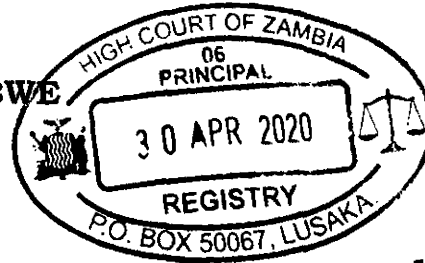


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

2015/HP/0482

BETWEEN:

ISAAC RONALD KAPAMBWE



PLAINTIFF

AND

**KELVIN KANDELA
OSCAR MOONO
YOLANTA HIMOONGA
ATTORNEY GENERAL**

**1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT
4TH DEFENDANT**

Before:

The Hon. Mr. Justice Charles Zulu.

For the Plaintiff:

Mr. M. Mwansa & Ms. N. Nkanzi of Mosha & Company.

For the Defendants:

Ms. D. Mulondiwa, Assistant Senior State Advocate, Attorney General's Chambers.

JUDGMENT

Cases referred to:

- 1. Daniel Chizoka Mbandangoma v The Attorney General (1979) ZR 45.***
- 2. Attorney General v Phiri (SCZ Appeal No. 161/2014).***
- 3. Ratcliffe v Evans (1892) 2 Q.B. S24, S27.***
- 4. Richman Chulu v Monarch (Z) Limited (1983) Z.R. 33 (H.C).***
- 5. The People v Austin Liato (SCZ Appeal No. 291/2014).***

Legislation referred to:

- 1. The Constitution of Zambia Chapter 1 of the Laws of Zambia.***

2. The Criminal Procedure Code Chapter 88 of the Laws of Zambia.

The Plaintiff, Isaac Ronald Kapambwe took out an amended writ of summons and a statement of claim dated, April 16, 2015, claiming the following reliefs:

- 1. Damages for wrongful arrest;**
- 2. Damages for loss of business incurred by the plaintiff due to the detention and subsequent court attendance amounting to USD 28, 045, 000.00;**
- 3. Damages suffered as a result of the 1st and 2nd Defendant's malicious statement that the Plaintiff had died;**
- 4. Any other relief that the court may deem fit; and**
- 5. Costs.**

The Plaintiff sued the four Defendants and averred as follows, that: the first Defendant, Kelvin Kandela and the second Defendant, Oscar Moono were at the material time Inspectors in the Zambia Police Service based at Lusaka Central Police Station; the third Defendant, Volanta Himoonga was an Assistant Superintendent, and Officer-In-Charge at Lusaka Central Police Station; the fourth Defendant was averred to be the "legal representative of the first, second and third Defendants".

The Plaintiff testified and called one witness. The Plaintiff described himself as a businessman engaged in the business of general supplies in and outside of Lusaka. He said he was the Managing Director of Lwishishe Investment Limited.

The Plaintiff testified that in August 2014, he was approached by a gentleman named Brian Chisenga, who availed to him a business plan. The Plaintiff said Mr. Chisenga told him that he had a contract to supply cell phones from India to Zambia, but had a budget deficit. The Plaintiff said he lent Mr. Chisenga the sum of K400, 000.00, to enable him dispatch the cargo to Zambia.

The Plaintiff said the consignment was expected to be delivered to Zambia on February 9, 2015. He said Mr. Chisenga was supposed to organize transport from Durban to Lusaka, and his role was to secure a place where to store the cargo. He said the truck and trailer carrying the goods, named *Cargo 2 Congo* arrived in Lusaka on February 10, 2015 around 02:00 hours, and that by then he had already secured a place where to keep the truck, at Nyimba Investment Limited, belonging to Mr. Patel.

The Plaintiff said after the truck and goods were stored at Mr. Patel's premises, Mr. Chisenga made errands to secure another place where to offload the cargo. He said when Mr. Chisenga had secured a place where to offload the goods, he advised him to only send another horse truck to tow the trailer with the cargo, and leave its horse. He added that he did this because his creditors where he borrowed the money he advanced to Mr. Chisenga waited security for the loan. He said, using another horse truck from West East Farms, the trailer with the cargo was removed from Mr. Patel's premises on February 13, 2015.

