IN THE HIGH COURT OF MALAWI

CIVIL CAUSE NO. 626 OF 1979

BETWEEN:

F.L. NCHENGA ..... 1ST PLAINTIFF

S.S. CHIBWEYA ..... 2ND PLAINTIFF

E.N. MSYALI ..... 3RD PLAINTIFF

and

WILSON & MORGAN ..... 1ST DEFENDANT

S.M. SINGANO ..... 2ND DEFENDANT

L.A. KHONGOMWA ..... 3RD DEFENDANT

Coram: Jere J.
For the Plaintiffs: Nakanga of Counsel
For the Defendants: Wills of Counsel
Official Interpreter: Sonani
Court Reporter: Brown

JUDGMENT

The three plaintiffs in this case are civil servants in the employ of the Malawi Government. They are clerks serving in the Registrar General's Department, Ministry of Justice, Blantyre. I shall refer to them as first, second and third plaintiffs respectively.

Wilson & Morgan is a firm of legal practitioners based in Blantyre. Mr. Singano, the second defendant, is an employee of Wilson & Morgan. At all material times he was employed as a personnel manager and chief clerk. Mr. Khongomwa, the third defendant, is also employed by Wilson & Morgan as an accounts clerk. I shall refer to them as the first, second and third defendants respectively.

In this action the first, second and third plaintiffs claim damages against the first, second and third defendants arising out of alleged false imprisonment and oral defamation by the second and third defendants personally and while acting on behalf of the first defendant in their capacity as servants of the first defendant.

The allegation of false imprisonment is denied and the defence of volenti non fit injuria has been canvassed in this court. In so far as the defamation allegations are concerned these too have been denied and the defence of qualified privilege was pleaded.

I shall be going into the details of the pleadings at an appropriate stage later in this judgment.

I remind myself about the burden of proof in civil matters.

I shall start with the sequence of events first, before the first and second plaintiffs appeared on the scene, and thereafter I shall deal with the evidence of the plaintiffs and the defendants first on the allegation of false imprisonment and the applicable law. I shall conclude with the oral defamation likewise.

During the week ending 25th August 1979 four cheques belonging to the first defendant were cashed at the National Bank of Malawi, Henderson Street, Blantyre. They were presented to and cashed by four different bank tellers. One of the four tellers who honoured the cheques was a Mrs. Tepani. Mr. Mkandawire, then acting accountant at the Henderson Street branch of the National Bank, suspected the cheques to be forgeries. On 25th August 1979 he telephoned Mr. Pitt, a signatory of the first defendant's accounts, who confirmed that he had not signed the cheques in question and added that two more cheques of the first defendant's were missing, making a total of four. Mr. Mkandawire soon found out that these other two cheques had also in fact been paid. The court has seen the allegedly forged cheques. They have been exhibited as Exhibit No. 1. Mr. Pitt told the court that the signatures on the four cheques were not his. It follows therefore that these cheques were forged and the moneys paid.

The next thing that the first defendant wanted to do was to trace the culprit responsible for the forgeries. Suspicion fell on all members of the staff of the first defendant. Why there was such a blanket suspicion is difficult to see, but it may well have been due to lack of the investigation skills which are normally possessed by the investigations branch of any police force. Be that as it may, the first defendant and Mr. Mkandawire agreed that Mr. Mkandawire and Mrs. Tepani should come to the first defendant's office and identify the authors of the forged cheques. Why the other bank tellers were not asked to accompany them is difficult to comprehend, because it is clear that the cheques were presented to other tellers besides Mrs. Tepani.

However, on Saturday 25th August 1979 the bank officials reported at the premises of the first defendant and all the employees present that day, including the second defendant, were gathered in an office. The bank officials failed to identify any of the members of the staff present as the person who had forged the cheques. They were told that some members of the staff had not reported for duty that day, so they (the bank officials) agreed to come back the following Monday and continue the exercise.

On Monday 27th August 1979 the two officials reported at the premises of the first defendant and again Mrs. Tepani failed to identify any of those who were present that day. Mrs. Tepani and the second defendant went by taxi to the location to see the few who had not reported for work and who had given in sick reports. Again this proved unsuccessful.

Mr. Mkandawire suggested to the second defendant that the presenters of the cheques might be persons from outside the establishment concerned. The second defendant replied that there were some outsiders who were frequenting the offices of the first defendant, namely, members of the staff of the Registrar General and market vendors. He went on to say that if necessary he would bring these people to the bank. The second defendant went to Mr. Blackwood, a partner in the first defendant firm, and reported to him about the investigations up to that stage. He also told him about Mr. Mkandawire's suggestion that outsiders might have presented the

cheques to the bank. Mr. Blackwood told the second defendant to go ahead with the investigation. Mr. Blackwood was not called to give evidence in this court. However, Mr. Pitt confirmed in court that the second defendant was given a general authority to continue the investigations.

