

NKUNGA v THE ATTORNEY-GENERAL 2010 (1) BLR 342 (HC)

Citation: 2010 (1) BLR 342 (HC)

Court: High Court, Lobatse

Case No: Misca 456 of 2007

Judge: Walia J

Judgement Date: February 22, 2010

Counsel: F H Mahwite for the plaintiff. A C N Nchunga for the defendant.

Flynote

Damages

- Assault - Quantum - Plaintiff strangled, pushed to ground and beaten G
- Plaintiff sustaining injuries from head to thigh regions, although no treatment or medication prescribed three days later
- Plaintiff awarded damages of P7 500.

Delict - Damages -

Wrongful arrest and detention - Arrest without warrant H - Quantum of - Plaintiff arrested on charge of common nuisance - No grounds for suspicion existing - Plaintiff detained for less than 24 hours and station commander apologising - Plaintiff awarded damages of P7 500.

Headnote

The plaintiff was a security guard who manned the front gate of the Botswana Power Corporation Training Centre. A number of police officers proceeded through the the gate without stopping and registering

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the necessary particulars, as required by the security procedures at the gate. A When the plaintiff insisted that they comply with the procedures, they assaulted him by strangling him, pushing him to the ground and beating him up. After assaulting him, they arrested him on a charge of common nuisance and detained him for a day. The plaintiff instituted action for damages for assault and for wrongful arrest and detention. In defence of the action, the defendant gave a completely different account of events at the front gate. B

Held: (1) On the evidence, the plaintiff had established that the assault was deliberate and unlawful.

(2) Further, the arresting officer had no reasonable grounds for suspecting that the plaintiff had committed the offence of common nuisance and his arrest and subsequent detention were consequently unlawful. C

(3) During the assault, the plaintiff sustained injuries from his head to thigh regions. He was examined by a doctor three days later but the doctor considered it unnecessary to prescribe any treatment or medication for

his injuries. In the circumstances, an appropriate award of damages for the assault was an amount of P7 500. *Mosaninda v The Attorney-General* [1994] B.L.R. 411 considered. D

(4) The plaintiff was detained for less than 24 hours, he received an apology from the station commander and there were no aggravating features that appeared from the evidence. In the circumstances, an appropriate award of damages for the unlawful arrest and detention was an amount of P7 500. *Tlharesegolo v The Attorney-General* [2001] 2 B.L.R. 730, *Mosaninda v The Attorney-General* [1994] B.L.R. 411, *Onkabetse v The Attorney-General and E Others* [1989] B.L.R. 120 and *Kebafetotse v The Attorney-General* [2004] 1 B.L.R. 419 considered.

Case Information

Cases referred to:

Kebafetotse v The Attorney-General [2004] 1 B.L.R. 419

Mosaninda v The Attorney-General [1994] B.L.R. 411

Onkabetse v The Attorney-General and Others [1989] B.L.R. 120 F

Sekobye v The Attorney-General [2006] 1 B.L.R. 270, CA

Tlharesegolo v The Attorney-General [2001] 2 B.L.R. 730

ACTION for damages for assault and for wrongful arrest and detention. The facts are sufficiently stated in the judgment.

F H Mahwite for the plaintiff. G

A C N Nchunga for the defendant.

Judgement

WALIA J:

The plaintiff claims the amount of P200 000 as damages for his 'wrongful and H unlawful assault, arrest and detention' by officers of the Botswana Police Force.

He alleges in his particulars of claim that on 9 December 2005, while he was on duty as a security guard manning the main gate at the Botswana Power Corporation (BPC) Training Centre, police officers from Old Naledi Police Station proceeded through the gate without stopping and registering the necessary particulars.

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His demands for compliance with procedures were met with assault, A arrest and detention for a day. The assault

had resulted in injury to his person.

The defendant alleges in her plea that the police officers had proceeded through the main gate which was open and unattended.

The plaintiff then locked the gate, preventing the police officers' exit and thereafter refused to open the gate or to hand the keys over. B

The plaintiff was therefore arrested, following the use of minimum force to facilitate the arrest. The arrest and detention were, according to the defendant lawful as the plaintiff had violently resisted the police officers' efforts to retrieve the gate keys from him.

On these pleadings, the matter proceeded to trial, the plaintiff testifying and calling no witnesses, while the defendant called two witnesses. C

The plaintiff testified that he was on duty on 9 December 2005. He was alone at the training centre as all others had gone to a Christmas party at the BPC head office.

At about 12.30 pm he was standing at the gate which he had left open, when a police vehicle carrying a number of people arrived and ignoring him, drove through the gate, stopping at the administration block, some 200-300 D metres from the gate.

