

**NQOBIZITHA NDLOVU**

**Versus**

**NELSON MUTSAKA**

**And**

**OFFICER IN CHARGE N.O.**

**And**

**THE COMMISSIONER GENERAL N.O.**

**And**

**MINISTER OF HOME AFFAIRS N.O.**

**IN THE HIGH COURT OF ZIMBABWE**

**MOYO J**

**BULAWAYO 15 & 16 OCTOBER & 4 NOVEMBER 2024 & 30 MAY 2025**

**Civil Trial**

*J. Mhlanga* for the plaintiff

*S. Jukwa* for the defendants

**MOYO J:** The plaintiff's claim is for;

- (a) Payment in the sum of US\$41 699,00 being for damages sustained as a result of an unlawful arrest and assault on the plaintiff's person by Nelson Mutsaka a member of the ZRP who was acting in the course and scope of his employment with the defendants.
- (b) The total sum is broken down as follows;
  - (i) US\$1 699,00 being for medical bills
  - (ii) US\$10 000,00 for future medical expenses
  - (iii) US\$8 000,00 being damages for pain and suffering
  - (iv) US\$10 000,00 being damages for loss of amenities of life and disfigurement

- (v) US\$12 000,00 for unlawful arrest and detention
- (c) Interest on the above sums at the prescribed rate from date of issue of summons to date of payment
- (d) Costs of suit

Plaintiff gave evidence for himself. He told the court that on 16 April 2017 he boarded a Honda Fit intending to drop off at D-square. He was in the company of his wife. The vehicle was full, there were some disagreements. The driver then turned into a route not leading to D-square where plaintiff was going. He then demanded payment. Plaintiff then said he would not pay since the vehicle was no longer headed for D-square. The driver then made a phone call and later drove to Western Commonage Police Station where they found a police officer standing outside the gate. The driver then pointed at plaintiff saying the person who does not want to pay is this one. This police officer then hit plaintiff with clenched fists and plaintiff fell to the ground. The police officer then took plaintiff to the Charge Office. Plaintiff was bleeding. Plaintiff's wife then warned them that plaintiff was now bleeding profusely. The police officer then dragged the plaintiff to the back of the police cells. He then hit him again and plaintiff fell. The police officer kicked him in the face. He left him near cells without placing him in the cell. He felt cold and he opened the cells and went in. He found other accused persons, sat with them and bled through the night. The other police officers did not attend to him saying that he belonged to "Mutsaka". He bled until he was frail. An ambulance was called and he was taken to the hospital. He said it is not correct that he earned the injuries and that he was drunk. Under cross examination he said he was kicked in the back and sustained an injury on his back. He was questioned as to whether the cells were not locked but with accused persons inside. He was asked that he was charged for disorderly conduct because he made noise at the police station.

He said he raised his voice to call for help as he was in pain. He was asked that he behaved in a disorderly manner because he was drunk. He was quizzed about a document at page 8 and he said that document should not be there.

He was also quizzed about a document at page 10 which was written Miss M. Moyo. He said that it's a mistake. He was asked under cross examination that he is claiming US\$10 000 and he said it is for a cornea transplant and that they later said it could not be done as the

back veins were already damaged. Asked that but he still claims it, he said that he still claims it because his condition was now worse. Asked how he got to US\$10 000, he said he considered the condition and the prices.

He was also questioned that he claims US\$8 000? And he said it was for pain and suffering and he said because he now has a headache. He was questioned on the aspect of US\$10 000 claimed for loss of amenities and he said there are things he can no longer do.

He was also quizzed on claiming US\$12 000 for unlawful detention he said there was no reason for his detention.

Plaintiff then closed his case.

