



**Republic of Malawi**

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CIVIL CAUSES NUMBER 312, 313, 310 and 309 of 2015**

**JUDITH SIKIYA**

**1<sup>st</sup> CLAIMANT**

**LEVISON SIBUYI**

**2<sup>nd</sup> CLAIMANT**

**HASTINGS MBEWE**

**3<sup>rd</sup> CLAIMANT**

**CHARLES KHEMBO**

**4<sup>th</sup> CLAIMANT**

**AND**

**MALAWI SHIPPING COMPANY**

**DEFENDANT**

**CORAM: JUSTICE M.A. TEMBO**

W. Pearson, Counsel for the Claimants  
N. Misanjo, Counsel for the Defendant  
Mankhambura, Official Court Interpreter

**JUDGMENT**

1. This is the decision of this Court following a trial in this matter on the claimants' claim for damages for false imprisonment, malicious prosecution, defamation and special damages incurred in relation to their impugned prosecution at the hands of the defendant. The claimants also sought costs of this action. The defendant denied the claim.

2. The case of the claimants is that they were employed by the defendant in various capacities. They asserted that in October, 2015, the defendant maliciously and without reasonable and probable cause laid a charge against each of the claimants before the Officer-in-Charge of Monkey Bay police station that they committed the offence of theft by servant following theft of diesel at the defendant's premises. They asserted further that the defendant procured the police to arrest them and prosecute them for a period of nine months.
3. The claimants indicated the particulars of malice and lack of reasonable and probable cause, namely, that the defendant knew that the claimants never committed the alleged offence, the defendant knew that there was no evidence to secure a conviction, the defendant knew that the charge against the claimants was a sham aimed at persecuting the claimants and that there was failure to conduct investigations before laying the charge by the defendant.
4. The claimants sought general damages. They also sought special damages, namely, K3 000 000 legal fees and K1 800 000 expenses incurred in fuel, accommodation, food, communication and domestic security.
5. In its defence, the defendant admitted being employer of the claimants. It then indicated that around 6<sup>th</sup> and 7<sup>th</sup> October, 2014, it was discovered that some fuel was missing at its premises in Mangochi. And that it reported this fact to police and requested the police to investigate the matter.
6. The defendant denied laying a charge or that it maliciously, without reasonable and probable cause laid a charge against the claimants before Monkey Bay police station. It asserted that if the claimants were arrested in connection with its missing fuel then they were arrested by the police out of the police's own responsibility and initiative and not pursuant to any direction or action of the defendant.
7. In the circumstances, the defendant denies that it caused or procured the police to arrest or imprison the claimants or to charge the claimants in court. It also denied the particulars of malice alleged by the claimants.
8. The defendant also denies that on 24<sup>th</sup> June, 2015 it gave instructions to the police to withdraw the charges against the claimants. It asserted that it never took part in the decision of the police regarding the conduct or withdrawal of the prosecution of the claimants. And therefore denied the loss and damages claimed.

