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IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NUMBER 1364 OF 1993

BETWEEN:

CHARLES MKANDAWIRE.....PLAINTIFF

AND

THE ATTORNEY GENERAL.....DEFENDANT

CORAM: D F MWAUNGULU, REGISTRAR

Mwafulirwa, Counsel for the Plaintiff
Mkandawire (Miss), Interpreter

ORDER

On the 15th of December, 1993 I awarded the plaintiff, Mr Mkandawire, K72,000 general damages for false imprisonment and battery. This action was taken out of the 8th of October, 1993. It was against the Attorney General. Judgment was obtained in default of notice of intention to defend. It was an interlocutory judgment and damages had to be assessed. The notice was served by post on the Attorney General on the 24th of November, 1993. The Attorney General did not appear on the date of assessment of damages. I heard the plaintiff, the only witness called. I made the order just mentioned. The action arose as follows. The plaintiff is a local director of Marie Stopes International. He is based in the City of Blantyre. The defendant, the Attorney General, is sued under the Civil Procedure (Suits by or against Government and Public Officers) Act.

On the 22nd of May, 1992, the plaintiff was at his place of work when four police officers from Blantyre Police Station arrested him. They found nothing. They did not tell the plaintiff why he was arrested. The plaintiff was taken to Blantyre Police Station. He was later taken to his house where, in the presence of his children and relations, the house was searched in vain. He was taken to Blantyre Police Station and later transferred to Chichiri Prison.

At Chichiri Prison, the plaintiff was undressed. He was literally naked. The search was conducted in the open to the ridicule and taunt of prison officials. He was put in a cell, 15 by 24 metres, shared among 200 remandees. He slept on the floor. No blanket.

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The next day he had watery porridge. He refused to take it. At lunch he had a meal of nsima and peas. The peas had weevils.

On the 23rd May, 1993, he was called to an interrogation room because officials had arrived from Police Headquarters. In the room, there were three people. The plaintiff knew two of them by name: Saiwa and Nyirongo. The three, using fists and footkicks, pumelled the plaintiff for about one and half hours. One of them retrieved a plier from his briefcase and clipped the plaintiff's genitals. The plaintiff was in great pain. He fell down and collapsed. After this torture, the plaintiff was taken to Blantyre Police Station, where the ordeal continued only that this time it was everybody at the Police Station and everything they could lay their hands on was a vehicle of torture. The plaintiff was there for a day. He went to Chichiri Prison where he stayed for three weeks before being taken to Zomba Prison. All this time the plaintiff was not given blankets.

On 12th June, 1993, the plaintiff was taken to Zomba Prison. He was searched. He had other problems apart from sleeping without a blanket. He was sick he was not attended to. His cell was near those waiting for death by hanging. He was at Zomba for five weeks. He was taken back to Chichiri. He was released on 24th July, 1992, after two months.

While he was in Prison, he was not paid. He was paid in arrears when he came out of the prison. His family had considerable problems when he was in prison.

The plaintiff was not charged with any offence. The police apologised for the arrest and released him.

It is following these events that the plaintiff took out this action. He claims general damages for false imprisonment and aggravated damages for battery and assault. Before I consider the quantity of damages I should comment on the pleadings, particularly the relief of aggravated damages. In Munthali vs. The Attorney General Civil Cause Number 52 of 1993, I heard that the expression "aggravated damages", as opposed to "aggravated damage", was wide enough to include exemplary damages. The distinction between "aggravated damage" and "aggravated damages" is not pedantic. It is based on the all important distinction between general damages and exemplary damages. Although damages, in the narrower sense, are punitive the courts aim at compensation. Exemplary damages, however, are punitive. When awarding general damages, aggravation and mitigation are an aspect of compensation. Exemplary damages go beyond compensation. In Rookes vs. Barnard (1964) A.C. 1129. 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."

Later he continues as follows:

"Moreover, it is very well established that in cases where damages are at large, the Jury (or Judge, if the award is left to him) can take into account motives and conducts of the defendant where they aggravate the injury done to the plaintiff."

