



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 352 OF 2014

BETWEEN:

ELLARD CHIWINDI AND FOUR OTHERS AND
ILLOVO SUGAR (MALAWI) LIMITED Coram:

PLAINTIFFS
DEFENDANT

JUSTICE M.A. TEMBO,
Kamkwasi, Counsel for the Plaintiffs
Chisanga SC and Phiri, Counsel for the Defendant
Chanonga, Official Court Interpreter

JUDGMENT

This is this court's judgment following a trial of this matter on the plaintiffs' claim for damages for the false imprisonment, defamation, malicious prosecution and for costs of this action.

The plaintiffs are all employees of the defendant, a limited liability company carrying on the sugar manufacturing business with some operations at Nchalo in Chikhwawa district.

The plaintiffs' claim is that, on a charge laid by the defendant's senior management that the plaintiffs were burning the defendant's sugar cane fields, the plaintiffs were arrested by police officers of Nchalo Police sub-station.



The plaintiffs claim that the 1st plaintiff was arrested on 10th April, 2014 at 10.00 am. That the 2nd, 3rd, and 4th plaintiffs, Fandson Kenneth, Lucious James and Alexious Malunga respectively, were arrested on 12th April, 2014 at 8.00 am. And that the 5th plaintiff, McBoot Nondi was arrested on 14th April, 2014 at 8.00 a.m.

The plaintiffs claim further that they were all incarcerated at Nchalo police substation in a filthy tiny cell infested with lice, mosquitoes and bed bugs and were so held without taking a bath until 17th April, 2014 when they were transferred to Chikhwawa prison. The plaintiffs claim that the conditions at the prison were far much worse.

The plaintiffs claimed further that the 1st plaintiff was released on court bail on 30th April, 2014 and that the rest of the plaintiffs were released on court bail on 2nd May, 2014. The plaintiffs have since returned to work for the defendant.

The plaintiffs claim that they were arrested because they had initiated a claim at the Industrial Relations Court against the defendant for payment of overtime worked. They stated that they lost that case before the Industrial Relations Court and are now appealing.

The plaintiffs further claim that upon their arrest they were moved around whilst handcuffed and were seen by people in that state at Nchalo and Chikhwawa and those people view the plaintiffs as criminals. Further, that they have consequently been treated with ridicule and contempt by right thinking members of society.

The plaintiffs further claimed that they have as a result of the foregoing matters been put through economic hardship by hiring two lawyers to represent them in preparation for trial.

The plaintiffs claim that the charges laid against them by the defendant were baseless, invalid and unsubstantiated. Hence, the plaintiffs' claim for damages herein.

On its part, the defendant denied that it laid the charges against the plaintiffs. The defendant further denied that it caused or procured the police to arrest the plaintiffs. On the contrary, the defendant claimed that the police acted on their own initiative and upon their own investigations and not in pursuit of any direction or action of the defendant.

The defendant further denied that the plaintiffs were arrested because they had initiated a claim against the defendant for payment of overtime worked. On the contrary, the defendant claimed that, according to the reasons given by the police, the plaintiffs were arrested for having been suspected of being responsible for incidents of arson on the defendant's sugarcane fields.

The defendant further denied directing the police to handcuff the plaintiffs. The defendant denied that the plaintiffs suffered the damage claimed.

The plaintiffs brought two witnesses who testified at the trial to prove their claim. The plaintiffs also filed submissions in support of his claim. The defendant also brought two witnesses in its own defence and also filed submissions on the factual and legal issues in this matter.

As is well settled, and rightly submitted by both parties herein, the standard of proof in civil matters is on a balance of probabilities. And he who asserts the affirmative on an issue bears the burden of proof to that requisite standard. The plaintiffs therefore bear the burden of proof on their claims to the requisite standard. See *Tembo and others v Shire Bus Lines Limited* [2004] MLR 405 applying *Miller v Minister of Pensions* [1947] ALL ER 372.

At the trial, the evidence was contentious only with regard to the role of the defendant leading up to the arrest of the plaintiffs by the police and the reasons for the said arrest. However, it was common cause that the plaintiffs were indeed arrested by the police as claimed.

The first witness for the plaintiffs was Ellard Chiwindi. He stated that on 10th April, 2014 around 10.00 a.m. he was home when he received a call from his section manager Mr Masoakhombira asking him to report at the defendant's office as soon as possible. He went to the office of Mr Masoakhombira who was waiting for him. He stated that he asked Mr Masoakhombira why he called him to the office when he was not on duty. Mr Masoakhombira is said to have replied that what had happened to him should also happen to Mr Chiwindi.

Mr Chiwindi stated that he was puzzled by Mr Masoakhombira's answer and asked for a further clarification. He added that later on Mr Masoakhombira told him that

the defendant had deployed police officers to arrest Mr Chiwindi on allegations that he was among the people who burnt sugarcane plantations.

Mr Chiwindi then stated that after 15 minutes police officers arrived and picked him up while in handcuffs on the way to Nchalo police station where he was incarcerated. He then added that the other plaintiffs were arrested as claimed and he gave details of the terrible police cell and prison conditions as indicated in the statement of claim. He also stated that the plaintiffs were released on court bail on 30th April, 2014 and 2nd May, 2014.

Mr Chiwindi then stated that it was clear that the plaintiffs were arrested because they had initiated a claim for payment for overtime worked against the defendant at the Industrial Relations Court which the defendant lost and on which the defendant has appealed.

He further detailed how people saw the plaintiffs in handcuffs and how the plaintiffs have suffered economic hardship by hiring lawyers to represent them on bail applications and preparation for trial.

He then stated that the plaintiffs were discharged by Nchalo Second Grade Magistrate Court on 30th June, 2014. He then stated that the plaintiffs suffered damage to their reputation due to the actions of the defendant's agents or servants.

