

IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

M. S. C. A. CIVIL APPEAL NO. 43 OF 2000

Being High Court Civil Cause No. 2069 of 1994

BETWEEN:

DONALD KAUNDAMA APPELLANT

- and -

THE ATTORNEY GENERAL RESPONDENT

BEFORE: THE HONOURABLE JUSTICE KALAILE, JA

THE HONOURABLE JUSTICE TAMBALA, JA

THE HONOURABLE JUSTICE MSOSA, JA

Mr. Chirwa, Counsel for the Appellant

Mr. Nyirenda, Counsel for the Respondent

Mchacha, Court Official

J U D G M E N T

MSOSA, JA

The appellant brought an action against the respondent claiming the sum of K15,000 the value of his motor cycle, general damages for malicious prosecution, exemplary damages for false imprisonment and costs for the action.

The judge in the Court below found in favour of the appellant on all his claims but decided that he could not award damages because the matter fell within the jurisdiction of the National Compensation Tribunal under Section 138 (1) of the Constitution. The appellant appeals against this finding.

The plaintiff was employed as a Court Clerk and was stationed at Balaka Magistrate's Court. He was under the direct supervision of the then learned Resident Magistrate, His Worship Chinangwa. The events complained of occurred in May 1989. The plaintiff was in custody of the sum of K589.00 which was money deposited to be used as an exhibit in a criminal trial. An amount of K200 out of the K589.00 was in dispute and there was need for the prosecutor to find out certain facts relating to that amount. For that reason the magistrate instructed the plaintiff not to bring the disputed amount on charge, but instead to keep the money in two separate envelopes until the matter was clarified.

Accordingly the plaintiff did not bring the amount on charge but merely kept it in the exhibit room in two separate envelopes, one containing K370 and another K219. Meanwhile, before the magistrate delivered his judgment and even before the disputed amount was tendered in evidence, Mr. Manong'a an internal auditor in the Judicial Department called at Balaka Magistrate's Court to carry out an audit inspection.

The plaintiff was asked by the auditor to account for the amount of K589.00 which was in his custody. The plaintiff accounted for K370.00 which was in one of the envelopes and

within the next 5 minutes he accounted for the K219 which was in the other envelope. However, by that time the auditor had briefly left the office. When the auditor returned from where he had gone, the magistrate informed him that the appellant had accounted for all the money.

To his surprise, a few days later the plaintiff was summoned by the police and upon his arrival at the police station, he was arrested on the ground that such was the instruction of the High Court. The plaintiff was in police custody for twelve days. He was subsequently tried for the offence of theft by a person employed in the public service before the Balaka First Grade Magistrate. The trial resulted in the plaintiff's acquittal of the charge.

The appellant filed three grounds of appeal. At trial, he withdrew one of the grounds and proceeded with the remaining two which are as follows:

(1) The Honourable Court below erred in law in holding that it had no jurisdiction to decide on this case by virtue of section 138 (1) of the Constitution of the Republic of Malawi.

(2) The Honourable Court below erred in law in not considering the provisions of section 108(1) of the Constitution of the Republic of Malawi.

The issue before us is whether it was the High Court or the National Compensation Tribunal which had jurisdiction over the appellant's case. It is important that we examine the relevant provisions of the Constitution. Section 138 (1) of the Constitution provides as follows:

“(1) 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 to the National Compensation Tribunal, which shall hear cases initiated by persons with sufficient interest.”

The Court below held that, the Court had on several occasions considered, interpreted and applied this section. The position taken on it has consistently been that cases of the kind contemplated under this section, in respect of claims dating back to the date before the Constitution came into force, if instituted before the date of the coming into force of the Constitution, would continue to be heard by the Court. And if such kind of cases are commenced before the Court after the date of the coming into force of the Constitution, the Tribunal has exclusive original jurisdiction.

