

SOUTH AFRICA / JUDGMENT

# Marwana v Minister of Police (3067/2010) [2012] ZAECPEHC 56 (28 August 2012)

**[2012] ZAECPEHC 56****COURT**

Eastern Cape High Court, Port Elizabeth

**BEFORE**

PW Tshiki

**CASE / FILE NUMBER**

3067/2010

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**Source record****IN THE HIGH COURT OF SOUTH AFRICA****EASTERN CAPE, PORT ELIZABETH****Case no: 3067/2010****Date heard: 28-30 Nov 2011****Date delivered: 28 Aug 2012**

In the matter between:

FRANCIS NOMKOLISEKO MARWANA

.....Plaintiff

vs

THE MINISTER OF POLICE

.....Defendant

**JUDGMENT**

SUMMARY: Plaintiff herein sues defendant, in his vicarious capacity, for damages resulting from unlawful arrest and detention, wrongful and unlawful assault as well as unauthorised entry into plaintiff's premises. Defendant has denied the allegations but Court has rejected the evidence by the defendant's witnesses and accepted that of the plaintiff who, in the opinion of the Court, has been a reliable and truthful witness.

Held that an assault which has resulted from an unlawful arrest and detention should be regarded as a serious violation of the plaintiff's right to dignity. In the circumstances of this case plaintiff had done nothing to merit the humiliation, shock, pain and trauma that she has suffered in the hands of the police in Kabega Park police station. In such circumstances the award of damages should merit the seriousness of the violation of plaintiff's rights aforesaid.

TSHIKI J:

## A) INTRODUCTION

[1] Plaintiff herein is suing defendant for the following damages:

unlawful arrest and detention

wrongful and unlawful assault

unauthorised entry.

[2] As well as consequential damages related thereto.

[3] Defendant who is sued vicariously has defended the action and has denied the plaintiff's allegations against it.

## B) FACTS

[4] Plaintiff at the time of her arrest was a domestic worker born on the 19th October 1963 who resides at Motherwell, Port Elizabeth. On 8 February 2010 her employer was robbed of his property including money and the matter was reported to the police for investigation. Plaintiff was not on duty on the date of the robbery. On the following day, 9 February 2010, she reported on duty and was then arrested and detained without a warrant by the members of the police. She was detained at Kabega Park police cells in Port Elizabeth about 09h00 and was only released on 10th February 2010 at about 15h15. During the period of her arrest and detention there was an occasion when the members of the police took her to her home for further investigation. It is plaintiff's contention that she never legally authorised the police to enter and search her premises and that during the process of her detention the police manhandled and assaulted her by striking

her with a wooden plank and strangled her with a plastic bag. As a result of the assault she sustained visibly injuries which were noted by Dr G.N. Mzayise of Motherwell Health Centre who also testified to confirm the contents of her report in the form of the J88, exhibit "A". In her evidence the doctor testified that she noted the following injuries on the plaintiff's body in the form of:

[4.1] excessive bruises on the back and upper arms;

[4.2] abrasions both wrist joints;

[4.3] bruises both knees;

[4.4] the doctor further recorded what the plaintiff had told her that she was also strangled with a plastic over the mouth and nose such that she soiled herself with faeces.

[5] According to the plaintiff's evidence she was never informed of the reason for her arrest when she was arrested by the policeman Mr Grootboom. At that stage she had already been informed by Joyce about the robbery at her employer's house although Joyce had confronted plaintiff for having revealed that she (Joyce) had told her about the robbery. According to the plaintiff, Grootboom only informed her that he was taking her to Kabega police station and

that she must not waste his time. It was at the police station that she was questioned by the police about the robbery and when she denied knowledge thereof she was assaulted to the extent that she soiled herself as aforementioned. She was interrogated by policemen Minnie and Grootboom and when she was still

being interrogated a policeman whom Minnie and Grootboom referred to him as the station commissioner came and told her to tell the truth because if she does not do so he does not know what Minnie and Grootboom would do to her after he had left that office. It was after this statement that she was assaulted with the wooden plank and at that stage the so called station commissioner had already left.

[6] Defendant called two police witnesses, Mbulelo Grootboom a detective sergeant and Christie Wepener a warrant officer both stationed at Kabega Park police station. The effect of Grootboom's evidence was to deny the wrongdoing as alleged against the members of the police force which the plaintiff testified about. From the information he received from the complainant in the robbery case they decided to take the plaintiff to the police station to question her about her involvement in the robbery. He and Minnie decided to detain her pending the outcome of their investigation. Plaintiff was then detained by Grootboom who was the investigator of the case. Grootboom only informed her of her constitutional rights verbally because at that stage they had no forms which contained those rights. Grootboom denied all the allegations by the plaintiff against him and Minnie. Warrant officer Wepener's evidence was to confirm that there were no complaints that were lodged by the plaintiff against the police whilst she was in detention on 9th and 10th February 2010.

