

PRECIOUS MAZVITA KANENGONI
versus
MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS
and
THE COMMISSIONER GENERAL PRISONS AND CORRECTIONAL
SERVICES
and
OFFICER IN CHARGE RUSAPE PRISON

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 27 and 28 February & 21 March 2018

Trial

A Masango, for the plaintiff
L T Muradzikwa, for the respondents

MUNANGATI-MANONGWA J: On 28 January 2014, Rusape Remand Prison woke up to a sombre atmosphere after the death whilst in custody of one Andrew Kamba a fairly young man 23 years of age. A known asthmatic patient, he had only been in prison for about 3 days when he succumbed to an asthmatic attack. His cellmates had raised “distress calls” throughout the night and his passing on affected them hence the sombre atmosphere. The plaintiff, deceased’s surviving spouse has approached this court seeking damages as against the defendants arising out of their failure to act leading to her husband’s death and consequently loss of support.

On 21 January 2015 the plaintiff issued summons claiming delictual damages as against the three defendants on the basis of vicarious liability. She seeks

- a) US\$5000.00 for funeral expenses.

- b) US\$295 000.00 for loss of support and
- c) Costs of suit.

The claim is defended. The defendants are denying liability. The issues referred for trial by the pre-trial conference judge are as follows:

- a) Whether or not the death of the deceased was attributable to the negligence of the defendants, if yes,
- b) Whether or not the defendants are liable to the plaintiff in damages as claimed by the plaintiff.

The following facts are common cause: On 24 January 2014 the now deceased Andrew Kamba was admitted into Rusape remand prison seemingly on trespassing charges. It is not in dispute that prison authorities were informed that he was an asthmatic patient and his Salbutamol inhaler was availed to the authorities. It is also on record that on the 25 January 2014 he sought treatment whilst in prison and was attended, this is borne by the outpatients prison record produced in court. It is also common cause that on the night of 27 January 2014 he had an asthma attack and three (3) distress calls were raised by fellow cellmates and prison authorities attended. It is how these distress calls were handled which is in dispute. Andrew Kamba died in the hands of a fellow prisoner at around 5.00 am on the 28 January 2018 and the cause of death is indicated on the death Certificate as

“- acute respiratory distress”
- pneumonia.

He left a pregnant wife who has since given birth to a girl child, who at the time of the hearing is 3 ½ years old having been born on 22 August 2014. It is not an issue that the deceased had a duty to support his wife and child. Neither is it contended that the defendants would be vicariously liable should the court find that the correction officers on duty on the day in question acted negligently when faced with the sick inmate, now deceased.

The plaintiff led evidence from three witnesses herself included. The first witness Robert Zonke gave evidence that he was imprisoned at Rusape Prison and shared Cell 3 with the now deceased, Andrew Kamba (hereinafter referred to as “deceased” or “Andrew” interchangeably) from 24 January 2014. There were over 40 prisoners in this cell. This evidence was corroborated by a co-witness and the duty officer one Mr Damu as shall be seen later. At around 7.00pm on 27

January 2014, the now deceased suffered an asthmatic attack. He took Salbutamol tablets which were in his possession in the cell but he did not improve. He was having breathing problems. The witness knocked on the prison door and called out to the duty officer one Mr Damu. Shungudzemoyo Mafetuka a fellow prisoner joined him in raising the distress call. Ultimately the duty officer responded.

It was his evidence that an inhaler was brought but it did not assist. The now deceased was wheezing and getting worse. Another distress call was raised at 10.00pm and another inhaler was brought by the nurse but the condition of the sick man did not improve. At around mid-night the witness knocked on the door again, once again officer Damu called the nurse and the nurse was informed that the now deceased was getting worse, he asked for his inhaler which was brought from home which was kept at the reception but was informed he could not get it. His call to be taken to hospital was ignored. The hospital as *per* this witness' evidence is within 500m from the prison.

Further calls for help after midnight were not responded to. The deceased passed on around 5.00 am. It was his evidence that all the prisoners were disillusioned and the Officer in Charge addressed them asking for forgiveness as all prisoners were concerned for their safety after this incident. He challenged the officer in charge as to how there was failure to take this particular prisoner to hospital when two days earlier a sick inmate had been taken to hospital during the night. In two days' time he was transferred to Mutare.

