

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA  
(CIVIL JURISDICTION)**

**2017/HP/1679**

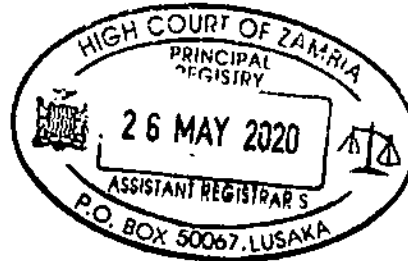
**BETWEEN:**

**BWEZA MILAMBO**

**PLAINTIFF**

**AND**

**ATTORNEY GENERAL  
DICKSON BANDA  
SAMUEL KABANJE**



**1<sup>ST</sup> DEFENDANT**

**2<sup>ND</sup> DEFENDANT**

**3<sup>RD</sup> DEFENDANT**

**BEFORE JUSTICE ELITA PHIRI MWIKISA**

**FOR THE PLAINTIFF: MR. A. BANDA OF L. M. CHAMBERS**

**FOR THE 1<sup>ST</sup> DEFENDANT: MRS. N. D. NCHITO STATE ADVOCATE,  
ATTORNEY GENERAL'S CHAMBERS**

**FOR THE 2<sup>ND</sup> DEFENDANT: IN PERSON**

## **JUDGMENT**

### **Cases Referred To:**

1. *Anti-Corruption Commission v Charles Sambundu SCZ Appeal*  
No. 054/2013.
2. *Richman Chulu v. Monarch (Z) Limited (1981) ZR 33.*
3. *Hicks v. Faulkner (1882) 8QBD 167.*
4. *Fred Chitengi Chingole v. Attorney General 2013/HP/0959*  
(Unreported).

5. *Richman Chulu and Anti-Corruption Commission v. Charles Sambundu.*

This matter was commenced by way of writ of summons and statement of claim both dated 28<sup>th</sup> September, 2017. Claiming the following reliefs what reliefs is the plaintiff seeking please refer to the writ or statement of claim. It was pleaded that on 16<sup>th</sup> July, 2014, the plaintiff was arrested, charged and prosecuted for the alleged offence of stock theft contrary to Section 275 (2) and 272 of the Penal Code Chapter 87 of the Laws of Zambia. This was after a complaint was lodged by the 3<sup>rd</sup> defendant, which complaint had no lawful justification and that the 3<sup>rd</sup> defendant was actively involved in ensuring that the plaintiff was arrested and prosecuted. The plaintiff is seeking the following reliefs:

- a) Damages for malicious prosecution.
- b) Damages for wrongful arrest and false imprisonment.
- c) Damages for defamation of character.
- d) Refund of K40,000.00, being legal fees incurred during the said malicious prosecution.
- e) Exemplary damages.
- f) Any other relief the court deem fit.
- g) Costs.

It was also averred that the plaintiff was kept in custody for 6 days from 16<sup>th</sup> July, 2014, to 21<sup>st</sup> July, 2014, when he was released on bail. It was averred that the particulars of the alleged offence were that the plaintiff on unknown dates but between 4<sup>th</sup> July, 2014, and 7<sup>th</sup> July, 2014, stole five herds of cattle valued at K21,000.00, the property of the 3<sup>rd</sup> defendant herein. The plaintiff pleaded that on 4<sup>th</sup> February, 2015, the Subordinate Court holden at Mazabuka under cause number RQM/290/2014 acquitted the plaintiff at no case to answer stage.

It was averred further that the plaintiff underwent untold humiliation from the date of arrest, detention and trial thereby causing damage to his reputation and character as he was branded as a cattle rustler. That had the defendants allowed proper and professional investigations to be conducted in the matter, the arrest, detention, humiliation and prosecution of the plaintiff would have been avoided.