We entirely agree with the observations of the Judge in the Court below, that in effect section 138 of the Constitution prohibits any person from instituting any criminal or civil proceedings against the Government of Malawi within the limitations and restrictions provided in that section. The prohibition is in respect of criminal or civil liability of the Government of Malawi arising out of abuse of power or office by the Government of Malawi which was in power before the commencement of the Constitution. The section is worded in very clear terms.

Counsel for the appellant has submitted that section 138(1) of the Constitution was framed to deal with cases such as those of detention without trial, and illegal forfeiture of property. He argues that the appellant's case does not fall within the kind of cases stipulated in that section as the appellant was prosecuted even though the explanation by him and the evidence, if it had been properly examined, he should not have been prosecuted.

The respondent on their part, argued that the Court did not have jurisdiction in the case because under section 138(1), the Constitution has given exclusive original jurisdiction over matters of the kind complained of by the plaintiff to the National Compensation Tribunal.

According to the undisputed evidence in the court below, the matters which the appellant complained of arose before the commencement of the Constitution. The appellant instituted the proceedings against the respondent after the commencement of the Constitution. It is clear that the liability of the Government that was in power then is not in dispute. The only question is whether the matters complained of by the appellant arose from abuse of power or office by an agent of the Government such as the auditor of the High Court. And, if so whether the matter fell within the exclusive original jurisdiction of the National Compensation Tribunal as stipulated in section 108(1) of the Constitution.

The appellant was arrested and prosecuted at the instance of the High Court. There was no justification for prosecuting the appellant as he had accounted for all the money that was in his custody. Both the High Court and the police had powers not to cause the arrest and prosecution of the appellant as there was no basis for taking such an action. There is no doubt that the action taken by the High Court and the Police was not only driven by malice but was also an abuse of power and office by the auditor of the High Court.

We are of the view that section 138(1) does not only apply to cases of unlawful detention, and illegal forfeiture. The section would also cover cases in which a person is unjustly tried in the Traditional Court, cases where there is miscarriage of justice, cases

arising from abuse of power under the Preservation of Public Security Act and the Forfeiture Act. These are just some of the examples. The list we have given is not exhaustive as liability of the Government will depend on the circumstances of each particular case.

It is clear that the National Compensation Tribunal was created with intention to give easy access to the many people who had suffered during the previous Government when principles of natural justice and provisions of the Universal Declaration of Human Rights and even basic rights were not respected and observed in many cases like the present case.

We agree with counsel for the appellant that section 108 (1) of the Constitution gives the High Court of Malawi unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law. However, the wording of section 138(1) gives exclusive original jurisdiction to the National Compensation Tribunal to deal with cases like the present one as provided therein. This is an exception to the general rule contained in section 108 (1) of the Constitution. We note that even the jurisdiction of the National Compensation Tribunal is transitional because under section 145(1) the National Compensation Tribunal Fund ceases to be charged with new claims for compensation ten years after the commencement of the Constitution at which time the Tribunal is supposed to be dissolved.

We further note that Section 138 (3) of the Constitution gives power to the National Compensation Tribunal to remit a case or a question of law for determination by the ordinary courts where the National Compensation Tribunal is satisfied that the Tribunal does not have jurisdiction, or where the Tribunal feels it is in the interest of justice to do so. It is clear from this section that the cases which fall within the jurisdiction of the National Compensation Tribunal can be referred to the High Court if the Tribunal feels that it is in the interest of justice to do so or where the Tribunal has no jurisdiction. Therefore the jurisdiction of the High Court is not ousted.

For the reasons we have given, the appellant should have commenced proceedings in the National Compensation Tribunal. The Judge in the court below was right in holding that he had no jurisdiction to assess damages in the appellant's case.

We consequently dismiss the appeal with costs.

DELIVERED in Open Court this 20th day of September, 2002, at Blantyre.

Sgd.:

J. B. KALAILE, JA

Sgd.:

D. G. TAMBALA, JA

Sgd.:

A. S. E. MSOSA, JA