IN THE SUPREME COURT OF ESWATINI

HELD AT MBABANE Case No: 47/2019

In the matter between:

SIBONGISENI KHUMALO **APPELLANT**

And

COMMISSIONER OF POLICE **FIRST RESPONDENT**

ATTORNEY GENERAL **SECOND RESPONDENT**

Neutral Citation : *Sibongiseni Khumalo v Commissioner of Police and Another (47/2019) [2020] SZSC 27*
(17 SEPTEMBER, 2020)

Coram : MCB MAPHALALA CJ; RJ CLOETE JA AND SJK MATSEBULA, AJA

Heard : 24th August, 2020

Delivered : 17th September, 2020

SUMMARY:

Civil appeal – claim for damages arising from unlawful arrest, detention and malicious prosecution – the police pleaded that the arrest was lawful on the basis that reasonable grounds existed for the suspicion that the appellant had committed an offence as contemplated by section 22(b) of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended – appellant was detained in police custody on the 27th and 28th July 2004 and thereafter remanded at Manzini Remand Centre from 29th July, 2004 to 3rd September,
2004 – bail was granted during the first remand hearing within 48 hours of arrest but appellant could not afford to pay bail - charges against the appellant were subsequently withdrawn on the date set for trial on the 3rd September 2004 – *court a quo* dismissed the appellant's claim for damages on the basis that the appellant's arrest was lawful and in accordance with section 22(b) of the Criminal Procedure and Evidence Act as amended since the appellant was found in possession of stolen items;

The *Court a quo* further held that the police could not be held liable for the appellant's detention before the first remand hearing on the basis that the appellant was brought to Court within a reasonable time and within the twenty-four (24) hour statutory period sanctioned by law;

The *court a quo* further held that the duty of the police is to bring the accused before Court to be dealt with in accordance with the law and that

the police cannot be held liable for the post-remand detention which has been ordered by the Magistrate;

On appeal this Court held that the liability of the police for unlawful detention pursuant to a remand Court order is determined in accordance with the principles of legal causation taking into consideration whether the consequence was foreseeable or whether there was a *novus actus interveniens;*

Held further that the deprivation of liberty through police arrest and detention is *prima facie* unlawful in the absence of any legal justification recognised by law, and that the respondents have not discharged the onus of establishing on a balance of probabilities that the arrest and subsequent detention were legally justified;

Held further that the police were liable for the harm suffered by the appellant on the basis that factual and legal causation was established on a balance of probabilities;

Accordingly, the Court held that the appellant was entitled to general damages for the unlawful arrest and detention including costs of the appeal as well as the costs for the High Court;

Consequently, the appeal is upheld with costs.

JUDGMENT

M. C. B. MAPHALALA, CJ

[1] The appellant was arrested by police officers based at Matsapha Police Station on the 27th July, 2004. When effecting the arrest of the appellant the police were acting during the course and within the scope of their employment with the Government of Eswatini. The appellant was arrested in terms of section 22 (b) of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended.

[2] The appellant was taken before the Manzini Magistrate's Court on the 29th July, 2004 where he was granted bail fixed at E5, 000.00 (Five Thousand Emalangeni). The appellant was charged with the offence of housebreaking with intent to steal and theft. The Crown alleged that the offence was committed on or about 10th March, 2004 at Logoba area in Matsapha at the home of Sandile Dlamini. Various items had allegedly

been stolen at the homestead including a four piece Hifi Technique set grey in colour valued at E5, 000.00 (Five Thousand Emalangeni).

[3] The appellant argued before the *court a quo* that when the police effected his arrest and preferred the charges against him they had no reasonable or probable cause for so doing since no one had complained about the loss of the items seized from the appellant's apartment. However, it will become apparent in the following paragraphs that Sandile Dlamini and his wife Sibongile Dlamini had reported to the Matsapha Police Station that a housebreaking and theft had occurred at their apartment in Matsapha and various items were stolen including a Hifi.

[4] The appellant contends that he has suffered damages amounting to E230, 000.00 (Two Hundred and Thirty Thousand Emalangeni) pursuant to his unlawful arrest and detention. In addition the appellant claimed interest at the rate of 9% per annum a *tempore morae* as well as costs of suit. The appellant's claim of E230, 000.00 (Two Hundred and Thirty Thousand Emalangeni) is divided as follows:

- ❖ Services of the Attorney E 10, 000.00
- ❖ Deprivation of freedom, tranquility and discomfort E100, 000.00
- ❖ Contumelia E 20, 000.00
- ❖ Malicious Prosecution E 100, 000.00

Total **E230, 000.00**

[5] The respondents concede that the police arrested the appellant as alleged; however, they plead that the appellant was lawfully arrested on the basis that there were reasonable grounds to suspect that he had committed an offence of housebreaking with intent to steal and theft on the 10th March, 2004 at Logoba area at the home of Sandile Dlamini.

