REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-DEL-2020/00414

In the matter between:

EBSON KATIRE **PLAINTIFF**

And

MINISTER OF SAFETY AND SECURITY **1st DEFENDANT**
INSPECTOR GENERAL OF THE NAMIBIAN POLICE **2nd DEFENDANT**
POLICE OFFICER KAURA **3rd DEFENDANT**
POLICE OFFICER KATIRA **4TH DEFENDANT**
POLICE OFFICER UPI **5TH DEFENDANT**

Neutral citation: *Katire v Minister of Safety and Security* (HC-MD-CIV-ACT-DEL-2020/00414) [2021] NAHCMD 543 (23 November 2021)

Coram: PARKER AJ
Heard: **13, 14, 15, 23, 24 September 2021**
Delivered: **23 November 2021**

Flynote: Delict – Specific form – Assault – Court finding that no probative material with regard to the alleged assault was placed before the court by plaintiff – Plaintiff and plaintiff's only witness who were together in each other's presence at the relevant time witnessed no assault as described by plaintiff – Court finding plaintiff's evidence about the assault unsafe and unsatisfactory – Court finding no proof of alleged assault.
Held, proof of a fact means the court had received probative material with regard to such fact and has accepted such fact as being the truth for purposes of the specific case.

Summary: Delict – Specific form – Assault – Plaintiff avers assault by police officials at a police station – Plaintiff and plaintiff's only witness were held at a police station together and in each other's presence – Plaintiff's witness witnessed no assault as alleged and described by plaintiff – Plaintiff waited for five long days before seeking medical attention for what plaintiff described as a severe beating that he allegedly received from the police officials – Court finding medical report admitted by court having no probative value – Report could not assist the court in deciding whether alleged injuries were as a result of an assault that allegedly occurred some five days previously.

ORDER

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1. The plaintiff's action is dismissed.
2. There is no order as to costs.
3. The matter is considered finalized and is removed from the roll.

JUDGMENT

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[1] Once more, the Minister of Safety and Security has been hauled before the court to vicariously answer for the alleged unlawful acts of police officials. In his pleading, plaintiff sued for assault and unlawful arrest and detention. However, Mr

Nanhapo, counsel for plaintiff, placed on record that plaintiff was not pursuing the unlawful arrest and detention claim; and so, no evidence was led to prove that claim. What remains is the assault claim.

[2] On the sole assault claim, we are confronted with these neat questions, namely, (a) is there proof that plaintiff was assaulted by the named police officials; (b) is there proof that plaintiff suffered the injuries as a direct consequence of the alleged assault; and (c) is there proof that plaintiff suffered the damages he claims he suffered? It is important to note that the court shall consider paras (b) and (c) only if plaintiff succeeds in establishing para (a); and so, it is to para (a) that I now direct the enquiry. In considering para (a), the first thing to do is to consider certain basic principles respecting the law of evidence.

[3] First and foremost, plaintiff bears the burden of proof of what he alleges. (*Pillay v Krishna* 1946 AD 946) In that regard, plaintiff must place before the court satisfactory and sufficient evidence in proof of what plaintiff alleges. And evidence is defined as 'any matter of fact, the effect, tendency, or design of which is, to produce in the mind a persuation, affirmative or disaffirmative, of the existence of some other matter of fact', and judicial evidence as "the evidence received by courts of justice in proof or disproof of facts, the existence of which comes in question before them".' (GD Nokes *An Introduction to Evidence* 4th ed (1967) at 4) Thus, plaintiff bears the burden of placing before the court sufficient and satisfactory evidence 'which tend to prove … any matter of fact, the truth of which is submitted to judicial investigation.' (Taylor *A Treatise on the Law of Evidence* 12th ed (1931); quoted in GD Nokes *An Introduction to Evidence* at 5) And in their work *Principles of Evidence* (1997) at 17, PJ Schwikkard *et al* write:

'Proof of a fact means that the court has received probative material with regard to such fact *and* has accepted such fact as being the truth for purposes of the specific case. Evidence of a fact is not yet proof of such fact: the court must still decide whether or not such fact has been *proved*. This involves a process of evaluation. The court will only act upon facts found proved in accordance with certain standards. In a criminal case the standard of proof is proof beyond a reasonable doubt. In a civil case the standard of proof is proof upon a balance of probability – a lower standard than proof beyond reasonable doubt.'

[Ehaphasis in original passage]

[4] I now proceed to apply the foregoing basic principles to the facts of the case. Plaintiff gave evidence in support of his case; and Mr Collin Kuhanga gave evidence in support of plaintiff's case. The first crucial finding to make is that on the evidence plaintiff and Kuhanga were together in each other's presence throughout the relevant time, except for a short insignificant time during which Kuhanga was placed in the police cells, to be followed by plaintiff later.

