

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 688 OF 1988

BETWEEN:

F.C. MANDA.....PLAINTIFF

- and -

ETHANOL COMPANY LTD.....DEFENDANT

Coram: MKANDAWIRE, J.

Chirwa, Counsel for the plaintiff
Jussab, Counsel for the defendant
Chigaru, Official Interpreter
Longwe, Court Reporter

JUDGMENT

The plaintiff in this case is claiming the sum of K472.40 being special damages and general damages for defamation, false imprisonment and malicious prosecution. The defendant is denying liability.

It is common case that the plaintiff was an employee of the defendant. He was an accounts clerk. The plaintiff's evidence was that on the morning of 4th February, 1988 he was called by his immediate boss, Mr. Tengatenga. Mr. Tengatenga told him that it had been reported to him that the previous night he, the plaintiff, was seen stealing some boxes containing computer paper. He denied the allegation and invited Mr. Tengatenga to his house so that he could see what was in the boxes that he carried but Mr. Tengatenga refused saying that there was nothing to worry about. The matter however took a very different dimension in the afternoon. At about 3.00 p.m. Mr. Tengatenga called the plaintiff again and informed him that the matter had been reported to the General Manager who directed that he be taken to Police. Mr. Tengatenga then took him to Blantyre Police Station and told the Police that he had stolen 4 boxes containing computer paper. Mr. Tengatenga narrated his story to Detective Constables Chikapa and Mughogho and the charge of theft was made in the presence of several other persons whom the plaintiff did not know. Thereupon the police locked him up without giving him the opportunity to explain his side of the story. The following day at around 10.00 a.m. Mr. Tengatenga went to the Police Station and personally delivered to the plaintiff a letter of dismissal. It was the

plaintiff's evidence that Mr. Tengatenga was very keen to have him dismissed and that was why he brought the letter in person. The letter could very well have been delivered by a messenger or some other junior officer. Although the plaintiff was arrested and detained on the allegation of theft of computer paper, the dismissal was based on alleged misappropriation of petty cash.

On the following day, 5th February 1988, Detective Constable Gondwe, Mr. Tengatenga together with the plaintiff, went to the latter's house at Ndirande and conducted a search. Some boxes were indeed found but they contained groceries and those were taken to the Police Station. No computer paper was found at the plaintiff's house. He was released on bail the following day. Finally, the case went to court and he was acquitted on a submission of no case to answer. The court record was tendered as Exhibit P1. It was the plaintiff's evidence that several people including Mr. Tengatenga had access to the room in which computer paper was kept. As a matter of fact not only did Mr. Tengatenga had access to the room but he was in fact keeping a key to it.

Turning to the counterclaim, the plaintiff denied owing the defendant the sum of K2,912.58. He was not present when the alleged debt was computed and he did not sign anywhere admitting the same. All he knows is that he owed the defendant no more than K600.00.

Perhaps I should go to the evidence of PW3, Detective Constable Mughogho since all PW2 did was to tender the court record relating to the criminal case. Detective Constable Mughogho's evidence was that Mr. Tengatenga brought the plaintiff to the police station when he and Detective Chikapa were interviewing witnesses. Mr. Tengatenga said that the plaintiff had stolen 5 boxes of computer paper worth over K1,000.00. But when a physical check was made at the office, it was found that 4 boxes were missing. The plaintiff's story was that the boxes he was seen carrying contained some groceries. A search was made at the plaintiff's house and the boxes that were found there contained beans, sugar and soap. Detective Constable Mughogho also interviewed a white lady who was in charge of the room where computer paper was stored. The police officer was satisfied that some boxes of computer paper had indeed been stolen, but the question was by who. It was his evidence that he was not satisfied that it was the plaintiff who had stolen the paper. He was the police officer in charge of investigations and he did tell Mr. Tengatenga that there was no evidence against the plaintiff. But there was so much pressure from the defendant that he had no choice but to charge the plaintiff. The watchman who had seen the plaintiff carrying some boxes did not check the contents and yet Mr. Tengatenga insisted that it was the plaintiff who was the thief. Asked as to why he charged the plaintiff when there was no evidence, he said there was so much pressure. He got the impression that the defendant company did not want the plaintiff. In the end he charged the plaintiff to avoid creating the impression that the police were releasing people anyhow.

