

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO. 120/99**

BETWEEN

DOMINIC MWANAMANGA PLAINTIFF

AND

EPISCOPAL CONFERENCE OF MALAWI DEFENDANT

CORAM : **CHOMBO, J.**
: Mr. Theu, Counsel for the plaintiff
: Defendant and Counsel absent
: Court Reporter`
: Court Interpreter, Mrs. L.C. Munyenyembe

JUDGMENT

The plaintiff had two preliminary applications before court. Firstly, the plaintiff submitted that for a long time the defendants have shown no interest in the case. The defendant's counsel, Chizumila and Company, have never filed their trial bundle of documents or attended any listing sessions. Proof of service of the summons was submitted in court. The plaintiff therefore applied, and was granted, to proceed in the absence of the defendants under Order 35 rule 1 of the Rules of Supreme Court. The case was therefore undefended.

Secondly, the plaintiff applied to regularize the list of documents by filing in court some missing documents forming part of the evidence of the plaintiff. The

application was made under Order 20 Rule 8 of the Rules of Supreme Court and this too was granted.

The brief history of the matter was that the plaintiff, the only witness on the matter, was employed by the defendants as a Messenger/Filing Clerk on 17th June 1996 on probationary terms. On 6th November 1997 he was confirmed in his appointment as evidenced by exhibit P1 under conditions of service part of which form exhibit P2 in this court. The starting salary for the plaintiff was K835.00 per month but this was reviewed to K863.00 with effect from 1st September 1997.

In order to supplement his income, the plaintiff used to farm and he applied for leave and was granted 3 days from 27th to 29th May 1998 to apply fertilizer in his garden. He reported back for work on 1st June 1998 and he was called to the Director's office where he found two strange people. Then Mr. Steven Malunga, another employee, was also called into the office and the next he heard was the strangers asking the Director "ndi amenewa" (Are these the people) and the Director said "Eya" (Yes) you can pick them. In response, the strangers introduced themselves as Detectives from Lilongwe Police Station and they proceeded to handcuff the two to be questioned at Lilongwe Police Station. At Police they were locked up in a filthy congested cell. The two were beaten, mocked and teased and forced to admit that they had stolen from their employer. The houses of the two were searched by Police and then they were charged with theft. When they appeared in court on 5th June 1998 they were granted bail and the case adjourned to 29th June for hearing and 3rd July 1998 for further hearing but the plaintiff and his colleague were discharged on grounds of lack of evidence. The court directed

that the plaintiff and his colleague be reinstated but the defendant has to date refused to carry out the order of the court but instead took away the plaintiff's bicycle, refused to pay his salary and terminal benefits. Although the plaintiff was discharged by court he had to continue reporting for bail as advised by court. Efforts to get a copy of the court file have proved futile but he tendered the bail bond as evidence of the same.

Whilst the matter was proceeding in court the defendant terminated the employment services of the plaintiff and his colleague without pay. The letter terminating the services provided that salary for the month of June 1998 would be paid but the same was not implemented and has never been paid despite efforts to have it paid in accordance with the defendant's letter of 1st June 1998 and exhibited as P7.

The plaintiff was surprised that the property complained off was stolen from the warehouse where he and his colleague, now deceased, were not working as they were attached to a different department. The man in charge of the warehouse and in whose custody were the keys for the warehouse was never questioned about the stolen property, instead he was used as prosecution witness, but the court found his evidence inadequate. This, in brief is the unchallenged evidence of the plaintiff on record.

The claim of the plaintiff is based on two grounds:

1. False imprisonment.

2. Breach of Contract of Employment.

False Imprisonment

Evidence was given that the plaintiff and his colleague, now deceased, were arrested and kept in police custody from the 1st to 5th June, 2006 before being released on bail. In order to successfully claim false imprisonment there is need to prove certain ingredients. Let me mention right from the onset that I am grateful to Counsel for case authorities made available to court.