This was indeed an extremely wide mandate that was given to the second defendant, and without a thought for the dramatic effect the exercise of it would entail.

The second defendant, armed with this mandate, started to implement it. The stage is now set for the entry of the first and second plaintiffs.

The second defendant telephoned the first plaintiff on 28th August 1979 and asked him to come to the offices of the first defendant immediately, together with the second plaintiff. The first plaintiff explained that he was busy at that time, but the second defendant insisted that he should leave whatever he was doing and come quickly. The plaintiff asked the defendant why he wanted him at the office, and the defendant told him that he preferred not to discuss the matter on the telephone. The plaintiff immediately left for the offices of the first defendant. There he found the second defendant in his office, and according to him the defendant had three other people in the office with him and he, the plaintiff, was asked to wait.

The second defendant agrees that this was substantially correct, and that he did not want to tell the first plaintiff anything over the telephone because he was afraid he might be overheard. He had asked the plaintiff if he could spare a few moments to come to his office. When the plaintiff arrived he was busy drafting a bill of costs.

The evidence of the first plaintiff is that he entered the premises of the first defendant and the door was closed. He went into the office of the second defendant. The second defendant was busy, he had three people with him. The first plaintiff did not speak to him. After the defendant had finished with these three people he asked the plaintiff to accompany him. They went outside the office, and they found the second plaintiff on the doorstep as they were going out of the offices of the first defendant.

The evidence of the second defendant is that after finishing his bill of costs he and the first plaintiff went out of the office and in the corridor he told the plaintiff the reason why he wanted him. He said he wanted his assistance in connection with the forgery of some cheques of the first defendant's, which forgery had been discovered by the Henderson Street branch of the National Bank, and that he wanted him to accompany him to the bank for identification. He said the first plaintiff agreed.

I do not accept this evidence. I have watched the demeanour of both these witnesses, and I have come to the conclusion that there was no question of the second defendant requesting the first plaintiff to come, or of the latter consenting. It was a command by the second defendant. After all, he had already telephoned the bank that he was bringing along people for identification. Further, his immediate reaction on seeing the first plaintiff is indicative of his mood at the time. He asked "Where is Mr. Chibweya?" (the second plaintiff). In my view this could only mean that the second defendant was in a hurry to bring the first and second plaintiffs to the bank so that they could be identified by the bank officials.

It is common ground that when the second defendant joined the first plaintiff he asked the plaintiff why the second plaintiff was late in coming, and the first plaintiff answered that he was busy at the office. At this stage we get different versions as to what followed next. The first plaintiff says that on the way to the bank his right hand was grabbed by the second defendant, and the second plaintiff says that his left hand was likewise grabbed. According to the first plaintiff the second defendant was in the middle, he himself was on one side, and the second plaintiff was on the other side. The third defendant accompanied them. The second and third defendants' version was that when the second plaintiff joined them as they were with the first plaintiff the second defendant explained what had happened at the offices of the first defendant and asked if the two plaintiffs would accompany them to the National Bank for identification purposes. To this request the two plaintiffs agreed, so they walked down to the bank, not using the main road Victoria Avenue but the path passing the New Building Society commonly used by pedestrians. It has been urged upon me to accept this evidence on the ground that if what the first plaintiff says is correct he would have had a string of witnesses to testify to what they had seen that day as the streets were crowded at that time.

The truth in my view is that when the second defendant was asked where he was taking the two plaintiffs he brushed the question aside and simply said "Let us go". He must have grabbed the hand of the first plaintiff and directed that they should follow him. He then let go of the first plaintiff's hand. The second and third defendants were in front, followed by the first and second plaintiffs. I come to this finding mainly because of the evidence of the second defendant and that of the second plaintiff.

As to the grabbing of the first plaintiff's hand, I have considered the evidence of the opposing parties and I am of the opinion that in the mood in which the second defendant was it is true that he did grab the hand of the first plaintiff. He was determined to get to the root of his problem and he would not allow anything to stand in his way.

The evidence of the first and second plaintiffs is that the four of them walked from the premises of the first defendant, and when they had gone as far as the New Building Society the second defendant was asked where they were going. He replied that they might end up at a police station. After they had gone a short distance he was asked what had actually happened, and he said that cheques had been stolen from the offices of the first defendant. They then crossed Victoria Avenue into Henderson Street and there entered the National Bank.

