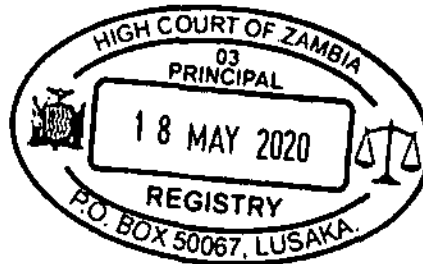


**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2017/HP/1915

BETWEEN:

**ALFRED MATE
MATHEWS MWALE
JONATHAN M. KUNDA**



**1st PLAINTIFF
2nd PLAINTIFF
3rd PLAINTIFF**

AND

ATTORNEY GENERAL**DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 18th DAY OF MAY,
2020**

For the Plaintiffs : Dr O.M.M Banda, Messrs OMM Banda and Company

*For the Defendants : Ms J. Mazulanyika, and Ms C.S. Mulenga, Attorney
Generals Chambers*

J U D G M E N T

CASES REFERRED TO:

1. *Bird v Jones 1845 7 O.B 742*
2. *Abrath v The North Eastern Railway Company Law Reports
Vol XI 1882 P 440, Bret MR*
3. *Collins v Jones 1955 1 QB 564*
4. *Dallison v Caffey 1964 2 ALL ER 610*
5. *Stapley v Annets 1969 3 ALL ER 1541*
6. *Claude Samuel Gaynor v Cyril Robert Cowley 1971 ZR 50*
7. *Attorney-General v Kakoma 1975 ZR 211*
8. *Mubita Mbanga v The Attorney-General 1979 ZR 234*
9. *Joseph Banda v Zambia Publishing Company Limited 1982
ZR 4*
10. *Richman Chulu v Monarch (Z) Limited 1983 ZR 33*
11. *Collins v Wilcock 1984 3 ALL ER 374 AT 377*
12. *Suzen Mwela Nkunde v Cetzam Financial Services Limited*

- 2013 Vol 2 ZR 400**
13. Attorney General and three others v Masauso Phiri SCZ No 17 of 2017

LEGISLATION REFERRED TO:

- 1. The National Parks and Wildlife Act No 14 of 2015.**

OTHER WORKS REFERRED TO:

- 1. Black's Law Dictionary, 4th Edition**
- 2. Clerk & Lindsell on Torts, 20th Edition, Sweet & Maxwell, London, 2010**
- 3. Halsbury's Laws of England, Vol 25, 3rd Edition**
- 4. Halsbury's Laws of England, Vol. 97, 5th Edition**
- 5. Margaret Brazier, Street on Torts, 9th Edition, London Butterworths, 1993**
- 6. Winfield and Jolowicz on Tort, 16th Edition, Thompson Sweet & Maxwell, London**

The plaintiffs commenced this action by way of writ of summons accompanied with a statement of claim, on 6th November, 2017, which was amended on 19th March, 2018. They claim the following;

- i. *Damages for false imprisonment.*
- ii. *Damages for malicious prosecution.*
- iii. *Damages for assault and battery.*
- iv. *Damages for:*
 - a) *Harassment and embarrassment.*
 - b) *Traumatic stress.*
 - c) *Pain, suffering, and mental anguish at the hands of the police.*
- v. *Interest.*
- vi. *Costs.*

vii. *Any other relief the court may deem fit.*

The 2nd plaintiff further claims;

- i. *Damages for loss of business due to false imprisonment at the hands of the National Parks and Wildlife Authority Officers from April, 2016 to date, approximately K410, 000.00.*
- ii. *Damages for defamation of character by the defendant.*

The 1st and 3rd plaintiffs also claim;

- i. *Damages for loss of employment due to false imprisonment at the hands of the National Parks and Wildlife Authority Officers from April, 2016, approximately K90, 000.00.*

The statement of claim shows that the plaintiffs allege that on or about 20th April, 2016, they were wrongfully and/or unlawfully arrested by the National Parks and Wildlife established under the National Parks and Wildlife Act No 14 of 2015, at Chaisa Filling Station, over baseless allegations that they were in possession of a raw piece of ivory. That as a result of the wrongful and/or unlawful arrest, they suffered trauma, stress, pain and suffering.

It is further the plaintiffs' claim that as a result of the traumatic stress caused by the defendant, the 2nd plaintiff collapsed and was admitted to the University Teaching Hospital (UTH). The plaintiffs state that they were maliciously prosecuted in the Subordinate Court under cause number 3D/047/2016, and they were acquitted of the criminal charge. It is averred that before the plaintiffs were wrongfully arrested in April, 2016, the 2nd plaintiff was engaged in business, and he has since suffered loss of business in the amount of approximately K410, 000.00.

The 1st and 3rd plaintiffs aver that due to the wrongful arrest, they have lost their employment, and the opportunity to earn salaries worth K90,000.00 approximately each. The plaintiffs state that the National Parks and Wildlife Authority Officers published defamatory words of them, which tended to lower them in the estimation of right thinking members of society, knowing that the same were false or reckless as to their truth or falsity.

Further, that the defamatory words published by the National Parks and Wildlife Authority Officers, caused damage including loss of business and employment and injury to reputation, and has exposed the plaintiffs to ridicule, and as a result, they have been shunned or avoided by right thinking members of society.

