IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 337 OF 1990

BETWEEN:

R MAUCOMBO (MALE).....PLAINTIFF

-- and --

MALAWI RAILWAYS LIMITED.....DEFENDANT

CORAM: MKANDAWIRE, J.
Nakanga, of Counsel, for the Plaintiff
Mhendera, of Counsel, for the Defendant
Kalimbuka Gama, Court Clerk
Phiri, Senior Court Reporter

J U D G E M E N T

In this case the plaintiff is claiming the sum of K2,065.19 which he says he lost as a result of the wrongful dismissal he suffered at the hands of the defendant. There is also a claim for damages for false imprisonment and trespass. The defendant is denying liability.

The plaintiff gave evidence as PW3. He said he was employed by the defendant in 1975 as a loader and then rose to the post of tarpaulin clerk. In 1987 his salary rose to K73.00 a month. It was the plaintiff's evidence that on the morning of 7th December, 1987 Mr Chimembe, another employee of the defendant, went to his house at Yasini and told him that he was wanted at the office. The plaintiff did not go for work that day because he was sick. When he arrived at the office, he reported at the Security Department, where he was pushed into a room which can conveniently be described as a cell. He was told that he was a thief, as he had stolen some tarpaulins and he was put in chains. He was kept in that room for some hours. Mr Chimembe later took him to Limbe Police Station in a car that contained some tarpaulins, allegedly stolen. Mr Chimembe told the Police that the plaintiff worked for the defendant and that he had stolen some tarpaulins. Mr Chimembe also told the Police that he would bring more stolen tarpaulins. The plaintiff was then locked up and later transferred to Chichiri Prison. On a number of occasions he was taken to Limbe Police Station for questioning. He told the Police he knew nothing about the tarpaulins. He resisted the pressure that he

should admit the allegation. He was kept in custody until 14th February, 1988, when he appeared in Court for alleged theft of 10 tarpaulins costing K14,500.00. On 14th March, 1988 he was released on bail. The case was adjourned on a number of occasions, but no witnesses appeared and so on 19th October, 1989 he was discharged under section 247 of the Criminal Procedure and Evidence Code.

When he was discharged, he reported at his place of work. They could not believe him and so he went to Court and got a letter, marked Exh.P1. Armed with this letter he went back to his employers and they told him to report after some three days. When he went there he was handed with the letter of suspension - Exh.P3, dated 9th March, 1990. The suspension was without pay. He wanted to know exactly what the position was and he was told he would be paid up to that date. Later, he was told that the question of payment would be decided upon by the Disciplinary Committee, since the days he was in custody were treated as absenteeism. Then he was given Form D1 - Exh.P4, which states that on 20th November, 1987 he stole one tarpaulin and sold it in Bangwe. He was told to report every day until he met the Committee. He did appear before the Disciplinary Committee on 5th April, 1990, but the matter was not resolved. On 20th April, 1990 he was served with another Form D1 - Exh.P5, which alleged that on the same date, 20th November, 1987 he stole 9 tarpaulins. He refused to sign this. It was the plaintiff's evidence that on some other day he was told to go to the Security Department. When he got there, Mr Chimembe and another man arrested him and proceeded to take him to Police. On the way he managed to escape and went home.

The plaintiff continued in his evidence that when he was released on bail on 14th March, 1988, he went to his house at Yasini, only to find that his house had no roof and that doors, windows and frames had been removed. He was informed that it was the defendant who had done that. He was informed that it was on 8th December, 1987, the day he was arrested. The house had 3 rooms, a store, cemented floor, but the bricks were unburnt. He gave the value as K1,669.25. It was his evidence that he has not been able to build another one.

In cross-examination, he denied that he absented himself from duties from 27th November, 1987 to 7th December, 1987. He said he did not know Mr Nkochera, nor did he know Messrs Rabson January and Nyambalo. When cross-examined about the use of private cars, he said he never used private cars for official duties, as the defendant provided him with transport. At ADMARC he dealt with Mr Sauka. He maintained that the tarpaulins removed from his house were those he had bought himself. He also maintained that on 24th November, 1987 the defendant's servants went to

his house. He denied having sold any tarpaulins to Mr Nkochera. He also denied to have taken Mr Chimembe and others to Mr Nkochera's place to recover tarpaulins.