He added that he knows Jerome Ngolombe who is one of the senior officers at the defendant's estate at Nchalo and who works as Human Resources Manager.

He added that it was not true that the defendant did not lay a charge against the plaintiffs at the police. He also stated that the 2nd defendant got the plaintiffs arrested because the police did not know the names of the plaintiffs.

He stated that he was arrested at the office. He said he lives in Thom village which is near the Nchalo police station. He reasoned that if it was the police who arrested him on their own they would have come to his village where he lives. He said that the police however passed his village and arrested him at the office. He reasoned that this showed that Mr Zelo in collaboration with his section manager Mr Masoakhombila called him to the office when he was not on duty. He added that once he was at the office Mr Masoakhombila told him that he had been told by Mr Zelo that he should be arrested.

He added that police arrived after 15 minutes and found him in the office of Mr Masoakhombila who identified him to the police who then handcuffed him.

He further stated he was incarcerated by police who told him that he was one of the people who were burning the defendant's sugarcane. He said that the police did not tell him where they got this information.

He then stated that at the time he went to court at Nchalo police said openly that the defendant had no evidence for getting the plaintiffs arrested. He however said he does not remember which police officer said this.

He stated that after he was discharged on the criminal case he returned to work for the defendant.

He added that the plaintiffs had sued the defendant at the Industrial Relations Court for non-payment of over time. And that the plaintiffs were processing an appeal because they had lost the case.

During cross-examination, he stated that he had worked for the defendant since 1993. Further, that the police took him from the defendant's office to the police station. He added that he was off-duty at that time but attended the office from home.

He stated that Mr Masoakhombila is his supervisor.

He further stated that the police took him to their station in a police vehicle. He however stated that it was wrong for the police to arrest him at the office of the defendant. He said that the police should have arrested him at his village. He stated that he was arrested on a Thursday at 10.00 am.

He stated that if he had not been off duty he would have been in the fields under the supervision of Mr Masoakhombila.

He was referred to his evidence that the defendant ordered the arrest of the plaintiffs because the defendant had lost a case against the plaintiffs in the Industrial Relations Court. He confirmed that this was his evidence but said that actually it is the plaintiffs who lost that case in the Industrial Relations Court and that they were pursuing an appeal.

He added that he saw the judgment of the Industrial Relations Court but does not know the date of the said judgment. When shown a copy of the judgment he agreed that this was the judgment and that it was dated 20th June 2013. He then stated that he was arrested on 10th April 2014. And that the defendant got the plaintiffs arrested because they were appealing against the decision of the Industrial Relations Court. He was not clear when the said appeal was lodged indicating 2015 and 2014. He explained that he did not know the facts on the appeal since his colleague is the one who is processing the appeal. He then stated that he knows the facts on the appeal.

He then stated that he has never been arrested before on the charge herein.

He then stated that the plaintiffs were being shunned by the people around Nchalo who saw the plaintiffs in handcuffs. He added that those people were not before this Court and that they cannot come to give evidence.

He then stated that the plaintiffs returned to work soon after their release on bail. And that the plaintiffs were not seen as criminals on their return to work. Further, that there were no disciplinary proceedings. He added that the plaintiffs' actions show that it believed that the plaintiffs were in the wrong although the defendant did not take any disciplinary proceedings against the plaintiffs.

He then said that bail was granted by the court and the police represented the State in prosecuting the criminal matter. Further, that the court discharged the plaintiffs.

He then stated that the police picked him up from the defendant's offices to Nchalo police in a police vehicle. He stated that the plaintiffs have not taken any action against the police.

He then stated that he does not know the role of the police in this country. But then stated that police have authority to arrest people on reasonable suspicion of commission of a crime. He then asserted that his bosses arrested him and the police handcuffed him.

He stated that he is a pump attendant at the defendant's estate and he looks after pumps that irrigate the sugarcane. And that he works in the fields. He added that the rest of the plaintiffs' job was irrigating the defendant's sugarcane in the fields.

He was then shown the statement of Mr Ngolombe the defendant's witness. He stated that Mr Ngolombe is a human resources management officer of the defendant. He then stated that it is true that there were fires at the defendant's sugarcane fields as alleged by Mr Ngolombe. He added that these fields are the same sugarcane fields where the plaintiffs worked.

He agreed that it was not wrong for the defendant to report to police about the fires in the present case. But he said that the plaintiffs were taken as culprits and were locked up for 21 days. He added that if the plaintiffs were suspected they should have been investigated. He stated that the plaintiffs were suspected of causing the fires in the sugarcane fields.

He then stated that at Nchalo police station he did not find any employee of the defendant. Neither did he see anyone at Nchalo police who said that the plaintiffs are the ones who caused the fires.

During re-examination, Mr Chiwindi stated that none from the defendant went to give a statement to police at Nchalo police station. He however said that he believed that his bosses went to Nchalo police to give statements.

He added that, other than pump attendants, other categories of workers such as supervisors and spanner boys also work in the defendant's sugarcane fields but none from those other categories was arrested.

He concluded that his section manager called him to the office where he was arrested and that Mr Zelo identified him to the police.

The second witness for the plaintiffs was Mr Masoakhombila. He stated that at the time of the events herein he was working as a farm manager for the defendant. He had worked for the defendant between June 2001 to 18th November 2014.

Mr Masoakhombila stated that on 10th April, 2014 at around 9.25 a.m. his boss Mr Zelo called him to his office from the sugar cane fields. Further, that when Mr Masoakhombila was in Mr Zelo's office Mr Zelo asked if Mr Masoakhombila knew Mr Chiwindi, the first plaintiff. Mr Masoakhombila stated that he answered that he knew Mr Chiwindi since he worked directly under his supervision. He added that at this point Mr Zelo informed him in confidence that Mr Chiwindi would be arrested by police officers from Nchalo Police station and that as such Mr Masoakhombila

should call Mr Chiwindi to be around so that the police officers do not have problems tracing him.

