

C.S.

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.326 OF 1987

BETWEEN:

EDSON R. DUWA

PLAINTIFF

- AND -

COLD STORAGE COMPANY LIMITED

DEFENDANT

CORAM: MKANDAWIRE, J.

Makhalira, Counsel for the Plaintiff
Msiska, Counsel for the Defendant
Chigaru, Official Interpreter
Maore, Court Reporter



JUDGMENT

By his amended writ of summons the plaintiff is claiming against the defendant the sum of K205.97 being one month's salary and leave pay; and damages for wrongful suspension, wrongful dismissal, false imprisonment, malicious prosecution and pension contributions. In the course of the trial the defendant conceded that the plaintiff was entitled to K102.97 leave pay and I accordingly entered judgment in that amount. The defendant is denying the other allegations.

It is not in dispute that in 1978 the plaintiff was employed in the defendant company as an Invoicing and Sales Clerk. He was in the Pork Section. His responsibilities involved the selling of meat products. He used to keep two sets of books, cash sale receipt books and miscellaneous cash sale receipt books. Big sales were transacted in the cash sale receipt books while the miscellaneous cash sale receipts were issued for small sales. It was not necessary to issue a cash sale for each small sale so that several small sales could be recorded on one miscellaneous cash sale. At the end of the day the money collected on the miscellaneous cash sale receipt books would be totalled and one receipt issued from the main cash sale receipt books. The money would then be paid over to the Chief Cashier. Mr. Kajawo who was the plaintiff's immediate boss would check the cash and the entries in the receipt books before the money was paid to the Chief Cashier. This in a nutshell was the sales procedure in the Pork Section where the plaintiff worked.

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It was the plaintiff's case that in about October/November, 1984, his sales books were checked by the Internal Auditor, Mr. Mwalukuwo. The Internal Auditor did not tell him if anything was wrong and he was not asked to give any explanation at all. To the plaintiff's surprise on 29th November, 1984, the Personnel Officer, Mr. Kachale called him to his office and told him that there was a theft but the amount allegedly involved was not disclosed. Then the Personnel Officer said they had to go to Police where the plaintiff was to give evidence. The plaintiff was driven to Blantyre Police Station in the Personnel Officer's car and the Internal Auditor, Mr. Mwalukuwo accompanied them. When they got to the Police Station, Mr. Mwalukuwo got hold of his shirt by the neck and dragged him. Then a Police Officer asked "Have you brought us a thief?" and Mr. Mwalukuwo said "Yes". The Police Officer then welcomed him with some slaps. It was Mr. Mwalukuwo who did the introduction and this is what he was alleged to have said:

"This is Duwa who worked for Cold Storage. He stole some money so keep him as we are still investigating. Some of the books cannot be found."

Acting on Mr. Mwalukuwo's instruction, the Police officer put the plaintiff in custody without even interrogating him. He was kept in Police custody for 7 days up to 5th December, 1984 when he was released on bail. He was released because Mr. Mwalukuwo told the Police that investigations were over.

Upon being released he went to the defendant company and saw the personnel Officer, Mr. Kachele who told him to go home and wait until the case was over. He was not given any letter of suspension neither was he given any letter of dismissal. While at home he did not receive any salary. The case was subsequently taken to Blantyre Court where he was convicted and sentenced to 5 years imprisonment with hard labour. He appealed to the High Court and on 13th January, 1987 the conviction was quashed and he was released. He then went to the defendant company to check on the position relating to his employment. To his shock he was told that he had been dismissed and he was given photocopy of the letter of dismissal. The letter reads as follows:

12th September, 1986

Mr. E.R. Duwa,
C/o Cold Storage Co. Ltd.,
P.O. Box 575,
BLANTYRE.

Dear Mr. Duwa,

You were suspended on 30th November, 1984
without pay for a case involving loss of company
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money due to your mismanagement of sales.

The company suffered the loss and this was confirmed and now Management decided to summarily dismiss you as from 30th November, 1984.

