

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CIVIL CAUSE NO. <sup>575</sup> OF 1993**



**BETWEEN:**

**J. G. NKHATA (MALE) ..... 1ST PLAINTIFF**

**A. NJOBVU (MALE) ..... 2ND PLAINTIFF**

**K. CHIKOMETSA (MALE) ..... 3RD PLAINTIFF**

**A. MATOLA (MALE) ..... 4TH PLAINTIFF**

**B. MANDA (MALE) ..... 5TH PLAINTIFF**

**AND**

**THE ATTORNEY GENERAL ..... 1ST DEFENDANT**

**MALAWI CONGRESS PARTY ..... 2ND DEFENDANT**

**CORAM: CHIMASULA PHIRI, J.**

**Temwa Nyirenda of Counsel for the Plaintiff  
Kenyatta Nyirenda, Parliamentary Draftsman, for  
the Attorney General  
G G Kaliwo, of Counsel for the 2nd Defendant  
Selemani, Official Interpreter  
Mrs Katunga, Recording Officer**

**JUDGMENT**

**The plaintiffs' claim against the defendants is for damages for assault and battery; false imprisonment, malicious prosecution and damages for unlawful interference with contract of employment and business contracts. The first four**



plaintiffs were at all material times employees of Blantyre Netting Company Limited whilst the fifth plaintiff is a self employed artist. On 29th October 1992 the first four plaintiffs were lawfully working at the premises of Blantyre Netting Company Limited when agents or servants of the Malawi Congress Party wrongfully arrested them and took them to the District office of the Malawi Congress Party at Blantyre. The fifth plaintiff was arrested by servants or agents of the Malawi Congress Party at his business premises and also taken to the District Office of the Malawi Congress Party. At the District office of the Malawi Congress Party the plaintiffs were thoroughly assaulted with hose pipes after being forced to take off their shirts. The notorious assault was carried out by Charles Kamphulusa, Paul Kachitsa Phiri, Amin Kawinga Phiri and others all of whom were senior party office bearers at District level. The plaintiffs suffered pain and injury.

On the same day the plaintiffs were handed over to the Police who without justifiable cause held them in custody until 5th December, 1992 when they were released on bail. On or about 15th December, 1992 the police without justifiable cause charged the plaintiffs with conduct likely to cause breach of peace and the plaintiffs were brought before the Chief Resident Magistrate Court at Blantyre. The said Magistrate, after examining the particulars of the offence and observing that they did not disclose the offence alleged to have been committed, discharged the plaintiffs. By reason of the unlawful arrests and imprisonment the first four plaintiffs were dismissed from employment on the ground that they had absented themselves from work and the fifth lost business.

A default judgment was entered against the defendants. Subsequently the 2nd defendant successfully applied to have judgment set aside and execution stayed. The defence relied upon by the 2nd defendant was merely a denial of the allegations. The second defendant also denied vicarious liability for the notorious actions of its office bearers above mentioned. The matter was set down for trial and the plaintiffs testified. In the course of the trial the second defendant withdrew its defence and admitted liability. However, the second defendant raised the issue of apportioning liability between itself and the Attorney General. Counsel for the Attorney General indicated that he did not wish to be heard further on the issue. The matter proceeded on the basis of assessment of damages and apportionment of liability.

Mr Nyirenda contended that these defendants were joint tortfeasors and the issue of apportionment was not material to his clients. On the other hand Mr Kaliwo contended that the main issue before this Court during this assessment is to determine what damages are payable by the second defendant to the plaintiffs as an independent tortfeasor. It is settled law that persons are said to be joint tortfeasors only when their separate shares in the commission of the tort are done in furtherance of a common design. Thus persons are not joint tortfeasors merely because their independent acts have resulted in damage. The authority for this proposition is *The Koursk* [1924] Probate 140. It is a well known legal position that where two or three persons not acting in concert, cause different damage to the same plaintiff they are treated differently in law.

Therefore where two or more people by their independent breaches of duty to the plaintiff cause him distinct injuries each tortfeasor is liable for the damage which he has caused and only for that damage. A persuasive authority cited by Mr Kaliwo is that of *Performance Cars Ltd Vs Abraham* [1962] 1 Q.B. 33 where it was held that prior damage to the plaintiff's motor vehicle by some other person was not recoverable against the defendant who caused a subsequent damage to the plaintiff's said motor vehicle.

