

MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 3705 OF 2001

BETWEEN:

PEARSON

CHAFULI.....PLAINTIFF

-and-

CHIBUKU PRODUCTS

LIMITED.....DEFENDANT

CORAM: THE HON. MR. JUSTICE F.E. KAPANDA

Chipembere, of Counsel for the Plaintiff

Nkuna, of Counsel for the Defendant

Chuma, Official Interpreter/ Recording Officer

Place and Dates of hearing : Blantyre 14th October 2005, 18th January 2006

Date of judgment: 5th January 2007

Editorial Note

The Plaintiff is claiming from the Defendant damages for false imprisonment. Hence, in these proceedings the Court has been invited to principally decide the following issue arising from the pleadings exchanged between the parties: whether the Plaintiff was falsely (wrongly) imprisoned by, or at the instance of, the Defendant

JUDGMENT

Kapanda, J:

Introduction

The Plaintiff, Pearson Chafuli, was at all material times an employee of the Defendant. He was working as a Cashier for the Defendant. The Plaintiff's work involved receiving money from the Defendant's drivers and/or salesmen.

The Defendant is a limited liability company incorporated in the Republic of Malawi. It is, and was at all material times, in the business of brewing and selling opaque beer.

The Plaintiff incurred a shortage of cash received from some sales in Blantyre. The Defendant's agents and/or servants reported the incident to Blantyre Police after the Plaintiff failed to explain the shortage and failed to report for duties. Blantyre Police officers arrested the Plaintiff on suspicion that the latter had stolen the money. The Plaintiff claims that his arrest was unlawful. Hence, the Plaintiff's claim for damages for false imprisonment.

The complaint by the Plaintiff and the Defendant's response

The claimant's complaint

The fine points of the claim by the Plaintiff are in the statement of claim¹ dated 13th December 2001 and attached to the Writ of Summons issued on the said 13th December 2001. For the purposes of this judgment, I do not wish to set out, within the text of this judgment, the full statement of claim. It will be enough if a sketch of what the Plaintiff is claiming is given.

The Plaintiff's contention is that he was wrongfully arrested by the Defendant's agents and/or servants. It is further alleged by the Plaintiff that he was unlawfully arrested and was put in detention, for a total period of thirteen (13) days. Moreover, it is the Plaintiff's averment that the Defendant had instigated the police to arrest him on a charge that he had stolen the Defendant's money. Accordingly, the Plaintiff is claiming damages for false imprisonment.

¹ **“STATEMENT OF CLAIM**

1. At all material times the Plaintiff used to work as Cashier for the Defendant, a brewer.
2. (a) On the 6th February 2001, the Defendant's servants or agents unlawfully imprisoned the Plaintiff overnight in the Defendant's offices on the false allegation that he had misappropriated the Defendant's money.
(b) During the said unlawful incarceration, the Plaintiff suffered mental anguish and humiliation and was deprived of food and proper resting place for the night.
3. (a) On or about the 9th February, 2001 the Defendant's servants or agents instigated the police to arrest the Plaintiff on a false charge made by the said servants or agents to the police that the Plaintiff had stolen the Defendant's money.
(b) As a result of the said false charge, the police arrested the Plaintiff immediately on the said date of 9th February 2001 until the 20th February 2001 when the police released the Plaintiff on bail.
4. During the period of his imprisonment, the Plaintiff underwent untold mental as well as physical suffering and public humiliation.
5. By reason of the matters aforesaid the Plaintiff claims damages for the wrongful imprisonment he underwent for a total of 13 days and for costs of this action.

Dated this 13th day of December 2001.

Kalekeni Kaphale

(signed)

For/ the PLAINTIFF”

Finally, the Plaintiff is claiming from the Defendant the costs of, and occasioned by, this action.

The Response by the Defendant

The Defendant, in the main, denies the whole of the plaintiff's claim. The full particulars of the Defendant's reply to the Plaintiff's claims are set out in the Amended Defence² dated 9th January 2006.

