

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 1003 OF 1993

BETWEEN

NYASULU PLAINTIFF

AND

SECURICOR (MALAWI) LTD..... DEFENDANT

CORAM: THE HON. MR JUSTICE MKANDAWIRE
Nyirenda, Counsel for the Plaintiff
Kanyuka, counsel for the Defendant
Mkhoma, Official Interpreter
Fukundo, Recording Officer

JUDGEMENT

The plaintiff is suing to recover damages for false imprisonment and malicious prosecution. He also wants to recover the sum of K5309.85 being arrears of salary for the period of 1st July, 1992 to 30th July 1993 at a monthly salary of K408.45.

It is common case that the plaintiff was employed by the defendant as a wages clerk and he was stationed in Lilongwe. His duties included the preparation of pay rolls and the payment of wages to senior guards who were referred to as NCOs. The plaintiff was the in-charge in the Wages Section and there were a number of clerks under him. The wages once prepared by the plaintiff and other clerks were checked by Mr Backston Mkandawire (DW1) who was both a cashier and Assistant Branch Manager. The plaintiff remained in the defendant's employ until 17th July, 1992 when he was taken into custody by the Police.

The books of accounts in Lilongwe were checked by Mr Wales Kambwiri (DW2) who was the senior accounts officer. He was based at the Headquarters in Blantyre and he used to commute between Blantyre and Lilongwe from time to time. Towards the end of June 1992 he travelled to Lilongwe for routine check. He inspected the plaintiff's work and all was fine. Mr Kambwiri actually commended the plaintiff for a job well done. There were however problems with the pay rolls prepared by Mr Mnyayi in that a number of false names were added thereby inflating the wages. On 17th July 1992 the plaintiff was taken to Lilongwe Police Station by Mr Kambwiri, Mr Msema and Mr Chipwaila. When they got there the police enquired from Mr Kambwiri if the man they brought was Mr Nyasulu. Mr Kambwiri answered in the affirmative and then the plaintiff was put in custody. No statement was obtained from him.

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It was his evidence that before he was taken to police on 17th July, 1992 Mr Kambwiri had gone to the police station several times. The following day he was transferred to Maula Remand Prison. The allegation made against him was that he had stolen company money by way of entering false names on the pay rolls. The branch manager and his assistant were also asked to make statements but they were not detained. The plaintiff told the court that he was surprised when he was put in police custody because when he was being taken there, he was told that they were merely going to make statements. Mr Kambwiri had told him that Mr Mnyayi and Mr Botomani were entering false names in the pay rolls. The plaintiff thought he was going to police to assist but instead he was put in custody. Earlier on Mr Kambwiri had made a statement to the police and this was tendered as Exhibit P1. In that statement Mr Kambwiri said the plaintiff kept unclaimed pay packets which is not true. All unclaimed pay packets were handed to Mr Mkandawire, the cashier for safekeeping. Wages were not only paid by the plaintiff, but by other officers such as Mr Kumwembe and Mr Kalua. The plaintiff did not take part in compiling the pay rolls for the months mentioned in Mr Kambwiri's statement. When payment is being made officers from the wages, discipline and operations departments assist in identifying the payees. Subsequently the plaintiff was taken to court on 7th September, 1992 and he was acquitted on 1st April, 1993. Both the charge sheet and copy of the judgement were tendered as Exhibit P2 and P3. He did not receive his salary for the month of July, 1992 and he was not served with suspension or dismissal letters.

The first witness for the defendant was Mr Backston Mkandawire. He was the defendant's cashier and assistant branch manager. His duties included checking the wages sheets prepared by the plaintiff and his team. Mr Nyasulu would check the wage summaries first before they were taken to the assistant branch manager. When he was satisfied he would sign the wages summaries and then hand them to the branch manager for final summary. When the summaries were passed Mr Nyasulu would then telephone the head office in Blantyre for the wages. When the money arrived, Mr Nyasulu and his team would put it in packets. And the plaintiff paid the NCO's while the other clerks paid the junior guards. If at all there were any pay packets unclaimed, these would be taken to the witness for safe keeping. If these were not claimed for a number of days, the money would be banked. Mr Mkandawire did not know the kind of report and statement Mr Kambwiri made at the police station.

