

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

2010/HP/920

BETWEEN:

FRIDAY CHOONGO

AND

THE ATTORNEY GENERAL



PLAINTIFF

DEFENDANT

Delivered in open Court by the Hon. Mr. Justice Mathew L. Zulu, at Lusaka the ... day of, 2020

For the Plaintiff:

Mr. L. Mukumbuta, Legal Resource Foundation

For the Defendant:

Mrs. D. M. Shamabobo, Senior State Advocate

JUDGMENT

Cases referred to:

1. Ahmed Wandu v. Kostic Investments Ltd(selected Judgment No. 30 of 2019)
2. Claude Samuel Gaynor v. Cyril Robert Cowley(1971)Z.R.50
3. Joyce Banda v. The Attorney General(1978) Z.R. 233
4. The Attorney General v. Phiri(S.C.Z. Appeal No. 161 of 2014)
5. Mbandagoma v. the Attorney General
6. Nyambe Lyuwa v. The Council of the University of Zambia(1995) S.J.
7. Anderson Kambela Mazoka and others v. Levy Patrick Mwanawasa and others(2005) Z.R.138(S.C.)

Legislation referred to:

1. The Criminal Procedure Code, Chapter 88 of the Laws of Zambia

Other materials referred to:

1. The Halsbury's Laws of England, Volume 45(4th Edition) 1985, para 1351
2. The Halsbury's Laws of England, Volume 97(5th Edition) 2015, para 725
3. Bullen and Leake, Precedents and Pleadings, Volume 1(17th Edition) Sweet and Maxwell, London, 2008.

The plaintiff commenced this action against the defendants on 26th August, 2010 by way of writ of summons accompanied by a statement of claim seeking the following reliefs.

1. **Damages for person injuries leading to the loss of the plaintiff's right leg(sic);**
2. **Damages for false imprisonment for a period of 3 weeks that the plaintiff was detained;**
3. **Damages for physical and mental pain and shock that the plaintiff suffered;**
4. **Damages for loss of future earnings as a mechanic(the plaintiff was earning between K1,000,000 to K 1,200,000 per month as a mechanic before he lost his leg;**
5. **Damages for malicious prosecution;**
6. **Aggravated and exemplary damages as pleaded;**
7. **Any other relief the court deems fit;**
8. **Interest on the sums found due; and**

9. Costs.

The case pleaded by the plaintiff in his statement of claim is that on 7th October, 2009, while at a named bar in Ng'ombe compound, he was approached by Kamfwa and Simuchembo who are police officers stationed at N'gombe Police. The two accused him of being a very dangerous and notorious criminal involved in a series of robberies within N'gombe Compound. The plaintiff states that while he was trying to comprehend the grounds of arrest, Kamfwa shot him in the right leg. He was taken to the University Teaching Hospital where his leg was amputated on 28th October, 2009 and he was discharged on 4th November, 2009.

After being discharged, he was taken to Ng'ombe Police where he was detained for three weeks before he was taken to court on 27th November, 2009 on a malicious charge of theft of a cell phone which charge he denied. The plaintiff claims that the state entered a *Nolle prosequi* on 23rd March, 2010. He asserts that he was deprived of his liberty and he has suffered personal injuries amounting to the loss of his right leg, physical and mental pain. He further

asserts that he was maliciously prosecuted and he asserts that the particulars of malice are that:

- 1. Falsely accusing the plaintiff of being a very dangerous criminal involved in various robberies within Ngombe Compound when the first and second defendant's had no basis for such allegations;**
- 2. Wrongly charging the plaintiff with the offence of theft of a cell phone whilst knowing very well that the plaintiff did not commit such an offence hence did not warrant that charge or any charge;**
- 3. Failure to release the plaintiff on bond even when the offence which the plaintiff was charged with was a bailable one and the fact that the plaintiff had just lost his right leg at the time of the detention.**

The plaintiff also claims exemplary and aggravated damages because he was randomly and mercilessly shot at without any justifiable cause.

The defendant filed into court his defence on 24th November, 2010. The defendant asserts that the plaintiff had on two previous

occasions been convicted of the offence of robbery and burglary and he had served two sentences of 1 and 3 years respectively. On his release, the Police received several complaints of robbery and burglary and the plaintiff was the main suspect. The police officers then received information that the plaintiff was drinking at a tavern in N'gombe and when they sought to effect a lawful arrest, upon seeing the Police, the plaintiff took flight and was shot in order to effect an arrest. The plaintiff was found with a crow bar and a machete.

