

REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CAUSE NO. 182 OF 2013

In the matter between:

GREY NAVAYA

PLAINTIFF

and

GREAT LAKES COTTON COMPANY LIMITED

DEFENDANT

JUDGMENT

The plaintiff, Mr. Grey Navaya, commenced this action by way of a specially endorsed writ of summons which was filed on 3rd April, 2013 claiming for damages for false imprisonment, malicious prosecution, defamation and damages for unfair dismissal, three months withheld wages and costs of the action.

The pleadings

In terms of pleadings, in the statement of claim the plaintiff alleges that on or about 1st July, 2011 the agent or servant of the defendant wrongly directed and procured the police at Monkey-Bay Police Station to arrest the plaintiff and put him in custody on a charge of theft until the 12th July 2011 when he was released on bail by the Third Grade Magistrates' Court sitting at Monkey Bay. The plaintiff believes that the agent or servant of the defendant caused him to be arrested in broad day light in public and thereby subjecting him to humiliation and disgrace and brought him into ridicule and contempt. The statement of claim shows that on the 8th July the plaintiff appeared before the abovementioned court where he pleaded not guilty to a charge of theft and on the 19th July, 2011 after a full trial the plaintiff was acquitted by the said court for lack of evidence relating to the offence. The plaintiff contends that in the premises the defendant caused the plaintiff to be wrongly imprisoned and deprived of his liberty for a period of 11 days and was greatly injured in his character and reputation and suffered considerable inconvenience and anxiety and thereby suffered loss and damage. The plaintiff also alleges that the defendant unfairly and unlawfully dismissed him from his employment on the 28th August, 2011. The

plaintiff further claims from the defendant withheld wages for the months of June, July and August 2011.

The defendant in its defence admits the fact that the plaintiff was arrested on a charge of theft but denies all the other accompanying allegations which appear in the statement of claim and puts the plaintiff to strict proof thereof. The defendant also admits that the defendant was dismissed from his employment but denies that the dismissal was unlawful and unfair. The defendant further denies the claim that it withheld wages for the months of June, July and August, 2011.

This court has been called upon to determine the following issues:

1. Whether or not the defendant is liable to the plaintiff for false imprisonment, malicious prosecution and defamation.
2. Whether or not the defendant unlawfully and unfairly terminated the service of the plaintiff.
3. Whether or not the plaintiff was entitled to the three months withheld wages.

The evidence

Three witnesses were called to testify in this civil action, the plaintiff himself and two witnesses on behalf of the defendant.

The plaintiff, Mr. Grey Navaya, was the first person to take the witness stand and testified on his own behalf in this matter. He adopted his witness statement as part of his evidence in examination in chief. In his witness statement the plaintiff states as follows:

1. That he was employed by the defendant as a cotton extension agent on 5th November 2008 and that he was stationed at Nkope Market, Monkey Bay. That his duties were to buy cotton on behalf of the defendant company and arrange for its transportation to the ginnery.
2. That on 1st July 2011 he was arrested by Monkey Bay Police at the instance of the defendant's internal auditor and was put into a cell until 12th July 2011 when he was released on bail by the Third Grade Magistrates' Court sitting at Monkey Bay. That he was charged with the offence of theft.
3. That he was defamed as he was arrested in broad daylight when members of the public were watching and that his neighbours at home came to know that he had been arrested for theft at his place of work.
4. That the conditions in the cell were dehumanising as it was overcrowded and unhygienic and he slept on a bare floor without a blanket or any cover. That

he was beaten up by the police to force him to confess that he had stolen the defendant's money.

5. That in spite of his protestation of innocence he was charged and tried for the offence of theft before the Third Grade Magistrates' Court and that on 19th July 2011 after a full trial he was acquitted by the court.
6. That in spite of being acquitted of the charge of theft the defendant unfairly dismissed him from employment on 28th August 2011. His expectation was that he would work for the defendant up to retirement age. That whilst in employment he was earning K15,500 per month and that at the time of the dismissal the defendant had not paid him his salary for the months of June, July and August 2011.

