

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: HC-NLD-CIV-ACT-DEL-2021/00135

In the matter between:

S H

JANNUS NDAHANGWAPO HAUKONGO

1ST PLAINTIFF

2ND PLAINTIFF

and

THE MINISTER OF HOME AFFAIRS,
IMMIGRATION, SAFETY AND SECURITY

DEFENDANT

Neutral citation: *Haukongo v Minister of Home Affairs, Immigration, Safety and Security* (HC-NLD-CIV-ACT-DEL-2021/00135) [2023] NAHCNLD 63 (03 July 2023)

Coram: MUNSU J

Heard: 19 April 2023

Delivered: 06 July 2023

Flynote: Delict – Wrongful arrest and detention – Police detaining minor who had been found together with a wanted suspect – Defendant denying that there was an arrest- Held that the minor was deprived of his liberty by the police officials, thereby

constituting arrest – Defendant failed to establish that the arrest and detention of the minor were lawful.

Summary: The first plaintiff, a minor, travelled home with his relatives, one of whom was wanted by the police for allegedly committing a crime. The wanted suspect was located by the police, however, the police took everyone he was travelling with, including the minor, into their custody. The minor instituted a delictual claim for unlawful arrest and detention. The second plaintiff, the minor's father, instituted action against the defendant for mental distress because he was concerned about the whereabouts of his son. The defendant maintained that the minor was not arrested and that his detention resulted from his family failing to pick him up from the police station.

Held, that the station commander's instruction to his colleagues was merely to locate the suspect, however, the police officers who went after the suspect brought everyone who was with the suspect, resulting in the minor's detention.

Held that, the confinement of the minor in one of the rooms at the police station for the entire night deprived him of his liberty. It matters not whether the defendant claim that the minor was not arrested.

Held further that, the minor was detained by the police during 3 – 4 December 2020.

Held, that on the authority of *Shaalukeni v Minister of Safety and Security and Others*, to arrest a person is to deprive him or her of his or her liberty by some lawful authority or a person lawfully authorised.

Held that, in the instant matter, the evidence points to the conclusion that the minor was deprived of his liberty by the police officials, that is, he was arrested on 3 December 2020.

Held further that, the defendant failed to establish that the arrest and detention of the minor were lawful.

Held, that the second plaintiff's evidence is undisputed that he was contacted by the minor's mother who informed him about the abduction of his son. The second plaintiff

made several phone calls to family members in an attempt to locate his son. He spent a night in anguish over the wellbeing of his son.

Held further, that the police conduct is similarly actionable in respect of the second plaintiff.

The court awarded damages in favour of the plaintiffs.

ORDER

Judgment in favour of the plaintiffs against the defendant in the following terms:

(a) First Plaintiff:

- (i) N\$ 15 000 for arrest and detention;
- (ii) N\$ 10 000 for pain and suffering;

(b) Second Plaintiff:

- (i) N\$ 10 000 for mental anguish and distress.

(c) Interest on the aforesaid amounts at the rate of 20% per annum from the date of judgment to the date of final payment;

(d) Costs of suit.

(e) The matter is removed from the roll, case regarded as finalised.

JUDGMENT

MUNSU J

Introduction

[1] The plaintiffs instituted action against the defendant for damages, arising from alleged wrongful acts allegedly committed by members of the Namibian Police. The claims are based on the fact that members of the Namibian Police are employees of the

defendant and that the defendant is vicariously liable for the wrongful acts committed by its employees during the course of their employment.

[2] The defendant defended the action and the matter proceeded in the ordinary manner with the parties filing pleadings.

The parties

[3] The first plaintiff is a minor male child, duly represented by his biological father Mr Jannus Haukongo.

[4] The second plaintiff is Mr Jannus Haukongo, an adult male person and resident of Onandjaba Okalongo, Omusati Region. He is employed by the Ministry of Education.

[5] The Defendant is the Minister of Home Affairs, Immigration, Safety and Security, duly appointed in terms of Article 32(3)(i)(dd) of the Namibian Constitution and cited in his official capacity as being the person legally responsible for the conduct of members of the Ministry of Home Affairs, Immigration, Safety and Security, with office situated at Cohen Building, Kasino Street, Windhoek, Namibia.

