

SOUTH AFRICA / JUDGMENT

Kubayi v Nkana and Others (6593/2017)

[2024] ZALMPPHC 19 (7 March 2024)

[2024] ZALMPPHC 19**COURT**

Limpopo High Court, Polokwane

BEFORE

Kganyago

CASE / FILE NUMBER

6593/2017

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Source record**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****LIMPOPO****DIVISION, POLOKWANE****CASE****NO: 6593/2017****REPORTABLE****OF****INTEREST TO OTHER JUDGES****REVISED****DATE:**

07/03/2024

In

the matter between:

JOHN

KUBAYI

PLAINTIFF

And

MAROPENE

FRANS

NKANA FIRST

DEFENDANT

THE

MINISTER OF

POLICE SECOND

DEFENDANT

SOUTH

AFRICAN POLICE SERVICES W/O

WILLIAMS
STATIONED SAPS WESTERNBURG,
POLOKWANE,
LIMPOPO THIRD
DEFENDANT

JUDGEMENT

KGANYAGO J

- [1] The plaintiff has instituted an action against the defendant for alleged unlawful arrest and detention, and malicious prosecution. According to the plaintiff's particulars of claim, the plaintiff was arrested on 1st July 2015 at his place of residence by the third defendant without a warrant in the presence of the first defendant. Thereafter the plaintiff was detained at 19h30 at the instance of the first defendant, and was ultimately released on bail on 3rd July 2015 when he appeared in court. The plaintiff was charged with malicious damage to property and theft. The charges against the plaintiff were withdrawn on 11th January 2016.
- [2] The defendants have defended the plaintiff's action. The first defendant's plea is that of a bare denial. The first defendant pleaded that he had opened a case of theft and contravention of a protection order and that the police did their investigations. The first defendant denied having assisted the third defendant in arresting the plaintiff as he is not a police officer. The first defendant further pleaded that it was reasonable of him to have opened a case against the plaintiff, and that the second defendant had decided on their own to set the law in motion. The second and third defendant in their plea have admitted the arrest and detention, and have pleaded that the arrest and detention was in pursuant of the provisions of section 40(1) of the Criminal Procedure Act 51 of 1977.
- [3] At trial, the plaintiff proceeded with his claim against the second and third defendants (defendants) only on claim 1 which relates to unlawful arrest and detention. At the commencement of the trial, the defendants conceded to merits 100% in favour of the plaintiff in relation to his unlawful arrest and detention. However, the parties could not agree on quantum, and the court is called upon to determine the issue of quantum only.
- [4] The plaintiff was the only witness to testify for his case. He testified that he was arrested on 1st July 2015 at 19h30 and released on 3rd July 2015 at 9h30. He was arrested at his workplace which is a farm where he also resides. At the time of his arrest he was with his brother and sister-in-law. He was pained by the way he was arrested. When he was arrested, the police accused him of having stolen a wire.
- [5] The police came to the farm in the company of the first defendant, and also using the first defendant's vehicle. The police told the plaintiff to accompany them to the police station in order to make a statement. After making a statement at the police station, the police and the first defendant told him to go to the holding cells. In the cells it was difficult to sleep. They

were sleeping on the floor and other boys will come and take away their blankets. He was not used to the situation, and that made him to be unable to sleep as he was frightened. The younger cell mates will search the plaintiff looking for cigarettes. The young cell mates will also take food away from the plaintiff. The cell in which the plaintiff was held was dirty and mixed up. The toilet was dirty, and he could not use it for two days. It was during winter time and cold in the cell. The cell was also

overcrowded.

- [6] The arrest had affected him emotionally and even up to date he is still affected. After he was released from the cells, the community members from the village that he comes from will shout at him, and refer to him as an old man who is a thief. In the community he was known as a good man. He did attend school, and did not hold any position in the community.
- [7] The plaintiff was cross examined and he stated that the blankets were taken from him on his admission in the cells. When asked why he did not report the incident to the police in charge of the cell, he stated that he did not know that he had to report, as it was for the first time he was arrested. The plaintiff stated that he did not eat for two days as the young cell mates were taking food meant for him. He conceded that he did not report to the police in charge that the young cell mates were taking food meant for him. That concluded the evidence of the plaintiff and he closed his case.
- [8] The defendants called Hendrik Boetie Williams as the only witness to testify for their case. He testified that he is a member of the SAPS, warrant officer by rank, and stationed at Westernburg police station. He is the one who had arrested the plaintiff at a certain farm where he worked around 19h00 to 20h00. On arrival at the farm he interviewed the plaintiff, and the plaintiff told him that his employer had instructed him to go and remove the fence of the first defendant. After interviewing the plaintiff, he arrested him and took him to the police station where he detained him.
- [9] When they arrive at the police station, supper for the inmates was already served as it is served between 17h00 and 18h00. It is possible that the young inmates might have taken food from the plaintiff, but if that had happened, the plaintiff could have asked for more food from police officers in charge of the cells. The holding cells are always clean, and they are been cleaned every morning and during the day. Toilets are clean and in good condition. They never received any complaint about the plaintiff been illtreated. The cells are been regularly inspected to avoid inmates killing each other. During eating time, there will always be a police officer who will be monitoring them. The plaintiff is lying when he testified that food was taken from him.
- [10] The witness was cross-examined and he stated that he took the plaintiff to Polokwane holding cells as Westernburg SAPS work hand in hand with SAPS Polokwane. Further that he knows how Polokwane SAPS operate and that at one stage he was stationed at Polokwane SAPS. The witness conceded that he did not see the toilet that the plaintiff was using, as he did not go to the holding cells. The witness denied that he was using the first defendant's

vehicle when he went to the farm to arrest the plaintiff, but that he was using the police vehicle. That concluded the evidence of the defendants and they closed their case.

