Library

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.52 OF 199

BETWEEN:

MARTIN MATCHIPISA MUNTHALI ..... PLAINTIFF

AND

THE ATTORNEY GENERAL ..... DEFENDANT

CORAM: MWAUNGULU, REGISTRAR
Mhango, Counsel for the Plaintiff
Counsel for the Defendant, Absent

O R D E R

On 11th January 1993 the plaintiff, Martin Matchipisa Munthali, took out this action against the Attorney General claiming aggravated damages and exemplary damages for false imprisonment and trespass to land respectively. The Writ of Summons, which was accompanied by an Acknowledgment of Service, was served on the Attorney General on the 20th of January 1993. The Attorney General did not lodge any Notice of Intention to Defend. So on the 11th February 1993 the plaintiff obtained an interlocutory judgment for damages to be assessed by the Master.

A Notice of Appointment for Assessment of Damages was taken out on the 16th of February 1993 setting down the case for the 12th of March 1993. On the 12th of March 1993 Namboya, State Advocate, who was by the Chambers but not for the particular case, informed the Court that the State Advocate handling the matter was outside the country. The case was adjourned to the 18th of March. On the 18th of March 1993, nobody was present for the defendant. I proceeded to hear evidence from the plaintiff.

This action starts may be in 1965 on the 27th of October when the plaintiff was arrested at Mlare in Karonga. He was found in possession of fire-arms. He was tried, convicted and

sentenced to 4 years imprisonment with hard labour. There was an appeal to the High Court and the sentence was increased to eleven years. He was to be released on the 25th of February and he was.

On the 25th of February the plaintiff was just coming out from the prison when two prison officers asked him to follow them. Fifteen minutes later he was served with a twenty-eight day detention order. The order, I presume, was under the Preservation of Public Security Act in its original form which authorised detention for 28 days pending the decision of the Minister. The twenty-eight days was later removed from the statute book and substituted with the words "reasonable time". He was not told why he was detained.

He was taken to Dzeleka Prison in Dowa. He was put in a dark solitary room. He was ordered not to speak to anyone. He was further told that he was a very influential person and that he would influence them and others because he told them that he wanted multi-party to come into the country. He was at Dzeleka Prison for two months.

After those two months he was sent to Mikuyu Prison. According to him, it was worse there. He was in a solitary cell measuring three feet by six feet. The room was much darker. There was no window and no ventilation. He was alone in Mikuyu up to 1974. His only companion was Chakufwa Chihana who joined him later and was released subsequently. He remained at the Mikuyu Prison till the 12th of June 1992 when he was released.

Talking about his life in prison, the plaintiff said that he lost sense of time. He could not read, he could not talk to anybody, he was confused. To quote his very words, "I don't know what was going on because a human being cannot be treated like that, even an animal can be treated better". This had an effect on his health, he developed high-blood pressure and he could not see properly.

The food was not so good till some time in 1975 when it improved, following a strike. In 1978 it dropped again. The cells were not cleaned. They were refused to clean them themselves or, if allowed to clean them themselves, it was with difficulty. He had, however, adequate blankets although he had no mattresses and pillows. He could not sleep straight or stretch himself because in the same cell was a bucket in which he had to help himself.

He had his first relation visit him in 1979. The visitor informed him that his house was burnt, so was his five hundred-tree coffee bush. He was told that this was done by Youth Leaguers. His bottle store was also burnt together with his fishing nets and carpentry equipment. When he went to his home after he was released on the 12th of June 1992, he verified most of these damages.

It is on account of these that he is claiming damages from the Attorney General. As we have seen, liability is not denied. Perhaps I should mention, as I proceed to assessment of damages, that I had a bit of problems with the reliefs sought. It may be important to reproduce paragraph 14 of the statement of claim:

> "Therefore the Plaintiff claims
>
> (i) Aggravated damages for False imprisonment
>
> (ii) Exemplary damages for Tresspass to land and goods."

