

## GERTRUDE MUNYONSI, ATTORNEY-GENERAL AND CATHERINE NGALABEKA

SUPREME COURT

SAKALA, CHIRWA AND MUZYAMBA, JJ.S.

30<sup>TH</sup> MARCH, 1999 AND 22<sup>ND</sup> JULY, 1999.

(S.C.Z JUDGMENT NO. 23 OF 1999)

### Flynote

Human Rights Law - Cruel and inhuman Treatment - State liability.

### Headnote

The respondent was a resident of Luanshya who was, at the material time, mother of a young man aged 21 years. She was picked up by the police including a female Constable who were looking for her son who was suspected of having committed an offence. She was handcuffed and detained in filthy police cells. After three days, she was released and ordered to look for her son. She took leave and an advance from her employers to go and look for her son who was living independent from her. She went to several towns in search of her son. On being unsuccessful, she was again detained by the same female Constable first at the same dirty police cells and then at remand prison. She was not charged with any offence. The High Court found that she had been subjected to cruel and inhuman treatment and ordered the State to pay her K15,000,000=00 in compensatory and exemplary damages. On appeal by the State, it was held:

- (i) The respondent was not duty bound to look for her son as this was police duty.
- (ii) The Police can only arrest for offences under the law; Police have no power to arrest people for the purposes of making inquiries.
- (iii) The woman constable was a servant of the state which was liable for her actions.

### Cases Referred to:

1. Paul Roland Harrison v The Attorney-General (1993/1994) Z.R. 68.
2. Times Newspaper Zambia Limited v Kapwepwe (1973) Z.R. 292.
3. Attorney-Genral v Mwiinde (1987) Z.R. 71.
4. Times Newspaper (Z) Ltd v Chisulo (1984) Z.R. 83
5. In Re Siuluta and Three Others (1979) Z.R. 14.

For the appellants: Mr.D.K. Kasote, Principal State Advocate.

For the respondent: Mr. L.C.T. Chali of Chali Chama and Company.

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### Judgment

**SAKALA, J.S.:** delivered the Judgment of the Court.

This is an appeal from an assessment of damages by the Deputy Registrar for false imprisonment and unlawful detention. The respondent obtained judgment in default of defence. The assessment of damages was also made in the absence of the appellant. The Deputy Registrar, after hearing the only story as narrated by the complainant, reviewed the old and recent decisions of this court; and awarded the respondent global compensatory damages in the sum of K15 million. The gist of the appeal is that this is the highest award of damages in cases of this nature in the history of awards in this country.

For convenience the appellants will be referred to as the 1<sup>st</sup> and 2<sup>nd</sup> defendants, the respondent as the plaintiff which they were at trial.

The facts of the case can only be ascertained from the pleadings and the evidence given by the complainant herself. The plaintiff, a resident of Luanshya, was at the material time a mother of a young man aged 21 years. She was employed as a council constable by Luanshya Municipal Council. On 20<sup>th</sup> September, 1994, she was picked from her mother's house by the

first defendant, a woman constable in the Zambia Police Force, based at Luanshya Police Station and taken to her house. At the house the first defendant searched her house. The search was to look for items purportedly stolen by the plaintiff's son. After they found nothing in the plaintiff's house, the first defendant demanded that the plaintiff directs them to the whereabouts of her son. Thereafter the plaintiff was ordered to escort the first defendant to Luanshya Police Station where she was detained in the police cells without charge until 17:00 hours on 21<sup>st</sup> September, 1994, when she was released.

The story of the plaintiff was that her son had left her home and was living with friends. She did not know anything about the case. At the police station she was not charged for any offence. She was detained in cells and told that she would be released if she produced her son. She was released the following day and was told to look for money to go out in search of her son. According to her, she went to the council, her employer and obtained an advance of K70,000.00 and went out looking for her son. She first went to Lusaka where she suspected her son would be living with his uncle but without success. She then went to some area in Ndola rural and then to Serenje but also without success.

The plaintiff explained that she had to take 14 days leave for the purpose of looking for her son. She spent all these days looking for him. As a result, on 20<sup>th</sup> October, 1994, she received a call asking her to report at Luanshya Central Police Station, room No. 43. The call was from the same woman constable, who had earlier in September picked her up. She got to room 43. She found the 1<sup>st</sup> defendant who asked her whether she had found her son. When she told her that she did not the 1<sup>st</sup> defendant handcuffed her and threatened her with assault if she did not produce her son. Despite protestations from her mother that she was a sickling, she was again locked up in the police cells. She stayed three days in the police cell but later transferred to Remand Prison. She explained that she was not charged with any criminal offence. The plaintiff explained that during her detention in September; she spent the night in a dirty and filthy cell which had a blocked toilet with urine and human excretes all over the floor. There were only two female detainees there. She was not provided with any beddings. She had to use her chitengi material to cover herself. She never slept. She spent the night standing and when tired she would sit down. She was not given any food and she was not allowed to receive food from relatives. She was not given an opportunity to bath.