In the bank the first and second plaintiffs and the third defendant were together when the second defendant went over to see Mr. Mkandawire. There is a conflict of evidence as to what actually happened in the bank. I shall be going into details later when I deal with the defamation complaint.

Later, as the second defendant moved over to the counter the two plaintiffs also moved over and the third defendant did the same. After Mrs. Tepani had failed to identify the two plaintiffs as having been concerned in the forgeries, the plaintiffs asked whether that was all and the second defendant said yes, they could go. The two plaintiffs then left, as did the two defendants, to return to their respective places of employment. I do not think that the plaintiffs left without a word as the third defendant would like the court to believe.

The following day the first plaintiff telephoned the second defendant asking what this was all about, and the second defendant told him to come to his office so that he could explain to him what had happened. This piece of evidence clearly shows that there had been no explanation given to the plaintiff as claimed by the second and third defendants. To make matters worse, the second defendant did not apologize to the two plaintiffs when the identification proved unsuccessful. However, such apologies were offered to the third plaintiff, the second defendant explaining to the court that in accordance with African custom they had to apologize to someone who had been troubled for nothing. Why such courtesy should not have been extended to the first and second plaintiffs also is hard to understand.

The foregoing is the evidence, and I shall now summarize it and make my findings of fact.

On 28th August 1979 the first plaintiff received a telephone call from the second defendant asking him to go to the offices of the first defendant, together with the second plaintiff. However the second plaintiff could not leave immediately because he was occupied with other business. When the first plaintiff reached the offices of the first defendant he made his presence known to the second defendant, who was busy at that time. When the second defendant was free he left his office with the first plaintiff without telling him why he wanted him. I do not accept the second defendant's assertion that he told the plaintiff in the corridor of the first defendant's offices why he had sent for him. My reason for rejecting this is that he has contradicted himself. If he had talked to the first plaintiff people would have overheard him - something he wanted to avoid. Also the fact that the first plaintiff telephoned on the 29th suggests that he was not told on the 28th as has been suggested by the second defendant.

The first plaintiff and the second defendant were joined by the third defendant, and they all left the offices of the first defendant. The question is, why did the third defendant join the first plaintiff and the second defendant? He was a fairly junior officer in the hierarchy of the first defendant's establishment. Throughout the period the plaintiffs came under the direction of the second defendant there was nothing useful that the third defendant did to advance the so-called enquiries concerning the forged cheques. No satisfactory reason has been given for his presence. I shall however return to this aspect of the case later in this judgment.

When the second and third defendants left the offices of the first defendant with the first plaintiff they were immediately joined by the second plaintiff, whose enquiry as to why he was wanted was brushed aside by the second defendant. It is my considered view that at that stage the second defendant grabbed the hands of both the first and second plaintiffs in the manner described by the two plaintiffs, but that he let go of their hands as soon as they started walking down towards the New Building Society. They must have walked towards the New Building Society down the lane leading to the Times Bookshop, close to Development House, in single file as described in detail by the third defendant and lightly touched on by the second plaintiff. There was an attempt by the first plaintiff on the way to find out what had happened to warrant such treatment of them. They were partially answered, and when they were about to cross Victoria Avenue to get to Henderson Street they were told they were going to the bank for purpose of identification in connection with cheques which had been stolen from the first defendant's offices. They then entered the Henderson Street branch of the National Bank of Malawi, and remained there until bank officials had cleared them of

any suspicion in connection with the forged cheques. The plaintiffs then asked if that was all, meaning that they were seeking permission to leave, and they were allowed to return to their offices.

I am of the view that the entire episode, that is from the time the first plaintiff reported to the offices of the first defendant until the time the two plaintiffs were permitted to leave the bank's premises, took about an hour.

The second defendant's evidence was unsatisfactory, as was conceded by counsel for the defendants. He failed to answer simple questions, he was evasive, and generally he created a very poor impression on the court. The evidence of the third defendant suffers mainly because of his trying to create the least damaging image.

The evidence of the first plaintiff is on certain aspects exaggerated. He spoke with feelings of self-pity. I have endeavoured to examine his evidence carefully. The second plaintiff's evidence seemed on the whole to be sounder. Despite the fact that he remained in court while the first plaintiff was giving evidence his evidence was certainly not a repetition of the first plaintiff's testimony.

That was the evidence. Now we must consider the law applicable in these circumstances.

The tort of false imprisonment is a common law wrong, and is one of the three torts which comprise trespass to the person. The other two are assault and battery. The best modern definition of the tort of false imprisonment is that contained in the decision of Lord Atkin in Meering v. Grahame-White Aviation Co. (1919) 122 L.T. 44. (Report not available.)

