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**REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL DIVISION
CIVIL CAUSE NO. 210 OF 2018
BETWEEN**

CECILIA KUMPUKWE.....CLAIMANT

AND

THE ATTORNEY GENERAL.....DEFENDANT

CORAM: THE HONOURABLE MR. JUSTICE D. MADISE

MR Majawa, of Counsel for the 1st, 3rd, And 4th Claimant

MR N. Banda, of Counsel for the 2nd Claimant

MR L. Bonomali, of Counsel for the Defendant

Mrs. J.A Madukani, of Counsel for the Defendant

Mr. Mathanda, Official Court Interpreter

Madise, J

JUDGEMENT

Introduction

1. The Claimants took out a writ of summons on 25th July, 2018 against the Attorney General claiming damages for false prosecution, defamation, and malicious prosecution, loss of business and costs of this action. The Claimants alleged that between 21 April to 27 April, and 5 May 2017, they were maliciously and without reasonable cause arrested and transported to Lilongwe Police Station on allegation of having published false news likely to cause fear and alarm to the public contrary to section 60 (1) of the Penal Code and making a false document contrary to section 353 of the Penal Code.
2. The first Claimant was arrested on 25th April, 2017 and was kept in custody until 27th April, 2017. The second Claimant was arrested on 21st April, 2017 and kept in custody until 27th April, 2017. The Third Claimant was arrested on 25th April, 2017 and kept in custody until 27th April, 2017. The fourth Claimant was arrested on 4th May, 2017 and kept in custody until 8th May 2017.
3. The Defendant has disputed the claim on the basis that at the time of the arrests the Police had reasonable and credible information that a crime had been committed. The Defendant also disputed the fact that the police acted with malice in prosecuting the Claimants. The Defendant further denied publishing

any defamatory material concerning the Claimants. Lastly the Defendant denied the claim of false imprisonment on the basis that the arrests were lawful based on reasonable suspicion. The Defendant called on the Claimant to prove the allegations in the statement of case.

The Facts

4. Cecilia Kampukwe told the court that on 25th April, 2017 while at home several police officers arrived and started searching her house and confiscated a mobile phone, Ipad and a laptop. She was not showed a search warrant. The police then informed her that she was being transported to Lilongwe. Upon arrival in Lilongwe she was taken to Kanengo Police Station where she was placed in a cell. She was informed that she was arrested on allegations that she had authored a false letter of resignation of the then Vice President Honorable Saulos Chilima.

5. On 27th April, 2017 she was taken to the Senior Resident Magistrate Court in Lilongwe under Criminal Case Number 839 of 2017. While at court she applied for bail and she was released from custody. Since the State was not ready the case was adjourned to 27th May, 2017. However the case could not proceed as the prosecutor did not attend court. The case was called again on

15th June, 2017 where the court issued a notice to dismiss the case for want of prosecution. The Matter was discharged on 12th January, 2018.

6. She told the court that the conditions of the police cell was not good and that the case was not prosecuted because the State did not have evidence against her. She alleged that she was arrested due to her association with former president HE Joyce Banda. She tendered in evidence **CK 1** to **CK 4** being news articles about her arrest. In cross examination the witness stated that she appeared before court within 48 hours and she acknowledged that it was the duty of the police to investigate crimes. She admitted that the newspaper articles were not published by the Defendant. She however stated that the newspaper articles were published due to the arrest at the hands of the State.

7. The second witness was Stella Asam, a member of the Peoples Party. She recalled that on 21st April, 2017 while at home in Kameza in Blantyre plan clothe police officers from Blantyre, Chichiri, Ndirande and Chilobwe police stations went to her house and arrested her. She stated that she was not informed the reasons for her arrest. The Police then took away the gadgets which were in the room where she carries on secretarial service business, to wit, a laptop and a printer/copier.

8. At Blantyre Police Station she was interrogated by Mr. Magalasi Regional Head of CID. She was accused of writing a fake resignation letter by the Vice President Honorable Saulos Chilima and forged his signature. She was then put in a cell. On 22nd April, 2017 she was taken to Lilongwe Area 3 Police Station, then to Area 18 Lingadzi Police Station and then Area 30 Police Headquarters. At Area 30 she was informed that she had been arrested for forging the VP's signature and authoring a publication which could cause panic to the public and that she had circulated the same.

9. She was not shown the said publication. She was then taken to Lingadzi Police Station and put in a cell. On 25 and 26 April, 2017 she was taken to Area 30 again for interrogation on the allegations of authoring a fake letter of resignation purportedly by the Vice President. The interrogation was conducted by a Mr. Chisale.

10. On 27th April she was taken to court where she was released on bail without taking a plea. She was finally discharged for want of prosecution on 12th January, 2018. The witness presented newspaper articles which published her arrest (SA 1 to SA 3). That she was finally acquitted of the charges at the expiry of one year by operation of law (Section 247 (2) Criminal Procedure

and Evidence Code). She now claims damages for false imprisonment malicious prosecution, defamation and loss of business due to the arrest.

11. In cross/re-examination the witness told the court that it was the duty of the Police to investigate crimes. She admitted that the newspapers which wrote articles about her arrest did not belong to the Government. However she stated that Government caused the publications due to her arrest.

12. The third witness was Honorable Ackson Kalaile Banda. He told the court that he was arrested at Dwangwa Trading Center on 4th May, 2017 by 10 armed Police men from Nkhunga Police Station. That he was not told the reasons for his arrest. He was then transported to Lilongwe and put in a cell at Lingadzi Police Station.

