



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL DIVISION

INJURY CAUSE NO. 188 OF 2016

**BETWEEN**

ROBERT PANYA BANDA.....1<sup>ST</sup> PLAINTIFF

DOYA MAKONDE TSA.....2<sup>ND</sup> PLAINTIFF

CHARLES YOTAMU.....3<sup>RD</sup> PLAINTIFF

DANEX PHIRI.....4<sup>TH</sup> PLAINTIFF

**-AND-**

ATTORNEY GENERAL .....DEFENDANT

**CORAM: THE HON. JUSTICE D.T.K. MADISE**  
Mrs. Mauluka, Counsel for the Plaintiff  
Defendant/Absent  
Mrs. M. Manda Official Interpreter

---

Madise, J

**JUDGMENT**

Registrar of High Court  
Civil Registry  
12 MAR 2018  
P.O. Box 30244  
Chichiri, Blantyre

**HIGH COURT  
LIBRARY**

## **1.0 Introduction**

1.1 Mr. Robert Panya Banda and three others commenced these proceedings by way of a writ of summons on 29<sup>th</sup> April, 2016 against the Attorney General (Malawi Police Service) seeking damages for false imprisonment and malicious prosecution. The Attorney General filed a defence in which they denied all the allegations leveled against.

1.2 When trial commenced the Attorney General applied to file their trial bundle out of time. I reluctantly granted them the prayer. At the expiry of the 14 days which they were given the Attorney General failed to comply with the directions of the Court. When trial resumed on 19<sup>th</sup> March, 2018 the Attorney General did not show up and no reasons were given for their non attendance. The Plaintiffs produced an acknowledgement of service of the notice of hearing and I allowed the plaintiffs to present their case. It was apparent the Attorney General was not interested to defend this matter. I now gave my opinion on the merits.

## **2.0 The Facts**

2.1 The facts which are not in dispute are that the plaintiff's were arrested by the police on 17<sup>th</sup> July, 2012 on allegations that they were among Democratic Progressive Party supporters who had carried panga knives around Blantyre City prior to the national wide demonstrations which had occurred on 20 July 2012. The plaintiff's were then kept in custody up and until the 23<sup>rd</sup> July, 2012 when they were taken to court. They were charged with an offence of carrying prohibited/offensive weapon contrary to section 81 of the penal code. On the same day the plaintiff's were released on bail.

2.2 Three years down the line on 28<sup>th</sup> April, 2015 the Plaintiffs were unconditionally discharged by the court below on the ground that the State

had failed to prosecute the case within a reasonable. The Plaintiffs further claim that their prosecution was malicious because it was devoid of reasonable or probable cause. The plaintiffs further allege that they suffered untold discomfort, humiliation and loss of liberty for 6 days.

**2.3** As earlier stated the Attorney General has not defended this action. Why they have failed to do so leaves for questions than answers.

### **3.0 The Issues**

**3.1** There are three main issues for determinations before me.

- 1) Whether there was false imprisonment
- 2) Whether there was malicious prosecution
- 3) If the answers are in the affirmative whether damages are payable and for how much.

### **4.0 The Law**

**4.1** The burden and standard of proof are set out at the beginning of the trial by the state of pleadings remaining uncharged throughout the trial. He who alleges the existence of certain facts must be the first to prove his case. See Miller vs Minister of Pensions (1947) AUER 372.

#### **4.2 False Imprisonment**

**4.2.1** This tort is the deprivation of liberty or freedom of movement without lawful cause. There must be no justification whatsoever why the right to freedom of movement should be restrained. The question before me is whether the police can violate this right when they arrest on reasonable suspicion. Obviously the answer is in the negative. False imprisonment is the infliction of bodily restraint which is not expressly or impliedly authorised by law. See W.A. Mzungu vs Blantyre Print and Publishing Co. Civil Cause No 1577 of 1995 (Unrepresented)

**4.2.2** The above is the restraint of liberty of movement without justification at law or otherwise. It is the confinement of an individual without his consent or authority of law. There two element must be established.

a) Imprisonment

b) False hood.

