

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2017/HP/1357



BETWEEN:

HERBERT KALONGA

PLAINTIFF

AND

BRIGHT MULYATA

1ST DEFENDANT

GIVEN MULYATA

2ND DEFENDANT

GEORGE KALONGA

3RD DEFENDANT

ATTORNEY GENERAL

4TH DEFENDANT

CORAM: HONORABLE JUSTICE MR. MWILA CHITABO, SC

For the Plaintiff: Ms. M. Siansumo of Messrs. Malambo and Company.

For 1st Defendant: N/A

For the 2nd Defendant: N/A

For the 3rd Defendant: N/A

For the 4th Defendant: Ms. A. Bowa State Advocate, Attorney General's Chamber

J U D G M E N T

Cases Referred To:-

1. *Khalid Mohamed v The Attorney General* (1982) ZR 49.
2. *Richman Chulu v Monarch (Z) Limited* (1983) ZR 33.
3. *Attorney General v Masauso Phiri Judgment No 8 of 2017*.
4. *The People v Benjamin Sikwiti Chitungu* (1992) ZR (HP).
5. *Chrissy Hamuka and 34 others v the Attorney General* 2011/HP/0777(unreported).

Legislation Referred to:-

1. *Penal Code Chapter 87 of the Laws of Zambia*.
2. *Criminal Procedure Code Cap 88 of the Laws of Zambia*.

The genesis of this suit is that on 15th August, 2017 the Plaintiff launched proceedings by mode of Writ of Summons and Statement of Claim, Claiming for the following reliefs against the four (4) Defendants:-

- (i) Damages for false imprisonment.
- (ii) Damages for assault.
- (iii) Damages for malicious prosecution.
- (iv) Damages for mental anguish, fear and anxiety.
- (v) Aggravated and exemplary damages.
- (vi) Interest
- (vii) Costs

On 27th November, 2017 the Plaintiff and the first Defendant entered into a mediated Consent Settlement order.

The Plaintiff marshaled one witness that was himself, PW1 49 year old **Herbert Kalonga**.

He recalled that sometime in June 2011, he found a child named Bobby Kalonga, a son to his young brother. The boy was in the custody of his grandmother. It was his testimony that he was staying at his late father's farm and he is the administrator of his father's estate.

Bobby had set fire to a bush of a neighbouring farm and he wanted to flee. He was apprehended. Witness got a whip and started whipping the boy to discipline him.

His Cousin **Hambo** was present when he was administering the punishment. The boy was released. Subsequently, he updated the boy's grandmother.

The boy was fine and was even attending school.

In October, 2011, George Kalonga (1st Defendant) got Bob from the boy's grandmother so that he could start staying with him.

Bob moved to Kalonga's place and enjoyed good health. He assisted Kalonga in the house construction of Kalonga. He also assisted in the herding of Kalonga's cattle.

In March, 2012, Bobby became paralysed.

George Kalonga claimed that the illness was attributed to the beating administered to Bobby by the witness sometime back.

Suggestions to take Bobby for medical attention was not done because George Kalonga was dilly dallying.

In April 2012, Bobby was taken by the witness and George Kalonga to a Private Clinic who referred the patient to Kafue Government Hospital. George Kalonga refused to take the patient to Kafue Government Hospital but instead to take him to Monze. They retired back to their homes,

In June 2012, George Kalonga took Bobby Mazabuka back to the Hospital. Bob was attended to and given a wheel chair. George Kalonga then called all Bobby's uncles so that they could charge him (that is the witness).

He was charged 12 herds of Cattle which he refused to deliver. He was then reported to NegaNega Police.

In July, 2012, the witness George Kalonga, Bright Mulyata and Given Mufaya and other people escorted us to NegaNega Police Station.

The Police requested George Kalonga to produce a medical report in respect of Bobby Kalonga. He failed to produce one. The Police then issued a medical form to take to any Government hospital. Bobby was taken to Kafue Hospital. The matter was then taken to NegaNega Victim Support Unit where the witness, Bright Mulyata and Given Mufaya were interviewed.

The Police then asked for K4 million (unrebased). He was to pay K2m (unrebased) and another K2m (unrebased) to be paid by the other named persons. The money according to the Police was intended to cover for transport logistics, settling Doctor's Medical bills.

