

## **THE ATTORNEY GENERAL v MUSONDA SAMUEL MOFYA (1995) S.J. (S.C.)**

SUPREME COURT  
NGULUBE, C.J., GARDNER AND SAKALA JJ.S.  
17TH NOVEMBER, 1994 AND 2ND MARCH, 1995.

### **Flynote**

Court - Damages - Assault - Intimidation - Trespass and false imprisonment - Assessment of damages.

Damages - Intimidation - Elements not proven - Damages award inappropriate - People in authority must be deterred from inflicting torture.

### **Headnote**

Respondent claimed damages under heads of assault, intimidation, trespass and false imprisonment. Appellant appealed against trial courts award of: K800.000 for false imprisonment and trespass; K800 000 for assault and intimidation; and a further sum of K50 000 as punitive and exemplary damages.

### **Held:**

- (i) Award of damages, in light of previous awards, not excessive.
- (ii) Award of damages under head of intimidation inappropriate but damages should have been awarded for false imprisonment and assault.
- (iii) No exemplary or punitive damages could be awarded because they were not pleaded, but damages for assault and torture should be awarded as pleaded.
- (iv) The total award was less than should have been awarded.

### **Cases referred to:-**

- (1) Harrison v Attorney General (1993) S.C.Z. Judgment No. 15
- (2) Attorney General v Mwiinde (1987) S.C.Z. Judgment No. 5.
- (3) Attorney General v Mwiinde (1986) S.C.Z. Judgment No. 5
- (4) Kunda v Attorney General (1993) S.C.Z. Judgment No. 1

For the Appellant: D.K. Kasote State Advocate

For the Respondent: R. Simeza of Simeza Sangwe & Associates

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### **Judgment**

**GARDNER, J.S.:** delivered the judgment of the court.

This is an appeal against a judgment awarding damages for assault intimidation, trespass and false imprisonment.

The facts of the case are that the respondent was arrested and detained by the police on the 2nd October, 1991. During the course of the trial before the High Court the appellant conceded that the respondent had been wrongly imprisoned for one day but the learned trial judge found as a fact that the wrongful imprisonment had been for a period of three days. The finding of the unlawful imprisonment was on the grounds that the respondent had not been charged throughout the whole time he was imprisoned. In addition, the learned trial judge found that he had been subjected to assault as a result of which he suffered from injuries consisting of swollen and numb arms, body abrasions, swelling on the head, and the wrists slightly swollen with a small ulcer on the radial aspect compatible with being suspended by his

wrists. The learned trial judge also found that the respondent had been suspended on a 'makeshift swing'.

Damages were awarded as follows:

False Imprisonment and trespass	K800,000
Assault and Intimidation	K800,000

A further sum of K500,000 was awarded as punitive and exemplary damages. The appellant appealed against that award and put in grounds of appeal as follows:

- (a) That in assessing the damages the trial judge failed to take into account the evidence of the appellant's witnesses.
- (b) That the awards made were so high that they were entirely erroneous.
- (c) that damages under the head of intimidation should not have been awarded.
- (d) that in assessing the damages the learned trial judge has misdirected himself in construing and applying the principles laid down in decided cases; and that
- (e) Exemplary damages should not have been awarded because they were not pleaded.

As to the first ground of appeal, Mr Kasote, on behalf of the appellant, argued that the learned trial judge had ignored the evidence of the defence witnesses who denied that the respondent was assaulted. He argued that the denial was supported by the fact that the whole episode as alleged by the respondent could not have happened within fifteen or twenty minutes. He pointed out that the statement of claim alleged that at about 14.30 hours on the relevant date the respondent was taken by a Detective to his office where the assault and the alleged suspension from the swing took place. Mr Kasote pointed out that there was evidence from the police officer P.W.7 that he went to the office where the interrogation was taking place at 14.45 hours. Mr Kasote argued that therefore, the assault would have had to take place within the fifteen minutes before P.W.7 went to the office which was impossible.

