



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO: 2555/201

In the matter between:

KERIKE IVAN NGCAMA

PLAINTIFF

and

MINISTER OF POLICE

1st DEFENDANT

NATIONAL DIRECTOR OF PUBLIC PROSECUTION

2nd DEFENDANT

JUDGMENT

CENGANI-MBAKAZA AJ

INTRODUCTION

[1] The plaintiff instituted action for unlawful arrest and detention against the Minister of Police (the 1st defendant) and the National Prosecuting Authority (the 2nd defendant) for malicious prosecution. On 12 July 2022, the plaintiff withdrew a claim for malicious prosecution against the second defendant and tendered to make payment for the wasted costs. The tendered payment was accepted by the second defendant's counsel.

THE PLEADINGS

[2] In pursuit of his claim for unlawful arrest and detention, the plaintiff issued a combined summons against the 1st defendant (the defendant) on 27 July 2016. The particulars of claim are summarised as follows:

(a) On 20 April 2015, at KSD College Libode, the plaintiff was wrongfully arrested and detained by members of the South African Police Service (SAPS), where it was alleged that he committed a crime of rape. The arrest was effected by the said members of SAPS without reasonable suspicion and justifiable cause and without any warrant authorizing it.

(b) The plaintiff further averred that he was unlawfully detained at Libode police station on 20th April 2015, was later transferred to Wellington Prison, and later released on 31st March 2016. He demands a sum of R2 500 000.00 (Two Million, Five Hundred Thousand Rand only) for a delictual claim against unlawful arrest and detention.

[3] The defendant delivered a plea dated 18 November 2016 and boldly denied the events as pleaded. This led to defendant filing an amended plea on 07 June 2022. In the amended plea, the defendant averred that the plaintiff was lawfully arrested and detained for a charge of rape of a five-year-old grade R girl by the name of [K.....].

[4] The claim is based on vicarious liability; it being pleaded that the members of SAPS committed a delict when acting in the course and scope of the defendant's employment. In a pre-trial conference held on 12 April 2023, the parties agreed that there would be no separation between merits and quantum. The trial proceeded on that basis.

[5] Counsel for the defendant admitted that the onus rests on the defendant to justify arrest. He further admitted that the duty to begin consequently rests with them.

DEFENDANT'S CASE

[6] Warrant Officer Xhala (the arresting officer) works for the Family, Child, and Sexual Offence Unit (FSC) at SAPS. He received a police docket from Libode police station. The docket consisted of a statement from the victim's mother who deposed that she observed the child oozing a substance from her genitals and peeing on herself. She ascertained from the child what was wrong. The child could not reveal until she later informed her that she was raped by the plaintiff.

[7] The docket further consisted of a medical report commonly known as a J88. This report was compiled by the Doctor after he examined the five-year-old girl on 17 April 2015. The details on the gynaecological examination are contained on pages 2 and 3 of the report. The Dr observed that the Clitoris, labia minora, frenulum of the clitoris and para-urethral folds were bloodstained. Additionally, there was active vaginal bleeding and scratches in her genitals to which the Doctor concluded that a vaginal penetration by a blunt object could have occurred in her genitals.

[8] The arresting officer interviewed the child in the presence of her mother. The child consistently informed him that she was raped by the plaintiff. The child implicated the plaintiff by calling his name and further described him as Sheniye's brother. In a statement written in both English and IsiXhosa languages the child stated that the plaintiff called her at his home and raped her.

[9] The arresting officer testified that considering the evidence that he possessed in the police docket, he formulated a reasonable suspicion that the plaintiff had committed a crime of rape. He then approached the suspect and introduced himself. He informed him of his constitutional rights and executed arrest and detention. The arresting officer further testified that even though no semen was detected which could be utilised to provide DNA evidence, he still held a reasonable suspicion that the plaintiff had committed the said crime.

[10] In cross-examination, counsel for the plaintiff suggested that the officer should not have arrested the plaintiff because there was no DNA evidence which is required for conviction in rape cases. Counsel claimed that the plaintiff should have been

interviewed before arrest. The officer should have relied on plaintiff's denial of facts and not arrest him, so he suggested. The arresting officer testified that he interviewed the plaintiff and that he denied the allegations against him.

