

IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO 12 OF 1988



BETWEEN

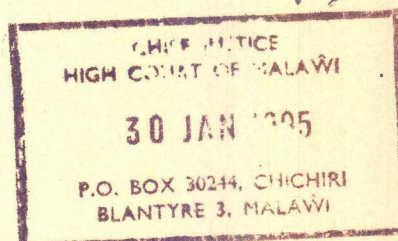
G. BANDA PLAINTIFF

AND

CAPITAL HOTEL DEFENDANT

CORAM: KALAILE, J

For the Plaintiff, Kumange of Kumange & Co
For the Defendant, Mankhambura, Sacranie Gow
Court Reporter, Kalagho
Official Interpreter, Gomani



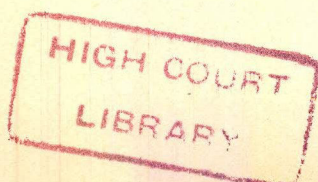
J U D G M E N T

It was pleaded by the plaintiff that by a contract in writing dated in or about March, 1986 between the plaintiff and the defendant, the plaintiff was employed as Accountant based at Mzuzu Hotel which was a subsidiary of the defendant's company. The plaintiff was allegedly wrongfully dismissed by the defendants on 16th September 1987.

Furthermore, it was alleged by the plaintiff that on or about 24th August, 1987, the defendant, through its agent or employee, Mr Chikalimba carried out an audit at Mzuzu Hotel of the plaintiff's books. On that occasion, Mr Chikalimba and the manager, Mr Mponela brought in policemen and arrested the plaintiff at his house at about 8.00 p.m. and took him to his office at the hotel. Whilst at the office, the plaintiff was handcuffed and taken into police custody and was so detained until he was released at 2.00 p.m. on 26th August, 1987. It is the plaintiff's case that the arrest was at the instigation of the defendant's employees or agents.

I wish to deal, first, with the issue of false imprisonment before dealing with the other issue of unlawful dismissal. For the tort of false imprisonment to succeed in the courts,

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one of the primary issues which should be established on a balance of probabilities by the plaintiff is that the defendant made a charge against the plaintiff. The following decided cases make this point perfectly clear.

In Hauya v. Cold Storage Co Ltd Civil Cause No 274 of 1987 unreported at p.5, Banda J. stated that -

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

Skinner C.J. stated the same principle in the following words in Chintendere v. Burroughs (Civil Cause No. 530 of 1981) unreported -

"The crucial issue, the issue of fact upon which this part of the case turns is whether the defendant's servants merely stated the facts to the police or whether they made a charge against the plaintiff."

When I examine the evidence which was adduced before this court, I am not satisfied on a preponderance of probabilities that the defendant's servants made a charge against the plaintiff. The relevant portion of the plaintiff's evidence was stated at page 6 of the court record and it is that -

"I was arrested at my house by two policemen, Mr Chikalimba and Mr Mponela, the hotel manager. Mr Chikalimba is present in court. I did not call for these policemen, they were called by the manager.

From my house I was taken to my office in the hotel where a C.I.D. man handcuffed me. I was taken to Mzuzu police and put in a cell. There were five of us in the cell"

Then Mrs Banda (PW2) testified as follows about the arrest at page 25 of the court record -

"It was at 8.00 p.m. when the manager knocked at our home: (from a group of four). A policeman was in the group.

The group asked for the plaintiff and I said he was at home in bed. They still wanted to see him even though he was sick with malaria. They wanted him to report at the office and he went. But he did not return from the office that day."

Mr Chikalimba did not specifically describe how the plaintiff was arrested but gave the following explanation for the arrest at page 3 of the court record -

"We went to the police for assistance so that we recover keys from Mr Banda. We ~~thought~~ it not advisable to go to Mr Banda's house on our own. That is why we went to the police. At the police we explained what happened; we were given a policeman to join us. The policeman arrested Mr Banda."

The hotel manager, Mr Mponela was more explicit about the arrest. It was his evidence at page 7 that -

"Since he left with the keys we sought the advice of the Officer-In-Charge at Police Mzuzu. We did not follow him since we did not know his intentions after he left the office.

The police assisted us by giving us a police escort to check for him at his house. There were two policemen, the auditor and myself. We asked him to go back to the hotel. At his house he said at first he could not find his keys. Later, he found them and joined us to the hotel.

