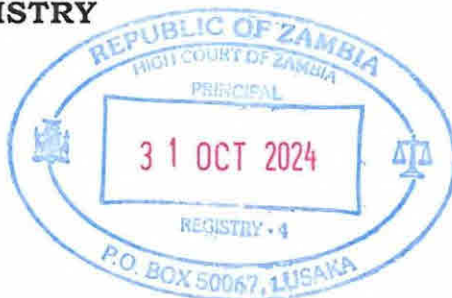


IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2023/HP/1007



BETWEEN:

JOHN KUFUNA

PLAINTIFF

AND

ATTORNEY GENERAL

DEFENDANT

BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 31st DAY OF
OCTOBER, 2024

For the Plaintiff : Mr. A.N. Boso, Legal Resources Chambers

For the Defendant : Mr. M. Chinyonga, State Advocate, Attorney General's
Chambers

J U D G M E N T

CASES REFERRED TO:

1. *Crockcroft v Smith (1705) MOD 43*
2. *R v Miller 1954 2 ALL ER 529*
3. *D. Landless (MW) v Attorney General 1970 ZR 56*
4. *Times Newspaper Zambia Limited v Kapwepwe 1973 ZR 293*
5. *Logdon v DPP 1976 LR 121*
6. *Christopher Lubasi Mundia v Sentor Motors Limited 1982 ZR 66*
7. *Philip Mhango v Dorothy Ngulube and ors 1983 ZR 61*
8. *Collins v Wilcock 1984 3 ALL ER 374 at 377*
9. *F v West Berkshire Health Authority 1990 AC 1*
10. *Emmanuel Mutale v Zambia Consolidated Copper Mines Limited 1994 SJ 67*
11. *R v Constanza 1997 LR 567*
12. *Zambia Consolidated Copper Mines Limited v Ennedie Zulu SCZ No 9 of 1999*
13. *Haystead v DPP 2000 3 ALL ER 690*
14. *Reuben Nkomanga v Dar Farms International Limited SCZ No 25 of 2006*
15. *Chief Chanje v Paul Zulu Appeal No. 73 of 2008*

16. *Midlands Breweries (PVT) Limited v David Muyenyembe SCZ Judgment No. 3 of 2012*
17. *Brenda Kachasu v Mwelwa Manda & 2 others Appeal No. 163 of 2021*

LEGISLATION REFERRED TO:

1. *The Criminal Procedure Code, Chapter 88 of the Laws of Zambia*
2. *The Narcotic Drugs and Psychotropic Substances Act No 35 of 2021*

OTHER WORKS REFERRED TO:

1. *Black's Law Dictionary by Bryan A. Garner, 8th Edition, Thomas Reuters, 2004*
2. *Damages for Personal Injuries and Death by John Munkman, 10th Edition, Butterworths, Dublin Edinburgh, 1996*
3. *Halsbury's Laws of England, Volume 12, 4th Edition*
4. *Halsbury's Laws of England, Volume 12, 4th Edition Re-issue*
5. *McGregor on Damages 16th Edition, London Sweet and Maxwell 1997*

1. INTRODUCTION

1.1 The Plaintiff, John Kufuna, commenced these proceedings by Writ of Summons which was accompanied by a statement of claim and the other documents on 13th June 2023, in which he claims:

- i. *Damages for Assault and Battery;*
- ii. *Special damages amounting to ZMW 17,000.00;*
- iii. *Breach of statutory duty by the Attorney General as a servant of the 2nd Defendant;*
- iv. *Interest;*
- v. *Costs; and*
- vi. *Any other relief the Court may deem necessary.*

2. STATEMENT OF CLAIM

2.1 The statement of claim shows that on or about 20th July 2022, around 02:00 am, while John Kufuna and his family

were sleeping, armed Zambia Police officers (“ZP”) and Drug Enforcement Commission officers (“DEC”), who are agents of the Attorney General, assaulted him by threatening to shoot him.

2.2 John Kufuna alleged that the said officers forced their entry into his house, by forcefully breaking the front door with an iron bar, breaking his bedroom door and slamming it into his face. The averment was that John Kufuna fell to the ground, and the officers started beating him with an iron bar and kicking him with extensive force.

2.3 It was stated that the officers kicked John Kufuna on the left side of his head, and as a result, perforated his left ear drum. The assertion was that as a result of the Attorney General’s agent’s actions, John Kufuna suffered pain, injury, loss and damage. The particulars of injury and exemplary damage were stated as:

PARTICULARS OF THE INJURY

- a. Broken nose;
- b. Broken left eardrum;
- c. Multiple body pains; and
- d. Excruciating headaches.

PARTICULARS OF EXEMPLARY DAMAGE

- a. Loss of balance due to broken eardrum;
- b. Loss of partial hearing resulting from a broken eardrum;
- c. Severe headaches and dizziness; and
- d. Limitation in John Kufuna’s mobility.

- 2.4 John Kufuna also contended that by reason of the Attorney General's agent's actions, he had suffered damage to his property, loss, pain, injury, and expenses, specifying the special damages as:

PARTICULARS OF SPECIAL DAMAGES

- a. Damages to household doors ZMW 15,000.00;
- b. Medical expenses ZMW 5,000.00; and
- c. Transport ZMW 2,000.00.

3. DEFENCE

- 3.1 In its' defence, which was filed on 2nd August 2023, the Attorney General denied the events of 20th July 2022 as alleged by John Kufuna. The defence was that the actions of the officers from the Drug Enforcement Commission and the Zambia Police did not cause John Kufuna to suffer damage to his property, loss, pain, injury and expenses. It stated that the officers acted within the law.
- 3.2 The Attorney General contended that the Drug Enforcement Commission received information that an unknown person was dealing in suspected illicit drugs in Chifwenkula area in 6 miles area. Thus, a team of officers from the Drug Enforcement Commission, as well as the Zambia Police was constituted to follow up on the report.
- 3.3 The assertion was that when the team arrived at John Kufuna's house, they knocked and they heard a male voice, which was later identified to be that for John Kufuna, responding from inside the house, asking who was at the door. Then the investigations officers proceeded to inform

John Kufuna that they were officers from the Drug Enforcement Commission and the Zambia Police, and they asked him to open the door. However, he refused to do so.

- 3.4 It was further the Attorney General's defence, that the team proceeded to forcefully open the front door by breaking the mortice lock, using a crawl hammer. The contention was that John Kufuna was shouting from behind a door within the house, which was later discovered to be the bedroom door.
- 3.5 It was alleged that John Kufuna had locked himself in the bedroom, and he refused to open the door at the request of the officers, which forced them to break the door, by pushing against it with their bodies. The assertion was that once the bedroom door was open, John Kufuna was standing directly at the entry, with a firearm in his hands pointed at the officers, while he was shouting on top of his voice, threatening to fire at the officers, if they did not leave him alone.
- 3.6 The further allegations in defence, were that the investigations officers asked John Kufuna to put down the firearm and cooperate, as they were officers. However, John Kufuna continued to threaten the officers, and he cocked his firearm. It was stated that the officers then quickly moved towards him in an attempt to disarm him, and he forcefully resisted. Thus, the officers struggled with John Kukuna until they all fell to the ground.

- 3.7 The contention was that the officers prevailed and disarmed John Kufuna and they removed five (5) live ammunition from the firearm.
- 3.8 The Attorney General further stated that the investigations officers explained to John Kufuna, the purpose for being at his house, and they introduced themselves to him. The averment was that John Kufuna thereafter proceeded to permit the team to search his house. It was stated that the team found an expired license for a pistol firearm with caliber 6.35mm and serial number 457174 with five rounds of ammunition, and they proceeded to seize both the documents and the pistol.
- 3.9 It was the Attorney General's assertion that at the close of the search, the investigations officers asked John Kufuna whether he had any complaint, and John Kufuna had responded that he had none. However, he refused to sign the seizure/search warrant. That was how the officers had instructed John Kufuna to report in person at the Drug Enforcement Commission offices as soon as practicable.
- 3.10 Further in defence, the Attorney General stated that John Kufuna went to the Drug Enforcement Commission offices, and he looked to be in good physical condition. There, a warn and caution statement was recorded from him. The assertion was that at that point, the Attorney General got to know John Kufuna as a retired Defence Officer and a Former Deputy Minister in the Ministry of Chiefs and Traditional Affairs.

