



**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO 262 OF 2013**

BETWEEN:

JOHN KAPITO-----PLAINTIFF

AND

THE ATTORNEY GENERAL-----DEFENDANT

CORAM: HON. JUSTICE M.C.C. MKANDAWIRE

Mvalo, Counsel for the Plaintiff

Chinyama, Counsel for the Defendant

Mrs Jere, Court Reporter

Mr Itai, Court Interpreter

JUDGMENT

Introduction

The Plaintiff's claim against the defendant is for false imprisonment, defamation and violation of his human rights.

Pleadings

In his statement of claim, the plaintiff avers that on or about the 17th of March 2012, he was lawfully pulling out of a parking space in broad day light at crossroads complex in the city of Lilongwe. As he was doing that, for no lawful reason, ten or so visibly armed police men surrounded his motor vehicle. The said policemen prevented the plaintiff from moving it any further. They swung and opened its doors, entered therein, arrested the plaintiff and started searching the vehicle in full view of an astonished public.

At that material time, the plaintiff was the Chairman of the Malawi Human Rights Commission and was scheduled to travel on official duties the following day to Geneva Switzerland, to attend a meeting called for National Human Rights Institutions in his capacity as Chairman of the Malawi Human Rights Commission. For that purpose, he had lawfully obtained foreign exchange from Standard Bank of Malawi as an authorized dealer bank.

The police unlawfully kept the plaintiff in their custody and harassed him all day by taking away his phones and moving him in comunicado from one police station to the other and later with the plaintiff in their company visited his house for another search which did not yield anything. No Charge has up to now been brought against the plaintiff and he is on police bail.

Wrongful arrest, false imprisonment and violation of human rights

The plaintiff claims that;

- I. He suffered wrongful arrest and false imprisonment
- II. By being denied access to his phones whilst in police custody, the plaintiff's right to communication was violated
- III. By being subjected to the search of his person, motor vehicle and home, the plaintiff's constitutional right to privacy was needlessly violated.

Defamation

Despite the police not finding the plaintiff in illegal possession of anything or in possession of anything illicit, the national spokesperson of police speaking in the course of his duties on behalf of the police, continued publishing false and malicious public statements about and concerning the plaintiff on radio stations in Malawi and on line that the plaintiff was found in possession of foreign exchange obtained illegally. This continued even after the plaintiff was released on police bail and had shown the police bank documents supporting his lawful purchase of the foreign exchange from a bank. The plaintiff therefore claims aggravated damages for defamation.

The Defence

The defendant filed a defence. In their defence, the defendant says that:

- I. The police detained and searched the plaintiff because they had reasonable and probable cause to believe that he had acquired foreign currency through criminal means.
- II. The police found out that the plaintiff had lawfully obtained the foreign currency after investigations had been concluded.
- III. That the plaintiff was informed about the reasons for his detention in accordance with section 42(1) (a) of the Republic Constitution. That the house search was lawfully done pursuant to a search warrant obtained from the court.
- IV. That after the plaintiff was cautioned he was released on bail.
- V. That after investigations, the plaintiff was discharged as there was no evidence implicating him and the money confiscated was released to him.
- VI. That the arrest was lawful and there was no violation of the plaintiff's rights.
- VII. That there was no defamation of character but that the police spokesperson only informed the public that the police suspected the plaintiff to have obtained foreign currency illegally and that the matter was being investigated.

Survey of evidence

The plaintiff adopted his statement that he had given as a witness. It is marked as P Ex 1. It is stated that in 2012, the plaintiff was the Chairman of the Malawi Human Rights Commission. In March 2012, the plaintiff was supposed to travel to Geneva Switzerland for an official meeting. He thus decided to obtain foreign currency from standard bank. On the 17th of March 2012, the plaintiff was on official duties in the city of Lilongwe. Whilst at Crossroads complex, he was arrested by members of the Malawi Police Service. He said that there were not less than 10 police officers led by the head of the criminal investigations department from the national police headquarters a Mrs Lexa Chalera. The plaintiff had parked his motor vehicle at crossroads complex and went about his business. When he returned to his vehicle, he found it surrounded by not less than 10 police officers and when he went into the vehicle and decided to pull out of the parking bay, he was prevented from moving out. To his amazement, the police opened the doors of his vehicle. Others came in whilst others went underneath the car. They searched the entire car up to the boot. The plaintiff said

that he voluntarily handed over to the police the foreign exchange that he had on him for his official trip to Geneva. The cash was in Dollars and Euros. He also handed to them his air ticket. It is his evidence that he deliberately handed over the foreign currency to the police because he knew that if they found the money on their own as they searched him and his vehicle, they would distort matters and allege that they found him in possession of illegally obtained foreign currency.

