

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 3273 OF 2002

BETWEEN:

SUDI SULAIMANA.....1ST PLAINTIFF
COLVIN KAUMILA.....2ND PLAINTIFF

- and -

THE ATTORNEY GENERAL.....DEFENDANT

CORAM: CHIMASULA PHIRI J.

Nkhata }
F. Mzumara } of Counsel for the plaintiff.
Attorney General absent/unrepresented.
Nsomba – court clerk.

JUDGMENT

Chimasula Phiri J.

By originating summons issued on 9th October 2002, the plaintiffs commenced this action claiming for the following orders: -

- a. That their arrests in March 2001 on allegations of treason and their resultant 1 (one) year incarceration in jail was a breach of their constitutional right to liberty and also tantamount to false imprisonment.

- b. That the prosecution which they underwent in the High Court was malicious.
- c. That arrest, imprisonment and prosecution was tantamount to defamation.
- d. Damages be awarded to the plaintiff's for breach of their constitutional rights, false imprisonment, malicious prosecution and defamation as stated in a., b., and c., above.
- e. The plaintiff's be awarded costs.

There is an affidavit in support sworn by Sudi Adaki Sulaimana on 9th October 2002. The originating summons was served on the Attorney General on 15th October 2002. On 23rd October 2002, the Attorney General acknowledged receipt of the summons and indicated that the defendant intended to contest the proceedings. The acknowledgement form was returned to the High Court on 24th October 2002. The matter was scheduled for hearing on 18th November 2002. On 11th November 2002, Mr Geoffrey Nkhata swore an Affidavit in Opposition which was filed in court on 13th November 2002. I have no doubt that the Attorney woke up from slumber after being served with notice of hearing on 8th November 2002. On 18th November 2002, the matter was adjourned to a date to be fixed by the Registrar because the Attorney General was absent. The new date fixed by the Registrar was 26th November 2002. Service of the Notice of Adjournment was done by fax on 20th November 2002. On the appointed date of hearing, nobody appeared and the judge adjourned the matter. A fresh notice of adjournment was taken out on 16th December 2002 appointing 10th February 2003 as new date for hearing. This was served by fax again on 17th December 2002. A repeat service by fax was done on 5th February 2003 for hearing on 19th February 2003. On 19th February 2003, the Attorney General raised a preliminary objection in relation to the mode of commencement of this action by originating summons as opposed to a writ. The court declined to strike off the action and instead ordered that the action be proceeded with as if it had begun by writ. Summons for directions were issued on 26th June 2003 returnable on 17th July 2003. This was served on the defendant on 4th July 2003. On 17th July

2003, the defendant did not attend court but nevertheless the plaintiffs went ahead to obtain the usual order. On 26th August 2003, the plaintiffs served a list of documents on the defendant. The defendant took no action. On 23rd September 2003 the plaintiffs took out a summons to strike off the Affidavit in Opposition on the ground, that defendant had not complied with the order for directions. This summons was heard on 2nd October 2003. Despite the defendant's absence the Assistant Registrar exercised his discretion and ordered that unless the defendant within 7 days served a list of documents, the plaintiffs would thereafter be at liberty to move the court for judgment. On 7th October 2003 the defendant served a List of Documents, basically showing that the defendant had only 2 documents namely a letter of demand from the plaintiffs lawyers dated 27th March 2002 and a letter from the defendant to the plaintiffs lawyers dated 25th May 2002. As can be seen this was a mere sham process intended to prevent the plaintiffs from obtaining judgment. The plaintiffs filed a Bundle of pleadings on 16th October 2003 and served it on the defendant. On 3rd November 2003, the plaintiffs caused a Notice of Hearing to be issued appointing 15th and 16th December 2003 as dates for hearing. The Attorney General was duly served. The matter could not be heard because there was no court bundle. Consequently, the plaintiffs issued a court bundle on 8th June 2004 and served the Attorney General on 23rd June 2004. The matter was scheduled for hearing on 28th and 29th June 2004 – vide – Notice of Hearing issued on 20th April 2004. This Notice of hearing was served on the Attorney General on 19th May 2004. The Attorney General was given 1 month and 10 days to make preparations in readiness for the trial. On 28th June 2004, the Attorney General was absent and never sent any message to explain his absence. In terms of Order 35 rule 1(2) of the Rules of the Supreme Court which provides that if, when trial of an action is called, one party does not appear, the judge may proceed, with the trial of the action or any counter claim in the absence of that party. If, however, the plaintiff appears but the defendant does not appear at the trial the plaintiff may prove his claim as far as the burden of proof lies on him. The court ordered the trial to be proceeded in the absence of the defendant. The two plaintiffs testified.