Mr MacDonald Nandolo, who is a brother-in-law to the plaintiff, gave evidence as PW.4. He said that on a date he could not remember he went to his sister who is married to the plaintiff. He found that his sister had gone to the market. While he was at the plaintiff's house, there came a vehicle belonging to the defendant. Two men emerged from this vehicle. They asked for the plaintiff's wife and he told them she was off to the market. They then explained their mission and proceeded to remove tarpaulins from the plaintiff's house. They said he should tell the wife that the plaintiff was imprisoned.

The first witness for the defence was Mr Mavuto Chimembe, who was in the defendant's employ as a security officer. His evidence was that in November, 1987 he had information that a vehicle belonging to Mr Linzi had collected tarpaulins from ADMARC. He, therefore, confronted Mr Linzi on 25th November, 1987. He also invited the plaintiff. In the presence of Mr Linzi, the plaintiff is said to have admitted that he had hired the vehicle to collect tarpaulins from ADMARC and took them to Bangwe. Then they went to Bangwe in an attempt to trace the tarpaulins, but nothing was found. Mr Chimembe went on to say that while in Bangwe he saw a house which was roofed with tarpaulins. This house belonged to Mr Rabson January. Mr January's explanation was that he had bought them from the plaintiff. Arrangements were made to have the tarpaulins removed. The plaintiff denied to have supplied the tarpaulins.

Back at the office, upon questioning, the plaintiff is said to have revealed that he had sold some tarpaulins to a Mr Nkochera of Chileka. The plaintiff then led Mr Chimembe and others to Mr Nkochera's place, where some 6 tarpaulins were removed. From that day the plaintiff did not report for duties. Mr Chimembe went on to testify that on 8th December, 1987 he had instructions to go to the plaintiff's place to collect him. When he arrived there, he was surprised to see that the plaintiff's house had company tarpaulins. He took the plaintiff to the office. But then he asked carpenters to go and remove the tarpaulins from the plaintiff's house. It was DW1's evidence that the plaintiff refused to join the carpenter because he would be embarrassed. When the tarpaulins were brought, they, together with the plaintiff, were taken to Limbe Police Station. Mr Chimembe told the Court that he explained why he took the plaintiff there and the Police accepted the story. From that day, the witness next saw the plaintiff on 4th May, 1990, when he was again instructed to take him to Police, but he ran away. When cross-examined, he said he

had told the Police that, "here is Mangombo, he stole tarpaulins." Then the Police put him in custody. He said he knew that it was the defendant who had placed the plaintiff in custody.

Mr Nkochera gave evidence as DW2. He told the Court that when he went to the defendant's place in Limbe he bought one tarpaulin on an official receipt prepared by the plaintiff. But then a deal was reached to collect more tarpaulins from ADMARC. The witness then hired a vehicle and went to ADMARC with the plaintiff to collect tarpaulins which were not receipted. He paid in excess of K100.00, but could not remember the precise amount. He confirmed Mr Chimembe's evidence that a team from Malawi Railways, together with the plaintiff, went to remove some tarpaulins from his place. He asked whether he was going to have his money back, but he was told that, that was a matter between him and the plaintiff.

The carpenter who removed tarpaulins from the plaintiff's house was Mr Christopher Medi, DW4. All he did was to remove tarpaulins from the main house and kitchen. He did not say how he removed and did not know the numbers printed on the tarpaulins. He said the one on the main house was dark and a bit new, not quite old, whatever that means.