3.11 The Attorney General contended that John Kufuna is not entitled to any of the reliefs sought, and numbered i, ii, iii, iv, v and vi, or at all.

4. EVIDENCE AT TRIAL

4.1 At trial, John Kufuna testified and he called One (1) witness while the Attorney General called One (1) witness.

PW1 – JOHN KUFUNA

4.2 John Kufuna produced his witness statement as his testimony. The evidence contained in the said witness statement, is that on 20th July 2022, around 02:00 hours, while John Kufuna and his family were sleeping, he was awakened by a loud bang on one of the bedroom windows, with voices threatening him to open the door, and identifying themselves as the Zambia Police.

4.3 He stated that in fear for his safety, and that of his family, he quickly dressed up, and reached out for his small pistol from the side drawer, and put it in the pocket of the leather jacket that he was wearing, as he feared that they could be thieves.

4.4 John Kufuna's testimony was that he proceeded to open the door, but before he could do so, the men who were amongst them, who were men who were clothed in what looked like Zambia Police uniforms with masks on, broke the door, which hit him, and he fell down on the floor. He stated that they forced themselves inside his bedroom, and they started beating him with a metal bar on his chest, while others stepped on him all over his body. Reference was made to the

pictures which depicted the damaged doors, at pages 7 to 8 of his bundle of documents.

- 4.5 It was also John Kufuna's evidence, that he was in shock when one officer hit him with a raised boot on the left side of his head. He stated that he felt dizzy, but he forced himself to stand up. John Kufuna further testified that the men dragged him and his wife to the sitting room while beating him. He explained that he had asked one lady why he was being beaten, and what crime he had committed, and she had told him that he was being beaten because he had delayed to open the door, and they were looking for Mr. Paul.
 - 4.6 Still in his testimony, John Kufuna's evidence was that he had told her that he was not Mr. Paul, but John Kufuna. He stated that the officers told him that they were searching for drugs and any illicit or illegal thing that they were going to find.
 - 4.7 John Kufuna's testimony was that one of the police officers came out of the bedroom with a pistol in his hands, that had fallen from John Kufuna's pocket as he fell down in the bedroom, when he was hit by the broken door.
 - 4.8 He stated that after revealing the pistol, some of the police officers who were in the living room, were amazed at the discovery of the firearm, and they said that John Kufuna could have killed them. However, John Kufuna had told them that he had no intentions of killing or shooting at them, and that he was just scared that the people who were banging on his window might have been thieves.
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- 4.9 His evidence was also that the officers then identified themselves as from the Zambia Police, and those who were in civilian attire, identified themselves as officers from the Drug Enforcement Commission. John Kufuna stated that a lady who was part of the team, asked him if they could search his house, and he agreed. It was his testimony that she produced a document for him to sign.
- 4.10 John Kufuna also testified that despite not being able to identify the document, as he was in a state of distress, he signed the document. His evidence was that the officers turned his house upside down, searching for the said illegal items, but they did not find anything.
- 4.11 It was stated that later, John Kufuna was asked to produce legal documents to show that he had a license to own a pistol, but because he was in pain, he was unable to find the gun record. The evidence that was further given, was that the officers seized the pistol on the grounds that John Kufuna had not renewed the license for the pistol. He told the Court that he was requested to produce the necessary documents within 3 (days), at which point they would return the firearm.
- 4.12 John Kufuna further testified that he found all the necessary documents regarding the pistol, and he took them to the Drug Enforcement Commission at 09:00 hours the same day, in Order that he could get his pistol back. He stated that the pistol was not given back to him, and instead he was charged with cocking a gun, obstruction of police officers

from executing their duties, and threatening violence. His evidence was that he denied the charge.

4.13 John Kufuna also told the Court that he was arrested, but there was no one to sign police bond for him, as it was after 17:00 hours. He testified that he spent a night in the police cells at Ridgeway Police Post, which is located behind the Magistrates Court. Then, the following day, his wife, his sister and a friend signed police bond for him.

4.14 It was John Kufuna's evidence that after he was released, he went to Central Police where he got a police report and thereafter, he rushed to Matero Level One Hospital where he was examined and treated. He stated that he was extremely traumatized, and whenever he tried to clean his ears with water, the water would come out through his nose, his mouth and his ears, and blood would come out of his ear.

4.15 John Kufuna told the Court that he was examined at Matero Level One hospital, and three X-rays were taken of his chest, head and on the side of his head. In that regard, he referred to the said x-rays at pages 10 to 12 of his bundle of documents. He testified that after he was examined, the Doctor gave him a referral letter to go to the University Teaching Hospital ("UTH") where after examination, the doctor told him that he had a broken eardrum.

4.16 He identified the medical report, as that at pages 2 to 3 of his bundle of documents.

4.17 John Kufuna with regard to other injuries that he suffered, testified that he suffered loss of balance, dizziness,

compromised hearing, and that he constantly had to take medication.

- 4.18 His evidence was that he was prosecuted on the charges that were leveled against him, but he was discharged of the said charges on 31st January 2023.

CROSS-EXAMINATION OF JOHN KUFUNA

- 4.19 In cross-examination, and when referred to paragraph 2 of his witness statement, John Kufuna testified that he heard voices outside his house, which were threatening him to open the door. His testimony was that a threat meant to cause harm or pain. John Kufuna admitted that he did not explain what harm or pain he was threatened with.
- 4.20 It was his evidence that the people identified themselves as Zambia Police officers. Still in cross examination, John Kufuna's testimony was that as a defence officer, he knew how police officers or other defence officers identified themselves.
- 4.21 When referred to paragraph 3 of his witness statement, John Kufuna's evidence was that he wore three items of clothing on his body when he dressed up, because he had slept naked, and he could not go outside naked.
- 4.22 He stated that he did not know if it was Zambia Police officers who were outside, even though they said that they were. John Kufuna's continued testimony in cross examination, was that he was in doubt because they were insulting.
- 4.23 He told the Court that he went to open the door of the bedroom, but the officers kicked it in. Further in cross

examination, John Kufuna stated that the officers dismantled the kitchen door. It was his testimony that he did not identify himself or state that he had a firearm because the officers were beating him.

- 4.24 On being referred to paragraph 7 of his witness statement, John Kufuna testified that the Zambia Police officers identified themselves twice. His evidence, when he was further referred to paragraph 6 of his witness statement, was that it would be unreasonable to conclude that he wanted to use the gun, when it was not in his possession, as it had fallen in the bedroom.
- 4.25 John Kufuna stated that it could only be a threat if he had the gun in his hand or on his body. It was his evidence when he was referred to paragraph 8 of his witness statement, that at that time, he had the papers for the purchase, and the receipts for renewal of the gun. Therefore, the officers saw that he had not renewed his license.
- 4.26 When further cross examined on his witness statements, and this time with regard to paragraphs 5 and 9 of the said witness statement, John Kufuna testified that he went to the Drug Enforcement Commission offices at 09:00 hours, the next day, and that he was injured at the time. His testimony was that his eardrum was broken, and there was blood as the medical documents showed. He added that he could move, but he was in pain.

RE-EXAMINATION OF JOHN KUFUNA

4.27 In re-examination, John Kufuna stated that anyone could dress up as a police officer. It was further his testimony that he took a while to dress up because it was dark, and the officers were all outside at the window.

PW2 – NAOMI KASEMA KUFUNA

4.28 Naomi Kasema Kufuna, John Kufuna's wife, was his witness. She produced her witness statement as her testimony. It was her testimony, that in the early morning of 20th July 2022, between 02:00 and 03:00 hours, John Kufuna and herself were awakened by a loud knock on the windows of their bedroom, and that voices were insulting and shouting that they were Zambia Police officers. She added that they were asked to open the door.

4.29 Further in her testimony, Naomi Kasema Kufuna testified that a few seconds later, they heard a loud bang on the kitchen door, and the officers entered the house. She stated that John Kufuna then reached out to a drawer, and took out his gun, and he put it in one of the side pockets of his leather jacket which he had put on, when they were awakened by the loud bang, because of fear that the people could be thieves.

4.30 Her testimony was that John Kufuna proceeded to the bedroom door, and when he got there, the officers broke down the door, and John Kufuna fell to the floor, and the gun fell out of his jacket. She stated that more than two persons descended upon him, as he was on the floor, and

they started hitting him with a metal bar on his chest, whilst others were stepping on him on the right side of his head.