> "Imprisonment is the restraint of a man's liberty, whether it be in the open field, or in the stocks or cage in the street, or in a man's own house, as well as in the common gaol; and in all these places the party so restrained is said to be a prisoner, so long as he hath not his liberty freely to go at all times to all places whither he will, without bail or mainprize."

The facts in that case can be gathered from the main English textbooks on the law of torts. They were as follows. The plaintiff being suspected of stealing a keg of varnish from the defendants, his employers, was asked by two of their police to go with them to the company's offices. He assented and at his suggestion they took a short cut there. On arrival he was taken or invited to go into a waiting room, the two policemen remaining in the neighbourhood. In an action for false imprisonment the defence was that the plaintiff was perfectly free to go where he liked, that he knew it, and that he did not desire to go away. This provoked Lord Atkin into saying:-

> "It appears to me that a person could be imprisoned without his knowing it. I think a person can be imprisoned while he is asleep, while he is in a state of drunkenness, while he is unconscious, and while he is a lunatic . . . ."

Certainly there is judicial authority to support that a person can be imprisoned while he is a lunatic.

In the instant case a defence of volenti non fit injuria has been submitted by counsel for the defendants. This was not pleaded. The burden of proving this defence is upon the defendants to establish facts upon which this court can so find. This is called an evidential burden, since the legal or general burden in the case is fixed and is upon the plaintiffs. The evidence of consent is that of the second and third defendants. The second defendant said that the first plaintiff had agreed in the offices of the first defendant to accompany him to the bank for identification. As for the second plaintiff, he had agreed when he was asked, saying, "Yes, let us go." I have already examined this evidence and found that it was untrue. I need not repeat what I have already stated. The defence of volente non fit injuria fails.

The next defence raised was that the plaintiffs were free to leave the defendants, presumably while they were walking to the bank as they were following the second and third defendants. I think this defence can be distinguished from that in such cases as Bird v. Jones (1845) 7 Q.B. 742, where the defendant wrongfully enclosed part of the public footpath on Hammersmith Bridge, put seats in it for the use of spectators of a regatta on the river, and charged for admission to the enclosure. The plaintiff insisted on passing along this part of the footpath and climbed over the fence round the enclosure without paying the charge. The defendant refused to let him go forward, but he was told that he might go back into the carriage way and cross to the other side of the bridge if he so wished. He declined to do so and remained in the enclosure for half an hour. The defendant was held not liable in an action for false imprisonment.

The other case to be considered is Herd v. Weardale Steel, Coal and Coke Company, Limited and Others (1915) A.C. 67. Here, a miner descended a coal mine at 9.30 a.m. in pursuance of his contract of employment. During his shift the plaintiff requested the defendants to carry him to the surface in their cage. In refusing this request the defendants committed no breach of contract; their contractual obligation was to transport the plaintiff to the surface at the end of his shift. The action for false imprisonment failed.

In the instant case the first and second plaintiffs could, for the sake of argument, have left the defendants as they were walking down to the bank, but they would thereby have exposed themselves to embarrassment and even serious damage to their reputations. The second defendant would have raised a hue and cry. His evidence is clear. He said, "I did not want him to go to his office until he was identified at the bank." Not only the public but also the police might have been involved. The chain reaction to such an escape would have been catastrophic indeed and most likely it would have been construed as an admission of guilt. An escape of this kind would have been quite unreasonable and would have exposed the first and second plaintiffs to ridicule and abuse. In my view the plaintiffs had no means of escape.

I have considered the part played by the third defendant. In my view he was with the plaintiffs all along, including going into the bank as a show of force.

I have considered the pleadings and the material paragraph is as follows:-

> "2. On or about the 28th day of August, 1979 at or about 10 o'clock a.m. the 2nd and 3rd defendants, acting on behalf of the 1st defendant and personally wrongfully, maliciously and without any reasonable or probable

> cause arrested the 1st and 2nd plaintiffs and imprisoned them for one hour on a charge of theft and cashing cheques belonging to the 1st defendant and afterwards took them (the said plaintiffs) to the National Bank, Henderson Street for identification where they were released after the identification was negative."

My findings of fact show that the second plaintiff was imprisoned from the moment he came under the direction of the second defendant up to the time the ill-fated identification ended in his favour. He was imprisoned the moment he appeared in front of the second defendant at the entrance to the premises of the first defendant. It was one transaction and I think it would be pedantic to split it into two or three. Street on Torts, Sixth Edition, page 25, states:-

> "Restraint on movement in the street even by a mere threat of force which intimidates a man into compliance without laying hands on him is a false imprisonment."

