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REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL DIVISION
CIVIL CAUSE NO. 386 OF 2013
(Before the Honorable Mr. Justice D. Madise)

BETWEEN

SULAIMANA MPONDACLAIMANT

AND

ATTORNEY GENERAL.....DEFENDANT

CORAM: Honorable Justice D. Madise

Ms. P. Amasi of Counsel for the Claimant

Mr. A. Mahonga of Counsel for the Respondent

Mr. Mathanda Official Interpreter

Madise J,

JUDGMENT

Introduction

1. On 18th April, 2013, the Claimant commenced the present proceedings against the Attorney General (Malawi Police Service) claiming damages for personal injuries. On 2nd May, 2013 the Defendant served their defence denying the claim and called the claimant to prove his case.

The Statement of case

2. The Claimant alleged that at the material time he was visiting a brother who was staying in Mbayani Township in Blantyre and on or about 20th July, 2011 while at his brother's house and while going to the bathroom he was shot by members of the Malawi Police Service who were chasing people who were demonstrating.
3. The Claimant alleged the Defendant was negligent for shooting live bullets without due regard to innocent persons. The claimant claimed that as a result of the shooting he suffered injury consisted with damage to median nerve and a fracture of the right radius close to a wrist joint. As a result of the injury the Claimant stated that he had to undergo painful surgery procedures. Presently he stated that he can no longer use his middle and ring fingers and he was left with pain due to nerve involvement.
4. He now seeks damages for pain and suffering and he further seeks compensation for breach of his constitutional right to liberty and dignity and special damages being the cost of medical reports and costs of this action. In their defence the

Defendant has denied being negligent and has called the Claimant to strict proof. They further denied the claims for damages and costs.

The facts

5. The Claimant Sulaimana Mponda testified on 26th July, 2021 and told the Court that on 18th July, 2011 he arrived in Blantyre to visit his brother who stays in Mbayani in Blantyre. On or around 20th July, 2011 there were country wide demonstrations and the police were chasing and shooting people. On this particular day he was shot by the police while he was getting into a bathroom. The bullet passed through his right buttock and got stuck in his right wrist. The bathroom was outside the main house.
6. He told the Court that his relative's house is at Zandeya's residence which is by the road side. He stated that he noticed the presence of police officers in camouflage uniform with helmets as he was going to the bathroom.
7. That when he was shot he became consciousness and he was picked by a neighbor and taken to Blantyre Adventist Hospital and later he was taken to Queens Central Hospital where he spent a month in hospital. He reported the matter to the Malawi Human Rights Commission SM 1, SM 2 and SM 3. He stated that he believed he was shot by members of the Malawi Police Service out of negligent and in breach of his constitutional rights to life, liberty and dignity.
8. In cross-examination he told the Court that after he was shot and he was rushed to Adventist Hospital and then Queens Central Hospital. He stated that he paid K200, 000 at Adventist Hospital. He admitted that the medical report he tendered

was from College of Medicine and not from Queens Hospital. The Claimant told the Court that he did not see the police man who shot him.

9. The second witness for the Claimant was Rajab Mponda. He told the Court that he stays at Mbayani in Blantyre. He stated that his cousin/brother visited him on 18th July, 2011 for a short stay. On or around 20th July, 2011 there were country wide demonstrations and the police were chasing and shooting people. In the process the Claimant was shot as he was getting into the bathroom. A bullet passed through his right buttock and got stuck on his right wrist.

10. He was alerted to the incident by a neighbor who was crying. Before the incident the witness told the Court he had seen members of the Malawi Police Service from his window and he also heard gun fire. After the incident he took his cousin to the hospital with the help of neighbours. He was unconscious when he was taken to the hospital. He spent a day at the Adventist Hospital and a month at Queens Central Hospital. He stated in conclusion that he believed the Claimant was shot by members of the Malawi Police Service in violation of the law.

11. In cross-examination, he told the Court that the Claimant was his brother and that on 20th July, 2011 they were together at the house. He then heard a gunshot and a cry from his brother who was in the bathroom. That with help of neighbours they carried the victim to the hospital. He stated that he did not see the one who shot his brother. He told the Court that on 20th July, 2011 the police were chasing

people while firing gun shoots and dispersing tear gas. That marked the close of the Claimant's case.

12. When called to enter a defence counsel Mahonga for the Attorney General stated that they had no witnesses and that they were simply going to make final submissions. Each party was given 14 days to file submissions.

The issues.

13. There are four issues for determination before me

1. Whether the Claimant was shot by members of the Malawi Police Service
2. Whether the Claimant suffered pain, suffering and injury
3. Whether the Defendant is liable in negligence for breach of duty of care
4. Whether damages are payable.

The Law

14. The burden and standard of proof in civil matters

The latin maxim "eilincumbit probatio qui dicit non negat" sums it all. The burden of proof lies on the party alleging the existence of given facts. It was stated in T. Sambo -vs- Electricity Supply Commission of Malawi Civil Cause No. 1160 of 2000. Hon Justice Chipeta then stated.

"I remind myself, this matter is a civil one. In such cases the requirement of the law is that he who asserts must prove. In the present case the asertion homes from the plaintiff. If I am to find for him therefore he needed to satisfy me on a balance of probabilities that his complaint against the defendant is justified."