The defendant entered appearance and filed a defence on 25th July, 2018. The gist of the defence is that the plaintiffs were arrested on 22nd April, 2016, for the offence of unlawful possession of a prescribed trophy. It is contended that the defendant reasonably believed that the plaintiffs were in unlawful possession of two (2) kilogrammes of ivory, which proved to be true when the plaintiffs were arrested, and actually found to be in possession of ivory. Therefore, the arrest of the plaintiffs was not baseless.

The defendant denies that the plaintiffs were maliciously prosecuted, stating that their prosecution before the Subordinate Court was just and fair. The claims that the plaintiffs suffered trauma, stress, pain and suffering as a result of the arrest is said to be within the plaintiffs' peculiar knowledge. The same goes with regard to the assertions that the 2nd plaintiff collapsed and was admitted to UTH as a result of the traumatic stress caused by the defendant.

The assertion that the 2nd plaintiff has suffered loss of business, while the 1st and 3rd plaintiffs lost their employment, and as a result, their ability to earn income is also said to be within the plaintiffs' peculiar knowledge. The defendant denies that it published defamatory words of the plaintiffs, which lowered their estimation in right thinking members of society, and which has resulted in the plaintiffs suffering damage, including loss of business and employment, injury to reputation, and has exposed them to ridicule, and they have been shunned or avoided. The defendant therefore denies the plaintiffs' claims.

At the trial, all three (3) plaintiffs testified and they called no witnesses, while the defendant called (4) witnesses. PW1 was the 1st plaintiff. He testified that in 2016 on 24th April, officers from the National Parks and Wildlife office arrested him, whilst he was at Total Filling Station in Chaisa. The 1st plaintiff told the court that he was charged with the offence of unlawful possession of ivory, but he denied having committed the offence.

It was further the 1st plaintiff's testimony that he had reported for work at Trent Tyres on Malambo road, in the light industrial area, and that at lunch hour, he went home to collect the money that seven (7) of them had contributed as "*chilimba*", at K200.00 each, that he was keeping. The 1st plaintiff testified that on the way back from home, he had jumped on to a taxi, and the driver of the taxi had proceeded to refuel at Chaisa Filling station.

However, the driver did not stop at the pump, and instead went and stopped at the Zanaco Automated Teller Machine (ATM). The 1st plaintiff explained that just as the taxi stopped, uniformed men opened the doors

of the taxi, and took them to the National Parks and Wildlife offices in Chilanga.

He also stated that there a bag commonly known as “*ukwa*” that was taken, which the officers said contained a roll of ivory, and that it was found in the taxi in which they were in. The 1st plaintiff denied any knowledge of the “*ukwa*” bag, and he testified that he was made to sign documents that he did not know after two (2) days. Thereafter, he was released on Friday, 22nd April, 2016, having spent two (2) days in custody. Still in his testimony, the 1st plaintiff stated that he appeared before the Subordinate Court on 25th April, 2016.

He further stated that trial in the matter commenced on 27th April, 2016, which lasted a year and one (1) month, and he was acquitted. He asked that he be compensated for the damage that had been caused to him, stating that he had lost his employment, and that the community no longer sees him as it did before his arrest. He further claimed as prayed in the statement of claim.

In cross examination, the 1st plaintiff testified that he was arrested on 20th April, 2016 between 13:00 and 14:00 hours. He told the court that he got onto the taxi at Mandevu, and that five (5) of them were in the vehicle. He agreed that the taxi operated at a bus stop, and that anyone could jump onto it. It was his testimony that he did not know the other three (3) people who were in the vehicle, apart from Jonathan, whom he was with at the time.

Further in cross examination, the 1st plaintiff stated that they found the 2nd plaintiff in the taxi, but that at the time, he did not know him. When referred to the statement that he gave the Wildlife Officers at pages 13-14

of the defendant's bundle of documents, he agreed that it states "*read over and signed*", and he told the court that the signature at the end looked like his. He agreed that in the second sentence of the first paragraph of that document, it states that he had stated that he was introduced to the 2nd plaintiff by his cousin who was selling ivory and that they got onto a taxi.

He however, denied having given that statement, testifying that he was forced to sign documents that he did not know. The 1st plaintiff also in cross examination stated that he was working for a company called Circle Transtra whose offices were at Trent Tyres. He agreed that he had signed the contract of employment, which was in the plaintiffs' supplementary bundle of documents, in which Simsak Zambia Limited had offered him employment on 30th March, 2016. The 1st plaintiff testified that at the time, he had a running contract with Circle Transtra.

He clarified that the contract of employment in the supplementary bundle of documents would start running on 2nd May, 2016, and he told the court that at the time of his arrest, he was working for Circle Transtra, although he had given thirty (30) days notice on 30th March, 2016.

Still in cross examination, the 1st plaintiff testified that he prayed for damages for loss of income, as Simsak revoked his appointment after they heard that he had been arrested. He stated that he reported there for work after he was released from custody, but they did not allow him to do so, and he was given a letter of termination of employment. He agreed that the said letter was not before court.

PW2 was the 2nd plaintiff. His evidence was that on 20th April, 2016 around lunch hour, he left home to go and buy materials that he uses in his business. He got on to a Toyota Corolla vehicle at the road side, which had a driver and a woman. The 2nd plaintiff further testified that when they reached the Mandevu junction, two (2) men got onto the vehicle which brought the total number of people in the vehicle to five (5). He like the 1st plaintiff testified that the driver of the vehicle proceeded to Chaisa Filling Station to refuel, but he did not stop at the pump, but near an ATM.