On 12th August 2012, he paid his portion of K2m(rebased). The others failed to pay their part.

On 10th November 2012, which was a Saturday, he was at home. He saw 3 male persons. He identified Bright Mulyata. He offered the men a place to sit, they refused.

He was asked to accompany them. He requested that he organizes someone to accompany him since he did not know where he was being taken to. One of the men said in Nyanja that he was cheek and proceeded to handcuff him.

They took him where they had left a vehicle near George Kalonga's house where the trio were joined by another person. He was then conveyed to Mazabuka Police Station.

He asked for Police Bond but that was denied.

On 15th November 2012, he was taken to Court. He was charged of assault ***Occasioning grievous bodily harm C/S 229 of the Penal Code¹***. He was granted bail.

Trial proceeded, and after hearing the Prosecution witnesses, the Court found him with no case to answer and he was acquitted on 21st January, 2016. He was therefore claiming for reliefs as set out in the pleadings.

CROSS EXAMINED by Ms. A. Bowa the witness testified that Bobby Kalunga was in his custody.

He conceded that Bobby did not set ablaze a neighbouring farm.

It was his testimony that Bobby had set ablaze a bush, which fire was almost extending to a neighbouring farm.

He admitted having beaten Bobby to discipline him. He had used a stick to beat Bobby.

Bobby suffered paralysis of the whole body. He was accused that it was the beating that had caused the paralysis.

He admitted that there was a complaint which had been lodged at the Police that he had beaten Bobby.

He admitted that the Police had a duty to investigate when a complaint was filed.

He believed, the Police had gone to apprehend him because he had beaten Bobby which amounted to assault.

According to him, in their life Chastisement is allowed to discipline children and that even the Bible allows that.

He denied that Police had reasonable cause to apprehend him. He came to learn that Bobby had fallen from a tree from the evidence of George Kalonga when he testified in Court.

It was his testimony that it was wrong for the Police to conclude that it was the beating that had led to Bobby's paralysis.

Bobby was not suffering from tuberculosis at time he was staying with him.

The Plaintiff rested his case. The matter was then adjourned to the 1st of November 2019 at 09:00 hours.

On the return date, there was no appearance from the 2nd, 3rd and 4th Defendants.

They were therefore deemed to have closed their case and this matter was set for Judgment on 2nd December, 2019 at 12:00 hours. Judgment was not delivered due to unforeseeable circumstances which included sessions out of the station, delay in delivery of the Judgment is therefore regretted.

From the outset, I have disclosed my mind to the **Onus** and burden of proof. Ngulube DCJ, (as he then was) succinctly and

authoritatively in the celebrated case of the Court of final resort in the case of **Khalid Mohamed v The Attorney** ¹, put in this way:-

“An unqualified proposition that a plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. A plaintiff must prove his case and if he fails to do so, the mere failure of the opponent’s defence doesn’t entitle him to Judgment. I would not accept a proposition that even if the plaintiff’s case has collapsed of its inanity or for some reason or other Judgment should nevertheless be given to him, on the ground that a defence put up by ...has also collapsed. Quite clearly, a defendant in such circumstances would not even need a defence”

The following facts are not in dispute :-

1. The Plaintiff was at all material times an uncle to a boy named Bobby Kalonga(hereinafter referred to as Bobby).
2. The father to Bobby is a young brother to the father of Bobby.
3. Bobby was at all material times staying with his grandmother.
4. The Plaintiff was an administrator of the estate of his late father and he was in physical occupation of his deceased’s

father's farm where Bobby's grandmother and Bobby were staying.

5. Bobby was in the custody of the Plaintiff.
6. Sometime in June, 2011, the Plaintiff beat up or chasticised Bobby using a whip for allegedly having set fire to a bush which was adjacent to a neighbouring farm.
7. In October 2011, George Kalonga the 3rd Defendant got Bobby from his grandmother's custody so that they could be staying together.
8. Bobby was in good health and assisted George Kalonga in herding his cattle and helped the 3rd Defendant in the construction of the later's house.
9. In March 2020, Bobby became ill and became paralysed.
10. The 3rd Defendant attributed Bobby's paralysis to the beating the Plaintiff had administered to Bobby sometime in June, 2011.
11. Bobby was attended to at Kafue and Mazabuka Government General Hospitals in the year 2012.
12. The 3rd Defendant then summoned his uncle who charged the

Plaintiff 12 heads of Cattle for allegedly causing the illness of paralysis which he had afflicted Bobby.

