



**JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY (CIVIL DIVISION)
CIVIL CAUSE NO. 380 OF 2014**

BETWEEN

HOPESON CHIFULEMBA CLAIMANT

AND

THE ATTORNEY GENERAL DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Chibwana, Counsel for the Claimant

The Defendant, absent and unrepresented

Mr. Henry Kachingwe, Court Clerk

JUDGEMENT

Kenyatta Nyirenda, J.

The action herein was commenced by the Claimant against the Defendant by a specially endorsed writ of summons issued on 9th August 2014. The Claimant is claiming damages for malicious prosecution. The Defendant denies the action and prays that it should be dismissed.

The case of the Claimant is set out in the following Statement of Claim:

- “1. The Plaintiff at the material time was in the employ of the Judiciary (herein referred to as 1st Defendant) as District Courts Administrator.
2. While stationed at Salima his District Magistrate informed him on 17th January 2011 that Court exhibit room was broken into on or about the 16th January 2011 and Indian hemp was stolen from it.
3. The Plaintiff avers that during the time of the incident referred to in the preceding paragraph he was not in Salima but in Lilongwe.
4. The Plaintiff was arrested by the Malawi Police Service (Salima Police Station herein referred to as 2nd Defendant) on 17th January 2011 on suspicion that he

stole the said Indian hemp and was placed in Police custody up to 20th January 2011.

5. *The Plaintiff was tried of theft by a person employed in the public service contrary to section 283 of the Penal Code and unlawful supply of cannabis sativa contrary to section 4 (6)(19)(i)(a) of Dangerous Drugs Act in the Lilongwe Magistrates' Court and acquitted on 25th January 2012.*
6. *Both the 1st and 2nd Defendants knew very well that there was no evidence to prove both courts against the Plaintiff.*
7. *The Prosecutors preferring charges against the Plaintiff without reasonable and probable cause before the Magistrates' Court amounted to malicious prosecution or abuse of process.*
8. *Due to the matters aforesaid the Plaintiff suffered loss and damage.*
 - (a) *The Plaintiff's liberty was restrained for no apparent reason.*
 - (b) *The Plaintiff suffered a great deal of inconvenience and humiliation.*
 - (c) *The Plaintiff's name was put into disrepute.*
9. **WHEREFORE** *the Plaintiff claims:-*
 - (a) *General damages*
 - (b) *Costs for this action."*

The Statement of Defence of the Defendant is worded as follows:

1. *The Defendant refers to paragraph 1 of the Defendant's statement of claim and admits the contents therein.*
2. *The Defendant refers to paragraph 2 and 3 of the Plaintiff's statement of claim, denies its contents and puts the Plaintiff to strict proof thereof.*
3. *The Defendant refers to paragraphs 4 and 5 of the Plaintiff's statement of claim and admits the contents therein.*
4. *The Defendant refers to paragraph 6, 7 and 8 of the Plaintiff's statement of claim, denies the contents and puts the Plaintiff to strict proof thereof.*
5. *The Defendant contends that the Indian hemp was stolen from an exhibit room whose keys the Plaintiff was the only custodian and upon investigation it was discovered that entry into the room was by way of keys.*
6. *The Defendant further contends that the Plaintiff along with his co-accused admitted to having committed the offence in their confession statements. The Defendant therefore had reasonable cause and suspicion to arrest the Plaintiff.*
7. *In all the circumstances, the Defendant denies being liable for:*

7.1 General damages

7.2 Costs of this action

8. *Save as herein admitted, the Defendant denies each and every allegation of fact as if the same were traversed seriatim.*"

There is one main issue in this matter for the determination of the Court, namely, whether or not the Defendant is liable to the Claimant for malicious prosecution?

It is trite that a claimant has the burden of proving the elements of his or her lawsuit on a balance of probabilities. This means that a claimant must prove a fact by showing that something is more likely so than not: see **Commercial Bank of Malawi v. Mhango [2002-2003] MLR 43 (SCA)**. It, therefore, follows that in the present case the burden of proof is on the Claimant as the party who has asserted the affirmative to prove on a balance of probabilities the respective elements of the tort of malicious prosecution.