The defendant asserts that the plaintiff was taken to court on 27th November, 2009 on a charge of robbery but was discharged when the key witness relocated to a place unknown to the police. The defendant asserts that the prosecution of the plaintiff was not malicious.

The plaintiff in his reply dated 28th February, 2011 joined issue with the defence.

At trial, the plaintiff opened his case as the first witness and he was PW1. He testified that on 7th October, 2009, he was in N'gombe

at a house where they sell beer. Three police officers went to the house and one of them entered the house and hit him with a gun in the head and told him to go outside where the other two were. The Police officers told him that he wanted to trouble them which he refused and one of them fired a shot on his knee. People who were present wanted to start fighting with the Police and they asked why they had shot him. The Police then fired in the air and they then carried the plaintiff and put him in a vehicle and took him to N'gombe Police and later to the University Teaching Hospital.

PW1 testified that he was admitted at UTH and on 21st October, 2009 he consented to his leg being amputated as his bone was badly damaged. He was discharged on 4th November, 2009 and upon being discharged he was taken to Ng'ombe Police Post and kept in the cells until 11th November, 2009 when they took him to CID room and asked other people if the plaintiff was one of the people they had stolen things with. The other people refused and the plaintiff was taken back to the cells. They then charged him with the offence of theft of a phone. He was taken to court on 27th November, 2009 and later remanded at Kamwala Remand. On 23rd

March, 2010, a Nolle Prosequi was entered and he was told to go home.

When cross examined PW1 confirmed that he never had any prior interactions with the officer who shot him. He confirmed that he used to get K1, 200 per month before he was shot but he never used to get receipts or any document because the garage was owned by an individual. He confirmed that he was not informed that he could obtain police bond.

The plaintiff's second witness was Fredrick Chileshe and he was PW2. He testified that on 7th October, 2009 three Police officers went to a house where beer is sold in Ng'ombe. One entered the house where they sell beer. It was his evidence that he was outside the house. The Police officer came out of the house with the plaintiff and he had a gun. The Police officer fired at the plaintiff in the right leg. PW2 and a group of people wanted to find out why they had shot at the plaintiff but the police just fired in the air and chased them away. Then a vehicle a Nisan Hard Body came and they threw the plaintiff in the vehicle and they left.

During cross examination PW2 confirmed that the three Police officers were not wearing uniforms.

This marked the close of the plaintiff's case.

The defendant called two witnesses. The first witness was Joseph Simuchembo and he was DW1. He testified that on 7th October, 2009 he received information that a certain man who had robbed a woman had been spotted in Ng'ombe area. DW1, Inspector Kafwa, and a Mr. Banda from neighborhood watch organized themselves, jumped into a vehicle driven by Sakaumba, the former officer in charge.

DW1 testified that when they reached the place where the plaintiff was spotted, since the officer in charge was in uniform, he remained in the vehicle and the three of them positioned themselves to surround the structure made out of poles and empty sacks of cement and mealie meal. DW1 testified that Mr. Kamfwa went in while he was opposite him on the right side about 2 to 3 meters from Mr. Kamfwa. Mr. Banda was positioned behind the structure. He then heard Mr. Kamfwa ordering everyone inside to lie down.

Shortly he saw Mr. Kamfwa retreating backwards. He then saw someone whom he later came to know as the plaintiff coming out of the main gate with a sack.

He then unfolded the sack and a machete was removed and the sack dropped and he started advancing towards Mr. Kamfwa. Mr. Kamfwa then fired a shot in the air but the plaintiff continued advancing towards him and so he fired the second shot in the air but because the plaintiff was not retreating, it was at that point that Mr. Kamfwa sensed danger as he was 3 to 5 meters away hence he shot him in the right leg and he fell down. They then took the plaintiff to UTH where he was admitted for 2 to 3 weeks.

DW1 testified that when the plaintiff was discharged, Inspector Kamfwa called him when recording the warn and caution. It was his evidence that they had asked the plaintiff to provide working sureties as the offence for which he was charged of Robbery was bondable but he didn't bring any. He testified that the plaintiff was charged when he was discharged as he could not be charged after the incident of 7th October, as he needed urgent medical attention.