9. The question for determination before this Court whether the claimants were falsely imprisoned, maliciously prosecuted and defamed. And whether they are entitled to the damages claimed.
10. As correctly noted by both parties in this matter, in a civil matter like the instant one, the claimant will succeed if she proves her case on a balance of probabilities. See *Mangani v Caltex Oil (Malawi) Limited* [2008] MLR 145; *Nkuluzado v Malawi Housing Corporation* [1999] MLR 302 and *Miller v Minister of Pensions* [1947] All ER 372.
11. The claimants had a single witness, namely, Charles Khembo. The defendant had three witnesses, namely, Joshua Chitsonga, Jinack Chinula and Daudi Massa.
12. Mr Charles Khembo stated, in his witness statement, that around October, 2014, the defendant maliciously and without reasonable and probable cause laid a charge before the Officer-in-Charge of Monkey Bay Police Station, in Mangochi against the claimants that they had committed an offence of theft by servant. He stated further that they were arrested and incarcerated for five days.
13. He then stated that they were produced before the court but the prosecution failed to produce any evidence and decided to withdraw the charge. He stated that, as a result of the arrest, detention and prosecution herein the claimants were deprived of their liberty and suffered mental anguish, harassment and defamation of character. And that they accordingly claim damages.
14. In his supplementary witness statement, Charles Khembo elaborated that on 6<sup>th</sup> October, 2014 in the morning he went to the defendant's diesel tank to issue diesel to vehicles. He stated that he found the place had diesel spillage over the ground and that the drain plug lock had been damaged. He stated that he reported the matter to the defendant's Shipyard Manager, Mr Lima who came to the scene together with Mr Mponda, the Shipping Operations Superintendent. He then dipped and verified that there was a shortage of diesel in the tank of about 4500 litres. He indicated that the damaged lock was taken to Mr. Lima who said they would have a meeting, which never took place.
15. He stated that in the evening of the same day, a new padlock was procured and Mr. Pindani who fixed the same in the presence of Mr. Mponda, Mr. Chitsonga, Mr. Lima, two security officers and himself. He added that two security officers were deployed at the tank the same night.

16. He then stated that on the morning of 7<sup>th</sup> October, 2014, when he came to report for duties Mr. Chitsonga told him that in the night thieves came again and had stolen diesel and also went away with the new lock which had been fixed on the drain plug. He indicated that he went to the diesel tank and dipped and found that 1000 litres of diesel were missing. And that the matter was reported to the Shipping Manager, Mr. Lima.
17. He then explained that a few minutes later, while he was reporting about the diesel to Mr. Lima, Mr. Mponda came to the office of Mr. Lima and said to Mr. Lima that he knew the suspects and will call the police to arrest them. He added that Mr. Mponda had asked Mr. Lima to give him a go ahead with his investigation and Mr. Lima accepted.
18. He indicated that on the afternoon of 8<sup>th</sup> October, 2014 Mr. Mponda came in together with two Monkey Bay criminal investigation officers and arrested two security guards, namely, Mr. Mbewe and Mr. Sibuyi who were deployed at the diesel tank.
19. He then stated that on 9<sup>th</sup> October, 2014, in the afternoon, Mr. Mponda came in together with two Monkey Bay criminal investigation officers with a warrant of search for himself, Judith Sikiya and Lewis John but they found nothing. He went further to say that the criminal investigation officers brought him and the two others back to the office but Mr. Mponda told Mr. Lima that he should not allow them back to work but rather that they be kept in police custody for further investigations because he had more evidence. And that Mr. Lima told the criminal investigation officers to keep him and the two others in custody until evidence was brought to the police.
20. He indicated that the police took him and the two others and locked them up without taking any statements from them until 13<sup>th</sup> October, 2014 when the investigation officers obtained their statements from the three of them and took them to court where they got granted bail.
21. He then asserted that since 13<sup>th</sup> October, 2014 up to 24<sup>th</sup> June, 2015, no witness or a defendant's representative came to court to testify and the three were later discharged for lack of evidence since Mr. Mponda was failing to adduce the alleged evidence that he had against them. And that they got acquitted.

