



**JUDICIARY  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NO. 446 OF 2015**



**BETWEEN**

**WISDOM MHANGO ..... PLAINTIFF**

**-AND-**

**OPPORTUNITY BANK MALAWI LTD ..... DEFENDANT**

**CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA**

Mr. Katsichi, of Counsel, for the Plaintiff

Mr. Ulaya, of Counsel, for the Defendant

Mr. Orbert Chitatu, Court Clerk

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**JUDGEMENT**

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Introduction

In the action herein, the Plaintiff is claiming damages for false imprisonment, defamation and malicious prosecution. The Defendant denies the claim.

Pleadings

The Plaintiff was employed by the Defendant. It is alleged that on or around 20<sup>th</sup> December 2012, the Defendant wrongfully directed and procured police constables of Mulanje Police Station to arrest the Plaintiff and take him into custody on a charge of forgery, uttering a false document and theft, then made by the Defendant.

It is further alleged that, acting upon the said direction, the said police arrested the Plaintiff and took him into custody at Mulanje Police Station where he was detained for 7 days and at Mulanje Prison where he was remanded until 28<sup>th</sup> December 2012 when he was released on bail and/or discharged from custody

The Plaintiff also state that he was taken before Mulanje Magistrates Court on the charges of forgery, uttering a false document and theft but he was acquitted. The Plaintiffs further state that the Defendant caused the Plaintiff to be wrongfully arrested and imprisoned and deprived of his personal liberty for 8 days.



The Plaintiffs furthermore state that at the time of the Plaintiff's arrest, the Defendant through his servants or agents called the Plaintiff all sorts of derogatory names thereby tarnishing his image and character. The alleged defamation has been particularised as follows:

- "a. Called the Plaintiff "thief")*
- b. Manhandled the Plaintiff during broad day light and in the presence of many people.*
- c. Paraded the plaintiff with handcuff from Chitakale satellite centre to Mulanje police."*

The Statement of Claim concludes by stating that the Plaintiff sustained severe shock and mental anguish and he was subjected to inhuman and degrading treatment and he suffered loss and damage. Particulars of degrading treatment have been expressed in the following terms:

- "a. slept without a blanket*
- b. slept near a bucket used as a toilet.*
- c. slept in a cell full of mosquitoes.*
- d. slept on wet floor.*
- e. slept in a cell full of bad smell."*

The Defendant denies each and every allegation of fact contained in the Statement of Claim, save for admitting that the Plaintiff was indeed its employee at the material time. The Defendant also avers that the arrest of the Plaintiff was independently made by the Police after their investigations. The Defendant further avers that the decision to prosecute the Plaintiff was never influenced by the Defendant but was independently made by the Police.

### Issues for Determination

The main issue for determination in the present case is whether or not the Defendant is liable to the Plaintiff for false imprisonment, defamation and malicious prosecution?

### Burden and Standard of Proof

It is trite that a plaintiff has the burden of proving the elements of his or her lawsuit: see **Commercial Bank of Malawi v. Mhango [2002-2003] MLR 43 (SCA)** wherein the Supreme Court of Appeal observed as follows:

*“Ordinarily, the law is that the burden of proof lies on a party who substantially asserts the affirmative of the issue. The principle was stated in the case of Robins v National Trust Co [1927] AC 515 that the burden of proof in any particular case depends on the circumstances in which the claim arises. In general, the rule is Ei qui affirmat non qui negat incumbit probatio which means the burden of proof lies on him who alleges, and not him who denies. Lord Megham, again, in Constantine Line v Imperial Smelting Corporation [1943] AC 154, 174 stated that it is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons. The judge said that the rule is adopted principally because it is but just that he who invokes the aid of the law should be the first to prove his case because in the nature of things, a negative is more difficult to establish than an affirmative. However, in a civil action the burden of proof may be varied by the agreement of the parties – see Bond Air Services Ltd v Hill [1955] 2 QB 417.”*

It is also commonplace that the standard of proof is that on a balance of probabilities. In **Miller v. Minister of Pensions [1947] 2 All ER 372**, Denning J said:

*“That degree is well settled. It must carry a reasonable degree of probability, not so high as is required in a criminal case. If the evidence is such that the tribunal can say; ‘we think it more probable than not’ the burden is discharged, but if the probabilities are equal it is not.”*

In short, this means that a plaintiff must prove a fact by showing that something is more likely so than not: See also the cases of **B. Sacranie v. ESCOM, Civil Cause No. 717 of 1991**, **Mr. Lipenga (Administrator of the Estate of Janet George) v. Prime Insurance Company Ltd, Civil Cause No. 1386 of 2005** and **Alfred Pensulo and Hastings Mawerenga v. United General Insurance Company Ltd, HC/PR Civil Cause No. 592 of 2015**.

It, therefore, follows that in the present case the burden of proof is on the Plaintiff as the party who has asserted the affirmative to prove on a balance of probabilities the respective elements of false imprisonment, defamation and malicious prosecution.

### Evidence

The Plaintiff was his own witness. He adopted his witness statement and the material part reads:

- “2. I was an employee of the defendant herein, working as a manager at Lujeri (Mulanje).
3. On the 20<sup>th</sup> December 2012, the defendants directed police officers from Mulanje police station to arrest me and take me into custody on a charge of forgery, uttering a false document and theft.

4. *Acting upon the said directions, the police arrested me and took me into custody at Mulanje police station where I was detained for 7 days and then sent to Mulanje prison where I was remanded for 1 day until 28<sup>th</sup> December 2012 when I was then released on bail.*
5. *During my arrest, I was manhandled in broad day light by the police in the presence of many people. I was handcuffed and made to walk from Chitakale Satellite Centre of the Defendant to Mulanje Police. Some of my colleagues called me derogatory names such as "thief" and thereby tarnishing my image and character.*
6. *I continued to go through the court proceedings, and I then appeared before Mulanje Magistrates court around 18<sup>th</sup> June 2015 where I was acquitted of all the charges forgery, uttering a false document and theft because the Defendant had approached the State that it wanted to conduct prosecution by itself but never did. There is now produced and shown copy of the court ruling exhibited hereto, marked "WM1".*
7. *Truthfully speaking there was no reasonable ground as to why I was arrested, detained and prosecuted considering that there was evidence of the said allegations the defendants put across.*
8. *It is clear that the prosecution was maliciously done as the Defendant enjoyed to keep me under the hook of criminal prosecution but never took any steps to bring forward evidence to support its claims.*
9. *As a result of this I had to stay in custody for 8 days was suffered considerable humiliation and mental anguish having been subjected to inhuman and degrading treatment. Thus during this period, I spent nights without blanket, I slept on wet floor in a cell which was full of mosquitoes. I was made to sleep near a bucket used by inmates as toilet.*
10. *I believe the arrest and consequent prosecution was maliciously done by the defendant as it immediately upon arrest dismissed me and even after I had presented to the offices that fact that I had been acquitted, they refuse to pay my arrears and even my salary.*
11. *I therefore, pray that this court grants me the damages as claimed in my statement of claim.*
12. *As a result of the groundless prosecution, I suffered loss and damage by facing fear and anxiety of the grounds of prosecution and conviction against me. The defendant immediately stopped paying me my salary and eventually terminated my services. The inconvenience and loss of liberty for 1 week, my image got tarnished as I was regarded as a criminal and as a result I cannot get any job anywhere. And currently I am still jobless since then till now*

13. *I therefore pray that this honourable court finds the Defendant liable for false imprisonment, malicious prosecution and defamation. I also pray that this court makes an order granting me special damages as pleaded and costs of this action."*

The Plaintiff tendered a copy of the ruling of the First Grade Magistrate Court sitting at Mulanje acquitting the Plaintiff, which was marked as Exhibit P1.

In cross-examination, the Plaintiff agreed that (a) he had the role of authorising loans, (b) some loans had been authorised not in line with laid down procedures and (c) he was the person who was responsible for the authorisation of the overdrafts.