THE PLEADINGS

On the part of the plaintiffs there is the originating summons and Affidavit in support. The Affidavit of Sudi Adaki Sulaimana states as follows:-

2. *THAT I was arrested by the police at Zomba Gymkhana Club on 19th March 2001, on allegation that I wanted to overthrow the lawfully constituted Government of Malawi.*
3. *THAT I was taken to the Regional Police Headquarters at Chichiri in Blantyre where my explanation that the allegations as stated in paragraph 2 hereof was not heeded by the police.*
4. *THAT I was taken to Chichiri Prison without bail until the 23rd day of September 2001 when trial against myself and three others commenced.*
5. *THAT on the 24th day of September the trial the State has already paraded 15 witnesses and the DPP has almost finished cross-examining me when the presiding Judge recused himself.*
6. *THAT in March this year the DPP discontinued the proceedings mainly on the ground that there was no evidence to constitute treason a fact when he only realised after dragging me and the three (3) others through criminal proceedings for 24 days. I attach hereto a Notice of Discontinuance filed with the court by the DPP and mark it exhibit SAM.*
7. *THAT after discontinuance I was released and let free along with the three co-accused persons after one year of incarceration in jail on allegations that the State ought to have known a long way back that they were not substantiated.*

8. **THAT** I repeat the following paragraphs and state that there was no reason or justifiable cause of arresting and incarcerating me and dragging me through criminal damages for:-
- a. Breach of my constitutional right to liberty to be assessed.
 - b. Damages for false imprisonment to be assessed.
 - c. Damages for malicious prosecution to be assessed.
 - d. Damages for defamation as I was viewed by members of the public.
9. **THAT** at the time of my arrest, I had already made arrangements to go back to the United Kingdom and I was to leave in 2 days' time but my trip was foiled by the arrest and imprisonment.
- 10 **THAT** in the United Kingdom I was studying for a Masters Degree in Economics and I was also involved in gainful employment at a salary of 350 pounds per week and due to my arrest and imprisonment I lost both my scholarship and the job for which I am claiming damages for: -
- a. Interfering with my education.
 - b. Loss of income at the rate of 350 pounds per week from the date of arrest to the date that I will be gainfully employed again.
- 11 **THAT** I attach hereto a letter of my confirmation of appointment in the United Kingdom and Mark it as exhibit SAM 2.

12 **THAT** due to my arrest my Landlord in the United Kingdom was forced to terminate my tenancy and this led to my loss of property as indicated in the documents attached hereto and marked exhibit SAM 3-5.

On the part of the defendant, there is an Affidavit in Opposition sworn by Mr Nkhata which provides as follows: -

2. I have read the applicant's originating summons and the affidavit of Sudi Sulaimana (hereinafter referred to as the applicant) in support thereof.
3. That the applicant's arrest on 19th March 2001 on charges of treason and his subsequent incarceration was not a breach of his constitutional right to liberty neither was it false imprisonment in so far as the respondent complied with section 42 2 (b) of the Constitution.
4. The applicant's prosecution was based on reasonable suspicion that he had committed an act of treason and thus cannot amount to malicious prosecution.
5. The arrest imprisonment and prosecution of the applicant was not tantamount to defamation in so far as a person intending to commit a criminal act does not get defamed by being charged and prosecuted if that is in fact true.
6. In any case, the proceedings herein have been irregularly commenced by originating summons instead of a writ of summons and accordingly the court is moved to strike out the originating summons in terms of Order 7 Rule 7 (5).
7. The contents of this affidavit are from my personal knowledge or belief except where stated otherwise.

