

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NUMBER 1686 OF 1994

BETWEEN:

ALEX CHAMPION CHIRWA PLAINTIFF

and

THE ATTORNEY GENERAL DEFENDANT

CORAM: E.B. TWEA, REGISTRAR
Matipwiri, counsel for the Plaintiff
Defendant/Counsel absent



ORDER

By his writ of 1 September 1994, the plaintiff brought an action against the defendant for false imprisonment, assault and loss of profit. On 28 October, 1994, the plaintiff obtained judgment for damages to be assessed.

The matter was set for assessment on 8 December, 1994. The defendant did not appear. The plaintiff proceeded with his case and called one witness: himself.

The evidence has it that the plaintiff was approached at his home in Machinga and questioned by Police. He admitted to be a member of Jehovah's witnesses sect. He was asked to buy a party card and he refused. The Police then arrested him. He was kept at Machinga Police then at Zomba Central Prison for 39 months. It was his evidence that while in prison he was kept in solitary confinement, assaulted until he lost consciousness and would have food withheld from him. Generally, he was very badly treated by the Police and prison authorities.

I bear in mind that there is judgment against the defendant for damages to be assessed on the heads claimed. I wish to point out that until recently, the religious sect to which the plaintiff

2/.....

belonged was a banned religion and it was criminal to belong to this sect. It would be dangerous if court were to rule a lawful arrest under a bad law in our history to be false imprisonment. The plaintiff was released in August, 1992 when the previous regime was under pressure to improve its human rights record.

I wish to make it clear that I am not implying that a lawful arrest could not in the end, in certain circumstances result in false imprisonment. There are cases on this point: Martin Machipisa Muntali Vs. the Attorney General CC 52 of 1993 is a case in point. What I am putting across is that the plaintiff has not shown any circumstances which would make it incumbent for this court to view the plaintiff lawful imprisonment as having become unlawful. I bear in mind that the plaintiff was in fact never taken to Court and that had it not been for the pressure on the Government then, his imprisonment may have been indefinite. Be this as it may, my duty is not to make out the plaintiff's case. In the absence of any evidence showing cause why a lawful arrest becomes unlawful, I decline to award any damages on this head.

On the question of assault, I am inclined to take the view that none of our statutes permits Police officers or prison warders to assault prisoners, not even the laws during the previous regime. Ill-treatment, assault and starvation of prisoners never adorned our statute books. It is my view that in this case, despite the reasons for his arrest, the plaintiff was singled out for and subjected to systematic ill-treatment for the time that he was in custody. He suffered a lot and in my view is entitled to damages for this. I would think K15,000 would adequately compensate him for the assault that he suffered.

On the question of loss of profits, I take into account that this was specifically pleaded and judgment was entered. I would have taken issue with the way the pleadings were put, but there was no defence here. I am constrained from delving into that matter.

It is enough in my view that the plaintiff did specifically plead the damages and got a judgment in his favour: See Namandwa Vs. Tannet (J) and Sons Ltd. 10 MLR p.383. I thus grant the plaintiff K212,550 less 45% tax liability. I grant K116,902.5 as damages on this head.

I wish to mention here that the question of jurisdiction in terms of Article 138(1) of the May 1994 Malawi Constitution was considered. The said article reads:

"No person shall institute proceedings against any Government in power after the commencement of this Constitution in respect of any alleged criminal or civil liability of the Government of Malawi in power before the commencement of this Constitution arising from abuse of power or office, save by application first to the National Compensation Tribunal, which shall hear cases initiated by persons with sufficient interest".

In my view the present action could fall into the category of cases envisaged by this article of the Constitution. Be this as it may, I bear in mind that Article 138 does not oust the jurisdiction of this court as such but reserves the right to commence action first before the National Compensation Tribunal, thus wrong or inappropriate choice of forum could only be a defence to the defendant but not a bar to plaintiff's action. In this case the defendant remained mute even after judgment was entered. As a court I wouldn't throw away the plaintiff's action on this ground.

The defendant to pay cost for this action.

PRONOUNCED IN CHAMBERS this 29th day of December 1995, at Blantyre.


E/B/ Twea
REGISTRAR