The paragraph I have just quoted from the statement of claim raises the pedantic difference between aggravated damage and exemplary damages. In a foot-note to paragraph 211 of McGregor on Damages, 14th Edition, the learned authors says this:

> "Frequently the expression is aggravation and or mitigation of "damages" and not of "damage". There is justification for both, since both the damage and the damages are made more or made less. Nevertheless it is submitted that it is preferable to adhere to the singular word "damage" for two reasons. First, this is logical order as the damage must be aggravated or mitigated before the damages can be aggravated or mitigated. Secondly, in relation to aggravation this helps to keep separate damages awarded as compensation to the plaintiff and damages awarded as punishment of the defendant, the distinction which, as explained by Lord Devlin in Rookes v. Barnard (1964) AC 1129, 1131, has in the past been too frequently blurred ..... "Aggravated damage" indicates that the loss to the plaintiff is increased and can therefore only have recourse, or lead on, to compensatory damages; but aggravated "damages" is ambiguous in this respect and could refer equally to compensatory damages and to exemplary damages".

This passage points to the proper way in which both exemplary and aggravated damages should be understood. This has more significance because, as Lord Devlin observed in Rookes v. Barnard, award of exemplary damages is "an anomaly from the law of England". It should be understood, however, that aggravated damage as opposed to aggravated damages is part of the compensatory policy of damages. What is envisaged in exemplary damages is that circumstances can be proved which would entitle the plaintiff to have an award of damages much higher than he would obtain ordinarily. In that sense aggravated damages

endeavour to fully compensate the plaintiff for the damage he has suffered. Exemplary damages, however, are not necessarily a compensation to the plaintiff for the damage he has suffered; they are more a punishment on the defendant for waywardness. In Rookes v. Barnard, Lord Devlin said:

> "Exemplary damages are essentially different from ordinary damages. The objective of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. It may well be thought that this confusion serves criminal functions of the law; and indeed, so far as I know, the idea of exemplary damages is peculiar to English law. There is no decision of this House approving an award of exemplary damages and your lordships therefore have to consider whether it is open to the House to remove an anomaly from the law of England".

Later, he continues as follows:

> "Moreover, it is very well established that in cases where damages are at large, the jury (or the judge if the award is left to him) can take into account motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There should be malevolence or spite or the manner of commiting the wrong is such as to injure the plaintiff's proper feelings of dignity and pride. These are matters which the jury can take into account in assessing the proper position. Indeed, when one examines cases in which large damages have been awarded for conduct of this sort, it is not at all easy to see whether the idea of compensation or idea of punishment has prevailed".

Reading paragraph 14 of the statement of claim in relation to false imprisonment, the plaintiff prays for aggravated damages. As we shall see later, this is a proper case where exemplary damages for false imprisonment ought to be awarded. I would not think, in view of what has happened in this case, that one should be pedantic enough to think that aggravated damages claimed for false imprisonment should not include the punitive aspect in exemplary damages. I would accept the submissions of the learned authors that when the words "aggravated damages" are used as opposed to "aggravated damage" they are wide enough to encompass exemplary damages.

It has been submitted for the plaintiff that he should be awarded exemplary damages. Mr. Mhango relied on the statement of Lord Devlin in Rookes v. Barnard. In that case Lord Devlin,

with whom Lord Justices Pearce, Hodson, Evershed and Reid agreed, thought that although before that decision exemplary damages were awarded widely, exemplary damages should be restricted to the three areas he mentioned. In this particular case, the plaintiff's situation clearly falls in the first category.

> "The first category is oppressive, arbitrary or unconstitutional action by the servants of the government. I should not extend this category I say this with particular reference to the facts of this case - to oppressive action by created powers or individuals. Where one man is more powerful than another it is inevitable that he will try to use his power to gain his ends; and if his power is much greater than the other's, he might, perhaps, be said to be using it oppressively. If he uses his power illegally, he must of course be punished for his illegality in the ordinary way; but he is not to be punished simply because he is the more powerful. In the case of the government it is different, for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service".

