



**REPUBLIC OF
MALAWI
IN THE HIGH COURT OF MALAWI
Principal Registry
CIVIL CAUSE NO. 114 OF 2013
(Before Hon. Justice Madise)**

In the matter between:

**HAROLD CHIGALU AND FOUR
OTHERS.....CLAIMANTS**

-AND

THE ATTORNEY GENERAL.....DEFENDANT

Coram.

Hon Mr. Justice D. Madise
Mr. Kamkwasi for the Claimants
Mr. Maulidi for the Attorney General
Mr. Mathanda Clerk

JUDGMENT

Madise, J

Introduction

1, The Claimants commenced the action herein on the 22nd day of February, 2013, claiming aggravated damages for false imprisonment, defamation, malicious prosecution and costs of the action. The action emanates from actions that took place on the 4th day of December, 2009. The within matter went for hearing where the Claimants paraded one witness, Mr. Harold Chigalu who testified on his own behalf and on behalf of the other Claimants. The Defendants closed their case without calling any witness.

The Facts

2, The Claimants called one witness the 1st Claimant herein who testified on his own behalf and on behalf of the other Claimants. He stated that the Claimants were on 4th December, 2009 arrested by officers from the Anti-Corruption Bureau on allegations that they had corruptly solicited money from Zomba Baptist Private Primary School. Despite their attempts to explain their innocence, they were taken to Chilomoni Police Station where they were incarcerated.

3, He stated that on the following day, they were taken to the Anti-Corruption Bureau (ACB) offices where they were questioned and remained in detention until around 16:00 hrs when they were granted police bail. That the news about their incarceration was aired on Zodiac Broadcasting Station, Joy Radio and was also published in Daily Times and the National Newspapers on 11th December, 2009. He tendered and exhibited copies of the publications which were marked as exhibits “**HC 1**” and “**HC 2**”.

4, He further stated that following the arrests, they were interdicted on 28th January, 2010 by their employer, the Ministry of Education, Science and Technology on the basis of the same allegations that were leveled against them by the Defendant's agents. He tendered copies of the interdiction letters which were marked as exhibits **"HC 3", "HC 4", "HC 5", "HC 6" and "HC 7"**.

He stated that following the arrests, they were on 14th December, 2010, summoned to Zomba Magistrate's court where they were charged with the offences of corrupt practices by a public officer. That they were subsequently prosecuted until they were acquitted after the Court found them with no case to answer on the 22nd August, 2011. In support of this testimony, he tendered a copy of the ruling on no case to answer which was marked as exhibit **"HC 8"**.

5, He testified that their Incarceration and subsequent prosecution was without basis and it was malicious. The 1st Claimant herein, further testified that as a result of the actions of the Defendant's agents, they were forced to hire a legal practitioner from JustLaw Consultancy who charged them the sum of MK460,000.00 as legal fees. He exhibited and tendered the legal practitioner's bill which was marked as exhibit **"HC 9"**.

6, He stated that they were wrongfully detained in police custody for 25 hours, which brought ridicule and contempt in that their colleagues, personal friends and the general public regarded them as corrupt persons when in fact they were not. He stated that the Defendant falsely and maliciously represented them to be corrupt persons. He also stated that they faced an extremely bad experience while staying in a police cell, whose condition was pathetic. This in turn, caused a great shame to them as well as their families when they were defamed, embarrassed and tortured. He concluded by stating that they have as

a result of the actions of the Defendant's agents lost opportunities like promotions in their employment. While they were on interdiction, their colleagues were promoted.

7, In cross-examination, the 1st Claimant stated that he had worked for the Ministry of Education for 20 years and he was currently on grade G whereas before the interdiction, he was on grade H. He stated that his promotion had delayed because of the interdiction. That they who arrested by officers from the ACB and Police officers. Following their arrest, they were given a police bail but that their arrests was done by government agents.

8, The 1st Claimant denied demanding allowances from officials from Zomba Baptist Primary Academy. He further stated that their allowances came from the Malawi Government which was giving them an allowance of MK6, 000.00. Finally, the 1st Claimant told the Court that it was private companies which published stories in the newspaper that they had been arrested.

During trial, the Defendant didn't call any witness.

The Issues

9, *Whether the Defendant is the rightful party to these proceedings.*

Whether the Defendants are liable for the false imprisonment of the Claimants herein.

Whether the Defendant is liable for the Defamation of the Claimants.

Whether the Claimants were maliciously prosecuted.

The Law.