Mulenga Jackson Kamfwa was the defendants' second witness and he was DW2. He testified that he is a police officer holding the rank of Detective Inspector. It was his evidence at the material time he was in charge of the criminal investigations department. He testified that Detective Inspector Simuchembu received information that the person they were looking for was spotted in N'gombe at house where beer is brewed. It was his evidence that a woman had gone to their office to complain that she was attacked by a person she knew as Friday Choongo who stabbed her and grabbed her phone.

DW2 testified that because they had opened a docket, they organized themselves i.e. two police officers who were himself, Simuchembo and one neighborhood watch officer. He told the neighborhood watch officer to go behind the structure, Mr. Simuchembo was told to stand on his right and he went inside to challenge the people. He then introduced himself and told everyone to lie down. DW2 testified that to his surprise, one person stood up and got a sack and started advancing towards him and in the process he unwrapped the sack. It was his evidence that he told the person to sit down but he produced a machete. He then fired one

shot while telling him to sit down but the person did not retreat. He fired another shot and by that time, the person was 3 to 5 meters away and ready to attack. Seeing that his life was in danger, he fired at him in the right leg beyond the knee. He fell down and dropped the sack and machete.

He then brought the vehicle they were using and took him to the police and informed the officer in charge and they then took the plaintiff to UTH. After he was discharged they took him to the police to answer the charges against him. It was DW2's evidence that he charged him with the offence of robbery and explained to him his rights to bond if he could meet the condition for sureties but no one came forward until he was taken to court. He testified that there was two to three weeks between the time the plaintiff was charged and taken to court because they had to prepare a docket and take it to the DPP who would then re-allocated it to the court.

During cross examination DW2 testified that when the plaintiff was taken to court, a Nolle Prosequi was entered.

This marked the close of the defendant's case.

I have considered the pleadings, the bundles of documents and the parties' oral evidence. The plaintiff is claiming damages for personal injuries for malicious prosecution against the defendants for his prosecution before the Subordinate Court. In order to establish a claim for malicious prosecution, the plaintiff must prove the following elements: that he was prosecuted by the defendant; that the prosecution terminated in his favour; that the prosecution was instituted without reasonable and probable cause; that the prosecution was instituted maliciously; and the plaintiff suffered damage. See: **the Halsbury's laws of England, Volume 97, (5th Edition) (2015) para 725.**

On the facts before me, it is not in dispute that the plaintiff was prosecuted by the defendant and that the same terminated in his favour as he was discharged. The first and second elements have therefore, been satisfied. The elements to be established are whether the defendant had instituted the proceedings maliciously and that there was no reasonable and probable cause for prosecuting the plaintiff and that the plaintiff has suffered damage. The plaintiff bears the burden of proving the foregoing.

The learned authors of the **Halsbury's Laws of England at paragraph 1351, Volume 45(4th edition) 1985** state that the plaintiff must prove malice in fact indicating that the defendant was actuated by either spite or ill will against the plaintiff, or by indirect or improper motive. They espouse that malice is established if the defendant had any purpose other than that of bringing the plaintiff to justice. At **paragraph 1358**, the learned authors espouse that it is not sufficient for the plaintiff to prove that he was innocent of the crime for which he was prosecuted by proving that the prosecution terminated in his favour but must show malice and lack of reasonable probable cause. The plaintiff in paragraph 9 of his statement of claim has given the particulars of malice. He asserts that the defendant falsely accused him of being a very dangerous criminal involved in various robberies within Ng'ombe compound; charging him with theft of a phone knowing that he did not steal the phone and failure to release him on bond when the offence was bailable and he had lost his right leg at the time of detention. During trial the plaintiff testified that he was not informed of his right to apply for bond.

The defendant's witnesses on the other hand testified that they received a complaint that the plaintiff had robbed a woman of a phone and stabbed her. DW2 also testified that the plaintiff was informed of his rights and he was informed that the offence of robbery with which he had been charged was one for which he could be granted police bond but the plaintiff failed to present sureties. I am of the considered view that the probabilities are equal. There is further no evidence that the police officers were driven by any other motive in prosecuting the plaintiff other than to bring him to justice. Further, the fact that the plaintiff was discharged is not enough to prove malice. I therefore, find that malice has not been established on a balance of probabilities.