4.31 Naomi Kasema Kufuna further testified that she was standing beside the window crying, as she was traumatized by the events that were transpiring. Her evidence was that she had asked what John Kufuna had done, but she was told to keep quiet, and stay out of it.

4.32 It was her testimony that they were dragged from the bedroom into the sitting room, and there, she noticed that there were eight officers in total, and one of them was wearing what looked like a Zambia Police uniform, while others wore masks, and only their eyes could be seen.

4.33 Naomi Kasema Kufuna testified that John Kufuna asked them who they were, and one of them had responded that they were from the Zambia Police. She stated that John Kufuna had also asked them what they were looking for, and they told him that they were looking for Paul.

4.34 However, they had explained to the officers, that they did not have a person named Paul at their house, and that only their two daughters and the boys who were only at home during the school holidays lived with them. It was Naomi Kasema Kufuna's testimony that John Kufuna and herself were informed that the officers broke into the house in such a manner because they did not open the door sooner.

4.35 Still in her testimony, she told the Court that as they were being interrogated, one of the officers that had remained in the bedroom went to the sitting room, while holding John

Kufuna's gun, and he had informed his colleagues that he had found a gun. Then in response, his colleagues had stated that John Kufuna could have shot them.

- 4.36 It was also Naoma Kasema Kufuna's evidence that the officers had asked who the gun belonged to, and John Kufuna had answered that it was his gun, and that he used it for protection. Thereafter, a lady who was part of the team asked John Kufuna if they could search the house, and he agreed.
- 4.37 Naoma Kasema Kufuna explained that they started by searching the bedroom, then thereafter the boys' bedroom, and after that, the girls' bedroom. She testified that the officers realized that their daughters were in the house, that is, one who was aged Six (6) years old, and the other Twenty (20) years old. Naomi Kasema Kufuna stated that the Twenty (20) year-old was taken to the sitting room, while the Six (6) year-old was left in the bedroom, as the officers continued searching the bedroom.
- 4.38 Then from there, the officers searched the kitchen and they did not find anything there.
- 4.39 Also, in her testimony, Naomi Kasema Kufuna testified that one of the officers had asked them why they were living in that house, and they had responded that it was because it was their house. She further stated that one of the officers had asked if John Kufuna had papers for the gun, and he had told him that he could not recall exactly where they

were, as he was traumatized by the events that had just transpired, but they were in the bedroom.

- 4.40 Naomi Kasema Kufuna's evidence was that they asked the officers why they had gone to their house in such a manner, and they had responded that their informants had told them that there was a person named Paul at their house who was dealing in illicit drugs.
- 4.41 Her testimony was that the officers insisted that there was a person named Paul at their house, but John Kufuna and herself told them that the only boys that lived at the house were at school, and they only went home during the holidays.
- 4.42 She stated that one of the officers asked John Kufuna his name, and he had told them that he was Honourable John Kufuna. Naomi Kasema Kufuna's evidence was that John Kufuna was then asked to go to the bedroom to look for the documents pertaining to the gun, and he did so. She testified that he found the license which had expired. Thus, the officers confiscated the gun, and they asked John Kufuna to go and collect it once he obtained proper documents for it, and they left.
- 4.43 Her evidence was also that after the officers left, John Kufuna started complaining that he was feeling pain in his left ear and when she checked it, she noticed some blood coming out. She had advised him to go to the hospital once the sun rose.
- 4.44 It was Naomi Kasema Kufuna's testimony, that later that morning, John Kufuna went to Kabangwe Police to get a

police report so that he could go to the hospital. Then, around 16:00 hours, he had called her, and told her that he had been charged with threatening violence to police officers and Drug Enforcement Commission officials. Her evidence was also that he had told her that he had been arrested and was detained at the Magistrate Court cells.

- 4.45 Naomi Kasema Kufuna stated that she rushed there with her daughter, in Order to pay his police bond, but they did not get there on time. As a result, John Kufuna spent a night in detention. It was also her testimony, that she discovered that the police at Kabangwe Police had declined to give John Kufuna a police report, and they instead referred him to the Drug Enforcement Commission, as there was a matter there. That was how John Kufuna ended up at the Drug Enforcement Commission offices.
- 4.46 Naomi Kasema Kufuna testified that the following day, her sister in law, her sister, John Kufuna's friend and herself went to the Magistrate's Court complex, and they paid for John Kufuna's police bond. Then from there, they went to Kabwata Police to get a police report, but John Kufuna was not given one. Her testimony was that they went to Lusaka Central Police where a police report was given to John Kufuna.
- 4.47 On what treatment John Kufuna was given, Naomi Kasema Kufuna testified that they went to Matero General Hospital where medical examinations were conducted and X-rays

were taken of John Kufuna's chest, the front of his head and the left side of his head.

4.48 Her evidence was that John Kufuna was later prosecuted for the charges that were leveled against him. Then on 31st January 2023, he was discharged by the Magistrates Court at Lusaka.

CROSS-EXAMINATION OF NAOMI KASEMA KUFUNA

4.49 In cross-examination, Naomi Kasema Kufuna on being referred to paragraphs 2 and 3 of her witness statement, stated that she did not go back to sleep. Her testimony was that John Kufuna wore a T-shirt and a jacket outside. She further told the Court that John Kufuna was wearing pajamas when he heard the loud bang, and he then changed into a tracksuit.

4.50 Naomi Kasema Kufuna's testimony, as regards paragraphs 17 and 18 of her witness statement, was that she remained at home when John Kufuna went to Kabangwe Police. She also testified that John Kufuna's wound was severe, and he was in pain, but he could move.

4.51 That marked the close of the case for John Kufuna.

DW1 – KASAKULA MULUBWA

4.52 The witness who was called by the Attorney General was Kasakula Mulubwa, an Investigations Officer at the Drug Enforcement Commission. She produced her witness statement as her testimony. It was her evidence in that witness statement, that on 20th July 2023, the Drug Enforcement Commission received information which was

conveyed to her, that an unknown person was dealing in suspected illicit drugs in Chifwenkula area in 6 miles.

- 4.53 Kasakula Mulubwa testified that along with a team of Drug Enforcement Commission officers, as well as those from the Zambia Police, they were tasked to investigate the said information. She stated that when they arrived at John Kufuna's house, the police knocked at the main door, and they heard a male voice from inside the house, which was later identified as being that for John Kufuna.
- 4.54 It was her testimony, that John Kufuna asked who was at the door, and she identified herself and the team as Drug Enforcement Commission and Zambia Police officers. Kasakula Mulubwa added that they requested John Kufuna to open the door, and he refused to do so.
- 4.55 Still in her testimony, Kasakula Mulubwa stated that herself and the team used a crawl hammer to force the front door open, by breaking the mortice lock. Her evidence was that John Kufuna was shouting from behind the door, which was later learned to be the bedroom door, and he refused to open it, at their request, forcing them to break it down by pressing against it with their bodies.
- 4.56 Her continued evidence was that when they opened the bedroom door, they found John Kufuna standing at the entrance with a firearm in his hand, trained in her and the other officer's direction. Kasakula Mulubwa testified that John Kufuna raised his voice threatening to shoot the officers if they did not leave him alone.

- 4.57 She stated that two officers quickly moved towards John Kufuna in an attempt to disarm him, and to secure the firearm, that he had in his possession. Thereafter, a struggle ensued, as a result of John Kufuna's resistance, which resulted in the officers and John Kufuna falling to the ground.
- 4.58 Kasakula Mulubwa testified that in the end, the officers successfully disarmed John Kufuna and they removed five (5) rounds of live ammunition from John Kufuna's firearm.
- 4.59 Still in her evidence, Kasakula Mulubwa told the Court that she proceeded to advance reasons to John Kufuna, as to why they were at his house, while formally introducing themselves. John Kufuna then granted the team permission to search the house, and a search was duly executed. Her evidence was that the search led to the discovery of an expired licence for a pistol with caliber 6.35mm, and serial number 457174, which was confiscated from John Kufuna.
- 4.60 It was also Kasakula Mulubwa's testimony, that at the close of the search, she had asked John Kufuna whether he had any complaints, and he had responded in the negative stating that he had no complaints. However, he declined to sign the seizure/search warrant which was issued to him. The evidence that Kasakula Mulubwa further gave, was that they instructed John Kufuna to report in person to the Drug Enforcement Commission offices as soon as possible.
- 4.61 Thereafter, the officers vacated John Kufuna's house venturing towards another official operation.