22. During cross-examination, he conceded that neither he nor the other claimants had adduced evidence on the alleged special loss and damage that he and the rest of claimants were claiming in this matter.
23. He indicated that he worked as a procurement officer for the defendant and that is why he went to verify the volume of diesel was missing in the diesel tank. He also indicated that Judith Sikiya would assist him and she was a costing clerk. He stated that Mr. Sibuyi and Mr. Mbewe were guards. He indicated that these two guards were deployed at the diesel tank by Mr. Massa and Mr. Mponda the night after the first diesel theft. He added that Mr. Mponda was a ship captain.
24. He then conceded that, with regard to the claim of defamation, neither he nor the other claimants had adduced evidence of how people's perception of them changed after the incident in this matter.
25. He then stated that in his supplementary witness statement made in January, 2021, he makes statements concerning Mr. Mponda which he never made in his initial witness statement. He denied making such statements because Mr. Mponda passed away in 2020. He confirmed that he knew Mr. Mponda passed away in 2020. He also clarified that Mr. Mponda never mentioned the names of his suspects. That closed the claimants' case.
26. The first witness for the defendant was Joshua Chitsonga. At the time of the incident herein he worked as the defendant's Supplies and Infrastructure Superintendent. He confirmed the two incidents of the theft of diesel herein. He heard of the arrest of the claimants but did not know how the matter of the missing diesel was reported to the police. He indicated that he was subsequently requested by the police to testify in the criminal court in connection with the diesel theft together with Mr. Mponda, now late. He indicated that he went to Mangochi to testify but was told by the prosecutor that the hearing failed due to the absence of the counsel for the accused, who are now claimants.
27. The next witness for the defendant was Jinack Chinula. He is the defendant's Human Resources Officer. He indicated that on 7<sup>th</sup> October, 2014, he was called by Mr. Lima to his office where he found Mr. Khembo, Ms. Sikiya and Mr. Mponda. He explained that Mr. Lima complained about the stolen diesel.
28. He indicated that Mr. Lima reminded Mr. Khembo and Ms. Sikiya that he had requested them to provide daily reports on diesel balance. And that it was

decided that the two should provide written reports on the missing diesel, which the two produced. He indicated that on 8<sup>th</sup> October, 2014, the police came to their offices and picked up Mr. Khembo, Ms. Sikiya and Mr. John the auto-electrician. He added that the police had parked their car near the administration block where his office is situated.

29. He then indicated that he never participated in reporting the diesel theft issue to the police herein.

30. The last witness for the defendant was Mr. Massa. He is in charge of the defendant's security. He indicated that on 6<sup>th</sup> October, 2014 he got a report of diesel theft herein. He indicated that again on 7<sup>th</sup> October, 2014, another diesel theft was reported involving the breaking of a new lock that had been fitted at the diesel tank after the initial theft. He added that when he asked Mr. Sibuyi when he realized that there had been the second theft, Mr. Sibuyi said he realized that there had been a theft around 4.00 a.m.

31. He then stated that after the two thefts, management instructed that his department ensure that the matter is reported to the police. He indicated that further to the instruction he went to Monkey Bay Police with Mr. Sibuyi and Mr. Mbewe to report the issue. And that at the police station they met Mr. Kazembe a police investigation officer.

32. He then explained that they informed the police of the diesel theft that occurred on the previous night and that he indicated that Mr. Sibuya was the guard assigned to the tank area and that Mr. Mbewe was the security supervisor on the night. He indicated that, after this, each of the three of them was asked to separately give a statement to Mr. Kazembe. He explained that after giving statements, Mr. Kazembe directed Mr. Sibuya and Mr. Mbewe to remain at the police station while he was told he was free to go. He added that in the afternoon of the same day, 7<sup>th</sup> October, 2021, Mr. Kazembe and another police officer came to the defendant's office premises and indicated to him that they came to conduct further investigations after which they left. He understood that the following day the police came to the defendant's premises and picked Mr. Khembo, Mr. John and Ms. Sikiya in connection with the diesel theft.

33. He then stated that on 9<sup>th</sup> October, 2014, the police arranged to visit the houses of Ms. Sikiya, Mr. Khembo and Mr. John. And that he was requested to be part of the visit as a representative of the defendant. He added that the three

were present during the visit since they had come together with the police. He indicated that after this the police dropped him at the defendant's premises entrance. He recalled that he later accompanied Mr. Chitsonga and late Mr. Mponda to court to testify but that the hearing of the case failed to take place.

