



IN THE HIGH COURT OF MALAWI
MZUZU DISTRICT REGISTRY: CIVIL DIVISION
CIVIL APPEAL NO 01 OF 2016

(Being Civil Cause No 175 of 2016 in the Senior Resident Magistrate Court sitting in Mzuzu)

BETWEEN

New Building Society Bank 1st Appellant
Moses Mphonde 2nd Appellant
-and-
Charity Jere (Suing On Behalf Of Goldwin Jere) Respondent

CORAM:

HONOURABLE JUSTICE D. A. DEGABRIELE

Mr. G.K Nyirenda

Counsel for the Appellants

Ms. C. Jere

Respondent, Unrepresented

Mr A. Kanyinji

Official Interpreter

Mrs Msimuko

Court Reporter

DeGabriele, J

JUDGMENT ON APPEAL

Introduction

This is an appeal from the decision of the Senior Resident Magistrate Court sitting at Mzuzu, which was pronounced on 18th August 2016. The Respondent successfully sued New Building Society Bank the 1st Appellant and Moses Mphonde the 2nd Appellant for loss of money in her account and for negligence. Both appellants were not satisfied with the decision of the lower court. The appeals were filed separately as each appellant had instructed the same counsel on different occasions. For easy management of the case, both appeals were heard at the same time and this is a consolidated judgement.

The grounds of appeal by the 1st Appellant are as follows;

1. In view of the circumstances of the case the lower court erred in finding that the 1st Appellant acted negligently in handling the Respondent's complaint.
2. In view of the facts of the case, the lower court erred in finding that the money in the Respondent's account would not have been withdrawn by the fraudster but for the act of the 1st Appellant only, and disregarding the conduct of the Respondent
3. An order requiring the 1st Appellant to pay the Respondent the sum of MK407,165 including damages awarded to be paid within 7 days from the date of judgment 18th August 2016 is excessive in the circumstances hence be varied as the court may deem it.

The grounds of appeal filed by the 2nd Appellant are as follow;

1. In view of the circumstances of the case at hand, the lower court erred in finding that the 2nd Appellant was not falsely imprisoned
2. The lower court erred in finding that the 2nd Appellant was not maliciously prosecuted
3. The lower court erred in finding that, in the circumstances of the case, the 2nd Appellant was not defamed

It is trite that appeals in this Court are by way of rehearing all the evidence that was before the court below, analysing the findings of fact and the law applied and then considering, in the light of all that took place during trial, whether the court below was within jurisdiction in reaching the conclusion it did.

The evidence in Brief

On 16th October 2015, the Respondent herein had gone to withdraw money from an ATM Machine at the 1st Appellant's Banking premises in Mzuzu in the company of his wife, Charity Jere. The Respondent made two withdrawals of MK40,000.00 and MK10,000.00. He inserted the ATM card for the 3rd time to check balances. While in the process, a person approached the Respondent and asked if the ATM was working. The Respondent, being a sickly person was shell shocked. The person then, unbidden, assisted the Respondent and told him to

insert his ATM card and enter his PIN number. The Respondent did as he was told and entered his PIN number in front of the person and checked that his balance was MK469, 000.00. The person retrieved the ATM card from the machine and gave it to the Respondent, who, without checking the ATM card, gave it to Charity Jere for safe keeping. Charity Jere then travelled to Lilongwe and the Respondent remained in Mzuzu.

The Respondent received a text message on 17th October 2015 that MK60,000 had been withdrawn from his account. The Respondent asked if Charity Jere had made the withdraw and she responded that she had not. The Respondent then received messages of withdrawals on 18th and 19th October 2015. He then instructed Charity Jere to go to the 1st Appellant bank in Lilongwe and inquire as to what was happening. On reporting the matter, Charity Jere then found out that the ATM card she had all along belonged to Godwin Hara from Karonga and she told the Respondent. On 19th October 2015, the Respondent reported the matter to the police who referred him back to the 1st Appellant bank in Mzuzu. After he explained to bank officials what had happened, and asked them to block the account, the officials from the 1st Appellant refused to believe him; and instead asked him to bring Charity Jere and the card. Charity Jere sent the ATM card in her possession by Bus in the evening of 19th October 2015 and the Respondent took it to the 1st Appellant on the next day. The 1st Appellant still refused to block the account. The last withdrawal was on 20th October 2015 after the matter had been reported on 19th October 2015. A total amount of MK275,165.00 was withdrawn from the Respondent's account.

