

~~CCC~~ P44

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 2054 OF 2000

BETWEEN:

Judge with retiring Judge
- Vicarious liability
- Ridicule, insult,

P. CHIMWAZA PLAINTIFF

- VERSUS -

SECURICOR MALAWI LIMITED DEFENDANT

CORAM: HON JUSTICE M. P. MKANDAWIRE

Mr Masiku, of Counsel for the Plaintiff

Mrs Kanyuka, of Counsel for the Defendant

M. H. Fatch, Recording Officer

J U D G M E N T

Matters in issue: Claim for damages for personal injury (assault and battery).

Introduction:

This matter commenced in this court on the 21st of June, 2000. On 20th of November, 2002 hearing was completed and the presiding judge adjourned the case for judgment. In his

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order, he said that the parties were to file with the court written submissions by the 4th of December, 2002 and that judgment could be ready 30 days thereafter. Mathematically, it therefore meant that judgment was to be ready by the 4th of January, 2003. It would appear that parties have not filed in their submissions for I have not seen any on the court file. At the same time, the court did not prepare the judgment until the trial judge went on retirement. The file has thus been given to me to come up with a judgment. As I have already stated in several other judgments which I have written on behalf of the same retired judge, it is very difficult to write a judgment in a case where you were not the presiding judicial officer. In controversial cases such as this one, the judge who has the benefit of observing the demeanor and credibility of witnesses is always better placed to come up with a decision. It is indeed unfortunate that the judge could not have finalized his judgments before he officially went on retirement. One wonders therefore whether the provisions of section 119 of the constitution were put to full use.

This section provides:

"(1) subject to this section, a person holding the office of Judge shall vacate that office on attaining the age prescribed in subsection (6):

Provided that the President, after consultation with the Judicial Service Commission, may permit a Judge who has attained that age to continue in office for such period as may be necessary to enable him to deliver judgment or to do any other thing in relation to proceedings that were commenced before him before he attained that age".

The plaintiff brought up this matter against the defendant claiming for damages for injuries she sustained at the hands of the defendant. In her statement of claim, the plaintiff said that the defendant was and is at the material time the employer of Mr Paul Magomero who was posted to

work at Dosani House to carry out security duties. The plaintiff avers that on the 5th of June, 2000, at the said Dosani House, the said defendant's servant whilst in the course of carrying out the said security duties assaulted the plaintiff in the offices of Messrs Makuta & company by literally man handling, squeezing, stopping and dragging the plaintiff from the offices of the said Makuta & Company and virtually threw the plaintiff out of the said Dosani House. As a result of the aforesaid, the plaintiff said that she sustained personal injuries and suffered loss and damage. She therefore claims for damages for personal injuries damages for the injury to her proper feelings of dignity and pride, and damages for assault and safety.

The defendant put in a defence. In their defence, they say that they deny that their servant had assaulted the plaintiff. They say that actually it is the plaintiff who had insulted their servant. They therefore deny that the plaintiff is entitled to any of the reliefs sought.

Survey of Evidence:

The plaintiff was the first to give evidence. She told the court that she works as a principal State Advocate with the Ministry of Justice and constitutional Affairs. At the material time, she was based at the Chief State Advocate Chambers in Blantyre. On the 5th of June, 2000, she reported for work at 7.30 am. It is her evidence that on this day, she was supposed to appear before the Malawi Supreme Court of Appeal in a Criminal case. But she had a cold which led her lose her voice. She therefore decided to inform her boss Mr Kamwambe the Chief State Advocate that she would be unable to handle the case due to her illness. He r boss accepted her excuse and he said that he would assist her to have the matter adjourned. At around 10.00 am, she decided to go to Dosani House to see her in-law Mr Kamkwasi who works for Messrs Makuta and Company. On arrival at the entrance of Dosani House, she said that she saw a guard seated on the right hand side where there is also a table. It is her evidence that she