I adopt this statement as applicable in the present circumstances.

It is clear that the two plaintiffs were under moral pressure to go to the offices of the first defendant. It is true that the second defendant was not a policeman, but I do not think this is relevant. In the celebrated case of Meering v. Grahame-White Aviation Co. the persons who made the arrest were private policemen employed by the company. These were ordinary citizens employed by a company as policemen. There is no difference between them and, say, the company of Securicor in this country. They are all private citizens employed for police work. In my view the first plaintiff was imprisoned immediately he came into the offices of the first defendant, and this imprisonment lasted throughout the trip from the offices of the first defendant to the National Bank, and he was only freed when permission was sought by him and granted by the second defendant.

The first defendant denies liability and pleads that:-

> "if the court finds that any of the acts alleged in the statement of claim to have been committed by the second defendant or the third defendant were in fact committed by them or either of them then the first defendant is not responsible for any such act or acts and denies liability in respect thereof."

There is the evidence first of Mr. Pitt to the effect that general authority was given to the second defendant to carry out investigations to see who had forged the cheques. The second defendant also gave evidence on this point that Mr. Blackwood had given him authority to carry out the investigations, which he did during working hours with the full knowledge of the first defendant. There is no evidence on record or any suggestion in the submissions by counsel for the defendants that the second and third defendants were not acting on behalf of their employer the first defendant. I hold the first defendant liable.

Finally, on the evidence as adduced and on the law as stated above I find that the first and second plaintiffs have proved their case on the balance of probabilities that the first, second and third defendants without any justification deprived them of their liberty on 28th August 1979. The defendants are therefore jointly and

severally liable for this action of false imprisonment. There will accordingly be judgment for the first and second plaintiffs against the defendants jointly and severally.

I now come to the claim by the third plaintiff. His evidence was that on the morning of 29th August 1979 the second defendant came to the Registrar General's office where he was working and asked him to come outside to discuss some matters with him. The plaintiff complied with the request, and as they went out he observed that the second defendant looked unhappy; he was not his usual self. He asked the defendant why he looked miserable, and the reply was that he had got a lot of thoughts. As they were walking along the second defendant told the third plaintiff that cheques were missing from the offices of the first defendant and asked whether he knew anything about it. The plaintiff enquired whether the missing cheques were addressed to the Government and the defendant said they were not. The plaintiff then asked whether there was any connection between the first defendant and the Government offices, and the defendant said he was just asking. They arrived at the National Bank, Henderson Street, and the plaintiff told the defendant that he would wait for him on the steps, but the defendant insisted that he should go into the bank with him. When they entered the bank they stood near a certain counter, and the defendant called Mr. Mkandawire. Mr. Mkandawire came and patted the plaintiff on the left shoulder. He then directed him to go to Mrs. Tepani's counter. When they got there the defendant put his hand on the plaintiff's right shoulder and asked, "Madam, is this the one?" Mrs. Tepani replied that he was not. The plaintiff then protested, and the defendant said he could go back to his place of work, so he left the bank and returned to his office.

These facts do not establish the tort of false imprisonment. There was no restraint at any stage on the liberty of the third plaintiff. The plaintiff failed to discharge the general burden which was by law placed on him. His case should have been dismissed at the close of the plaintiffs' case.

I now examine the evidence as regards the alleged oral defamation. The plaintiffs plead an innuendo.

The evidence of the first plaintiff was that when they entered the bank the second defendant went straight to Mr. Mkandawire and had discussions with him, and then both the second defendant and Mr. Mkandawire moved over to where the first and second plaintiffs were standing with the third defendant. The second defendant pointed to the first plaintiff, calling him, and then Mr. Mkandawire pointed out the first plaintiff to a bank teller, Mrs. Tepani, saying in Chichewa, "Is he the one?" - "Kodi ndi amenewa?" Her reply, again in the vernacular, was, "No, he is not the one." Then the second plaintiff was called and the lady was asked the same question and again she replied that he was not the one. In cross-examination the first plaintiff said he understood that maybe the bank officials would say they were the ones who had stolen the cheques.

The evidence of the second defendant is quite different from that of these two plaintiffs. He said that after the bank officials had failed to identify the person who had forged the cheques from amongst the staff of the first defendant it was suggested to him that an outsider might have cashed the cheques, and he answered that there had been outsiders frequenting the offices of the first defendant during the week ending 25th August 1979, namely, members of the Registrar General's Department and some chicken vendors from Blantyre market. The men from the Registrar General's Department he had in mind were Mr. Nchenga and Mr. Chibweya, the first and second

plaintiffs respectively. The third plaintiff, Mr. Msyali, from the same Department, also used to come to the first defendant's offices occasionally. It was accordingly agreed between them that the second defendant would bring these people to the bank for identification. It would appear that the bank officials were reluctant to return to the offices of the first defendant. It has not been suggested that the third defendant was present during the above conversation. It is my view that he was absent.

