



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL DIVISION
CIVIL CAUSE NO. 489 OF 2016
(Before Honourable Justice Mambulasa)

BETWEEN:

STANLEY PHIRI..... 1ST CLAIMANT

-AND-

WISLEY PHIRI.....2ND CLAIMANT

-AND-

DAMASECK BANDA.....3RD CLAIMANT

-VS-

THE ATTORNEY GENERAL (MALAWI POLICE
SERVICE).....DEFENDANT

CORAM: HON. JUSTICE MANDALA MAMBULASA

Mr. Nthembako Burtwell Banda, Advocate for the Claimants

Mr. Francis MacJessie, Advocate for the Defendant

Mr. Mustapher Kaunde Jr, Advocate for the Defendant

Mr. Obet Chitatu, Court Clerk

JUDGMENT

MAMBULASA, J

Introduction

- [1] The Claimants' claim against the Defendant is for damages for false imprisonment, malicious prosecution, special damages to the tune of MK783,050.00 being damages in respect of the Advocate's travel and accommodation costs and meal allowances in defending the charge and costs of the action.
- [2] The Claimants are citizens of Malawi holding the official positions of Traditional Authority Fukamalaza, Group Village Headman Thuli and Village Headman Zowani respectively in the area of Traditional Authority Fukamalaza in Nkhata-Bay District.
- [3] The Defendant is sued in his official capacity for and on behalf of the Inspector General of the Malawi Police Service.
- [4] On or about 24th February, 2015 at around 3:00 o'clock in the afternoon, while the Claimants were attending a funeral of the late Ms. Alani Phiri at Zakuya Village, Traditional Authority Fukamalaza in Nkhata-Bay District, police officers from Chintheche Police Post wrongfully and without reasonable cause, arrested the Claimants and took them into custody where they were detained and interrogated for about 25 hours until they were

released therefrom on 25th February, 2015 at around 4:00 o'clock in the afternoon.

- [5] The said police officers were at all material times under the direction and control of the Defendant in the performance or purported performance of their functions.
- [6] In the premises, the Claimants assert that they were wrongfully imprisoned and deprived of their liberty, and the Defendant is liable to the Claimants in respect of such imprisonment.
- [7] By reason of the matters aforesaid, the Claimants claim to have suffered loss and damage.
- [8] On or about 23rd June, 2016, the Defendant maliciously and without reasonable and probable cause laid a charge before the First Grade Magistrate's Court sitting at Chintheche in Nkhata-Bay District against the Claimants. The charge was that of proposing violence at an assembly, contrary to section 87(1) of the Penal Code¹.
- [9] On 22nd July and 6th October 2016, the Claimants duly appeared and were tried before the said Magistrate's Court. At the close of the prosecution's case, the court found the evidence not sufficient to justify calling any of the Claimants to enter their defence and acquitted them of the said charge on 18th November, 2016.

¹ Cap. 7:01 of the Laws of Malawi.

[10] In consequence of the matters aforesaid, the Claimants were injured in their reputation and were put to considerable trouble, inconvenience, anxiety and claim to have suffered loss and damage.

[11] Besides general damages, the Claimants suffered special damages in respect of Counsel's travel and accommodation costs and meal allowance in defending the charge.

[12] Particulars of special damages are as follows:

12.1 Transport costs on 25th July, 2016.....MK130,000.00

12.2 Accommodation at CBR Beach Resort
from 25th to 26th July 2016.....MK119,850.00

12.3 Meal Allowance for Counsel (2)
from 25th to 26th July 2016.....MK75,000.00

12.4 Transport costs on 5th October, 2016.....MK100,000.00

12.5 Accommodation at Kande Beach Resort
from 5th to 7th October, 2016.....MK75,600.00

12.6 Meal Allowance for Counsel (2).....MK75,000.00

12.7 Transport costs from 17th to 18th November,
2016.....MK100,000.00

12.8 Accommodation at Kande Beach Resort
on 17th November, 2016 to 18th November 2016....MK47,600.00

12.9 Meal allowance for Counsel (2).....MK60,000.00

Total amount **MK783,050.00**

[13] The Claimants claim, general damages for false imprisonment, malicious prosecution, special damages as stated above and costs of the action.

[14] The Defendant filed its Defence in the matter. It denied the allegations of false imprisonment, malicious prosecution as pleaded in the Claimants' statement of case and put the Claimants to strict proof of their claims.

[15] The Defendant also contended that there was a reasonable and probable cause to arrest the Claimants. As such, the arrests were justified.

[16] Finally, the alleged injuries, loss and damages as pleaded and particularized in the Claimants' statement of case were denied in their totality.

Issues for Determination

[17] During the scheduling conference held on 20th October, 2022, the Court and the parties agreed that there were four issues for determination before the Court. These are:

- 17.1 Whether or not the Claimants were falsely and wrongfully imprisoned by the Defendant?
- 17.2 Whether or not the Claimants were maliciously prosecuted by the Defendant?
- 17.3 If the issues in 17.1 and 17.2 are answered in the affirmative, whether or not the Claimants suffered damage as a result thereof?
- 17.4 If so, whether or not the Claimants are entitled to recovery of general and special damages as pleaded and costs of the action?

