

IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NUMBER 108 OF 2019

BETWEEN:

MAUREEN CHIMOWA SELEMANI.....CLAIMANT

AND

ATTORNEY GENERAL1ST DEFENDANT

FIRST CAPITAL BANK.....2ND DEFENDANT

CORUM: R.M CHINANGWA

JUDGE

Jafali

Counsel for the Claimant

Absent

Counsel for the Defendant

Chitao

Counsel for the Respondent

JUDGEMENT

Introduction

1. The claimant seeks damages for false imprisonment; unlawful detention; malicious prosecution; defamation and costs of the action.
2. Through an agreed order dated 18th November 2020, the claimant discontinued the action against the 2nd defendant.
3. The matter continued with the 1st defendant and was scheduled for trial on 31st August 2021. Under Order 16 rule 7 of the Civil Procedure Rules 2017, the court proceeded to hear the matter in the absence of the 1st defendant who were duly served on 13th August 2021 at 11:35 hours. Chisomo duly acknowledged service on behalf of the 1st defendant.

4. The only witness in this matter was the claimant herself. She gave her evidence through a witness statement. Below is a summary of her evidence.

The Evidence

5. She stated that she started work at 2nd defendant institution on 1st February 2008 as a Customer Consultant at Mponela Branch. From the year 2014, various ATMs were recording shortages. In June 2016, Cedrick Toto and herself were appointed permanent custodians of the ATMs in a bid to stop shortages. Despite putting checks in place to avoid shortages the ATM shortages continued. The two requested a transfer so that new custodians would be able to detect the continued problem of shortages on the ATMs. The new custodians noted that the ATMs would record shortages on Mondays, Wednesdays and Fridays between 6:30am to 7:30am. This was a time when there was a mandatory prayer session for all employees save for the Janitor who would be cleaning the premises. The CCTV footage showed that at the time the prayer sessions were held the CCTV was switched off. It was recorded that the Janitor would come into the office and then the CCTV would be switched off and when it was switched on the Janitor would be seen beginning to clean. On 22nd November 2016, internal investigations began whereby every staff member was interviewed. This resulted into the Janitor being taken to the Police. Later, Cedrick Toto and the claimant were taken to the police, questioned for 8 hours and were released at 10pm. On 29th November 2016, the two were called back to the police and were arrested for the shortages at the ATM. The court granted them bail after spending 9 days in custody. Whilst in custody the claimant states she was denied water to bath and a mattress; used the toilet in the presence of male prison staff; verbally harassed by Officer Gertrude Chonzi and Thandi Kamanga; was not allowed to see a doctor when she fell ill; suspended and dismissed from work. On her acquittal, she was perceived and treated as a criminal and this brought psychological and emotional harm to her.

Issues for Determination

6. This court has to determine whether the claimant was falsely imprisoned; unlawful detained; maliciously prosecuted; defamed and whether the claimant is entitled to costs of the action. These will be dealt with in turn.