[11] Counsel criticised the arresting officer for relying on the child's statement which was not commissioned. The arresting officer conceded that the child statement was not commissioned and asked the court to note that this was a child and that he interviewed her in the presence of her guardian (the mother).

[12] Counsel further criticised the arresting officer for not employing less invasive arrest techniques. It was put to him that the plaintiff was not a flight risk. The arresting officer conceded that there was no likelihood that the plaintiff would evade his trial. He further stated that he was not required to request a warrant prior to his arrest. Based on the information in the police docket and his analysis of facts he decided that the plaintiff ought to be arrested and detained. The arresting officer was adamant that his actions were justified. With this evidence, the defendant closed his case.

THE PLAINTIFF'S CASE

[13] The plaintiff testified that at the time of his arrest, he was a student at FET College in Mthatha. On the day of his arrest, the police officer came to school, introduced themselves and publicly informed him of the crime he was being arrested for.

[14] They arrested and detained him at Ngqeleni Police Station for three days, later at Libode police station and further at Wellington prison. After his first appearance in court, he was detained for a period of seven days. He later applied for bail which was denied. He was detained for a period of twelve months. When the 5-year-old girl testified in court, she implicated him and another known 5-year-old boy as the perpetrators. He testified that during criminal proceedings, the court returned a verdict of not guilty and discharged him accordingly.

[15] The plaintiff further testified that the police cells were filthy with a capacity of about 10 inmates inside. They were made to wash with cold water and sing the whole night. It was easy to fight among the inmates, so he testified.

[16] In cross-examination the plaintiff testified that on the day of the incident he had paid a visit at Nqadu area. He admitted that the child is his neighbour and would normally come to his home to play with others. The plaintiff further confirmed that he made a statement to the police and informed them that on the day of the incident he saw the child fetching water at his home. It was further put to him that the arrest and subsequent detention were justified.

ISSUES

[17] The issues up for debate are whether plaintiff's arrest and subsequent detention were justified and whether the less invasive methods of arrest were not necessary in the circumstances.

THE LAW

[18] Section 12 of the Constitution of the Republic of South Africa (the Constitution)¹ guarantees the freedom and security of a person. The section pledges *inter alia* the right not to be deprived of freedom arbitrarily without a just cause. The onus rests upon the arrestor to prove that the arrest was objectively lawful.²

[19] It is common cause that the plaintiff was arrested without a warrant of arrest. Section 40(1) (b) of the Criminal Procedure Act (CPA)³ prescribes arrest without a warrant as is relevant in this case. The Section reads,

"A peace officer may, without a warrant, arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from custody".

¹ Act 108 of 1996, The Constitution.

² Minister of Law and Order and Others v Hurley and Another 1986(3) SA 568 AD at 589 E-F; Minister of Law-and-Order v Matshoba 1990 (1) SA 280 AD at 284.

³ The Criminal Procedure Act 51 of 1977.

[20] To prove that the arrest was lawful, it must be satisfied that:

- (i) The arresting officer was a peace officer;
- (ii) the arresting officer entertained a suspicion;
- (iii) the suspect to be arrested committed an offence referred to in Schedule 1; and that
- (iv) the suspicion rested on reasonable grounds.

[21] The ruling in *Mabona*⁴ demonstrates how a reasonable suspicion is formed. Jones J explained what the concept of reasonable suspicion entailed. First, he held, the test is an objective one involving an enquiry into whether a reasonable person in the arrestor's position and having the same information would have considered that there were 'good and sufficient grounds for suspecting that the arrestee had committed a Schedule 1 offence. Secondly, the arrestor is required to analyse and assess the quality of the information critically and not accept it without checking it where it can be checked. Thirdly, while the section requires 'suspicion but not certainty', that suspicion must be based 'upon solid grounds' because if it is not, it is 'flighty or arbitrary, and not a reasonable suspicion'.

