



**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY**

CRIMINAL CASE NUMBER 622 OF 2012

BETWEEN

JESSIE SOKO.....PLAINTIFF

AND

OPPORTUNITY INTERNATIONAL BANK OF MALAWI.....DEFENDANT

CORAM : MWALE, J.
Soko, of Counsel for the Plaintiff
Nyanda, of Counsel for the Defendant
Namagonya, Court Reporter
Kaferanthu, Court Interpreter

Mwale, J

JUDGMENT

Introductory

1. The plaintiffs action, commenced by writ of summons, is for damages for false imprisonment, malicious prosecution, defamation of character, inconvenience and costs of the action. The dispute arises from an employment relationship. The plaintiff was at all material times the defendant's employee as Card Administration Officer until on or about 16th May 2006, when the relationships between them took a bitter turn as the plaintiff was arrested and taken into custody on a charge of conspiracy to defraud the defendant. The

plaintiff was taken to Area 3 Lilongwe Police Station where he was detained until she was granted bail on 18th May 2016. The plaintiff was subsequently and acquitted of the charge.

Plaintiff's Case

2. It is the plaintiff's claim that the defendant wrongfully and maliciously directed and procured two Police Officers to arrest her. As a result, the three days she spent in police custody deprived of her liberty constituted wrongful imprisonment. In consequence, she sustained severe shock and mental anguish and that she suffered loss and damage. Further, the plaintiff claims that the defendant acted out of spite and malice towards her and caused her to be arrested in broad daylight in a public thoroughfare and thereby subjected her to ridicule and contempt.

The Defence Case

3. The action is defended and the defendant whilst admitting that the plaintiff was arrested, denies that the subsequent prosecution was malicious or at its behest. With regard to the arrest, the defendant claims that at the time in question, an arrestable offence (theft and conspiracy to defraud) perpetrated by the defendant's servants had occurred and the defendant had reasonable grounds for suspecting the plaintiff. The plaintiff was at the time informed by the defendant of the suspicion. The police consequently acted on their own responsibility and initiative in arresting the plaintiff. It is the defendant's contention that the prosecution was instituted and carried out by the Director of Public Prosecution and all the defendant did was to give evidence which it did in good faith.

Background

4. Hearing of the matter at which both the plaintiff and the defendant called one witness each, commenced on 12th May 2015 and was concluded on 31st January 2017. At the final hearing the plaintiff was directed to file their final written submissions in 21 days and the defendant was to reply 7 days thereafter. The plaintiff filed their submissions on 7th February 2017 and to date, there has been no compliance by the defendant. This judgment has therefore been made taking into account only final submissions by the plaintiff.

Court's Reasoned Determination

(a) False Imprisonment

5. The tort of false imprisonment is made out when the defendant or its servants or agents make a charge against the plaintiff, on which it becomes their duty to act. False imprisonment is therefore premised on the actions of the defendant, its servant or its agent which actions go beyond merely narrating facts to the police (see *Khomba v Smallholder Farmers Fertilizer Revolving Fund*, [1999] MLR 129 (HC)). Thus, where the defendant, its servant or agent simply narrates facts and the police conduct their investigations and come to the conclusion that there are reasonable grounds to formally charge the plaintiff, the defendant will not be found liable (see *Iphani v Makandi Tea and Coffee Estate* [2014] MLR 91).
6. The evidence in this particular case on the issue of false imprisonment came primarily from the testimony of the plaintiff to which the defendant's witness offered no rebuttal. By way of background, the plaintiff testified that she was employed by the defendant bank as a Card Administration Officer in the Electronic Banking Department. This department dealt with clients who did not have bank accounts but accessed the salaries from various employers through Malswitch Smart Cards. Her primary role was to register, distribute, issue, record and track registered cards. In addition to her, another person, Donald Chimata held the same post.
7. In relation to the incident that led to her arrest, the plaintiff testified that on the morning of 16th May 2006, a manager asked her to interpret a Malswitch report on the issue of an unknown ATM card being used to transact on an account that belonged to another person. The plaintiff upon investigation noted that the transaction bore all the hallmarks of fraud and she reported the same to the manager who referred the issue to her. The manager then asked the plaintiff to cross check with Alefa Mtunga (who was the defendant's witness), the Customer Service Manager, as to whether there was any record of the card in question

in the registry. According to the plaintiff's testimony, n record was found even after crosschecking.

