

ANDREW NGHIKEMBWA VERSUS MINISTER OF HOME AFFAIRS

MTAMBANENGWE, J

DAMAGES AND COSTS

Civil action - claim for damages for assault and injuria and cost of suit, injuria in respect of injuries to plaintiff's feelings and loss of dignity. No award for, and no award of costs and minimal award for pain suffering and loss of amenities since plaintiff in a way was the author of his own suffering.

IN THE HIGH COURT OF NAMIBIA

In the matter between

ANDREW NGHIKEMBWA

PLAINTIFF

versus

MINISTER OF HOME AFFAIRS

DEFENDANT

CORAM: MTAMBANENGWE, J.

JUDGMENT

MTAMBANENGWE, J. : Plaintiff claims damages against Defendant vicariously as head of the Namibian Police, in respect of injuries sustained by him as a result of an assault he alleges was perpetrated on him by a member of the Police acting in the course and scope of his employment at the Oshakati Police Station on 2 April 1992. He claims an amount of N\$10,000 00 for pain and suffering, disfigurement and loss of amenities and a further N\$2, 000 00 for injuria.

Though Defendant's plea, somewhat indirectly, denies plaintiff's allegation that the Police who assaulted him was at all material times acting within the course and scope of his employment or within the risk created by such employment; no evidence was led to support that denial or

none to controvert plaintiff's evidence in support of that allegation. Thus the only outstanding issues in this case are the nature and extent of the alleged assault and the quantum of the damages suffered by the plaintiff.

The plaintiff's evidence is that on the day in question at about 7 pm he was at his sister's house when two kids took from the mattress where he was resting after work his identity card and some pocket money. The two kids went to a neighbour's house and locked themselves inside. When he went there and knocked, the two kids would not open the door or return the items. He got angry and went to knock at the window of the house so hard that the window pane broke and as a result he sustained an open cut on his right thumb. Suddenly a motor vehicle with Police registration numbers arrived at the scene. He was taken to the Oshakati Police Station and made to sit next to a window in the Charge Office.

The plaintiff said that on asking why he was arrested one of the police officers grabbed the collar of his shirt and hit him on the right cheek. This officer had, on arrival at the charge office, referred to the plaintiff as a botsotso. The blow to the cheek made plaintiff fall against the window and as a result plaintiff sustained a 5 to 6 centimetre cut above his left eyebrow. Plaintiff produced 3 photographs of himself which were put in as exhibit "A", "B" and "C". He said photo "A" was of himself taken before the incident and photo "B" and "C" were of himself taken after the incident. The scar is clearly visible on photos "B" and "C". All he

knew was that a policeman at the station hit him, he could not say if the culprit was one of the two policemen in civilian clothes who picked him up from his sister's neighbour's house where he broke the window, driving a Toyota Stallion with Police Registration numbers. After some 6 minutes bleeding from the cut he was taken by the Police to Oshakati Hospital at about 8 pm that evening.

At the Hospital he was taken to the theatre where the wound was stitched, he was put on a drip and given some injections. He had six stitches in all. After his discharge he had to go back for redressing 2 times a day for a period of three weeks at Ongwediva Clinic. During these three weeks he had headaches and sometimes felt dizzy and the headaches and dizziness made him miss work for ten days. He also felt pains in the ribs. As the pain increased all the time he was put on painkiller tablets and antibiotics for a month. A week after the incident he had laid a charge against the Police and made a statement in connection therewith, but he does not know the result as he was never called to testify. The charge he laid had the officer on duty on the day in question as Lukius Mutileni and that was the only identification of his assailant that he could make. The evidence however clearly shows that it was Inspector Hennock Haimbili who assaulted him in the way described later in this judgment.

