

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.707 OF 1989

BETWEEN:

M. CHIUMIA PLAINTIFF

SOUTHERN BOTTLERS LIMITED DEFENDANT

CORAM: UNYOLO, J.

Nakanga, Counsel for the Plaintiff
Msisha, Counsel for the Defendant
Chigaru, Official Interpreter
Phiri, Senior Court Reporter

JUDGMENT

In this action the plaintiff by his writ of summons and statement of claim filed therewith claims damages against the defendants for false imprisonment. The plaintiff avers in the said statement of claim that the defendants on 6th June, 1988 acting through their servants (a) wrongfully arrested and imprisoned him for one hour at their premises and (b) wrongfully directed and procured the Police at Ndirande to arrest and imprison him and that he was consequently kept in custody from the said date of 6th June, 1988 to 11th June 1988. In their defence the defendants deny these allegations. On the question of the plaintiff's arrest by the Police and his subsequent incarceration the defendants aver that the said Police acted on their own responsibility in the matter and not pursuant to any direction or request of their servants as alleged or at all.

The following facts are common ground. The plaintiff was at all material times employed by the defendants as a Stores Clerk. He worked in the Stores Department at the defendants head office in Blantyre. He was responsible for looking after spares of divers kinds procured by the company for internal use and also for issuing the same from time to time upon requisition by the appropriate departments. There was another Stores Clerk, one Maulana, who did this job with the plaintiff. Further there were three other employees who worked in the Stores and shared office with the plaintiff and his colleague, Maulana. These were the Stores Controller, a Costing Clerk and a Tyres Recording Clerk.

Routinely the Stores Department carried out a stock take of the items in the Stores every month. Accordingly a stock take was commenced on 1st June, 1988. The Stores Controller, the plaintiff and the other Stores Clerk took part in the said stock take. At the end of the exercise the team found a shortage to the tune of K2,200.00. They started all over again assisted by the Company's Assistant Accountant just to be sure they had not made a mistake but again they came up with the same result. The plaintiff and his colleague were asked to explain how the shortfall came about. Both failed to do so. They were then told not to enter the Stores again while the matter was being referred to Management. The plaintiff and his colleague reported for duties on the next day but just sat outside. An Internal Auditor was called to come and carry out a further check. The said Auditor did this and he too came up with the same result. This was on 3rd June 1988, a Friday. Then on Monday, 6th June, 1988 the plaintiff and his colleague reported for duties but again they just sat outside as they had been banned from entering the Stores. Later in the course of the day they were called and then taken to Ndirande Police Sub Station where the matter was reported and without much ado they were there locked up in cell. Later on they were both charged with embezzlement and then released on bail on 11th June, 1988. They were required, as one of the conditions of their bail, to report regularly to the Police, which they did and subsequently they were arraigned before the Resident Magistrate's Court, Blantyre on a charge of theft by servant. They pleaded non cul. For reasons which are not clear the prosecution later withdrew the case and the plaintiff and his colleague were thereupon discharged. The case was however resurrected the following year. The prosecution led evidence and at the end of the prosecution's case the court found no case for both accused (namely the plaintiff and his colleague) to answer and they were accordingly acquitted. In the interim i.e. after his discharge, already mentioned, the plaintiff instituted the present proceedings against the defendants. Thus far, the facts are agreed.

The plaintiff's case as indicated at the very beginning of this judgment is that the defendants per their servants wrongfully arrested and imprisoned him for a period of one hour at the defendant's premises. The plaintiff's evidence on this point was that after he reported on duty on Monday, 6th June 1988 he was later taken to a room used by security guards and kept there for one hour where he was beaten up by the said guards so as to induce him to disclose what he had done with the missing items. He said that the said guards had actually been instructed by the company's personnel officer to subject him to physical torture until he had disclosed where the items were. None of the guards was called by the defendants to refute the story on this aspect. The Court was told that the personnel officer could not testify in this case because he left this world in 1990 before the case came to trial. He died from natural causes. The Stores Controller gave evidence. He said he was simply asked to take the plaintiff and his

colleague to the Police Station and that he did not know the two had earlier been detained in the guardhouse and subjected to torture. It is pertinent, pausing here, to note that the plaintiff's case on the pleadings is, as already indicated, for false imprisonment only. An action or claim for assault or battery is not included and nowhere in the statement of claim does the plaintiff aver that he was assaulted or tortured. In his evidence the plaintiff said that when he got into the guardhouse, several guards set upon him with baton sticks hitting him in the legs. In my view that would be quite a serious matter which the plaintiff could not have glossed over in his statement of claim if indeed he had gone through such an ordeal. Indeed he would have suffered actual bodily harm for which there is no evidence nor is there any evidence that he raised the matter with the police or anybody. In short I am unable to believe the story on this aspect and would reject it as an exaggeration and also as being irrelevant, the matter having not been pleaded in the first instance.