The restrictions created by Lord Devlin have not been warmly welcomed by common law jurisdictions. In Australia the limitations there were confirmed by the Privy Council of the House of Lords in Australian Consolidated Press v. Uren (1969) 1 AC, Lord Maurice of Borth-y-Gest delivering the judgment of t board upholding the insurgency on the basis that under Australian common law exemplary damages were awarded for libel. He also opined that other common law jurisdictions could develop on the principles in Rookes v. Barnard. In Broome v. Cassell & Co. (1972) AC 1027, 1067, Lord Hailsham, the Lord Chancellor, was perturbed that uniformity could not be achieved in the common law jurisdictions. Just across, in Zambia, Rookes v. Barnard has had to be tailored to the development of the Law in Zambia. Deputy Chief Justice Baron said, in Times Newspapers (2) Limited v. Kapwepwe (1973) 2 ZLR page 292, 298:

> "Limitations of exemplary damages to these categories of cases was clearly a departure from what was previously understood to the law, and recognised as such by Lord Devlin when he said in Rookes v Barnard at page 410, 'I am well aware that what I am about to say will, if accepted, impose the limits not hitherto expressed on such awards and that there is powerful, though not compelling authority, for allowing them a wider

range'. Although we will naturally give the most serious consideration to decisions of the House of Lords, it is the function and duty of this court to develop our law against the background of our own essential conditions and not those of some other country. The difference between the circumstances prevailing in England and Zambia are very material in this case; it is very necessary to decide at the outset whether the law as laid down in Rookes v. Barnard is suitable for Zambia".

In Malawi the case of Rookes v. Barnard has been widely applied. I must point out, however, that reasons such as have caused a departure from the House of Lords decision in Rookes v. Barnard have not arisen here. For the most part, cases in which Rookes v. Barnard has been cited on claims for exemplary damages have been, like they are in this case, cases against public officers. In that regard the principles in Rookes v. Barnard have been applied. I also want to apply them in this case.

This leads us to how these exemplary damages are to be worked out. Again, here, the starting point is what Lord Devlin said at page 411 in Rookes v. Barnard:

> "..... if, but only if, the sum which the jury have in mind to award as compensation (which may of course be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark the disapproval of such conduct and to deter him from repeating it, then they can award some larger sum".

In my mind, what comes out of this statement is that the court must come up with a proper award after taking into account all circumstances of aggravation. With that figure in its hands, the court must ask itself whether it adequately punishes the defendant for his conduct. If it does not, the court must award a larger sum to show its disconfiture with the defendant's conduct. Where the award adequately punishes the defendant, it is improper to award a larger sum because exemplary damages are by nature included in aggravated damages. This is what Lord Hailsham said in Cassell v. Broome at page 828:

> "The true explanation of Rookes v. Barnard is to be found in the fact that, whether damages for loss of reputation are concerned or whether a simple outrage to the individual or to property is concerned, aggravated damages in the sense I have explained can, and should, in every case

lie outside the categories to take care of the exemplary element. And the jury should neither be encouraged nor allowed to look beyond generous solatium as is required for the injuria simply in order to give effect to feelings of indignation. It is not that the exemplary element is excluded in such cases. It is precisely because in the nature of things it is, and should be, included in every such case that the jury should neither be encouraged nor allowed to look for it outside the solatia and then to add to the sum awarded another sum by way of penalty additional to the solatia. To do so would be to inflict a double penalty for the same offence."

And then Reid said at page 809:

> "... if the jury think that the sum is insufficient as a punishment then they must add to it enough to bring it up to a sum sufficient as a punishment. The one thing they must not do is to fix sums as compensatory and punitive damages and add them together. They must realise that the compensatory damages are always part of the total punishment".

I will be looking at the actual awards a bit later. Let me now consider some aspects that have been raised by counsel for the plaintiff to help me assess the damages in this case.

The first point taken by Mr. Mhango is that in assessing damages generally, each case must be treated on its own merit, based on its peculiar circumstances. He submitted that this is true even when assessing damages for false imprisonment. He submitted that decided cases only act as guidance for amounts to be allowed. This seems to have been asserted by our courts in Malawi for from time to time when awarding damages for false imprisonment. Previous cases have been cited. There is, in fact, support even from our neighbours in East Africa. In Katende v. The Attorney General (1971) EALR 260, 261 Phadke, J. said:

> "Both counsel referred to several decisions of this court relating to quantum for damages awarded in such cases ..... These decisions have furnished a helpful guidance but they cannot furnish material for formulating a comparative basis. Ultimately the damages should be such as the court considers reasonable in all the circumstances of a case".

