



IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
Civil Cause No. 161 of 1999

BETWEEN

OSBORNE MKANDAWIRE.....PLAINTIFF

AND

NAMING'OBA TEA ESTATES LIMITED..... DEFENDANT

Coram: The Hon. Justice H.S.B. Potani

Tukula, of the Counsel for the Plaintiff

Msowoya, of the Counsel for the 2nd Defendant

Mdala, Official Interpreter

JUDGEMENT

Potani J,

This is an action by the plaintiff , Osborne Mkandawire, against the defendants, Naming'omba Tea Estates Limited, his former employer. The plaintiff's claim is for damages for false imprisonment, defamation and malicious prosecution. He also claims salary from February 4, 1996, to the date of judgement

with interest thereon at a rate the court may deem fit and costs of the action. The plaintiff's claim is contested by the defendants who deny all the material allegations levelled by the plaintiff.

Only the plaintiff himself testified in and of his claim. On the part of the defendants three witnesses were paraded.

The plaintiff's evidence, in essence, is that he was employed by the defendant at one of their estates as a check clerk and by February 1996 he was a head clerk. His duties were mainly overseeing other clerks, assigning work and preparation of salaries. On February 3, 1996, the plaintiff discovered that a scale which he had, on the previous day, issued out to a clerk was missing. He made enquiries from a number of some subordinates about the missing scale but to no avail. He reported the matter to his superior, a Mr Sitima, who referred the matter to the security officer, Mr Nkhukuzalira (DW2). The security officer called for the plaintiff, James Khoviwa (DW 1), a Mr Malingamoyo and two others being staff in the stores whom

he asked, without success, about the missing scale. The security officer then decided to refer the matter to the police. They started off to Luchenza Police on a vehicle driven by the security officer.

According to the plaintiff, on the way to the police, the security officer stopped the vehicle and alleged that it was the plaintiff who took the scale and told him that he would better return it lest he face the music at the police but the plaintiff denied the allegation despite insistence by the security officer. They proceeded to the police and upon arrival the security officer allegedly entered the police offices alone leaving the plaintiff and the four others outside. He stayed in the police offices for a long time. When he came out, he called for them to the police offices and having entered, a police officer, without asking anyone of them any questions, ordered the other four to go and locked up the plaintiff. He remained in the cell for two weeks in very deplorable conditions before being released on bail after the police had recorded a caution statement from him asking him who he suspected to have taken the scale but he denied having taken it or knowing who took it. Eventually the plaintiff was tried

on a charge of theft before the magistrate's court at Thyolo. He was acquitted of the charge and the court issued to him a letter directing that he be reinstated but when he presented the letter to the defendants, they refused to reinstate him. No terminal benefits were paid to him and no letter of termination was given to him.

It is the defendants' evidence that when it was reported to the security officer Mr Nkhukuzalira (DW 2) that a scale had gone missing, he called for the plaintiff and four other clerks, that is, James Khoviwa (DW 1) Luvalo, Malingamoyo and Davisi who he questioned but they all denied knowledge of its whereabouts. The security officer then decided to refer the matter to Luchenza Police and took the plaintiff and the four others in a vehicle he was driving. On the way, he stopped the vehicle and pleaded with them that if anyone took the scale they should come out in the open so that the matter should be resolved otherwise without involving the police as he did not want to see anyone of them being in trouble but none of them came forth with a confession. Upon arrival at the police, the security officer, according to

James Khoviwa (DW1), told the police that a scale had missed at the defendants place and that the five people he had brought were the ones who could explain and that he wanted the assistance of the police. The police then asked each one of them about the matter. After the questioning, it appeared the police failed to get any meaningful clue as to who among the five was the culprit as such they decided to go and inspect the defendants' place. They visited all the offices and took the five back to Luchenza Police at which they said from what they had observed at the offices, it was the plaintiff who could explain better about the missing scale. They then released the other four.