The second and last witness for the defendants was Mr Wales Kambwiri. He was employed by the defendant as a senior accounts officer and he was stationed at the headquarters in Blantyre. His duties included checking the books of accounts at the Lilongwe office where the plaintiff was based. It was also his responsibility to remit wages to Lilongwe.

The procedure was that after the pay rolls were made, by the wages clerks, the plaintiff would prepare a summary. For the plaintiff to prepare the summary, he would have to check the pay rolls and the labour register. All guards were entered in the labour register. From time to time some guards left employment. When that happened, the names of guards who left employment were cancelled in the labour register. Guards whose names were cancelled were not supposed to appear on the pay rolls. That is why when preparing the summaries it was important for the plaintiff to check both the pay rolls and the labour register. After preparing the summary, the plaintiff would take it to the assistant branch manager for checking and he in turn would pass it to the branch manager. When the summary was finally passed, the plaintiff would telephone the head office in Blantyre so that wages may be sent. Once the wages were received in Lilongwe, they were packed in pay packets and then payment would take place at the various pay points. The system was that the wages clerks should rotate, but the plaintiff changed that and he only paid at the main office. At the end of the day all unclaimed pay packets were handed to the cashier for safe keeping.

Towards the end of June, 1992, Mr Kambwiri went to Lilongwe to check the books of accounts. When he checked the centre at which the plaintiff paid, he found discrepancies. What he discovered was that guards whose names were cancelled in the labour register appeared on the pay rolls. In other words payment was made to persons who had long left employment. This was defrauding the defendant company. According to the report Mr Kambwiri gave to the police, this fraud started in January, 1992 and it went on up to June 1992. By this method of making false entries on the pay rolls the defendant company lost a total of K42030.35. Mr Kambwiri tendered in evidence a number of cancelled employment cards, pay rolls and a labour register which clearly show the persons who were not in employment were being paid. The money so stolen went into the pockets of the defrauding wages clerks. The pay rolls that contained fictitious names were prepared by Mr Mnyayi. When the plaintiff was asked about this discrepancy, he said he did not know.

The matter was then reported to the police. The police did not have transport and so they requested that the suspected clerks and the books be taken to the police station. So Mr Kambwiri and Mr Mkandawire took the plaintiff together with Mr Botomani and Mr Chibambo to the police station. The plaintiff and his colleagues were left at the police station. Two wages clerks, Mr Mnyayi and Mr Kunwembe had by then absconded. Mr Mnyayi wrote a letter admitting involvement. It was Mr Kambwiri's evidence that although wages were paid in the months of May and June, 1992, the plaintiff had not prepared any summaries for those months.

In cross-examination, Mr Kambwiri told the court that the plaintiff prepared pay rolls for NCO's and that those pay rolls had no fault. It was however, the plaintiff's responsibility to prepare summaries. He maintained that he took to police not only the plaintiff but also Mr Botomani and Mr Chibambo. He conceded that the police asked: 'Is this Mr Nyasulu?' And he answered 'yes'. He maintained that the discrepancies were found at the main centre where the plaintiff paid.