This witness gave his evidence well and insisted he was next to the now deceased. He was up all night till the time deceased took his last breath, he even felt his cold body. He thus had first-hand information on what transpired on the night and how the correctional officers responded.

The second witness for the plaintiff was Shungudzemoyo Mafetuka. His evidence corroborated that of Robert Zonke in all material respects. He mentioned the three distress calls and how they were responded to. It was his evidence that it was him and Robert Zonke who communicated with the prison officials about the request for Andrew's inhaler and that he was asking to be taken to hospital. He personally received the inhaler from the nurse through the spyhole and gave it to the sick man. Andrew had asked him to check the expiry date as the

inhaler supplied was not assisting. He checked it and discovered that it had expired as it had a 2012 date.

He chronicled how after the last visit by the nurse after midnight, further distress calls were not answered. People prayed and Andrew died whilst he held him in his arms. He closed his mouth and eyes. He chronicled how the prisoners were frustrated and ultimately he was immediately transferred to Mutare.

This witness knew Andrew as he had given his generator to him for repairs. He was unshaken during cross-examination and insisted the prison officers should have done more as the deceased's condition was clearly deteriorating with their knowledge.

The plaintiff gave evidence to the effect that she was customarily married to Andrew and she was pregnant when he died, with the child Tinotenda Lorita Kamba being born thereafter on 22 August 2014. She is unemployed and survives on intermittent support from relatives. Her child should be in pre-school but is unable to go due to lack of funds. Whilst her husband Andrew was asthmatic, he was on salbutamol tablets and inhalers and when the medication failed to stabilise him, he would always be taken to hospital where he would stabilise and recover. Upon his arrest she had ensured that he had his medication on him. She produced a salbutamol inhaler inscribed with the deceased's name as an exhibit, and stated that this was the inhaler which had been left with the prison authorities and it was handed over to her by prison officials after her husband passed on. She believes her husband died due to failure to quickly get the required assistance and holds the defendants liable.

The plaintiff stated that she relied on her husband for sustenance prior to his death. The couple lived at Andrew's parent's home whilst his father stayed in Botswana. Her husband had a business and ran a workshop specialising in repairs for generators, chainsaws, motor bikes and even motor vehicles. His income was around US\$1500.00 *per* month. To support this evidence invoices from Supreme Bike Centre (Pvt) Ltd were produced and stand as exh 3 (a) to 3 (e). They are all for work done in January 2014 and total US\$1637.00. The plaintiff indicated that Andrew had employees he worked with in his business. The evidence on monthly earnings was not challenged.

The plaintiff claimed US\$5000-00 for funeral expenses but indicated that she had lost some of the receipts. However she produced a schedule of expenses to the tune of US\$1395.00

detailing some of the expenses incurred at the funeral. The defendants did not challenge the schedule. A look at the schedule of expenses reveals that they are the ordinary expenses like purchase of grave site, cement, bricks, food and transport for mourners. A further amount of US\$764.75 was presented to court being the bill for Moonlight Funeral Assurances and apart from enquiring about the person who paid the amount the figure was not challenged.

As for the claim for US\$295 000 the plaintiff indicated she relies on estimates. The plaintiff indicated that she would require US\$50.00 *per* month rentals for her accommodation and that of the child. An amount of between US\$150– US\$200 would be required as fees for pre-school *per* term. When the child starts primary education, between US\$200– US\$250 *per* term would be required. The amount would rise to between US\$450– US\$500 when the child goes to secondary school. If the child is doing well she would require between US\$800– US\$1000 *per* semester for tertiary education. It was her evidence that her husband was spending between US\$250– US\$300 on her for food, clothing and hairdressing. The plaintiff closed her case. She gave her evidence well and withstood cross examination. Suffice that the figures she provided were not interrogated.