[22] It is trite that if the jurisdictional facts are satisfied, the peace officer may invoke the power conferred upon him and arrest the suspect, but he has discretion as whether to exercise that power. In *Holgate- Mohammed v Duke*⁵, it was stated that the exercise of discretion will be unlawful if the arrestor knowingly invokes the power to arrest for a purpose not contemplated by the legislator.

[23] The *Sekhoto*⁶ matter ruled that once jurisdictional facts are present the discretion of whether to arrest arises. Harms DP set some limits of the reasonable suspicion discretion.

"At para 42-44:

⁴ *Mabona & another v Minister of Law and Order & others* 1988 (2) SA 654 (SE) at 658E-H,

⁵ 1984 (1) All ER 1054 (HL) 1057.

⁶ 2011 (1) SACR 315 (SCA).

1. Peace officers are entitled to exercise this discretion as they see fit, provided they stayed within the bounds of rationality.
2. This standard is not breached because an officer exercised the discretion in a manner other than that deemed optimal by the court.
3. The standard is not perfection, or even the optimum judged from the vantage of hindsight, and, as long as the choice made fell within the range of rationality, the standard is not breached.
4. It is clear that the power to arrest is to be exercised only for purpose of bringing the suspect to justice; however, arrest is but one step in that process.
5. The arrestee is to be brought to court as soon as reasonably possible, and the authority to detain the suspect further is then within the discretion of the court.
6. This discretion is subject to a wide-ranging statutory structure and, if a peace officer were to be permitted to arrest only when he or she is satisfied that the suspect might not otherwise attend the trial, then the statutory structure would be entirely frustrated. To suggest that such a constraint upon the power to arrest is to be found in the statute by inference is untenable.
7. The arrestor is not called upon to determine whether a suspect ought to be detained pending trial; that is for the court to determine; and the purpose of an arrest is simply to bring the suspect before the court to enable it to make that determination.
8. The enquiry to be made by a peace officer is not how best to bring the suspect to trial, but only whether the case is one in which the decision ought properly to be made by a court. The rationality of the arrestor's decision on that question is depended upon the facts of the particular case, but it is clear that in cases of serious crimes such as those listed in Schedule 1, an arrestor could seldom be criticised for arresting a suspect to bring him or her before the court."

THE PARTIES' LEGAL SUBMISSIONS

[24] In his heads of argument, the plaintiff launched certain points of criticism regarding the defendant's defence to the claim. He brought the court's attention to the defendant's plea, on page 31 and paragraph 3 of page 32 of the index bundle. The paragraph reads:

"3 the defendant further contends that Plaintiff was lawfully arrested and detained for charge of rape of a five-year-old Grade R girl by the name of [K....]"

[25] The plaintiff argued that the defendant's defence is a bare denial as it does not contain a specific reliance on a Section in the CPA.

[26] Before traversing on the facts and other points of criticism that were raised by the parties, I pause to deal with this preliminary issue. To settle the argument raised, it is imperative to first have regard to the basic principles governing pleadings in general. The pleadings must state the facts only and not the law; pleadings must state the material facts and not the evidence required to prove those facts and lastly, the material facts must be pleaded concisely. The other party must not be ambushed, he must know which case to meet.

[27] In *Minister of Safety and Security v Slabbert*,⁷ the court stated,

“The purpose of pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies, it is impermissible for a plaintiff [in this case the defendant] to plead a particular case and seek to establish a different case at trial.”(Accentuation added)

[28] At the onset, the defendant’s plea was a bare denial until he filed an amended plea which specifically stated that the plaintiff was lawfully arrested and detained for charge of rape of a five-year-old Grade R girl by the name of [K.....].

[29] It must be remembered that a pre-trial conference was held on 12 April 2023⁸. In paragraph 2 of the minutes, the following is stated,

“Both parties agreed that at this stage neither party has been prejudiced due to non - compliance with the Rules of Court.”