Mr Masoakhombila added further that Mr Zelo warned him not to reveal to Mr Chiwindi that police officers were coming to arrest him. Mr Masoakhombila said that he tried to inquire from Mr Zelo why Mr Chiwindi would be arrested but he was not told why.

Mr Masoakhombila stated that he then called Mr Chiwindi to the office. And that at the time Mr Chiwindi arrived he also saw police officers who came to his office and who asked for Mr Chiwindi. He added that he handed over Mr Chiwindi to the police officers as advised by his boss Mr Zelo. He said that Mr Chiwindi left with the police for Nchalo police station.

He further stated that on 11th April, 2014 Mr Zelo asked him again to call Mr Fandson Keneth and to advise him that he was wanted by the police officers at Nchalo Police Station. He did what he was asked to do. He then stated that all this time he never knew why these people were reported to police although he was their immediate boss. However, he stated that rumour had it that the issue leading to the people being wanted by the police was the fire at the defendant's sugar estate.

Mr Masoakhombila then stated that on 12th April, 2014 he met Mr Alexious Malunga, Fandson Kenneth and Lucious James who were on their way to Nchalo police station. He said the three had been advised by their bosses to go to Nchalo police station.

He then stated that a week later Mr Watson Ligomba, the defendant's Field Manager requested either him or Mr Zelo to go to Nchalo Police to give a statement on sugarcane fires at Nchalo sugar estate. He stated that Mr Zelo went to give a statement.

He stated that this is when he realized that the plaintiffs were being arrested on allegations that they were setting ablaze sugar cane at the defendant's Nchalo sugar estate. He added that he proceeded on 30 days' annual leave on 19th April, 2014. He stated that on his return to work he found Mr Kenneth and Mr Chiwindi back at work. And that, he also later heard from Mr Chiwindi that the plaintiffs had been acquitted of the criminal charges levelled against them.

He added that he no longer works for the defendant since he was dismissed. He however stated that he is not bitter with the defendant. He said he has sued the defendant.

He also denied that the defendant simply reported to Nchalo police for help in finding out who was responsible for the fires in the sugarcane fields in this matter. He said this is because his supervisor then asked him to call the plaintiffs in this matter before their arrest. He stated that the police did not catch anyone starting the fires.

During cross-examination, Mr Masoakhombila stated that he left the defendant's employment on 23rd February 2015 after he was fired on 18th November 2014.

He stated that he had been charged with poor performance which he was found guilty of at a disciplinary hearing. He added that he has consequently sued the defendant.

He stated that he was the defendant's farm manager and was responsible for the work of the plaintiffs.

He stated that he signed his witness statement in this matter on 20th February 2015 and that this is when he decided to be a witness in this matter. And that this was after he was fired by the defendant on 18th November 2014. He added that this was before he sued the defendant in the Industrial Relations Court.

He stated further that he is not bitter with the defendant but wanted to come and tell the truth to this Court.

He stated that at the time of the arrests herein there were fires and that Mr Ngolombe is right on this aspect. He also said that it is true that nobody knew who was starting these fires and that he was investigating to find out who was starting these fires.

He stated further that it was not good for the defendant's sugarcane to be burning. He added that it was not wrong for the defendant to report to police about the fires herein.

He then stated that all the plaintiffs herein were working in the sugarcane fields. He also stated that the field that was under his charge was also attacked by the fires.

He then stated that Mr Zelo told him that police would arrest Mr Chiwindi because of suspicion about fires but conceded that this was not stated in his evidence in chief where he stated that Mr Zelo did not tell him why Mr Chiwindi would be arrested. He added that by this time the defendant's management had already reported about the sugarcane fields fires to the police. He added that he never knew why Mr Chiwindi would be arrested.

He then stated further that police came and picked up Mr Chiwindi in a police vehicle. And that by this time the defendant's management had already reported about the fires herein to the police.

Mr Masoakhombila stated that he could have gone to make a statement to the police but that Mr Zelo is the one who went to make the statement. He also stated that by then all the plaintiffs had been arrested.

He then stated that he does not agree that the police investigated the matter then arrested the plaintiffs and later asked for statements. He added that he did not agree that the police arrested the plaintiffs after investigations. He asserted that there was a tip from the defendant to the police that the plaintiffs were the suspected arsonists.

He further stated that he realized that the plaintiffs were being arrested on suspicion that there were setting the fires herein after the plaintiffs had been arrested.

He agreed that there were fires as stated herein. He stated that it is not good for the defendant's sugarcane to bum and the defendant had to establish the cause of the fires. He stated that he did not suspect anyone for causing the fires but he stated that the fire was caused by someone. And, that those responsible for the fires could be defendant's employees or not but they did not really know who was causing these fires.

He then stated that the sugarcane fields are open. And that people were busy spreading rumours anonymously as to who was causing the fires herein.

He stated that the fires herein occurred during the time of negotiation of remuneration between the defendant and its employees' union.

During re-examination, Mr Masoakhombila stated that when Mr Zelo asked him to call Mr Chiwindi he did not know why he had to call Mr Chiwindi but that Mr Zelo had the reason.

He then stated that the most senior was the Agriculture Manager. He stated that Mr Ligomba who was more senior than Mr Zelo asked Mr Zelo to go and give a statement to the police.

He then stated that Mr Chiwindi was at his house when he had called him to come to the office. Further, that the police arrived 15 to 20 minutes after Mr Chiwindi had arrived at the defendant's office.

He then stated that he did not want sugarcane to bum as it gave money. He added that he heard rumours that the defendant's employees were setting the fires but no one was caught.

He then stated that he cannot find a statement of the defendant against the plaintiffs. But that the plaintiffs were implicated by rumours.