[5] The issue is not as 'simple' as plaintiff's counsel, Mr Nanhapo, thinks. It is not simply that plaintiff 'was assaulted by the defendant'. The case turns primarily on whether an assault has been proved by plaintiff, that is, has plaintiff placed sufficient and satisfactory evidence before the court 'which tend to prove' the assault whose truth the court ought to investigate (GD Nokes *An Introduction to Evidence* at 5) And it must be remembered, on the pleadings, defendants bear no onus to prove that there was no assault. In other words, the question is: Has the court 'received probative material' with regard to the alleged assault, that is, has 'such fact been proved (PJ Schwikkard *Principles of Evidence* loc cit) The plaintiff is before a court of law, which is interested in receiving probative material presented as proof of a fact; and the court must 'decide whether or not such fact has been proved'. (PJ Schwikkard *Principles of Evidence* loc cit)The court is not interested in allegations and unproved assertions and averments. That could probably make good media news.

[6] In his witness statement, plaintiff says that he was driven to the Okondjatu Police Station by police officials, namely, third defendant (Kaura), fourth defendant (Katira) and fifth defendant (Upi) (a defence witness). Furthermore, he was handcuffed across his back and then kicked sending him to the floor. While on the floor, Kaura 'started to brutally assault me and was shortly joined by Katira and Upi'. But in his oral examination-in-chief-evidence, plaintiff testified that upon entering the threshold of the charge office, Kaura gave him a hard slap on his face, sending him to the floor. Thereupon, he was handcuffed and beaten by Kaura, Katira and Upi. According to plaintiff, the beating took the form of being kicked with boots all over his

body, punched, and hit with hand palms, and his handcuffed arms being twisted. The assault according to plaintiff lasted over one hour, leading him to defecate. The first inconsistency on his testimony is that he was either handcuffed only after a blow had sent him to the floor or he was handcuffed before the alleged beating.

[7] Plaintiff did not mention in his witness statement that after he and Kuhanga were released from the police cells the following day (12 September 2019) he went to buy Panado pain-killer tablets because he had suffered bodily pain as a result of the alleged beating. This is mentioned only in his oral evidence.

[8] There is nothing in plaintiff's pleading that Kaura and Upi assaulted him and his companion and plaintiff witness, Kuhanga, with *shamboks*. But in his evidence, Kuhanga testified that upon their arrival at the Police Station, he and plaintiff were separately handcuffed at their backs and the handcuffs secured to two gas cylinders; and while in that position, they were beaten with *shamboks* by Kaura and Upi. Although plaintiff and Kuhanga were together at the relevant time and in each other's presence, except for a short insignificant time, Kuhanga testified that he did not see any police officials kick plaintiff to the floor of the charge office, whereupon, three of them descended upon him and gave him the type of beating plaintiff testified on. The high probability is that Kuhanga would have seen it, if it took place.

[9] As I say, Kuhanga's testimony has great probative value and it carries enormous weight. He is a plaintiff's witness. Kuhanga was candid and forthright, and forthcoming with his answers in his cross-examination-evidence. I find him to be a credible witness. I cannot say the same of plaintiff. Plaintiff gave me the distinct impression that he was concealing the truth. For instance, in his cross-examination-evidence, he testified that he did not see the need to seek medical attention at a clinic at Okondjatu where the alleged assault took place; even though he alleged he was beaten severely, causing him to defecate, and causing a dislocation of his left shoulder bone; and he suffered other bodily injuries and was bloodied. His reason for not seeking immediate medical attention is that he knew the local clinic did not have an X-Ray machine. But on his own evidence, the dislocation of his left shoulder bone was not the only injury. Indeed, he testified that his shirt was soaked with blood. To start with, with all that beating and injuries that he alleged he suffered, plaintiff was

able to walk 8 km towards his homestead at Okamari village, getting a lift from a motor vehicle for the last two kilometres; and what is more, he refused to seek immediate medical attention at the clinic at the locus of the alleged beating.

[10] Common sense (*S v Jaar* 2004 (8) NCLP 52) and common human experience (*Bosch v The State* [2001] BLR (Court of Appeal); see *Geomar Consult CC v China Harbour Engineering Company Ltd Namibia* NAHCMD 455 (5 October 2021)) tell me that if in truth plaintiff received the kind of beating he says he received and suffered the injuries he says he suffered, he would have sought immediate medical attention at the locus of the alleged beating, that is, Okondjatu. He also did not seek immediate medical attention at any nearby intermediate medical facility, eg at Okakarara.

[11] Plaintiff waited for five long days before seeking medical attention in Windhoek. His excuse that he did not seek medical attention at the clinic at Okondjatu clinic because he knew they did not have an X-Ray machine is rejected as, with respect, bunkum, since, as I have said, the alleged dislocation of his shoulder bone was not the only injury he himself testified he suffered, and he testified further that his shirt was soaked with blood as a result of the injuries he alleged he suffered as a consequence of the alleged beating. In any case, there is no evidence tending to establish that the only medical attention that plaintiff needed was X-Ray examination; and plaintiff did not testify that he has had medical training to be able to decide that.