Regarding his arrest, the Plaintiff stated that he was arrested by three police officers in the presence of bank officers. He conceded that he did not know that the police officers had been invited by the Defendant. The police officers told him that he was being arrested on a charge of forgery, uttering a false document and theft. When he was asked what he would do if he was a victim of a criminal offence, he said that he would report to the police. He further agreed that it would not be unusual to report to the police where there is suspicion that a criminal offence had been committed. He explained that he believes that it is the Defendant who directed the police officer to arrest him because he was arrested whilst he was within the Defendant's Bank premises.

Turning to his prosecution, he stated that it was police officers who took him to court. When questioned about the outcome of his claim against the Defendant, he stated that the Industrial Relations Court found that he had been fairly dismissed for authorising wrong transactions.

In re-examination, the Plaintiff stated that it is the Branch Manager who called him to go to the Bank. He believes it that it was the Bank which relayed to the police information leading to his arrest. Finally, he stated that the lower court acquitted him on all three counts of forgery, uttering a false document and theft.

The Defendant called one witness by the name of Arthur Ngosi. He adopted his witness statement and this formed his evidence in chief. The witness statement reads as follows:

- "1. *I am the Clients Portfolio Director in the defendant Bank.*
2. *I previously worked as the Defendant Bank's Chief Human Resources Officer.*

3. *I am aware that the plaintiff was arrested by the Police on or about 20<sup>th</sup> December, 2012.*
4. *The plaintiff was arrested for being suspected to have committed a criminal offence whilst working for the Bank.*
5. *The arrest was done by the police after the Bank lodged a complaint. The police commenced investigations and requested the bank to submit an audit report. Further investigations were conducted after the submission of the report which led to the arrest of the plaintiff. There is now produced an shown to me copy of the audit report which the Bank submitted to the Police marked "AN 1"*
6. *The Police requested bank officials to invite the plaintiff to come to the bank premises because the police did not know his whereabouts.*
7. *By simply inviting the plaintiff to come to the bank premises, the bank did not in any way direct or cause the arrest of the plaintiff. The bank only obliged to the police as a state institution request, and the employee was called.*
8. *The police went further to prosecute the plaintiff in a court of law.*
9. *The prosecution was conducted by the police and not the bank."*

Mr. Ngosi tendered a copy of the audit report referred to in his witness statement and this was marked as Exhibit D.

In cross-examination, Mr. Ngosi the stated that (a) he does not know where the Plaintiff was on 20<sup>th</sup> December, 2012, (b) he is aware that the Plaintiff was arrested based on records at the bank, (c) he does not know who at the bank lodged a complaint, (d) he does not know the date when police commenced investigations.

Regarding the audit report, he could remember neither the date when police requested for the audit report nor the date when the police submitted the audit report.

### Submissions

Counsel Katsichi submitted that the evidence shows that the Plaintiff was arrested and detained by the police at the instance of the Defendant. He was kept in custody for 7 days.

Counsel Katsichi further submitted that the Plaintiff was prosecuted at the instance of the Defendant and he was acquitted after full trial. He contended that the prosecution lacked proper and probable cause and the Defendant had throughout acted maliciously with the aim of seeing the downfall of the Plaintiff. To buttress his submissions, Counsel Katsichi cited the cases of **Matanda v. Sales Service Limited and Others** [1990] 13 MLR 219 and **Kaisi v. The Registered Trustees of Blantyre Adventist Hospital** [1996] MLR 97.

Counsel Ulaya submitted that the crucial issue in 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: **Manda v. Ethanol Company Ltd** [1993] 16(2) MLR 572 and **Mbewe v. Admarc** [1993] 16 (2) MLR 594.