The plaintiff tendered in evidence three documents namely, the judgment of the Third Grade Magistrates' Court acquitting the plaintiff which was marked exhibit P1, the letter of 19th September, 2011 from the defendant to the plaintiff which was marked exhibit P2 and the letter of 30th June, 2011 from the defendant to plaintiff, which was marked exhibit P3.

In cross examination, the plaintiff stated that Auditor Godia came to the market on 1st July 2011 and checked all the documents and money which the plaintiff had and found that he was to spent around K8,5 million during the season and that he returned around K400,000.00 back to the office. He testified that he did not agree with the auditor on weight of cotton as weight loss could be because of dryness and termites eating some of the cotton. That the auditor was not satisfied with the response of the plaintiff so he took him to Monkey Bay Police Station where the plaintiff alleges that the auditor told the police to keep the plaintiff and that the police would be advised later as to what to do with the plaintiff. That in August the plaintiff attended a disciplinary hearing where he was given a chance to explain his side of the story as to the stolen cotton and stones being found in the cotton. After the disciplinary hearing his services were terminated through a letter of summary dismissal. The panel at the disciplinary hearing did not accept his explanations although he was acquitted by the court. The plaintiff stated that at the disciplinary hearing he was not given reasons for his dismissal but the explanation was in the letter. That he was not given benefits and there was no explanation in the letter of dismissal.

In re-examination the plaintiff stated that he had no freedom from the time Auditor Godia took him to the police. He also remarked that the issue of stones was only brought up at the disciplinary hearing. The witness revealed that he was found to be grossly negligent by the disciplinary hearing panel which constituted of the

Human Resource Manager, the Production Manager, the Purchasing Manager and the Auditor.

Mr. Thangatani Khobwe, the Internal Auditor of Great Lakes Cotton Company Limited, was the first witness for the defendant. He adopted his witness statement as part of his evidence in examination in chief in the proceedings. He reveals the following facts in his statement:

1. That on or about 1st July 2011, Mr. Dalitso Godia, who was then an Internal Auditor for the defendant visited the plaintiff at Nkope Market for an audit while this witness was assigned to another market.
2. That at that time the plaintiff was employed by the defendant as a Cotton Extension Agent and was a custodian at Nkope Market.
3. That the witness was ably informed by Mr. Godia what he found at Nkope Market and he produced an audit report.
4. That the audit showed that the market had bought 56,004kgs of seed cotton but only 53,330kgs was sent to Balaka Ginnery leaving a book balance of 2,674kgs which was valued at K401,100.00.
5. That upon tracing the seed cotton sent to Balaka Ginnery it was found that 1,140kgs were stones which weight was valued at K171,000.00.
6. That the Auditor after detecting the shortage reported the matter to Monkey Bay Police Station.
7. That the police upon being given the information conducted their investigation, arrested and detained the plaintiff after they suspected him of stealing and mismanaging the cotton seeds and funds.
8. That the plaintiff's arrest was not procured by the defendant and/or its servants/agents.
9. That the plaintiff was arrested by the police officers upon being given information by the auditors of the missing kilograms of cotton seeds but the defendant's agents/servants never laid a charge against the plaintiff.

In cross examination Mr. Khobwe conceded that there could be weight loss of cotton because of cotton drying or being eaten by termites and that these could be plausible reasons. He confirmed that the audit was on 1st July yet the letter of suspension had been written on 30th June. He stated that cotton was collected from the market by a transporter to Balaka Ginnery. He disclosed that he was not present when Auditor Godia was reporting the incident to police so he had no idea what he told the police. He stated that the conclusion of the audit report was that the plaintiff was liable for the loss. The witness was not subjected to re-examination.