The Claimant adopted his witness statement and the material part reads as follows:

- "1. *I am Hopson Nathaniel Chifulemba from Chalilima Village, T/A Chilooko in Ntchisi District born on 5th July 1963.*
2. *I was employed by the Traditional Courts Department on 1st May 1986 as a Court Clerk and later became District Courts Administrator in the Judiciary.*
3. *I left Salima for Lilongwe on Friday 14th January 2011 for Chilembwe day holiday. I received a phone call on 17th January 2011 from the District Magistrate that Chamba was stolen from exhibit room between the night of 16th to 17th January 2011. Upon receipt of the news, I started off for Salima and arrived at the court campus at around 1:00 pm, where I found nobody. I phoned the Magistrate about my arrival. She came and told me not to visit the place where the theft had occurred. Police Officers came and arrested me on allegation that I was the one who stole the chamba. I was taken to Salima Police Station and moved to Lilongwe Police Station, where I spent 4 nights before being granted bail on 20th January 2011.*
4. *I was cautioned and charged with theft by public servant and I denied the charge. I was reporting to police every fortnight for bail until the end of the case. I was served with an interdiction order without pay.*
5. *The matter was concluded on 30th August 2012 by the 2nd Grade Magistrate's Court, Lilongwe. I was re-instated by the Judicial Service Commission following my acquittal. Attached hereto is judgment copy, marked exhibit **HNCL**.*
6. *My character was assassinated since the matter was published in the Nation Newspaper, on Zodiac Radio and internet that chamba was sent to South Africa.*

7. *Both the Defendants knew very well that there was no evidence to prove that I unlawfully supplied cannabis sativa or committed any theft.*
8. *The prosecutor's preferring of charges against me without reasonable and probable cause or belief before the court amounted to malicious prosecution or abuse of the process.*
9. *I suffered loss and damage as my liberty was restrained. I was inconvenienced, humiliated and my name was put into disrepute."*

The Defendant did not parade any witness.

Malicious prosecution is a tort whereby a person maliciously and without reasonable and probable cause initiates against another person judicial proceedings which terminate in favour of the person against whom the judicial proceedings were initiated and which result in damage to his reputation, person, freedom or property: See "**Street on Torts**", 8th edn. **Butterworths, 1988** at p28.

A claim for malicious prosecution cannot succeed unless the claimant proves four essential elements, namely, (a) that the defendant prosecuted or initiated the criminal proceedings against him or her, (b) that the prosecution lacked reasonable and probable cause, (c) that the defendant acted maliciously, and (d) that the prosecution ended in the claimant's favour: See **Mvula v. Norse International Ltd [1992] 15 MLR 331** and **Nthani v. City Council (1995) 1 MLR 161**.

In **Glinski v. Mc Iver (1962) A.C. 726**, the House of Lords held that, in order that the claimant may succeed on the issue of reasonable and probable cause, he or she must prove either that the defendant did not believe that the claimant was probably guilty of the offence or that a person of ordinary prudence and caution would not conclude, in the light of the facts in which he or she honestly believes, that the claimant was probably guilty.

The Claimant chiefly relies on the fact that he was acquitted by the 2nd Grade Magistrate Court sitting at Lilongwe. A perusal of the judgement of the Magistrate Court shows that five witnesses gave evidence on behalf of the State. The Magistrate Court found that the Claimant had a case to answer and it, accordingly, called upon the Claimant to give evidence in his defence.

The finding by the Magistrate Court that the State had established a prima facie case against the Claimant is fatal to the case of the Claimant. That finding nullifies the argument by the Claimant that the prosecution of the Claimant on the criminal charges levelled against him had no reasonable prospect of succeeding: see **Sulaimana and another v. Attorney General (2004) MLR 383**.

Further, the mere fact that the prosecution ended in favour of the Claimant is not enough. The Claimant has also to show that the Defendant acted maliciously, that is, the Claimant must prove that the Defendant had another motive other than of simply instituting a prosecution for the purpose of bringing the Claimant to justice: See **Mwafulirwa v. Southern Bottlers Ltd [1991] 14 MLR 316** and **Stevens v. Midland Countries RY Co. (1854) 10 Exch. 352**. There is nothing in the evidence before the Court to prove that the defendant acted maliciously.

In view of the foregoing, the Claimant has failed to establish to the required standard two of the four essential requirements in the tort of malicious prosecution, namely, (a) that the prosecution lacked reasonable and probable cause, and (b) that the defendant acted maliciously. Accordingly, the action by the Claimant dismissed.

Pronounced in Court this 19th day of January 2021 at Lilongwe in the Republic of Malawi.



Kenyatta Nyirenda
JUDGE