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IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO.274 OF 1987



BETWEEN:

L.J. HAUYA PLAINTIFF

AND

COLD STORAGE CO. LTD. DEFENDANT

CORAM: BANDA, J.

Nakanga, Counsel for the Plaintiff
Msiska, Counsel for the Defendant
Phiri, Court Reporter
Mkumbira, Official Interpreter



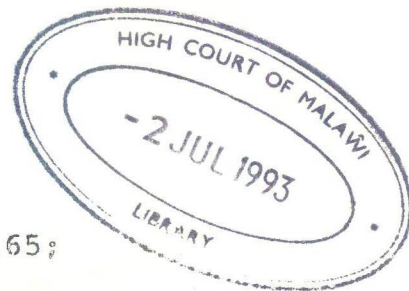
JUDGMENT

The plaintiff is claiming damages against the defendants for unlawful dismissal, false imprisonment and malicious prosecution. There is also a claim for damages for the alleged conversion of a motor vehicle allegedly belonging to the plaintiff.

The plaintiff was employed by the defendant company on 17th July, 1967 as a credit and wages controller. It was the contention of the plaintiff that it was an express term of the employment agreement that the plaintiff would continue working for the defendant company until such employment was determined by one month's notice in writing on either side. It was further contended, in the alternative, that it was an implied term of the said employment agreement that the plaintiff's employment should be determinable only by reasonable notice and it was suggested that 3 months was such reasonable notice.

The plaintiff submitted that it was as a result of these terms of employment that he started work with the defendants until the 24th April, 1984 when the defendants wrongfully, and in breach of the said agreement and, without giving the plaintiff one month's notice in writing or any notice, determined the said agreement by letter dated 24th April, 1984 with immediate effect. The plaintiff contended that by reason of the unlawful dismissal he has been deprived of his salary and pension, which he would have otherwise earned, and that he has suffered loss and damage.

The particulars of loss and damage have been given as follows:-



- (a) Loss of salary for one month at K310.92;
- (b) 32½ days leave pay at K388.65;
- (c) Salary from 1st April to 24th April 1984 at K287.00;
- (d) Pension contributions up to 29th February, 1984 at the rate of K1,118.64.

Originally, there was also a claim for pension contributions from 1st March to 30th March, 1984 with 3% interest thereon, but these two claims were abandoned. There is a further claim for salary from 1st May, 1984 to 5th March, 1987 for a period of 34 months at K10,571.28. It was also the plaintiff's claim that he was, at all material times, the owner and entitled to the possession of a motor vehicle registration No. BD 1052 and that the defendants have been, since the month of April 1984, wrongfully in possession of the said vehicle.

The defendants have conceded the claim for leave pay but have denied the other claims.

The plaintiff was at the material time working as the Chief Internal Auditor. His evidence was that on 30th March, 1984 he escorted his wife to hospital and that before he left he sent one of his children to report to Mr. Chikwanje that he had gone to hospital with his wife. The plaintiff stated that he came back late in the evening when he was told by one of his children that members of staff from Cold Storage and the Police had come home and had left a message for him to report at Blantyre Police. He stated that he went to report to Blantyre Police on the following morning and that when he arrived at Blantyre Police he was put into a cell. He stated that after a short time the police took him to an office where he met three CID Officers. He had spent one hour in the cell. He stated that when the CID Officers told him that Cold Storage had told them that he was one of the people who had stolen money, all the three officers started beating him with one of them pressing his private parts with a plier; that after an hour he was sent back to the cell; that the officers came back again and took him to the office where they continued assaulting him. In the evening of the same day they took him to Chichiri Prison where he stayed until he was released on bail on 17th April, 1984.

The plaintiff stated that while in prison he was sleeping on the floor and that the food was not good. He said that after he was released on bail he went to the hospital where he was given treatment of injections for 7 days and tablets for 5 days. He was not, however, able to produce any medical evidence to support this medical treatment. He stated that when he went back home he discovered that his motor vehicle

had been collected on 9th April, 1984 by Cold Storage staff. After he had felt well enough, he went to see Mr. Vart who was the General Manager for Cold Storage and asked him why they had taken the motor vehicle away from him. He was told that the motor vehicle had been repossessed because there was a balance on it of K996.00.

