

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case No: HC-MD-CIV-ACT-DEL-2019/01902

In the matter between:

**MAX KLEOPHAS**

**PLAINTIFF**

and

**MINISTER OF SAFETY AND SECURITY**

**1<sup>ST</sup> DEFENDANT**

**COMMISSIONER GENERAL OF**

**THE NAMIBIAN CORRECTIONAL SERVICES**

**2<sup>ND</sup> DEFENDANT**

**SUPERINTENDENT LIBANDA**

**3<sup>RD</sup> DEFENDANT**

**SENIOR CHIEF CORRECTIONAL OFFICER ANGHUWO**

**4<sup>TH</sup> DEFENDANT**

**SENIOR CHIEF CORRECTIONAL OFFICER**

**SHAFOKUTYA KAMATI**

**5<sup>TH</sup> DEFENDANT**

**SENIOR CORRECTIONAL OFFICER LUCAS**

**6<sup>TH</sup> DEFENDANT**

**SENIOR CHIEF CORRECTIONAL OFFICER**

**LUCAS MUGENYU**

**7<sup>TH</sup> DEFENDANT**

**CORRECTIONAL OFFICER WAANDJA**

**8<sup>TH</sup> DEFENDANT**

**Neutral citation:** *Kleophas v Minister of Safety and Security & Others* (HC-MD-CIV-ACT-DEL-2019/01902) [2021] NAHCMD 419 (19 August 2021)

**Coram:** USIKU, J

**Heard:** 3 – 4 August 2020; 6 August 2020; 7 September 2020; 25 – 26 January 2021 and 19 April 2021

**Delivered:** 19 August 2021

**Reasons:** 16 September 2021

**Flynote:** Delict – Action for damages – Invasion of the bodily integrity of an individual – Infringement of bodily integrity prima facie unlawful and once the infringement is proved, the onus rests on the wrongdoer to prove justification – Assault – Assessment of damages is a discretionary matter and has, as its objective, to fairly and adequately compensate an injured party – Amount to be awarded as compensation cannot be determined with mathematical precision and awards in previous cases serve as a guide.

**Summary:** The plaintiff instituted action against the defendants for damages suffered as a result of a physical assault on him by the third to the eighth defendants. The defendants defend the action and plead that the plaintiff was injured as a result of a prison brawl between inmates. Court found that third to eighth defendants assaulted the plaintiff. No justification existed in respect of the assault. Damages awarded in favour of the plaintiff.

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## ORDER

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The court grants judgment in favor of the plaintiff against the defendants, jointly and severally, the one paying the other to be absolved, in the following terms:

1. Payment in the amount of N\$ 15 000;
2. Interest on the above mentioned amount at the rate of 20% per annum from the date of judgment to the date of final payment;
3. I make no order as to costs;
4. The matter is finalized and removed from the roll.

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## JUDGMENT

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**USIKU, J**

## Introduction

[1] The plaintiff instituted a claim against the defendants for assault allegedly perpetrated by prison warders employed by the first defendant. He claims damages as a result of the alleged assault in a sum of N\$ 900 000, made up as follows:

- (a) damages for *contumelia* in the amount of N\$ 200 000;
- (b) damages for psychological and emotional shock, pain and suffering in the amount of N\$ 500 000;
- (c) damages for loss of amenities of life in the amount of N\$ 100 000; and
- (d) damages for future medical expenses in the amount of N\$ 100 000.

[2] The plaintiff alleges that on or about 7 October 2018, the third to eighth defendants, while acting within the course and scope of their employment with the first defendant, unlawfully and wrongfully assaulted him at the Windhoek Correctional Facility. He alleges that he was assaulted with fists, kicked with boots and beaten with a baton all over his body and on the head. He alleges that at the time of the assault he was handcuffed. The plaintiff also alleges that as a result of the assault, his left ear started bleeding and he sustained multiple bruises and lacerations all over his body. He further alleges that after the assault he was in severe pain and suffering for several months. The plaintiff claims that as a result of the assault, he had to go to the hospital for ear pain, neck pain, stomach pain and post assault trauma. He also suffered and still continue to suffer poor hearing as a result of the alleged assault.

[3] In their plea, the defendants dispute and deny that they assaulted the plaintiff. They allege that plaintiff was involved in a prison brawl in his section cell over illegal contraband which took place on 7 October 2018, during which incident he sustained injuries. The defendants therefore deny any liability in respect of the plaintiff's assault.

[4] The issues to be decided are whether the plaintiff was assaulted by the third to eighth defendants and whether the defendants should be held liable for the damages suffered by the plaintiff as a result of the alleged assault and whether the plaintiff is entitled to damages in the amount of N\$ 900 000.