Despite all this, the police still arrested him. They then took him to one police station after another starting with the central police regional headquarters, Lumbadzi police station and back to national police headquarters. During all this time, he was not allowed to communicate with anyone and his mobile phones were taken away from him.

The plaintiff said that all this time he was not charged with any offence and later on the police drove him to his house which was a flat arranged by the Malawi Human Rights Commission since his real base was in Blantyre. The police ransacked his private items although they did not find anything unlawful. He was later released on police bail and the offences indicated on the bail bond were those of possession of material carrying seditious words and illegal possession of foreign currency. After he was released, he supplied the police with supporting documents for foreign currency. In a nutshell, the plaintiff spent 10 hours in police custody.

The plaintiff said that although he informed the police as to how he had obtained the foreign currency even producing the air ticket for his travel, as well as supporting official documents, Mr Davie Chingwalu then police service spokes person in his official capacity went public on domestic and international media proclaiming that the plaintiff was found in illegal possession of foreign currency which was illegally obtained. On the 30th of April 2012 the Malawi Human Rights Commission wrote the police protesting about the said false publication by their spokesperson. The letter was tendered as P Ex 1(b). The plaintiff also tendered several publications which Mr Chingwalu had done. These are P Ex 1(c) to 1(c). The plaintiff lamented that up to now, he has not been charged with any offence.

The plaintiff called two witnesses, namely Yusuf Witness Nthenda and Paul Patrick Mhango as Pw no 2 and Pw no 3 respectively. Pw no 2 adopted a written statement which is marked as P Ex 2. The witness said that he knew the plaintiff

very well and that all along until he read these publications he had held the plaintiff in the highest esteem. He however said that all was now gone and that his estimation of the plaintiff was now so lowered as he now knew that the plaintiff was an illegal foreign exchange dealer a criminal not worth of respect and that he now shuns or avoids him to avoid being associated with him as a fellow illegal foreign exchange dealer. Pw no 3 also adopted a written statement which is P Ext no3. He too said that he knew the plaintiff as a respectable law abiding person. He said that since he had read those publications of and concerning the plaintiff being found in illegal possession of foreign currency he had lost all the respect for the plaintiff. He has since been shunning the plaintiff to avoid people associating him in the illegal foreign exchange dealings.

The defence called one witness a Mrs Lexa Chalera a retired Deputy Commissioner of police. She was Dw no 1. She adopted her written statement which is D Ex 1. The witness said that on the 17th of March 2012, there was a presidential function at Civo Stadium. Whilst there on duty, the Inspector General of police sent his staff officer with his mobile phone which had a message which carried security information. The message read that Mr John Kapito was at crossroads conducting a meeting and that he was carrying seditious material with him to distribute to members attending the meeting. After reading the message, she accompanied by her driver took action by going to crossroads where she met other police officers who she assumed had received a similar message from elsewhere. On arrival, she found the plaintiff in his car about to drive off. After introducing herself to the plaintiff she informed him that they had received a message that he was carrying seditious material with him. She then ordered one of the officers to search the car in a manner that would not attract public attention. In the course of conducting the search, they found foreign currency on the plaintiff. The plaintiff was asked if he had any backing documents for the foreign currency but he did not have any and he said that the bank had not yet provided him with the documents. With that response, she decided to take custody of the foreign currency until further investigations. The plaintiff was however not found with any seditious material on him and he was thus invited to the police station to be cautioned on both the seditious material and possession of foreign currency. The police later on searched his house for seditious material but found nothing. They later released him on police bail. Eventually the plaintiff

brought supporting documents for the foreign currency and the money was released to him. Later on it was very clear that the plaintiff had not committed any offence and the file was closed.

It is from the said evidence that this court had to decide whether the plaintiff has proved his case on a balance of probabilities.

Issues

From the pleadings and the evidence on record, the issues for determination are as follows:

1. Whether or not the defendant is liable for false imprisonment.
2. Whether or not the defendant deprived the plaintiff of his constitutional right to communicate throughout the period that he was in police custody.
3. Whether or not the defendant deprived the plaintiff his constitutional right to privacy by subjecting him to unwarranted searches.
4. Whether or not the defendant is liable for defamation.

The first issue to be considered is false imprisonment. False imprisonment relates to the liberty of an individual which is a human right enshrined in section 18 as read with section 39(1) of the Republic Constitution. Section 18 of the Constitution provides that 'every person has the right to personal liberty.' On the other hand section 39(1) provides that 'every person shall have the right to freedom of movement and residence within the borders of Malawi.' It is therefore imperative to appreciate that a person shall not be deprived of his or her personal liberty, except where there is legal justification. This therefore means that every imprisonment is *prima facie* lawful until or unless legally justifiable per **Liverside v Anderson** [1942] AC 206. False imprisonment is the complete deprivation of a person's liberty for anytime however short without lawful cause. Thus any form of unlawful restraint might turn up to be false imprisonment.

