



IN THE REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
MZUZU REGISTRY: CIVIL REGISTRY  
Civil Cause No. 80 Of 2012

Between

Clifford Kajiwa ..... 1st Claimant  
Watson Balakasi ..... 2nd Claimant  
-and-  
ESCOM..... Defendant

**CORAM:**

**HONOURABLE JUSTICE D. A. DEGABRIELE**

Mr. G. Kadzipatike

Counsel for the Claimant

Ms. S. Mtambo

Counsel for the Defendant

Mr. A. Kanyinji

Official Interpreter

Mrs. R. Luhanga

Court Reporter

***DeGabriele, J***

**JUDGEMENT**

**1. Introduction**

1.1. Through a writ of summons filed in this Court on 15 June 2012, the Claimants herein, Clifford Kjiwa and Watson Balakasi commenced this action suing the Defendant on vicarious liability for the alleged tort of false imprisonment, and defamation because the servants or agents of the Defendant caused the Claimants to be arrested without a legal basis. The Claimants did not

specifically plead malicious prosecution but raised the same in their skeleton arguments.

1.2. The Defendant denied liability stating that the claimants were arrested by the Police, after the said police had conducted proper, prudent and independent investigations into the alleged theft of the Defendant's property.

## **2. The Claimant's case**

2.1. The Claimant filed a statement of claim which reads as follows:

1. *THAT plaintiffs were at all material times employees of the Defendants, Electricity Supply Corporation of Malawi (ESCOM) based in Mzuzu.*
2. *The defendant is sued vicariously for offences committed by its agents/ employees who maliciously alleged and cause the plaintiffs to be arrested and prosecuted without basis.*
3. *It was baselessly alleged by the Defendant's agent/employees that on or about the 2<sup>nd</sup> say of June, 2011, at Luwinda Sub-station MAREP stores in the city of Mzuzu being persons employed by the defendants as security guards stole 25 metres of aluminium copper wire valued at K49, 063.00 the property of the said defendant.*
4. *On or about the 5<sup>th</sup> day of June, 2011, the plaintiffs were arrested and remanded by the Mzuzu Police based on the said allegations and were charged with the offence of theft by public servant contrary to section 286 of the penal code.*
5. *The plaintiffs were later charged before the Senior Resident Magistrate's court sitting at Mzuzu on the said charged in the criminal case number 92 of 2011. The state versus Clifford Kajiwa and Watson Balakasi where after a full public trial, the two were acquitted of the said offence.*
6. *On the foregoing premises, the plaintiffs have suffered loss and damage caused by the defendants servants or agents for which the defendants vicariously basic.*

### **7. PARTICULARS OF OFFENCE**

1. *The plaintiffs suffered loss of dignity against their constitutional right under section 19 (1) of the Malawi Constitution.*

II. *The plaintiff's suffered loss of reputation as a result of the arrest, false imprisonment and prosecution as the public regards them as thieves and has since lost trust in them.*

III. *The plaintiffs have suffered false imprisonment as they both were under police custody.*

**WHEREFORE** the plaintiff claims:

(a) *(a) damages for breach of his constitutional right to dignity*

(b) *General damages for defamation*

(c) *Special damages for defamation*

(d) *Damages for false imprisonment and*

(e) *Costs of this action*

2.2. The first witness for the Claimant was Clifford Majawa who stated that while he was off duty on 1 June 2011, his colleague Gift Chilasa asked him to work on 2 June 2011, covering the shift of the said Gift Chilasa. The driver went to pick Gift Chilasa on 2 June 2011 because he did not know the witnesses supposed to work there. Gift Chilasa reported for duty as usual at 6:00am. The witness then asked Watson Balakasi to take him to Gift Chilasa's work place by bicycle. When the witness arrived around 7:20 am, the night shift had already handed over all property to Gift Chilasa, who in turn handed over to the witness when he arrived. The stores clerk came later and he asked the witness if everything was in order. The witness stated that all was well. Later the security sergeant came and asked the witness what had happened. Later Watson Balakasi called the witness to tell him that he had to go to the police to record a statement. When he had recorded the statement, the security sergeant got him arrested and the witness stayed for 2 days at Mzuzu Police Station. He was granted bail on 7 June 2011. The witness stated that he was arrested by the Defendant and its agents who handed him over to the Police. The witness states that he lost his liberty and freedom when he was in the cell and when he was reporting for bail. He also lost his job with the Defendants.

