



IN THE HIGH COURT OF ESWATINI

JUDGMENT

In the matter between:

Case No.1860/2004

TERROR MAZIYA

Plaintiff

And

THE DIRECTOR OF PUBLIC PROSECUTION

1st Defendant

THE ATTORNEY GENERAL

2nd Defendant

Neutral citation : *Terror Maziya v The Director of Public Prosecution and Another (1860/2004) [2020] SZHC 194 (29th September, 2020)*

Coram : **M. Dlamini J**

Heard : **8th June, 2020**

Delivered : **29th September, 2020**

Evidence : *1st defendant alleged to have set the law in motion by laying a false charge: arrest not challenged as Commissioner of Police not cited; - court to infer that arrest was lawful; - what remains is to determine if*

plaintiff was subjected to remands and trial without availability of sufficient evidence: - plaintiff granted bail without opposition by 1st defendant; where plaintiff fails to pay bail, remands lawful – no evidence supporting plaintiff’s version that he was subjected to trial - PW2 did not testify about plaintiff’s trial.

Summary: In his amended particulars of claim, the plaintiff demands a sum of E800, 000.00 following 1st defendant’s conduct of laying a false charge against him. The first defendant also filed an amended plea contending that plaintiff’s arrest and detention was lawful.

The Parties

[1] The plaintiff is described as a Swazi male adult. He resides at Msunduzi, Mbabane, region of Hhohho.

[2] The 1st defendant is the prosecution authority in the Kingdom. Its head office is at the Ministry of Justice Building, Mbabane, Hhohho region. The 2nd defendant is the legal representative of the 1st defendant. It has its main offices in the same building as the 1st defendant.

Particulars of Claim

[3] The plaintiff’s particulars were very brief as follows:

“5. On the 20th October 2000 and at Mbabane the 1st defendant wrongfully and maliciously set the law in

motion by laying a false charge of house breaking and theft against the Plaintiff.

6. *When laying this charge, the Defendant had no reasonable or probable cause for so doing, nor did he have any reasonable belief in the truth of the information given.*
7. *The Plaintiff suffered as a result of the Defendant's conduct in the sum of **E800, 000.00 (Eight Hundred Thousand Emalangi)** being damages for contumelia, deprivation of freedom and discomfort suffered by the Plaintiff.*
8. *Despite demand having been made in terms of the Limitation of Proceedings Against Government Act, the Defendants refused and /or failed to pay to the Plaintiff the said sum of E800, 000.00 (Eight Hundred Thousand Emalangi)."¹*

[4] He then prayed for the sum of E800 000. He also claimed interest and costs of suit.

¹ Page 8 paragraph 5 – 8 of book of pleadings

The Plea

[5] The defendants filed a detailed plea where they admitted setting the law in motion. They however denied that such was malicious and unlawful. They justified the arrest and detention as follows:

“AD PARAGAPH 4

4.1 *The arrest was effected by a police officer who is in law a peace officer.*

4.2 *The arresting officer had reasonable grounds to suspect the Plaintiff of having committed the offence of breaking into premises with intent to commit an offence.*

4.3 *Breaking into premises with intent to commit an offence is referred to in Part II of the First Schedule to the Criminal Procedure and Evidence Act, 1967.*

5.

The detention of the Plaintiff was lawful due to the following facts and circumstances:

5.1 *Following his arrest, the Plaintiff was brought before court within a reasonable time.*

5.2 *The Plaintiff was afforded the opportunity to apply for bail at his first appearance in court.*

5.3 *The continued detention of the Plaintiff was in consequence of decisions by Magistrates remanding him in custody.”²*

[6] They prayed that the plaintiff’s cause of action be dismissed with costs.

Oral Evidence

Plaintiff’s

[7] **Themba Terror Maziya** (PW1) took an oath. He testified that in the year 2000, he was residing at Mncitsini, Mbabane. On 20th October, 2000 his friend, **Sifiso Soso Dlamini (Soso)** came with his friend **Mfanizile Mgovu Thwala (Mgovu)** to his place of residence. The time was about 2000 hours. They requested to sleep over. They said they would leave in the morning to a place where they had been promised employment. He acceded to their request.