[6] The appellant was granted bail of E5, 000.00 (Five Thousand Emalangeni) by the Manzini Magistrate's Court on his first day of remand hearing on the 29th July, 2004. The respondents contend that the period of detention between his arrest and his first remand hearing was reasonable since it did not exceed the forty-eight hour statutory period sanctioned by section 30(2) of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended. They further contend that they cannot be held responsible

for the appellant's continued detention after the first remand hearing from the

29th July to the 3rd September, 2004 on the basis that the appellant was granted bail on the 29th July, 2004 but he failed to make payment. It is common cause that the appellant was subsequently transferred from Matsapha Police Station to Manzini Remand Centre after his first remand hearing on the 29th July, 2004.

[7] According to the charge sheet presented before the Manzini Magistrate's Court, the appellant was charged with the offence of housebreaking with intent to steal and theft of the following items valued at E12, 220.00 (Twelve Thousand Two Hundred and Twenty Emalangeni):

- Hi-sense 51cm colour TV valued at E2, 000.00
- Akai V. C. R Video player valued at E1, 500.00
- 4 Piece Techniques Hi-fi valued at E5, 000.00
- Ideal D. V. D valued at E2, 500.00
- 5 Video cassets valued at E550.00
- 2 x 750 ml Premmy martin beer valued at E220.00

- ❖ 1 x 3.5 ml blue curtain drop valued at E450.00

[8] It is apparent from the evidence that 2874 Constable Patrick Nxumalo and 3195 Constable Justice Mahlangu arrived at the appellant's rented apartment on the 27th July, 2004 in the company of the appellant's brother Samkeliso Khumalo and Sandile Dlamini, since deceased, who was claiming ownership of the Hifi technique. The police arrested the appellant together with his brother Samkeliso Khumalo for the theft of the items mentioned in the preceding paragraphs which were found in the possession of the appellant. It is the evidence of the appellant, which was never disputed, that all the items which were seized by the police from his apartment, save for the Hifi, belonged to him.

[9] Similarly, the appellant's evidence that the Hifi had been brought to his apartment by his brother Samkeliso Khumalo who had offered to sell the Hifi to him was never disputed. The appellant contends that he didn't have the money to buy the Hifi. Samkeliso Khumalo then offered to sell the Hifi to Sandile Dlamini who pretended to be interested in buying the Hifi so that he could get Samkeliso Khumalo arrested. Sandile Dlamini claimed that the Hifi offered by Samkeliso Khumalo belonged to him.

Samkeliso Khumalo was subsequently arrested and charged with housebreaking with intent to steal and theft together with the appellant.

[10] The appellant was remanded every fortnight, and, on the second remand hearing, the police released the items for which he was arrested save for the Hifi. Strangely enough the appellant was not released but he was kept in custody at the Manzini Remand Centre. On the contrary the Court set a trial date which was on the 3rd September 2004. The appellant was subsequently released on the 3rd September, 2004 which was the date set for trial and the charges preferred against him were withdrawn by the prosecution. A total of sixteen years has lapsed since the charges against the appellant were withdrawn and the alleged stolen items returned to him; however, the charges have not been reinstated against the appellant. It is logical to conclude that the appellant's arrest didn't comply with section 22(b) of the Criminal Procedure and Evidence Act as amended on the basis that the appellant was never prosecuted for the crime for which he was arrested.

[11] The appellant's brother Samkeliso Khumalo corroborated the evidence of the appellant in all material respects. The evidence of Samkeliso Khumalo was undisputed that he had purchased the Hifi from Sibusiso Dlamini who was his neighbour at his rented apartment in Matsapha. According to his evidence Sibusiso Dlamini who was working for Fridge Masters in Matsapha had bought the Hifi from Ellerines Furnishers in Manzini; he told the Court that he had witnessed the delivery of the Hifi at the apartment of Sibusiso Dlamini.