The last witness for the defence was Mr Moses Khonje, DW5. He was the Senior Administrative Oficer in the Traffic Department. His evidence was that Clauses 6 and 7 and the Disciplinary Code were not adhered to. It was because of this non-compliance that the letter of suspension - Exh.P3 was issued on 9th March, 1990. He said disciplinary action could not be instituted earlier because the plaintiff was not available, as he had absconded. He also told the Court that they could not have suspended him on 8th December, 1987, as he was in custody. The plaintiff could not be in custody and at the same time be under suspension. Whatever disciplinary action that was to be instituted, had to wait until the case was over. According to Mr Khonje, the plaintiff was finally discharged on 18th July, 1991.

I now proceed to evaluate the evidence and in so doing I shall start with wrongful suspension/dismissal and the claim for 27 months' salary plus 9 days' salary in March, 1990. It is common case that the plaintiff was suspended on 9th March, 1990 and the reason given was that he stole one tarpaulin and sold it in Bangwe. The suspension was without pay. He was dismissed on 18th July, 1991. Although he was suspended for alleged theft, the reason given for dismissing him was abscondment. Exhibit P4 says that the plaintiff left work on 4th May, 1990, when he absconded. In his submission, Mr Mbendera has conceded that dismissal cannot be backdated. He said that presumably the plaintiff is

entitled to salary up to the date of dismissal, that is 18th July, 1991. But then Mr Mbendera observed that the plaintiff was suspended without pay on 9th March, 1990. So perhaps payment of salary could ordinarily be limited to that date. Mr Mbendera, however, sought to bring into play the provisions of Clause 19 of the Disciplinary Code. He says that although ordinarily an employee would be entitled to salary up to the date of suspension or dismissal, in this particular case, the plaintiff is not entitled to any salary, because, in terms of Clause 19, he was absent from the date of arrest. Perhaps I should set out the provisions of Clause 19. It provides as follows:

> "An employee who is arrested and detained by the Police for any cause of a civil or criminal nature shall be regarded as being absent from duty and shall not receive any wages or allowances during such absences."

It is Mr Mbendera's submission that this was a condition of service and so no salary can be paid. It matters not that the plaintiff was arrested by the defendant's security officers. On the other hand, Mr Nakanga submitted that if we are looking at the terms of contract of employment, then arrest must be by the Police, and not by a security officer. I think I agree with Mr Nakanga. Clause 19 must indeed refer to an attested member of the Malawi Police Force and no other person, although he may loosely be referred to as "police". The reason is not far to fetch. The powers of arrest of the Police and of a civilian are different. Suppose an employee of the defendant is arrested by a person other than the Police and that arrest turns out to be unlawful, should the employee lose his salary because of Clause 19? I think not. In the instant case, it is conceded that the arrest was by the defendant's servants and as a matter of fact, the plaintiff was initially detained within the defendant's premises. In cross-examination, Mr Chimembe conceded that it was the defendant who put the plaintiff in custody. In the case of **P F Gwembere -vs- Malawi Railways, Ltd, Civil Cause No. 327 of 1978** to which Mr Mbendera referred, arrest was done by a police officer. I, therefore, find that the plaintiff is entitled to salary.

Mr Nakanga further submitted that the suspension was wrongful and invalid, as the defendant did not comply with the procedures and timetable as laid down in the Disciplinary Code. It is true that the timetable was not followed and Mr Khonje, DW5, conceded that. On my part, I find that whatever delays were there, these were amply cured by the provisions of Clause 22 of the Disciplinary Code. In the case of **P F Gwembere -vs- Malawi Railways Ltd., supra**, the Court rejected the contention that a suspension would be invalid merely because the timetable as laid down in the Disciplinary Code was not followed. I, therefore, hold that

the plaintiff will have salary up to the date of suspension which is 3rd March, 1990. This works out to be K1,992.19. The element of tax will have to be taken into account.

