



REPUBLIC OF MALAWI
MALAWI JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL DIVISION
CIVIL CAUSE NO. 325 OF 2016

BETWEEN

ASK NATHANIEL PHIRI.....CLAIMANT

-AND-

KAPALASA FARM LIMITED.....DEFENDANT

CORAM: THE HON. MR. JUSTICE D. MADISE

Mr. Chimowa Counsel for the Claimant,
Mr Mwagomba, Counsel for the Defendant
Mr. M. Mbekeani, Official Interpreter

Madise, J

JUDGEMENT

1.0 Introduction

- 1.1 On 23rd August 2016 the plaintiff in this matter commenced this action by way of a writ of summons against the defendant Kapalasa Farm limited claiming damages for false imprisonment, malicious prosecution, defamation and costs. The defendant has disputed the claim and has called on the party to prove his case.
- 1.2 The plaintiff's case has been particularised in the statement of claim which has accompanied the summons. The denial by the defendant is spelt out in the statement of defence which was filed in response to the summons and the statement of claim.

2.0 The Facts

- 2.1 The plaintiff told the Court that he was employed by the defendant at their farm as a livestock officer from 21st xxxxx2010. His responsibilities included among other things taking care of livestock and selling the animals on behalf of the defendant. His immediate boss was the Managing Director Mr Lars Gruner. In January 2013 to 31st October 2013 the Managing Director left for Zambia leaving 61 heads of cattle.
- 2.2 During the time the Managing Director was away the plaintiff sold some cattle while others died. On arrival of the owner Mr Gruner only 39 cattle were left. Mr Gruner then demanded an account from the plaintiff in writing.
- 2.3 While the plaintiff was preparing the report as demanded by Mr Gruner the latter apparently laid a charge against the plaintiff at Namadzi Police Station.
- 2.4 Consequently, the police arrived at the farm and arrested the plaintiff. He was incarcerated in police custody from 1st November 2013 to 5th November 2013. According to the plaintiff the charge against him was theft of cattle. On 5th November 2013 he was granted court bail.

On 27th June 2014 he was taken to Chiradzulu magistrate court where he was found with no case to answer and he was acquitted.

- 2.5 The plaintiff claims that as a result of all this criminal process which was initiated by the defendant he has suffered damage. He now seeks damages for false imprisonment, malicious prosecution and defamation.
- 2.6 The plaintiff rendered in evidence his bail bond and a copy of the judgement from the court below acquitting him of the charge of theft of cattle.
- 2.7 The defence called four witnesses. Mr. Barnet Mataya stated that he worked for the defendant's farm and that the plaintiff was managing the heads of cattle. After Mr. Gruner had returned from Zambia on 31st October 2013 the plaintiff was not around to brief the owner on the status of the cattle. The plaintiff then appeared on 1st November 2013 and Mr. Gruner demanded to know the number of cattle. Upon checking the records, it was discovered that 22 cattle were missing.
- 2.8 PW1 stated that together with Mr. Gruner they recorded on a DVD the interview they had with the plaintiff where he confessed that he could not account for the missing 22 cattle. The said DVD was tendered in as evidence.
- 2.9 PW1 stated that during the interview the plaintiff failed to produce any documentary evidence that the alleged cattle were sold and the money was deposited in the farm's account. There is no dispute that the plaintiff gave written a report in which he admitted that he could not explain as to the 22 missing cattle. Thereafter the matter was reported to the police and the plaintiff was arrested after the police visited the farm and did their own investigations.
- 2.10 Anne Unyolo told the Court that she has been working at the farm for 14 years. She stated that butcher men from around Thondwe used to

visit the farm to buy cattle and the animals were collected at night or early in the morning.

- 2.11 She further stated that she was present when the police arrived at the farm using the defendant's vehicle as the police did not have fuel for their vehicle.
- 2.12 Upon arrival the police went to meet Mr Bola Manyowa at the kraal and they had a discussion with him. She stated that when the police arrived they did not accuse the plaintiff of theft in full view of the other workers.
- 2.13 In conclusion she stated that after the plaintiff was arrested he was dismissed from the farm. He later started work at a New Farm Estate which was close to Kapalasa farm. He later worked at St Paul's apostle seminary in Mangochi. Therefore, it was not true that no one wanted to employ him.
- 2.14 Smart Bwirani stated that he was present when Mr. Gruner went to Namadzi police to report about the missing 22 cattle. That Mr. Gruner told the police that it was the plaintiff who was incharge of the animals and failed to account for the 22 missing cattle. Smart Bwirani stated that Mr. Gruner did not report that the plaintiff had stolen the cattle. Thereafter the police asked the defendant for a lift to the farm as the police vehicle had no fuel.
- 2.15 Together with Detective inspector Chauya and Detective Magombo they went to the farm to investigate the matter. After checking the records at the farm, the plaintiff failed to account for the missing 22 cattle.
- 2.16 Bwilani denied being instructed by the defendant's Managing Director to arrest the plaintiff. That the police had acted on their own judgement when they decided to arrest the plaintiff.