[12] Samkeliso Khumalo further gave undisputed evidence that Sandile Dlamini who claimed ownership of the Hifi did not produce any documentary evidence to substantiate his claim either during their arrest at the appellant's apartment or upon their arrival at the Matsapha Police Station. When the items which were seized from the appellant's apartment were released by the police to the appellant, the Hifi was not released. The charges of house breaking with intent to steal and theft preferred against the appellant and his brother Samkeliso Khumalo were subsequently withdrawn. There is undisputed evidence that upon his release from the Manzini Remand Centre Samkeliso Khumalo demanded

the return of the Hifi from the police but he was told that the Hifi could not be located at the Matsapha Police Station where it was being kept.

[13] During the evidence in-chief of Sibongile Dlamini, the wife to the late Sandile Dlamini, it transpired that the police subsequently gave the Hifi to her notwithstanding that neither she nor her late husband had positively identified the Hifi as belonging to them. She conceded that she merely identified the Hifi by a scratch which she had previously made. This was also the finding of the *court a quo.* She further conceded that she did not go to Lewis Furnishers where their Hifi was purportedly purchased to identify it. She also conceded that she was never called to Court to testify in a criminal trial relating to the housebreaking at her apartment. She acknowledged that the charges against the appellant and his brother Samkeliso Khumalo were subsequently withdrawn by the prosecution.

[14] Another interesting aspect of the evidence of Sibongile Dlamini was her concession that she didn't produce any document to identify the Hifi as belonging to her. However, she subsequently contradicted this evidence

under cross-examination when she told the Court that she had given the receipt relating to the purchase of the Hifi to a certain police officer at Matsapha Police Station but she could not recall his particulars. She told the Court that the receipt contained the serial number of the Hifi. She further conceded that during the identification of the Hifi, she merely pointed to a scratch in the Hifi which she had allegedly made during the delivery of the Hifi by Lewis Furnishers. She also conceded that the identification of the Hifi at Matsapha Police Station was attended by four police officers and another person she didn't know who also claimed ownership of the Hifi. Consequently, there is no evidence that Sibongile Dlamini succeeded in positively identifying the Hifi as her lost property in the absence of the serial number. It is not surprising that the charges preferred against the appellant and his brother Samkeliso Khumalo were eventually withdrawn by the prosecution on the 3rd September, 2004.

[15] The evidence of Constable Sikhumbuzo Mamba contradicts the evidence of Sibongile Dlamini in material respects. Constable Mamba testified that during the identification of the Hifi at Matsapha Police Station, Sibongile Dlamini produced a receipt with a serial number which she used to identify the Hifi. His further evidence is that the police had also gone to

Lewis Furnishers with Sibongile Dlamini where she positively identified the Hifi using the serial number on the receipt. His concession that he was not the investigating officer in the matter but 3195 Constable Justice Mahlangu shows that his evidence was hearsay. It is against this background that the Crown did not dispute the evidence of the appellant and his brother Samkeliso Khumalo that Constable Mamba was not present during their arrest in Matsapha. Under cross-examination Constable Sikhumbuzo Mamba denied knowledge of the appellant's landlord or that the appellant's landlord was present during their arrest; he further denied knowledge of the appellant's residence where they were arrested with his brother.

[16] It was the evidence of the appellant, which was not disputed, that during their arrest, the landlord Mr Maziya who is now deceased was present and that the police had explained to him that the appellant had stolen various items for which he was being arrested. The appellant had further testified that Mr Maziya upon hearing the allegations of housebreaking with intent to steal and theft against the appellant, he had threatened to evict him from the apartment but the appellant had denied knowledge of the theft. This evidence was not denied.

[17] Constable Sikhumbuzo Mamba testified that Mr Maziya was not present at the homestead when the appellant and his brother were arrested and that nobody was present at the homestead save for the appellant. He denied that the landlord had an interaction with the police during the arrest of the appellant and his brother. He also denied knowledge of the threats of eviction made by the landlord to the appellant after the police had told him that the appellant was being arrested for housebreaking with intent to steal and theft.

[18] Under cross-examination Constable Sikhumbuzo Mamba could not recall the list of items seized by the police from the appellant save for two computers and a Hifi. Similarly, he could not recall who had released the items to the appellant as well as the list of the items released. He further conceded that the appellant's evidence that the Hifi belonged to his brother Samkeliso Khumalo was never challenged. He also conceded that the evidence of Samkeliso Khumalo was never disputed that he bought the Hifi from Sibusiso Dlamini and that the Hifi belonged to him.

