



IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL DIVISION

CIVIL CAUSE NO. 955 OF 2020

BETWEEN

WICKSON PHIRI.....1ST CLAIMANT
YAMIKANI NAMAKWA.....2ND CLAIMANT
BLESSINGS ZIGIBO.....3RD CLAIMANT
JAMISON KUDZALA.....4TH CLAIMANT
TED SICHONE.....5TH CLAIMANT
SAIKONDA SMART.....6TH CLAIMANT
WISTED SAIKONDA.....7TH CLAIMANT
FELIX MAJOR.....8TH CLAIMANT
JOSEPH JOHN.....9TH CLAIMANT

AND

FOODS & FEED WHOLESALERS LIMITED t/a KAPANI ENTERPRISES.....
.....1ST DEFENDANT
ATTORNEY GENERAL (MALAWI POLICE SERVICE).....2ND DEFENDANT

Coram:

Brian Sambo, Assistant Registrar

Mr. W. Namasala, of counsel for the Claimants

Mr. Matola, of counsel for the 2nd Defendant

Mr. G. Kumwenda, Official Interpreter/ Law Clerk

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Civil Cause Number 955 of 2018.*

ORDER ON ASSESSMENT OF DAMAGES

BACKGROUND

On 5th July, 2021, the Claimants obtained a default judgment for the following;

- a. Damages for false imprisonment
- b. Damages for malicious prosecution
- c. Damages for defamation
- d. Damages for mental, distress and torture
- e. Damages for pain and suffering for the 6th Claimant.
- f. Damages for disfigurement for the 6th Claimant.
- g. Exemplary damages
- h. Any other relief which the court may deem just, and
- i. Costs of this action.

On 29th September, 2021 I received evidence on assessment *interparte*. I now return to give my order on assessment of damages, but before I do so, let me first give brief facts of this matter.

BRIEF FACTS

Facts of this case are this simple. All the Claimants except the 9th Claimant were arrested at Kapani Enterprises in Area 29 in Lilongwe around 9.30 hours on the 9th of October, 2018. The 9th Claimant was arrested on the 3rd of October, 2018. They were all released on the 17th December, 2018 when the court found them with no case to answer for total lack of evidence. Three guards of the Defendant were caught with chicken meat on 3rd October, 2018. The 1st Defendant's CCTV Cameras confirmed the same.

The 2nd Defendant, acting on the report made by the 1st Defendant, arrested all security guards indiscriminately including the Claimants. The 6th Claimant is said to have been tortured inside the police cell by some police officers in an attempt to obtain a confession. It is said he was severely beaten up by a panga knife and he suffered injuries.

EVIDENCE

The Claimants testified during assessment. Their evidence was in full agreement of the facts outlined above. They all testified that there was no basis for the police to arrest them because none of them was found in possession of the items alleged to have been stolen; the three guards who were caught with chicken meat never mentioned them, the 1st Defendant's CCTV Cameras never picked any of them

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in the act of stealing yet the cameras are placed at every corner in the 1st Defendant's premises, and there was a long distance between the place where the chickens were being kept to where the Claimants were stationed for duties.

The 6th Claimant added that, while all his colleagues were detained at Maula Prison, he was kept at Kanengo Police Station. He said, while in the police custody, the police assaulted him with a panga knife in an attempt to obtain a confession from him. They made him lay on his stomach as they whipped him on his back using the mentioned weapon. He testified that they bet him up for three minutes, before they could stop. He felt much pain and agony.

When the 1st Witness was cross examined, he told the court that they were taken to court within 48 hours from the time they were arrested. That his extended stay in the custody of the police was sanctioned by the court. He said when the court had granted them bail on the 12th of November, 2018, the police re-arrested them, immediately and took them back to their custody. He said they were re-arrested on the same allegations; that they had stolen chickens from the 1st Defendant. He said, upon being arrested again, none of them asked for bail again because they were afraid that even if the court gave them bail, the police would re-arrest them. He said they stayed at Maula Prison from the 10th of October, 2018 to the 17th of December, 2018. He said while he was in prison, his children stopped going to school as they were visiting him in prison. He also said, while in prison, he sold his piece of land at Mchesi within the city of Lilongwe in search of money to support his family while he was still under incarceration.