On her way to Mzuzu on 22nd October 2015, Charity Jere recognized the 2nd Appellant as the person who had assisted them and swapped the ATM card. The 2nd Appellant had boarded the same bus as Charity Jere. She informed the Respondent who alerted the police. The 2nd Appellant was arrested on arrival in Mzuzu and the Respondent and his family were asked to come the next day to go and view the CCTV at the 1st Appellant. On 23rd October 2015 the CCTV footage showed that the 2nd Appellant was the one who had been withdrawing the money from the Respondent's account. The CCTV was viewed in the present of PW3 a police investigator, who stated that the person who had been withdrawing the

money was the 2nd Appellant. After identifying him and confirming the withdrawals, PW3, arrested the 2nd Appellant and instituted criminal proceedings against him. The 2nd Appellant was then put in custody. The 2nd Appellant was acquitted of the criminal charges because the 1st Appellant failed to provide this CCTV footage that was viewed stating that it was erased after 3 months.

PW4 was a security officer official from the 1st Appellant who confirmed that the CCTV was viewed. He stated that he was unable to identify that the person who withdrew the money was the 2nd Appellant because he had never seen him before. He also stated that the CCTV for the 1st Appellant banking premises in Mzuzu was not available at the time of the criminal trial as it had been erased. PW4 also stated that the official report was made on 20th October 2015, the last withdraw was made on the same day for the amount of MK16,000, and the account was also blocked on the same day from Lilongwe. PW4 also emphasized that the 1st Appellant always cautions its clients that for security reason, they should not disclose their PIN to another person.

The first defence witness was the Branch Manager for the 1st Appellant who stated that after receiving the report of withdrawals, he requested that the account be blocked from Lilongwe, but a further withdrawal of MK16,000 had been made after the matter was reported. He also stated that all clients are warned not to divulge their PIN numbers to strangers. He also stated that CCTV was part of their security measures but the culprit herein was aware of the CCTV and was disguising himself as he withdrew the money. The witness confirmed that the 1st Appellant had expert CCTV readers but they were not involved in this case.

The second defence witness was the 2nd Appellant who stated that he was a mechanic who had travelled to Lilongwe on 16th October 2015. On return to Mzuzu on 22nd October 2015 he was arrested by the police who took him to the station, telling him that they will explain the reason for the arrest at the police station. At the station he was told that he had stolen money from the Respondent. He was searched while handcuffed and his house was also searched but no NBS Bank ATM card was found in his possession. He stated that he watched the

CCTV and he was not the person that made withdrawals. He said that he was released on Bail on 19th November 2015. He was ill-treated by the police while in custody and his business suffered while he was in custody. He states that he was prosecuted and acquitted but that the community do not trust him anymore and treats him with contempt. He is now unable to do his business effectively.

The Law and Analysis of evidence

In civil cases, the burden of proof is on the plaintiff to prove that the defendant acted negligently. Lord Denning, as he was then, stated as regards the standard of proof in civil matters in the case of *Miller v Minister of Pensions* [1947] 1 All ER 372, at page 373 and 374, that:

"That degree is 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 more probable than not,' the burden is discharged, but if the probabilities are equal, it is not."

It is trite that he who alleges must prove his case and the plaintiff must prove on a balance of probability that the defendant acted negligently. Was the Respondent able to prove his claim of negligence against the 1st Appellant in the lower court? The 1st Appellant filed 3 grounds of appeal which I rephrase and address below.

i. Whether the lower court erred in finding that only the 1st Appellant and not the Respondent was negligent

In order to prove negligence, a claimant has to establish a number of elements which include that a duty of care existed between the parties, that there was a breach of that existing duty of care and that the harm or loss suffered by the claimant was a result of the breach of the duty to care, *see Kadawire v. Ziligone and Another* [1997] 2 MLR 139.