He also confirmed that unknown persons opened the doors of the vehicle, and he testified that they were beaten and put in another vehicle, and were taken to the National Parks and Wildlife Offices. The 2nd plaintiff further in his testimony stated that a sack was taken to them, and he was charged with the offence of being found in possession of ivory, and he was made to sign a document that he did not know. His evidence was that from there, they were taken to the police station where they were detained for five (5) days, and he was released on police bond.

It was also the 2nd plaintiff's testimony that he was notified to appear in court, and trial commenced. He was acquitted after one (1) year and one (1) month. He prayed that he be granted the reliefs sought.

When cross examined, the 2nd plaintiff stated that he was self employed as a blacksmith, and that he made bakery pans at the time of his arrest. He testified that he no longer does that business. It was stated that when the 2nd plaintiff got on to the vehicle at Mandevu bus station, he did not recognize the woman who was inside the vehicle with the driver.

He further stated that he did not see the sack that the officers showed them in the taxi. When referred to the statement that he gave the National Parks and Wildlife officers at pages 9-10 of the defendant's bundle of documents, the 2nd plaintiff agreed that he wrote his name on the document.

On the damages for mental stress, the 2nd plaintiff testified that the claim was on the basis that he had lost customers, and his name was published in the newspaper. He also stated that after he was released from custody, he went to the hospital, as he was beaten. The 2nd plaintiff testified that he had a medical report to that effect, even though it was not before court.

When referred to the various medical documents in his name at pages 25, 26 and 29 of the plaintiff's bundle of documents, the 2nd plaintiff stated that he cannot read. He however confirmed that he was arrested on 20th April, 2016, and that he was released on 25th April, 2016. It was his evidence that his colleagues were released on 24th April, 2016, and that he was released later, as he was required to provide working sureties, whom he did not find on time.

On the damages for loss of business, the 2nd plaintiff told the court that he would make K15, 000.00 on a daily basis, on being given orders to make bakery pans. He stated that the invoice at page 19 of the plaintiffs' bundle of documents in the name of W & M Metal Fabricators, was in his business name, and that it is dated 8th September, 2016, and is an invoice for K2, 000.00.

He maintained that this document just like the one at page 20 of the said bundle of documents is a receipt even though it is written invoice. In

conclusion, the 2nd plaintiff testified that he had sued over the article in the Daily Mail newspaper, which is at page 21 of the plaintiffs' bundle of documents.

PW3 was the 3rd plaintiff. His testimony was that on 20th April, 2016, he had reported for work on Malambo road at Circle Transtra. Then around lunch hour, he and the 1st plaintiff went to collect money from the 1st plaintiff's house. He confirmed that on collecting the money, the two (2) of them had boarded a taxi in which there were three (3) other people, including a lady who sat in the front passenger seat.

The 3rd plaintiff further confirmed that the taxi driver drove the vehicle to Chaisa Filling Station where he stopped near an ATM, and that people went and opened the doors of the vehicle. The 3rd plaintiff added that the people had guns, and that himself, and the 1st and 3rd plaintiffs were taken to the National Parks and Wildlife office, leaving the lady and the driver.

It was further his testimony that nothing was removed from the taxi when they were taken, and he confirmed that they were detained in custody, and he was released after two (2) days. He stated that prior to his release, he was told sign documents that he did not know. Still in his testimony, the 3rd plaintiff testified that he had reported for work on Saturday, and there, he was shown an article in the Zambia Daily Mail which had his names.

He added that at the time, their contracts were being renewed, and his boss told him that his contract would not be renewed, as he had a criminal case. In terms of how the community regards him, the 3rd plaintiff testified that he is no longer trusted, and he is viewed as a

criminal. Further, he cannot even find a job. In ending his testimony, the 3rd plaintiff testified that whilst he was in police cells, he suffered trauma, pain and anguish.

In cross examination, he testified that he was working as a Stores Assistant at Circle Transtra at Trent Tyres, at the time of his arrest. His evidence was that he is a teacher by profession, having qualified in 2016. The 3rd plaintiff also testified that he had not applied to be employed as a teacher, as he had no money to apply for a teaching licence, which he said was K1, 300.00. He stated that he was verbally told that his contract would not be renewed. The 3rd plaintiff agreed, that having been acquitted, he did not have a criminal record. He stated that following his acquittal, he had gone back to Luanshya to be kept by his father, as he is not in gainful employment.

He also told the court that he had no qualifications when he was employed as a Stores Assistant. The 3rd plaintiff testified that he signed the statement that he gave to the National Parks and Wildlife Officers which is at pages 11-12 of the defendant's bundle of documents. That marked the close of the plaintiffs' case.

DW1 was Margaret Kachali, a Wildlife Intelligence Officer. She stated that she was on duty at Chilanga headquarters on 20th April, 2016, when she received information from members of the public, that some people were in possession of elephant ivory and were selling it. DW1 told the court that she informed the Senior Intelligence Officer, who commanded her to verify the information. She went further to testify that upon verification of the information, the Commander instructed them to go and pounce on the suspects.

To that effect, DW1 went to where the informer was in Chaisa compound, and on meeting them, she obtained the phone number for the sellers. From there, she started communicating with the sellers directly, posing as a buyer, which is part of her job as an undercover officer. DW1 explained that one of the sellers said that they should meet at Chaisa Filling Station, and DW1 booked a taxi at Downtown mall.