The issues to be determined by the court –

1. Whether or not the prosecution of the plaintiffs by the State amounts to malicious prosecution.
2. Whether or not if the claim for the malicious prosecution turns out to be successful, the plaintiffs herein are also entitled to damages for false imprisonment.
3. Whether or not if the claim for the malicious prosecution turns out to be successful, the plaintiffs herein are also entitled to damages for defamation.
4. What are the other heads of damages available to the plaintiffs if their claim for malicious prosecution turns out to be successful; and
5. Generally, whether or not the plaintiff's incarceration amounted to false imprisonment, at any point in time.

THE EVIDENCE

The first witness to testify was Sudi Adaki Sulaimana who adopted his written statement. He also tendered in court documentary evidence in support of his claim for loss of property, employment, and malicious prosecution marked as exhibits P1 to P5. There was no cross-examination. His unchallenged evidence is as follows: -

He was arrested on the 19th March 2001, at around 10 o'clock in the morning, a day before his departure to Manchester, the United Kingdom, where I lived with my three children David, Naomi and Sudi junior.

He was picked up from Zomba in the presence of relatives and many family friends. The police searched his premises and found nothing. He was then taken to Limbe police station in a white land rover where he was detained for 3 days without food or water in a relatively small,

heavily congested and smelling cell with hardcore criminals. He was then charged with treason. During the interrogations he was informed that he was being accused of plotting to overthrow the Government of the Republic of Malawi. The police said that they only heard it from a businessman called Chimenya, an allegation that the police failed to substantiate. On the 3rd day, he was then transferred to Chichiri prison after more 36 hours of continuous and torturous investigations.

At Chichiri prison he was detained in a small cell of 4 meters by 7 meters with about 150 inmates originally intended to accommodate about 50 inmates. The cell was poorly ventilated.

In the summer the inside temperatures were unbearably hot and during winter it was freezing cold. At night he slept on the bare floor with a noisy night from unruly inmates, with each inmate occupying approximately one and half foot of floor space. It was torture of the highest degree. Inside the cell there were no provisions for keeping their belongings. As a result they had to use plastic shopping bags tied to ropes hanging from the roof. With a population of 150 inmates there were about 1000 plastic bags hanging half way between the roof and the floor. The total outlook was completely madness, awful and reduced them simply to a bunch of psychotic-like patients.

During the day they had to use folded shirts and trousers as chairs. Lockup time was nearly after mid-day at 3.30 p.m. and unlock up time was 7.00 am that meant he was shut up for almost 17 tormenting and horrible hours on each passing day. He received food once a day. The food was grossly unpalatable and unappetizing made of half cooked beans and porridge-nsima. Once after every several days they were subjected to a security search that amounted to waking up during early hours of the morning and being paraded and searched almost naked.

Then there was the most humiliating, degrading and dehumanising act: responding to the call of nature in the full view of everybody. It was nothing but animalism.

During visitors hours they were made to talk to their relatives and friends through a double meshed wire with a 2-metre space in between. Each visitor was allowed almost 15

minutes of talk time and because of the many people talking at the same time one had to speak at high tone in order to be heard. And this was ridiculous and absolutely dehumanising.

The scale of the psychological pain became unbearable with the fact that his three children were stranded in the United Kingdom. In June 2001 he pleaded with the UK embassy in Malawi to intervene. After seven months of being stranded in the UK the authorities there dispatched the children back to Malawi in October 2001. What was more painful in all this is the fact that the children were academically reduced from being UK high school students to rural primary school pupils in Zomba because he could not afford the school fees at private institutions.

Adding salt to injury his UK employers terminated his contract after 6 months absence without leave, losing in the process a total of about 1,400 pounds per annum.

Worse still during the period he was in custody on 5th May 2002 his landlord in UK disposed of his entire property from the house due to his failure to renew his tenancy agreement. In the process he lost the entire household items.

He applied for bail twice on 21st July and 26th November 2001 but the DPP strongly objected to the bail application while fully aware that the evidence before him did not warrant him to take such a stand. His actions were therefore personal and unprofessional and intended purely to inflict citizens.