Under cross-examination plaintiff denied, that he was drunk on the day in question and that the woman who owned the house the window of which plaintiff broke explained to the

police in his presence what had happened. It was indicated during cross-examination of plaintiff that this lady and some police officer would testify that plaintiff was drunk that day, but in the end, these witnesses were not called to so testify. He also denied that the window against which he hit after being hit on the cheek by Sgt Hennock Haimbili was already broken. Again it was said that several police were going to testify that the window was already broken and these were subsequently not called to so testify except for Sgt Mutileni. It was said Sgt Haimbili, Lukas Mutileni and Lucia the lady whose window plaintiff broke would testify that plaintiff was very obnoxious and threatened that he would stab Haimbili, beat him and shoot him. The plaintiff denied this and also that when Haimbili told him to sit down he jumped up and threatened Haimbili and as a result Haimbili held him by both shoulders and asked him to sit down. It was said that plaintiff jumped up the second time and threatened to stab Haimbili with a knife or to shoot him. Plaintiff denied this and that it was then that Haimbili took him by both shoulders and requested him to sit down but plaintiff tried to wiggle out of Haimbili's hands and as a result knocked himself against the window and cut his face. He denied ever receiving summons in connection with a charge of malicious injury to property laid by Lucia or a warrant of arrest in connection with the same. Finally plaintiff indicated that the window against which he was pushed by the police was 1% metres high and 2% metres wide.

Plaintiff said although he had a bruise on his face where he was hit by the police he did not mention this to the doctor

who treated him at the hospital, nor did he mention the cut to his hand, because he had pain on the forehead cut by-glass .

Dr Hainyemba treated the plaintiff, she testified that plaintiff was not under the influence of alcohol; he was walking and talked very clearly and he did not smell of alcohol. She was the medical officer of Oshakati Hospital and it was her evidence that plaintiff's forehead was full of blood and if he had any bruises to the cheek she would not have observed it because of the blood. Plaintiff was in the hospxtal for 2 hours. Her report was put in as part of the file and produced as exhibit "D". It reads as follows:

"The patient came to casualty on 2.4.92 at 20:30 pm with a deep cut wound on the forehead (L) side. He was cut by glasses.

Exam: Open deep wound in the forehead which bleeding which bleeding txt IV drip plact was put Sature done then betadine dressing after that the pt went home after getting treatment."

Under cross-examination Dr Hainyemba stuck to her evidence in chief and her report.

For the defence 2 witnesses gave evidence. Inspector Hennock Haimbili was Station Commander of Oshakati Police Station. He said on the day in question he received a report as a result of which he and Sgt Ipumbi went to a certain house where they saw the accused busy kicking on the door. The owner of the house came out and made a report. He saw a window broken. He took plaintiff and the woman to the police, she wanted to lay a charge against the

plaintiff. On arrival at the Police Station he handed the plaintiff to a sergeant on duty. He told plaintiff to sit on a bench and he did. He sat on his desk to check the Occurrence Book. Plaintiff stood up and walked to him to threaten that he would stab him or hit him or shoot him with a revolver because he had brought him to the charge office. He said as he did not know the plaintiff before he concluded that Plaintiff was under the influence of drink, to behave the way he did, so he got hold of him by the shoulder and ordered him to sit down which he did. The office was full of other police officers.

He said he went back to his desk but before he could sit down again plaintiff stood up and repeated the threats to stab, hit or shoot him. Plaintiff looked aggressive and was making loud noises swearing at him and making funny movements like one practising Karate. Plaintiff said he would stab, beat or shoot him wherever he was. Face to face with plaintiff he ordered him again to sit down, he did. He said it was the third occasion when he told plaintiff to sit down that plaintiff pulled out of his hands and fell and hit his head against a broken window glass. Plaintiff then said look what has happened why did you beat me. He said he told him he had not beaten him but that plaintiff had been looking for it. He instructed Sgt Mutileni to bandage the plaintiff and then they took him to the hospital. Asked if he would say plaintiff was under influence of alcohol he said since he did not know him he looked like he had had some intoxicating liquor because he was making noises like a mad person. Lucia Heshongwa was also in the police

some intoxicating liquor because he was making noises like a mad person. Lucia Heshongwa was also in the police station making a statement about the charge she was laying against the plaintiff.