The evidence before this court shows that the Respondent maintained a bank account with the 1st Appellant and that through a contractual relationship, the Respondent was issued a card that allowed him to make transaction at ATM machines. The contractual relationship included the allocation of a PIN number which the Respondent was supposed to safeguard and not disclose to strangers.

The 1st Appellant owed a duty of care to the Respondent, that included that the duty not to disclose any confidential information of the Respondent as regards the Bank Account, and a duty of care not to act in such a way as to cause disturbances on the Bank account of the Respondent without instructions.

The facts as disclosed by the evidence are that while the Respondent was withdrawing money at an ATM machine, a man walked up to him and decided to help him. The Respondent had not asked for help. The man was able to observe and see the PIN number being inserted and when the transaction was done, the man pulled out the ATM card from the machine and handed it over to the Respondent who pocketed the card without checking Respondent's husband was negligent. At this point, the interaction was solely between the Respondent and the unidentified man, with Charity Jere looking on. Based on this brief description, I do agree with the 1st Appellant that the Respondent was negligent in his conduct. It is trite that all reasonable persons would do everything in their power to safeguard their savings. The Respondent herein had two options open to him; to either refuse the help and ask the man to move on, or to call for security guard to remove the man and his unsolicited help. Prudence would have required the Respondent to take either option, or indeed abort the whole process. After all, in her evidence, PW1 stated that if it were her, she would not have allowed the unidentified man to tamper with her transaction. I also wonder why the Respondent, being a sickly person, did not have the help of Charity Jere, his wife, but readily accepted the unsolicited help of a stranger? I find that by letting the stranger aid him, the Respondent opened himself to a great risk, which he came a reality.

I also find that failure to check an ATM card, which the stranger pulled out of the machine and gave to the Respondent, who proceeded to pocket the same without checking is a hallmark of carelessness and negligence. This was a total stranger who helped without being asked, how could the Respondent trust him that much. I do agree with the submissions of the 1st Appellant that the Respondent failed to act reasonably as would be expected in such circumstances. The Respondent owed himself a duty of care to ensure that he looked after his assets with utmost care. This, I find was the first level of the

Respondent's own negligence and the 1st Appellant at this point is not involved at all.

The second level of the Respondent's negligence arose after the first withdraw was made on 17th October 2015. The evidence discloses that after money amounting to MK60,000 was withdrawn, the Respondent had checked if Charity Jere had made the transaction. On getting a negative response, the Respondent had 3 options open to him. The first option was to request Charity Jere to check and ensure that the ATM card her custody. As seen in the evidence, Charity discovered that she had an ATM card belonging to Godwin Hara on Monday the 19th October 2015. I presume that Charity Jere was aware of the PIN number otherwise the Respondent would not have asked why she was withdrawing money. The second option was to instruct his Charity Jere who was the custodian of the ATM card to go to an ATM machine and change the PIN number. This is a service available to all card users in any of the banks that operate ATM machines. The third option was that the Respondent was to report the matter to the bank and have the account blocked on that day as it shows that the first withdraw was made at 5:00am, and banks remain open till 11 am on Saturdays. The withdrawals continued on 18th and 19th October and still no action was taken. I find that at this stage, the negligence was that of the Respondent and his wife and the 1st Appellant was not in any way negligent.

ii. Whether the 1st Appellant was negligent in handling the Respondent's complaint

The evidence shows that the first report was made to the 1st Appellant on Monday 19th October 2015 after a withdrawal, and the 1st Appellant was asked to block the card and the 1st Appellant refused to do so. According to DW1, it was hard to block the account on the date of the report because it was opened in Lilongwe and not Mzuzu. The instruction to the 1st Appellant's branch in Lilongwe block the account was issued on 20th October 2015. By the time the account was blocked, there was a withdrawal of MK16,000 done on the 20th October 2015. The lower court found that the 1st Appellant was negligent in the way they handled this particular complaint. I agree entirely. The 1st Appellant breached his

duty of care by refusing to take reasonable and urgent instructions from the Respondent. The instructions were meant to ensure that the Respondent's money was safe from any further fraudulent withdrawals. The 1st Appellant acted negligently, leading to the loss of the MK16,000 that was withdrawn on 20th October 2015 after the Respondent had lodged his complaint.

