**SIKUTE v OTIENO AND TWO OTHERS (1974) ZR 125 (HC)**

HIGH COURT

DOYLE CJ

17th APRIL 1974

(1973/HP/85) 10

**Flynote**

**Tort - Assault and false imprisonment - Whether wrongs committed when the action of the superior police officer in effecting forcibly arrest of the subordinate officer male fide.**

**Headnote**

The plaintiff was a police officer who had come off shift on the 15 morning of 5th December, 1972. He reported to his police station, went home, took off his uniform and was about to go to bed. A constable arrived and informed him that he was required by the officer commanding, Kabwe Division. The plaintiff replied that he would go as soon as he was washed and dressed. He then began to iron his shirt to wear. A few 20 minutes later the first defendant, a chief inspector and the second defendant, an inspector, arrived and after a short conversation about the necessity for ironing the shirt before reporting to headquarters, the first defendant became angry. When the plaintiff had just finished ironing his shirt and was about to wash his face the first defendant and the 25 second defendant, together with the other police officers, seized the plaintiff and dragged him to a Land - Rover. At the time the plaintiff was only dressed in a pair of trousers and he was refused permission to put his shirt on. The plaintiff resisted being put in the Land - Rover and in the course of the struggle sustained a cut over his eye and other minor 30 abrasions. Having failed to put the plaintiff in the Land - Rover the first defendant said he was arresting the plaintiff for disobedience to orders and asked him if he was resisting arrest. The plaintiff became frightened, ceased resistance and got into the Land - Rover still dressed in his trousers.

To the plaintiff's claim of damages for assault and false imprisonment, 35 first defendant pleaded arrest for disobedience to orders without good and sufficient cause contrary to section 30 (1) *(a)* of the Zambia Police Act, Cap. 133; the third defendant pleaded that the acts of the first and second defendant were in the course of their duty and as his servant or agent. 40

*Held:*

   (i)   *A mala fide* behaviour of the superior officer will make his order unlawful and consequently an action in pursuance a wrongful one.

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   (ii)   An offence under s. 30 (1) *(a)* of the Police Act, for which an arrest would be justified, could be committed only if there was no reasonable cause for disobedience to the orders of the superior.

   (iii)   A superior police officer is liable for the wrongs committed by 5 his subordinate if he pleads that the subordinate was acting in the course of his employment and as the superior's servant or agent.

*E N A  Torgbor, Esq.,* for the plaintiff.

*A J  Nyangulu, State Advocate*, for the defendants.

**Judgment**

**Doyle CJ:** This 10 is a claim for assault and false imprisonment. The plaintiff is a sergeant of police. The first defendant is a chief inspector and the second defendant is an inspector of police. The third defendant is the Attorney-General, who was joined as a defendant at his own request.

Briefly, 15 the plaintiff's case is that on the morning of the 5th December, 1972, he had just come off night shift. He reported to his police station, Raylton Police Station in Kabwe. He then went to his house, took off his uniform and was about to go to bed. He then saw Constable Simosa coming, who told him that he was wanted by the Officer 20 Commanding, Kabwe Division, at divisional headquarters. The plaintiff said he would come when he was washed and dressed. He began to iron his shirt to wear. A few minutes later the first and second defendants arrived. The first defendant asked the plaintiff's name and told him he must come immediately to headquarters. The plaintiff said he was ironing a shirt for that 25 purpose. There was a short conversation about the necessity for ironing the shirt. The first defendant appeared to be angry. The two defendants then went away and a few minutes later returned with a number of policemen. The plaintiff had just finished ironing his shirt and was about to wash his face when, without more ado, the first defendant seized him 30 and the second defendant and other police officers then started to pull the plaintiff to a Land - Rover. At the time the plaintiff was only dressed in a pair of trousers. He pleaded to be allowed to put on a shirt which was refused. He asked why he was being dragged away, but got no answer. The plaintiff resisted being put in the Land - Rover and there was a struggle 35 for some minutes, during which plaintiff received a cut over the eye and minor abrasions.