- 2.17 Bwilani also told the Court that the police also arrested Chigamba who was allegedly buying the cattle at night from the plaintiff. After the arrest the plaintiff was prosecuted but he was acquitted of the charge of theft of cattle.
- 2.18 The last but one witness for the defence was Patrick Magombo who was working for Namadzi Police Station at the material time. He stated that he was present when Mr. Gruner reported about the missing 22 cattle at his farm. His evidence was not different from that which was given by his fellow police officer Mr. Bwilani. I will therefore not repeat what was stated in Court.
- 2.19 In conclusion of the defence's case Mr. Gruner told the Court that the plaintiff was in charge of the cattle. That in January 2013 he left for Zambia and returned on 31st October 2013. On his return the plaintiff could not account for 22 cattle.
- 2.20 The plaintiff then signed a written report where he expressly stated that he could not explain on the missing 22 cattle. Mr. Gruner told the Court that the answers the plaintiff gave were all recorded in a DVD which was presented to the Court.
- 2.21 Thereafter he lodged a complaint at Namadzi police. Since the police did not have transport he provided his vehicle. Upon arrival at the farm the police interrogated the plaintiff and later arrested him.
- 2.22 Mr. Gruner denied giving instructions to the police to arrest the plaintiff. He denied instructing the police to prosecute the plaintiff who was later acquitted by the magistrate court.

3.0 The Issues

- 3.1 There are four main issues for determination before me,
- 1) Whether there was false imprisonment.
 - 2) Whether there was malicious prosecution.
 - 3) Whether there was defamation.

4) Whether damages are payable in the event that the answer to the above are in the affirmative.

4.0 The Law

4.1 The burden and standard of proof in civil matters is this. He/she who alleges must prove and the standard required by the civil law is on a balance/scales of probabilities. The principle is that he who invokes the aid of the law should be the first to prove his case as in the nature of things, a negative is more difficult to establish than an affirmative.

4.2 As Denning J, stated in Miler vs. Minister of Pensions [1947] 2 A II E.R. 372.
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

4.3 Similarly the degree of probabilities will depend upon the subject matter. When a civil court is deciding on a charge of fraud, it naturally follows that a higher degree of probability is required than when deciding an issue of negligence. However, the standard does not reach as high as that required in a criminal court which is beyond a reasonable doubt. The general principle is that the court must require a degree of probability which suits the occasion and is commensurate with the law and facts.

4.4 False imprisonment

False imprisonment is a form of trespass to the liberty of a person against his/her will. It causes indignity and discomfort to the person so restrained. It is an imprisonment which is not sanctioned by law. 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.

4.6 The question before me is whether the police can violate this right when they arrest on reasonable suspicion or probable cause. Obviously the answer is in the negative. False imprisonment is the infliction of bodily restraint which is not expressly or impliedly authorized by law. See W.A. Mzunga vs. Blantyre Print and Publishing Co. Civil Cause No 1577 of 1995 (Unrepresented)

4.7 In Kadango vs. Stage Coach {2000-2001} MLR 182, Tembo J as he was then called "The defendant will be liable for false imprisonment if they laid a charge against the plaintiff on which it became the duty of the police to arrest the plaintiff. They will not be liable if all they did was to give information to the police about the loss of money at their premises.

4.8 Suffice to say that there is substantial difference at law between giving information to the police and laying a charge against a person or persons. Where the police on their own investigations and on reasonable suspicion or ground make an arrest, the tort of false imprisonment cannot stand.

4.9 The plaintiff must show to the court that there was undue pressure from the defendant to the police to effect such an arrest. Once a court is satisfied on a balance of probabilities it will rule in the plaintiff's favour and it will award damages

4.10 Malicious prosecution

The tort operates where there is prosecution which is done maliciously and without lawful or reasonable cause. Where an arrest is made without reasonable and probable cause which ends in prosecution and the person so charged is acquitted he may seek remedy for malicious prosecution.

