



**REPUBLIC OF NAMIBIA**

**CASE NO: I 2782/2005**

**IN THE HIGH COURT OF NAMIBIA**

In the application of:

**LAVIANA NGHIMWENA**

**PLAINTIFF**

and

**THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA**

**DEFENDANT**

**CORAM: GIBSON, J**

**Heard on: 17 – 20 March 2008**

**Delivered on: 8 April 2011**

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**JUDGMENT**

The Plaintiff has brought an action against the defendant claiming damages under two heads:

In the first part, the Plaintiff claims that she was wrongfully and unlawfully arrested by certain members of the Police Force whose names appear in the judgment and she was also unlawfully detained at the instance of the said members of the Police Force. As a result she suffered damages in the sum of N\$200 000.00.

Secondly, the Plaintiff claims damages for unlawful assault, torture and other unlawful acts, that she was subjected to cruel and inhuman treatment.

Consequently, she claims damages in the sum of N\$500 000.00.

The Plaintiff was the only witness to her cases, she said she arrived at the office of Mu Africa at about 14h30hours and found three policemen, namely Chief Inspector Sheehama and two others. The Police told her that they wanted her to accompany them to the Police Station to answer some questions.

She was instructed to drive her car with one of the Policeman as passenger. At the Police Station she was taken to Chief Inspector Sheehama's office where she was shown a photograph of Jason Awene Killingi. She was asked where Killingi was. She told the police that she only knew that he resided in Windhoek and was not aware of any address in the north.

The Chief Inspector became angry on that explanation. He seized her by her hair and shook her, fondled her all over the body. Another Police Officer accused her of lying and called her a bitch.

The Police then resumed the questioning for a while, they stopped and left her alone in the office.

A short while later one of them returned, she recognized the passenger with whom she had driven from her office, he was more gentle and placatory.

He asked her to tell him frankly, and save herself from being locked up. She answered that she did not have anything more to tell.

The other two Police Officers then returned, the questioning resumed and she gave the same negative replies. The Police then told her they were going to take her to her husband. She was asked to drive her own car, if I may comment now;

On this aspect the evidence of the Plaintiff was confusing, it wasn't clear to me whether she drove with one policeman while Chief Inspector Sheehama followed in another car, or whether she rode in the same car with the Chief Inspector. The Plaintiff talked of an argument with the Chief Inspector as they drove, as a result of which she left her seat and sat at the back.

When they got to her home they found her children only so they returned to her office. As they arrived, her husband also arrived and made his way to the office. However the police seized him and pulled him about. They then called for further police assistance. She said her husband was dragged to a police car and she too was put in a car.

They were driven to Oshakati Police Station. She was not asked to get out at the Police Station but was taken to a different Police Station where she was interrogated until midnight. She was then handed to two women Police Officers in camouflage dress to guard her.

The Plaintiff then said that at 23h00 hours she heard a loud voice screaming for help. She recognized the voice as that of her husband. Shortly afterwards Warrant Officer Scott and Chief Inspector Sheehama arrived and escorted her to her husband.

She said her husband was not recognizable; he was bleeding and sat with his head on one arm resting on the table. The other arm was dangling loosely between his legs.

The police told her she was to be locked up. She got worried about her children and appealed to Warrant Officer Scott, he refused and replied in a foul language.

Her personal particulars were taken after which she was escorted to a cell where she was locked up. The cell was dark and smelly and cold. She was uncomfortable as she had to sleep on the floor without blankets. She was aware of cockroaches creeping all over her as she lay down.

The Plaintiff was adamant about the interrogation and denied this was in her office. The Plaintiff told the Court that she never complained about the assault to the police before she was discharged, and she never told her lawyer who came to collect her from the Police Station.

That ends Plaintiff's evidence.

The Defence called Chief Inspector Sheehama and two police officers. Also called, was an employee of MTC, the mobile phone company. I will deal with his evidence later.