Pertaining to the element of reasonable and probable cause, the plaintiff has not led any evidence to show that there was no reasonable or probable cause for arresting and charging him with robbery. The defendant's witnesses on the other hand testified that they received a complaint of robbery and the victim identified the plaintiff as the perpetrator of the alleged crime. The claim for malicious prosecution therefore fails.

I must also mention before I leave this point that I have noted that the defendant in its defence in paragraph 3 and 4 have pleaded matters which show that the plaintiff was previously convicted of theft and burglary. They have also produced evidence of these previous convictions. Though this evidence was not objected to by the plaintiff's counsel, the outcome of criminal proceedings should not have been referred in these proceedings. See: **Ahmed Wandi and another v. Kostic Investments Ltd**¹. This evidence should therefore, not have graced the record. I however, properly warned myself and exclude it when determining whether the arrest was justified.

The plaintiff claims damages for false imprisonment. To establish a claim of false imprisonment, the plaintiff must establish imprisonment and onus is on the defendant to justify it: **Claude Samuel Gaynor v. Cyril Robert Cowley**². In the case of **Joyce Banda v. the Attorney General**³, the Supreme Court the following:

That proposition is sacrosanct and it leads to the further proposition, which is well settled, that in an action for false imprisonment all the plaintiff is required to do in

the first instance is to assert the imprisonment and its unlawfulness. If the defendant denies the imprisonment then of course the onus is on the plaintiff to prove it; but if the defendant admits the imprisonment the onus is on him to justify it. If he fails to establish a legal justification for the deprivation of liberty he fails on the merits.

In the case of **Attorney General and others v. Phiri**⁴ the Supreme Court held that there is no false imprisonment if a person's arrest is justifiable or if there is reasonable and probable cause for restraint. The Supreme Court further guided that where a police officer makes an arrest, without a warrant, it is incumbent upon him to inform the person so arrested of the grounds for arrest unless he himself produces a situation which makes it practically impossible to inform him. Failure to inform the arrested person as soon as is reasonably practicable to do so of the true reason of his arrest will, in a proper case, constitute false imprisonment.

Coming to this case, it is not in dispute that the plaintiff was imprisoned. The burden is therefore, on the defendant to justify the imprisonment. The defendant asserts that the arrest of the plaintiff was lawful. The defendant's witnesses testified that they received a

complaint from a woman that the plaintiff had stabbed and robbed her. Their evidence in this respect was not challenged. I am persuaded by the case of **Mbandangoma v. The Attorney General**⁵ the trial judge observed that to justify an arrest, the defendant must show that at the time of the arrest, the arresting officer had reasonable suspicion that the plaintiff committed the offence with which he is charged. I am therefore, of the considered view that there were reasonable grounds for suspecting that the plaintiff has committed an offence

The plaintiff raised issue that he was not granted bond. He testified that he was not informed of his right to bond. There is no evidence that the plaintiff was arrested with a warrant. DW1 and DW2 testified that the plaintiff was charged with Robbery. Robbery is an offence for which an officer may arrest effect an arrest without a warrant under the First Schedule of the Criminal Procedure Code. In the case of **Mbandangoma v. The Attorney General**⁵, the court referred to **section 33 of the Criminal Procedure Code** and held that the release of a person on bond is mandatory if it does not appear practicable to bring the person concerned before an

appropriate competent court is mandatory court within 24 hours of being taken into custody unless the offence is one of a serious nature. If the person is retained they must be brought before such court as soon as is practicable.

The defendant's witnesses testified that the plaintiff was informed of his right to bond as the offence for which he was charged was one for which he could be released on bond. It was their evidence that the plaintiff failed to present sureties. The probabilities on this evidence are equal and none of the parties struck me as being dishonest. DW2 testified that when the plaintiff was shot, he could not be charged because he needed medical attention. It was his evidence that after his release he was taken to the police and charged but he was only brought before the court 2 to 3 weeks after he was charged because they had to prepare a docket, take it to the DPP who then had to take it to court.

It is my view that there is no evidence that the plaintiff was not taken to court as soon as it was practicable as the defendant's explanation of the delay is reasonable under the circumstances. I therefore, find that the claim for false imprisonment equally fails.