²

"AMENDED DEFENCE

1. The Defendant denies paragraph 1 of the statement of claim and puts the Plaintiff to strict proof thereof.
2. The Defendant denies that on the 6th February 2001, its servants or agents unlawfully imprisoned the Plaintiff overnight in their offices on the alleged false allegation that the Plaintiff had misappropriated its money as alleged in paragraph 2(a) of the statement of claim or at all.
3. The Defendant states that on the date referred to in the statement of claim, the Defendant's Operations Director representing Management invited the Plaintiff to reconcile all his transactions for the preceding three days so that he could confirm that he did not have any shortage as he had claimed.
4. This required that the Plaintiff work late and the Plaintiff agreed to do so and he remained and worked in the brewery reception voluntarily and of his own free will though he was at all material times entirely free to go in and out of the reception as and when he desired to do so.
5. The Defendant denies that on or about 9th February 2001, its servants or agents instigated the police to arrest the Plaintiff on alleged false charge allegedly made by the said servants or agents to the police that the Plaintiff had stolen the Defendant's money as alleged in the paragraph 3(a) of the statement of claim or at all.
6. The Defendant denies that as a result of the said alleged false charge the police immediately arrested the Plaintiff on the said date of 9th February 2001 until the 20th February 2001 when the police released the Plaintiff on bail as alleged in paragraph 3(b) of the statement of claim or at all.
7. Further or in the alternative the Defendant contend that the said police acted on their own responsibility and initiative and not pursuant to any instigation or action of the Defendant.
8. Alternatively at the date referred to in the statement of claim, an arrestable offence, namely, theft of money, had been committed at the Defendant's brewery and the Defendant by its servants or agents with reasonable cause suspected the Plaintiff of having committed the said offence.

Particulars

- (a) The Plaintiff was custodian of Defendant's money which he failed and admitted failing to account of the same when confronted.
9. The Defendant denies that during the alleged period of his imprisonment, the Plaintiff underwent untold mental as well as physical suffering suffering and public humiliation as alleged in paragraph 4 of the Statement of Claim or at all.
10. The alleged damages and loss are denied.
11. Save as hereinbefore expressly admitted the Defendant denies each and every allegation contained in the Statement of Claim as if the same were herein set out and traversed seriatim.

Dated the 9th day of January 2006

(signed)

In essence, the Defendant denies that the arrest of the Plaintiff was wrongful. In this regard the Defendant further avers that its servants and/or agents reasonably suspected the Plaintiff of having committed an arrestable offence, namely, theft of money.

In short, the Defendant has joined issues with the Plaintiff on the claim by the latter. It accordingly became necessary for this Court to hear each parties' testimony on the facts in dispute in the action herein.

Evidence

As required by the rules of procedure³ the parties put in evidence their respective written witness statements and adopted them. The Plaintiff tendered one written witness statement. On its part the Defendant also offered one witness statement. It is well to point out that there was one written statement of the Police Officer who arrested the Plaintiff but it was neither signed nor tendered during trial.

All the witnesses availed themselves for cross examination. Indeed, they were also re-examined by the party that called them. Further, both parties tendered some documents as part of their testimony. As matter of fact, the evidence that was offered by these parties was in a form of written witness statements, *viva voce* testimony and exhibits.

Chisanga & Tomoka
LEGAL PRACTITIONER FOR THE DEFENDANT”

³Order 34/10 and 38/2A of the Rules of the Supreme Court 1995 ed. Pages 613-614 and 647-653 respectively.

It is from the testimony of these witnesses that the facts of this case are to be discerned. Before I set out the said facts let me make an observation about the testimony that was adduced by the Plaintiff. It appeared to me that the witness statement of the Plaintiff was not properly done. It does not have a statement of truth. As I understand it, the proper procedure in the preparation of witness statements entails that Counsel should reduce in writing what a witness says. Whatever is obtained from a prospective witness is supposed to be read over to him/her. Thereafter, if the witness agrees with the contents of the statement he/she should sign for it. Further, the signing must be verified by a statement of truth stating that the maker of the statement believes the facts stated in the document are true to the best of his knowledge and belief. Moreover, if the witness statement is not so verified by a statement of truth the Court may direct that it shall not be admissible as evidence. It is also well to note that a legal practitioner, and the witness alike, have an obligation to take the greatest care to ensure that statements contain the truth⁴. As I said earlier, It appears that what has just been described above was not done. However, I will exercise my discretion and still accept the Plaintiff's written witness statement.

Facts

It is now necessary that I should set out the facts that arose from the evidence of the witnesses herein. As far as practicable, I shall set out the facts that are relevant to the determination of the issues raised by the pleadings. As mentioned earlier, the facts of this matter are those that have been established from the accepted and relevant testimony of the witnesses who appeared before this court and whose written witness statements were tendered before this Court.

The following are the summary of the pertinent facts in this matter:

⁴*ZYX Music Gmb H vs King* [1997]3 All ER 129.

The Plaintiff's work

It is common fact that the Plaintiff was a Cashier. Further, there is no denying of the fact that, at all material times, his job involved receiving money from drivers on their return from sales trips. Further, it has been established that the Plaintiff's place of work was in Blantyre.