Particulars of claim

[6] It is alleged that on 03 December 2020 and at or near Okahao, the first plaintiff was unlawfully and arbitrarily arrested and detained by members of the Namibian police along with four other persons who were suspected of having committed crime in the Erongo Region.

[7] It is alleged that the aforesaid members of the Namibian police were at all times acting in the course and scope of employment of the Namibian police.

[8] It is further alleged that the arrest and detention of the first plaintiff was unlawful, wrongful and arbitrary in that:

8.1 The first plaintiff was not a suspect in the commission of any offence;

8.2 The arresting officers despite knowing that the first plaintiff was not to be charged with any offence, nevertheless arrested and detained him in a blatant abuse of power and in violation of his civil liberties and rights as a child;

8.3 The arrest and detention of the first plaintiff was arbitrary and incompatible with the first plaintiff's rights to liberty and freedom, as provided for under Articles 7, 8, and 11 of the Namibian Constitution.

8.4 The arrest and detention violated Article 15(5) of the Namibian Constitution which prohibits "preventive detention" of children below the age of 16. The first plaintiff was 9 years old at the time of the arrest.

[9] In addition, it is alleged that the first plaintiff's arrest and detention was a traumatic experience for him, as he is still suffering as a result of the aforesaid horrible experience. In the premises, it is alleged that the first plaintiff suffered general damages and claims payment in the amount of:

9.1 N\$ 40 000 in respect of wrongful arrest and detention;

9.2 N\$ 40 000 in respect of pain and suffering;

9.3 N\$ 20 000 in respect of mental anguish.

[10] It is further alleged that the unlawful arrest and detention of the first plaintiff was further detrimental to the second plaintiff in that the second plaintiff spent a sleepless night worrying about his son's whereabouts. As a result, it is claimed that the second plaintiff suffered damages as a result of the mental, psychological anguish and distress in the amount of N\$ 60 000.

The plea

[11] The defendant disputes that the first plaintiff was unlawfully and arbitrarily arrested and detained. The defendant states that on 3 December 2020, members of the Okahao police station were tracking down a suspect believed to have committed a crime of housebreaking with intent to steal and theft under Cr (12/12/2020) in Walvis Bay. It is further stated that the suspect was seen at Onemanya location in Okahao.

[12] The defendant pleaded that the police managed to trace and locate the suspect and brought him to the Okahao police station for questioning. It was further pleaded that the suspect was brought to the police station with a relative of his, the first plaintiff with whom he was travelling with when he was located.

[13] In addition, the defendant claimed that the suspect was brought to Okahao police station for questioning while members of the Walvis Bay police station were on their way to Okahao police station to pick up the suspect and transfer him to Walvis Bay.

[14] The defendant further pleaded that while the suspect was waiting to be transferred to the Walvis Bay police station, members of the Okahao police station had notified the first plaintiff's family to come pick up the first plaintiff from the police station, but no one showed up. As a result, the defendant alleges that the first plaintiff was kept overnight at the police station in order to ensure his safety.

[15] Furthermore, the defendant pleaded that the first plaintiff's family members only showed up on the following day 4 December 2020, in the morning, to pick up the first plaintiff.

[16] The defendant denied violating the first plaintiff's constitutional rights in any manner.

Replication

[17] The plaintiffs pleaded that the police did not notify any family member to pick up the first plaintiff, notwithstanding the first plaintiff and the alleged suspect's request to that effect.

[18] The plaintiffs' further claim that, had the police not meant to keep the first plaintiff, they would have requested the first plaintiff to direct them to his residence.

[19] The plaintiffs alleged that the first plaintiff's mother was only called on the morning of 4 December 2020 and she immediately directed family members to pick up the first plaintiff.

Plaintiff's case

[20] The first witness to testify on behalf of the plaintiffs was Mr Kornelius Shiimi. He is employed as a driver at Indongo Toyota, Ongwediva. He testified that on 03 December 2020 he drove with the first plaintiff and three other relatives namely Fredrick Namalenga (Kaushi), Iita and Kashupi from Oshakati to the village at Uukuvu in Okahao Constituency. He testified that, upon arrival at Uukuvu village, they decided to go to the cucashop called Ehafo to buy refreshments before going home.