2.3. In cross examination he stated that his colleague **Gift Chilasa had called him about swapping shifts** on 1 June 2011 while he was off duty. However, the same Gift remained at work on the said shift on 2 June 2011. On 2 June 2011

and on taking over the shift, the witness arrived at work at 7:20am, but he was supposed to report for duties at 6:00am. The witness met with Gift Chilasa and they patrolled the perimeter and did handovers. He then called the driver to take him home for a night shift but the driver did not come. He stated that the storeroom was always locked and the guards just checked outside. He stated that the copper wire was not stolen as it was there at the yard. He attended a disciplinary hearing and was arrested by CID officers and was later found with a case to answer by the Magistrate Court in Mzuzu. In re examination he stated that the driver was unaware of the shift changes. The aluminium wire was stored in drums outside but the copper wire was inside the tin-house/storeroom.

2.4. The second witness for the Claimants was Watson Balakasi. He told the Court that he had given his bicycle to the 1st Claimant Clifford Kajiwa so he could report for work and the bicycle had to be returned to him by Gift Chilasa. When he was at the workplace of Clifford Kajiwa, he saw Clifford working with two temporary employees and he saw Mwahimba join them. The next day he got a call from the security sergeant that he should write a report concerning stolen copper wire. He states that once the statement was written, the Defendant and his agents caused their arrests. He stayed in police custody for 2 days. He was charged and prosecuted for the offence of theft but was acquitted. In cross examination he stated that he stated that he was arrested by the police in relation to the theft of copper wire at the substation at Luwinga. He stated that Clifford Kajiwa and Mwahimba found him at the gate but he was going to his field. In re-examination he stated that the Defendant caused his arrest without basis. He acknowledged that he was found with a case to answer at the Magistrate Court.

2.5. The third witness for the Claimants was Chancy Mfuno who informed the Court that he knew the 1st Claimant and that when he heard that he was arrested for theft of cables he was surprised because he never imagined the 1st Claimant as a criminal. In cross examination he stated that he heard that the 1st Complainant had been arrested in connection with theft of cables. He was not aware of the circumstance of the theft, nor was he aware that the 1st Claimant was found with a case to answer. There was no re-examination.

2.6. The fourth witness for the Claimants was Wesley Thom who told the Court that he knew the 2nd Claimant for some time. He had heard that the 2nd Claimant was arrested for theft of copper wires and his personal esteem regarding him went down. The witness always thought that the 2nd Claimant was a person of high integrity. He also stated that the 2nd Claimant was a former employee of the Defendant. Currently, the witness has formed the opinion that the 2nd Claimant is not trustworthy. In cross examination he stated that he knew the 2nd Claimant but was not aware of the circumstances that led to this arrest. There was no re-examination.

### 3. The Defendant's Case

3.1. The defendant filed a defence statement which reads as follows;

1. *The defendant admits the contents of paragraph 1 of the statement of claim*
2. *Paragraph 2 of the statement of claim is denied and the plaintiffs are put to strict proof thereof.*
3. *Paragraph 3 and 4 of the statement of claim are denied and the plaintiffs are put to strict proof thereof.*
4. *The defendant states that the plaintiffs were arrested after proper, prudent and independent investigations carried out by Police Officers on the allegation that the plaintiffs had stolen ESCOM.*
5. *The defendant further states that the plaintiff's incarceration was a result of independent police investigations*
6. *The defendant denies that the criminal process was instituted and carried on after being actuated by malice and without any reasonable and probable cause rather it was instituted after formal police investigations on the matter*
7. *The defendant denies the contents of paragraph 5 and 6 of the statement of claim and puts the plaintiff to strict proof thereof*
8. *The alleged damages as particularized in paragraph 7 of the statement of claim are denied and the defendant avers that the plaintiff is not entitled to the reliefs being sought or at all*
9. *The defendant prays for a dismissal of the action with costs.*

10. Save as herein specifically admitted the defendant denies each and every allegation of fact as if the same were herein set out seriatim and specifically traversed.

3.2. The first witness for the Defendant was Peterson Kamwendo told the Court that he was employed by the Defendant as a Security Sergeant. Frank Mwahimba reported to him about theft at the Lubinga MAREP Stores on 2 June 2011. He instituted investigations and all guards including the 1st Claimant wrote statements. All incidences of theft are reported to police and this was no exception. In the present case 20 meters of copper wire was established as stolen. This happened after the 1st Claimant had taken over the Lubinga station from Gift Chisala. The 1st Claimant had taken over the duties without approval from the witness or his supervisor and against the duty roster. The 1st Claimant had hired a bicycle taxi of the 2nd Claimant to go to the Lubinga station. The 1st Claimant was taken through a disciplinary hearing as shown by the document marked and exhibited as **PK1** and its appendices. The matter was taken for prosecution and he was found with a case to answer, as shown by the judgement marked and exhibited as **PK2**: that Clifford Kajiwa took over the station from Gift Chisala an act which was against the duty roster and without prior approval from me as the Supervisor. That Clifford Kajiwa used a bike belonging to Watson Balakasi to go to Lubinga station. The Claimants were arrested by the police.