[30] At the beginning of the proceedings, there were no preliminary issues raised and the trial was conducted on the understanding that the defendant bore the onus to prove that the arrest and subsequent detention were justified. The fact that a rape charge falls under Schedules 1 of the CPA was never placed in dispute. The defendant admitted that the plaintiff was arrested without a warrant. Counsel for the plaintiff laid no basis to demonstrate that a different case was pleaded, and that he suffered prejudice. Instead, he referred the court to the case of *Jowell v Bramwell-Jones* 1998(1) SA 836 (W). It is insignificant to dwell much on this case, it is safe to

⁷ *Minister of Safety and Security v Slabbert* [2009] ZASCA 163; (2010) 2 All SA 474 (SCA).

⁸ Pages 66- 70 of the amended index to pleadings

conclude that the facts at the *Jowell* matter as well as the principles laid down thereto are irrelevant for purposes of these proceedings. In the present matter, the material facts were known by both parties throughout the proceedings. The fact that no relevant section was quoted in the pleadings is immaterial. In my considered view, the plaintiff suffered no prejudice as a result of the lack of a quotation of a particular section in the CPA.

[31] Counsel also criticized the defendant for not calling the child and her mother to give evidence before court. Their statements remain hearsay with no probative value to be attached to them at all, so the argument continued.

[32] The plaintiff further argued that the child's statement was not commissioned and should accordingly be rejected.

[33] The defendant, on the other hand, referred the court to several authorities and argued that rape is a very serious offence that justified arrest and made issuing of summons inappropriate. The defendant further argued that the information at the arresting officer's disposal was sufficient to justify the arrest and subsequent detention.

EVALUATION

[34] The following facts are found to have been proven:

- (a) Warrant Officer Xhala was a peace officer;
- (b) He entertained a suspicion;
- (c) a suspicion was that the plaintiff had committed a Schedule I offence;
- (d) the plaintiff was arrested on 20 April 2015;
- (e) on his first appearance before the court, he was detained for seven days;
- (f) on the day of the formal bail application, bail was opposed and formally denied by the court;
- (g) the plaintiff is Sheniye's brother and also the child's neighbour;
- (h) when the matter was tried, the child witness implicated the plaintiff and another five-year-old boy as perpetrators of the crime of rape;

- (i) the court returned a verdict of not guilty in terms of Section 174 of the CPA and
- (j) the plaintiff was released on 31 March 2016.

ARREST

[35] Our courts have accepted that if an arrest or detention is by or at the instance of any public officer or authority, the responsible official must justify the arrest or detention by pointing to the statute or statutory regulation from which he claims to derive his power to arrest or detain the detainee and he must demonstrate that he acted within the scope of the power conferred, and further that he has observed the provisions of the statute or regulation that empowered him to do so.⁹ As alluded, Section 40(1) (b) of the CPA justifies arrest without a warrant.

[36] Rape of a minor child is a statutory offence falling within the ambit of Section 3 of Criminal Law Sexual Offences and Related Matters Amendment Act, 32 of 2007.¹⁰ In terms of statute rape it is defined as an act of 'sexual penetration' with another person without such person's consent. The statement of the child's mother, that of the child and a medical report were discovered in the bundle of documents. An act of sexual penetration was demonstrated in the said statements. The child consistently informed the arresting officer that she was raped by the plaintiff. It is imperative to note that a five-year-old lacks the capacity to consent to sexual intercourse.¹¹ The arresting officer obtained a statement from the child's mother to prove consistency in the child's complaint and not to prove that rape had occurred.¹² This is a standard practice that is admitted in criminal proceedings in particular rape matters. The statement is normally referred to as first report evidence. With respect, the contention that the mother's evidence is irrelevant because he was not present when the rape offence was allegedly committed is misplaced. Additionally, the fact that semen was not emitted during the alleged sexual intercourse is irrelevant for

⁹ *Madyibi v Minister of Police* (4132/17) [2020] ZAECHMHC 11;2020(2) SACR 243 (ECM) (17 March 2020).

¹⁰ The Criminal Sexual offences and Related matters Amendment Act, the Act.

¹¹ Section 1(2)(d)(iv) Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007.

