

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING

CASE NO.: HC-MD-CIV-ACT-DEL-2019/05034

In the matter between:

ELIAS TJIRIANGE
PLAINTIFF

and

MINISTER OF SAFETY AND SECURITY	FIRST DEFENDANT
COMMISSIONER GENERAL OF THE NAMIBIAN CORRECTIONAL SERVICE	SECOND DEFENDANT
SUPERINTENDENT HAIYAMBO OF THE NAMIBIAN CORRECTIONAL SERVICE	THIRD DEFENDANT
SERGEANT E.A LUKAS OF THE NAMIBIAN DEFENDANT CORRECTIONAL SERVICE	FOURTH

Neutral Citation: *Tjiriange v Minister of Safety and security* (HC-MD-CIV-ACT-DEL-2019/05034) [2022] NAHCMD 629 (11 November 2022)

Coram: OOSTHUIZEN J
Heard: 10, 11, 12 May 2022- 14 July 2022
Delivered: 11 November 2022

ORDER

1. Plaintiff's claims against defendants are dismissed.
2. No order as to costs is made.
3. The matter is finalized and removed from the roll.

REASONS

OOSTHUIZEN J:

Introduction and background

[1] The plaintiff is Elias Tjiriange, an adult male, at present incarcerated at Walvis Bay Correctional Facility.

[2] The first defendant is the Minister of Safety and Security, the head of the Namibian Correctional Services in the care of the Government Attorney, Namibia.

[3] The second defendant is the Commissioner General of the Namibian Correctional Service, the Director-General of the Namibian Correctional Service in the care of the Government Attorney, Namibia.

[4] The third defendant is Superintendent Haiyambo of the Namibian Correctional Service, head of Unit five in the Windhoek Correctional facility in the care of the Government Attorney, Namibia.

[5] The fourth defendant is Sergeant E. A Lukas of the Namibian Correctional Service in the care of the Government Attorney, Namibia.

[6] The defendants are all sued in their official capacity.

[7] The plaintiff instituted proceedings against the defendants, claiming that on 29 June 2019 when he was brought to the reception area in the Windhoek Correctional facility, he was assaulted by the fourth defendant on the instructions of the third defendant and as a result he suffered bodily injuries and that his psychological integrity, dignity and self-esteem were infringed. He is therefore claiming general damages in the amount of N\$500 000.

[8] The defendants entered a notice to defend the action and pleaded and admitted that the plaintiff was escorted from the holding cell to another unit and denied that any assault was inflicted on the plaintiff and further denied that the third defendant gave any instruction to the fourth defendant. The defendant's put the plaintiff to the proof thereof.

The issue that the Court is required to resolve

[9] This court is required to determine whether the plaintiff was assaulted on 29 June 2019 by the third and fourth defendants.

[10] I will proceed by starting off with the evidence presented by the plaintiff.

The plaintiff's evidence

[11] The plaintiff testified in support of his claim. The plaintiff testified as follows:

'3. On 29 June 2019 from approximately 12h00 until approximately 14h00 at the reception area in the Windhoek Correctional Facility, Windhoek,

4. I was instructed to go to the reception area from unit 5 by a female officer whose name I do not know.

5. At the reception area I found Supt; Haihambo and other correctional officers one of whom was Sergeant E.A Luckas and they questioned me about a cell phone, to which I told them I did not have, the questioning went on for some time,

6. At some point Sergeant E.A Luckas placed me in hand cuffs on the instruction of Sept; Haihambo. Thereafter he started assaulting,

7. The said assault consisted of me being placed in hand cuffs, hands behind my back, being punched in the face, kicked to the stomach and being kicked all over my body by the said sergeant.

8. After the assault, I then requested to be taken to the internal clinic in order to receive medical treatment as a result of the assault on my person.

9. I was then taken to the internal clinic for the required treatment and was attended to by S/Supt Kambalala.

10. After the medical treatment, I was then escorted back to the unit (5).

11. As a consequence of the assault on my person, I suffered body injuries, more particularly; pain in the head, and left side jore multiple bruises, to the knees, legs and body.

12. I endured shock, pain, suffering and discomfort, which was initially severe.'

[12] The plaintiff further testified that on 17 June 2020, he requested for the occurrence book at the internal clinic from Senior Kambalala. He was informed that there is no such book, but that he believes there is such a book.

[13] After the plaintiff testified he was subjected to cross-examination. During cross-examination the defendant's legal practitioner put it to the plaintiff that the summons was not served by the deputy sheriff and the plaintiff admitted that yes it was served by himself.

[14] The defendant's legal practitioner further pointed out to the plaintiff that he was never treated by Mr Kambalala and the plaintiff in response stated that the defendant's want to cover up their assault inflicted on him.

[15] Petrus Bwanga testified on behalf of the plaintiff. He stated that he saw the plaintiff after he was brought back to the unit and his clothes and parts of his body were dirty. He observed bruises on his face and knee.

The defendants' evidence

[16] The defendants relied on the evidence of three witnesses in support of its case. The first witness was Joseph Kondjeni Haihambo (third defendant). He testified that on 29 June 2019, the plaintiff was brought to the reception by SCCO

Shafeokutya after he requested the plaintiff to be brought on a suspicion of him having a cellphone. The plaintiff informed him that SCCO Shafeokutya had mistaken a calculator for a cellphone and when the alleged calculator was requested he refused and became rude and aggressive. He then instructed SCO Lukas to handcuff the plaintiff. The plaintiff then requested the handcuffs to be removed in order for him to go and show SCCO Shafeokutya where the cellphone was. They left and returned with the cellphone and upon their return the plaintiff requested to be taken to the clinic. The third defendant testified that he left the plaintiff with Mr Kambalala and later the plaintiff was collected by SCCO Shafeokutya. He stated that the plaintiff was not assaulted in his presence. The plaintiff was in his unit and never complained of an assault until he was transferred to Walvis Bay months later.