Shortage of cash and the arrest of the Plaintiff

It is a fact that during a surprise cash count the Defendant's external auditors discovered that there was a cash shortage amounting to MK 335,501.50 and that sales money deposited for banking was not tallying with brewery cash to bank record. Then on 6th February 2001 the Defendant's servants confronted the Plaintiff on the said shortage of cash. The Plaintiff persistently denied incurring any shortage. Thus, the Defendant asked the Plaintiff not to knock-off from work but proceed to recount all the cash, reconcile all cash transaction against cash banked. This court has found and concluded that the Plaintiff was eventually allowed to leave the office. However, the Plaintiff never came back to report for resumption of his duties until some four (4) days later when a Police Officer from Blantyre Police Station arrested him at his house in Chilomoni Township. It would appear that the Plaintiff was arrested on a charge of theft by servant. On 20th February 2001 he was released on court bail in Criminal Case No. 19 of 2001. The Plaintiff was eventually discharged by the court.

As a matter of fact, the Plaintiff purported to show that he was discharged under Section 81 (a) of the Criminal Procedure and Evidence Code⁵. As it were, the Plaintiff may as well be charged with the said offence of theft by servant since he was merely discharged and not acquitted. Further, indeed as was mentioned earlier, it is well to put it here that the officer who arrested the

⁵The said Section 81(a) of the Criminal Procedure and Evidence Code provides, inter alia,:

“In any trial before a subordinate court any public prosecutor may, with the consent of the court or on instructions of the Chief Public Prosecutor, at any time before judgment is pronounced, withdraw from prosecution any person; and upon such withdrawal-

(a) if it is made before the accused is called upon to make his defence, he shall be discharged, but such discharge of an accused shall not operate as a bar to subsequent proceedings against him on account of same facts;”

Plaintiff on the said charge of theft by servant never testified before this court. Accordingly, the court will never know whether the arrest was on the instructions of the Defendant or the police acted on their own. I find it as a fact that on 6th February 2001 the Defendant's servants and/or agents never arrested the Plaintiff. If there was any arrest it was well after the Plaintiff failed to report for duties for a period of four days after being questioned on a shortage of cash. As stated already, there is no cogent evidence to suggest that the Defendant's agents and/or servants told the police to arrest the Plaintiff.

The above are the relevant facts that emerged from the evidence on record. I will shortly turn to deal with the issue for determination in this matter⁶. As pointed out already, it is not my wish to determine the said issues seriatim. Suffice to put it here that at the end of this judgment all the pertinent questions raised by the pleadings will be dealt with.

Further, I wish to express my deepest appreciation of Counsel's careful and thoughtful written submissions. Any clarity in this judgment is essentially due to the said submissions. It will not, however, be possible to refer to each and every detail of their submissions. Actually, if I attempted to include all their arguments this judgment would be unnecessarily long. Accordingly, if it becomes necessary to do so, my reference to the arguments of Counsel will not be detailed. I will only give a sketch of the essence of the arguments. However, the parties are advised that all their points of view will be taken into account before arriving at a decision in this matter.

Without much ado, I must now proceed to consider the pertinent issue for consideration in this action.

Law and Consideration of the Issue

The court earlier on observed that the principle matter to be resolved in this action is whether or not the Plaintiff was imprisoned by the Defendant. Actually, the proper question that must be answered is whether or not the Defendant's servants or agents unlawfully imprisoned the

⁶The said issue for consideration has been set out in the editorial note to this judgment.

Plaintiff.

Was the Plaintiff unlawfully imprisoned?

As regards this question the Plaintiff asserts that the Defendant deprived him of his liberty without lawful cause. The Defendant has submitted in argument that it never arrested the Plaintiff since the Plaintiff was only required to work because of the shortage that was revealed by the audit spot check report.

It is trite law, and I need not cite an authority for it, that the tort of false imprisonment is established on proof of the fact of imprisonment and absence of lawful authority to justify that imprisonment. Further, the position at law is that once imprisonment is established the onus shifts to the Defendant to prove that it was reasonably justified⁷. Moreover, in the local case of **Victor Steward Mhango vs Attorney General**⁸ Mtambo, J., as he then was, said the following which is illuminating:

*“The law on the subject is that an arrest, if made on reasonable suspicion, is lawful notwithstanding that the suspected offence was not in fact committed.”*⁹

