



IN THE HIGH COURT OF THE KINGDOM OF ESWATINI
JUDGMENT

HELD AT MBABANE

CASE NO.1819/2007

CELUMUSA KHUMALO

Plaintiff

And

COMMISSIONER OF POLICE

1st Defendant

ATTORNEY GENERAL

2nd Defendant

Neutral citation:

Celumusa Khumalo vs Commissioner of Police & Another (1819/2007) [2020] SZHC 212 (21st October 2020)

CORAM:

MASEKO J

FOR PLAINTIFF:

Mr T MAMBA
MKHWANAZI ATTORNEYS

FOR DEFENDANT:

Ms K MAGAGULA
ATTORNEY GENERAL'S CHAMBERS

DATE OF HEARING: 7th to 8th March 2018

DATE OF JUDGMENT: 20th October 2020

Preamble: *Civil law – Civil suit for damages arising out of the arrest and detention of the Plaintiff at Mbabane Police Station where he was denied the right to call his family and also his fiancée was denied the right to see him whilst he was in custody.*

Held: that the actions of the police in refusing Plaintiff's requests to call his family to notify them of his arrest, together with their refusal to, let his partner to see him whilst he was in police custody in respect of a petty offence of Theft By False Pretence of E500.00, amounted to inhuman and degrading treatment and was a violation of Plaintiff's constitutional human rights as enshrined in Article 16 (6) (a) and (b) of the Constitution of The Kingdom of Eswatini Act No.001/2005

JUDGMENT

- [1] On the 28th May 2007, the Plaintiff issued a combined summons against the Commissioner of Police and Attorney General respectively being cited as First and Second Defendants for damages arising out of his arrest and detention at Mbabane Police Station on the 26th October 2006.

[2] The Plaintiff's Particulars of Claim are outlined as follows:

- (a) that on the 26th October 2006 the Plaintiff was arrested by the Mbabane Police.
- (b) that on the 27th October 2006 the Plaintiff appeared before the Mbabane Magistrate's Court where he was admitted to bail in the sum of E500 (Emalangeneni Five Hundred).
- (c) that despite having appeared before Court and there being no order from the Court, the Plaintiff was detained by the Mbabane Police and denied the right to pay bail.
- (d) that Plaintiff was denied access to his relatives by the Police.
- (e) that the Plaintiff remained in custody until the 30th October 2006 and was thereafter released by the Police.

(f) that the Plaintiff suffered damages as a result of the 1st Defendant's conduct in the sum of E50 000-00 (Emalangeni Fifty Thousand) being damages for *contumelia*, deprivation of personal liberty and discomfort.

(g) that despite demand having been made in terms of The Limitation of Proceedings Against Government Act, the Defendants refuse and or fail to pay to the Plaintiff the said sum of E50 000.00 (Emalangeni Fifty Thousand) being damages for *contumelia*, deprivation of personal liberty and discomfort.

(h) that despite demand having been made in terms of The Limitation of Proceedings Against Government Act, the Defendants refuse and or fail to pay to the Plaintiff the said sum of E50 000.00 (Emalangeni Fifty Thousand).

(i) Wherefore the Plaintiff claims-

1. Payment of the sum of E50 000.00.

2. Interest thereupon at the rate of 9% per annum

3. Cost of suit.

4. Further and or alternative relief.

[3] The Defendants duly filed their Notice of Intention to Defend the Action on the 22nd June 2007.

[4] On the 3rd July 2007 the Defendants filed and served the Defendant's Plea to the Plaintiff's Particulars of Claim as follows:

(a) that liability is denied and Defendant is put to strict proof thereof and in particular that on the 27th October 2006, the Plaintiff appeared before Court and was granted bail at the sum of E500.00 (Emalangeneni Five Hundred) and he was otherwise remanded till 3rd November 2006.

(b) that the Plaintiff on his own accord failed to pay bail and was therefore remanded into custody.

(c) that Plaintiff is conveniently not aiding the Honourable Court on how he came to the conclusion that he was denied the right to pay bail.

(d) that Defendants deny and put Plaintiff to strict proof that Plaintiff was denied access to his relatives by the Defendants and further that Plaintiff has not even stated the identity of the said relative or relatives who was or were denied access to him.

(e) that Defendants deny liability for damages in the amount of E50 000.00 (Emalangeneni Fifty Thousand) as claimed by the Plaintiff and in fact Plaintiff is put to strict proof thereof.

[5] On the 6th July 2007 the Plaintiff filed his Discovery Affidavit and further filed a Notice of Discovery calling upon the Defendants to make discovery within 21 days of service of the said Notice. Indeed on the 15th August 2007, the Defendants filed their Discovery Affidavit. On the 21st September 2015 the Plaintiff and Defendants conducted a Pre-Trial Conference wherein all denials in the pleadings were confirmed, and on the 11th March 2016 the Plaintiff filed a Notice requesting a trial date from the Registrar of this Court.

[6] On the 16th March 2016, the Plaintiff compiled a Book of Pleadings and same was filed in Court on the very same day the 16th March 2016 and it was also duly served on the Defendant.

[7] The matter was eventually allocated the 7th to 8th March 2018 for hearing and the matter duly proceeded on those dates.

THE PLAINTIFF'S CASE

[8] The Plaintiff testified under oath that on the 26th October 2006 he was in Mbabane, and that he left the office of his friend Boy Mamba whom he had visited earlier and proceeded to the gym. He also discovered that he had forgotten his cellular phone at an Indian shop.

[9] He testified that he then called his children to alert them that he didn't have a phone in the event they wanted to call him and also that they were not to be worried if they did not get him through his phone. It was during this conversation with his children that they informed him that a Police Officer by the name of Andrew Motsa was looking for him and in fact wanted him to report to the Mbabane Police Station. He also made a call to his fiancée Cebile Simelane, who also informed him that she had received a call from Officer Andrew Motsa, wherein the Officer instructed her to inform him to report to Mbabane Police Station in connection with a criminal case that has been reported against him.