Mr. Chikumbutso Njolomole, the Human Resource Manager for the defendant, was called to testify as the second witness for the defendant. He adopted his witness statement as part of his evidence in examination in chief in which he makes some of the following statements:

1. That the plaintiff who was a former employee of the defendant stationed at Nkope Market was arrested by police on or about 1st July 2011 on allegations of theft after an audit revealed that some kilograms of cotton seeds were missing at his station.
2. That the defendant through a letter dated 19th August 2011 invited the plaintiff to a disciplinary hearing to answer some charges on the shortage of 2,674 kilograms of seed cotton and sending to ginneries stone in seed cotton bales weighing 1,140kgs.
3. That the plaintiff was present and heard at the disciplinary hearing which was conducted on 25th August 2011 and the outcome of the hearing which was a summary dismissal of the plaintiff for gross negligence was communicated to the plaintiff in a letter dated 28th August 2011.
4. That the plaintiff's dismissal was fair since he was accorded a chance to be heard and reasons were given and that the plaintiff had been previously warned for misconduct through a letter dated 5th July 2010.
5. That the plaintiff did not get his wages for the months of June 2011 as the value of the shortage in a warning letter was being recovered through deductions from his wages since July 2011.
6. That the letter of dismissal of the plaintiff stipulated and the defendant did recover the loss that the defendant had incurred due the plaintiff's misconduct from the plaintiff's terminal benefits and his two months wages. That the calculations of the terminal benefits that were due to the plaintiff upon his dismissal less the shortages incurred by the defendant due the plaintiff's misconduct were done and communicated to him.
7. That the plaintiff owes the defendant the sum of K569,984.00 being outstanding balance for the seed cotton shortage and value of stones that were sent to the ginnery by the plaintiff.

In cross examination the witness was cross examined on why the suspension letter was written on 30th June 2011 when the audit was done on 1st July 2011? The witness stated that the audit was carried out from 1st July, 2011 after the suspension but prior to conducting investigations. That a disciplinary hearing was held whereat the plaintiff was found guilty. The witness stated that he had no plausible explanation as to why the final warning letter was not removed from the plaintiff's file despite instructions to remove it after 9 months and yet the same greatly influenced the decision to dismiss the plaintiff. He stated that the appeal by the plaintiff was not

heard. He informed the court that cotton drying and cotton eaten by termites could account for the cotton weight loss. That cotton was carried by transporters and that it could be possible for stones found in cotton bales to be attributed to the transporters. He did not understand how the court acquitted the plaintiff based on the same explanation that the disciplinary panel dismissed the plaintiff on.

In re-examination he stated that the final warning letter was written in July, 2010. The testimony of this witness marked the end of the defence case and the closing of the evidence in this civil matter.

The plaintiff's arguments and submissions

In analysing the evidence, the plaintiff notes that the audit started on 1st July, 2011 and yet the plaintiff received a warning letter dated 30th June, 2011, which appeared as exhibit marked P3. The plaintiff observes that Auditor Godia who took the plaintiff to Monkey-Bay Police and reported the incident to the said police was not called by the defendant to give evidence of his version of events nor were the police called to testify as to what caused them to arrest the plaintiff and put him in custody. On this particular issue, this court finds that in terms of procedure the parties are at liberty to call witnesses whom they think will help their case. It is unreasonable for the plaintiff to insist that the defendant should have called particular witnesses in this matter. The plaintiff might as well as have called such witnesses. The plaintiff submits that the defendant is guilty of false imprisonment through the acts of its servant or agent Auditor Godia who took the plaintiff to police.

The plaintiff contends that the defendant had made up its mind to dismiss the plaintiff as can be seen from suspending him on 30th June, 2011 while the auditor started his investigations on 1st July, 2011; not removing the final warning letter from the plaintiff's file and not hearing the plaintiff's appeal. The plaintiff asserts that the defendant had no valid reason to dismiss the plaintiff as the plaintiff was acquitted by a competent court of the same charges that were levelled against the plaintiff in the disciplinary hearing.

The plaintiff further notes that the defendant does not dispute that it did not pay the plaintiff three months wages but states that it deducted the same to cover for losses incurred by the plaintiff however the plaintiff was acquitted by a competent court and the defendant had in the circumstance no right to withhold the plaintiff's wages.