- 4.62 Her evidence was that John Kufuna reported to the Drug Enforcement Commission offices alone, and he looked to be in good physical condition. Kasakula Mulubwa testified that a warn and caution statement was recorded from him, and it was then, that the Drug Enforcement Commission officers identified him as being John Kufuna, a retired Defence Officer and former Deputy Minister – Chiefs and Traditional Affairs.
- 4.63 It was her evidence that John Kufuna was charged with obstruction and threatening violence, by means of trying to fire at officers', contrary to **Section 64(e) and 90(a) of the Narcotic Drugs and Psychotropic Substances Act No. 35 of 2021** and the **Penal Code Act Chapter 87 of the Laws of Zambia**. Kasakula Mulubwa testified that the docket was duly submitted to the National Prosecution Authority.

CROSS-EXAMINATION OF KASAKULA MULUBWA

- 4.64 In cross-examination, Kasakula Mulubwa on being referred to paragraph 2 of her witness statement, stated that she received information on 20th July 2022, and not 20th July 2023.
- 4.65 Her testimony when she was referred to the warn and caution statement which was at page 2 of the Attorney General's bundle of documents, was that she wrote it on 20th July 2022 at 14:27 hours, and that there was a typing error when drafting the witness statement.
- 4.66 It was her evidence that she received the information around midnight, and she went with the police to John Kufuna's

house between 03:00 to 05:00 hours. Kasakula Mulubwa also testified that there was already a team that was on the ground doing an operation, when they received the information. She added that their intelligence team receives information, and her role was just to go and investigate.

4.67 Further in cross examination, Kasakula Mulubwa stated that she did not know the person that they were going to investigate in Chifwankula, 6 miles. She maintained that the person was unknown to herself.

4.68 It was also her testimony, that they knocked on the main door of John Kufuna's house in the front, between 03:00 to 05:00 hours, and they had informed John Kufuna that they were officers from the Drug Enforcement Commission and the Zambia Police. Kasakula Mulubwa testified that a reasonable person would open for people who stated that they were police officers at 03:00 hours.

4.69 Her evidence when she was referred to paragraph 4 of her witness statement, was that she waited for more than 20 minutes before breaking the door. She added that they were Eight (8) officers including the police, but they could have been less. It was also Kasakula Mulubwa's testimony, that One (1) officer from the Zambia Police was armed, but she did not know what type of firearm he had.

4.70 She told the Court that when they got to the bedroom door, John Kufuna was behind the said door. It was explained that when the Two (2) officers broke the door, John Kufuna pointed a firearm right at them. Kasakula Mulubwa testified

that she had not testified that the door was pushed inward. Her evidence was that the door was locked with a key or by putting something in it.

- 4.71 Further in cross examination, Kasakula Mulubwa's evidence was that John Kufuna was standing right at the entrance even though the door was pushed open. She denied that he was pushed back by the force of opening the door. Her testimony was that John Kufuna had a pistol, but she could not state if it was cocked.
- 4.72 When referred to paragraph 10 of the Attorney General's defence, Kasakula Mulubwa testified that it showed that the gun was cocked. She however stated that there were Five (5) rounds of ammunition in the magazine which they saw after John Kufuna was disarmed.
- 4.73 She told the Court that Two (2) officers struggled to get the firearm from John Kufuna, but it did not go off. In continued cross examination, Kasakula Mulubwa testified that Inspector Daka and Assistant Investigations officer Chileshe disarmed John Kufuna. She maintained that the gun did not go off, even though the bullets were in the chamber, when they fell during the struggle.
- 4.74 Her evidence, when she was referred to paragraphs 11, 12 and 13 of the defence, was that according to the paragraphs, John Kufuna fell to the ground. Kasakula Mulubwa stated that after John Kufuna was disarmed, they all went to the sitting room and no officer remained in the bedroom. It was however her testimony, that One (1) officer had the pistol,

and he was present as she explained the purpose of their visit to John Kufuna.

- 4.75 Kasakula Mulubwa further testified that John Kufuna, Naomi Kasema Kufuna, their daughter and possibly their son were also present. She agreed that they did not find any drugs or anything similar to drugs.
- 4.76 Her evidence as regards paragraph 8 of her witness statement, was that they issued a notice of seizure on seizing the items, and they issued one for the firearm. It was stated that the seizure/search warrant showed the items that were confiscated.
- 4.77 Kasakula Mulubwa when referred to page 1 of the Attorney General's bundle of documents, testified that it was a search and seizure warrant. Her evidence was that a firearm was seized.
- 4.78 I noted that the document showed that Kasakula Mulubwa signed on it. Kasakula Mulubwa told the Court that the document was faint, and it was her evidence that John Kufuna's license had expired. However, she stated that she did not investigate to establish whether the gun was legally acquired, but she found that the license had expired.
- 4.79 Kasakula Mulubwa's testimony was also that John Kufuna refused to sign the search and seizure warrant, and it was indicated so on the warrant. Her evidence was that the follow up showed that the firearm was not in his name, but the expired license was in his name. Kasakula Mulubwa stated

that John Kufuna purchased the gun from a person that she could not recall.

- 4.80 It was her testimony that John Kufuna reported to their offices that very day, and she recorded a statement from him around 14:00 hours. Kasakula Mulubwa testified, when she was referred to paragraph 9 of her witness statement, that she only came to know John Kufuna when she interviewed him.
- 4.81 Her evidence was that paragraph 8 of her witness statement stated that John Kufuna looked like he was in good physical condition. She agreed that she is not a medical doctor, and therefore, she could not tell if he had internal injuries.
- 4.82 It was also her testimony, when she was referred to the warn and caution statement at page 3 of the Attorney General's bundle of documents, that John Kufuna did not admit any of the charges that were levelled against him.
- 4.83 She testified with regard to the medical report which was at page 1 of John Kufuna's bundle of documents, that the Zambia Police issued the document because John Kufuna alleged that he was assaulted. Kasakula Mulubwa's evidence was that the findings on the medical examination showed that John Kufuna was fully conscious, but he had tenderness in the left ear.
- 4.84 She denied that John Kufuna was assaulted, but she agreed that there was a scuffle. Kasakula Mulubwa disputed the allegation that John Kufuna was beaten, but not the contents of the referral document from Matero General

Hospital which was at page 2 of his bundle of documents. She agreed that she did not issue the document.

- 4.85 In relation to the struggle that happened in the bedroom, Kasakula Mulubwa testified that she was behind the Two (2) officers with a search warrant and notice/seizure warrant. Her evidence was that she was explaining to John Kufuna because she wanted him to put the firearm down. Kasakula Mulubwa added that at that point, she did not know that he is John Kufuna.
- 4.86 Her evidence, when she was referred to paragraph 10 of her witness statement, as regards the docket having been taken to the National Prosecution Authority, was that the matter was taken to Court. She told the Court that she attended the hearing, and that the records at the National Prosecution Authority showed that the matter was withdrawn, even though their records showed that John Kufuna admitted the charges.
- 4.87 The testimony that was given in respect of the Order which was at page 1 of John Kufuna's supplementary bundle of documents, was that it was an Order of discharge, and that after that, John Kufuna went to the Drug Enforcement Commission offices once that year, so that he could be given his firearm back.
- 4.88 Kasakula Mulubwa testified that they did not give John Kufuna the firearm because it was not in his name, even though the expired license was in his name. She added that from her recollection, there were no purchase receipts. Her

evidence was that the Drug Enforcement Commission dealt with the same, and that John Kufuna sued so that he could be given back the firearm.

5. DECISION OF THIS COURT

5.1 I have considered the evidence and the submissions.

FACTS NOT IN DISPUTE

5.2 It is not in dispute that in the early hours of 20th July 2022, a team of Drug Enforcement Commission and Zambia Police officers went to conduct a search at John Kufuna's house. The facts that are further common cause, are that the Attorney General alleges that when the officers arrived at John Kufuna's house, he did not immediately open the door after being requested to do so.

5.3 It is not in dispute that the team of officers broke down the kitchen door in Order to enter John Kufuna's house. It is common cause that the officers also broke the door to John Kufuna's bedroom.