usually goes to that House and she knows the geography very well. Thus upon arrival at the entrance, she started to go upstairs using the steps. As she was passing by, the guard said in Chichewa "How are you aunt". But she did not respond because she felt not obliged and he also greeted her casually, she thus proceeded to the office of Mr Kamkwasi. Unfortunately, she did not find him there. She thus decided to leave a message with his secretary. As she was leaving the message with the secretary, she saw the guard arrive in that office and he enquired from the secretary if the plaintiff was related to her. The secretary said no. Then the guard enquired why she had by - passed him at the entrance when he told her to stop. As the plaintiff had problems to speak on that day having lost her voice, she literally had to whisper. She told him that he had not told her to stop. After that, the plaintiff said that she continued talking to the secretary. To her surprise, the guard intervened and said that, how could the plaintiff continue talking to the secretary, did she not know that he was still talking to her. He went on to say that who did she think she was. He threatened that he would take her out of the office. As the guard was saying those words, she received a call on her cell phone. As she was trying to respond to the call, the guard continued making noise. She therefore decided to go out of the office in order to respond properly. She stood in the corridors. But the guard followed her and challenged that who was she trying to call. He threatened that he was not afraid of that. He then and there shouted at her that she was a prostitute and started pulling her out of the building. She literally fell down in the course of being dragged by the guard. She could not believe her eyes. She started crying as the atmosphere was extremely humiliating. She then left the House crying and went to report to securicor at their office at Ginnery Corner. She was assured that the authorities at securicor would look into the matter. To her surprise, when she passed by in the afternoon, the guard was still there. She therefore decided to report to the police. The second witness for the plaintiff was Mr Maclean Kamwambe the Chief State Advocate then. The evidence of Mr Kamwambe is that during the morning of 5th

June, 2000, the plaintiff who was her subordinate approached him at the office with a note. On that note, she wrote that she had lost her voice and as such, she requested him if he could go and adjourn a case before the Malawi Supreme Court of Appeal. Mr Kamwambe even cited the case number at the M.S.C.A. He also tendered the notice of hearing as "PEX W 1"; and the cause list as "PEX NO. 2". Mr Kamwambe finally said that he personally went to the MSCA to have the matter adjourned on behalf of the plaintiff.

The third witness for the plaintiff was Mr Maxwell Bazwell Munyonga. He told the court that he is employed by Messrs Mpando and Company as a process server. He said that he knows Dosani House very well because he has been serving court processes there on legal files such as Makuta & Co. It is his evidence that when he first went to Dosani House, he found a guard who sits at the entrance. At that time as he did not know the building very well, he had to ask the guard to guide him. At that time, he was going to the offices of Real Estate Agents. Since then, he said as he goes to Dosani House, he finds that guards do not enquire anything from him. He just passes them by on the entrance. All he does at times is just to wave them as he goes. As he comes out, he does the same. The witness said that there are occasions when he is not even greeted by these guards. He also said that the guards do not request him to sign anywhere.

The defendant invited three witnesses for their case. The first witness is Mr Paul Magomero. He works for the defendant and he is posted to work at Dosani House. He told the Court that he has been working at the main door for 3½ years. He told the court that he has a table, book (Register) and a pen. His duties involve assisting visitors, customers and also enquiring from visitors. He also protects property for the clients at Dosani House.

The witness told the court that on the 5th of June, 2000, the plaintiff arrived at Dosani House at 6.45 am. When she arrived at the entrance where he was, she went straight

upstairs without passing by his desk so that he records he details and where she was going. But before she went up, the witness said that he asked her where she was going but she did not give him an answer. He then followed her upstairs. He found her on the 1st floor and observed that she was coming out of the offices of Makuta and Company. She found nobody at the offices. She then asked him where Mr Makuta was. At this moment, the witness said that he told her that he would not disclose to her where Mr Makuta was because she had not asked him at the gate when she was entering. At that moment, the plaintiff pleaded with him to help her as she had come on duty. But he responded by saying that he was also on duty. Immediately after having answered her thus, the plaintiff started insulting him that he was a mere guard and that he would die as a poor guard. As a result of those insults being showed on him cleaners came to observe the drama. She even insulted him more in the presence of these cleaners. Since he was angry and carried away, that is when he also responded by saying that if he was a guard that was fine, but that she was a prostitute. He then asked her that which was better to be a prostitute or a guard. Then and there, she called on a cell phone and then left the scene. Then a clerk Botomani came and there was noise. He found her shout at him. After she had left, the police came to arrest him and was locked in for five hours and then released on bail.