The defendant called its first witness Decision Damu a correction officer. He was the “in charge” duty officer on the day Andrew fell ill. His evidence was that on the 27 January 2014 after 6:00 pm he went to cell 3 to attend to inmates after inmates raised alarm. He was informed of Andrew’s illness and he inquired of him whether he wanted to be attended to by a nurse. Andrew indicated that he wanted his inhaler which was with another inmate in Cell 2. He duly went to take the inhaler and gave it to Andrew. Another distress call came at around 10.00pm and Andrew requested to see the nurse as his medication had ran out. He called the nurse who arrived in about 20 minutes time and the nurse conversed with Andrew. The nurse went to get an inhaler from the dispensary, handed it to the sick inmate and went away. The inhaler was passed on through the spy hole. He confirmed receiving another distress call at mid-night, the nurse was called again and attended to Andrew. He only learnt of Andrew’s death the following morning at 5:15 am. This witness confirmed that neither he nor the nurse had physical contact with Andrew as they spoke to him through the spy hole. He indicated that it was the nurse’s duty to recommend that the ill inmate be taken to hospital. He had no knowledge that Andrew had medication by the reception and as far as he was concerned he had done his best. At around 2 am

when he did rounds Andrew appeared sleeping. He denied that there were further distress calls raised on behalf of Andrew after midnight.

This witness was not entirely truthful as he could not have seen Andrew sleeping through a spy hole in a cell with over 40 inmates. In any case the other inmates gave evidence that they had a sleepless night calling for the attention of prison officers after the last visit by the nurse at midnight and this was to no avail. This witness is likely to have ignored further distress calls after midnight and if he had done rounds at 2.00am as he claims, he must have heard the calls from Cell 3 inmates.

The defence's last witness was Misheck Zongoro. He stated that he is a nurse by profession and has been with prisons for 5 years. He confirmed Andrew was a known asthmatic patient as he had attended to him on the 25th January 2014 as indicated by the outpatients record produced in court. He confirmed being awakened at around 10.00pm on the 27th January 2014, the day in question to attend to a sick inmate. He spoke to Andrew through the spy hole and he told him he was having breathing problems. He could hear that he was wheezing but it was not serious. He supplied Andrew with a Salbutamol inhaler from the dispensary and the patient calmed down after 10 minutes. A call was raised around midnight and he examined him and noted that Andrew had difficulty in breathing. It was the nurse's evidence that Andrew indicated that the inhaler was not working, he asked him to shake it and educated him on its use. He stabilized and the nurse went home. He denied the allegation that the inhaler had expired and referred to a stock card with information on drugs kept in stock which stands as exh 6.

He confirmed that Andrew's death was due to acute respiratory distress (a condition which is a sign of asthma) and relates to difficulties in breathing, and pneumonia.

Under cross examination the nurse admitted that he had not done any physical examination of the patient. He had listened to the patient's wheezing sound and breathing through the spy hole. He confirmed that the hospital was less than one (1) km away from prison. He stated that as per his assessment, Andrew's condition was not serious. He had not checked on the patient thereafter as he awaits to be woken up whenever required to attend to a patient. He admitted that asthma is a life threatening disease and he had not checked on the vitals e.g. blood pressure, heart beat, pulse etc. He admitted that acute respiratory distress is consistent with the evidence that Andrew could not breathe properly.

This is a delictual claim. The issue for determination is whether the death of Andrew Kamba was a result of negligence on the part of the defendants' employees. If indeed the defendants' employees were negligent, the defendants become liable vicariously for damages arising out of or as a result of the negligent execution of duty by their employees during the course and scope of their employment.

In the case of *Midfred Mapingure v Minister of Home Affairs and Others* SC 22/14 PATEL JA restated the test for professional negligence as expounded in *Mukheiber v Raath & Another* 1999 (3), SA 1065 (SCA) as follows:

“For the purpose of liability culpa arises if-

- a) a reasonable person in the position of defendant
 - i) would have foreseen harm of the general kind that actually occurred;
 - ii) would have foreseen the general kind of causal consequence by which that harm occurred
 - iii) would have taken steps to guard against it; and
- b) the defendant failed to take those steps

Jonathan Burchell in *The Principles of Delict* (Juta Publication) p 31 simply put the test as follows:

“Negligence, unlike intention is assessed objectively, the test being whether the defendant complied with the standard of the reasonable person. If a reasonable person, in the same external circumstances as defendant, would have foreseen harm to the plaintiff then defendant ought to have foreseen such harm. If a reasonable person would have taken steps to guard against such harm to the plaintiff occurring, then the defendant is negligent if he or she did not take the requisite reasonable steps to guard against this eventuality.”

