

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 316 OF 1986

BETWEEN:

MASTER G. MKUMBA

PLAINTIFF

AND

THE ATTORNEY GENERAL

DEFENDANT

Coram: UNYOLO, J.

Kaliwo, Counsel for the Plaintiff
Gonaulinji, Counsel for the Defendant
Manda, Court Reporter
Namvenya, Official Interpreter

J U D G M E N T

The plaintiff claims against the defendant damages for false imprisonment and defamation. He pleads, in the first place, that the defendant caused him to be wrongfully arrested and imprisoned for a period of eight days on a charge of failing to pay tax. He pleads that such charge was unfounded and that he suffered loss and damage. The plaintiff pleads further that the defendant through his agents or servants falsely and maliciously spoke of him that he had failed to pay tax and that by reason of those words he was greatly injured in his credit, character and reputation and brought into public scandal, ridicule and contempt.

The defendant served a defence in which he admits having made the charge complained of against the plaintiff. He pleads that the plaintiff was liable to pay minimum tax and that he failed to produce either evidence of payment of such tax, i.e. a tax receipt or a certificate of exemption, when required to do so. He denies that the plaintiff was wrongfully imprisoned. As regards the second head of the plaintiff's claim, the defendant admits that his agents spoke the words complained of, but pleads that the same were true, justified and made in pursuance of a public duty. He denies that the plaintiff was injured in any way. Finally, the defendant pleads that all in all, the plaintiff's arrest and imprisonment were wholly contributed to by the negligence of the plaintiff. The particulars of the alleged negligence are set out.

The plaintiff, as is to be expected, rendered a reply in which he denies that he was asked to produce a tax receipt or exemption certificate as alleged by the defendant. He avers that he was in law required to produce such tax receipt or exemption certificate within seven days and pleads that the defendant failed to give him such time. Finally the plaintiff denies that the defendant's servants were at the material time carrying out any public duty and that if they were, they carried it out in an improper, unlawful and negligent manner. He denies the allegation of contributory negligence raised by the defendant.

I now turn to the evidence. The plaintiff comes from Traditional Authority Kapeni's Area in Blantyre District. During the month of August, 1985, he left Blantyre and went to Kanduku Village in Mwanza District to visit his uncle. It was in the plaintiff's evidence that on 15th August, 1985, he set out with his uncle for another village in the neighbourhood. He testified that while there a Government Landrover appeared on the road and stopped. Some people came out of the Landrover. These were tax officers on tax campaign in the area. They called him, the plaintiff, and his uncle. When he went there he was asked whether he had paid tax. In response, so the plaintiff said, he told the tax officers that he had not because he was still at school. He was a student, that is. The plaintiff went on to say that the tax officers did not listen. They arrested him and his uncle, got them into the Landrover and were whisked off to the local traditional court in the area. At the court a summons, Exh. P1, was issued charging him with failing to pay tax contrary to section 136 of the Taxation Act. He was then brought before the court. It was in the plaintiff's evidence that he told the presiding court chairman that he was at school, but the chairman did not believe him. He was found guilty and convicted and sentenced to a fine of K36 in default four months imprisonment with hard labour. Since he did not have any money, he was taken to prison, at Mwanza Boma, to serve the term. All this happened on the same day. It was only after he had been in prison for eight days that his sister paid the K36 and he was consequently released.

The plaintiff testified that he was at the material time a student at Luchenza M.C.C. Centre and he tendered in evidence Exh. P3, viz. a To-whom-It-May-Concern letter written by the Acting Principal of the Malaŵi Correspondence College certifying that he was a bona fide student of that Institution and that he had actually enrolled in 1983. Perhaps I should point out here that this letter was written on 16th August, 1985, after the plaintiff had already been taken into custody.

The plaintiff contended that having told the tax officers that he was a student he should not have been arrested and taken to court. He said that both the arrest and the incarceration were in the circumstances wrongful. He claims damages for the eight days he spent in prison. As regards the second head of claim, the plaintiff said that the alleged defamation took place at the traditional court in that there the tax officers informed the court that he had not paid tax, referring to what the tax officers involved said in court itself.

The plaintiff's uncle also gave evidence and his testimony was substantially supportive of that given by the plaintiff as to how the two were arrested and brought before the traditional court.