## Evidence

[5] The plaintiff testified and called three witnesses to testify on his behalf, namely Petrus Bwanga, Andreas Negongo and Dr Joab Mudzanapabwe.

### *Plaintiff's version*

[6] In his testimony, the plaintiff related that on the 7<sup>th</sup> of October 2018, while he was asleep, he was woken up by noise and noticed that an inmate, by the name of Simon, was lying on the floor. The plaintiff was informed that a fight broke out between two inmates, Simon and Cloete, over a cellphone, and that Cloete had stabbed Simon. Cloete and Simon were subsequently taken out of the cell by the third to eight defendants. After a while, the defendants came back to the cell and asked the plaintiff to hand over 'the cellphone'. He informed the defendants that he had no cellphone. He related that he was then taken out of the cell to the prisoners' visiting section, where he was handcuffed by the sixth defendant and assaulted.

[7] The plaintiff testified that he was assaulted twice. The first assault took place in the presence of inmate Andreas Negongo (who was also assaulted). The third to eighth defendants kept on insisting that the plaintiff hands over a phone. When the plaintiff informed the defendants that he had no cellphone, the sixth defendant hit him with a baton, while the fifth defendant hit him with his clenched fists in the head, face, stomach and on the left side of his ear, until his ear started bleeding. Thereafter, the plaintiff was escorted back to his cell, still handcuffed, while the defendants insisted that he hands over the phone. After indicating once again that he had no cellphone, he was taken back to the prisoner's visiting section where the second assault took place in the presence of inmate Petrus Bwanga (who was also assaulted). During the second assault the plaintiff testified that he was beaten by the seventh defendant. He was beaten in the stomach and his back and fell on the ground. He was hit with fists and kicked in the presence of the other defendants, who merely watched as he was assaulted. After the assault, the plaintiff was taken back to his cell and the defendants left.

[8] The plaintiff testified that the assault took place on a Sunday, and on the Monday morning, 8 October 2018, he approached the unit manager to lay a complaint but he was not assisted that day. He was only given permission to go to the hospital the following day, the ninth of October 2018 and he was seen by a doctor at the Katutura State Hospital. He testified that he informed the doctor that he had a painful ear, painful neck, back pain and stomach pain. The plaintiff further testified that he was thereafter referred to a specialist at the Windhoek Central Hospital, who gave him medication for his ear.

[9] The plaintiff further testified that he still cannot properly hear and sometimes experiences pain in his ear due to the assault and anticipate needing future treatment to get his hearing back. He also experiences pain in his chest at times. He also testified that he is still traumatized as a result of the assault and also experiences nightmares of police officers assaulting him.

[10] Regarding the defendants' defence that the plaintiff was assaulted by fellow inmates in a prison brawl, the plaintiff testified that there was no fight among inmates that day, and the only fight he is aware of is the fight that took place between inmate Simon and Cloete.

Andreas Negongo

[11] In his evidence, Negongo testified that on 7 October 2018, and while he was in his cell (cell 4), correctional officers came and took him out from his cell to the prisoners' visiting section, together with the plaintiff. When they reached the visiting section, the officers started asking him and the plaintiff whether they had cellphones. When the two responded that they had no knowledge of any cellphone, the officers started assaulting them. According to the witness's testimony, it was the fourth to eighth defendants that assaulted the plaintiff.

[12] The witness narrated that although he was assaulted simultaneously with the plaintiff, he could clearly see the assault perpetrated on the plaintiff. The witness testified that the plaintiff was hit with fists while standing and he fell. When he fell, the officers kicked him as he lay down. He further narrated that the plaintiff was hit with

fists on his ear and head. He testified that he and the plaintiff were handcuffed, with their arms behind their backs, while being assaulted, and after the assault, they were returned back to their respective cells. The witness further testified that after a while, he saw the officers returning and took the plaintiff and Petrus Bwanga with them.

[13] The witness related that he observed that the plaintiff had swollen cheeks, and he could tell from the way the plaintiff was walking that he was injured.