#### The defendant's case

Nelson Mutsaka, 1<sup>st</sup> defendant, told the court that on the day in question, he was on duty at the charge office when Themba Moyo came to report that there was a drunk and violent man in the car. He then went to the car and invited plaintiff to come out so that they could iron out the differences between them. Plaintiff refused. He then opened the right rear door and held him by the belt. Plaintiff responded by pulling his shirt and Themba Moyo to pull him to the charge office. They put him behind the counter, and he started talking at the top of his voice trying to assault him. He tried to talk to him nicely but he kept shouting at the top of his voice. His wife was also shouting at the top of her voice. With the assistance of Themba and Takaedza they then held plaintiff by the belt and put him in open cells as he had refused to supply his name. Plaintiff later chased away 2 lady officers from the cells. He went to talk to plaintiff but plaintiff responded by threatening him. Plaintiff said he would do to him as he had done to people in South Africa. Plaintiff charged towards him and he retreated trying to close the door but plaintiff jumped and held his shoulder so he pulled him to the cells and tried to get out.

Plaintiff held the shoulder badge of his uniform and he then fell down. He left him in the cells and later charged him with disorderly conduct. They took plaintiff to court, he said he was not fit, the matter was postponed and plaintiff then lodged an assault report against him. He denied first receiving a call from the driver and waiting for the car by the gate. He said plaintiff was so drunk he could not even stand on his own. He said Themba assisted him to drag plaintiff because female officers could not handle him since he was violent and that it was

after 4:30 and therefore he could not get reinforcement. He said under cross-examination it was reported that plaintiff tried to grab the steering wheel from the driver and that an accident could have occurred. He said plaintiff was seated behind the driver and that he took plaintiff to the charge office in order to hear plaintiff's side of the story.

Asked if he manhandled plaintiff instead of inviting him to the charge office, he then said that plaintiff jumped onto him. He said that holding someone by the belt could not be abusing his rights.

He said that he used minimum force to take plaintiff to the charge office. He said at the charge office he put plaintiff behind the counter as plaintiff was pushing people who were trying to report their cases. He said plaintiff was drunk and violent and that he sustained injuries when he held the 1<sup>st</sup> defendant's shoulder badge which got torn resulting in plaintiff falling to the ground. He said this happened in the open cells. He said from the car right up to the charge office plaintiff was never injured. He said plaintiff was injured because he saw blood in plaintiff's eyes. Asked what he then did about plaintiff having been injured, he said plaintiff kept on charging at anyone opening the cell door until when he knocked off. He later changed under cross examination to say he never saw blood from plaintiff's eyes but that he saw that plaintiff had been injured from the medical report. He said that plaintiff could have bled from injuries sustained when he fell causing him to be taken to hospital in an ambulance later. He said that he did not know Themba Moyo. Those were the material respects of 1<sup>st</sup> defendant's testimony.

Next to testify was Themba Moyo. He said after picking plaintiff and after they did not pay his fare when he asked for it, he then drove to the police station. As he proceeded into the police station plaintiff held the steering wheel. He drove into the police station and went to the charge office. He told the police his story and they said they would lay a charge of pirating on him (the witness).

They then assisted him to remove plaintiff from the vehicle because he was refusing to go out. They opened the door and persuaded plaintiff to come out, they then assisted plaintiff to enter the charge office as he could not walk on his own.

He denied changing the direction of the intended route and said plaintiff just refused to pay because he was drunk. When asked where plaintiff was seated in the vehicle, he said

plaintiff was seated in the centre. He said first he was told by the police officer to call plaintiff to the charge office and when plaintiff refused that is when the 2 police officers (a male and a female) accompanied him to the charge office. He said first they persuaded plaintiff to come out of the motor vehicle and go to the charge office.

They then grabbed him by the arm and that is when plaintiff grabbed the police by the shirt, they then took him to the charge office. He said the police used force when they took plaintiff out of the car because he could not walk. He said after plaintiff was removed from his car, he then left and at that stage plaintiff was not injured. He said that he did not know 1<sup>st</sup> defendant. Those were the material respects of Themba Moyo's testimony.

Next to testify was Ndumiso Nkomo an inmate in the cells on the day in question. He said plaintiff was brought into the cells arguing, calling some police officers to flee. Plaintiff wanted to leave so he was trying to force his way out of the cells. Plaintiff held a police officer's badge as that officer opened the door and while he tried to force his way out. Plaintiff pulled the badge but then fell to the floor. That is when he observed plaintiff bleeding. Plaintiff continued banging the door and making noise. He said plaintiff had fallen face down in the cells and that he bled profusely but the police did not realise that until in the morning when they called an ambulance. He said that plaintiff was drunk when he was brought to the cells.