8. The plaintiff continued to narrate how later that same afternoon she was summoned to the boardroom by Mr. Webster Mbekeani. In the boardroom was a cashier, Jonazi Thawani, some senior bank officers and two gentlemen she did not know. It was only after introductions that they were identified as officers for the fiscal police. According to the plaintiff, after the introductions, Mr. Mbekeani told the persons gathered that the bank had been defrauded through the use of cards that had been fraudulently issued and that the plaintiff, Jonazi Thawani and Donald Chimata would be in a better position to explain to the police since the defendant bank suspected them of having committed the offences. The plaintiff was not asked to narrate her side of the story but along with Thawani, she was simply taken to the Regional Police Station in Lilongwe, without further ado. Donald Chimata joined them there directly as he had been out on field work when the rest were being conveyed there.
9. The plaintiff further recounted how at the time the fraudulent cards were created, she had not been in the office. With regard to the first card which was created on 23rd February 2006, the plaintiff was on leave. She had taken leave from 20th February to 24th February 2006 and only reported for duty on Monday 27th February 2006. The other card had been created on 17th March 2006. On this date, the plaintiff had been assigned to field work at Kanengo industrial site and only returned to the office after a week.
10. The defendant's witness Alefa Mtunga gave evidence to the effect that upon the discovery of the fraudulent transactions, an Audit Department investigation linked Jonazi Thawani to the fraud. The cards that were used to link to the customers accounts for the fraudulent transactions, were among those that were in the plaintiff's and Donald Chimata's dual custody at the time of linking and were removed without being recorded in any register. The defendant's witness however failed to confirm the dates on which the cards were created as she was in another department from the plaintiff. She was therefore in no position to testify as to whether the plaintiff was on duty or in the office during their

creation. The defendant's witness also revealed during cross-examination that in order for someone to link the Malswitch cards to the ATM, that person required special security privileges which the plaintiff did not have.

11. The defendant's witness was also unable to produce any documentation in line with her testimony; that is, the audit report that implicated Jonazi Thawani to the fraud and the card custody records that would indicate that the cards in question were in the plaintiff's custody. Faced with the question in cross-examination whether she was the right person to give evidence for the defendant on this issue, the witness's reply was that she wasn't in the Electronic Banking Department. By her own admission, she was only in court to give evidence that indeed the issue happened and that she was in the defendant's employment at the time. With regard to the chain of events that led to arrest, all this witness could tell the Court was that it was Mr. Webster Mbekeani who reported the matter to the police. The said person was no longer in the defendant bank's employment and she could not say what transpired in the boardroom as she was not there.
12. It is clear from the defendant's witness' testimony that she was in no position to offer contrary evidence to that of the plaintiff as to the course of events that led to the arrest and therefore the plaintiff's evidence therefore went unchallenged. I find no reason to doubt the plaintiff's testimony that the defendant's IT Manager, Mr. Webster Mbekeani laid a charge against her to the police. The circumstances around the event corroborates the plaintiff's testimony. If the police had acted on their own responsibility, having done their own investigations, they would have interrogated the plaintiff and discovered that the plaintiff was not physically in the office at the time the fraudulent cards were being created and therefore could not have created them. The investigations would have also shown that the plaintiff lacked the requisite security privileges to link the fraudulent cards to an ATM and therefore lacked the capacity to perpetrate the fraudulent scheme. The fact that the police immediately took the plaintiff to the station and charged her soon after Mr. Mbekeani spoke to them shows that whatever he said influenced them and they did not stop to consider what to do, they quickly did he wanted them to do.

13. The fact that the defendant's witness also failed to bring any supporting evidence as to the investigations undertaken by the bank and the custody records of the cards in question which were all in the defendant bank's custody also weighs against their case. If there were reasonable grounds to suspect the plaintiff and such grounds were the basis of police action, the defendant failed to produce them. By calling a witness who was not privy to the material acts constituting false imprisonment, the defendants failed to quell the tide of cumulative evidence, both direct and indirect against them. Thus, on a balance of probabilities, it is more likely than not that they made charges against the plaintiff which the police took it as a duty to act upon.
14. Further, the general view taken by the courts in matters of this nature is that where police action is in issue, it is helpful to the court for the police witnesses to be called as witnesses (see *Khomba v Smallholder Farmers Fertilizer Revolving Fund* cited above). Further, just because Mr. Mbekeani was no longer employed by the defendant bank is not its own sufficient reason for not having called him as a witness. The failure by a defendant to call key witnesses has also been frowned upon by the courts so that the inference drawn is that the witness would have said things adverse to their case (see *Mpingulira Trading v Marketing Services Division* [1993] 16 (1) MLR 346 (HC)). As both the the plaintiff's and defendant's evidence has displayed, these charges were not based on any reasonable suspicion. I therefore find for the plaintiff on the claim for false imprisonment from 16th to 18th May 2016.

Malicious Prosecution

15. In order to succeed in a claim for malicious prosecution, the plaintiff must satisfy four requirements. These are:
- (a) that s/he was prosecuted by the defendants;
 - (b) that the prosecution was determined in his or her favor;
 - (c) that it was without reasonable or probable cause; and
 - (d) that it was malicious.

(See *Mithi and Others v Reserve Bank of Malawi and Another* [2006] MLR 118).

From the evidence of the plaintiff which I have already analyzed above, it is clear that the police did not exercise any independence in arresting the plaintiff on a charge of conspiracy to defraud from the manner in which they acted. The plaintiff therefore succeeds on the first test. As the plaintiff was prosecuted and subsequently acquitted after a trial that lasted close to five years. The second test is also satisfied.