When considering the issue of a reasonable man, PATEL JA indicated in the *Mapingure* case cited *supra* that, when dealing with an expert, the standard is higher than that of an ordinary lay person. The court must consider the general level of skill and diligence possessed and exercised at the time by members of the branch of the profession to which the practitioner belongs.

Thus when considering how a reasonable man would react and or handle the situation in *casu*, the court must consider the general level of skill and diligence possessed and exercised by a nurse not an ordinary lay person. Certainly a lay person may not handle or manage an asthmatic patient in the same manner as a nurse would do because the latter is a professional possessed of the relevant knowledge. Mr Zongoro the prison nurse, knew that Andrew was an

asthmatic patient having treated him two days before his death. Twice he had been called upon to attend to Andrew who was experiencing an asthmatic attack. From his own evidence the now deceased was having difficulty in breathing, he was wheezing. The patient also told him that the provided inhaler was not working. Applying the test above any reasonable nurse should have foreseen that the asthmatic attack could result in loss of life as asthma is a life threatening condition more so, with the difficulty in breathing that Andrew was experiencing. A reasonable person in Zongoro's circumstances should have taken reasonable steps to guard against the loss of life occurring and this the nurse failed to do.

Suffice to say the nurse did not do a physical examination of the ill patient nor take readings of the vital indications preferring to communicate through the spy hole. A hospital was about 600m from prison and the patient could have been taken to hospital for further management. There can be no abrogation of duty of care that surpasses that displayed by the nurse. More so, when the nurse never made an effort to then check on the patient until he passed on.

No doubt prison officers owe a duty of care to the prisoners in their custody. It is a legal duty that arise from the creation of the entity. In terms of Section 227 of the Constitution of Zimbabwe (No. 20) 2013 Prisons are obliged to take and keep in custody those remanded in custody and those serving their sentences. The nature of the defendants' duties is such that they also see to the welfare of the prisoners. When sick a prisoner looks up to the prison authorities to attend to him or make arrangements for medical attention. Being in custody means a person's right to freedom of movement is curtailed, and crucial decisions are made on his behalf as he is incapacitated by being under the control of prison officials. Section 208(2)(d) of the Constitution calls upon Prisons as part of the security services, not to violate the fundamental rights and freedoms of any person in the exercise of their functions.

Section 3 of the Constitution states that Zimbabwe is founded on respect for values and principles which include among others, fundamental rights and freedoms. Section 50 (1) (c) of the constitution requires that detained persons must be treated humanely and with respect for their inherent dignity. Article 5 of The African Charter on Human and Peoples Rights equally provides for the right to dignity and freedom from cruel, inhumane or degrading treatment. This is part of universal civil rights which are found in nearly all constitutions of modern day. The

right to dignity pertains to the worthiness of a person, in my view, it being given that a human being deserves to be treated in a humane way that does not strip him the very sense of being human irrespective of incarceration. In *Goldberg v Minister of Prisons* 1979 (1) SA 14 at 39C-F Corbett JA stated as follows:

“It seems to me that fundamentally a convicted and sentenced prisoner retains all the basic rights and liberties (using the word in its Hohfeldian sense) of an ordinary citizen except those taken away from him by law, expressly or by implication, or those necessarily inconsistent with the circumstances in which he, as a prisoner, is placed. Of course, the inroads which incarceration necessarily makes upon a prisoner's personal rights and liberties (for sake of brevity I shall henceforth speak merely of "rights") are very considerable. He no longer has freedom of movement and has no choice in the place of his imprisonment. His contact with the outside world is limited and regulated. He must submit to the discipline of prison life and the rules and regulations which prescribe how he must conduct himself and how he is to be treated while in prison. Nevertheless, there is a substantial residuum of basic rights which he cannot be denied; and, if he is denied them, then he is entitled, in my view, to legal redress.