Under cross-examination he said that plaintiff was brought to the cells by 2 female police officers and that they opened the door and brought him in. He said he does not know 1<sup>st</sup> defendant's version that plaintiff was brought by him to the cells as female police officers could not handle him and he insisted that police officers brought plaintiff to the cells. He said plaintiff forced a female police officer to flee as he tried to force his way out. Then other police officers came and that is 1<sup>st</sup> defendant. It is at that juncture that plaintiff then grabbed the male officer's badge. He said he had no knowledge of 1<sup>st</sup> defendant assaulting plaintiff. He said he had been arrested for failure to produce an identification document. Those were the material respects of this witness's testimony.

Sarah Banda was next to testify. She went to the police station to feed her son. Then a certain man came to lodge a complaint about passengers refusing to pay. She said then a certain man came and insulted the police. He then went outside. Another police officer went outside, she then heard the words "you are assaulting a police officer" being uttered. They then came in holding him. A woman was asking where her husband was and that is when it ended.

She said the 1<sup>st</sup> person was detained and he appeared visibly drunk. She did not observe any injuries. She said plaintiff was brought in by the driver of the vehicle plus one police officer. She said plaintiff told the police officers that they are fools and if they wanted to arrest him they would not arrest him. She said plaintiff was brought into the charge office and then was taken to the cells for detention and that he was never placed in the charge office. These were the material respects of Sandra Banda as testimony.

#### Factual analysis

Plaintiff gave evidence for himself, he said police assaulted him after colluding with the driver of the car he was a passenger in after that the driver phoned them prior to going to the police station. He confirmed refusing to pay as the driver had changed the route.

It is however important to note at this juncture that plaintiff never led any evidence to support his claim for general damages as claimed in the summons, save responding to a few questions during cross-examination. Plaintiff's case had no material contradictions within itself although this court believes that there should have been some conduct at the police station by the plaintiff that resulted in the physical manhandling or assaults on him by the police although he does not tell the court this.

#### Defendant's case

1<sup>st</sup> defendant denied assaulting plaintiff as alleged and said plaintiff was drunk and violent and that he only held him with a belt to make him come out of the motor vehicle and go to the charge office. He was assisted by Themba Moyo to do this. Plaintiff was initially placed in the charge office where he disturbed people making noise and was later put in the cells. Plaintiff was left in the cell area (open cells). He said he saw blood on plaintiff's face after plaintiff had fallen, but he later said he never saw plaintiff injured but he saw it from the medical report.

It was never put to this witness that the injuries caused by him and confirmed by the doctor resulted in both special and general damages during cross-examination. Neither did defendant's counsel invite 1<sup>st</sup> defendant to comment on plaintiff's special damages that had been stated before the court. 1<sup>st</sup> defendant was only invited to comment on the general damages which plaintiff had not given evidence on in court.

Themba Moyo denied calling the police before going there and said that when at the police station, plaintiff was assisted by 2 police officers who dragged him out of the car as he refused to come out. Plaintiff was also drunk, could not walk on his own hence he was assisted. He said they took plaintiff to the cells and did not place him at the charge office as alleged by 1<sup>st</sup> defendant. He also said he could not remember if he held plaintiff or not, or if the 2 police officers who handled plaintiff are female or not due to lapse of time.

Ndumiso Nkomo the inmate said in the cells plaintiff fell face down while struggling with 1<sup>st</sup> defendant and pulling his uniform badge. Plaintiff lay down and bled until morning. He did not see 1<sup>st</sup> defendant coming to check on plaintiff again as alleged by 1<sup>st</sup> defendant. Plaintiff was left inside the cell and not outside as alleged by 1<sup>st</sup> defendant.

According to him the shift changed in the morning that is when plaintiff was taken to hospital. He believes plaintiff was injured when he fell. His evidence materially contradicts 1<sup>st</sup> defendant's evidence as to who brought plaintiff to the cells and whether the police came back to the cells and after putting the plaintiff and that plaintiff was bleeding.

