



HIGH COURT
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REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
CIVIL DIVISION
PRINCIPAL REGISTRY
CIVIL CASE NUMBER 536 OF 2013

BETWEEN:

STEVEN MAXWELL LIWONDE.....FIRST CLAMANT

-AND-

MC FORD CHIDIMA.....SECOND CLAMANT

-AND-

ACKIM MDALA.....THIRD CLAMANT

-AND-

TRANSGLOBE PRODUCE EXPORT LIMITED.....DEFENDANT

CORAM: Hon Mr Justice Jack N'riva, Judge
Mr. Chimwemwe Kalua for the claimant
Defendant absent and not represented
Mrs. Mtegha Court Clerk

JUDGMENT

1. Introduction

The claimant commenced this action against the defendant claiming false imprisonment, malicious prosecution and defamation. This is the Judgment of the Court to determine whether the claimant has made out a case against the defendant.

2. Case statements:

2.1 Claimant's statement of Case

According to the statement of claim, the claimants were employees of Transglobe Produce Export Limited (the defendant). On 11 June, 2012, the defendant procured the police to arrest them on an allegation that they stole two bags of maize. They were arrested at the defendant's offices and were in custody at Limbe Police from 11th June until 13 June 2012, when they received bail. The police brought the claimant to a criminal trial at Midima Court where the court acquitted them.

The claimants claim that the police had no probable cause to arrest them, they had no evidence against them and failed to withdraw the matter at the Court. Further the defendant portrayed the claimants as thieves, thereby damaging their reputation leading to considerable stress and embarrassment.

2.2 Defendant's Case

The defendant argued that on their own (at no instance of the defendant) the police caught the claimants red-handed stealing. There was thus justification to arrest the claimants.

3. Burden and standard of proof

The burden is on the claimant to prove the allegations he levelled against the defendant. The law casts the burden of proof on the one who is making an allegation, to prove his or her case against the other- *Joseph Constantine Steamship Line v Imperial Smelting Corporation Limited* [1942] AC 154, 174. The standard of proof is that of proof on a balance of probabilities. If the evidence is such that the Court can say: "We think it more probable than not, the burden is discharged, but if the probabilities are equal it is not" (Denning J in *Miller v Minister of Pensions* [1947] All ER 372, 373, 374.)

5. What is Required of the Claimants to Prove

In accordance with the law, the claimants are supposed to prove that the defendant was liable for their arrest and that there was no basis for the arrest. Further, on malicious prosecution, the claimants have to prove that the defendant moved for

a prosecution against them when there was no basis to do that. Finally, on defamation, the claimants have to prove that the defendant published, directly or impliedly, defamatory statements against them.

4. The Law

4.1 False imprisonment

False imprisonment consists of erroneous or wrongful restraint of one's liberty: (Rogers 2006)¹. The tort is established on proof of the fact of imprisonment (or restraint of one liberty to go where they please) and absence of lawful authority for the restraint (Jones, 2006:890).² In *Mtita and others v Stagecoach Malawi Ltd* [1997] 1 MLR 97 (HC) the Late Kunitsonyo J said

The classic definition of imprisonment appears in *Terms de la Rey* [sic] and reads as follows:

“Imprisonment is no other thing but 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 a man's own house as well as in the common gaol; and in all places the man so restrained is said to be a prisoner so long as he hath not his liberty fully to go at all times to all places whither he will without bail or mainprise or otherwise.”³

It is well-settled that giving information to the police and the police arrests a person on erroneous grounds amounts to false imprisonment on the person giving the report to the police: *Chintendere v Burroughs Limited* (1981-83) 10 MLR 215.

4.2 Malicious prosecution

Laying a criminal charge against an innocent person, motivated by malice without reasonable and probable cause for prosecution are the elements of malicious prosecution. A claimant cannot raise the claim for malicious prosecution unless he or she shows that there were criminal proceedings that have been terminated in his or her favour, see *Mvula v Norse International Ltd* [1992] 15 MLR 331. The termination must arise from want of reasonable and/or probable cause. (*Khembo v. Blantyre Print & Packaging Co. Ltd.* (H.C.) 9 MLR 452, *Phiri v. Lujeri Tea Estates Ltd.* (H.C.) (1981-1983) 10 ALR (Mal). In showing malice,

¹ Rodgers, W. (2006). *Winfield & Jolowicz on Tort*. London: Sweet & Maxwell

² Dugdale, A (Ed) (2006), *Clerk & Lindsell on Torts*. London, Sweet & Maxwell.