In re-examination he told the court that from the 12th of November, 2018 he was released from detention along with others on the 17th of December, 2018.

The 2nd Claimant was cross-examined, and he told the court that he was arrested on 9 October, 2018 and he was taken to court after 2 days; on 11 October, 2018. He said in his witness statement that he was taken to Mkukula Magistrate Court on the 9th of October, 2018 which was the same day he was arrested. He said he was not sure as to whether or not he had spent a night at Kanengo Police Station. He told the court that he was taken to court on the 12th of October, 2018. He said when they appeared in court, they applied for bail which was granted by the court but the police refused to let them go; they re-arrested them and took them back to prison on the same allegations. He said they stayed at Maula Prison for 3 months; from October, 2018 to December, 2018. He said his character and that of his colleagues was tarnished because of being connected to theft allegation which they did not know.

In re-examination he told the court that he had forgotten some dates because the incident happened long time ago.

The 6th Claimant was cross-examined. He told the court that he was arrested on 10th October, 2018 and they were taken to court on the same date. He said bail was granted to them by the court but the police re-arrested them, immediately and took them back to their custody on the same allegation. The police told them that they were re-arrested because they were investigating another undisclosed matter against them. He said when they were re-arrested, they did not bother themselves asking for another bail because they knew that they would be taken back to custody even if the court gave them another bail. He said they were in police custody for 3 months. He said because of the beating, he was unable to walk or to sit down or to sleep. He told the court that he did not have any medical evidence in support of the beating allegation. He said they stayed in prison from October, 2018 to 17th December, 2018. He said, while he was in custody, his family sold his piece of land in order to realise money for bail that was granted by the court. He said he did not have any evidence in support of the fact that his family sold his land for the sake of his bail.

In re-examination he told the court that he had forgotten exact dates of certain events because the incident happened in 2018. He added that the police did not take them to court on the same day they arrested them as they said they were still investigating the matter.

ISSUE

The hearing was conducted in order to assess the quantum of damages payable by the Defendants to the Claimants under the specific heads outlined above..

ANALYSIS AND DETERMINATION

I have gone through the evidence adduced by the Claimants, and also submissions made by counsel for the Claimants, Mr. Namasala as well as by counsel for the Defendant, Mr. Matola. I had time to look at other comparable case law relevant to the present assessment, as well.

In these type of matters, the victim is required to prove that he/she indeed incurred or suffered some damage and that the defendant was the cause of his damage out of his negligence. Once that has been done, the duty remains with the court to assess the extent to which the victim should be compensated. This follows the cardinal principle of **restitution in integrum** which simply means to be compensated as far as money can do; the law will try to place the injured

person in the same condition he was before the accident had happened. See **Black's Law Dictionary 9th Edition p1428.**

Turning to the claims of damages involving all the 9 Claimants, i.e. damages for false imprisonment, damages for malicious prosecution, damages for defamation, damages for mental distress and torture and exemplary damages, this is what I have found.

Beginning with the claim for damages for false imprisonment, not all days of incarceration were wrongful. False imprisonment began when the police refused to release the Claimants after bail was granted by the court.

From the evidence, it is clear that all Claimants herein save the 9th Claimant stayed in police custody for 67 days, while the 9th Claimant stayed there for 73 days, generally. These periods include the lawful imprisonment and the false one. After their arrest, they were taken to court within 48 hours according to section 42(1) of the Constitution. On 15th October, 2018, they had an opportunity to ask for bail but it was denied because the state had convinced the court with the fact that they were still investigating the matter. On 12th November, 2018 they repeated their application for bail and the court granted their request but the Defendant refused to release them on pretext that they were investigating them for another different charge. This was the day when the wrongful detention/false imprisonment began. All other days before the 12th of November, 2018 were properly sanctioned by the court, and therefore the question of false imprisonment does not arise. Now, counting days from the 12th of November, 2018 to 17th December, 2018, there are 34 days. This is not a very long time considering some of the case precedents that have been cited by the parties.