The second witness for the defendant is Snowden Botomani. He is a clerk working for one of the Estate Agents housed in Dosani House. He told the court that on 5th June, 2000, he was already at the office between 6:00 am to 7:00 am. During that time people had not really reported for work. As he was at his office, he heard a voice of a lady calling the guard all sorts of insults. He decided to go where the voice was coming from. He found the lady insult the guard that he would die as a guard. She went on to say that she could pay his wages. The witness said he told the guard to accept that he was indeed a guard. When he said that, the lady left the place. According to the witness, he did not hear the guard call her prostitute. May be, he stated it was said before he arrived

at the scene. He concluded that he saw the lady walk out of the House on her own. She was not assaulted by the guard.

The third and last witness for the defendant is Mr Precious Mpekasambo. He is the Assistant Branch Manager responsible for training. He also teaches employees of securicor not to abuse customers (discipline). He said that Mr Magomero was the security officer in-charge at Dosani House. He had a register where to record names and details of visitors at that House. He said that what was alleged against Mr Magomero was not proper. If he indeed did that, then he did it on his own for the defendant does not teach them bad manners to insult visitors or clients.

Analysis of evidence:

The whole evidence has been narrated and there are three witnesses from each side. I have looked at the evidence on record. I am satisfied that on this material day, the plaintiff was indeed sick and that she had lost her voice. This piece of evidence has actually been ably corroborated by the evidence of Mr Maclean Kamwambe the Chief State Advocate who was the plaintiff's boss. He told the court that actually the plaintiff had to write a note explaining about her problem. She was not in a better position to speak to him at the office as she had lost her voice. Indeed if her voice was okey, I see no reason why she could not have orally requested Mr Kamwambe to go and adjourn the case on her behalf at the MSCA. This Court can therefore not believe the defendants' witnesses who said that the plaintiff was speaking on top of her voice at Dosani Building (House) that very morning.

The Court has looked at the evidence of the plaintiff in relation to when she went to Dosani House. She put the time to have been around 10:00 am. The defendants' witness would however want the court believe that it was around 6:45 am. I had big doubts about this piece of evidence from the two defence witnesses. The plaintiff is a well educated person and she knows very well working hours for legal houses. In

actual fact, the two defence witnesses said that most of the offices at Dosani House open at 7:30 am. The plaintiff was looking for an in-law at one of the legal Houses in that Dosani House. Certainly, she should have known that they report at around 7:30 am. I therefore find no sense in believing the guard Mr Magomero and Mr Botomani the clerk of the Estate Agents that by 6:30 am, the plaintiff was already there looking for Mr Kamkwasi yet their offices open around 7:30 am. I think there is no logical thinking in this version. I also found that Mr Botomano was a witness who was very over enthusiastic about this case. He is a mere clerk at the office. One wonders as to what interest he had on this day to be at the office at 6:00 am yet most of the offices open at 7:30 am. Does this not sound strange. As we further go deep in this case, I will be showing the untruthfulness of this Mr Botomani.

Going back to the scene at the entrance of Dosani Building, the court has been told by Mr Magomero that the plaintiff by – passed him as he was trying to stop her to have her details registered in the book. The funny part of it is that if indeed that register was in existence, why was it not produced in open Court so that the court should have inspected it on its own. The record could indeed have shown if at all on that day the 5th of June, 2000, all visitors that came to Dosani House were having their particulars and objectives of visits recorded therein. The Court had doubt if that register was there.

These doubts were indeed confirmed by the evidence of plaintiff witness number three a Mr Maxwell Manyoza of Mpando & Company. He explained at length how he has been visiting that Dosani Building on his business errands as a process server. He even identified Mr Magomero as one of the guards who has been manning the gates. At no time did he ever sign any register at the entrance. He could just wave at the guards and they could respond. Thus to say that the plaintiff was being stopped in order to sign in the register is just an act of afterthought.

The court therefore believed the plaintiff that when she passed by the entrance where Magomero was, all that he did was to greet her to which greeting she gave no response. She said that she did not feel obliged and that she had also lost her voice on that day.