In the present case it is very clear from the sequence of events that each of the two defendants was engaged in separate torts independent of the other. As for the Malawi Congress Party it is liable for the following independent torts: Firstly, false imprisonment of the plaintiffs from the time of their arrest up to the time they were handed over to the Police. I do not accept the plaintiffs' argument that the second defendant specifically requested the Police to keep the plaintiffs on behalf of the said second defendant. Be it in a multi-party democratic era or in a one party dictatorial regime activities of a political party must be deciphered and distinguished from activities of the Government. Where a government official acts following party dictates in total disregard of official government procedures, the blame should not subsequently be pushed to the political party. The Government officials, inclusive the Police Force, must jealously guard their official government responsibility against political abuse. Therefore, I cannot hold the second defendant liable for the extended false imprisonment up to 5th December 1992. It is settled law that a defendant will only be liable in false imprisonment for the period he had control over a plaintiff. The authority on this point of law is the case of *Malawi Railways Limited Vs Rabson Mangombo*, MSCA Civil Appeal No. 3 of 1993. In this case the Supreme Court of Malawi in the course of its judgment said:-

*"But we think there is a further point for our consideration. Mr Mibenders raised this point in the court below but it does not appear to have been resolved. He has now raised it before us. He has submitted that even if the arrest was initially by the appellant, its liability is only limited to 24 hours because thereafter the respondent became the responsibility of the Police. He referred us to the Sections 33 - 35 of the Criminal Procedure and Evidence Code. Sections 33 and 34 are about arrest by private persons and provide that the arrested persons shall without unnecessary delay be made over to a police officer or taken to the nearest police station. The police then shall either arrest him or at once release him if there is no sufficient reason to believe that he has committed any offence. Under Section 35, once the person has been arrested and taken into custody by the police for an offence other than an offence punishable with death, such person must be brought up before a Court of law having jurisdiction to be dealt with according to law, within 24 hours of arrest or as soon as practicable thereafter. That is the law. The signal, clear signal, is that the law recognises a person's liberty which should therefore be respected and not interfered with unnecessarily. The Police, therefore, were expected*

***to bring the respondent before a court of law within 24 hours of his arrest by them or as soon as practicable. The Police did not do that and instead they kept the respondent in custody for 98 hours before he was released on bail. The Police, therefore disobeyed the law and it does not seem reasonable to us that the appellant should be held liable for such disobedience as it can only be their responsibility. Accordingly, we are of clear opinion that the appellant cannot be held liable in false imprisonment for the full period in false imprisonment for the full period that the respondent spent in Police custody; it had no control over them."***

The above quoted dictum of the Supreme Court of Appeal applies squarely to the case at hand. The second defendant handed the plaintiffs to the Police the very same day of arrest on 29th October, 1992. Therefore I find the second defendant liable for 48 hours only and would award each of the 1st, 2nd, 3rd and 4th plaintiffs a sum of K5,000.00 as damages for false imprisonment. I would similarly award K3,500.00 to the 5th plaintiff for false imprisonment under the hands of the 2nd defendant.

The first defendant is vicariously liable for wrongful acts of the Police. In this case the Police unlawfully kept the plaintiffs from 29th October, 1992 up to 5th December, 1992. I would also consider that loss of employment and business was a direct consequence of this prolonged false imprisonment. Therefore having regard to the case of John Kiwa Vs B.A.T. (M) Ltd Civil Cause No. 322 of 1987 where the Court awarded K40,000.00 for one month imprisonment and Fordson Banda Vs Southern Bottlers Limited, Civil Cause No. 41 of 1987 where the Court awarded another K40,000.00 for another month imprisonment, I would consider K45,000.00 for each plaintiff to be a fair and just award and I so order against the Attorney General.