Damages for false imprisonment are generally awarded for the non-pecuniary loss of dignity. The principal heads of damage appear to be the injury to liberty i.e. the loss of time considered primarily from a non-pecuniary viewpoint and the injury to feelings i.e. the indignity, mental, suffering, disgrace and humiliation with any attendant loss of social status. In addition there may be recovery of any resultant physical injury or discomfort as where the imprisonment has a deleterious effect on the Claimant's health. **McGregor on Damages 16th Edition Para 1850-1851.**

When awarding damages for false imprisonment, the court also considers time spent in custody and aggravating circumstances. Considering the case of *Ngulube v Attorney General, Civil Case No. 1509 of 1993* where it was stated and I quote;

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"in relation to time, I would say that longer imprisonment in the absence of alternative circumstances should attract heavier award, shorter imprisonment in the absence of aggravating circumstances should attract lighter awards. What should be avoided at all cost is to come with awards that reflect hourly, daily and monthly rates. Such an approach could result in absurdity with longer imprisonment and shorter imprisonments where there are assimilating or aggravating circumstances. This approach is to come up with different awards depending on whether the imprisonment is brief or very long etc. and subjecting this to other circumstances".

Counsel for the Claimants in his submissions proposed MK540, 000,000.00 being damages for false imprisonment (MK60,000,000.00 for each of the 9 Claimants) while the Defendant is proposing MK1,500,000.00 per Claimant as sufficient damages under this head. From the law I have outlined above, it is clear that the proposition made by the Claimants is too much on the higher side. It exceeds awards made in very heinous and heartrending cases such as those in *Martin Machipisa Munthali vs Attorney General, Civil Cause No. 52 of 1993*. I have already pointed out that the circumstances of the present detention cannot be described as appalling as was the case in those other cases cited by counsel for the Claimants. The cases are not a match to the present matter, and the amount proposed, therefore, has been exceedingly exaggerated.

In *Benard Makande and Alli Muhammad Snake vs Attorney General (Ministry of Home Affairs, Malawi Defence Force and Malawi Police Service, Civil Cause No. 576 of 2020* where the Claimants were held in unlawful detention for 27 days, an award of MK3,500,000.00 in damages was made in August, 2021.

In the instant case, the Claimants were in false imprisonment for 34 days, and considering the fact that there are no aggravating circumstances, I therefore award each one of them **MK2, 000,000.00**.

With regard to malicious prosecution, a tort which provides redress to persons who have been prosecuted without cause and with malice, the claimant must prove the following essential elements for him to succeed.

- a. The claimant is required to show that he was prosecuted. see *Waters v Pacific Delivery Service Ltd (1963) 42 DLR (2d) 661*.
- b. The second element to be proved is that the prosecution must end in favour of the Claimant. See *Parker v Laugly (1713) 10 Mod 145*.

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- c. That the defendant had no reasonable and probable cause for bringing the prosecution and the prosecutor was not required to do the same: *Abrath vs N.E Railways (1883) 11 QBD 440; Stapeley v Annetts [1907] 1 WLR 20.*
- d. That the defendant brought the unsuccessful action maliciously. *Glinski vs McIver, (1713) 10 Mod 141.*

The 4th element is of greater importance on issues of assessment of damages. The greater the damage the greater the award. In the present case, the Claimants raises issues of assassination of their respective character, mental distress and torture, loss of property such as plots of land, and failure by their children to go to school. *Prema facie*, what the Claimants raise constitute sufficient damage. The only problem is that they did not support their assertions by evidence. In cross examination, answers were clear that they did not have proof of torture, there was no proof that they lost property because of this matter. There was again no evidence that children were unable to go to school because they were visiting them in detention. Alleging is one thing and proving is another. This is a court of law, and cases are not determined based on mere assertions; there has to be proof on balance of probabilities. It is true that, proof on balance of probabilities does not mean 'no proof at all'. It does not entail that a party may simply allege things and wait for the court to agree even in the absence of slightest proof. This does not mean that, in the present case there was no malicious prosecution, there was, and the evidence of incarceration in itself is proof of damage, but that the Claimants had some work to do to support those other assertions of damages.