Continuing with her testimony, DW1 testified that when they reached Chaisa Filling Station, she had called one of the sellers. When he went to the vehicle, he had introduced himself as Alfred Mate, the 1st plaintiff herein, and that he was with his friend Jonathan, the 3rd plaintiff, who would knock off after an hour. It was further DW1's evidence that the 1st plaintiff called the 3rd plaintiff, having put the phone on loud speaker, and DW1 heard him tell the 3rd plaintiff that DW1 had gone there to buy the ivory. The 3rd plaintiff had said that they should wait.

It was stated that after thirty (30) minutes, the 3rd plaintiff had arrived, and he also got on to the vehicle that DW1 had booked. DW1 testified that they were led to a road near the Filling station where they said a cousin Mwale, the 2nd plaintiff lived. After the 2nd plaintiff was called, he went there with a vehicle, and left after they discussed. Then later, the 2nd plaintiff went back to the vehicle that DW1 had booked, and negotiated the price with DW1, at K1, 200.00 per kilogramme.

Still in her testimony, DW1 testified that the 3rd plaintiff had told her if she paid for one (1) ivory, they would go and get two (2) more. When she consulted with her boss, he told her to just get one (1), as they do not buy. It was further her evidence that there is a sign and a tracking device on her phone that sent the message, that she would buy one, and that

she would lead the sellers to the Filling station where the other four (4) officers were, and she was being tracked.

DW1 stated that she told the 1st plaintiff that they should go to the Filling Station where she would withdraw the money at the Zanaco ATM. Her testimony was that at the Filling Station, she gave a signal to the team, and they got out of their vehicle, and pretended to withdraw money at the ATM. DW1 also gave them a signal that the ivory was there, and they proceeded there. It was also DW1's evidence that the 2nd plaintiff took the sack of ivory to the vehicle, and that he gave it to Fred, and they went with it to the Filling Station.

DW1 stated that she cancelled the transaction at the ATM, and she went into the shop where she observed the arrest. Thereafter, she went into the taxi, which was waiting as directed by her boss, and she was dropped off at Downtown.

In cross examination, DW1 testified that she had worked for the National Parks and Wildlife since 2000, and she agreed that she was a very experienced officer. DW1 expressed ignorance on the assertion that the plaintiffs were acquitted after the matter was taken to the Subordinate Court, stating that she was not called to testify in the matter.

DW2 was Mukendwa Kakoma, an Investigations Officer at the National Parks and Wildlife. At the time of his testimony, he was based at the Kenneth Kaunda International Airport, having worked there for two (2) years. He stated that prior to that, he had worked at headquarters for six (6) years. It was his testimony that the plaintiffs were suspects in a matter in which he had arrested them, after they were apprehended with elephant ivory in Mandevu compound.

DW2 testified that he seized the ivory, and had a veterinary doctor certify it, who confirmed that it was ivory. With reference to page 2 of the defendant's bundle of documents, DW2 told the court that it was his investigations diary, in which he had recorded the activities that he had carried out with respect to the matter. He testified that at entry number 1 on the said page, which is dated 22nd April, 2016, he had referred to the hand over of the elephant ivories to the veterinary doctor for certification.

Later, he had warned and cautioned the suspects, in Nyanja language, which they understood well, for the offence of being found in possession of elephant ivory without a certificate allowing them to possess it. DW2 stated that when he asked the suspects if they had anything to say in respect of the allegations, each one of them had volunteered a statement.

In that regard, Mathew Mwale, the 2nd plaintiff had said that a woman had taken the elephant ivory to him, and she had asked him to sell it on her behalf. Further, that he would be given commission for selling it. DW2 also stated that the 2nd plaintiff had stated that he had started looking for a buyer, and he later met the 1st plaintiff, who was taken to his home by the 1st plaintiff's uncle.

The 2nd plaintiff had further stated that the 1st plaintiff had promised to find a buyer for the ivory, and on 20th April, 2016, the 1st plaintiff and Jonathan Kunda, the 3rd plaintiff went with DW1 who had posed as a buyer for the ivory to collect the elephant ivories at Chaisa Filling Station. DW2 identified pages 9-14 of the defendant's bundle of documents as the statements that the three (3) plaintiffs gave, with the one at pages 9-10 being for the 2nd plaintiff, the one at page 11-12 as for the 3rd plaintiff and the one at pages 13-14 as the one for the 1st plaintiff.

He also testified that the plaintiffs as accused persons, signed the statements, and he made up his mind to charge and arrest them for the offence of being in possession of elephant ivories. DW2 further identified page 6 of the defendant's bundle of documents as the charge sheet for the plaintiffs, as accused persons, and he told the court that the next day, the 1st and 3rd plaintiffs were released on police bond, after they met the conditions of providing two (2) sureties from reputable organisations, and who were of fixed abode.

That the third entry in the Investigations Diary at page 3 of the defendant's bundle of documents shows this. He concluded his evidence by stating that the 2nd plaintiff who had not met the police bond conditions was detained in custody, and that the docket was handed over for court proceedings.

DW2 when cross examined, agreed that he did not take part in the operation. He stated that he recorded warn and caution statements from the plaintiffs, and that they accepted the allegations. DW2 also agreed that while the statements showed that the plaintiffs admitted the charge, they however denied the charge when they appeared before the Subordinate Court for plea. He further agreed that they were acquitted after the trial.

