

**Republic of Malawi**

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CIVIL CAUSE NUMBER 1423 OF 2010**

**CHRISTOPHER NKOPEKA**

**CLAIMANT**

**AND**

**NATIONAL BANK OF MALAWI**

**DEFENDANT**

**CORAM: JUSTICE M.A. TEMBO**

Phokoso, Counsel for the Claimant  
Kalua and Munyanga, Counsel for the Defendant  
Mankhambera, Official Court Interpreter

**JUDGMENT**

1. This is the decision of this Court following a trial in this matter on the claimant's claim for damages for false imprisonment on aggravated basis. The claimant also sought costs of this action. The defendant denied the claim.
2. The claimant indicated in his statement of claim that on 13<sup>th</sup> January, 2010, himself and another cashier, Mr. Bwanali, in the course of their duty noticed

that the cash handled by another cashier, a Mr. Mhone, was not adding up, and reported this to their supervisors.

3. He stated that the said Mr. Mhone was called to the office by the supervisor to explain the shortfall. He added that Mr. Mhone's explanation was however not satisfactory.
4. He asserted that, in reaction to this, to the surprise of the defendant, the defendant's servants or agents wrongfully directly and procured the Police at Liwonde Police Station to arrest the claimant and take him into custody on a charge, then made by the defendant, that the claimant had failed to account for about K9 200 000.
5. The claimant then asserted that acting upon the said direction, the said police thereupon arrested the claimant and took him into custody to Liwonde Police Station, where the claimant was detained until the 18<sup>th</sup> January, 2010 when the police released him on bail. He then stated that the Police later informed him that he would not be prosecuted as there was no case against him. And that he would be used as a state witness in the state's case against the said Mr. Mhone.
6. In the premises, the claimant asserted that the defendant caused the complainant to be wrongfully imprisoned and deprived of his liberty for a period of five and a half days. And that by reason of the foregoing he suffered severe shock and mental anguish. Further, that the defendant caused him to be arrested in broad daylight and thereby subjected him to humiliation and disgrace and brought him into ridicule and contempt.
7. The claimant seeks damages for false imprisonment including aggravated damages. The claimant seeks costs of this action.
8. The defendant admitted that there was indeed a shortfall as alleged and Mr. Mhone could not explain satisfactorily on the same. It however asserted that it will contend that the police acted on their own responsibility and initiative and not pursuant to any direction or action of the defendant. It therefore denies that it wrongfully or at all imprisoned the claimant or deprived him of his liberty.
9. The defendant indicated that it will, in the alternative, contend that if it caused the police to arrest the claimant, which is denied, the defendant was justified in arresting the claimant because its servants had reasonable grounds to believe that the claimant had committed an arrestable offence.

10. The defendant specified particulars of grounds of belief, namely, that the claimant was supervisor of Liwonde Agency of the defendant's Zomba branch. And that as a supervisor, the claimant was in charge of treasury of the agency and he kept keys for the treasury. That the treasury (safe) could not be opened in the absence of the keys kept by the claimant and indeed in the absence of the claimant himself. That since a huge amount K9 240 500 went missing from the treasury without a plausible explanation from the claimant, the defendant's agents were entitled to suspect that the claimant had a hand in the missing of the money.
11. The defendant then denied the alleged damages and loss.
12. The defendant then made a counter claim and stated that the sum of K9 240 500 went missing due to the claimant's negligence. It then stated the particulars of negligence, namely, failing to properly supervise the agency so to protect the defendant's property, failing to put into place measures to safeguard the safe so as to prevent theft from the safe, failing to safeguard the keys to the safe so as to prevent theft from the said safe, failing to take any or other safety measures to prevent theft of money from the safe.
13. The defendant then asserted that as a result of the claimant's negligence it suffered loss and damages. It particularized the loss as K9 240 500. It claimed the sum of K9 240 500, general damages to be assessed and costs.
14. The claimant denies negligence and the counter claim.
15. In a civil matter like the instant one, the one who asserts the affirmative will succeed if he proves his case on a balance of probabilities. See *Nkuluzado v Malawi Housing Corporation* [1999] MLR 302 and *Miller v Minister of Pensions* [1947] All ER 372. The claimant must prove his claim and the defendant must prove its counter claim.
16. To prove his case, the claimant testified. The defendant also brought its own witnesses to prove its version of the events as well as the counter claim.
17. The claimant's evidence was that he worked as Bank Supervisor for the defendant at Liwonde Branch. He added that he had worked for the defendant for 30 years and during that time he had never received a warning or got reported to management over misconduct.
18. He then stated that on the evening of 12<sup>th</sup> January, 2010 one of the cashiers who was working under his supervision Mr. Mhone told him and his other