The lower court also found that the 1st Appellant was negligent because the 1st Appellant did not manage the crucial CCTV footage, and that this negligence led to the acquittal of the 2nd Appellant. The evidence shows that CCTV footage was considered on three crucial stages. The first time was when the Respondent went to view CCTV footage in the company of the police investigator, a security officer from the 1st Appellant and Charity Jere and the 2nd Appellant herein. According to evidence of PW1 and PW3, that is when the 2nd Appellant was identified and confirmed as the person who had been fraudulently withdrawing money from the Respondent's bank account. From this point on, the 2nd Appellant was formally charged with a criminal offence. The lower court found that because this particular CCTV footage was not made available at the criminal trial, and was said to have been erased after 3 months, the 1st Appellant was negligent. This Court agrees with this finding in part. Indeed the 1st Appellant was aware that a crime had been committed and the CCTV footage was essential as part of the evidence at court. As such, the 1st Appellant should have exercised prudence by holding on to the particular CCTV footage by making copies. As seen from the evidence, two clients of the 1st Appellant were being affected by this crime, namely the Respondent and Godwin Jere.

I had stated above that I agreed in part because the neglect at this level cannot be wholly apportioned to the 1st Appellant. There was the role played by the police investigator and the prosecutor. In a criminal process, any evidence has to be collected and documented. There is nothing in the court record that shows that the CCTV footage was in this instance requested, collected and safeguarded as part of evidence in the criminal matter. However, despite the lack of a formal request, the 1st Appellant still owed a duty to the Respondent and his clients to safeguard any CCTV footage that is connected to a commission of a crime.

The second crucial stage was that the 1st Appellant did not use the services of their expert CCTV footage readers in assisting the investigators. The lower court held that the 1st Appellant had been negligent in that they let a security officer who was not an expert in reading CCTV footage to go with the parties and view the same. Furthermore, the person who withdrew money from four different locations and the CCTV footage of each one of these areas was not viewed. I find that it was only the 1st Appellant who had the requisite records to show where the ATM card was used to access the Respondent's account. Indeed, it was incumbent on the 1st Appellant to do all that was possible to ensure that the person who had been withdrawing money was brought to book, bearing in mind that two of the 1st Appellant's bank clients had been affected. I find that the 1st Appellant had a prima facie duty to ensure that the CCTV footage from the other ATM could be viewed as well.

The third crucial stage was that the wrong CCTV footage was viewed in the lower court when dealing with a criminal matter concerning the 2nd Appellant. In this case, the 1st Appellant brought a different CCTV footage that concerned the case of Godwin Hara and not the CCTV as viewed by the parties on 23rd October 2015. The viewing of the wrong CCTV footage in court, coupled with the faulty identification description that the person who withdrew money was tall and stout meant that the criminal court had to acquit the 2nd Appellant for lack of clear identification. The 1st Appellant told the criminal court that the CCTV had been cleared after 3 months. A closer examination of the court record shows that the incident occurred in October 2015, that the matter was reported to police on 20th October 2015, that the CCTV footage at the Katoto Filling Station was inspected on 23rd October 2015; and the decision in the criminal case was handled down in June 2016. I am convinced that by the time evidence was being adduced in court the CCTV Footage had not been erased. As stated above, I find that there was contributory negligence between the 1st Appellant and the prosecutors.

In conclusion, I find that thein the circumstances, the Respondent was grossly negligent by not immediately reporting the matter and also by allowing another person to have access to the PIN number. His status as a sickly person does not excuse his negligence. It is also clear that he had a number of options open to

him which he did not use to safeguard his assets. The 1st appellant was also negligent in the fact that they failed to act promptly when the Respondent reported the matter to them, that they did not use their expert CCTV reader and did not inspect the other ATMs where money was withdrawn when such information was only within their knowledge. The 1st Appellant was also jointly negligent with the investigators and prosecutors in the way CCTV footage evidence was managed and handled in the criminal trial. This court finds that the 1st Appellant was not negligent for the money that was lost from 17th to 19th October 2015. The 1st Appellant was responsible for the loss through withdrawals of 20th October 2015.

iii. Whether the damages awarded can be varied

In the final analysis I find that there was contributory negligence. Both the Respondent and 1st Appellant were negligent. Based on the evidence on file, I place the contributory negligence at 50 percent each. To that end I order that the Respondent be refunded half of the total money lost, which is MK275,165 ÷ 2 = MK137,582.50.