He saw three police officers and a civilian at the vehicle and asked them to come to the gate. They in turn asked him to go to them. He asked them once more to come to the gate but the sub-inspector said that he, the plaintiff, was full of himself.

The sub-inspector then went to the administration block door and shook it E violently, at which stage the plaintiff wondered if the occupants of the vehicle were, indeed, police officers, although three of them were in uniform and the vehicle was in Naledi Police Station livery.

He proceeded to lock the gate to investigate if the administration block door had been damaged and telephoned the station commander at Naledi Police Station, to ascertain if the people in uniform were, indeed, police officers. F

He was still on the phone when the vehicle arrived at the gate. The station commander asked him to hand the telephone to one of the police officers but the sub-inspector just banged the telephone on the table in the guard room.

The sub-inspector instructed him to open the gate, at the same time G instructing the constables to fetch handcuffs. The plaintiff remonstrated with the sub-inspector about the latter's attitude and explained that he had locked the gate to ascertain if the door to the administration block had been damaged.

The sub-inspector then took a knobkerrie from the table and hit him whereupon he ran into the toilet. According to him, he was in the toilet for H three seconds only. The plaintiff, however, retracted his statement that the sub-inspector had hit him with the knobkerrie.

The plaintiff then wanted to check the administration block door and open the gate if the door was not damaged. Before he could do that, however, one of the police officers felled him to the ground and the sub-inspector started strangling him. He was choking and could not talk. He was

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in no condition to retaliate as someone tried to remove the gate keys from his A pocket.

He had been assaulted and was bleeding 'all over' his body. He had a wound to his head and injuries to his neck and other parts of his body.

The keys were taken from him and he was forced into the vehicle. His pleas for the BPC head office to be informed went unheeded and he was driven to the Naledi Police Station where he was detained in a cell without any B explanation of why he was being detained.

He was released the following morning and subsequently saw a doctor. The medical report in respect of that examination was admitted without objection.

Thereafter he called on the station commander at Naledi Police Station and the station commander apologised to him for his officers' behaviour. C

He was later charged with common nuisance and acquitted.

He concluded his testimony with a prayer for damages in the sum of P200 000. He himself had no knowledge of how to compute damages but his attorney had told him that demand should be made for P200 000.

Under cross-examination, he denied that he was not at the gate when the D police vehicle arrived and reiterated that he had been at the gate and had tried to stop the vehicle.

He also refuted suggestions of drunkenness and denied that he had spent a long time in the toilet or that he had locked himself in the guard room.

He also refuted the suggestion that he had been fighting and kicking and added that if he had been fighting or kicking, one or more of the police officers would have received injuries. He agreed that some of the injuries to his E person could have been caused by his falling to the ground but insisted that the bulk of the injuries resulted from direct assault.

The medical report tendered by the plaintiff shows that he was examined at Kgatelopele Clinic on 12 December 2005 and the following injuries noted: F

- Bruises and abrasions on the back, between the shoulders.
- A healing wound at the left parietal side.
- Grazes at the left shoulder, left elbow, right elbow and lower left back.
- Swelling at the left thigh.
- Scratching (nail marks) at the neck. G

The human body depictions appearing on the medical form bear testimony to injuries extending from the head to thigh regions.

Sub-Inspector Gopadileng was the first witness for the defendant. He was the leader of the detail assigned to investigate a case of trading without a licence at the BPC Training Centre. Accompanied by two uniformed officers and a H civilian, he proceeded to the training centre in a marked police vehicle.

The entrance gate to the training centre was unmanned and open and they proceeded to the car park at the administration block, some 50 metres from the gate.

As he was about to enter the building, the plaintiff called him to the gate but he responded that he would see the plaintiff when he completed his assignment.

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He entered the building through an unlocked door and was informed by A someone in the office that the person he was looking for was not in.

There were people in the office and outside and there was no need for him to shake any door as alleged by the plaintiff.

The police team then proceeded to the gate but the plaintiff locked it, went into the guard room and locked himself in. All entreaties for him to let the team out were in vain. No reason was given. The witness then told the plaintiff that he B was committing the offence of common nuisance.

He instructed his subordinates to arrest the plaintiff. According to him, a police officer is authorised to arrest any person committing any offence in his presence.

The plaintiff came out of the guard room with his baton and refused to open the gate or to hand over the keys. Suspecting that the plaintiff had the keys on C his person, the witness decided to search him. A scuffle ensued but the plaintiff was so strong that it took the combined efforts of the three police officers and the civilian to subdue him and retrieve the keys.

The plaintiff was thereafter forced into the police vehicle, having been arrested for common nuisance, and driven to Naledi Police Station where he was detained overnight. He was subsequently charged with common nuisance but D acquitted.

Under cross-examination, the witness denied that the plaintiff had been on the phone at any stage or that he had banged the telephone on the table.