It must be shown that the arrest was at the instance of the employer and not the police. The same can be proved by the particular words used to affect the arrest. The plaintiff testified that when he and his colleague were called into the office of the Director he found two people that were strange to him and the strangers asked whether the plaintiff and his colleague were the people and the Director simply said “Eya” [yes] “you can pick them”. Following these few words the two were picked up by police and locked up in a cell for 5 days. During that time they were beaten, mocked and teased in an attempt to make them admit the charge of theft. What is not very clear in this matter is the conversation that may have gone on before the plaintiff and his colleague were called into the Director’s ¹office. Whatever it was when the two were identified to the two strangers they were taken by police, and locked up. It was laid down in *Mkumba v Attorney General* where Unyolo, J. (as he then was) quoted with approval the *12 Malawi Law Reports 143 at 15¹* case of *Sewell v National Tel. Co. Ltd*² that:

¹¹ 12 Malawi Law Reports 143 at 151

² [1907] 1 KB, 557

“--- it was held that where one makes a charge against another ---”

In the present case, the defendant's servant, the Director identified the plaintiff and his colleague to the plain clothed police officers and further stated that *“you can pick them”*. It can only be assumed that the matter was discussed before the plaintiff and his colleague being called in the room and when they came into the room they were identified and the police were given instructions to pick them. The instruction to police to *“pick them”*, in my view had the same implication of laying a charge against the plaintiff and his colleague. If the defendant's servant had merely said *“Eya”* to the question put to him *“Ndiamenewa?”* it would have been a different story. It would have been left to the police officers to decide whether or not to arrest the plaintiff for questioning, in which case the said arrest would have been at the discretion of the police officers. It should be borne in mind that the standard of proof in civil case is on a balance of probabilities. The question that any reasonable person should ask is whether the police, given such a directive, would act as the police officers did in this particular case. The Police had been called by the defendant's servant to whom a complainant was laid in the absence of the plaintiff and his colleague. Then, in the presence of the plaintiff the said servant is asked by the police whether the two called in his office are the same that they had talked about and the defendant's servant actually says *“Eya”* you can pick them.

If one were to apply the objectivity standard, these two being police officers and a report of a criminal nature having been made to them, it will be expected that

they will act on the matter. Now in addition to them being required by law to act on the matter they are further directed to “*pick them*”; that is the plaintiff and his friend. The police were under a duty to act but it should have been left to their discretion whether to arrest the plaintiff and his colleague or not. If the police had elected to effect the said arrest, the same would have been an arrest necessary in the course of their office and the defendant would not have been liable. But in this case I find that the defendant, by its servant caused the arrest of the plaintiff. Skinner, C.J. (as he then was) in *Chintenderev Buroughs*³ Ltd stated that false imprisonment will have been proved where:

“... the defendant, acting through its servants or agents, ordered the police to arrest the plaintiff, it is imprisonment by the defendant as well as by the police and is a ground for an action of trespass against the defendant, but if the defendant merely stated the facts to the Policemen, who, on their own responsibility took the plaintiff into custody, this is no imprisonment or trespass by the defendant. It comes down to this: If the defendant’s servants made a charge on which it became the duty of the police to act, then it is liable but it is not liable if they gave information and the police acted according to their own judgment.”

And Makuta, C.J. (as he then was) defined false imprisonment as follows:

3 10 MLR 215

“ - - - the imprisonment must be by a defendant or by his orders. Where the defendant does no more than state the facts to the police officer, who, exercising his discretion, decides to make an arrest, there is no remedy by way of action for false imprisonment”.
(Underlining supplied for emphasis)

When the matter went to court the plaintiff was discharged for want of adequate evidence. The imprisonment was therefore, I must find false and the plaintiff must be compensated for the same.

Having found that there was false imprisonment I must therefore decide the level of the damages. The plaintiff was kept in police custody for five days at Lilongwe Police Station and he submitted that he was tortured by police in an attempt to make him admit the allegation of theft.

In deciding the level of damages I must rely on case authority available to me. In *Enock Mizere v The Attorney General*⁴, the plaintiff was awarded K100,000.00 for imprisonment of two days. In *Martin Ngwira v The Attorney General*⁵, the plaintiff was awarded K200,000.00 for 25 days imprisonment.