The State then brought them to the High Court for trial being paraded before TV cameras and the highly keen media reporters. The trial commenced on the 22nd September 2001 after eight months in custody. They were branded criminals and political thugs by the State. They emphasized that these were men who were only greedy and showing disrespect to a legally established authority. The DPP castigated them further by saying they were pure criminals and nowhere near being politicians. He emphasized this by loudly announcing the theft charges of uniforms. This was highly humiliating and defaming.

During the course of trial things took a dramatic turn when the State arrested Brown Mpinganjira the NDA leader and equally charged him with treason. The motive for this arrest was not clear since they had never shared common interests or discussed anything to the effect of treason. The cooked up connection did not work when the High Court granted bail to the NDA leader and eventually the whole plot collapsed in the face of unconvincing evidence. The DPP was intending to use them perhaps to incriminate the NDA leader. However, they stood to the truth and refused any move to create false evidence. If they had conceded to any pressure to tamper with the evidence available their innocence too would have been in question. The evidence that the DPP tendered against them was kindergarten.

During the course of the trial, however, on the 12th November 2001 after six weeks of continuous and exhausting court attendance events at the court took a dramatic turn when the presiding judge excused himself from the case blaming the State for accusing him of incompetence. At that point they were then shovelled back to prison. This is was the most heart breaking moment of his life.

Despite the discontinuation of the trial all the psychological and economic damage had already been done. Even after release the society still held a negative attitude towards him. Most of his friends hardly associate with him because they do not want to be seen in his company. All his business contacts and agreements were technically affected and he was and is cut off from the business community completely. His sponsors in the UK also cut off all scholarship and social welfare agreements citing his arrest, detention and prosecution as not being in their interest. His career, academic advancement and his children's education opportunities were immediately suspended. This was the end of the road for a family that was putting all the resources and energies available together for survival and improvement.

The second witness was Colvin Usi Kaumila of care of Box 448, Blantyre. He adopted his witness statement which states as follows:

He was arrested on the 16th March 2001 at his house at Kameza roundabout in Blantyre. During the arrest the police officers without a search warrant violently searched his house

breaking many household items as a result. They also arrested his wife. They kicked everyone out of the house including the kids and locked the house up until the next day. That was total harassment of his family most of whom were below the age of ten who could not look after themselves properly. His wife was forced to dig around the house on areas they said were suspicious but never found anything.

He was detained at Blantyre police station in a congested small cell without water or toilet. He was kept in this cell for seven days without food. He was then transferred to Chichiri prison on the 23rd March 2001 after nearly 36 torturing hours of interrogation by police officers. He was then told that a businessman called Chimenya informed them that he was one of them who wanted to overthrow the legitimate and lawfully constituted Government of the Republic of Malawi.

At Chichiri prison he was detained together with TB infested inmates in a critically congested cell. Food was provided once a day, which was poorly cooked and prepared. There was no privacy inside the prison and as such bathing and responding to the call of nature was done in the presence of everyone.

In the course of his detention the investigation officers, in trying to convince his wife to give false incriminating evidence against himself, persistently harassed her. The DPP also used to pick his wife for lunch in an attempt to convince her to give unfounded evidence.

After several weeks in custody, they had applied for bail at least twice but the DPP objected strongly to the bail application on both occasions and were continuously remanded in custody.

On the 22nd September 2001, after eight months in custody, he was taken to the High Court of Malawi for trial. The trial attracted national interest and was highly covered both in the print and electronic media. It was a period of total humiliation.

During the trial the DPP paraded over 15 witnesses all of whom gave evidence that amounted to nothing but assassination of character for a total of six undivided weeks. The accused persons shunting between the court and the prison in an open van with a lot of heavily armed men as they were the most dangerous criminals in the country. As trial progressed the presiding judge abandoned the case on 12th November 2001 saying that he felt uncomfortable to proceed because the State had accused him of wrong doing and at that point he was also an accused person. The DPP without remorse ordered their continued stay in custody.

The DPP came around and on the 5th March 2002 issued a certificate of discontinuance. In his statement the DPP stated that he did not see any material in the witnesses statements. He further said that the testimony of the key witness did not reveal intent to commit crime. This correct assessment of the evidence available was professional but came rather too late. To avoid infringing the constitutional rights of innocent citizens it was right and proper that the DPP would have assessed the evidence before him in his office rather than testing it in an open court. It was grossly unconstitutional to take an entire one year period to assess the strength of evidence against an accused.