The Respondent claimed MK150,000 as damages for the cost of the hearing the matter. The lower court awarded her special damages of the same MK150,000. The 1st Appellant claims that she should have been awarded costs as pleaded and not special damages. The 1st Appellant argues that the law requires that special damages must be strictly pleaded and be strictly proven. The evidence on the lower record shows the MK150,000 awarded was for transport costs and not special damages. I uphold the award of MK150,000.

The total will be ***MK287,582.50***, to be paid to the respondent within 7 days of this order.

Each party will bear the costs of the appeal.

Now I move on to the claims of the 2nd Appellant, Moses Mphonde. He has filed 3 grounds of appeal as outlined above. This Court is called upon to determine whether or not the appellant was falsely imprisoned, whether or not he was maliciously prosecuted and whether or not he was defamed.

a. Was the 2nd Appellant falsely imprisoned in this case?

In order for a person to successfully claim the civil wrong of false imprisonment, the evidence before the court must show that the person was arrested or imprisoned, by another person, without lawful justification or where a person is prevented, by another person, from exercising his right of leaving the place in which he is. The law also states that a defendant is not liable for false imprisonment if he merely conveyed information to the police of his suspicion and the police acted according to their own judgment by taking the plaintiff into custody, see *Matanda v Sales Services Limited and others* [1990] 13 MLR 219. An acquittal after the arrested and prosecution was made on reasonable suspicion does not mean that his initial arrest was unlawful. *Iphani v Makandi Tea and Coffee Estate* [2004] MLR 91 and *Mhango v Attorney General civil cause number 199 of 1994 (High Court) (unreported)*.

In the case of *James Saulosi and Goodwill Raketi v Bata Shoe Company (Mw) Limited, civil cause numbers 568 and 569 of 1987*, where Unyolo J as he was then stated that,

"The crucial issue in false imprisonment is to decide whether this defendant's servants merely stated the facts to the Police or whether they made charges against the plaintiff. It is accepted that conveying one's own suspicion to the police who, on their own responsibility, take the plaintiff into custody, is not making a charge. However, where the defendant acting through their agents or servants order the police to arrest the plaintiff, it is imprisonment by the defendant. The test is this: If the defendant's servants made a charge on which it became the duty of the Police to act then the defendant will be liable but they are not liable if they merely gave information and the Police acted according to their own judgment"

The 2nd Appellant claims that the lower court erred in finding that he was not falsely imprisoned. He claims that he was arrested on the basis of the report made by Charity Jere that he was the one who took her husband's ATM card, and used the same to steal the money. From the evidence, the matter of the theft or swapping of the ATM card had already been reported to the police and an active investigation was underway by the time the 2nd Appellant was arrested.

Again, the evidence of PW3 shows that criminal charges were drawn after the CCTV was viewed and PW3 who was an investigator was satisfied that the person who was withdrawing money was the 2nd Appellant. Therefore, I find that it was not the Respondent through Charity Jere who started the wheels of prosecution. The suspicion of Charity Jere was confirmed by the police investigator who then charged the 2nd Appellant.

This Court agrees entirely with the holding by Chatsika J, as he then, when he stated in the case of **Tembo vs Industrial Development Group (1) (1993) Vol 16(2) MLR 865 at 875** that;

"...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 while 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. If, on the other hand the citizen, instead of merely supplying information makes a charge to the effect that the suspect has committed a crime, and on the strength of the charge, the Police arrests the suspect, the suspect would have a cause of action of false imprisonment against the citizen who made the charge if it is subsequently found that the suspect is innocent...."

This Court finds that there was reasonable suspicion and the suspicion was confirmed by the police investigator who arrested the 2nd Appellant. The claim for false imprisonment therefore fails in its entirety.

b. Was the 2nd Appellant Maliciously prosecuted?