Plaintiff had laid a charge of assault against him and though he could not recall what became of the charge he had paid an Admission of Guilt fine of N\$50,00 in respect of the charge of Assault on 23th January 1995. He had paid the fine because previously he had had another charge against him which had caused him to spend a lot of money in attending Court and for which he had been suspended from duty; he paid the fine to avoid spending a lot of money as in the other case. He was acquitted in that case which involved allegations of theft of bail money and he was waiting to be told when he would be reinstated. That case occurred in 1992 and was concluded in January 1994 and he has been on suspension since 13 November 1992.

It was his evidence under cross-examination that plaintiff came to the station voluntarily without saying a word when he asked him to come into the police car. He handed him to duty officer and although not under arrest yet plaintiff was not free to go. The witness was very evasive on this question and despite the question being repeated several times, he would not give a straight answer whether or not plaintiff was free to go or under arrest while he himself examined the Occurrence Book.

The witness repeated that in the car on the way to the

station plaintiff was peaceful it was only when he, the witness, was reading the Occurrence Book of the station, that plaintiff got up 3 times and threatened to stab, hit or shoot him saying he had a pistol, and it was only then that he thought he was drunk. There were up to 7 other police officers in the station. The witness said he did not ask plaintiff why he was threatening him. Only after much questioning did the witness say that plaintiff was weak and unbalanced in his movements as a reason why he thought he was drunk. It was his evidence that all these 3 times plaintiff made threats to stab, hit or shoot him he never got angry nor did he think of locking plaintiff up.

Inspector Haimbili was a very unconvincing witness in some areas of his evidence. For example he said plaintiff got up three times to make the threats against him yet when plaintiff was cross-examined it was said that he did so twice only. In his warning statement to the police made in connection with the assault charge laid against him by plaintiff, he only talks of the threat to shoot him. His attitude as a witness was rather aggressive. There are other discrepancies in his evidence.

Only Sgt Mutileni, the duty officer at the time, was called as the other defence witness. Mutileni made no mention of plaintiff threatening to beat or stab Inspector Haimbili. He said he heard plaintiff say that he had a pistol and they should let him go. Suffice it to say that although the general tenor of Mutileni's evidence is supportive of Haimbili's evidence there are several discrepancies between

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On the evidence I find that it is highly improbable that plaintiff was suddenly pushed against the window by Haimbili without him doing anything. It is also highly improbable that plaintiff hit his head against the window in the manner described by the defence witnesses. I find it more probable that plaintiff was indeed making some protest and some movements which annoyed Haimbili and led him to push the plaintiff against the window. In his statement to the police recorded on 16/4/92 produced as exhibit "F" Mutileni actually says, Haimbili ordered plaintiff to sit down for the second time and when plaintiff refused "Inspector then pushed him to the back and he fell against the window and was cut by the broken window through out his face." I should point out however, that in giving evidence, Mutileni denied that this was a correct translation of his statement given in Afrikaans. I also found it highly probable that the window was already broken when plaintiff fell against it. My conclusion on the evidence and the probabilities in this case is that Haimbili assaulted the plaintiff after being provoked by the manner in which plaintiff was conducting himself in the police station.

The plaintiffs claim is for damages in the total sum of N\$12,000 00 of which N\$2,000 00 is for "Injuria in respect of: Injuries to his feelings and loss of dignity." If I am correct in thinking that plaintiff was behaving in the uncontrollable manner at the police station testified to by Inspector Haimbili and as corroborated by Sgt Mutileni, I do

not think he deserves any award on that score.

As regards pain and suffering, disfigurement and loss of amenities, having regard to the fact that plaintiff in a way was the author of his own suffering, in the sense that had he remained calm and composed, Inspector Haimbili would not have been provoked to push him as he did against the broken window, there was no aggravation in this matter.

In the result I make the following order:

Judgement in favour of plaintiff for pain and suffering, disfigurement and loss of amenities in the sum of N\$3 500,00 with interest on that sum at the rate of 20% p.a. from date of judgment.

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