Counsel Ulaya contended that there is no evidence in this case to prove that the defendant direct the police to arrest the Plaintiff. It might not be out of order to quote in full the relevant part of the Defendant's Final Submissions:

*"In paragraphs 3 and 4 of the witness statement the plaintiff stated that he was arrested by the police after the defendants directed them to do so. However, during cross-examination, the plaintiff admitted that it was the police who arrested him and that he did not know that there was a complaint by the bank to the police and that the police had been invited to the bank premises. Clearly, the plaintiff was not present when a complaint was made to the police, the police were being invited to the Bank premises. The plaintiff did not give any evidence on how the defendant directed the police to arrest him. He did not even say in his evidence that when he was being arrested the Bank officials actually directed the police to arrest him. On the contrary, the plaintiff during cross-examination stated that he believed that the bank directed the police to arrest him because the police arrested him within the premises of the bank.*

*My Lord, the law is settled that it is the duty of the plaintiff in a civil case to prove his allegations on a balance of probabilities. In the present case, the plaintiff did not bring any evidence that show that the bank officials directed the police to arrest him. We submit that the fact that the plaintiff was invited by the bank officials to the bank premises and that the police arrested him within the bank premises does not prove the fact that the defendant directed the police officers to arrest the plaintiff. The plaintiff should at least have brought evidence showing how the bank officials directed the police to arrest him.*

*Further, the uncontroverted evidence of the defence witness show that the bank laid a complaint to the police and after conducting their investigations, the police requested the bank to invite the plaintiff to its premises because the police did not know his whereabouts. It is our submission that by inviting the plaintiff to its premises where the plaintiff was arrested by the police, the bank did not thereby direct the police to arrest the plaintiff. The plaintiff would at least have testified that after he was invited by the*

*bank to its premises, he heard the bank officials direct or instruct the police to arrest him. No such evidence was brought before the court. Instead the plaintiff told the court that the police told him that they were arresting him on a charge of forgery, uttering a false document and theft.*

*In the premises, we submit that the court should find as a fact that the defendant did not direct the police to arrest the plaintiff and that the plaintiff was arrested by the police after a complaint from the defendant. Further, the court should find as a fact that the defendant had reasonable grounds for complaining to the police after the audit report had shown that the plaintiff did not follow some laid down procedures in approving loans. In fact, the*

*plaintiff admitted during cross-examination that he did not follow the laid down procedures in approving the loans and that his arrest was connected to those transactions."*

Turning to the Plaintiff's claim for defamation, Counsel Ulaya submitted that the claim lacks merit. His arguments were put thus:

*"The plaintiff's claim for defamation arises from his arrest. We have already submitted that the defendant did not direct the police to arrest the plaintiff. The plaintiff was arrested by the police after receiving a complaint from the defendant. The said arrest was made in exercise of the police duties after considering the defendant's complaint. As such the defendant should not be held responsible for the alleged defamation arising from the arrest. We therefore submit that the defendant should not be held liable for any defamation emanating from the arrest."*

With respect to the Plaintiff's claim for malicious prosecution, Counsel Ulaya submitted that the defendant is not liable. He invited the Court to note that the evidence before the Court is that after arresting the Plaintiff, the police took him to Court to prosecute him. Counsel Ulaya contended that there is no evidence to the effect that the prosecution was under the direction or instruction from the Defendant. To the contrary, so the argument went, it is the Plaintiff's testimony that the Defendant intended to prosecute the case privately but did not do so. In this regard, Counsel Ulaya submitted that it was the police that prosecuted the Plaintiff such that if it was malicious at all, liability for the same should not fall on the Defendant.

### Determination

#### *Claim for false imprisonment*

A defendant is liable for false imprisonment if he or she lays a charge against a plaintiff upon which it becomes the duty of the police to arrest the plaintiff. As was aptly put by Skinner, C.J. (as he then was) in the oft-cited case of **Chintendere v.**



**Boroughs Ltd [1981-83] 10MLR 215**, false imprisonment will have been proved where:

*“... the defendant, acting through its servants or agents, ordered the police to arrest the plaintiff, it is imprisonment by the defendant as well as the police and is a ground for an action of trespass against the defendant, but if the defendant merely stated the facts to the Policemen, who, on their own responsibility took the plaintiff into custody, this is no imprisonment or trespass by the defendant. It comes down to this: if the defendant’s servants made a charge upon which it became the duty of the police to act, then it is liable but it is not liable if they gave information and the police acted according to their own judgement.”*

In the present case, it is plainly clear from the evidence that the Defendant did not direct the police to arrest the Plaintiff. The Defendant merely complained to the police and the police, in execution of its duties, arrested the Plaintiff. The Defendant had reasonable grounds for complaining to the police because, as admitted by the Plaintiff during cross-examination, the Plaintiff authorized loans without following laid down procedures. Since the Defendant merely laid facts before the police, it is my finding that the Defendant is not liable for false imprisonment.

