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**IN THE HIGH COURT OF MALAWI**  
**PRINCIPAL REGISTRAR**  
**CIVIL CAUSE NO 162 OF 2014**

**BETWEEN**

**COSMAS NJIRIMA.....PLAINTIFF**

**-AND-**

**HENRY MUSSA.....DEFENDANTS**

**CORAM: The Hon Mr. Justice D. Madise**  
Mr. Phokoso, Counsel for the Plaintiff  
Mr. Chalamanda, Counsel for the Defendant  
Mr. M. Manda Official Interpreter

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**Madise, J**

**JUDGMENT**

## **1.0 Introduction**

- 1.1. The plaintiff in this matter Cosmas Njirima took out a writ of summons before the Honorable Registrar against the defendant herein claiming damages for false imprisonment, defamation and mental suffering and physical discomfort. The particulars of the claim and the damages are set out in the bundle of pleadings. The defendant filed a defence in which he has denied the allegation raised by the plaintiff and has called the plaintiff to strict proof. Actually the defendant stated that he was not even aware that the plaintiff was arrested.
- 1.2. Trial commenced on 25<sup>th</sup> November, 2017 and the plaintiff gave his evidence under oath. After the plaintiff had given his testimony the parties approached the Court that they wanted to settle the matter outside court. The matter was adjourned to allow this to happen.
- 1.3. When hearing resumed on 22<sup>nd</sup> March, 2018 the Court was informed that the parties had failed to reach an agreement and that hearing should proceed. Since the plaintiff had closed his case the defendant was invited to present his defense. He gave no evidence and called no witness. Therefore, the defendant closed his case.

## **2.0 The Facts**

- 2.1 According to the witness statement the plaintiff had been in the employment of the defendant from 7<sup>th</sup> February 2005 to 29<sup>th</sup> May, 2005. On 17<sup>th</sup> February, 2011 he received a message from Limbe Police Station that he was wanted at the criminal investigation department (CID). He went to Limbe and he met a Mr. Thanzi who was in the company of other CID Officers.
- 2.2 Mr. Thazi then asked if the plaintiff knew of any offensive text messages which were being sent to Mr. Henry Mussa. He answered in the negative. Then Mr. Nthazi made a call asking the person on the other end of the line what should happen as the plaintiff had denied the allegation. The plaintiff did not hear the response from the other person.

- 2.3 After the telephone conversation had ended the plaintiff was locked up in a cell until the 27<sup>th</sup> of February, 2011. The plaintiff claims it was the defendant who gave instructions to the police to have him locked up. He was released on 27<sup>th</sup> February, 2011 and has been reporting for his bail until 23<sup>rd</sup> April 2011 when he was told by the police to stop reporting.
- 2.4 The plaintiff claims when the police called for a TNM call log to check out the owner of the number who was sending offensive message it turned out that it was not the plaintiff but the defendant's driver a Mr. Richard Kamilayi.
- 2.5 The plaintiff told the court that he was never taken to a court of law to be dealt with accordingly. Further to that the people who knew him held him in low esteem after his arrest and that assassinated his character. In conclusion he stated that he was traumatized during this period due to the poor condition of the cell he was put in.
- 2.6 When the defence was called to respond to the allegations they elected not to call any witness and they simply closed their case and invited the court to proceed with judgment on the merits.

### **3.0 The issues**

- 3.1 There are two main issues for determination before the court.
- a) Whether the defendant ordered the arrest of the plaintiff.
  - b) If the answer is in the affirmative whether damages for false imprisonment, defamation and mental and physical discomfort are payable.

### **4.0 The law**

- 4.1 The burden and standard of proof in civil matters is this. He/she who alleges must prove and the standard required by the civil law is on a balance/scales of probabilities. The principle is that he who invokes the aid of the law should be the first to prove his case as in the nature of things, a negative is more difficult to establish than an affirmative.

4.2 As Denning J, stated in Miler vs. Minister of Pensions [1947] 2 A II E.R. 372.

*If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not*

4.3 Similarly the degree of probabilities will depend upon the subject matter. When a civil court is deciding on a charge of fraud, it naturally follows that a higher degree of probability is required than when deciding an issue of negligence. However, the standard does not reach as high as that required in a criminal court which is beyond a reasonable doubt. The general principle is that the court must require a degree of probability which suits the occasion and is commensurate with the law and facts.

4.4 The tort of defamation

It is settled law that 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.

4.4.2 It is the intentional false communication or publication of a story that injures another's reputation or good name. Defamation holds a person to ridicule, scorn and contempt in a respectable and considerable part of the community. (Black Law Dictionary 6<sup>th</sup> Ed. 1990).

4.4.3 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.

