

NOT REPORTABLE

**N THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, EAST LONDON**

**Case no: EL 464/2012
ECD1164/2012**

**Date heard: 18.6.2015
Date delivered: 30.6.2015**

In the matter between:

EMEKA CHRISTIAN OKONKWO

Plaintiff

Vs

MINISTER OF HOME AFFAIRS

First Defendant

**THE DIRECTOR GENERAL FOR THE DEPARTMENT
OF HOME AFFAIRS**

Second Defendant

JUDGMENT

TSHIKI J:

[1] In this action, the plaintiff sued the defendants for damages which he allegedly suffered as a consequence of a wrongful and unlawful arrest and detention which occurred in East London on or about the 3rd August 2012. It is common cause that he was lodged and detained at Fort Glamogan Prison in East London. He was detained in that prison by the employees of the first defendant department for a period of seventy five (75) days without being taken to Court or dealt with in terms of the applicable law. Having detained without trial for such a period the plaintiff was simply released from custody without appearing in Court.

[2] After his release from custody and on the 15th May 2012 the plaintiff issued summons against the defendants for damages aforesaid. The defendants defended

the claim and the matter took the full duration until it was ripe for trial. In view of the attitude of the defendants in defending the matter, the case had to be given several trial dates. Ultimately, on the 18th February 2015 the defendants conceded the merits of the claim and consequently an order in the following terms was made:

“[2.1.1] That arrest and detention of the plaintiff were unlawful;

[2.1.2] That the defendant is liable to pay plaintiff for the damages proven or agreed upon as a result of the unlawful arrest and detention;

[2.1.3] That the defendant is to pay costs of suit; and

[2.1.4] The issue of quantum is postponed to the 18th June 2015.”

[3] On the 18th June 2015 the parties could not settle the issue of quantum and this necessitated a trial for the determination of quantum. During that hearing only the plaintiff was called and the defendants did not call evidence. In his evidence, the plaintiff testified that when he was arrested he was in his shop when the officers of the first defendant's department arrested him. The humiliation by the said officials took place in front of other people including his wife and their neighbours. He was told to close his shop and the officials ordered him to board the bakkie of the first defendant's department. He was eventually taken to the holding cells awaiting for his fate that would have to be determined by the officials of the first defendant's department. In the holding cells he would be threatened with assault by the other awaiting trial prisoners who were with him. Some of the awaiting trial prisoners made attempts to have sex with him. The cells were smelling of urine. He had no bed to sleep on, something he would enjoy at his home. He was dispossessed of the bed as the other awaiting trial prisoners had occupied all the available beds. The food he was given was not good in that he would be given stamped mealies and a lot

of bread. He was not used to eat stamped mealies. The holding cells in which he was sleeping were congested as there were a lot of other awaiting trial prisoners. There was a competition for the use of the toilet. According to the plaintiff the first defendant's employees did not even know the reason for his arrest and detention. During the period of his incarceration, he was not able to take care of his family, his wife and child. According to the plaintiff, as a result of the arrest, he is no longer in good terms with his wife because she left him and went to stay in Cape Town and that his child is staying in King William's Town. His wife left him because he was detained in prison. In his business he was selling cellphones and also gold chain business and he had a licence to run his business.

[4] In his evidence plaintiff contended that he was the only person who could run his shop effectively. He could not rely solely on his wife. In any event, she left the shop after he was incarcerated.

[5] No other witness was called after the plaintiff and on that note both parties closed their cases.

[6] *Ms Da Silva* who represented the plaintiff argued that the defendants' employees had no warrant of arrest yet they gave the plaintiff the impression that they were in possession of one against him. He was subjected to a lot of humiliation as he has described to this Court. He had to line up for food and at times he had to sleep on the floor. The bedding on which he slept was smelling of vomit and urine. The toilet he had to use had no privacy and was contained in one place for seventy five days and without a charge put to him.

[7] The defendant's department did not take the plaintiff to Court so as to have his case adjudicated by a competent Court. There was no justification for the incarceration. *Ms Da Silva* referred this Court to decided cases which she argued had similar facts as the one *in casu*. In her view, the plaintiff was entitled to a sum of R800 000.00 for *contumelia* embarrassment, deprivation of liberty and arrest and detention for seventy five (75) days. This coupled with payment of costs.

