

IN THE HIGH COURT OF MALAWIPRINCIPAL REGISTRYCIVIL CAUSE NO.558 OF 1987BETWEEN:C.L. MHANGO.....PLAINTIFF

- and -

CITY OF BLANTYRE.....DEFENDANTCoram: BANDA, J.

Nyirenda, Counsel for the plaintiff  
Mbendera/Mwafulirwa, Counsel for the defendant  
Longwe, Court Reporter  
Nkhoma, Official interpreter

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JUDGMENT

The plaintiff is suing the defendants for general damages for assault. It is alleged by the plaintiff that he was wrongfully assaulted by the defendants by pushing, dragging him and twisting his arm. It is further alleged that by reason of the said assault the plaintiff suffered pain and injury of discomfort, inconvenience, injury to feelings and injury to dignity and reputation.

It is the contention of the plaintiff that the defendants' agents in assaulting him were actuated by anger, malice or spite towards the plaintiff and that in doing all these things the defendants intended to humiliate the plaintiff in the presence of his wife and members of the public and that the plaintiff was subjected to ridicule and contempt in public. The plaintiff further contends that by reason of these factors the injury to him was greatly aggravated. The defendants deny these allegations and in the alternative they have pleaded a defence of justification.

There are certain facts which are not greatly disputed in this case. It is the evidence of the plaintiff that on the material day, after going to the Blantyre Sports Club for dinner with his wife, he left for Hotel Chisakalime where he arrived at about 10.00 p.m. or 10.15 p.m. He conceded that it was a crowded night and that there was a dance going on and



that he was not able, with his wife, to find a table where they could sit. He sat at one end of the bar counter towards the dancing floor and that occasionally when a number was played which appealed to his sense of music he would go to the dancing floor and dance with his wife. It was his evidence that during his dinner at Blantyre Sports Club he had about 3 or 4 beers with his dinner. It was also his evidence that at Chisakalime he had 3 or 4 beers before the incident occurred which forms the basis of this case. The plaintiff stated that at about break time he wanted to buy a certain round of drinks but that the bar was very busy as everybody from the dancing floor had gravitated towards the bar. The barmen, according to the plaintiff, were serving on the other side of the bar away from the dancing floor. The plaintiff stated that every barman was busy serving other customers as he tried to get a beer. He got an empty bottle of beer and knocked it on the top of the table to attract the attention of the barman. He stated that he knocked the bottle on top of the counter hard enough for the barman to hear. He stated that he left the bottle on the bar counter and as it was not properly placed, it rolled over and fell to the ground where the barmen sit. He stated that the bottle was broken as it fell down.

It should be noted that the bar counter is made of concrete and for a bottle to be knocked on a concrete top sufficiently loud to attract the barman's attention over a din of noise which was present, the consequences of such an action must be patently obvious. There could have been no doubt, in my view, that no bottle or any glassware would survive a hard knock on a concrete top.

The evidence by the defendants is that the plaintiff ordered some drinks which amounted to K4.80 or K4.90. The evidence of the barman who served the drinks to the plaintiff was that it is a procedure at Hotel Chisakalime that a barman demands payment from a customer before the drinks can be served. The barman's evidence was that the plaintiff refused to pay for the drinks and that when the barman insisted, the plaintiff is alleged to have snatched away the bill from the barman and chewed it. It was the evidence of the barman that the plaintiff refused to pay immediately and stated that he would pay the bill later. The barman stated that when he insisted on the plaintiff paying for the drinks immediately, he was accused by the plaintiff of embarrassing him and that immediately the plaintiff threw a bottle at the barman which he ducked and the bottle hit a pillar behind. It was further stated by the defendants that the plaintiff was also seen pushing bottles and glasses which were on top of the counter to the floor thereby breaking them. The barman stated that immediately after this, he asked his assistant to call for the bouncer.