On the other aspect it may well be true that the plaintiff and his colleague were kept in the guardhouse just before they were taken to the police station. The story is plausible and indeed it has not been effectively challenged. As to what constitutes an arrest or imprisonment the law is settled. The classic definition of imprisonment appears in Termes de la Rey which is as follows:

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

There is, on the facts of the present case, no direct evidence that the plaintiff was brought into the guardhouse and/or kept therein against his will. The evidence must however be considered as a whole. There is no doubt that the plaintiff was suspected in the matter. For three days he was not allowed to resume work let alone enter his office. It may indeed be that when he was called into the guardhouse and kept there he genuinely believed that he could not leave at will. In short I am satisfied on the total evidence that the defendants servants did arrest and imprison the plaintiff at the defendants premises on the material day, and I find accordingly.

The next question to be resolved is whether this was wrongful arrest and imprisonment. Before I go any further I wish to say that I have considered with sufficient care the arguments put forward by Mr. Msisha, learned counsel for the defendants, in his submissions and I am obliged to him for the authorities he presented. On the other hand Mr. Nakanga, for

the plaintiff, thought that there was no need for submissions, he did not therefore make any submissions in this matter. Reverting to the question at hand it is trite that powers of arrest are, under the law, normally vested in the police. The reason for this is not far to seek. The liberty of a person is of paramount importance and should not be interfered with except on legal grounds. With their training and knowledge of the relevant law, the police are expected to know when they may arrest, with or without warrant; that is why. In Malawi a private person may however also effect an arrest. Section 33 of the Criminal Procedure and Evidence Code provides:

"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." (The underlining is mine).

Section 34 of the Code is also pertinent. This provides:

"Any private person arresting any other person without a warrant shall without unnecessary delay make over the person so arrested to a police officer, or in the absence of a police officer shall take such person to the nearest police station."

Put briefly, a private person in Malawi may effect the arrest of another person without a warrant in any of the three situations given under section 33 and having done so such person must turn over the arrested person to the police without undue delay. Such is the position at criminal law so that if, depending on the facts, these provisions have been complied with the private person effecting the arrest does not commit an offence and cannot be faulted, definitely not under criminal law. The thorny question is whether the position is different under civil law, as in the present case. Mr. Msisha argued that it should not make any difference. Citing the case of Christie v. Leachinsky (1942) AC 573 and the case of John Lewis v. Tims (1952) A.C. 676 the learned Editors of Clerk & Lindsell on Torts 11th Edition summarize the law on this aspect at page 270, paragraph 420 as follows:

"An unlawful arrest is a false imprisonment, and if the requirements of the law as to informing the arrested person of the grounds of his arrest or taking him before the approved authorities within a reasonable time are not complied with, an arrest which might otherwise have been justified will be unlawful and ground an action in false imprisonment."

From this statement of the law, which I agree with, with respect, it is clear that where a person arrests another person in compliance with the requirements of the law, and for the purposes of this case I am basically referring to the provisions of sections 33 and 34 reproduced above, then such

arrest cannot constitute a criminal offence nor ground an action for false imprisonment. I therefore agree with Mr. Msisha that the position is the same in a criminal case as in a civil case.

The next question therefore is whether the defendants servants in the case at hand acted in compliance with the said requirements of the law. Just to remind ourselves I am talking at this juncture only about the incident that occurred at the defendants' premises. The first point to be considered here is whether the plaintiff was reasonably suspected of having stolen the missing spares. In the final analysis this is a factual question whose answer must depend on the total facts of the case. I would here repeat what I have said earlier on that matters involving the liberty of the individual or abuse of human rights must not be taken lightly. Courts must therefore proceed with chameleon caution in considering the question whether the private person had reasonable cause for suspecting that a felony had been committed by the person arrested. From the plaintiff's evidence, and the cross-examination of the defendants witnesses by Mr. Nakanga, it appears the plaintiff's position is that the defendants servants had no reasonable ground for suspecting him in the matter at all. First it was asserted the plaintiff and the other stores clerk were but only two of the five people who shared the room/office the stores were kept. It was asserted further that the said stores were kept in an open place. Finally it was asserted that the plaintiff was sick and did not come to work on a number of days in May; the month the items missed. It was the Plaintiff's argument between the lines that on these facts it was not reasonable to pick on him as the other three clerks or one of them could have stolen the missing spares.