The Plaintiff added that on February 14, 2015 while driving along Kafue Road, he was surprised to be stopped by Police Officers and to be told that he was under arrest for stealing a truck, *Cargo 2 Congo*. He said he was taken to Lusaka Central Police Station, where he was detained and all his cell phones were grabbed from him. He said the Police Officers introduced themselves as Inspector Kelvin Kandela and Inspector Oscar Moono. He said he was released on Police Bond on February 17, 2015, and was advised to appear before the Subordinate Courts (Lusaka) on February, 20, 2015 for the offence of Theft of Motor Vehicle.

According to the Plaintiff, when he went to Court on February 20, 2015, his case was never called, and that when he engaged a prosecutor named Ndopu, his docket was never located. He said even on February 21, his case was never called, and no docket was ever found.

The Plaintiff also recounted that when he was released on February 17, he went to see Mr. Patel to check on the horse truck (*Cargo 2 Congo*), and was advised that the same was collected by the Police and others on the day of his arrest. He said this prompted him to report to Police Headquarters. He explained that, that was the same truck he was alleged to have had stolen.

The Plaintiff alleged that during the time of his detention, his Company, Lwishishe had some running contracts; and that Police Officers who had custody of his phone were answering to his calls

telling his customers that he was dead. He said one of the customers was a South African Company called Markoe Trading. He said he was supposed to supply 50, 000 metric tonnes of white maize worth \$14, 500, 000.00. He made reference to a copy of an agreement allegedly made between Lwishishe Investment Limited and Markoe Trading dated November 14, 2014.

The Plaintiff added that upon his release and when he went through his cell phones, he discovered that a call from South Africa came in, and when he returned the call to the South African Company, he was told that he was a thief and that the Police had advised them that he was dead. He said Markoe Trading later sent an email to him to terminate the contract. He made reference to the letter date March 5, 2015; here below reproduced:

Dear Isaac

I hereby wish to inform you that I no longer want to do business with Lwishishe Investments LTD or you in person.

I called you on 15th February, 2015 on your number 00977347712 and someone answered and said you are dead and you are in UTH mortuary but before going there you should pass through central police here in Lusaka because you are a thief.

I therefore decided to cancel all the contracts we entered with you as company or anything to do with you in person. Because you are not trustworthy.

I am really sorry that it should end like this.

Kind regards

Manna Brink

Markoe Trading

The Plaintiff also stated that his Company, Lwishishe had contracts with D.M Bonds of Zimbabwe for supply of 40, 000 metric tonnes of white maize valued at \$12.6 Million, but could not supply the maize because of his arrest. He made reference to an Authorizing Importation Permit dated December 13, 2014.

According to the Plaintiff most of the relevant documents went missing when Court Bailiffs raided his home. He exhibited the Seizure Report in a matter between *Mwange & Others v Lwishishe Investment Company Ltd Comp/415/2015*, dated January 20, 2017.

The Plaintiff added that the other contract he lost was for Zim Sources worth \$945,000.00, as a result of his arrest. He said the total value for all the contracts was \$28, 045, 000.00. He alleged that the Defendants were liable to pay his claims.

In cross-examination, the Plaintiff admitted that Lwishishe Investment Limited was a company at law, but he was making the claims as a shareholder. He said he never saw the cell phones that were imported by Mr. Chisenga, and that he was not sure whether the truck *Cargo 2 Congo* was stolen or not. He said no payment was made by Markoe Trading under the said contract. He said he was supposed to be paid 50% of the contract sum on November 4, 2014. He denied the allegation that he sold the subject truck to Mr.

Mohammed Saeed (DW1). He alleged that the said horse truck was collected from Nyimba Investment Limited premises by the first and second Defendants.