#### D) REASONS FOR JUDGMENT

[7] I must say though that plaintiff has impressed me as a truthful witness throughout her evidence. She does not appear to have been either telling lies or exaggerating her testimony with a view to suit her case nor has she been shown to have either lied or misled the Court. Neither did I hear Ms Msizi to be saying I should not believe the version of the plaintiff on the grounds that she has not told the truth. For instance, on page 65 of the record she was honest enough to concede that the policemen concerned allowed her the opportunity to phone her family but she did not make any call. She was also prepared to concede when it mattered.

At one stage on page 75 line 13-14 she conceded that Captain Grobler was one of the people who entered the room where she was with the other policemen, but she denied that Grobler had gone to check how the questioning was going on. According to her evidence, Grobler went there to instruct her to tell the truth or else he (Grobler) could not guarantee what would happen to her if she does not comply. She was also prepared to concede that the police gave her the opportunity to put on her pair of jeans.

- [8] On the other hand, the evidence of the main witness for the defendant Mr Grootboom is not consistent with the probabilities of the case. For instance, he has denied that they assaulted the plaintiff yet there is proof from the doctor's report that the recorded injuries are consistent with what she has told the Court. Plaintiff was also taken from her place of work on suspicion of her knowledge of the robbery as a result she was arrested and detained without a charge preferred against her. The manner and effect of arrest is governed by section 39 of the Governed Procedure Act 51 of 1977 (the CPA) whose provisions are:

*"39 Manner and effect of arrest*

An arrest shall be effected with or without a warrant and, unless the person to be arrested submits to custody, by actually touching his body or, if the circumstances so require, by forcibly confining his body.

The person effecting an arrest shall at the time of effecting the arrest or immediately after effecting the arrest, inform the arrested person of the cause of the arrest or, in the case of an arrest effected by virtue of a warrant, upon demand of the person arrested hand him a copy of the warrant.

The effect of an arrest shall be that the person arrested shall be in lawful custody and that he shall be detained in custody until he is lawfully discharged or released from custody." (My emphasis)

- [9] It therefore follows that an arrest becomes lawful only when effected in accordance with the provisions of section 39 above and if the above provisions have not been followed any subsequent detention of the arrested person is unlawful. (Ramphal v Minister of Safety and Security 2009 (1) SACR 211 (E)).

- [10] Where, however, an arrest is effected by a peace officer like Mr Grootboom and or Minnie in this case the relevant provisions of section 40 of the CPA state:

*"40 Arrest by peace officer without warrant*

A peace officer may without warrant arrest any person –

...

...

whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody.

[Only subsection (c) of section 40 is relevant to the facts of the case under discussion and for that reason I need not mention the other situations where a peace officer may arrest a person without a warrant of arrest.]

- [11] There is no dispute that the plaintiff was arrested and detained and therefore the defendant bears the onus to prove the lawfulness or justification for the arrest and detention of the plaintiff. When she was arrested no explanation of a charge or of whatever nature was made to her as the reason for her arrest and neither was she told whether or not she was being arrested. On the evidence of Mr Grootboom plaintiff was taken for questioning. She was never informed of the offences of which she was suspected of having committed. At least none was explained to her. Instead of questioning she came out of police detention with injuries. When she was questioned she denied the involvement in the commission of the robbery at her employer's house and therefore could not assist the police in their investigations. Having taken her to her home and searched it nothing was found from her home yet this did not persuade the two policemen to release the plaintiff. They, instead, decided that she should spend the night and the greater part of the following day in custody.
- [12] From what I have heard by way of evidence I do not believe that there was any lawful justification in the arrest and detention of the plaintiff. She was singularly taken to custody yet there is evidence that two of them who work for the complainant in the robbery case could have shared light on the knowledge of the people who committed the robbery. In any event, I do not believe that the evidence that the police had at the stage of plaintiff's arrest and detention was sufficient for them to arrest and detain her for whatever reason. This in fact is proved by the assaults they inflicted on the person of the plaintiff. What was the reason for the assault if they had *prima facie* evidence of her commission of the offence. There was none.
- [13] It is trite law that an arrest is *prima facie* wrongful and unlawful. It is worse when it is accompanied by detention. One of the fundamental rights of a human being is the right to personal liberty and that the lawfulness or otherwise of a person's detention must be objectively justified, regardless even of whether or not he or she was aware of the wrongful nature of the detention. (*Minister of Correctional Services v Tobani* 2003 (5) SA 126 (E) [2001] 1 ALL SA 370 at 371f (ALL SA)). There has been no such justification in the present case. If the purpose of arresting the plaintiff had any justification there could have been no purpose of detaining her after she had provided answers to the questions posed to her by the two policemen. This is more so when the complainant himself had informed the police that plaintiff was not amongst the people who committed the robbery. On the facts of this case policemen could never have entertained a reasonable suspicion that plaintiff was either involved
- or connected with the commission of the robbery.

