

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



Case Number: 74795/2014

8/6/2016

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED

08/06/16
DATE SIGNATURE

In the matter between:

JOHANNES PAPA KGAPOLA

PLAINTIFF

and

MINISTER OF POLICE

DEFENDANT

JUDGMENT

Bagwa J

[1] The Plaintiff herein is Johannes Papa Kgapola an unemployed male of [...], Midrand.

[2] In *casu* he sues the Minister of Police as a result of an incident which occurred on 12 March 2014 when members of the South African Police Service arrested the Plaintiff without a warrant.

[3] He alleges that when the said members arrested him, they did not sufficiently furnish him with reasons for his arrest and after the arrest he was taken to Ivory Park Police Station where he was detained.

[4] Plaintiff alleges that the conduct of the Plaintiff caused him humiliation and embarrassment as he was arrested in full view of the members of the public.

[5] Plaintiff further alleges that his arrest by members of the South African Police Services was wrongful and unlawful and that he suffered damages as a result thereof for deprivation of liberty, discomfort and inconvenience, contumelia and loss of income.

[6] The defendant has defended the claim by Plaintiff and in his plea he states that Plaintiff was lawfully arrested by a police officer in terms of section 4(1)(b) of the Criminal Procedure Act 51 of 1977 for a Schedule 1 offence of rape.

[7] At the commencement of the trial the parties agreed that the Defendant had the right to begin as the burden of proof rests on the arresting officer to prove that the arrest was lawful.

(See *Minister of Safety and Security and Another v Swart* 2012 (2) SCA at 191).

[8] The first witness to be called by the Defendant was Constable Daphne Mabokela who testified about a rape complaint which was laid at Ivory Park Police Station by the complainant's mother and the complainant who was 13 years old at the time, on 3 March 2014. The complainant indicated to her at the time of taking of her statement that she did not know the assailant but could identify him if she saw him again.

[9] The next witness was the arresting officer, Constable Malisela Kutu who testified that he responded to a call from the South African Police Service Radio Controller to attend to a complaint at [...]. He also testified that the plaintiff was pointed out by the complainant who was accompanied by her father. He further stated that he informed the suspect of his rights which included his right to respond or remain silent after he had informed him that he was being arrested for rape. This occurred after he had been pointed out by the complainant.

[10] The defendant also presented the testimony of Sergeant Goodstaff Swartz who was the investigating officer. Swartz testified how the case was allocated to him for investigation on 04 March 2014. At the time of allocation he could not take the matter further as no suspect had been identified. He was notified by Kutu after the suspect had been arrested and put into custody.

[11] Swartz testified further that he took the plaintiff to hospital for blood sample tests and the following day booked him out to attend court where bail was refused and the case remanded to 26 March 2014. The plaintiff was released on 27 June 2014 as a result of negative DNA tests and a nolle prosequi decision by the prosecution.

[12] The plaintiff gave evidence and testified about being arrested at his home in Ivory Park and detained at Ivory Park Police station by members of the South African Police Service without a warrant. Upon inquiry he was informed that he was being arrested for rape. He stated that no rights were read out to him and that the person who pointed him out to the police was the complainant's father and not the complainant as testified by constable Kutu.

[13] Plaintiff also presented the evidence of Thabiso Mamabolo who was with the plaintiff at the place and time of his arrest. Mamabolo also stated that the person who pointed the plaintiff to the police was a gentleman who drove an audi motor vehicle and that two police officials thereafter arrested him and informed him that he was being arrested on a rape charge. According to him there was no thirteen year old child at the place and time of plaintiff's arrest.

EVALUATION

[14] Central to the consideration of whether plaintiff's arrest was unlawful or not are sections 39 and 40 (1) (b) of the Criminal Procedure Act together with the evidence presented by the parties.

[15] What we have to do with here is the so called Wednesbury principles which were referred to in the judgment of Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 2 ALL ER 680.

[16] These principles are also discussed in the case of *Minister of Safety and Security v Sekhoto* 2011 (5) SA 367 at page 381 (SCA) where Harms DP expressed himself as follows:

"[34] These principles are in substance no different from those formulated by Innes ACJ in *Shadrack v Union Government* (1912) 42 S.A. 642 at 651-652. Now it is settled law that where a matter is left to the discretion or the determination of a public officer, and where his discretion has been bona fide exercised or his judgment bona fide expressed, the court will not interfere with the result. Not being a judicial functionary no appeal or review in the ordinary sense would lie; and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a court of law either to make him change his mind or to substitute its conclusion

for his own.....There would be circumstances in which interference would be possible and right. If for instance such an officer had acted mala fide or from ulterior and improper motive, if he has not applied his mind to the matter or exercised his discretion at all.....in such cases the court might grant relief. But it would be unable to interfere with a due and honest exercise of discretion inequitable or wrong."

