

• AT THE PRINCIPAL REGISTRY

AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

CHRISPINE KANDINDIMA

AND

ALICK NDALAMETI

FRANCIS PHIRI

LAMECK PHIRI

LAMECK NJOBVU

ATTORNEY GENERAL



PLAINTIFF

1ST DEFENDANT

2ND DEFENDANT

3RD DEFENDANT

4TH DEFENDANT

5TH DEFENDANT

BEFORE HON. JUSTICE C. CHANDA IN OPEN COURT ON 26TH JUNE 2020.

For the Plaintiff : Mr. KMG Chisanga, Messrs KMG Chisanga Advocates

For the Defendants : Ms. B. Kafunya, State Advocate, Attorney General's Chambers

J U D G M E N T

CASES REFERRED TO:

1. *Mubita Mbanga V The Attorney General* (1979) ZR 234
2. *Richman Chulu V Monarch (Z) Limited* (1983) ZR 3
3. *Claude Samuel Gaynor V Cyril Robert Cowley* (1971) ZR 50
4. *Associated Picture House Limited V Wednesbury* (1948) 1 KB 223
5. *Attorney General V Felix Chris Kaleya* (1982) ZR 1
6. *Willers V Joyce* (2016) UKSC 43
7. *Wilson V Pringle* (1986) 2 All ER 440.
8. *Sim V Stretch* (1936) 52 TLR 669
9. *Roe V Ministry Of Health* (1954) 2 All ER 131

10. *Cassidy V Ministry of Health (1951)1 All ER 57*
11. *Mazoka & Others V Mwanawasa & Others (2005) ZR 138*
12. *Christopher Lubasi Mundia V Sentor Motors Limited (1982) ZR 66*
13. *Claude Samuel Gaynor V Cyril Robert Cowley (1971) ZR 50*
14. *Mubita Mbanga V The Attorney General (1979) ZR 234*
15. *Attorney General & Others V Masauso Phiri Selected Judgment No. 28 Of 2017*
16. *Hicks V Faulkner (1878) 8 QBD 167*
17. *Muhango V Ngulube (1983) ZR 61*
18. *Attorney General V Amos Mumba (1984) ZR 14*
19. *Zulu V Avondale Housing Project (1982) ZR 172*

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *The State Proceedings Act, Chapter 71 of the Laws of Zambia.*
2. *Narcotic Drugs and Psychotropic Substance Act, Chapter 96 of the Laws of Zambia*
3. *Clerk & Lindsell On Torts 20th Edition*

By an amended writ of Summons, the Plaintiff herein seeks the following reliefs: -

- (i) Damages for defamation in the sum of K 500, 000.00.**
- (ii) Damages for malicious prosecution in the sum of K 500, 000.00.**
- (iii) Damages for assault and battery in the sum of K 500,000.00.**
- (iv) Damages for false imprisonment in the sum of K 700, 000.00.**
- (v) Loss of business in the sum of K 500,000.00.**
- (vi) An injunction restraining the Defendants from harassing the Plaintiff.**
- (vii) Exemplary damages**
- (viii) Interest**
- (ix) Costs**
- (x) Any other reliefs the Court may deem fit.**

The Plaintiff pleaded in his amended statement of claim that he was a Zambian national and a businessman residing in Lusaka. The 1st to 4th Defendants were sued as Investigators in the employ of the Drug Enforcement Commission (DEC) such employer represented herein by the 5th Defendant who is sued in terms of the provisions of the State Proceedings Act, Chapter 71 of the Laws of Zambia.

It was then alleged that on 27th February, 2015 at about 19:00 hours, the Plaintiff was buying cough syrup in a shop in Devil street, Emmasdale, Lusaka when he heard gunshots. Immediately the 1st to 4th Defendants stormed the said shop and ordered everyone to kneel down. The Plaintiff then averred that the said Defendants singled him out and started beating him brutally with kicks, fists and iron bars thereby causing him to sustain a swollen right knee and complained of a painful ear, chest, ribcage and general pains.

Thereafter, the Plaintiff was apprehended and taken to the DEC Headquarters but was subsequently taken to Kabwata Police Station where he was issued with a medical report form on the same date of apprehension. It was then averred that the Plaintiff was detained at the said Police Station for eight (8) days before he was eventually charged with the offence of Trafficking under the Narcotic Drugs and Psychotropic Substance Act, Chapter 96 of the Laws of Zambia. Upon the close of the prosecution's case, the Plaintiff was on 30th September 2015 acquitted of the said offence having been found with no case to answer.