[8] In the morning about 0400 hours, police officers came knocking at his door. He proceeded to the door to open. **Mgovu** followed him. He peeped to see. He realised that there were police officers. They asked who was behind him. He said that it was **Mfanizile Thwala**. They said, “*Oh it is Mgovu.*” By this time **Mgovu** was carrying a firearm. The police his hand saying “*Oh this is Mgovu.*”

[9] It was PW1’s evidence that the name **Mgovu** was not known to him by then. He learnt for the first time that **Mfanizile Thwala’s** other

² Page 4 paragraphs 4.1 – 5.3 of Defendants amended plea

name was **Mgovu**. As the police held **Mgovu**, trying to dispossess him of the firearm, the firearm triggered, discharging a bullet that hit the roof of his house. Although he did not know the model of the firearm, it was said that it was a norico pistol. He was shocked to learn that his friends were in possession of a firearm. The police then assaulted **Mgovu**.

[10] It was his further evidence that the police turned to him and told him that since he was in the company of criminals, they would arrest him. **Soso** woke up and dashed away. They chased him and apprehended him. **Mgovu** was assaulted until he bled, accusing him and saying that he intended them to leave their children behind. The police told him that he was being arrested for harbouring criminals. He told them that he did not know anything. The said police officers were **Kina Dlamini, Percy Dlamini** and **Seith Shongwe** and others. He did not know the identity of the others.

[11] He told the court that had he known that the duo were in possession of a firearm, he would not have permitted them to sleep over. Although the others were handcuffed, he was not.

[12] PW1 proceeded to testify that after some days a white man came alleging that **Mgovu** and **Soso** have committed a crime against him. Again some days later the police officers arrived with **Soso** and **Mgovu's** friend. This was **Sabelo Hlatshwayo (Sabelo)**. **Sabelo** was in possession of many bullets for the firearm. His friends asked

that the police release PW1. The police refused saying he was found in the company of his co-accused.

[13] On 3rd December, 2001, PW1 was granted bail of E2000. His mother paid for it. **Mgovu** escaped from prison. The matter was prosecuted. He was accused No. 3. He faced a charge of robbery by the use of a firearm where a number of items were stolen. The complainant was **Andrew Baterman**. He was acquitted of the charges. He had taken a plea of not guilty. The Principal Magistrate said, "*Oh we have a visitor here.*" The prosecutor **Celani Dladla** said that he was sorry that he was prosecuted for nothing. **Mr. Baterman** did not implicate him to the offence.

[14] PW1 handed to court a charge sheet and testified that the items listed therein were never found in his possession. He ended by testifying that the sum of E800, 000 was for staying in custody for nothing. He said that life was difficult in prison as there were lice and flees. PW1 was cross-examined briefly. I shall capture his cross-examination later.

[15] PW2 was **Sifiso Soso Dlamini**. He testified that in 2000 he was residing at Mncitsini area. He was not employed. He was a criminal. One day, it rained. He was in the company of **Mfanizile Mgovu Malindzisa** and **Sabelo Hlatshwayo**. He did not know where to spend the night. He decided to go with **Mgovu** to PW1's residence and asked to spend the night. They told PW1 that they had found a

job and therefore requested to sleep. They would leave in the morning.

[16] At around 0400 hours, police officers arrived. They were many. They knocked hard on the door shouting the name of PW1 to open the door. He opened. He woke up **Mgovu** and he told him that there were police officers and that things were bad. **Mgovu** woke up. The police were carrying a big torch. They lit **Mgovu's** face and shouted, "*It is Mgovu.*" **Mgovu** produced a firearm and shot on the air. The police pounced on him, dispossessing him the firearm.

[17] PW2 took refuge under the bed. He saw that the door was opened. He dashed out. As he turned the corner, he heard one saying, "*Fire*". He was shot at the left leg. He continued to run into a valley. He sat there for about two hours unable to walk. Thereafter, he was sure that the police had left. He suddenly saw them approaching. He ran and jumped into a nearby ditch. It was however not deep. His head protruded. The police eventually apprehended him after he alerted them that he was in the ditch as he feared he would be shot at again.

