

REPUBLIC OF SOUTH AFRICA**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

14/11/14

CASE NO: 47317/2012

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
14/11/2014	
DATE	SIGNATURE

IN THE MATTER BETWEEN:

GIRLY MLAUTI NYAMBE**PLAINTIFF****and****THE MINISTER OF SAFETY AND SECURITY (POLICE)****DEFENDANT**

J U D G M E N T**Heard on: 11 November 2014****Handed down on 14 November 2014**

KUBUSHI, J

[1] The plaintiff in this case is suing the Minister of Safety and Security (Police) for assault. It being alleged that the plaintiff was assaulted by a police officer who is a member of the South African Police Services, one Emmanuel Mkhabela (Mkhabela). The said assault occurred during the cause and scope of Mkhabela's employment as a policeman of the South African Police Services and the defendant as his employer is thus vicariously liable.

[2] The plaintiff tendered the evidence of two witnesses, the plaintiff and her daughter Angel Onise Nyembe (Nyembe). The defendant on the other hand, proffered the evidence of Mkhabela the police officer it is alleged assaulted the plaintiff.

[3] The plaintiff's evidence is that on the day in question whilst she was busy selling sorghum beer, a woman came to buy. She paid with a R20 note and she gave her change. The woman, however, said she had short changed her because she gave the plaintiff a R50 note. The plaintiff was adamant that the amount the woman gave her was R20 and not R50 and she refused to give her more money.

[4] Later on the woman came back in the company of another woman who requested the plaintiff to give her friend the correct change. The plaintiff refused. The women left and came back in the company of two police officers who also insisted that she give the two women the correct change. Her employer also ordered her to give them the extra money but she refused. The police then informed her that they were arresting her for selling sorghum beer without a licence. She was then ordered to go into the back of a

police van and was taken to the police station. On the way to the police station she was handcuffed to the van by one hand. The two women were also in the van with her.

[5] At the police station she was taken by Mkhabela to an office where Mkhabela continued to inform her that she was arrested for selling sorghum beer without a license. Mkhabela ordered her to give him R45 but she refused. Whilst she was still haggling with Mkhabela about the money another police officer came into the office and told her to go. That police officer offered to drive her back to her home. She went back to the van that was used to ferry her to the police station and sat in the back. Whilst sitting there, Mkhabela accosted her and hit her with a hose pipe which was lying around there. He hit her several times, she could not say how many times, on her back. She was also hit on the left eye. Initially she had said she was hit below the eye but under cross examination she said it was in the eye. She could not avoid being hit by Mkhabela and could not run away because she was sitting in the van. I should also add that the back of the van was open and did not have a canopy. After the assault the plaintiff went into the police station to report the assault. The police officers in the charge office refused to assist her. They also refused to take her to the hospital saying that there was no motor vehicle available to take her there. She stayed in the charge office until late in the evening when her children came and took her to hospital. She was referred to several hospitals where she received treatment for her eye. At the moment the eye does not see properly.

[6] Although Nyembe did not witness the assault, she gave evidence that she had received a phone call informing her that her mother had been arrested. She went to the police station where she found her mother busy walking around in the charge office holding her eye. Her mother related to her what transpired and told her that Emmanuel

assaulted her. Her mother had an injury on her right eye and was very agitated. She asked the whereabouts of Mkhabela but was informed that he was not there. She also confirmed that the police officers at the charge office refused to assist her mother. Whilst still there she was informed by one police officer that Mkhabela was outside. She went outside and saw Mkhabela smoking cigarette. She enquired from him why he assaulted her mother and Mkhabela said her mother fell and chased her (Nyembe) away by saying 'voetsek'. She confirmed that Mkhabela was known to her and that he was in fact a relative of hers. She then took her mother to hospital.

[7] Mkhabela, who gave evidence on behalf of the defendant, testified that on the day in question he was at the police station when two women came and laid a complaint against the plaintiff for failing to give them the correct change. He went together with a colleague he referred to as Khakhu, to go try and resolve the matter. When they arrived at the scene, he noticed that the plaintiff was drunk. She was unruly, did not want to listen to them and was pushing the two women around. He tried to reason with her but to no avail. Her boss came and also informed her to give the women the money but she refused. According to him, the situation was getting out of control and he decided to take the plaintiff and the two women to the police station where he thought the matter may be resolved amicably. The plaintiff's employer told her to go with them. The plaintiff climbed, together with the two women, at the back of the van. He confirmed that it was an open van without a canopy. He was adamant that he had not arrested the plaintiff but had only taken her in to resolve the complaint.

[8] At the police station he tried again to reason with the plaintiff but to no avail. He then asked the two women whether or not they want to lay a charge against the plaintiff. They however told him that because the plaintiff was drunk they will come back tomorrow when she is sober. He then allowed the plaintiff to go back home. He denied any knowledge of the assault. In his evidence in chief he testified that he only came to know about a charge of assault laid against her by the plaintiff in the early hours of the following morning whilst he was out on patrol. Someone from the charge office phoned to inform him. However, under cross examination he contradicted himself by saying he came to know about the charge some months later from the officer investigating the case.

[9] It is common cause that the plaintiff was assaulted on the day in question. What is in issue is who assaulted her. The plaintiff's evidence is that she was assaulted by Mkhabela, but Mkhabela denies vehemently that he had anything to do with the assault. The result being that I was at the end of the evidence faced with two mutually destructive stories. The issue I therefore have to determine is which of the two versions is probable. The plaintiff bears the *onus* and must therefore convince me on a balance of probabilities that her story is more probable.