13. On 7th May, 2017 he was informed by Commissioner of Police Chisale of the reasons for his arrest. He was accused of authoring a fake letter on the resignation of the Vice President. On 8th May, 2017 he was taken to court where he was granted bail without taking plea. The case was called at court on 27th May and 15th June but the state failed to proceed with prosecution. He was finally discharged on 12th January, 2018 for want of prosecution. (AKB 1)

14. He stated that the whole prosecution process was a sham and a waste of time and that it was politically motivated because of his association with the Peoples Party. He accused the State of ill motive and that his name was defamed due to the arrest. In cross/re-examination the witness stated that he was arrested on suspicion he had authored a fake letter about the resignation of the Vice President. That the papers which wrote about him did not belong to Government.
15. The last witness was Yesaya Nkhwala. He told the court that he was arrested, on 25 April, 2017 while at home by 12 Police officers who were armed with guns in full view of his family. He was taken to Lingadzi Police Station where he was put in a cell which was in a bad condition. While at Lingadzi, he was accused of authoring a fake resignation letter purportedly by the Vice President. On 27th April, 2017 he was taken to court where he was granted bail without taking plea. The case was called on 27th May and 15th June 2017 but the state failed to show up to prosecute the case.
16. He was finally discharged on 12th January, 2018 and later acquitted one year later. That the case failed because the state did not have evidence against him. He blamed the State for the newspaper articles which went into circulation due to his arrest, and for malicious prosecution and false imprisonment. In cross/re-examination the witness stated that he was given bail within 48 hours

and that it was the duty of the police to investigate crimes. That marked the close of the Claimants' case.

17. In defence, the Defendant called Oyster Chisale of National Police Headquarters. He stated that in April, 2017 social media was awash with a purported letter of resignation of the Vice President Dr Saulos Chilima. He started investigations of the matter and he received information that the letter was written by former employees of the office of the then Vice President Joyce Banda, and the Claimants names were mentioned. He then arrested the four and confiscated their gadgets like phones. The four were taken to court within 48 hours where they were granted bail. The police conducted further investigations but failed to find a direct link connecting the four to the crime. The police failed to find the author of the fake letter.

18. He stated that at the time of the arrests, there was reasonable cause to believe the four had committed an offence and that the arrests were justifiable. He denied that the police defamed the four as the police did not publish any article on the arrest. In cross/re-examination the witness stated that the police at first had evidence the letter was authored by the 2nd Claimant but it turned up to be untrue in the end. That the second Claimant was arrested on 21st April and released on 27th April, 2017 which was more than 48 hours. He admitted that

the arrests of the four attracted a lot of media attention. That marked the close of the Defence's case.

The Issues

19. There are five main issues for determination before me.

- (1) Were the Claimants arrested by the Police?
- (2) Was there false imprisonment?
- (3) Was there malicious prosecution?
- (4) Was there defamation?
- (5) Was there loss of business?

If the answer to the above are in the positive are damages payable?

The Law

The Burden and standard of proof

20. The burden and standard of proof in civil matter is this. He who alleges the existence of given facts must be the first to prove as a positive is easier to prove than a negative. He who alleges must prove. The burden of proof rests on the party (the plaintiff) who substantially asserts the affirmative. It is fixed at the beginning of the trial by the state of pleading and remaining uncharged

through the trial. See Joseph Constantine Steamship Line vs. Tamperial Smelting Corporation Limited [1942] AC 154,174.

21. In Joseph Jonathan Zinga vs. Airtel Malawi Limited, Civil Cause No. 74 of 2014 (Mzuzu District Registry) (unreported), the court said

“In civil matters there are two principles to be followed. Who is duty bound to adduce evidence on a particular point and what is the quantum of evidence that must be adduced to satisfy the court on that point? The law is that he who alleges must prove. The standard required by the civil law is on a balance of probabilities. Where at the end of the trial the probabilities are evenly balanced, then the party bearing the burden of proof has failed to discharge his duty. Whichever story is more probable than the other carry the day”.
[Emphasis added].

The standard required is on a balance of probabilities. If the evidence is such that the tribunal can say; we think it more probable that not the burden is discharged but if the probabilities are equal it is not. Denning J in Miller vs. Minister of Pension [1947] All E.R 572.

False Imprisonment

22. It is the unauthorized restraint of liberty without any justification at law. It is the detention of a person without his consent and without lawful authority. It is the unlawful restraint of a person’s liberty or freedom of locomotion. The

plaintiff need not prove ill will or malice. But if this is proved a court will award punitive damages in addition to nominal damages.

23. For the plaintiff to succeed he must show that the defendant laid a charge against him as opposed to reporting a crime and allowing the police to do their own investigation. The defendant must specifically mention that it was the plaintiff who committed the crime. Once this proved the court will award damages for humiliation, loss of dignity, mental suffering and loss of time suffered by the plaintiff if it is found at the criminal trial that he did not commit the offence.

24. In *Hauya vs. Cold Storage Co* [1994] MLR 92 Unyolo, JA, Mtegha, JA and Msosa JA stated as follows: *Where the defendant merely informs the police that a fraud has been discovered, and 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.*

Defamation

25. A defendant is liable for defamation if he publishes to some person other than the plaintiff some false and defamatory story which injures the plaintiff's reputation. Three elements must be present for a defendant to be

liable for defamation. False story, Publication to third party, Injury to reputation.

26. It is the intentional false communication published or publicly spoken that injures another's reputation or good name. It holds a person to ridicule, scorn or contempt in a respectable and considerable part of the community. (Black Law Dictionary 6th Ed. 1990).