Yours faithfully,

J.J. Kachale
PERSONNEL & TRAINING OFFICER

It was the plaintiff's evidence that although the letter was dated 12th September, 1986, he never got it until on 10th April, 1987 when a copy of it was given to him at the defendant's offices. This was because it was addressed to him at Cold Storage Ltd. although he no longer worked there.

According to the terms of employment, his services could only be terminated on his being given one month notice. As he was not given any notice he is now claiming one month salary in lieu of notice. The defendant company had a contributory pension scheme so that when his services were terminated he got his own contributions amounting to K172.42. He is now claiming the defendant company's contributions which according to the conditions of service were $\frac{2}{3}$ of his own contributions. For the criminal prosecution he hired Messrs Wilson and Morgan who charged him K400.00. He is now claiming this amount from the defendant as it is alleged that the prosecution was malicious in that there was no reasonable or probable cause.

It is common case that the Internal Auditor, Mr. Mwalukuwo who audited the plaintiff's books left the country after this case was reported to Police. Mr. Khondiwa who was the Company Accountant testified that after the Internal Auditor left the country he was instructed by Management to go through the books. He did go through the books maintained by the plaintiff and he confirmed the discrepancies that were reported by the Internal Auditor. He compared the daily sales in the miscellaneous cash sales and the main cash sales showing the day's amount that was to be handed over to the Chief Cashier. He then made summaries of his findings. The miscellaneous cash sale books were tendered as Exhibit D1 while his summaries were Exhibit D2. It was his evidence that the plaintiff did not pay to the Chief Cashier all the money that was realised. He used to withhold some amounts. It was impossible for the Chief Cashier to discover this discrepancy as he did not examine



the miscellaneous cash sales. Mr. Kajawo, the Production Manager, used to sign for the money to be paid over to the Chief Cashier but did not go through the miscellaneous cash sales. It was Mr. Khondiwa's evidence that according to his findings the plaintiff had misappropriated K1,155.00. It was his view that this was a proper case to be referred to Police.

Mr. J.J. Kachale, the Personnel and Training Manager is the person who took the plaintiff to Police. His evidence was that when Management was satisfied beyond doubt that theft was committed the matter was reported to Police. The Police said they had no transport and he and Mr. Mwalukuwo took the plaintiff to Police. At the Police Station, it was Mwalukuwo who presented the matter. They had carried the relevant books with them. It was Mr. Kachale's evidence that it is not true that Mwalukuwo had dragged the plaintiff into the Police Station. They did not say that they had brought a thief and no Police Officer slapped him. After making the report the Police Officer told them to leave the plaintiff there so that they should investigate the matter. According to this witness the Police imprisoned the plaintiff on their own and it was the Police who decided to prosecute the plaintiff. Turning to the dismissal letter he said he wrote it so late because the case took a long time. As far as he is concerned, there is nothing wrong about backdating a dismissal letter. As for pension, he said that the plaintiff's service was so short that he did not qualify for company contribution. The company's conditions of service were not made available to the Court.

It was Detective 2nd Sergeant Chabvuta who was charged with this case. He told the Court that on 29th November, 1984 he received a report of theft from Cold Storage. It was Mr. Mwalukuwo who had telephoned. Mr. Chabvuta did not have transport and so he told Mr. Mwalukuwo to go to the Police Station. Mr. Mwalukuwo went there with Mr. Kachale and the suspect, the plaintiff. They also brought receipt books with them. The Police officer interviewed Mr. Mwalukuwo and he went through the books in the presence of the suspect who denied having misappropriated any money. Sergeant Chabvuta then put him in custody. As for taking the plaintiff to Court, he said it was the Police decision to prosecute. The Officers from Cold Storage did not influence the Police. It was his evidence that he carried out the investigations and it took him many days before he finally decided to charge the plaintiff with theft by servant.