ISSUES IN DISPUTE

5.4 It is in dispute whether the Drug Enforcement Commission and Zambia Police officers assaulted and battered John Kufuna at his house, and he is therefore entitled to damages for assault and battery. What is also in contention, is whether John Kufuna is entitled to special damages in the amount of K17,000.00 and whether the Attorney General was in breach of statutory duty.

ANALYSIS

- 5.5 It was John Kufuna's testimony, that he was awakened by a loud bang on his bedroom window, and there were voices threatening him to open the door, by persons who identified themselves as officers from the Zambia Police. He stated that he feared that they could be thieves, and so he reached out for his gun, and put it in the pocket of his leather jacket.
- 5.6 Then, before he could open the door to his bedroom, the officers broke it, and it hit him and he fell to the floor. John Kufuna also testified that the officers forced themselves into his bedroom, and they started beating him on his chest with a metal bar, while others stepped on him all over his body. He added that one officer hit him with a raised foot on the left side of his head.
- 5.7 John Kufuna further testified that he was dragged to the sitting room with his wife whilst he was being beaten.
- 5.8 Naomi Kasema Kufuna, who testified as John Kufuna's witness, testified in a manner that was similar to John Kufuna. She added that a few seconds later, they heard a loud bang on the kitchen door and John Kufuna then reached out for his gun in a drawer, and he put it in the side pocket of the leather jacket that he was wearing.
- 5.9 It was her evidence, that John Kufuna thereafter proceeded to the bedroom door, and when he got there, the officers broke it down, and he fell to the floor and the gun fell from his pocket. Naomi Kasema Kufuna added that while John Kufuna was on the floor, more than Two (2) persons

descended on him, and they hit him, while others were stepping on the right side of his head.

- 5.10 On the part of the defence, Kasakula Mulubwa who was one of the officers from the Drug Enforcement Commission, who were part of the team that went to John Kufuna's house, testified that John Kufuna refused to open the door to his house, at their request, forcing them to break it down and that they also broke down the door to his bedroom by pressing their bodies against it. She stated that when they opened the door, they found John Kufuna standing with a firearm pointed in their direction, and he raised his voice threatening to shoot them if they did not leave him alone.
- 5.11 Her evidence was that Two (2) officers quickly moved to attempt to disarm him, and a struggle ensued, as a result of John Kufuna's resistance, and they fell to the ground. Thereafter, John Kufuna was taken to the sitting room and Kasakula Mulubwa explained the purpose of their visit. She testified that John Kufuna allowed the officers to search the house when she requested him.
- 5.12 It was also her evidence, that they seized a pistol from John Kufuna but he refused to sign the seizure form for the same.

DECISION

CLAIM FOR DAMAGES FOR ASSAULT AND BATTERY

- 5.13 The first claim is for damages for assault and battery.
- 5.14 The definition of *assault* as given in ***Black's Law Dictionary by Bryan A. Garner, 8th Edition, Thomas Reuters, 2004*** is as follows:

“...The threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact; the act of putting another person in reasonable fear or apprehension of an immediate battery by means of an act amounting to an attempt or threat to commit a battery.”

5.15 The said **Black’s Law Dictionary** defines *battery* as:

“...The use of force against another, resulting in harmful or offensive contact. — Also termed criminal battery.”

5.16 In his submissions, John Kufuna referred to the definition of assault and battery, as defined in **Black’s Law Dictionary by Bryan A. Garner, 2nd Edition**. It was submitted that from the definition of assault, it is clear that for an assault to occur, actual injury is not a requisite requirement, as long as the victim becomes afraid of potential harm that is about to, or is likely to occur.

5.17 The cases of **R v Constanza** ⁽¹¹⁾, **R v Miller** ⁽²⁾ and **Logdon v DPP** ⁽⁵⁾ were relied on, in support of the submission.

5.18 It was also stated that battery is any unlawful physical harm that is done to a person with the case of **Haystead v DPP** ⁽¹³⁾ being relied on as authority. It was submitted that from the definition, it was clear that unlike assault, which may just involve threatening words of violence or where a person’s actions threaten violence against the victim, battery involves

actual physical harm that is done to a person, which results in injuries on a person's body.

- 5.19 The submission was that for the tort of battery to succeed, there has to be actual physical harm, that a Plaintiff suffers, and this can be shown by medical evidence.
- 5.20 The case of **Chief Chanje v Paul Zulu** ⁽¹⁵⁾ was relied on, and it was submitted that in this particular case, John Kufuna had produced medical evidence in the form of X-rays that were taken at Matero Level One Hospital, and he was referred to UTH for other tests for the injuries that he suffered, when he was beaten.
- 5.21 The Attorney General in the submissions, relied on the definition of *assault* and *battery* as referenced in the case of **Brenda Kachasu v Mwelwa Manda & 2 others** ⁽¹⁷⁾ as follows:

“The learned authors of Clerk & Lindsell on Torts, at paragraph 12-01 state as follows:

‘The fundamental principle, plain and incontestable, is that every person's body is inviolate. Interference however slight with a person's elementary civil right to security of the person and self-determination in relation to his own body, constitutes trespass to the person. Trespass to the person may take three forms. A battery is committed when there is an actual infliction of unlawful physical contact with the Plaintiff and

assault where the Plaintiff is caused to apprehend the immediate infliction of such a contact. Deprivation of liberty constitutes false imprisonment.”

- 5.22 It was submitted that the conflict originated from the perceived danger that was posed by John Kufuna aiming his firearm at the police officers, which ultimately resulted in their attempt to disarm him, due to fear for their own safety.
- 5.23 Reliance was placed on the cases of ***F v West Berkshire Health Authority*** ⁽⁹⁾ and ***Crockcroft v Smith*** ⁽¹⁾ the submission being that self-defense serves as a valid justification for assault and battery. Therefore, the actions that were taken by the police officers at that time, were warranted in light of the perceived threat.
- 5.24 It was stated that in the case of ***Collins v Wilcock*** ⁽⁸⁾ a distinction was drawn between assault and battery, as follows:

“the law draws distinction between assault and battery. That an assault is an act which causes another to apprehend the infliction of force on his person; a battery is the actual infliction of unlawful force on a person. Both assault and battery are forms of trespass to the person...”

- 5.25 The definitions of assault and battery that have been seen above, show that they are both forms of trespass to a person. Assault is the threat or use of force on another, while battery is the infliction of unlawful force on a person.

- 5.26 In this matter, John Kufuna testified that he was beaten by the officers who went to his house, after they broke down the door to his bedroom and they dragged him to the sitting room. In her testimony, Kasakula Mulubwa stated that the officers struggled with John Kufuna whilst they were attempting to disarm him of the firearm.
- 5.27 John Kufuna and Naomi Kasema Kufuna on the other hand testified that the officers descended on John Kufuna after they broke down the door to his bedroom, and they started beating him as they dragged him to the sitting room, as he had delayed to open the door.
- 5.28 The testimony of the witnesses shows that there was forceful physical contact between John Kufuna and the officers when they went to his house. In support of his allegation, John Kufuna produced medical reports and X-ray images of the injury that was inflicted on him.
- 5.29 A perusal of John Kufuna's bundle of documents reveals that on the document at page 2, he was referred from Matero General Hospital, to the University Teaching Hospital (UTH) on 22nd July 2022. The reasons for the referral (Including history/Examination findings) were stated as follows:
- “for ENT to see.
H10 being punched 2/D ago near the LT ear.
CIO” – Pain inside the left eye, headache -
Tinnitus.”***
- 5.30 The provisional diagnosis on the document was stated as:
- “Tinnitus 2° is trauma.”***

5.31 John Kufuna also produced his UTH *outpatient first attendance card* and audiometric assessment. The interpretation or diagnosis on the audiometric report was as follows:

“Bi – Mixed type of hearing loss”

5.32 Also produced, was images of the X-rays that were taken of John Kufuna’s ear, chest and face at pages 10,11 and 12 of his bundle of documents.

5.33 The evidence that is on record, shows that the days following the incident, John Kufuna went to the hospital, and he was examined, which examinations showed that he suffered injuries. The audiometric assessment, in particular at page 6 of John Kufuna’s bundle of documents, shows he was diagnosed with mixed type of hearing loss, after he complained of a painful left ear, as seen at pages 2-4 of the said bundle of documents.