¹² In *S v Hammond* (500/03) [2004] ZASCA 71; [2004] 4 All SA 5 (SCA) (3 September 2004).

purposes of Section 40(1) (b) of the CPA. This then settles the argument that scientific proof in the form of DNA analysis was not produced.

[37] It is further my considered view that the focus should not be on the quantity of evidence that a police officer had at his disposal. The focus should rather be on the quality of information that the officer possessed.

[38] The following passage quoted from the matter of *Biyela v Minister of Police*¹³ is relevant in these proceedings:

“At para [35] What is required is that the arresting officer must form a reasonable suspicion that a Schedule 1 offence has been committed based on credible and trustworthy information. Whether that information would later in a court of law found to be inadmissible is neither here nor there for the determination of whether the arresting officer at the time of arrest harboured a reasonable suspicion that the arrestee committed a Schedule 1 offence.”

[39] On the hearsay nature of evidence, as argued, it must be remembered that the arresting officer not only relied on the witness's statements but also interviewed all the parties involved on the alleged charge of rape. I disagree with the plaintiff's counsel that the child and the mother ought to have been called to testify in these proceedings. I am therefore not persuaded that the evidence of the arresting officer qualifies as hearsay in terms of Section 3 (1) of the Law of Evidence Amendment Act 45 of 1988. Regardless, the principle in *Biyela*¹⁴ matter settles the argument raised on this aspect.

[40] It is noted that the child statement was not commissioned. To address this point, it is commanding to consider the Standing Orders 322, 327 and Standing Order General 18 of 1990. The guidelines relating to the taking of a statement of a child victim are set out in the Standing Orders. In terms of Section 28 of the Constitution, a child is a person under the age of 18 years. Police are guided to determine whether or not a child understands the oath or affirmation. In terms of the Standing Orders, it is generally accepted that a child under the age of 12 years does

¹³ (1017/2020) [2022] ZASCA 36; 2023 (1) SACR 235 (SCA) (1 April 2022).

¹⁴ Supra footnote no 13.

not understand the oath or affirmation. This then explains why the child's statement was not commissioned.

[41] It is further accepted that the child was a 5 –year- old grade R girl. Most importantly she was interviewed in the presence of her mother. It was therefore significant for the arresting officer to keep records of the said interview. The arresting officer informed the court that the content of his interview with the child was consistent to what was contained in the statement. In my considered view, reliance on the statements of the witnesses, the records of the interview of the child and the plaintiff as well as a medical report was enough to formulate a reasonable suspicion that the child was raped, and the perpetrator was satisfactorily identified. Even though the date of the incident was not specifically mentioned, the plaintiff admitted to have seen the child at his home on the day of the alleged incident. The issue of alibi was raised later, hence the arresting officer could not make any follow up to verify it. I therefore find that the information was credible and trustworthy for purposes of formulating a reasonable suspicion that a Schedule 1 offence was committed. Considering the above, the suspicion was based on solid grounds. I am therefore satisfied that prior to arrest, the jurisdictional facts were established. The fact that the plaintiff was discharged in terms of Section 174 of the CPA has no bearing on the issues raised.

DETENTION

[42] An argument was raised that the arrest should have been effected by less invasive means. This triggers a question on whether the arresting officer was justified to detain the plaintiff. The methods of securing the attendance of an accused in court are encapsulated in Section 38 of the CPA.¹⁵ In *Louw v Minister of Safety and Security*¹⁶, it was stated that police are obliged to consider each case when a

¹⁵ "38 METHODS OF SECURING THE ATTENDANCE OF ACCUSED IN COURT

(1) *Subject to section 4(2) of the Child Justice Act, 2008 (Act 75 OF 2008), the methods of securing the attendance of an accused in court who is eighteen years or older in court for purposes of his or her trial shall be arrest, summons, written notice and indictment in accordance with the relevant provisions of this Act."*

¹⁶ 2006 (2) SACR 173(T) at 186a-187(e).

charge has been laid for which a suspect might be averted whether there are no less invasive options to bring the suspect before a court other than immediate detention of the person concerned. If there is no reasonable apprehension that the suspect will abscond or fail to appear in court if the warrant is first obtained for his or her arrest or a notice or summons to appear in court is obtained, then it is constitutionally untenable to exercise power to arrest.