[21] Mr Shiimi further testified that while at the cucashop, he found his biological mother Ms Johanna Amutenya. While in conversation with his mother, a corolla quest drew up in front of their vehicle and a man got out of the vehicle and instructed him not to move. According to Mr Shiimi, the said man demanded that he hand over his wallet and ordered everyone in the car he was driving to follow him. He continued by narrating how the first plaintiff and the other passengers in his car were led behind one of the bars and had their wallets seized by the aforementioned individual, who was now joined by many more men wearing police uniforms.

[22] In addition, Mr. Shiimi recounted that the man in civilian clothing asked them who among them was Kaushi, and they identified him and the man immediately took Kaushi to the vehicle they had arrived in, while the witness and his colleagues were given the order to get in their car and drive to the Okahao Police Station.

[23] Moreover, the witness stated that he, Kaushi, and Iita were all handcuffed when they arrived at the police station. He further claimed that the first plaintiff was placed in a small room with an old mattress.

[24] According to the witness, he requested the police to give him his cellphone so he could call someone at home to pick up the first plaintiff, but his request was repeatedly

refused until he was, together with his colleagues locked up in the corridors of the police station where they spent the night while the first plaintiff slept in the small room.

[25] Mr. Shiimi also narrated that he was interrogated several times the following morning before being released that afternoon. He was informed that the first plaintiff had been released earlier that morning.

[26] The ten-year-old first plaintiff testified that on 3 December 2020, he traveled to their village of Uukuvu in the Okahao Constituency with his uncle Fredrik Namalenga and three other relatives.

[27] He testified that at about 18:00 at Onemanya Cucashop, a group of men dressed in civilian attire approached them and ordered them to get out of the car they were in. He further claimed that they were harassed and that the men instructed the others to follow them to the police station while forcing his uncle Mr. Namalenga into their vehicle.

[28] In addition, he stated that it wasn't until Okahao Police Station that the men disclosed that they were law enforcement officials and that his uncle Mr. Namalenga was wanted in the Erongo Region.

[29] He added that Mr. Namalenga had asked the police to call his parents and had given them his mother's phone number, but the police had merely instructed the witness to sleep in a cramped space and had only provided him with a blanket. The witness claims that on 3 December 2020, neither his mother nor any other relative received a call from the police.

[30] Additionally, the witness told the court that his mother and uncle Imbili were only called by the police to fetch him from the police station on 4 December 2020.

[31] The witness added that the cell in which he had been kept was filthy and bug-infested. Additionally, he said that he was deprived of food and drink while in the cell and that he was unable to sleep at night due to his overall state of anguish, confusion and fear.

[32] Ms Martha Kapweya, a teacher by profession, is the biological mother to the first plaintiff. She testified that on 03 December 2020 her cousin Fredrick Namalenga and three other relatives picked the first plaintiff from her house at Ehenye location in Oshakati and travelled with him to their village at Uukuvu.

[33] She testified that at around 18h00 p.m, she received a call from a relative, Ms. Johanna Amutenya, reporting that a group of men had abducted the first plaintiff, her vehicle, and three of her relatives.

[34] She further testified that she spent the night of 3 December 2020, calling the Oshakati Police Station to inquire about the whereabouts of her family members and the first plaintiff. She was told they were not in their custody.

[35] Furthermore, she testified that on the morning of 04 December 2020, she received a phone call from Okahao Police Station to let her know that her son was at the police station and she should go and get him. She testified that she immediately instructed her cousin one Imbili, employed as a traffic officer at Oshakati Police Station to go and get her son as well as her vehicle.

[36] Ms Kapweya further testified that she spent the night of 3 December 2020 in utter anguish and fear over her son's whereabouts. Additionally, she testified that she is unaware of any efforts by the police to call her or any other family member on 3 December 2020 regarding her son.