10, The standard of proof required in civil cases is generally expressed as proof on a balance of probabilities. This Court in **Kentam Products v Kenneth Mweso**, Civil Cause No. 68 of 2013, High Court, Mzuzu District Registry (unreported) presented the law on both the burden and standard of proof in civil cases. The court stated as follows:

*“The burden and standard of proof in civil matters is this: He/she who alleges must prove and the standard required by the civil law is on a balance of probabilities. The principle is that he who invokes the aid of the law should be the first to prove his case as in the nature of things, a negative is more difficult to establish than a positive. 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 NOT must carry the day.**” (Emphasis provided)*

11, Denning J in **Miller v. Minister of Pensions** (1947) All ER 372; 373, 374 had this to say:

“If the evidence is such that the tribunal can say: We think it more probable than not, the burden is discharged, but if the probabilities are equal it is not.”

In civil cases the burden of proof rests on the party who asserts a fact affirmatively and wants it to be believed. Facts are presented through

pleadings which confine what issues the court shall consider. See Yanu Yanu Bus Company Ltd v. Mbewe and Mbewe (MSCA) 10 MLR 417.

False Imprisonment

12, 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.

13, In Reggie Kanjere v. A-G civil cause no. 1094 of 1996 it was stated 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 1994 enshrines and entrenches such liberty under section 18. People should not be deprived of their liberty for no justifiable reasons.

14, 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.

15, 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”.

16, Secondly for the tort to be committed the Claimant must show that the police arrested him without reasonable suspicion or cause. That there was no lawful cause for the police to arrest him. A person is said to be falsely imprisoned if the one effecting the imprisonment does not have a lawful justification or authority for effecting the same. An act of confining somebody without legal authority qualifies as false imprisonment. As was rightly stated in **Pearson Chafuli v. Chibuku Products Limited Civil Cause No. 3705 of 2001** Kapanda J then had this to say as regards to false imprisonment:

“it is trite law, and I need not cite an authority for it, that the tort of false imprisonment is established on proof of the fact of imprisonment and absence of lawful authority to justify that imprisonment. Further, the position at law is that once imprisonment is established the onus shifts to the Defendant to prove that it was reasonably justified”.

Defamation

17, 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. It is settled law that Imputation of a criminal offence punishable with imprisonment is actionable *per se* as was held in **Simmonds v. Mitchell (1880)** 6 App. CAS. 156, P.C. that there must be direct imputation of the offence, not merely a suspicion of it.

18, Defamation 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).

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”.

19, Parading a plaintiff before a criminal Court and accusing him in the presence of members of the general public constitutes defamation. This was held in *People's Trading Centre v. Makhaliva*, Civil Appeal No. 1 of 1993 (unreported). It has also been held that to refer to someone as a thief is undoubtedly defamation which is actionable per se. Read *Mtila and others v. Stagecoach Malawi Limited* (1997) 1 MLR 97. The same position was also advanced in **Gatley on libel and Slander 5 Ed at 20**. Kunitsonyo J in the *Mtila case* (ante) had this to say on defamation by conduct as far as the requirement that proof must be shown by the Plaintiff that there was publication of the defamation.

[I]n the law of defamation, proof must be shown by the Plaintiff that there was defamation. In the instant case, I must ask myself whether conduct of the

servants of the Defendant did amount to publication of the defamation. The answer is in the affirmative.”

20, In **Cecilia Kumpukwe and others vs Attorney General** Principal Registry Bt civil Cause no 210 of 2018 (unreported) I made a similar finding of publication by conduct and I said this;

*“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”.

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”

Malicious prosecution

21, 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.

It is trite law that malicious prosecution is a tort whereby one maliciously and without reasonable and probable cause initiates against another judicial proceedings which ends in favour of the other but which result in damage to reputation, person, freedom or property

22, The plaintiff must prove that there was malice by word of mouth and or 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.

23, 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. There are six elements that must be satisfied. To succeed with a claim for malicious prosecution the Claimant must demonstrate that the Defendant prosecuted or caused him to be prosecuted, that the prosecution lacked reasonable cause and that it ended in favour of the Plaintiff. See *Mvula v. Norse International Limited* [1992] 15 MLR 331.

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.

Claimants' Submission

24, On false imprisonment the Claimants submitted and cited the case of **Reggie Kanjere v. A-G** civil cause no. 1094 of 1996 where it was stated 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 1994 enshrines and entrenches such liberty under section 18. People should not be deprived of their liberty for no justifiable reasons.

25, That a person is said to be falsely imprisoned if the one effecting the imprisonment does not have a lawful justification or authority for effecting the same. An act of confining somebody without legal authority qualifies as false imprisonment. They cited **Pearson Chafuli v. Chibuku Products Limited** Civil Cause No. 3705 of 2001.