Chief Inspector Sheehama was called. He told the Court that he reached Ondangwa the day before they found Killingi's bakkie on the 11<sup>th</sup> of January. When they found the bakkie they surrounded a house pointed out to them, where the bakkie was. They identified this vehicle as one which was said to have been driven to the North by Jason Awene Killingi. They laid siege of the house for some time and eventually they raided it, only to find two women occupants, Warrant Officer Scott said they slept on the spot.

However, following upon a conversation with the women they learned that Killingi had been at the house for two days but left that morning, that is 11<sup>th</sup> January and was driven away in a white Condor vehicle with the letters "Mu Africa" on the sides.

The police drove around the town on the 11<sup>th</sup> January 2005 and made enquiries. Eventually they found the business premises of "Mu Africa", sometime that day. They went in, and introduced themselves to a woman in the shop who turned out to be the wife of Mr. Grunni, the owner and husband of the Plaintiff, in these proceedings.

They questioned the Plaintiff and asked for the whereabouts of her husband. She denied any knowledge of his whereabouts. They asked her about Killingi, she

agreed she knew him but said he resided in Windhoek. Whilst questioning the Plaintiff, the Chief Inspector received a message that Killingi was at the Eastern Border Post with two men, that Killingi and the other man had crossed into Botswana, but the third man had remained in Namibia. That man was identified as Mr. Grunni, the Plaintiff's husband.

In addition to this information, the police had a telephone number, a landline, that Mr. Killingi had contacted in the course of the robbery that telephone number belonged to the "Mu Africa" business where the Police were.

The police requested permission to browse through the phone log. Among the messages sent, the police found a voice mail message to Killingi's cellphone number on 11 January 2005. The message was in Oshiwambo and was translated as follows:

"When you get to Grootfontein, change your clothes and do not leave before I telephone you or you telephone me" Also there was a reference to collecting the parcel.

As well as this telephone call, calls had been made to Plaintiff's cellphone on the day of the robbery, in 2004.

The Chief Inspector said in his view the message was a warning to Killingi that the police were closing on them.

The Plaintiff having agreed that this was her voice, the Chief Inspector said he then told the Plaintiff that he was arresting her, Pressed in Court to explain the grounds for the arrest, the Chief Inspector said he formed a reasonable suspicion that the Plaintiff and her husband had been rendering assistance to Killingi, a fugitive from justice. He told her that she was being arrested because of the admission that she left the message to Killingi on the phone.

The Plaintiff then suggested that they go to her home, they found only children. They returned to “mu Africa” offices.

On the way the Plaintiff asked to make a telephone call, she put the Chief Inspector on the phone to her husband.

Mr. Grunni told him that he was on his way. He arrived within a few minutes of their arrival. The Chief Inspector said they immediately confronted him with the news that he was seen at the Eastern Border Post with Killingi and another man, Mr. Grunni denied initially, he became violent. Both, became aggressive, however they were subdued and taken to Oshakati Police Station.

On arrival the Plaintiff's husband was told he was under arrest. The Plaintiff was detained.

He was referred to Warrant Officer Nowaseb's account. He said he couldn't understand why Warrant Officer Nowaseb said that Plaintiff was questioned at the Police Station. He agreed Nowaseb was in his team but said he didn't know where he was most of the time. He said that they were a large team, as many as ten at one time. So he did not know where the officers were from time to time.

The Chief Inspector was questioned about the message to Killingi upon which he said he formed the suspicion to arrest the Plaintiff. He said the message was a voicemail, sent to Killingi's phone that it was played out loud and the Plaintiff also listened to it. He said it was then that she admitted that this was her voice but did not explain why she sent it.

The Chief Inspector admitted that he made a statement in the robbery case in December 2005, a year after the events. He said that there was a mistake in it, it was a long time and memories deteriorate. He said it was purely a human error that he made when he talked of a text message.

Chief Inspector Sheehama was substantially corroborated by the Investigating Officer at the time. Warrant Officer Scott gave evidence that he remembered the playback on the loud speaker of the Plaintiff's phone. He knew it was a woman's voice and was in Oshishiwambo which he recognized, but could not understand.