The Law

- [18] It is trite learning that in civil matters, it is the claimant who bears the burden of proof. In *Commercial Bank of Malawi –vs- Mhango*² the Supreme Court of Appeal for Malawi observed as follows:

Ordinarily, the law is that the burden of proof lies on a party who substantially asserts the affirmative of the issue. The principle was stated in the case of *Robins –vs- National Trust Co.* [1927] A.C. 515 that the burden of proof in any particular case depends on the circumstances in which the claim arises. In general, the rule is *ei qui affirmat non qui negat incumbit probatio* which means the burden of proof lies on him who alleges, and not him who denies. Lord Megham, again, in *Constantine Line –vs- Imperial Smelting Corporation* [1943] A.C. 154, 174 stated that it is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons. The judge said that the rule is adopted principally because it is but just that he who invokes the aid of the law should be

² [2002-2003] MLR 43 (SCA).

the first to prove his case because in the nature of things, a negative is more difficult to establish than an affirmative. However, in a civil action the burden of proof may be varied by the agreement of the parties - see *Bond Air Services Ltd – vs- Hill* [1955] 2 Q.B. 417.

[19] It is also commonplace that the standard of proof in civil matters is on a balance of probabilities. In *Miller –vs- Minister of Pensions*³ Denning J said:

That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. 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.

[20] Section 18 of the Republican Constitution protects the right to personal liberty of every person. It expressly provides as follows:

Every person has the right to personal liberty.

[21] Similarly, section 19 of the Republican Constitution protects the right to human dignity and other personal freedoms. It expressly provides, *inter alia*-

(1) The dignity of all persons shall be inviolable.

(2) ...

(3) No person shall be subjected to torture of any kind or to cruel, inhuman or degrading treatment or punishment.

³ [1947] 2 All ER 372.

[22] In a proper case, human and constitutional rights may be limited or restricted by the State. That is clear from section 44 of the Republican Constitution. A police officer may only limit or restrict the enjoyment of the human and constitutional rights to liberty and dignity where sufficient grounds for such limitation or restriction exist.⁴

[23] It is a constitutional right of an arrested person to be informed of the reason of his or her arrest at the time of such arrest. That is clear from section 42 (1) (a) of the Republican Constitution. This position is also supported by sections 20 and 20A of the Criminal Procedure and Evidence Code.⁵

[24] In interpreting section 42 (1) (a) of the Republican Constitution, the High Court sitting in a constitutional matter in the case of *State and 3 others, ex-parte: Right Honourable Dr. Cassim Chilumpha, SC*⁶ said:

A plain reading of section 42(1)(a) would show that what is required is to inform the arrested person the reason for his arrest and not necessarily details of the reasons of his arrest... We therefore take the view that on arrest, it is enough to tell the arrested person the nature of the allegations against him and not necessarily the particulars thereof...

[25] In *Kanyemba –vs- Malawi Hotels Ltd*⁷ this Court explained what constitutes false imprisonment. It said thus:

⁴ See for instance, section 34 of the Police Act, Cap. of the Laws of Malawi.

⁵ Cap. 8:01 of the Laws of Malawi.

⁶ [2006] MLR 406 (HC) at page 417 e-f.

False imprisonment consists of inflicting bodily restraint which is unauthorised and without lawful authority. In order to succeed, the plaintiff need not prove actual imprisonment in the sense of imprisonment in a gaol, for “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 the man’s own house as well as in the common gaol.”

[26] In *Meja –vs- Cold Storage Co Ltd.*⁸ Mkwandawire J, as he then was, at page 240 d-e said:

I now move on to false imprisonment...As a matter of fact his imprisonment started right away at the defendant’s premises when there was a restraint on his personal liberty. He was a prisoner at Kanabar House and Chichiri Prison was the climax of his imprisonment.

[27] Under the tort of false imprisonment, the onus lies on the defendant to prove the existence of a reasonable cause for the arrest. In *Hicks –vs- Faulkner*⁹ Hawkins J said:

...in false imprisonment the onus lies upon the defendant to plead and prove affirmatively the existence of reasonable cause as his justification; ...

[28] The law on malicious prosecution is well settled. Malicious prosecution is a tort whereby one maliciously and without reasonable and probable cause

⁷ [1991] 14 MLR 157 at 162.

⁸ [1990] 13 MLR 234.

⁹ [1881-5] All E.R. 187 at page 190.

initiates against another judicial proceedings which terminate in favour of that other and which result in damage to his reputation, person, freedom or property.¹⁰

[29] According to *Nguza –vs- Mzuzu City Council*¹¹ the tort of malicious prosecution has four essential elements that must be proved by the Claimant. These are: (a) that the defendant prosecuted him; and (b) that the prosecution ended in his favour; and (c) that the prosecution lacked reasonable and probable cause; and (d) that the defendant acted maliciously.