#### *Claim for defamation*

As to what constitutes defamation, Chatsika J. in **Nyirenda v. AR Osman and Co. [1993] 16(2) MLR 681** at 702 g to i had this to say:

*“Defamation has been defined, in different terms, as the publication of a statement which tends to lower a person in the estimation of right thinking members of the society generally, or which makes them shun or avoid that person. It has also been defined as any imputation which may tend to lower the plaintiff in the estimation of right-thinking members of society generally, to cut him off from society or to expose him to hatred, contempt, ridicule.”*

The evidence relied upon on the claim of defamation is to be found in paragraph 5 of the Plaintiff’s witness statement:

*“During my arrest, I was manhandled in broad day light by the police in the presence of many people. I was handcuffed and made to walk from Chitakale Satellite Centre of the Defendant to Mulanje Police. Some of my colleagues called me derogatory names such as “thief” and thereby tarnishing my image and character.”*

I am afraid that I cannot concur in this reasoning. Whether or not an alleged act or statement is defamatory has to be judged by the standard of an ordinary, right thinking member of society: see **Banda v. Pitman [1990] 13 MLR 34**. To my mind, it would be stretching the law of defamation beyond its limit to hold that

incarceration and/or court attendances, without more, constitute defamation. In any case, it has already been held that it is the Police that arrested the Plaintiff and took him into custody. In the premises, the Plaintiff has failed to prove defamation.

*Claim for malicious prosecution*

Malicious prosecution is a tort whereby one maliciously and without reasonable and probable cause initiates against another judicial proceedings which terminate in favour of that other and which result in damage to his reputation, person, freedom or property: See “Street on Torts”, 8<sup>th</sup> edn. Butterworths, 1988 at p28 and **Manda v. Ethanol Company Limited [1993] 16(2) MLR 572.**

A claim for malicious prosecution cannot succeed unless the plaintiff proves four essential elements, namely, (a) that the defendant prosecuted or initiated the criminal proceedings against him, (b) that the prosecution lacked reasonable and probable cause, (c) that the defendant acted maliciously, and (d) that the prosecution ended in the plaintiff’s favour: See **Mvula v. Norse International Ltd [1992] 15 MLR 331**, **Mbewe v. Admarc [1993] 16(2) MLR 594** and **Nthani v. City Council (1995) 1 MLR 161.**

In **Glinski v. Mc Iver (1962) A.C. 726**, the House of Lords held that, in order that the plaintiff may succeed on the issue of reasonable and probable cause, he must prove either that the defendant did not believe that the plaintiff was probably guilty of the offence or that a man of ordinary prudence and caution would not conclude, in the light of the facts in which he honestly believes, that the plaintiff was probably guilty.

The mere fact that the prosecution ended in favour of the Plaintiff is not enough. The Plaintiff has also to show that the Defendant acted maliciously, that is, the Plaintiff must prove that the Defendant had another motive other than of simply instituting a prosecution for the purpose of bringing him to justice: See **Stevens v. Midland Counties RY Co. (1854) 10 Exch. 352.** On the evidence before me, I was unable to find improper motive or wrong purposes on the part of the Defendant for having the Plaintiff prosecuted in a court of law. In the premises, the claim for malicious prosecution is unsuccessful.

Costs

Costs are awarded in the discretion of the Court but normally follow the event: s. 30 of the Courts Act as read with O. 62, r. 3(3) of the RSC. The Defendant has

successfully defended the case. I, therefore, award the Defendant costs for and incidental to these proceedings. It is so ordered.

Pronounced in Court this 12<sup>th</sup> June 2017 at Blantyre in the Republic of Malawi.

A handwritten signature in dark ink, appearing to be 'KN', enclosed within a large, loopy oval shape.

**Kenyatta Nyirenda**  
**JUDGE**