The case for the defendants is that it was entitled to dismiss the plaintiff because of his misconduct. The particulars of such misconduct have been pleaded. The duty to prove justification is on the defendants and must prove it on balance of probabilities that it was justified in summarily dismissing the plaintiff. The defendants contended that the plaintiff, as the chief internal auditor, it was his duty to check on all the clerks' work, including books, like cash sale invoices and nominal ledger. They contended that it was his duty to check them daily to see that everything was running smoothly.

It was important, in my view, to set out briefly what the system was or how the cash sales and other documents moved from the cashiers office to the plaintiff's office. There were three sales cashiers and one chief sales cashier. There was a beef cashier, one pork cashier and one fish cashier. They reported daily to the chief cashier on all the money they had collected each day. The chief cashier would receive cash plus a machine tapping which showed the total cash received on each machine. The chief sales cashier would take the cash to the plaintiff's office for audit purposes and for recording in the sales journal. It is important to remember that the plaintiff was in the audit section with his assistant, Mr. Meja. The sales receipts would be sent to the audit section everyday for checking, i.e. for the plaintiff to see that the sales are being conducted well and are being recorded in the sales journal.

It was the evidence of Mr. Hara for the defendants that if the cash is not taken to the audit section the plaintiff would query immediately to see what had happened and would take action later on. It was the plaintiff who was responsible for checking other sections. It would appear that on 29th March, 1984 one senior debtors clerk reported something to Mr. Hara who was the office supervisor in charge of the accounts. As a result of that report Mr. Hara decided to check everything in the fish section and discovered that some cash sales relating to February, 1984 were missing. He reported to management and on further checks with cash sales, invoices, sales journal, cash reconciliation sheets and daily fish records, he discovered that more cash sales were missing. The cash sale reconciliation sheets are prepared by the chief cashier after receiving cash from each sales cashier. They are prepared daily and they are intended for easy monitoring of sales. Mr. Hara checked these from December 1983 to March 1984 and discovered that there was a total amount of K4,948.50 which had not been banked. It was the duty of the plaintiff to check the journal to see if it was correctly done. It was also the plaintiff's duty to check stocks and sales. It was

the plaintiff whose duty it was to cross-check cash banked with cash collected by the sales cashiers. It was Mr. Hara's evidence that checking these documents would immediately reveal the missing of the cash sales and the cash. It was also the plaintiff's duty to see that all the receipts had gone in the sales journal. It was the defendants' case that when they discovered that a fraud had been perpetrated they decided to enlist the help of the police to investigate the matter. It was as a result of this decision that Sergeant Buleya was called to Cold Storage premises.

Sergeant Buleya's evidence was that he received a phone call on 30th of March, 1984 from Cold Storage Company and that he spoke to the General Manager, Mr. Vart, who reported that a fraud had been committed at his company and that certain members of his staff were being suspected. Sergeant Buleya stated that when he arrived at Cold Storage premises he made initial investigations to see if an offence had been committed. He stated that he interviewed certain members of staff including Mr. Hara, Mr. Mtambo, Mr. Mwenda and Mr. Meja. He stated that he looked at some of the cash sales, sales journal and reconciliation sheets. He said he was convinced, after those investigations, that Mwenda, Meja and Hauya were involved in the fraud and decided to arrest them. He stated that he discovered from the cash sale receipts that the total amount misappropriated came to K4,948.60. It was his evidence that he asked Cold Storage staff to lead him to Hauya's house as the latter was not at the defendants' premises and that he was going to the plaintiff's house to arrest him. He confirmed that he arrested the plaintiff on 31st March, 1984 after he had reported to Blantyre Police. He said that he had given instructions that the plaintiff should be arrested because he was convinced an offence had been committed. He denied that the plaintiff was tortured in any way. It was Buleya's evidence that the plaintiff gave two statements: one, when he was in custody and the second one, after he had been released on bail. In both statements the plaintiff agrees taking money from one of the cashiers at Cold Storage.