During the period he was in custody he lost my job with the M.I.B. security company. He was earning about K180,000 per annum. It was a painful and emotional period that would take many years to heal. The psychological effects caused have far reaching results.

He tendered in evidence a letter showing that he was engaged as Operations Manager with effect from 4th May 1998 at a salary of K144,000.00 per annum and housing allowance of K3,500.00 per month. Another letter showed that he was confirmed in his employment after probation at a salary of K180,000.00 per annum with effect from 31st May 1998. Finally there is exhibit P8 which provides as follows: -

M.I.B. Force Security Group
P. O. Box 2462
BLANTYRE.

Staff No. 002

30th April 2001

cc: Accountant

Dear Sir,

TERMINATION OF SERVICE

It is for the interest of the company to have your services terminated with effect from the date of this letter as you have been absenting from duties for about a month now without a just cause or any information to this office.

Please surrender all company uniforms/equipment issued to you to our stores. By copy of this letter the accountant is requested to take note for his action.

Yours faithfully,

F. C. Pearson

MANAGING DIRECTOR

This evidence too went unchallenged in the absence of the defendant.

THE LAW

Essential Elements of malicious prosecution

The essential elements which must be proved on a tort of malicious prosecution are best explained in **Clerk and Lindsell on Torts 12th Edition, paragraph 1695 (at page 894)** where it is provided as follows:

"In an action of malicious prosecution the plaintiff must show first that he was prosecuted by the defendant, that is to say, that the law was set in motion against him on a criminal charge; secondly, that the prosecution was determined in his favour; thirdly that it was without reasonable and probable cause; fourthly, that it was malicious".

Once the above quoted four elements have been proved by the plaintiff then the case has been proved.

PROSECUTION BY THE DEFENDANT

What is prosecution?

To prosecute is to set the law in motion, and the law is only set in motion by an appeal to some person clothed with judicial authority in regard to the matter in question, and to be liable for malicious prosecution a person must be actively instrumental in so setting the law in motion. **Clerk and Lindsell on Tort, 12th Edition in paragraph 1697.**

Further in the case of **Danby –vs- Beardsley (1880)43 L.T. 603 Lopes J.** described a prosecutor as *a man actively instrumental in putting the law in force."*

It has also been decided that it is sufficient for one to be called a prosecutor if he signs the charge and express to the police his willingness to attend the court and give evidence against the accused. **Malz –vs- Rosen (1996) 1 WLR 1008 and Mohammed Amin -vs- Bannerjee (1957) A. C. 322.**

FAVOURABLE TERMINATION OF PROSECUTION

For one to be successful on a claim for malicious prosecution, he must prove what "**Winfield and Jolowicz on Tort**" at page 514 describe a legal end as follows:

"The plaintiff must show that the prosecution ended in his favour but so long as it did so it is of no moment how this came about, whether by a verdict or acquittal, or by discontinuance of the prosecution, by leave of the court or by quashing of the indictment for a defect in it or because the proceedings were 'coram no judice or by 'non suit' ' - Watkins versus see (1839) 5 M&W 720 and Jones versus Gwynn (1712) 10 Mod 148.

LACK OF REASONABLE AND PROBABLE CAUSE

In the case of Herniman vs Smith (1938) A. C. 305, the House of Lords approved the definition of reasonable and probable cause by Howkins J. in Hicks vs Faulkner (1837)3 Bing N.C. 950 as follows:

"An honest belief in the guilt of the accused is 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 ordinary 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."

Another helpful and illustrative definition of reasonable and probable cause is provided by the House of Lords in the case of Glinski vs Mc Iver (1962) ALL ER 696. The Lords at pages 666 to 667 stated:

"This makes it necessary to consider just what is meant by reasonable and probable cause. It means that there must be cause (that is, sufficient grounds) for thinking that the plaintiff was probably guilty of the crime imputed."