[12] Similarly, I reject as unsatisfactory plaintiff's reason that he did not seek immediate medical attention in Windhoek soon after 12 September 2019 and only did so on 17 September 2019 because public transport from Okondjatu to Windhoek was not available. But Windhoek was not the only alternative. The evidence indicated that there are nearby intermediate medical facilities, eg in Okakarara. Besides, plaintiff does not tell the court as to what other efforts he made in vain to seek immediate medical attention in a medical facility in Windhoek or Okakarara.

[13] The police officials deny that they assaulted plaintiff while he was at the police station. I have already found that plaintiff sought no immediate medical attention at a

medical facility on 12 September 2019, even though plaintiff and Kuhanga were released from the police station at 13H49 on that date. The information on the medical report issued by the Windhoek Intermediate Hospital on 17 September 2019 is an excerpt from a Ministry of Health and Social Services Health Passport issued to outpatients. The information therein has no probative value. The report does not tell the court that the alleged dislocation of the shoulder bone of plaintiff occurred on 11 September 2019. It should be remembered that in his evidence, Upi testified that when the police officials were about to place plaintiff in handcuffs, plaintiff informed the police officials that they should take care, because he had dislocated his left shoulder bone in a fight in Windhoek. That evidence stood uncontradicted at the close of plaintiff's case. Secondly, Kuhanga testified that plaintiff did not tell him that his left shoulder bone had dislocated as a result of the beating by the police officials. What Kuhanga testified is that he saw that plaintiff's left shoulder was swollen. I reject this piece off testimony. There is no evidence that plaintiff wore no shirt when he and Kuhanga were in the police charge office or in the police cells; or when they were released from the cells.

[14] Filed of record is one sheet of paper with the notation 'Ministry of Health and Social Services: X-Ray Examination.' Similarly, the report does not estimate when the dislocation of the left shoulder bone occurred. The report merely repeats what plaintiff had told the medical practitioner who attended to him; and what is more, there is no X-Ray photograph to prove conclusively that an X-Ray examination of the shoulder actually took place. In sum, plaintiff's evidence is unsafe and unsatisfactory to accept.

[15] The inevitable conclusion is that Kuhanga's evidence that he did not witness any assault as described by plaintiff take place should to be accepted as true. There is no evidence *aliuende*, for example, in the form of clear and conclusive medical examination report, to contradict Kuhanga's cogent and satisfactory evidence.

[16] Plaintiff's allegation that he defaced as a result of the alleged beating should also, by a parity of reasoning, be rejected as false. Upii testified that it is true plaintiff defecated; and that plaintiff announced that he was going to defecate before he defecated. There is no medical evidence tending to establish that the defecation

could only be as a result of a beating. In any case, plaintiff did not inform the medical practitioner who attended to him that he defecated during the alleged beating for the medical personnel to make such a medical assessment and supply to the court scientific evidence to assist the court.

[17] Upon the authority of *M Pupkewitz & Sons (Pty) Ltd t/a Pupkewitz Megabuilt v Kurz* 2008 (2) NR 775 (SC) para 30, going upon a mere preponderance of probability, I find that there is no cogent, safe and satisfactory evidence tending to establish that police officials assaulted plaintiff. There is no such evidence before the court tending to prove the alleged assault, the truth of which I have subjected to judicial investigation, and found not to exist. (See GD Nokes *An Introduction to Evidence* at 5.) Doubtless, what is alleged and not proved remains a mere irrelevance. (See *Klein v Caremed Pharmaceutical (Pty) Ltd* 2015 (4) NR 1016 (HC)). Indeed, plaintiff case falls under its own weight, as I have shown.

[18] As I intimated previously, having found that plaintiff has not proved the assault, it is otiose to consider the injuries plaintiff alleged he suffered and the claim for damages for the alleged injuries: See para 2 above.

[19] As to costs; I should say this. The defendants have succeeded in resisting and parrying plaintiff's claim. In that regard, I rehearse here what I said in a similar case, namely, *Naholo v The Government of the Republic of Namibia* NAHCMD 553 (2 December 2020), in order to make no costs order against plaintiff:

> 'It is rather the defendants who have succeeded substantially, having successfully resisted four out of five claims; and so, in the normal run of things, it is defendants who should have their costs. Nevertheless, I have taken into account the following important factors: The defendants are from the Government. The plaintiff is an ordinary, unemployed person who came to court to vindicate her rights guaranteed to her by the Namibian Constitution. Such conduct by poor, ordinary persons should be encouraged in a constitutional State. For these reasons, I think it is fair and just that each party pay their own costs.'

[20] Based on these reasons, I order as follows:

1. The plaintiff’s action is dismissed.
2. There is no order as to costs.
3. The matter is considered finalized and is removed from the roll.

C PARKER

Acting Judge

APPEARANCES:

PLAINTIFF:	T NANHAPO Of Brockerhoff & Associates Legal Practitioners, Windhoek
DEFENDANT:	F MATSI Of Government Attorney, Windhoek