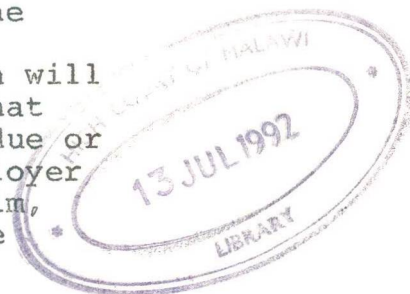
Such was the evidence before me. I now have to consider the evidence in relation to the claims made by the plaintiff. I start with wrongful suspension and wrongful dismissal. These are really one and the same thing. In paragraph 2 of its defence the defendant has pleaded that it was justified in dismissing the plaintiff summarily because he was guilty of misconduct.

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In his submission Mr. Msiska said that an employer is entitled to dismiss summarily where an employee has misconducted himself. He then cited the provisions of Section 11 of the Employment Act. On the other hand Mr. Makhalira submitted that the defendant was not justified in dismissing the plaintiff the way it did.

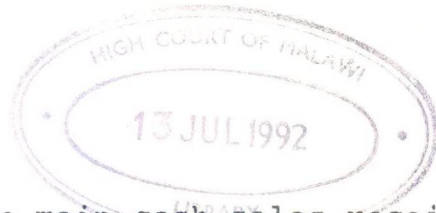
The law is quite clear on the question of summary dismissal. It is well established law that an employer is entitled to dismiss summarily where an employee has misconducted himself. Section 11(a) of the Employment Act is to this effect and in addition there is a wealth of authority. I can only cite the case of George Nyirenda -vs- Lujeri Tea Estates Limited, Civil Cause No.507 of 1981 (unreported). In that case Unyolo, J. quoted with approval passages from the cases of Sinclair v. Neishbour (1967) 2QB 289 and Wasili v. Clan Transport Ltd., Civil Cause no.506 of 1981 (unreported). The passage from the Wasili case reads as follows:

"It has been said time and time again by the Courts that there is no fixed rule of law setting out the degree of misconduct which will justify dismissal. The general rule is that anything which is incompatible with the due or faithful discharge of his duty to his employer the employer is justified in dismissing him, even though the incompatible thing is done outside the service."



There does not have to be a criminal conviction to amount to a misconduct. Indeed in the case of George Nyirenda the plaintiff was acquitted of criminal charges and yet it was held on the facts that the defendant was entitled to dismiss him summarily.

What is the position in the present case. The criminal prosecution ended in the plaintiff's favour. In allowing his appeal in the High Court, it was observed that the proper witness of fact would be Mwalukuwo who bolted the country. Mr. Khondiwa, the Company Accountant, gave evidence in his place. It was noted that the evidence of Mr. Khondiwa was inconsistent and self contradictory and mostly hearsay. That was all very well in a criminal case where the prosecution must prove its case beyond reasonable doubt. In a civil case however, the burden of proof is on a balance of probabilities. Mr. Khondiwa gave evidence in this Court. He said he went through the books maintained by the plaintiff and then prepared summaries. These were then tendered in evidence. I have looked at the miscellaneous cash sales and the main cash sales receipt books. These do not leave the plaintiff entirely free of guilt. I am using the word "guilt" in the civil sense and not in the criminal sense. When one adds up the sales in the miscellaneous

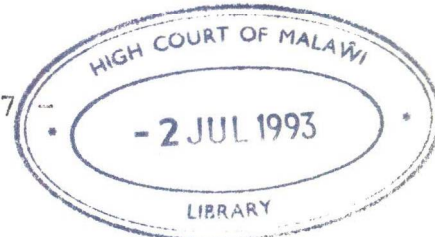


cash sales and compares them with the main cash sales receipts, one finds a number of discrepancies. Although he was not alone in the Pork Section, it was his responsibility to see to it that sales were properly conducted, books of accounts properly maintained and all monies realized handed over to the Chief Cashier. Having discovered these discrepancies, I think that the defendant could no longer hold him in its trust and so it was entitled to dismiss him instantly. I therefore find that in the circumstances the defendant was entitled to dismiss him summarily. This cause of action therefore fails.