[10] He testified further that he then went to the Mbabane Police Station whereupon he found Police Officers at the Reception. Upon introducing himself to the officers, he was then and there questioned about the whereabouts of money which he was alleged to have stolen. He was surprised because he did not know any money nor did he steal any money. It turned out that one of the officers who were already questioning him about the money was Andrew Motsa who had called his wife. He alleges that he also deduced from their line of interrogation that he was alleged to have stolen E20 000.00 (Emalangenani Twenty Thousand) from his friend Boy Mamba whom he visited earlier in the day.

[11] The Plaintiff testified further that he was then detained in the Police cells and his belt was stripped from his trouser. He testified further that he was subjected to **inhuman and degrading treatment as he was not even allowed to call his family to advise them that he was now in Police custody, because the police suspected that he was going to give instructions to have the alleged stolen money hidden.**

[12] He spent the night in the Police cells and on the following day, he was taken to the Mbabane Magistrate's Court for a remand hearing. When he got to the Magistrate's Court he was further confused because the charge he was facing there was one of the Theft by False Pretences of an amount of E500.00 (Emalangeneni Five Hundred) belonging to a Mtsetfwa gentleman from the National Library, and not the E20 000.00 he was heavily interrogated on.

[13] He testified that he was asked how he was going to plead, and he indicated that he would plead not guilty and the Magistrate then granted him bail of E500.00 (Emalangeneni Five Hundred). There was no mention whatsoever in the Charge Sheet of the E20 000.00 (Emalangeneni Twenty Thousand). He did not pay the E500.00 bail amount and he was again remanded into custody whereupon Officer Andrew Motsa took him back to the Mbabane Police Station. Plaintiff

testified that he again **requested to call his partner (PW2) from DW1, however that request was turned down by DW1 who claimed that he was still investigating the matter.**

[14] The following day was Saturday the 28th October 2006 and Plaintiff testified that the Police refused his partner Cebile Simelane (**PW2**) to see him. This story was corroborated by Cebile who testified on behalf of the Plaintiff as **PW2**.

[15] On the Sunday 29th October 2006, Plaintiff testified that the then Station Commander, a Mr Ngwenya conducted an inspection of all the people in the holding cells and enquired from Plaintiff as to why he was in the cells all this time and one Officer quickly replied that the Investigating Officer was **DW1** who was off-duty that weekend and had not made a handover of this matter since he was the only investigating Officer who knew about this matter. Mr Ngwenya then advised Plaintiff that the Investigating Officer Andrew Motsa was off-duty that weekend. It is common cause that Mr Ngwenya himself never testified in these proceedings. As a senior Officer at the Mbabane Police Station at that time, he could have shed some light before Court why the Plaintiff was treated in this manner.

- [16] On the Monday 30th October 2006, Plaintiff was released from custody after Cebile Simelane (**PW2**) had paid the bail deposit of E500.00. He testified further that ever since he was admitted to bail, he has never been prosecuted. His case was eventually withdrawn and he was refunded the E500.00 bail deposit.
- [17] Plaintiff also testified that he was aware of the E500.00 that he once owed Mtsetfwa but that he had long paid back the said E500.00 to Mtsetfwa and was therefore surprised why he was charged for Theft by False Pretences of that money.
- [18] The Plaintiff was cross-examined at length by Ms K. Magagula for the Attorney General. It appears from the cross-examination that the Plaintiff was more concerned with Officer Motsa's conduct in arresting and detaining in custody and further refusing him access to his family and also denying him the right to call his family and alert them that he had been arrested. As regards the E500.00 Plaintiff testified that notwithstanding that he had repaid the E500.00 to Mtsetfwa, he (Mtsetfwa) never withdrew the charges which resulted in him being incarcerated. It is also common cause that the said Mtsetfwa himself was also not led in evidence by the state to prove his complaint against the Plaintiff as at the time of Plaintiff's arrest. This evidence

was crucial because Plaintiff testified that he had paid Mtsetfwa a long time ago before his arrest and detention at Mbabane Police Station.

[19] Plaintiff further put his blame squarely on Officer Motsa for the remand into the Police custody and his failure to pay the bail deposit of E500.00 on the Friday 27th October 2006. He testified that Officer Motsa had told him that he was remanded into Police custody because he was not through with his investigations. He insisted that he was suing the 1st Defendant's unlawful conduct, who by his actions had denied him the right to call his family on the Thursday 26th October 2006 when he was arrested, and on the Friday 27th October 2006 before he was taken to Court and when he had been granted bail. He testified that if his family had been alerted of his arrest on the 26th October 2006, he would have been released on the 27th October 2006, after his admission to bail because his family would have paid that bail deposit.

[20] Cebile Nomzamo Khumalo (born Simelane), **PW2**, testified on behalf of the Plaintiff. She stated that on the 26th October 2006 whilst at Enkwene Primary School, she received a call from Officer Andrew Motsa who informed her that her partner and now husband was wanted by the Mbabane Police for an offence that he had committed, although he did not disclose to her what offence he had committed.

She testified that she relayed the message to the Plaintiff, and from thereafter the Plaintiff disappeared as she could not get in touch with him on his cell phone. She was then assisted by her sister Cebisile Zamile Khumalo who was a Police Officer at Mankayane to ascertain that Plaintiff was in Police custody at Mbabane Police Station. On the Saturday 28th October 2006 she went to Mbabane Police Station whereupon she was denied access to the Plaintiff by a plain-clothes Police officer whom she found at the Reception, **and who told her that she would not see him because she would conceal evidence in the case.** Again this crucial witness was not led in evidence by the Defendants to rebut **PW2's** testimony.

- [21] On the Monday 30th October 2006, she was assisted by her sister wherein they secured the documentation from the Mbabane Magistrate's Court and eventually paid the bail deposit of E500.00. They went to the Mbabane Police Station, submitted the proof of payment of the bail deposit and the Plaintiff was then released. Nothing turns on the cross-examination of **PW2** by the Attorney General and her evidence remained unchallenged. The Plaintiff then closed its case.