I now wish to evaluate the evidence before me. I start with false imprisonment. The law relating to false imprisonment is well settled. The defendant can only be liable if he made a charge against the plaintiff. On the other hand the defendant is not liable if he merely laid information to the police who in their own judgement put the plaintiff into custody. In the instant case, is there evidence that Mr Kambwiri laid a charge to the police. The plaintiff told the court that he was alone when being taken to police. He also said that all the police said was 'Is this Mr Nyasulu?' and when Mr Kambwiri answered 'Yes' they just put him in custody. This court is being asked to believe that in the absence of the plaintiff, Mr Kambwiri must have told the police that it was the plaintiff who stole the money. This it is contended is the only inference to be drawn from the fact the police put him in custody immediately it was confirmed that he was Mr Nyasulu. I regret to say that I cannot draw that conclusion because it would be mere conjecture. Mr Kambwiri did not tell the police that Mr Nyasulu was a thief. Mr Kambwiri made a statement to the police and in that statement he did not refer to the plaintiff as a thief. It is true that in his statement Mr Kambwiri only mentioned the plaintiff but he did not say that the plaintiff was a thief. The mere fact that the statement said the plaintiff kept pay packets would not itself mean that he was the thief. It is true that the statement did not mention the officers involved in the preparation of pay rolls and it did not say the loss was occasioned by adding false names on the pay rolls. Those omissions, however would not mean that Mr Kambwiri had charged the plaintiff with theft. It must be remembered that it was not only the plaintiff who was taken to police. Mr Chibambo and Mr Botomani were also taken to police together with the plaintiff. In cross-examination, the plaintiff conceded that he together with Mr Botomani and Mr Chibambo were taken to police. All three made statements. The plaintiff said he was asked a lot of questions at the police station. My finding on the matter is that Mr Kambwiri did not lay a charge. He merely reported the matter and on the instructions of the police he took the plaintiff and two others to the police. Had Mnyayi and Kumwembe not absconded, they too should have been taken to police. The police asked the plaintiff a lot of questions and on the answers given they decided to put him in custody. The claim for false imprisonment therefore falls away.

I now move on to the claim for damages for malicious prosecution. The plaintiff was subsequently charged with theft by servant and the trial ended up in his acquittal. This claim can only succeed if he can prove that there were no reasonable and probable grounds for taking him to court. As Makuta CJ (as he then was) put it in the case of Kiwa vs BAT (Malawi) Ltd Civil Cause No. 322 of 1987.

'The onus of proving the absence of reasonable and probable cause lies upon the plaintiff. In the absence of such evidence judgment must be entered for the defendant : see Abrath v. North Eastern Railways (1883) 11 Q.B.D. 440. Reasonable and probable cause consists in an honest and genuine belief based upon reasonable ground in the guilt of the accused. Reasonable grounds are such circumstances as would lead a prudent man to the conclusion that the accused committed the crime alleged and it is material only to consider the facts known to the defendant : Hicks v. Faulkner (1881-82) 3 Q.B.D. 167. If the plaintiff can prove that the defendant was actuated by malice in the sense of some wrong or indirect motive, an action will lie. Evidence of malice may be present where the defendant prosecuted the plaintiff not because he believed him to be guilty, but in order to deter others from committing depredations on his property : Stevens v. Midland Counties Railway Co. and Lander (1854) 10 Ex. 354.'

On the facts of this case, I find that there were reasonable and probable grounds for bringing the prosecution. The discrepancies were found at the centre the plaintiff paid. This fact is not disputed. What this means is that payment was made to persons who did not exist. Although the pay rolls were prepared by Mnyayi, it was the plaintiff who prepared the summaries. The procedure was that in preparing summaries the plaintiff was required to check the pay rolls and the labour register. If he did do the checking then he was aware that the pay rolls contained false names and yet he proceeded and paid thereby occasioning a large loss. There were therefore reasonable and probable grounds for bringing the prosecution. The plaintiff has not shown any malice on the part of the defendant. This cause of action also fails.

Finally I move on to the claim for salary. Clearly this claim cannot succeed. There were sufficient grounds upon which the plaintiff could have been summarily dismissed. The plaintiff was in charge of the accounts section. True it was Mnyayi who prepared the pay rolls with false names. This started in January 1992 and it run up to June 1992, when Mr Rambwiri discovered the scheme. If the plaintiff checked the pay rolls and the labour register he would easily have arrested the fraud. It is easy to see that the fraud went on for so long because he was a party to it.

I am satisfied on a balance of probabilities that he was part of the scheme. It was in evidence that for the months of May and June, he did not prepare any summaries although he telephoned at the head office for salaries. It is true that he was acquitted but I find that his conduct was wholly incompatible with the duties of his office. As I have already observed, the scheme would not have succeeded without his co-operation. This cause of action also fails.

In the result the action is dismissed in its entirety. the plaintiff is condemned in the costs of these proceedings.

Pronounced in open court this 26th day of August, 1994.


R. P. Mkandawire
JUDGE