th December, 2017**

Arrest - *the law demands that authorized officers should arrest on reasonable grounds of suspicion as Section 22 (b) points out unless the perpetrator is found in the process of committing an offence*

Summary: Summons were sued out of this court for a claim of E70 000 arising from unlawful arrest against first defendant. The first defendant denies any unlawfulness.

The parties

- [1] The plaintiff is an adult female spinster of Mbabane, region of Hhohho.
- [2] The first defendant is in charge of the Police organization and is based at fourth floor, Police Headquarters, Mbabane, region of Hhohho.
- [3] The second defendant is so cited in his nominal capacity as the legal representative of *inter alia*, first defendant.

The Pleadings

- [4] In its particulars of claim, the plaintiff (Ms. Mayisela) alleged that on February 2012 members of first defendant arrested her and “*subjected her to interrogation for about six hours on allegations of theft*”.¹ Consequence thereto she suffered damages as follows:

“As a result of the arrest and detention, Plaintiff sustained damages in the sum of E70,000.00 (seventy thousand Emalangeni) made up as follows:

<i>General damages for insult, indignity and suffering</i>	<i>E20,000.00</i>
<i>Loss of Liberty and freedom</i>	<i>E20,000.00</i>
<i>Humiliation</i>	<i>E15,000.00</i>
<i>Discomfort</i>	<i><u>E15,000.00</u></i>
	<i><u>E70,000.00”</u></i>

¹ see para 5 of particulars of claim at page 4 of book of pleadings

[5] She then sought the following orders:

- “a) Payment of the sum of E70,000.00 (seventy thousand Emalangi)*
- b) Interest at 9% per annum a tempore morae from date of service of summons to date of payment.*
- c) Costs of suit.”*

[6] The first defendant (Commissioner) denied that Ms. Mayisela was “*arrested, detained and interrogated for six hours*”. The Commissioner also stated:

“save to admit that the police were acting within their scope of employment the Defendants deny that the Plaintiff was arrested and detained by the police”²

Oral evidence

[7] Ms. Mayisela was the only witness in her case. She testified under oath. She stated that she was residing at Mpolonjeni near Nkoyoyo. She was a domestic worker.

[8] In 2012 she was under the employ of Mr. Nyathi. Mr. Nyathi gave her keys for his residence at room number 6, Sunrise flats in Mbabane. She did not know the whereabouts of his residence. Mr. Nyathi directed her to the flats which were adjacent to Swaziland Royal Insurance.

² see para 3 of *n*¹

[9] She proceeded to Sunrise Flats. Upon reaching the flats, she began to look for room number 6. As she was going about her business, she saw a lady opening the curtains and beckoning her to enter. She obliged. That lady demanded her bag and cellular phone. She handed the said items to her. The lady then called the police to come and arrest her. She explained her mission. However, the lady who had a female companion would hear none of her explanation. Police officers arrived shortly. They enquired on her mission after greeting her. She explained that she had been sent by Mr. Nyathi to room 6 to clean it. She gave the police Mr. Nyathi's number hoping that they would call him. The police ordered her to board the police van. She obliged. Inside the van, she called her boyfriend, Joshua. Upon reaching the police station, the police took her for interrogation. They then detained her in the police cell. They uttered profane words against her, telling her that she should not think that she was in their presence in order to commit bedroom activities. She cried. They ordered her to remove heavy chairs. She refused.

[10] Eventually Mr. Nyathi came. The Police refused to release her telling Mr. Nyathi that they would release her after they had completed their investigations. Mr. Nyathi left. He came later and it is then that she was released. She went to the Times of Swaziland to report her ordeal. The Times of Swaziland published her story.

[11] Again on another day she received a call to report at the Magistrate's court. She obliged. At the Magistrate's court she was taken back to Sunrise flat to the same room where she was taken by the police. They inspected the room. She was then released. She went to seek the services of an attorney and this resulted in the present action. She besieged the court to grant her compensation.

[12] She was cross-examined. In her cross-examination Counsel on behalf of the Commissioner put to her the circumstances which led to her arrest and how she was released. I shall highlight the salient features pertaining to her cross-examination under adjudication herein.

Defence

[13] Ms. Mayisela having closed her case, the defence led two witnesses in rebuttal. The first witness (DW1) was 5222 Detective Sergeant Sibusiso Mamba.

[14] DW1 on oath testified that he was working in the criminal investigations department. He received a call from Ms. Dolly Mziyako of Sunrise flat on 12 February 2017. The said Dolly had on 26th January 2012 reported a case of house breaking with intent to commit an offence and theft. On the 11th February 2017 the said Dolly called saying she had apprehended someone who was trying to open her door. He, together with 5474 D/Constable Sithole proceeded to Sunrise flats. Dolly explained to them that she had found the lady, pointing at Ms. Mayisela, trying to open her house using a key. They introduced themselves to Ms. Mayisela. They enquired who she was and what her mission was. She explained that she had been sent by Mr. Nyathi to clean his room. They asked for Mr. Nyathi's cell number in order to verify Ms. Mayisela's version. Ms. Mayisela gave them and upon calling the number, it was out of network. They decided to take her to the police station.