[18] He was taken back to PW1's house. He found **Mgovu** covered in blood. He had been assaulted. They handcuffed him to **Mgovu** and left. After taking some few steps, the police asked, "*Why are we leaving him?*" They were referring to PW1. They said he would be charged because he had offered them a place to sleep. The stolen items were not brought to PW1 but only the firearm.

[19] PW1 was released on bail after spending a year at Sidwashini. PW2 was cross-examined very brief. I shall refer to his cross-examination later. The plaintiff closed his case. Defendant applied to amend his plea. There was no objection from plaintiff. The reason for such an amendment at this stage of the proceedings was said to have been caused by plaintiff's failure to discover the documents testified upon i.e. charge sheet.

Defence's

[20] The defence opened its case by the testimony of Inspector **Percy Dlamini**. On oath, he told the court that in 2000 he was stationed at Mbabane Police Station in the criminal investigation department. He testified that it was on 26th October, 2000 when they received information upon which on the following day, they went to PW1's residence. They arrested PW1 and **Earnest Chiwari Vilakati (Vilakati)** on a house breaking and theft charge. They asked for permission to search PW1's house. It was granted. Upon search, they found a hack saw. PW1 failed to give a satisfactory answer when requested by the police and who the owner was.

[21] **Andrew Baterman** was the complainant. He was called to identify it as his. PW1 and Vilakati were charged. They were taken to court. In court, they were told of their rights to have an attorney and that they could apply for bail. PW1 did apply for bail which was not apposed. He could not pay bail. He was remanded pending payment of bail.

[22] He refuted that his arrest in October, 2000 was together with **Soso** and **Mgovu**. He testified that by 2000 **Mgovu** had escape while in jail. He was no longer in the country in 2000. He referred the court to the charge sheet. He disputed that PW1 was accused No. 3. He said in that charge sheet, PW1 was accused No. 1 in terms of their records. He handed to court such records bearing PW1 as accused No.1. After a lengthy cross-examination by the plaintiff's attorney, the defence closed its case.

Determination

[23] I must say from the onset that if these were criminal proceedings, I would have acquitted PW1. The reason is that when PW1 was cross-examined, it was put to him that the reason he was arrested was because he made a pointing out of the firearm which was a subject of a crime. However, when the police officer, inspector **Dlamini**, took to the witness stand on behalf of the defence, he testified that PW1 was arrested because he had been found in possession of a hack saw. Such contradiction evidence at the instance of the defence cannot stand in a court of law. That as it may, it remains my duty to enquire whether the plaintiff did establish his cause of action on the preponderance of probabilities.

Cause of action

[24] The plaintiff's cause of action is founded on his Particulars of Claim. It reads:

“5. On the 20th October 2000 and at Mbabane the 1st Defendant wrongfully and maliciously set the law in motion by laying a false charge of house breaking and theft against the Plaintiff.”³

[25] The above allegations must be noted in view of the fact that they were not directed against the Commissioner of Police and his servants. They were directed to the Director of Public Prosecutions. In other words, the trier of facts must look at what transpired in court after the plaintiff was handed by the police for his remands and trial. In short, what transpired at PW1’s residence during the arrest is neither here nor there. It is irrelevant for purpose of the enquiry as the Commissioner of Police is not before court.

[26] This means that the contradictory evidence that the plaintiff was arrested for being found with a firearm used in the commission of an offence or a stolen item such as a hack saw is not material. What is material though is that both the 1st defendant and the plaintiff agreed that in October 2000, plaintiff was arraign on a criminal charge before the magistrate. The criminal charge, as both testified on the same evidence, was for house breaking and theft.

Issue

[27] Has plaintiff establish a cause of action? Has he adduced sufficient material evidence to tilt the scales of justice in his favour? What is this evidence? It is that the remands which took over a year were at

³ Page 8 paragraph 5 of the book

the instance of 1st defendant. It is further that plaintiff was subjected to trial which was not supported by availability of sufficient evidence. I must state that the pleadings show that defendant excepted to plaintiff's Particulars of Claim. However, before me the matter came for trial.