4.11 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. However not every acquittal will entitle the plaintiff to seek redress for malicious prosecution. There must be shown that there was no reasonable cause to arrest the plaintiff in the first place. See opinion of Kapanda J as he then called in Iphani vs. Makandi Tea Estate [2004] MLR 91 AT PAGE 100.

Accordingly the arrest of the plaintiff cannot in any way be described as unlawful or wrongful. Further it is my understanding of the law that the fact that the plaintiff was later acquitted does not mean that his initial arrest by the defendant was unlawful.

4.12 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 which was baseless in law was set in motion against him on a criminal charge at the instance of the defendant. Secondly that the prosecution was determined in his favour. Thirdly that it was without reasonable cause and was Malicious.

5.12 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.

5.13 The tort of defamation

It is settled law that a defendant is liable for defamation if he publishes to some person other than the plaintiff some false and defamatory

story which injures the plaintiff's reputation. Three elements must be present for a defendant to be liable for defamation.

1. False story
2. Publication to third party
3. Injury to reputation.

5.14 It is the intentional false communication or publication of a story that injures another's reputation or good name. Defamation holds a person to ridicule, scorn and contempt in a respectable and considerable part of the community. (Black Law Dictionary 6th Ed. 1990).

5.15 In Uren vs. John Fairfax & Sons Ltd [1967] 11 CLR 118, 150 Windeyer, J.

It seems to me that properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was publicly defamed. For this reason, compensation by damages operates in two ways: - as vindication of the plaintiff to the public and as a consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money.

5.16 In the end the Plaintiff must prove the following elements for a tort of defamation to stand.

(a) A statement made by the defendant

(b) The statement must refer to the plaintiff

(c) The statement must injure the plaintiff's reputation (false/malicious statement) in the eyes of right thinking members of society.

(e) There must be publication of the false statement to a third person.

6.0 The Finding

6.1 According to the evidence there is no dispute that the plaintiff was working for the defendant as a livestock manager. There is no dispute

that when Mr. Gruner the Managing Director was away to Zambia, 22 heads of cattle went missing from the farm. There is no dispute according to the plaintiff's report and the DVD recording of the interview that the plaintiff failed to explain how the 22 animals went missing.

- 6.2 The plaintiff claims the animals were sold to pay for the operational costs at the farm. No documentary evidence has been presented to substantiate this claim. There is no dispute that the Managing Director reported this matter to the police. There after the plaintiff was arrested and locked up from 1st November 2013 to 5th November 2013. There is no dispute that the police used the defendant's vehicle to go to the farm where they arrested the plaintiff.
- 6.3 The question before me is whether the defendant laid a charge against the plaintiff at the police or the plaintiff was arrested after the police had carried out their own investigations?
- 6.4 According to the evidence before me and on a balance of probabilities I find that the defendant did not instruct the police to arrest the plaintiff. The defendant simply made a complaint at the police and upon their own judgement and after investigations, the police arrested the plaintiff.
- 6.5 The fact that the police used the defendant's vehicle in itself is not enough to lay blame on the defendant or ~~a~~ charge him with false imprisonment. Had the police not gone to the farm my decision could have been different therefore find that the defendant is not liable for false imprisonment.
- 6.6 When the police prosecuted the plaintiff, he was acquitted by a competent court at Chiradzulu. The evidence before me does not show that the defendant had instructed the police to prosecute the plaintiff. On their own motion, the police took the plaintiff to the court. The fact that the plaintiff was acquitted in itself is not enough to

accuse the defendant of malicious prosecution. For that claim to stand there must be evidence that there were no merits in the prosecution and that the same was done maliciously.

6.7 In considered view, I find that the evidence was strong enough to warrant prosecution notwithstanding the fact that there was an acquittal. The fact remains that 22 cattle were missing and there was no reasonable explanation given to the defendant. How the plaintiff was acquitted leaves more questions than answers.

6.8 In my considered view there were strong grounds for the police to arrest and prosecute the plaintiff and I see no malice in their actions. In this regards the claim for malicious prosecution must fall.

6.9 In view of the above findings the claim for defamation automatically falls as the police were within their lawful mandate when they arrested and prosecuted the plaintiff the acquittal notwithstanding.

6.9 In these premises the plaintiff has failed to convince this Court on a balance of probabilities on his allegations. The claims have no merit based on the evidence presented before me and the relevant law on the subject matter. I therefore dismiss this action.

7.0 Costs

7.1 There are the exclusive preserve of the court but they normally follow the event. The plaintiff is condemned in costs.

I so order.

Pronounced in open Court at Blantyre in the Republic on 16th January 2019.



Dingiswayo Madise

Judge.