Analysis of Law and Evidence

7. On false imprisonment: In **Hauya v Cold Storage Co Ltd** [1994] MLR 92 (SCA) it was held that where '...there is no evidence that the defendant laid a charge against the plaintiff, and the police carry out their own investigations and decide to arrest the plaintiff, the defendant is not liable for false imprisonment'. In this case the claimant states that internal investigations were carried out and following the internal investigations she was taken to the police by her office officials on 22 November 2016. There she was questioned for 8 hours and then released. Later on, 29th November 2016 she was called back by the police, arrested and kept in custody for 9 days before being released on court bail. As earlier noted, the 1st defendant was not available to provide contrary evidence. In the absence of the same, the court only has the claimants uncontroverted story before it. It is clear from the evidence that the police did not carry out their own investigations to arrest the claimant. The claimant was brought to them by the 2nd defendants. The claimant was then questioned for 8 hours and then released. Then six to seven days later the claimant was called back by the police and arrested for 9 days. It is this courts view that the 8-hour questioning by the police constituted an investigation and the arrest was orchestrated by the police as they released the claimant after the 8 hour long questioning and called her back after about six to seven days. If the 2nd defendants had merely arrested the claimant when she was first brought without questioning then the 1st defendants would be liable for false imprisonment as they simply acted on the employer's word without their own investigations. The claimants claim for false imprisonment fails on ground that the 1st defendant did by questioning the claimant carry out an investigation which latter led to her arrest.
8. On unlawful detention: It was held in **Iphani v Makandi Tea and Coffee Estate** [2004] MLR 91 (HC) that an acquittal is not proof of unlawful arrest but where an arrested person is kept for more than 48 hours that may constitute unlawful imprisonment or detention. Section 42(2b) of the Constitution states that any person arrested has the right to be brought before an independent and impartial court of law not later than 48 hours after the arrest. In this case the claimant states she was arrested on 29th November 2016 and was released 9 days later having attempted to apply for bail 3 times. This court finds that the claimant has not told the court when she first appeared before a competent court of law. This would help the court determine when the time of unlawful detention started running. Again, it is not

clear as to whether she was kept in custody at the instance of the court within the 9 days. This is said noting that at times an accused person can be brought before the court and may be kept on remand at the instance of the court whilst awaiting a bail ruling. In the absence of the said evidence this court finds that the claim for false detention has not been substantiated as such it must fail.

9. On malicious prosecution: In **Mbewe v Agricultural Development and Marketing Corporation** [1993] 16(2) MLR 594 (HC) it was held that malicious prosecution requires proof of absence of reasonable and probable cause and proof of malice in commencing proceedings. A plaintiff may prove malice by showing improper motive or purpose. In this case, it is recorded in the lower court record that one of the accused persons had admitted stealing the money and sharing the same with the claimant herein. It is also recorded in evidence that the claimant was one of the persons in charge of the ATM machine. In addition, it is recorded that the money was noted missing at times when morning prayers were in session on specific days of the week. In all the evidence before the prosecution, there was no clear evidence linking the claimant to the commission of the offence. The confession if at all clearly at law can only be used against the claimant if the same was adopted by her. The claimant was acquitted of the offences. This shows that there was no reasonable cause to prosecute the claimant as the evidence that was presented before the prosecution was far removed from the claimant. There was no prospect of success: **Kazombo v Reserve Bank of Malawi** [2004] MLR 140 (HC) Being a custodian of keys does not necessarily mean one would be the thief. A suspicion should not drive prosecution. This court finds that the prosecution against the claimant was malicious. The claim succeeds.
10. On defamation: In **Nyirenda v AR Osman and Co** [1993] 16(2) MLR 681 (HC) defamation is publication of a statement that tends to lower a person in the estimation of right-thinking members of the society generally; or which make them shun or avoid that person or expose her to ridicule, hatred or contempt. The test is objective'. In **Kwalira v Ganiza** [1993] 16(1) MLR 236 (HC) it was held that the exact words constituting defamation are to be pleaded. In this case the claimant has not told the court the exact words that were said in the alleged defamation. It has to be very clear as regards the words used

and to whom were the words made to. This has not come out clearly in the evidence. In that regard the claim for defamation has not been substantiated.

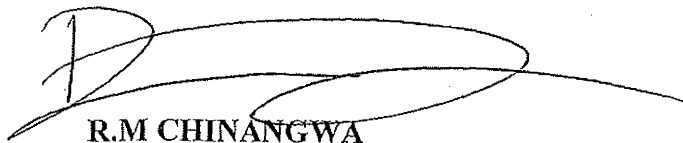
11. On costs of the action, it is trite law that costs are awarded in the discretion of the court.

This court orders that each party shall bear its own costs.

Finding

12. The claimants claim for malicious prosecution succeeds. The rest of the claims fail and are dismissed.

Pronounced this 21st day of September 2021 at LILONGWE



R.M CHINANGWA

JUDGE