The first witness for the defendant was Mr. Tengtenga who at the material time was the Accountant although he also performed administrative duties. On 3rd February, 1988 he got a report from two watchmen that they had seen the plaintiff carry 3 boxes of computer paper at around 9.00 p.m. the previous night. When he got that report he asked Mrs. Pilossof, the computer trainer, to take count of her stock. She reported that 4 boxes were missing. He then called the plaintiff and asked him about the watchmen's report. The plaintiff agreed to have carried some boxes the previous night but that they contained groceries. Mr. Tengtenga then reported the matter to the Chief Executive who directed that the matter be referred to police. Mr. Tengtenga then rang the police who told him to call in person and make a statement which he did. He went there alone and in his statement he said that he suspected the plaintiff. He did not meet Detective Constable Mughogho but dealt with a different officer whose name he could not remember. The plaintiff was taken to the police station by a police officer. He said he delivered the dismissal letter in person on the instructions of the Chief Executive. He denied having discussed anything with Detective Constable Mughogho.

Mr. Tengtenga told the Court that at the time of his dismissal the plaintiff owed the defendant the sum of K2,912.58. The plaintiff was entitled to some terminal benefits to the extent of K788.10 but the money went towards his indebtedness. The balance was therefore K2,124.48 which formed the basis of the counterclaim.

The cross examination of Mr. Tengtenga was quite revealing. He conceded that the computer print out, Exh. D4, representing the plaintiff's indebtedness, was a photocopy. He said that the original ledger card must be at the archives. He also conceded that records can be altered and photocopies of the altered record can then be made. Exhibit D4 was prepared by Mr. Tengtenga and the plaintiff did not acknowledge the debt by signing it. Although the plaintiff was alleged to have misappropriated some petty cash, this was not reported to Police. He conceded that apart from Mrs. Pilossof and himself, messengers had access to the room where computer paper was kept. It was possible that anyone of them could have taken the computer paper. He denied having dealings with Detective Constable Mughogho. About the criminal proceedings he told the court that the police called the wrong witnesses to court. The reason was that the police did not want the case to succeed. He also revealed that the defendant company was keen to get a police report because it was only then that they could claim from the insurance company for the stolen computer paper.

Elson Anusa was DW2. He works for the Bible Society as a watchman. The defendant's offices are within the premises of the Bible Society. While on duty during the night of 3rd February, 1988 he saw the plaintiff and a friend take away 3 boxes which he

thought contained computer paper. He did not detain the boxes nor did he check the contents. The following morning he reported the incident to Mr. Tengatenga

I now proceed to evaluate the evidence. I start with the claim for special damages representing K450.00 legal costs and K22.40 being bus fares for attending court proceedings. It is trite law that unlike general damages, special damages must be proved strictly. In the instant case, there is nothing to support the claim of K472.40. There is no bill of costs and there is no receipt. Both in his examination in chief and in cross examination, he said he paid K400.00 to his lawyers. He has not produced any document. Turning to the bus fares, there are no tickets. In his evidence he said he was not sure of the bus fares he paid. He said it could have been 40t or 35t per day. The plaintiff has therefore failed to prove his claim for special damages. This claim is therefore dismissed.

I now turn to false imprisonment. The law relating to false imprisonment is well settled and there is a wealth of local authorities on the subject. I can only cite the case of L.J. Hauya v. Cold Storage, Civil Cause No. 274 of 1987 (unreported) in which Banda, J. (as he then was) said as follows:-

"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 policemen 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 judgement."

In the instant case, I have no difficulty in finding that the defendant did not just lay information but they made a charge. It was clear from the evidence of the plaintiff and Detective Constable Mughogho that it was Mr. Tengatenga who took the plaintiff to the Police. Mr. Tengatenga said he only phoned the Police who went to collect the plaintiff. He also denied having dealt with Detective Constable Mughogho. I find it as a fact that Mr. Tengatenga was telling lies. In my judgment, I find that it was Mr. Tengatenga who took the plaintiff to the

police and told them he had stolen computer paper. It will be noted that although the watchmen saw only 3 boxes, the plaintiff was charged with theft of 4 boxes. It is also significant to note that although there is overwhelming evidence that several other people had access to the room containing computer paper, only the plaintiff was taken to the police. It is clear in my mind that the defendant made a charge upon which it became the duty of the Police to act. Detective Constable Mughogho said he had considerable pressure from the defendant.

I now move on to malicious prosecution. It is common case that the plaintiff was prosecuted and that such prosecution ended in his favour. Malicious prosecution may briefly be defined as the malicious preferring of unreasonable criminal charge. But then what is a prosecution? The answer is provided by the learned authors **Clerk and Lindsell on Torts, Fourteenth Edition, page 1077 paragraph 1887** where it says:-

"To prosecute is to set the law in motion, and the law is only set in motion by an appeal to some person clothed with judicial authority in regard to the matter in question, and to be liable for malicious prosecution, a person must be actively instrumental in so setting the law in motion."

