



REPUBLIC OF MALAWI
MALAWI JUDICIARY
IN THE HIGH COURT OF MALAWI
MZUZU DISTRICT REGISTRY
CIVIL CAUSE NO. 74 OF 2014

BETWEEN

JOSEPH JONATHAN ZINGA

PLAINTIFF

-and-

AIRTEL MALAWI LTD

DEFENDANT

Coram : **Honorable Mr. Justice D.T.K. Madise**

Mr. C. Chithope-Mwale Counsel for the Plaintiff

Mr. R. Mhone Counsel for the Defendant

Mr. A. Kanyinji/l. Zimba Bondo Official Interpreters

Mrs. F. Silavwe Court Reporter

Madise, J

JUDGMENT

1.0 Introduction

1.1 On 3 April 2014 the Plaintiff in this matter took out a writ of summons against the Defendant Airtel Malawi claiming damages for false imprisonment, defamation and malicious prosecution. The Defendant opposed the claim and called the Plaintiff to strict proof.

2.0 Statement of Claim

2.1 In his statement of claim the Plaintiff told the court that at the material time he was an employee of Northern Engineering Works Ltd and affiliated to Airtel. That on 13 July 2013 Mr. Chinangwa an Airtel employee (Security and Compliance Manager) and a Mr. Mphatso (Project Manager for Airtel) went to his house at 6 am with 2 police officers and arrested him. He was picked from his house and they travelled to Lingadzi Police.

2.2 The Airtel officers mentioned in the foregoing laid a charge against him alleging that he had stolen 4 Airtel battery towers from the zone he was managing in Mzimba. Thereafter, on the same day, he was taken to Limbe Police Station in Blantyre. He was kept in a police cell in which he spent the night. On 14 July 2013 the Plaintiff was taken from Limbe Police in Blantyre to Kasungu Police, while in hand-cuffs where he was kept in a police cell in which he also spent a night.

2.3 on 13 July 2013 the Plaintiff whilst in hand-cuffs and in the company of a police officer was transferred from Kasungu Police cell to Mzimba Police on a public transport, National Bus Company bus, which was full of passengers. At Mzimba Police the Plaintiff was also put in a cell in which he spent the night and he was released on bail on 16 July 2013 at around 2 pm after spending 80 hours under arrest as a result of the charge laid against him by Airtel and its said officers.

2.4 The Plaintiff was latter charged with the offence of theft by servant contrary to section 286 of the Penal Code at Mzimba Magistrate Court on the allegations concerning the 4 batteries as alleged by Airtel and its officers. At court there was no single piece of evidence adduced that could make a reasonable person lay a charge against the Plaintiff resulting in his eventual loss of liberty, being defamed as a criminal, being inconvenienced and incurring unplanned for expenses to defend himself (which included commuting between Mzuzu where he stays to Mzimba Court where the case was being heard). He commuted between Mzuzu and Mzimba to attend to his criminal case for at least 6 times incurring fuel cost of K20,000 per trip.

2.5 As a result of lack of any piece of evidence adduced which could make a reasonable person level theft allegations against the Plaintiff, the Plaintiff was acquitted by the Magistrate Court merely at no case to answer stage without the case proceeding to defence.

2.6 As a result of the conduct above-mentioned and theft allegations by Airtel and its officers against the Plaintiff, the Plaintiff unjustifiably lost his liberty, was maliciously prosecuted, was defamed as a criminal in the eyes of right thinking members of the public, was inconvenienced and incurred unplanned expenses to defend himself in court at Mzimba from Mzuzu.

2.7 Wherefore the Plaintiff claims

- i. Damages for false imprisonment.
- ii. Damages for malicious prosecution.
- iii. Damages for defamation.
- iv. Damages for inconvenience.
- v. K120,000.00 special damages.
- vi. Costs of this action.