34. During cross-examination, he stated that Mr Mponda was to be principal witness but that since Mr. Mponda passed away he came in to testify. He indicated that he never looked at Mr. Mponda's witness statement though he had been told that Mr. Mponda had made a witness statement. He then insisted that he is the one who went to report the matter herein to the police. He was asked to note the sworn statement of Mr. Mponda where Mr. Mponda stated that he, that is Mr. Mponda, had notified the police of the missing diesel after which two police officers came to the defendant's offices. And where Mr Mponda further stated as follows:

When the police officers came to MSC premises, I went with them to Mr. Lima's office. When we got to Mr. Lima's office, Mr. Lima, in my presence requested the police to investigate the matter. Thereafter, the police officers requested that we should take them to the diesel tank for inspection. This we did. Then we returned to Mr. Lima's office. There, they asked us to give them names of the security guards that had been assigned to the tank area during the previous night. We gave them the names, namely, Mr. Hastings Mbewe and Mr. Levison Sibuyi.

35. He insisted that Mr. Lima instructed him to report to the police and that Mr. Mponda's statement to the effect that it was actually Mr. Mponda who was instructed to report to police is not the correct statement.
36. He explained that Mr. Lima is not a witness in this matter since he left for Portugal his home country. He could not recall when Mr. Lima left. He then stated that Mr. Kazembe the police officer is not a witness in this matter.
37. He then stated that he does not know how Ms. Sikiya and Mr. Khembo were arrested and he could not challenge their version of how they got arrested. He however insisted on re-examination that he is the one who reported the matter herein to police.
38. Both parties then made submissions in this matter on the question for determination before this Court whether the claimants were falsely imprisoned, maliciously prosecuted and defamed.
39. This Court considers the parties' submissions on the issue of false imprisonment. Both parties correctly stated the law on false imprisonment.

40. The tort of false imprisonment arises upon the distinction between a defendant merely reporting a matter to the police whereupon the police investigates and decides to arrest and the defendant laying a charge against the claimants on which it becomes the duty of the police to arrest him or her. See *Banda v Mchenga Coal Mines* [2007] MLR 181, *Chimtendere v Burroughs Ltd* (1891–83) 10 MLR 215, *Chiumia v Southern Bottlers Limited* [1991] MLR 38 and *Nsanjama v National Oil Industries Limited* [1955] 2 MLR 654).
41. This was well explained in the case of *Tembo v Industrial Development Group* (1) [1993] MLR 865 in which the Court stated that:

It should be remembered that it is only the duty of every citizen to give information of an alleged commission of crime to the police. If while acting on the information so given by a citizen, the police mount investigations which result in the arrest of a suspect, if the suspect is eventually found to be innocent, he cannot entertain an action in false imprisonment against the citizen who initially supplied the information to the police. If on the other hand the citizen, instead of merely supplying information, makes a charge to the effect that the suspect has committed a crime, and on the strength of the charge, the Police arrests the suspects, the suspect would have a cause of action in false imprisonment against the citizen who made the charge if it is subsequently found that the suspect is innocent.

42. In the case of *Disi v Reserve Bank of Malawi* [2005] MLR 100, the Court held as follows:

- (i) The crucial issue in false imprisonment is to decide whether the defendant's agents merely stated the facts to the police or whether they made a charge against the Claimants;
- (ii) It is accepted that conveying one's suspicion to the police who on their own responsibility, take the Claimants into custody is not laying a charge;
- (iii) However, where the Defendant, acting through their agents or servants order the police to arrest the Claimants, it is imprisonment by the Defendant as well as the police and an action for trespass would lie against the Defendant;

43. This Court would add that, for the claimants' action to succeed they must show that they were arrested and prosecuted by the defendant without reasonable and probable cause resulting in their being falsely imprisoned, maliciously prosecuted and ultimately being defamed. There must be proof that there was no lawful justification of the defendant's actions against the claimants. See *Chikago and another v Director of Anti-Corruption Bureau*



civil cause number 33 of 2015 (High Court) (unreported) and *Sulaimana and Another v Attorney General* [2004] MLR 383.

