MARCUS KAMPUMBA ACHIUME (1983) Z.R.1 (S.C.)

SUPREME COURT
SILUNGWE, C.J., NGULUBE, D.C.J., AND MUWO, J.S.
7TH DECEMBER, 1982 AND 5TH JANUARY, 1983
(S.C.Z. JUDGMENT NO. 2 OF 1983)
APPEAL NO.1 OF 1981

Flynote
Legal Practitioners - Duty of Counsel - Right to be present in the examination room while a doctor examines the client for drunkenness - Availability of.
Civil Procedure - Appeal - Lower court's findings - Interference with - When possible.
Courts -Evaluation of Evidence - Unbalanced nature of - Entitlement of appeal court to interfere.

Headnote
The appellant's action arose out of an award of K10,000 damages to the respondent for assault and false imprisonment by the police simply because he wished to be in attendance during the medical examination of his client for drunkenness. It was contended by the appellant that in, the circumstances, the appeal court had a right to interfere with the factual findings of the lower court.

Held:
(i) Police officers have a right to be in attendance during the medical examination of the accused person, but defence counsel was not so entitled as of right, since he has no visible useful role to play there.
(ii) The appeal court will not reverse findings of fact made by a trial judge unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly can reasonably make.
(iii) An unbalanced evaluation of the evidence, where only the flaws of one side but not of the other are considered, is a misdirection which no trial court should reasonably make, and entitles the appeal court to interfere.

Cases cited:
(1) Watt v Thomas [1947] 1 All E.R. 582.
(2) Benmax v Austin Motor Co. Ltd [1955] 1 All E.R. 326.
(3) Zulu v Avondale Housing Project Ltd (1982) Z.R. 172.
(4) Peters v Sunday Post Ltd (1958) E.A. 424.

Legislation referred to:
Roads and Road Traffic Act Cap. 766; ss. 198A; 198B.

For the appellant: A. G. Kinariwala, Senior State Advocate.
For the respondent: S. M. Malama, Jacques and Partners.

Judgment

NGULUBE, D.C.J., This is an appeal against the decision of the High Court in finding for the respondent and, in the alternative, against the award of K10,000 damages for assault and false imprisonment. For convenience, I will refer to the respondent, who was the plaintiff in the action, as the plaintiff, and to the appellant as the defendant.

The plaintiff is an advocate in private practice. On or about 4th July, 1977, at about 2100 hours, the plaintiff was driving his brother-in-law to the latter's house when they came across a road traffic accident involving a vanette driven by Mr Nkandu who was one of the plaintiff's clients. Three police officers arrived. According to the plaintiff and his client the latter had immediately retained the plaintiff and requested him to be in attendance. The police arrested Mr Nkandu for driving while incapacitated by drink, and, in terms of section 198A of the Roads and Road Traffic Act, Cap. 766, required him to subject himself to a medical examination for the purpose of enabling a doctor to ascertain whether, in the doctor's opinion, Mr Nkandu was under the influence of intoxicating liquor or drugs to such an extent as to have been incapable of having proper control of the vehicle he had been driving. Mr Nkandu was accordingly taken to the hospital and the plaintiff followed as instructed by his clients. Thereafter, it was common ground that the plaintiff was lifted bodily by the police from the doctor's examination room, driven to the police station, and finally detained in a cell at the police stations where he remained until 1230 hours the following day when he was released on police bond.

There were conflicting accounts of the events that led to the plaintiff being taken out of the hospital and finally being detained. The plaintiff's version of the incident was briefly this. After Mr Nkandu had retained him at the scene with instructions to be in attendance during the course of that event, the plaintiff had introduced himself to the police as a lawyer. He had enquired and D W 3 Constable Simukonda, had assured him that there would be no objection to the plaintiff coming, along to the hospital. The plaintiff had followed the police and his client to the hospital where he once again informed the police that he was a lawyer and that he intended to be present in the examination room when the doctor would be examining his client. DWs.1 and 2, Reserve Inspector Geloo and Constable Botha, objected to the plaintiff attending the examination but the plaintiff nevertheless entered the doctor's examining room and sat next to his client. The Reserve Inspector informed the plaintiff that he considered the latter to be interfering with police business. The plaintiff refused to leave as requested and, despite his protests, was lifted and dragged outside into a police vehicle. He was taken to the police station where he was accused of interfering with police work and was arrested and booked for being idle and disorderly. Requests to be released on police bond were turned down. Later that evening the late Mr Ryan, a High Court Commissioner and the plaintiff's employer at the time, telephoned with a similar request. The shift officer's reaction was to inform the plaintiff that he, the shift officer, had been

inclined to release the plaintiff on bond but would not do so following the threats made by the late High Court Commissioner over the telephone. The plaintiff was, thereafter, duly detained in a cell.