The plaintiff's evidence on the issue of the bouncer is briefly as follows. He stated that a man approached him and casually greeted him and that he, the plaintiff, returned the greetings. And that after that the bouncer asked the plaintiff if everything was alright and that he answered in the affirmative and that after that the bouncer then asked the



plaintiff if he could go outside. The plaintiff stated that the bouncer did not introduce himself and so he asked why the plaintiff should go outside. He said the bouncer said 'we should go and discuss some other matters'. The plaintiff then stated that he told the bouncer that if he had anything to discuss, it could be discussed inside the night club. Thereafter the bouncer again told the plaintiff that they should go outside and that the bouncer then grabbed him by his arm trying to push the plaintiff outside. It is the plaintiff's evidence that he reacted and tried to free himself from the bouncer's grasp and that he resisted to be taken outside the night club. The ensuing commotion apparently drew the attention of other people and that although he resisted being taken outside, he was taken out, nevertheless. It was the plaintiff's evidence that Mr. Chiphwanya and Mr. Ngosi and the late Mr. Jussab came towards him to try and rescue him from the bouncer. The bouncer is alleged to have told these three people to mind their own business. It was the evidence of the plaintiff that the bouncer was pushing him along the tables very violently up to outside. The plaintiff's further evidence was that when they were outside, the bouncer asked the plaintiff to go to the office and that it was at that moment that the bouncer introduced himself to the plaintiff and that the plaintiff asked the bouncer what wrong he had done to be taken outside the hotel and that he was then told that he had broken bottles inside the night club. They then went to the office which, according to the evidence before me, was the reception lounge of the hotel.

The plaintiff called 3 witnesses, PW2, PW3 and PW4. He did not call his wife as a witness. PW2 was a Mr. Audreyson Edmund Chiphwanya, who described himself as managing director of Standsand (Central Africa) Ltd. PW3 was a Mr. Happy Crydon Ngosi and he too described himself as managing director of Freight International. I found these two witnesses most unsatisfactory. The total effect of their evidence was to contradict sharply the evidence of the plaintiff himself. Mr. Chiphwanya was a hesitant and evasive witness who was quite prepared to suppress the truth of the matter. He evaded to answer questions which were put to him and when it suited him he was quite prepared to exaggerate certain incidents. For instance, he suggested that the plaintiff was in fact lifted from the night club towards the outside of the hotel. No one deposed to the fact that the plaintiff was lifted nor did the plaintiff himself refer to being lifted from the night club. I found Mr. Chiphwanya a most unreliable witness. Mr. Ngosi was equally an unsatisfactory witness. He started by professing that the plaintiff was not his friend but later he conceded that the plaintiff is not only a friend of his but in fact they are related. It was the evidence of this witness that he got to the club at about 9 o'clock and that by that time the plaintiff was already at the night club. The evidence of the plaintiff, as already indicated, is that he arrived at the hotel at 10.00 p.m. or thereabouts. Mr. Ngosi could not have been telling the truth when he said he found the plaintiff at the hotel. I find it difficult to understand why this witness should have attempted to give the impression that he was a total stranger to the plaintiff when in fact he



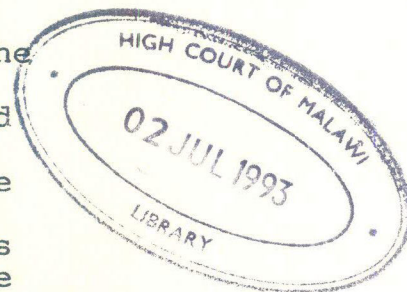
is related to him. I can attach little weight to what these witnesses said. The evidence of PW4 who is a deputy general manager of Hogg Robinson was limited to what he saw happening between the plaintiff and the bouncer. It was his evidence that as he entered the club he saw a commotion with people pushing and pulling and that he noticed that two people were involved and more people were surrounding them. As he got closer he recognised the plaintiff and could not believe what he saw. He said he went to the plaintiff's wife who was standing close to the counter and asked her what was happening. She later followed the plaintiff outside. He did not see any broken bottles and glasses on the floor but he stated that he did not go close enough to the counter. He said from what he saw it was the plaintiff who was being pulled out and that the plaintiff was trying to resist. The pushing was not friendly.