He added that Mr Chiwindi was suspected for his role in the overtime issue. He then stated that he signed his witness statement herein on 20th February 2015 at the plaintiffs' lawyer's office but that is not the date he decided to become a witness in the present matter.

At the close of the plaintiffs' case, the defendant indicated that it wanted to call a police officer as a witness. There had been no prior indication that such would be the case since only a witness statement of Mr Ngolombe for the defendant was filed and served by the defendant. The plaintiffs objected, as they ought to have, in the circumstances.

The defendant explained that it failed to file any witness statement as per the order for trial directions because the police informed it that police officers could only be subpoenaed. The defendant then submitted that it should be allowed to call the police officer and that the plaintiffs be allowed to bring rebuttal evidence, if necessary.

This Court agreed with the plaintiffs and disapproved of the conduct of the defendant in not giving any indication at an early stage that it would call a further undisclosed witness, being the police officer. This Court further advised the defence that it would

only be allowed to call this witness this time but that that otherwise this will not ordinarily be allowed. Further, that the defence must always ordinarily give an indication of the fact that it was calling a police officer on a subpoena and give a precis of the evidence to be given so that there is no prejudice to the plaintiff who at this stage had disclosed his case without knowing the full case of the defence.

In the end, this Court ordered that the plaintiffs give rebuttal evidence if they so wish in view of the police officer's testimony and that costs occasioned be for the plaintiffs in any event.

The first witness for the defendant was Peter Chikwemba, an Inspector of Police and in-charge of Montfort Police at Chiradzulu district.

He stated that he remembered that it was two years ago when he was working at Nchalo police post as a station investigating officer when he received a complaint from the defendant about damage to their sugarcane fields by fires. He stated further that upon receiving those reports they started investigating. He indicated that through their investigation they got information about the suspects and that information led to the arrest of the plaintiffs on suspicion that they started the fires herein.

He then stated that, within 48 hours of their arrest, the plaintiffs were taken to court at Nchalo where the court ordered their remand in custody at Chikhwawa prison. He added that caution statements were taken from the plaintiffs who were not charged with any offence.

He then stated that since investigations were taking long the court discharged the plaintiffs. He added that the matter is however still on.

During cross-examination, Inspector Chikwemba stated that by saying that the criminal case is still on he meant that the court discharged the plaintiffs but the police investigations are still on-going.

He stated that he is aware of provisions of the Criminal Procedure and Evidence Code. He agreed that if a person is discharged of an offence and the case is not re commenced after one year the discharge becomes an acquittal.

He was shown the order of discharge and he stated that it was signed by the Nchalo Magistrate and dated 30th June 2014. He stated that by the date of trial the plaintiffs

were acquitted. He added that the order of Nchalo Magistrate court was served at Nchalo police station but by then he was no longer there. He however stated that when the plaintiffs were being discharged he was still at Nchalo.

Inspector Chikwemba then stated that he knew Ms Mawale who was the officer-in charge at Nchalo police at the time of the events herein. He denied that Mr Chiwindi was the first to be arrested by Ms Mawale. He however agreed that Mr Chiwindi was the first to be arrested. He then stated that he was not aware that Mr Chiwindi was arrested in Mr Masoakhombila's office. He also said he was not aware that Mr Chiwindi was arrested by Ms Mawale. He however stated that he arrested Mr Chiwindi. And that he picked up Mr Chiwindi from the defendant's offices.

He then stated that he could not recall whether at the time of the arrest Mr Chiwindi was on duty or not. He however stated that he knows the prosecuting officer in the matter against the plaintiffs. He added that the prosecutor did not warn him each time the matter of the plaintiff came for hearing. He however stated that he did not appear in court not because he was not warned by the prosecutor. He added that the prosecutor was aware that the issue of the plaintiffs was still under investigations and that is why the prosecutor never called him to testify and that the prosecutor informed the court.

He stated that the plaintiffs were discharged because he took so long to investigate. He denied that the plaintiffs were discharged because he did not go to testify. He added that the court was told that investigations were underway.

He then stated that he arrested the other plaintiffs. He added that some were arrested at his office and one or two were arrested at the defendant's offices.

He stated further that police investigations led to the arrest of the plaintiffs. He added that the police did not share the findings of the investigations with the defendant's management.

During re-examination, Inspector Chikwemba stated that on the court order discharging the plaintiffs there is a reason given for the discharge of the plaintiffs. Further, that the order does not say that the plaintiffs are acquitted.

He reiterated that he arrested Mr Chiwindi and that it was not the Officer-in-charge who arrested Mr Chiwindi. He added that he was the one investigating this matter.

He then stated that the order of discharge is dated 30th June 2014 and that on that date he was at Nchalo. He however stated that on the date of service of the order of the discharge of the plaintiffs on the Officer-in-charge herein, on 11th July 2014, he was not there at Nchalo. That was the end of his testimony.

The second witness of the defendant was Mr Jerome Ngolombe. He stated that he is the Human Resources Manager for the defendant at Nchalo since 2014 when the plaintiffs were suspected of setting fire to the defendant's sugarcane fields.

He stated that between the months of March and April 2014, the defendant's estate at Nchalo was experiencing incidents of strategic malicious fires set on sugarcane fields. He added that these fires were set deliberately and they would start in the evening around 7 or 8 p.m. when it was dark and sometimes during the day.

He added that the defendant reported the matter to police at Nchalo police station so that the police should assist the defendant in finding out who was responsible. He added that, as management of the defendant at Nchalo they had no idea of who was responsible hence they had no suspects. He then stated that the police started investigations and in the course of their investigations they identified some suspects who happened to be employees of the defendant.

He stated that the police contacted Mr Zelo, the defendant's area manager, to tell the plaintiffs who were working under his supervision, to go and report to police for interrogation.