For purposes of pleading it is cardinal rule that in the High Court a claim for exemplary or punitive damages must be specifically pleaded. The rule does not apply in subordinate courts, Drane vs. Evangelou (1978) 2 All E.R. 437, because, unlike in the High Court where it is a requirement under order 18, rule 8 (3), no rule exists for subordinate courts. While in Munthali vs. The Attorney General, I held that the term "aggravated damages" is wide enough to encompass exemplary damages, I did not intend to open a floodgate so that any simulation or extension of words would bid for qualification. If the plaintiff wants exemplary damages, he must ask for them precisely. The plaintiff here claims damages on an "aggravated footing." This should not be understood as a claim for exemplary damages. I will, therefore, make no award for exemplary damages.

At common law damages for false imprisonment are at large. In Munthali vs. The Attorney General I opined that, where some decisions seem to relate awards in relation to time, the awards defy comparison. At least the Munthali case demonstrates that if time was a yardstick, given longer imprisonments, the awards would border closer to absurdity. On the other hand, disproportionate large awards would be justified for brief periods if there are aggravating circumstances. (Juma vs. Gani Civil Cause Number 154 of 1988 per Mkandawire, J.; Phiri and others vs. Council of the University of Malawi Civil Cause Number 626 of 1992 per Tambala, J.) Equally there could be obviously similar cases where parity of awards may be logical. Apart from these permutations, awards for false imprisonments, are at large and left properly to a Judge or Jury, as the case may be, to decide on the facts of the case. The cardinal question is whether the award adequately compensates the plaintiff.

The plaintiff here was in prison for no reason at all. The law requires arrest for purposes of the criminal process. Where the prisoner is arrested without warrant, he should be brought to Court within twenty-four hours. The Court, which is independent, should decide on the further imprisonment of the prisoner. If the prisoner is in prison because of the order of the court, an independent institution, the prisoner's incarceration is remote from the tortfeasers act because the

chain of causation is broken. Imprisonment by the court introduces a new cause of action, malicious prosecution, which relieves the tortfeasor and the police of liability for false imprisonment (Lock vs. Ashton (1848) 12 Q.B. 871). Until the intervention by the court, the tortfeasor and the policeman have no protection for an action for false imprisonment. This was succinctly dealt with in Diamond vs. Minter (1941) 1 K.B. 656. At page 674, Justice Cassels quoted Lord Justice I Scrutton in Harnett vs. Bond (1924) 2 K.B. 517, 565:

"But it appears to me that when there comes in the chain the act of a person who is bound by law to decide a matter Judicially and Independently, the consequence of his decision are too remote from the original wrong which gave him a chance to decide."

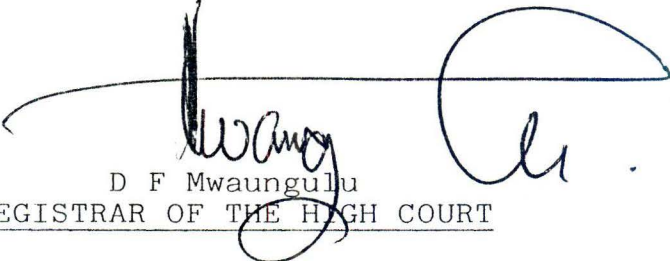
If only by ministerial act the imprisonment continues, it is unlawful unless it can be justified on other grounds. I awarded the plaintiff K60,000 as damages for false imprisonment. This, in my view, adequately compensates the plaintiff.

On the claim for battery, I am going to award general damages only having decided that exemplary damages were not pleaded. The plaintiff, however, wants me to consider the aggravation. That aggravated or exemplary damages can be awarded in assault by the police seems to have been decided in Flavius vs. Commissioner of Metropolitan Police (1982) 132 New L.J. 532. The plaintiff is entitled to damages for pain and suffering. Pain refers to the sensation, what is felt by the senses. In this case, the plaintiff was subjected to much grueling torture. He was brutally assaulted twice. His genitals were clipped with a pair of pliers much to the amusement of the tormenters. The episode smacks sadism. Suffering entails the mental anguish of the pain. The plaintiff was there for two months. When I looked at from the perspective that the plaintiff was guilty of nothing known to the law, the anguish is beyond description. There are aggravating circumstances. I would award the plaintiff the sum of K12,000.

There is no loss of earnings

In all, therefore, I award the plaintiff the sum of K72,000.

Made in Chambers this 8th day of January 1994 at Blantyre.


D F Mwaungulu
REGISTRAR OF THE HIGH COURT