In terms of the law the plaintiff notes that he has to prove his case on a balance of probabilities: *Msachi v Attorney General* [1991]14 MLR 287. In regard to the claim for false imprisonment the plaintiff is aware that he must show that the

defendant made a charge against the plaintiff upon which it became the duty of the police to arrest: *Mtukumila v Malawi Railways Limited* 2 MLR 172. The plaintiff asserts that in the present case the police had to arrest the plaintiff based on the report given to them by Auditor Godia, the defendant's servant or agent. The plaintiff submits that imputation of a crime is actionable *per se*, if words impute theft: *Mkulichi v Central Africa Transport Company* 10 MLR 403. It is the view of the plaintiff that in the present case, the plaintiff was made out as a thief who had stolen the defendant's money by delivering less cotton than the money paid for the cotton.

The plaintiff refers to the case of *Themuka v Escom Limited*, IRC matter no. 544 of 2008 and while noting that in principle a dismissal is unfair if there is no valid reason for the dismissal and if the employer does not accord the employee a hearing he contends that in the present case the defendant did not have a valid reason to dismiss the plaintiff. The plaintiff argues that a sham hearing was held which disciplinary hearing did not constitute a hearing in terms of the law at all.

The plaintiff's prayer is that the defendant should be found to be liable for the entire plaintiff's claim as claimed in paragraph 9 of the statement of claim.

The defendant's arguments and submissions

The defendant is of the view that the entire claim of the plaintiff should be dismissed with costs. The defendant has advanced the arguments and submissions discussed below under the different heads of the claims.

In terms of what constitutes false imprisonment the defendant refers cases of: *John Msusa v Orascon Continental* Civil Cause No. 879 of 2012; *Kanyemba v Malawi Hotels Ltd* [1991] 14 MLR 157; *Mbewe v Agricultural Development and Marketing Corporation* [1993] 16 (2) MLR 595; *Mpunga v Blantyre Print and Publishing Company Limited* [1999] MLR 282 and *Chiumia v Southern Bottlers Limited* [1990] 13 MLR 114. The defendant notes that the following elements need to be proved for an action in false imprisonment to succeed: actual imprisonment; the defendant or by his agents or by his order made a charge against the plaintiff at the police and acting on such charge the police proceeded to make an arrest and placed the plaintiff in detention. That as an extension to this requirement, where the defendant does no more than state the facts to the police, who, in exercising its discretion, decides to make an arrest there is no remedy by way of action in false imprisonment; whether there is reasonable and probable cause of suspicion that a felony has been committed a police officer can arrest a suspect.

After analysing the evidence before the court the defendant is of the view that it does not reach the requirements for a cause in false imprisonment to be sustained

as all the evidence we have from the plaintiff is that he was arrested "at instance of the Defendant's internal auditor." The defendant finds this statement to be a vague description of the facts intending to prove false imprisonment that are before the court and is of the strong view that the evidence is not enough and fails to meet the requirements outlined in the case of *John Msusa v Orascon Continental*.

The plaintiff after referring to the cases of *Mbewe v Agricultural Development and Marketing Corporation* [1993] 16 (2) MLR 595 and *Mpunga v Blantyre Print and Publishing Company Limited* [1999] MLR 282 submits that no charge was laid against the plaintiff on which the police acted and arrested the plaintiff. According to the plaintiff, from the evidence it was reasonable and probable for the police to prosecute the plaintiff because he was stationed at Nkope Market as a cotton extension agent for the defendant and he was given an amount of money to purchase certain amounts of cotton. That after an audit at the market conducted by the defendant, it was revealed that 2,674 Kgs of cotton, valued at K401,100.00 were missing at the place where the plaintiff was stationed. That after detecting the shortage, the auditor, Mr. Godia reported the matter to Monkey Bay Police Station. The defendant contends that there is no evidence whatsoever that the defendant laid a charge against the plaintiff at the police station. The defendant submits that the police acted out of their own independent judgment and decided to arrest the plaintiff and keep him in custody during the period he was in custody. The defendant submits that the claim under false imprisonment should not be sustained as the plaintiff has failed to prove that the defendant or the defendant's agents or servants laid a charge against the plaintiff upon which the police acted and imprisoned the plaintiff.