[30] In *Mbewe –vs- Agricultural Development and Marketing Corporation*¹² the Court stated that the tort of malicious prosecution requires proof of absence of reasonable and probable cause and proof of malice in the commencement of prosecution. The requirement for malice may be satisfied by proof of improper motive or purpose.

[31] In *Manda –vs- Ethanol Company Ltd*¹³ Mkandawire J, as he then was, opined that:

As for malice, the mere insistence on prosecution when there was no evidence is in itself evidence of bad motive.

¹⁰ *Street on Torts* 8th Edn (Butterworths) 1988, at 28.

¹¹ [1995] 1 MLR 161 at 164.

¹² [1993] 16 (2) MLR 594 at 602.

¹³ [1993] 16 (2) MLR 572 at 577.

[32] The law on special damages is also well settled. These must be specifically pleaded and strictly proved.¹⁴

[33] It is also trite law that where a witness who is available is not called, it may be presumed that his evidence would be contrary to the case of the party who fails to call him.

[34] In *Maonga and others –vs- Blantyre Print and Publishing Co Ltd*¹⁵ the defendant failed to call the company secretary who wrote the letter of complaint to the police. It also failed to call the police officers who effected the plaintiff's arrest. All these witnesses were available.

[35] The court also quoted Banda J, as he then was, in the case of *Leyland Motors Corporation Malawi Ltd –vs- Mohamed*¹⁶ as follows:

Failure to call a material witness to testify on a material point may damage the case of the party who failed to do so as that failure may be construed that the story is fictitious.

[36] The *dicta* in the *Maonga* and *Leyland* cases referred to above were quoted with approval by the Supreme Court of Appeal for Malawi in *BP Malawi Ltd –vs- NBS Bank Limited*¹⁷ as follows:

¹⁴ *Govati –vs- Manica Freight Services (Mal) Ltd* [1993] 16 (2) MLR 522-523.

¹⁵ 14 MLR 240.

¹⁶ Civil Cause No. 240 of 1983 (High Court of Malawi) (Principal Registry) (Unreported).

¹⁷ [2009] MLR 39 at 46.

We think that the court was indeed entitled to attach significance to the absence of the company secretary, who was available to the appellant, to give evidence at the trial.

[37] Section 30 of the Courts Act¹⁸ provides that costs are in the discretion of the High Court. It provides as follows:

Subject to this Act, the costs of, and incidental to, all proceedings in the High Court, including the administration of estates and trusts, shall be in the discretion of the High Court; and the discretion shall be exercised in accordance with the practice and procedure provided in the rules of procedure made by the Chief Justice under section 67 of this Act.

[38] Order 31, rule 3 (1) of the Courts (High Court) (Civil Procedure) Rules, 2017 is couched in the following terms:

The Court has discretion as to-

- (a) whether costs are payable by one party to another;
- (b) the amount of these costs; and
- (c) when they are to be paid.

[39] When the Court decides to make an order about costs, then, the general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party. This is clear from Order 31, rule 3 (2) of the Courts (High Court) (Civil Procedure) Rules, 2017.

¹⁸ Cap. 3:02 of the Laws of Malawi.

[40] There are exceptions to the general rule, where a successful party shall not always be entitled to have an order for costs against the unsuccessful party. For instance, where a successful party recovers no more than nominal damages, it may be ordered to pay the unsuccessful party's costs.¹⁹ The successful party may also not be entitled to costs where the issue on which a party succeeded is raised for the first time by amendment at a very late stage.²⁰

The Evidence

[41] In his testimony, the 1st Claimant told the Court that his name was Stanley Phiri (also officially known by his position Traditional Authority Fukamalaza) of Fukamalaza Area, Traditional Authority Fukamalaza, Nkhata-Bay District. His postal address is P.O. Box 22, Chinteché, Nkhata-Bay.

[42] The 2nd and 3rd Claimants are also officially known by their positions as Group Village Headman Thuli and Village Headman Zowani. They both exercise their respective positions within the 1st Claimant's jurisdiction.

[43] The 1st Claimant recalls that on 24th February, 2015, there was a funeral at Zayuka Village, which was within his jurisdiction. The deceased was a lady, Alani Phiri, who had been married at Mgodi to a certain Mr. Alick Milanzi. Amongst the chiefs who attended the funeral were: Traditional Authority

¹⁹ *Texaco Ltd –vs- Arco Technology Inc* (1989) *The Times*, 13 October 1989.

²⁰ *Beoco Ltd –vs- Alfa Laval Co Ltd & Anor* [1995] QB 137.

Mankhambira, Group Village Headman Chibwana, Village Headman Zayuka, the 2nd Claimant and 3rd Claimant, who was his spokesperson.

[44] When time came for burial, the husband's parents and the deceased's parents were required to meet and discuss the matter regarding burial. By custom, in a marriage where the husband has not paid or fully paid dowry (*lobola*), as was the case in the marriage between the deceased and Mr. Milanzi, the husband was required to fully pay the *lobola* amount first before taking the body to the graveyard for burial.