I now turn to the evidence adduced on the part of the defendant. I will deal with the evidence of DW1, DW2 and DW3 together. DW1, on the one hand, was at all material times the Executive Officer at Mwanza Boma, responsible for tax collection in the District. DW2 and DW3, on the other hand, were tax clerks at Migowi and Neno tax officers also in Mwanza District. The three tax officers went out in a Landrover on the material day, accompanied by messengers, on a tax campaign in

the area of Traditional Authority Mlauli. In the course of the campaign they arrested several tax defaulters and as they continued they came to Tumbize Village where they saw the plaintiff and his uncle, PW5, selling second-hand clothing by the road-side. They stopped and asked the plaintiff to produce his tax receipt. The plaintiff did not produce one, he said he was at school. At that point the officers asked the plaintiff to produce evidence or a certificate of exemption in that regard. Again, the plaintiff did not produce one. It was in the evidence of the three witnesses that since the plaintiff failed to produce either, they did not believe his story. Accordingly, they arrested him then and there, so too his uncle, and brought them before the traditional court in the area to adjudicate upon the matter. The three witnesses said that what heightened their suspicion about the plaintiff was the fact that they had found him engaged in a business activity, selling clothes, as I have said earlier.

Finally, the three witnesses testified that when they got to the traditional court DW3 issued a summons, Exh.P1, requiring the plaintiff formally to appear before the court to answer the charge which had been preferred against him viz. a charge of failing to pay tax under section 136 of the Taxation Act. It was actually DW3 who presented the case before the court and it was in his evidence that after hearing the facts the court found the plaintiff guilty and sentenced him accordingly. The three witnesses said that they acted throughout in accordance with instructions given them by the appropriate office in situations such as that presented in the instant case.

The other witnesses were DW4 and DW5 and these were the clerk of the court and the court chairman at the court the plaintiff was prosecuted. DW5 was actually the court chairman who tried the plaintiff's case and DW4 was the official court clerk in attendance. It was in the evidence of both these witnesses that when the charge was read over all the plaintiff said was that he had not yet started paying tax. He did not tell the court that he was at school. In the end, the court ordered him to pay a fine of K36 or go to prison for four months. DW4 said that since the plaintiff did not pay the fine he was committed to prison. In cross-examination DW5 forcefully denied that the plaintiff said he was at school. He said that he, as a matter of fact, took the view that the plaintiff was a persistent tax defaulter because all he said was that he had not yet started paying tax.

The foregoing then was the evidence adduced by the two sides in this case. Most of the facts do not seem to be in dispute. The only aspects upon which there is a controversy are these : first, the plaintiff denies the averment made by DW1 - DW3 that he was selling second-hand clothes at the time he was picked up. Secondly, DW4 and DW5 deny, as I have just indicated, that the plaintiff told the court that he was a student.

I now turn to the law. To start with, it is to be observed that section 130 of the Taxation Act imposes a liability on all male persons in Malawi who have attained the age of eighteen years to pay what is known as "minimum tax." The amount payable is K3.50 per head per year and the due date for payment is the 1st April. It was conceded in the present that the plaintiff had attained the age of eighteen years.

Secondly, under section 131(1)(c)(ii) of the Act, any person who satisfied the Commissioner of Taxes that he is attending an approved institution for education and training and is unable to pay such tax is exempted from payment of such tax. This was indeed the plaintiff's contention in this case, that he was exempt from payment of the tax on account of his being a student.

Then comes section 134(1). That section provides:

"If a person laible for minimum tax fails to produce a receipt or certificate of exemption when required to do so under section 133, the Commissioner may either collect the tax due and any penalty payable under section s32, or deliver a notice in writing to such person requiring him within seven days to appear at an office designated in the notice in the District in which the person ordinarily resides and either -

- (a) produce the receipts given to such person for the minimum tax due in the current tax year and in the immediately preceding tax year, or produce certificates of exemption granted in respect thereof;
- (b) pay to the Commissioner any minimum tax, and any penalty which may be payable thereon, payable for the current tax year and for the immediately preceding Four tax years except to the extent that such person satisfied the Commissioner that such tax and penalty have been paid."

And finally, I would refer to section 136. That section makes the failure to pay minimum tax a criminal offence and it will be recalled that the plaintiff was actually charged under that section and brought before the traditional court, abovementioned. The offence there is punishable by a fine of an amount equivalent to twice the amount of tax due with a minimum period of four months public work in default. However, in cases involving persistent tax defaulters it is open to the court to impose a custodial sentence, without the option of a fine, up to six months.