It was also his evidence in cross examination that he had translated the statements that the plaintiffs, as accused persons, gave him in Nyanja language, as the independent person who was the only officer that was available was part of the operation, and he did not want to say anything. DW2 denied that the plaintiffs did not understand what they were signing, stating that they had the right not to accept what was written, because they did not understand.

He went on to state that during the interview with the plaintiffs, they accepted that they were present at the scene where they were apprehended from. It was DW2's testimony that he was aware that the plaintiffs were acquitted after the trial before the Subordinate Court. DW2 stated that he did not see it fit to speak with the taxi driver, as he was just booked, and he did not know what was happening. Further, that there was need to protect him in the public interest.

Steven Zulu, also an Investigations Officer at the National Parks and Wildlife office was DW3. He told the court that he had worked as an investigator for seven (7) years, and in the department for five (5) years. He further testified that he was part of the team that apprehended the plaintiffs on 20th April, 2016, in Chaisa. To this end, he stated that DW1 who was under cover disembarked from the vehicle at Puma Filling Station along Cairo road, and that she got onto a taxi that was used for the under cover operation.

He further testified that they proceeded to Chaisa Filling Station, and that Muchawa and Commander went to the police station there to report their presence in the area, and they returned with another police officer. That from there, DW1 and the taxi driver went to meet the suspects, and they returned some minutes later, and DW3 saw the vehicle park in front of the ATM.

He stated that DW1 disembarked from the vehicle, and she went to the ATM, and as it had been agreed that DW1 would give them a signal confirming that she had the elephant ivory, by scratching her head, she gave the sign to Muchawa, who was nearby. Thereafter, Muchawa gave them the sign, and DW3 started approaching the vehicle. DW3 testified

that there were four (4) people in the vehicle, that is the driver in front, and three (3) male passengers at the back.

It was further his testimony that the person who sat in the middle had the sack, commonly known as "ukwa" bag on his laps, and that Mike Mulena instructed the person to open it. When opened, DW3 had observed a piece of suspected elephant ivory, and Mulena had asked the men if they had documents authorising them to be in possession of the said suspected elephant ivory. He told the court that they said that they had no documents, and they were apprehended and taken to Chilanga for further investigations, and were handed over to DW2.

DW3 further in his testimony stated that was called to the Subordinate Court to testify in 2017, and that in 2019, he was informed that he needed to testify before this court over the same matter.

In cross examination, DW3 stated that he was not aware of the outcome of the matter before the Subordinate Court. He stated that he did not recall having testified before the Subordinate Court that the plaintiffs hired a taxi. He could not recall what time they had arrived at Chaisa Filling Station, as he did not have a watch, although it was in the afternoon. He agreed that he did not see DW1 scratch her head, but he saw Muchawa do so.

DW3 stated that he saw the bag in the car, although he could not recall what colour it was, stating that time had passed. He testified that the oldest of the three (3) Mathew, the 2nd plaintiff, sat in the middle, but that he did not recall on which side the 1st plaintiff sat.

The last witness called by the defendant was Muchawa Muchawa, also an Investigations Officer at the National Parks and Wildlife. He was part

of the team that apprehended the plaintiffs at Chaisa Filling Station. He confirmed DW1 and DW3's evidence that DW1 left Chaisa Filling Station in a taxi, and that she returned with the suspects. DW4 further confirmed that there were three (3) men in the back of the vehicle when DW1 returned with the taxi, and that she went to the ATM on arrival.

He stated that DW1 gave her the sign by scratching her head, and he gave the sign to DW3. Thereafter, DW4, DW3, Mike Mulena, Kamwi and a police officer that had accompanied them approached the taxi. He confirmed DW3's evidence that the man sitting in the middle of the back seat had a sack bag on his laps, commonly known as "ukwa" bag. Further, that Mulena told the man to open it, and he saw a suspected piece of elephant ivory, and the men were apprehended and taken to Chilanga, where they were handed over to DW2.

DW4, like DW3 told that the court that he testified before the Subordinate Court on the criminal charge, and that he was also informed in November, 2019 that he had to testify before this court. He identified pages 4-5 of the defendant's bundle of documents as the apprehension report that he prepared.

When cross examined, DW4 testified that he had worked for the National Parks and Wildlife for eleven (11) years, out of which he had served for six (6) years under operations, in the lower Zambezi National Park. DW4 did not know for how long the plaintiffs were in custody before they were charged or were granted police bond, or when they appeared in court. He reiterated that the sign was that DW1 would scratch her head as a signal that she had the elephant ivory.

On how far away DW4 was from DW1, he stated that it was about four (4) metres away, and that he was seated in the front seat of the car that he was driving. He also testified that the vehicle was parked in front of the ATM where DW1 went. DW1 stated that he did not know the outcome of the matter before the Subordinate Court.

I have considered the evidence and the submissions that were filed by the defendant. It is common cause that the three (3) plaintiffs were apprehended at Chaisa Filling station on 20th April, 2016, on the allegation that were in possession of elephant ivory without authority to do so. It is also common cause that the plaintiffs were charged and arrested and were prosecuted for the offence of unlawful possession of a prescribed trophy contrary to **Section 130 (2) of the National Parks and Wildlife Act, No 14 of 2015 of the Laws of Zambia.**

It is not in contention that all the plaintiffs were acquitted of that charge. The question is whether they are entitled to the reliefs claimed? I will start with the claim for malicious prosecution.

