ELLEN VHEREMU
versus
SERGEANT MARUZA
and
SERGEANT JURU
and
COMMISSIONER GENERAL OF POLICE
and
MINISTER OF HOME AFFAIRS

HIGH COURT OF ZIMBABWE
BERE J
HARARE, 5, 6 & 7 November, 2013.

Civil Trial

S.G. Mutambaseke, for the plaintiff
T.D. Dodo, for the respondents

BERE J**:** The plaintiff's issued out summons in this court on 14 October 2010 seeking damages to the tune of US$8 500 emanating from an alleged assault on her by the first and second respondents during the course of their work as police officers.

The liability of the third and fourth respondents was built around the concept of vicarious liability.

The allegations prompting this civil suit was premised on the alleged assault of the plaintiff by the first and second respondents and it is necessary to restate the relevant part of the plaintiff's declaration. The relevant part of the declaration was given as follows:

> "6. On or about the 6th of September 2010 at around 1200 hours, plaintiff was in custody of the Zimbabwe Republic Police at Matapi Police Station in Mbare, Harare.
>
> 7. At the aforementioned police station plaintiff was brutally assaulted with a sjambok and baton sticks, on the back, buttocks and under the feet by the 1st and 2nd defendants and other members of the Zimbabwe Republic Police unknown to the plaintiff." My emphasis.

Naturally the plaintiff was expected to bring evidence to court that would support her serious allegations against the police.

For some reason the plaintiff decided to zero her evidence on her own testimony and sought to seek corroboration of her story from exh 1 (request for medical report form 234); exh 2 (the medical report in the form of an affidavit statement) in terms of s 278(1) 13 of the Criminal Procedure and Evidence Act [*Cap 91:07*] as well as exh 3 (being scribbled clinical notes from her out patient record and review card) from Harare Central Hospital. Her story was sealed on the strength of her own testimony and the exhits referred to.

Ellen Vheremu's story was a simple narration of events as she saw them.

Following allegations of having stolen money from a young boy, Hampfrey, her brother 's son who had just returned from South Africa and whom the plaintiff had just escorted from the road port here in Harare, the plaintiff found herself as an unwelcome visitor at the renowned Matapi Police Station.

It was the plaintiff's testimony that upon her arrival at the police station and without being asked anything about the alleged theft three police officers set upon her and started assaulting her using baton sticks, hands and anything at their disposal. She said these officers were in uniform and that she was able to identify the first and second defendants and that she was unable to identify the third assailant.

She testified that despite pleading innocence the officers continued to assault her and that they insisted that she takes them to her place of residence from where she would produce the stolen money.

The plaintiff's further testimony was that she was force driven to her place of residence in Prospect, Waterfalls, Harare at which the assaults continued in the full view of her landlady who pleaded with the police not to continue with the assault and personally offered to pay the US$200 (the allegedly stolen money) herself on behalf of the plaintiff. The plaintiff testified that her ordeal was to continue again at Matapi Police Station where the three police officers continued to assault her. The plaintiff said at one stage the police officers made an abortive attempt to force her to drink urine which was in a cabin where the assault was allegedly taking place. The plaintiff's situation got worse when she was shown a blooded coffin and told she would be killed and her remains placed in that coffin.

After her detailed account of the assault the plaintiff produced the three exhits earlier on alluded to and closed her case.

It is quite significant that in her testimony the plaintiff said that Tabeth Peturo who was at the centre of the alleged theft was heard by her friend telling her that the police were going to assault her at Matapi in order to force her to produce the stolen money.

It was further her uncontroverted testimony that her brutal assault in Prospect was witnessed by among other persons her landlady who pleaded with the police not to continue assaulting her and personally offered to pay back the alleged stolen money on her behalf.

For the defendants, only three witnesses gave evidence viz, the first, second defendants and one Tabeth Peturo the grandmother to Hampfrey whose money was allegedly stolen by the plaintiff and which money it was common cause was eventually paid back at the police station before the plaintiff was released from Matapi Police Station.

Both defendants flatly denied ever assaulting the plaintiff in the detailed manner she alleged or at all. They argued that as pisi officers they could not have had access to baton sticks and that the nature of their work as undercover police officers entailed they operated in civilian attire and that on this day they were so dressed.

The narration of the events as put forward by the two details was confirmed by Tabeth Peturo who all the parties were agreed was present throughout the times the alleged assault took place.

The evidence given by the two police details was diametrically opposed to the narration of the events as put forward by the plaintiff but corroborated in virtually all material respects by Tabeth Peturo who I must confess gave her evidence in a mature and motherly manner.

The witness was candid to reveal to the court that she did not relate well with the plaintiff but was quick to rule out this as justification to lie against the plaintiff or to give evidence not favourable to the plaintiff if such evidence was at her disposal. I accept without any shadow of doubt that she was indeed an honest witness. Her evidence was told with a convincing tongue.

The evidence of the police officers was quite consistent and in my honest view even after cross examination it remained intact and clear.