[37] Mr Jannus Ndahangwapo Haukongo is the biological father to the first plaintiff. He is employed as a teacher and resides at Ongha. He testified that on 3 December 2020, the mother of the first plaintiff, Ms. Kapweya, called him to inform him that her son had been abducted together with his uncles and that he was missing.

[38] In addition, Mr. Haukongo testified that he tried unsuccessfully to locate his son on the evening of 3 December 2020, calling a number of family members in the

process. As a result, he spent the night in agony and mental anguish over the lack of knowledge of first plaintiff's whereabouts.

[39] The witness further narrated that on 4 December 2020, the first plaintiff's mother informed him that his son was detained at Okahao police station and that she had sent someone to get him out of custody.

[40] It was Mr Haukongo's testimony that after the first plaintiff was picked up from the police station, he narrated to him his entire ordeal. He further testified that he approached Okahao police station on numerous occasions for an explanation as to why his son was detained overnight and why he was not called to pick him up, however, he received no assistance in that regard. Mr Haukongo testified that due to frustration from the lack of assistance and cooperation from the police, he approached his legal practitioner of record to assist him in instituting this matter on behalf of his minor son.

Defendant's case

[41] Inspector Michael Kapweya Kamati, a police officer stationed at Okahao testified that there was a suspect by the name Fredrik Namalenga who was suspected of having committed crime in Walvis Bay and he was seen in Onemanya location.

[42] Inspector Kamati further testified that he instructed officer Ashipala to seek assistance from other police officers in order for him to go and search for the suspect and bring him to Okahao Police Station for further questioning.

[43] Inspector Kamati narrated that the first plaintiff was not arrested and was kept at the charge office with other police officers whilst he was waiting for his relatives to come and pick him up.

[44] Sergeant Lundulula Sakalia Ashipala, stationed at Okahao Police Station testified that on 3 December 2020 at around 17h00, Inspector Kamati called him to his office. There Inspector Kamati informed him that there was a suspect by the name Namalenga Fredrick wanted in Walvis Bay for allegedly committing a crime of housebreaking with

intent to steal and theft under CR number 12/12/2020. According to Sergeant Ashipala, Inspector Kamati informed him that the suspect was seen around Onemanya location and he further informed him to seek the assistance of fellow police officers to go after the suspect.

[45] The witness added that he traveled at Onemanya with his colleagues between the hours of 17h30 and 18h00. He claimed that they discovered the suspect with two other adult males and a young male. Sergeant Ashipala also stated that in order to verify the name, he requested the suspect's identification card. After the suspect's identity was established, he told him that he was wanted for a crime he committed in Walvis Bay and that he should travel to Okahao Police Station for additional questioning. He recounted that the suspect, including two adult males and one juvenile were taken to the police station.

[46] According to the witness, the three adult males were placed in the waiting area of the police station for further questioning by police officers from Walvis Bay, while the juvenile was kept at the charge office for his safety with other police officers. He narrated that the first plaintiff was not arrested. He further testified that he knocked off at 20h00 and left the first plaintiff in the charge office with other police officers waiting to be picked up by one of his relatives.

[47] Warrant Officer Simon Ekandjo, of Okahao Police Station testified that on 3 December 2020 he was on duty as the shift commander. His duty started at 14h00. At about 18h52, his colleagues brought in three adult male persons and one male juvenile (first plaintiff). One of the adult male persons was suspected of having committed a crime in Walvis Bay. Warrant Ekandjo narrated that his colleague Sergeant Ashipala informed him that they were waiting for police officers from Walvis Bay to interrogate the three male adults.

[48] Warrant Ekandjo testified that when he asked Sergeant Ashipala why the first plaintiff had been brought in with the adults, the latter said that the first plaintiff had been traveling with the three adult males.

[49] Warrant Ekandjo further testified that he heard Mr Kornelius Shiimi ask Sergeant Ashipala if he could call a family member to come pick up the first plaintiff together with the vehicle they were travelling in. According to Warrant Ekandjo, Sergeant Ashipala gave Mr Shiimi the permission to make the phone call. He claimed that the phone call was made by Mr. Shiimi in front of him and Sergeant Ashipala. Warrant Ekandjo narrated that when Mr. Shiimi finished the phone call, Sergeant Ashipala inquired as to who he was speaking with. Mr. Shiimi responded that he was speaking to the mother of the first plaintiff, who said she would arrange for someone from Okahao to come and pick up the car and the first plaintiff.