Warrant Officer Scott said not long after listening to the message he left for Oshikuku on further enquiries on another aspect of the robbery with some of the officers. He said he accomplished that job and returned that same day late in the evening about 23h00 hours, he never slept there.

He went straight to the Oshakati Police Station, on arrival. He saw a woman in white standing outside with a woman police officer in camouflage dress. The woman was crying but he did not pay any attention.



On entry into the police station, he went into an office where the Plaintiff's husband was, Mr. Grunni was sitting on a chair handcuffed behind his back, he was still under interrogation.

After midnight the Chief Inspector asked him to detain both the Plaintiff and her husband, which he did.

As to the dates, Warrant Officer Scott said he couldn't remember the exact date but said he arrived in the North on a Sunday afternoon. The date was given subsequently as the 9<sup>th</sup> of January 2006.

They made enquiries and got information from an informant. He said the Chief Inspector arrived after them. Warrant Officer Schott said they visited the house where Killingi's bakkie was parked, he gave evidence as on record.

As for the arrest, Warrant Officer Scott said he did not know the merits. He merely carried out the instructions from the Chief Inspector who gave the order to lock up the Plaintiff and her husband.

He said there were many police officers including Warrant Officer Lazarus Nowaseb, the witness ideal with next.

Nowaseb's evidence was that the Windhoek team travelled North on the 9<sup>th</sup> of January 2006, not the 11<sup>th</sup>. He said however that the Plaintiff was seen later, on the 12<sup>th</sup>, but denied that any interview took place at her offices. He said the Plaintiff was interrogated at the Police Station, there was no playback of the phones in her office.

Warrant Officer Nowaseb also related that after the visit to the house where Killingi's truck was parked, the team went to Oshikuku on further enquiries and spent the night. That is the end of the evidence.

The Plaintiff evidence was not at all convincing. It is unlikely that the police team who had been led to the North and had relied on the telephone messages and cellphone messages to pin point the movements of Killingi's, would have hastily removed themselves from the first human link to the phone calls, and from the place of operation and guidance to the fugitive without nosing around the premises, because the police had no warrant authorizing the search of the Mu Africa premises. Further, the premises and occupant had not been of interest to the police when they came North.

Thus the presence of the plaintiff was a heaven sent opportunity for gathering any information to help their inquiries on the role of "Mu Africa's" owner.

Also, money had been taken to the north and Mu Africa personnel had been among those called from the scene of robbery.

Though the Plaintiff's version appears supported by Warrant Officer Nowaseb, I do not give much credence to it. Warrant Officer Nowaseb seems to have been out on the periphery concerning the events and developments in the North. His references to calling on the Ondangwa house, then proceeding to Mu Africa premises and to Oshikuku the same afternoon, on the Sunday, appears highly improbable. The

police needed to make further inquiries once they reached Ondangwa and to ascertain the whereabouts of their suspect, Killingi. He was never suggested that Killingi had gone to Oshikuku.

Warrant Officer Scott's version that the Police team laid siege round the house where Killingi's car was for some time, the day before the arrest, and slept there is more in accord with reality and common sense.

After all, Chief Inspector Sheehama who was heading the investigation was not in the advance team, he only arrived a day before the call on the Plaintiff. As he would have to approve any move, the team could not have done more than watch Killingi's truck, in case he had returned. On abandoning the search in the early hours of the 11<sup>th</sup>, the police would then have made inquiries about Mu Africa.

The other aspect of the Plaintiff's evidence which made no sense to me was her account of her removal from her premises to the Police Station. Her claim that she was asked to drive her car to the Police is improbable and unlikely. The part of her version is totally confused, as is further shown by her account regarding the call on her home after some interrogation.

The question who drove what car, and how many cars were there, and whether she was allowed to drive herself, presumably after the assault, is not plausible.