Sandra Banda was at the charge office to give her son food. Plaintiff came, insulted police officers then went out. A police officer also went out and she heard words to the effect that "you are assaulting a police officer". She said plaintiff was grabbed by 1 police officer and the driver of the car (Themba Moyo). That plaintiff was never placed in the charge office as they passed through the charge office with him as they took him to the detention cells. This is another material contradiction.

### Analysis

Clearly, plaintiff's version stands against a manifestly contradicted and unreliable defence case. We have the 1<sup>st</sup> defendant, Themba Moyo and Sandra Banda all having material contradictions on the version of what transpired when Themba Moyo drove into the police station, the motor vehicle that plaintiff was a passenger in following a misunderstanding in the motor vehicle. We also have a mutually destructive defence case on what transpired at the cells.

Ndumiso Nkomo says plaintiff was brought by 2 female police officers, yet 1<sup>st</sup> defendant says he took him to the cells as females could not handle him. Ndumiso Nkomo also says the police left plaintiff in the cells and never came back after he fell so they did not notice

that he was bleeding but 1<sup>st</sup> defendant said they went back to check and that he had noticed that plaintiff was bleeding although he later prevaricated on that point. So all the defence witnesses materially differed with one another and 1<sup>st</sup> defendant even contradicted himself. It is only plaintiff's version which stands on a balance of probabilities convincing the court on what should have transpired on the day. However, this court finds that the plaintiff did not give a clear account as to what led to his assault as clearly the police should have assaulted him whether wrongfully, but for some reason.

On a balance of probabilities, plaintiff has proven that he was assaulted by the 1<sup>st</sup> defendant at the police station in that, Themba Moyo, does not say he ferried an injured plaintiff, but it is common cause that plaintiff left the police station in an ambulance having been injured. This coupled with a confused and self-destructive defence case will lead this court to the conclusion that indeed plaintiff was assaulted but what does not come out clearly from the plaintiff's case is why he was assaulted. It does not make sense that the police officer just pounced on him. It is my view that the evidence of Ndumiso Nkomo on the falling of the plaintiff, that would still not entirely destroy the preponderance of probabilities that fell in favour of him having been assaulted before he was brought to the cells. This would also explain the inaction by the police in getting medical assistance for him especially if he had fallen on his own. Failure to render assistance shows that the police must have been fighting with the plaintiff.

The 1<sup>st</sup> issue for determination on the issues for trial is whether or not plaintiff was assaulted by the 1<sup>st</sup> defendant? The 2<sup>nd</sup> issue is whether or not plaintiff sustained injuries as a result of the assault by the 1<sup>st</sup> defendant? My analysis and findings of fact have already resolved these 2 issues and therefore they have been found on plaintiff's favour on a balance of probabilities.

3. Whether or not plaintiff's arrest and detention was unlawful?

This issue is not clear from the facts for the simple reason that, a misunderstanding ensued inside the pirate taxi causing the driver to go to the police station. At the police station clearly the misunderstanding continued between plaintiff and the police. Plaintiff himself says he was charged for disorderly conduct resulting in his assault and detention. This court does not want to believe that the police assaulted plaintiff for no reason. Some form of misunderstanding obviously occurred creating tension and the resultant assault and detention.



Even plaintiff does not put the court in his confidence where he says when they got to the police station, the driver said the person who does not want to pay is this one, and the policer officer immediately pounced on him. This does not make sense. There must have been some harsh exchanges amongst everyone involved resulting in the assault. It therefore follows that if there was some mayhem amongst all the parties involved, with plaintiff being at the centre of the issue for refusing to pay it would thus not be unreasonable and unlawful to detain him in my view. After all he was subsequently charged for disorderly conduct. I would not totally dismiss the defendant's version that plaintiff behaved in a rowdy or disorderly manner on the day in question as clearly they would not just assault him for no absolute reason. The probability of the assault and detention having something to do and being a reaction to plaintiff's own conduct does exist in my view.