It is clear that the second defendant telephoned Mr. Mkandawire in advance that he was bringing to the bank the people from the Registrar General's office immediately the first plaintiff came to the offices of the first defendant. His evidence is that when they all entered the bank he went to the enquiries counter and asked for Mr. Mkandawire, and when the latter came he told him that he had brought two people. Mr. Mkandawire called Mrs. Tepani, and when she came he told her that the second and third defendants had brought these two people. At this time the first and second plaintiffs with the third defendant were some distance away behind the second defendant. Mrs. Tepani said these men were not the ones. She was saying these words in Chichewa. The two plaintiffs were not identified separately. Then the first plaintiff asked "Is that all?" and the witness said "Yes", so the two plaintiffs left the bank.

In cross-examination the second defendant said he told Mr. Mkandawire that they had brought in the two people, pointing to the two plaintiffs, who were behind him with the third defendant. He demonstrated to the court what he did. When Mrs. Tepani came Mr. Mkandawire pointed out the two plaintiffs to her, saying that Mr. Singano and Mr. Khongomwa (the second and third defendants) had brought them and asking if she could identify them. She answered in Chichewa, "No, these are not the ones." The second defendant denied that he spoke to Mrs. Tepani. He emphasized that it was Mr. Mkandawire who spoke to her.

The evidence of the third defendant was that on 28th August 1979, the day following the unsuccessful identification at the offices of the first defendant, he was approached by the second defendant, who told him that he was continuing with the enquiries and that he had invited people from the Registrar General's Department and wanted the third defendant to accompany them to the bank. The first plaintiff and the two defendants went out of the offices of the first defendant and met the second plaintiff at the door, and they all proceeded to the Henderson Street branch of the National Bank. When they reached the bank the second defendant went to the enquiries counter, the third defendant followed him, and then the two plaintiffs also moved over to the counter. The third defendant was near the second defendant, and the two plaintiffs also came near, because it was not far from the doors of the bank to the counter where the defendants were standing. The second defendant asked to see Mr. Mkandawire. Mr. Mkandawire's office was an open office, and when Mr. Mkandawire saw them he stood up and then came to where they were standing. The second defendant said to Mr. Mkandawire that he had brought in some other people, and Mr. Mkandawire said, "Let us wait for Mrs. Tepani." The conversation was carried on in Chichewa. When Mrs. Tepani came Mr. Mkandawire said to her, "Mr. Singano has brought in two people. Can you recognize anyone?" He did not point at anyone. Mrs. Tepani said, "No, there is no one here." Mr. Mkandawire said, "O.K." After that the two plaintiffs left the bank, leaving the two defendants behind. Mr. Mkandawire invited the defendants into his office.

Mr. Mkandawire's evidence was that after the unsuccessful attempt to find the culprit from amongst the employees of the first defendant he suggested that the presenters of the cheques might be outsiders and not members of the first defendant's staff. The second defendant agreed that during the week ending 25th August some people had frequented their offices, namely, market vendors and members of the Registrar General's staff. Mr. Mkandawire said that if there was any need these people should be brought to the bank. Thereafter Mr. Singano the second defendant telephoned him to say he had got some people for identification, and Mr. Mkandawire said he could bring them down to the bank. The second defendant on arrival at the bank with the two plaintiffs went straight over to the enquiries counter and told Mr. Mkandawire that the two gentlemen who were standing in the background, behind him, had been brought for identification. Mr. Mkandawire fetched Mrs. Tepani, and as they were going towards the counter he whispered to her to have a look at these two and see if she could identify either of them. She looked at them and said no. The witness said there were other people in the bank because it was during business hours. He then advised the defendants to report the matter to the police.

As is clear from the foregoing narrative, there is considerable conflict of evidence. The following are my findings.

There were discussions at the offices of the first defendant. It was suggested by Mr. Mkandawire that outsiders might be involved in the forgery and encashment of the cheques. The second defendant told Mr. Mkandawire that there were people who had been frequenting the offices of the first defendant, and it is clear that he, the second defendant, had these people in mind. He said they were members of the staff of the Registrar General and market vendors. It was then agreed that such people should be brought to the bank for identification, to see whether Mrs. Tepani would recognize any one of them as the person who had presented the forged cheques and cashed them.