44. It is a question of fact to be proved by evidence whether a claimant was arrested and prosecuted without reasonable and probable cause. An acquittal of an accused person of a criminal charge does not automatically entail that the arrest and prosecution was malicious. See *Mwafulirwa v Southern Bottlers Limited* [1991] 14 MLR 316.
45. The claimants herein in a bid to discharge their burden of proof relied on the evidence of Mr. Khembo who indicated that around October 2014 the defendant herein, maliciously and without reasonable and probable cause laid a charge before the Officer of Monkey Bay Police Station, in Mangochi District against the claimants on allegations that they had committed an offence of theft by servant and they were arrested and detained for 5 days.
46. They asserted that their evidence, that the criminal trial was dismissed for lack of evidence, was not challenged by the defendant.
47. They argued that their evidence was not challenged during cross-examination. And that the defendant adduced the evidence of Mr. Massa on circumstances surrounding their arrest. But that, however, during cross-examination, it was apparent that his testimony was contradictory and suspicious. They noted that the best witness in the circumstances would have been from a police officer who arrested the claimants and Mr. Lima. They observed that Mr. Massa clearly stated that he did not know how Mr. Khembo and Ms. Sikiya were arrested.
48. The claimants observed that it is a trite law that failure to call a material witness raises the assumption that the evidence of that witness would have been adverse to the party who should have called the witness. See: *Mtingwi v Malawi revenue Authority* [2014] MLR 96. And that the defendant failed to call either Mr. Lima or the police officer who actually arrested the claimants to clear the mist.
49. The claimants therefore asserted that they have discharged their burden of proof that the defendant laid a charge against them at the police station and they were arrested and detained without any lawful cause.
50. On its part, the defendant first submitted on the claimants' statement of case on how arrests were made herein. They pointed out that it is important to note that in their statement of case, the claimants pleaded that the purported laying

of a charge was done before the Officer in Charge of Monkey-bay Police Station. And that this is also echoed by Mr. Khembo in his evidence.

51. The defendant observed that, however, nowhere in his statement does he say that he was present, nor have the claimants called any witness to testify, that they witnessed the defendant communicating with the Officer in Charge of Monkey-bay Police Station nor that the defendant laid any charge against the claimants in any conversations between the defendant and the said officer in-charge.
52. The defendant then submitted that the claimants have failed to prove the case which they pleaded in their statements of case.
53. The defendant then submitted that the arrests followed police investigation. It observed that the evidence that was given at trial actually points to the police arresting out of their own investigations than following the alleged laying of a charge by the defendant.
54. It pointed out that the evidence of Mr. Massa, its Security in charge at the time, shows that he, together with Mr. Mbewe and Mr. Sibuya, went to police on 8<sup>th</sup> October to report the issue of missing diesel to the police. And that it is clear from Mr. Massa's evidence, that their intention when going to the police station was to report the issue of missing diesel. And that when they got to the Police Station, they met Police Officer Kazembe, who obtained information from them both collectively and later from each individual. And that the arrest of Mr. Mbewe and Mr. Sibuyi occurred, and resulted from, the police interview/investigation.
55. It submitted that the facts clearly show that the detention of Mr. Mbewe and Mr. Sibuyi occurred after the police questioned Mr. Massa, and Mr. Mbewe as well as Mr. Sibuyi themselves. Further, that from what Mr. Massa told Police Officer Kazembe, it does not appear that there was any laying of charge. And that Mr. Mr. Massa only mentioned Mr. Sibuyi and Mr. Mbewe in response to a question by the Police Officer relating to who was on duty on the previous night. Further, that Mr. Massa was only giving the police information and not necessarily laying a charge against the claimants. And that, in fact during the police interview, he mentioned Mr. Mbewe and Mr. Sibuyi only. And he did not mention Mr. Khembo or Ms. Sikiya.
56. The defendant submitted that it is aware that Mr. Khembo in his witness statement states that Mr. Mbewe and Mr. Sibuyi were arrested at its premises.