4.4.4 In the end the Plaintiff must prove the following elements for a tort of defamation to stand.

(a) A statement made by the defendant

(b) The statement must refer to the plaintiff

(c) The statement must injure the plaintiff's reputation (false/malicious statement) in the eyes of right thinking members of society.

(e) There must be publication of the false statement to a third person.

#### 4.5 False imprisonment

False imprisonment is a form of trespass to the liberty of a person against his/her will. It causes indignity and discomfort to the person so restrained. It is an imprisonment which is not sanctioned by the law. This tort is the deprivation of liberty or freedom of movement without lawful cause. There must be no justification whatsoever why the right to freedom of movement should be restrained.

4.6 The question before me is whether the police can violate this right when they arrest on reasonable suspicion or probable cause. Obviously the answer is in the negative. False imprisonment is the infliction of bodily restraint which is not expressly or impliedly authorized by law. See W.A. Mzungu vs. Blantyre Print and Publishing Co. Civil Cause No 1577 of 1995 (Unrepresented)

4.7 In Kadango vs. Stage Coach {2000-2001} MLR 182, Tembo J as he was then called "The defendant will be liable for false imprisonment if they laid a charge against the plaintiff on which it became the duty of the police to arrest the plaintiff. They will not be liable if all they did was to give information to the police about the loss of money at their premises.

4.8 Suffice to say that there is substantial difference at law between giving information to the police and laying a charge against a person or persons. Where the police on their own investigations and on reasonable suspicion or ground make an arrest, the tort of false imprisonment cannot stand.

4.9 The plaintiff must show to the court that there was undue pressure from the defendant to the police to effect such an arrest. Once a court is satisfied on a balance of probabilities it will rule in the plaintiffs favour and it will award damages.

#### **5.0 The Finding**

5.1 According to the evidence there is no dispute that the plaintiff was summoned to Limbe Police Station. While there he was confronted with allegations of sending offensive messages to one Henry Mussa. When he denied the allegations, the plaintiff claims Mr. Thanzi called someone whom he claims was the defendant informing him that the plaintiff had denied the allegations. Then Mr. Thanzi called and wanted to know from the person on the other side of the line what he should do to the plaintiff.

5.2 The plaintiff did not know who the other person was. He just assumed it was The defendant since the issue at hand involved him and the defendant. The plaintiff never heard or saw the defendant giving instructions to the police to arrest him.

5.3 However the matter at hand involved offensive text messages which were being sent to the defendant. The defendant has not denied receiving these messages. In my considered view since offensive messages were being sent to the defendant it must have been him and only him who went to the police to complain. At that point he had simply informed the police about the incidence and gave the name of the plaintiff as a suspect.

5.4 Things turned when the plaintiff arrived at Limbe Police Station. After interrogation the plaintiff denied the claim. Thereafter Mr. Thanzi called a person unknown to seek further instructions. Thereafter the plaintiff was put in a cell. I'm of the considered view that Thanzi was talking to the defendant

(complainant) as the matter involved him. At that point he had laid a charge by instructing the police to detain the plaintiff.

5.5 The law on false imprisonment is clearly outlined above. In my considered opinion the defendant violated the law by laying a charge against the plaintiff for an "offence" which he never committed. The plaintiff was released on bail without being prosecuted in a court of law. He suffered indignity and discomfort at the hands of the police who were working under the instructions of the defendant.

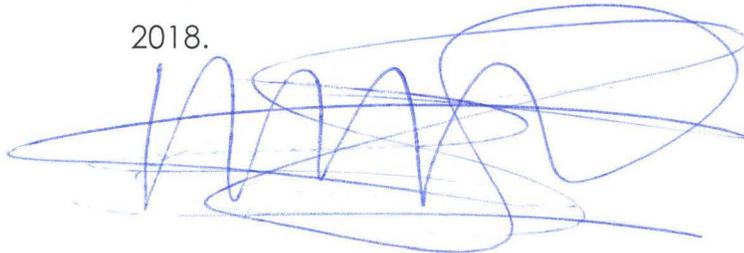
5.6 As for defamation I equally find in favour of the plaintiff as the imprisonment was without any justification at law as evidence by the non prosecution of the plaintiff. I find that the arrest lowered his moral, social and legal understanding in society. This made right thinking members of society to disregard him due to the arrest.

5.7 In these premises I find that the plaintiff has made out a good case on a balance of probabilities. The defendant did not even bother to defend this action. I rule in favour of the plaintiff on all reliefs sought in the summons. I further award him costs of this action.

5.8 The plaintiff has 21 days to file summons for assessment of damages for false imprisonment, defamation and loss of dignity and discomfort suffered before the Hon Registrar.

I so order.

Pronounced in open Court at Blantyre in the Republic on 22<sup>nd</sup> October, 2018.

A handwritten signature in blue ink, consisting of several overlapping loops and lines, positioned above the name of the judge.

Dingiswayo Madise

**Judge**