On the claim for false imprisonment, the law as to what constitutes false imprisonment is well settled and there is a wealth of case authorities on the subject. One local case authority that is quite illuminating as to what amounts to false imprisonment is **Hauya V Cold Storage** Civil Cause No 274 of 1987 in which the court stated as follows:

"The crucial issue in false imprisonment is to decide whether the defendants' servant merely stated the facts to the police or whether they made a charge against the plaintiff. It is accepted that conveying one's suspicion to the police who, on their own responsibility, take the plaintiff into custody, is not making a charge. However, where the defendants acting through their agents or servants order the police to arrest the plaintiff, it is imprisonment by the defendants as well as the police and an action for trespass would lie against the defendants; but if the defendants merely stated the facts to the policemen who, on their own responsibility took the plaintiff into custody, this is not imprisonment or trespass by the defendants. The test is this: if the defendants's servant made a charge on which it became the duty of the police to act then the defendants will be liable but they are not liable if they merely gave information and the police acted according to their own judgment".

The plaintiff alleges in this case that the defendants are liable for false imprisonment because their servant, Mr Nkhukuzalira the security officer took him to the police on a vehicle, alleged on the way that he was the one who stole the scale and that he would face the music at the police if he would not voluntarily confess to him and further that at the police, the security officer spent sometime with the police in the absence of the plaintiff and other suspects and when the plaintiff and the others were called by the police, the police put the plaintiff in custody and released the others without any questioning.

The evidence, in totality, is such that the plaintiff's allegations against the security officer are suspect. The evidence shows that there were five people the security officer took to the police and according to the security officer he had to drive them to the police as the police had no transport. If the security officer had singled out or made a charge against the plaintiff as the culprit then he could have taken only him to the police. The evidence of James Khoviwa (DW1), one of the suspects taken to the police, shows that on the way to the police the security officer did not accuse

the plaintiff of being the thief; rather he made a plea to all the five suspects that if anyone of them took the missing scale he should come out in the open so that the police should not get involved. The court does not believe the plaintiff's assertion that at the police the security officer had a long private discussion with the police after which the plaintiff together with the other suspects were called and then only him was detained while the others were released without questioning. According to James Khoviwa (DW 1), one of the suspects, all the five suspects were questioned by the police who after failing to get a helpful clue found it necessary to visit the defendants' premises at which the scale went missing and it was only after inspecting the premises that the police detained the plaintiff and released the others. This account sounds more credible than that of the plaintiff. The thus evidence shows that the security officer only lodged a complaint to the police to whom he gave information about the circumstances in which the scale went missing whereupon the police set in motion their investigation of machinery and in their own judgment they singled out the plaintiff among five suspects.

In the circumstances, it cannot be said that the security officer laid a charge against the plaintiff or ordered the police to arrest him. The claim for false imprisonment therefore fails.

The other aspect of the plaintiff's claim is on alleged defamation. In paragraph 12 of the amended statement of claim, the plaintiff alleges that by informing the police that the accused stole a scale thereby subjecting him to criminal prosecution the result of which was his acquittal, which notwithstanding the defendants refused to reinstate him caused the plaintiff to be seen as a criminal thereby bringing him to ridicule and contempt. Simply defined, defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of society generally. Thus in Kwalira v Ganiza (1933) 16 (1) MLR 236, it was held that calling a person a thief amounts to defamation. The question to be asked in this case is: Did the defendants' security officer publish to the police or indeed any third party that the plaintiff was a thief or made such imputation. As earlier observed and found, the defendants' security officer in dealing with the issue about the missing scale merely passed on

information and expressed his suspicion to the police about the circumstances in which the scale went missing. He did not lay a charge against or call the plaintiff or indeed any person a thief. Besides, the case of **Kwalira V Ganiza**, earlier cited, is to the effect that a plaintiff suing for alleged defamation must set out, in the pleadings, the precise words used in the alleged defamation. This, the plaintiff has not done in his pleadings and it renders his claim suspect. In the end result, the court would throw away the claim and so it is ordered.