In order to succeed in this claim, the plaintiff must not only prove that he was prosecuted at the instance of the defendant, but he must go further and prove that such prosecution was without reasonable and probable cause and that the defendant was actuated by malice.

The evidence of Detective Constable Mughogho was very clear. After carrying out the investigations he found no evidence against the plaintiff and he so advised Mr. Tengtenga. The police officer went on to say that he only charged the plaintiff because of heavy pressure from the defendant. He was categorical that he would not have preferred the charge in the absence of pressure. Mr. Tengtenga said in cross examination that the police called wrong witnesses and they did not want the case to succeed. It cannot be true that the police wanted the case to fail. All it means is that although Detective Constable Mughogho found no evidence upon which to base a prosecution, Mr. Tengtenga exerted pressure on the Police that there must be prosecution. It is clear therefore that the defendant was actively instrumental in setting the law in motion. Having been advised that there was no evidence against the plaintiff, it cannot be said that the defendant had an honest and genuine belief that there were reasonable grounds upon which the plaintiff could be found guilty. Put simply, there was no reasonable and probable cause for the prosecution. As for malice, the mere insistence on prosecution when there was no evidence is in itself evidence of bad motive. It will also be noted that the plaintiff was dismissed even before the police

were through with investigations. He was arrested on the allegation of theft of computer paper and yet the dismissal was based on what I may call bogus theft of petty cash which was not even reported to the Police. All in all, I find that the plaintiff has succeeded in proving his claim of malicious prosecution.

I do not have to labour myself with the definition of defamation. To call a person a thief when that is not true is defamatory and actionable *per se*. In the present case, I have already found that Mr. Tengatenga told the Police in the presence of civilians that the plaintiff had stolen boxes of computer paper. It is not necessary that the plaintiff should prove the exact words that Mr. Tengatenga uttered. It is sufficient if the plaintiff proves that Mr. Tengatenga published words bearing a defamatory meaning. This claim must also succeed.

I must now consider the quantum of damages. The plaintiff was imprisoned for a period of 43 hours which is about 2 days. He was not beaten while in prison but he described the conditions as appalling. In the case of Admarc vs. Stambuli, M.S.C.A. Civil Appeal Number 6 of 1984, the plaintiff was awarded K4,000 for being in custody for 3 days. Since that case there have been a number of devaluations so that the value of the Kwacha has been eroded. I therefore award the plaintiff the sum of K4,500.00.

I think that this was a bad case of malicious prosecution. The defendant was told that there was no evidence upon which to base a prosecution and yet they pressurised the police to prosecute. The trial was commenced in April 1988 and the acquittal was entered in November, 1988. According to the bail bond the plaintiff had reported either to police or to court no less than 24 times. In the case of John Tikiwa v. B.A.T. (Mw) Ltd., Civil Cause Number 322 of 1987, the plaintiff was awarded K300.00. I think that the present case was particularly bad. I think a sum of K3,000.00 would be fair compensation and I so order.

To call a person a thief when he is not is a serious matter. Nobody wants to be associated with thieves. The plaintiff must have been ridiculed among his friends. In the case of Mkulichi vs. Central Africa Transport Co. Ltd., Civil Cause Number 599 of 1981, the plaintiff was awarded K1,000 for being called a thief. That was 12 years ago and since then the social and economic conditions have changed considerably. I award the plaintiff the sum of K5,000.00.

I now come to the defendant's counterclaim. The original ledger card has not been produced. Mr. Tengatenga said the original must be in the archives, and no effort was made to fetch it. The copy of a computer print-out cannot be relied upon. It does not bear the plaintiff's signature and it is secondary evidence. I would have dismissed the counterclaim in its entirety but for the admission the plaintiff made. He said that he owed the defendant only about K600.00. I therefore enter

judgment for the defendant to the extent of K600.00. The plaintiff's terminal benefits came to K788.10 which was applied to set off a debt which has not been proved. Since the counter-claim has succeeded to the extent of K600.00 the plaintiff must get back his K188.10. In all, the plaintiff will get K12,688.10 less K600.00 which comes to K12,088.10.

I now come to costs. The plaintiff has succeeded in all his major claims but failed in the minor claim of special damages. The defendant's counterclaim would have failed completely had it not been for the plaintiff's own admission. The plaintiff will therefore have full costs of the action.

Pronounced in open Court this 17th day of September, 1993 at Blantyre.


M.P. Mkandawire
JUDGE