Perhaps the best language in which to leave the question to jury is that adopted by Cave J. in Abrath vs North Eastern Rly Co(1883) 11 QBD 247 at 443 "... *did the defendants honestly believe in the case which they laid before the magistrates?*"

MERE SUSPICION

Mere suspicion is not a justification to commence a prosecution, Clerk and Lindsell on Torts at page 906 paragraph 1715 describes the position of the law as follows: -

"it is not justifiable to commence a prosecution on mere suspicion, Meering v. Graham White Aviation Company 1919 122 L.T. at 56.

For example, it is not a reasonable ground for a charge of forgery that the forged document resembles the handwriting of the party accused, nor is possession of stolen goods a long time after their abstraction a reasonable ground for a charge of larceny. It has been held that the evidence of the plaintiff's bad character has no bearing on the issue of reasonable and notable cause-Clerk and Lindsell on Torts, 12th Ed, p906.

The above position of the law on reasonable and probable cause can be summarized as follows: it is the duty of the plaintiff to prove the absence of the reasonable and probable cause for the institution of the proceedings against him. Such absence may be established in one of the two ways:

- a. the plaintiff may show that the prosecutor had no honest belief in the probable guilt of the plaintiff; and
- c. he may show that despite the prosecutor's honest belief in the plaintiff's guilt, the facts which the defendant honestly believed would not lead a man of ordinary prudence and caution to that conclusion

MALICE

The proper description of malice is provided by Clerk and Lindsell on Torts 12th Ed. Paragraph 1725 page 911. It provides as follows:

"The term malice in this form of action is not to be considered in the sense of spite or hatred against an individual, but of malus animus and as denoting that the party is actuated by improper and indirect motives; Mitchell vs Jenkins (1883) 5 B& Ad.588. The proper motive for prosecution is of course, a desire to secure the ends of justice. If a plaintiff satisfies a jury, either negatively that this was not the true or predominant motive of the defendant or affirmatively that something else was, he proves his case on the point. Mere absence of proper motive is generally evidenced by the absence of reasonable and proper cause."

In the case of Stevens vs Midland Countries Rly (1854) 10 Ex 352 Alderson B at p356 indicated that where a prosecution for larceny had been instituted "in order to deter others from committing similar depredations' this was declared to be 'not a motive of such a direct character as to afford a legitimate foundation for a criminal prosecution.'

Malawian courts have endorsed the above principles of law and have also stated that to succeed on a claim for malicious prosecution, the plaintiff must show that there was no reasonable prospect of success with the proposed prosecution, and the prosecution has been instigated by the defendant who had acted with malice-Mwafulirwa v Southern Bottlers Limited (1991) 14 MLR 316; Mvula v Norse International Limited (1992) 15 MLR 332.

DAMAGES FOR MALICIOUS PROSECUTION

The leading case on the quantum of damages for malicious prosecution is Savill v Roberts (1698) 12 Mod 208. In the case, Holt C.J. in discussing the question of damages stated that:

"First, damages to his fame if the matter whereof he be accused be scandalous. Secondly, to his person, whereby he is imprisoned. Thirdly, to his property where he is put to charges and expenses."

The first head of damages is payable because the allegations might involve damage to the fair fame of the person accused which cannot be afterwards repaired by the failure of the proceedings.

The second head of damages is recoverable for being put in danger of losing one's life, limb or liberty. If there has been an arrest and imprisonment up to the hearing of the cause, damages in respect thereof should also be included and will be the same as would be recoverable in action for false imprisonment. Mc Gregor on Damages 15 Ed. Paragraph 1629.

Regarding the last head of pecuniary loss, the plaintiff is entitled to recover all losses or charges incurred because of malicious prosecution. In the cases of Savile vs Roberts as well as the case of Berry vs British Transport Commission 1962 1Q.B. 306 it was decided that all plaintiffs' expenses in defending himself against the prosecution are recoverable. Again, in Child's vs Lewis 1924 40 T.L.R. 870 an action for false imprisonment, it was admitted that had the action been for malicious prosecution, the loss of the plaintiff' directors fees by reason of his forced resignation would have been recoverable.

Where malicious prosecution did not lead to imprisonment, loss of liberty could clearly not be contemplated as a head of damages, but damage to the plaintiff's reputation as well as the suffered indignity, humiliation and disgrace justified an award for damages. The court's discretion should be employed. Loss of wages during false imprisonment are recoverable as general damages – Bulla vs Agricultural Development and Marketing Corporation (1993) 16 (1) MLR 32.