DEFENDANT'S CASE

[22] The Defendants opened their case by calling Officer **3499 Sergeant Andrew Motsa DW1**. He testified that during the year 2006 he was based at the Mbabane Police Criminal Investigations Department (**CID**) of the Royal Eswatini Police Service. He was the Investigating Officer of a case of Theft by False Pretences reported by one Mtsetfwa in 2005. He testified that during his investigations he could not locate the Plaintiff until the 26th October 2006 when Mtsetfwa reported that the Plaintiff was around Mbabane. He testified that Mtsetfwa also gave him the phone number of Plaintiff's girlfriend **PW2** and he called **PW2** and informed her that Plaintiff was wanted in connection with a criminal case that had been reported against him at Mbabane Police Station.

[23] He testified further that Plaintiff thereafter reported to the Police Station on Thursday 26th October 2006 in the afternoon, and that he was in the **CID** office together with other officers when the officer at the Reception informed him that there was Plaintiff at the Reception looking for him. The officer at the Reception accompanied Plaintiff to the Investigations' office. He introduced himself to the Plaintiff in the presence of the other officers and further informed him of the reason why he was wanted by the Police, and that is, a case of Theft by False Pretences which had been reported by Mtsetfwa.

[24] He testified further that after the introduction of the subject matter of the investigations, he then cautioned the Plaintiff in terms of the Judges Rules-that he is a suspect in the case of Theft by False Pretences of E500.00 reported by Mtsetfwa and that he has a right to remain silent, and was not obliged to say anything, but that whatever he says may be reduced down to writing and may be used in Court as evidence. After the caution, the Plaintiff did say something and he was then charged accordingly, detained in custody pending his appearance before the Magistrate Court on the following day, the Friday 27th October 2006.

[25] **DW1** testified that during the process of detaining an accused person, two official registers are completed namely **RSP 3** which is completed by the Arresting or Detaining Officer which gives details on the criminal charge faced by the accused as well as his state of health upon detention. This register or book, as it were, is kept by the Custody Officer at the Reception who is in charge of the people/suspects in custody. There is also a Jailer who is the assistant to the Custody Officer. The second register or book is **RSP 15** which is an inventory for recording personal items of the accused which are not allowed to enter the cells. These may be his belt, shoes, pair of socks etc. This register or book comes in triplicate. There is an original that is pink in colour and is given to the suspect and he /she goes to the cell with it.

[26] The duplicate is green in colour and is attached to the items and kept with them. The triplicate is white in colour and remains with the book. These measures are basically employed to ensure the safety of items belonging to the suspect. All these processes were observed as regards Plaintiff and he was then accordingly detained in custody. In the morning the people in custody were checked by the Station Commander and Desk Officer who inspect the cells every morning. On the following morning, the Friday, **DW1** testified that Plaintiff was taken out of the cells and taken to the Magistrate's Court for a remand hearing. Plaintiff duly appeared before the Magistrate and he was admitted to bail in the sum of E500.00.

[27] **DW1** testified further that after the remand hearing he took the accused back to police custody pending his payment of the bail amount as set by the Court. He explained further that at the Police Station, the procedure is that it is the Custody Officer that has to transfer him to the Correctional Services. He testified that upon their arrival at the Police Station he duly handed Plaintiff's documents over to the Custody Officer for him to process the transfer of Plaintiff to the Correctional Services and proceeded with his other duties. It is common cause that the Custody Officer was never led in evidence before this Court to corroborate the testimony of **DW1**. His testimony would have shed light on why the Plaintiff was taken back to the holding cells instead of being transferred to the Correctional Services

and why he was denied the right call his relatives and also denied access to his partner **PW2**.

[28] **DW1** was subjected to a lengthy cross-examination by Mr.J. Mamba for the Plaintiff. He reiterated under cross-examination that the cellphone number of **PW2** was given to him by Mtsetfwa, and that he had consulted Mtsetfwa as it is standard procedure for Police Officers to consult the complainants.

[29] **DW1** further reiterated his evidence that when the Plaintiff arrived at Police Station he was in the Investigator's office with other officers and not at the Reception as alleged by Plaintiff. Further that Plaintiff was brought to the **CID** office by the officer he found at the Reception.

[30] **DW1** further denied that the Plaintiff was ridiculed by him and other officers, and that he told Plaintiff that he was going to produce the money which he had stolen. **DW1** reiterated that he cautioned Plaintiff in terms of the Judges Rules in relation to the Theft by False Pretences charge relating to the complaint by Mtsetfwa.

[31] **DW1** further denied that after the Court remand he informed Plaintiff that he was taking him back to custody because he was still

conducting his investigations, but reiterated that the Plaintiff was taken back to the Mbabane Police Station for the Custody Officer to process his transfer to Sidvashini Correctional Services pending payment of the E500.00 bail deposit. **DW1** emphasized that Plaintiff did not have the funds to pay the aforesaid bail deposit, otherwise he would have been released on the very same Friday he was admitted to bail. However, **DW1** was unable to explain why the Plaintiff was not allowed to call his next-of-kin, in particular **PW2** who had assisted him to arrest the Plaintiff on the 26th October 2006, as this would have assisted Plaintiff to be discharged on Friday the 27th October 2006 after being admitted to bail by the Magistrate's Court.

- [32] **DW1** clarified further that if he was still conducting his investigations he would have opposed Plaintiff's bail application and this being a first remand, Applicant would have been denied bail but because he had completed his investigations, it is for that reason that he did not oppose the bail and Plaintiff was thus granted the bail. He denied that he fabricated any evidence against the Plaintiff and stated that the Police prefer criminal charges against suspects on the basis of evidence contained in the docket for that particular case. He insisted that *in casu* there was sufficient evidence of the criminal charge of Theft by False Pretences whose complainant is Mtsetfwa and who is very well known to the Plaintiff. However, for reasons best known to

the Defendants, that criminal docket was never discovered in evidence.

- [33] The Defendants closed their defence case after leading the evidence of **DW1**.

ANALYSIS OF THE EVIDENCE

- [34] It is common cause that the Plaintiff was arrested by Mbabane Police on the 26th October 2006 and detained in custody until 27th October 2006 when he was taken to appear at the Mbabane Magistrate Court for a remand.