fellow cashier Mr. Bwanali that he was going on a holiday the following day hence he would not report for duties.

19. He then said that Mr Mhone did not follow the procedure required when seeking a holiday which is usually that one fills forms, have his cash counted and handed over to the claimant and finally cause the application to be approved at the parent branch which in this case was Zomba Branch. He added that on this day, as they were knocking off, himself, together with other cashiers, locked the chubs where money is stored.
20. He added that the way the chub stores were designed is that no one person can open them. And that they required the presence of all three of them, two cashiers and himself as supervisor. Further, that each of them had a key for the chubs.
21. He then stated that the following morning, on 13<sup>th</sup> January, 2010, Mr Mhone did not report for work, and when the time clocked 7.45 am himself and the other cashier, decided to open the chub in readiness for that day's banking transactions. He stated that they then noticed in the process that Mr Mhone had left his keys on the desk the previous. He said they proceeded to open Mr Mhone's chub to collect new bank notes and it was at this point that they discovered that the packs of these notes were under packed.
22. He explained that he then called the Customer Service Manager, Mr. Bakali from Zomba Branch to inform him about the development and he recommended his Branch Manager, Mr. Chirwa to come and witness the same. He added that Mr. Chirwa in fact came and witnessed the development.
23. He then said that the Manager called a Supervisor Mr. Macheya who came and witnessed what had transpired. He added that the two agreed to count the money from both cashiers' chubs. And that first to be counted was money in Mr. Bwanali's chub and no shortage was found. And that the two then counted money from Mr. Mhone's chub and there they realized a shortfall of K9 200 000.
24. He then stated that Mr. Mhone was called and came in the same day and indeed identified that packs in issue as belonging to his chub. He added that when Mr. Mhone was asked why the money packs were under packed Mr. Mhone did not provide a response. He said that at that point the Manager, Mr. Chirwa, called Mr. Noel Tomoka, Audit Manager at the Head Office in

Blantyre. He added that, apparently, a decision was made by the Manager and the Supervisor that himself and the other cashier should return to duty. He said that, however, this decision was reversed when Mr. Tomoka arrived and who instead called the police officers from Liwonde Police Station. He added that the police officers came and inspected if there was any forced entry into the chubs but they found that there was none. He stated that at that point the police officers left the Bank and went back to their police station.

25. He indicated that upon the departure of the police officers Mr. Tomoka instructed him to follow Mr. Tomoka to the police station which he did. And that upon arrival at the police station, Mr. Tomoka instructed the police officers to arrest him, Mr. Bwanali and Mr. Mhone. And that the arrest was in fact effected on the three of them. This was on 13<sup>th</sup> January, 2010.
26. He explained that the following morning, statements and fingerprints were taken from him and that he remained in police custody until 18<sup>th</sup> January, 2010 when he was granted police bail.
27. He then stated that due to the arrest, the defendant unlawfully froze his salary and his bank account for seven months. He then stated that police officers told him that they had found nothing linking him to the commission of the crime herein and that he had just discovered and reported the said crime. And further, that the police officers said that they actually wondered how the defendant would order his arrest in the circumstances instead of thanking him.
28. He then indicated that the police decided to make him a state witness. He strongly believes that the defendant wrongly procured his arrest and made him suffer mental anguish, humiliation, disgrace and violation of his right to liberty as a result.
29. During cross-examination, he confirmed that the chub could not be opened unless he was present with the two cashiers, Mr. Mhone and Mr. Bwanali.
30. He then stated that on 13<sup>th</sup> January, 2010 he realized that some cash was missing from the chub and that this was the day Mr. Mhone was absent. He added that there was no sign of a break in. He added further that there was suspicion that someone accessed the chub using the keys.
31. He explained that there was no other way to access the cash apart from the chub. But he also said cash may have gone missing at the counter. He elaborated that cashiers count the money. And that as a Supervisor he would check the money moving from the cashier's counter to the chub by doing a