3.3. The second defence witness was Frank Mwahimba informed the Court that he was working as stores keeper for Malawi Rural Electrification Project (MAREP). He went to Lubinga on 2 June 2011 in the company of temporary labourers to work on removing the aluminium conductors from drums. He was surprised to see the un-coiled aluminium wire from a drum, running to a stretch of about 60 meters. The guard on duty explained that all handovers were done properly and when he took over the wire was properly secured in the drum. Later on Clifford Kajiwa stated that Kalua and Munthali told him that thieves had come at night but they failed to shoot because they were afraid to leave the station. One temporary labourer, Stephano Chirwa, who he had been brought by the witness to help was sent by Clifford Kajiwa to go and look for maize for roasting. After

investigations, 20 meters of copper wire was discovered missing after our investigation. The 2nd Claimant was close-by when the witness was checking the area with the 1st Claimant. A coil of aluminium wire was then found in a water drain outside the fence. The 1st Claimant was questioned in the presence of the witness and he accepted being in the wrong.

3.4. In cross examination he stated that he was the custodian of keys and worked as a stores clerk he stated that there was a fence and a lockable gate but the guards had no keys. There was also a storeroom with a lockable door. The 1st Claimant was on duty on 2 June 2011. He states that there was a coil of wire from the drum all the way to the entrance. Once the report to police was made, the Claimants were arrested. In reexamination he stated that guards had no keys. He noted the wire that was outside the drum at the gate when he arrived at around 9 am. The 1st Claimant told him that at handover time everything was in order. He opened the gate together with the 1st Claimant and found that the wire was cut. The 1st Claimant admitted that the incident had happened during his shift. He had no keys but the perimeter fence had no razor wire.

#### 4. The issue for Determination

4.1. The court has to determine whether or not the Claimants were falsely imprisoned and whether they are entitled to the reliefs sought.

#### 5. The Law and its application to the facts

5.1. The requirement of law that the burden of proving the elements of his or her lawsuit was laid down in the case of **Commercial Bank of Malawi v. Mhango (2002-2003) MLR 43 (SCA)** where 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 rises. 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 td Hill (1955) 2 QB 417”.*

5.2. In any civil suit the standard of proof is that on a balance of probabilities. I agree and echo the sentiments of Denning, J in the case of **Miller v. Minister of Pensions (1947) 2 All ER 372**, who stated that;

*“... 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.”*

5.3. The tort of false imprisonment arises where the liberty of a person is completely restrained without lawful justification, see **Chiumia vs Southern Bottles Limited 14 MLR 38**. It was held by Lord Campbell C J in **Broughton vs. Jackson (1852) 21 L. J QB 265** at 267 that:

*“... the defendant must show reasonable grounds of suspicion for the satisfaction of the court; it is not enough to state that he himself reasonably suspected, but he is not bound to set forth all the evidence: it is enough if he shows facts which would create a reasonable suspicion in the mind of a reasonable man.”*

## 6. Whether the Claimants were falsely imprisoned by the Defendant?

6.1. In this case the evidence shows that the Claimants were arrested by the police following on a reported incident of theft of cables at the Defendant's Lubinga Stores. There is nothing in the evidence of the Claimant that shows that the Defendant and its agent acted unlawfully and arrested them or ordered the police to arrest them. Indeed from their own sworn witness statement, the Claimants stated that on arrival at the police station, they both were informed by a female constable that the police were looking for them. It is the finding of this court that the Claimants were arrested by the police after an incident of theft had been reported to them.



6.2. It is not disputed that the Claimants were arrested. The law regarding false imprisonment clearly shows that the defendant would be liable where he makes a charge against the plaintiff and the police arrest the plaintiff based on that charge alone; and or where the defendant orders the Police to arrest the plaintiff. There is a distinction at law between a statement which may be construed as constituting a charge against a plaintiff, which charge leads to an arrest; and a statement which may be construed as constituting a mere statement of facts, which statement of fact may lead an independent body to affect an arrest. The distinction is brought to bear in ***Clerk and Lindsell on Torts, (15 ed)***, paragraph 14–12 in which the learned authors stated that a defendant or his agent incur liability if he makes

*“... a charge on which it becomes the duty of the constable to act. But it is quite a different thing if a party simply gives information, and the constable thereupon acts according to his own judgment. In such case the informer incurs no responsibility in the tort of false imprisonment”.*

The same sentiments were reflected in the case of ***Chintendere v Burroughs, Civil Cause No 530 of 1981***, where Skinner CJ had this to say:

*“The crucial issue, the issue of fact upon which this part of the case turns is whether the defendant’s servants merely stated the facts to the Police or whether they made a charge against the plaintiff”. The line between “merely stating the facts to the Police” and “making a charge against the plaintiff” is not easy to draw. The defendant does not have to use any technical words in order for the Court to be satisfied that he made a charge or merely stated the facts. The facts of each case must be considered upon their own merit”.*