There can be no doubt about the foregoing evidence. The second defendant after getting hold of the two plaintiffs went with them to the bank according to the understanding reached between him and the bank officials. He asked for Mr. Mkandawire and informed him that he had brought two people from the Registrar General's Department. It is my opinion that he first told him verbally and then pointed out the two plaintiffs. He must have pointed out the two without necessarily separating them. After all, they were close to him, opposite Mr. Mkandawire.

Mrs. Tepani has not been called to give evidence. She could have enlightened the court as to what actually passed either between the second defendant and herself as is alleged by the first and second plaintiffs or between Mr. Mkandawire and herself as is alleged by the defendant.

The evidence of Mr. Mkandawire is to be preferred on this issue. He was an independent witness, and I find that he asked Mrs. Tepani to have a look at the two plaintiffs and say if she could identify either of them as the person who had presented and encashed the forged cheques. Mrs. Tepani answered in Chichewa that they were not the ones.

I now examine the legal implications of these facts.

The words complained of giving rise to the innuendo pleaded were oral and not written. It is therefore slander. It is alleged that there is an imputation of a criminal offence, and in these

circumstances such slander or oral defamation would be actionable per se without proof of special damage. In a jury trial the functions of the jury and the judge are distinct. "It is always a question for the judge upon reading the innuendo and after having heard the evidence upon it, to say whether the words are reasonably capable of bearing the meaning attributed to them": Huber v. Crookall (1886) 10 Ontario R. at p. 481 (report not available) quoted in Gatley on Libel and Slander, Fifth Edition, p. 130. See also Tolley v. Fry (1931) A.C. at p. 339. It is the duty of the judge in the first place to determine upon the evidence adduced whether the words are reasonably capable of being understood in the meaning ascribed to them in the innuendo. The jury's function is to decide whether the publication has the meaning so ascribed to it.

Taking all the circumstances in the present case into consideration, what is clear is that in the offices of the first defendant the second defendant told Mr. Mkandawire, or it was implied, that he would bring some members of the Registrar General's staff for identification as people who might have cashed the forged cheques belonging to the first defendant. At that time there was no identification of the first and second plaintiffs. There could therefore be no publication to Mr. Mkandawire. However, when they were brought to the bank the second defendant intimated to Mr. Mkandawire that he had brought the people; Mr. Mkandawire had a look at them and asked Mrs. Tepani whether they were the ones and she said, in Chichewa, no, they were not the ones. There was a clear publication to Mr. Mkandawire. There can be no doubt about that. The question is whether there was publication to Mrs. Tepani. There is no direct evidence that the second defendant asked Mrs. Tepani, "Kodi ndi amenewa?" The evidence is that Mr. Mkandawire asked her the question. In normal circumstances one could have held without difficulty that the publication was only to Mr. Mkandawire, but I think that would be taking an extremely narrow view of the matter, and one could not make sense out of such an interpretation of the evidence. The entire transaction has got to be read together. Publication must be taken as a whole. Both the defendants and the plaintiffs are entitled to have the whole publication submitted to the jury so that they can construe the entire document: see Button on Libel and Slander, Second Edition, page 56. One is not allowed to mutilate the evidence and choose bits which are favourable to one side or the other.

In these circumstances I hold that there was publication to both Mr. Mkandawire and Mrs. Tepani. The question before me is whether the words "Kodi ndi amenewa? Iai, siamenewa" - "Is it these ones? No, it is not these ones" - are reasonably capable of being taken to mean that the plaintiffs had committed a criminal offence. Guidance is to be obtained from decided cases as to whether the words complained of can reasonably be interpreted to mean that the plaintiffs had committed a criminal offence. The first case is a Privy Council decision, Simmons v. Mitchell (1880) 6 App. Cas. 156. In that case it was held that:-

> "Words merely conveying suspicion will not sustain an action for slander.
>
> Where such words admit fairly, and in their natural sense, of two meanings, the one being an imputation of suspicion only, the other of guilt, the sense in which they were uttered should be left to the jury.
>
> The innuendoes not declaring that the words were spoken with the intention of imputing to the plaintiff

a felony, and not importing to enlarge the meaning of those words:-

> Held, that the prefatory averments which only professed to give the motives of the defendant could not be substituted for those innuendoes whereby the plaintiff undertook to give the meaning of the words spoken."

This judgment finds authority in the well known book on the law of libel, Gatley on Libel and Slander, Fifth Edition, at page 55, where the author states:-

> "Words which do not definitely charge a crime, but impute a mere suspicion that the plaintiff has committed a crime, are not actionable without proof of special damage."

