



REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY

CIVIL CAUSE NUMBER 919 OF 2018

BETWEEN:

ANDREW ISSAC KAMWALA.....CLAIMANT

-AND-

THE ATTORNEY GENERAL (MALAWI POLICE SERVICE).....DEFENDANT

Coram: A.P KAPASWICHE : ASSISTANT REGISTRAR

Ndalama : Counsel for the Claimant

Mahonga : For the Defence

Kumwenda : Court Clerk / Official Interpreter

**ORDER ON ASSESSMENT OF DAMAGES**

The Claimant in this matter took specially endorsed summons on 6<sup>th</sup> November 2018 against the Defendant claiming damages for false imprisonment, unlawful arrest, defamation, damages for loss of opportunities such as promotions; damages for emotional distress; damages for inhumane conditions suffered in custody; withheld salary arrears and all other withheld benefits; damages for malicious prosecution punitive/ exemplary damages and costs of this action. On the 23<sup>rd</sup> day of July 2021, Justice Ruth Chinangwa delivered a Judgment which awarded the Claimant damages for

malicious prosecution; pain and suffering; withheld wages and benefits; exemplary damages and costs of the action. This is the assesment of the said damages as per the awards of the Judge.

### THE EVIDENCE

The matter came for hearing on the 2<sup>nd</sup> November 2021. The Claimant himself was the only witness in the present matter. He adopted his witness statement as his evidence in the present case. His evidence is as follows;

“

- 1) My name is Inspector **ANDREW ISAAC KAMWALA**, I come from Kamwendo Village, T/A Kwataine in Ntcheu District.
- 2) I am of full age and the Claimant in this matter as such competent to make this statement. Find attached a copy of my **identity card marked A.K. 1**.
- 3) I verily recall that on or about the 5<sup>th</sup> day of May, 2013, I was detained on charges of murdering a civilian on the 21<sup>st</sup> of July, 2011 demonstrations and was released on court bail on the 24<sup>th</sup> of May, 2013.
- 4) I further recall that during my 19 days of detention at Area 3 police station, I was exposed to inhumane and degrading treatments which were inconsistent with my constitutional right to dignity which is evident in the following;
  - a. I was placed in a cell with poor ventilation and unhygienic conditions.
  - b. I was allowed to use the bathroom and toilet only once a day which had very poor sanitation.
  - c. I slept on the floor with no beddings. The weather is actually very cold in May in the Country.
  - d. No food was provided from the agents of the Defendant, the only food I had was the one that came from home when my relations visited or at times, when some of my cellmates shared with me.
  - e. I mostly ate once a day as my family which resided in Lumbadzi, at that material time, could not manage transportation costs to come deliver food more than once a day.
- 5) My arrest and prosecution on the allegations of murder were accompanied with total malice intended to implicate me and secure a conviction against me. The Defendants agents being agents of government acted in an oppressive, irrational and an unconstitutional manner as

they had not only violated my right to liberty but also my right to dignity knowing fully well that I was not the one who committed the crime. The agents of the Defendant were grossly reckless considering the conditions I stayed in while in the cell throughout the 19 days and the fact that on the first day I was locked up whilst still in my police uniform as against our police rules.

6) Due to my detention and malicious prosecution by the Defendants agents I suffered loss and damages as evidenced below;

a. I lost my right to liberty for 19 days. It is clearly obvious that my arrest was very unnecessary, and was as a result of the malice of the Defendants agents.

I lost my dignity and the good reputation I had as a proper member of society throughout the 5 years I was on trial accused of murder I did not commit. Despite the fact that I was later acquitted, I suffered tremendous shame every day I appeared in Court, and when my own friends in uniform peddled lies and fabricated stories against me in the view of the whole public.

b. I suffered from fear, anxiety and emotional distress throughout the criminal trial. The risk of being incarcerated for decades, and being away from my whole family was too hard for me to handle. I became emotionally unstable and almost lost all the pleasures of life. I was living in hell on earth.

c. I was interdicted and received half pay at work which affected the financial situation at home as I was the only bread winner in the family

d. I lost benefits at work which include but are not limited to promotion opportunities. My fellow officers at Lumbadzi Police Station who were within and some below my rank were all promoted in April, 2014, I was left out as the criminal trial against me was ongoing. A promotion in 2014 would have made me Inspector, a promotion I have only receive on or about 26<sup>th</sup> January, 2021. This means I missed salary raise, leave grants and other benefits that go with the position for about six years. It must also be stressed that I had proper qualifications at the time of the arrest as I was a holder of Diploma in Law.

7) I make this statement knowing that it will be used as evidence in the current matter and verily believe the contents to be true to the best of my knowledge."