The amount of damages varies depending on the circumstances surrounding the false imprisonment. The plaintiff was kept in the cells for 5 days before being

⁴ Civil Cause No. 19 of 2005 (unreported)

⁵ Civil Cause No. 292 of 2004 (unreported)

taken to court where bail was granted upon application. The plaintiff alleged that he was tortured by police and that this including beatings during the five days. I want to believe that if indeed there was torture of the level attested to by the plaintiff he would have gone to hospital upon release on bail and medical proof of the same would have been tendered in court. In the absence of the same I have difficulties assessing the level of the same. I therefore award damages for false imprisonment in this respect in the sum of K100,000.00.

I must now come to the second claim of breach of contract. The undisputed evidence on record is that the plaintiff was employed by the defendant on 17th July 1996 as Messenger/Filing Clerk at an initial basic salary of K835.00 per month. The same was reviewed and increased to K863.00 from 1st September 1997. The package came with a housing allowance pegged at 30% of the basic salary and free transport to and from work. The plaintiff's services were terminated effective 1st June 1998, the date of his arrest. In the said letter of termination the defendant indicated that:

"In view of the foregoing, your last pay is that of the month of June 1998"

But to date the defendant has not paid the plaintiff the said salary nor benefits thereto as a result of the said termination.

The question that I ask myself is whether the defendant is entitled to the claim of the said salary and benefits. I must therefore consider two material documents:

(a) exhibit P7 which is a manifestation of the manner in which the said services were terminated; and (b) the conditions of service, tendered in this court as exhibit P2. The evidence in exhibit P7 is that the defendant terminated the services of the plaintiff.

It will be important to quote the letter in full so as to appreciate the issue of breach of contract or unfair dismissal as claimed by the plaintiff. Exhibit P7 of 22 June 1998, with a heading of "TERMINATION OF APPOINTMENT" states as follows:

"I am directed to inform you of the decision by ECM Secretariat Management to terminate your services with effect from the date you ceased operation at CADECOM offices on Monday, 1st June, 1998. In view of the foregoing, your last pay is that of the month of June, 1998. The ECM's Secretariat wishes to thank you for whatever good services you rendered as its member of staff."

This was clearly a termination and not a dismissal. Under the conditions of employment, exhibit P2, termination of service is provided for under paragraphs 14.0 and 14.3.

14.0 provides as follows:

"TERMINATION OF APPOINTMENT
It is the express desire of ECM to retain and develop its employees within the realm of the resources available. However, when interests of the organization are at variance or incompatible with those of the

employee or vice-versa, the Secretariat shall consider termination of appointment.”

The terms of employment provide for the procedure to be followed in terms of termination of services. And, for support staff, the category that the plaintiff was placed in on employment, is 30 days notice or 30 days' pay in lieu of notice. The applicant sought to demonstrate to court that he was unfairly dismissed. With respect, the plaintiff's employment was terminated. The plaintiff could also have chosen to terminate the services by following the laid down procedure and he would have been perfectly entitled to do so. Equally the defendant, by following the laid down procedure could terminate the said services. Maybe if the plaintiff had been employed on a contractual term and was relieved of his position without proper justification before the expiry of the said term of contract he would have been entitled to claim against the defendant. Because the defendant chose to terminate the service of the plaintiff the defendant was supposed to have paid 30 days' salary in lieu thereof.

The said salary would have been K863.00. The plaintiff admitted losing the property of the defendant, a bicycle. The plaintiff claims that the bicycle was only worth K1,950.00 when his bicycle that the defendant ceased from him was worth about K4,999.95. The question I ask myself is how is the court to rely on this evidence when there is no documentary evidence to prove the same? Suffice to say that the plaintiff made a material admission that he lost the defendant's bicycle and it was replaced with his personal bicycle. It is not known in what condition the plaintiff's bicycle was. The defendant was entitled to recover the

cost of the said bicycle from the plaintiff. As stated the plaintiff has failed to show the actual cost of the two bicycles. It would be reasonable in the circumstances to conclude that the defendant was entitled to withhold the last pay of the plaintiff for the lost bicycle.

I find therefore that the claim of breach of contract and return of the bicycle or its value thereof have not been successful and I must dismiss them.

MADE in Court this 28th July 2008.

E.J. Chombo

J U D G E