Another case of great assistance is Lewis v. Daily Telegraph, Ltd. (1963) 1 Q.B. 340; affirmed sub nom. Rubber Improvement, Ltd. v. Daily Telegraph, Ltd. (1963) 2 W.L.R. 1063. In that case the defendants had published a paragraph in the newspapers stating that the officers of the City of London Fraud Squad were investigating the affairs of the plaintiff company, and the plaintiff alleged that these words carried the meaning that the company's affairs were conducted fraudulently or dishonestly. By a majority the House of Lords decided that the words were not capable of bearing that meaning. Lord Devlin pointed out that one cannot make a rule about the fundamental question - what is the meaning which the words convey to the ordinary man - but the ordinary sensible man is not capable of thinking that whenever there is a police inquiry there is guilt. Otherwise "it would be almost impossible to give accurate information about anything". I realize that in that particular case there was no question of an innuendo being pleaded, but I think the case is all the same helpful.

As I have already stated, it is important to look at the entire publication. This is clear from the case of Chalmers v. Payne (1835) 2 Cr. M. & R. 156 per Alderson B. at page 159 (report not available):-

> ". . . In one part of the publication something disreputable of the plaintiff is stated, but that is removed by the conclusion, the bane and the antidote must be taken together."

In these circumstances, if the ordinary reasonable man was asked whether the words do impute the commission of an offence, I think his answer would be in the negative, for the end part of the answer to the question removes the sting. Accordingly I do not think the words are defamatory for, as can be gathered from the evidence as a whole, after the failure to identify the culprits from amongst the members of the staff of the first defendant, suspicion fell on market vendors as well as on members of the staff of the Registrar General's Department. In these circumstances I hold that the words complained of do not carry the meaning ascribed to them.

In case I am wrong and it can be held that these words are defamatory, I shall deal with the defence of qualified privilege which has been raised in the sense that publication to the first, second and third defendants and to the bank took place on a privileged occasion.

The first defendant in its defence pleaded that:-

> ". . . . any statements made by the second defendant to any official of the National Bank of Malawi were made on an occasion of qualified privilege - the National Bank of Malawi and the first defendant and the second defendant having a common and corresponding interest in the subject matter and publication, if any, which publication is denied and a common and corresponding interest in finding out who the persons were to whom monies had been paid on the cheques purporting to have been drawn by the first defendant which cheques were forgeries.
>
> . . . . any statements made by the third defendant to any official of the National Bank of Malawi were made on an occasion of qualified privilege - the National Bank of Malawi and the first defendant and the third defendant having a common and corresponding interest in the subject matter and publication, if any, which publication is denied and a common and corresponding interest in finding out who the persons were to whom monies had been paid on the cheques purporting to have been drawn by the first defendant which cheques were forgeries."

I agree that there was qualified privilege, but in my view such privilege was clearly defeated by the fact that there was no reasonable cause why the two plaintiffs should have been brought to the bank or indeed why they should have been suspected in the first place. The mere fact that the first plaintiff visited the premises of the first defendant was no reason to suspect him of stealing cheques. There was absolutely no reason for suspecting the two plaintiffs. Further, the plea is defeated because of over-publication, for the publication was made in the bank in the presence of many people, so this kind of conduct in my view completely defeated the privilege that undoubtedly was there.

I now come to the third plaintiff. He gave evidence which was substantially the same as that of the first and second plaintiffs. I need not go into details, but, as I have already held in the other instances, there was no defamation, and I hold the same in the case of the third plaintiff.

I now turn to the question of damages for false imprisonment. Mr. Nakanga has asked for substantial damages, arguing that this is one of the worst cases, and Mr. Wills has not had much to say on this matter. I have been assisted by a number of East African cases, in particular Kasana Produce Store v. Kato (1973) E.A. 190, although in those cases the false imprisonment was far more serious than in the instant case. I also bear in mind the general principle that damages should reflect the general economic standing and social conditions in the country: see Burgess v. Aisha Osman and Jimu (No. 2), 1964-66 ALR (Mal.) 500. By this I mean that what would be appropriate damages in the United Kingdom, for example, would certainly be excessive in this country. I also take into account that there are cases more serious than the instant case both in the United Kingdom and in East Africa.

I do not in any way condone the ill-conceived action of the second defendant in arresting innocent people. All I am doing is putting it in its proper perspective.

I award general damages of K2,000 for each of the first and second plaintiffs, and I hold that the three defendants are liable jointly and severally. In case I am wrong and the words do bear

some defamatory meaning, I would award damages of K1,000 for each plaintiff, including the third plaintiff, against the three defendants jointly and severally.

Costs for the plaintiffs.

Pronounced in open court this 9th day of May, 1980, at Blantyre.

N.S. JERE
JUDGE