Next I come to the claim for one month's salary, since the plaintiff was dismissed without notice. It appears to me that the plaintiff is not entitled to this. Rabson January and Linzi were not called to give evidence. I am not so sure if Nkochera got his receipt from the plaintiff, since the plaintiff was not engaged in selling tarpaulins. His official duties did not involve receiving money and issuing receipts. Again, the tarpaulins recovered from Nkochera were not in any way identified. Be that as it may, I think that there was some evidence to suggest that the plaintiff was either dishonest in his dealings, or was grossly negligent. There may not be sufficient evidence to stick a criminal conviction and perhaps that is the reason why proceedings have not been re-instituted since he was discharged on 19th October, 1989. This, however, is a civil case where the burden of proof is on a balance of probability. I think that there was sufficient ground to entitle the defendant to dismiss summarily.

I now have to consider the question of false imprisonment. In recent years, there has been a lot of litigation in this area, so that the law seems to be well settled. There is an abundant wealth of case authority. I can only cite a few. **Hauya -vs- Cold Storage Co. Ltd.**, Civil Cause No. 2074 of 1987 (unreported), **Fordson Banda - vs- Southern Bottlers Ltd.**, Civil Cause No. 41 of 1987 (unreported), **Wasili -vs- Clan Transport**, Civil Cause No. 506 of 1981 (unreported). These cases say that where the defendant or his servants merely state the fact to the Police and then the Police arrest and detain in their own judgement, the defendant will not be liable. But if the defendant makes a charge on which it becomes the duty of the Police to act, then the defendant will be liable.

Now, what are the facts of this case? It was conceded by the defendant, both in the pleadings and in evidence, that the arrest was done by the defendant's security officers. Not only did they arrest him, but they chained him and confined him in a room for several hours. He was then driven to the Police together with some tarpaulins which he allegedly stole. According to the plaintiff, Mr Chimembe told the Police that "this is Mangombo. He works for Railways and he has stolen tarpaulins". Some tarpaulins were left and Mr Chimembe said they would bring more tarpaulins. In my view, this is not laying information before the Police, but certainly making a charge. And what did the Policeman on duty do? He took down the plaintiff's name and address, asked the plaintiff to take off his slippers and belt, then put him in a cell without any interrogation. In his evidence-in-chief Mr Chimembe said

that tarpaulins and Mangombo were taken to Police. They explained their story as to why they took him there and the Police accepted the story. When cross-examined by Mr Nakanga, Mr Chimembe is recorded as having said:

> "we told Police here is Mangombo. He stole tarpaulins. Then they put him in custody. I knew it was Nalawi Railways who placed him in custody."

What else is there to look for? It is evident that when Mr Chimembe and his colleagues were taking the plaintiff to Police, he was not a suspect, but a "thief". So the Police acted on that charge and locked up the "thief". Mr Chimembe is a retired police officer and he retired at a fairly senior rank of Sub-Inspector. So perhaps in making the charge he wanted to make an impression that he still has the bite of a police officer. But alas he did that at the peril of the defendant.

Mr Mbendera then submitted with force that even if the arrest was initially by the defendant, its liability is limited to 24 hours, because thereafter it becomes the responsibility of the Police. He referred to sections 33-35 of the Criminal Procedure and Evidence Code. He then cited the case of **M Chiumia -vs- Southern Bottlers Ltd.**, Civil Cause No. 707 of 1989 (unreported) as authority for this. With respect to Mr Mbendera, the plaintiff's claim for false imprisonment did not fail on the basis of the provisions cited by Mr Mbendera. The learned Judge dismissed the claim on the basis that the defendant merely laid information at the Police and did not make a charge. This is very clear from what the learned Judge said, at page 7, second paragraph:

> "Reverting to the present case the defendants' case is that they merely stated the facts emerging from the stock 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."

At page 6 the learned Judge quoted what the Personnel Officer said to the Police:

> "The people we are suspecting to have stolen are these. Please help us so that goods are recovered."

This type of reporting is indeed simply stating the facts before the police and it is significantly and substantially different both in fact and in law from saying "Mangombo has

stolen" tarpaulins and then bringing some tarpaulins allegedly stolen to consolidate the charge. In the **Chiumia** case, **Unyolo, J.** cited the **Hauya** case as representing the law. In the **Hauya** case, **Banda J.**, as he then was, dismissed the plaintiff's case for false imprisonment in the following words:

> "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."