- [35] It is also common cause that on the 27th October 2006 he was admitted to bail of E500.00 (Emalangeneni Five Hundred) and thus remanded into custody until the payment of bail. According to **DW1**, The Plaintiff was taken back to the Police Station in order for the Custody Officer to process his transfer to the Remand Centre at Sidvashini Correctional Services. However such transfer never happened on that day and there was no cogent evidence from **DW1** why the Plaintiff was not taken to Correctional Services on the 27th October 2006 after the Court remand.

[36] The charge which was preferred by the Police against the Plaintiff remains a mystery, because the Police claim to have charged him for Theft by False Pretence of an amount of about E500.00 (Emalangenzi Five Hundred), however the Plaintiff testified that upon his arrival at the Police station on the 26th October 2006, he was interrogated about the loss of E20 000.00 (Emalangenzi Twenty Thousand) belonging to his friend Boy Mamba.

[37] Plaintiff testified that on the 26th October 2006 he was interrogated and eventually detained until the following morning when he was taken before the Magistrate Court for a remand. He testified that for the first time at the Magistrate Court he discovered that the charge he was facing was Theft by False Pretence of an amount of E500.00 (Emalangenzi Five Hundred) belonging to a Mtsetfwa gentlemen who was working at the National Library. He was thereafter admitted to bail of E500.00. **Plaintiff testified that after the remand he was taken back to the police station by DW1 who also informed him that he would still not be allowed to make any calls to his family as they were still conducting their investigations.** The events of 26th and 27th October 2006 are very disturbing and unfortunate because **had DW1 called PW2** on the 26th October 2006 after arresting and detaining the Plaintiff and alerted her of the arrest and detention, this matter would not be in Court as it is now, because **PW2** would

have made arrangements to have the bail deposit paid on the 27th October 2006 after the hearing, as she did on the 30th October 2006.

[38] I must state that during the trial of this matter, the Defendants never produced the Charge Sheet and/or the Court Record before court to enable the court to appreciate the charge(s) which were actually faced by the Plaintiff. Even the Complainant's statement (Mtsetfwa) was not produced before the court nor was he led in evidence. It is for that reason that the charge(s) faced by the Plaintiff as at the 27th October 2006 remains a mystery and unknown to the Court. In fact no document related to this criminal matter was ever discovered by the Defendants. This is unfortunate because the Plaintiff issued out the Combined Summons on the 28th May 2007, about six (6) months after the arrest of the Plaintiff on the 26th October 2006, the docket and the Court Record were easily accessible by then.

[39] However, what is not in dispute is that Plaintiff presented and surrendered himself to the Mbabane Police Station on Thursday 26th October 2006 and he was interrogated, charged, arrested and thereafter detained. This was after he had been informed by his partner (**PW2**) that he was wanted by **DW1** at Mbabane Police Station.

[40] The events of Saturday the 28th October 2006 are also very unfortunate. According to **PW2** she arrived at the Mbabane Police Station to check on the Plaintiff, only to be told by a plain-clothes Officer who was behind the Counter at the Reception that "**she wanted to conceal evidence**" and thus she was denied the right to see him. She testified further that she was only able to see him on Monday the 30th October 2006 after she had requested the assistance of her sister Cebisile Zamile Simelane who was a police officer then based at Mankayane Police Station to accompany her to Mbabane Police Station. They together paid the bail and the Plaintiff was then released.

[41] According to **PW2**, in the afternoon of the 26th October 2006 she received a call from **DW1** through her phone that **PW1** (Plaintiff) was wanted by Officer Andrew Motsa of the Mbabane Police Station and she duly notified him. This evidence was confirmed by **DW1** that indeed he called **PW2** and instructed her to call **PW1**, which she did, and indeed **PW1** surrendered himself to the Police on that fateful afternoon of the 26th October 2006.

[42] It would have been prudent for the Police in particular the Investigation Officer to have notified **PW2** on that evening of the 26th October 2006 that the Plaintiff (**PW1**) had surrendered himself and

that he was now being detained pending his appearance before the Mbabane Magistrate's Court on the 27th October 2006, and also explain the criminal charge or charges to her and further explain the possibility of him being admitted to bail on the 27th October 2006. This would have been easy as **DW1** already had the cell phone number of **PW2**, who infact had actually assisted him to arrest **PW1** the Plaintiff.

[43] A call to **PW2** from **DW1** on the 26th October 2006 would have prepared her to deal with the issue of the arrest of Plaintiff and his subsequent appearance in Court on the 27th October 2006. I say this because it was **PW2** who was called by the Investigating Officer **DW1** on the 26th October 2006 when he wanted the Plaintiff. Surely the Investigating Officer was duty bound to alert **PW2** of the arrest and detention of the Plaintiff. I make this observation because **PW2** was heavily frustrated by the disappearance of the Plaintiff whom she last talked to when informing him that he was wanted by the Investigating Officer. The frustration was made worse by the fact that she was not in Mbabane but at Nkwene Primary School so far away in the Shiselweni District, and her partner (**PW1**) had suddenly disappeared after she informed him that he was wanted by the Mbabane Police.

[44] Infact **PW2** was so frustrated by the disappearance of the Plaintiff to the extent that on the Friday 27th October 2006 she eventually called her sister Cebile Zamile Simelane, a Police Officer then based at Mankayane Police to seek her assistance in locating the whereabouts of the Plaintiff. Indeed Cebile made enquiries and eventually found that Plaintiff was detained at Mbabane Police Station.

[45] It is equally disturbing that the Plaintiff since his arrest and detention on the 26th October 2006 was refused to contact his family on the basis that investigations were still on-going, and to make matters worse even further, was that the Court had granted him bail, how was he then expected to arrange for his bail deposit if he was refused to contact his family. This was on the Friday the 27th October 2006.

[46] As stated above, the refusal by the police to allow **PW2** to see Plaintiff on the 28th October 2006 was a heavy blow on **PW2** as she had been frustrated by his disappearance after she had informed him that the Mbabane Police were looking for him. It is common cause that if the Investigating Officer had communicated with **PW2** or allowed Plaintiff to call his family at least on the morning of Friday 27th October 2006, the Plaintiff would not have spent the weekend in the police cells, instead **PW2** would have made means to arrange for his bail deposit. Even if she would have failed to have him released on the Friday or

even on the weekend, the police would have discharged their constitutional duty of informing his next-of-kin promptly of his arrest and detention, hence the matter would not even be before Court, as there would have been no fault on the part of the Police.