Further in connection with the evidence of the alleged ill-treatment Mr Kasote pointed out that the respondent could not have been suspended from a table in a swing as he alleged because the table which he indicated to the court as being similar to the one from which he was suspended was too low for such suspension to have taken place.

Mr Kasote further said that there was evidence from the respondent himself that at the time of the theft of the motor vehicle which was the subject of the case, he had been thrown from the motor vehicle as it was moving. Mr Kasote argued that this must have been when the respondent received the injuries complained of. In view of these matters which were not taken into account by the learned trial judge, Mr Kasote argued that the award should be considerably reduced.

In arguing that the award was far too high, Mr Kasote referred the court to the facts of the case which were that the respondent had according to his own evidence and his statement of claim, been detained from the 2nd of October, 1991 until the 4th of October, 1991, which according to Mr Kasote was a period of only two days, whereas the respondent claimed and the learned trial judge found that the detention was for three days. We were asked to compare this period with the period of twenty-one days for which the plaintiff was falsely imprisoned in the case of *Harrison v Attorney general*, (1) (1993) SCZ Judgment No. 15. He pointed out that in that case, where there had been no assault, no pain and suffering and no intimidation, the award by this court had been K400,000. Mr Kasote said that the difference in inflation between September, 1991, which was the date of assessment in the Harrison case, and September, 1993, the date of this award, should not increase the damages in the present case to the extent that the

award was justified. As to the award of damages under the head of intimidation Mr Kasote argued that intimidation was an entirely separate tort and an award of damages for such a tort in this case was inappropriate. He further argued that there was no trespass to the person in this case.

Finally, Mr Kasote pointed out that exemplary damages were not pleaded; but, in answer to a question by the court, he conceded that, if the respondent was in fact assaulted by the police as alleged, this would be an appropriate case for aggravated damages to be awarded.

Mr Simeza on behalf of the respondent in answer to the first ground of appeal pointed out that the evidence relating to how long the interrogation lasted was said by one witness to be approximate, and that in any event there was no reason why the injuries suffered by the respondent could not have been inflicted within as short a time as fifteen minutes. As to the possibility that the injuries might have been caused by a fall from the motor vehicle Mr Simeza argued that there was no evidence of this whatsoever and that the arresting officer had given evidence that the respondent was in good health when he was arrested.

Mr Simeza further argued that, although he did not agree with the headings under which the trial judge had awarded damages, the total assessment was correct, and was in fact in accordance with the provisions of the authorities in which this court had awarded or approved damages. As to the failure to plead exemplary damages, Mr Simeza agreed that these had not been pleaded and should not have been awarded, but he pointed out that there was a claim for aggravated damages, he urged this court to find that the total sum awarded was not too high having regard to the aggravation of damages evidenced by the assault by the police.

With regard to the first ground of appeal we note from the record that the suggestion that fifteen to twenty minutes was insufficient time for the respondent to have been treated as he alleged was not put to the respondent and that at no time was it suggested that any of the times referred to were of such importance that they were going to be used in argument that the police did not have time to inflict the injuries referred to. Neither was there any cross-examination or any other evidence suggesting that when the appellant was thrown off a vehicle he sustained the injuries which were later seen by the doctor. In this connection the cross-examination by Mr Kasote in the court below was as follows:

"A. So I lost grip of the vehicle at the corner when he swerved and threw me off side.

Q. So what did you do when you were thrown?

A. I continued running after it."

There is no suggestion here that the respondent even fell over, thus the suggestion by Mr Kasote that he sustained the injuries which were later seen by the doctor has no foundation. With regard to the question of the table indicated by the respondent in court as not being high enough to allow him to be suspended from it, the evidence under cross-examination by Mr Kasote was as follows:

"A. How long was that table? Was it that size? (pointing at the table where the witness was seated).