Turning to the claim for malicious prosecution the defendant refers to the case of *Mbewe v Agricultural Development and Marketing Corporation* where the court described the requirements in a claim under the Tort of malicious prosecution as requiring

"... proof of absence of reasonable and probable cause and proof of malice in the commencement of prosecution ... The requirement for malice may be satisfied by proof of improper motive or purpose."

The defendant submits that there were large sums of money that got missing under the plaintiff's watch and that the defendant acted in good faith in reporting to police as the auditor honestly and genuinely believed that there were shortages involving large sums of money. The defendant is of the view that the claim is baseless and should fail as there is no evidence before the court that the matter was reported to police with a view of serving an improper purpose or motive. The defendant argues that it reported in good faith after realising that huge sums of money had gone

missing and it cannot be said that the arrest and the prosecution were for a wrongful purpose.

For the plaintiff's third claim for defamation, which the defendant notes that it is aimed at the protection of the dignity of any human being is defined as "the publication of a statement which tends to lower a person in the estimation of right thinking members of society generally or which makes them shun or avoid him or to cut him off from society or to expose him to hatred or ridicule": *John Msusa v Orascon Continental*. In this case where the plaintiff alleges that the conduct of the defendant was at fault the defendant relies on the cases of *John Msusa v Orascon Continental* and of *Ndiwo v Attorney General* [1997] MLR 223 in submitting that the plaintiff in this matter has failed to prove that the arrest has brought his reputation into disrepute in the eyes of the right thinking members of the society as the mere fact that the plaintiff was arrested and subjected to police investigation, did not itself convey the actual guilt of the plaintiff and could not be construed as defamatory of the plaintiff by way of meaning that the plaintiff had in fact committed the offence. The defendant submits that the claim under defamation should not succeed as there is no evidence to support the claim that the plaintiff was defamed due to the arrest.

In respect of the claim for damages for unfair dismissal while the defendant concedes that the law provides that the employment of an employee shall not be terminated by an employer unless there is a valid reason for such termination connected with the capacity or conduct of the employee or based on the operational requirements of the undertaking it notes that conduct that would justify termination has not been listed. The defendant notes that misconduct is a ground for dismissal under the Employment Act. The defendant on the strength of the evidence before the court and relying on the case of *Chiwindo v Stagecoach Malawi Ltd* [1997] 1 MLR 457 submits that it would be unfair to find the defendant in the wrong when the defendant had lost trust in the plaintiff due to his shortages as this was the second time to be found with a shortage. The defendant submits that the plaintiff's claim under this head should be dismissed as he was accorded with all the rules of natural justice as he was given an opportunity to be heard and he was told of his charge in advance.

Lastly, the defendant is of the view that the withholding of wages was justified as that was the only means in which the defendant could have recovered its money that was got lost under the watch of the plaintiff.

The Decision

As has been noted by both parties in regard to the claim for false imprisonment the fact of imprisonment is not in question here. However the issues is whether or not