Petrus Bwanga

[14] In his evidence, Bwanga testified that he shared a cell with the plaintiff and that on 7 October 2018, he witnessed a fight that broke out between Simon and Cloete, and that Cloete stabbed Simon. Prison officers arrived and removed both Simon and Cloete from the cell. He testified that the fight was only between Simon and Cloete. The officers later returned and took the plaintiff and Andreas Negongo from their respective cells. The officers later returned both the plaintiff and Andreas Negongo to their cells. When they brought back the plaintiff, the witness noticed that the plaintiff's face was swollen and his ear was bleeding. The officers then questioned the witness whether he knows the whereabouts of the plaintiff's cellphone. He responded that he had no knowledge of whether the plaintiff had a phone. The witness was then requested by the officers to leave the cell and was taken to the prisoners' visiting section together with the plaintiff where they were both assaulted. Bwanga testified that when they arrived at the visiting section, the seventh defendant handcuffed the plaintiff's arms to his back and began assaulting him by beating him with batons and kicking him. The other officers then started beating him on the head, chest and all over his body and kicked him.

[15] The witness testified that he observed bruises and lacerations on the plaintiff's back and the area of his ribs. The witness testified and confirmed that the officers that assaulted the plaintiff were the fourth to eighth defendants.

[16] When it was put to the witness that it is the defence's case that the plaintiff sustained the injuries due a prison brawl, the witness testified that there was no fight that took place between inmates on that day, apart from the fight between Cloete and Simon.

Dr Joab Mudzanapabwe

[17] Dr Mudzanapabwe testified that he is a qualified Clinical Psychologist operating as an independent clinical psychologist in private practice in Windhoek since 2001, and that he has more than 22 years' experience in clinical psychology. On or about 7 December 2019 the plaintiff was referred to Dr Mudzanapabwe for psychological assessment and evaluation for an alleged assault by correctional facility officers.

[18] According to the witness, the assessments, which were conducted on three occasions, (clinical interviews<sup>1</sup>, psychometric tests<sup>2</sup> and neuropsychological assessment<sup>3</sup>) showed that plaintiff underwent significant physical and emotional pain due to the alleged beatings by the correctional officers. He further testified that the plaintiff struggled to hear with his left ear during the clinical interviews. The witness testified that during his assessment he observed that the plaintiff developed a fear of the correctional officers even when they have no intention of harming him. The plaintiff presented memory flashbacks of the incident, intrusive thoughts of the incident and anxiousness when he sees correctional officers (re-traumatization), nightmares and anger towards the officers. He testified that these symptoms are mostly seen in a diagnostic category of Post-Traumatic Stress Disorder (PTSD). He however reported that the plaintiff was no longer experiencing nightmares at time of evaluation.

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<sup>1</sup> According to the witness, clinical interviews is where the psychologist gets the history in terms of the presentation of the symptoms from the patient, i.e. the symptoms during the incident and the symptoms during the time of the assessment.

<sup>2</sup> According to the witness, psychometric tests are quantitative measures of psycho behavioral functioning of human beings and they are usually used to assess or make diagnostic implications (assessment of intelligence). For example, in this case, the psychologist wanted to assess the intellectual functioning of the plaintiff. He explained that a person needs to get information from somebody whom you feel confident that the intellectual functioning is average or good enough to be able to provide adequate information.

<sup>3</sup> According to the witness, these are tests to assess whether there was like damages in terms of his neuropsychological functioning because of the traumatic event.

[19] Dr Mudzanapabwe recommends that the plaintiff undergoes treatment for the post-traumatic stress disorder symptoms. He testified that if the plaintiff had received treatment from the time of the assault, it would have cost, according to his assessment, N\$ 25 092 for 6 months for one session per week. He estimated future treatment i.e. booster sessions, to cost N\$ 50 184 for one year for one session a week. He also estimated the costs for the traumatic experience of the assault at N\$ 150 000 and estimated cost for PTSD symptoms, discomfort (constant fear of the correctional officers) at N\$ 85 0000.

*The defendant's version*

[20] For the defence, five witness gave evidence, namely: Superintendent Fidelis Libanda (third defendant), Kletus Anghuwo (fourth defendant), Elia Shafeokutya (fifth defendant), Elias Lukas (sixth defendant) and Abraham Waandja (eighth defendant).

[21] In summary, the defendants deny ever assaulting the plaintiff on 7 October 2018. Their version of events is that at the time of the incident, they were off duty. They received a call that there was a fight that broke out between inmates and that an inmate had stabbed another, and they rushed to the prison.

[22] The third to eighth defendants testified that the plaintiff could have suffered the injuries as a result of a prison brawl in his section over contraband. Further to this, their evidence is that they did not assault the plaintiff with batons nor did they handcuff him, because over the weekend they do not handle batons and handcuffs. They are locked up and kept in the arsenal and only a specific person can issue the items out, and the person who had the keys to the arsenal was off duty at the time of the alleged assault.