5.34 The question that arises is whether it can be safely concluded that John Kufuna suffered injuries as a result of the struggle as the officers tried to disarm him of the firearm or it was a result of being assaulted by the officers?

5.35 While Kasakula Mulubwa testified that the struggle ensued because the officers were trying to disarm John Kufuna of the firearm, John Kufuna’s testimony was that after the officers had kicked in the door and he fell down, the pistol fell from his pocket. Thereafter, the officers started beating him, and he was dragged to the sitting room. Then there, one officer came out of his bedroom with the pistol and he

showed it to the other officers. That was how the other officers stated that John Kufuna could have killed them.

- 5.36 Therefore, there is a dispute as to whether the officers were beating John Kufuna or they were struggling with him so that they could disarm him of the pistol. Thus, the question is which story is to be believed?
- 5.37 When Kasakula Mulubwa testified in cross examination, she agreed that in paragraph 10 of her witness statement, she had stated that the pistol was cocked. It was also her evidence, that when the two officers, Inspector Daka and Assistant Investigations Officer Chileshe disarmed John Kufuna, the pistol did not go off, even though it had bullets in the chamber, and they fell during the struggle.
- 5.38 There is no evidence on record to show whether the pistol was an automatic one, such that if the trigger was pulled, it would have fired until all the ammunition was expelled from it or it was not.
- 5.39 What is however clear from the evidence, as can even be seen from the pictures of the damaged doors of John Kufuna's house at pages 7 and 8 of his bundle of documents, is that the doors were damaged after they were forced open by the officers.
- 5.40 In the submissions, the Attorney General stated that self-defence, is valid justification for the assault and battery, and that the officers' actions were warranted to act, in light of the perceived threat from John Kufuna.

- 5.41 John Kufuna's position, as also testified by Naomi Kasema Kufuna, was that when they heard the people outside, John Kufuna put the firearm in the pocket of his jacket, and when the officers broke the door to his bedroom, he fell down.
- 5.42 Kasakula Mulubwa however stated that when the officers pushed the door open, John Kufuna was standing, pointing a firearm at them, and threatening to shoot them if they did not leave him alone. Kasakula Mulubwa's testimony was that when the officers broke the door, it fell. She however maintained that John Kufuna was standing, pointing the firearm at the officers when they broke the door.
- 5.43 Kasakula Mulubwa conceded that the officers broke the door to John Kufuna's bedroom. This entailed that if John Kufuna was standing behind it, then with the force of the breaking of the door, he should have fallen.
- 5.44 The law empowers police officers to use reasonable force when arresting a person. **Section 18 of the Criminal Procedure Code (CPC), Chapter 88 of the Laws of Zambia** provides for the manner in which an arrest is made. It states that;

“18. (1) In making an arrest, the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.

(2) If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such

police officer or other person may use all means reasonably necessary to effect the arrest.”

- 5.45 The section therefore connotes that when unreasonable force is used to effect an arrest, it amounts to assault.
- 5.46 The evidence that was given by John Kufuna and his wife which was not disputed, was that the police officers and officers from the Drug Enforcement Commission went to his house around 02:00 hours, and they demanded that he opens the house for them. It is also true that John Kufuna did not dispute that when the officers knocked at the window of his bedroom, they had identified themselves as those from the Zambia Police and the Drug Enforcement Commission.
- 5.47 Kasakula Mulubwa’s evidence which went unchallenged, was that they waited for about Twenty (20) minutes before they broke down the kitchen door to John Kufuna’s house.
- 5.48 ***Sections 52 and 53 of the Narcotic Drugs and Psychotropic Substances Act No 35 of 2021*** state that:

“52. (1) Where the Director-General has reasonable grounds to suspect that in, or on, any premises there is concealed or deposited any property liable to forfeiture under this Act, or as to which an offence under this Act is reasonably suspected to have been committed, or any book or document directly or indirectly relating to, or connected with, any dealing or intended dealing, whether within or outside the Republic, in respect of any property liable to seizure or forfeiture under this

Act, or which would, if carried out, be an offence under this Act, the Director-General may, by order in writing, authorise an investigating officer or police officer to—

(a) enter the premises and search for, seize and detain the property, book or document;

(b) search any person who is in, or on, the premises, and detain that person or remove the person to any place in order to facilitate the search;

(c) arrest any person who is in, or on, the premises in whose possession or control of any suspected drug or precursor chemical or any property liable to seizure or forfeiture under this Act is found, whom the officer reasonably believes to have concealed or deposited the property;

(d) break open, examine and search any article, container or receptacle; and

(e) stop, search and detain any conveyance.

(2) An investigating officer under subsection (1) may, if it is necessary to do so—

(a) break open any outer or inner door or window of any premises;

(b) forcibly enter the premises or any part of it;

(c) remove by force any obstruction to entry, search, seizure and removal; or

(d) detain any person found in, or on, the premises until the premises is searched.....

53. (1) An investigating officer may, with a warrant, at any time—

(a) enter and search any premises or any other premises, including a private dwelling, where information or documents which may be relevant to an investigation may be kept;

(b) search any person on the premises if there are reasonable grounds for believing that the person has personal possession of any document or article that has a bearing on the investigation, except that a person shall only be searched by a person of the same sex;

(c) examine any document or article found on the premises that has a bearing on the investigation;

(d) require information to be given about any document or article by—

(i) the owner of the premises;

(ii) the person in control of the premises;

(iii) any person who has control of the document or article; or

(iv) any other person who may have the information;

(e) take extracts from, or make copies of, any book or document found on the premises that has a bearing on the investigation;

(f) use any computer system on the premises, or require assistance of any person on the premises to use that computer system to—

(i) search any data contained in, or available from the computer system;

(ii) reproduce any record from the data;
or

(iii) seize any output from the computer for examination and copying; or

(g) attach and, if necessary, remove from the premises for examination and safeguarding any document or article that appears to have a bearing on the investigation.....”

5.49 It will further be seen that the provisions of **Sections 118 and 119 of the Criminal Procedure Code** are as below:

“118. Where it is proved on oath to a magistrate that, in fact or according to reasonable suspicion, anything upon, by or in respect of which an offence has been committed or anything which is necessary to the conduct of an investigation into any offence is in any building, vessel, carriage, box, receptacle or place, the magistrate may, by warrant (called a search warrant), authorise a police officer or other person therein named to

search the building, vessel, carriage, box, receptacle or place (which shall be named or described in the warrant) for any such thing, and, if anything searched for be found, to seize it and carry it before the Court of the magistrate issuing the warrant or some other Court, to be dealt with according to law.

119. Every search warrant may be issued and executed on a Sunday, and shall be executed between the hours of sunrise and sunset, but a magistrate may, by the warrant, in his discretion, authorise the police officer or other person to whom it is addressed to execute it at any hour.”

- 5.50 The above provisions of the law show that a warrant that is issued under the **Criminal Procedure Code** shall be executed at any time between sunrise and sunset, unless the Magistrate in their discretion, endorse on the warrant that it can be executed at any time. For a warrant that is issued under the **Narcotic Drugs and Pyschotropic Substances Act**, it can be executed at any time.
- 5.51 Therefore, the warrant which is at page 1 of the Attorney General’s bundle of documents, which was issued pursuant to **Sections 52 and 53 of the Narcotic Drugs and Psychotropic Substances Act No 35 of 2021** could be executed at any time.
- 5.52 Having found that John Kufuna did not challenge the defence that the officers had identified themselves when they

asked him to open the door, but he refused to do so, justifies the breaking into his house, in line with the law that has been cited above.

- 5.53 The damaged doors as seen at pages 7 and 8 of John Kufuna's bundle of documents is evidence of the force that was used to gain access to the house, and also that considerable force was used to open the door. The use of force was attributed to John Kufuna having delayed to the open door, with Kasabula Mulubwa testifying that they waited for about Twenty (20) minutes before they broke the door to the kitchen.
- 5.54 John Kufuna on the other hand stated that the delay to open was because he was dressing up, having slept naked. Naomi Kasema Kufuna testified in cross examination, that John Kufuna slept in his pajamas. Therefore, the two witnesses contradicted themselves on the reason why John Kufuna delayed to open the door for the officers, as John Kufuna testified that he was dressing up, while his wife stated that he was wearing pajamas and therefore, he did not have to dress up. She did however state that he changed into a track suit from his pajamas.
- 5.55 As force was used to break down the doors, it is more probable than not, that a person who was standing right behind the door would fall, looking at the damage that was done to the doors, as evidenced at pages 7 and 8 of John Kufuna's bundles of documents.