13. The Plaintiff refused to pay.
14. In July 2012, the Plaintiff, Bright Mulyata, (1st Defendant) Given Mulyata, (2nd Defendant) and George Kalonga (3rd Defendant) reported the matter to NegaNega Police.
15. The Police asked the 3rd Defendant for a medical report in respect of Bobby which the later was unable to produce.
16. The Zambia Police Service at NegaNega gave the 3rd Defendant a medical report form and he was tasked to take it to a medical practitioner to complete it.
17. On the 10th November, 2012, the Plaintiff was apprehended by 2 Policemen from his residence whilst in the Company of the 1st Defendant and conveyed to Mazabuka Police where he was locked up in Cells.
18. Plaintiff asked for Police Bond but it was rejected.
19. Plaintiff was on 15th November, 2012 taken to the Magistrate.
20. On 27th November, 2020, the Plaintiff and the 1st

Defendant, entered into a mediated Consented Settlement Order.

Court (**Case No IQM/134/2012**) where he was admitted to bail and was on 21st January 2016 acquitted at the stage of no case to answer of the offence of **Assault Occasioning Grievous Bodily Harm Contrary to Section 87 of the Penal Code**

I will now deal with the issues to be resolved,

(1) FALSE IMPRISONMENT

The Court of final resort had Occasion to pronounce itself on the subject matter in the case of **Richman Chulu v Monarch (Z) Limited**² held that false imprisonment only arises where there is evidence that the arrest which led to the detention was unlawful because no reasonable or probable cause existed.

This Legal proposition was restated by the apex Court in the case of **Attorney General and Another v Masauso Phiri**³.

False imprisonment is restraint on the liberty of a person without lawful cause either by confinement or imprisonment.

In **Casu**, the evidence is that the Police received a Complaint to the effect that the Plaintiff had assaulted **Bobby Kalonga** .

The Plaintiff admits beating up the boy in June, 2011.

It will be noted that Corporal Punishment was criminalized by operation by the repealing of **Section 27 of the Penal Code by Act No 10 of 2003**.

The Police were therefore justified to investigate the Complaint by apprehending the suspect and conveying him to the Police Station to assist them with investigations.

The Police are permitted to hold a person for atleast 48 hours to assist them with their investigations by virtue of **Section 33 of the Criminal Procedure Code**. The case of **The People v Benjamin Sikwiti Chitungu⁴** is also instructive.

A complaint of Assault Occasioning grievous Harm having been lodged, the Police were justified to apprehend and hold the Plaintiff (then suspect for at least 48 hours. The evidence was that the suspect having been apprehended on 10th November, 2012 was in Police Custody for 4 days.

1(a) Whether the holding of the Plaintiff in Police Custody in excess of the allowable 48 hours or 2 days was Justifiable.

The evidence on record is that the Plaintiff was apprehended from his residence so the Police knew that he was of fixed abode. Denial of Police Bond was unjustified. I therefore hold that whereas the confinement of the Plaintiff for 48 hours was Justified, the holding into Confinement of the Plaintiff in excess of the allowable 48 days was unjustified.

The Plaintiff has proved his case that he was falsely imprisoned for 48 hours.

I was not addressed on the quantum of damages for false imprisonment. I will award a sum of K5,000=00 under this limb.

2. Damages for Assault

No evidence was led as to how he was assaulted to sustain the tort of assault.

Assault being an apprehension that the defendant is about to do some harm like threatening to strike someone or threatening to strike someone or threatening to shoot somebody. When the threat manifests into action for example where the slaps lands or the bullet is discharged and hits the Plaintiff then the assault becomes **battery**.

There being no evidence to support this claim, the limb for assault is dismissed.