A. I would not know exactly but almost this table.

Q. But if the table was like this one you cannot be suspended?

A. I am saying almost but not exactly like this my lord."

From this it will be seen that the respondent did not agree with Mr Kasote that the table from

which he was suspended was the same as the one in court and the argument that he could not have been suspended from such a table is again without foundation. None of the arguments on this ground can succeed.

With regard to the ground of appeal relating to damages awarded for intimidation, the tort of intimidation consists of threatening another that if he does not do something or abstain from doing something he will be harmed.

We therefore agree that to award damages under such a head in this case was completely inappropriate. We agree with Mr Simeza, however, that damages should have been awarded for false imprisonment and assault taking into account the pain and suffering caused by the assault.

We further agree with Mr Kasote that no exemplary or punitive damages could be awarded in this case because they were not specifically pleaded, but following the principles set out in *Attorney General v Mwiinde* (2) (1987) SCZ Judgment No. 5, the damages for assault and torture by the police should be aggravated damages as pleaded by the respondent.

As to the ground of appeal that the wrong principles were applied in this case, we propose to consider whether the total figure awarded, although wrong heads of damages were referred to, was a proper sum taking into account the date of the award, that is the 27th September 1993. The total figure of two million one hundred thousand Kwacha at that date must be compared with awards in similar cases made by this court in previous years. Despite Mr Kasote's argument that the cases of the *Attorney General v Mwiinde* (3) (1986) S.C.Z. Judgment No. 5 and *Kunda v The Attorney General* (4) (1993) S.C.Z. Judgment No. 1 are not good examples because damages were awarded for trespass to the person, the cases are comparable because the damages were aggravated by the fact that police officers recklessly shot and injured civilians. In this case, the assault on the respondents was aggravated by the fact that it was carried out by the police inflicting torture. In the *Kunda* case, in which the original award was dated February, 1991 the award by this court for trespass to the person, being damages for "shooting at a taxi carrying innocent passengers, which was dangerous in the extreme," was K30,000.00. The cost of living index, according to the figures provided by the Central Statistical Office, increased by a factor of ten times between the relevant dates of the *Kunda* case and this case. As we said in *Harrison v the Attorney General* (1993) S.C.Z. Judgment No. 15, it would be quite unrealistic simply to multiply the former award by such a figure, but inflation must, nevertheless, be taken into account. In comparing the awards we would also take into account that the dangerous shooting of an innocent passenger merits a considerably lesser award than intentional torture, consisting of suspending from a "swing" and beating, as found by the learned trial judge in this case. We agree with the learned trial judge that people in authority who inflict torture must be deterred, and we hope that the damages awarded will not be borne solely by the tax payer but that those responsible will be made to feel the burden.

Torture is so much to be condemned that the damages for the assault and torture should be nearly four times the amount awarded for the trespass to the person in the *Kunda* case. Suitably increased to take into account inflation since that award, the proper amount to be awarded under the head for assault and the consequent injuries and pain and suffering is eight hundred thousand Kwacha.

Bearing in mind the award of K400,000.00 for false imprisonment in the *Harrison* case which were calculated at the date of an assessment in July, 1991 the amount to be awarded under this head should take into account the increase in the cost of living and to some extent should reflect the difference between the number of days imprisonment which in that case was twenty two days, and in this case two to three days, although, as this court has said before, the

damages are for wrongful imprisonment and the difference between the number of days' imprisonment in one case and another is not a matter for strict calculation but merely some indication of difference in severity. The cost of living index increase between July, 1991 and September, 1993 was the same as that in the comparison of the Kunda case, that is, a factor of ten. The resulting figure for damages for false imprisonment would be well over one million Kwacha, and this, added to the figure for the assault and torture, would be similar to or in excess of the amount awarded in total in this case by the learned trial judge. There is therefore, no ground upon which this court should interfere with the award.

The appeal is dismissed with costs to the respondent.  
Appeal dismissed

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