3.0 Statement of Defence

1. The Defendant admits the contents of paragraph 1 of the statement of claim.
2. The Defendant denies paragraph 2 of the statement of claim and states that the Airtel Project Manager did not accompany the police to arrest the Plaintiff.
3. The Defendant refers to paragraph 3 hereof and avers that the arrest, if any, was neither made by the Defendant nor its employees but by the police upon finding a reasonable suspicion that the Plaintiff may have committed the offence, which reasonable suspicion came about after the police conducted thorough investigations of the crime that was reported to them.
4. The Defendant refers to paragraph 3 hereof and states that at the time of trial, the Defendant will further aver that the only role it played in this matter was to report the suspected crime to the police after which report the police carried out independent investigations that led to the arrest of the Plaintiff.
5. The Defendant refers to paragraph xxxxx of the statement claim and denies the contents thereof and the Defendant will during trial contend that its employees made no false allegations against the Plaintiff and that the Plaintiff was taken for questioning after being implicated in the theft of batteries by colleague who was in custody at Limbe Police Station in Blantyre.
6. The Defendant refers to paragraph 5 and 6 of the statement of claim and makes no comment thereof.
7. The Defendant refers to paragraph 6 of the statement of claim, denies its contents and puts the Plaintiff to strict proof thereof.

8. The Defendant refers to paragraph 9 of the statement of claim, denies its contents and puts the Plaintiff to strict proof thereof.
9. The Defendant refers to paragraph 11 of the statement of claim and avers that the alleged malicious prosecution therein is denied entirely and puts Plaintiff to strict proof thereof and the Defendant further contends that whatever prosecution ensued after the arrest of the Plaintiff by the police was after thorough investigations had been carried out by the police themselves and not the Defendant, for this reason, it is without basis to sue the Defendant on a prosecution carried out by the police.
10. The alleged loss and damage are denied as the arrest was done by the police after thoroughly investigating the matter and not by the Defendant.
11. Save as herein expressly admitted the defendant denies each and every allegation of fact contained in the statement of claim as the same transverse seriatim.
12. Wherefore the Defendant urges this court to dismiss the Plaintiff's claim in its entirety with costs

4.0 The Evidence

4.1 The Plaintiff in this matter gave a witness statement and he stated as follows:

- 1) I was at all material times an employee at Northern Engineering Works Ltd (NEWL). NEWL was at all material times affiliated to Airtel Malawi Ltd (hereinafter referred to as Airtel) and I was at all material times working as a NEWL Zone Engineer manning Airtel towers in Mzimba.
- 2) On 13 July 2013 Airtel employees Mr. Chinangwa (Security and Compliance Manager for Airtel) and one Mphatso (Project Manager for Airtel) at around 6 am came to my house at Chiputula in Mzuzu with 2 police officers whereby they put me under arrest and picked me up from

my house and travelled with me to Lingadzi Police in Lilongwe where I was kept in a police office.

- 3) The Airtel officers mentioned in the foregoing paragraph laid a charge against me alleging that I had stolen 4 Airtel battery towers from the zone I was manning in Mzimba. Thereafter, on the same day, I was taken to Limbe Police Station in Blantyre in a twin cab placed between 2 CID officers. At Limbe Police I was kept in a police cell in which I spent the night.
- 4) On 14 July 2013 I was transferred from Limbe Police in Blantyre to Kasungu Police, while in hand-cuffs, where I was also kept in a police cell in which I also spent the night.
- 5) On 13 July 2013 whilst in hand-cuffs and in the company of a police officer I was again transferred from Kasungu Police cell to Mzimba Police on a public transport, National Bus Company bus, which was full of passengers.
- 6) At Mzimba Police I was also put in a cell in which I also spent the night and I was released on police bail on 16 July 2013 at around 2 pm after spending 80 hours under arrest as a result of the charge laid against me by Airtel and its said officers see the document marked JJZ1 being copy of my police bail bond executed days after my arrest.
- 7) Thereafter the onset of trial in court slightly delayed for some time because Mr. Chinangwa had only orally registered Airtel's complaint to the police and there was nothing in writing which could serve as a formal complaint to the police in their (police) records as well as which could be served on the defence (my legal practitioner) as part of the disclosures. Consequently, Mr. Chinangwa, a former police officer, recorded his own statement in which he put in writing his, and Airtel's earlier oral complaint to the police in a statement dated: see a copy of Mr. Chinangwa's statement attached hereto marked JJZ2.