27. In *Uren vs. John Fairfax & Sons Ltd* [1967] 11 CLR 118, 150 Windeyer, J.

It seems to me that properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was publicly defamed. For this reason, compensation by damages operates in two ways: - as vindication of the plaintiff to the public and as a consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money.

Malicious prosecution

28. For a defendant to be liable for malicious prosecution it must be shown that the defendant together with the prosecuting authority through witnesses connived to tell lies with the view to have the plaintiff go through a vexatious criminal trial aimed at simply inconveniencing and embarrassing the plaintiff. The plaintiff must prove that there was malice by word of mouth or and action.

29. It is the institution of a criminal or civil case maliciously without probable cause. Once the case has been terminated, the plaintiff may sue for malicious prosecution. Any person who takes an active part in the initiation, continuation or procurement of a civil or criminal proceeding may be liable for this tort. Elements:

1. Commencement of proceedings.
2. Legal causation by defendant.
3. Its termination in favour of the plaintiff.
4. Absence of probable cause for such proceedings.
5. Presence of malice.
6. Damage to the plaintiff by reason thereof.

30. It is a constitutional right of an arrested person to be informed of the reason for his arrest at the time of such arrest. Section 42 (1) (a) of the Constitution provides:

“Every person who is detained, including every sentenced prisoner, shall have the right-

- (a) *to be informed of the reason for his or her detention promptly, and in a language which he or she understands”.*

31. On the other hand, **Section 20** of the **Criminal Procedure and Evidence Code**, (the CP & EC), provides, *inter alia*:

“(1) In making an arrest a police officer or other person making the arrest shall actually touch or confine the body of the person to be arrested, and shall inform the person that he is under arrest.

(2) Where the person to be arrested submits to the custody by word or action, the arrest shall be effected by informing the person that he is under arrest”. [Emphasis added]

And **Section 20A** of the CP & EC, reads, *inter alia*:

“(1) Subject to subsection (5), where a person is arrested, otherwise than by being informed that he is under arrest, the arrest is not lawful unless the person arrested is informed that he is under arrest at the time of arrest or as soon as is practicable after his arrest.

(3) Subject to sub section (5) no arrest is lawful unless the person arrested is informed of the reasons for the arrest at the time of or as soon as it practicable after the arrest

(5) Nothing in this section shall be deemed to require a person to be informed_

(a) that he is under arrest; or

(b) of the reason for the arrest,

if it was not reasonably practicable for him to be so informed by reason of his having escaped from arrest before the information could be given". [Emphasis added]

The Claimants' submissions

32. The Claimants submitted that their arguments were premised on the following torts:
- False imprisonment;
 - Malicious prosecution;
 - Defamation; and
 - Loss of business.

The law on false imprisonment

33. The Claimants argued that Under Chapter IV of the Republic of Malawi (Constitution) Act, ("the Constitution"), every person has a right to personal liberty and dignity.

Section 18 of the Constitution provides:

"Every person has the right to personal liberty".

And Section 19 of the Constitution provides, *inter alia*:

(1) The dignity of all persons shall be inviolable.....

(3) No person shall be subjected to torture of any kind or to cruel, inhuman or degrading treatment or punishment".

34. That in a proper case, the constitutional rights to personal liberty and dignity may be interfered with by operation of the law.

Section 44 (1) of the Constitution reads:

“No restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society”.

35. They submitted that a police officer can only interfere with an individual’s constitutional rights to liberty and dignity where sufficient grounds exist for such interference. 4.4 Section 34 of the Police Act, No. 12 of 2010, provides, *inter alia*:

(1) *Every police officer shall exercise such powers and perform such duties as are conferred or imposed on a police officer by or under this Act or any other written law and as are by law conferred or imposed on police officers.....*

(4) *It shall be the duty of every police officer to-*

(a) *collect and communicate intelligence affecting the functions, powers and duties of the Police;*

(b) *prevent the commission of offences and public nuisances;*

(c) *detect crime and bring offenders to justice; and*

(d) *apprehend all persons whom he is legally authorized to apprehend and for whose apprehension sufficient grounds exist* [Emphasis added by them]

36. That it is a constitutional right of an arrested person to be informed of the reason for his arrest at the time of such arrest. Section 42 (1) (a) of the Constitution provides:

“Every person who is detained, including every

sentenced prisoner, shall have the right-

to be informed of the reason for his or detention promptly,

and in a language which he or she understands”.

And Section 20A of the CP & EC, reads, *inter alia*:

“(1) Subject to subsection (5), where a person is arrested, otherwise than by being informed that he is under arrest, the arrest is not lawful unless the person arrested is informed that he is under arrest at the time of arrest or as soon as is practicable after his arrest.

(5) *Nothing in this section shall be deemed to require a person to be informed_*
(c) that he is under arrest; or
(d) of the reason for the arrest,
if it was not reasonably practicable for him to be so informed by reason of his having escaped from arrest before the information could be given". [Emphasis added].

37. That in interpreting the provisions of Section 42 (1) (a) of the Constitution, the High Court, sitting as a Constitutional Court, in the case of State and 3 others; **Ex Parte: Right Honorable Dr. Cassim Chilumpha, SC** [2006] MLR 406 (HC), at page 417 e-f, said:

"A plain reading of section 42 (1) (a) would show that what is required is to inform the arrested person the reason for his arrest and not necessarily details of the reasons of his arrest..... We therefore take the view that on arrest, it is enough to tell the arrested person the nature of the allegations against him and not necessarily the particulars thereof".

[Emphasis added by them].