[45] The two sides, therefore, met to look at the matter and come to an agreement. At the meeting, Mr. Milanzi was charged MK350,000.00 and he partly paid MK40,000.00 leaving a balance of MK310,000.00. When the two sides returned to the assembly (*mphala*), a report was given to the chiefs regarding what the two parties had discussed and agreed upon.

[46] After presenting the report, the first chief to comment was Traditional Authority Mankhambira who said: *"If it were at my place Sanga, such people like the husband in this matter, are the ones required to be beaten but because the funeral was in STA Fukamalaza area, he was the one to decide what to do"*. These words were also supported by GVH Chibwana, who also comes from Sanga area.

[47] Since one of the deceased's relatives was threatening violence, with a view to calm the situation, which was growing tense, the 1st Claimant rose up and requested the husband's side to leave the place for their home, Mgodi and come back later after the burial for continued discussions. The party of the

husband duly left the funeral place for their place at Mgodì. The 1st, 2nd and 3rd Claimants and the rest of the chiefs with other attendants remained at the *mphala*.

- [48] When the husband's party were at the main road (i.e. Nkhata-Bay – Chintheche Road) (about 2 Kms away from the funeral place), a fight allegedly ensued between the Mgodì group and certain boys/men from the area of the wife, Zayuka Village. The 1st Claimant did not know that such a fight would occur or had occurred.
- [49] Later in the afternoon, around 3:00p.m. or thereabout, Chintheche Police Post officers drove to the funeral place where they arrested him, the 2nd and 3rd Claimants. At the time of his arrest, no reason was given for the arrest.
- [50] The 1st Claimant was put in the police motor vehicle and driven to Chintheche Police Post where he was put in a police cell. The conditions in the police cell were horribly dehumanizing. He was not provided with any blankets to cover himself against cold and mosquitoes. He was bitten by mosquitoes until his release the next day. The cell was smelling of human urine and excreta. He was not provided with food, etc.
- [51] After spending the night, on 25th February, 2015 around 3:00p.m. or thereabout when the police were recording statements from him, it was then that he was informed by the said police officers that he had been arrested for inciting violence at an assembly. He categorically denied the charge. He was released on police bail in the afternoon of 25th February, 2015.

- [52] Although he thereafter reported to Chintheche Police Post on several days in compliance with the bail conditions, he was not taken to court. The police gave various reasons for not taking him to court, which in his view were not plausible.
- [53] On 4th August, 2015, his police bail bond was withdrawn and cancelled by the Police at Chintheche Police Post without taking him to court to plead to the charge. Since he felt that his constitutional rights had been unlawfully infringed upon, on or about 2nd December, 2015 he instructed his former lawyers to take legal action against the Chintheche Police Post officers and claim compensation.
- [54] His former lawyers wrote a letter of demand for compensation, which was also the notice of his intention to take legal action against the Defendant, dated 18th December, 2015. The said letter was duly sent to the Defendant. The same was produced and exhibited as, “SP1”. A similar letter was addressed to the Officer-In-Charge of Chintheche Police Post and was produced and exhibited as, “SP2”. He personally delivered the second letter to the Officer-In-Charge at Chintheche Police Post on or about 20th June, 2016.
- [55] Two days later, on 22nd June, 2016, he received a message from the Officer-In-Charge calling him, the 2nd and 3rd Claimants to go to Chintheche Police Post the following day, 23rd June, 2016. He went there and was told by the prosecutor that he should attend court to plead to the offence with which he had been previously charged. Apart from refusing to attend court because of insufficient time to prepare for it, he was strongly convinced that what had

triggered his prosecution, his police bail bond having been withdrawn and cancelled, was his letter of demand for compensation. He was advised by the prosecutor that a date would be communicated to him.

[56] On Friday, 24th June, 2016, he was served with a summons to appear before the court on the same day. He was utterly shocked because he was at the Chintheche Police Post the previous day, Thursday 23rd June, 2016 and the prosecutor did not tell him that he would be taken to court the following day, Friday, 24th June, 2016.

[57] Nevertheless, he attended court on Monday 27th June, 2016, where he was told to come back on Tuesday, 5th July, 2016 to take plea. He duly attended court on 5th July, 2016 where he pleaded not guilty to the offence of inciting violence at an assembly. There is produced and shown to the court a copy of the Charge Sheet exhibited as, “SP3”. Thereafter, he informed the court that he would be represented by counsel of his choice during trial, which was, therefore, set down for Tuesday, 19th July, 2016.

[58] The trial however took place on 22nd July, 2016 and 6th October, 2016 during which the prosecution called 5 witnesses. At the close of the prosecution’s case, his former lawyers submitted to the court that the prosecution had failed to establish, on the face of it, a case warranting him to give evidence in his defence. The court adjourned the matter to 18th November, 2016 to deliver its ruling on his submission of no case to answer.