I am therefore not convinced that the detention was entirely unlawful. It may have been unprocedural but definitely not unlawful as the parties, that is the police and the plaintiff did have a misunderstanding which nonetheless does not come out clearly from the evidence led due to the contradictions in the defence case which render it unreliable. Some misunderstanding clearly occurred between plaintiff and the police leading to his assault and detention in my view. I will thus not be persuaded that the detention was definitely unlawful.

4. The 4<sup>th</sup> and 5<sup>th</sup> issues are one in my view. That is, whether it is just and equitable that plaintiff be awarded the damages he claims and the quantum thereof? I will start with the damages for unlawful arrest and detention as I have already found what plaintiff did was made a case for unlawful arrest and detention from his evidence, clearly no damages can be awarded to him in that respect. I will do the rest of the damages head by head.

1. Is plaintiff entitled to special damages in the sum of US\$1 699,00 being for medical bills?

Before I assess these damages I need to point out that plaintiff's case was not properly presented and ventilated *vis-à-vis* the damage heads and the amounts? Plaintiff tendered a bundle of documents it was marked Exhibit A. He took the court through pages 1, 2, 3, 4 5 and 7 and photographs. He narrated what these documents are;

Page 1 - police report

Page 2 - continuation of page 1

Page 3 is a doctor's report

Page 4 - letter from United Bulawayo Hospitals

Page 5 and 6 - a discharge summary

Page 8 - a receipt for when he suffered a headache and he paid US\$12

Page 9 - a receipt for RTGS723 plus US\$20

Page 10 - Receipt for US\$15

Page 11 - receipt for US\$60

Page 12 - receipt for US\$17,50 for eye medication

Page 15 - receipt for eye medication for US\$3

He said the total bill is US\$1 698,00 as at page 33 there is an amount for Parirenyatwa of US\$1 243,71. He also stated that his eye was normal before the assault. He said he has not fully recovered from his injuries and the eye still gives him problems/headaches. He said with the headache he gets medication or goes to the hospital. He said that he has to apply medication every day. He said the doctor prescribed 3 types of medication all totaling US\$52 per month. He said it has affected his life in that he used to do carpentry and joinery but the doctor has since stopped him due to dust.

Surprisingly the contents of the medical report were not read into the court record, neither did plaintiff lead evidence on the contents of the medical report particularly where the medical report says he has 30% permanent loss of the eye. Plaintiff did not lead evidence in court about the condition of his eye, whether it is blind, partially blind or not. The court is just seeing for itself in the medical report after fishing through the bundle of documents which is undesirable. Plaintiff did not explain the nature of the injuries he suffered, and the degree of pain even in ordinary layman's language. Plaintiff's evidence has simply touched on the special damages amounting to US\$1 699,00. That is all the evidence we have from plaintiff on the damages he seeks and the amount he claims. Plaintiff did not lead evidence on any other head of damages. He did not tell the court that he suffered damages from unlawful detention and arrest. He did not tell the court that he suffered damages for pain and suffering. He did not tell the court that he suffered damages for loss of amenities or disfigurement.

He just mentioned in passing that he used US\$52 per month for medication. He also just mentioned that his eye was normal before, now it is not. No evidence was lead. The court has to glean for itself from the medical reports. Plaintiff was supposed to detail his injuries, from a layman's point of view, and also tell the court the findings of the doctor per the medical reports. He was also expected to detail the pain he felt as a result of the injuries. He was supposed to tell the court for how long he was hospitalized. He was also supposed to detail disfigurement and loss of amenities of life and juxtapose that with the medical report. All he said in that respect was that he was stopped by his doctor from doing carpentry and joinery because of dust and nothing else. He did not tell the court if he can see or partially see or if he is totally blind. He did not make any monetary claims for damages in his evidence in chief. He was just silent on all the claims except the US\$1 699,00 being special damages. This court cannot award that which was not claimed and for which no case was made or even substantiated. Neither did plaintiff even state that he is claiming damages in the sums stated in the summons or whatever sum the court may find appropriate. The plaintiff just claimed and proved absolutely nothing on general damages. In the case of *NRZ v Stuart* SC-70-21 the Supreme Court stated thus on general damages:

“General damages on the other hand are those damages that naturally flow from the wrong and one of a non-pecuniary nature such as pain and suffering, duration, intensity of pain caused by the intentional afflictions of harm ...