[47] For ease of reference, here is the testimony of **PW2** Cebisile Khumalo (Simelane) both in chief and under cross-examination by counsel for Defendant:

Evidence in Chief -

(a) **Question:** Do you know Celumusa Khumalo?

Answer - Yes he is my husband.

(b) **Question:** Tell this Court all that you know that pertains to this matter on the 26th October 2006 to 30th October 2006.

Answer - On the 26th October 2006 I received a phone call at Nkwene Primary School and the person on the other end of the line was a Police Officer Andrew Motsa.

(c) **Question:** What did he say?

Answer- He asked me how I was related to Celumusa Khumalo and I told him he was the father of my child.

(d) **Question:** Relate the conversation;

Answer - He asked where he was and I told him he stays in Mbabane and I stay in Nkwene and we meet on weekends. He said he wants him and he said he had committed an offence and he is wanted. But he did not say what the offence was and that he should report to the Police.

(e) **Question:** Did you tell Plaintiff that he was sought by the Police?

Answer - Yes in the evening he called using a coin box and I told him he was wanted by the Police and we didn't talk much.

(f) **Question:** On the Friday were you able to contact him as normal?

Answer - No I tried to call on his cellphone and I didn't get him because I was worried how he went to the Police Station.

(g) **Question:** Upon being unable to get your husband what steps did you take?

Answer - Seeing that I was not getting him I then called my sister who was a police officer based at Mankayane Police Station, Cebisile Zambile Simelane.

(h) **Question:** What advice did she give you?

Answer - She promised to call, and thereafter called to say Plaintiff was arrested and was at Mbabane Police Station but she did not state the charge.

(j) **Question:** What then did you do?

Answer – I asked her what to do and she said I must go to the Police Station to enquire.

(j) **Question:** Did you go there?

Answer – I went there in the morning of Saturday.

(k) **Question:** Were you assisted?

Answer – When I entered the office I found a plain-clothes Officer behind the Counter and I introduced myself and asked to see Celumusa Khumalo and he responded by saying **I wanted to conceal evidence.**

(l) **Question:** Were you able to have audience with your husband?

Answer – I never saw him, the Police refused and said **I had come to conceal evidence.**

(m) **Question:** Did you return to the Police Station on any other day and were you assisted?

Answer – I was turned back on Saturday and I was only able to see him on Monday. On the Monday I was accompanied by my sister to the Police Station where we were directed to the Magistrates Court where we obtained documents and paid bail at Treasury and he was then released.

(n) **Question:** Do you recall what hour of the day you secured his of release?

Answer – It was in the morning hours.

That's all.

Cross Examination by Ms K Magagula (Defence Counsel).

(o) **Question:** Mrs Khumalo-were you at any point denied to pay bail?

Answer – No problem on the Monday there were no hiccups.

(p) **Question:** On Saturday you were only told you will conceal evidence?

Answer – Nothing was said on bail, but I was only told I am going to conceal evidence.

That's all.

[48] The refusal by the police to allow **PW2** to see Plaintiff on the Saturday 28th October 2006 was unlawful, unreasonable and amounted to inhuman and degrading treatment to the Plaintiff. This is because if they were afraid that he was going to conceal evidence, then such meeting was supposed to be in the presence of the police. It was important that his partner be allowed to see him and make whatever arrangements for his release. Infact as I observed earlier on and repeat again that, **she should have been contacted by the Investigating Officer on the Thursday 26th October 2006**

immediately he was arrested and detained, because she is the one who made it possible for the police to arrest him anyway. Alternatively, the Investigating Officer ought to have notified her on Friday morning the 27th October 2006 when he was preparing to take him to the Magistrate's Court. This would probably have given her time to prepare for the payment of the bail deposit. Even if she had failed to raise the bail deposit after being timeously advised by the police in particular **DW1**, such failure would never be attributable to the police who would have discharged their constitutional duty of informing his next-of-kin promptly of his arrest and remand hearing.

- [49] The refusal by the police to let Plaintiff communicate with his family on the basis that he was going to hide the money thereby concealing evidence, gives credence to his testimony that he was interrogated for the alleged loss of the E20 000.00 (Emalangeneni Twenty Thousand) allegedly belonging to a Boy Mamba. It cannot be that the police were worried about the charge of Theft by False Pretence of E500.00. This amount of E500.00 raises eyebrows when you consider that the Plaintiff was eventually admitted to bail of E500.00, an amount equivalent to the quantum of the Charge. The learned Magistrate would never admit the Plaintiff to bail of E500.00 because of the **"half the value principle"** applicable in the Magistrates' Court in determining the amount of bail to be set.

[50] The failure by the Defendant to discover the Charge Sheet and the Court Record, or the Statement of the Complainant (Mtsetfwa) was unfortunate in these circumstances, because it makes the Court to rely only on the words of the Plaintiff and **DW1**, yet had these documents been discovered in evidence, such discovery would have greatly assisted the court to ascertain the Charge or Charges which the Plaintiff was facing on the 27th October 2006. Further the Court would have been assisted by the Court Record to ascertain whether the Plaintiff was remanded into Police Custody or to the Remand Centre. These are public documents which ought to have been discovered by Defendants.

[51] There is no cogent and /or credible testimony that was led by the Defendants to counter the allegations by the Plaintiff and **PW2** that, firstly, Plaintiff was denied the right to communicate with his family between the 26th October 2006 when he was arrested all the way to his eventual release on the 30th October 2006 when his then fiancée **PW2** eventually paid his bail deposit. The denial offered by **DW1** the Investigating Officer lacks credence for the simple reason that, indeed Plaintiff never communicated with his family in particular **PW2** on these dates despite him repeatedly and persistently asking to do so. Further, and secondly, when his partner went to the police station on the Saturday 28th October 2006, she was denied the right to see him because the Officer at the Reception told her that "**she was going to**

conceal evidence", hence she couldn't see him. This evidence too was not denied by the Defendants as none such was led by the Defendants to contradict the claims by **PW2**. It is interesting at this stage to refer to the cross-examination of **DW1** by Plaintiff's Counsel Mr T Mamba of Mkhwanazi Attorneys:

- (a) **Question:** Plaintiff testified that whilst in the cells he was not allowed to see his girlfriend?