- rough check. He confirmed that at Liwonde Bank he was the top man and was supposed to check cash moving from cashiers' counters to the chub. He added that he worked on trust and checked the cash roughly.
32. He asserted that he would not be suspected by someone who did not know that he operated on trust of the cashiers. He stated that the missing of the K9 200 000 was serious that is why he reported to his superiors at Zomba Branch immediately. He added that thereafter he proceeded with the usual bank day business.
  33. He then said that Mr. Chirwa arrived at Liwonde from Zomba around 9.00 a.m. He stated that a Supervisor arrived later in the afternoon.
  34. He explained that, when asked, Mr. Mhone did not explain how the under packing of his cash occurred.
  35. He then said that Mr. Tomoka arrived at night and by then the Bank was closed.
  36. He explained that there was no decision made by the defendant to suspend him and the two cashiers but that he and the other cashier were to return to work the following day. He then stated that Mr. Chirwa said he had found Mr Mhone who was stealing the cash by under packing the cash packs.
  37. He then stated that the police officers checked whether the chub was broken and that this was their job. He added that after they had checked the chub they left the Bank although due to passage of time he could not recall exact time they left the Bank.
  38. He then stated that when the police officers left the Bank, Mr Mhone and himself was still inside the Bank with Mr. Tomoka and others. He added that at that point the police did not indicate that they suspected Mr. Mhone. He added further that at that point the police did not take statements from him or the two cashiers and did not say why. He stated that at this point the police officers did not tell them to follow them to the police station.
  39. He then stated that they all went to the police station as instructed by Mr. Tomoka and that this was within five or ten minutes of the departure of the police from the Bank.
  40. He then asserted that Mr. Tomoka instructed that the police arrest him and the two cashiers, Mr. Mhone and Mr. Bwanali. He however did not know the names of the police officers who arrested him. He added that they did not tell him why they arrested him. He then stated that Mr. Tomoka told the police to

keep him and the two cashiers in custody because none of the three accepted responsibility for the cash shortage. He added that the police officers who arrested him are not the ones who came to the Bank and did not know the facts of the matter.

41. He then stated that the letter from the police advising the defendant that he would be state witness dated 9<sup>th</sup> February, 2010 was written after he had been released on bail on 18<sup>th</sup> January, 2010. He added that this letter was written after police investigations almost three weeks after the incident of the missing cash herein.
42. During re-examination, he stated that upon arrival at the police station himself and the two cashiers denied responsibility for the missing cash and Mr. Tomoka said the police should keep them in order to investigate. He reiterated that police checked the chub at the Bank and left without indicating that they would arrest anyone.
43. He then stated that cash would not be stolen from the chub but that Mr. Mhone was stealing the cash at the counter and was under packing his cash packs before sealing them. He then stated that it was not possible for him as a supervisor to know that the packs were under packed as he only did a rough check of the cash packs.
44. He then stated that when closing the chub, he and each of the two cashiers had keys with which they closed the chub and then he also locked both chubs. He added that he left his keys at the police and each cashier took his own key. And that one person could not access the chub.
45. He reiterated that they found Mr. Mhone's chub key on his desk. He said that they waited for Mr. Mhone but since Mr. Mhone did not show up until 8.45 a.m they opened the chub of Mr. Mhone to access new bank notes but found under packing of cash packs. and that, he then reported the matter.
46. He then insisted that the police officers at the police station had no reasonable suspicion but only made arrests on instruction of Mr. Tomoka.
47. He reiterated that the police investigated the matter and made him and Mr. Bwanali state witnesses. Further, that the police found that Mr. Mhone was responsible since it was his cash that was missing. And that this was the state of affairs after he had already been arrested. That marked the end of the claimant's evidence.