... In considering such damages the court considers the facts and circumstances of the case, the injuries suffered by the plaintiff, including their nature, permanence, severity and impact on plaintiff's life. In the process the court considers the trend of awards in similar cases including the economic environment affecting such awards. Though these damages are not capable of precise calculation a plaintiff is still expected to speak to the quantum of the claim. The court is not expected to speculate on the quantum of damages to award where no quantum was testified to.” (Emphasis mine)

What this means to a plaintiff is that they must firstly adduce evidence to establish the liability of the defendant, the loss and the quantum. That is not what the plaintiff before me has done.

In *Aarons Whale Rock Trust v Murray & RRoberts Ltd and Anor* 1992(1) SA 652 at 655 the court stated thus;

“Where damages can be assessed with mathematical precision, a plaintiff is expected to adduce evidence sufficient to meet this requirement. Where, as is the case here, this cannot be done, the plaintiff must lead such evidence as is available to it (but of

adequate sufficiency) so as to enable the court to quantify his damage to make an appropriate award in his favour. The court must not be left with an exercise in guesswork, what is required of a plaintiff is that he should put before court enough evidence from which it can, albeit with difficulty, compensate him by an award of money as a fair approximation of his mathematically unquantifiable loss.”

In the case of *Arendse v Maher* 1936 TPD 162 the court had this to say;

“If remains therefore, for the court, with the very scanty material at hand to try and assess damages, we are asked to make bricks without straw, and if the result is inadequate, then it is a disadvantage which the person who should have put proper material before the court should suffer” per GREENBERG J.

So a plaintiff who neither leads detailed evidence on his injuries, nor leads any evidence on the damages he suffered, and is therefore claiming has a limping case even if the scale is on a balance of probabilities, evidence must be lead to tilt that balance of probabilities in plaintiff’s favour.

Our legal system is adversarial in nature and the court cannot come in and mend a scant or poorly presented case by assuming and presuming that which was not mentioned before it. That would be a miscarriage of justice.

A plaintiff must lay a claim before the court and lead evidence to sustain their claim. It would not take a plaintiff’s case anywhere to simply present a bundle of papers and, not carefully ventilate issues for purposes of the court and the court record. The plaintiff was legally represented and the plaintiff’s counsel after failing to properly present plaintiff’s case, also failed to file closing submissions. It is unheard of that a party claiming damages does not file closing submissions because they must summarise the plaintiff’s case by showing that indeed the defendants are liable, that indeed plaintiff suffered damages as claimed and that the court should find in plaintiff’s favour on the issues of liability, damages, and the quantum to be awarded. The plaintiff’s counsel was also duty bound to refer to case law and awards. Failure by plaintiff’s counsel to file closing submissions must have been due to the fact that there was clearly nothing to summarise especially regarding the larger part of plaintiff’s claim being the general damages where plaintiff absolutely claimed nothing and also led no evidence at all in their regard. He just mentioned 2 statements in passing.

One that his eye was not like that before with no further details and that he was stopped from doing carpentry and joinery by the doctor due to dust. So if that is the case what then is

he claiming and at what quantum? Plaintiff's case was poorly presented so much so that the claim for general damages was neither presented in evidence nor sustained at all.

It is for these reason that I am unable to make any award under general damages as none were claimed or proven in evidence presented.

I will thus award plaintiff special damages as claimed in pleadings and as proven in court.

I accordingly order as follows;

- (a) The plaintiff's claim for special damages against all the defendants liable jointly and severally the one paying the other to be absolved the sum of US\$1 699,00 succeeds together with interest at the prescribed rate from the date of issue of summons to date of payment.
- (b) Defendants to pay costs of suit.

*Zimbabwe Lawyers for Human Right, plaintiff's legal practitioners*  
*Civil Division. Of the Attorney General's Office, defendant's legal practitioners*