6.3. In this case the Claimants have argued that the Defendant and its agents were liable for the tort of false imprisonment because the Defendant arrested and charged the Claimants. A survey of the evidence shows that after the incident of theft was reported, the security sergeant for the Defendant investigated the matter and asked the security guards to write statements. Thereafter, and as is its policy, the Defendant reported the incident to the police and the Claimants

were arrested. Therefore, there was no false imprisonment by the Defendant or its agents as the matter was simply reported and the police arrested the Claimants following their own investigations. In their evidence in Court the Claimants clearly indicated that they were arrested by the police. In fact the 2nd Claimant was calling the 1st Claimant to go to the police and make a statement as regards the theft of the cables.

6.4. The 1st Claimant was asked together with the rest of the guards who were on duty at the time the incident occurred to write statements. These statements were to be used by the Defendant at the disciplinary hearing process. It is trite that any employer is allowed at law to investigate incidences that occur at the workplace and gather information for disciplinary process. Indeed it must be noted that this is a different process, although it happened around the same time the police were investigating the criminal matter of theft of cables. It is the finding of this Court that by crying out that process of internal investigation, the Defendants did not lay a charge, or arrest or order the police to arrest the Claimants.

6.5. Where a claim of false imprisonment arises, the defendant has a defence, if he can show that the arrest was lawful. In this case the Defendant is stating that the Claimants were arrested by the police based on a proper, prudent and independent investigations. The Claimants have also acknowledged that there was theft of cables and they were arrested as regards that theft of the cables. It was held in the case of **Victor Steward Mhango vs Attorney General. Civil Cause No. 199 of 1994 High Court [unreported]** Mtambo, J., as he then was, said the following which is illuminating:

*“The law on the subject is that an arrest, if made on reasonable suspicion, is lawful notwithstanding that the suspected offence was not in fact committed.”*

6.6. It is not enough for the Defendant to state that the arrest and prosecution was made on suspicion. The Defendant must give evidence that clearly shows that the arrest and prosecution was based on a legal basis, supported by clear evidence, see **Broughton vs Jackson (1852) 21 L. J. QB 265**. In this case, the

evidence of the Defendant is clear that the Claimants were indeed arrested by the police and were prosecuted on a legal charge and not mere suspicion. The Claimants have failed to show the Court the basis of the claim that the arrest was false and the prosecution was malicious.

6.7. The Claimants came that they were maliciously prosecuted because there was no cause for arrest and the prosecution was done with malice. The Claimant claim that since they were acquitted of the offence, they were maliciously prosecuted. In this case, the burden of proof is on the Claimants to prove on a balance of probabilities that the Defendant had acted maliciously in getting them arrested and prosecuted. The Claimant has not given this Court such evidence. What the evidence as a whole shows is that the 1st Claimant went to a duty station he was not supposed to be and worked there without authorisation by the supervisor. He also had the duty station handed over to him with everything accounted for. It was at a later time in the day that the stores clerk found that there was some cables missing. Up to that time of discovery by the stores clerk, there was no report that the store room had been broken into. The 2nd Claimant ferried the Claimant to the duty station and was observed loitering around the same place at the time of the incident. The investigation carried out was therefore essential in these circumstances. The arrests and prosecution was also to be expected in these circumstances.

6.8. Indeed, the Claimants were found with a case to answer at the end of the prosecution case. The effect of this was that at that stage, the Court was convinced that the prosecution had raised *prima facie* evidence against the Claimants and the Claimants were required to answer. The final acquittal at the end of their defence does not mean that the initial arrest was unlawful, or done with malice, it simply means that the evidence brought in by the prosecution did not meet the standard required by the law for a conviction to stand, which is proof beyond reasonable doubt. It is the finding of this Court that the acquittal *per se* did not mean that the arrest was wrong, nor did it mean that the prosecution was malicious.

**7. Whether the Claimants were Defamed by the Defendant**

7.1. Defamation has been defined as 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. Whereas libel is always actionable without proof or special damage, slander must, in order to be actionable per se or without proof of special damage. Impute a criminal offence punishable by imprisonment. The accusation of theft in the instant case is punishable by imprisonment.”*

7.2. The Claimants herein have not tendered any evidence to show on a balance of probabilities that the Defendant defamed them by publishing the fact that the Claimants were thieves. The claim for defamation fails as it is not substantiated.

8. In conclusion, it is the finding of this Court that the Claimants have failed to prove their claims on a balance of probabilities. The claim must fail in its entirety. Accordingly, the claimants are condemned to pay the costs for this action.

**Pronounced in Open Court at Mzuzu Registry this 26th day of February 2019**

  
**D. A. DeGabriele**

**J U D G E**