16. Moving on to the question whether the prosecution was without reasonable or probable cause, two tests settle the issue. The first test is articulated in the case of *Hicks v Faulkner* [1878] QB 167 by Hawks J (cited with favour in *Herniman v Smith* [1938] AC 305) as follows:

An honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which assuming them to be true would reasonably lead any prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charge was probably guilty of the crime imputed.

The second test comes from a local case, *Manda v Ethanol Company* [1993] 16 (2) MLR 572 in which the honourable Mkandawire J reasoned that mere insistence on prosecution when there is no evidence is in itself evidence of bad motive or malice. The fact that the plaintiff was never called upon to explain herself especially in view of that she was away at the time that she had no security clearance had led a prudent and cautious man to conclude that she was guilty. Prosecution follows in consequence of a charge. The charge in this case was at the insistence of the defendant as was the subsequent prosecution. The plaintiff was taken to the police station and immediately thereafter the processes for prosecution were set in motion. Again, there does not appear to have been any independent action of the police in taking charge of the process. If the police had reviewed the evidence of the defendant against the plaintiff they would have been able to distinguish her from her colleagues and charged her with a different offence, if at all. However, they were presented with three persons and they charged all three with the same offence regardless of the evidence surrounding the commission of the offence and their differing capacities for culpability. Their actions show them to have been acting at the instance of the defendant. The prosecution was therefore without reasonable or probable cause which proof that it

was malicious. I therefore also find that there is enough evidence on a balance of probabilities that the plaintiff was maliciously prosecuted.

Defamation

17. The plaintiff's evidence shows that immediately prior to her arrest she was invited/summoned to a boardroom in which she found senior bank officials, her co-accused and Mr. Jonazi Thawani and the two CID Officers. It was in this boardroom that Mr. Webster Mbekeani made criminal accusations against the plaintiff. The plaintiff exact testimony on the issue is as follows:

When I got to the Boardroom, Mr. Webster Mbekeani the bank's Head of IT made the introductions, upon which I discovered that the two strange gentlemen were from Fiscal Police. After introduction Mr. Mbekeani told the gathering that the bank had gotten defrauded by fraudulently issued cards and that myself, Jonazi Thawani and Donald Chimata would be in better position to explain to the Police as the bank suspected us of having committed the offences. I was not asked to give my side of the story. Thereafter I and Thawani were taken to Regional Police Station (Lilongwe) where we were joined by one Donald Chimata. Chimata came directly from his field work.

The precise defamatory words spoken by Mr. Webster Mbekeani were not reported verbatim in the plaintiff's testimony nor were they pleaded in the Statement of Claim.

18. In order for a plaintiff to succeed in a claim for defamation, in this case slander, the plaintiff must essentially prove:

- (a) that defamatory words were uttered;
- (b) that the words referred to the plaintiff; and
- (c) that the words were maliciously published.

The fact that offending words were uttered by Mr. Webster Mbekeani were paraphrased in the plaintiff's testimony is cause for great concern. Whilst it may be sufficient in a claim of false imprisonment or malicious prosecution to give a general intimation of the words spoken and the surrounding circumstances to show that the defendants set in motion the imprisonment and prosecution, such generality does not suffice for defamation. In the

claim for false imprisonment and malicious prosecution, the general circumstances and conduct of the defendant lead to the irrebuttable inference that the police could not have been acting independently, but to succeed in defamation much more is needed. At the risk of stating the obvious, the emphasis in a suit of defamation are the defamatory words. Before we can even begin to apply the three-prong test for the requisites of a suit of defamation, the offending words must be identified. It is only after these words have been identified that the Court can then determine whether the plaintiff has succeeded in proving that they were actually uttered; they referred to the plaintiff; and that they were maliciously published. It is trite law that where the words spoken imputes that the plaintiff is a criminal or has committed a crime punishable imprisonment, the slander is a actionable per se.

19. The words reproduced in the plaintiff's testimony in the except cited above are a paraphrased version of what was said as they are not reported as direct speech. Even if they were direct speech, they cannot be said to accuse the plaintiff of a crime. The words, as reported, if taken in their ordinary meaning, merely suggest that she was suspected of an offence. That is not the same as an accusation. Slander can also be made out by conduct, but again this must be specifically pleaded so that the defendant knows what he or she is facing. It is for this reason that the pleadings in an action for slander should in so far as possible contain the words complained of conversely where the slander is by conduct, the conduct should be specified in the pleadings. The Statement of Claim in this case states that the defendant caused the plaintiff to be arrested in broad daylight in a public thoroughfare and thereby subjected her to ridicule and contempt. In such a case, the slander would have been by conduct. This allegation is however not borne out by the evidence at hand and no argument has been made for it. There is no mention of this conduct whatsoever outside the Statement of Claim. For all I have reasoned above, I find that the claim for defamation has not been made out in this case.

Damages and Costs

20. The plaintiff is awarded damages for false imprisonment and for malicious prosecution, to be assessed by the Senior Deputy Registrar on a date to be fixed by him. Costs are awarded to the plaintiff.

I so order.

Made in open court in Lilongwe in the Republic this 29th day of May 2017.

F.A. MWALE

JUDGE