[15] At the police station, they called Mr. Nyathi again but his cellphone was out of line. It is then that they took Ms. Mayisela to the criminal investigation department for interrogation. They also kept on calling Mr. Nyathi who

responded around 12:00 noon. He arrived at the police station. By this time they had requested Ms. Mayisela to remain in the reception. They enquired whether he knew Ms. Mayisela. He confirmed knowing her and sending her to Sunrise flat to clean his room. They then released her after recording a statement from Mr. Nyathi.

[16] Under cross-examination, it was ascertained on why he failed to take Ms. Mayisela to Amadi, the workplace of Mr. Nyathi instead of driving her to the police station after realizing that Mr. Nyathi's cellular phone number was unavailable. He pointed out that firstly, he became suspicious of Ms. Mayisela after calling Mr. Nyathi to no avail. Secondly, the police van he was using was to convey police officers to court as it was the only vehicle at the police station. He disputed Ms. Mayisela's evidence that when Mr. Nyathi arrived at the police station earlier, they refused to release her citing that they were still interrogating her. He maintained his evidence that they proceeded to Dolly's house upon Dolly reporting that Ms. Mayisela tried to open her door using a key and pointed out that he was not in a position to verify if indeed Ms. Mayisela actually did so. He also maintained his evidence that they tried calling Mr. Nyathi but could not receive any response.

[17] He was referred to the police report and it was pointed out that he did not write that they called Mr. Nyathi to no avail. He pointed out that he could not write everything in a police report. He was queried on why she took Ms. Mayisela to the police station. He explained that as Ms. Mayisela was said to have attempted to use a key to gain entry into Dolly's house, and this was the same *modus operandi* used on January where her items were stolen, they were compelled to take her to the police station.

[18] The next witness was 5372 Detective Sergeant Bheki Dlamini. His evidence was on similar lines as DW1. He did not go to the place where Ms. Mayisela had been apprehended. He was however present during the interrogation at the police station. Having established from Ms. Mayisela that she had been at Sunrise flats to clean Mr. Nyathi's room, they decided to keep Ms. Mayisela at the police station's reception area until Mr. Nyathi responded to their calls. Eventually Mr. Nyathi did and was invited to the police station. At the police station, he was caused to meet Ms. Mayisela. He confirmed Ms. Mayisela's version. Ms. Mayisela was released to his custody thereafter.

[19] Similar questions as posed to DW1 were used to cross-examine DW2. He maintained his grounds on his evidence in chief and answered similarly to DW1.

Determination

[20] I must point out from the onset that a cursory glance at the particulars of claim is that the main bone of contention by Ms. Mayisela was the period of six (6) hours she was kept for at the police station. This is deduced from her paragraph 5 which reads:

“On or about February, 2012 at Sunrise Flats in Mbabane, the Plaintiff was arrested and detained by members of the Royal Swaziland Police where she was subjected to interrogation by the police for about six (6) hours on allegations of theft against her”.³

[21] However, in her evidence in chief, she did not pursue this line of claim but shifted to claim for being hauled to the police station to be investigated for

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a crime she did not commit. I shall therefore disregard her ground for the claim on the six hour detention as reflected in the particulars of claim for the reason that it was not pursued. Although she is responsible for the allegations in her particulars of claim following from the presumption that she gave her attorney such instructions, I shall accept for a while that she did not draft the particulars of claim. For purposes of her action, I will consider her *viva voce* evidence as it was attested to. I guess Ms. Mayisela was well advised to forgo the six hours detention following section 16(3) and (4) of the Constitution Act No.1 of 2005 which permits investigators to do so within a reasonable period not exceeding forty eight hours.

[22] Ms. Mayisela also testified under oath that the police insulted her while interrogating her. I shall not consider this evidence although it was stated under oath. This is because it is not in her particulars of claim and therefore does not form a *causa* for the claim. The *dictum* by **Fannin J**⁴ lends credence to this position of the law:

“The purpose of pleading is to clarify the issues between the parties and a pleader cannot be allowed to direct the attention of the other party in one issue and then, at the trial, attempt to canvass another.”

The rationale for this position of our law is that the absence from the particulars of claim of the assertion on assault prejudiced the Commissioner as he could not prepare for its defence. Under-cross examination it was not put to any of the Commissioner’s witnesses that Ms. Mayisela was insulted while at the police station.

⁴ Nyandeni v Natal Motor Industries Ltd 1974 (2) 274 at 279

The law on arrest or detention

[23] Section 22 of the Criminal Procedure and Evidence Act No. 67 of 1938 stipulates as follows:

“Every peace officer and every other officer empowered by law to execute criminal warrants is hereby authorized to arrest without warrant every person –

(a) who commits any offence in his presence;

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

(c) whom he finds attempting to commit an offence, or clearly manifesting an intention so to do.”