Analysis

It is not in dispute in this case that the plaintiff's liberty was restrained when he was arrested at crossroads complex. It is cloudlessly in my mind from the evidence of the plaintiff which evidence was confirmed by that of Mrs Lexa Chalera Dw No 1 that the plaintiff was really arrested by the police. This arrest

was effected in a very bizarre way as there were almost ten police officers against one civilian. The arrest was made in broad day light at a public place in full view of the watching public. Therefore, it has indeed been proved that there was an arrest and imprisonment of the plaintiff. The imprisonment immediately commenced from the time of arrest. The last element to be determined is whether the imprisonment of the plaintiff was lawful. In this matter, pursuant to section 34(3) (d) of the Police Act (Cap 13:01), every police officer is legally mandated to apprehend all persons who he or she is legally authorized to apprehend and for whose apprehension **sufficient grounds** exist. Further to this, pursuant to section 28(a) of the Criminal Procedure and Evidence Code (CP&EC), a police officer can only arrest any person without a warrant of arrest if the police officer suspects on **reasonable grounds** that the person being arrested has committed an arrestable offence. These arrestable offences are found in the First Schedule of the CP & EC. Under that schedule, the offences of distribution of seditious material and illegal possession of foreign currency would require a police officer to obtain a warrant of arrest before he or she can arrest any person. In addition, under section 20A (1) (2) of the CP&EC is to the effect that any arrest is not lawful unless the person arrested is informed of the reasons for the arrest at the time of the arrestor or as soon as is practicable after his or her arrest.

From the evidence on record, the plaintiff stood by his words that when arrested, he was not informed of the reasons for his arrest. Even the evidence of Mrs Lexa Chalera does not say anything on that. Not only that, the next question is whether the police had **reasonable grounds** or **sufficient grounds** existed to have the plaintiff arrested. A survey of the evidence shows that there was strong suspicion by the police that the plaintiff was addressing a meeting at crossroads where it was also believed that he would be distributing seditious materials. When the police stormed the place, they did not find the plaintiff addressing the so called meeting. The plaintiff was actually about to pull off in his motor vehicle. If the police had genuine information about the said meeting, one wonders as to why the same police did not even attempt to take the plaintiff to the place where he had been addressing the said meeting and confirm if any seditious material had been distributed. The police instead went ahead to search his motor vehicle but found nothing related to seditious material. At that point in time therefore, the police did not have any sufficient grounds or reasonable grounds that the plaintiff

had any seditious materials. In the course of this drama, the plaintiff produced United States Dollars and Euros and he informed the police that the foreign currency was for his official trip that he was about to embark on to Geneva in Switzerland. The plaintiff produced the air ticket for the trip and further disclosed that he had obtained the foreign currency from Standard Bank Capital City branch and that the funding was provided for by the United Nations Development Programme (UNDP) in Lilongwe. The plaintiff of course did not have all the supporting documents from the bank as some of them were at his house in Blantyre where he was staying. It would appear that the police did not believe the plaintiff although they could have easily confirmed with the bank and UNDP which offices were within reach. They could also have easily driven to these places and confirm instead of driving the plaintiff to divers police stations in the city of Lilongwe such as area 3 police station, national police headquarters and Kanengo. Mrs Lex Chalera told the court that the plaintiff had told her that the bank had not given him the documents for the foreign currency. This evidence was strange because there is no way that the bank would have released the foreign exchange to the plaintiff without any supporting documents. This was just an afterthought. I am satisfied on a balance of probabilities that the arrest and imprisonment of the plaintiff was unlawful and it amounted to false imprisonment.

The next issue relates to breach of the plaintiff's constitutional right to communicate. Section 42(1) (d) of the constitution provides that every detained person shall have the right to be given the means and opportunity to communicate with and to be visited by, his or her spouse, partner, next-of-kin, relative, religious counselor and a medical practitioner of his or her choice. The constitution does not of course stipulate the time frame when the detained person has to be given the means and opportunity to communicate with the said category of people mentioned in section 42(1) (d). It therefore behooves the courts to give meaning and life to this constitutional imperative.