The defendant's version of the incident was briefly this. When the three police officers had attempted to interview Mr Nkandu at the scene, the plaintiff kept on answering questions directed at Mr Nkandu. The plaintiff was requested not to follow the police officers to the hospital but

nevertheless did so. At the hospital the plaintiff failed to satisfy the officers that he was a lawyer, and in any event it was the officers' belief that a lawyer has no right to be present during the medical examination, of his client for drunkenness. The plaintiff had been requested not to enter the doctor's room but that, such request notwithstanding, the plaintiff had become abusive, shouted at the police and forced his way into the doctor's room whereupon the Reserve Inspector and Constable Botha had decided to forcibly remove the plaintiff, who was subsequently charged with being idle and disorderly.

The learned trial judge accepted the plaintiff's version that he had not behaved in an idle and disorderly fashion but had been assaulted and humiliated and finally wrongfully detained solely because the plaintiff wished to be in attendance at the examination of his client, and because the police objected to and resented such attendance. The trial court rejected the allegations that the plaintiff had behaved in the manner alleged by the police officers.

On behalf of the defendant, Mr Kinariwala has advanced a number of arguments in support of his submission that the learned trial judge ought not to have found for the plaintiff. I would like to deal first with the submission that a lawyer has no right to be present in the examination room when a client is being examined for drunkenness by a doctor. Mr Kinariwala has argued that, since the arrested person must be examined by the doctor, neither a police officer nor a lawyer representing the arrested person is entitled to be present during the actual examination. Mr Kinariwala has not cited any authority for this proposition but invites us to find it supported by common sense. The learned trial judge had considered this matter, though from a somewhat different approach; and came to the conclusion that the discretion whether to permit others to be present when he is examining a patient is that of the doctor alone.

I think that it would be erroneous to suppose that an arrested person who is required to submit to a medical examination under the relevant provisions of the Roads and Road Traffic Act can be regarded as a patient in the ordinary sense. I do not see how an arrested person in those circumstances can be likened to any other patient with regard to whom the doctor would be obliged, by professional ethics, to maintain a certain degree of confidentiality. I believe also that the courts can take judicial notice of the practice and usage which has arisen in drunken driving cases whereby the doctor completes a form which is signed by both the arrested person and the police. That form is frequently produced in evidence. There is also the question of section 198A and 198B of the

Roads and Road Traffic Act. An arrested person who is required to submit to a medical examination under section 198A may be called upon by the doctor, under section 198B, to provide a specimen of blood or urine, in which event it is incumbent upon the police officer of the relevant rank to administer a warning to the arrested person that failure to oblige constitutes yet another offence. I do not see how the police officer can discharge his duty under those sections unless he be in attendance. I do not see how the police officer can sign as a witness on the form that is frequently produced in court unless he in fact witnessed the examination. The police would have, in any event, taken. the arrested person to the hospital, and, though it may not be absolutely necessary that they be present in the examination room when the doctor, who is an independent and impartial professional person is actually conducting the examination, the police are obliged to be on hand to

administer the warning if it arises, and to collect the doctor's report and the arrested person. To the extent, therefore, that Mr Kinariwala's submission relates to the attendance by the police I would not agree that they have no right to attend.

I now turn to the lawyer. The situation that arose in this case is certainly unusual, and, in the absence of useful precedents, our decision; in my opinion, can only be founded on principle, usage, and realistic practical considerations. It is accepted that a lawyer's place with regard to an offence is not necessarily confined to a court-room. His services may be required, for instance, to secure bail for his client should the police decide to detain the client in custody. He may be called upon to advise his client during the course of interrogations or investigations and for that purpose he may wish to be on hand. In my opinion, however, the client's right of access to the services of his lawyer cannot conceivably extend to a doctor's examination room where another professional will be performing his duty, and where a lawyer has no visible useful role to play. An arrested person in those circumstances cannot be entitled as of right to have a lawyer in the doctor's examination room. Conversely he lawyer has no business and consequently no entitlement as of right to be in the doctor's examination room. That the plaintiff in this case was present at the scene of the accident was fortuitous. In most cases the client would have to summon his lawyer. I do not see, therefore, how a right can be assumed to exist which would entitle as of right every arrested person to have his lawyer present at the medical examination, when the inevitable delay occasioned by any attempts to secure the attendance of the lawyer would most probably defeat the very object that the law intends to achieve by an early medical examination. It follows from the foregoing that, in my opinion, while the discretion to exclude unnecessary persons is vested the doctor, I do not consider that the learned trial judge's conclusion to that effect had any relevant bearing on the question of the right and entitlement of the lawyer to be in the doctor's examination room. It follows also that I would uphold the submission made by Mr Kinariwala to the extent that it relates to the lawyer.