[24] Part II Schedule 1 includes the offence of” *breaking or entering any premises with intent to commit an offence either at common law or in contravention of any statute.*” That as it may, the law demands that authorized officers should arrest on reasonable grounds of suspicion as Section 22 (b) points out unless the perpetrator is found in the process of committing an offence.

Issue

[25] Following the above dictates of the law, the question facing me is, “Were the police officers justified in law for their conduct against Ms. Mayisela?” The answer lies in the circumstances of this case.

Common cause

[26] It was not disputed that Ms. Dolly Mziyako's flat at Sunrise flat was broken into and theft of her items took place on 26th January 2012. Entry into her flat was gained through the use of keys as there was no visible break to her flat. Although it was contested that Ms. Mayisela used some of the keys to try and open Ms. Dolly's flat on the 17th February, 2012 it was not disputed that the police received a call from Ms. Dolly advising them that she had apprehended Ms. Mayisela while attempting to open her flat by using a key. This was two weeks after her items were stolen through the same *modus operandi*.

[27] Now the question is, "What should the police have done upon receiving the call from Ms. Dolly advising them that she had just apprehended a lady who was attempting to open her flat with the use of a key? The answer is obvious, they had to rush to where Ms. Dolly was in order to interrogate the said person, as they did.

[28] It is also common cause that upon interrogation at Ms. Dolly's flat by the police, Ms. Mayisela advised the police that she had been at Sunrise flat through the instruction of one Mr. Nyathi. Evidence from Ms. Mayisela and the police was that Ms. Mayisela gave the police Mr. Nyathi's number. The police testified that they called Mr. Nyathi to no avail. Ms. Mayisela stated that they did not call Mr. Nyathi. However, of note, is that Ms. Mayisela testified that the police asked for Mr. Nyathi's number. She did not say that she suggested that she should give the police Mr. Nyathi's number and that they should call him. The court enquired as to who called Mr. Nyathi as according to both parties' evidence, Mr. Nyathi showed up at

the police station. Ms. Mayisela told the court that her boy friend Joshua called Mr. Nyathi after she had asked him to call him while she was in the police van. When asked if she saw Joshua calling Mr. Nyathi, she responded in the negative. When asked as to why she did not call Mr. Nyathi herself instead of calling Joshua to call Mr. Nyathi, she said a number of things. Firstly, that she could not answer the question. Secondly, that she did not have airtime and thirdly, that she only told Joshua that she had been arrested and her cell phone went off then. She failed to advance a clear answer on why she did not call Mr. Nyathi who would have come to her rescue as she disputed that the police called Mr. Nyathi while at Dolly's flat and that Mr. Nyathi was not available earlier. The only plausible answer is that Mr. Nyathi responded to the police call. I further accept the evidence of the police to the effect that when they enquired from Mr. Nyathi as to why his cellphone had been off following that the police had called him several times before a response, he informed them that he had been conducting lectures and he had switched his cellphone off. Ms. Mayisela was cross-examined:

Ms. N. Nkambule: "You were only released after Mr. Nyathi came and confirmed you had been sent by him to go and clean the house?"

Ms. Mayisela: "Yes."

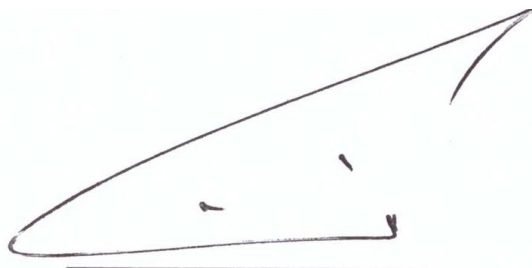
Ms N. Nkambule: "The reason you could not be released was that no one had confirmed your version until Mr. Nyathi came to confirm it".

Ms. Mayisela : "That is true."

[29] From the above, it is clear that this Ms. Mayisela was released upon Mr. Nyathi confirming her version. In the totality of the above circumstances, the police were justified in carrying out their investigation as they did. Had they released Ms. Mayisela without confirmation of her version, they would have dismally failed in their duty of investigating the culprit that entered into Ms. Dolly's house through the use of keys two weeks prior. The evidence is that she was carrying a set of three keys. Ms. Dolly's communication to the investigators was that she attempted to open her flat. Juxtapose this piece of evidence with Ms. Mayisela's evidence that she did not know where Room 6 was and that when she was called by Ms. Dolly she was searching for the said room, Ms. Dolly's communication is not far fetched to be believed therefore. That Ms. Mayisela was not the culprit is neither here nor there. They were justified in taking Ms. Mayisela to the police station for interrogation and releasing her after her version was confirmed. They therefore acted within the confines of the law and cannot be blamed.

[30] In the above, the following orders are entered:

1. Plaintiff's cause of action is dismissed;
2. Plaintiff is ordered to pay first defendant costs of suit.

A handwritten signature in black ink, consisting of a large, sweeping loop that starts from the left, goes up and over to the right, then comes down and back to the left, ending with a small flourish. There are a few small, dark marks scattered within the loop.

M. DLAMINI J

For Plaintiff:

X. Mthethwa of Bhembe Attorneys

For Defendants:

N. Nkambule from the Attorney General's Chambers