Moving on the claim for malicious prosecution, the facts amply show that the plaintiff was tried on a criminal charge of theft by servant before the First Grade Magistrate's Court at Thyolo but ended up being exonerated. Can it then be said that he was maliciously prosecuted? Malicious prosecution, loosely defined, is where a person without reasonable ground and probable cause and motivated by malice sets in motion the prosecution of another. **Clark and Lindsell on Torts** 14th edition page 1077 paragraph 1887 defines prosecution as:

“to set the law in motion, and the law is only set in motion by an appeal to some person clothed with judicial authority in regard to the matter in question, and to be liable for malicious prosecution, a person must be actively instrumental in so setting the law in motion”

It thus follows that in order to succeed in his claim for false imprisonment, the plaintiff must prove not only that he was prosecuted at instance of the defendant, but also that such prosecution was without reasonable and probable cause and that the defendant was driven by malice. While the evidence in this case shows that the plaintiff was tried before the Thyolo Magistrate's Court after the defendants, through their security officer, had complained to the police, there is no evidence that the decision to subject the plaintiff to judicial proceedings was actively influenced by the defendants or their servant. One would therefore surmise that decision to prosecution was made by the police in exercising their professional judgment based on the investigations they conducted. This contrasts sharply with what was obtaining in Manda V Ethanol Company Ltd (1993) 16

(2) MLR 572 in which the police investigator clearly stated that he found no evidence against the plaintiff but he was pressurised by the plaintiff's employers to charge and prosecute him. It should also be noted that the evidence strongly shows that the plaintiff was the custodian of the keys for the store room in which the missing scale was being kept. The plaintiff's prosecution can therefore not be said to have been without reasonable grounds and driven by malice. The claim for false imprisonment is therefore unsustainable.

With regard to the claim for payment of salary from February 1996 to date of judgment, the basis of such a claim as can be fathomed from the pleadings and the evidence is that from the date the scale missed, that is, February 3, 1996, the defendants suspended the plaintiff with no pay and after his acquittal they dismissed him despite the court recommending his reinstatement. In response to the claim, the position taken by the defendants is that the plaintiff's suspension and subsequent dismissal were in accordance with the conditions of service governing the his employment contract. The defendant exhibited

to the court such conditions of service as exhibit D5 and in particular they rely on clauses 4(a) (i) which entitled them to summarily dismiss an employee guilty of misconduct. It is the defendants' contention, as per the letter of plaintiff's dismissal and attendant correspondence exhibited in these proceedings, that the missing of the scale which was in the custody of the plaintiff amounted to an act of negligence and misconduct of his part hence the suspension and summary dismissal.


It is appreciated and recognised that the plaintiff's suspension and dismissal took place before the enactment of the employment Act, 2000 which has elaborate provisions regulating employer and employee relationship. At that time, employment was largely governed by common law principles and the contract between the employer and employee. In this regard, the common law position is such that summary dismissal was justified if the act done by the employee was inconsistent with discharge of duty or continuing confidence between the employee and the employer. See **Dhuda V North End Motors** 1984 – 86 MLR 425. The case also stands for the proposition that an employee summarily

dismiss is entitled to payment in lieu of notice where the contract of employment stipulates period of notice of payment in lieu and there is no entitlement to general damages unless there are exceptional circumstances. According to the clause 4 (a) (i) of the plaintiff's conditions of service, that is, exhibit D5, an employee summarily dismissed would be entitled to wages due up to the time of dismissal. The letter of the plaintiff's dismissal dated February 16, 1996 states that the dismissal was with effect from February 3, 1996. There is no evidence from the plaintiff as to how much wages were due to him up to that date. Considering that most employers in this country pay wages on the 30th of each month, it is most probable that the plaintiff was paid his wages up to 30th January 1996 such that any wages due to him as at February 3 would be very minimal. It is ordered that the defendants should pay wages due to plaintiff up to the effective date of termination of his employment with interest at the prevailing bank rate until the date of actual payment.

On costs, it is a matter in the court's discretion but as a general rule they fall the event, that is, they are awarded to the

successful party. In this case, it is the defendants who have substantially succeed. However, the circumstances of this case are such that the court considers it fair and just to exercise its discretion on costs by ordering each party to bear its own cost.

Pronounced in the open Court this day of March22nd.....
2011 at Blantyre


H.S.B Potani
JUDGE