It noted, however, that its witnesses were firm that this was not the case. It then observed that if this were false, Mr. Mbewe and Mr. Sibuyi who are the claimants in this action would have refuted it. Surprisingly, Mr. Mbewe and Mr. Sibuyi chose not to give evidence.

57. The defendant therefore urged this Court to find, based on the evidence, that the arrest of Mr. Mbewe and Mr. Sibuyi followed, and resulted from, investigations by the Police.
58. The defendant next submitted on the arrest of Mr. Khembo, Ms. Sibuyi and Mr. John. It asserted that the evidence of both parties shows that Mr. Khembo, Ms. Sikiya and Mr. John were arrested on the following day after the detention of Mr. Mbewe and Mr. Sibuyi. And that Mr. Khembo also confirmed this in cross-examination. The defendant noted that, however, nothing has been stated by the claimants to show how these three were arrested. It noted further that, however, it is clear from Mr. Massa's statement that on the afternoon of 7<sup>th</sup> October, 2014, after interviewing him (Mr. Massa), Mr. Mbewe and Mr. Sibuyi, the Police came to the defendant's premises to conduct further investigations. And that this was before the arrest of Mr. Khembo, M. Sikiya and Mr. John.
59. The defendant then asserted that, based on the above, it is more probable than not, and urged this Court to find, that the arrests of Mr. Khembo, Ms. Sikiya and Mr. John also occurred following the Police's own investigations, and that, in any case, there is no evidence suggesting that the defendant laid a charge against them to the Police.
60. In the premises, the defendant submitted that the claimants have failed to make out a case of false imprisonment against the defendant, and that the claim should be dismissed.
61. This Court has noted the matter raised by the defendant concerning the statement of case of the claimants alleging that the charge was laid by the defendant against the claimants before the Officer-in-charge of Monkey Bay Police Station and that this does not correlate with the evidence adduced by the claimants. This aspect was not replied to by the claimants. However, the understanding of this Court is that the Police Station is overseen by the Officer-in-Charge. Such that, in the statement of case, reference to a charge being laid before the Officer-in-Charge may not literally mean that the charge was laid personally before the Officer-in-Charge. It may actually be a

reference to the institution of the police station as headed by the officer-in-charge. Such that, as long as a charge is laid at the police station headed by the officer-in-charge then there is no issue to be taken up as is being sought to be taken up by the defendant. In the premises, this supposed discrepancy as pointed out by the defendant would not be fatal to the claimants' case.

62. This Court now considers the issue of the arrest of Mr. Sibuyi and Mr. Mbewe.

This Court agrees with the submission of the defendant on the evidence, that Mr. Massa clearly explained how he went with Mr. Sibuyi and Mr. Mbewe to the police station where each one of them got questioned separately a result of which the two of them got arrested. It is clear from the evidence of Mr. Massa that he responded to the questions of the police upon their inquiry as to who was on guard duty the time the thefts herein occurred. And it is in fact Mr. Sibuyi and Mr. Mbewe who were on duty. There is clearly no contrary evidence from the claimants to challenge the evidence of Mr. Massa in this regard. Attempts to compare his testimony with the witness statement of late Mr. Mponda as to who reported the matter herein did not impeach Mr. Massa's testimony at all.

63. This Court finds that in fact the police upon their own inquiry arrested Mr. Sibuyi and Mr. Mbewe. In the circumstances, this Court agrees that the defendant cannot be held liable for false imprisonment in this case where eventually no evidence was offered against these two and they got acquitted as a result. The Police are responsible for the arrest of Mr. Subuyi and Mr. Mbewe upon their own inquiry. The claim for false imprisonment by these two therefore fails.