The inconsistency is not material, save that it shows the unreliable nature of her account and the sequence of events. Rather I accept Chief Inspector Sheehama

version that the visit to her house was made from her office after she was questioned and threatened that they would take her to Police Station for further questioning.

By then the Plaintiff would have realized the grave situation she was in, hence the need to telephone her husband, who came within minutes. Clearly he had been in hiding with her knowledge and was ready to come forward and face the music when he realized that the Police were not going to go away without him or his wife.

Chief Inspector's account of finding of the voice message to Killingi's cellphone, changed the police's brief and put the plaintiff right in their investigation.

Warrant Officer Scott confirms the playback on the landline speaker. He, as the investigator would have been right in the midst of the enquiry. His departure immediately for Oshikuku was made with the assurance and knowledge that part of the inquiry had been concluded satisfactorily. Warrant Officer Scott's account is coherent and logical, and is in line with the probabilities.

The final aspect of the Plaintiff's version which makes her claim of assault whimsical is the account of where she and her husband were taken to from "Mu Africa" premises.

The Plaintiff's evidence that she was taken to a different Police Station after dropping her husband at Oshakati Police Station is difficult to accept as reliable because Plaintiff says that in the course of interrogation which finished at midnight, she was able to hear the cries of her husband during his own interrogation, at about 11pm.

Clearly the two would not have been held at different Police Station if she was able to hear her husband. In any even overwhelming evidence shows that she was left in

the care of two female police officers in camouflage uniform outside the Police Station, as seen by Warrant Officer Scott.

The final witness for the Defence, Mr. Mark Praaght, an employee of MTC was largely unchallenged. He gave mainly technical evidence explaining how cellphones work, how calls could be used to track down the person answering a call. He gave evidence of the calls made to or from Killingi's cellphone, for instance on the 11<sup>th</sup> January 2005, and even before that, in 2004, at the time of the robbery.

He also confirmed that Killingi's phone was used to call Mu Africa on the day of the robbery, as well as when Killingi was on the run at Ondangwa.

The question is whether the Chief Inspector Sheehama had a reasonable suspicion to arrest the Plaintiff?

Section 40(1)(b) of the Criminal Procedure Act 51 of 77 provides that:

"A peace officer may without warrant arrest any person ...

(l) A peace officer may without warrant arrest any person -

(a) who commits or attempts to commit any offence in his presence;

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

*"Suspicion" has been held to mean a state of conjecture or surmise where there is no proof, such suspicion is present at the beginning of an investigation intended to procure evidence of a prima facie case;*

Duncan v Minister of Law and Order 1986 2SA 805 at 814E.

In regard to the requirement that the suspicion be reasonable, in Mabona and another v Minister of Defence and other, 1982 SSA 654(SE) at 658 F-H, the Judge held that: *“In evaluating his information a reasonable man would bear in mind that the section authorizes a drastic police action. It authorizes an arrest on the strength of suspicion without the need to swear out a warrant, that is something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically and he will not accept it lightly. But this is not to say that the information at his disposal must be of sufficient quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires that the suspicion must be based upon solid ground.”*

It is clear from the above that the test for whether or not the suspicion is reasonable is not subjective; it is not whether the police officer believes that he has a good reason to suspect, rather, that the suspicion, when look at objectively, one can say that the police officer as a reasonable man has reasonable grounds for harbouring such suspicion: Watson v Commission of Customs and Exice 19603SA2212(N), at 216. This decision was followed in the Dunvan case, above.

In the present case the Police Officer had come to Ondangwa in pursuit of a suspect, Killingi who was alleged to have been involved in a serious crime of robbery in which N\$5 700.00 was stolen.

On calling at the house where Killingi had been hours before they found two women who gave them information which they followed and located the business premises of Mu Africa. At the premises, they found a woman, the Plaintiff, wife of the owner of the business, she however, was not forthcoming with information concerning her husband.

Further, upon investigations, the police found that the Plaintiff had been in communication with her husband and Killingi by phone giving certain information which, as it turned out was vital to the escaped fugitive eluding pursuers.