The first question falling for the determination of the court is whether the arrest of the plaintiff was justified in law. Mr. Gonaulinji, learned State Advocate, referred the court on this aspect to the provisions of section 134 above-mentioned and submitted that under that section the tax officers in this case cannot be faulted in that they simply carried out a lawful duty in pursuance of the section. Learned State Advocate contended that the tax officers in this case were

entitled to demand payment of the tax and to bring the plaintiff before the court for failing to pay the same.

To my mind section 134 is clear. The section confers a discretion on the Commissioner of Taxes as to how he can proceed against a person who has failed to produce a tax receipt or a certificate of exemption when required to do so. In those circumstances the Commissioner may choose to collect the tax due or give a written notice to such person to either produce the tax receipt or certificate, or to pay the tax due within seven days. In other words the Commissioner may choose to collect the tax forthwith or give the person a chance to produce the requisite document(s) or to pay the tax due on some future date as may be indicated in the notice.

With respect, I would agree with learned State Advocate that the Commissioner is entitled to demand payment of minimum tax. Indeed, he is empowered under the provisions of section 134 to collect such tax. I would agree further with learned State Advocate that the Commissioner is also empowered to bring a tax defaulter before a court of law, and that is what section 136 is all about.

The crucial question is whether the Commissioner has power under the law to arrest a tax defaulter forthwith and bring him before a court of law as was done in the present case. Plainly, there is no explicit provision in the Taxation Act giving either the Commissioner or tax officers powers to arrest. I have indicated that section 134 empowers the Commissioner to collect tax due. That provision cannot, however, be construed as conferring upon the Commissioner powers to arrest. As was pointed out by Mr. Kaliwo, if Parliament meant to give the Commissioner powers of arrest either in that section or any other section the same would have been expressly stated. One must, therefore, turn to the provisions of penal law in this regard. What happened in the present case was an arrest effected by private persons as opposed to, and distinct from, Police Officers. With regard to a private person section 33 of the Criminal Procedure and Evidence Code cites only two situations where such a private person may effect an arrest of another person. The first situation is where the other person commits a cognizable offence in the view (or presence) of such private person. The second situation is where such a private person reasonably suspects the other person of having committed a felony. And referring to the present case, the offence under section 136 is neither a cognizable offence nor a felony. In the circumstances the tax officers cannot avail themselves of the provisions of section 133. No authority, it is to be observed, has been cited by the defendant upon which the arrest of the plaintiff can be justified. Indeed I have found none. I find, therefore, that the plaintiff's arrest was wrongful and unlawful.

That, however, does not conclude the matter. It is to be noted that two distinct and severable periods are discernible on the facts of this case. The first period ran from the time the plaintiff was arrested in the village to the time DW3 issued the summons in Exh. P1 and brought him before the traditional court, thereby setting in motion the criminal prosecution of the plaintiff. The second period, on the other hand, ran from that point, through the hearing

of the case, through the period the plaintiff spent in prison after his conviction up to the time he was released. There can, of course, be little doubt that the plaintiff was imprisoned and deprived of his liberty during both those two periods. With regard to the former period, it is significant that although the plaintiff was not physically put in a place of confinement, such as a prison or cell, he was clearly deprived of his liberty and was not a free man throughout and that situation amounted to imprisonment in law. It was what would be termed imprisonment by ministerial officers. And having found that the plaintiff's arrest by the tax officers was unlawful it would appear to me that the plaintiff's deprivation of liberty during that first period amounted to false imprisonment. But from what I have said above a line must be drawn between the end of imprisonment by the ministerial officers viz. the tax officers and the commencement of the criminal proceedings before the traditional court. And with regard to the former period I regret I cannot comment upon it any further. It will be recalled that the plaintiff's complaint in this case only concerns the period he spent in prison after his conviction. The court cannot, therefore, give judgment on matters relating to the former period since the same are not before it. The court cannot do this in point of principle. See Mkwawila v. Press (Agencies) Ltd., MSCA Civil No. 7 of 1978 (unreported).