The Plaintiff's witness was Mr. Ronas Mwange, he was basically called to confirm the arrest, detention and release of the Plaintiff on Police Bond.

In defence, the Defendants settled for a joint defence, filed into Court by the Attorney General's Chambers. All allegations of liability were denied. It was averred that the first and second Defendants did not arrest the Plaintiff, but apprehended him as a suspect in order to help them locate the trailers and lime that was reported missing. And that the Plaintiff was detained for further investigations, as such no warn and caution was administered.

The defence called two Defence Witnesses (DW), and the first Defence Witness (DW1) was Mohammed Saeed Essa, the Transport and Logistics Manager, Nyimba Investment Limited. He recounted that in the past, the Plaintiff was an employee of Nyimba Investment Limited, working as a personal driver.

Mr. Essa stated that on February 9, 2015, he was approached by the Plaintiff, and told him that he had some friends who were selling a truck and trailer. He said he told the Plaintiff that he was interested to purchase subject to physical inspection. He said the truck and

trailer from South Africa was labeled *Cargo 2 Congo*, laden with goods covered with a tarpaulin was taken to his premises in Makeni. He said the Plaintiff was with his colleagues. He said, he told the Plaintiff and his colleagues that he was going to purchase the truck and trailer once it was cleared in Zambia, and the agreed purchase price was \$70,000.00. He said the next day he made a down payment of \$35,000.00 to the Plaintiff and his friend, Michael Phiri and another. He added that after making the said payment, the Plaintiff requested that the trailer be released to enable them offload the goods elsewhere. He said the trailer was covered with a tarpaulin, and did not know the nature of the said goods. He said another horse truck was brought to tow the trailer.

DW1 further stated that he expected the trailer to be returned to him the following day, but this was not done. He said before he could make a follow-up, he was contacted by the Police, in particular by Inspector Kandela. He said Inspector Kandela informed him about a missing truck. He said he then narrated to Inspector Kandela events leading to how he came in possession of the said truck, and gave them details of the Plaintiff. He added that Mr. Gulam Patel never told him anything concerning the subject truck as regards the offloading of goods in the yard.

In cross-examination, DW1 said, the sale agreement was not reduced in writing; neither did he sue the Plaintiff to recover the down

payment. He said, he was only informed by the Police that the truck and trailer was stolen. He said the Police took possession of the truck.

DW2 was Kelvin Kandela, the first Defendant, a Police Officer. He said in 2014, he was assigned to the Anti-Motor Vehicle Theft Team. He said on February 12, 2015, his office received a report of a stolen truck and goods in transit, the property of a South African based company, *Cargo 2 Congo* destined for Congo. He said the report was made by an employee of *Cargo 2 Congo*, Kebby Cheelo. He said through his investigations he came to discover that the truck was sold to Mr. Mohammed (DW1) of Makeni. He said when he interviewed DW1, DW1 disclosed to him that he bought the truck from the Plaintiff. He said DW1 led him to the Plaintiff, leading to his arrest on February 14. He said at the time of arresting the Plaintiff, he was in a drunken state and could record a statement from him. He said he arrested and detained the Plaintiff with the offence of theft of the truck and goods in transit. He said when the Plaintiff was re-interviewed on the third day; it led to the apprehension of his colleague and recovery of the goods that was on the trailer.

Mr. Kandela denied allegations by the Plaintiff that while the Plaintiff was in detention he answered calls on the Plaintiff's phone, telling callers that the Plaintiff was dead.

In cross-examination, Mr. Kandela said the Plaintiff's interview was under *warn and caution*. He said the Plaintiff was never taken to Court. He said the case was still pending. According to him, the case

was not taken to Court due to the disappearance of the Plaintiff. He said the goods (lime) was never recovered.