The defendant in the submissions refers to malicious prosecution as a tort whose foundation lies in the abuse of the court process by wrongfully setting the law into motion. That the tort exists to discourage the perversion of the machinery of justice for an improper purpose. Reliance is placed on the learned author **Margaret Brazier, Street on Torts, 9th Edition, London Butterworths, 1993** at page 476 where it is observed that;

“The tort of malicious prosecution is not regarded with favour by the courts because it runs counter to the policy of freedom

to prosecute suspected criminals and to the interest in bringing litigation to a close”.

The defendant also submits that four (4) elements have to be established in order for the tort of malicious prosecution to be proved. These are named as;

1. *There must be a prosecution by the defendant, that is the law was set into motion.*
2. *The prosecution must end in the plaintiff's favour.*
3. *The prosecution was instituted without reasonable and probable cause.*
4. *The prosecution was instituted maliciously.*

The defendant relies on the case ***Stapley v Annets*** ⁽⁵⁾ in submitting that the burden is on the plaintiffs to prove that they were maliciously prosecuted. It is submitted that Lord Denning in that matter stated as follows;

“In an action for malicious prosecution, the burden is on the plaintiff to prove malice and lack of reasonable and probable cause. If the defendant denies it, it is not the practice to require the defendant to give particulars of his denial. It is only if he puts forward a positive allegation, that he should be required to give particulars of it”.

The defendant concedes that the first two (2) elements of the tort of malicious prosecution have been established, as it has been shown that the plaintiffs were charged and arrested, and thereafter prosecuted for the offence of unlawful possession of a prescribed trophy, and they were

acquitted of that charge. The defendant however argues that the plaintiffs have not established that there was want of reasonable and probable cause for their prosecution.

Halsbury's Laws of England, 5th Edition, Volume 97 at paragraph 672 states that;

“A malicious prosecution is an abuse of the process of the court by wrongfully setting the law in motion on 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 claimant’s favour. The claimant must also prove damage”.

The evidence on record shows that the plaintiffs were apprehended at Chaisa Filling Station and they were charged and arrested with the offence of unlawful possession of a prescribed trophy, contrary to **Section 130(2) of the Zambia Wildlife Act No 14 of 2015**. It is also on record that they were prosecuted for the said offence, and were acquitted. Therefore, the first two (2) elements of the tort of malicious prosecution have been satisfied.

The next element of the tort, is that there was lack of reasonable and probable cause for the prosecution. As to what constitutes reasonable and probable cause, the defendant relies on the case of **Claude Samuel Gaynor v Cyril Robert Cowley** ⁽⁶⁾ where it was stated that it is a genuine belief, based on reasonable ground, that a criminal offence has been committed.

It is submitted that key in what constitutes reasonable and probable cause, is that the defendant has an honest belief that the accused has committed the offence. That in this case, the plaintiffs were in possession of a prescribed trophy which constitutes a criminal offence as provided in **Section 130(2) of the Zambia Wildlife Act No 14 of 2015**. Further, that in the case of ***Abrath v The North Eastern Railway Company*** ⁽²⁾ the court noted that;

“It is not enough for the plaintiff to show, in order to support the claim which, he has made, that he was innocent of the charge, upon which he was charged. He has to show that the prosecution was instituted against him by the defendant without any reasonable and probable cause, and with malicious intention in the minds of the defendant, that is, not with the mere intention of carrying the law into effect, but with an intention which was wrongful in fact. It has been decided over and over again that all three points must be established by the plaintiff, and the burden of each of them lies upon the plaintiff”.

As seen from the evidence that was adduced in this matter, the plaintiffs allege that they just boarded a taxi in which there was a woman, and when the driver of the taxi went and stopped at the ATM at Chaisa Filling Station, the Wildlife Officers who were in the company of a police officer went and opened the vehicle and apprehended them. The plaintiffs contend that they did not see the “*ukwa*” bag that they were shown in Chilanga which contained the ivory, while they were in the vehicle. Further, that they were made to sign statements that they knew nothing about.

The witness DW1 was the key witness in establishing reasonable and probable cause for the prosecution. She testified that she worked undercover, posing as a buyer for the elephant ivory, after she was tipped by members of the public that there were people who were selling the said elephant ivory. This witness narrated to the court that after she was commanded to go and apprehend the sellers of the ivory, she had booked a taxi, and she was given a phone number for the alleged sellers.

DW1 testified that when she reached Chaisa Filling Station, as guided by the sellers, she met the 1st plaintiff who told her that the 3rd plaintiff would join them, and take them to where the ivory was. Further, that after the 3rd plaintiff joined them, he led them to the 2nd plaintiff who produced the ivory, and they negotiated a price for it. The plaintiffs were apprehended after DW1 got out of the taxi on the pretext that she was going to the ATM to withdraw the money to pay for the ivory.

DW3 and DW4 confirmed DW1's evidence that the 2nd plaintiff had the sack containing the elephant ivory in the taxi. DW3 and DW4 even stated that the 2nd plaintiff sat in the middle of the back seat of the taxi with the sack on his laps. When cross examined, the evidence given by DW1 as to how she had done the transaction with the plaintiffs when she posed as a buyer, was discredited in any way. Even the testimonies of DW3 and DW4 who were at the scene equally went unchallenged.