[19] The Learned Judge in the *court a quo* dismissed with costs the appellant's claim for damages arising from his unlawful arrest and detention. Her ladyship had this to say:

> **"22. The Court cannot overemphasize that police officers in the discharge of their duty to arrest do so on the basis of reasonable suspicion and not *prima facie* case . . . .**
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> **23. Once the evidence became common cause that the plaintiff was found in possession of an item alleged to be the subject of a prior reported house-breaking and theft, the police officer was under a duty to bring him before a Court of Law to be dealt with according to law. It was for the Court to exercise its discretion whether it accepted the version of the plaintiff and rejected that of Sandile Dlamini or his wife and not the police. The identification by Sandile Dlamini's wife (DW1) of the contested item by a clearly marked peculiar identity, fortified the reasonable suspicion formed by the police officer.**

. . . .

27. The evidence, again which is common cause, is that the plaintiff was taken to Court on the following day. He was not kept at the police station for an unreasonable period of time. Plaintiff, during his evidence did not take any issue of his detention in the police custody. It must be borne in mind that once an arresting officer takes the suspect to Court, the Court's duty is to deal with the suspect according to law. Now the question is, how did the Court deal with the plaintiff?

28. The evidence from plaintiff and his witness PW2 is that on their first appearance they were granted bail. This was confirmed by PW2 and the investigating officer. Further, the evidence coming from plaintiff and PW2 is that charges against them were withdrawn on the 3rd September, 2004. They were kept in custody for seven days. They were granted bail and failed to pay same. They were released on the basis that charges against them were

withdrawn. They were in brief, never prosecuted . . . .”

[20] The appellant noted an appeal against the judgment of the *court a quo* on the following grounds: Firstly, that the *court a quo* erred in fact and in law in failing to hold that the respondents bore the onus of justifying as being lawful, and excusable, the arrest and detention of the appellant, in light of the respondent’s plea. Secondly, that the Court erred in law and in fact in holding that it was for the Court to exercise discretion whether it accepted the version of appellant and rejected that of Sandile Dlamini or his wife and not the police. Thirdly, the *court a quo* erred in fact and in law in failing to comprehend and apply its mind to the question whether the first respondent had brought evidence justifying the arrest and detention in order to escape liability. Fourthly, the *court a quo* erred in fact and in law in finding any form of justification for the arrest and detention particularly in light of the fact that the appellant advised the arresting officers at the time and in the presence of PW2, that the Hifi was brought by PW2 to his house.

[21] The issue for determination by this Court is whether the arrest and subsequent detention of the appellant was lawful. If it was lawful that brings the matter to an end. However, if the Court finds that it was unlawful, the respondents become liable for the harm suffered by the appellant as a result of his arrest and subsequent detention. What is critical is whether the police caused the appellant's detention factually and legally pursuant to the unlawful arrest.

[22] In the case of Bryan James De Klerk v. Minister of Police[1] the applicant sought leave to appeal the decision of the Supreme Court of Appeal.[2] The main issue for determination was whether the Minister of Police was liable to compensate the applicant for the entire period of his detention following his unlawful arrest including the period following his first appearance in Court. The Supreme Court of Appeal found that the

[1] Case CCT 95/18

[2] De Klerk V. Minster of Police (2018) ZASCA 45

applicant was unlawfully arrested and that he was entitled to damages for the unlawful arrest and detention excluding the period following his first remand appearance.

[23] In the De Klerk case the majority of the Judges of the Supreme Court held that the Minister of Police cannot be held liable for the applicant's detention after his Court appearance. In coming to this conclusion the Supreme Court of Appeal relied on its previous judgment in Sekhoto.[3] In the Sekhoto judgment, the Court held:[4]

> **"While the purpose of arrest is to bring the suspect to trial, the arrestor has a limited role in that process. He or she is not called upon to determine whether the suspect ought to be detained pending a trial. That is the role of the Court (or in some cases a Senior Officer). The purpose of the arrest is no more than to bring the suspect before the Court (or the Senior Officer) so as to enable that role to be performed."**

[3] Minister of Safety and Security v. Sekhoto (2010) ZASCA 141; 2011 (5) SA 367 SCA

[4] Para 44

[24] The Supreme Court of Appeal relying on the Sekhoto judgment found that once an accused is brought to Court, it is the responsibility of the Presiding Officer to ensure that the accused is given a fair trial as reflected in the Bill of Rights. Accordingly the Court held that the respondent was liable to compensate the applicant for his unlawful detention until his appearance in Court. He was awarded R30, 000.00 (Thirty Thousand Rands) in damages plus costs.