I only received submissions from the Plaintiff dated February 12, 2019, and none from the Defendants. And as regards wrongful arrest: it was noted that the Plaintiff was detained on February 14, 2015, and released on February 17; it was therefore submitted that the detention of the Plaintiff was contrary to section 33 of the **Criminal Procedure Code Chapter 88 of the Laws of Zambia**, which provides:

33. (1) When any person has been taken into custody without a warrant for an offence other than an offence punishable with death, the officer in charge of the police station to which such person shall be brought may, in any case, and shall, if it does not appear practicable to bring such person before an appropriate competent court within twenty-four hours after he was so taken into custody, inquire into the case, and, unless the offence appears to the officer to be of a serious nature, release the person, on his executing a bond, with or without sureties, for a reasonable amount, to appear before a competent court at a time and place to be named in the bond: but, where any person is retained in custody, he shall be brought before a competent court as soon as practicable. Notwithstanding anything contained in this section, an officer in charge of a police station may release a person arrested on suspicion on a charge of committing any offence, when, after due police inquiry, insufficient evidence is, in his opinion, disclosed on which to proceed with the charge

The case of **Daniel Chizoka Mbandangoma v The Attorney General (1979) ZR 45**, was resorted to in which it was held:

Under section 33 of the Criminal Procedure Code, the release on bond of a person arrested without a warrant is

mandatory if it does not appear practicable to bring the person concerned before an appropriate competent court within 24 hours of his being taken into custody unless the offence is one of a serious nature.

As regards false imprisonment, reference was made to the case of Attorney General v Phiri (SCZ Appeal No. 161/2014) in which it was held:

False imprisonment consists in unlawfully and either intentionally or recklessly restraining another person's freedom of movement from a particular place. The restraint must be total for a time, however short.

I should interpose to state that in the above cited case it was further held:

There is no false imprisonment if a person's arrest is justifiable or if there is reasonable and probable cause for restraint.

It was submitted that it was unlawful for the first and second Defendants to unlawfully arrest the Plaintiff. According to the Plaintiff's Counsel, the failure by the State to submit the docket to the Court meant that the State could neither secure a *nolle prosequi* nor a conviction.

As regards the claim for malicious statement, the following quote was vouched, reported to have been given in the case of Ratcliffe v Evans (1892) 2 Q.B. S24, S27 thus:

As a general rule it is an actionable wrong to make a false statement respecting any person or property with the result that other persons deceived thereby are induced to act in a manner which causes loss to him.

The Plaintiff's Counsel repeated the Plaintiff's testimony in this regard. And regarding the alleged termination of contracts on account of malicious statements by the first and second Defendants to his customers, it was submitted that notwithstanding that the contracts aforesaid were contracted by Lwishi Investments Limited, the Plaintiff as a shareholder was entitled to profits. And that he was therefore entitled to all the claims.

I have carefully considered the evidence adduced and the submissions made hereof. I will proceed with my determination in the order the Plaintiff outlined his claims, starting with the claim for wrongful arrest and false imprisonment. First, I am content that on or around February 12, 2015, DW2, Kelvin Kandela received a complaint of a stolen truck and trailer together with its goods. The truck and trailer was South African based, owned by *Cargo 2 Congo*. Investigations were instituted which led DW2 to DW1, Mr. Essa, who confirmed that he bought the subject truck from the Plaintiff. Consequently, the Plaintiff was on February 14, arrested and detained for the offence of Theft of Motor Vehicle.

I am compelled to make reference to the case of **Richman Chulu v Monarch (Z) Limited (1983) Z.R. 33 (H.C)** in which it was held:

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

Section 26 of the **Criminal Code Procedure**, empowers any Police Officer to arrest any person whom he/she suspects upon reasonable

ground of having committed a cognizable offence without an order from a Magistrate and without a warrant of arrest. However, reference should also be made to Article (13) (1) (e) of the Constitution of Zambia, which provides:

13 (1) A person shall not be deprived of his personal liberty except as may be authorised by laws in any of the following cases:

...

(e) Upon reasonable suspicion of having committed, or being about to commit, a criminal offence under the Law in force in Zambia.