Answer- I heard that my Lord.

- (b) **Question:** Is it procedural for Police to deny a detainee to see his visitors?

Answer – A detainee is allowed to see his relatives for him to air his grievances.

- (c) **Question:** You will agree with me that the refusal to allow the girlfriend audience with him on the Saturday, necessarily deprived him of his right to pay bail?

Answer – I don't agree, but what I can also explain is that he is not allowed to be seen by anyone, and that involves his safety in preventing him from outside harm- I have evidence that his sister- in-law was now aware that he was in custody.

- (d) **Question:** Is it your evidence then that a sister in law is closest relative to the mother of the child such that the mother of his child could be deprived of the right to see him?

Answer – That would have been allowed maybe if she was then a wife.

- (e) **Question:** Isn't it interesting that when you wanted to arrest him you called this girlfriend but post his arrest you are now denying her the right to see him?

Answer – If the girlfriend had declared that she wanted the Andrew Motsa who had called her because I don't stay at Reception but in the **CID** Office, I wasn't aware of such, so I would be in a position to attend to her because I know her.

(n) **Question:** I put it to you that the consequences of the unlawful deprivation runs in the face of justice and he was forced to spend the whole weekend in custody which he would not have spent.

Answer - I deny that he was forced to stay in custody unlawfully, instead he was being in custody pending payment of bail. The girlfriend came on Saturday and she stated that she paid the bail on the Monday morning wherein she was swiftly assisted- she testified that when she had paid the bail he was then released- I dispute any malice as we did not know him.

[52] There is no other conclusion that could be arrived at other than to hold that the Plaintiff was denied his constitutional right to contact and access his next-of-kin. He was forced to spend the whole weekend from Thursday the 26th October 2006 without being allowed to communicate with his family. The act of denying the Plaintiff the opportunity and the right to communicate with his family resulted in him spending the whole Friday 27th October 2006 and the weekend of 28th and 29th October 2006 respectively in police custody, was unwarranted, unfair and unconstitutional. I cannot blame the Plaintiff to feel ill-treated in the hands of the police, he was indeed unfairly ill-treated. **The Constitution of the Kingdom of Eswatini Act No.1 of**

2005 (the Constitution) does not allow that people who have been charged with criminal offences and arrested and detained in custody be denied their fundamental rights to communicate with their family, next-of-kin etc as the case may be.

[53] Chapter III of the Constitution provides for the Bill of Rights. In particular **Article 16 of the Constitution** deals with the **Protection of Right to Personal Liberty**. Relevant to these proceedings is Article 16 (6) which provides as follows;

16 (6) ***Where a person is arrested or detained –***

(a) ***The next-of-kin of that person shall, at the request of that person, be informed as soon as practicable of the arrest or detention and place of the arrest or detention.***

(b) ***The next-of-kin, legal representative and personal doctor shall be allowed reasonable access and confidentiality to that person;***

(c) ***That person shall be allowed reasonable access to medical treatment including, at the request and at the cost of that person, access to private medical treatment.***

[54] It is common cause that of particular relevance *in casu* is Sub-Article 6(a) and (b). I have demonstrated above how the Plaintiff was denied his constitutional right to contact his family and the next-of-kin and the same applied to the Plaintiff's partner **PW2** who, I will repeat, is the one who was called by the Investigating Officer **DW1** through her phone when he was enquiring about the whereabouts of the Plaintiff, and as a law abiding citizen, she immediately called the Plaintiff and advised him to go to Mbabane Police Station and see **DW1**, which Plaintiff did and he was then arrested and detained.

[55] I will repeat for the sake of repeating, that the failure by **DW1** to call **PW2** in the evening of the 26th October 2006 to alert her that he had arrested and detained Plaintiff together with the refusal by **DW1** to allow **PW1** to call his family as he testified, was a violation of Plaintiff's constitutional right, it makes it worse here because, in essence, it was **PW2** who assisted **DW1** to eventually arrest Plaintiff. In other homesteads this may cause friction between the couple, but in this case it didn't, because at the time **PW2** was Plaintiff's partner and by the time the matter went to trial in March 2018, they were husband and wife.

[56] Again I will repeat, the failure to allow the Plaintiff to call his next-of-kin on the 27th, 28th, 29th October 2006 was also a violation of the

constitutional right of the Plaintiff as enshrined in Sub-Article 6 (a) and (b) herein referred to above. **It must be borne in mind that the wording of the said Sub-Articles is peremptory because of the word "shall" which is operative in the sense that it commands the 1st Defendant to allow such communication and visits in respects of detainees.**

[57] In terms of the **HUMAN RIGHTS STANDARDS AND PRACTICE FOR THE POLICE-OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN-RIGHTS - UNITED NATIONS NEW YORK AND GENEVA 2004** at page 17 titled **Detention, Human Rights Standards** provides as follows.

- (i) *pre-trial detention shall be the exception rather than the rule.*
- (ii) *a person deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.*
- (iii) *every one charged with a penal offence shall be presumed innocent until proven guilty in a fair trial.*
- (iv) *no detainee shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment, or to any form of violence or threats.*

- (v) ***detained person shall be held only in officially recognized places of detention, and their family and legal representatives are to receive full information.***

[58] The Constitution of this Kingdom of Eswatini also provide Article 18 which is titled "**Protection from inhuman or degrading treatment**". Which provides as follows;

"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.*

[59] It is common cause that the act of being arrested and detained cannot be a pleasant one. **However, the position *in casu* is the denial of the fundamental and constitutional right to communicate with his next-of-kin at the time when he needed them most,** which denial by the police then resulted to the inhuman and degrading treatment. For someone who had surrendered himself to the command of the law enforcement agency and comparing that with the petty offence which he was facing, did not deserve to be treated in this unfair and unconstitutional manner of being denied the right to communicate with his next-of-kin from the 26th October 2006 when he was arrested and during the time whilst in custody of the 1st Defendant, and in particular to have **PW2** at least informed of his arrest and detention.

