



**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NUMBER 1100 OF 2014**

BETWEEN:

ENOCK GIBSON CHIWANDA.....CLAIMANT

AND

ATTORNEY GENERALDEFENDANT

CORUM: R.M CHINANGWA JUDGE

Chihana

Counsel for the Claimant

Chisiza

Counsel for the Defendant

Chitao

Counsel for the Respondent

JUDGEMENT

Introduction

1. The claimant claims damages for a) malicious prosecution b) damages for cruel, inhumane and degrading treatment and c) costs for the action
2. The claims were opposed. A total of two witnesses gave evidence through witness statements and they were examined. Below is the summary of the evidence.

The Evidence

3. The claimant stated that he is a police officer based at Lilongwe Police Station. In the year 2009, he was stationed at Area 47 police unit in Lilongwe. On or about the month of August, 2009. He was arrested by Lingadzi Police Station on allegation that he had committed the offence of buggery with a suspect in a police cell at Area 47 police unit. He was then tried and convicted for 5 years imprisonment with hard labour. He appealed against the conviction and sentence and the High Court quashed his conviction and sentence. The claimant argues that among other reasons for quashing the conviction and setting aside the sentence, the High Court stated that the respondent's case had serious loopholes that raised reasonable doubts on their case. The respondent failed to comply with the procedure provided under the law when giving evidence and there was conflicting evidence between the complainant and the third prosecution witness. The claimant was incarcerated for 9 months and he argues that he was subjected to torture, cruel and inhuman and degrading treatment; his reputation has been tarnished and cannot be repaired; he lost money and resources.
4. In defence Superintendent Diederichs Banda stated that he was the investigator in the matter that led to the arrest of the claimant. He received a report from Area 47 Police Unit officers that the claimant had sexually assaulted Mr Analia. In his investigations he established that during the night, the claimant took the complainant out of the police cell and committed buggery with the complainant. A medical examination proved that the complainant was sexually assaulted. The claimant denied the charge on being cautioned. As an arresting officer, the witness stated that he believed the complainant had committed the crime because the complainant had difficulties walking and complained of pain between his legs; other suspects told the investigator that the claimant took the complainant outside the cell at night and a medical report established penetration.

Issues for Determination

5. This court has to determine whether the claimant has proved his claims on a balance of probabilities. These will be dealt with below.

Analysis of Law and Finding

6. 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. The claimant was arrested following an allegation that he committed sexual act with a male inmate. The defence argue that the prosecution was without malice because the complainant had difficulties walking and complained of pain between his legs; other suspects told the investigator that the claimant took the complainant outside the cell at night and a medical report established penetration. As was observed in the High Court decision on appeal, a medical report would have proved beyond reasonable doubt whether the offence was committed or not. The author of the medical report as required by law did not present his findings before the court of first instance. This was one of the key witnesses to the claimant's criminal matter. His absence shows there was lower probability of success in the matter and no probable cause to prosecute the claimant. In addition, the evidence had to point to the fact that the claimant did commit the offence. The identity of the accused was only told of by other suspects. Again, what is not clear as to how did they identified the claimant as the suspect. As the High Court decision on appeal observes, there were other police officers apart from the claimant in the same house. Again, the probability of success on the evidence regarding who committed the crime left a lot to be desired. The defence evidence had to show high prospects of success regarding two aspects. First was the offence committed and secondly who committed the offence. These fell short. The claim for malicious prosecution succeeds.
7. On cruel, inhumane and degrading treatment: The claimant states he suffered this form of treatment whilst in custody for 9 months. However, the claimant did not adduce evidence to show what cruel treatment he suffered/ what inhumane treatment he suffered or what degrading treatment he suffered? All he has done is to lay the claim. As observed in **Marinho v SGS Blantyre (Pvt) Ltd** [1998] MLR 208 (HC) the court stated that a plaintiff cannot just lay a claim and leave it to the court to decide. It is interesting to note that in the skeletal arguments clause 4.3.6 Counsel states 'as a result of being incarcerated the claimant sustained pecuniary loss from his work benefits, business prospects, costs of undertaking the proceedings at the court using legal services at appeal stage. All these

expenses should be recoverable'. Here Counsel is giving evidence on behalf of the claimant which should not be the case. Even if it is argued not, the claimant has not shown in evidence which business he was running so that the loss is decided in his favour. The claimants' claims fail for they have not been substantiated.

8. Regarding costs, it is trite that costs are awarded in the discretion of the court. If the defence had read the High Court decision on appeal, trial in this matter would have been avoided.

Finding

9. The claims for damages for malicious prosecution and costs of action succeed. The claim for damages for cruel, inhumane and degrading treatment fail.
10. The amount of damages are to be assessed by the Assistant Registrar on a date to be fixed.

Pronounced this 24th day of September 2021 at LILONGWE



R.M CHINANGWA

JUDGE