It was also averred that the plaintiff incurred legal fees amounting to K40,000.00 defending himself during the criminal trial and that as a result of the defendant's actions, the plaintiff has suffered loss and damage and claims the following:

Damages for malicious prosecution; damages for wrongful arrest and false imprisonment; damages for defamation of character; refund of K40,000.00 being legal fees incurred during the said malicious

prosecution; exemplary damages; any other relief the Court may deem fit; and costs.

On the other hand, the 1<sup>st</sup> defendant on its behalf as well as that of the 2<sup>nd</sup> defendant filed a defence dated 27<sup>th</sup> April, 2018. The 1<sup>st</sup> and 2<sup>nd</sup> defendants denied the allegations made by the plaintiff. The defendants only admitted that the plaintiff was arrested charged and prosecuted for the offence of stock theft after a complaint from the 3<sup>rd</sup> defendant.

The 1<sup>st</sup> and 2<sup>nd</sup> defendants also averred that there was a reasonable suspicion to believe that the plaintiff had committed an offence and that the plaintiff is not entitled to any reliefs that he seeks against the defendants and that each claim is denied in totality.

In his reply dated 9<sup>th</sup> May, 2018, the plaintiff averred that there was no reasonable suspicion to believe that the plaintiff had committed an offence because no investigations were made by the police before the arrest and subsequent prosecution of the plaintiff. That this observation was made by the Court which tried and subsequently acquitted the plaintiff.

Further, that there was no reasonable cause for the 3<sup>rd</sup> defendant to report the plaintiff to the police for the alleged offence.

When the matter came up for trial, PW1 testified that on 16<sup>th</sup> July, 2014, around 10:00 hours to 11:00 hours, two police officers went to his house and apprehended him. He told the Court that when he got to the Police Station, he was detained in Police cells where he found Ernest Choleluya and Cresta Hapeya. PW1 explained that Ernest Choleluya was a taxi driver he had booked to take meat to Cresta Hapeya in Nega Nega on 10<sup>th</sup> July, 2014.

PW1 also told the Court that he was charged with stock theft which he denied. He explained that he bought the cattle he had taken to Cresta Hapeya from two people, which people were called and interviewed by the Police. That the said two people brought with them brand sticks to prove that they were the ones who sold the said cattle to PW1. He went on to explain that despite the explanation, the Police did not listen to PW1 and that he was detained in Police cells from 16<sup>th</sup> to 21<sup>st</sup> July, 2014, and then released on bail.

PW1 explained further that when trial commenced, Police officers from Nega Nega gave evidence that he had gone to the Police Station to have a stock permit signed by them. He testified further that the Mazabuka Magistrate Court found him with no case to answer and he was acquitted.

PW1 testified that when he went back to the village, he was ridiculed and called a thief who should not go near other people's animals.

In his defence, DW1 testified that in July, 2014, whilst on duty, he received a report of stock theft in which the 3<sup>rd</sup> defendant herein reported that 5 herds of cattle branded Y8N and N2N2 valued at K21,000.00, were stolen by unknown persons in July 2014. DW1 told the Court that he instituted investigations in which he interviewed the complainant and other witnesses and that in the process the complainant disclosed that he received information from a member of the public that there was a car that had passed through Musikili gate carrying some carcasses. He went on to explain that the taxi driver who transported the carcass was interviewed and disclosed that he had transported the same from Mwanachingwala area upon being hired by the plaintiff herein from Nega Nega area at Cresta Hapeya's place. DW1 testified that a search was conducted at Cresta Hapeya's place and a skin, black in colour, with a mark on the back was recovered after being identified by the 3<sup>rd</sup> defendant herein. That it was at that point that Cresta Hapeya, was apprehended and interviewed. That the said Cresta Hapeya disclosed that he had bought the animal in question from the plaintiff. Later during the investigations, the plaintiff was also apprehended and he also disclosed that he was sold the animals in question by other people. DW1 told the Court that the said people were also interviewed and that they admitted selling cattle to the plaintiff but not the cattle

whose skin was recovered at Cresta Hapeya's place. DW1 testified that it was at that point that he made up his mind to arrest the plaintiff and charged him with the offence of stock theft.