[17] The second witness was Lukas Elias Alukonga (fourth defendant) who testified that on 29 June 2019, the third defendant informed him to join him in interviewing the plaintiff on a suspicion of a cellphone. The plaintiff was brought by SCCO Shafeokutya and he was questioned on the whereabouts of the cellphone, which he denied and stated that he had a calculator. The third defendant then requested him to search the plaintiff whereby the plaintiff refused and pushed him away. The third defendant then ordered him to handcuff the plaintiff and the plaintiff did not refuse to be handcuffed. The fourth defendant then searched the plaintiff and did not find the cellphone. He further testified that the plaintiff thereafter requested to speak privately with the third defendant and SCCO Shafeokutya and he left them.

[18] The defendants then called Senior Superintendent Kambalala to testify. He testified that he is head of nursing and on 29 June 2019 he was informed by Superintendent Haihambo that they would bring an offender to the clinic as such offender is suspected of having a cellphone and that an X-ray should be taken. The plaintiff was brought on the said date at the clinic, but that he did not attend to the plaintiff or consult the offender on that day. That the plaintiff and the two officers that brought him on that day just left without him talking to the plaintiff. He further testified that entries are recorded in the health passport and the book is for outside referrals. That there is a register form with the date, name and unit. That there is another book for medication.

Submissions

Plaintiff's submissions

[19] The plaintiff submitted that his claim is based on an assault which involved punches, kicks and assault all over his body. That when he was assaulted he was handcuffed and in the process fell to the ground where the fourth defendant continued to kick him. The plaintiff further submitted that his right as a human being were violated.

[20] He further submitted that Kambalala denied having attended to him on the date in question, however the third defendant stated that he took him to the clinic. Further that both Kambalala and Bwanga stated that there is a book, however, Kambalala tried to keep the existence of the book from the court, which to him seemed like a deliberate attempt to conceal the existence of the said book.

Defendant's submissions

[21] The defendant's legal practitioner further submitted that the plaintiff served the combined summons on the defendants on 14 November 2019 within six months after the alleged cause of action arose on 29 June 2019, but did not give notice to the defendants in terms of s 33(2) of the Public Service Act 13 of 1995.

[22] The defendants further submitted that there was no reason for Kambalala to deny that he treated the plaintiff for the alleged injuries suffered, taking into consideration that he stated that he saw the plaintiff at the clinic, but did not treat him. Kambalala further did not fabricate and state that the book does not exist, considering the fact that he explained that there are different register books within the clinic and that inmates have their own medical passports which they use to provide a history of the inmate's illness and such medical passport was also confirmed by Bwanga.

Analysis

[23] In considering the merits of the matter, it is clear that the court is faced with two mutually conflicting versions.

[24] It was required from plaintiff to prove on balance of probabilities that he was assaulted as alleged.

[25] From the evidence before me, it is clear that the plaintiff was taken to the fourth defendant for questioning over a cellphone. It is further clear that the plaintiff was taken to the clinic thereafter. Plaintiff alleged that he was assaulted by fourth defendant in the presence of third defendant. This was denied by third and fourth defendant. The plaintiff alleges that he was taken to the clinic and was treated by Kambalala for injuries he sustained on his body, specifically for pain in his head, bruises on his jaw, knees and legs. That his injuries were recorded in a book. The witness of the plaintiff alleges that he observed the bruises on the plaintiff's face and knee and that the plaintiff's clothes were dirty, when he was brought back to the cell an hour after he was taken away. But according to plaintiff's evidence he was away for more than two hours from 12h00. The plaintiff's version is that, he was two hours with the third and fourth defendants before he was taken to the clinic. On his own version and the version of Kambalala he had to spend more time at the clinic. The evidence of his witness therefor is unreliable.

[26] The third defendant's evidence is that the plaintiff was taken to the clinic on the request of the plaintiff himself and that he was not assaulted. Kambalala testified that he saw the plaintiff being brought to the reception of the clinic on the said date, but that he never spoke to the plaintiff and nor did he treat the plaintiff as the plaintiff has left before being attended to. He further made it clear that inmates that are brought to the clinic require a health passport and that there is a register book for inmates referred for medical treatment outside of the correctional facility and other registration forms to be completed.

[27] Kambalala testified that no paperwork was completed by him on 29 June 2019 because he, as a nurse, did not treat nor dispense any medicine to plaintiff on that day.

Conclusion

[28] Having had regard to all the evidence before me, the plaintiff did not convince me on a balance of probabilities that he was indeed assaulted on the 29th of June 2019, as alleged. Plaintiff did not produce his health passport either.

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

1. Plaintiff's claims against defendants are dismissed.
2. No order as to costs is made.
3. The matter is finalized and removed from the roll.

GH OOSTHUIZEN
Judge

APPEARANCES:

PLAINTIFF: E Tjiriange
Plaintiff in person

DEFENDANTS: LK Tibinyane
Office of the Government Attorney, Windhoek