Mr. Makhalira has submitted that the plaintiff only received the letter of dismissal on 10th April, 1987, so he must be paid for the period 30th September, 1984 to 10th April, 1987. This claim cannot succeed because the plaintiff did not specifically plead the loss occasioned during this period. According to the pleadings he only claimed K205.97 representing one month salary and 26 days leave pay. But let me say this, the letter of dismissal is dated 12th September, 1986 but the dismissal is ante-dated to 30th November, 1984. It is wrong in law to ante-date dismissals and suspensions. See the cases of J.C. Mwalwanda -vs- Press Holdings Ltd., Civil Cause No.146 of 1982 (unreported), P.F. Gwembere v. Malawi Railways Ltd., Civil Cause No.327 of 1978 (unreported). Perhaps I should go a little further. Even if the plaintiff had specifically pleaded the loss of salary during this period, it is very doubtful if such a claim would have succeeded. I say so because the plaintiff was suspended without pay on 29th November, 1984, but he was paid up to 30th November, 1984. Although it is wrong in law to ante-date dismissals, in the instant case the dismissal was only ante-dated to about the day the plaintiff was suspended without pay.

I now move onto false imprisonment. The evidence before this Court is that Mwalukuwo and Kachale took the plaintiff to the Police Station. I do not believe that Mwalukuwo physically dragged him into the Police Station. If there was any need for dragging that should have started at Cold Storage. I further do not believe that Sergeant Chabvuta had asked if they had brought a thief. It is clear from the evidence that it was the defendant through Mwalukuwo and Kachale that initially arrested and imprisoned the plaintiff. The plaintiff was imprisoned from the moment he was told to go into Mwalukuwo's car. I do not agree that the plaintiff voluntarily went into Mwalukuwo's car. He was being charged with theft, a theft which he was denying and I do not think that in those circumstances he could have volunteered to go to Police. He may not have been physically dragged into the car but he certainly did not go into it freely and voluntarily. Imprisonment does not necessarily mean confinement in a building declared to be a prison. It consists of the restraint of a man's liberty. In the case of Terms de a Ley it was defined as:

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as:

"Imprisonment is no other thing but the restraint of a man's liberty, whether it be in the open field, or in the stokes, or in the cage in the streets or in a man's own house as well as in the common goal; and in all the places, the party so restrained is said to be a prisoner so long as he had not his liberty freely to go at all times to all places whether he will without bail or mainprise or otherwise."

The question that immediately follows is, were Mwalukuwo and Kachale justified in so arresting and imprisoning the plaintiff. Mr. Msiska submitted that they were, because a theft had been detected and it was the Police who requested them to take the suspect and the books to the Police Station. With respect, this is not entirely correct. The evidence of Sergeant Chabvuta (DW4) was that when he got the report on the phone, he asked the reporter to go to the station as he had no transport. He did not say bring Mr. Duwa and the books. Mwalukuwo could very well have gone to Police to report the alleged theft without taking with him the plaintiff and the books.

The powers of arrest by a private person are very restricted. They are not as wide as those of a Police Officer. Indeed imprisonment whether false or lawful cannot be divorced from arrest for imprisonment must of necessity start with an arrest. Section 33(1) of the Criminal Procedure and Evidence Code gives the private citizen powers of arrest. It provides as follows:

"Any private person may arrest any person who in his view commits a cognizable offence, or whom he reasonably suspects of having committed a felony, or who has been proclaimed as an offender under section 106."

This section is a mere restatement of the common law position. It would indeed be a serious encroachment on the liberty of the subject if mere suspicion were to be the basis of a lawful arrest and subsequent imprisonment. For a private person to justify an arrest or imprisonment it is not enough merely to show that he had reasonable suspicion that a felony had been committed he must go further and prove that a felony was in fact committed. In the case of Beckwith -vs- Philby (1827) 6 B&C 635 Lord Tenterden said as follows:

"In order to justify (a private individual) in causing the imprisonment of a person he must not only make out a reasonable ground of suspicion but

he must prove that a felony has actually been committed."