It is perhaps important to refer briefly to the evidence of Ken Ngwale, the bouncer. It is interesting to note that substantially his evidence and that of the plaintiff's, on the approach to the plaintiff and the conversation which took place between them, is the same. And the only difference is that Ngwale said that he had introduced himself to the plaintiff inside the hall while the plaintiff stated that he did this when they were outside. However, Ngwale sought to give the impression that the pulling and pushing was friendly. I am unable to accept that. The fact is, and there can be no doubt on the plaintiff's own admission, that he was resisting to be taken outside the hotel and that Ken Ngwale was also insistent that the plaintiff should go out. In those circumstances, there was bound to be some force being exerted. However, I am satisfied and I find that had the plaintiff not resisted the request to go out there would have been no pulling and pushing and the matter would have been settled amicably. There can be no doubt, in my judgment, that by the time the incident occurred the plaintiff, on his own evidence, had consumed not less than 7 or 8 bottles of beer. The evidence of Mr. Ngosi was that it would be unrealistic to expect a man who had taken 4 or 5 bottles of beer to be sober. I am satisfied that the amount of beer the plaintiff had consumed greatly contributed to his behaviour that evening.

The plaintiff had paid for his entrance to the night club. He was, therefore, a licensee for value. The legal effect of such a licence is that the plaintiff was entitled to enter the premises and that if he behaved himself, to remain until the end of the dance which he had paid to enjoy. A servant has implied authority to take reasonable steps to protect and preserve his master's property in case of acts endangering such property. For acts done by the servant within the scope of that authority the master is liable. The servant's acts may exceed the authority and whether they do or not is a question of degree. The case of Hurst v. Picture Theatres Ltd. (1915) 1 K.B., at page 1, was considered rightly decided by Viscount Simon in the case of Winter Garden Theatres (London) Ltd. v. Millenium Products Ltd., where the Noble Lord said, at page 189,



"I regard this case as rightly decided and repudiate the view that a licensor who is paid for granting his licensee to enter the premises in order to view a particular event can nevertheless, although the licensee is behaving properly, terminate the licence before the event is over, turn the licensee out and leave him to an action for the return of the price of the ticket. The licence in such a case is granted under contractual conditions, one of which is that a well-behaved licensee shall not be treated as a trespasser until the event he has paid to see is over and until he has reasonable time thereafter to depart."



In the Hurst case it was held that the licensee's rights were disregarded and the plaintiff was forced to leave prematurely; substantial damages were awarded for assault and false imprisonment.

The crucial issue, therefore, in the instant case is whether the plaintiff had properly behaved himself after he had been granted licence to enter and remain on the premises. In other words, the issue I have to determine is whether the plaintiff had abided by the contractual conditions of his licence to enter and that issue will revolve on whose version of the story is accepted as the more credible of the two versions. As I have already pointed out in this judgment, the plaintiff alleges that the defendants' servants were actuated by spite and that their intention was to humiliate the plaintiff in the presence of his wife and other members of the public.

I have carefully reviewed the evidence of the plaintiff and that of the defendants. I paid particular attention to the manner in which the respective witnesses gave evidence. I have already found that PW2 and PW3 were not credible witnesses. PW4 was only able to depose, in his evidence, to facts relating to the pushing and commotion. Clearly, he could not have been there when the alleged breaking of bottles by the plaintiff took place as he only entered when the pushing and pulling had already started. On the other hand, I found defence witnesses as witnesses who were endeavouring to recall, as much as they could, the facts which happened that night. I did not get the impression that in giving a recollection of those facts of that fateful night they were people who were actuated by any malice or spite, nor did I get the impression that they were trying to protect their own jobs in giving the evidence as they did. I was particularly impressed with the manner in which DW2 gave his evidence. He struck me as an honest witness who was trying honestly to remember



the events of that fateful night. I could find no reason in his manner or demeanour to suggest that he is a man who could exaggerate or make up a story. It was this witness who stated that he saw the plaintiff pushing bottles and glasses to the floor where they broke.

After a careful consideration of the evidence in this case I am satisfied and I find that the plaintiff did not honour his contractual conditions of his licence to enter the premises. I am satisfied and I find that he behaved rather ungentlemanly in throwing a bottle at the barman and breaking some of them. The defendants' servants had authority to take reasonable steps to protect and preserve the defendants' property. It is clear that the plaintiff's behaviour greatly endangered not only the defendants' property but their servants as well. That behaviour, in my judgment, was a clear breach of the conditions of his licence to enter the premises. Having breached that condition he became a trespasser and the defendants' agents were entitled to evict him. Consequently, the plaintiff's claim must fail and it is dismissed with costs.

Pronounced in open Court on this 16th day of June, 1988 at Blantyre.

A handwritten signature in dark ink, appearing to be 'R.A. Banda', written in a cursive style.

R.A. Banda  
JUDGE