1. The guidelines of how damages are worked out in false imprisonment cases are few: generally it is not a pecuniary loss but a loss of dignity and the like and is left much to the jury's or judge's discretion. The principal heads of damage would

appear to be the injury to liberty, that is the loss of time considered primarily from the non-pecuniary view point and the injury to feelings, that is the dignity, mental suffering, disgrace and humiliation, with any attendant loss of social status. This will be included in the general damages which are usually awarded in these cases; no breakdown appears in the cases – MacGregory on Damages 14th Ed paragraph 1357.

2. Damages for false imprisonment are at large and a matter of impression not addition. Damages are not necessarily a pecuniary loss but a loss of dignity and the like and a matter for the court. Previous awards are at the most of little assurance. Munthali v. Attorney General (1993) 16(2) MLR 646.

A DISCUSSION OF THE LAW AND THE FACTS

1) Whether or not the defendants herein were maliciously prosecuted

In order to determine the above issue, the four elements in respect of malicious prosecution shall be discussed *vis-à-vis* the available facts as pleaded:-

1.1 Prosecution by the defendant

It is very clear that the criminal prosecution was set in motion by the State through the office of the Director of Public Prosecution. Further it was the Director of Public Prosecution who was actively instrumental in putting the law in force. The said criminal proceedings were conducted in the High Court of Malawi. In the premises, it is very conclusive that there was a prosecution and the same was at the instance of the defendant herein.

1.2 Favourable termination of prosecution

There is no doubt that the criminal proceedings against the defendants were brought to a legal end in favour of the plaintiffs. This is so because the Director of Public Prosecution withdrew the case under section 77 of the Criminal Procedure and Evidence Code. Further, in report of discontinuance by the Director of Public Prosecution, he clearly stated that in his view the case was not credible for prosecution and as such he would not continue with the case. This is a clear testimony that the whole case was in favour of the plaintiffs.

1.3 Lack of reasonable and probable cause

From the facts of the case it is clear that no reasonable and prudent prosecutor could have preferred the charges that were preferred by the Director of Public Prosecution. In all earnest, there was hardly any reasonable and probable cause for instituting the proceedings which were instituted by the DPP.

1.4 Malice

Malice on the part of the prosecutor means no more than lack of proper motive for the instigation of the prosecution. The DPP in the present case displayed clear malice by commencing proceedings against the plaintiffs when it was clear that the charges against the plaintiffs were unfounded. Every reasonable and sober prosecutor should have made this deduction without much ado.

FALSE IMPRISONMENT AND DEFAMATION

False imprisonment is the infliction of bodily restraint, which is not expressly or impliedly authorised by law. It consists of the complete deprivation of liberty for any time, however, short without lawful cause – W.A. Mzungu v. Blantyre Print and Publishing Company, civil cause no 577 of 1995 (unreported). This is the common law position. In Malawi, however, the Constitution has taken a step further by making freedom of movement a constitutional right.

Section 39(1) of the Constitution provides that every person has the right of movement and residence within the borders of Malawi.

It is the plaintiffs' contention that their incarceration and arrest were all unlawful and wrongful, hence they were falsely imprisoned by the defendants' agents.

The plaintiffs also contend that their prosecution on the baseless treason charges and subsequent incarceration disparaged their names in the estimation of right thinking members of the society. It is the plaintiffs' submission that the acts of the defendant's agents have resulted to their respective reputations. In fact on head of damaging for a successful claim in malicious prosecution is damages in defamation.

FINDINGS

On the evidence available, I find the defendant liable on all the claims made by the plaintiffs and judgment is hereby entered against the defendant.

Damages

Having given the matter anxious thought and considering of giving the defendant a second chance I would defer making any awards of damages. Instead I direct that the Registrar should appoint a dates for assessment of damages including special damages for 1st plaintiff. The 2nd plaintiff is only entitled to general damages.

The defendant is condemned to pay costs of and incidental to these proceedings.

PRONOUNCED in open court at Blantyre this 26th day of August, 2004.

Chimasula Phiri
JUDGE