[23] The third and fourth defendants testified that on the day of the alleged assault, they never had any personal interaction with the plaintiff and neither had verbal exchanges with him. The fifth defendant testified that he, with other correctional officers, proceeded to cell 5, after the fight between Cloete and Simon, to search the cell. The defendant testified that the plaintiff was removed from the cell and taken to the courtyard to be questioned separately. It is the defendants' testimony that the plaintiff was co-operative and told the officers that he had a cellphone hidden in his



locker. The officers then took him to his locker but he couldn't find the cellphone. However, the defendant testified that the cellphone was discovered in the plaintiff's locker, hidden. The sixth and eighth defendants testified that on the day of the incident they accompanied some officers to cell 5 where the plaintiff was and conducted a search for hidden contraband, where they found sim cards. Both defendants testified that the plaintiff accompanied the officers to the courtyard where the plaintiff confessed that he had a cellphone in his locker. The plaintiff then took the officers to his locker but no cellphone was found. The sixth and eighth defendants allege that at all times the plaintiff was extremely co-operative.

### Analysis

#### *Assault*

[24] In relation to whether or not the third to eighth defendants assaulted the plaintiff, the evidence of the plaintiff and that of the defendants is, mutually destructive. As regards mutually destructive versions, the following trite legal principles are well settled in our law, namely:

- a) where the evidence of the parties is mutually destructive, the court must decide as to which version to believe on probabilities;<sup>4</sup> and
- b) the approach that a court must adopt to determine which version is more probable, is to start from the undisputed facts which both sides accept, and add to them such other facts as seem very likely to be true, as for example, those recorded in contemporary documents or spoken to by independent witnesses.<sup>5</sup>

[25] In the case of *Lubilo and Others v Minister of Safety and Security*<sup>6</sup>, the court stated that an assault violates a person's bodily integrity and that every infringement of the bodily integrity of another is *prima facie* unlawful.<sup>7</sup>

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<sup>4</sup> *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at H 440E – G: Also see *Harold Schmidt t/a Prestige Home Innovations v Heita* 2006 (2) NR at 556.

<sup>5</sup> *Motor Vehicle Accident Fund of Namibia v Lukatezi Kulubone* Case No SA 13/2008 (unreported) at 39-17 para 51.

<sup>6</sup> (I 1347/2001) [2012] NAHC 144 (delivered on 8 June 2012).

<sup>7</sup> Para 9. Followed in *Mouton v Mouton* (I 889/2011) [2021] NAHCMD 91 (26 February 2021) and *Nghilundwa v Maritz* (HC-MD-CIV-ACT-DEL-2019/04292) [2020] NAHCMD 409 (4 September 2020).

[26] The plaintiff testified that he was assaulted by the defendants with fists, kicked with boots and beaten with a baton all over his body while he was handcuffed. This evidence was also confirmed by Andreas Negongo and Petrus Bwanga who were assaulted together with the plaintiff on two separate occasions. He further testified that as a result of the assault, his ear started bleeding and sustained multiple lacerations and bruises all over his body. He also suffered from pain and trauma.

[27] It would appear from the evidence of the plaintiff and that of his witnesses that the cellphone syndicate that he was allegedly implicated in was the cause of the assault. There is no evidence that the plaintiff was involved in a prison brawl. The only evidence presented before court of a fight, is the fight that occurred between inmate Cloete and Simon.

[28] The plaintiff's version was corroborated by the evidence of his two witnesses. All three gave evidence in a candid and satisfactory manner. They were all consistent in saying that the plaintiff was assaulted by the prison warders and was not involved in a prison brawl.

[29] The version of the five defendants' witnesses is that they did not hit the plaintiff. It is improbable that the plaintiff would have needed to be taken to hospital, soon after the incident, if he had not been seriously injured to require medical treatment.

[30] As far as probabilities are concerned, the only probable explanation for the injuries sustained by the plaintiff is that he was assaulted by the third to eighth defendant. From the evidence, it is apparent that the third to eighth defendants were acting and did act in the cause of their employment with the first defendant.

[31] On the totality of the evidence, I conclude that the plaintiff has discharged the onus of proving that he was assaulted by the third to eighth defendant and that such defendants were acting in the course and within the scope of their employment with the first defendant.

*Damages*

[32] In determining the quantum of damages, especially general damages, the court seek aid in awards granted in comparable cases. However, in doing so, the court must always take into account the circumstances of each individual case and make a discretionary finding that it deems reasonable.

