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IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY  
CIVIL CAUSE NO 438 OF 2015

BETWEEN:  
MATHEWS COSMAS.....1<sup>st</sup> CLAIMANT  
FRED TSAMWA.....2<sup>nd</sup> CLAIMANT  
AND  
OPPORTUNITY BANK OF MALAWI.....DEFENDANT

CORAM: THE HONOURABLE JUSTICE CHINANGWA  
Sikwese , Counsel for the Claimants  
Nyanda, Counsel for the Defendant  
Chitao Ms, Court Clerk

JUDGEMENT

**Introduction**

1. The claimants seek damages for false imprisonment; malicious prosecution; loss of earnings and income and costs of the action.
2. The claims are opposed in defence but the defendant did not call any witness.
3. The claimants filed witness statements and the same were adopted in evidence. Their evidence was the same and is summarized below.
4. The claimant states that on 27<sup>th</sup> June 2013 while he was working in the office, Ms. Khumbo an auditor invited him to her office and then picked him up and took him to Kasungu Police

station and handed him over to the police officers on allegations that he and the 2<sup>nd</sup> defendants had stolen one million kwacha. The two were detained up to 28<sup>th</sup> July 2018 when they were granted bail. He was later acquitted by a criminal court.

### **Issues for Determination**

5. This court has to determine whether the claimants were falsely imprisoned; maliciously prosecuted; are entitled to lost earnings and costs of the action.

### **On false Imprisonment**

6. In **Hauya v Cold Storage Co Ltd** [1994] MLR 92 (SCA) it was held that where '...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'. In this case it is noted that the defence did not give any evidence. During cross examination there was no evidence either to contradict the evidence of the claimants. That being said the evidence of the claimants still has to be tested. The claimants state the defendant's auditor took them to the police. It is worth noting from defendants' submissions that the defendants state that, '*the defendant reported the matter to police and the police called the claimants for questioning thereafter the two claimants were arrested and charged by the police after investigating with conspiracy to defraud the bank*'. As earlier stated, the defence did not give evidence. By making such a statement in submissions the defence Counsel is adducing evidence. Procedurally this is not correct. Witnesses are the ones to give evidence. It is thus the courts finding that the claimant's evidence is uncontested. A finding of false imprisonment is entered as the defendants brought the claimants to the accused persons. The police did not carry out their own investigations leading them to arrest the claimants. The claim succeeds.

### **On malicious prosecution**

7. In **Mwafulirwa v Southern Bottlers Ltd** [1991] 14 MLR 316 (HC) it was held that to succeed on a claim for malicious prosecution, the plaintiff had to show that there was no reasonable prospect of success with the proposed prosecution, and the prosecution had been instigated by the defendant who acted with malice. For this court to establish malicious prosecution this court ought to analyse the prosecution evidence which is obtained from

the lower court record. There were three witnesses. The first witness Patsone Kalonga, Fraud and Investigations Officer for the defendants. His evidence is recorded on page 1 of the lower court judgement as follows, 'after his investigations, he discovered that the money which was supposed to be found in the ATM machine was not there this come up after Mathews and Tsamwa had signed cash for the ATM machine amounted to Mk902,000. The cheque was done on 21/06/2013 but the operations manager did not open the ATM machine because it was not functioning. Later when he opened the ATM machine, he noticed that the cash was not there despite that the machine was faulty. Later when he checked the CCTV Camera, he confirmed that Mathews and Tsamwa entered into the machine room to put cash into the machines. Later on the same day, Tsamwa pulled out the cassettes from the machine and Cosmas entered into the machine room alone with a blue box in his hands. Later the following day, Mathews and Tsamwa entered into the machine room and removed the cash from the machine. Later the same day Cosmas entered the same machine room and replaced the empty cash box. Later surprisingly the money which was supposed to be into the machine was not there. The third prosecution witness, Deborah Nakanga, a police officer, pretty much said the same thing as she narrated what she saw on the CCTV camera. In reading the said evidence this court finds that there was reasonable and probable cause for the prosecution. The claimants were at the center of the operations on the ATM machine on the day the money went missing. The CCTV footage captured them. Surely the evidence did indicate a reasonable prospect of success. In addition, there is no indication of malice as it was not in dispute that money went missing. It should be noted that an acquittal does not necessarily mean that there was malicious prosecution as the court considers the probability of success of the proposed prosecution. The claim for malicious prosecution fails.

#### **On claim of lost earnings**

8. It is noted from the default judgement filed in the Industrial Relations Court, that the claimants are claiming compensation for unfair dismissal. It is this court view that this matter be continued in the Industrial Relations Court as it would cover the time which they were falsely imprisoned.

#### **Costs of the Action**

9. Costs are awarded in the discretion of the court. The evidence of the claimants was quiet straight forward. If the defence had given some thought to the evidence before them as presented in the witness statement, this matter should not have come through to trial. Time and other expenses should have been saved. Costs are awarded to the claimants.

**Finding**

10. The applicants claims for false imprisonment and costs succeed. The claims for malicious prosecution fails and that for loss of earnings is referred to the Industrial Relations Court.

**Pronounced this 6<sup>th</sup> day of September 2021 at LILONGWE.**



**R.M CHINANGWA**

**JUDGE**

i.