I subscribe to these sentiments, a prisoner still retains certain basic rights despite incarceration and the Zimbabwean Constitution guarantees that in Section 50 (1)(c) mentioned earlier, and Section 50(5)(d) which reads:

(5) Any person who is detained, including a sentenced prisoner, has the right—
(a)..
(b)...
(c)....

(d) to conditions of detention that are consistent with human dignity, including the opportunity for physical exercise and the provision, at State expense, of adequate accommodation, ablution facilities, personal hygiene, nutrition, appropriate reading material and medical treatment.

This section more or less reads the same as Section 35(2)(e) of the South African Constitution which provides for these rights. Humane treatment is consistent with respect for inherent dignity because certain forms of treatment erodes’ a person’s dignity, their value as a person, their esteem and worthiness. No doubt incarceration by its nature has an effect on one’s enjoyment of rights, however the constitution still demands that there be standards to be observed vis respect for a prisoner’s rights hence specific provisions in Sections 50 of our constitution.

The right to dignity entails the right of an incarcerated person to be treated in a humane way and, to receive medical treatment as constitutionally provided in Section 50 (5)(d) and to die in a dignified way.

Section 44 of the Constitution imposes a duty on the state inclusive of every institution and agency of the government at every level to respect, protect, promote and fulfil the rights and freedoms set out in the declaration of rights. Any act therefore by a state institution that infringes upon a person's right to human dignity contravenes the supreme law of the land. In the absence of a death sentence every person has a right to life. Prisons being a state institution are thus mandated to observe and promote the values, and the rights so provided by the constitution. That includes access of prisoners to proper medical care to prevent unwarranted deaths.

In the case of *Moses v Minister of Safety and Security* 2000(3) SA 106(C) a person detained by the Police died after being assaulted by cellmates. Although the court found that the police were not liable due to certain circumstances prevailing, the following pertinent sentiments emerge from the judgment. That once a person is arrested, the detaining authorities employees are under an obligation to such a person to perform their functions and duties in a reasonable manner regard being made to the detained person's fundamental rights. That a person is in detention and deprived of freedom of movement and ability to decide and carry out their own decisions *heightens the duty* on the part of the detaining authority's employees of safeguarding a detained person's interests (my emphasis). The detained person's situation becomes a relevant fact in the overall consideration of circumstances relevant to the enquiry of wrongfulness. I thus find that, given the foregoing, when an inmate falls ill it is incumbent upon prison authorities that his right to medical care, his dignity and right to life are protected. It is a legal duty and where it is foreseeable that the illness can result in death if no action is taken, and no measures are taken to prevent the occurrence, the authorities cannot escape liability for inaction

In casu there was abrogation of the constitutionally imposed duty to protect the deceased's fundamental rights, such inaction results in delictual liability on the part of the state.

The court is convinced that the prison officials particularly nurse Zongoro was negligent in the manner in which he handled or managed a patient, Andrew Kamba in custody, resulting in his death. It was clear that Andrew was experiencing breathing difficulties and the nurse appreciated that an asthmatic attack is life threatening yet the authorities failed to act to prevent such eventuality. Timeous intervention by way of referral to hospital may have saved his life. To call for help and be denied full medical attention until one dies in the hands of an inmate is a gross omission on the part of prison officials and an affront of one's dignity. Medical treatment

for prisoners being constitutionally guaranteed has to be meaningful, adequate and effective. In casu Andrew's condition was deteriorating and certainly called for further management by a professional above a nurse's level and the failure to so arrange breached his right to medical treatment. Moreso when it is not in dispute that the hospital is just next to Rusape Prison, about 500m away. Apart from failing the institution he represents, the nurse fell short of respecting the Nurse' pledge which every trained nurse should uphold. Consequently, the defendants are vicariously liable for loss of support by the plaintiff and her child arising from the death of their breadwinner as a result of negligence on the part of their officials.

As regards the quantum of damages, the figures provided as funeral expenses totaling US \$2 159-75 were not contested hence the plaintiff is entitled thereto.