In cross-examination, PW1 stated that he was interdicted for five years on half pay though he could not remember as to how much he was getting as a salary that time. On lost benefits, the Claimant told this court that on a number of occasions, police officers are hired to perform various private duties where they get paid hence this is a benefit lost for him. He was actually an officer in-charge of

operations and he had responsibility of allocating police officers to private duties hence he had more chances of partaking such duties though he confirmed that it is not every time when one gets an opportunity to do private duties. He also stressed that he missed an opportunity to get promoted over the years that he was answering to the criminal charges. He stated that he was sure that he could have been promoted because at one point the former President of the Republic of Malawi directed that all police officers at Lumbadzi police should be promoted but he did not benefit due to the arrest and subsequent trial.

The Claimant further confirmed that he is also claiming for damages for pain and suffering. The pain and suffering is in relation to the fact that he was locked up in a police cell whilst in police uniform and the fact that during the time he was in custody his diet was poor as his family faced financial challenges that made them unable to constantly provide him food whilst in police cell. Two of his children dropped out of school due to his arrest as there was no one to pay for their school fees. The Claimant was also doing legal studies at the material time and he could not proceed with his education due to the arrest.

### ISSUES

The only issue for the Court to determine is the appropriate quantum of damages payable to the Claimant.

### THE LAW ON ASSESEMENT OF DAMAGES

The High Court in *Ngosi t/a Mzumbamzumba Enterprises vs. H Amosi Transport Co Ltd* [1992] 15 MLR 370 (HC) set the basis for assessment of damages:

*'Assessment of damages.....presupposes that damages have been proved. The only matter that remains is the amount or value of the damages.'*

To arrive at the appropriate quantum of damages, the courts use the principle of *restitutio in integrum*. The court in *Makala v. Attorney General Civil Cause No. 301 of 1994*, provided that; this principle in all actions of tort, is said to be adequate and a fairly easy guide to the estimation of damage; and that the aim for calculating damages is to make good to the plaintiff in so far as money can do it. The court is moved to determine the reasonable quantum of damages that will adequately compensate the Plaintiff. The measure of damages to be awarded was ably illustrated by Lord Blackburn in *Livingstone vs. Rawyards Coal Company (1880)* 5 App 25 as follows:

*'That sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.'*

Courts, however, have recourse to decided cases of a comparable nature and they also bear in mind the devaluation of the Malawi Kwacha since the awards in the comparable cases were made. **See J.D. Simwanza vs. The Attorney General Civil Cause No. 18 of 2011.**

The Claimant in the present case claims damages for malicious prosecution, pain and suffering, exemplary damages, withheld benefits and costs for this action.

## ANALYSIS OF THE LAW AND EVIDENCE

### DAMAGES FOR MALICIOUS PROSECUTION

In order for a claimant 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. In the case of **Bulla v Agricultural Development and Marketing Corporation** [1993] 16(1) MLR 30 (HC) the court cites with approval the assertion by the authors of McGregor on Damages, in paragraph 1367, in which they state:

*"The principal head of damage here is to the fair fame of the plaintiff, the injury to his reputation. In addition, it would seem he would recover from injury to feelings, that is, for indignity, humiliation and disgrace caused him by the fact of the charge being preferred against him."*

On damages for malicious prosecution, Counsel for the Claimant prayed for an award of MK30, 000,000.00 to Claimant for malicious prosecution. He cited the following authorities for the court to consider:

In **Kalua vs. Attorney General civil cause no. 49 of 2017**, a 70 year- old Claimant who had been incarcerated for 4 days was awarded MK 5, 000, 000.00 (Five million kwacha) as damages for malicious prosecution on the 13<sup>th</sup> August, 2018. In the case of **Bennet Kalavina vs. Hussein Jussab t/a Zoom Car Hire personal injury case no. 57 of 2010**, the court awarded MK 4, 000, 000.00 (Four million kwacha) damages for malicious prosecution to a Claimant who had been incarcerated for 7 days with

habitual offenders in a tiny and filthy police cell infested with lice, mosquitos and bed bugs; no proper toilet facilities and had not bathed for 7 days. Award was made on 13<sup>th</sup> July, 2020.

In the present matter, the fact that the Claimant was facing criminal prosecution maliciously damaged their reputation; integrity and caused a lot more inconveniences to the personhood of the Claimant and his family. However, the authorities cited by the Claimant in support of his prayer do not justify the prayer made by the Claimant. Even taking into account the fact that the Claimant stayed for more days in custody than the Claimants of the two cited cases, I find the amount of MK30,000,000.00 still on the higher side. Having appreciated the circumstances of the present case, it is my considered view that an amount of MK8,000,000.00 would be adequate compensation to the Claimant for malicious prosecution.