Having failed to put plaintiff in the Land - Rover, the first defendant then said he was arresting plaintiff for disobedience to orders and asked if the plaintiff was resisting arrest. The plaintiff was frightened. He 40 immediately ceased his resistance and got into the Land - Rover, still dressed only in his trousers. Some of the policemen who were assisting the first defendant pleaded that plaintiff should be allowed to dress, but this plea was refused.

A Sergeant Monde, who happened to be standing by, also added his 45 pleas to this effect and also because he thought that undue force was being used. The only result of his request was he was threatened with arrest by the first defendant.

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When they got to divisional headquarters, plaintiff was marched into the commanding officer's office. The commanding officer asked what it was about and the first defendant stated he had arrested plaintiff because the latter, in his capacity as chairman of the Musheni Police Club, had refused to sign a cheque for K10 for a farewell party for the officer in 5 charge of the Kabwe police station. The plaintiff said that he had in fact signed the cheque and handed it over to the secretary of the police club. The commanding officer asked the first defendant if he had made inquiries and the first defendant replied that he had. When asked by the commanding officer why he had arrested plaintiff, he made no reply. The 10 second defendant, when asked a similar question, admitted that he had received the cheque, but made no reply as to why plaintiff had been arrested.

The Officer Commanding said he wanted reports and the plaintiff was released. Since then no disciplinary charge had been laid against him. 15

During the interview with the Officer Commanding, there had been an interruption by army officers and the plaintiff had been hustled out of the room and roughly treated outside.

In respect of the incidents at his house the plaintiff's case was supported and corroborated by a number of police officers, some of whom 20 had assisted in trying to put him in the Land - Rover.

The Officer Commanding, Kabwe Division, gave evidence for the plaintiff. His memory was exceedingly vague and I had the impression that he was trying to put the best case he could for the first defendant's behaviour. However, his evidence did state that he had never arranged 25 to see the plaintiff that day, and had given no orders for the plaintiff to be brought to him. He remembered the plaintiff being brought, but could not remember that he was without a shirt, or had a cut on his eye. He suggested that, although he himself had given no orders, the first defendant might give orders for an interview on his behalf. He agreed that the 30 plaintiff should certainly have been given time to wash and dress, in the circumstances. He explained that no disciplinary proceedings were taken because the civil action had been instituted.

The first defendant was not called as a witness. The second defendant stated that, at his request, he accompanied the first defendant to plaintiff's 35 house. There the first defendant asked why plaintiff had not reported to the commanding officer who wanted to see him. The plaintiff replied that he had seen the commanding officer the day before and wondered what he was now wanted for. The first defendant gave no reason but stated he would take the plaintiff by force if he did not come. Plaintiff said that 40 he was washing.

The two defendants then went and collected some policemen. When they returned, 20 - 25 minutes later, the plaintiff was still ironing. The first defendant asked why he had not finished and he and the second defendant and other policemen then forcibly took plaintiff to a Land - Rover. After 45 some time, while they were trying to get plaintiff into the Land - Rover,

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first defendant said he was arresting the plaintiff for disobedience to orders. The plaintiff then ceased his resistance and got into the Land - Rover voluntarily.

The witness at first denied that plaintiff had any injury, but then 5 admitted that he had seen an injury on the plaintiff a little bit later. He agreed that he had received the cheque from the plaintiff. He did not go to the plaintiff about a cheque. He did not know why the first defendant went to the plaintiff. He had in fact shown the cheque to the first defendant on their way to see the plaintiff, and the first defendant had told him 10 that he was going for a different purpose, which he refused to disclose.

He agreed that the plaintiff had no shirt on at the time he was put into the Land - Rover.

In the light of the evidence, it is of interest to look at the particulars of the defence as pleaded. They are as follows:

*(a)*   A 15 meeting was to be had between the plaintiff, the first and second defendants and some other police officers on one hand and the commanding officer, Kabwe, on the other, at 0800 hours on the date in question.

*(b)*   The plaintiff had been informed on the 1st December, 1972, of 20 the forthcoming meeting.

*(c)*   When the time arrived for the meeting, the plaintiff failed to turn up for the same.

*(d)*   After making further unsuccessful attempts to procure the plaintiff's presence at a meeting, the first and second defendants 25 went to the plaintiff's house and found him ironing a shirt.