48. The first witness of the defendant was Mr. Brian Chirwa and he stated that at the time of the cash incident herein he was the Service Centre Manager at the defendant's Zomba Branch.
49. He then stated that Liwonde Service Centre is an agency which operates under Zomba Service Centre just like Balaka and Mangochi.
50. He explained that at the time of the incident in January, 2010, the agency was manned by the claimant who was the Supervisor. He added that Mr. Mhone was the Head Bank Teller and Mr. Bwanali was a Bank Teller. He added further that the treasury was under the Supervisor who had one set of keys and Mr. Mhone was custodian of the other set of keys. He stated that the treasury is supposed to be opened by two people together. And that one person cannot open the treasury and close the same so the claimant and Mr. Mhone would open and close the treasury together.
51. He then stated that on 13<sup>th</sup> January, 2010, when he was on leave, Mr Bakali who is the Operations Manager for Zomba Service Centre telephoned him that the claimant had telephoned Mr. Bakali to report at Liwonde Service Centre. He indicated that, at that point, the claimant had not stated why he wanted Mr. Bakali to go to Liwonde Service Centre. He then stated that since he was on leave and Mr. Bakali was alone, Mr. Bakali asked him to Liwonde to see what the problem was. He then drove to Liwonde and arrived around 10.00 a.m.
52. He then stated that, once he got to the Bank, the claimant briefed him that he and Mr. Bwanali discovered that some packs of money were missing on the morning of that day. He added that since it was already time to open the Bank he ordered that they count the money at the end of the day. He added that he called in Mr Macheya to come help with counting the cash. He then stated that at the close of business, they counted the money and found a shortfall of K9 240 500. He then reported this finding to Mr. Tomoka the Internal Audit Manager who later drove to Liwonde.
53. He then stated that upon being briefed on what transpired he together with Mr. Tomoka asked the claimant and the two cashiers how the money went missing and each one of them said they did not know. He added that Mr. Mhone said he could only respond in writing. He explained that after a long time Mr. Tomoka called the Head of Risk and they were advised to call the police.



54. He explained further that he called the Officer-in-Charge at the Liwonde Police and told them money was missing and asked for their help. He then said they were sent two police officers Mr Muheya and another one.
55. He then said he briefed the police about the missing money upon which the police officers asked questions to the claimant and the two cashiers but no solution was found. He stated that at this point, which was around mid-night, the police invited them all to the police station where more questions were asked and eventually the claimant and the two cashiers were detained by the police.
56. During cross-examination, he stated that after discovering the cash shortfall he decided that Bank operations should continue its services on the material day since the claimant had already opened the Bank for business. He stated that Mr. Mhone was not at work on that day and was therefore not one of the personnel to carry on work on that day.
57. He then stated that the police came to the Bank on that same day but that it is not correct that they left without saying anything. He added that it is also not correct that Mr. Tomoka decided to take the claimant and others to police. He clarified that they all went to the police station together with the police. And that it is the police that instructed all persons present to go to the police station for further investigations.
58. He said it is correct that Mr. Tomoka was not present in the morning when the decision was made for the claimant to carry on working. And that decisions to arrest the claimant were made when Mr. Tomoka had arrived at the Branch at Liwonde.
59. During re-examination, he stated that when the police arrived at the Bank he and them all asked questions to the claimant and the two cashiers on how the money was lost. He added that because none of them made a convincing statement the police asked all of them to go to the police station for further investigations.
60. He then stated that the police were not called in the morning of the missing cash because he had to first investigate internally as per the defendant's protocol. He added that he investigated internally and later reported to Internal Audit to Mr. Tomoka and that this is why they had to wait for Mr. Tomoka.
61. He then stated that Mr. Mhone was not told to go back to work since he had started his leave and was not on duty.