the defendant or by his agent ordered the imprisonment of the plaintiff? Whether or not the defendant or his agent laid a charge against the plaintiff and acting on such charge the police proceeded to make an arrest and placed the plaintiff in detention? From the evidence of the plaintiff what we have are allegations that on 1st July 2011 the plaintiff 'was arrested by Monkey Bay Police at the instance of the defendant's internal auditor and was put into a cell until 12th July 2011' however the plaintiff fails to prove that the police had to arrest the plaintiff based on the report given to them by Auditor Godia who was the defendant's servant or agent. There is no evidence that the defendant's agent or servant made a charge against the plaintiff to the police and acting on such charge the police proceeded to make an arrest and place the plaintiff in detention. The plaintiff merely alleges but does not prove that his imprisonment was by the order of Auditor Godia. What is worth noting is that from the evidence the defendant has managed to prove that there was reasonable and probable cause for suspicion that a felony had been committed and the police could arrest a suspect, in that the plaintiff was suspended on 'an allegation of shortage of 2674 kgs of seed cotton' and Mr. Khobwe stated that the audit report revealed that the plaintiff had incurred shortage of stock of 2674 kg of seed cotton valued at K401,000.00. In law the arrest and detention of the plaintiff based on the suspected and established loss of cotton seed belonging to the defendant cannot be argued that such conduct did constitute defamation. The decision of the police to prosecute the plaintiff on the available facts could not be faulted as there was reasonable and probable cause for instituting criminal proceedings against the plaintiff and his prosecution was justified. The case of *Mhango v Opportunity Bank Malawi Limited*, HC/PR Civil Cause No. 446 of 2015 [unreported 12 June 2017], is authority for the proposition that a defendant is not liable for false imprisonment where there is reasonable cause for complaining to the police and the police in execution of their duties arrest the plaintiff. Accordingly, on the facts what is clear is that the defendant suspected and detected a shortage of cotton seed, but what is not revealed by the plaintiff who had the burden to prove all his claims is whether or not the defendant laid any charge against the plaintiff in reporting the matter to the Police.

Under the claim for malicious prosecution it is clear from the circumstances in this case that it is difficult to find improper motive or wrong purpose on the part of the defendant for having the plaintiff prosecuted at Monkey Bay Magistrates' Court. If anything there is sufficient evidence that was reasonable or probable cause for believing that the plaintiff was responsible for loss which the auditor established at Nkope market which an indisputably was under the supervision of the plaintiff. To depend on the judgment of the criminal trial court as evidence malicious prosecution is improper because the procedures and standard of proof of evidence in a criminal case are different from a disciplinary hearing or a civil action. As was

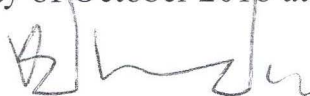
noted in the case of *Tondeza v Carlsberg Malawi Limited and Attorney General*, HC/PR Civil Cause no. 58 of 2013 [unreported 21st September 2015] an acquittal in a criminal trial on the same facts does not mean that a plaintiff will be successful in a civil claim for damages for false imprisonment, malicious prosecution and defamation.

The claim for defamation is unsuccessful and is dismissed as what the plaintiff told the court were mere allegations and the available evidence falls short of fulfilling the four factors stated in the case of *Nyirenda v A R Osman and Co*, 16 (2) MLR 681 that a statement must satisfy in order for a plaintiff to make out a case for defamation which are as follows: first, that the words complained of were published maliciously; secondly, that they are defamatory; thirdly, that they refer to the plaintiff and lastly, that they were published. The plaintiff should have adduced evidence, proving any words, conduct or activity, directed at or done in the presence of members of the public and specified neighbours which were defamatory of the plaintiff or he should have called some of the neighbours to testify on the matter.

The claims for labour related matters this court noted that as much as the High Court has original jurisdiction over all civil and criminal matters there still exists an Industrial Relations Court which has jurisdiction to handle labour and employment matters: section 64 of the Labour Relations Act. In labour related disputes the Labour Relations Act only provides the High Court appellate jurisdiction over decisions from the specialised Industrial Relations Court. This court is of the considered opinion that the labour reliefs sought by the plaintiff can be competently dealt with by the Industrial Relations Court they should not have been included under the civil claims in this action. By the authority of *Chilemba v MHC* [2008] MLLR 136, it is ordered that these claims be transferred to the Industrial Relation Court and the plaintiff is to comply with the procedure and practice obtaining in the Industrial Relations Court by 31st October 2018.

On the claims that have been disposed of the costs are awarded to the defendant.

Pronounced in open court this 4th day of October 2018 at Chichiri, Blantyre.



Dorothy nyaKaunda Kamanga
JUDGE

Case information:

Mr. Makwinja
Mr. Nazombe/ Chatepa
Ms. Million

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