A misconduct to warrant summary dismissal must be of such a nature as to be incompatible with the due and lawful performance of duty on the part of the employee to his employer. Such misconduct need not be grave nor need any dishonesty be proved but it must be shown that because of the misconduct the confidence between the employer and the employee has been breached to such an extent that the employee can no longer be trusted by the employer. In each case the misconduct of dishonesty complained of must be of such a nature that the employee's continued engagement on duty or his confidential relationship with his employer is injured substantially and amounts to a fundamental breach of the agreement. It is trite law that there is no fixed rule of law defining the degree of misconduct which will justify summary dismissal. There may

be a misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other but misconduct which is inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal. See case of Clouston & Co. Ltd. v. Corry (1906) A.C., p.122.

The crucial issue in false imprisonment is to decide whether the defendants' servants merely stated the facts to the police or whether they made a charge against the plaintiff. It is accepted that conveying one's suspicion to the police who, on their own responsibility, take the plaintiff into custody, is not making a charge. However, where the defendants acting through their agents or servants order the police to arrest the plaintiff, it is imprisonment by the defendants as well as the police and an action for trespass would lie against the defendants; but if the defendants merely stated the facts to the policeman who, on their own responsibility took the plaintiff into custody, this is not imprisonment or trespass by the defendants. The test is this: if the defendants' servant made a charge on which it became the duty of the police to act then the defendants will be liable but they are not liable if they merely gave information and the police acted according to their own judgment.

Mr. Nakanga has submitted that the plaintiff was only suspected and that no evidence was adduced to connect him to the offence. He contended that there was no offence to justify the prosecution of the plaintiff. Mr. Nakanga further contended that the evidence adduced did not show that the plaintiff committed the offence and he has submitted that the claim for malicious prosecution must be upheld. On the claim for false imprisonment, Mr. Nakanga has submitted that on the evidence of Sgt. Buleya himself it was clear that he acted on what he was told by the defendants' servants because he ordered the plaintiff's detention even before he interviewed him. He cited the case of Wasili v. Clan Transport Co. (unreported), Civil Cause No.506 of 1981. Mr. Nakanga has argued that since the plaintiff was only suspected of an offence in which he was tried and acquitted, he contended that the whole blame must be put on the defendants. Mr. Nakanga further submitted that the witnesses who gave evidence against the plaintiff were actuated by malice.

Mr. Msiska, for the defendants, has submitted that there was justification for summarily dismissing the plaintiff. He argued that it was the plaintiff's duty to check the cash sales and receipts everyday and that it was his duty to report to management if any shortage was discovered. He submitted that failure to discover the fraud was because the plaintiff was privy to it. Mr. Msiska further submitted that under section 11 of the Employment Act the defendants are entitled to summarily dismiss their employee. He submitted that it was not the defendants who detained the plaintiff nor did they make any charge against him. He submitted that the police,

on their own responsibility after carrying out investigations decided to detain and prosecute the plaintiff. Mr. Msiska submitted that the motor vehicle in issue was repossessed in terms of the Loan Agreement which was existing between the defendants on the one hand and the plaintiff on the other.