The three defence witnesses gave a credible account of the possible origins of the plaintiff's injuries. They all gave a detailed account of the very funny and unusual behaviour of the plaintiff in Waterfalls, where she was rolling herself on the ground and holding onto shrubs or trees in an effort to resist being taken back to Matapi Police Station.

Contrary to the evidence of the plaintiff, the declaration (paragraph 7 thereof) made specific reference to assault on the plaintiff by *inter alia* sjambok and baton sticks. In addition, the declaration further suggests that the plaintiff was assaulted by more than three police officers.

Compare this with exh 1 which makes specific reference to a single baton stick having been used with no further reference to anything other than that. It is further worth noting that whereas the plaintiff's declaration points to the plaintiff having been assaulted by more than three officers, her own evidence limits the alleged assault to only three officers, the two defendants and the other unknown officer.

If the truth be told and contrary to the plaintiff's counsel's attempt to point a glossy perception or picture of the plaintiff's evidence, the record will show several aspects of her evidence which were far from being satisfactory.

I am extremely concerned with the conservative approach adopted by the plaintiff in the presentation of her case. There are so many witnesses who were at her disposal whom she could have brought to court to corroborate her story but she deliberately chose not to do so.

Let me put it this way – the view that I take, hold to dearly and cherish is that in every prosecution that is brought before the courts, be it civil or criminal the evidence brought must strive to meet the minimum threshold of the evidence required to tilt the balance in favour of the party bringing the matter to court for adjudication.

In such prosecution this cannot be achieved by confining the interrogation to the evidence of a single witness who invariably has a biased interest in the outcome of the case. This is particularly so as in this case where it is clear that before the plaintiff brought her case to court she was sitting on valuable evidence which she deliberately decided not to bring to court in the misplaced hope that her evidence on its own would be sufficient. That approach is a hopeless attempt to suffocate or rape the mind of the court.

In fact, the view that I take is that a plaintiff who holds vital information or evidence and makes a conscious decision not to present such evidence to court must for all intents and purposes be treated as a suspect witness in her own case requiring the court to be on guard against possible deception.

In this regard I draw some guidance from the view expressed by McNALLY JA in the case of *Sunface Bhaudhi Temba* v *The State* SC No. 81/91 where the learned judge condemned in very strong terms the tendency of adopting what he referred to as a "boxing match approach" in assault related matters. Although the learned judge was commenting on a

criminal matter I believe the views expressed are apposite even in civil proceedings like the instant case. The learned judge remarked as follows:

> "I have drawn attention before to the tendency of prosecutors and investigating officers to adopt what I have called the "boxing match approach" to criminal prosecutions. By this I mean the tendency, especially in assault cases, to throw the protagonists into the ring with the magistrate as referee. At the end of the bout the magistrate awards points for demeanour and probability, and names the winner, who is usually the complainant. One suspects that the unspoken reasoning behind the conviction is "why would the police have charged the accused if he was not the guilty one?"

I draw an analogy with this particular case. I am supposed to find in favour of the plaintiff by awarding her points on demeanour and probabilities when it is clear to me that she deliberately decided to deprive the court of valuable evidence which was at her disposal at the time she brought this matter to court which she decided not to utilize.

Equally ironic, I am supposed to find the two defendants liable merely because they have said in their testimony they do not know why among all the police officers who were at Matapi on 6 September 2010 the plaintiff decided to zero on them.

Strange reasoning. Is it not so? A litigant in a civil matter particularly where money is involved or where she is hoping to get money as in this case has every motive to exaggerate or to lie outrightly in an effort to project herself in good light in order to find sympathy with the court. The court must always be wary of or of on guard of the flashing danger warning signs in such a matter.

There is one issue that I must deal with in this case before I conclude this judgment.

There is overwhelming evidence in this case pointing to the criminal conduct of the plaintiff as regards the cash that was stolen from Hampfrey. The plaintiff is the prime suspect. That the money was eventually given back to Tabeth Peturo lends credence to the unrepentant or unremorseful personality of the plaintiff.

Such litigants are dangerous. They know of no remorse and having displayed such level of dishonesty they dent their credibility to a point beyond reproach. The plaintiff's deceptive character is for all to see.

These courts cannot be used as refugees for those with clearly defined postures to deceive. The plaintiff in my view is one such character. The totality of her posture has not impressed me. I am frightened by her contact.

Hers was a totally misguided attempt to vent off the frustration from her criminal conduct on the innocent defendants. This is so given the uncontroverted averments by the defendants in paragraph 4 of their plea that the plaintiff was released only because the money had been paid back leading the complainant to formally withdraw the allegations of theft and following an apology by the plaintiff.

In all circumstances of this case the plaintiff has not made a case against the defendants.

I have agonised on the question of costs in this matter and this is one case which was screaming for costs on a punitive scale. The plaintiff's only salvation is that the defendants in their wisdom or lack of it have not asked for such costs.

The plaintiff's claim is dismissed with costs.

Zimbabwe Human Rights (NGO forum), the plaintiff's legal practitioners
Civil Division of the Attorney General's Office, defendants' legal practitioners