[33] In its particulars of claim, the plaintiff claims monetary compensation in an amount of N\$ 900 000. However, in his written and oral submissions, counsel for the plaintiff submitted that plaintiff will not persist with his claim as set out in his particulars of claim but rather modify his damages in accordance with the estimates of Dr Mudzanapabwe in the amount of N\$ 310 276.

[34] In the matter of *Sandler v Wholesale & Coal Supplies Ltd*<sup>8</sup>, Watermeyer JA said the following:

‘ . . . . The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge’s view of what is fair in all circumstances of the case.’<sup>9</sup>

[35] I have considered cases of a similar nature in our jurisdiction<sup>10</sup> and the high limit in those cases appears to be N\$50 000 and the base line appears to be N\$15 000. It is only in extreme circumstances that the court awarded damages above N\$ 100 000<sup>11</sup>, of which such circumstances do not appear in the present matter. Extreme in the sense that in the matter of *Gabrielsen v Crown Security* the plaintiff was awarded an amount of N\$ 600 000 for *contumelia* and pain and suffering as the defendant was shot around the chest area and the injury had reduced him to a paraplegic for life. In the matter of *Mouton v Mouton* the plaintiff was awarded N\$ 100 000 in respect of shock, pain and suffering and *contumelia* as the plaintiff was head butted and injured on his left eye. He suffered an orbit fracture that resulted in a permanent reduction of his vision, making reading difficult (this testimony was confirmed by the plaintiff’s expert witnesses). He experienced constant headaches and could not use stair cases without assistance. He spent time in hospital and

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<sup>8</sup> *Sandler v Wholesale & Coal Supplies Ltd* 1941 AD 194 at 199.

<sup>9</sup> At 199. Followed in *Mouton v Mouton* (I 889/2011) [2021] NAHCMD 91 (26 February 2021).

<sup>10</sup> See *Meyer v Scholtz* (I 3670/2012) [2014] NAHCMD 148 (25 March 2014); *Du Plessis v Katjimune* 2006 (1) NR 256 (HC); *Nghilundwa v Maritz* (HC-MD-CIV-ACT-DEL-2019/04292) [2020] NAHCMD 409 (4 September 2020).

<sup>11</sup> See *Gabrielsen v Crown Security CC* (I 563/2007) [2013] NAHCMD 124 (13 May 2013) and

underwent surgery for his left eye but this could still not fix his vision to its pre-assault condition.

[36] The court has to ultimately consider each case according to its specific and unique circumstances, the injuries sustained by the plaintiff, including their nature, duration, severity and impact on the plaintiff's life.

[37] The plaintiff claims payment in the amount of N\$ 100 000 in respect of future medical expenses. According to Dr Mudzanapabwe, the plaintiff requires compensation in the amount of N\$ 310 276 in respect of future psychological treatment, made up as follows:

- (a) N\$ 25 092 estimated expenses for post-traumatic stress disorder for six months,
- (b) N\$ 50 184 estimated future treatment costs for one year, including booster sessions,
- (c) N\$ 150 00 estimated compensation for traumatic experience of being assaulted,
- (d) N\$ 85 000 estimated costs, post-traumatic stress and anxiety.

[38] Dr Mudzanapabwe testified that during his interviews with the plaintiff, he established that the plaintiff underwent a traumatic life event, due to the alleged beatings by the prison warders. The findings made by Dr Mudzanapabwe are based on what the plaintiff related to him.

[39] On the evidence given by the plaintiff and his witnesses, I find that the plaintiff's injuries did not require admission to hospital. No treatment, other than prescription of 'some medicine', was administered, therefore his injuries must have been superficial. I am therefore not persuaded that there is evidence before court that the plaintiff suffered trauma as the result of the assault by the prison warders, to require future psychological treatment. On this basis, the claim for future medical expenses stands to be declined.

[40] Having taken into account all the foregoing factors and applying my mind reasonably to the evidence, a globular amount of N\$15 000 is fair and reasonable in the circumstances.

[41] As regards to the issue of costs, I make no order as to costs as the plaintiff was represented by counsel on the instructions of the Legal Aid Directorate.

[42] In the result, the court makes the following order:

The court grants judgment in favor of the plaintiff against the defendants, jointly and severally, the one paying the other to be absolved, in the following terms:

1. Payment in the amount of N\$ 15 000;
2. Interest on the above mentioned amount at the rate of 20% per annum from the date of judgment to the date of final payment;
3. I make no order as to costs;
4. The matter is finalized and removed from the roll.

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B USIKU  
Judge

## APPEARANCES:

## PLAINTIFF:

F Bangamwabo  
Of FB Law Chambers  
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## DEFENDANTS:

M Meyer  
Of Office of the Government Attorney  
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