The issue I have to decide is whether there was a misconduct in this case which could justify the summary dismissal of the plaintiff. I have carefully considered the evidence of Mr. Hara because it is the evidence of that witness which set out the duties and responsibilities of the plaintiff as chief internal auditor. It is clear from the evidence of that witness that if proper checking had been done and if proper monitoring was done by the plaintiff, he would have immediately discovered the missing cash sales and would have immediately discovered that the cash banked was less than the cash received from the machine tappings. It is difficult to understand how the fraud which was clearly being perpetrated was not discovered by the plaintiff in his office. The only reason I can reasonably find for it was that the plaintiff himself was privy to such a fraud. Indeed, on his own admission made to the police, in his own statements, and secondly, in the statement he made after he was released on bail, supports the conclusion that the plaintiff was privy to the fraud. Mr. Nakanga has made great play of the fact that the plaintiff was tried, convicted and, on appeal, was acquitted. To prove a criminal charge, it is necessary to adduce such evidence as would prove the guilt of an accused person beyond reasonable doubt. In a civil case proof that the plaintiff was involved or connected in the fraud, in any way, must be done on a balance of probabilities. It is a lesser burden to discharge than in a criminal trial. There can be no doubt, in my judgment, that in deliberately failing to report the fraud which the plaintiff knew was clearly being committed was, in my judgment, a misconduct and it was a misconduct which was inconsistent with due fulfilment of his duty to his employers. It was a wrongful act, inconsistent with his duty towards his master. I find, therefore, that the claim of wrongful dismissal fails.

The evidence of Sgt. Buleya was that he was not directed or ordered by the defendants to arrest or prosecute the plaintiff. His evidence was that after making initial investigations by interviewing four members of staff, he concluded that an offence had been committed and that the plaintiff was involved. It is significant to note that the plaintiff went on his own to report to Blantyre Police as a result of a message he received. There can be no doubt on the evidence before me that a fraud was discovered at the defendants' premises and it was the duty of the defendants to report it to the police. There is no evidence that the defendants, apart from informing the police that a fraud had been unravelled, that they laid a charge against the plaintiff or any other member of staff. Mr. Nakanga contended that the fact that Sgt. Buleya gave instructions that the plaintiff should be detained before he interviewed him is an indication that he had already been convinced by what he was told by the defendants'


servants that the plaintiff was involved and Mr. Nakanga cited the case of Wasili v. Clan Transport supra as his authority for that proposition. The same point was also made in the case of Fordson Banda v. Southern Bottlers Ltd. (unreported), Civil Cause No.41 of 1987. But those two cases can be distinguished from the instant case. In the present case the police officer did make investigations. He interviewed other witnesses and it was after those interviews that he said he was satisfied that the plaintiff was involved. In the other cases, on the other hand, no such investigations were made. The plaintiff, in the other two cases, was arrested and detained before any investigations were made. The Wasili and Fordson Banda cases are not on all fours with the instant case. I am satisfied therefore that the defendants made no charge against the plaintiff as the decision to arrest and prosecute the plaintiff was made by the police after due investigations had been made and there was no evidence to show that the witnesses who gave evidence at the trial of the plaintiff were actuated by any malice. Indeed as Mr. Msiska submitted the fact that the plaintiff was tried and convicted in the magistrate's court is some indication that there was reasonable and probable cause for prosecuting him. I am satisfied that the claims of false imprisonment and malicious prosecution must fail too.

The issue of repossession of the motor vehicle is a matter which must be considered against the background of the loan agreement between the plaintiff and the defendants. There can be no doubt, in my judgment, that in repossessing the motor vehicle the defendants were only exercising a right which the loan agreement reserved to them. See clause 4 of Exhibit D18. There was a balance owing on the loan and they were entitled to act as they did. Although it is clear that the motor vehicle was sold by the defendants, there was no clear evidence at what price such re-sale was made although Mr. Khondiwa thought that it was over K1,200.00. In my view, the plaintiff can only claim the surplus and this is conceded by Mr. Msiska for the defendants. Consequently, the claim for conversion must inevitably fail too.

As already indicated earlier in the judgment, the claim for leave pay is conceded by the defendants and there will therefore be judgment for the plaintiff for the sum of K388.65 being leave pay, and the sum of K204.00 as the surplus from the re-sale price of K1,200.00 as against the defendants' loan of K996.00.

The plaintiff has failed to substantiate his main claims against the defendants and I will order that he pays the costs of this action.

PRONOUNCED in open Court this 30th day of November, 1989 at Blantyre.


R.A. Banda
JUDGE