### **DAMAGES FOR PAIN AND SUFFERING**

The Claimant claimed a sum of MK12, 000,000.00 under this head. Before going further, there is a great need to understand the application of the awards under this head. The word *pain* connotes that which is immediately felt upon the nerves and brain, be it directly related to the accident or resulting from medical treatment necessitated by the accident while *suffering* includes fright, fear of future disability, humiliation, embarrassment and sickness. (See **Ian Goldrein and Others, Personal Injury Litigation, practice and Precedents**; Butterworths, 1985; 8 and **City of Blantyre vs. Sagawa** [1993] 16(1) MLR67 (SCA)).

Counsel for the Claimant inappropriately applied the case of **Oscar Banda vs. Attorney General Civil cause No. 431 of 2016** the present case. The Oscar Banda case talks of an award of damages on the head of false imprisonment and malicious prosecution in which the court observed that;

*"They are primarily awarded for the injury to liberty, feeling including loss of dignity, mental suffering, disgrace and humiliation. Regard must be had to the conditions of the incarceration, length of time in incarceration."*

This is not the head of damages for false imprisonment or malicious prosecution but rather that of pain and suffering. The Claimant was cross-examined to explain the basis of this claim and it is clear that there is no basis for an award on this head. In his evidence; he stated that he was locked up in a police cell whilst in police uniform; that during the time he was in custody his diet was poor as his family faced financial challenges that made them unable to constantly provide him food whilst in

police cell; that two of his children dropped out of school due to his arrest as there was no one to pay for their school fees and that the Claimant himself was also doing legal studies at the material time and he could not proceed with his education due to the arrest. These issues do not qualify as issues proving the head of damages of pain and suffering. I will, therefore, proceed to assess damages payable under this head at zero.

#### **DAMAGES FOR WITHHELD BENEFITS**

This head was withdrawn on the basis that by the time the matter was coming for assessment of damages, the Claimant had already been paid his withheld payments.

#### **PUNITIVE/ EXEMPLARY DAMAGES**

Exemplary damages are punitive in nature. They are not necessarily a compensation to a Claimant for the damage suffered but they aim at punishing a defendant for waywardness as was held in the **Munthali v. The Attorney General Civil Cause No. 52 of 1993**. These damages are recoverable where they are prescribed by statute or in two major categories. The first category is in cases of oppressive, arbitrary or unconstitutional action by servants of the government and the second instance is where the defendant's tortious act has been done with guilty knowledge, for the motive that the chances of economic advantage outweigh the chances of economic or physical penalty. [**Rookes v Banard 1964 AC 1221** and **Broome v Cassell 1972 AC 1063**].

On punitive and/or exemplary damages, Counsel for the Claimant is praying for an award of K55,000,000.00. The basis was that the facts of the case are very peculiar and depicts an unimaginable impunity and disregard to fairness by the state. It shows how the state, in trying to save many faces, planned to crucify the Claimant. The Claimant was maliciously prosecuted for murder and the state went as far as manufacturing and falsifying evidence. Two cases were cited in support of the amount prayed for.

In the case of **Thomas Malonda vs. Attorney General (Malawi Police Service) Civil cause no. 914 of 2019**, the court awarded the sum of **MK 20, 000, 000.00 (Twenty million kwacha)** as exemplary damages. The Claimant in this matter had been shot by a Police officer without provocation or any known reason. Exemplary damages were specifically pleaded through summons and the statement of case. In granting them during assessment, the court stated that the Police officer had violated numerous constitutional rights including the right to human dignity, his acts were oppressive,

arbitrary and an unconstitutional action by a servant of the government. Award was made on 1<sup>st</sup> June, 2020. In **Magombo vs. Attorney General (Malawi Police Service)** personal injury no. 282 of 2018, the Claimant who was arrested at his home with no sufficient evidence, spent one day in police custody and was tortured by officers was awarded the sum of MK 30, 000, 000.00 (Thirty million kwacha) as exemplary and/or punitive damages on the 5<sup>th</sup> of August, 2021.

Looking at the two cited cases, one would note that the other case involved shooting of the Claimant while the other case involved torture of the Claimant. Both scenarios are not applicable in the present case to justify using such cases as awards that this court should follow. In the circumstances of the present case, it is my considered view that the amount of MK55,000,000.00 prayed for is on the higher side and I proceed to award a sum of MK6,000,000 as exemplary damages to the Claimant.

### FINDING

In summary, therefore, the claimant awarded MK8,000,000.00 damages for malicious prosecution and MK6,000,000.00 as exemplary damages. The total damages awardable is, therefore, MK14,000,000.00. The claimant is further awarded costs for the assessment proceedings to be taxed if not agreed by the parties.

MADE IN CHAMBERS THIS 16<sup>TH</sup> DAY OF MARCH 2022



ANTHONY PITILIZANI KAPASWICHE

ASSISTANT REGISTRAR