- [11] The plaintiff in addressing the court on the reasonable and fair damages to be awarded to the plaintiff, submitted that at the time of his arrest the plaintiff was 60 years of age, and was held in the cells that were unhygienic, terrible and overcrowded. The plaintiff's counsel referred this court to the case Claasen who was the plaintiff's employer and was arrested together with the plaintiff. In Claasen's case the full bench of this division had awarded him R400 000.00 as damages he had suffered. Claasen was also 61 years old at the time of his arrest. However, counsel for the plaintiff conceded that the circumstances under which Claasen was arrested are slightly different from the plaintiff's case, and therefore a fair and reasonable amount to be awarded to the plaintiff should be R300 000.00. Counsel for the defendant submitted that the plaintiff appears to be exaggerating his case, and that a fair and reasonable amount to awarded to him should be R60 000.00.
- [12] It is trite that in the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved injured party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. The courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. It is impossible to determine awards of this nature with any kind of mathematical accuracy. It is helpful to have regard to awards made in previous cases to serve as a guide, however, such approach should not be slavishly followed. (See *Minister of Safety and Security v Tyulu*[1]).
- [13] In *Motladile v Minister of Police*[2] F Kathree-Setiloane AJA said:
- "The assessment of the amount of damages to award a plaintiff who was unlawfully arrested and detained, is not a mechanical exercise that has regard only to the number of days that the plaintiff had spent in detention. Significantly, the duration of the detention is not the only factor that a court must consider in determining what would be fair and reasonable compensation to award. Other factors that a court must take into account would include (a) the circumstances under which the arrest and detention occurred;
- (b) the presence or absence of improper motive or malice on the part of the defendant; (c) the conduct of the defendant; (d) the nature of the deprivation; (e) the status and standing of the plaintiff; (f) the presence or absence of an apology or satisfactory explanation of the events by the defendant; (g) awards in comparable cases; (h) publicity given to the arrest; (i) the simultaneous invasion of other personality and constitutional rights; and U) the contributory action or inaction of the plaintiff'.

- [14] The plaintiff had spent two nights and two days in the holding cells. The manner in which he was arrested was not that inhuman. However, the plaintiff seems to exaggerate the conditions in which he had to endure whilst in the cells. I find it to be improbable that for the two nights and two days he had spent in the cells he did not use a toilet because it was not clean. It is improbable that he was able to hold the call of nature for two nights and two days taking into consideration his advanced age of 60 at the time of his arrest. It is possible that the toilets were not clean, but not that he was unable to use them because they were not clean.
- [15] The plaintiff has also relied on the case of his employer Johannes Claasen who was awarded damages of R400 000.00 for unlawful arrest and detention by the full court of this division. Even though the Claasen case emanate from the incident which led to plaintiff being arrested, the facts of the Claasen case is distinguishable from the plaintiff's case. According to the facts of the Claasen case, he was physically dragged out of his property, shoved into the police van, and he struggled to get into the police van as his hands were handcuffed behind his back. During his arrest he suffered an injury to his elbow which caused tremendous pain and suffering. All these did not happen to the plaintiff, and as I have already pointed out above, the plaintiff was arrest was not that inhumane. There is no evidence led that there was any malice or improper motive in arresting the plaintiff. There was no evidence led that the arrest of the plaintiff was highly publicised. The plaintiff has testified that he did not hold any position in the community that he comes from.
- [16] In Motladile case the appellant had remained in custody for five days and four nights. Whilst in custody the appellant was assaulted by other inmates who also stole his food. The Supreme Court of Appeal had upheld the appeal and awarded the appellant R200 000.00. In the plaintiffs case they stole his food and blankets but was never assaulted. The plaintiff did not take any steps to bring it to the attention of the police officers in charge of the holding cells that his food and blankets were stolen from him. In my view, a fair and reasonable amount to be awarded to the plaintiff will be the amount R100 000.00 for the unlawful arrest and detention.
- [17] With regard to costs this was not a long and complicated matter, and in my view, the appropriate scale should be that of magistrate court.
- [18] In the result the following order is made:
- 18.1 The second and third defendants are jointly and severally ordered to pay the plaintiff the sum of R100 000.00 with costs on party and party scale on a magistrate court scale.
- 18.2 The claim of malicious prosecution is postponed sine die.

JUDGE OF OURT OF SOUTH AFRICA,

LIMPOPO DIVISION,

POLOKWANE

APPEARANCES:

Counsel for the plaintiff: Adv

JP Morton

Instructed by: Chari Naude Attorneys

Counsel for 2nd and 3rd defendants: Adv S Mbali

Instructed by: State

Attorney Polokwane

Date heard: 14th

February 2024

Electronically circulated on: 7th March 2024

[1] 2009 (S) SA 85 (SCA) at para 26

[2] (2023] ZASCA 94; 2023 (2) SACR 274 (SCA) (12 June 2023) at para 17

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