DW1 went further to testify that the animal skin that he found at Cresta Hapeya's place was black in colour with a mark on its back but its brand mark was removed. That the said mark had been affixed by the 3<sup>rd</sup> defendant who identified the skin. DW1 testified further that he arrested the plaintiff based on the statements from witnesses.

Under cross-examination, DW1 told the Court that he had a report from Nega Nega police on the carcasses the plaintiff took to Mr Cresta Hapeya and that they were different brand marks from the ones named by the Complainant. DW1 testified that amongst the carcasses in the report from Nega Nega Police, there was no brand mark for the 3<sup>rd</sup> defendant.

DW1 testified further that the statement from Mr Cresta Hapeya was not before Court because he (Cresta Hapeya) was a State witness in the criminal trial. DW1 admitted that he did not get any written agreement between the plaintiff and Cresta Hapeya pertaining to the carcasses other than Cresta Hapeya's word. DW1 admitted that he had nothing to connect the plaintiff to the offence.

DW1 testified that there was sufficient evidence on which to prosecute the plaintiff, that is to say evidence from the 3<sup>rd</sup> defendant on the identification of the skin and the statements from the taxi driver and the buyer Cresta Hapeya.

Under re-examination, DW1 testified that the brand marks were removed and that is why the taxi driver could not confirm carrying the carcasses belonging to the 3<sup>rd</sup> defendant. DW1 also testified that he had evidence to confirm that the accused committed the crime and that he was a suspect.

I have considered the evidence on record together with the written submissions from both Counsel.

In order for one to succeed in a case of malicious prosecution, the plaintiff must prove five elements. In the case of **Anti-Corruption Commission v Charles Sambundu SCZ Appeal No. 054/2013**<sup>1</sup> the Supreme Court held that:

***“There are primarily five essential elements which a plaintiff should establish in order to prove malicious prosecution. These have been enumerated by the learned authors of Bullen & Leake & Jacob’s Precedents of Pleadings, Vol. 1, 16<sup>th</sup> Edition, who have indicated in paragraph 2-12, that to establish a claim for damages for malicious prosecution, the claimant must plead and establish that:***

- (a) He was prosecuted by the defendant, i.e that proceedings on a criminal charge were instituted or continued by the defendant against him;***
- (b) The proceedings were terminated in the claimant’s favour;***



- (c) The proceedings were instituted without reasonable and probable cause;**
- (d) The defendant instituted the proceedings maliciously; and**
- (e) The claimant suffered loss and damage as a result.”**

The plaintiff herein must therefore prove that he was prosecuted and that the prosecution was terminated in his favour and that the accuser acted without reasonable and probable cause and did so with malice and lastly that he suffered loss and damage.

In **Richman Chulu v. Monarch (Z) Limited (1981) ZR 33<sup>2</sup>**, the court held that:

**“False imprisonment only arises where there is evidence that the arrest which led to the detention was unlawful, since there was no reasonable and probable cause.”**

In the case of **Hicks v. Faulkner (1882) 8QBD 167<sup>3</sup>**, Hawkins J states that:

**“I should define reasonable and probable cause to be, an honest belief in the guilty of the accused 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 ordinarily 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.”**

The Learned authors of Halsbury Laws of England 4<sup>th</sup> edition at paragraph 1340, state that:

**“A malicious prosecution is an abuse of the process of the court by wrongfully setting the law in the motion a criminal charge. To be actionable as a tort the process must have been without reasonable and probable cause must have been instituted or carried on maliciously and**

***must have terminated in the plaintiff's favour. The plaintiff must also prove damage."***

It is not in dispute that the plaintiff was prosecuted and that the said prosecution was terminated in his favour by Ruling dated 4<sup>th</sup> February, 2015, which is at page 1-5 of the plaintiff's bundle of documents. What the Court therefore needs to determine is whether the prosecution was without reasonable and probable cause and was malicious.