[25] The Supreme Court of Appeal alluded to what it termed the limited role of the police during an arrest that their duty extends no further than securing the presence of the accused before Court.[5] The Supreme Court of Appeal continued:[6]

> **"Failure by the Magistrate to enquire at the first appearance as to the reasons for further detention is clearly a contravention of the above constitutional imperatives, and therefore the further detention of a suspect without just cause would be arbitrary and unlawful. In my view, the police cannot be held liable for the**

[5] De Klerk v. Minister of Police (2018) ZASCA Para 14

[6] Para 14

further detention, even if the arrest is found to have been unlawful. What is critical is that the Justice Department would be responsible and liable for the further detention because of its failure to observe the constitutional rights of a detained person."

[26] On the contrary the Constitutional Court followed the minority judgment of the Supreme Court and found that the police were liable for the entire period of detention on the basis that the lawfulness of the detention after the first Court appearance is not essential for establishing liability and that the determining factor is whether the police caused the detention, both factually and legally, after the first remand hearing pursuant upon the unlawful arrest. The Constitutional Court found that factual and legal causation had been established and it awarded the applicant R300, 000.00 (Three Hundred Thousand Rands) in non-patrimonial damages.

[27] It is common cause that in the present appeal the appellant seeks compensation for damages arising from unlawful arrest and detention including the period following his first remand appearance at the Manzini Magistrate Court. A claim for unlawful arrest and detention is a delictual

action. His Lordship Justice Theron delivering a majority judgment of the Constitutional Court describes a delictual action as follows:[7]

> **"13. A delict comprises wrongful, culpable conduct by one person that factually causes harm to another person that is not too remote. When the harm in question is a violation of a personality interest caused by intentional conduct, then the person who suffered the harm must institute the *actio iniuriarum* (action for non- patrimonial damages) to claim compensation for the non- patrimonial harm suffered.**
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> **The harm that the applicant complains of in respect of his detention is the deprivation of his liberty, a significant personality interest. He alleges that it was his wrongful arrest that caused the harm (namely, the detention before and after his court appearance).**

[7] De Klerk v. Minister of Police CCT 95/18 at para 13 - 14

14. A claim under the *actio iniuriarum* for unlawful arrest and detention has specific requirements:

(a) the plaintiff must establish that their liberty has been interfered with;

(b) the plaintiff must establish that this interference occurred intentionally. In claims for unlawful arrest, a plaintiff need only show that the defendant acted intentionally in depriving their liberty and not that the defendant knew that it was wrongful to do so;

(c) the deprivation of liberty must be wrongful, with the onus falling on the defendant and to show why it is not;

(d) the plaintiff must establish that the conduct of the defendant must have caused, both legally

and factually, the harm for which compensation is sought."

[28] When dealing with the general principles of causation, His Lordship Justice Theron in the De Klerk's matter had this to say:[8]

> **"24. Causation comprises a factual and legal component. Factual causation relates to the question whether the act or omission caused or materially contributed to the harm. The "but – for" test *(condictio sine qua non)* is ordinarily applied to determine factual causation. If, but for a wrongdoer's conduct, the harm would probably not have been suffered by a claimant, then the conduct factually caused the harm. It is common cause that the factual component of causation is satisfied in this case: but for the arrest by Constable Ndala, the applicant would probably not have been remanded by the Magistrate for the week.**

[8] Para 24 - 25

25. Legal causation is concerned with remoteness of damage. This entails an enquiry into whether the wrongful act is sufficiently closely linked to the harm for legal liability to ensue. Generally, a wrongdoer is not liable for the harm that is too remote from the conduct concerned or harm that was not forseeable."

[29] Justice Theron correctly summarized the legal principles underlying unlawful arrest and detention as follows:[9]

"62. The principles emerging from our jurisprudence can then be summarized as follows: The deprivation of liberty, through arrest and detention, is per se *prima facie* unlawful. Every deprivation of liberty must not only be effected in a procedurally fair manner but must also be substantively justified by acceptable reasons. Since Zealand, a remand order by a Magistrate does not necessarily render subsequent detention lawful. What matters is whether, substantively, there was just cause for

[9] Para 62 - 63

the later deprivation of liberty. In determining whether the deprivation of liberty pursuant to a remand order is lawful, regard can be had to the manner in which the remand order was made.