Adjudication

[28] The plaintiff was to establish malicious prosecution in the hands of the 1st defendant. The plaintiff's claim of E800 000 is justified, in a globule format as follows:

*“7. The Plaintiff suffered as a result of the Defendant's conduct in the sum of **E800, 000.00 (Eight Hundred Thousand Emalangi)** being damages for contumelia, deprivation of freedom and discomfort suffered by the Plaintiff.”⁴*

[29] The defence cross-examined PW1 following his evidence that he was released from custody on 3rd December 2001 after paying bail.

Counsel Mr. M. Vilakati : *“Is it not correct that you had been granted bail long before 3rd December 2001?”*

⁴ Page 8 paragraph 7 of book of pleadings

PW1 : “I was granted bail on 3rd December 2001.”

Counsel Mr. M. Vilakati : “The 3rd of December 2001 is the day you paid bail?”

PW1 : “Yes”.

Counsel Mr. M. Vilakati : “You were granted bail long before?”

PW1 : “Yes”.

Counsel Mr. M. Vilakati : “When?”

PW1 : “I cannot recall.”

[30] We know from the evidence of the defence (DW1) which was uncontested that plaintiff was granted bail on the first day of his remand. This evidence must be juxtapose with the fact that the plaintiff did not challenge his arrest by the police. The only probable inference that can be drawn from this is that the arrest by the police was lawful. On the totality of these circumstances the court accepts the evidence of the defence that following a lawful arrest, he was granted bail on his first appearance. His subsequent remands were therefore not due to 1st defendant but according to law.

[31] PW1's further evidence was that he ought not to have been prosecuted. He says he was acquitted of his charges. This evidence was challenged by the defence from the onset.

[32] It was put to him that he was never prosecuted for the reason that the complainant left the country as he was an expatriate. Now can the court grant his relief on the basis of his evidence on acquittal? The plaintiff testified that the Principal Magistrate **Dumisane Magagula** viewed him as a visitor during the trial following that none of the prosecution's witnesses implicated him on the house breaking and theft charge. The prosecutor was **Mr. Celani Dladla**. Should the court admit such evidence in light of the defence evidence that there was no prosecution?

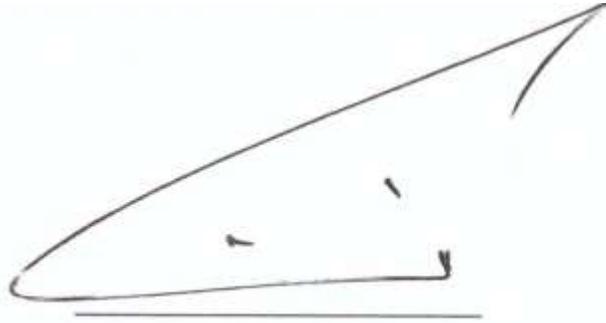
[33] Plaintiff called upon PW2 who was his accomplice. PW2 did not testify that plaintiff was ever subjected to a trial despite PW2's detailed testimony of the events surrounding this case. He did however testify that plaintiff was released after a year following bail.

[34] Why such evidence of what transpired on trial was left out yet it was highly contested? The answer lies in law on probable inference. It is that there was never a trial of plaintiff on the charge. If there was, PW2 would have testified on it. This leads to one direction and it is that the defence's evidence that plaintiff never stood trial is to be accepted.

[35] In the above, I find that plaintiff has failed to establish his cause of action. I enter as follows:

35.1 Plaintiff's cause of action is dismissed.

35.2 Plaintiff is ordered to pay costs of suit.

A handwritten signature in black ink, appearing to be 'M. Dlamini J', written over a horizontal line. The signature is stylized and somewhat cursive.

M. DLAMINI J

For the Plaintiff : **N.D. Jele of Robinson Bertram**

For the Defendant : **M. Vilakati of the Attorney General**