In my view those factors, were grounds enough upon which a reasonable man might have suspected that a crime had been committed.

Thus I am of opinion that the arrest was justified in law.

The fact that Plaintiff was released after detention does not detract from the initial finding. A police officer may arrest a suspect with intention of conducting further enquiries and depending on the results may release or charge the suspect: Duncan vs Minister of Law and Order 1986 2SA505 at 819-820.

The next question is whether the Plaintiff's objection to the admissibility of Killingi's record of calls on his cellphone made available to the Police by MTC, the mobile phone company which helped to locate the movements of Killingi, is sustainable in Law given the fact that the Police did not have a Court Order to do so.

Every citizen has a fundamental right to privacy of communications, inter alia, by virtue of the Namibian Constitution.

The breach of a Constitutional right, however does not invariably lead to the exclusion of the evidence illegally obtained, particularly so in civil proceedings.

Furthermore it is trite that the effect of such breach can be of varying degrees, the decision would depend on whether it was deliberate or inadvertent, or cruel and violent. This is a principle that emerges from a number of Court precedents in South Africa.

Clearly the Court has discretion whether or not to allow the use of such evidence: S V 2001 SACR 572C v Madiba 1998 1BCLR 38 (D).

In SV Mkhize 19992SACR 632, the Judge affirmed the view that there is a discretion, and said,

“The Constitution envisages precisely that there will be a circumstance when evidence will be admissible even if the obtaining of the same entailed the violation of a right enshrined in the Constitution (Bill of rights) 35 (5) of the South African Constitutions.



The principle in our Courts and under The Namibian Constitution is that the right to privacy is fundamentally enshrined.

Section 13, (1) provides:

*“No person shall be subject to interference with in the privacy of their homes, correspondence or communications save as in accordance with law and as in necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others”.*

This Article, by its saving clause clearly permits the deviation from the fundamental right of privacy, inter alia, for the prevention of disorder and crime.

“It would be a matter for the Courts to determine whether a matter falls within or without the saving clause. The Court, in coming to its decision, in exercise of its discretion will no doubt be guided by the principle of fairness to ensure Justice to both sides.

In the instance case, the Police were in pursuit of an elusive and mobile suspect allegedly involved in a grave criminal matter in which a lot of money was taken. Given that the suspect might still be in possession of some of the money, the need to intercept him became of great urgency. Granted the publicity that the case enjoyed at the time, it was necessary for the Police to get Killingi before some brave person and member of the public got in his way, with resultant injury to the suspect or

member of the public. Embarking on a Court of application for an order, would have costs and lost a lot of valuable time.

In the result I hold that the Police were justified in employing the latest technology to locate and apprehend the suspect as soon as possible. Therefore breach of Killingi's rights to privacy pales into insignificance as against the goal of achieving justice. A Court must be wary lest it be seen to be too quick to tip the scales of justice in favour of a litigant alleged to have deliberately trampled on the rights of others;

S V Ngcobo 1998 10 BCLR 1248 (N)

In conclusion, I hold that the Plaintiff has failed to prove her case. There was no unlawful arrest or unlawful detention.

The Plaintiff also sought damages for assault and torture; I find no merit in this claim. The assault even if viewed from the Plaintiff's side was not plausible, there was no mark or signs either physically or mentally on her. Thus, at the time the Plaintiff was released the following day, she went straight to work rather than to her home to recuperate, or receive medical attention.

In an event, the evidence of such assault if any was not that convincing. If the Plaintiff had been dragged by her hair as she claimed signs of bruises or forceful removal of hair should have been seen. Further, the Plaintiff did not even tell her lawyer about it on being released, or soon after. It was only when she lodged the complaint for unlawful arrest and detention that she raised it.

Thus i find not merit in the claim for assault.

Both claims for damages are therefore dismissed.

In light of his conclusion, I will not go into the matter of quantum.

The Defendant will be entitled to their costs.

**IT IS ORDERED ACCORDINGLY.**

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**GIBSON, J**

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