- [59] On Friday, 18th November, 2016, the court agreed with the submissions of his lawyers and consequently it acquitted him. There is produced and shown to the Court a copy of the Ruling exhibited and marked as “SP4”.
- [60] In his conclusion, the 1st Claimant blames the Defendant, firstly, for falsely imprisoning him in that at the time of his arrest, the police did not tell him the offence that he had committed to warrant his arrest. They merely arrested and drove him in their motor vehicle to Chintheche Police Post, where he was put in a police cell. It was around 3:00-p.m. when the police were recording statements from him, that he was for the first time being told that he had been arrested for the offence of inciting violence at an assembly. There was absolutely no evidence pointing at him that he uttered words or conducted himself in such a way as to incite violence at an assembly. Therefore, the police had no reasonable and probable cause to arrest him.
- [61] Secondly, the 1st Claimant blames the police for initiating the prosecution itself before the court. The prosecution was vividly actuated by malice. It came as a result of a letter of demand for compensation for being unlawfully imprisoned and defamed. It was clearly wrong and unlawful for the police to prosecute him merely because of exercising his constitutional right to demand compensation for violation of his constitutional rights. There was absolutely no evidence to warrant his being prosecuted, which eventually subjected him to humiliation, loss of liberty and dignity.
- [62] In addition, the 1st Claimant’s prosecution subjected him to unnecessary incurring of legal costs for lawyers’ fees, transport, accommodation and meal expenses, including his own costs to report for bail and attending trial.

- [63] It is on this basis that he is claiming general damages for false imprisonment and malicious prosecution in addition to specific costs as tabulated in his statement of case.
- [64] In cross-examination, the 1st Claimant told the Court that they were not handcuffed when they were taken to Chintheche Police Post. When asked how many suspects they were, he said that they were three of them.
- [65] Asked whether he could remember the date when he was taken for interrogation, the 1st Claimant informed the Court that he could not remember the exact date. He also could not remember the exact date when he was released on police bail. However, he was quick to observe that he was in police custody for one day.
- [66] The witness confirmed that inciting violence at a funeral was the offence that he was charged with. He told the Court that it followed that the charge was never dropped by the State and that the police were at liberty to take them to court at any time thereafter. The 1st Claimant confirmed that the same charge that was proffered against them at the police was the same that they answered at court.
- [67] In re-examination, the witness told the Court that the bail bond was eventually taken by an officer in the Criminal Investigations Department (CID) and that that took place before the Claimants were tried by the State.

- [68] The 2nd witness was Wisley Phiri, the 2nd Claimant. He told the Court that he was the current Group Village Headman Thuli. Mr. Wisley Phiri adopted the witness statement of the 1st Claimant in its entirety as his own.
- [69] The 2nd Claimant was not cross-examined. It follows that there was no re-examination.
- [70] The 3rd witness was Damaseck Banda, the 3rd Claimant. He told the Court that he is the current Village Headman Zowani. Mr. Damaseck Banda adopted the witness statement of the 1st Claimant in its entirety as his own.
- [71] The 3rd Claimant was not cross-examined. It follows that there was no re-examination. That marked the end of the Claimants' case.
- [72] The Defendant called one witness, Mr. Abel Mkandawire, a Police Officer, A5824 Detective Sub Inspector who has worked for the Malawi Police Service for 24 years. He told the Court that in the year 2015, he was stationed at Chintheche Police Post
- [73] On or about the 24th of February, 2015, they received a complaint from Mr. Aliko Operako Milanzi, Mr. Alick Mwenefumbo, Mr. Zuze and Senior Group Village Headman Ngombo and other villagers who had gone to attend burial in the area of Sub Chief Fukamalaza that they had been injured after being attacked by people that were incited to attack them by Mr. Stanly Phiri, Wisley Phiri and Damaseck Phiri.

- [74] After receiving the complaint, the witness organized his colleagues and rushed to the scene where they found other people still being beaten, especially women.
- [75] To calm the situation and in a bid to understand what was going on, they called chiefs that were there for interrogation. This included Mr. Stanley Phiri, Wisley Phiri and Damaseck Phiri, because they are chiefs in the area and they took a leading role at the funeral.
- [76] Their further investigations revealed that the fracas arose because the husband to the deceased had not yet paid dowry to the parents of the deceased and the parents were demanding that they be paid the same before conclusion of all burial rites.
- [77] After the husband and his relations had indicated that they did not have money to pay for the said dowry, the Claimants, led by the 1st Claimant ordered the husband and his people to leave the area.
- [78] As the husband and his people were leaving the area, the 1st Claimant asked the youth that were there why they were allowing the people walk away freely upon which a fight erupted.
- [79] That a lot of people were injured including the ones that reported the matter to the police.