[60] As stated above, the refusal by the police on Saturday 28th October 2006 to let **PW2** see her partner was another constitutional right violation by the 1st Defendant. In terms of the Constitution she had a right to visit and see her fiancé who was in detention at Mbabane Police Station. She is after all his next-of-kin. The duty to observe and comply with the Constitution by law enforcement can never be over emphasized. Not only is this a common law right of the detainee, it is also and importantly a constitutional and human right of the detained person and which can easily be complied with by those law enforcement agents.

[61] According to the **European Court of Human Rights-A GUIDE ON THE CASE LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS**, titled **PRISONERS' RIGHTS** updated on the 31st August 2020, **COUNCIL OF EUROPE**, the introduction provides as follows;

"The Court is frequently called upon to rule on complaints alleging a violation of different Articles of the Convention related to the treatment of prisoners as well as restrictions on or interferences with their rights. The Court has developed abundant case-law determining the nature and scope of prisoners' rights under the Convention and the duties of the domestic authorities as regards the treatment of prisoners".

For the purpose of this Guide the term "prisoners" primarily covers persons who have been remanded in custody by a judicial authority or who have been deprived of their liberty following conviction but may also refer to all other persons detained for any other

reason in a prison. Moreover, it should be noted that the principles related to prisoners' rights may apply to people held in waiting rooms or similar spaces intended to be used for short periods of time, such as police stations and immigration detention facilities (MURSIC V CROATIA {GC} 2016 page 92; see for instance GEOGIA V RUSSIA (I) {GC} 2014 page 192-205; KHAITIA AND OTHERS V ITALY [GC] 2016 pages 163-167; SAKIR V GREECE 2016 pages 50-53). These principles may also apply to people held in psychiatric establishments (SOKAN V ROMANIA 2019 pages 24-29)."

[62] Paragraphs 73-74 provides for family contacts and visits;

"It is the Court's well-established case-law that detention, like any other measure depriving a person his liberty, entails inherent limitations on his private and family life. However, it is an essential part of a prisoner's right to respect for family (KHOROSHENKO V RUSSIA {GC} 2015 page 110, with further references)".

- 1. Any interference with the right to respect for private and family life must be justified within the meaning of Article 8 and 2 of the Convention. In particular, any law on which restrictions on family visits are based must meet the "equality of law" requirement under Article 8. In cases against Russia, the Court has found that this requirement was not met due to the fact that the law conferred on the authority, remaining in charge of the Criminal case, unrestricted discretion to grant or refuse prison visits and provided nothing to limit the scope of the discretion and manner of its exercise. The Court thus considered that such law deprived the detainee of the minimum degree of protection against arbitrariness or abuse to which citizens are entitled under the rule of law in a democratic society (KUNGUROV V RUSSIA 2020 pages 18-20).*

[63] It appears to be the trend in international jurisdictions that no matter how serious the crime may be, a person who is in custody has a fundamental right to communicate and have access with his/her next-of-kin. The Constitution of this Kingdom provides so as I have demonstrated above herein. Even the Conventions on Human Rights also observe the right of a detainee to have access to his/her next-of-kin either telephonically or through written correspondence as the case may be. This is also the position under the democratic South Africa Constitution.

[64] In the case of **LAWYERS FOR HUMAN RIGHTS V MINISTER OF HOME AFFAIRS AND SIX OTHERS (CCT 38/16) [2017] ZACC 22; 2017 (10) BCLR 1242 (CC) 2017(5) SA 480 (CC0 (29 JUNE 2017) MOGOENG CJ, NKABINDE ADCJ, CAMERON J, FRONEMAN J, KHAMPEPE J, MADLANGA J, MHLANTLA J, MOJAPELO AJ, PRETORIUS AJ AND ZONDO J** (all concurring) the judgment written by **JAPHTA J** where at paragraphs 41-42 of the Judgment His Lordship quoted **Section 35 (2) of the South African Constitution** as follows:

"41 Section 35 (2) of the Constitution provides:

Everyone who is detained, including every sentenced prisoner, has the right-

a) to be informed promptly of the reason for being detained

b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;

c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;

e) to conditions of detention that are consistent with human dignity, including at least and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment, and

f) to communicate with, and be visited by, that person's

(i) spouse or partner

(ii) next of kin;

(iii) chosen religious counsellor

(iv) chosen medical practitioner

[65] The Legal Service Commission of South Australia provides that;

- “ A police officer must, as soon as reasonably practicable following the arrest of a person (regardless of whether apprehension occurred with or without a warrant) warn the arrested person that anything they say may be taken down and used in evidence”***
- “ The arrested person has a right to make a telephone call (in the presence of a police officer) to a friend or relative to inform them of their whereabouts (see Summary Offences Act (SA) s 791 (a). Where the telephone call is not answered, the arrested person should be allowed to make another telephone call (see R V TANNER [2005] SAC 416.***
- “ The police Officer in charge of the investigation can refuse a telephone call to, or the presence of, a particular person during interrogation or investigating, where he or she has reasonable cause to suspect that communication between the person in custody and that particular person would result in steps made to avoid apprehension, or the destruction or fabrication of evidence (see Summary Offences Act (SA) s 79A (2). The power to refuse the presence of a particular person does not apply to the right to have a solicitor during an interrogation or investigation”***

[66] It is common cause that the Australian legal system is based on the English law, which is a similar case with the history of the English law influence in our kingdom. Australia is one of the original members of the Commonwealth of Nations, otherwise known as the British Commonwealth. This resulted therefore to the similarity in the methodology of law enforcement activities in the Commonwealth

Nations because of the influence and dominance of the English law during the colonial era. It is common cause therefore that the manner in which the police conduct their activities in law enforcement, in particular crime prevention and detection which in essence is investigations and including the procedure of cautioning of suspects in terms of the Judge's Rule, all of these originate from the English jurisprudence.