*(e)*   The plaintiff was asked by the first and second defendants to stop all that he was doing and accompany the first and second defendants to the meeting at the office of the commanding 30 officer, where the commanding officer was already waiting, but the plaintiff just refused to co - operate and obey without good and sufficient cause.

*(f)*   At about 1000 hours on the date in question, the first defendant informed the plaintiff that he (the first defendant) was then 35 arresting him (the plaintiff) for disobedience to orders without good and sufficient cause, contrary to section 30 (1) *(a)* of Cap. 133 of the Laws of Zambia and also for insubordinate or oppressive conduct, contrary to *(b)* (i) of the above - mentioned section and Act.

*(g)*   The 40 said arrest was effected with no more force than was reasonably necessary in the circumstances.

Paragraphs *(a)*, *(b)*, *(c)* and *(d)* are not merely unsubstantiated by the evidence of the defence, but they are clearly fabrications by the first defendant. They bear no resemblance to the facts. Paragraph *(f)* states 45 two offences for which the arrest is alleged to have been made. It may be

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significant that no mention was made in evidence of the second offence, namely insubordinate or offensive conduct contrary to section 30 *(b)* (i) of the Police Act. This offence is not one for which an arrest may be made.

I have not the slightest hesitation in accepting the plaintiff's case where it differs from that of the defendants. That the first defendant 5 gave no evidence came to me with no surprise, in the light of the evidence given by other witnesses. In the result his real reason for his arrogant and oppressive behaviour remains a mystery.

I do not accept that the first defendant was carrying out any order of the commanding officer and the evidence shows that he did not purport 10 to be enforcing any order made by himself. Even if he had been doing so, this is no justification for using violence to compel the order to be carried out. It was open to him to arrest the plaintiff for failure to carry out a lawful order if such an order were given and if it were disobeyed without cause. Even upon the case made for the defence, the arrest had 15 taken place only after the plaintiff had been assaulted and injured in an attempt to put him into a Land - Rover. I have no doubt, therefore, that the defendants are liable for all that occurred until the first defendant arrested, or purported to arrest, the plaintiff.

If the first defendant had *bona fide*, ordered, after the struggle, the 20 plaintiff to come to the commanding officer, and upon his refusal had arrested him, there would then be no question of any further false imprisonment. I am, however, not satisfied that any order was given by the first defendant personally. The evidence shows that at all times he purported to be carrying out an order given by the divisional commanding 25 officer, which order he must have known was never in fact given. I have no doubt that he was behaving *mala fide*, even if it were held that his statement to accused was a personal order. Even had it been a lawful order, an offence can only be committed against section  30 (1) *(a)* of the Police Act if the offender disobeys without reasonable cause. On the 30 evidence I do not consider that the plaintiff was disobeying without reasonable cause. He was merely asking for a short delay to wash himself and put on his clothes.

Even had the commanding officer given an order, clearly the urgency of the order did not require that the plaintiff should be brought before 35 him half - naked and unwashed. As the commanding officer gave no order the lack of urgency becomes more apparent. It is not necessary for me to determine what was the real reason which impelled the first defendant to behave as he did. As a matter of conjecture it may be that, having determined on a course of conduct, his pride would not let him abandon it 40 when he discovered from the second defendant that he had no basis for further action. However that may be, I find as a fact that his action was malicious and not *bona fide*.

That disposes of the defence.

I find, therefore, for the plaintiff on both the claim for assault and 45 for the false imprisonment for a matter of two or three hours. The first defendant was liable as being the person who caused all these things. The

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second defendant is liable because he assisted and the third defendant admits in the pleadings that the actions of the first and second defendants were in the course of their duty and as a servant or agent of the third. In these circumstances all three are liable and judgment 5 is given against all three.

The plaintiff has not received any serious injury. He was, however, humiliated by being dragged half - naked to the Land - Rover and through the camp and into the officer commanding's office. This was seen not only by policemen but by other bystanders. It is not easy to assess the amount 10 of damages, but I assess them at K600 and give judgment for that sum and costs. I do not consider that it is necessary to impose any exemplary damages as I hardly imagine that this is the sort of conduct which is likely to be followed by other police officers.

*Judgment for plaintiff*

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