3. Damages for Malicious Prosecution

In addressing this limb of Claim, I refer to what I said in the case of **Chrissy Hamuka and 34 others v the Attorney General**⁵, I observed as follows:-

“Black’s Law Dictionary 8th Edition defines malicious prosecution as institution of Criminal or Civil Proceedings for an improper purpose and without probable Cause”

Bullen Leake & Jacob’s Precedents of Pleadings Vol 1, 16th Edition, Paragraph 2-12, the Plaintiff has to show:

- (a) He was prosecuted by the defendant, ie that proceedings on a Criminal Charge were instituted or continued by the defendant against him;
- (b) That the proceedings were terminated in the Claimant's
- (c) favour;
- (d) The proceedings were instituted without reasonable and probable cause
- (e) The defendant instituted ***the proceedings maliciously and***
- (f) ***The Claimant suffered loss and damage as a result.***

The Supreme Court in the case of Anticorruption Commission v Sambundu Appeal No 054/2013 held that Malicious Prosecution is an abuse of the process of the Court by wrongfully setting the law in motion on a Criminal Charge.

I have considered the facts of the case and the evidence on record and I hold that the first two(2) ingredients have been proven that Criminal Proceedings were instituted against the Plaintiff and were terminated in the Claimant's favour.

As regards the ingredient of the proceedings were instituted without reasonable and probable cause, I have held in one of the preceding paragraphs that, there is evidence on admission by the Plaintiff himself that sometime in June 2011, he had assaulted ***Bobby Kalonga*** which is a Criminal Offence.

The Plaintiff admitted a Complaint was lodged with the Police that led to his apprehension from his residence. In my view, the Police were acting within permissible grounds of Law. In my view, the preference of Criminal Charges of Assault Occasioning grievous Bodily Harm cannot be said to have been instituted without reasonable and probable cause.

As regards the ingredient **Malice**, this has not been proved.

The mere fact that Criminal Proceedings terminate in favour of the Claimant or Plaintiff does not automatically mean that the prosecution was malicious. This limb has not been proven.

As regards the ingredient that the Claimant or Plaintiff suffered loss and damage, there is no iota of evidence that the Plaintiff suffered loss and damage.

This ingredient has not been satisfied. The burden of proof is on he who alleges as laid down in the ***Khalid Mohamad v The Attorney General's Case***.

It follows that the claim for damages for malicious prosecution cannot succeed and it fails.

4. Damages for Mental Anguish, fear and anxiety.

There is total lack of evidence to support this limb of the Claim.

No attempt was made to secure a medical report from the medical experts in the relevant field that the Plaintiff suffered mental

anguish, fear and anxiety. It is not sufficient merely to allege that one suffered mental anguish, fear **and anxiety**: This limb collapses.

5. Aggravated and exemplary damages

It is trite law that Aggravated and Exemplary damages must be strictly proved. There is no evidence to support this limb it collapses.

6. Interest

Having succeeded on the limb of false imprisonment and an award of K5,000=00 having been awarded, I will award interest of 10% from the date of the writ up to the date of Judgment.

Thereafter, the Principal amount of K5,000=00 Plus the interest earned up to the date of Judgment will form the Judgment **Debt** and it will attract Bulky lading rate or Commercial rate, but not exceeding the Bank of Zambia lending rate until the Judgment debt is liquidated.

7. Claims against the 2nd and 3rd Plaintiffs

The claims against the 2nd and 3rd Defendants are dismissed as they acted within permissible grounds of law when they reported an alleged grounds of law when they reported an alleged Criminal Offence to the Police.

8. Costs

Ordinarily, the successful litigant harvests the Costs of litigation unless good Cause is shown why that litigant should be deprived of the Costs.

Costs however are at the discretion of the Court. In exercising that discretion, the Court should do so **Judiciously**.

The Legend of this case reveals that the Original Sin is placed right at the door steps of the Plaintiff when he assaulted Bobby Kalonga in the name of disciplining the boy but in the eyes of the law was a **Criminal offence**.

Further, the Plaintiff has nominally succeeded in his claim.

The Justice of the case is that each Party bears its own Costs.

I grant Leave to appeal to the Superior Court of Appeal.

Delivered under my hand and Seal the ^{57A}.....day of July 2020



**Mwila Chitabo SC
Judge**