63. In cases like these, the liability of the police for detention post-court appearance should be determined on an application of the principles of legal causation, having regard to the applicable tests and policy considerations. This may include a consideration of whether the post appearance detention was lawful. It is these public policy considerations that will serve as a measure of control to ensure that liability is not extended too far. The conduct of the police after an unlawful arrest, especially if the police acted unlawfully after the arrest of the plaintiff, is to be evaluated and considered in determining legal causation. In addition, every matter must be determined on its own facts – there is no general rule that can be applied dogmatically in order to determine liability."

[30] His Lordship Justice Theron then turned to deal with the issue of foresight of consequences and had this to say:[10]

> **"76. A reasonable arresting officer in the circumstances may well have foreseen the possibility that, pursuant to an unlawful arrest, the arrested person would routinely be remanded in custody after their first appearance. Here, however, the arresting officer had actual, subjective foresight that the proceedings in the 'reception court' would occur as they did and that the applicant would not be considered for bail at all and accordingly suffer the harm that he did.**
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> . . . .
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> **81. As explained, subjective foresight of harm cannot itself necessarily imply that harm is not too remote from conduct. It is, however, a weighty consideration. In the present matter, Constable Ndala subjectively foresaw the**

[10] Para 76

precise consequence of her unlawful arrest of the applicant. She knew that the applicant's further detention after his court appearance would ensue. She reconciled herself to that consequence. What happened in the reception court was not, to Constable Ndala's knowledge, an unexpected, unconnected and extraneous causative factor – it was the consequence foreseen by her, and one which she reconciled herself to. In determining causation, we are entitled to take into account the circumstances known to Constable Ndala. These circumstances imply that it would be reasonable, fair and just to hold the respondent liable for the harm suffered by the applicant that was factually caused by his wrongful arrest. For these reasons, and in the circumstances of this matter, the Court appearance and the remand order issued by the Magistrate do not amount to a fresh causative event breaking the causal chain."

[31] It is common cause that the appellant in this matter was arrested by the police on the 27th July, 2004 at his rented apartment in Matsapha together

with his brother Samkeliso Khumalo. The police were acting during the course and within the scope of their employment with the Government of ESwatini. Various items mentioned in Paragraph 7 of this judgment were seized from the appellant's apartment and allegedly valued at E12, 220.00 (Twelve Thousand Two Hundred and Twenty Emalangeni). It is apparent from the evidence that it was Sandile Dlamini and his wife Sibongile Dlamini who had reported a case of house-breaking and theft of a Hifi and other items at Matsapha Police Station. The other items which were seized from the appellant's apartment were subsequently released to the appellant during his second remand hearing.

[32] The evidence of Samkeliso Khumalo was not disputed that the two police officers who arrested them had assaulted the appellant upon their arrest. Notwithstanding the assault upon the appellant there is no evidence that the appellant was resisting lawful arrest. Similarly, there is no evidence that the appellant was cautioned during his arrest that he had the right to remain silent and that he was not obliged to say anything but whatever he would say would be recorded and used in evidence against him during trial or that he had the right to engage the services of an attorney.

[33] The evidence of Constable Sikhumbuzo Mamba constitutes hearsay evidence. He was not present during the arrest of the appellant and his brother Samkeliso Khumalo. The evidence of the appellant and his brother was not disputed that only 3195 Constable Justice Mahlangu and 2874 Constable Patrick Nxumalo effected their arrest, and that both of them are now deceased.

[34] There is a concession by Constable Sikhumbuzo Mamba that the investigating officer in the case was 3195 Constable Justice Mahlangu. Constable Sikhumbuzo Mamba does not know the physical location of the appellant's rented apartment which is a clear indication that he was not present during the arrest. Similarly, he is not aware that the arresting police officers had engaged the landlord where the appellant was renting the apartment. Interestingly Constable Sikhumbuzo Mamba could not recall the list of items seized by the police from the appellant's apartment and who had released the items from the Matsapha Police Station to the appellant. Accordingly the evidence of Constable Sikhumbuzo Mamba that the appellant and his brother had disowned the Hifi during their arrest constitutes hearsay evidence because he was not present during the arrest.

[35] The appellant was arrested allegedly in terms of section 22(b) of the Criminal Procedure and Evidence Act[11] which provides the following:

> **"Every police officer and every other officer empowered by law to execute criminal warrants is hereby authorised to arrest without a warrant every person whom he has reasonable grounds to suspect of having committed any of the offences mentioned in Part II of the First Schedule."**

[36] The respondents pleaded that the appellant was lawfully arrested on the basis that there were reasonable grounds for suspecting that he had committed an offence mentioned in Part II of the First Schedule. However, the respondents have failed to discharge the onus of proving on a balance of probabilities that the arrest and subsequent detention of the appellant was legally justified.