The witnesses DW1, DW3 and DW4 therefore established that the plaintiffs acted in concert when they sold DW1 the prescribed trophy, being the elephant ivory, when they had no licence to deal in it. DW2 arrested and charged the plaintiffs, and he had the elephant ivory verified. Upon verification that it was elephant ivory, DW2 warned and cautioned the plaintiffs, as accused persons.

DW2 referred to the statements that the plaintiffs gave in response to the charge, which are at pages 9-10, 11-12 and 13-14 of the plaintiffs' bundle of documents wherein they admitted the charge. Following the Warn and Caution, the plaintiffs were arrested and they were later prosecuted for the offence, which as, has already been seen, they were acquitted of. The evidence on record reveals that there was an honest belief that the plaintiffs had committed a criminal offence hence, their apprehension, arrest, charge and subsequent prosecution.

The fact that they were acquitted of the criminal offence does not entail that there was want of reasonable and probable cause, as the requirement is that for there to be lack of reasonable and probable cause, the defendant should not have had an honest belief that the plaintiffs had committed the offence.

In the case of *Dallison v Caffey* ⁽⁴⁾ it was stated that;

"It seems to me that the positive identification by Miss Phillips, coupled with the statement by James Long (which I think can be taken into account despite the fact that he afterwards retracted it) and the phantom "Jock" all show that the defendant had reasonable and probable cause for prosecution. True, it is that the plaintiff was innocent all the time, but that is no reason for making a police officer liable when he has only done his duty in investigating a crime".

The evidence on record showing that there was honest belief that the plaintiffs had committed the offence, the claim that there was lack of reasonable and probable cause fails.

Coming to the element that the prosecution was maliciously carried out, the defendant denies that this is the position. Reliance is placed on the case of ***Mubita Mbangwa v The Attorney-General*** ⁽⁸⁾ where it was stated that malice exists where there is some motive on the part of the accuser than the desire to bring to justice, the person believed to be guilty. The defendant submits that the plaintiffs were arrested, charged and prosecuted, as they were in possession of a prescribed trophy, and no malice in their prosecution has been established.

Paragraph 696 of Halsbury's Laws of England, Vol 25, 3rd Edition states that;

“The malice which a plaintiff in an action for malicious prosecution or other abuse of legal proceedings has to prove, is not malice in its legal sense, that is such as may be assumed from a wrongful act done intentionally, without just cause and excuse, but malice in fact-malus animus-indicating that the defendant was actuated either by spite or ill will against the plaintiff”.

What the evidence on record shows is that the plaintiffs were found with a prescribed trophy without a licence, and that was the basis of the arrest. While they argued that they did not see the sack in the taxi that had the prescribed trophy, which they were only shown in Chilanga, they did not discredit the evidence of DW1, DW3 and DW4 that they had the said prescribed trophy. The plaintiffs have not established malice in their prosecution, and the claim that they were maliciously prosecuted fails.

Halsbury's Laws of England, Vol. 97, 5th Edition, at Paragraph 733, states as follows:

"733. Damage.

To support a claim for damages for malicious prosecution, one of three heads of damage must be shown. The damage may be:

(1) damage to a man's fame, as where the matter of which he is accused is scandalous; or

(2) damage done to the person, as where his life, limb or liberty is endangered; or

(3) damage to his property as where he is put to the expense of acquitting himself of the crime with which he is charged.

The claimant must show that any damage to fame suffered was a necessary and natural consequence of the charge itself, and as regards the second head of damage, that actual loss of liberty was suffered. Once one of these heads of damage is proved, damages are at large and may include compensation for loss of reputation and injured feelings."

The claim for malicious prosecution having failed, it follows that the claims for harassment, embarrassment, traumatic stress and damages for loss of business and income equally fail as they were dependent on the success of the claim for malicious prosecution.

Coming to the claim for false imprisonment, the defendant refers to the definition in *Winfield and Jolowicz on Tort, 16th Edition, Thompson Sweet & Maxwell, London*, which is;

"The infliction of bodily restraint which is not expressly or impliedly authorized by law".

With regard to the elements constituting the tort, **Clerk & Lindsell on Torts, 20th Edition, Sweet & Maxwell, London, 2010** is referred to, which lists them as;

“1. The fact of imprisonment; and

2. The absence of lawful authority to justify the imprisonment and for these purposes, imprisonment is complete deprivation of liberty for anytime, however, short, without lawful cause”.

That these elements were reiterated in the case of **Bird v Jones** ⁽¹⁾. The defendant submits that there was lawful cause to arrest the plaintiffs in this matter and restrain their liberty, as **Section 130(2) of the Zambia Wildlife Act No 14 of 2015** prohibits the unlawful possession of prescribed trophies. In the case of **Attorney General and three others v Masauso Phiri** ⁽¹³⁾, it was stated that;

“False imprisonment consists in unlawfully and either intentionally or recklessly restraining another person’s freedom of movement from a particular place..... Further, there is no false imprisonment if a person is arrested in circumstances where arrest is justifiable or if there is reasonable and probable cause for the restraint”.

Further, in the case of **Richman Chulu v Monarch (Z) Limited** ⁽¹⁰⁾ it was held that;

“Reporting crime and even signing charge sheet which may lead to an arrest is insufficient to make the giver of the information liable for the imprisonment even if there is

insufficient evidence to prosecute, unless the report was made mala fide”.