The plaintiff said that she was later on followed upstairs by the guard Magomero. Indeed, the guard has confirmed that in his own testimony. It is not a hidden secret here that by the time Mr Magomero was making the follow up, he should have been already annoyed or angry. I say so because if all was okay with him, he could not have taken the trouble to make a follow up. I thought that the same door was being used as an exit. Therefore it would have been very easy for him to wait for the plaintiff at this place.

The guard Mr Magomero wanted this court to believe that when he went up he met the plaintiff in the corridors as she had found no one up there. He then said she asked him to assist her as to the whereabouts of the owner of that office a Mr Makuta.

The court found this piece of evidence to be very funny and only capable of being believed by a child. It was the same Magomero who told the court that time was 6:45 am before people had reported for work. The court therefore wonders how the plaintiff could have seen looking for Mr Makuta yet it was not yet time for work. The witness Mr Magomero also said that she told him to help her as she was looking for Makuta on official issue. But he responded by saying that he could not tell her and assist her since he was also on duty and that she had by – passed him at the entrance. I find all this type of testimony to be mere fallacies. How could he have known the whereabouts of Mr Makuta yet Mr Makuta had not yet reported for work. I found that all these were just cooked up stories by Mr Magomero no wonder they do not give any sense.

The second defence witness Mr Botomani had his own weak points. He wanted to pose in court that the plaintiff was speaking on top of her voice and that is how he managed to hear the noise from his office. Unfortunately this was the same day that the Court has already found the plaintiff had lost her voice. Therefore, she could not have been shouting on top of her voice. Moreover, if the witness Mr Botomani was indeed there and witnessing the events, he could have told this court what the insult the guard had offered on the plaintiff. Surprisingly enough, Mr Botomani said that he did not hear Mr Magomero say anything bad about the plaintiff yet the guard himself confessed that he did produce the words that she was a prostitute. The impression Mr Botomani gave the court from the totality of his testimony was that he was all set to exonerate his friend the guard. He was therefore not ready to say anything negative about Magomero. No wonder he kept on repeating in his evidence and even cross - examination that it was only the plaintiff who had insulted Magomero by saying that he was a guard and that he would die a guard. In order to vindicate my observations that this Mr Botomani was over enthusiastic about this case, he even went to the extent that the plaintiff had also said that she could pay wages for Mr Magomero. This was very strange because Mr Magomero himself did not say that he heard the plaintiff say that.

One other interesting thing was that during cross - examination, Mr Botomani denied having seen any cleaners around yet Mr Magomero said in his evidence that there came several cleaners witnessing the incident and that when these cleaners arrived, the plaintiff insulted him more. These contradictions are so strong and they all show that the story told by these two witnesses was a mere cooked up version.

After having assessed the evidence on record, I found that the plaintiff plus her two witnesses a Mr Maclean Kamwambe and the process server from Mpando & Company a Mr Munyoza were witnesses of truth. Their coherence and consistency show that the plaintiff was indeed telling the

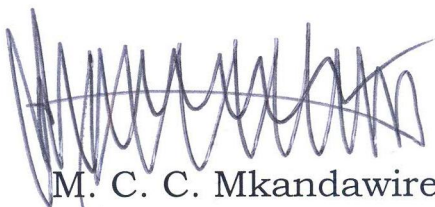
truth. On the other hand I found that the defendant's story was full of comical versions especially the 1st and 2nd witnesses. As for the Assistant Branch manager training, his evidence was just a formal one. It had no direct bearing on what actually transpired on that day. The key witnesses were the guard and Mr Botomani whose inconsistencies one can not comprehend to believe. *first and second*

Finding:

I find that on this day, without any lawful justification, the defendants' agent a Mr Paul Magomero indeed ridiculed the plaintiff. Not only that, apart from calling her a prostitute, he also subjected her to unbearable hardship by pushing her around pulling her whereby she indeed fell down and started crying. This type of conduct had indeed subjected her to personal injury and she also apprehended immediate harm. She suffered trauma and was psychologically tortured. I therefore find that her claims are proved on a balance of probability. The defendant is found liable and also condemned to costs of these proceedings.

I do order that the Registrar of High Court should assess the damages within 30 days from the date hereof as this is an old matter.

DELIVERD in Open Court this 16th day of February 2005 at Blantyre.


M. C. C. Mkandawire
JUDGE