- 8) In the statement formalizing the earlier oral complaint to the police, he expressly stated that he was reporting at the police "theft of four site or tower batteries which was committed by NEWL Zone Engineer, Mr. Joseph Zinga" thereby clearly showing the laying of a charge rather than merely reporting the matter to police for the police to conduct its own investigations and form their own opinion whether there was a reasonable basis to suspect that I might have committed the offence of theft.
- 9) I was later charged with the offence by servant contrary to section 286 of the Penal Code at Mzimba Magistrate Court on the allegations concerning the 4 batteries as alleged by Airtel and its officers.
- 10) At court there was no single piece of evidence that could make a reasonable person lay a charge against me resulting in my eventual loss of liberty, being defamed as a criminal, being inconvenienced and incurring unplanned for expenses to defend myself (which included commuting between Mzuzu where I stay to Mzimba Court where the case was being heard.
- 11) I commuted between Mzuzu and Mzimba to attend to my criminal case for at least 6 times incurring fuel cost of K20,000.00 per trip.
- 12) Even though a charge was laid against me by the Defendant and its servants/agents, resulting in my eventual arrest and prosecution, there was no reasonable basis/suspicion for a reasonable person to conclude or suspect that I had or might have committed the theft of the alleged tower batteries for several reasons:
 - i. The type of batteries in issue are not only bought, used or sold in Malawi by the Defendant TNM (Telecom Networks Malawi Ltd) as well as even individuals are also able to buy, use and sell the said type of batteries.
 - ii. There was no housebreaking or shortage of batteries in any of the Defendant's warehouses or indeed any place where the

Defendant stored such batteries in respect of the zone I was manning, a thing the Defendant's servant or agent Mr. Chinangwa confirmed during criminal trial.

- iii. There was no battery missing from any of the towers I was manning.
- iv. The origin of the alleged batteries was unknown to the Defendant and Mr. Chinangwa who testified in court on behalf of Airtel failed even to suggest the origin of the batteries.
- v. The alleged stolen batteries were not found in my possession.
- vi. All the towers I was manning were guarded by guards of Chiloni Security Services and there was no complaint from the guards at any point during my time of manning the towers that any battery had been stolen or went missing.

13)As a result of lack of any piece of material evidence adduced which could make a reasonable person level theft allegations against me, I was acquitted by the Magistrate Court merely at no cast to answer stage without the case proceeding to defence; see the document marked JJZ3 attached hereto being a copy of the judgment acquitting me.

14)As a result of the conduct abovementioned and theft allegations by Airtel and its officers against me, I unjustifiably lost my liberty, was maliciously prosecuted, was defamed as a criminal in the eyes of right thinking members of the public (by being arrested, hand-cuffed in a public transport, among others), was inconvenienced and incurred unplanned for expenses to defend myself in a Court of Law at Mzimba from Mzuzu.

15)Therefore I claim from the Defendant the reliefs as sought in my statement of claim.

16)I make this statement conscientiously believing the same to be true to the best of my knowledge, belief and information.

4.2 In reply the Defendant summoned Kennedy Chinangwa who was the Security and Compliance Manager for Airtel at the material time. He stated as follows:

- 1) I was working with the Defendant company as a Security and Compliance Manager.
- 2) The Plaintiff in this matter was an employee for Northern Engineering Works Ltd and has never worked for Airtel Malawi Ltd.
- 3) During the material time Airtel Malawi experienced lot of theft of its tower batteries and the matter was reported to police throughout Malawi.
- 4) The police did their investigations in connection with the matter and Limbe Police Officers managed to arrest businessman, one Rodrick Danwick Who mentioned that he bought the batteries from Mr. Herbert Kamwaza, another employee for Northern Engineering Works Ltd based in Kasungu.
- 5) The police brought in Mr. Herbert Kamwaza for confrontation with Rodrick Danwick who was consequently arrested and later asked Airtel Malawi to provide them transport to Mzuzu where they were to collect another suspect whom they claimed to have been mentioned at Limbe Police Station by Mr. Herbert Kamwaza and Rodrick Danwick.
- 6) The company asked me to drive the police to Mzuzu where the police picked Mr. Joseph Jonathan Zinga, the Plaintiff herein.
- 7) I never knew the house of Mr. Joseph Jonathan Zinga before and I only managed to reach it under the direction of the police.
- 8) During the material time I and the police were not accompanied by Mr. Mphatso from Airtel Malawi, as the Plaintiff alleges.
- 9) At no point did I ask or instruct the police to arrest anyone in connection with the theft of batteries and that all the company did was to report the matter to police who carried out their independent investigations and consequent arrests.