[50] Warrant Ekandjo further testified that as the evening wore on, he realised that no one came to pick up the first plaintiff and the vehicle from the police station. After that, he made the decision to put the first plaintiff in a certain visiting room within the charge office. In addition, Warrant Ekandjo described how, on 3 December 2020, at 22h00, he handed over his shift to Warrant Officer Joaquin and notified her about the first plaintiff and that he would be picked up by his family.

[51] His further testimony was that on 4 December 2020, when he reported for duty, he found the first plaintiff in the same room where he had left him the day before. He recounted that the first defendant was only picked up from the police station between the hours of 06:00 – 08:00 am on 4 December 2020.

[52] Warrant Officer Tresia Joaquin, stationed at Okahao Police Station testified that on 3 December 2020 her shift started at 22h00. She narrated that during her shift, the first plaintiff was kept in the charge office with other police officers for his safety until the morning of 04 December 2020 when he was picked up by one of his relatives.

[53] Warrant Officer Timoteus Uugwanga of Okahao Police Station testified that the suspect who was suspected of having committed a crime in Walvis Bay was detained at the waiting area in Okahao Police Station with two other adult males for questioning. In addition, he stated that while the first plaintiff was waiting for his family to pick him from the police station, he was detained at the charge office with other police officers for his safety rather than being arrested.

Discussion

[54] I propose to deal with the matter in the sequence of how the events unfolded.

[55] The information about the suspect who was wanted in Walvis Bay was received by the Station Commander of Okahao police station Inspector Michael Kapweya Kamati. The latter then instructed Sergeant Ashipala to ask his colleagues for help in locating the suspect.

[56] The difficulty with the defendant's case arose when the police decided to detain everyone who was travelling with the suspect. According to Inspector Kamati, his instruction was to merely locate the suspect, however, the police officers who went after the suspect brought everyone who was travelling with the suspect.

[57] When asked why they detained everyone, the police officer's version changed as the matter progressed. They contradicted themselves and gave versions that are irreconcilable.

[58] One of the suspect's relatives, Mr. Shiimi, testified that they were all told to accompany him to the police station, where they were all held until the next day. On the one hand, the police witnesses claimed that they only ordered the suspect to accompany them to the police station and that the rest of his squad willingly decided to follow. Firstly, even if such were the truth, this version fails to explain why the suspect's entire traveling team ended up being detained.

[59] On the other hand, the police witnesses provided a different version stating that they gave the order for everyone to accompany them to the police station for questioning and that they believed one of the suspect's team members had an arrest warrant out for them. They continued by saying that they made the decision to take everyone to the police station after receiving advice not to release the others from the Walvis Bay police officials. There are several problems with this version.

[60] First of all, such version does not form part of the defendant's pleaded case, nor does it feature in any of the defendant's filed witness statements.

[61] Secondly, there was no evidence that any of the police witnesses who attended to the scene spoke to any of the police officers in Walvis Bay. As pointed out earlier, the instruction came through Inspector Kamati who testified that he was contacted by the station commander of Outapi that there was a sought after suspect spotted at Onemanya cucashops. With the description he was given, Inspector Kamati instructed Sergeant Ashipala to seek assistance from his colleagues and go after the suspect alone. Inspector Kamati was very clear that he never gave the order to interrogate everyone, even though he also testified on matters about which he had no personal knowledge. Additionally, Inspector Kamati's role in the case was minimal after he gave the instruction because he then knocked off.

[62] Thirdly, none of the police officers from Walvis Bay testified to confirm that such instruction was given to any of the police officers who attended to the scene.

[63] Fourthly, the issue of one of the suspect's team members being suspected or believed to be on a warrant of arrest was not pleaded, neither was there any discovery to that effect. There is no single evidence of any police officer who claimed that he or she is the one that had such suspicion or belief and the reason therefor. Clearly, this version was an afterthought to justify the detention.