He then stated that when the employees went to the police, they were detained and the police informed the defendant that they had detained these people for suspecting them of setting fires to the defendant's sugarcane fields.

He then stated that, several days later, the employees were released on bail and they reported back to work for the defendant. He added that Mr Zelo advised the plaintiffs so report to Human Resources because the plaintiffs had been away for two weeks.

He then stated that at the Human resources office he asked the plaintiffs to give written reasons for their absence. He added that after receiving and being satisfied with the statements of the plaintiffs the defendant advised the plaintiffs to go back to work and that if there were any further developments the plaintiffs should inform the defendant.

He stated that the plaintiffs continued working at the defendant's estate at Nchalo. He stated further that the defendant's management was not aware that the plaintiffs were attending court on charges because they were not involved. And that the matter was between the plaintiffs and the police who conducted investigations and arrested the plaintiffs. He added that the defendant's management was not even called to court to give evidence against the plaintiff because all the defendant's management did was to raise a general complaint to the police and the police took it up from there.

He noted that the plaintiffs asserted that they were arrested because they had initiated a claim for payment of overtime hours against the defendant at the Industrial Relations Court. He stated that this is very false because the plaintiffs initiated the claim at the Industrial Relations Court in 2011/2012. He stated that the Industrial Relations Court dismissed the plaintiffs' claim in its entirety on 20th June 2013. He exhibited a copy of the judgment of the Industrial Relations Court.

He then stated that therefore the defendant had no reason or malicious intention to punish the plaintiffs in any way. He added that the matter before the Industrial Relations Court was concluded in 2013 and the plaintiffs were arrested by police in 2014.

During cross-examination, Mr Ngolombe stated that he does not know the name of the police officer who arrested the plaintiffs in this matter because he was not informed as to who the policeman was. He added that may be the police should have informed him.

He denied that by the time of the arrests herein he had been at Nchalo for two or three days only. He added that he moved to Nchalo from Dwangwa in January 2014. He stated that he had been at Nchalo for three months and a few days when the events herein happened. He added that when he was at Dwangwa he was not aware of any issues between the plaintiffs and the defendant. He added that when he arrived at Nchalo the plaintiffs' matter against the defendant before the Industrial Relations Court was one of the matters he was handed over to deal with.

He stated that he knew why no one from the defendant testified at the Nchalo magistrate court and this is because the defendant was never informed by police about the findings of the police in its investigation. He added that, as Human Resources Manager, he did not try to find out more on the same.

He then stated that the defendant does not use police investigations as a dimension in disciplinary matters.

He then stated further that the plaintiffs were absent from duty whilst in police custody. Further, that in Human Resources at the defendant's office they find out why an employee is absent from duty.

He then stated that the plaintiffs are working for the defendant and no disciplinary proceedings were taken against them.

In re-examination, he stated that the defendant takes disciplinary action against an employee if there is evidence, otherwise no such action is taken. He added that the plaintiffs said they were arrested by the police and that that arrest had nothing to do with the defendant. He concluded that the plaintiffs are still working for the defendant because they had no disciplinary issues.

At this point the plaintiffs gave evidence in rebuttal in view of the evidence of Inspector Chikwemba. The first to testify was Mr Chiwindi.

Mr Chiwindi stated that he does not know Inspector Chikwemba. He stated that he was arrested by Ms Mawale who was the officer-in-charge at Nchalo police station. He added that she is now based at Chikhwawa police. He then stated that it is not true that someone else other than Ms Mawale arrested him.

He then stated that in the police car that he rode in after his arrest there was Ms Mawale and a driver. He added that Ms Mawale, and not Inspector Chikwemba, interrogated him at the police station. He then stated that he never gave any statement at the police station and it was not true that a caution statement was recorded from him by the police.

During cross-examination, Mr Chiwindi reiterated that he was arrested by Ms Mawale of Nchalo police station. He added that he never gave his particulars to Nchalo police and Nchalo police did not have his particulars. He then stated that after his arrest he was granted bail.

He then stated that there are many police officers at Nchalo police. He added that he only knew Ms Mawale and not the other police officers since she is the one who arrested him. He also stated that he knows the police prosecutor who he saw at the

court but he does not know the prosecutor's name. He further stated that he does not know the name of the driver who came with Ms Mawale.

Mr Masoakhombila also testified. He stated that he used to meet Inspector Chikwemba at Nchalo trading centre.

He then stated that he is the one who called Mr Chiwindi to the defendant's office. He added that he knew that Ms Mawale, officer-in-charge of Nchalo police, is the one who arrested Mr Chiwindi. He denied that somebody else arrested Mr Chiwindi.

During cross-examination, Mr Masoakhombila stated that Ms Mawale was by herself when she found him to arrest Mr Chiwindi. He added that he handed over Mr Chiwindi to Ms Mawale. He denied lying. He was referred to his witness statement on this aspect and conceded that in his witness statement he had indicated that there was more than one police officer on the occasion. He then stated that he was meant to give his evidence as he was stating it. He added that he did not mention Ms Mawala in his witness statement.

During re-examination, Mr Masoakhombila stated that he did not know the who was driving the police car that Ms Mawale used to pick up Mr Chiwindi. He also stated that in the documentary evidence filed by the defence no police officer was mentioned by name.

After the parties testified the parties filed written submissions on the matter at hand. The submissions by both parties correctly addressed the following issues that are to be determined by this Court as follows. Whether or not the plaintiffs were arrested pursuant to a charge laid by the defendant. Whether or not the plaintiffs were defamed by the defendant. Whether or not the plaintiffs were maliciously prosecuted by the defendant. And, whether or not the plaintiffs are entitled to the damages sought.