- 5.56 Therefore, the only reasonable conclusion that can be drawn, is that it was unlikely that the officers found John Kufuna standing at the door pointing a firearm at them, after they broke the door to his bedroom, and that they struggled to disarm him. Rather, they used unlawful force on him because he delayed to open the door for them, and because he had a firearm.
- 5.57 The unlawful force that was used on John Kufuna is evident from the medical reports that he produced in his bundle of documents. It is also worth noting that John Kufuna and Naomi Kasema Kufuna testified that the officers uttered insults when they got to their house, hence the reason why they thought they were not officers, an allegation that was not challenged by the Attorney General.
- 5.58 However, while it may have been reason to doubt that they were officers from the Zambia Police and the Drug Enforcement Commission, it still gave them power within the law that has been seen above, to force or break their way in, after they had they had notified John Kufuna that they were officers, and he refused to open for them.
- 5.59 Having entered John Kufuna's house, and he had fallen down, due to the force that was used to break the door to his bedroom, the officers had no legal right to beat him. In the case of *Zambia Consolidated Copper Mines Limited v Ennedie Zulu* ⁽¹²⁾ it was held that:

“The police are not allowed to beat suspects and it is illegal to do so.”

5.60 Therefore, my finding is that in fact, the officers assaulted John Kufuna upon entering the house, as can be seen from the medical evidence in his bundle of documents. He accordingly succeeds on the claim for damages for assault and battery.

5.61 With regard to the damages that are payable for assault and battery, *McGregor on Damages 16th Edition, London Sweet and Maxwell 1997* in paragraph 37-001, at page 1564, is as follows in provision:

“in so far as an assault and battery results in physical injury to the Plaintiff, the damages will be calculated as in any other action for personal injury. However, beyond this, the tort of assault affords protection from the insult which may arise from interference with a person. Thus, a further important head of damage is the injury to feelings, i.e the indignity, mental suffering, disgrace and humiliation that may be caused. Damages may thus be recovered by a Plaintiff for an assault, with or without a technical battery, which has done him no physical injury at all.”

5.62 Liability is attached to the Attorney General for the actions of the officers, as noted from the decision in the case of *D. Landless (MW) v Attorney General* ⁽³⁾ where it was held that:

“The distinction between the two cases was that in Warren v Henlys Ltd. the garage attendant was not

acting in his employer's interests but pursuing his own ends whereas in the second case the Defendant's manager was carrying out his master's business in an unlawful manner and it is clear that a wrongful act committed in the course of a servant's employment will only fix the employer with liability if the course of employment has not been broken by some exterior motive. I cannot say here that the soldiers concerned were in any way pursuing their employer's interests by this unprovoked and disgraceful assault on the Plaintiff and therefore I cannot say that they were acting in the course of their employment when they committed this assault. It follows therefore that, on that ground, the State cannot be held liable on the basis of the master and servant relationship."

- 5.63 In this matter, Kasakula Mulubwa testified that the Drug Enforcement Commission received information that an unknown person was dealing in suspected illicit drugs in Chifwenkula area in 6 miles. Thus, they were tasked with investigation of the said information.
- 5.64 That evidence therefore shows that the officers were acting in the course of their duties, when they went to John Kufuna's house, and they used unreasonable force on him, which resulted in him sustaining injury.

5.65 In the case of ***Emmanuel Mutale v Zambia Consolidated Copper Mines Limited*** ⁽¹⁰⁾, the Appellant was awarded the amount of K40, 000.00 as damages, as during the course of his arrest, he was assaulted, and as a result of which, he suffered a swollen eye, a bleeding nose and bruises on his hands.

5.66 I will return to the quantum of damages that are payable to John Kufuna as I deal with the claim for payment of exemplary damages.

CLAIM FOR SPECIAL DAMAGES

5.67 John Kafuna also claims special damages in the amount of ZMW17,000.00 for damage to household doors in the amount of ZMW15,000.00, medical expenses amounting to ZMW 5,000.00 and transport in the amount of ZMW 2,000.00.

5.68 ***Black's Law Dictionary by Bryan A. Garner, 8th Edition, Thomas Reuters, 2004*** defines ***special damages*** as:

“Damages that are alleged to have been sustained in the circumstances of a particular wrong. • To be awardable, special damages must be specifically claimed and proved.”

5.69 Special damages have to be specifically claimed and proved in Order for them to be awarded to a party that is claiming them. Further, ***McGregor on Damages, by Harvey McGregor, 16th Edition, London Sweet & Maxwell, 1997, in paragraph 2063*** states that the evidence in proof

of special damage must show the same particularity as is necessary for its' pleading.

5.70 In this matter, John Kufuna produced images of the doors of his house that were damaged by the officers. A perusal of his bundle of documents, shows that at page 9, is a quotation in the amount of ZMW14,840.00 for the fixing of the doors.

5.71 John Kufuna also produced medical reports that show that he went for treatment at the hospital. However, he has not submitted or led any evidence in relation to the amount that he spent on transport or the actual amounts that he incurred as medical expenses.

5.72 In the case of ***Philip Mhango v Dorothy Ngulube and ors*** (7) it was held that;

“It is, of course, for any party claiming a special loss to prove that loss and to do so with evidence which makes it possible for the Court to determine the value of that loss with a fair amount of certainty. As a general rule, therefore, any shortcomings in the proof of a special loss should react against the claimant. However, we are aware that, in order to do justice, notwithstanding the indifference and laxity of most litigants, the courts have frequently been driven into making intelligent and inspired guesses as to the value of special losses on meagre evidence”.

5.73 Then in the case of ***Midlands Breweries (PVT) Limited v David Muyenyembe*** (16), the Supreme Court held that:

“We agree with the appellant’s submission that this being a special damage, the Respondent should have produced receipts or some other documentary proof to show that this sum was paid as towing charges....

Since the motor vehicle was damaged in the accident, there can be no doubt that the Respondent must have incurred repair costs. The purpose for awarding damages under this head is to put the Plaintiff in the position he could have been had the wrong act not been committed.

Although no receipt was produced to show that K26,000,000=00, was paid as repair cost, there was evidence to the effect that the Respondent was quoted, and paid K26,000,000=00 as repair costs. The invoice also showed that the sum in question was paid.

As a result of the appellant's conduct, the Respondent's motor vehicle was damaged. And that as a result, it could not be used to carry passengers at a fee. Therefore, there was no doubt that the Respondent must have incurred some loss of business during the period his motor vehicle was not operating.”

5.74 The above cases show that while there may not be strict proof of special damages at trial, where there is proof in the

form of special damage having been incurred, the Court may still award damages.

- 5.75 In this matter, John Kufuna has not produced any receipts for the money that he spent on the doors, medical bills or transport as required by the law, in Order to be awarded special damages.
- 5.76 With regard to the damage to the doors, it is worth noting that I have found that Kasakula Mulubwa testified that the same was done because John Kufuna did not open the door in time after being requested by the officers to do so. In cross examination, her evidence which was not challenged, was that it took about Twenty (20) minutes before the officers broke the door.
- 5.77 I have also found that John Kufuna testified that he slept naked, and that he wore three (3) items of clothing before he headed to the door. The evidence further reveals that Naomi Kufuna however testified that John Kufuna slept in his pajamas before he changed into a tracksuit. Therefore, the Two (2) witnesses contradicted themselves on the reason why John Kufuna delayed to open the door for the officers.
- 5.78 However, what is not in contention is that John Kufuna did not dispute that he delayed to open the door, thereby forcing the officers to break the doors to enter his house and his bedroom.
- 5.79 The Attorney General in their bundle of documents, produced the search warrant at page 1, which authorized them to enter his premises at any time. Thus, as John

Kufuna did not dispute, that he delayed to open to door after they had told him that they were officers, and that was why the officers broke down the door, the officers cannot be liable to replace the doors, and that claim will fail.

5.80 As regards the medical expenses and transport charges for the same, it has been shown that John Kufuna did suffer injury, but he has not produced any receipts to evidence the same.