In the case of **Anti-Corruption Commission v Charles Sambodu** cited above, the Supreme Court stated:

***"Reasonable and probable cause for a prosecution has been said to be an honest belief in the guilt of the accused 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.***

***It is also important to note that the presence of reasonable and probable cause for a prosecution does not depend upon actual existence, but upon a reasonable belief held in good faith in the existence of such facts as would justify a prosecution."***

At page 1070 of Clerk and Lindsell on Torts 20<sup>th</sup> edition, Sweet & Maxwell 2010, the 4 essential elements that must be proved in a case of malicious prosecution are that:

***"The claimant must show first that he was prosecuted by the defendant that is to say, that the law was set in motion against him by the defendant on a criminal charge, secondly that the prosecution was determined in his***

***favour and thirdly, that it was without reasonable and probable cause and fourthly that it was malicious.”***

The Learned authors go no to state that:

***“The onus of proving every one of these is on the claimant. Evidence of malice of whatever degree cannot be invoked to disperse with or diminish the need to establish separately each of the first three elements of the tort.”***

The plaintiff has indeed proved that he was acquitted of the charges levelled against him. The question that remains is whether the prosecution was without reasonable and probable cause and was malicious. In the case of **Fred Chitengi Chingole v. Attorney General 2013/HP/0959 (Unreported)**<sup>4</sup>, Mulenga J, as she then was, at page J20 states that:

***“The defendant thus has to show that there was sufficient ground or cause for thinking that the plaintiff was probably guilty. The prosecutor must only be concerned with whether there is a case fit to be tried and not necessarily the probability of securing a conviction.”***

I have noted that the 2<sup>nd</sup> defendant (DW1), under cross examination, testified that there was evidence from the 3<sup>rd</sup> defendant on the identification of the skin found at Cresta Hapeya’s place. The statements from the taxi driver and the buyer, Cresta Hapeya, was sufficient on which to prosecute the plaintiff, according to the evidence of DW1 in the court below.

In examination in chief, PW1 testified that during his interview, he explained that he had bought the cattle that he had taken to Mr

Cresta Hapeya, from two people who were also interviewed and confirmed his statement. This position was confirmed by DW1 under examination in chief.

PW1 also testified that the 2 people he bought the cattle from took with them brand sticks to prove that they were the ones who sold the said cattle to the plaintiff. Further evidence was given by PW1 that he got a stock permit from Nega Nega Police Station which evidence was also confirmed by DW1 when he testified during cross examination that he had a report from Nega Nega Police on the carcasses the plaintiff is alleged to have transacted with Mr Cresta Hapeya and that amongst the ones in the report, there was no brand mark for the 3<sup>rd</sup> defendant. This evidence was not challenged as the plaintiff was not cross-examined.

In my considered view, a perusal of the evidence on record shows that the defendants had a reasonable and probable cause to prosecute the plaintiff as shown in the testimony of DW1 who testified that there was sufficient evidence on which to prosecute the plaintiff especially that of the taxi driver who mentioned that he had been hired by the plaintiff from Nega Nega area to transport the carcasses from Mwanachingwala area. It was further mentioned in court by DW1 that investigations at Cresta Hapeya's place led him to the plaintiff who was alleged to have sold the animal in question to a

witness by the name of Cresta Hapeya who was found with a black skin of an animal.

In view of the law enumerated above and the cases of **Richman Chulu and Anti-Corruption Commission v. Charles Sambundu<sup>5</sup>**, amongst others, I find that the plaintiff has failed to prove his case on a balance of probabilities and I accordingly dismiss this case. I order no costs.

Leave to appeal is granted.

Delivered in Open Court at Lusaka this <sup>26<sup>th</sup></sup> day of <sup>May</sup> 2020

  
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**ELITA PHIRI MWIKISA**  
**HIGH COURT JUDGE**