It must be obvious from this case that ultimately the court has to look at the particular case and, as I have repeatedly said because of the nature of the injury that is being compensated in

false imprisonment, the assistance which can be had from previous cases is really muted. In Malawi, however, a further problem has arisen and counsel has raised it in his submission.

Mr. Mhango has submitted that awards in Malawi have been based on time spent in prison. From there, Mr. Mhango thinks there is an hourly or daily rate which is established by the courts and followed profusely. I have stated persistently that this is not the case. First, I have stated that the cases which are related to some degree to time were based on a misconception which emanated from a decision where the award was not actually based on the time of imprisonment although time was one of the factors that were considered. Secondly, I have been able to demonstrate by looking at the various awards in the High Court and those confirmed by the Supreme Court of Appeal that there is no uniformity. In looking at the cases that have been cited by counsel, this is confirmed. In ADMARC v. Stambuli M.S.C.A. Civil Appeal No.6 of 1984; K4,000.00 for three days was approved. This would give a daily rate of K1,333.00 or an hourly rate of K55.00; yet in Malemia v. Optichem (Malawi) Ltd. Civil Cause No.387 of 1985, K800.00 was awarded for imprisonment of thirty minutes. This would give an hourly rate of K1,600.00 or a daily rate of K19,200.00. This cannot be reconciled with an award of K40,000.00 for false imprisonment of thirty days in Banda v. Southern Bottlers Ltd. Civil Cause No.42 of 1987. Surely, the decisions in both the High Court and the Supreme Court are not clear on awarding damages in relation to time. Some decisions seem to confirm the traditional view which is expressed in the East African case Katende v. The Attorney General that I referred to earlier. This seems to be the view in England for the learned authors of McGregor on Damages, 14th Edition, state at paragraph 1537:

> "The details of how the damages are worked out in false imprisonment are few; generally it is not a pecuniary loss but a loss of dignity and the like and is left to the jury's or judge's discretion. The principal heads of damage would appear to be the injury and liability, i.e. the loss of time considered primarily from a non-pecuniary view-point and the injury to feelings i.e. the indignity, mental suffering, distress and humiliation with any attendant loss of social status. This will be included in the general damages which are usually awarded in this case; no breakdown appears in the cases".

After reviewing all these cases, in Bula v ADMARC, Civil Cause No.1189 of 1991, I concluded as follows:

> "In my view, there is more in support of the view point that damages to be awarded for false imprisonment should really be left to

the court to determine after taking into account all the circumstances of the case including time. The problems that arise when time becomes the sole basis of the award is that such an approach is most likely to ignore circumstances, both of aggravation and mitigation, which may attend a particular case. In certain cases, the circumstances of the case might be more pertinent to the quantum of damages than time for, obviously, imprisonment in horrendous and horrible circumstances even for a short time may do more damage to the plaintiff than a protracted or elongated imprisonment in otherwise innocuous and harmless circumstances. This is understandable because damages for false imprisonment are an award not only for loss of liberty, which in some way can be related to time but also for loss of reputation and status which are not related to time. The approach, therefore, should be to leave it to the court to decide quantum in the circumstances of the case".

Now coming to the particular case, this is surely a case where exemplary damages should be awarded. The plaintiff was sentenced to 4 years imprisonment with hard labour for the offence which he had committed for which he was convicted. The State felt that this sentence was wholly inadequate; they appealed. That sentence was enhanced almost three times over to eleven years imprisonment to reflect the seriousness of the offence and to allay fears that might have been there as to the security of the nation. Then thereafter to keep the man for another nineteen years without any court order or conviction shocks every sense of justice or punishment. Even if it may be conceded that some surveillance had to be made to ascertain the security risk, a fact which should have been ascertained in the eleven years he was there, it would appear to every average man that it is irresponsible to detain a man for another nineteen years beyond what is expected of a government which runs its affairs including security in a manner in which it should and not willy nilly interfere with the basic rights of its citizens, to freedom and opportunity for personal achievement and progress. The ignominy in this case lies in the magnanimity in which public officials disregarded the constitutional and legal avenues available to justify the incarceration or release of the plaintiff. The point here is how much would this Court award to a man who was adequately punished for his wrongs but is kept irresponsibly in circumstances we have described for nineteen years? In my mind, this is a case where not only should he be adequately compensated but a case also where those public officers who are called upon to act within the confines of the law and authority should get the signal that the Court will award such damages as would prevent and deter the repetition of what has happened. For, obviously, this case will go into the