[37] The respondents could not establish that the items seized from the appellant's apartment were stolen, and, these items were subsequently released to the appellant save for the Hifi. Sibongile Dlamini conceded

[11] No. 67 of 1938 as amended

that she could not positively identify the Hifi by means of a serial number. She testified that she could only identify the Hifi by a scratch she had previously made on the Hifi upon delivery. There was no positive identification of the Hifi as having been stolen from the apartment of Sibongile Dlamini. Accordingly, the arrest and subsequent detention of the appellant was unlawful. It is common cause that after the seizure of the items from the appellant, they found Sibongile Dlamini at the Matsapha Police Station but she failed to identify the Hifi or any of the items as belonging to her. Accordingly there were no reasonable grounds to suspect that the items seized from the appellant were stolen.

[38] It is well-settled that a police officer who effect an arrest without a warrant bears the onus of proving on a balance of probabilities that reasonable grounds exist for the suspicion that the accused has committed an offence mentioned in Part II of the First Schedule.[12] The basis of the onus being placed on the arresting police officer is that every arrest constitutes an invasion on the fundamental human rights of the individual and deprives the arrested person of his personal liberty. The test for determining the existence of reasonable grounds for the suspicion is

[12] No. 67 of 1938 as amended; footnote 9 above

objective in nature enquiring what a reasonable man would have done in similar circumstances with the same information at his disposal.

[39] It is not disputed that the appellant was brought to Court for his first remand hearing within the statutory period allowed by section 30(2) of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended. It is further not disputed that the Magistrate Court granted bail of E5, 000.00 (Five Thousand Emalangeni) to the appellant upon his first remand hearing. The appellant could not afford payment of the bail amount; hence, he was remanded to the Manzini Remand Centre. It is also not in dispute that remand hearings involving the appellant were done every fortnight, and, that on the second remand hearing, the police released all the items seized from his apartment save for the Hifi. However, the appellant was kept in custody and a trial date was set presumably in respect of the Hifi which Sibongile Dlamini had failed to positively identify as stolen from her home. On the date set for trial being 3rd September, 2004 the Crown withdrew the charges in terms of section 6 of the Criminal Procedure and Evidence Act which allows the Director of Public Prosecutions to withdraw charges without giving reasons.

[40] The evidence of Samkeliso Khumalo has not been disputed that upon his release from the Manzini Remand Centre on the 3rd September, 2004 he went to the Matsapha Police Station and demanded the release of the Hifi which he had purchased from Sibusiso Dlamini. He found that 2874 Constable Patrick Nxumalo who was one of the two police officers who had arrested him had been transferred to Manzini Police Station. The other officer 3195 Constable Justice Mahlangu had died. Together with Constable Nxumalo they searched but could not find the Hifi at the Matsapha Police Station. The evidence of Constable Sikhumbuzo Mamba is hearsay that he was told by another police officer based at Matsapha Police Station that the Hifi was released to its lawful owner, and, this evidence is inadmissible in law.

[41] It is the finding of this Court that the appellant suffered harm pursuant to his unlawful arrest and detention from the 27th July, 2004 to the 3rd September, 2004. He was deprived of his personal liberty without legal justification. At the time of his arrest he was a relatively young man having been born on the 25th September, 1970. He was employed as a Procurement Clerk at the Swaziland Meat Industries in Matsapha and earning E1, 300.00 (One Thousand Three Hundred Emalangeni) at the

time. He had completed Form V which is the completing school grade in this country.

[42] It is common cause that at the time of arrest the appellant was residing at a rented apartment at a Maziya homestead at Mhlaleni area in Matsapha. It is not in dispute that during the time of arrest the landlord was present at the homestead and the police explained to him that they were arresting the appellant upon reasonable suspicion that he had committed an offence of housebreaking with intent to steal and theft. The police had explained to the landlord that various stolen items were found at the appellant's apartment. The landlord had threatened to evict the appellant from the apartment since the police had presented him as a criminal offender to the landlord. It took persuasion on the part of the appellant to convince the landlord that the items in question belonged to him.