It is not denied that the deceased had his own business and was an income earner and earned income of about US\$1500-00 *per* month. The plaintiff is not employed and was financially sustained by the husband. Counsel for the plaintiff and the defendant agreed that should liability be established the plaintiff needs to be catered for until the minor child attains 18 years old. In her declaration the plaintiff stated as follows in para 14

"The damages are calculated as follows:

- a)
- b) The plaintiff's maintenance together with the child until the wife remarries and the child reaches 18 or becomes self-sustaining will cost an average of US\$295 000-00."

The court will thus proceed to consider the child's support requirements until she turns 18 years old and this means the period to be looked at is 14 years. Consequently this period is applicable to the mother as per the parties agreement. It is unfortunate that there is no actuarial report provided which would have given scientifically calculated projections of loss of support taking into consideration the circumstances of the parties including the age factor of the deceased and the claimants.

It is a reality that the child needs to attend pre-school and go up to high school. Whilst tertiary education is a possibility, the claims refer to the age of 18 years. Considering the figures provided (using the minimum of the figures provided) the child's requirements would be as follows

Pre-school	\$150 x 3 terms x 2 years	US\$900
Primary Education	\$200 <i>per</i> term x 3 terms x 7 years	US\$4200-00

Secondary Education	\$450 <i>per</i> term x 3 terms x 6 years =	US\$8100-00
Food and clothing for the child	@ \$150 <i>per</i> month x 12 months x 14 years	US\$25 200-00
SUB-TOTAL		US \$38 400-00

For plaintiff

Whilst she indicated that her husband used to spend between US\$250– US\$300 for food, clothing and hairdressing the court will work with US\$250.00 being the lower figure of the two.

Food, Clothing and incidentals	US\$250 x 12 months x 14 years	US\$42 000-00
Rentals	US\$50 x 12 months x 14 years	US\$8 400-00
SUB-TOTAL		US\$50 400-00

Thus between the two loss of support would come to:	US\$38 400-00
	+ US\$50 400-00
TOTAL	US\$88 800-00

The resultant global figure comes to US\$88 800-00

This is a case where inflation has to be factored in as the calculations are based on current figures. Due to absence of an actuarial report, the figures provided are static yet the practicalities of every economy are such that prices cannot remain static for 14 years. Without any guidance from any expert report the best way to handle this issue would be to simply be guided by the minimum operative interest of 5% to minimize loss given the foregoing expressed sentiments. The court will thus make a provision for an additional 5% to the global amount to cater for inflation.

It is within the court's discretion to factor in contingencies. The percentage to be knocked off takes cognisance of the fact that the plaintiff did not claim past loss of support and has been relying on support from relatives much to her loss and disadvantage. Without empirical data providing projections on the likely earnings of the now deceased over a period of time and the active employment life span, it becomes very difficult for the court to factor in all variables without a scientifically calculated report. It is incumbent upon legal practitioners when faced with such claim to go all out in seeking expert evidence especially where actuarial reports are

required. Whilst the court appreciates that Zimbabwe has a very small number of actuaries and plaintiff being a simple unemployed woman may not afford such services a report by a chartered accountant consisting of some formula and substantiated figures could assist a court.

As a result, all factors considered the plaintiff's award would be calculated as follows:

Amount brought down (initial award)	US\$88 800-00
Less 10% Contingency	US\$8 880-00
Sub-total	US\$79 920-00
Add 5% inflation provision	+ US\$3 996-00
GRAND TOTAL	US \$83 916-00

Accordingly the following order is granted.

1. The defendants shall jointly and severally the one paying the others to be absolved pay plaintiff the sum of US\$2 159.75 as funeral expenses.
2. The defendants shall jointly and severally the one paying the others to be absolved pay the plaintiff a total sum of US\$83 916.00 for loss of support for herself and the minor child Tinotenda Lorita Kamba (born 22 August 2014).
3. Interest at the rate of 5% *per annum* to accrue on amounts stated in clause 1 and 2 calculated from date of judgment to date of full and final settlement.
4. The defendants to pay costs of suit.

Muronda Malinga Legal Practitioners, plaintiff's legal practitioners
Civil Division of the Attorney General, respondents' legal practitioners