I must have already found and concluded as a fact that the incident of 6th February 2001 does not amount to false imprisonment. There is cogent evidence to show that the Plaintiff did not leave the office so as to allow him to disprove that the said sum of MK 335,501.50, which the external auditor had found to be missing, had not been stolen. The Defendant can no be faulted for directing the Plaintiff to remain in the office so that the issue of the said shortage could be dealt with considering the amount of cash that was missing and could not be accounted for. In my view what the Defendant did can not be said to amount to false imprisonment. Indeed, this court finds that the Defendant’s action in not allowing the Plaintiff to leave the offices was reasonably justified in the circumstances. Further, it is important to observe that it has been found as a fact that the Plaintiff was eventually allowed to go home but he never came back to work. Actually, we have no proof that the Defendant laid a charge against the Plaintiff. The Plaintiff left that to this court to speculate. In point of fact we will never know what exactly was said at the time the report was made to the police because the officer who arrested and charged the Plaintiff never testified before this court. If anything what we have on record is that the Plaintiff did not report for duties for four days whereupon the Defendant then made a report to police who then arrested the Plaintiff.

The above does not dispose of the allegation of false imprisonment. I must now consider the issue regarding the continued detention of the Plaintiff.

⁷*Sekasan vs Scebadica* [1968]EA 213, see also *Peter Iphani vs. Makandi Tea and Coffee Estate* Civil Cause No. 3623 of 2001 High Court [unreported]

⁸ Civil Cause No. 199 of 1994 High Court [unreported]

⁹*Ibid.*, p. 3

The arrest of the Plaintiff by the Police

As mentioned earlier, the Police arrested the Plaintiff after some report was made to it to the effect that the latter had not been reporting for duties. We do not know what exact words were used in making the report. Indeed, the absence of the testimony from the police has denied us the opportunity to know whether the Defendant only laid information before the said police or preferred a charge. In saying this I am alive to the settled principle of law that where a person makes a charge against another on which it becomes the duty of the police to act, the person making the charge is liable for false imprisonment. Further, this court is aware that if a person merely gives information to the police and the police act accordingly to their own judgment, no liability for false imprisonment arises¹⁰. In the absence of evidence to the contrary, I conclude that the Police put the Plaintiff in custody on their own. Indeed, it was perfectly possible for the Police not to arrest the Plaintiff if it thought that there was no case against him notwithstanding any report by the Defendant.¹¹ Indeed, I doubt if the Defendant's agents and/or servants had control over what should happen to the Plaintiff upon making the report to the Police. Consequently, the Defendant can not be held liable for the detention of the Plaintiff by the Police.

Further, the position at law is that once a person has been arrested by the Police he has to be taken before a Court of law before the expiry of 48 hours from the time of such arrest.¹² If they keep an arrested person for more than 48 hours that may constitute unlawful imprisonment.¹³ Who then is responsible for the detention of the Plaintiff? It is the judgment of this Court that it is the State and not the Defendant. At law the Police should have kept the Plaintiff for a period of not more than 48 hours unless the Court authorized it. The Defendant

¹⁰ Wheeler vs. Whitting (1840) 9 C & P 262

¹¹ Section 34(2) of the Criminal Procedure and Evidence Code (Cap 8:01) of the Laws of Malawi.

¹²Section 42(2)(b) of the Republic of Malawi provides as follows:

Section 42 (2) Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right –

(b) as soon as it is reasonably possible, but not later than 48 hours after the arrest, or if the period of 48 hours expires outside ordinary Court hours or on a day which is not a Court day, the first Court day after expiry, to be brought before an independent and impartial Court of law and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be released;

¹³*Patrick Maseko vs the Attorney General* supra.

can not be held liable for the acts of the State unless the Police were acting as the agents of the Defendant. This is not the case. Indeed, there is no evidence to suggest that the Defendant told the Police to keep the Plaintiff in custody. As a matter of fact the Defendant's agent, in so far as the evidence on record is concerned, told the Police that the Plaintiff was not reporting for duties after being queried on some missing cash belonging to the Defendant. The Police then decided to put the Plaintiff in custody.

Moreover, the acts of the Police in keeping the Plaintiff in custody for a period of more than 48 hours, and therefore unlawfully imprisoning him, can not be blamed on the Defendant. Indeed, the Police were expected to bring the Plaintiff before a Court of Law within 48 hours of taking over the Plaintiff into custody. Unfortunately, the Plaintiff never took out any action against the State. This Court cannot, therefore, make any order against the state in respect of the Plaintiff's allegation of false imprisonment.

To sum up, the Plaintiff's claim for false imprisonment against the Defendant must fail. It is so found.

Conclusion

The Plaintiff's claim is dismissed. Accordingly, he is condemned to pay the costs of, and occasioned by, this action.

Pronounced in open Court this 5th day of January 2007 at the Principal Registry, Blantyre.

F.E. Kapanda

JUDGE