Again in the case of Waters v. W.H. Smith & Son Ltd. (1914) 1KB 595, it was said that the case of a private person arresting another, he must show that the particular felony for which he arrested had in fact been committed and that, he had reasonable ground for suspecting that the person he arrested had been guilty of that felony. At page 607 Sir Rufus Isaacs, C.J. had this to say:

"When a person, instead of having recourse to legal proceedings by applying for a judicial warrant for arrest or laying an information or issuing other process well known to the law, gives another into custody, he takes a risk upon himself by which he must abide and if in the result it turns out that the person arrested was innocent, and that therefore the arrest was wrongful, he cannot plead any lawful excuse unless he can bring within the proposition of law which I had enunciated in this judgment.



In this case, although the defendants thought and indeed it appeared that they were justified in thinking, that the plaintiff was the person who committed the theft it turned out in fact that they were wrong. The felony for which they gave the plaintiff into custody had not in fact been committed, and, therefore the very basis upon which they must vest any defence of lawful excuse for the wrongful arrest of another fails them in this case."

In that case the plaintiff was arrested by private persons on an allegation of theft. He was subsequently acquitted of the criminal charge. He then sued his arrestors for false imprisonment and malicious prosecution. He succeeded in the claim for false imprisonment but lost in the other claim. Similarly, in the instant case, Mwalukuwo and Kachale must not only show that they had reasonable cause to believe that the plaintiff was guilty of theft, but they must go further and prove that there was in fact a theft committed. Since they are private persons, that is the only way they can justify the arrest and imprisonment. As it happened no theft was in fact committed as prosecution ended in the plaintiff's favour. The very basis of the defendant's defence was therefore completely shattered.

Still on the question of false imprisonment, I found the case of Dallison -vs- Caffery (1965) 1KB 348 to be very interesting. In that case the defendant was a Detective



Constable. He had arrested the plaintiff for theft on some mistaken identity. In the final analysis the plaintiff was acquitted as the prosecution offered no evidence. Drawing a distinction between the powers of a Constable and a private person, Lord Denning M.R. said as follows at page 366:

"So far as arrest is concerned, a Constable has long had more power than a private person. If a Constable makes an arrest without a warrant, he can justify it on the ground that he had reasonable cause for suspecting that the accused had committed a felony. He does not have to go further (as a private person has to do) and prove that a felony has in fact been committed."

In the same case at page 370 Diplock, L.J. said as follows:

"The rule that a person who arrests, detains or prosecutes a suspected felon commits no actionable wrong if he acts honestly, and reasonably applies alike to private persons and Police Officers, but, what is reasonable conduct in the circumstances may differ according to whether the arrestor is a private person or a Police Officer. One difference, too well settled now by authority to be altered, is that a private person can only arrest if a felony has in fact been committed; whereas a Police Officer can do so if he reasonably believes that a felony has been committed."



So what is the position in the present case. Since no felony was in fact committed, in arresting and detaining the plaintiff, the defendant did so at its own peril. It cannot justify the course of action it took. It matters not that the defendant acted in the honest belief that the plaintiff was a thief. The truth of the matter was that in fact no felony had been committed.

I now want to look at what happened at the Police station. As to that, the law was well stated in the case of C.S. Chintendere -vs- Burroughs Ltd. Civil Cause No.530 of 1981 (unreported). Mwalukuwo and Kachale may not have said in so many words, that they had brought a thief, but the facts spoke for themselves. Sergeant Chabvuta had only asked the reporter to go to Police. He did not say bring Duwa or the suspect or the books and yet Mwalukuwo and Kachale took with them the plaintiff and books of accounts. In my view Mwalukuwo and Kachale were not just setting on foot a judicial inquiry,

but they were in fact telling the Police officer that the plaintiff was the thief and they even took the evidence with them to show how the plaintiff committed the theft. The plaintiff was not the only Clerk in the Pork Section, there was an assistant and it was conceded that some of the receipts were not written by the plaintiff. According to Kachale, Management was satisfied beyond doubt that the plaintiff was the thief and that was why he was taken to Police. The defendant did not only lay information at the Police but in fact made a charge against the plaintiff. In my judgment the subsequent imprisonment by Sergeant Chabvuta was in fact imprisonment by the defendant. There can be no doubt whatsoever that it was the defendant who put the plaintiff into custody. The claim for false imprisonment therefore succeeds.