[64] While the police witnesses claimed that the first plaintiff's mother was contacted and informed about her son in order to pick him from the police station, there isn't a single police officer who is on record to confirm that he or she spoke with the first plaintiff's mother. Conjecture is what is on record.

[65] Sergeant Ashipala testified that Mr Shiimi was allowed to phone the first plaintiff's mother who said that she would send someone to pick the first plaintiff. According to Mr Ashipala, the phone was on loud speaker and that Warrant Ekandjo was present. Mr Shiimi denied this evidence. Given that Sergeant Ashipala did not know the first

plaintiff's mother, and also that no details were provided about the phone call, I find that Sergeant Ashipala's claim was not sustained. This is more so, especially when the mother of the first plaintiff also denied that she was phoned on 3 December 2020. There was no material placed before court from which it could be inferred that whoever that might have been called, if at all such call was made, was the first plaintiff's mother. Sergeant Ashipala did not testify on what basis he concluded that the first plaintiff's mother was called.

[66] According to Warrant Ekandjo, the phone number of the first plaintiff's mother was provided to Sergeant Ashipala by the first plaintiff. Warrant Ekandjo testified that he only spoke to the first plaintiff when he asked for his name and nothing else. He testified that he did not ask for further details from the first plaintiff because Sergeant Ashipala had already spoken to the first plaintiff. Sergeant Ashipala on the other hand testified that he did not speak to the first plaintiff.

[67] Warrant Joaquin who took over from Warrant Ekandjo testified that she was informed to hand the first plaintiff once his relatives arrived. However, she had no idea about the phone call, neither did Warrant Ekandjo give her any of the contact details of the first plaintiff's relatives.

[68] Warrant Uugwanga testified that he did not know whether Sergeant Ashipala made the phone call to the first plaintiff's relatives. Thus, there is no satisfactory evidence that the first plaintiff's mother was contacted on 3 December 2020.

[69] Even if this court was to accept that the first plaintiff's mother was contacted, it is worthy to note that the first plaintiff and his relatives were taken to Okahao police station after 18h00. The first plaintiff's mother lived in Oshakati and could not have left her home as she had small baby. She also testified that she did not know of any driver in the Okahao area that she could have asked to pick the first plaintiff. Under the circumstances, the first plaintiff's detention at Okahao police station cannot be blamed on his mother.

[70] The police witnesses conceded that had they not detained everyone who was travelling with the suspect, the first plaintiff would not have spent the night at the police station, more so when Mr Shiimi and not the suspect was the driver of their vehicle. Without a doubt, the court would not be hearing this case.

[71] There is undisputed evidence that the first plaintiff knew the way to his grandmother's house at Uukuvu. If only the police bothered to take him to his grandmother, he would have been able to direct them. Inspector Kamati conceded that the first plaintiff should have been taken home. He also conceded that, aside the suspect, the rest should not have spent the night at the police station. The concession was rightly made.

[72] The first plaintiff is a minor who at the time of the incident was aged 9 years old. His movement on the fateful day was dependent on his elder relatives with whom he was travelling. The detention by the police, of the relatives he was travelling with and his confinement, for the night, to one of the rooms at the police station, deprived him of his liberty. It matters not that the defendant claim that the first plaintiff and his relatives were not arrested (as their names were not reflected in the police books for arrested individuals). The fact of the matter is that the first plaintiff and his relatives were detained by the police during 3 – 4 December 2020.

[73] The Criminal Procedure Act 51 of 1977 does not define the word 'arrest'; and so we should have recourse to the ordinary grammatical meaning by the context of the word 'arrest'.¹ To arrest a person is to deprive him or her of his or her liberty by some lawful authority or a person lawfully authorised.²

[74] In the instant matter, I find that the evidence points inexorably to the conclusion that the first plaintiff was deprived of his liberty by the police officials, that is, he was arrested on 3 December 2020. I hold that the defendant has failed to establish that the arrest and detention of the first plaintiff were lawful.

¹ See *Shaalukeni v Minister of Safety and Security and Others* (HC-MD-CIV-ACT-OTH-2019/05140) [2021] NAHCMD 401 (8 September 2021).

² *Ibid* para 8.

