

Appeal Case No.23/2002

In the matter between:

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

**1st Appellant
2nd Appellant**

VS

MATHOKOZA VILAKATI

Respondent

CORAM

**: BROWDE J.A.
BECK J.A.
ZIETSMAN J.A.**

**For Appellants
For Respondent**

**: P. Msibi
: B.W. Magagula**

JUDGMENT

Beck J.A.

The respondent (plaintiff in the Court *a quo*) brought an action against the appellants for damages for unlawful arrest and unlawful detention. Maphalala J. held that he was lawfully arrested but that his subsequent detention was wrongful. The learned Judge awarded the respondent damages in the sum of E10.000 for the wrongful detention, and a further sum of E5 000 as damages for loss of dignity and honour. The appellants have appealed against the finding that the detention of the respondent was unlawful, and against the award of damages in the total sum of E15.000.

On the morning of Tuesday, 6th October 1998, Elizabeth Kyamogi, was drawing some cash at an automatic teller machine when she noticed two men walking by. After she had drawn her

money she then walked past a group of three men, one of whom called out to her “Ye sisi” and she recognised him as one of the two who had passed by her when she was at the automatic teller machine. As she continued on her way she heard a raised male voice behind her again rudely calling out to her “Ye sisi.” Looking back she saw it was the same man who had seen her drawing her money and who had previously called out to her. He had detached himself from the group of three men that she had just walked past and he was now following her. She became fearful and took to her heels, whereupon this man chased after her. In her headlong flight Elizabeth fell and injured herself. An acquaintance from a nearby shop came to her assistance and a security guard who witnessed the chase and heard the man shouting “I want my money, I want my money” ran after him and caught him. It was the respondent and he was taken to a nearby Police caravan. The woman Elizabeth identified him as the man who had chased her and he was arrested. The respondent testified that it was about midday when he was arrested and taken to the Mbabane Police Station where he was detained.

The respondent has not cross-appealed against the finding that the arrest was lawful. The respondent’s subsequent detention constituted a continuation of that lawful arrest. In **Rex vs Mazema 1948 (2) S.A. (E) 152 at pages 153/154** Hoexter J. (as he then was) said: “Mr Jennett has argued on behalf of the appellant that detention is something different from arrest. We are unable to find any difference. Possibly the police may prefer to use the phrase ‘detained for investigation’ in the case where an accused person has been arrested on suspicion and no specific charge has as yet been formulated against him. But in such a case the accused is none the less under arrest. A person is under arrest as soon as the police assume control over his movements. In the present case the movements of the appellant were controlled by the police from the moment when he was detained by Sergeant Campher on the 26th October until he was released on bail on the 30th October.”

Having found the arrest of the respondent to have been lawful, his ensuing detention was, *prima facie*, also lawful and the onus was upon the respondent to show that there was a stage when it became unlawful.

In holding that his detention became unlawful the learned Judge *a quo* found that the respondent had been detained for 3 days and that this was an unreasonably long period in the circumstances of the case. The undisputed evidence of the investigating officer however, is that he released the respondent from custody on 8th October. On that day the investigating officer received the docket, he took the respondent’s fingerprints and then he went to the

hospital to interview the complainant. She was not there however and his attempts to contact her at the mission where she was teaching were unsuccessful. Accordingly he released the respondent that same day from custody, but warned him that he might be called back when the complainant was found. The time of the respondent's release from custody on 8th October was not stated, but it appears from the respondent's evidence to have been in the afternoon. The finding that the respondent was detained in custody for 3 days was therefore a misdirection of fact. He was released after being detained for only a few hours more than 48 hours after his arrest.

The period for which a person arrested without warrant may lawfully be kept in custody is regulated by sub-sections (1) and (2) of section 30 of the Criminal Law and Procedure Act No.67 of 1938. Those sub-sections read as follows;

“30. (1) No person arrested without warrant shall be detained in custody for a longer period than in all the circumstances of the case is reasonable.

(2) Unless such person is released by reason that no charge is to be brought against him, he shall, as soon as possible, and without undue delay, be brought before a magistrates' court having jurisdiction upon a charge of an offence.”

It is apparent that no fixed time has been laid down for lawfully keeping an arrested person in custody. Detention following a lawful arrest only becomes unlawful when it is no longer reasonable in all the circumstances of the particular case.

In the instant case the respondent was promptly released when the investigating officer failed to make contact with the complainant and was therefore uncertain whether a charge would be brought against the respondent. The only basis upon which it might be found that he was detained for a period that was longer than was reasonable in all the circumstances of the case would be if it were proved that the police were in a position to have done on Wednesday the 7th of October everything that was done on Thursday the 8th of October. There was however, no evidence to that effect and it was not shown what the circumstances were on the Wednesday, the day following his lawful arrest.

On behalf of the respondent Mr Magagula submitted that it was unreasonable to have detained him at all if he was to be charged with nothing more serious than common assault.

At the time of his arrest however the information gleaned from the complainant and from the security guard who caught the respondent may well have resulted in a decision to charge the respondent with the much more serious offence of attempted robbery and there was every reason to arrest him and detain him for investigation.

The finding that the detention of the respondent was unlawful, based as it was on the misdirection of fact that the detention lasted for three days, is set aside. The trial court should have found that the respondent failed to prove that by the time he was released on the 8th October, 1998 he had been detained for a period that in all the circumstances of the case was unreasonable.

Accordingly the appeal succeeds with costs, the orders made by the court *a quo* are set aside and the following order is substituted;

It is ordered that there be absolution from the instance and the plaintiff is to pay the costs.

C.E.L. BECK J.A.

I agree

J. BROWDE J.A.

I agree

N.W. ZIETSMAN J.A.

Delivered on thisday of November 2002