26, On defamation the claimant cited **Turner v. Metro-Goldwyn-Mayer Pictures Limited** [1950] 2 All E.R. 449 where it was held that the imputation of some quality which would be detrimental or the absence of some quality which is essential to the successful carrying on of his office, trade or profession, such as want of ability, incompetence and, of course, dishonest or fraudulent conduct was defamation.

27, That imputation of a criminal offence punishable with imprisonment is actionable *per se* and it was held in **Simmonds v. Mitchell** (1880) 6 App. CAS. 156, P.C. that there must be direct imputation of the offence, not merely of

suspicion of it. That it has also been held that to refer to someone as a thief is undoubtedly defamation which is actionable per se. They cited **Mtila and others v. Stagecoach Malawi Limited** (1997) 1 MLR 97.

28, On defamation by conduct the Claimants submitted that parading a Plaintiff before a criminal Court and accusing him in the presence of members of the general public constitutes defamation. This was held in **People's Trading Centre v. Makhaliva**, Civil Appeal No. 1 of 1993 (unreported).

29, On malicious prosecution the Claimant stated that this was a tort whereby one maliciously and without reasonable and probable cause initiates against another judicial proceedings which ends in favour of the other and which result in damage to his reputation, person, freedom or property. See **Street on Torts, 8th Edition, Butterworths, 1988 at page 28.**

30, That to succeed with a claim for malicious prosecution therefore one needs to demonstrate that the Defendant prosecuted or caused him to be prosecuted, and that the prosecution lacked reasonable cause and it ended in favour of the Plaintiff. See also the case of **Mvula v. Norse International Limited** [1992] 15 MLR 331.

Defendant's Submission

41, Legal Personality of the Anti-Corruption Bureau

Section 5A of The Corrupt Practices Act (Cap:7:04) provides as follows

Any Civil suit arising from the exercise of functions, duties and powers of the Bureau or the Director shall be instituted by or against the public office of the of the Director,

but the provisions of the Civil Procedure (Suits by or against the Government or Public Officers) Act shall otherwise apply in respect of any such suit as they apply in respect of any suit by or against any other public officer.
(Emphasis supplied)

42, The Defendant submitted that it was clear from the reading of the above cited section that the Anti-Corruption Bureau is a body corporate and it has legal personality and therefore in all claims arising from the exercise of functions, duties and powers of the Anti-Corruption Bureau, the Defendant must be the Director of the Bureau and not the Attorney General.

43, That in **Tembo and Kainja v The Honourable Speaker of National Assembly, M.S.C.A. Civil Appeal NO. 1 of 2003** the Malawi Supreme Court of Appeal held that where a wrong party has been sued, an action cannot be sustained. On whether this error can be cured, the Malawi Supreme Court of Appeal had this to say:

*“As regards the second argument that a procedural error can be cured by an amendment, we agree that such errors are rectified by an amendment. But clearly learned Counsel did not ask the court to allow him to make the necessary amendment. We are not impressed by Counsel’s argument that the learned Judge in the court below should have ordered that the necessary amendment should be made, pursuant to 0.20 rule 8 of the **Rules of the Supreme Court.**”*

A decision regarding which party to sue is an important decision which is made by a party or his Counsel after a careful consideration of the facts of the case. The task of which party to sue must be performed by the litigant and

not the court. It is no business of the court to assist a litigant in choosing for him the correct party to sue. Where a litigant is represented by Counsel it would not be proper for the court to assist Counsel in making a decision regarding the correct party to sue. To do otherwise would undermine the essence and spirit of our adversarial system of litigation. Courts are not in the habit of forcing an amendment on a litigant”: See **CROPPER v. SMITH (1884) 26 Ch.D 700.** (*Emphasis provided*)

44, That in **The State v The Attorney General and Laston Kaliba ex parte Allackson William (on his own behalf and on behalf of the other Members of the Chinkazichina Family)** Judicial Review Cause No 109 of 2010, the Honourable Justice Kenyatta Nyirenda held that where a party sues a wrong party, the application must be dismissed. The Honourable Judge stated as follows:

*“In the circumstances, **the Court has no option but to dismiss the action herein.**”* (*Emphasis supplied*)

45, In **Banda v Cilcon Ltd [1991] 14 MLR 21 (HC)** the Court held that for the claim of false imprisonment to succeed, the actual body that initiated the process must be sued. **Banda J** (as he was then) stated as follows:

“The plaintiff’s allegation of false imprisonment could not be entertained. The alleged theft related to Nicholas, not to the defendant. The complainant in the criminal charge of theft was thus Nicholas. The person who locked him up in the office was Mr. Stewart, an employee of Nicholas. And it was Mr. Thunga, an employee of Nicholas, who physically took him to the Police in a vehicle that belonged to Nicholas. Obviously then, the wrong party had been

sued in respect of the plaintiff's claim for false imprisonment and Nicholas should have been cited, not the defendants.