He denied that the plaintiff was assaulted in any way and suggested that any injuries suffered by the plaintiff would have been caused by his own actions in resisting lawful arrest. He denied, however, that the plaintiff had suffered the E injuries testified to by him as he, the witness had seen no injuries and the plaintiff was not bleeding.

The second witness for the defendant was Punkie Sebaka, who was a special constable in 2005. She was in the detail assigned to the BPC Training Centre. F

When they arrived at the gate, it was unmanned and open. They therefore drove straight to the administration office. In her estimate, the distance from the gate to the office is about 30 metres.

As the vehicle was parked, the plaintiff appeared from the guard room and instructed them to return to the gate. The sub-inspector replied that they would do so on completing their assignment. The plaintiff said that he would lock the gate if they did not return immediately. G

The police officers then went to the restaurant but did not find the person they were looking for. According to her, no one entered the building.

The team returned to the gate and it had been locked. The sub-inspector asked the plaintiff for the keys but the plaintiff did not comply. A scuffle ensued between the plaintiff, the sub-inspector and the constable. Neither she, nor H the civilian had played any part in the scuffle. The sub-inspector and the constable forced the plaintiff into the vehicle and drove to Naledi Police Station. She had seen no injuries on the plaintiff.

She had seen a number of people at the training centre and some even came to the gate to see what was going on.

Under cross-examination, she said that she did not recall the

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sub-inspector having called upon anyone to assist him in apprehending the A plaintiff.

She acknowledged that the plaintiff was on the phone when they got to the guard room from the car park. The plaintiff had not told them why he had locked the gate.

Under some searching cross-examination, her account of the scuffle became B garbled. She did not know if anyone fell during the scuffle. The civilian was not called upon to assist but at some stage, joined in. She herself however, had played no part whatsoever at any stage of the scuffle.

I propose to deal with the evidence before me in two stages. The first stage starts with the arrival of the police detail and ending with their return to the locked gate. The second stage is the plaintiff's arrest.

In my assessment of the evidence, the defendant's witnesses' version of C the first stage is the more probable one. Both witnesses testified that the gate was unmanned and open. Their evidence was not materially challenged in cross-examination.

The plaintiff, on the other hand, was evasive and uncomfortable in many aspects of his evidence. He acknowledged that the gate is required to be kept closed at all times and yet there was no explanation of why he had left it open. D There was also a spurious excuse for his not being in uniform.

His evidence that he was the only person at the centre on the day is also controverted by his own admission under cross-examination that a number of people had arrived at the scene of his arrest.

His estimate of the distance between the gate and the administration block is E also open to doubt as he could not have seen what he alleged from a distance of 200 to 300 metres. The estimate of the defendant's witnesses is more credible.

I therefore find, in respect of the first stage, that the gate was unmanned when the police detail arrived, that there were people at the centre and that the sub-inspector had no need to shake the door in the manner alleged by the F plaintiff. I find also that he locked the gate not for the reasons given by him, but to assert his authority and to 'fix' the police detail as suggested by the defendant's counsel.

Turning to the second stage, it is the defendant's case that the plaintiff violently resisted the retrieval of the keys from him, the plaintiff was not assaulted and minimal force was used in arresting him. It is to be noted that G no mention is made in the plea of the offence the plaintiff was arrested for.

The starting point has to be the plaintiff's allegations of assault. His account of events is straightforward. He was strangled, pushed to the ground and beaten up. He testified to being strangled by the sub-inspector but did not specifically identify the other assailants.

The evidence of the defendant's witnesses on the issue of the assault is full H of irreconcilable contradictions. The sub-inspector testified that the plaintiff was so strong that it took three police officers and a civilian to subdue him, as he had overpowered three of the officers.

The second witness testified that she had played no part in what she called the scuffle. In fact, her account provided very few details. According to her, the plaintiff was relatively easily dispossessed of the keys.

The injuries suffered by the plaintiff all over his body do not speak of a

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simple scuffle, nor is it possible that injuries to various parts of his body - A front, back and sides could be the result of a fall.

The scratch marks on the plaintiff's neck support his claims of being throttled and there is much force in his argument that if he was, indeed, as strong as alleged by the sub-inspector and had been engaged in a vicious fight, surely one or more of those trying to subdue him would have suffered some injury. B

I had the opportunity to observe the plaintiff. He is a slight man and quite incapable, in my view, of displaying the superhuman feats of strength attributed to him by the sub-inspector. Furthermore, I must give credence to his account of events, having regard particularly to the discrepancies in the evidence of the defendant's witnesses.

Even on the sub-inspector's version, it would have been unnecessary to C engage the plaintiff in any physical confrontation. It would have been quite easy to handcuff him, thus disabling him and retrieving the keys from his person.