³ *Termes de la Ley*, Imprisonment, as quoted in *Bird v Jones* (1845) 7 Q.B. 742 [Rastell, J. (1812, Rep) *Les termes de la ley: or certain difficult and obscure and terms*. Boston, J Johnston.

the claimant would have to show improper motive for instigating prosecution- *Jacob Banda v Mchenga Coal Mines* [2007] MLR 181 (HC).

The claimant needs to show that he was prosecuted by the defendant *Lapukeni v Commercial Bank of Malawi* [1996] MLR 139 (HC), that is to say, the defendant was actively instrumental in setting the law in motion- *Matanda v Sales Services Ltd and Others* [1990] 13 MLR 219.

4.3 Defamation

Defamation has been defined to mean 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. The prerequisites of defamation generally are that the claimant must prove there was a malicious publication of defamatory words and that the words referred to him or her: In *Nyirenda v AR Osman* [1993] 16(2) MLR 681 at 704, the Court said:

Defamation has been defined, in different terms, as the publication of a statement “which tends to lower a person in the estimation of right-thinking members of society generally; or which make them shun or avoid that person”. It has also been defined as any imputation which may tend to lower the plaintiff in the estimation of right-thinking members of the society generally, to cut him off from society or to expose him to hatred, contempt or ridicule. Having established that the statement or imputation answers the above qualities, four things must be satisfied in order for the plaintiff, subject, of course, to the availability of any possible defence:

- (a) That the words complained of were published maliciously;
- (b) That they are defamatory;
- (c) That they refer to the plaintiff;
- (d) That they were published.

By imputation, publication of defamation may be deduced from conduct of the defendant. In *Mtila and others v Stagecoach Malawi Ltd* [1997] 1 MLR 97 (HC), for example, the Court held that by parading the plaintiffs handcuffed and in bare feet and calling them thieves, the defendant had defamed the plaintiffs. The Court said:

To refer to someone as a thief is undoubtedly defamation which is actionable *per se*. Evidence has shown that the plaintiffs were continuously accused of theft during the investigations. To parade someone by exposing him to the

public while in handcuffs is clearly to suggest that that person has transgressed the criminal law.

In that case, the defendants, through their servants, provided transport to carry the plaintiffs around and in particular to Blantyre Police Station, then to their work place, during working hours, and then to their homes while in handcuffs and without shoes. In their homes, their wives and children and the public in the neighbourhood saw them in handcuffs and without shoes.

The Court held that mere fact that the plaintiffs were paraded in this manner was defamatory and amounted to defamation by conduct as well as publication of the said defamation to the public in the neighbourhood of the plaintiff's homes and to their fellow employees.

6. Evidence

The first claimant provided a written statement on the behalf of his co-claimants. His evidence was that: on 25th May 2013, his Factory Manager, a Mr. Sini, sent him to collect bags of maize at the Company's Warehouse in Maone. The second and third claimants accompanied him. They loaded 175 bags of maize, went through the weighbridge and got papers from the officer at the weighbridge.

As they were driving back, the motor vehicle developed a problem. They stopped at the nearest stage near 'Our Lady of Wisdom' to check the vehicle. As that was happening Ackim Mdala noted that some two bags of maize were almost falling off the vehicle. The claimants asked some people to assist him to get the two bags back to the vehicle. A guard from Transglobe arrived at the scene. The guard thought that the two bags were being stolen. They put back the two bags to the vehicle and drove back to the office. They offloaded all the bags. The Security Officer sent one of two employees to get the bags from the load and put them as the gate as evidence that they were about to be stolen.

The defendant suspended the three on 26 May 2012, on 31 May 2012, they had a hearing and were told to go back and come back on 11 June for the defendant to bring its witnesses. When they went back, the police came to arrest them. Mr Makhaza, the Personnel Officer called the police to arrest the three. They were in police custody until 13 June 2012. They underwent a trial and were later acquitted on 29 October 2012.

The defendant did not appear before the Court to defend the matter. The offices, of the lawyers that the defendant instructed, I was told, were closed.

I gave the defendant more time to bring legal representation, if they wished, but they did not.