[43] In *McDonald v Kumalo*¹⁷, Graham JP reiterated that, the object of the arrest of an accused person is to ensure his attendance in court to answer to a charge, and not to punish him for an offence of which he has not been convicted.

[44] It has been established that effecting an arrest is a harsher method of initiating a prosecution than citation by way of summons but if circumstances exist which make it lawful under a statutory provision to arrest a person as a means of bringing him to court, such arrest is not unlawful even if it is made because the arrest will be more harassing than summons.¹⁸ At 17H, Schreiner JA said,

“But there is no rule of law that requires the milder method of bringing a person into court to be used whenever it would be equally effective.”

[45] In the case under consideration, the arresting officer conceded that there was no likelihood that the plaintiff would evade his trial. The arresting officer’s role was to arrest the plaintiff to bring him before the court. I find that this was a reasonable step to employ. I also find that in doing so, he followed all the relevant procedures, I say so because the plaintiff was aware of the charges that were levelled against him, he was informed of his constitutional rights and was brought to court within a reasonable time. At page 6 of the index bundle titled ‘index on docket contents’, it is noted that the plaintiff was informed of his rights to consult with a legal representative of his choice. He thus elected to be provided with a legal practitioner.

¹⁷ 1927 AD 293 at 301.

¹⁸ *Tsose v Minister of Justice and Others* 1951 (3) SA 10(A) at 17F-H.

[46] According to my assessment of the *Sekhoto*¹⁹ case, since the plaintiff was charged with an offence falling under schedules 1 and 6 of the CPA, the quality of information in favour of the arrest and detention was overwhelming. Even if the arresting officer had a belief that arrest will be more harassing than summons, he was unable to prevent arrest and subsequent detention for purposes of bringing the plaintiff to justice. The statutory framework governing bail would be undermined if the arresting officer were only required to arrest in circumstances where he was satisfied that the suspect would not attend the trial. This was not a trivial offence where the peace officer would have been expected to employ other methods of arrest. It was for the court to make a determination on whether the plaintiff was eligible to be released on bail or on warning. I agree with the defendant's counsel that the issuing of summons in this situation would be inappropriate.

[47] Section 60(11) (a) of the CPA justifies detention in rape cases involving minor children. This provision reads:

“Notwithstanding any provision of this Act, where an accused is charged with an offence referred to (a) in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his or her release”
[Emphasis added]

[48] The word ‘*shall*’ demonstrates that the detention is peremptory, and the court can only release the suspect after having heard the evidence and exercising its discretion based on the circumstances of the case. In this scenario, the onus was placed upon the plaintiff to adduce evidence to prove that exceptional circumstances exist which in the interest of justice permitted his release. The plaintiff's further detention which spiralled up to a period of twelve months was dependent upon the lawfulness of the Magistrate's orders. The facts demonstrate that although the plaintiff was allowed to adduce evidence in a formal bail application, he failed to meet the necessary threshold. The situation is not at all the fault of the arresting officer.

¹⁹ Above n 8.

[49] Our Constitution empowers police officers to prevent, combat and investigate crime, to maintain public order, to protect, and secure inhabitants of the Republic, and to uphold and enforce the law.²⁰ The South African Police Act, on the other hand, permits police officers to exercise their authority and to carry out the responsibilities granted to or delegated to them by law, subject to the Constitution and with proper consideration for each person's fundamental rights. Failure to effect arrest and detention in circumstances where it is reasonable and justified may undermine the community's confidence in the criminal justice system. In my respectful view, the arresting officer carried out his official task in a manner that was rational under the circumstances. I, therefore, conclude that the arrest and subsequent detention of the plaintiff were lawful. It then follows that plaintiff's claim must fail.

ORDER

[50] The plaintiff's claim is dismissed with costs.

N CENGANI-MBAKAZA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

APPEARANCES:

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²⁰ Section 205 (3).

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:
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DATE HEARD : **30 June 2023**

DATE DELIVERED: The judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 01 August 2023 at 10:00