I must conclude therefore, as I do, that the assault on the plaintiff was deliberate and unlawful, whether perpetrated by one or more of the persons in the sub-inspector's party. D

I deal now with the lawfulness or otherwise of the plaintiff's arrest. The plaintiff alleges that he was not informed of the charge he was being arrested for. The sub-inspector alleges that he informed the plaintiff specifically that he was being arrested for common nuisance. Disregarding, for the purposes of this enquiry the second witness' complete silence on the manner of the arrest, I E will proceed on the assumption that the plaintiff was informed of the reason for his arrest.

As was to be expected, the sub-inspector was cross examined at length on the matter of the arrest. He was asked what common nuisance meant and gave the following answer:

'Common nuisance means a person who does not conduct himself in an F affordable manner - provoking someone - acting in an unacceptable manner.'

Common nuisance is defined as follows in s 176(1) of the Penal Code (Cap 08:01): G

(1) 'Any person who does an act not authorized by law or omits to discharge a legal duty and thereby causes any common injury, or danger or annoyance, or obstructs or causes inconvenience to the public in the exercise of common rights, commits the offence termed a common nuisance ...' H

It will be seen immediately that the sub-inspector was off the mark by a considerable margin on what constitutes common nuisance.

It is trite law that once arrest is conceded, the onus is on the defendant to justify the arrest and detention. The following head note in *Sekobye v The Attorney-General* [2006] 1 B.L.R. 270, CA summarises the law quite succinctly:

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'The onus, where an arrest and detention of a plaintiff was admitted, rested with A the defendant, ie the police, to justify such arrest and detention. In order to acquit the onus it had to be proved on a balance of probabilities that reasonable grounds existed at the time of the arrest for suspecting that the person arrested had been involved in the commission of the offence in question. The test was an objective one.' B

The sub-inspector's entirely misconceived understanding of common nuisance apart, on the evidence before me and considered objectively, I cannot say that the offence of common nuisance had been committed or that the sub-inspector had any grounds for suspecting that the plaintiff had been engaged in the commission of that offence.

The plaintiff's conduct may well have been provocative and he may well have C behaved in a manner the police officer considered unacceptable. This conduct, however, did not, in my view, constitute any grounds for surmising that the offence of common nuisance was or was being committed.

I find therefore that the plaintiff's arrest and subsequent detention were unlawful and the plaintiff is entitled to damages.

On the quantum of damages, I have had no assistance whatsoever from the D plaintiff's attorneys. They are content to say merely that damages in the globular sum of P200 000 be awarded, notwithstanding that the claim is for damages for assault and unlawful arrest.

The defendant had been helpful in drawing my attention to a number of previous awards. She has not, however, drawn my attention to any case law dealing specifically with damages for assault. E

My own research has unearthed only one case dealing with damages for assault, that of Mosaninda v The Attorney-General [1994] B.L.R. 411 where damages of P5 000 were awarded for assault which in the findings of the court, amounted to the plaintiff being handcuffed and put in leg-irons which caused bruises and lacerations. He was awarded P5 000.

The assault in this case was more serious and the injuries more extensive. F The plaintiff no doubt suffered pain as a result but the suffering was not so great as to cause the doctor examining him, albeit three days after the assault, to administer any treatment or prescribe any medication. I therefore award the sum of P7 500 as damages for assault.

On damages for the unlawful arrest and detention, I can do no better than G place reliance on the previous awards drawn to my attention by the defendant:

- Tlharesegolo v The Attorney-General [2001] 2 B.L.R. 730 - P5 700 for detention in excess of 10 hours.
- Mosaninda (supra) - P5 000.
- Onkabetse v The Attorney-General and Others [1989] B.L.R. 120 - H P2 000 for a 10 hour detention.
- Kebafetotse v The Attorney-General [2004] 1 B.L.R. 419 - P10 000 for a 46 hour detention.

The plaintiff was detained for less than 24 hours, he received an apology from the Station Commander and there are no aggravating features

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appearing from the evidence before me. I therefore award the sum of P7 500 A for the unlawful arrest and detention.

There will therefore be judgment for the plaintiff in the total amount of P15 000 together with costs as hereinafter ordered.

The plaintiff's attorneys have acted in complete disregard of this court's clarion calls to desist from creating unrealistic expectations by bringing grossly inflated claims. In this case, the attorney ought to have known that B the damages claimed are completely out of sync with the circumstances of the plaintiff's assault, arrest and detention and far in excess of previous awards for similar torts.

I express my disapproval by ordering that the costs payable by

the defendant shall be on the magistrate's court scale.

I order also that payment in respect of the damages shall be made within 30 days. C

Judgment for the plaintiff.