- [80] During the trial at the magistrate court however they were surprised that a lot of the injured people refused to give evidence and those that gave evidence changed their stories.
- [81] That there was, however, reasonable and probable cause for the police to arrest the claimants herein and charge them with the offence of proposing violence at an assembly contrary to section 87(1) of the Penal Code.
- [82] In cross-examination the witness was asked whether he and his colleagues arrested the people that were still beating the women when they rushed to the scene. He told the Court that those people were not arrested.
- [83] Asked further why they left people to continue committing an offence right in their face, the witness did not answer.
- [84] The witness confirmed to the Court that the beating of people did not take place at the house where the funeral was taking place. It took place some 30 to 50 metres away.
- [85] Asked again whether the Claimants were found at the place where the women were being beaten, the witness told the Court that they were not at the exact place.
- [86] While Mr. Abel Mkandawire told the Court that he knows Damaseck Phiri, the 3rd Claimant told the Court that he was Damaseck Banda.

- [87] The witness was asked whether the police may arrest someone whom they have called for interrogation. Mr. Mkandawire told the Court that they do especially if the person was involved in the commission of the offence.
- [88] Mr. Mkandawire confirmed to the Court that the Claimants were arrested on 24th February, 2015 and that they were charged on 25th February, 2015.
- [89] The witness was asked why he and his colleagues ignored other chiefs for interrogation. He explained to the Court that there were more than three chiefs.
- [90] Asked to mention the name of the person who told the police that there were chiefs in the area and that they took a leading role in proposing violence, Mr. Mkandawire told the Court that nobody told them that.
- [91] The witness told the Court that the people who lodged the complaint at Chintheche Police Post were not present in court during the trial of this matter.
- [92] Mr. Abel Mkandawire told the Court that what the Claimants did led by the 1st Claimant to order the husband and his people to leave the house where the funeral was taking place, did not amount to violence.
- [93] The witness confirmed to the Court that the one who had suggested that people should be beaten was T/A Mankhambira. Asked whether T/A Mankhambira was charged, Mr. Mkandawire said that he was not charged and he was not prosecuted either.

- [94] Asked whether Mr. Mkandawire had gone through the witness statements of the Claimants, he said he did not.
- [95] Asked whether the person who reported to the police that after the husband and his people were leaving the area, the 1st Claimant asked the youth that were there why they were allowing the people walk away freely upon which a fight erupted was present in court, the witness said the person or persons were not in court.
- [96] Mr. Mkandawire explained to the Court that there was some evidence that linked the 2nd and 3rd Claimants even though he did not include it in his witness statement.
- [97] The witness failed to produce any evidence in court showing that some people had sustained injuries as a result of violence that had ensued in the area.
- [98] Even though Mr. Abel Mkandawire alleged to have recorded statements from the Claimants herein, the same were not attached to his witness statements as evidence in the court.
- [99] In re-examination, Mr. Mkandawire explained to the court that the police knew that there was a fracas because some people who were more than 10 came to complain about it. Amongst the people who complained were Senior Group Village Headman Ngombo, Alick Milanzi, Alick Mwenefumbo, Mr. Zuze and some women.

[100] The witness told the Court that Senior Group Village Headman Ngombo was the one who mentioned the Claimants that they were the ones who incited violence including T/A Mankhambira.

[101] Mr. Mkandawire explained the way in which they found the situation. Some people were being beaten, some were unable to cross a river and only managed to do so, because of their presence and intervention.

[102] The witness said that the police took more than ten (10) people for interrogation at their office and that the Claimants were identified after the said interrogation.

[103] Mr. Mkandawire told the Court that the police did not give reasons for the interrogation at the material time because the situation was not good and also police officers were few in number. They decided to take some of the people for interrogation.

[104] The witness told the Court that the 2nd and 3rd Claimants were mentioned by other people as those who also contributed to inciting violence.

[105] Mr. Mkandawire explained to the Court why the State did not prosecute T/A Mankhambira. He said that the Officer in Charge for Nkhata-Bay did not give them an approval when they sought one. Mr. Mkandawire alleged that it could possibly be because of T/A Mankhambira's position. That marked the end of the Defendant's case.

Analysis and application of the law to the facts

- [106] The Court would like to sincerely thank advocates on both sides for their industry in conducting research especially on the position of the law on false imprisonment and malicious prosecution. On the other aspects of the case, the Court has had to do its own independent research. The Court is also grateful to the advocates for making case authorities available to it. This eased its work in the preparation of this judgment.
- [107] The first issue that the Court has to grapple with is whether the Claimants' were falsely imprisoned by the Defendant. In other words, did the Defendant prove the existence of a reasonable cause for their arrest.
- [108] The Claimants contend that they were picked up from the funeral place at Zakuya Village by Chintheche Police Post officers at around 3:00p.m. on 24th February, 2015 without informing them of the reasons for their arrest. This has not been disputed by the Defendant. It was only after they had spent a night in police custody on 25th February, 2015 when they were told of the reasons for their arrest, namely, that they had incited violence at an assembly, a charge which they denied.
- [109] DW conceded that before a person is arrested, an investigation must be carried out first which should establish reasonable grounds for effecting an arrest. In this case, DW conceded in cross examination that it was T/A Mankhambira and GVH Chibwana who had incited violence and not the Claimants.