Both in the **Chiumia** and **Hauya** cases there was no false imprisonment, because the defendants merely laid information and there was evidence from police officers saying they acted on their own judgement after making investigations.

In the present case, a charge was made and the plaintiff was detained immediately without any interrogation. The evidence shows that the Police acted on the directions of the defendant. This submission, therefore, fails.

Finally, Mr Mbendera submitted that the arrest and detention were justified, in that an arrestable offence was committed. The only way in which a private person can justify an arrest is to show that an offence has in fact been committed. No offence was proved to have been committed in the instant case. It is said that the criminal case was not concluded, as the plaintiff was discharged under section 247 of the Criminal Procedure and Evidence Code. That is so. But the case started on 14th February, 1989 and the discharge was entered on 19th October, 1989. During this period the bail bond was extended 17 times, meaning that the case had been called many times, but not a single witness testified. Since he was discharged on 19th October, 1989, prosecution has not been re-started. In my view, this is because there is absolutely no evidence to stick a criminal conviction. The plaintiff is said to have absconded on 4th May, 1990, when the defendant proceeded to arrest him, for a second time. I would not say he absconded. He merely succeeded in resisting an unlawful

arrest which he is entitled to do in law. If the Police wanted him, they could easily have found him. There is no evidence that either the Police or the defendant tried to locate him after this date. If Mr Nakanga was able to communicate with his client, I see no reason why the Police or the defendant should fail to get him. The plain truth is that no offence was committed. This is clear from the manner in which the defendant kept on changing D1 Forms. This submission also fails. I, therefore, find the defendant liable for false imprisonment.

I now come to the painful question of damages. He was in custody for 98 days. He described the conditions in the police and prison cells as very appalling indeed. His reputation and dignity sunk and was put to great embarrassment. In the case of **Fordson Banda -vs- Southern Bottlers Ltd.** the plaintiff was awarded K40,000.00 for having been falsely imprisoned for 30 days. At the time the **Fordson Banda** case was decided, I thought that the award was really on the high side. But since the decision of that case the value of the Kwacha has been eroded. I award the plaintiff the sum of K40,000.00 as compensation for the persecution he suffered at the hands of the defendant.

I now come to the claim for trespass. It is crystal clear that the plaintiff did not authorise the removal of the tarpaulins. And the people who went to remove the tarpaulins did not even have the courtesy to wait for the wife who had gone to the market. And yet Mr Chimembe was bold enough to say that the plaintiff and the wife had given authority. Such conduct clearly constituted trespass. And there was no justification, because there was no evidence that the tarpaulins removed were not those that the plaintiff bought on receipts - Exhs. P6 and P7. The carpenter who removed them did not make a record of the tarpaulins. Mr Chimembe, who carried out the investigations, as he claims, has no record of those tarpaulins. As a matter of fact, the tarpaulins removed from Rabson January and Mr Nkochera and the plaintiff, cannot be identified. They are all lumped together. You cannot tell which one came from who. The plaintiff explained that the tarpaulins removed were those he bought. There is no evidence rebutting this assertion. In my view, this was a simple exercise, because the receipts carry numbers of tarpaulins, so it was just a matter of comparing those numbers with those printed on the tarpaulins removed from the house. This was not done. The claim for trespass, therefore, succeeds.

Coming to damages. I think that the value given has been greatly exaggerated. It will be noted that the defendant did not remove doors and windows. The house itself was of unburnt bricks. In the circumstances, I award K500.00.

In all, I enter judgement for the plaintiff in the sum of K42,492.19. In so far as salary is concerned, tax be calculated. The plaintiff has failed on a small item, but has succeeded on all major claims. I, therefore, condemn the defendant in costs.

PRONOUNCED in open Court this 16th day of October, 1992, at Blantyre.

M P Mkandawire
JUDGE