

SOUTH AFRICA / JUDGMENT

Mayeza and Others v Minister of Police and Another (165/2012) [2020] ZAECMHC 13 (5 May 2020)

[2020] ZAECMHC 13

COURT

Eastern Cape High Court, Mthatha

BEFORE

Dawood

CASE / FILE NUMBER

165/2012

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IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN CAPE LOCAL
DIVISION: MTHATHA)
CASE
NO. 165/2012

In the matter between:

ZWELETHU
MAYEZA
1ST
PLAINTIFF
ZOLEKA
MAYEZA
2ND
PLAINTIFF
NTOMBIKAYISE
MAYEZA
3RD
PLAINTIFF
NTANDOKAZI
MAYEZA
4TH
PLAINTIFF
ONESIMO
FAKU
5TH
PLAINTIFF
And

MINISTER OF POLICE
1ST DEFENDANT
UNATHI
NTANTISO
2ND
DEFENDANT

JUDGMENT

DAWOOD J

1. The plaintiffs herein instituted a claim against the first and second defendant for damages arising out of the shooting of the deceased by the second defendant, being a police officer, on the basis that the deceased had a duty to support them.
2. The parties separated the issue of liability from quantum so at this stage the issue for determination is simply whether or not the second defendant was justified in shooting and killing the deceased.
3. The shooting itself is common cause.
4. The manner in which the shooting occurred was in dispute with the plaintiffs' witness alleging that the second defendant simply fired at the deceased on the back of the shoulder whilst his back was to them and whilst he was unarmed.
5. I do not propose going into her testimony in any detail as it was readily conceded by the plaintiffs' counsel that her testimony should be disregarded. Her testimony was fraught with inconsistencies the most vital being the fact that the deceased was from the objective facts, as revealed in the post mortem, shown to have been shot in the chest in the front and not at the back, in other words he was facing the second defendant when he was shot by her and did not have his back to her.
6. Her evidence was not only improbable but also found to be false. The second defendant's evidence to the effect that this witness was not present when the shooting occurred is far more credible in this regard. She failed to make a statement to the police at any stage and further apparently even told the deceased's brother not to mention the fact that she was there. This version is farfetched considering the fact that if someone has simply shot another unarmed person who has his back to her and kills that person one would be far more inclined to want to bring the perpetrator to justice and the family would most certainly insist or demand that you to report what you had witnessed instead of agreeing to conceal the fact that you were present and had witnessed the incident.
7. If the plaintiffs' case was dependant on this witness's account of what had transpired on the day the plaintiffs would not have succeeded.

8. Fortunately for the plaintiffs in this instance where the shooting has been admitted, the onus rest upon the defendants to establish that it was in fact justified.

9. The test for justification has been set out as follows in inter alia the following cases:

a) In *Nhlanhla v Minister of Police and Another*[1] it was held that—

“The second defendant’s defence was one of self-defence. In this respect it is trite that the second defendant bears the evidentiary onus to prove, on a preponderance of probabilities, that he acted in self-defence, and has the onus to prove, also on a preponderance of probabilities, that the second defendant did not exceed the boundaries of self-defence.

...

He testified that the plaintiff pointed his firearm at him, that he panicked and reacted by shooting the plaintiff.

Four basic considerations in each case which influence the reaction of a reasonable man in a situation posing a foreseeable risk of harm to others are: —

- the degree or extent of the risk created by the actor’s conduct;
- the gravity of the possible consequences if the risk of harm materialises;
- the utility of the actor’s conduct; and
- the burden of eliminating the risk of harm.

In the matter of *Mugwena and Another v Minister of Safety and Security* (303/2003) [2005] ZASCA 117; [2006] 2 All SA 126 (SCA) (29 November 2005) at paragraph

[21] the following dictum appears: —

“[21] Self-defence, is treated in our law as a species of private defence, is recognised by all legal systems. Given the inestimable value that attaches to human life, there are strict limits to the taking of life and the law insists upon these limits being adhered to.

‘Self-defence takes place at the time of the threat to the victim’s life, at the moment of the emergency which gave rise to the necessity and, traditionally, under circumstances in which no less severe alternative is readily available to the potential victim’. ...

(per Chaskalson P in *S v Makwanyane and Another* [1995] ZACC3[1995] ZACC 3; ; 1995 (3) SA 391 (CC) para 138).”

In *R v Attwood* 1946 AD 331 at 340 the following is stated: —

“Homicide in self-defence is justified if the person concerned ‘... had been unlawfully attacked and had reasonable grounds for thinking that he was in danger of death or serious injury, that the means he used were not excessive in relation to the danger, and that the means he used were the only or least dangerous means whereby he could have avoided the danger.”

This test is objective.”[2]

b) In *Mdiko v Minister of Police*[3] it was held:

“At the time of the shooting he was relatively young, 28 years, comparatively inexperienced as a policeman and probably lacking in the judgment necessary to deal with the crisis situation in which he found himself.

It remains to consider, based on the established facts, the plea of self-defence raised by the defendant. The requirements to be established for the attack and for the defence when seeking to prove self-defence are listed separately. One element of the attack is that it must already have commenced or be imminently threatening but must not yet have ceased. The act/s committed in self-defence must be directed against the aggressor, must be to protect the threatened right and, crucially, the act of defence must not be more harmful than is necessary to ward off the attack.