[110] Yet, T/A Mankhambira and GVH Chibwana were not interrogated or arrested because allegedly no approval for the arrest had been given by the Officer-in-Charge for Nkhata-Bay. No reason was given why GVH Chibwana was not arrested, yet the 2nd Claimant, who holds a similar position to GVH Chibwana was arrested.

[111] Similarly, other people who were assaulting women in the presence of police officers were not arrested.

[112] According to DW, the Claimants were not taking part in assaulting the women or indeed anybody. In order to justify their arrest, DW testified that he was told that the 1st Claimant asked the youth that were there why they were allowing people to walk away freely upon which a fight erupted. DW said that he understood those words to incite violence.

[113] The Claimant therefore submitted that the Defendant did not have a reasonable and probable cause for the arrest of the Claimants and consequently failed to discharge the duty placed on them that they had a reasonable and probable cause in arresting the Claimants.

[114] The Defendant contended that they arrested the Claimants following a complaint from Chief Ngombo and other people that the Claimants had incited violence at a funeral where as a result of the said incitement, the fracas that ensued caused injuries to a lot of people.

[115] The Defendant further argued that its witness had demonstrated that it was practically impossible to inform the Claimants the reasons for their arrest considering the volatile situation on the ground. The general rule that the investigation ought to come first before an arrest can be departed from since the facts in this particular case are an exception to the aforesaid general rule.

[116] The Defendant submitted that based on the application of the law, the facts and the evidence, the arrest of the Claimants by the Defendant on charges relating to incitement of violence was justified as there was reasonable and probable cause for police to believe that the Claimants had committed the said offence. Further, the Claimants conceded that they had not spent more than 48 hours in incarceration. The Defendant was within the 48-hour rule. Therefore, the arrest of the Claimants was lawful or justified. The Defendant cannot therefore be held liable in damages for false imprisonment.

[117] In order to determine whether there was reasonable and probable cause to arrest the Claimants, the question whether it was the Claimants who incited violence must be addressed first.

[118] It is in evidence of the 1st Claimant that after presenting the report of what was agreed upon between the families of Mr. Milanzi and the deceased wife, the first chief to comment was T/A Mankhambira. It was T/A Mankhambira who uttered the words that: “If it were at my place Sanga, such people like the husband in this matter, are the ones required to be beaten but because the funeral was in STA Fukamalaza’s area, he was the one to decide what to do”. This comment was also supported by GVH Chibwana, who also comes from the Sanga area.

[119] It was alleged by DW that they received a complaint from Mr. Aliko Operako Milanzi, Mr. Alick Mwenefumbo, Mr. Zuze and Senior Group Village Headman Ngombo and other villagers who had gone to attend burial in the area of Sub Chief Fukamalaza that they were injured after being attacked by people that were incited to attack them by the Claimants.

[120] It was further alleged by DW that after the presentation of the report the Claimants led by the 1st Claimant ordered the husband and his people to leave the area (the funeral place). DW told the Court that as the husband and his people were leaving, the 1st Claimant asked the youth that were there why they were allowing the people to walk away freely upon which a fight erupted.

[121] This Court has no difficulty to find that there was no reasonable and probable cause for the Defendant to arrest the Claimants. First, according to the evidence that is before the Court, the words that allegedly incited violence were not uttered by any one of the Claimants in this matter. They were uttered by T/A Mankhambira and were supported by GVH Chibwana.

[122] Second, the allegation by DW that the 1st Claimant asked the youth that were there why they were allowing the people to walk away freely upon which a fight erupted is hearsay evidence and is inadmissible in this Court. DW was not at the funeral place at Zakuya Village. He told the Court that he and his colleagues rushed there upon receiving a complaint, which was after the alleged words had already been uttered. In other words, DW went to the scene after the event with the exception of the assault that was allegedly

being occasioned on the women that he said they witnessed and sadly did nothing about it. In short, DW did not hear any such words attributed to the 1st Claimant being uttered by the 1st Claimant himself. If DW was told by any one of the persons that he mentioned in his testimony, the law requires that those persons should have been called as witnesses to testify to that effect. They were not called as witnesses. That renders that piece of evidence to be hearsay and therefore inadmissible in this Court, unless perhaps if Order 17, rule 55 of the Courts (High Court) (Civil Procedure) Rules, 2017 had been complied with by the Defendant, which was not the case.

[123] Third, this Court was left with a distinct impression that no investigations had been carried out by the Defendant before effecting the arrests of the Claimants so as to establish a reasonable and probable cause. In fact, the Defendant conceded this fact and attempted to explain it away in its submissions that the circumstances of this particular case must be treated as an exception. This Court is not willing to ride with the Defendant on its boat. The position of the law is very clear on this point. In view of the reasons given, this Court is satisfied, on a balance of probabilities, that the Claimants herein were falsely imprisoned by the Defendant. As such, they are entitled to be compensated in damages on this tort that was committed against them.