[8] *Mr Sibeko* who appeared for the defendants, contended that the amount suggested by *Ms Da Silva* cannot be justified. In his view, the facts of the cases relied upon by counsel for the plaintiff were distinguishable from those of the case in issue. He submitted further that when dealing with the issue at hand this Court has to take into account that we are dealing with the public funds. Therefore, evidence has to be placed before Court so as to arrive at a fair and just award. He submitted further that the plaintiff's standing in society has also to be considered when the Court has regard to make an award in this case. He contended further that the plaintiff's predicament should be distinguished from a situation where a female is put with males. In a nutshell in his view, there is no justification for the award of R800 000.00. He then submitted that an amount of between R380 000.00 and R450 000.00 would be appropriate in the circumstances.

[9] The right of an individual to personal freedom is a right which has always been jealously guarded by our Courts and our law has always regarded deprivation of personal liberty as a serious injury. (***Ochse v King William's Town Municipality*** 1990 (2) SA 855 (E) at 860F-G). This right has been protected by, *inter alia*, section 21 of the Bill of Rights of the Constitution.

[10] In the case in issue the plaintiff was taken from his place of business, taken to custody and without any justification. He was taken to custody by the officials of the defendants' department without access to Court or any form of freedom. He remained in custody for seventy five (75) days without trial. Those who took him to custody did not, in my view, have any intention to take him to Court so as to answer to whatever offence he might have committed. No charges were ever formulated against him nor was he taken to Court with a view to have such charges formulated by the State prosecutors. If what was done to the plaintiff herein cannot amount to malicious arrest and detention nothing else could be referred to as malicious arrest.

[11] Plaintiff in this case was never taken to Court and had it not been for the intervention of the prison warder who became interested in what offence was committed by the plaintiff, he would still be languishing in the police cells. The plaintiff is a foreign national from Nigeria who was in the country lawfully. There was no reason for him to deserve the treatment he received from the defendants' officials. Section 12 of our Constitution gives everyone the right to –

“Freedom and security of the person, which includes the right –

(a) not to be deprived of freedom, arbitrarily or without just cause;

(b) not to be detained without trial.”

[12] On the other hand, section 14 confers on everyone the right to privacy. Plaintiff's dignity was disregarded by the defendants' employees and without justification. *Mr Sibeko* has argued that the plaintiff's status in the community is not known and therefore, he has to be awarded damages that are deserved by people of his status. He submitted that for the reason that the plaintiff has no special status in the community therefore the Court should award a lesser amount of damages to the

plaintiff. I do not agree. The nature of the treatment which the plaintiff received from the defendants' employees makes his circumstances more serious than others in the ordinary. Staying in custody for no reason and be subjected to cruel treatment by the awaiting trial prisoners, without having to be taken to Court for trial is the worst treatment I have ever seen in cases I have ever dealt with during our democracy. No one of the defendants' employees was prepared to release the plaintiff from custody nor were there any intentions to take him to Court to answer to his sins, if any. In my view, this is one of the worst treatments that had been endured by a human in our country since the dawn of our democracy.

[13] I must also mention that the cruel treatment against the plaintiff by the defendants continued even when he had sued the defendants. They knew very well that they had no defence to the plaintiff's claim but did not consider settling the claim. It took the full distance and even when the merits were conceded on the date of trial they refused to settle the quantum. The case had to take the long distance in circumstances when, in my view, it should have taken the shorter route. This, in my view, is a reprehensible treatment in the extreme.

[14] It seems to me that the facts of all the decided cases I have been referred to although they are of assistance, are not exactly the same as those of the present case. For that reason, I have no reason to refer to them. Each case has to be treated according to its own circumstances.

[15] I am of the view that in the circumstances of this case, an award of R750 000.00 will be just.

[16] In the result, I make the following order:

[16.1] The first defendant is ordered to pay the plaintiff a sum of R750 000.00 together with legal interest on the aforesaid sum from the date of judgment to date of final payment.

P.W. TSHIKI
JUDGE OF THE HIGH COURT

Counsel for the plaintiff : Adv Da Silva
Instructed by : Makaula Zilwa & Co
c/o Msesiwe Vapi Inc
EAST LONDON
Ref: MV/M25/10

Counsel for the defendant : Adv Sibeko SC with him Adv Mqobi
Instructed by : State Attorney
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Ref: 482/12-p10 Mrs Yako