The Academic book, Clerk and Lindsell on Torts, define the ingredients of malicious prosecution as follows:

"Essentials of the tort of malicious prosecution: In action of malicious prosecution the claimant must show first that he was prosecuted by the defendant, that is to say, that the law was set in motion against him on a criminal charge. Secondly, that the prosecution was determined in his favour; thirdly, that it was without reasonable and probable cause; fourthly, that it was malicious. The onus of proving every one of these is on the claimant".

It was held in the case of *Matanda v Sales Services Limited and others* [1990] 13 MLR 219 that a tort of malicious prosecution is proved if the plaintiff shows that he was prosecuted by the defendant, that the prosecution ended in the plaintiff's favour, that there was no reasonable or probable cause for the prosecution and that the prosecution was actuated by the defendant's malice, that is, improper motive. The 2nd Appellant claims that the lower court erred in finding that the Appellant was not maliciously prosecuted. The evidence on record shows that in the criminal case, the CCTV footage that was shown to the court was not the one that had been viewed by the Respondent, the investigating officer (PW3), PW4, Charity Jere and the 2nd Appellant. It was a CCTV footage from Karonga. The reason was that the relevant CCTV footage had been erased because it was beyond 3 months. In this scenario, the 2nd Appellant was acquitted. It is clear that had the right footage been viewed by the lower court hearing the criminal matter, the 2nd Appellant would not have been acquitted. From the evidence on record, the prosecution was not malicious. It was premised on the belief that a crime had been committed and that the 2nd Appellant was the one who committed the crime. Bearing in mind the evidence before me, I must find that there is no evidence to the effect that the prosecution was malicious.

c. Was the 2nd appellant defamed in the circumstances of this case?

Defamation is the publication of a statement which tends to lower a person in the estimation of right-thinking members of society generally; or which tends to make them shun or avoid that person. In the case of *John Kiwa vs BAT (Malawi) Ltd, Civil Cause Number 322 of 1987 (High Court – unreported)* the former Chief Justice Makuta said: -

"In so far as defamation of character is concerned, it is clear that the allegation of theft was false and it must certainly have affected his reputation. ... The right of each man, during his lifetime, to the unimpaired possession of his reputation and good name is recognized by the law. Reputation depends on opinion, and opinion in the main depends on the communication of thought and information from one man to another. He, therefore, who directly communicates to the mind of another, matters untrue and likely in the natural course of things substantially to disparage

the reputation of a third person is, on the fact of it, guilty of a legal wrong, for which the remedy is an action of defamation".

The 2nd Appellant claims that the lower court erred in finding that under the circumstances of the case the Appellant was not defamed. He claims that Charity Jere told the police that the Appellant was a thief in a depot and this action caused injury to his reputation. He also claims that being handcuffed and taken to the Police Station in full view of the people injured his reputation. In the present case, the evidence shows that after Charity Jere had pointed out the 2nd Appellant as the person who had swapped the ATM cards and withdrew money from the Respondent's account, the police arrested him. The Respondent, through Charity Jere or otherwise did not publish any statement which tended to lower the 2nd Appellant's reputation among right thinking members of the society. Indeed, the 2nd Appellant felt embarrassed or put on the spot but that was the consequences of a public arrest not publication of the fact that he was a thief.

Furthermore, the matter was then concluded to be true by the police investigator who instituted criminal proceeding after being satisfied that the CCTV viewed on 23rd October 2015 showed that the 2nd Appellant was the one withdrawing money from the Respondent's account. Therefore, I do not see any evidence in this matter that suggest that the report to police was untrue, and that it was done with malice with an intention to damage the reputation of the 2nd Appellant

Looking at the facts in the present instance, it is my view that the 2nd Appellant failed to prove in the lower court that he was falsely imprisoned, maliciously prosecuted and defamed. Likewise, I come to the same conclusion. In the final analysis the 2nd Appellant's appeal fails in its entirety.

I award costs of this appeal to the Respondent.

Made in Chambers at Mzuzu Registry this 11th day of December 2017


D.A. DeGarniele

JUDGE