38. That at common law false imprisonment is defined as restraint of personal liberty. That in the case of **Namasasu vs. Wood Industries Corporation Ltd & others** [1997] MLR 162 (HC) Chimasula Phiri J then. at 173f – h said:

*"False imprisonment has been defined in several cases. In **Chiumia v. Southern Bottlers Ltd Civil Cause No. 797 of 1989** (unreported), Unyolo J. (as he then was) quoted the following definition of false imprisonment;*

“Imprisonment is no other thing than the restraint of a man’s liberty, whether it be in the open field, or in the stocks, or in the cage, in the streets, or in the man’s own house as well as in the common goal: and in all places the man so restrained is said to be a prisoner so long as he has not his liberty fully to go at all times to all places whether he will be without bail or mainprize or otherwise.”

39. And in the Joseph Zinga case *supra*, at pages 10-11, Madise, J stated

“It is the unauthorized restraint of liberty without any jurisdiction at law. The detention of a person without his consent and without lawful authority. It is the unlawful restraint of a person’s liberty or freedom of locomotion. The plaintiff need not to prove ill will or malice. But if this is proved a court will award punitive damages in addition to nominal damages”. [Emphasis added].

40. They stated in submission that in Meja v. Cold Storage Co. [1990] MLR 234 (HC), Mkandawire J, (as he then was), at page 240 d-e, said:

“I now move on to false imprisonment..... As a matter of fact, his imprisonment started right away at the defendant’s premises when there was a restraint on his personal liberty. He was a prisoner at Kanabar House and Chichiri Prison was the climax of his imprisonment”.

41. That under the tort of false imprisonment, the onus rests on the defendant to prove the existence of a reasonable cause for the arrest. In the case of Hicks v. Faulkner [1881-5] All E.R. Rep. 187 QBD, at page 190 G, Hawkins, J. said:

“..... in false imprisonment the onus lies upon the defendant to plead and prove affirmatively the existence of reasonable cause...”

42. In conclusion they submitted that in light of the above, the Defendant did not have a reasonable and probable cause for the arrest of the Claimants and consequently failed to discharge the duty placed on them that they had a reasonable and probable cause in arresting Claimants. Consequently, in view of the above factors, the Claimants submitted that the arrest of the Claimants was in violation of **Sections 18, 19, 42 (1) (a) and 42 (2) (b)** of the Constitution; **Sections 20 and 20A** of the CP & EC and the common law position as stated in the *Ex Parte: Right Honorable Dr. Cassim Chilumpha* case *supra*.

43. That in light of the definition of false imprisonment in the *Joseph Zinga* case *supra*, which propounded, to wit, as “*the unlawful restraint of a person’s liberty or freedom of locomotion*”, the Claimants submitted that the arrest of the Claimants was unlawful and consequently they suffered false imprisonment at the hands of the police.

The law on malicious prosecution

44. That at common law, to succeed in the tort of malicious prosecution the plaintiff must prove absence of reasonable and probable cause and malice in the commencement of prosecution. Hence in the case of *Mbewe vs. Agricultural Development and Marketing Corporation* [1993] 16 (2) MLR 594 (HC), Tambala J. (as he then was) at page 602 f:

“The tort of malicious prosecution requires proof of absence of reasonable and probable cause and proof of malice in the commencement of prosecution: see Abrath v. North Eastern Railway [1883] 11 QBD 448; see also the case

of Mwafulirwa v Southern Bottles Ltd Civil Cause No. 85 of 1987 (unreported). The requirement of malice may be satisfied by proof of improper motive or purpose". [Emphasis added].

45. And in the case of Matanda v Sales Services Ltd and others [1990] 3 MLR 219 (HC), Unyolo, J (as he then was) at page 230b – h:

"I now turn to the claim for malicious prosecution. As has been stated in several cases decided by this court, in order for a plaintiff to succeed in an action for malicious prosecution he must establish that there was no reasonable and probable cause, that is, no sufficient reason for the prosecution and he must also show malice, that is, an improper motive for instigating the prosecution. These, however, are not the only ingredients of this tort. There are two others: first the plaintiff must also show that he was prosecuted by the defendant and secondly that the prosecution was determined in his favour.....

46. That again in the case of Joseph Zinga v. Airtel Malawi Ltd supra, at page 12, paras 6.4.1 – 6.4.2, my Lord said:

"For a defendant to be liable for malicious prosecution it must be shown that the defendant together with the prosecuting authority through witnesses connived to tell lies with the view to have the plaintiff go through a criminal trial aimed at simply inconveniencing and embarrassing the plaintiff. The plaintiff must prove that there was malice by word of mouth or and action.

It is the institution of a criminal or civil case maliciously without probable cause. Once the case has been terminated, the plaintiff may sue for malicious prosecution. Any person who takes an active part in the initiation,

continuation or procurement of a civil or criminal proceeding may be liable for this tort". [Emphasis added

47. Again, they submitted that the Claimants were maliciously prosecuted upon looking at the following factors as emerged from the evidence before this Court: That in view of the evidence, there was no reasonable and probable cause for the prosecution of the Claimants. Secondly, under **paragraphs 6 and 8** of the Witness Statement of **DW1**, the witness explicitly told the Court that police investigations "*failed to find direct evidence connecting the four suspects to the publication of the resignation letter up to now*".
48. The Claimants stated in submission that when did the police fail to find direct evidence connecting the 4 suspects? Was it before taking them to Court? If so, why take them to court when there was no evidence connecting the 4 suspects? On the other hand, if the police failed to find direct evidence connecting the 4 suspects after 27th April 2017, when they were taken to court, was it proper or reasonable for the prosecution to take them to court without first having sufficient evidence for the offence they were called upon to plead?
49. They submitted that **DW1** deliberately omitted to tell the Court below when he realised that he did not have direct evidence connecting the 4 to the commission of the alleged offence. Was it before or after taking the 4 to court? That he intentionally left it to the Court to figure out, a thing which is not for the Court to do. He was supposed to tell the Court about it.
50. The Claimants argued that that there was, per the words of Unyolo J (as he then was) in the *Matanda* case *supra* "no sufficient reason for the

prosecution”, for if they had, the prosecution would have proceeded. But it did not.