[10] Having evaluated the evidence, I found both the witnesses for the plaintiff to be impressive witnesses. They were honest and related their story as *per* their own recollections. There were no contradictions in their respective evidence nor did they contradict each other. The contradictions suggested by the defence counsel in respect of whether or not the plaintiff's eye that was injured was the right or left eye holds no water in my view. The plaintiff was here in court and she showed us the eye which was injured, and it is the right eye. Besides being cross examined on this issue, there is no evidence

disputing the injuries and that she was injured on the right eye. If this injury was in dispute the defence ought to have called the medical practitioner who completed the medical form to prove that the eye that was injured was the left eye and not the right eye. This was not done thus the evidence of the plaintiff remains unchallenged.

[11] It is indeed so that the plaintiff was a single witness in relation to the assault. In this regard the defence's counsel relying on the judgment in *R v Mokoena*¹, contended that for the plaintiff's evidence to be acceptable it must be satisfactory in all respect. This, however, is no longer the test. The test in *Mokoena* has been reformulated in *S v Sauls*² wherein it was held that there is no rule on thumb in which to deal with the evidence of a single witness. A court is expected to consider the merits and demerits of the evidence before it, and on the totality of such evidence to determine whether the truth has indeed been told.

[12] The defence reliance on the judgment in *S v Texeria*³ and its calling for the corroboration of the plaintiff's evidence is also misplaced. In this respect, the defence counsel's assertion is that the plaintiff should have called the police officers to whom he reported the assault to corroborate her evidence. Counsel overlooked the fact that corroboration is not a requirement in our law. Even so, it could not have been expected that the police officers, who are employed by the defendant, would come to testify against their employer. More so, the evidence before me is that the said police officers refused to assist the plaintiff when she wanted to lay a charge against Mkhabela.

¹ 1932 OPD at 79 at 80

² 1981 (3) SA 172 (A) at 180E – F

³ 1980 (3) SA 755 (A)

[13] I do not agree with the assertion by the defence counsel that a negative inference be made against the plaintiff for failing to call witnesses to corroborate her story. According to the plaintiff's evidence, except her and Mkhabela, there was no one present at the place where she was assaulted. In this regard she did not have to call any other person as a witness. The argument by the defence counsel that it was unlikely that there would be no one in that area who could have witnessed the assault is to me ill-conceived because that is just mere speculation.

[14] Even though corroboration is not required, the plaintiff's evidence as regards the assault was however corroborated by that of Nyembe. It is Nyembe's testimony that she went to the police station and found the plaintiff there. The plaintiff was holding her eye which was swollen. She was at that very time informed by the plaintiff that she was assaulted by Mkhabela. She confronted Mkhabela the very same day and Mkhabela told her that the plaintiff fell. Her evidence also corroborates the plaintiff's evidence that the police officers at the charge office refused to assist the plaintiff.

[15] There was no constructive criticism against the evidence of both witnesses for the plaintiff. The criticism that was raised against the evidence of the plaintiff is not material and does not, in my view, affect her credibility. I am thus satisfied that the plaintiff's evidence and that of her witness is credible and that I can rely on it.

[16] I can however not say so about the evidence of Mkhabela. I found him not to be an honest witness particularly under cross examination. He was evasive and his evidence was not understandable most of the time. He came across as defensive and tried too hard

to impress me as to his non-involvement in the assault. He also adapted his answers to suite his version. His counsel's submission is that he had difficulty answering some of the questions put to him because he is not educated. I am not in agreement with this submission. Mkhabela has been in the police force for about 18 years, surely during that time he had made several appearances in court where he had to answer questions. I indicated in court that there was nothing difficult about the questions put to him.

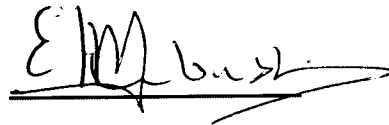
[17] The contradiction between his statement to the police and his evidence in court is to me material. I have to agree with the submission by the plaintiff's counsel that a police officer of 18 years-experience should be more astute and make sure what is in his statement is correct. He wanted me to believe that he only came to know about the charges of assault preferred against him by the plaintiff some months after the incident whilst in his statement he stated that he knew the same day of the incident.

[18] The contention by the plaintiff's counsel that a negative inference should be made against the defendant for its failure to call other witnesses to support Mkhabela's evidence is correct. At the commencement of the trial the defence indicated that they will call two witnesses and only one was called. Under cross examination it was put to the plaintiff's witness that a policeman will be called to dispute the totality of what she was saying as a fabrication. It was also put to her that policemen are going to dispute and say her evidence that she was told by the police officers on duty on the 15th that her mother was assaulted by Mkhabela, was mere lies. None of these witnesses were called and no explanation was provided why it was so. The explanation by the defendant's counsel from the bar, as to why one of the witnesses was not called, cannot be admitted into evidence.

[19] I would as such hold that the probabilities in this instance are stacked against the defendant. The plaintiff has as such proved her case on a preponderance of probabilities.

[20] Consequently I would make the following order:

1. The plaintiff's claim succeeds with costs.
2. The defendant is ordered to pay the plaintiff's proved or agreed damages.



E.M. KUBUSHI

JUDGE OF THE HIGH COURT

Appearance:

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