64. With regard to the arrest of Ms. Sikiya and Mr. Khembo, this Court observes that, contrary to the defendant's submissions, Mr. Khembo explained in detail how he got arrested together with Ms. Sikiya. The two of them were arrested at the defendant's offices as confirmed by the evidence of both the claimants and the defendant. Mr. Khembo also explained how Mr. Lima was instigated by late Mr. Mponda to have the two arrested. Mr. Massa clearly stated that he could not challenge the evidence of Mr. Khembo on how Mr. Khembo and Ms. Sikiya got arrested because he was not privy to what transpired at Mr. Lima's office where Mr. Mponda instigated Mr. Lima to insisted to the police that Ms. Sikiya and Mr. Khembo should be kept in custody.

65. It is understandable that Mr. Mponda cannot testify for the defence since he passed away. However, as correctly submitted by the claimants, there is no explanation given by the defendant as to why it never called Mr. Kazembe the police investigating officer or indeed Mr. Lima its employee at the material time who is back in Portugal. With the use of modern technology encouraged under the Rules of procedure in the High Court the testimony of Mr. Lima would easily have been arranged. That was not done and no explanation for such a state of affairs was offered. An adverse inference is drawn against the defendant on account of its failure to call crucial witnesses like Mr. Lima and Mr. Kazembe and for failing to explain the failure. See *Mtingwi v Malawi revenue Authority* [2014] MLR 96.
66. In these circumstances, this Court is unable to agree with the defendant that just because Mr. Khembo and Ms. Sibuyi were arrested after the two guards were arrested it should be assumed that the former were arrested after police investigations. There was no evidence and therefore no reasonable and probable cause to support the arrest of Mr. Khembo and Ms. Sikiya. The contrary is true with regard to the two guards who were on duty when the thefts of diesel took place herein.
67. The conclusion of this Court is that the defendant laid a charge against Ms. Sikiya and Mr. Khembo and the charge was unjustified as reasonable and probable. The defendant actually insisted that the police keep the two in custody. In terms of the authorities stated herein, including *Disi v Reserve Bank of Malawi* [2005] MLR 100, this Court finds that Ms. Sikiya and Mr. Khembo were falsely imprisoned by the defendant.
68. This Court next considers the claim of malicious prosecution. Both parties correctly submitted that to establish a claim for damages for malicious prosecution the claimants must state and establish that that they were prosecuted by the defendant, i.e that the law was set in motion against them by the defendant on a criminal charge; that the proceedings were resolved in the claimants' favour; that the proceedings were instituted without reasonable or probable cause; and that the defendant instituted the proceedings maliciously. See *Lapukeni v Commercial Bank of Malawi* [1996] MLR 139 and *Matanda v Sales Services Ltd and Others* [1990] 13 MLR 219.
69. The parties also correctly submitted that it was also held in *Mwafulirwa v Southern Bottlers Limited* (1991) 14 MLR 316 and *Mvula v Norse*

*International Limited* (1992) 15 MLR 332 that to succeed on a claim for malicious prosecution, the claimants must show that there was no reasonable prospect of success with the proposed prosecution, and the prosecution has been instigated by the defendant who had acted with malice.

70. The claimants indicated that they were prosecuted for no reasonable and probable cause and the prosecution was instigated by the defendant for improper purpose and was hence malicious.
71. On the other hand, the defendant noted that it is not in dispute that some of its diesel went missing at its premises. And that based on this, it submits that there was a basis for reporting the theft of the diesel to the police. And that there was also a basis for the Police to investigate the matter and institute the prosecution. It also indicated that the case failed to take place because defence counsel was absent.
72. This Court observes that the main point is that the prosecution was ended prematurely and the claimants were acquitted. It matters not that on one hearing date the proceedings failed to take place due to the absence of defence counsel.
73. This Court agrees with the defendant that with regard to Mr. Sibuyi and Mr. Mbewe, as guards on duty at the time of theft, they were arrested upon police investigation and it appears that their circumstances gave rise to a reasonable and probable cause for arrest since they were in charge of security of the scene of the crime when the crime happened. These two have therefore failed to prove that they were prosecuted without reasonable and probable cause notwithstanding their acquittal. An acquittal does not automatically result in a finding of malicious prosecution in the circumstances. See *Mwafulirwa v Southern Bottlers Limited* [1991] 14 MLR 316. Their claim for damages for false imprisonment therefore fails.
74. This Court however agrees with the claimants with regard to Ms. Sikiya and Mr. Khembo who were arrested at the instigation of Mr. Lima and Mr. Mponda. The two were subsequently prosecuted after the whole criminal process had been set in motion by Mr. Lima and Mr. Mponda. There was no reasonable and probable cause for the prosecution of Ms. Sikiya and Mr. Khembo. Contrary to the submission of the defendant, there was no evidence to raise such against the two. The two ended up being acquitted. The elements of the tort of malicious prosecution have accordingly been made out as

