



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3828/2015

In the matter between:

THOMAS INGHANGWE NDJEBO

PLAINTIFF

and

THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA

DEFENDANT

Neutral citation: *Ndjebo v The Government of the Republic of Namibia*
(I 3828/2015) [2017] NAHCMD 140 (15 May 2017)

Coram: OOSTHUIZEN J

Heard: 27-31 March 2017

Delivered: 15 May 2017

Flynote: Claim for unlawful arrest – elements of reasonable suspicion – definitive to objective reasonable suspicion – claim for wrist watch not proven – succeeded claims for unlawful arrest and loss of cell phone.

Summary: As dealt with in the judgment, paragraphs [1] to [4] under the heading 'Summary of Pleadings and Evidence'.

ORDER

Having heard **Mr Brandt**, for the plaintiff and **Ms Kaakunga**, for the defendant –

IT IS ORDERED THAT:

1. Defendant shall pay N\$ 20 000.00 for the unlawful arrest and detention of plaintiff.
 2. Defendant shall return the plaintiff's cellular phone, alternatively pay N\$ 800.00 in damages.
 3. Interest at a rate of 20% per annum on the abovementioned composite amount of N\$ 20 800.00 from 15 May 2017 to date of final payment thereof.
 4. Costs of suit.
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JUDGMENT

OOSTHUIZEN J:

Summary of Pleadings and Evidence

[1] Plaintiff was arrested during the early morning of 6 July 2015 by members of the Namibian Police Force without a warrant of arrest.

[2] Plaintiff alleged that he was continuously assaulted during interrogation, which mainly occurred during the morning of 7 July 2015, and just after his arrest of 6 July 2015. This judgment shall centre on the question of whether plaintiff was lawfully arrested and detained. No cogent and objective evidence was presented by the plaintiff concerning the alleged assault upon him and the court find that the allegations of assault is highly improbable.

[3] Sergeant Nakangombe Frans Ndeshipanda testified that at the time of plaintiff's arrest he had a reasonable suspicion upon which he could arrest the plaintiff on an armed robbery which took place during the morning of 5 July 2017. He testified that information supplied by a confidential informant had proved to be correct and plaintiff's failure to take the police officers to his (plaintiff's) place of residence strengthened the suspicion.

[4] Sergeant Ndeshipanda testified about an informant (which the police wish not to identify) who on the Sunday of the robbery, gave valuable information to the police. As a result of the information the police were able to arrest a suspect prior to the arrest of the plaintiff. When the first mentioned suspect's residence was searched they found most of the items stolen during the robbery. On this first arrested suspect they found a cellular phone which contained the cellular number of the plaintiff.

The Law

[5] Was the plaintiff lawfully arrested?

[6] The fact that plaintiff was arrested without a warrant of arrest, is not conclusive of an unlawful arrest.

[7] Section 40(1)(b) of the Criminal Procedure Act, Act 51 of 1977 (the Act) provides that a peace officer may arrest any person without a warrant of arrest whom he reasonably suspects of having committed an offence referred to in schedule 1, other than the offence of escaping from lawful custody. Robbery is such an offence. Reasonable suspicion “will have to be supported by circumstances sufficiently strong in themselves to induce in a cautious person the belief that the arrested person has committed a First Schedule offence”.¹

[8] A reasonable suspicion does not equate to what the peace officer subjectively believed when he made the arrest. A reasonable suspicion must be an objective reasonable suspicion.²

Application of the law on the facts

[9] The facts I may lawfully consider is the following:

9.1 A robbery was committed on Sunday 5 July 2015.

9.2 A suspect was arrested by the police earlier on the morning of 6 July 2015, which was clearly identifiable on CCTV video tape and in which possession most of the robbed items were found.

9.3 The CCTV video footage was in the possession of the arresting officer, arresting the plaintiff, before he made the arrest of the plaintiff.

9.4 Plaintiff was not identifiable on the CCTV footage. Four identifiable suspects were clearly identifiable and known to the police. A fifth, wearing something covering his face was seen on the CCTV footage.

¹ Lansdown and Campbell, (1982) *South African Criminal Law and Procedure Vol V* at 276.

² *Nghimwena v Government of the Republic of Namibia* (SA 27-2011) [2016] NASC (22 August 2016).

9.5 No evidence was tendered by Sergeant Ndeshipanda that the plaintiff wore similar clothes to the hooded suspect or that similar clothing was found at his residence.

9.6 Plaintiff's cell number was found on the cell phone of the suspect who was already arrested and before plaintiff was enticed to meet the first mentioned suspect at a sewage drain by using the cell phone of the first mentioned suspect.

9.7 Plaintiff at first did not point out his correct place of residence. It was pointed out by his girlfriend.

9.8 Nothing linking plaintiff to the crime could be found at his residence after a diligent search.

[10] Sargent Ndeshipanda testified that –

'At this stage there was a reasonable suspicion upon which I could arrest the suspect. Firstly, the information that was supplied by the confidential informant had proved to be correct up to that point, and secondly, the failure of the suspect to take us to his place of residence raised suspicion. I touched him and placed him under arrest.'

[11] I find that the said police officer did not make the arrest on an objective reasonable suspicion.

[12] Plaintiff testified inter alia that the police confiscated his wrist watch and cell phone and that he did not get it back upon his release. Plaintiff did not prove that he had his wrist watch confiscated (if he had one). It was admitted that his cell phone was/is in the possession of the defendant and not given back to the plaintiff, although tendered.

[13] Plaintiff succeeds with his claim for unlawful arrest and his lost cell phone.

[14] It is ordered that –

1. Defendant shall pay N\$ 20 000.00 for the unlawful arrest and detention of plaintiff.
2. Defendant shall return the plaintiff's cellular phone, alternatively pay N\$ 800.00 in damages.
3. Interest at a rate of 20% per annum on the abovementioned composite amount of N\$ 20 800.00 from 15 May 2017 to date of final payment thereof.
4. Costs of suit.

GH Oosthuizen
Judge