Lastly, though the claim for false imprisonment and malicious prosecution have failed, the plaintiff in his statement of claim, is claiming damages for personal injuries as a result of the damage to his leg. He asserts that he was shot in the right leg while he was trying to understand the reason for his arrest. During trial the plaintiff testified that on the material date, one of the officers went in the structure where he was and hit him on the head with a gun. When they went outside, the officers told him that he wanted to trouble them and one of them shot him in the leg.

PW2 confirmed witnessing the incident as he was outside and it was his evidence that one officer went inside the structure and when he came out with the plaintiff, he shot him in the leg. It was his evidence that when he and a group of people wanted to ask why the police had shot the plaintiff, the police fired two shots in the air to disperse the crowd. His evidence was not challenged during cross examination.

The defendant in his defence states that the injuries sustained by the plaintiff were as a result of the police trying to effect a lawful

arrest. Though the defendant denied the fact that the plaintiff's leg was amputated, when the plaintiff appeared for trial, it was evident that his leg had been amputated and the documents at page 1 to 5 of the plaintiff's bundle of documents show the consent to amputate the leg as a result of a gunshot wound. The defendant's witnesses on the other hand testified that when they found the plaintiff in Ng'ombe in a structure, DW2 asked him to come out but he removed a machete and started advancing towards DW2. DW2 testified that he fired two warning shots but the plaintiff did not stop and when he was 3 to 5 meters away, fearing for his life, DW2 shot the plaintiff in the leg with the intention to maim him.

The learned authors, Bullen and Leake in their book title, Precedents and Pleadings, Volume 1(17th Edition), Sweet and Maxwell, London, 2008 states the following:

The police now have the power to arrest for any offence and an arrest will be lawful so long as it is necessary. A police officer may use reasonable force. Where more than reasonable force is used, there is a battery.

It is therefore, clear that a claim for the personal injuries in the circumstances of this case is one that involves the determination whether there was excessive use of force by the police officers and whether the plaintiff had established a claim for battery. The Statement of claim however, does not include a claim for battery.

The Supreme Court in the case of **Nyambe Lyuwa v. The Council of the University of Zambia**⁶ observed that a claim must be set out in the statement of claim and it is immaterial that it was included in the writ of summons of summons. When a claim is not included in the statement of claim it must be treated as having been abandoned and cannot be dealt with unless the statement of claim is amended. The Supreme Court however, observed that the important consideration is when a claim is not included in the statement of claim is whether the defendant had notice of the claim.

In this case, though the plaintiff did not include a claim for battery in his statement of claim, I am of the considered view that the defendant had notice of the claim for the injury to his leg. Further as shown above, both the plaintiff and the defendant led evidence on the issue of injury to the leg. I therefore, do not believe that they

defendant would be caught by surprise. In the case of the Supreme Court in the case of **Anderson Kambela Mazoka and others v. Levy Patrick Mwanawasa and three others**⁷ that where a defence or any matter not pleaded is let in evidence and not objected to by the other side, the court is not and should not feel precluded from considering it. However, in that event, a party is at the mercy of the court and the court will deal with him as it considers just. I shall therefore, consider the matter.

Section 18(2) of the Criminal Procedure Code Chapter 88 of the Laws of Zambia states that if a person forcibly resists arrest, the police officer or other person may use all means reasonably necessary to effect the arrest. A perusal of the defence at paragraph 5 appears to be at variance with DW1 and DW2's evidence at trial. In that paragraph, the defendant asserts that the plaintiff was shot in order to effect a lawful arrest after the plaintiff took flight on seeing the police. I am therefore, disinclined to believe the defendant's evidence that the plaintiff was shot because he attacked Inspector Kamfwa. Having listened to the evidence of the parties, I find the plaintiff's evidence which was corroborated by PW2 more

probable than not that the plaintiff was blatantly shot in the leg by the defendant's officers and that the defendant's officers only fired shots in the air to disperse the crowd that was incensed by their actions. I therefore, find that the defendant used excessive force in effecting the arrest than was necessary and I find them liable for battery.

In the light of the above, I find that the plaintiff has proved his case for damages for personal injuries and I accordingly find in his favour and refer the matter to the learned registrar for assessment of damages. I order that each party shall bear its own costs.

Leave to appeal is granted.

Delivered at Lusaka the...^{11th}.....day of March, 2020.



**MATHEW. L. ZULU
HIGH COURT JUDGE**