I am mindful that in determining the reasonableness of Mantashe’s actions the court must, in the words of Van Winsen J in *Ntanjana’s* case, avoid the role of an ‘armchair critic wise after the event.”[4]

10. In *S v Papu and Others*[5] it was found that the police could not have believed that their lives were in imminent danger and were not entitled to fire into the darkness directly at the would – be attacker without firing a warning shot.
11. In this case I accept the second defendant’s testimony that indeed the deceased was coming at her with a knife and she was in a narrow passage with no room to manoeuvre and the ground was wet and slippery.
12. I accordingly accept that there was an imminent attack and that she believed that she was in danger of death or serious injury.
13. The second defendant however is not an ordinary lay person, she is a trained police officer who received training in disarming individuals. The question then arises was the force necessary, that is shooting of the deceased in the chest, in the circumstances to repel the attack. Further whether or not the means she used was commensurate to the danger and was that the only means whereby she could have averted the danger. In other words whether or not the act of defence was or was not more harmful than was necessary to ward off the attack. In determining this factor objectively one has to have regard to the fact that:
 - a) The second defendant conceded that she panicked.
 - b) She further conceded that she did not—
 - (i) Inform the deceased that she was a police officer;
 - (ii) Inform him that she was armed;
 - (iii) Instruct him to stop;

- (iv) Fire a warning shot;
 - (v) Shoot at the hand that had the knife; or
 - (vi) Shoot at the ground or on the foot of the deceased.
 - (vii) She stated that she could not move despite the fact that she did have the firearm in her hand and was able to aim it at his chest she could just as easily have aimed it at his foot, his shoulder the ground or in the air.
- c) She ultimately conceded that if she had not panicked and been scared she would have tried to block him and because she panicked she did not think straight and all this happened quickly.
- 14. The concessions made by her aptly demonstrate that the force used by her was not necessary to ward off the attack and that the act of defence was more harmful than was necessary to ward off the impending attack in the circumstances.
 - 15. Her actions subjectively viewed as a young newly appointed police officer suddenly feeling that her life was in danger whilst stuck in a narrow passage with the perpetrator just a foot away, not being able to properly assess the situation and thinking of the worse possible case scenario and reacting from that position is understandable, but not justifiable as a defence objectively viewed.
 - 16. They were clearly objectively viewed numerous options available to her that would not have resulted in the death of the deceased.
 - 17. She made no attempt to disarm him, nor did she state that she even ordered him to put down the knife.
 - 18. She described him as someone who was small in stature.
 - 19. She could have attempted to disarm him in that passage. He had the same challenges that she did in the narrow passage with movement being restricted and the ground being slippery.
 - 20. As indicated she was 23 years old at the time, comparatively inexperienced as a police officer and from her actions, probably lacking in the judgment necessary to deal with the crisis situation she found herself in.
 - 21. A reasonable police officer in her position would remember their training and remain calm and collected in the face of such an attack and attempt to disarm the attacker whilst warning them that they are in the presence of an armed police officer and only if that failed then fire a warning shot or a shot to a non-vital area.
 - 22. The force used was not necessary to ward off the impending attack.

23. She clearly did not take reasonable steps to avoid injury and the death of the deceased by shooting the deceased point blank at close range in his chest.
24. She conceded that she simply assumed that the other person behind the deceased was armed with a firearm because of the manner in which he reached into his pocket, she did not see a weapon.
25. No firearm was produced and this person in fact ran away when she shot at the deceased.
26. This again demonstrates that she over reacted to the situation.
27. There was a threat by the person advancing with a knife that warranted some intervention however her actions in firing a shot at the chest of a person armed with a knife clearly exceeded the bounds of self-defence and in the result she had failed to justify her actions.
28. The act of defence was more harmful than was necessary to ward off the attack in this case as already indicated.
29. Given the inestimable value that attaches to human life, there are strict limits to the taking of life and the law insists upon these limits being adhered to. She failed to adhere to these limits in this case.
30. There clearly were less severe alternatives readily available to the second defendant in this case which she failed to utilise.
31. The means she used was not the least harmful she could have used to avoid the danger as she correctly conceded.
32. It was conceded that in light of the fact that she used her service pistol and so to speak “put herself on duty” at the material time, that she went there as a police officer and not just a curious observer.
33. She was accordingly in fact acting in the course and scope of her employment at the material time and the first defendant accordingly is vicariously liable for wrongs committed by her.
34. In the circumstances the defendants have failed to discharge the onus resting upon them to justify the shooting of the deceased and prove self-defence.
35. In the premises the defendants did not prove on a balance of probabilities that the second defendant acted in self-defence at the material time since her actions exceeded the bounds of self-defence objectively viewed.
36. In the circumstances the following order is made:

ORDER

- a) The shooting of the deceased by the second defendant is found to be wrongful and unlawful.

- b) The first defendant is liable to compensate the plaintiffs, in the event of them establishing their entitlement to the same, for any proven or agreed damages in the form of loss of support arising out of the wrongful shooting of the deceased by the second defendant.
- c) The first defendant is liable to pay the plaintiffs costs of suit in respect of the determination of the issue of liability.

DAWOOD J

JUDGE OF THE HIGH COURT

DATE HEARD:

05-07 FEBRUARY 2020

DATE DELIVERED:

FOR THE PLAINTIFFS: MR

CALAZA

PLAINTIFF'S ATTORNEYS: SAKHELA

INC.

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MDA

DEFENDANT'S ATTORNEYS:

STATE ATTORNEY

BROADCAST HOUSE

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FORTGALE

1. REF: 1302/14-A8

[1] (GP) unreported case no 17429/2010 of 24 October 2014.

[2] Ibid at paras 4, 17, 90 and 92-4; see also Ngubane v South African Transport Services

[1990] ZASCA 148; 1991 (1) SA 756 (AD) at 776H-I; Pretoria City Council v De Jager 1997 (2) SA 46 (AD) at 56 A-C.

[3] (WCC) unreported case no 17042/2009 of 13 September 2017.

[4] Ibid at paras 42 and 47-8

[5] 2015

(2) SACR 313 (ECB).

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