46, The Court proceeded to say:

“I am satisfied, therefore, that in so far as the claim for false imprisonment is concerned, I find that a wrong party was sued and the plaintiff must therefore fail in his claim for false imprisonment.”

47, That in **Taulo and others v Attorney General and another** [1994] MLR 328 (HC) Mbalame J held that where a wrong party is sued, an application must fail. the Court held that such proceedings against it are a misguided missile. The action against such a defendant is untenable in law and cannot be sustained. It must be accordingly dismissed with costs.

48, That as per **Section 5A** of the **Corrupt Practices Act**, the Anti-Corruption Bureau has a different legal personality and it has the capacity to sue or to be sued through its Director. The Attorney General does not represent the Anti-Corruption Bureau. The plaintiff has not demonstrated in any way that the Attorney represents the Anti-Corruption Bureau. The defendant therefore submitted that the Anti-Corruption Bureau is a body corporate capable of suing or being sued through its Director and therefore the Attorney General cannot be made a Defendant in claims arising from the exercise of functions, duties and powers of the Anti–Corruption Bureau.

49, That from the evidence of Mr. Chigalu, the five Plaintiffs were arrested and prosecuted by the Anti-Corruption Bureau and the Spokesperson for the Anti-Corruption Bureau was the one who granted interviews to various media houses about the arrests of the five plaintiffs. None of the media outlets that published or aired the news about the arrests belongs to the Malawi Government. That all agents that were substantially involved in the arrests, prosecution and publishing information about the five Plaintiffs have their own separate legal personalities and therefore must be sued in their own names.

The Finding

50, The evidence before me is that Claimants herein, through their witness Mr. Chigalu were arrested on the 4th day of December, 2009 by officials from the ACB together with police officers. They were locked up at Chilomoni Police Station before they were taken to ACB offices the next day where they were held until around 16:00 hrs when they were released on police bail.

51, The Claimants alleged that the arrests were based on unfounded allegations that they had been involved in corrupt practices. There is no dispute that the Claimants were arrested by the ACB and kept in the cells by the police. The question before me is whether the Claimants have sued the right party. If they have, I will deal with the rest of the issues before me. If not I will terminate these proceedings at this stage as to answer the other questions will be academic.

52, It has been argued by the Defendant that as per **Section 5A** of the **Corrupt Practices Act**, the Anti-Corruption Bureau has a different legal personality and it has the capacity to sue or to be sued in its own right through its Director.

That the Attorney General does not represent the Anti-Corruption Bureau. The Claimants have stated that they were arrested by the officers of the ABC who were accompanied by the Police. That they were prosecuted by officers of the ACB and not the DPP's office or the Police Prosecutors. The question before me is whether the Claimants have demonstrated in any way that the Attorney represents the Anti-Corruption Bureau.

53, Looking at the evidence before me, I agree with the Defendant that the Anti-Corruption Bureau is a body corporate capable of suing or being sued through its Director and therefore the Attorney General cannot be made a Defendant in claims arising from the exercise of functions, duties and powers of the Anti-Corruption Bureau.

54, I totally agree with my late elder brother in *Taulo and others v Attorney General and another* [1994] MLR 328 (HC) where Mbalame J held that where a wrong party is sued, an application must fail. The Court held that such proceedings against it are a misguided missile. The action against such a defendant is untenable in law and cannot be sustained. This was a procedural error which could have been cured by an amendment. Learned Counsel did not ask the court to allow him to make the necessary amendment.

It is no business of the court to assist a litigant in choosing for him the correct party to sue. Where a litigant is represented by Counsel it would not be proper for the court to assist Counsel in making a decision regarding the correct party to sue. To do otherwise would undermine the essence and spirit of our adversarial system of litigation. Courts are not in the habit of forcing

an amendment on a litigant”: See *Tembo and Kainja v The Honourable Speaker of National Assembly*, M.S.C.A. Civil Appeal NO. 1 of 2003

This is a sad day for justice. The Claimants herein had as very good case but they sued the wrong party. I have no other option. I accordingly dismiss this action with costs.

Pronounced in open Court at Blantyre in the Republic on 1th April 2022

Dingiswayo Madise

Judge