The handover was finalised. Nobody threatened Mr Banda. After the handover, the police took Mr Banda to the police station."

To my mind, this evidence does not satisfy the tests laid down by Banda J. in the Hanya case nor that laid down by Skinner C.J. in the Chintendere case. The claim for false imprisonment cannot therefore succeed on the facts before me.

The pertinent facts on the claim for unlawful dismissal are that by a contract in writing made in March 1986 between the plaintiff and the defendant (which is supported by Exhibit P2), it was agreed that -

"Your salary will be payable at K690.00 per month reviewed annually on 1st January.

A house will be provided, the company bearing the full cost, which is currently K300.00 per month.

You will be provided with M.A.S.M. cover for yourself and immediate family and be eligible to join the pension scheme.

Your leave entitlement will be 36 working days per annum.

Meals will be provided while on duty and transportation between your residence and the hotel whenever possible.

A full copy of Mzuzu Hotel standard conditions, which includes details of sickness benefits, will be forwarded.

We would also confirm that the company will pay the cost of transportation of your possessions from Lilongwe to Mzuzu and that we will provide you with K300.00 as an Educational Loan on your arrival at Mzuzu."

This letter was signed by the defendant's Finance and Administration Manager. Now, clauses 9 and 10 of the defendant's conditions of service stipulated that -

"9. Dismissal

Dismissal means termination without notice and without salary in lieu of notice, of the appointment of a person on the ground of misconduct.

10. In the event of dismissal an employee will not be entitled to any privileges under these Conditions,

other than the refund of his own contributions to the provident fund/pension scheme mentioned in Clause 38."

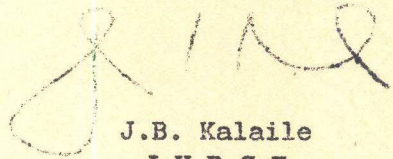
What follows next is an examination of the alleged acts of misconduct by the plaintiff. It was Mr Chikalimba's evidence that according to Exhibit D1, it was misconduct for Mr Banda to take cigars from the tobacco float without the support of any documentary evidence. The value of the cigars was K6.75 and this fact was conceded by Mr Banda in the presence of Mr Chikalimba, a policeman and Mr Mponela the manager. According to Exhibit D2, Mr Banda was found with a shortage of K1.58. This shortage, was to say the least, insignificant to warrant a charge of misconduct. Indeed, I would say the same about the tobacco float discrepancy of K6.75.

When Mr Mponela testified, it was his evidence that Mr Banda was dismissed because of irresponsibility. Again Mr Mponela made reference to the sums of K6.75 and K1.58 respectively. Although there were long winded references to Mr Banda's drunkenness in the hotel premises, no clear cut evidence was led in support of this allegation. The plaintiff and his wife led evidence to show that on the day the handover took place, he was sick and bed ridden. This evidence was not seriously challenged. On this point I believe the plaintiff's evidence. I find it hard that a man of Mr Banda's status could lose his job because of a shortage of an amount of less than K10.00. If such a shortage could constitute misconduct, then the average employee would lose his job on all sorts of flimsy grounds. The Longman Dictionary of Contemporary English (New Edition) defines misconduct as "intentional bad behaviour". But Roget's Thesaurus defines it as "vice, misdeed, misdoing, transgression, trespass, offence, crime, corpus delicti." I am afraid, I cannot see a shortage of less than K10.00 falling into any of those categories even if the plaintiff failed to put on record the cigar which he took so as to warrant the loss of a senior officer's job.

In my considered view, the plaintiff has made out a case for unlawful dismissal and is entitled to the 2 months pay in lieu of notice which amounts to K2,370.00. He is also entitled to the leave entitlement which stands at K320.00 and the pension contribution of K316 if this has not already been paid to him. I find difficulties in awarding the plaintiff subsistence allowance, since at the material time, the plaintiff was resident at his duty station. See clause 30 of the conditions of service. The plaintiff is therefore awarded the sum of K2,986.51 and the costs of these proceedings at the subordinate court level.

In his submissions, the plaintiff's counsel made reference to slander as one of the causes of action in issue. Slander was not pleaded and I make no further reference to it in this judgment.

PRONOUNCED in open court this 3rd day of November 1994 at Lilongwe.



J.B. Kalaile
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