In the case of *Mubita Mbanga v The Attorney-General* ⁽⁸⁾ the court stated that;

“A lawful arrest of course is no false imprisonment”.

In proving false imprisonment, the plaintiff need only establish the fact of imprisonment, and the onus is upon the defendant to justify the detention. In the case of *Attorney-General v Kakoma 1975 ZR 211* it was held that;

“The fact of detention having been established, the onus was on the defendant to justify such detention, on the facts, manifestly this onus had not been discharged”.

In this case, the plaintiffs have shown that they were apprehended and detained in police custody, and that they were prosecuted for the offence of unlawful possession of a prescribed trophy. They have however not established that this was unlawful, as there was basis. When one peruses the investigations diary at pages 2-4 of the defendant’s bundle of documents, they will note that after the plaintiffs were apprehended 20th April, 2016, they were warned and cautioned on 22nd April, 2016, and thereafter arrested for the offence of unlawful possession of a prescribed trophy. This was after the ivory had been certified by the veterinary doctor.

Further, on the same day, 22nd April, 2016, they were granted police bond. Therefore, the plaintiffs were informed of the reason of their arrest without undue delay, and they granted police bond after they were

charged and arrested. There was basis for their arrest, being reasonable and probable cause. The claim for damages for false imprisonment fails.

The plaintiffs also claim damages for defamation of character. The defendant refers to the definition of defamation in **Black's Law Dictionary, 4th Edition** at page 581 as;

"The offence of injuring a person's character, fame or reputation by false and malicious statements".

It is submitted that the arrest of the plaintiffs was carried in the Zambia Daily Mail newspaper dated 30th April, 2016. The defendant's contention is the said publication does not amount to defamation, as the plaintiffs were indeed nabbed for being in unlawful possession of a prescribed trophy, and they were subsequently prosecuted for the same. The defendant therefore pleads the defence of justification.

Reliance is placed on the case of **Joseph Banda v Zambia Publishing Company Limited** ⁽⁹⁾ where it was stated that;

"The defendant in its defence, although not in exact words has pleaded justification contending that the words complained of were true in substance and fact. To an action for libel a plea, of justification is a complete defence. But to establish this defence, the defendant must establish and prove that the defamatory imputation is true in substance and in fact".

In this case, the article complained of by the plaintiffs is at page 21 of the plaintiffs' bundle of documents, dated 30th April, 2016. With regard to the plaintiffs, the article states as follows;

“Mr Kalembwe says the DNPW which falls under the Ministry of Tourism and Arts has arrested three male suspects and recovered one cut piece of ivory weighing two kilogrammes at Chaisa’s Total Service Station in Lusaka. He named the three as Mathews Mwale, Jonathan Kunda and Alfred Matale all Zambians aged 44, 35 and 34 respectively”.

In order to establish the tort of defamation, the plaintiff has to prove the following elements;

1. That the statements in the natural and ordinary meaning were defamatory.
2. That the statements issued referred to them.
3. The statements were published, and lowered their reputation in right thinking members of society.

In the case of ***Collins v Jones*** ⁽³⁾ it was held that the claimant in the statement of his case must be able to set out with reasonable certainty the alleged defamatory words. This position was reiterated in the case of ***Suzen Mwela Nkunde v Cetzam Financial Services Limited*** ⁽¹²⁾. In this case, the words complained of have not been stated, and the defendant has raised the plea of justification stating that indeed the plaintiffs were found in unlawful possession of a prescribed trophy, and they were apprehended.

I have already stated that DW1, DW3 and DW4 who testified that the plaintiffs were in possession of the prescribed trophy, and they had no authority to do so when they were apprehended, were not challenged on this evidence. The newspaper article complained of reported what had

transpired, which the plaintiffs do not dispute. Therefore, the defence raised by the defendant succeeds.

It will be noted that the claim for injury to the plaintiffs' reputations could be awarded as damages, if the claim for malicious prosecution had succeeded, as damage resulting from the malicious prosecution, includes injury to reputation. The defence of justification having succeeded, the claim for defamation of character fails.

The plaintiffs also claim damages for assault and battery. In the case of **Collins v Wilcock** ⁽³⁾, Robert G. Off stated that;

“the law draws distinction between assault and battery. That an assault is an act which causes another to apprehend the infliction of force on his person; a battery is the actual infliction of unlawful force on a person. Both assault and battery are forms of trespass to the person...”

In this case, while the plaintiffs in the statement of claim state that they claim damages for assault and battery, there are no facts that have been pleaded to support that claim. There are medical records for the 2nd plaintiff in the plaintiffs' bundle of documents which show that he was treated at UTH on 30th April, 2016 for syncope attack, which in simple medical language is fainting. There is no evidence on record to show that the defendant assaulted the plaintiffs leading to the 2nd plaintiff fainting.

By his own testimony, the 2nd plaintiff told the court that he was released on police bond on 25th April, 2016, five days before he fainted. Thus, there is no evidence to prove the battery and the assault, and the claim fails. All the claims having failed, the matter is dismissed with costs to

the defendant to be taxed in default of agreement. Leave to appeal is granted.

DATED AT LUSAKA THIS 18th DAY OF MAY, 2020

S. Kaunda
S. KAUNDA NEWA
HIGH COURT JUDGE