[16] Section 39 (2) of the Criminal Procedure Act 51 of 1977 (CPA) provides that the person effecting the arrest shall when doing so inform the person being arrested about the reason for the arrest and in line with sections 25 of the constitution inform him of his rights or give him the so-called Notice of rights.

[17] According to the evidence presented through constable Kutu this procedure was adhered to when the plaintiff was arrested. The investigating Officer Sergeant Swartz also repeated the exercise when he interviewed the plaintiff who was then a suspect, at the Ivory Park Police Station.

[18] Section 39 (3) of the Criminal Procedure Act provides that the arrested person be detained in custody until he is lawfully discharged or released from lawful custody. According to the evidence presented by the aforesaid police officials, a charge of rape was preferred against the plaintiff under Ivory Park Cas No 46/03/14. He was held until he was lawfully discharged and released as stated above on 27 June 2014.

[19] Whilst Section 40 (1) (b) of the Criminal Procedure Act provides for the arrest of a person by a peace officer whom he suspects of having committed an offence referred to schedule 1 of the Criminal Procedure Act, there are certain jurisdictional requirements which are in line with Wednesbury principles which have to be satisfied.

19.1 The arresting officer must be a peace officer;

19.2 The arrestor must entertain a reasonable suspicion;

19.3 The suspicion must be that the suspect committed an offence referred to in schedule 1 of the Criminal Procedure Act, and

19.4 The suspicion must rest on reasonable grounds.

[20] These jurisdictional requirements must be established by the defendant in order to escape liability.

See Duncan v minister of law and order 1986 (2) SA 805 A

[21] In *Minister of Safety and security v Sekhoto 2011 (1) SACR 315 SCA at Para 28* the following was stated;

"[28] Once the jurisdictional facts for an arrest, whether in terms of any paragraph of section 40 (1) or in terms of section 43, are present, a discretion arises. The question whether there are any constraints on the exercise of discretionary powers is essentially a matter of construction of the empowering statute in a manner that is consistent with the constitution. In other words, once the required jurisdictional facts are present, the discretion whether or not to arrest arises. The officer, it should be emphasised, is not obliged to effect an arrest". This was made clear by this court in relation to Section 43 in *Groenewald v Minister of Justice*.

[29] As far as 40 (1) (b) is concerned, Van Heerden JA said the following in *Duncan* (at 818 H-J): 'If the jurisdiction requirements are satisfied, the peace officer may invoke the power conferred by the subsection i.e. he may arrest the suspect. In other words, he then has a discretion as to whether or not to exercise that power (*cf Holgate - Mohammed v Duke [1984] 1 ALL ER 1054 (HL) at 1057*). No doubt the discretion must be properly exercised. But the grounds on which the exercise of such discretion can be questioned are narrowly circumscribed. Whether every improper application of a discretion conferred by the subsection will render an arrest unlawful, need not be considered because it does not arise in this case'

[30] He proceeded to say that an exercise of the discretion in question will be clearly unlawful if the arrestor knowingly invokes the power to arrest for a purpose not contemplated by the legislature"

[22] In casu the arresting officer was responding to a request or instruction conveyed through the South African Police Services Controller to attend a pointing out of a suspect in respect of a rape charge. After the pointing out he effected an arrest.

[23] According to Constable Kutu, even though the complainant was a thirteen year old child, she was in the company of her father when the pointing out was done. A complaint had already been registered on 03 March 2014 at Ivory Park police Station where Kutu was stationed. This pointing out was therefore a follow up in the investigation of a case in which no suspect had been identified at the time the complaint was registered. Objectively speaking therefore, a pointing out of a suspect established a prima facie case and effecting an arrest cannot be said to have been unreasonable under those circumstances.

See Swart v minister of safety and security 2012 (2) SACR 226 SCA

[24] At the time of effecting the arrest, constable Kutu was a member of the South African Police Service and as such was an arresting officer as defined in section 5 of the South African Police Service Act 68 of 1995 exercising his powers in terms of section 13 of the South African Police Act read with the Criminal Procedure Act.