62. The second witness of the defendant was Mr. Noel Tomoka who stated that he is an Internal Audit Manager at the defendant. He further stated that his duty is to investigate cases at the defendant and that is how he got involved in the present matter.
63. He reiterated that Liwonde Service Centre was under Zomba Service Centre and that it was manned by the claimant and the two cashiers herein. He also reiterated the mode of access to the treasury as explained by Mr. Chirwa.
64. He then explained that on 13<sup>th</sup> January, 2010, he received a report from Liwonde Service Centre in line with the defendant's procedures upon which he drove to Liwonde. He stated that once he was there he was briefed on what had transpired. He then reiterated what Mr Chirwa said as to what transpired in relation to how they interrogated the claimant and the two cashiers and how the police came and ended up asking all of them to go to the police station where the claimant and the two cashiers were detained.
65. He was not cross-examined.
66. The third witness for the defendant was Inspector Muheya who stated that he has been stationed at Liwonde Police Station for the past nine years. He stated that he was at Liwonde Police Station in 2010 and he is familiar with the issues in the present matter.
67. He stated that he was detailed by the Officer-in-Charge at Liwonde Police Station to investigate the missing of K9 200 000 at the defendant's Liwonde Bank. He stated that he went to the defendant's Bank where the officials narrated what they had discovered and he found that there was no break in at the Bank.
68. He stated that he decided to call the claimant and the two cashiers to the police station and then detained the three for further investigations. He stated that after thorough investigations he released the claimant and one cashier who were turned into state witnesses.
69. During cross-examination, he insisted that as investigating officer he decided to advise the defendant's officers to come to the police station and he decided to arrest the claimant and his two co-workers. He indicated that he had travelled to this Court by bus from Liwonde and came to answer to the subpoena from this Court. He insisted that he was not paid an allowance. He added that maybe the defendant will pay him an allowance after testifying but that it was his job to testify and he did not expect an allowance.

70. During re-examination, he reiterated that since there was no break in at the Bank he decided to arrest the claimant and the two cashiers since they all had the chub access key.

71. It is clear in this matter that the claimant was arrested as alleged. The claimant was never prosecuted and was released and turned into a prosecution witness.

72. The issue for determination is whether the defendant is responsible for the arrest of the claimant in circumstances where it was not him that allegedly committed the offence as revealed by the investigation that was subsequent to the arrest. That requires answering two questions as submitted by the parties, namely, whether the defendant instructed the police to arrest the claimant and whether there was reasonable and probable cause for the arrest.

73. This Court observes that, on the claim for false imprisonment both parties correctly cited the settled law on the subject. That, as was held in the case of *Banda v Mchenga Coal Mines* [2007] MLR 181 at 184

The law on false imprisonment is that a defendant would be liable if the defendant lays a charge against the plaintiff on which it becomes the duty of the police to arrest him. However, the defendant will not be liable if all he does is give information about loss of property on his premises and asks the police to investigate. This was laid down in *Chimtendere v Burroughs Ltd* [1981-83] 10 MLR 215; *Admarc v Stanbul MSCA Civil Appeal No. 6 of 1984* and *Mvula v Norse International Ltd* (1992) 15 MLR 331

74. And as further held in the case of *Tembo v Industrial Development Group* (1) [1993] 16 (2) MLR 865 at 875, where Chatsika J, as he then was, stated that

It should be noted that it is the duty of every citizen to give information of an alleged commission of a crime to the police. If so acting on the information so given by a citizen, the police mount investigations, and the investigations result in the arrest of a suspect, if the suspect is eventually found to be innocent, he cannot entertain an action in false imprisonment against the citizen who initially supplied the information to the police.