- outlined in the cases of *Lapukeni v Commercial Bank of Malawi* [1996] MLR 139 and *Matanda v Sales Services Ltd and Others* [1990] 13 MLR 219.
75. Ms. Sikiya and Mr. Khembo have therefore made out their claim for damages for malicious prosecution.
76. The claimants never made any submissions on their claim for damages for defamation. The defendant however correctly submitted that a defamatory statement is defined in the case of *People's Trading Centre v Ngoma* [1999] MLR 343 at 348, as "one which has the tendency to injure the reputation of the person to whom it refers."
77. The defendant further correctly submitted that determining whether or not the statement complained of is capable of defamatory meaning is a question of law and requires the court to decide if there is evidence of the tort having been committed. Further, that once the court is satisfied that the words complained of are capable of bearing defamatory meaning it must then determine as a question of fact whether the claimants was actually defamed by those words. See *Marinho v SGS Blantyre (Pvt) Ltd* [1998] MLR 208 at 218.
78. The defendant also correctly observed that in *Namba v Rajani* [1998] MLR 262 it was held that proof by the claimants of the publication of defamatory matter by the defendant is essential to prove a cause of action in slander. And that publication means the making known of defamatory matter to some person other than the claimants.
79. The defendant noted that the claimants allege that their character was defamed. However, it pointed out that there is no clear connection between the facts pleaded or the evidence on the one hand, and the allegation that they were defamed by the defendant. Further, that there was no witness who gave evidence showing that his estimation of the claimants was lowered by any acts of the defendant. And that, further, no evidence was led to show how the arrest and prosecution of the claimants defamed them.
80. The defendant submitted that, in the circumstances, the claim for damages for defamation has not been made out. This Court entirely agrees with the submission by the defendant on the evidence and in the absence any contrary submission by the claimants. Indeed, there was no witness who gave evidence showing that his estimation of the claimants was lowered by any acts of the defendant. And further, no evidence was led to show how the arrest and

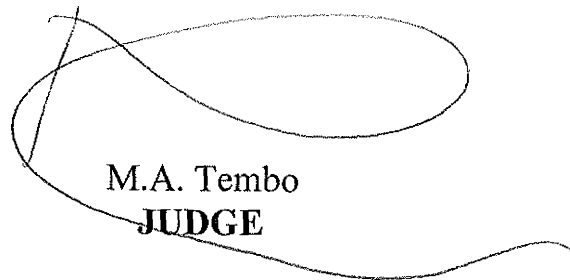
prosecution of the claimants defamed them. The claimants' claim for damages for defamation therefore fails.

81. The claimants' witness conceded that neither he nor the other claimants had adduced evidence on the alleged special loss and damage that he and the rest of claimants were claiming in this matter. The claim for special damages namely, K3 000 000 legal fees and K1 800 000 expenses incurred in fuel, accommodation, food, communication and domestic security, therefore fails.

82. This Court considered the question of costs which normally follow the event. Ms. Sikiya and Mr. Khembo will get the costs of this action. Mr. Sibuyi and Mr. Mbewe are condemned in costs for the defendant.

83. The damages and costs herein shall be assessed by the Registrar.

Made at Blantyre this 23<sup>rd</sup> December 2021.



M.A. Tembo  
**JUDGE**