Secondly, the second defendant is independently liable for assault and battery. The only dispute between the plaintiffs and the second defendant is that the plaintiffs have adduced evidence of injuries which were not specifically pleaded. Civil litigation is governed by rules which create certainty. The defendant must not be taken by surprise hence the requirement that the pleadings must disclose the issues to be tried so that the parties must prepare on the sort of evidence which will be required to prove or rebut the allegations. In this action the 3rd plaintiff did not plead that he contracted diarrhoea and that his neck was swollen. Similarly the fifth plaintiff did not plead injury to his eye. Mr Nyirenda contends that these are consequential injuries flowing from the assault and battery and need not specifically pleaded. I do not think that is correct because it would not be known before hand what evidence the defendants would be required to bring in order to rebut the allegations. I would therefore confine my award to the plaintiffs within the parameters of the pleadings and evidence in support thereof because Mr Nyirenda did not even amend the pleadings during the trial to incorporate in the pleadings facts which were disclosed in the evidence. There is overwhelming evidence that the plaintiffs were exposed to severe torture through beatings using hose pipes. The

aggravating factors include the use of pipes, the number of people executing the beatings, the duration of the beating, the soaking of the plaintiffs in water and the agony suffered therefrom. There is no doubt in my mind that this was degrading and inhuman especially when one considers that all this suffering came for no crime committed by any of them except for allegedly being in possession of membership cards of a pressure group. The plaintiffs greatly suffered injury to their feelings and dignity. The way the assault and battery was executed cannot be said not to have been intended and calculated by the second defendant. In *Charles Mkandawire Vs The Attorney General*, Civil Cause No. 1364 of 1993 the plaintiff was awarded K12,000.00 for pain and suffering resulting from brutal torture. In the present case I would consider K7,500.00 award for pain and suffering to be a fair and just one to each of the 1st, 2nd, 3rd and 4th plaintiffs and K5,500.00 for the 5th plaintiff. This award is made against the second defendant only.

The Attorney General is also independently liable for malicious prosecution. The decision to prosecute these plaintiffs was unfortunate. Each and every sane Government official diligently and duly executing the duties of his office mandated to prosecute should have known that these plaintiffs had not committed any crime. I presume one would be led into such a trap, which destroys ones professional reputation, where he wants to be seen to be pleasing those in political power to gain material favour. Of course sometimes it would arise out of fear. Whatsoever the true reasons may be I condemn such practices. A professional man must always live up to the mark without any compromise. In *Ngunge Bulle Vs ADMARC*, Civil Cause No. 1198 of 1991 (High Court) unreported, the Registrar awarded K2,000.00 for damage to reputation, indignity, humiliation and disgrace. Imagine the plaintiffs being paraded in handcuffs from the Blantyre Police Station to the Magistrate Court. If the plaintiffs were well known figures in our political or public life I was going to make very big awards. However, without lowering the status of the plaintiffs to the abyss I would award each one of them K5,000.00. This award is against the Attorney General.

Lastly, the plaintiffs also claim damages in respect of interference with contracts of employment and general business. Mr Nyirenda submits that it is in the discretion of the Court to award damages under this head. Mr Kaliwo has contended that if the plaintiffs wanted to claim under this head it should have come under special damages and it should have been specifically pleaded and evidence adduced thereon. I would subscribe to the views of Mr Kaliwo. If the plaintiffs had wanted an award specifically under this head they should have so pleaded. Otherwise in my award for false imprisonment I have generally taken into consideration that the plaintiffs might have suffered loss of income. However, I have put a limit to that loss to the extent that the plaintiffs should or ought to employ measures to mitigate that loss. They may seek other employment or engage in other business. They should not just sit idle hoping that money will fall like manna from heaven. Therefore I decline to make a specific and special award under this claim.

The issue of costs has exercised my mind. I would award the costs of this action to the plaintiffs. However, in view of the independence of the torts I would order that the 1st defendant pays two thirds of the taxed costs, if not agreed while the second defendant pays one third thereof. In summary then, the total award for each of the 1st, 2nd, 3rd and 4th plaintiffs becomes K62,500.00 while the 5th plaintiff gets K59,000.00. Out of these total awards each of the 1st, 2nd, 3rd, 4th and 5th plaintiffs is awarded K50,000.00 against the 1st defendant while the remainder is against the second defendant.

Pronounced in open Court this 8th day of January, 1997.



G M CHIMASULA PHIRI  
JUDGE