75. The parties correctly cited other case authorities, namely, *Manda v Ethanol Company Ltd* [1993] 16 (2) MLR 572, *Meja v Cold Storage Co. Ltd* [1990] 13 MLR 234.

76. On the first question as to whether the claimant was arrested at the instruction of the defendant, the claimant submitted that he was arrested on the instructions of Mr. Tomoka. And that the defendant is liable for the false

- imprisonment. He disputed the account of Sub Inspector Muheya to the contrary that actually Sub Inspector Muheya is the one who made the decision to arrest the claimant and his two cashiers. He asserted that the evidence of the defence is clear that Sub Inspector Muheya was not there at the Bank when Mr. Tomoka gave instructions to go to the police. Further, that Sub Inspector Muheya was not there when Mr. Tomoka advised the police officers at the police station to arrest the claimant.
77. The defendant on the contrary contends that the police arrested the claimant at their own instance on account of the circumstances whereby the police decided to effect the arrest after inspecting the chub and deliberating on the matter amongst themselves.
78. This Court's impression of the evidence is that the defendant reported the matter to police and the police came in to inspect the scene of the alleged crime being the chub. The police found no break in. This Court has no reason to doubt Sub Inspector Muheya's account that he took the decision to arrest the claimant and his two cashiers. He was insistent on that fact and never wavered during cross-examination.
79. There is no evidence substantiating the claimant's assertion that Mr. Tomoka instructed the police to arrest the claimant and the two cashiers. It appears the police decided to call the people from the Bank to the police station and that is where the police decided to arrest the claimant and the two cashiers.
80. In the foregoing circumstances, this Court finds that the police made the decision to arrest the claimant and that they did so of their own volition and not at the instance of the defendant. The defendant cannot therefore be liable for the arrest as per *Banda v Mchenga Coal Mines* [2007] MLR 181 at 184 and *Tembo v Industrial Development Group* (1) [1993] 16 (2) MLR 865 at 875.
81. On whether there was a reasonable and probable cause for the arrest, this Court notes that the claimant asserts that the facts did not show probable cause for arresting the claimant. The defendant contends to the contrary.
82. This Court observes that the claimant asserted that he was under no suspicion and that is why he was allowed to conduct banking business on the material day. This is contrary to the evidence adduced. The claimant was actually allowed to conduct banking business the day cash went missing because he had already opened the bank and was allowed to carry on by Mr. Chirwa.

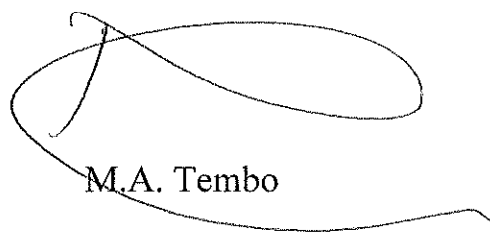
83. The claimant added that he could not be under suspicion since cash could miss between the cashier counter and the chub. This fact was canvassed during the testimony. The duty to check the cash between the cashier counter and the chub was on the claimant. He accepted that he did rough checks and thereby satisfied himself that all was alright. However, what is significant is the fact that at that beyond this point the cash once in the chub could only be accessed by use of keys held by the claimant and the cashiers combined. In such circumstances, as submitted by the defendant, the missing of the cash in the chub would implicate the claimant and his two cashiers hence reasonable and probable cause arose for believing that the three were somehow involved in the course of the cash missing.

84. This Court also observes that Mr. Tomoka, who the claimant alleges told the police to arrest the him, came to testify and asserted that the police arrested the claimant on their own volition. He was never cross-examined and his testimony was never challenged.

85. In the final analysis, this Court finds that the claimant's claim fails given that he was arrested at the instance of the police on their own volition after investigations. And further, that there was reasonable and probable cause for the arrest.

86. Costs normally follow the even and shall be for the defendant.

Made at Blantyre this 17<sup>th</sup> December 2020.



M.A. Tembo  
**JUDGE**