Both parties correctly submitted on the relevant law as follows. That the principle that the one who asserts must prove and the standard of proof in civil cases has been discussed by Lord Denning L. J. in *Miller v Minister of Pensions* [1947] 2 All ER 372 at 374 in the words

This means that the case must be decided in favor of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in a civil

case. The degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it is more probable than not the burden is discharged but if the probabilities are equal it is not.

The cases of *Madinga v Nedbank (Malawi) Ltd* MSCA civil appeal number 15 of 2009 and *Yanu Yanu Bus Company Limited v Mbewe and another* [1981-1983] 10 MLR 417 were also correctly cited on this aspect.

The plaintiffs correctly submitted that in *Kanjere v Attorney General* civil cause number 1094 of 1996 it was stated that one fundamental policy of the law is to safeguard an individual's liberty in line with section 18 of the Constitution.

The plaintiffs then correctly submitted that false imprisonment is defined as confining a person in prison or as if in prison without legal justification. They referred to the cases of *Chiumia v Southern Bottlers Limited* [1991] 14 MLR 38 and *Chafuli v Chibuku Products Limited* civil cause number 3705 of 2001 (High Court) (unreported) and *Namasasu v Wood Industries Corporation Limited and others* [1997] 1 MLR 162.

The defendant correctly submitted that false imprisonment is defined as the infliction of bodily restraint which is not expressly or impliedly authorised by the law. W.V.H. Rogers, *Winfield & Jolowicz on Tort* (1994) 14th edition at 63.

And that the crucial issue in false imprisonment cases is whether the defendant merely laid facts on which it became the duty of the police to arrest the plaintiff or laid charges against the plaintiff on which the police acted. Where the defendant did more than merely laying facts but made charges against the plaintiff and wanted, against the police's better judgment that the plaintiff be prosecuted for the crime, the court will hold that there was false imprisonment. *Manda v Ethanol Company Ltd* [1993] 16(2) MLR 572.

Both the plaintiffs and the defendant also correctly submitted that on a claim for false imprisonment the court inquires whether it was the defendant who carried out the arrest or who ordered the police to carry out the arrest, or did the police carry out the arrest of their own volition after the contribution made by the defendant had been no more than to convey information to the police? In the event of the former, the defendant would be liable, in the latter case not. *Kapenda v Malawi Rural Finance*

Company Limited and another civil cause number 50 of 2010 (High Court) (unreported) and *Meja v Cold Storage Co Ltd* [1990]13 MLR 234 (HC).

Further, that the court in the case of *Banda v Mchenga Coal Mines* [2007] MLR at 184 stated that

The law on false imprisonment is that a defendant would be liable if the defendant lays a charge against the plaintiff on which it becomes the duty of the police to arrest him. However, the defendant will not be liable if all he does is give information about loss of property on his premises and asks the police to investigate. This was laid down in *Chimtendere v Burroughs Ltd* [1981-83] 10 MLR 215; *Admarc v Stanbul MSCA Civil Appeal No. 6 of 1984* and *Mvula v Norse International Ltd* (1992) 15 MLR 331

The parties correctly submitted that where the police conducted preliminary investigations and then arrested the suspect, the court will hold that the police officer acted according to his own judgment in deciding to arrest the plaintiff. Where the defendant did not only report the matter but actually took the plaintiff to the police station, then the court would hold that there was false imprisonment.

The defendant pointed out that in *Tembo v Industrial Development Group* (1) [1993] 16 (2) MLR 865 at 875, Chatsika J, as he then was, stated the law as follows

It should be noted that it is the duty of every citizen to give information of an alleged commission of a crime to the police. If so acting on the information so given by a citizen, the police mount investigations, and the investigations result in the arrest of a suspect, if the suspect is eventually found to be innocent, he cannot entertain an action in false imprisonment against the citizen who initially supplied the information to the police.

And further, that in *Mtukulira v Malawi Railways Ltd* [1997] 2 MLR 172, the court at 178-179 approved the following passage from *Hauya v Cold Storage Company Limited* Civil Cause No. 274 of 1987

The crucial issue in false imprisonment is to decide whether the defendant's 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, in their own responsibility, take the plaintiff into custody, is not making a charge. However, where the defendant acting through their agents order the police to arrest the plaintiff, it is imprisonment by the defendant as well as the police ...The test is this: If the defendant's servant made a charge on which it became the duty of the police

to act then the defendant would be liable but they are not liable if they merely gave information and the police acted according to their own judgment.

The defendant also correctly observed that in the case of *Chintendere v Burroughs Limited* [1981-83] 10 MLR 215, the plaintiff's claim of false imprisonment failed because the defendant had neither given the police a direct order to arrest the plaintiff nor had they laid a criminal charge against him.

The plaintiff then submitted that the plaintiffs through their witnesses told this Court that the arrest of the plaintiffs was orchestrated by the defendant through its officers Mr Ligomba and Mr Zero.

The plaintiffs submitted further that the defendant's cross-examination which mainly dwelt on discrediting the witnesses, particularly Mr Masoakhombila after he was fired by the defendant, did not in any way affect the plaintiffs' version of events.

The plaintiffs further submitted that the defendant called Inspector Chikwemba who claimed to have arrested the plaintiffs himself. And that this claim was rebutted by the evidence of Mr Chiwindi and Mr Masoakhombila when recalled to testify in this matter. The plaintiffs submitted that they categorically disowned Mr Chikwemba and stated that they were arrested by a female officer called Ms Mawale.

The plaintiffs further submitted that in the case of *Matola and others v Electricity Supply Corporation of Malawi Limited* personal injury cause number 228 of 2014 (High Court) (unreported) the court opined that where the defendant provided transport to take the plaintiff to police that entails that the defendant caused the arrest of the plaintiff. The plaintiffs submitted that there are many occasions in which the court can make similar conclusions.