[25] Section 13 (1) of the South African Police Act provides that subject to the Constitution and with due regard to the fundamental rights of every person, a police officer may exercise such powers and shall perform such duties and functions as assigned to a police official. Section 13 (3) (a) also enjoins such member to perform such duties in a manner that is reasonable in the circumstances.

[26] The plaintiff's case is mainly based on the submission that the arrest was not justifiable in that it was not based on reasonable or rational grounds. That submission is based on plaintiff's evidence to the effect that plaintiff was not pointed out by the complainant on the day of his arrest but by the father. The plaintiff alleges that the father was alone and not accompanied by the complainant.

[27] As already mentioned (*supra*) the defendant's evidence as presented by constable Kutu contradicts this version. The outcome is that the two versions are mutually exclusive or contradictory in regard to the manner the arrest was effected. This implies that this court has to weigh the probabilities based on the credibility of the witnesses.

[28] I found Kutu to be a credible witness. He gave his evidence in a chronological manner and was not swayed by a probing cross examination. From the time that he received a telephone instruction from the Controller to the time of the pointing out by the complainant who was accompanied by her father, he was consistent with his evidence.

[29] The plaintiff also presented his evidence and stuck to his version that the complainant's father was alone when he pointed him out but went on to state that the complainant was present at the police station even though he did not see her. He was told that the complainant was crying and that is why she was not brought into the room where he was.

[30] Kutu was just a policeman on patrol when he was called. He was informed that the case involved a rape incident. The probabilities of a policeman in a case involving rape accepting a pointing out of the alleged rapist by a male person are minimal if at all. Further, the presence of the girl complainant at the police station which was confirmed by the plaintiff corroborates Kutu's version rather than the plaintiff's version.

[31] It is Kutu's version that from the place of arrest, they proceeded to the police station and that the complainant was accompanied by her father, hence her presence at the police station. I accordingly find that the defendant's version is to be preferred in this regard than that of the plaintiff.

[32] Based on this finding, the actions of Kutu subsequent to the pointing out by the complainant of the plaintiff as the person who raped her became both rational and reasonable. In my view, it would have been a dereliction of duty on the part of Kutu not to effect an arrest in the circumstances described by the defendant especially since the suspect had not been identified until the time of the pointing out.

[33] An arrestor's decision must be based on an intention to bring the arrested person to justice. Kutu arrested plaintiff, took him to Ivory Park Police station and handed him over to the investigating officer, Sergeant Goodstaff Swartz. Plaintiff was taken to Hospital for blood tests by Swartz and on the following day taken to court within the prescribed forty eight hour period. The matter was thereafter dealt with by the magistrate court according to justice, until the plaintiff was duly released on 27 June 2014. No irrationality or arbitrariness could therefore be read into the actions of Constable Kutu or any other official who processed him until his release by the court.

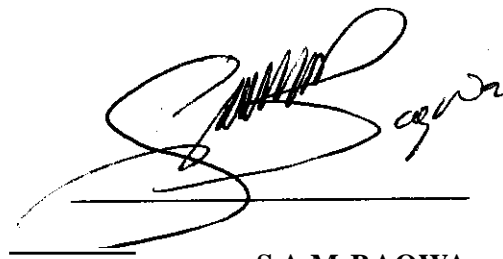
[34] In the circumstances I find that the police officials employed by the defendant merely executed powers they are entrusted with by the law of bringing and securing the attendance of the plaintiff to court after he had been duly charged and warned of his rights regarding a schedule 1 offence.

[35] Plaintiff's testimony and submissions by counsel seemed to suggest a claim for wrongful and unlawful detention but no such claim was alluded to in the pleadings. I can therefore make no finding in that regard.

[36] Upon a consideration of all the facts and listening to counsel in this matter I have come to the conclusion that plaintiff's arrest was justified in terms of Section 39 and Section 40 (1) (b) of the Criminal procedure Act 51 of 1977.

[37] Wherefore the following order is made:

The plaintiff's claim is dismissed with costs including costs of counsel.

A handwritten signature in black ink, appearing to read 'S.A.M. Baqwa', is written over a horizontal line.

S.A.M BAQWA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Heard on: 2 -3 June 2016

Delivered on: 08 June 2016

For the Plaintiff: Adv B.N Mbiko

For the Defendant: Adv W.N Mothibe