[75] Even if one assumes in favour of the defendant that the police actions in this matter do not constitute arrest in the strict sense, it inevitably follows that their conduct is actionable. The *libertas* (bodily freedom) is protected not only against the total deprivation of liberty but against any limitation of a person's freedom of movement or action.³ It is certain that there was a physical means of obstruction or at least the first plaintiff was being subjected to physical control.

[76] As a form of *iniuria*, wrongful deprivation of liberty consists in a person being deprived of his physical freedom without justification. To succeed, the plaintiff must prove that the defendant himself, or a person acting as his agent or servant, deprived him of his liberty. This was established in this matter. The first plaintiff was not suspected of having committed a crime and he was not to be arrested.

[77] According to the second plaintiff's uncontested testimony, the first plaintiff's mother called him on the evening of December 3, 2020, and informed him that the first plaintiff had been abducted by unknown men. He made several phone calls to family members in an attempt to locate the first plaintiff but was unsuccessful. The next morning he was phoned by the first plaintiff's mother who informed him of the whereabouts of the first plaintiff. According to the second plaintiff, he spent the night in anguish over the missing of the first plaintiff. Similarly, I find the police conduct actionable in respect of the second plaintiff.

Quantum

[78] It is trite that in assessing delictual damages, the court ought to make a comparative look at awards made by the court in similar cases; of course, regard being had to factual differences and circumstances of the wrongful act complained of.

[79] In *Iyambo v Minister of Safety and Security*⁴ the plaintiff was brought before a magistrate four days after his arrest and detention in violation of Art 11(3) of the Namibian Constitution. The court took into account inter alia the circumstances surrounding his arrest and his loss of esteem among members of the local community

³ See Neethling J et al 2003 *Law of Delict*, 4th Ed. P 335.

⁴ *Iyambo v Minister of Safety and Security* 2013 (2) NR 562 (HC).

where plaintiff worked as a primary school teacher. The plaintiff was awarded damages for 'loss of freedom and attendant psychological pain' in the amount of N\$12 000.

[80] In *Minister of Safety and Security v Tyulu*,⁵ the respondent, a magistrate was wrongfully arrested and detained for a few hours. The court took into account his age, the circumstances of his arrest, its nature and short duration, his social and professional standing and that he was arrested for an improper motive. The court awarded damages in the amount of N\$15 000.

[81] In *shaalukeni v Minister of Safety and Security and Others*⁶ the court considered an award of N\$ 30 000 to be fair and reasonable for unlawful arrest and detention that lasted eight days.

[82] In *Mthimkhulu and Another v Minister of Law and Order*⁷, the court awarded damages in the amount of R40 000 for unlawful arrest and detention where the period of the detention was 144 days.

[83] In the instant case, the period of detention was one night. I am mindful that this matter involves a minor, which is an aggravated factor. It was unnecessary for the police to detain the first plaintiff.

[84] I keep in mind the caution regarding duplication and overlapping of awards, and to this end, I consider the claim for pain and suffering and the claim for mental anguish to be a duplication.

[85] For these reasons, I make the following order:

Judgment in favour of the plaintiffs against the defendant in the following terms:

(f) First Plaintiff:

(iii) N\$ 15 000 for arrest and detention;

(iv) N\$ 10 000 for pain and suffering;

⁵ *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA) at 93 d-f.

⁶ *Shaalukeni v Minister of Safety and Security and Others* (HC-MD-CIV-ACT-OTH-2019/05140) [2021] NAHCMD 401 (8 September 2021).

⁷ *Mthimkhulu and Another v Minister of Law and Order* 1993 (3) SA 432 (E).

(g) Second Plaintiff:

(ii) N\$ 10 000 for mental anguish and distress.

(h) Interest on the aforesaid amounts at the rate of 20% per annum from the date of judgment to the date of final payment;

(i) Costs of suit.

(j) The matter is removed from the roll, case regarded as finalised.

D C MUNSU
JUDGE

APPEARANCES

For the Plaintiffs:

D Ndana

Of Jacobs Amupolo Lawyers & Conveyancers, Ongwediva

For the Defendant:

N Ilovu

Of the Government Attorney, Windhoek.