51. They submitted that the Defendant did not have sufficient reasons, for the prosecution of the Claimants and the same was primarily aimed at inconveniencing and/or embarrassing the Claimants. They strenuously submitted that the prosecution of the Claimants was therefore malicious.

52. That the Defendant failed to prosecute the Claimants in the Senior Resident Magistrate Court sitting at Lilongwe. Following such failure, the Senior Resident Magistrate Court discharged the four on 12th January 2018 from the criminal proceedings which were brought against them. After 1 year had elapsed without charging them on the allegations, they acquitted by operation of the law, under **Section 247 (2)** of the CP & EC.

The law on defamation

53. That the publication of a statement which tend to lower a claimant in the estimation of right thinking members of a society generally is defamation. In the case of Saikonde v. Chirwa & another [1997] 1 MLR 307 (HC), Chimasula-Phiri J then at page 310 said this:

“What is defamation? Defamation is 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.”

54. The Claimants cited Walter vs. Alltools (1944) 61 T.L.R. 39 at p 40, where the Court held that:

“a false imprisonment does not merely affected a man’s liberty, it also affects his reputation”.

Where the defamatory statement is in a form of permanence, such as, writing, painting, or a wax model, it is libel and is actionable *per se*, that is, without proof of damage. See: **Chidongo v. Cremer and others [2002-2003] MLR 17 (HC) at page 29 b – 30 a,**

55. In the case of **Joseph Zinga supra**, they stated that for a claimant to succeed in a claim for defamation, he must prove 3 elements against a defendant, namely:

Firstly, that the statement or story was false;

Secondly, that the statement was published to a third party; and

Thirdly, that the statement damaged or injured his reputation.

56. That the act of making known a defamatory statement, or the act of conveying an imputation by conduct, to a person or persons, other than the person who is the subject of the defamatory imputation, is publication.

See: **Pullman v. Hill & Co [1891] 1 QB 524 (QBD) at 527.**

57. That the question of whether there is publication will depend upon the facts of each case. In the case of **Byrne v. Dean [1937] 2 All ER 204 (CA) at page 212 E**, Greene LJ, said:

“Now, on the substantial question of publication, publication, of course, is a question of fact, and it must depend on the circumstances in each case whether or not publication has taken place”.

58. They submitted that the statement from **DW1** that the Claimants had forged the signature of the Vice President and written a letter of resignation by the Vice President was, frankly speaking, false. Since these false statements were the basis of their arrests and prosecution of a criminal offence, as **DW1** had stated under **paragraph 5** of his Witness Statement, they submitted that their reputation was injured or damaged by such false statements. That in cross examination of **DW1**, the Defendant’s only witness conceded that the arrest and prosecution of the Claimants on the allegations of forging the signature of Vice President and writing a resignation letter of the Vice President were likely to attract media attention.

The law on a claim for loss of business

59. The Claimants submitted that where immediate use of a chattel was within the reasonable contemplation of the parties, a claimant will be entitled to recovery of profits lost in the non-use of a profit-earning chattel. That in the case of **Gondwe v. Barros Engineering** [1984-86] MLR 40 (HC), at page 44 line 25, Banda, J. (as he then was) said:

*“It is true that for almost a year the plaintiff’s maize mill lay idle, but that es not preclude him from recovering any loss of profits. In my judgment it does not. As it was held in the case of **Victoria Laundry (Windsor) Ltd v. Newman Indus. Ltd** [1949] 1 All E.R. 997, the plaintiff cannot be precluded from*

recovering a general, although contemplative sum which must represent the normal profit he expected.....”

60. That in that regard a claimant is entitled to claim general damages for loss of business as a result of a defamatory statement which is actionable *per se*. In the case of *Manica (Malawi) Ltd v. Mbendera t/a PG Stationery* [2005] MLR 225 (SCA) at page 232 c – d, the Court said:

“..... the damages sought for loss of business or for loss of profits are generally classified as special damages representing consequential losses and in this case they needed to be pleaded because if they are claimed without pleading they would be a matter of surprise.....”

And at the same **page 232 h – i**, the Court went on to say:

“A plaintiff who claims damages must prove such damages, and if he claims special damages he must strictly prove them. If he is claiming general damages he must also prove them, but not as strictly as in the former case. The standard of proof is, of course, on a preponderance of probability”.

61. That specifically the Second Claimant told the Court that she had been running a business of secretarial, typing, photocopying and internet services, amongst others, under the name and style of On Target Office Solutions. She said that she started her business in September 2016. In her cross examination, this evidence was not disputed. And under **paragraph 30** of her Witness Statement, **PW2** also told the Court that when the police arrested her, she was consequently denied her constitutional right to engage in economic activity. Furthermore, the police confiscated her business equipment, namely, laptops,

printer copier, scanner, internet route, Ipad and Iphone. When these were returned to her, she discovered that they were damaged by the police. That this piece of evidence too was not disputed by the Defendant in cross examination.