10) When the police were conducting their investigations, the only role I played was to transport them to where they wanted and nothing more. Even at Kasungu Police station, the prosecutor asked Airtel Malawi to provide transport for the Plaintiff to be transported to Mzimba. While I was on the way to Kasungu, the then Station Officer for Kasungu Police Station declined the help saying the transport arrangements were already made by Plaintiff's relatives.

11) I make this statement believing the same to be true to the best of my knowledge and belief.

5.0 The Issues

5.1 There are two main issues for determination before me;

- 1) Whether the Defendant laid a charge at the Police against the Plaintiff
- 2) Whether the Defendant is liable for false imprisonment, defamation and malicious prosecution.

6.0 Law and Evidence

6.1 Burden and Standard of Proof

6.1.1 In civil matters there are two principles to be followed. Who is duty bound to adduce evidence on a particular point and what is the *quantum* of evidence that must be adduced to satisfy the court on that point? The law is that he who alleges must prove. The standard required by the civil law is on a balance of probabilities. 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 the other must carry the day.

6.2 False imprisonment?

6.2.1 It is the unauthorized restraint of liberty without any justification at law. 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.

6.2.2 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 lost of time suffered by the plaintiff if it is found at the criminal trial that he did not commit the offence.

6.2.3 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.

6.3 Defamation

6.3.1 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.

1. False story
2. Publication to third party
3. InjURy to reputation.

6.3.2 It 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).

6.3.3 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.

6.4 Malicious prosecution

6.4.1 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 criminal trial aimed at simply inconveniencing and embarrassing the plaintiff. The plaintiff must prove that there was malice by word of mouth or and action.

6.4.2 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. 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.

Elements

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.

7.0 Finding

7.1 In this matter there is no dispute that the Plaintiff was picked at his home in Chiputula at 6 am on 13 July 2013 by two police officers and Mr. Chinangwa from Airtel. There is no dispute that he was escorted to Lingazi, then Blantyre (Limbe), Kasungu and finally Mzimba under police custody. There is no dispute that he spent 80 hours in custody.

7.2 When trial commenced at Mzimba he was found with no case to answer and was acquitted. The question before me is whether the Defendant laid a charge before the police or simply gave information about the theft and that it was the police in their own judgment based on reasonable suspicion who arrested the Plaintiff.

7.3 The defence argued that the Plaintiff was mentioned by a Mr Herbert Kamwaza and Rodrick Danwick. That he was arrested by the Police in the course of their investigations. I have looked at the evidence and I find that Mr. Chinangwa in his written statement at Mzimba Police specifically mentioned the Plaintiff thereby laying a charge against the Plaintiff. What he said was more than reporting a crime. He stated as follows.

Date: 23/07/2013

States: I am as stated above based at Airtel Malawi Head Office in Lilongwe.

"I hereby report at your good offices, theft of four site or tower batteries which was committed by NEWL, Zone Engineer Mr. Joseph Zinga....."

7.4 For all intents and purpose Mr. Chinangwa acting on behalf of the Defendant was not simply reporting a crime. He had laid a charge specifically against the Plaintiff in this matter so I find. All that Chinangwa could have said was that there was theft of four tower batteries full stop. On a balance of probabilities the Plaintiff has made out his case for false imprisonment.

7.5 It is also my reasoned judgment that what Mr. Chinangwa presented at Mzimba Police was defamatory in nature. By telling lies about the Plaintiff there was an element of defamation. The story that the Plaintiff had stolen four batteries was false as he was acquitted by the court below. The Plaintiff was working in Mzimba and news of his arrest went round the town. I find publication to third parties of this false story. I therefore find the Defendant liable for defamation.

7.6 In conclusion, I fail to find evidence of malicious prosecution. I have seen the court record and there is no evidence thAt Mr. Chinangwa influenced the prosecuting authority to take the Plaintiff to court. I find no evidence of malice on the part of the Defendant. This claim must fail.

8.2 The Plaintiff must file summons for assessment of damages for false imprisonment, defamation and special damages for expenses incurred during his trial at Mzimba before the learned Registrar within 14 days.

9.0 Costs

These follow the event. I award them to the Plaintiff.

Pronounced in Open Court at Mzuzu in the Republic on 8th October, 2015.

Dingiswayo Madise
JUDGE