

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE 439 OF 1988

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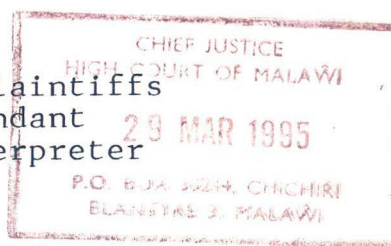
K G NYIRENDA, G S MWAMBETAMIA  
t/a KARONGA MANUFACTURERS.....PLAINTIFFS

AND

DEVELOPMENT OF MALAWI TRADERS TRUST..... .1ST DEFENDANT  
S D W CHITENGA..... .2nd DEFENDANT

CORAM:

Mtegha J  
B Mhango, Counsel for the Plaintiffs  
Msaka, Counsel for the defendant  
Manondo (Mrs), Official Interpreter



JUDGMENT

The plaintiffs in this case, K G Nyirenda and G S Mwambetamia representing Karonga Manufacturing Association, hereinafter referred to as KAMA, brought this action to recover the sum of K4,012.82t which the second defendant, Sylvester D W Chitenga received on behalf of the plaintiffs while he was in the defendant's employment.

The plaintiffs pleadings aver that they are an affiliate member of the African Business Association incorporated under Trustees Incorporation Act. The first defendant is also a Trustee Body Incorporated under the same Act. The first defendant employed the second defendant as a business consultant based at the first defendant's office at Karonga.

It is alleged by the plaintiff's that in about June 1985 the second defendant, acting as agent of his employers, received for and on behalf of the plaintiffs the sum of K4,012.82 from Robert Construction Company, later known as International Construction Company, that the second defendant received this sum as an agent or in the course of his employment and failed to pay or account for this sum to the plaintiffs but converted it to his own use.

The first defendant aver that the second defendant did not receive this money, and if did receive the money, the same was done outside course of his employment and is therefore liable in his personal capacity.

On the other hand the second defendant pleaded that he only received the sum of K2,572 which he utilized for paying persons in Karonga engaged in moulding and supplying bricks to Roberts Construction Company.



I am aware that this is a civil case and the plaintiffs have to prove their case on a preponderance of probability.

I will now examine the evidence which is before me.

The first witness for the plaintiffs was Kelvin Gwebe Nyirenda. In February 1985 he was elected Chairman of Karonga Manufacturers Association. The main purpose of the Association was to mould bricks and sell the bricks to Roberts Construction Company which was building a Teachers Training College at Karonga. He told the Court that the Association was initiated by the Second defendant, who was at that time a Business Consultant employed by the first defendant. To support this allegation the witness produced Ex P1, which was a letter written by the second defendant, on his employer's headed paper, calling for a meeting on 20th February 1985 at which Mr Nyirenda was elected chairman. The second defendant again, on 23rd June 1985 called for another meeting of Executive Committee to discuss the Role of Business Consultant to the Association and Advances to the Association.

Mr Nyirenda went on to tell the Court that while the second defendant was at the Head Office, he, the second defendant, wrote on 15th August 1985 to say that his head office was happy with KAMA and he had presented KAMA'S financial problems to Sedom for assistance. On his return from the Head Office, the second defendant called the committee and produced a draft constitution to the committee, which was approved by the committee. It was at this meeting that the Committee also discussed raising a loan from Roberts Construction to assist members.

Subsequently they approached Roberts Construction Company which agreed to lend them money on the understanding that K4,012.82 was added to the loan. According to Mr Nyirenda, they were surprised since they never took a loan before. However, since the second defendant was present he agreed to have taken it. When he was asked to give back the money the second defendant said that he deposited it into his employers account because KAMA had just been formed, and had no bank account. However, a loan of K4,000.00 was granted to the association and the second defendant opened a bank account with the Bank. Meanwhile, attempts to recover the money amounting to K4,012.82 from the second defendant proved futile and the matter was handed over to the plaintiff's lawyers who wrote him. After protracted correspondence and meetings, he agreed to pay by instalments of K200.00 per month, a promise which he never kept.

In the meantime, the plaintiffs lawyers wrote to his employers claiming the money. Meanwhile, on 19th March 1986 the second defendant was dismissed from his employment.

The evidence of PW 2 Mr Leon Joseph Chitanda, Managing Clerk in the employ of Bazuka and Company is to effect that the second defendant came to his office to see Mr Mhango with a view to make arrangements to settle the debt he owed to KAMA by instalments.



The second defendant did not give evidence in his defence.

It is quite clear, from the evidence before me, that the second defendant took the money in question from Roberts Construction Company on behalf of KAMA. The defence he raised that he distributed the money to members of KAMA does not hold water either. I find it as a fact that he did not distribute the money in question to KAMA members.

This brings me to the next point which has been raised by the first defendant, and that is that the second defendant did not receive the sum of K4,012.82t as its agent and that the second defendant received the money outside the course of his employment and therefore it is not vicariously liable. In support of this contention D W 1, Eman Chibwana Luhanga, the first defendant's Training Officer, told the Court that the second defendant was employed as a Business Promotion Consultant and in 1984 he was posted to Karonga. The Regional Manager for the North at that time was Sikarera. It was his evidence that as a Business Consultant in the first defendants employment, Chitenga's duties were to provide technical and any advice to business community in his area and also to promote new business. He produced a job description - exhibit D2. It is stated, interalia, in that document, that the Business Promotion Consultant shall:

- "(1) Provide on going business advisory services to carefully selected clients and business in his area.
- (2) Initiate training programmes, seminars and workshops for groups of carefully selected clients.
- (3) Develop a workplan and budget for his operational area to guide delivery of field services.
- (4) Provide assistance to qualified individuals in business promotion efforts...."

It was his evidence that procuring loans for clients was none of the second defendant's business.

The general rule is that an employer is liable whenever his employee commits a tort in the course of his employment.

It is also a well established principle that the evidence that the employee's conduct is criminal or otherwise wilful wrongdoing will not of itself take the conduct outside, the scope of the employee's employment. In the case of Barwick vs English Joint Stock Bank (1867) L R Exch. 259, it was held that fraudulent misrepresentations by a bank manager were in the course of his employment. In the case of Lloyd vs Grace, Smith and Company (1912) AC 716, in an action to recover title

deeds by the plaintiff, a client of the solicitors, who were defendants in the action, a managing clerk was consulted by the plaintiff about selling her house. The managing clerk induced her to sign documents transferring the property to him. It was held that the managing clerk was employed to carry out, inter alia, conveyancing transactions, and although the defendant solicitors did not benefit from the fraud, perpetrated by their employee for his own purposes, they were held liable.

The main issue in the present case is whether the plaintiff relied on the ostensible authority with which the employer had clothed the employee.

In the present case the second defendant, in advising KAMA on how to run their brickmaking business, opening a bank account for them, preparing a draft constitution for them and indeed, receiving monies on their behalf on several occasions, he was acting within the scope of employment and indeed the plaintiffs relied upon him.

I therefore find the first defendant liable for the actions of their employee. I enter judgment for the plaintiffs in the sum of K4,012.82t with interest at current rate from August 1985 and costs.

Pronounced in open Court this 20th day of February 1995 at Blantyre.

  
H M Mtegha  
JUDGE