7. Findings

7.1. False imprisonment

As I have said false imprisonment comprises of, for purpose of the claim before me, arresting a person without legal justification. The question to ask, therefore, is whether the defendant had no legal justification to report the claimants to the police. The law on the subject is that where a person lays a charge to the police so as to make it a duty of the police to act, then the said person is liable for false imprisonment – see *Chintendere v Burroughs Limited* (1981-83) 10 MLR 215 and *ADMARC v Stambuli MSCA* Civil Appeal Number 6 of 1984 (unreported).

In *Tembo v Industrial Development Group* (1) [1993] 16(2) MLR 865 (HC), the Court said:

In *Chintendere v Burroughs*, Civil Cause No 530 of 1981, [(1981-83) 10 MLR 215.], in deciding whether a report of a crime made to the Police is a “charge” or “mere information”, Skinner CJ had this to say:

“The crucial issue, the issue of fact upon which this part of the case turns is whether the defendant’s servants merely stated the facts to the Police or whether they made a charge against the plaintiff”.

The line between “merely stating the facts to the Police” and “making a charge against the plaintiff” is not easy to draw. The defendant does not have to use any technical words in order for the Court to be satisfied that he made a charge or merely stated the facts. The facts of each case must be considered upon their own merit.

On the whole evidence before me, I find the defendant did not act wrongfully in making a judgment that the claimants were stealing some maize. Looking at the entirety of the evidence, the defendant had all the reasonable belief that the claimants were stealing the maize. Therefore, one cannot be heard to say that the defendant had no reason or cause to arrest the claimants. The onus was on the claimants to demonstrate that the defendants had no reasonable cause for the arrest. On the claimants’ own evidence, I fail to appreciate that the defendant had no reasonable or probable cause for the arrest.

7.2. Malicious Prosecution

Was the prosecution malicious? That is the question. ‘Malicious’ is a wide term. It covers such acts as prosecuting a person as a means of embarrassment, that is to say, where the charges are trumped up or without reasonable evidence or witnesses. It might include continuing with a trial where it is unreasonable to so proceed, where the case lacks merit: Dugdale, 2006. In short, malicious prosecution is a prosecution without a reasonable and probable cause. A reasonable and probable cause is said to be:

an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily 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 not a question of being acquitted. It is a question of whether the defendant ought not, in the first place, to have put the claimant on prosecution due to, for example, inadequacy of evidence. It is a question of whether the accuser had a reasonable cause to lay the accusation against the accused.

On the evidence before me, the defendant had a reasonable cause to set the prosecution in motion, as it were. It worth observing, though, that there is no evidence that the defendant had a hand in the prosecution of the claimants.

From the evidence the defendant had reasonable belief that the claimants were, or were attempting, to steal the maize. The defendant had every reason to report the matter to police. I do not perceive that the police were wrong in prosecuting the claimants. In the Court, a guard gave evidence. Then a police investigator also gave evidence. The Court even found the defendants with a case to answer. That is according to the judgment the claimants brought in evidence. A criminal case going that far can hardly be said to be without a probable cause, unless the Court is satisfied in defence that there was malice, nonetheless.

The Court, among other reasons, acquitted the claimants for want of corroboration of the guard’s evidence. One can ask whether that was an evidential requirement in the matter. But that is not the issue in this Court. The other reason for the acquittal was that the claimant were special owners of the maize in question. This implies that the claimants could not have stolen the maize from themselves. The other ground was that the defendant suffered no shortage. The question is whether with all that, one can say there was no probable and

reasonable cause to prosecute the claimants. Can one not say that the acquittal was technical? Would it have been prudent to expect the defendant to look at all those technicalities? I fail to appreciate that the prosecution of the claimants was without a reasonable cause. In fact, it had.

7.1.3. Defamation

As I have stated before, defamation consists of uttering or malicious publication of defamatory words referring to a claimant. Publication of defamation can also be imputed from conduct. From the evidence, I find nothing to suggest any act of defamation on the part of the defendant. The claimants have not shown anything to impute defamation on the part of the defendant.

8. Conclusions

To crown it all, on the facts before me, the claimants have not succeeded in establishing the claims for false imprisonment and malicious prosecution. I do not find the basis on which the claimants say that the defendant had no reason to report to the police the theft of the maize bags. I also fail to appreciate that the prosecution of the claimants was without a probable cause. Again, the claimants have failed to prove the case of defamation. The evidence falls short of showing what the defendant did to defame the claimants.

In summary, I dismiss the claimants' claim for defamation. The claimants have a right to appeal against the decision.

Each part will have to meet their costs.

DELIVERED at Blantyre the 28th day of February, 2018

J N'RIVA
JUDGE