On the other hand, the following facts are also pertinent: First it is common case as earlier indicated that after the stock take a large number of spares valued K2,200.00 were found to be missing. Secondly it is to be noted that of the five persons who shared the office where the said spares were kept it was the plaintiff and his colleague, as stores clerks, who had the primary responsibility of looking after the spares and issuing them out; the other three basically had their own specific jobs to do. It was also in evidence that the plaintiff kept the key of the said office as did the other stores clerk. On these facts it appears to me reasonable to suspect him and his colleague in the matter. Indeed the argument that the other three men should also have been suspected and arrested does not in my view assist the plaintiff so long as he too was reasonably a suspect in the matter. For these reasons I reject the plaintiff's argument on this aspect.

The second point is whether the plaintiff was told why he was placed under confinement. The evidence is clear. He knew at all material times this was because he was suspected of having stolen the missing spares. Then there is the final point whether the defendants servants acted without unnecessary

delay in turning the plaintiff over to the police. As earlier pointed out the time the plaintiff complains of is one hour. With respect I do not consider this as undue delay in all the circumstances.

In the upshot I find that the defendants servants were justified in detaining the plaintiff and keeping him to the time they handed him over to the police. Accordingly the plaintiff's case on the first limb must fail and it is dismissed.

I now turn to the second limb relating to what happened at the Police Station when the plaintiff was brought there. The plaintiff's case on this point was that when they arrived at the Police Station the Personnel Officer said to the police:-

"The people we are suspecting to have stolen are these. Help us to that the goods can be recovered."

The plaintiff went on to say that the Stores Controller then handed to the police a document on which the missing items were noted and that immediately after this they were placed in cell. The Stores Controller gave evidence. He said that when they got to the Police Station he simply told the police about the shortage as disclosed by the stock take and that Management had requested him to bring the two stores clerks to police and report the matter for assistance. He said the police requested him to give a statement which he did and then left. It was his evidence further that after two days the police phoned requesting him to bring the other two clerks viz the costing clerk and the tyre recording clerk. He did so and he was asked to tell how they worked in the office. Then the other two clerks gave their statements after which they were told to go. The police officer who handled the case gave evidence. He agreed that the Stores Controller merely reported about the shortage found after the stock take and went on to say that the decision to detain the plaintiff and the other stores clerk was his after interviewing the parties.

Let me stop here to say something about the law. I think that it is now settled the critical issue in false imprisonment where a matter is reported to the police is to decide whether the defendant or his servants or agents merely stated the facts to the police or whether they made a charge against the plaintiff. The cases go on to say that the test is that if the defendant or defendant's servants or agents made a charge on which it became the duty of the police to act then the defendant is liable but will not be liable if they merely gave information and the police acted according to their own judgment. See Hauya v. Cold Storage Co. Ltd. Civil Cause No. 274 of 1987 and see also Saulosi & Paketi v. Bata Shoe Co. (Mw) Limited Civil Cause No. 568 of 1987, both unreported. I also wish to add here that in the final analysis this is a factual

matter. All the available evidence must be considered with religious care. The Court should not only look at what the reporter said. As everyone knows actions can speak louder than words. Consequently the manner in which the reporter has acted is a factor which may be taken into account in determining whether such reporter merely gave information or whether he procured and/or directed the police to effect an arrest.

Reverting to the present case the defendants case is that they merely stated the facts emerging from the stock take to the police and that the police detained and incarcerated the plaintiff according to their own judgment. In this contention they have been amply supported by the police officer who actually handled this matter as I have just pointed out. Indeed that is also what I think the plaintiff's own evidence, as reproduced above, amounts to. The plaintiff's case on this aspect must therefore fail.

In conclusion I would like to refer to sections 31, 32 and 34(3) of the Criminal Procedure and Evidence Code to which the Court's attention was brought by Mr. Msisha. To start with Section 34(3) provides that when a suspect has been brought to the police such person shall be at once released if there is no sufficient reason to believe that he has committed any offence. Where, however, this is not the case, the police must in compliance with section 32 bring the arrested person before a court as soon as possible. For most offences this means within 24 hours. And under section 31 the police are empowered to release the arrested person on bail to appear before a court on a date specified in the bail bond. Regrettably these provisions may not in most cases be complied with by the appropriate authorities. I thought I should bring these matters out but all in all the person who reports a case cannot be faulted once he has himself complied with what is required of him personally under the law as I have endeavoured to show in this judgment.

For all these reasons the plaintiff's action fails in its entirety and is dismissed cum costs.

PRONOUNCED in open Court this 1st day of October, 1991 at Blantyre.

L.E. Unyolo
JUDGE