5.81 In line with the cases of ***Philip Mhango v Dorothy Ngulube and ors*** ⁽⁷⁾ and ***Midlands Breweries (PVT) Limited v David Muyenyembe*** ⁽¹⁶⁾ as there is evidence of the special damage but which has not been strictly proved, I am at liberty to make an intelligent guess as an award. I accordingly award John Kufuna a token amount of ZMW2, 500.00 as special damages for medical expenses and transport.

5.82 The amount shall carry interest at the average short-term deposit rate from the date of issue of the Writ of Summons until Judgment, and thereafter, at the Bank of Zambia lending rate until payment.

CLAIM FOR PAYMENT OF EXEMPLARY DAMAGES

5.83 In the statement of claim, John Kufuna particularized exemplary damages as follows:

- a. *Loss of balance due to broken eardrum;*
- b. *Loss of partial hearing resulting from broken eardrum;*
- c. *Severe headaches and dizziness; and*
- d. *Limitations in John Kufuna's mobility.*

- 5.84 It has been seen that with regard to the injury that was occasioned to his person, John Kafuna produced medical reports. In his submissions, he stated that he seeks exemplary damages.
- 5.85 In opposition, the Attorney General submitted that John Kufuna had not provided details regarding the facts or aggravating circumstances that would justify the granting of exemplary damages. It was stated that John Kufuna had merely enumerated the alleged injuries that incurred on the relevant day.
- 5.86 Exemplary damages are defined in ***Halsbury's Laws of England, Volume 12, 4th Edition at page 474, paragraph 1190*** as follows:

“Exemplary damages are damages which are awarded to punish the Defendant and vindicate the strength of the law. They may only be awarded in actions in tort, and only in three categories of cases.”

- 5.87 In the case of ***Times Newspaper Zambia Limited v Kapwepwe*** ⁽⁴⁾ the Supreme Court held that:

“in Zambia, exemplary damages may be awarded in any case where the Defendant has acted in contumelious disregard of the Plaintiff's rights.”

- 5.88 Further, ***McGregor on Damages, by Harvey McGregor 16th Edition London Sweet and Maxwell, 1997*** in paragraph 430 states that:

“the primary object of an award of damages is to compensate the Plaintiff for the harm done to him; a possible secondary object is to punish the Defendant for his conduct in inflicting that harm. Such a secondary object can be achieved by awarding, in addition to the normal compensatory damages, damages that are variously called exemplary damages, punitive damages, vindictive damages or even retributory damages...”

That a case has been made out for dispensing with such damages, with the argument against them being that they are anomalous in the civil sphere, confusing the civil and criminal functions of the law, and in particular that it is anomalous that money exacted from the defendant by way of punishment should come as a windfall to a Plaintiff rather than go to the state. That on the other side a major justification for exemplary damages is that they are a suitable means of punishing minor criminal acts, which are in practice ignored by the police, too caught up in the pursuance of serious crime”.

5.65 In paragraph 440 of the said *McGregor on Damages* the provision is that:

“exemplary damages are now confined to torts of trespass, whether to the person or property, defamation, false imprisonment with private

nuisance possibly included, but not malicious prosecution, which are torts infringing the rights of personality.”

5.89 It will further be seen that *Halsbury’s Laws of England, 4th Edition Re-Issue Volume 12 in paragraph 1190 at page 474* states that:

“Exemplary damages are damages which are awarded to punish the Defendant and vindicate the strength of the law. They may only be awarded in actions in tort, and only in three categories.

The first is oppressive, arbitrary or unconstitutional action by servants of the Government. It seems that this category is not confined to Crown servants but includes persons who are exercising functions of a government character, like the police. This category does not however ordinarily extend to oppressive actions by private corporations or individuals.

The second category is cases in which the Defendant’s conduct is calculated by him to make a profit for himself which may well exceed compensation payable to the Plaintiff. This category is not confined to money making in the strict sense but extends to cases (for example libel or trespass) where the Defendant is seeking to gain some object at the Plaintiff’s expense. However, the mere fact that a tort, particularly a libel is

committed during the course of a business carried on for profit is not sufficient to bring a case within this category.

The third category is cases where exemplary damages are expressly authorised by statute.”

5.90 A perusal of the Writ of Summons and the statement of claim, shows that John Kufuna did not plead the payment of exemplary damages, although he particularised the exemplary damages. He claims payment of the same in his submissions.

5.91 As rightly highlighted by the Attorney General in its' submissions, in the case of ***Christopher Lubasi Mundia v Sentor Motors Limited*** ⁽⁶⁾ it was held that:

“The function of pleadings is very well known, it is to give fair notice of the case which has to be met and to define the issues on which the Court will have to adjudicate in order to determine the matters in dispute between the parties. Once the pleadings have been closed, the parties thereto are bound by their pleadings and the Court has to take them as such.”

5.92 It has been found that John Kufuna was assaulted and battered by the police officers at his house, and the same has been proved by the medical records that he produced. By being assaulted and battered, there was trespass to his person.

- 5.93 The medical evidence at page 6 of John Kufuna's bundle of documents, shows that he suffered mixed hearing loss after the officers beat him. That injury reveals that John Kufuna was assaulted badly, and in contumelious disregard of his rights by the Attorney General's agents, especially that the evidence establishes that the intelligence report that the Drug Enforcement Officers contended that they received, which prompted them to go and search John Kufuna's house was unsubstantiated as nothing was found there.
- 5.94 In the book, ***Damages for Personal Injuries and Death by John Munkman, 10th Edition, Butterworths, Dublin Edinburgh, 1996***, Appendix 1 is *Guidelines for assessment of general damages in personal injuries* which is compiled for the Judicial Studies Board. At pages 210-211, the Appendix provides under (d) for partial hearing loss/tinnitus. The ranges at page 211, cover severe tinnitus, moderate tinnitus and hearing loss, mild tinnitus with some hearing loss and slight or occasional mild tinnitus with slight hearing loss.
- 5.95 It has been seen that page 6 of John Kufuna's bundle of documents shows that he suffered mixed hearing loss, but the severity of that hearing loss is not stated. Therefore, looking at the ranges that are stated in the guidelines that have been seen above, I would term it as moderate tinnitus and hearing loss. The awards provided for under that head range from 13, 500 pounds to 18, 500 pounds.
- 5.96 In the case of ***Reuben Nkomanga v Dar Farms International Limited*** ⁽¹⁴⁾ the Supreme Court with reference

to *Munkman on Damages for Personal injuries and Death 11th Edition* at page J13, guided that when awarding a Plaintiff damages based on the guidelines in the book, the awards tabulated in pounds had to be divided by a quarter to give a value in Zambian Kwacha, as the Pound and Kwacha do not command the same purchasing power.

5.97 Therefore, in this matter, looking at the manner the injury to John Kufuna was inflicted, even though the severity of the injury is not stated, I award him the amount of 16, 000 pounds. To give a value in Kwacha, I divide that amount by a quarter, bringing the amount payable to 4000 pounds. The Daily Mail newspaper of Monday, 28th October, 2024 quotes the exchange rate of one Pound to the Zambian Kwacha, by the Bank of Zambia, at K34.87. When that amount is multiplied by 4000 pounds it comes to K139, 000.00.

5.98 I accordingly enter Judgment in favour of John Kufuna for that amount, which shall carry interest at the average short-term deposit rate, from the date of issue of the Writ of Summons until Judgment, and thereafter, at the Bank of Zambia lending rate until payment.

DAMAGES FOR BREACH OF STATUTORY DUTY

5.99 John Kufuna claims damages for breach of statutory duty. However, no evidence was led to establish that claim. In the premises, it fails, and it is dismissed.

6. CONCLUSION

6.1 John Kufuna has succeeded on the following claims:

- | | |
|--------------------|------------|
| i. Special damages | K2, 500.00 |
|--------------------|------------|

- ii. Damages for assault and battery which resulted in hearing loss K139, 000.00
- iii. Total **K141, 500.00**

6.2 The amount shall carry interest at the average short-term deposit rate from the date of issue of the Writ of Summons until Judgment, and thereafter at the Bank of Zambia lending rate until payment. John Kufuna having succeeded on his claims, he is awarded costs, which shall be taxed in default of agreement. Leave to appeal is granted.

DATED AT LUSAKA THIS 31st DAY OF OCTOBER, 2024

of awards
S. KAUNDA NEWA
HIGH COURT JUDGE