[43] The appellant's evidence that he was not in a good state of health when he was arrested, and, that he was suffering from swelling glands has not been disputed by the respondents. He further told the Court that on his arrest he had purchased medication using a doctor's prescription; he took the medication during his detention until it was finished. The sickness had

persisted and the Nursing Sister at the Manzini Remand Centre couldn't assist him. There was continued swelling of the glands which was very painful. He was without medication for a week. The appellant was subsequently taken to Mbabane Government Hospital for further treatment.

[44] The appellant's evidence that the living conditions at the Manzini Remand Centre were torturous and unbearable was not disputed. According to the appellant the Manzini Remand Centre was overcrowded. No mattresses were provided to the inmates and they were sleeping on the cold cement floor. Only a blanket was provided to the inmates. They were sleeping in close proximity to each other due to overcrowding. Other inmates were smoking day and night and this affected the appellant badly since he didn't smoke.

[45] It is the appellant's evidence that he was allergic to the food which was served at the Manzini Remand Centre. Security was non-existent since they were locked in the afternoon and warders would only come in the morning to count them and give them food. Most importantly the appellant testified that his unlawful arrest and detention portrayed him as

a hard-core criminal. He referred to an incident when he was taken to a hospital with leg-irons, and, he saw a relative who was even scared to greet him. He told the Court that other people seeing him at the hospital in leg-irons gave way because they were afraid to come close to him. He also told the Court that he lost an opportunity of employment with the ESwatini Railways, that he was invited to an interview but could not attend because he was incarcerated.

[46] It is the appellant's evidence that the police ill-treated him in police custody. This evidence is consistent with the evidence of Samkeliso Khumalo that when they arrived at the appellant's apartment, 2874 Constable Patrick Nxumalo and 3195 Constable Justice Mahlangu started assaulting the appellant. The appellant's brother also decried the bad living conditions at the Manzini Remand Centre corroborating the evidence of the appellant in all material respects. His evidence was also consistent with that of the appellant that the appellant was sick during their detention and that the prison was overcrowded with inmates sharing rooms with sick people. Other inmates were smoking day and night in the rooms rendering the living conditions unbearable.

[47] I have come to the conclusion that the arrest and detention of the appellant was unlawful and that the police in arresting the appellant foresaw the possibility of further detention of the appellant after the first remand hearing. The police had reconciled themselves to this consequence and proceeded to arrest the appellant. The unlawful detention before and after the remand hearing was a direct consequence of the unlawful arrest. The respondents are liable not only for the unlawful arrest but the entire period of the appellant's detention. Such a conclusion is in accordance with reasonableness, fairness and justice.

[48] Now I turn to consider the determination of compensation payable to the appellant. The appellant lodged the claim for compensation on the 27th January, 2005 and the matter could not be heard until 21st June, 2019. Regrettably the damages claimed have been adversely affected by inflation due to the passage of time. Generally it would have been desirable to refer the quantum of compensation to the High Court for determination of the damages to be awarded as a Court of first instance in order to allow for an appeal process in the event that becomes necessary. However, in view of the passage of time, the depreciation in the value of the amount claimed and to avoid a protracted legal battle accompanied by

further legal costs, it would be in the interests of justice, fair and equitable that the matter is finalized by this Court.

[49] The respondents did not challenge the quantum of compensation before the High Court as well as before this Court. The respondents were happy to leave the quantum of damages for compensation in the hands of the Court. On the contrary the appellant's Counsel addressed this Court on the quantum of damages and supported the amount claimed. However, I should point out that the appellant was never prosecuted by the Magistrate's Court. It is common cause that a trial date was set for the 3rd September 2004; however, on the date set for trial, the charges were withdrawn by the prosecution. Accordingly, the claim for malicious prosecution is both misdirected and incompetent in the circumstances of this matter.

[50] I have considered the submissions made by Counsel on appeal and I consider it appropriate to award just and equitable general damages under the *actio iniuriarum* for non-patrimonial damages. Undoubtedly the costs will follow the result.

[51] Accordingly, the following order is made:

1. The appeal is upheld.

2. The first respondent as the Commissioner of Police is ordered to pay the appellant an amount of E100, 000.00 (One Hundred Thousand Emalangeni) with interest at the prescribed rate of 9% from date of delivery of this judgment to the date of payment.

3. The Commissioner of Police is directed to pay the costs of this appeal as well as the costs before the High Court.

For the Appellant	:	Attorney Ben J. Simelane
For the Respondents	:	Crown Counsel Lenhle Simelane

I agree

MCB MAPHALALA, CJ

I agree

RJ CLOETE, JA

I agree

SJK MATSEBULA, AJA