The question which now remains to be decided is whether the plaintiff's subsequent incarceration for a period of eight days was unlawful. Several observations can be made here. First, if I may repeat myself, the Commissioner of Taxes has power to institute criminal proceedings under section 136 against any person who fails to pay minimum tax. With regard to a prosecution before a magistrate's court the provisions of section 83 of the Criminal Procedure and Evidence Code would no doubt apply. A formal charge would have to be signed and presented to the court by a public prosecutor. In the case of a traditional court, rule 13 of the Traditional Courts (Procedure) Rules provides that such a prosecution may be instituted by the issue of a summons, as was done per Exh. P1 in the present case. It appears to me, therefore, that the tax officers (DW1 - DW3) employed the correct procedure in instituting the criminal proceedings and in bringing the plaintiff before the traditional court. In other words, the plaintiff was properly charged and brought before the traditional court concerned. The court itself was a lawfully constituted court with jurisdiction to try the offence the plaintiff was charged with.

I have already pointed out that both the presiding court chairman and the court clerk in attendance gave evidence. Their testimony shows that the plaintiff was tried in the normal manner and that the verdict of the court was rendered after both sides were heard in the matter. The two witnesses said that the plaintiff did not disclose to the court that he was a student but merely said that he had not yet started paying tax. I would agree with Mr. Kaliwo on this aspect that the court should at that point have asked the plaintiff to elaborate on what he meant by saying he had not yet started paying tax. This, however, appears to be the only criticism which can be made against the court chairman otherwise to my mind both the conviction and the subsequent incarceration of the plaintiff were the result of a judicial decision.

In Sewell v. N.T. Co. Ltd. (1907) 1 K.B. 357, a case involving, *inter alia*, false imprisonment, as here, it was held that where one makes a charge against another whereupon the court orders the person charged to be taken into custody and detained the party making the charge is not liable to an action for false imprisonment because he does not set a ministerial officer in motion but a judicial officer. The court went on to say that in those circumstances the opinion and judgment of the judicial officer are interposed between the charge and imprisonment. With respect I think that this is a correct statement of the law.

Mr. Kaliwo drew my attention to the fact that the conviction of the plaintiff was subsequently quashed and the sentence set aside by the Chief Traditional Courts Commissioner. The Commissioner there took the view that the plaintiff was not given ample time, allegedly by the court, to produce a certificate of exemption and that the failure to do so was "grossly unlawful" and amounted to a failure of justice.

In Smith v. Sydney and Others (1869-70) 5 Q.B. 203, the defendants issued a writ of summons against the plaintiff for the sum of £34 (this must have been a substantial sum in those days). In due course the defendants signed a judgment by default against the plaintiff. And subsequently the plaintiff was arrested and he paid the money. He then applied to have the judgment set aside. He was successful. He sued the defendants for false imprisonment. It was held that an action did not lie from the mere fact that the judgment was set aside and that the court must see the ground on which such judgment was set aside. It may be set aside for irregularity or because it was signed in bad faith, or on the ground of error. It was said that the authorities distinguished between an act of the court and an act of the parties, and it is only when the proceedings are set aside on the latter ground that the party is made a wrong-doer. With respect I think that this principle is applicable to the facts of the present case.

For these reasons I regret I am unable to agree that the plaintiff's incarceration amounted to false imprisonment. The plaintiff's claim on this aspect must, therefore, fail and it is dismissed.

I now turn finally to the claim for slander. The plaintiff's case, as I have already indicated, was that the alleged slanderous words viz. "This is the man who failed to pay his income tax", were uttered by one of the tax clerks, DW3, in court as the said tax clerk was presenting the case against the plaintiff.

There is a line of case law authority on this point. I would refer particularly to Munster v. Lamb (1883) 11 Q.B. 603. Fry, L.J. there quoted with approval the rule of law

enshrined in the considered judgment of the Court of Exchequer Chamber in Dawkins v. Lord Rokeby : L.R. 8 Q.B. 255, which appears in the following passage:

"The authorities are clear, uniform and conclusive that no action of libel or slander lies whether against judges, counsel, witnesses, or parties, for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognised by law."

This, to my mind, is good law and I cannot find any reason why the plaintiff's case should be an exception to this rule. Accordingly, the plaintiff's claim under this head must also fail and it is dismissed.

In the result the plaintiff's action fails in its entirety and it is dismissed with costs.

PRONOUNCED in open Court this 1st day of March, 1988, at Blantyre.


L.E. Unyolo
JUDGE