The Claimants demand MK180,000,000.00 being damages for malicious prosecution thus MK20,000,000.00 for each of the Claimants, while the Defendant is of the view that MK500,000.00 each Claimant would be sufficient compensation to all of them. From the discussion above, it is obvious that MK20,000,000.00 per Claimant is much on the higher side, and at the same time, MK500,000.00 is an underestimation.

In *Rabson Munthali and 11 others vs Attorney General*, Civil Cause Number 121 of 2020, the court awarded MK2, 000,000.00 as damages for false imprisonment and malicious prosecution. The award was made on 23rd October, 2020.

Considering the above, I award each one of the Claimants the sum of **MK1, 500,000.00** being damages for malicious prosecution.

Regarding the claim for exemplary damages, I need to examine the conduct by the police if it was exceptional to the extent that an average man, upon hearing it, could conclude that the wrong was indeed overstepped. See Lord Devlin's test

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in *Rookes v Barnard*, [1964] A.C. 1129. The evidence before me does not disclose heinous/aggravating circumstances worthy ordering the Defendants to compensate the Claimants with as high as MK30, 000,000.00 per Claimant; translating to MK270, 000,000.00. Counsel for the Defendant proposed MK1, 000,000.00 per Claimant as sufficient punitive damages. The 6th Claimant's assertion of beating was not supported by evidence. Apart from the evidence of incarceration, there is no any other evidence demonstrating aggravating circumstances worthy attracting so much punitive damages. Considering these, and the comparable case law, I award each Claimant the sum of **MK1, 000,000.00** being exemplary damages.

On the claim of damages for mental distress and torture. There is no evidence of torture but mental distress. Admittedly, the conduct by the police in arresting all the Claimants before thoroughly investigating the matter, and also of refusing to release the Claimants after the court of law had duly granted them bail were enough cause of mental distress. I know the issue of mental distress is biological and should have been supported by medical evidence or otherwise, and that none of the Claimants had attempted to bring such evidence. The court could only rely on the evidence in the witness statements and the testimonies given in court to award damages under this heard. Going through the evidence, none of the witnesses had seriously given evidence of mental distress. However, inferences have to be made by the court to arrive at a just and fair award. Considering the evidence before me, I award **MK500, 000.00** to each Claimant as damages for mental distress.

Coming to the claim for damages for defamation, it is true the Claimants were defamed. By publishing that the Claimants had committed an offence punishable by imprisonment (See *Steven Kavuli vs Attorney General (Ministry of Home Land Security, Civil Cause No.99 of 2020)*) the tort defamation had been committed. The defamation began when the Defendant had re-arrested the Claimants, after they had been granted bail by the court, and when they told the Claimants that they were being investigated for another criminal offence. At first, by acting on the report made to them by the 1st Defendant, the tort of defamation was not yet committed. It is obvious that the right thinking members of their respective communities, would not consider them as criminals. However, I take notice that the present publication is slander, and slander is less serious than libel, and hence the award should also be less. The circumstances of the defamation too are not aggravated. Considering these circumstances, I award them **MK500, 000.00** each as damages for defamation.

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Coming to the claims of damages for pain and suffering and disfigurement, there is no evidence supporting these. There is no Medical Report let alone a spectacle shown to this court of the said disfigurement. Disfigurement is never in abstract; it is physical, and the 6th Claimant did not show the court any impairment or deformity whatsoever. It may be true that the police had really beaten him up, and it may also be true, in the absence of evidence, that the police never assaulted him. This being a court of law, I must determine cases based on concrete evidence and relevant law. During cross examination, the PW6 said he did not have evidence that he was beaten up by the police. He said he did not have any Medical Report, and it was indeed difficult for one to believe that he was beaten up by the police. I have already said elsewhere in my assessment that, the mere fact that proof in civil matters is on preponderance of evidence, it does not mean 'no evidence at all'. To that end, I decline to award any damages under these heads.

In conclusion, each Claimant is awarded a total sum of **MK5, 500,000.00** in damages. This means that, for the 9 Claimants, the Defendant shall pay **MK49, 500,000.00**. This whole sum is payable by the Defendant within 35 days from today.

Costs are for the Claimants and shall be assessed separately if not agreed upon by the parties.

Made in chambers today the 26th of November, 2021.


Brian Sambo
Assistant Registrar.