[124] The second issue to be considered is whether the Claimants were maliciously prosecuted by the Defendant.

[125] The first element to be established by the Claimants is that there was no sufficient reason for their prosecution. This Court having already found that

there was no reasonable and probable cause for the Defendant to arrest the Claimants herein, it follows that this element has been already proved. Second, the law requires that the Claimants must show malice, that is, an improper motive or purpose for instigating their prosecution. The law is clear that the mere insistence on prosecution when there was no evidence is itself evidence of bad motive or purpose.²¹ In this case, following their arrests, the Claimants were granted police bail after staying in custody for one day. The Claimants were religiously reporting to Chintheche Police Post for their bail. Almost 7 months elapsed without the Claimants being tried or prosecuted by the Defendant. Eventually, the Defendant withdrew and cancelled their bail bonds.

[126] This Court agrees with the Claimants that the only logical inference to be drawn from such withdrawal and cancellation of their bail bonds was that their charges had equally been withdrawn and cancelled. It was only after being served with a demand letter for compensation for false imprisonment and defamation that two days later, prosecution was instituted against the Claimants.

[127] In view of the previous finding, it is clear in the mind of this Court that the Defendant had no case against the Claimants herein. Their prosecution was triggered by their demand letter in which they were demanding damages for false imprisonment and defamation. That was really an improper motive or purpose for instituting prosecution. The Court agrees with the Claimants' submission that the prosecution was meant to silence them from seeking compensation.

²¹ n13 above.

[128] The third element to be established by the Claimants is that they were prosecuted by the Defendant and that the prosecution was determined in their favour. Indeed, it is in evidence that the Claimants were prosecuted by the Defendant in the First Grade Magistrate Court sitting at Chintheche. The 1st Claimant exhibited a Ruling on no case to answer by the First Grade Magistrate Court in which they were acquitted of the offence of proposing violence at an assembly which was contrary to section 87 (1) of the Penal Code. It was exhibit, “SP4”. Similarly, in view of the foregoing reasons, this Court is satisfied that the Claimants have proved on a balance of probabilities that they were maliciously prosecuted. They are entitled to be compensated in damages for the same. It is so ordered.

[129] The third issue to be resolved by this Court is whether the Claimants are entitled to special damages relating to their Advocate’s travel and accommodation costs and meal allowances in defending the charge.

[130] The position of the law is that special damages must be strictly stated (as in pleaded) and strictly proved.²² In this case, there is no doubt that they were so stated. However, they were not strictly proved. No receipts were attached as proof of these expenditures by the Claimants to either their List of Documents or Witness Statement. Consequently, this claim must fall. It is dismissed.

[131] Costs are awarded in the discretion of the Court as is provided by law. The general principle is that the unsuccessful party pays the costs of the successful party. The Claimants have succeeded in two of their claims and

²² n14 above.

have only failed on one. In view of this, the Court is of the considered view that the Claimants should be awarded costs of this action and the Court proceeds to do so. It is so ordered.

[132] In *Professor Arthur Peter Mutharika et al –vs- Dr. Saulos Klaus Chilima et al*²³ the Supreme Court of Appeal for Malawi sternly warned that it could in future order Commissioners of the 2nd Appellant to pay costs personally for inappropriate conduct.

[133] This Court takes judicial notice that there are so many cases of this nature in our courts against the Defendant. Where the Claimants are able to prove their claims, as is the case in the present matter, it is public funds that are used to compensate them in damages and also pay costs of the action. Cumulatively, those funds may be a drain on public financial resources that may have been used for other more pressing issues that the country is facing. In order to ensure that there is appropriate conduct in line with the dictates of the law, this Court too, warns that in future, in cases of this nature and others where it is clear that its officers deliberately and carelessly failed to act in accordance with the law, it will consider making orders for costs to be borne personally by those errant officers.

Finding and Determination

[134] In view of the foregoing, it is this Court's finding and determination that the Claimants were falsely imprisoned and maliciously prosecuted by the Defendant. The Court has dismissed the Claimants' claim for the

²³ MSCA Constitutional Appeal No. 1 of 2020 (Sitting at Lilongwe) (Unreported).

reimbursement of travel and accommodation costs and meal allowances to the tune of MK783,050.00 as the same was not strictly proved as required by law. The Claimants are awarded costs of this action.

[135] The Claimants shall have to be compensated by the Defendant for damages for false imprisonment and malicious prosecution. The Registrar of this Court shall assess the damages payable unless the parties shall earlier agree on the quantum.

[136] Any party dissatisfied with this judgment has a right to appeal against it to the Supreme Court of Appeal for Malawi after the assessment of damages payable to the Claimants.²⁴

[137] Made in open court this 20th day of July, 2023 at Blantyre, Malawi.



M. D. MAMBULASA
JUDGE

²⁴ See generally *Premium Tama –vs- F. Mambala and others* Civil Appeal No. 72 of 2016 (Supreme Court of Appeal for Malawi) (Unreported).