This entails that if the police arrest an individual on reasonable or probable cause that does not amount to false imprisonment until it is proved that the allegations which led to the arrest were false. This therefore means that the arrest was null and void from the very beginning. For the plaintiffs to succeed they must show to the court that the arrest was unlawful.

#### **4.3 Malicious Prosecution**

**4.3.1** The tort operates where there is prosecution which is done maliciously and without lawful or reasonable cause. Where an arrest is made without reasonable cause which ends in prosecution and the person so charged is acquitted he may seek remedy for malicious prosecution. Apart from proving that it was the defendant who was responsible for the laying of the charge the plaintiff must further show that the prosecution was without reasonable cause.

**4.3.2** In an action of this nature the Plaintiff must show first that he was prosecuted by the defendant. That is to say that the legal process was set in motion against him on a criminal charge. Secondly hat the prosecution was determined in his favour. Thirdly that it was without reasonable cause and was malicious.

**4.3.3** In Danby vs. Beardsley (1880) 43 LT. 603 Lopes J. described a prosecutor as a man who is actively involved and instrumental in putting the law in motion without probable cause. Mere suspicion is not a justification to commence a prosecution. See Meering vs. Graham White Aviation Co[1919] 122 LI at 56. Malice does not entail hate or spite. The Plaintiff need not prove this. The Plaintiff must simply prove absence of a proper motive and absence of reasonable cause.

For the plaintiffs to succeed in this claim, they must prove the following.

- a) Prosecution
- b) Discharge or acquittal
- c) That the prosecution lacked merit as it was based on unreasonable and non probable cause. The plaintiff's must show that the defendant prosecuted them maliciously.

**4.3.4** On defamation the plaintiffs have argued about this claim but they did not include it in their statement of claim. The claim therefore does not form part of the pleadings.

## **5.0 The Finding**

**5.1** There is no dispute that the Plaintiff were arrested by the police on allegations that they exhibited dangerous weapons around Blantyre on 17<sup>th</sup> July, 2012. They were kept in custody for 6 days. The Attorney General at first wanted to defend this matter but they eventually grew cold feet. I do not know why. The plaintiff's were then taken to court where they were charged and eventually released on bail.

**5.2** No prosecution took place for 3 years and the magistrate court discharged them on 28<sup>th</sup> April, 2015 for want of prosecution. They now seek damages for

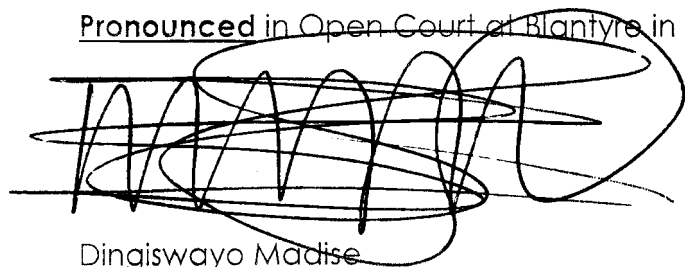
false imprisonment and malicious prosecution. There is no doubt in my mind and I so find on a balance of probabilities that a case for false imprisonment has been made out. If the police had a case against the plaintiffs they could have prosecuted them. They never did this for a period of 3 years.

5.3 If the police had a good case based on reasonable and probable cause they could have prosecuted the plaintiffs. All the police did was to take the plaintiffs to court for plea and nothing else. The plaintiffs were eventually discharged from the criminal case for want of prosecution. I find no better case of malicious prosecution than this. The plaintiffs must carry the day. The evidence and the law tilt towards the plaintiffs.

5.4 I therefore award damages to the plaintiff's for false imprisonment and malicious prosecution to be assessed by the Registrar. I farther award the plaintiff's costs of this action.

I so order

Pronounced in Open Court at Blantyre in the Republic on 21<sup>st</sup> May, 2018.

A large, stylized handwritten signature in black ink, consisting of multiple overlapping loops and horizontal strokes.

Dingiswayo Madise  
**JUDGE**