ATTORNEY-GENERAL v PETER MVAKA NDHLOVU (1986) Z.R. 12 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND SAKALA, JJ.S.
5TH FEBRUARY, 1986
(S.C.Z. JUDGMENT NO. 4 OF 1986)

Flynote
Civil Procedure - Appeal - Factual finding of trial judgment - Conditions for reversal of.

Headnote
The Attorney-General appealed against an award of damages to the respondent for false imprisonment. The false imprisonment arose out of his alleged arrest and detention in the cells at Choma Police Station on the 14th August, 1982. The court elected to believe the evidence of the respondent and his witnesses in opposition to the police and concluded that he was subjected to false improvement. The attorney-general objected to the trial courts findings of fact.

Held:
Where it is unmistakable from the evidence itself and the unsatisfactory reasons given for accepting it, that the trial court could not have taken proper advantage of having seen and heard the witnesses; this is ground for disturbing the findings of fact.

Nkhata and four others v Attorney-General followed.

Cases referred to:
(1) Nkhata and Others v Attorney-General (1966) Z.R. 124

For the appellant: B.L. Goel, Senior State Advocate,
For the respondent: R.M.A. Chongme, Chongwe and Co.

Judgment
GARDNER, J.S.: delivered the judgment of the court:

This is an appeal from the judgment of the High Court awarding damages to the respondent for false imprisonment which occurred on the 14th August, 1982. The facts of the case were that the respondent's son was suspected of stock theft and police from Choma Police Station went to the respondent's village looking for the son. It is alleged in the statement of claim that the police arrested the respondent without giving any reason for such an arrest and kept him in the cells at Choma Police Station until twelve noon the following day. It is also alleged in the statement of claim that only after he was arrested was the respondent told that his son had been involved in theft of cattle.

The respondent, who was the plaintiff in the action, gave evidence and called his wife to support

him. He said in his evidence at the trial that the police came to his village and told him that they were looking for his son. He told them that he did not know where his son was and they then said he must find his son and bring him to Choma Police Station. He said that when he told the police that he had no transport to comply with such a request they then arrested him for failing

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to comply with such a request they then arrested him for failing to agree to find his son and bring him to the police station.

The defence case was that the police were investigating a case of stock theft and the respondent's son was involved in that case. They therefore went to the respondent's village where they were making inquiries as to the whereabouts of the respondent's son. According to the defence, the respondent then became aggressive, violent and started insulting them. As there were a number of villagers around, the police arrested the respondent for conduct likely to cause a breach of the peace. He was then taken by the police around several neighbouring villages looking for his son and, when the son was not found, he was taken to Choma Police Station and charged with conduct likely to cause a breach of the peace. The police witnesses said that entries to this effect were made in the occurrence book at the Police Station and in the notebook of the police officer, but when the case came for trial the arresting officer said that he had lost his notebook and there was evidence that the relevant page had been torn out of the occurrence book.

Mr Goel on behalf of the appellant argued that the learned trial judge was wrong in accepting that the respondent and his wife were telling the truth and finding that the defence witnesses were lying and that they had invented the charge of conduct likely to cause a breach of peace in order to justify their detention of the respondent. Mr Goel pointed out that the statement of claim alleged that no reason had been given for the arrest at all and that after the arrest the respondent had been told that the police had been investigating a case of stock theft against his son, but that when the respondent came to give evidence he said that he was told that he was being arrested because he refused to bring his son to the Police Station as requested.

This, argued Mr Goel, was a contradiction of the statement of claim, and indeed, the learned trial judge had found that in all probability the respondent was arrested in connection with the disappearance of his son. Therefore it was argued that the claim in the statement of claim, namely, arrest without charge, had not been substantiated.

Whilst we agree with Mr Goel that the evidence at the trial differed from the relevant paragraph of the statement of claim, we cannot ignore the fact that the statement of claim made reference to the son's involvement in the charge of stock theft, nor can we agree that there was such a discrepancy between the statement of claim and the evidence in court that the respondent and his wife should be treated as untruthful witnesses on that account.

Mr Chongwe on behalf of the respondent argued a number of matters and in particular that there was ample evidence upon which the learned trial judge could base a finding on credibility that the defence police officers were not telling the truth. Both counsel agreed that the learned trial judge's finding depended solely on the credibility of the witnesses.

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We have considered the law set out in past judgment of this court when a trial judge's findings of fact are attacked on appeal, as in this case. In the case of *Nkhata and four others v The Attorney General* of *Zambia* the Court of Appeal which was a predecessor of this Court made the following comments on this type of appeal:

> "(1) (2) By his grounds of appeal the appellant, in substance, attacks certain of the learned trial judge's findings of fact. A trial judge sitting alone without a jury can only be reversed on fact when it is positively demonstrated to the appellate court that:
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> > (a) by reason of some non-direction or mix-direction or otherwise the judge erred in accepting the evidence which he did accept; or
> > (b) in assessing and evaluating the evidence the judge has taken into account some matter which he ought not to have taken into account, or failed to take into account some matter which he ought to have taken into account; or
> > (c) it unmistakenly appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he cannot have taken proper advantage of his having seen and heard the witnesses' or
> > (d) in so far aside judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witnesses which he accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer".

In her judgment the learned trial judge gave detailed reasons including, for instance, the fact that the page from the occurrence book was missing, for disbelieving the defence witnesses. In the course of giving these reasons, the learned trial judge entered into speculation and reasoning which in our view could not support the finding which she made. In view of the course which we propose to take we will not go into detail as to these speculations and reasoning except to say that they were such as, in our view, amount to serious misdirections, and, on the principles set out in the *Nkhata* case, the learned trial judge's finding of fact must be disturbed under ground (c), that is, that it unmistakably appears from the evidence itself, and from the unsatisfactory reasons given by the judge in accepting it, that she cannot have taken proper advantage of her having seen and heard the witnesses. In this case the learned trial judge rejected the defence evidence and, as we have said, gave unsatisfactory reasons for doing so. As a result, she accepted the plaintiff s evidence for the same unsatisfactory reasons.

The appeal is allowed and the judgment of the High Court with its attendant award of damages is set aside.

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We have considered whether or not this is an appropriate case for retrial and we have taken note of Mr Goel's argument that there is sufficient evidence on the record for us to come to our own conclusion. However, in view of the fact that this case depended entirely upon the question of credibility, namely, that there were two entirely conflicting sets of evidence from two different sets

of witnesses, who could each have his or her own reasons for being prejudiced, we are quite satisfied that it would be quite impossible for this court to substitute from the record before us a judgment of our own deciding which of the witnesses were telling the truth. We have no alternative therefore, but to send this case back for retrial and we accordingly order that this case be retried before another judge of the High Court.

The money paid into court by the appellant in respect of the damages is ordered to be paid out of court to the appellant. Costs will be in the cause.

Appeal Allowed.
Retrial Ordered.