[14] As for the assault I accept the plaintiff's evidence that she was assaulted. She could not have inflicted those injuries on her body. It therefore follows that the police officer Mr Grootboom is not telling the truth to say they never assaulted the plaintiff. The fact that she did not make a report to warrant officer Wepener that she had been assaulted by the police does not necessarily mean she was not assaulted. Part of warrant officer Wepener's evidence is that other detainees do not report assaults and or ill-treatment by police officers.

[15] In *Ochse v King Williams Town Municipality* 1990 (2) SA 855 at 860F-H on the same issue as in casu this Court per Van Rensburg J remarked as follows:

*"The right of an individual to personal freedom is a right which has always been jealously guarded by our Courts and our law has always regarded the deprivation of personal liberty as a serious injury."*

[16] In the present case the unlawful arrest and detention of the plaintiff has resulted in a serious invasion of her constitutional right against the invasion of her liberty. It makes it more serious when she is assaulted with impunity when her answers to the questions posed to her by the members of the defendant could not yield the desired results. Assaulting an adult person for no apparent reason is a serious transgression of his or her right to dignity.

[17] In considering quantum sight must not be lost of the fact that liberty is one of the fundamental rights of a man or woman in a free and democratic society which should be jealously guarded and protected at all times. It is the duty of this Court to protect this right. Unlawful arrest

and detention coupled with wrongful assault constitutes a serious inroad into the freedom and rights of an individual. [*Thandani v Minister of Law and Order* 1991 (1) SA 702 (E). See also *Ramphal v Minister of Safety and Security* supra).

[18] As for the police taking her to her home for searching it seems to me that at that stage she was no longer in control of her movements. She had been detained questioned and then assaulted. Thereafter she was told she was being taken to her home to search her premises. No rights were ever explained to her in that she was never told that she had a right to refuse searching her premises. Having rejected their version of events, I am also satisfied that the police did not in law get the necessary permission from her to search her premises. Evidence led proves that she had no powers to exercise her rights to refuse but simply to obey the commands of her captors.

[19] I am therefore satisfied that plaintiff should succeed in all her claims.

## E) AWARD

### E1) UNLAWFUL ARREST AND DETENTION

[20] Plaintiff was detained from 09h00 on 9th February 2010 to 15h55 on 10th February 2010 about 30 hours. In my view, an award of R55 000.00 would be reasonable in the circumstances.

## E2) ASSAULT

[21] This in my view is a serious violation of the plaintiff's rights to dignity. Plaintiff had done nothing to merit such humiliation, shock and trauma. No doubt that she suffered pain which could not be justified even by any stretch of imagination. Before I dealt with this case, I could not, even for a moment, comprehend as a reality in our advanced state of constitutional democracy, that there are policemen who are still engaged in such clandestine conduct of assaulting detained persons. This type of behaviour should be viewed in a serious light and those involved should be removed from the ranks of the police service. In my view an award of R90 000.00 would be just in the circumstances.

## E3) UNATHOURISED ENTRY

[22] Although the police had no right to enter the premises of the plaintiff there is no evidence that they had done something wrong or anything beyond their mandate. This in my view cannot be regarded as a serious violation of the plaintiff's rights when compared to the other violations abovementioned. I am of the view that an award of R10 000.00 would be justified in the circumstances.

## F) COSTS

[23] The question of costs is always not an easy problem. In my view any violation of the rights of a human being should be viewed as serious. This is so especially the right to dignity, privacy and more so in circumstances where the plaintiff suffers emotional shock, humiliation and trauma by reason of having been assaulted by the law enforcement agents. To litigate in the High Court with a view to protect and enforce your rights is not uncommon in our constitutional democracy and will always justify the award of costs even on the High Court scale. This is more so when the defendant is one of the state organs who should have ensured that the rights of the plaintiff should be respected. I have no reason to believe that the plaintiff herein should not be awarded costs on the High Court scale. For that reason the costs herein shall be taxed at the High Court scale.

[24] In the result, I make the following order:

[24.1] Claim A – (Arrest and detention) – the plaintiff is awarded a sum of R55 000.00

[24.2] Claim B – (Assault) – Plaintiff is awarded a sum of R90 000.00

[24.3] Claim C – (Unlawful entry) – Plaintiff is awarded the sum of R10 000.00

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PW TSHIKI

JUDGE OF THE HIGH COURT

Counsel for the plaintiff : Adv Frost

Instructed by : Ingram & Louis

PORT ELIZABETH

Counsel for the defendant : Adv Msizi

Instructed by : State Attorney

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