[67] *In casu*, the investigation did not extend to a situation which warranted that the Plaintiff be denied the right to access his next of kin, or family as it were, due to the nature of the Charge(s). **DW1** was clear that he charged, arrested and detained Plaintiff on the 26th October 2006 for Theft by False Pretences of the sum of E500.00 only. This was the Charge which presumably was so petty such that it would not justify the refusal by the police to allow Plaintiff to contact his family or for them to contact his family on his behalf so that the family in particular **PW2** be informed that the Plaintiff was in Police custody and awaiting to appear before Court on a remand on the 27th October 2006.

[68] Further **DW1** himself testified that if there were outstanding investigations, he would have opposed the bail application because it was a first remand, but that he did not because he was through with

the investigations. Why then was the next-of-kin in particular **PW2** not informed early on the 26th October 2006 or at the very least in the morning of the 27th October 2006 that Plaintiff was being taken to Court remains a mystery. Secondly why was she denied the right to see him on the 28th October 2006 (the Saturday) and told that **"she will conceal evidence"**. Surely these unlawful and unconstitutional actions cannot be ignored and overlooked in this constitutional dispensation particularly where such acts are and clearly pronounced as inhuman and degrading treatment in violation of the Plaintiff's rights as enshrined in the Bill of Rights of the Constitution as demonstrated above.

[69] The Office of the **High Commissioner for Human Rights in co-operation with the International Bar Association (IBA)** conduct trainings to Judges, Prosecutors and Lawyers on human rights. In 2003 the **theme** was **"Human Rights in the Administration of Justice"** and this was contained in a **Manual** titled **"Professional Training Series No.9"**

[70] The introduction in **Chapter 1** provides as follows;

"In recent decades international human rights law has had an ever-growing impact on domestic legal systems throughout the world, and thereby also on the daily work of domestic judges,

prosecutors and lawyers. This evolving legal situation, the true dimensions of which could hardly have been foreseen half a century ago, requires each State concerned, and also the relevant legal professions, carefully to consider ways in which effective implementation of the State's legal human rights obligations can best be secured. This may in many instances constitute a challenge to legal practitioners, owing to the conflicting requirements of different laws, lack of access to information, and the need for further training"

"The objective of the present manual is therefore to convey a basic knowledge of, and skills in, the implementations of international human rights law to judges, prosecutors and lawyers-legal professions without which there can be no truly efficient protection of the right of the individual at the domestic level..."

Chapter 8 Clause 5 at page 356 provides for the prisoner's right to contact with family members and friends:

"A fundamental premiss when dealing with the right of detainees and prisoners to maintain contact with the world outside the institutions where they are held is that, like free persons, those deprived of their liberty enjoy all the human rights guaranteed by international law, subject of course to those restrictions that are an unavoidable consequence of the confinement. This means, inter alia, that no detainee or prisoner "shall...be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence (article 17 of the,

International Covenant on Civil and Political Rights)

Rule 37 of the Standard Minimum Rules provides that;

"Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits". Prisoners who are foreign nationals "shall be allowed reasonable facilities to communicate with their diplomatic and consular representatives of the State to which they belong" or "with the diplomatic representatives of State which takes charge of their interests or any national or international authority whose task is to protect such persons"

Further Rule 92 provides that;

" An untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution"

Principle 16(1) of the Body of Principles stipulates that:

" Promptly after arrest and after each transfer from one place of detention

or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody"

Principle 19 of the Body of Principles stipulates as follows:

"A detainee or imprisoned person shall have the right to be visited by and correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations".

"The refusal of the prison authorities to allow a detainee or prisoner to write to, and receive visits by, family members, may violate both Article 7 and Article 10(1) of the International Covenant On Civil and Political Rights".

[71] It therefore seems to be paramount after consideration of the international jurisdictions that a person who has been arrested and detained has a constitutional right to be afforded access to

communicate with his/her next-of-kin **promptly** after such arrest and detention. As mentioned above **repeatedly: in casu**, the Investigating Officer called **PW2** through her phone enquiring about the Plaintiff, and gave her instructions to call the Plaintiff and inform him that he must report to the Mbabane Police Station and ask for **DW1**. **PW2** complied and conveyed the instructions to the Plaintiff, and immediately upon receipt of the instructions, Plaintiff who was around Mbabane City immediately reported to **DW1** whereupon he was interrogated, arrested and detained.

[72] On the other hand **PW2** was left in the dark about the arrest and detention of her then fiance. Plaintiff himself requested to contact his family on the 26th October 2006 after his arrest, in particular **PW2** and he was denied that opportunity by the 1st Defendant on the basis that he was going to conceal evidence. I fail to understand why **DW1** did not take **PW2** into his confidence and promptly inform her on the 26th October 2006 that Plaintiff was now in Police custody after handing himself over to the Mbabane Police and that Plaintiff would appear in Court on a remand on the 27th October 2006. I say this because **PW2** had taken **DW2** into her confidence by informing her partner that he was wanted by **DW2** of Mbabane Police on that fateful 26th October 2006.

[73] I have demonstrated above that the right to access and communicate with the next of kin is a fundamental constitutional human right to a person held in custody in terms of our Constitution, and the events of the 26th October 2006 to the 29th October 2006 at the Mbabane Police Station where the Plaintiff was detained are a clear violation of this constitutional right as enshrined in terms of **Article 16 (6) (a) and (b) of the Constitution of the Kingdom of Eswatini Act No. 001 of 2005.**

[74] Consequently, for the above reasons and considerations, I hereby find in favour of the Plaintiff and order that;

1. Plaintiff was denied the right to communicate and be visited by his relatives (next-of-kin, spouse and/or partner) in particular **PW2** during the period of his arrest and detention at Mbabane Police Station on the 26th October 2006 until his release on bail on the 30th October 2006.
2. Defendants are therefore liable to compensate the Plaintiff for damages for violation of his Constitutional right in terms of the Bill of Rights as contained and enshrined in

Article 16(6) (a) and (b) of the Constitution of the Kingdom
of Eswatini Act No.001 of 2005.

3. Interests thereupon at rate of 9% per annum.
4. Defendants are liable to pay costs of this suit on the
ordinary scale.
5. The parties are given an opportunity to deliberate on the
quantum of damages, failing which the matter will be
allocated a date in this Session for the determination of
the quantum of damages.

So ordered



NM MASEKO
JUDGE-HIGH COURT