62. The Claimants stated that in cross examination of **DW1**, the witness conceded that the 2nd Claimant was denied use of the equipment in her business during the period the items were in the police custody and possession. That the 2nd Claimant had proved to this Court that during the period she was arrested, she lost earnings from her business.

Submissions from the Defendant

False Imprisonment

63. The defendant submitted that false Imprisonment has been generally defined in law as the infliction of bodily restraint which is not expressly or impliedly authorized by law. (**Winfield & Jolowicz on Tort** 16th Ed p81). And according to the old Termes de la Ley (1520);

“Imprisonment is restraint of a man’s liberty whether it be in the open field, or in the stacks or cage in the street, or in a man’s own house, as well as in the common goal. And in all these places the party so restrained is said to be a prisoner, so long as he hath not his liberty freely to go at all times to all places whither he will, without bail or main prize”.

64. That it is a very fundamental policy of the law to jealously safeguard an individual’s personal liberty and it is for this reason that the country’s Constitution enshrines and entrenches such liberty under section 18 (see: **Reggie Kanjere v. Attorney General** Civil Cause No 1094 of 1996). That an arrest of a person is lawful if the Police have good grounds for reasonable

suspicion that a person committed an offence: *Nino Santagostino v. Attorney General* Civil Cause No 1537 of 1993. That however, an arrest or detention which is lawful could subsequently be unlawful and render the person holding the other liable in tort for false imprisonment if the other is in custody for longer than is necessary to fulfill the lawful purpose for which the person is detained/arrested (*George Thindwa v. Attorney General* Civil Cause No 1522 of 1993).

65. That it must be kept in mind that the burden rests on the Claimant herein to adduce evidence proving the necessary elements of the tort of false imprisonment at the required standard prescribed by law. It also ought to be kept in mind that there exists a principle that an arrest of a person is lawful if the police have good grounds for reasonable suspicion that a person committed an offence: *Nino Santagostino v. Attorney General* Civil Cause No 1537 of 1993.

66. That it ought to be emphasized that the Claimants' adopted witness statements stated that they were arrested on allegation that they authored and circulated a fake letter purporting to be a resignation by the Vice President Rt. Hon. Dr S.K Chilima. 4th Claimant also told this Court that he was arrested on 4th May 2017 and releases on 8th May 2017. It must be noted that on 4th May 2017 it was on Thursday and the 8th May 2017 it was Monday. Upon being cross-examined the Claimants agreed that it is the duty of the Police to arrest persons who are suspected to have committed an offence. The Claimants also agreed that the Police complied with the 48 hrs rule as they were taken to Court with 48 hrs. In this regard, the evidence of this witness cannot and should not be

taken into account with such grave inconsistencies especially when the fact of this being a false imprisonment suit is taken into account.

67. The Attorney General (AG) argued that the Claimants herein at no point during examination in chief, cross or re-examination gave any evidence showing that the arrest was not on good grounds for reasonable suspicion of committing a crime. It is worth noting that the burden of proof, as discussed in paragraph 4.1 above, rested on the Claimant to produce evidence proving each and every element of the tort of false imprisonment at the standard required by law.

68. That DW1's testimony which stands unchallenged, shows that the Claimants were actually arrested on reasonable suspicion that they are the ones who authorised and circulated a fake letter purporting to be a resignation of the Vice President Rt. Hon. Dr S.K Chilima as they were the only people closely connected to the office of the Vice President. The Claimants herein were only arrested after the police had conducted their investigations.

69. The AG stated that considering the foregoing discussion on the testimony and the law the Claimants were arrested after proper investigation and reasonable suspicion were made that indeed the claimants were the one who authored and circulated a fake letter purporting to be a resignation of the Vice President Rt. Hon. Dr S.K Chilima. The Claimants were taken to Court within 48 hrs and they were all granted bail. That the 4th Claimants stayed in the cell for four days as the 6th May and 7th May 2017 were Saturday and Sunday. It is against this background that the Defendant submitted that the Claimants failed to

prove their claim for false imprisonment as per the standard prescribed by law and that the same be dismissed with costs.

Defamation

70. The AG argued that defamation has been defined as the publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of right thinking members of society generally or tends to make them shun or avoid him. (**Winfield and Jolowicz on Tort** 15th Ed p391). Clearly the "wrong" in defamation suits is the injury to reputation. **Tambala JA** in delivering the Judgment of the Malawi Supreme Court of Appeal in **People's Trading Centre vs Joyce Ng'oma** MSCA Civil Appeal No. 30 of 1996 (unreported) quoted with approval the statement in **Salmond and Heuston on the Law of Torts** 19th Ed p155 that :-

"A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers".

71. That the learned Judge went on to say that the essential feature of a defamatory matter is, therefore, its tendency to damage the reputation or good name of the Plaintiff. The often quoted test in determining what is defamatory is the one laid down by **Lord Atkin** in **Sim v Stretch** (1936) 2ALLER 1237 @ 1240 which is the question whether "the words tend to lower the Plaintiff in the estimation of right thinking members of society generally". That in order for the Plaintiff to succeed in an action for defamation whether the case be libel or slander three essential elements need to be proved :-

1. That the statement complained of is defamatory;
2. That it refers to the Plaintiff;

3. That it was published i.e. communicated to at least one person other than the Plaintiff.

72. The Defendant stated that in considering whether a statement is capable of defamatory meaning, the Court should give to the material in question its “natural and ordinary meaning”. It is up to the Judge to decide whether or not the words complained of are capable of the defamatory meaning alleged to arise from their natural and ordinary meaning or are capable of bearing the defamatory meaning ascribed to them in a true innuendo (*Turner v MGM Pictures Ltd* (1950) 2 All ER 449 @ p454; *Lewis v Daily Telegraph* (1964) AC 234).