annals of history as an example of how a modern government treats its citizens. Even if I was tempted to look at the awards that have been made in these courts in otherwise very innocuous cases, if compared to this one, it is still very difficult to come up with an award that compensates the plaintiff for the loss of liberty and opportunity that he has suffered by his incarceration. Indeed if I were to tow Mr. Mhango's submission that there is an hourly or daily rate, I would lock the finances of the whole economy to compensate the plaintiff in this case.

In compensating the plaintiff for what he has suffered. I must take into account all the circumstances of the case. In this particular case the unjustified and protracted detention of the plaintiff is a serious consideration. Mr. Munthali has been deprived of his liberty for close to two decades. In that period he has lost opportunity for reform, rehabilitation and absorption in the society . It must always be understood that ultimately the best institution for rehabilitation is not prison or a detention camp. It is the society. For with its benefits and burdens, adversities and advantages, it shapes the destiny of many and mostly for good. Mr. Munthali must be compensated for the anguish, agony and debasement of solitary confinement and being cut-out from association and contact with society. The awards for false imprisonment are, so to speak, at large. The awards reflect society's discomfiture of the wrongdoer's deprival of a man's liberty and society's sympathy to the plight of the innocent victim. The awards, therefore, whether meted by a jury or judge, are based on impression.

> "In other words the whole process of assessing damages where they are "at large" is essentially a matter of impression and not addition"

per Lord Hailsham, L.C. in Broome v. Cassell & Co (1972) A.C. 1027, 1072. Time is one of the factors to be taken into account. It is not the only consideration.

In this particular case, in awarding damages, both the compensatory and punitive aspects of the award must be borne in mind. From the Statement which I quoted earlier from Rookes v. Barnard, Lord Devlin did not envisage two awards, one reflecting the compensatory aspect and the other punitive one. What was being championed was that the jury or judge must aim at adequate compensation. If the adequate compensation equally punitive, the judge or jury should award that sum. If the award for compensation was not punitive enough, upon ascertaining the wrongdoer's ability to pay, a larger sum, not an additional sum, should be awarded to reflect the punitive element. The splitting of an award into a compensatory one and a punitive one was deprecated in the House of Lords in Broome v. Cassell & Co. In Zambia, in Times Newspapers Limited v. Kapwepwe, awards were split. I think there is better sense in a single award which

reflects both the compensatory and punitive aspect of the award. We employ the same principles in sentencing criminals. We do not create two sentences to reflect deterrent and punitive aspects of the sentence. At the end of the day one has to look at the whole award and see whether in itself it both compensates the victim and adequately punishes the wrongdoer. In this case taking into account the longevity of the imprisonment and the circumstances in which Mr. Munthali was treated, bearing in mind that this is not the sort of conduct which a civilised government should be allowed to perpetrate, I award K4,500,000.00 for false imprisonment. This award adequately compensates the plaintiff and punishes the defendant for waywardness in treating the plaintiff.

For trespass to the land and the goods, I would have awarded more to compensate for the losses that have been incurred as a result of the destruction of the crops and the other property mentioned in evidence. The value, however, has not been very easy to ascertain. The evidence has been of little assistance. I think that in that case the approach to take would be the one taken by the court in Attorney General v. Msonda & Others (1974) ZLR page 220. Most of the claims that were not established, in circumstances much like the present, were disallowed for lack of proof. I have said that liability was not denied. I would think, however, that the circumstances in which the plaintiff's property was gotten into would justify an award for exemplary damages. I would award K4,000.00 for trespass to land and goods.

The parties can appeal to the Supreme Court.

MADE in Chambers this 19th day of May, 1993.

D.F. Mwaungulu
REGISTRAR OF THE HIGH COURT OF MALAWI