During the second detention she spent three days in the cells. The conditions in the cells did not change. She was not given food for three days. There was again no bath and no beddings. At Remand prison, she shared beddings with a female prisoner and was eating meals prepared for convicted prisoners. The plaintiff further explained that she was released on 26<sup>th</sup> October, 1994. Immediately upon her release, she went to Ndola to seek legal advice. She said that she felt distressed. She explained that when her mother asked for her release on Police Bond, the police refused. She explained that during the period she spent in prison; she was almost suspended from her employment but instead an urgent leave was approved.

This was the uncontroverted story to the Deputy Registrar. The learned Deputy Registrar considered this evidence. Before making the award the Deputy Registrar noted that the Attorney-General's Chambers had entered appearance to the writ; that the Attorney-General's failure to deliver a defence prompted the plaintiff to take up a notice to enter judgment in default of defence; that the notice of intention to apply for leave to enter judgment in default of defence was filed on 10<sup>th</sup> July, 1995; that on 14<sup>th</sup> August, 1995, the plaintiff's advocate filed a summons for leave to enter judgment in default of defence supported by an affidavit. The court was satisfied that all these documents were served on the Attorney-General. The assessment was heard on 3<sup>rd</sup> April, 1996. Again the Attorney-General did not appear.

The learned Deputy Registrar further noted that at all the occasions when the plaintiff was detained, she was released without being charged with any criminal offence. The court found that the circumstances surrounding the plaintiff's detention were "undoubtedly very grave and revealed gross violation of the plaintiff's rights by an over-zealous woman constable. "In the Deputy Registrar's view, the plaintiff was subjected to cruel and inhuman treatment of the worst kind in that she spent four days in filthy police cells without food, beddings and water; and she spent a further four days at Remand Prison sharing food and beddings with a convicted prisoner as if she was a convicted prisoner himself. The Deputy Registrar was satisfied that this was a clear case of gross violation of human rights. The court found that the first defendant acted in contumelious disregard of the plaintiff's rights. The court felt that in accordance with the principle of law that whenever the conduct of a defendant deserves it, all awards of compensatory damages should take into account an exemplary element. The Deputy Registrar was alive to the decisions of this court on damages awarded. The court,

however, observed that it was common cause that since 1991, the value of the Kwacha had suffered serious fluctuations. The court concluded that taking into account all the circumstances of this case including the exemplary element and the serious fluctuations of the value of the Kwacha compensatory damages of K15 million would be adequate compensation and at the same time to serve as a punitive measure to over-zealous law enforcement officers. The award was made to attract interest at a quarter of the average bank deposit rate from the date of the writ to the date when interlocutory judgment was entered and thereafter at the rate of 6% till final payment with costs to be taxed in default of agreement. The Attorney-General has appealed against this award of K15 million.

Mr. Kasote, the Principal State Advocate, while expressing shock at the facts of the case, argued that the Deputy Registrar misdirected himself in law and fact when he awarded the plaintiff K15,000,000.00 in damages without taking into account the authorities; that the Deputy Registrar erred in law and fact when he awarded the damages on the ground that the Zambian Kwacha had suffered serious inflation from 1991 to 1995 without showing how he arrived at the award; and that the award of exemplary damages was a misdirection when the defendant's conduct was not inhuman, degrading or contumelious of the plaintiff's right.

The gist of the learned Principle State Advocate's submission is that the Deputy Registrar made an erroneous estimate of the damages to which the plaintiff was entitled because the plaintiff was in remand for eight days, not harassed nor assaulted "but merely remanded." The Learned Principal State Advocate conceded that the remand was unjustified but that the damages awarded were excessive and on the higher side. The case of ***Harrison v Attorney-General (1)*** was relied upon for this submission. The gist of the rest of the submissions by Mr. Kasote was that the Deputy Registrar should have shown how much of the damages were for false imprisonment and how much of the amount was for exemplary damages. According to Counsel to lump the two distinct damages together was bad in law because it did not give the defendant the chance to know which of the two damages was excessive. Mr. Kasote pointed out that since exemplary damages are awarded to punish the wrongdoers, in the instant case the award serves no purpose as the officer concerned would not feel it.

All we can immediately say in fairness to Mr. Kasote, is that in the circumstances of the history of this case, that is, that the action was never defended at both the pleadings and assessment stages, he did his best in this court. We did not want to hear Mr. Chali on behalf of the plaintiff but he nonetheless informed the court that while he had nothing to add, he relied on the reasoning of the Deputy Registrar.