73. Publication is of the essence in an action grounded on libel and slander because the wrong is to reputation, not insult, and reputation is what other people think of one, and not one’s own opinion of oneself. (see *Winfield and Jolowicz on Tort* 15th Ed p411).

74. That the Claimants testimony is in sharp contrast to that of the Defendant in this regard. DW1 as he deny ever having uttered or published the alleged defamatory words. The Claimants called no other witness to support the claim that the alleged defamatory words were uttered or published by the Defendant at all.

75. That the evidence does not show that the alleged defamatory words, (if they were uttered at all) were published. It has not been shown that the claimants were lowered in the estimation of right thinking members of society or that she was shunned or avoided by reason of the alleged defamatory words.

76. That the claimants were under a duty to prove all the essential elements of they claim in order to succeed. As already pointed out proof of publication is of the essence in an action grounded in defamation as the wrong is to reputation. There is no way one can be injured in one's reputation in the eyes of right thinking members of society if those members did not hear the alleged defamatory words from the defendant.

77. The Defendant submitted that the Claimants cannot succeed under this claim because the evidence does not support the allegation that the statement complained of was ever made by the Defendant. If it was at all made then there is no evidence to suggest that it was published. That without publication and a witness to testify on the lowering of character, reputation in the society, the Defendant submitted that the, Claimants cannot succeed in an action based on injury to reputation and this claim must fail.

Malicious Prosecution

78. The Defendant argued that the action for damages for malicious prosecution is part of common law of England. The foundation of the action lies in abuse of the process of the Court by wrongfully setting the law in motion, and it is designed to discourage the perversion of the machinery of justice for an improper purpose. The Claimants must prove that the proceedings instituted against them were malicious, without reasonable and probable cause, that they terminated in their favour, and that they have suffered damage. Damages might be claimed under three heads, (1) damage to the person, (2) damage to property, (3) damage to the reputation. A criminal charge involving scandal

to reputation or the possible loss of life or liberty to the party charged does necessarily and naturally involve damage, and in such a case damage to reputation will be presumed. See Mahamed Amin vs. Jogendra Kumar Bannerjee (1947) A.C. 322, at pp 330 and 331 per **Sir John Beaumont**.

*The principles applicable in actions for malicious prosecution were laid down in the case of Abrath v North Eastern Ry. Co. 11 Q.B.D. 440 at 455, 457 per **Bowen L.J.** (See also Cox v English, Scottish, and Australian Bank, Limited (1905) A.C. 168, at p170 and 171, per **Lord Davey**). The Plaintiff have to prove first, that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made; secondly, that there was a want of reasonable and probable cause for the prosecution, or, as it may be otherwise stated, that the circumstances of the case were such as to be, in the eyes of the Judge, inconsistent with the existence of reasonable and probable cause; and, lastly, that the proceedings of which he complains were initiated in a malicious spirit, that is, from an indirect and improper motive, and not in furtherance of justice. The Plaintiff has the burden though-out of establishing that the circumstances of the prosecution were such that a Judge can see no reasonable or probable cause for instituting it.*

Lord Atkin's statement of the law in Herman vs. Smith (1937) A.C. 305 at p315 and 319, is quite instructive:

*"In these circumstances it was not disputed that the proceedings had terminated in favour of the present Plaintiff so as to satisfy that essential element in an action for malicious prosecution. Upon this state of facts was there evidence of want of reasonable and probable cause for the prosecution? I know of no better statement of issue than the words of **Hawkins, J.** in Hicks v Faulkner 8 Q.B.D. 167 at 171: I should define reasonable and probable cause to be, an honest belief in the guilt of the accused based upon a full*

conviction, founded upon reasonable grounds of the existence of the state of circumstances, which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed. It is well established that the question of the absence of reasonable and probable cause is for the Judge. When the Judge knows the facts operating on the prosecutors' mind, he must then decide whether they afford reasonable or probable cause for prosecuting the accused. It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but whether there is reasonable and probable cause for a prosecution”.

79. That the foregoing is a complete statement of the common law of England necessarily required to be considered and applied in determining an action for malicious prosecution. It is also, applicable law in Malawi. (see *Donald Kaundama vs. Attorney General* *op cit*).

80. What the evidence shows however, is that they were arrested on allegations that they authored and circulated a fake letter purporting to be a resignation by the Vice President Rt. Hon. Dr S.K Chilima. The Police felt and indeed we so submit that the unexplained authorisation and circulation of a fake letter purporting to be a resignation by the Vice President Rt. Hon. Dr S.K Chilima by the Claimants afforded reasonable and probable cause for a prosecution of those responsible for authorisation. That there is no malice whatsoever in the foregoing. Further the evidence reveals that the Claimants were actually prosecuted at the instance of the DPP in which case the Defendant cannot be said to have caused the prosecution of the Claimants, maliciously or otherwise.

81. It must be borne in mind that the burden rests always on the Claimants to show that a prosecution was malicious. The AG submitted that the Claimants failed to discharge that burden. That the state of facts herein reveals a reasonable and probable cause for a prosecution as people who were closely connected with the office of Vice President and that the Claimants have not shown malice whatsoever on the part of the Defendant in relation to their prosecution herein.