The plaintiffs then submitted that a failure to call a crucial witness by a party who was supposed to do so has far reaching consequences on such a party. In that, it is presumed that such a witness, if called, would give evidence favourable to the opposing party.

The plaintiffs then submitted that Mr Zelo and Mr Ligomba are still employed by the defendant. Further, that the two are the only defendant's employees who were in contact with the police regarding the plaintiff's arrest. And further, that it has not been explained why the defendant failed to call the two as witnesses.

The plaintiff further submitted that Mr Ngolombe only testified on procedural aspects in cases of this nature as they are normally handled by the defendant. And that he fell short of explaining what Mr Ligomba and Mr Zero had done or not done relating to the plaintiffs.

The plaintiffs therefore submitted that the defendant caused their arrest.

On its part, the defendant submitted that it was not in dispute at trial that the plaintiffs were arrested by police officers of Nchalo Police sub-station. That the same was admitted even in the plaintiff's pleadings and evidence. However, what was in dispute was whether or not the plaintiffs were arrested as a result of a charge which was laid by the defendant's senior management.

The defendant further submitted that the law is clear that the crucial issue on a claim of false imprisonment is whether the defendant merely laid facts on which it became the duty of the police to arrest the plaintiff or laid charges against the plaintiff on which the police acted. Where the defendant did more than merely laying facts but made charges against the plaintiff, against the police's better judgment, for the plaintiff to be prosecuted for the crime the court will hold that there was false imprisonment. See *Manda v Ethanol Company Ltd and Mtukulira v Malawi Railways Ltd*.

The defendant further submitted that the plaintiffs in their evidence claimed that they were arrested on a charge which was laid by the defendant company whilst the defendant disputed the same stating that they merely reported a crime to the police without citing any suspects and the police, upon subsequent investigations on the complaint, acted on their own initiative in arresting the plaintiffs.

The defendant pointed out that, it was the plaintiffs' belief that they were arrested because they had initiated a claim for overtime hours against Illovo at the Industrial Relations Court (IRC) which they alleged that the defendant lost and were now pursuing an appeal. However, that Mr Chiwindi who testified on behalf of all the plaintiffs admitted in his cross examination that he had no proof of the foregoing allegation against the defendant company. In fact, when presented with a copy of the judgment tendered by Mr Ngolombe and marked as exhibit "CTI", Mr Chiwindi corroborated that this was the same claim the plaintiffs were referring to.

The defendant then asserted that the said judgment was pronounced on 20th day of June, 2013 almost a year before the plaintiffs were arrested and it was on the contrary held in favour of the defendant company. The defendant submitted that the plaintiffs therefore failed to substantiate their claim before the court that the defendant had a motive to lay a charge or to even direct the police to arrest them.

The defendant observed further that the plaintiffs further based their allegation that they were arrested at the instance of the management of the defendant company because the police had gone through the defendant as the plaintiffs' employer to make available the plaintiffs for interrogation and the arrest.

The defendant submitted that it was its case that it had been experiencing incidents of strategic malicious fires set on its sugarcane fields. That the matter was reported to the police to investigate because no one knew who was responsible for setting the fields on fire. That this is a fact which was ably corroborated by Mr. Masoankumbira, who was part of management during the material time.

The defendant submitted further that it was also its case that when the police in the course of their investigations identified the plaintiffs as the suspects, the police contacted management at Illovo to inform the plaintiffs who worked on the estate to go and report to the police station at Nchalo for interrogation. That the plaintiffs voluntarily attended the police station. And that it was only Mr Chiwindi, the 1st plaintiff, who was arrested by the police right at the defendant's premises. Regardless, the defendant submitted that there was no evidence before the court that the defendant or its agent had done more than just comply with the police's request to make available the plaintiffs who were its employees.

The defendant submitted that in fact, Mr Chiwindi admitted in cross examination that he heard no one directing the police during or at the time of his arrest that he was the person who was responsible for setting fires to the sugarcane fields.

The defendant further submitted that Mr Chiwindi, however, claimed in his evidence that he was then told by Mr Masoankumbira that they have deployed police officers to arrest Mr Chiwindi on allegations that he was amongst the people who burnt sugarcane plantations, a fact which Masoakhombila denied in his entire evidence.

The defendant submitted that, on the contrary, Mr Masoakhombila told the court that he was told by his boss Mr. Zelo that the police would be coming to arrest Mr. Chiwindi but he was never told and therefore he never knew the reasons for the said arrest.

The defendant submitted that it was, therefore, evident at trial that the defendant did not know who was responsible for setting fires to its sugarcane fields hence there was no way they could even have conveyed mere suspicion as to the plaintiffs' involvement. The defendant submitted further that the same was demonstrated when the defendant did not even commence any disciplinary actions against the plaintiffs when they returned to work after their incarceration; a disciplinary action which essentially has a lower standard of proof than that of a criminal case.

The defendant further submitted that, it was further evident from the evidence of the police investigator who was subpoenaed to testify that the police had conducted investigations and they had interrogated the plaintiffs before arresting them on suspicion of their involvement in setting fires to the defendant's sugarcane fields.

The defendant noted that the Mr Chiwindi disputed that he was arrested by Mr Chikwemba, the police investigator. Further, that Mr Chiwindi alleged that it was the Officer in Charge of the Nchalo sub-station, Ms Mawale, who conducted the arrest. The defendant submitted that, however, Mr Chiwindi's evidence was not corroborated and the same was unreliable as he kept contradicting himself. The defendant further submitted that it is also highly unlikely that an officer of higher ranking such as an Officer in Charge would be involved in arresting a suspect in a case which she was not investigating and/or when she had other male officers capable of suitably doing the same job.

