



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
MZUZU REGISTRY
CIVIL DIVISION

CIVIL CAUSE NO. 227 OF 2020

BETWEEN

OLIKA NKHOMA.....1ST CLAIMANT
ETINA KAMANGA.....2ND CLAIMANT
MERCY CHIRWA.....3RD CLAIMANT
BRENDA PHIRI.....4TH CLAIMANT
LUTE CHIMOTO.....5TH CLAIMANT
TAMALIA NKHWAZI.....6TH CLAIMANT
ROSE BANDA.....7TH CLAIMANT
JOSOPHINE NKHOMA.....8TH CLAIMANT
STANLEY CHIMOTA.....9TH CLAIMANT
CHIKOZO BANDA.....10TH CLAIMANT
EPHRON PHIRI.....11TH CLAIMANT
RAYMOND PHIRI.....12TH CLAIMANT
DONALD PHIRI.....13TH CLAIMANT

-AND-

THE ATTORNEY GENERAL (Ministry of Justice and Constitutional Affairs and Ministry of Homeland Security).....DEFENDANT

CORAM: Chiotcha P.D.: ASSISTANT REGISTRAR

C. Mandala : Counsel for Claimants

Absent ; Counsel for the Respondent

T. Chiulika ; Court Clerk

ORDER ON ASSESSMENT OF DAMAGES

1. The matter was commenced by the claimants who are claiming for damages for false imprisonment, damages for violation of their constitutional right to dignity, aggravated or exemplary damages, refund of their fines and the costs of this action.
2. The summons was duly issued by the court on the 1st of July 2021 and was served on the defendants on the 20th days of July 2020 at about 15:57hrs. And there is proof of the said service on the court record as evidenced by the return of service. However, as of 22nd of October 2020, the defendants did not express any intention to defend the matter nor did they respond to the court process. As a result, the court entered a default judgement against the defendants on the 22nd October 2020.
3. Eventually, the matter was adjourned for assessment of damages on the 1st of September 2021. All the claimants and their witnesses came. The defendants never attended that hearing though they were duly served. The court directed that the matter should proceed for assessment of damages in the absence of the defendants.
4. According to the evidence on record, the claimants were primary school learners and their parents from the area of Traditional Authority Malanda in the District of Nkhatabay. In or about the month of April 2016, some of the primary school learners were found to be pregnant. Consequently, the magistrate Court at Chintheche in collaboration with the police officers of Chintheche, in their capacities as members of a purported Child Protection Committee (CPC) arrested and prosecuted the said

pregnant girls, together with their parents and boyfriends, who are now the Claimants in this matter, because of the said pregnancies. The pregnant girls, their parents and their boyfriends, were called to answer charges related to the pregnancies before the *indaba* of the CPC which was chaired by the Magistrate of Chintsheche Magistrate Court.

5. The magistrate after hearing the parties found the claimants liable or guilty and fined the girls, their parents and the boyfriends to MK10 000.00 each. After that, the Magistrate proceeded to order the claimants to be incarcerated at police cells until they had fully paid their respective fines.
6. The claimants spent hours in police cells ranging from 12 hours to two full days, only to be released after payment of the fines. Olike Nkhoma, Etina Kamanga, Mercy Chirwa and Brenda Phiri were in police for a day (12 hours) each for being found pregnant. Lute Chimoto and Rose Banda, both parents, spent a day (12 hours) in custody for their children purported transgressions. Although counsel through his submission would like us believe that Tamalia Nkhwazi was not put in cell as she was away and that Josephine Nkhoma, a girl with hearing impairment, was not incarceration by paying the fine, their evidence contradicts counsel's submissions. They told the court that they were, prosecuted and incarcerated. Only that later, their parents came and bailed them out. The evidence further shows that, Chikozo Banda spent two days in police custody for being accused of impregnating a girl. Ephron Phiri, Raymond Phiri, Donald Phiri and Stanley Chimota each spent 12 hours in police cells.
7. Because of the foregoing, the claimants felt aggrieved and commenced this action arguing that they suffered loss and damage. They argued that they suffered loss of their liberty from the time they were called to answer to the non-existent and unlawful charges, their whole purported prosecution and conviction. They also claim that they suffered loss of liberty for their respective hours that they spent detained in police cells. And they further argued that their right to freedom to dignity and to be treated as human beings was also violated during the whole process of purported trial which was never registered with any subordinate court and unlawful incarcerations.
8. I should quickly point out that although the default judgment has awarded the claimants damages for false imprisonment, damages for violation of their constitutional

right to dignity, aggravated or exemplary damages and refund of their fines, Counsel did not touch on all these during the hearing of the matter nor in his submissions. He has not argued nor submitted anything on the damages for violation of the claimants' constitutional right to dignity and aggravated or exemplary damages. Although he has argued at length on how much should be paid for damages for false imprisonment, he has not said anything on the damages for violation of their constitutional right to dignity nor on aggravated or exemplary damages. I will take it therefore that he has abandoned these heads of damages. As, I will only proceed to assess damages for false imprisonment and refunds.

9. The general principle is that in awarding damages, a plaintiff is to be put in the same position as before the tort. Greener, W, put it this way in the case of *Hall v Barclay* [1937] AC 620 at p. 623:

“...in my judgment, it is undoubted fact that there are two rules with which we begin in ascertaining how the damages should be ascertained. The first is this: A plaintiff who is suffering from a wrong committed by a defendant is entitled, so far as money can do it, to be put in the same position as if he has not suffered the wrong. This is what is referred to as *restitutio in integrum*...”