Applicable law relating to loss of business

82. That the law is very clear in that the parties' case is set out in their pleadings and the court is bound by the same. It is beyond the court's duty to enter upon inquiry on the case before it other than to adjudicate upon the matters in dispute which the parties themselves have raised by their pleadings. See *Malawi Railways Limited –vs- P.T.K. Nyasulu*, MSCA Civil Appeal No. 13 of 1992 (unreported). That the Claimant are therefore expected to show by evidence the allegations made in their pleadings.

83. That the 2nd Claimant despite pleading for loss of business, she did not at all prove how the Defendant caused the loss of the business. The 2nd Claimant told this Court that she sent someone to correct her gadgets. The Defendant cannot be punished for something it never had control of. They submitted that therefore this claim must fail.

The Finding

84. It is not in dispute that the four were arrested by the police on divers days on allegation that they had authored a fake letter of resignation purportedly written by the Vice President Dr Saulos Chilima. The four were taken to Police Stations in Lilongwe and Blantyre where they were locked up in police cells. The four were eventually released on bail by the court. No prosecution took place and the four were eventually discharged for want of prosecution on 12th January, 2018. They were finally acquitted by operation of law one year later.

85. The four Claimants claim the arrests were a sham and without legal basis. The Attorney General Claims the four were arrested on reasonable suspicion and the arrests were justified. The four claim they were defamed by the articles which carried stories about the arrests. The Attorney General claim the Government did not publish the alleged stories.

86. On False Imprisonment I agree with the Defendant that the police are duty bound to arrest where there is reasonable suspicion and belief that an offence has been committed. The question before me is whether there was reasonable believe or suspicion that an offence had been committed by the four namely publication of false information likely to cause fear and alarm among the

public. What little piece of evidence if any was there to suggest the four had committed the alleged offence? What little connection was there between the commission of the alleged offence and the four Claimants? Who was the complainant in this matter?

87. Did the police find any information in the gadgets they had, confiscated, to suspect that the four had authored the fake letter? On a balance of probabilities I have searched the evidence before me and I find that the police had no reasonable belief or suspicion to arrest the four. This was a pure case of abuse of office which was based on overzealousness and unprofessionalism. Additionally the Police had no search warrants nor did they have a warrants of arrest.

88. When arresting the four the police did not inform the four the reasons for their arrests. It is a constitutional right of an arrested person to be informed of the reason for his arrest at the time of such arrest. Section 42 (1) (a) of the Constitution provides:

“Every person who is detained, including every sentenced prisoner, shall have the right- to be informed of the reason for his or detention promptly, and in a language which he or she understands”.

89. There was no legal basis whatsoever to arrest the four without informing them of the reasons. There was no formal complaint. The police admitted that they acted on their own motion based on social media reports. The veil of reasonable cause and suspicion must now be unveiled. The police cannot

continue to hide behind this veil whenever they discharge their duties unprofessionally. There must be some piece of evidence pointing at the accused for the police to effect an arrest. That piece of evidence is the genesis behind reasonable suspicion

90. In the present matter there is no single piece of evidence to implicate the four.

These arrests should not have taken place and I wish we knew who gave these instructions in the first place. They could have accounted for their action. The police abused their powers in the name intelligence gathering and criminal investigation. I therefore find that the four Claimants were falsely imprisoned by the police notwithstanding the fact that two of the Claimants were released within 48 hours. The police had no reasonable cause to arrest the four and they must be compensated for the pain, suffering and humiliation they suffered. (See *Nino Santagostino v. Attorney General* Civil Cause No 1537 of 1993) This must not happen again in a democratic state.

Malicious Prosecution.

91. There was a mere attempt to prosecute and not even a plea was taken. There was no prosecution and this prayer cannot succeed.

Defamation

92. The State did not publish the alleged defamatory statements. The Defendant stated that it will be absurd to connect the arrest to the tort of defamation. Three elements must be present for a defendant to be liable for defamation. False story, Publication to third party, Injury to reputation.

93. The elements of this tort are clear. There must be publication by the defendant which is not the case in the present matter. However that notwithstanding it is clear that the Defendant was behind the arrest which was without reasonable cause. It will be against the dictates of the law to allow the Defendant get away with this abuse of the powers of arrest. As was stated in Walter v. Alltools (1944) 61 T.L.R. 39 at p 40, where the Court held that

“a false imprisonment does not merely affected a man’s liberty, it also affects his reputation”.

94. In these premises I find that these unlawful arrests which resulted in false imprisonment not only affected the Claimants’ liberty but they also greatly affected their standing and reputation in society and specifically in the eyes of right thinking members of the public. The Defendant cannot in this regard plead non publication. The Government cannot be claiming that they must not pay for the sins of other non-state actors. They had put in motion the machinery of State and a legal process which enabled the media to defame the

Claimants and they must account for it. The Defendant is liable in defamation in this regard.

Loss of Business

95. The Claimants stated that they seek damages for loss of business. That the police had confiscated their gadgets including mobile phones and that during this time they were unable to use their phone and they lost business in that regard. According to the evidence it took a court order to compel the police to release the gadgets. In my considered view the Claimants have made out a case for loss of business and they must be paid damages to be assessed for the time the gadgets were with the police. The 2nd Claimant must specifically be awarded damages for the business equipment the State confiscated during her arrest and release.

96. In these premises the four Claimants must succeed on the claims of false imprisonment, defamation and loss of business. They must take out summons for assessment of damages within 14 days.

Costs

These are awarded to the Claimants at 75 %

Pronounced in open Court at Blantyre in the Republic on 25 January 2022.



Dingiswayo Madise

Judge.