Mr. Kasote was correct in saying that the highest award this court has made was in December, 1993. This was in the ***Harrison case*** in which we awarded K400,000.00. In that case the State did not appear to the writ of summons and the appellant in that case, with the leave of the court, entered judgment in default of appearance for damages to be assessed. The Deputy Registrar in that case awarded K150,000 general damages and K60,000.00 exemplary damages. It is interesting to note in that case, that on appeal, counsel for the appellant was urging this court to award K14 million on account of the racing inflation and devaluation of the Kwacha. In that case the appellant was detained for 21 days. Having taken cognisance of the conditions of the detention in that case, we said at page 71:

"...we bear in mind that damages cannot be assessed on a per diem basis....Having regard to the high inflation that has taken place since the earlier awards this must be reflected in later awards."

On the authorities of ***Times Newspaper Zambia Limited v Kapwepwe (2)*** and ***Attorney-General v Mwiinde (3)***. We awarded K400,000.00 which included the aggravating element (exemplary damages) in the final award of compensatory damages. Indeed we take the point that in awarding compensatory damages it is desirable that the court should first consider what sum to award as compensatory taking into account any aggravating conduct of the defendant (i.e any conduct in contumelious disregard of the plaintiff's rights) and only then turn to consider whether this proposed award is sufficient to punish and deter the defendant and if not award some larger sum. This means that two sums may be awarded under the two different heads as was the case in the ***Kapwepwe case***. However the court may as well consider that the exemplary element has been taken care of in considering the aggravating conduct and end up awarding one sum as compensatory damages. In making the award in ***Harrison case***, we were not oblivious of the principle in the case of ***Times Newspapers (Z) Ltd v Chisulo (4)*** where this court said:

"An appellant court will not interfere with an assessment of damages unless the lower court had misapprehended the facts or misapplied the law or where the damages are so

high or so low as to be an entirely erroneous estimate of the damages to which the plaintiff is properly entitled.”

Our holding in the *Harrison* case was that:

“Where the tortious circumstances are more serious, then the awards must reflect this, as well as the impact of inflation in order to arrive at a fair and reasonable amount.”

The foregoing authorities were drawn to the attention of the Deputy Registrar. In this court Mr. Kasote’s first contention is that the Deputy Registrar made an erroneous estimate of the damages to which the plaintiff was entitled because she was in remand for eight days, not harassed nor assaulted but merely remanded. We are satisfied that in putting up this argument, Mr. Kasote was doing his best. But we do not share his views of the facts of this case. As already alluded to, it is not only the number of days that counts in assessing damages in cases of false imprisonment. All the facts must be considered. In the ***Harrison case (1)*** the appellant was a suspected prohibited immigrant. In the present case the plaintiff was not suspected of any criminal offence. Her “offence” if it was, was that she was a mother of a son whom the police merely suspected to have committed an offence. She was handcuffed and detained in filthy police cells. She was released after three days and ordered to look for her son. She took leave and an advance from her employers to go and look for her son who was living independent from her. She went to Serenje, Lusaka and finally Ndola rural in search of her son. On being unsuccessful she was again detained first at the same dirty police cells then at remand prison. All this for no offence at all. All these things were done to her by no other but a fellow woman but wearing police uniform. All trappings of gender issues became irrelevant. Mr. Kasote wants us to accept that she was “merely” remanded. We reject this suggestion. In our view, this is the worst case of false imprisonment and unlawful detention involving a woman plaintiff by a woman constable who should have been more humane. This was not the case. Indeed, the plaintiff was not duty bound to look for her son at whatever cost. It was the duty of the police. Perhaps it is now appropriate to take the opportunity of this case to affirm what the High Court stated in ***Re Siuluta and Three Others (5)*** that the police can only arrest for offences under the law. In this connection suspects are held to help with investigations as allowed by law. They have no power to arrest persons for the purposes of making inquiries. In Zambia there is no law to detain anyone as hostage or ransom to force a suspect to come to a police station. Regrettably this is what the woman constable did in this case. The second argument by Mr. Kasote was that the figure of K15 million should have been split to show the amount awarded for false imprisonment and the amount awarded as exemplary damages. The basis of this argument was that an award of a lump sum denies a defendant the chance to know which of the two awards was excessive. This argument is attractive in criminal law. But in civil matters the law was on the side of the Deputy Registrar [See *Harrison’s case (1)*]. Mr. Kasote put up a very spirited fight. But this was a bad case. This court cannot accept the suggestion that in a case of this nature exemplary damages serve no purpose because the woman constable who committed the wrong would not feel it. If this is the truth of Government institutions, there is a very serious omission in the whole system. As far as this court is concerned, the 1<sup>st</sup> defendant is a servant of the State. What they do to her for causing such heavy loss to government coffers is their own business. But we regret that the money will come from the tax payer. The Deputy Registrar was on firm ground with the award.

On the facts, this is the worst case of contumelious disregard of a woman plaintiff’s rights. On all the grounds this appeal must fail. It is, therefore, dismissed with costs to be taxed in default of agreement.

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