I now turn to the claim for malicious prosecution. This claim must fail. Sergeant Chabvuta's evidence was that when the plaintiff was in custody he made his own investigations. He even went to Cold Storage to investigate and finally decided to prosecute the plaintiff. Indeed there were reasonable grounds upon which to base a prosecution. This claim is dismissed.

The claim for the defendant company's contributions towards the plaintiff's pension cannot be sustained. This was a contract of employment and the question of pension scheme can only be part of conditions of service to which the plaintiff submitted himself. Such a claim can only be based on the conditions of service. Such conditions of service were not made available and so it is impossible to say in what circumstances the defendant would contribute towards its employee's pensions. It was for the plaintiff to come up with all this in order to prove his claim. In my judgment he has failed to substantiate the claim. It is accordingly dismissed.

Having entered judgment for the plaintiff in respect of false imprisonment I must now address my mind to the question of damages. He was in custody for 7 days. During this period he must have suffered mental anguish and embarrassment. The case of S.J. Mwakalinga -vs- Tratsel Supplies Ltd. Civil Cause No.403 of 1984 soundly summarises what a plaintiff is compensated for in cases of false imprisonment. I wish however to echo what has time and time again been said in these Courts that a person's liberty is a very precious thing and it should not be interfered with without just cause. Indeed as Sir Rufus Isaacs, C.J. said in the Walters case at page 602:

"Interference with the liberty of the subject, and especially interference by a private person has ever been most jealously guarded by the common law of the land."

Now I come to damages proper. I intend to seek assistance from what was awarded in similar cases. In Fordson Banda v. Southern Bottlers Ltd. Civil Cause No.41 of 1987 the plaintiff was falsely imprisoned for 30 days. He was awarded K40,000.00 damages. In ADMARC -vs- Stambuli M.S.C.A. Civil Appeal No.6 of 1984 K4,000.00 was awarded for 3 days. In S.J. Mwakalinga v. Tratsel Supplies Ltd. Civil Cause No.403 of 1984 K10,000.00 was awarded for 22 days. Indeed there can be no arithmetical progression in the assessment of damages. Each case must be decided on its own facts. Even then I would wish to comment that the damages awarded in the Mwakalinga case were very much on the low side. In the instant case I think that a sum of K7,500.00 would be sufficient compensation and I so order.

The question of costs has really exercised my mind. This is so because the plaintiff has only succeeded in false imprisonment but lost in wrongful dismissal and malicious prosecution. In the Mwakalinga case the plaintiff lost in malicious prosecution and yet he was awarded all the costs. Similarly in the cases of Godfrey E. Malemia v. Optichem (unreported) Civil Cause No.379 of 1985 and John Kiwa -vs- BAT (MW) Ltd. Civil Cause No.322 of 1987 the plaintiffs lost in malicious prosecution claims and yet they were awarded the full costs of the trial. Costs are in the discretion of the Court and going by the authorities I have cited, I order that the defendant will pay the costs of these proceedings.

PRONOUNCED in open Court this 27th day of June, 1990,
at Blantyre.


M.P. MKANDAWIRE
JUDGE

MR. MPONDA: I seek leave for a possible appeal in respect of costs. I am only taking judgment on behalf of my Senior Colleague. I seek leave in case he decides to appeal against that order - Order 62/2.

MR. MAKHALIRA: I do not see the validity of the appeal - but they have the right of appeal - I cannot object.

COURT: Leave granted.


M.P. MKANDAWIRE
JUDGE