The defendant submits that the plaintiffs failed to prove that the defendant company laid a charge against them upon which the police arrested them. The plaintiffs even failed to prove that the allegation that the defendant company had any or any malicious reason to have them arrest. The defendant effectively argued before the court that all it did was report/complain to the police that someone was maliciously setting fires to its sugarcane fields after which the police commenced their investigations and on their own volition identified and arrested the plaintiffs as suspects.

This Court has carefully evaluated the evidence of Mr Chiwindi and Mr Masoakhombila, on the one hand, against the evidence of Mr Ngolombe and Inspector Chikwemba, on the other hand, on the role of the defendant in the arrest of the plaintiffs. The evaluation was aimed at determining whether the plaintiffs have proved that the defendant's officers reported the plaintiffs to the police as the ones who were responsible for the fires in relation to which the plaintiffs were arrested.

There is no direct evidence in this matter on the alleged role of the defendant in laying a charge of maliciously causing the fires, otherwise known as arson, against the plaintiffs to Nchalo police. This is a fact admitted in evidence by both witnesses for the plaintiffs. They could not point to any direct evidence that an officer of the defendant laid a charge as alleged. This Court is therefore being asked to look at the circumstances and conclude that the defendant laid the charges.

The plaintiffs alleged that they were arrested because the defendant was not happy after losing a case against the plaintiffs in the Industrial Relations Court. That turned out to be an incorrect statement of fact because Mr Chiwindi actually conceded that it is actually the defendant that prevailed before the Industrial Relations Court. It is therefore unlikely, as submitted by the defendant, that the defendant who prevailed at court may want to be vengeful on its employees who actually lost their claim in the Industrial Relations Court. The motivation alleged by the plaintiffs on the part of the defendant in getting the plaintiffs arrested is therefore not well supported on the plaintiffs' own evidence as rightly submitted by the defendant.

The plaintiffs also contended that Mr Zero and Mr Ligomba should have been called to testify or else it should be presumed that they would have come and testified unfavourably by implicating the defendant that they laid a charge against the plaintiffs. This Court does not agree that in the circumstances of this matter that inference is merited. This is because even from the testimony available before this Court Mr Zelo had not informed Mr Masoakhombila that the defendant had reported the plaintiffs to police as being the suspects in this matter. According to Mr Masoakhombila, Mr Zelo only went to police to give a statement in this matter a week later after all the plaintiffs had been arrested.

The evidence of Mr Masoakhombila is also to the effect that the plaintiffs were implicated by rumours. However, these rumours cannot be attributed to the defendant.

In the circumstances, as conceded by the plaintiffs it was not wrong for the defendant to report the strategic malicious fires to its sugarcane fields to the police because that is what any person in the defendant's position would do. Mr Ngolombe testified that as management of Illovo they reported the fires to police for the police to investigate. There were no questions put to him as to who exactly reported the issue. It is not suggested by the plaintiffs that it is Mr Zero or Mr Ligomba who did the reporting.

There are therefore no background facts to support the presumption that if Mr Zero and Mr Ligomba had come to testify then they would have given unfavourable evidence on their role as management of the defendant in the arrest of the plaintiffs.

The other contentious issue is the disagreement as to who arrested Mr Chiwindi. Mr Chiwindi and Mr Masoakhombila insisted that it is Ms Mawale, and not Inspector Chikwemba, who arrested Mr Chiwindi thereby rendering the evidence of Inspector Chikwemba not credible. This Court however agrees with the defendant that the evidence of the plaintiffs on this aspect is what is not credible due to the selfcontradictory nature of the same.

In particular Mr Chiwindi and Mr Masoakhombila in their witness statements stated clearly that Mr Chiwindi was arrested in Mr Masoakhombila's office by police officers. That meant that there were more than one police officer. This gives room to speculation that the plaintiffs decided as an afterthought to change that in fact it was only one police woman Ms Mawale who made the arrest of Mr Chiwindi. That makes the contradiction of Inspector Chikwemba's evidence by the plaintiffs unreliable. Police officers means exactly that and cannot mean one police officer. During his testimony Mr Masoakhombila was unable to satisfactorily explain the self-contradiction in this regard.

In the circumstances, this Court does not find the evidence of Inspector Chikwemba to be impeached. It is not out of the question that he was involved in the party arresting Mr Chiwindi and his testimony is credible. He testified that they proceeded to effect the arrests herein after getting reports of the malicious fires from the defendant and only upon getting their own information as police pointing to the

plaintiffs as suspects. This does not appear far-fetched in view of the rumours that Mr Masoakhombila testified about as implicating the plaintiffs. Inspector Chikwemba did not say where the police information came from. He however did not point at the defendant as the source of such information leading to the arrest of the plaintiffs.

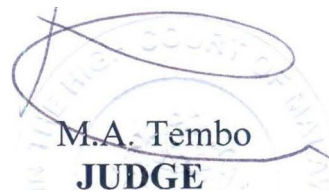
Mr Chiwindi was arrested by police at the defendant's offices. The police requested for him to be available to make the arrest easy. The rest of the plaintiffs were asked to go to the police station by the police. In all this, there is no evidence that the defendant directed the arrest of the plaintiffs.

In the foregoing premises, this Court finds that the plaintiffs have not proved on a balance of probabilities that the defendant laid the charge leading to their arrest or that the defendant directed their arrest. Rather, the defendant only conveyed a complaint to the police about the strategic malicious fires. The police on its own investigation or on the basis of undisclosed information arrested the plaintiffs. The defendant cannot be held liable for the actions of the police in effecting arrests on the basis of undisclosed information resulting in a failed prosecution. The plaintiffs' claim for false imprisonment therefore fails.

The preceding finding entails that the defendant cannot be held liable for the resultant alleged defamation and malicious prosecution of the plaintiffs herein. Those claims therefore fail too.

Costs are for the defendant.

Made in open Court at Blantyre this 14th October 2016.



M.A. Tembo
JUDGE