10. This position was echoed in the Malawian case of *George Kankuni v Shire Buslines Limited* where Katsala, J stated that;

“...The Law demands that the Plaintiff, as far as money can do it, be put in the same position as if he has not suffered the loss. This is what is referred to as *restitution in integrum*...”

11. When it comes to false imprisonment, damages are awarded for loss of liberty, humiliation and mental suffering (see *Mikombe and another v United Transport (Mal) Ltd* 1992] 15 MLR). This was succinctly put in the case of *Mulenga v Mwale* 91114 MLR when it was stated that;

“...the indignity humiliation and stigmatization consequent upon imprisonment is what the Court endeavors to compensate. No monetary value can be ragged to these. Admittedly, the time spent under such restrains aggravates or mitigates the

injury but it is not what is compensated and it cannot be the basis of the award although it is a relevant consideration...”

12. In other words, the court should not only look at the period of incarceration without regard to the other factors of the case.
13. This was better explained in *Mwakalinga v Tratsel Supplies Ltd Civil Cause Number 403 of 1984 (Unreported)*. The court stated the following;

“...In common law countries, damages under this head are at large. This time being one of the considerations cannot be a yardstick. The circumstances of the imprisonment might be so outrageous that high awards have to be made even through the period of incarceration is short...”
14. It is however not easy to quantify damages for losses that are not monetary in nature like the present case. Therefore, courts use comparable cases as a guide to the quantification of the applicable damages, without losing sight of particularities in the individual case that the court is dealing with (See *Chipeta vs Dwangwa sugar Corporation Civil Cause NO. 345 of 1998 (Unreported)*. In *Munthali v Attorney General [1992] 16(2) MLR 646* and *Mausa and Mausua v The Attorney General and Inspector General of Police High Court, Civil Cause Number 373 of 2003* the courts resorted to awarding conventional figures guided by awards made in similar cases and considering the money value.
15. Further, the Court will also consider factors such as passage of time since a particular comparable award was made as well as currency fluctuations within the period between the case at hand and the comparable one (See *Hon Kennedy Kuntenga v Attorney General. Civil cause no. 2002 of 2002, High Court, Principal Registry (Unreported)*).
16. In *Jacinta Bello versus the Attorney General Civil Cause NO. 232 of 2018*, the court awarded MK4,500,000.00 as damages for false imprisonment to a claimant who spent 4 days in custody and released without any charge. The court awarded her the sum of. The award was made on 12th August 2019. In *Shepherd Mumba v Director of Anti-Corruption Bureau Civil Cause Number 182 of 2015 [2016]* the Claimant was awarded MK1,500,000.00 after spending nine and a half hours in

police custody. The award was made on 25th May 2016. In the case of *Chimwemwe Kalua v Attorney General Civil Cause Number 490 of 2012* the Claimant was awarded MK2,000,000.00 for false imprisonment after spending 7 hours in police custody. In the case of *Llewelyn Kalua v Attorney General Civil Cause Number 49 of 2017* the Claimant was awarded K3,000,000.00 after spending 5 days in a police cell.

17. The Claimant herein were detained for periods of between 12 to 48 hours. The reason for such incarceration were that those who were girl children were found to be pregnant while the boy children were incarcerated for allegedly being responsible for the pregnancies. On their part, the parents of the children were incarcerated for the non-existent crimes of being parent to a pregnant child. In Malawi, pregnancy has never been a crime punishable by imprisonment. But the police Officer In-charge and the Magistrate at Chintheche decided to try, convict and incarcerate the claimants for on non-existent offences.
18. The Claimants were exposed to deprivation of liberty, humiliation, injury to feeling, stigma, mental suffering and psychological torture. Some of them being pregnant, made their situation worse, since the pregnancy alone comes with its own problems. The present case is similar to the case of *Jacinta Bello* cited above in that the incarceration was on purely a civil matter. However, the circumstances were much exacerbated in the present case in that here we are talking about young children of tender age. As shown above, most of the claimants were primary school children with age ranges of 15 to 17 years old at the time of the detention. Surely, they were traumatized by this experience and this will have far-reaching consequences on their mental health.
19. From the evidence, we are told that on their way to police from the court, there were placed in a group of the pregnant girls and their responsible boyfriends. They were being dragged by the police officers to the police station. They were exposed to a lot of humiliation and ridicule as people were taking their pictures as police were dragging them. People shouted insults at them. At police they were remanded barefooted and in very unventilated and unkempt police cells. Some of them stood in open human defecate and urine right in the cell.

20. For these reasons, the 1st, 2nd, 3rd, 4th, 6th, 8th, 9th, 11th, 12th and 13th claimants are awarded MK4 000 000.00 each on this head of damages. The 10th claimant, Chikozo Banda, spent the longest time in custody among all the claimants. I therefore awarded MK5 000 000.00 to the 10th claimant. The 5th and 7th claimants are parents of some of the impregnant girls. They also suffered but not much as compared to the children who I have already said were of tender age at the time of the said illegal incarceration. I will therefore award MK3 000 000.00 to each of the 5th and 7th claimants.
21. For avoidance of any doubt, the claimants are awarded MK51 000 000.00 (Fifty-One Million Malawi Kwacha) in total for damages for false imprisonment.
22. Further, the claimants must be paid back the fines they paid and the same must be paid back with interest at the prevailing bank lending rate.
23. The claimants are also awarded costs for the hearing on assessment of damages.
24. Any aggrieved party can appeal to the Malawi Supreme Court of Appeal.

Pronounced in Chambers this 28th of September 2021



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P.D. CHIOTCHA
ASSISTANT REGISTRAR