



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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The Minister of Police v K (403/2019) [2020] ZASCA 50 (6 May 2020)

Today the Supreme Court of Appeal (SCA) handed down judgment in an appeal against an order of the Eastern Cape Division of the High Court, Port Elizabeth (Sephton AJ, sitting as court of first instance). The appeal was upheld with costs.

The matter concerned an action instituted by the respondent, Ms K, against the Minister of Safety and Security (the first defendant in the court a quo), for damages she allegedly suffered as a result of the failure of the police to conduct a proper search for her, and thereafter to conduct a reasonably effective investigation into the crimes perpetrated against her.

On 9 December 2010, Ms K was abducted, robbed of her personal belongings and sexually assaulted at King's Beach, Port Elizabeth. While enjoying a walk on the beach at about 14h30, Ms K was confronted by an unknown man who overpowered her and subsequently dragged her into the nearby bushes. There she was instructed to remove her clothes, which were used as a blindfold, and was repeatedly raped until early the next morning when she managed to escape. Ms K caught the attention of a group of joggers on the beach, one of whom escorted her back to the parking lot and thereafter to the Humewood Police Station, where she opened a case of abduction, assault, rape and robbery.

Ms K's cousin reported her missing and provided the police with the details of Ms K's vehicle at approximately 19h00 on 9 December 2010. Thereafter, at about 23h30 that night, the police managed to track down Ms K's vehicle at the King's Beach parking lot. Ms K was however nowhere to be seen. A police search was launched, which included the use of a search and rescue dog and a helicopter, but Ms K could not be found. The search efforts were aborted in the early hours of the morning of 10

December 2010. The offences subsequently reported by Ms K were investigated by the police, though once again without success. No perpetrators were arrested or convicted.

On 14 November 2013 Ms K issued summons against the Minister of Safety and Security, along with three police officers involved in the investigation of her case, claiming damages for the harm allegedly suffered as a result of the police's failure to conduct a reasonably effective search for her, as well as the police's failure to conduct a reasonably effective investigation into the crimes perpetrated against her. Ms K's claim was based on a number of duties which she submitted were owed to her by the SAPS. The list includes, amongst others, the duty to prevent, combat and investigate crimes; to protect and secure Ms Kawa and her property; to protect her dignity and to ensure that her dignity was respected and protected; to ensure her safety and security; to obtain information from the persons whom the relevant police officers reasonably suspected of having committed the offences, or could provide information thereon; and to exercise their powers and perform their duties in a reasonable manner.

Ms K contended that the SAPS unlawfully and/or wrongfully and negligently breached its duty to protect and secure her and her property, and to prevent and combat the continuation of the crimes of assault, abduction, kidnapping and rape between 23h00 on 9 December 2010 and 6h00 the following morning, by failing to search the area in the vicinity of the King's Beach parking area, in particular the sand dunes.

While not disputing the duties alleged by Ms K to be owed to her, the police denied acting negligently or unlawfully. They pleaded that both the search for Ms K – in difficult circumstances and complicated terrain – as well as the subsequent investigation into the crimes committed against her, were carried out with due diligence and regard to the trauma which she had allegedly suffered as a result of the traumatic experience. In particular, the defendants denied that Ms K suffered any further physical injury, post-traumatic stress and/or depression consequent upon any breach of duty by the police. It was further denied that Ms K had been unable to return to work in any capacity since December 2010, as a result of any breach of duty by the police. The defendants submitted that there was no causal nexus between the alleged conduct of the police, on the one hand, and any mental or psychiatric condition, or aggravation thereof, suffered or being suffered by Ms K on the other.

The high court found in favour of Ms K, holding that the police had negligently breached these two legal duties and that these failures caused her to suffer additional psychopathology. The Minister was accordingly held liable for 40 percent of the damages Ms K would be able to prove.

The SCA held that the duties on the police to search for Ms K shortly after becoming aware that she was missing on 9 December 2010, and to investigate her case of abduction, kidnapping and rape which she reported the following morning, were clear constitutional and statutory duties and thus not in dispute. The State has a duty to protect members of the public from violations of their constitutional rights, and the duty to prevent crime and protect vulnerable members of society must enjoy some

prominence. The legal issues to be decided were thus, firstly, whether the police had breached their duty to search for Ms K by failing to search the sand dunes, alternatively whether the police searched the sand dunes in a negligent manner; and, secondly, whether the police breached their duty to investigate Ms K's case by failing to conduct a reasonably effective investigation.

The SCA proceeded to consider the five elements of Aquilian liability. In relation to negligence it was found that the search procedure involving the search and rescue dog was conducted correctly, a conclusion that was conceded by one of Ms K's expert witnesses, a former captain within the SAPS and dog training expert. The police helicopter search was also conducted reasonably, the pilot having searched both the waterline as well as the sand dunes and not seeing any trace of Ms K. The pilot's decision to withdraw from the aerial search was based solely on the request to land of an air traffic controller, who advised of an incoming aircraft, and was thus reasonable. No negligence in relation to the police's search for Ms K had been established.

As regards the police's alleged failure to conduct a reasonably effective investigation, Ms K's case was that the police failed to bring together and photograph the bush dwellers who slept in the sand dunes, which would have enabled her to identify her abductor and/or interview them and take statements on the morning of 10 December. Ms K further contended that the police failed to obtain CCTV footage from the municipal street cameras; to take statements from two car-guards, whose details were provided by Ms K and who apparently knew who her abductors and associates were; and to view the CCTV footage obtained by Ms K after she engaged the services of a private investigator. The SCA found all of these allegations to be without merit. Negligence in fulfilling the duty to investigate the crimes committed against Ms K had not been established.

In considering wrongfulness, the SCA found that the high court's approach was fundamentally flawed. The high court had held that policy considerations imposed a duty on the police to fulfil their obligations and a failure to do so was wrongful. The shortcomings relied on by the high court were the search and rescue dog handler's failure to continue searching beyond a particular point, and, in relation to the investigation, the police's failure to search, question and investigate all bush dwellers in and around King's Beach with any sense of urgency. On this basis it held that the police's conduct was wrongful. However, the SCA found that the high court never considered whether it was reasonable, in the circumstances of this case, to impose liability on the police for the harm suffered by Ms K. The imposition of liability on these facts would hinder future police investigations due to the constant threat of civil litigation in the event of even the slightest degree of negligence, or the absence of a successful arrest and conviction.

Finally, the SCA considered the element of causation: whether the police's failure to conduct a proper search and to conduct a reasonably effective investigation was the cause of, or an aggravation to, Ms K's psychopathology. On this score, the expert witnesses were not able to quantify the amount of

trauma that Ms K suffered as a result of the police's alleged omissions, as opposed to the crimes committed against her themselves. The prolonged life-threatening trauma of the incident could not be divided into quantifiable subunits with any level of psychological or psychiatric validity. Causation was accordingly not established on a balance of probabilities.

The SCA concluded that the high court's findings in relation to negligence, wrongfulness and causation could not be supported by the evidence proffered on behalf of Ms K. Her claim should therefore have been dismissed. In the result, the appeal was upheld with costs, including the costs attendant upon the employment of two counsel.