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Mr Kinariwala has also submitted that this court should reverse certain findings of fact made by the learned trial judge. He has attacked the findings that the evidence of the defendant's three witnesses was untruthful, that the plaintiff had not behaved in a disorderly manner, and that the shift officer had turned down a request from the late High Court Commissioner Ryan that the plaintiff be released on bond. Counsel contends that the court below had wrongly disbelieved the defendant's case on the grounds that the evidence was convicting, and that the doctor and the two nurses mentioned in the evidence had not been called to give evidence. It has been argued that the inconsistencies of the evidence from the police officers did not relate to material facts, and that the substance of their testimony was in fact the same. It has further been submitted that the failure to call the additional witnesses had been explained, and that no adverse inference should have been drawn from such failure Mr Kinariwala has drawn our attention to a number of inconsistencies and discrepancies in the plaintiff's own side of the story, and has invited us to find that, had the learned trial judge given, proper consideration to the flaws on each side, he could not have believed the plaintiff and should in fact have believed that the plaintiff had behaved in a disorderly manner so that his forcible removal, arrest and detention, were justified. He has also drawn our attention to various aspects of the police officers' evidence, and invites us to find that the similarities in their evidence or out-weighed the inconsistencies.

On behalf of the plaintiff, Mr Malama has defended the findings below and has argued that the conclusion that the plaintiff had been unjustifiably assaulted, arrested and imprisoned, did not, rest on the grounds advanced by Mr Kinariwala but depended on the issue as to whether or not the plaintiff had behaved in a disorderly manner. Mr Malama's submission is that the issue before the trial court was one of credibility as between two conflicting versions, and since the learned trial judge had correctly identified that the inconsistencies in the defendant's case were more glaring than those in the plaintiff's case he was justified in resolving in favour of the plaintiff. Mr Malama contends that it has not been disclosed that any of the settled grounds for reversing a trial judge's findings exists, and that, in the circumstances, it is not open to this court to reverse findings based on an issue of credibility. Mr Malama relies on *Watt v Thomas* (1), and also on *Benmax v Austin Motor Co. Ltd.* (2), to the effect that an appellate court which only has the transcript of evidence before it and which does not have the advantage that the trial judge had of seeing and hearing the witnesses should not lightly interfere with findings of the trial judge based on credibility. These cases are to the effect also that the appellate court should not interfere unless it is satisfied that the trial judge has given reasons which are not satisfactory or because it unmistakably appears from the evidence that the trial judge has not taken proper advantage of his having seen, and heard the witnesses. We have had occasion in the past to consider in what circumstances we could and should reverse the findings of a trial judge. For example; in *Wilson Masauso Zulu v Avondale Housing*

Project Ltd. (3), a case in which the judgment was delivered only recently on 15th December, 1982, we had expressed ourselves on this issue in the following terms:

> "Before this court can reverse findings of fact made by a trial judge, we would have to be satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly could reasonably make."

I think that basically the position in this case was that the learned trial judge was faced with two conflicting versions of the same event. Each side had its fair share of flaws or weaknesses in the evidence, and in resolving the conflict the learned trial judge pointed out the weaknesses in the defendant's case only. If I apprehend correctly, Mr Kinariwala's submission is in effect that an unbalanced evaluation of the evidence where only the flaws of one side but not of the other are considered is a misdirection entitling this court to interfere. I find that there is a great deal of substance and fierce in this submission. It is, in my view, from a reading of the judgment below that, in highlighting, weaknesses in the defendant's case, the learned trial judge had glossed over, even turned a blind eye to the weaknesses in the plaintiffs case, with the result that the full significance of certain aspects of the evidence was apparently not appreciated. I would agree that the case of *Peters v Sunday Post Ltd* (4) to that effect, which Mr Kinariwala cited in his list of authorities, is in point. In the view that I take, it is unnecessary to set out all the aspects that had been ignored which were pointed out in argument. I must, however, mention, one circumstance, one piece of evidence which I think is conclusive, for after all, as Mr Malama correctly pointed out, the crux of the matter was whether or not the plaintiff had behaved in a, disorderly manner. The plaintiff who I have already said had no right to be in, the doctor's examination room, insisted on entering such room. In his own words he gained entry in the following manner, and I quote from the

record:

> "*Q*. Before you went into the examination room was it an easy task or was there some resistance?
> *A*. What I would call resistance is in that they stopped in front of me, but after I explained this I made my way between them and sat down."

The police officers had stated that they had requested the plaintiff not to enter the room but that he had forced his way in. He made his way between them. They did not give him way but, as the plaintiff himself put it, he made his way between them. As I see it, in that single sentence the plaintiff had admitted that he gained entry forcibly by literally pushing aside the two police officers who were blocking his path and who had objected to his entry. Such conduct can hardly be described as conduct unlikely to cause a breach of the peace. In my opinion, the learned trial judge had made findings favourable to the plaintiff which,

on a proper and well-balanced view of the whole of the evidence, no trial court, acting correctly, could reasonably make. It follows from the foregoing, and, for the reasons that I have stated, that I would reverse the findings below. I would allow this appeal and fired for the defendant appellant, with costs both here and below, such costs to be taxed in default of agreement.

Appeal allowed