It is trite law that he who alleges the existence of certain facts is legally bound to prove his/her case as a positive is always easier to prove than a negative. The standard required is on a balance of probabilities. The scale must tilt towards the claimant's story for him/her to succeed. If the scales are evenly balanced, the claim must fail. As Denning J, stated in Miller vs. Minister of Pensions [1947] 2 A II E.R. 372.

If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not

Negligence as a tort

15. The best definition of negligence was given by Baron Alderson in Blyth vs Birmingham water works (1856) 1 Ech 781 at 784.

"Negligence is the omission to do something which a reasonable man would, guided upon those circumstances which ordinarily regulate the conduct of human affairs do or doing something that a prudent man would not do"

The tort demands that a defendant must owe the claimant a duty of care and there must be a breach of such a duty which result in the claimant suffering damage. See Banda vs. Southern Bottlers Ltd Civil Cause No. 558 of 2010 (High Court) (unreported). For a better understanding of the tort of negligence read Winfield and Jolwicz on tort 14 Ed page 78. On duty of care Lord Atkin stated in Donoghue vs. Stevenson (1932) AC, 562 as follows:-

"A person's neighbors are those persons who are closely and directly affected by any act that I ought reasonably to have them in contemplation as being affected when in directing my mind to the acts or omissions which are called in question".

The maxim *res ipsa loquitur* sums up the law on negligence"

17. The Police Act Section 44

- (a) Any person in lawful custody charged with or convicted of a felony when such person is escaping or attempting to escape.
- (b) Any person who by force rescues or attempts to rescue any other person from lawful custody or
- (c) Any person who by force prevents or attempts to prevent the lawful arrest of himself or of any other person
- d) Resort shall not be had to any firearm as authorized unless the police officer has reasonable ground to believe that he cannot otherwise prevent the escape and unless, he has given warning to such person that he is about to use such firearm against the person and such warning is unheeded.
- e) Resort shall not be had to any firearm as authorized unless the police officer has reasonable ground to believe that he or any other person is in danger of grievous bodily harm and that he arrest or prevent such rescue.

18. The arguments

The Claimant cited Donoghue -vs- Steveson (1932) AC 562 and Bluth -vs- Birmingham Water Works Co (1856) 11 ex. 78. The Claimant argued that the Malawi Police Service owed the Claimant a duty of care. That there is evidence that the Claimant was at home at his brother's house and he was shot by the police who were chasing people who were demonstrating. That the Claimant never took part in the demonstration and he was shot as he

was going to the bathroom. That there was a breach of a duty of care by the police which resulted in the Claimant sustaining serious injuries.

Attorney General did not file any arguments.

The finding.

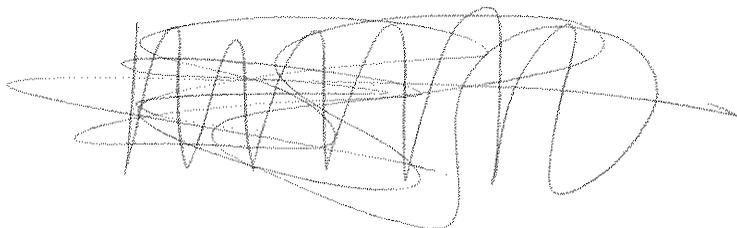
19. The evidence before me is that the Claimant had visited his brother in Mbayani Blantyre on 18th July, 2011. That there were demonstrations on 20th July, 2011 and the police while dispersing crowds fired gunshots and released teargas, around the Mbayani area. As the Claimant was going to the bathroom he was shot in the right buttock and the bullet rested in his wrist. He cried and then fainted. The brother together with the neighbors rushed him to Adventist Hospital where he was admitted for a day before being taken to Queens Hospital. He stayed there for a month.

20. The Claimant produced a Medical Report from the College of Medicine. The Attorney General disputed the medical report on the premises that it was supposed to come from Queens Hospital and not the College of Medicine. There is no law which says only the treating hospital must produce a medical report. It is up to court to attach weight. The Attorney General also disputed the alleged K200, 000 the Claimant claimed to have paid at Adventist Hospital on the basis that no receipts of such expenditure had been produced.

21. I was privileged to see the scars the Claimant has due to the shooting. The Claimant is not faking it. These scars emanated from the serious injuries he sustained. The question before me is how the Claimant sustained these injuries. There is evidence which is not disputed that the police were firing live ammunitions and teargas on 20th July, 2011 around the Mbayani area.
22. There is evidence that it was only the police who were firing live bullets. There was no any other person who was shooting about on this particular day around the Mbayani area. It was only members of the Malawi Police Service. If it was not them where else did the bullet come from? On a balance of probabilities I find that the bullet was fired from a weapon operated by the police.
23. The police owed the Claimant and all persons around a duty of care not to injure anyone including the Claimant during the operation. The use of a firearm on the Claimant was unreasonable and unlawful as provided for in the Police Act. The Claimant was not among the demonstrators nor was he a person under arrest for an offence or convicted of one. He was not resisting arrest nor was he assisting any person to resist arrest. He was not trying to escape from lawful custody.
24. His brother or indeed himself were not violating any law and there was no warning that a shot was going to be fired. The police breached a duty care and violated the Claimants right to life, liberty and dignity. On a balance of probabilities I find in favour of the Claimant and I award him costs of this

action. He must take out summons for assessment of damages within 14 days.

Made at Blantyre in the Republic on 13th October, 2021.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Dingiswayo Madise

Judge.