The question that follows is whether there was reasonable suspicion and probable cause to justify the arrest and detention of the Plaintiff. As to the meaning of reasonable suspicion, regard is had to the case of The People v Austin Liato (SCZ Appeal No. 291/2014) wherein Malila J.S., had this to say:

Reasonable suspicion is not arbitrary, there ought to be factual basis upon which it is achieved.

Turning to the present case, I am satisfied that the arrest and detention of the Plaintiff was anchored on reasonable and probable cause. It is true and probable that the truck and trailer belonging to *Cargo 2 Congo* was stolen. And I find the testimony of DW2, Mr. Essa, to be truthful and reliable that the Plaintiff and his like-minded wrongdoers took the truck and the trailer together with its goods to him for purposes of selling the truck and trailer to him. Clearly, this was an act of theft, and constituted a serious offence. A deal was

reached with Mr. Essa, who agreed to purchase the truck and the trailer at the value of \$70,000.00. He paid \$35,000.00 to enable the Plaintiff and his friends to facilitate customs clearance.

As to whether Mr. Essa ought to have acted diligently or not, that is immaterial, what is material is to assess his credibility, and I hold that Mr. Essa was truthful and reliable, that it was the Plaintiff and his friends that sold the truck and trailer to him. The sale was without the consent of the owner of the truck and trailer. I find no truthfulness in the Plaintiff's narration that his connection to the truck and trailer was in respect of his business dealings with Mr. Chisenga, to whom he allegedly forwarded a loan to enable Mr. Chisenga import cell phones to Zambia from India. It is equally not true that when the truck arrived in Zambia he took it to the premises of Nyimba Investment Limited for safe keeping, what is true is that the Plaintiff took the truck and trailer to his former boss to fraudulently sell the truck and trailer. The goods on the truck were not cell phones, but lime, which the Plaintiff and his friend took elsewhere after Mr. Essa bought the truck and trailer. I therefore find the Plaintiff's testimony regarding his dealing with the truck and trailer allegedly emanating from his alleged transaction with Mr. Chisenga to be fabricated.

The arrest and detention of the Plaintiff was not actuated by malice, but on reasonable and probable cause, based on the confirmation Mr. Essa made truthfully that it was the Plaintiff and his friends that sold him the stolen truck and trailer. Therefore, the claim for

wrongful arrest and false imprisonment is untenable. And while there is no doubt that the Plaintiff was arrested on February 14, and only released on bond on February 17, that does not render the arrest and detention unlawful. It also follows that, the fact that he was not arraigned does not invalidate his arrest and detention. In any event Mr. Kandela stated that the case was still open.

As earlier noted, the credibility of the Plaintiff is seriously questionable, starting with his lies that he only took the truck and trailer to Nyimba Investment Limited for safe keeping when in fact it was a commission of an offence. He took it there in particular to Mr. Essa with a view to sell the same. The Plaintiff was inspired to tell lies because he wanted to exonerate himself from the theft of motor vehicle, and to unjustly enrich himself through falsehood. Therefore, the reliability of his allegations against the first and second Defendants, who are accused to have maliciously dissuaded his clients from having business dealings with the Plaintiff is improbable.

The claims for loss of business from the alleged "contracts" are procedurally fatal; the same were not personally contracted by the Plaintiff, but allegedly by his Company, Lwishishe Investment Limited, a separate entity at law, with the right to sue or to be sued in its own name. The argument by his Advocates that there was nothing irregular because he was entitled to profit as a shareholder is not helpful either. At best it is a machination of imagination and fantasy that Lwishishe Investment Limited or/and the Plaintiff was personally entitled to profit in the sum of USD \$28, 045,000.00.

The claim of \$28, 045,000.00, is colossal, which cannot be granted on account of mere speculation tainted with dishonest.

In view of the foregoing, I come to the conclusion that the Plaintiff's claims are in total dismissible for lack of merit. And I so order.

Costs shall follow the event to be taxed in default of agreement.

DATED THIS 30TH DAY OF APRIL, 2020.



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THE HON. MR JUSTICE CHARLES ZULU