The evidence from the plaintiff which was not challenged was that when the plaintiff was arrested he had two personal cell phones on him. Both cell phones were immediately confiscated by the police. It was also his evidence that throughout his stay in police custody, the police did not give him an opportunity to communicate with his family, relatives or lawyers. I am aware that during

cross-examination, the plaintiff conceded that he later on communicated to Mrs Grace Malera who is the Executive Secretary of the Malawi Human Rights Commission. Unfortunately, that communication is not within the purview of section 42(1) (d) of the constitution. If the plaintiff was afforded the opportunity to communicate as envisaged in section 42(1)(d), Mrs Lexa Chalera could have confirmed that. Let me emphasise here that communication is very vital. The arresting officials are under a legal duty to facilitate it. It becomes easier when the arrested person has got his or her own communication gadgets as was the case herein. I therefore find that the defendant had blatantly breached the plaintiff's constitutional right as a detained person as enshrined in section 42(1)(d) of the constitution.

The plaintiff further claimed that the defendant had breached his constitutional right to personal privacy. Section 21(a) of the constitution provides that every person shall have the right to personal privacy, which shall include the right not to be subjected to searches of his or her person or property. The right to privacy provided for in section 21(a) is however not an absolute right. It can be limited or restricted. The right to privacy can be limited or restricted by obtaining a search warrant pursuant to section 24A(4) of the CP&EC. The evidence of Mrs Lexa Chalera was that before the police could go to search the house of the plaintiff, they obtained a search warrant from the court. During cross-examination, the plaintiff conceded that he was shown the search warrant by Mrs Chalera. I was therefore unable to appreciate that the plaintiff's right to privacy was violated by the police as they had followed the right procedure before they went to search the house.

The last issue relates to defamation. Defamation is a publication of a statement which tends to lower a person in the estimation of a right thinking members of society generally or which makes them to shun or avoid that person per **Mangani-vs-Caltex Oil Malawi Limited** [2008] MLR 146. In the case of **Khomba- vs-Smallholder Farmers Fertiliser Revolving Fund**[1999] MLR 129 Nyirenda J (as he then was) held that there are three elements to the legal wrong of defamation. These are, there must be publication of the defamatory words. Publication entails the making known of a defamatory matter to someone other than the person of whom it is written or spoken. Second, the words must refer to the plaintiff and lastly, the words must have been maliciously published.

Turning to the matter at hand, the plaintiff was first targeted as being in possession of seditious materials. Upon searching his car, nothing of that sort was found. On his own volition, the plaintiff produced the foreign currency that he had lawfully obtained from the bank. He informed the police that the other bank documents were at his house which house was in Blantyre. Before the police could verify this very vital information either with the bank or by giving him an opportunity to bring the documents to the police from his house, the police through their public relations officer Mr David Chingwalu broke the news to the media. There are three articles carried in the online publications called Malawi today, Nyasa Times and Malawi Voice found in PEx 1c, PEx 1d and PEx 1e respectively which have been the subject of defamation in this matter. All these articles are dated 17th March 2012. In Malawi today, Mr David Chingwalu is quoted having said the following; ***'The law on currency exchange demands that whoever is looking for forex should first apply with relevant institutions. It appears that this did not happen in this case, hence the arrest,'*** In Nyasa Times the relevant article said that Malawi Police spokesman David Chingwalu confirmed the arrest, saying he was nabbed for ***"Illegal possession of forex."*** Chingwalu said Kapito was found holding US dollars and euros without ***"valid bank documents."*** Malawi Voice carried the following article ***"The law on currency exchange demands that whoever is looking for forex should first apply with relevant institutions. It appears that this did not happen in this case hence the arrest,"*** Chingwalu said.

This matter is rather intriguing. As I had already indicated, the conduct of the Malawi Police leaves a lot to be desired in the way this matter was handled. The plaintiff had voluntarily informed the police that he had in his possession foreign currency and he then and there disclosed how he had obtained it. The police without any due regard to what the plaintiff had said as to how he had obtained the foreign currency, went ahead to tell the world portraying the plaintiff having obtained the foreign currency without following the legal procedures. That publication was certainly malicious. The impression that these articles had carried in the minds of any ordinary person was that the plaintiff was arrested because he was an illegal foreign currency dealer. The police had a duty to verify what the plaintiff had told them. There were several options available. They could have easily taken the plaintiff to the bank for verification or they could have allowed

him to collect the documents from his house. But without taking any of these measures, the publicity officer went to the media. It was not surprising therefore to hear from Pw no 1 and Pw no 2 as to how they now viewed the plaintiff after having read those articles. The police was full of malice in the way they handled the publicity. I therefore find the defendant vicariously liable in defamation for libel.

The defendant is found liable for false imprisonment, breach of the plaintiff's right to communicate and defamation. I order that the Registrar should assess the damages. I also award costs to the plaintiff.

DELIVERED THIS 27th DAY OF JUNE 2016 AT LILONGWE

M.C.C. MKANDAWIRE

JUDGE