The Plaintiff then alleged that the said charge of trafficking in heroin was the Defendant's desperate attempt to cover up themselves after they had severely assaulted the Plaintiff by planting the same on him

which attempts failed hence his acquittal. It was averred further that the allegations of drug trafficking damaged the Plaintiff's reputation in the eyes of right-thinking members of society and the business community who viewed him as a criminal, untrustworthy and bad example to the youth. And that the Plaintiff had been severely injured in his credit and reputation whereby he was brought into scandal, odium and contempt and whose future business prospects were diminished by false charges. He claimed to have been remanded in custody from 27th February 2015 to 30th September 2015 and thereby incurring losses and damages in his business on false and malicious charges hence seeking the above set out claims.

In their defence, the Defendants denied the Plaintiff's claim and put him to the strict proof thereof. They pleaded instead that a report was received of a person selling suspected controlled drugs to members of the public in the said devil street. They proceeded to the targeted place, which was a make shift stand after booking the operation at Emmasdale Police Station. In the said make shift stand, they found a man who was standing whom they later came to know as **NTAMANYILE LYAMBAULA (PW2)** who was informed of the reason for their visit. A body search conducted on him yielded nothing.

The search was then extended to the makeshift shop where a transparent plastic containing a blue plastic with cream powder suspected to be narcotic drugs were found and shown to PW2 who remained mute. While the search was still on in the makeshift, a gunshot was heard and the voice of the 2nd Defendant was heard outside ordering someone to *"drop off the gun or I will blow off your head."*

When the other Defendants went outside to see what was happening, they found the Plaintiff kneeling down and had dropped a gun as ordered. The said pistol was found with one (1) bullet in its chamber and was ready to fire after conducting a normal safety precaution on it. That was how the Plaintiff was handcuffed and a search on his body revealed six (6) sachets of suspected narcotic drugs wrapped in assorted papers.

The Defendants denied assaulting the Plaintiff and pleaded instead that both the Plaintiff and PW2 were picked and detained at Emmasdale Police Station and were later charged with Trafficking while the Plaintiff was also charged with Threatening Violence. At the no case to answer stage, the Plaintiff and PW2 were acquitted of the Trafficking charges while the Plaintiff was found with a case to answer for Threatening Violence.

Finally, the Defendants denied the allegation that the charges were false and malicious and pleaded that there was a reasonable and probable cause to charge the Plaintiff and denied that the Plaintiff suffered any loss or damage and his claims were denied in total.

At trial, the Plaintiff testified and called two (2) other witnesses. **PW1** was the Plaintiff himself who stated that he was a Businessman and a Farmer who was the Patriotic Front (PF) Youth Chairperson involved in the national security of PF. It was the Plaintiff's testimony that in the evening of 27th February, 2015 at around 19:30 hours, he was on his way to the Eastern Province to go and attend the Ncwala Ceremony driving his Toyota Caldina ALT 6252. He was carrying with him the sum of K 120, 000.00 cash which he got from State House and a 9mm pistol with 17 rounds of live ammunition.

Upon reaching Matero Police Station, PW1 turned into Florida Road and stopped at Bread of Life. He then removed 16 bullets from his pistol leaving only one bullet in the gun. The 16 bullets were then put in a plastic together with the money which he had placed underneath the car seat. As he was feeling feverish with a cough and sneezing, he decided to buy medicine called Benylin. After which he went to a shop at a house and bought two drinks.

Whilst standing at the shop, PW1 heard three (3) gunshots from the direction of Bread of Life and run towards his car. He then heard some people ordering him to lie down but he just sat down and saw people entering the main gate of the house and closed the window.

PW1 was then asked what he was doing and told them that he was buying a drink. When he asked who they were, they just started beating him up and when they made him lie down his fire arm showed. Then one of them shouted that he had a gun and a person from the brown van came and alleged that PW1 wanted to shoot his friend.

PW1 was then put in a van and another person they got from the main house was equally put in the same van and were taken to the Defendant's offices on Ridgeway area whilst they kept on firing shots. At the Defendant's offices, about 15 officers continued beating them up. He recognized one person FRANCIS PHIRI the second Defendant and photographs were taken of them. Later they were taken to Kabwata Police Station at around midnight.

At Kabwata Station, PW1 was put in cells on allegations that he wanted to shoot LAMECK NJOVU. The following morning, he

informed the Officer in charge at Kabwata Police Station that he had been beaten and asked to be taken to the hospital. However, he spent 13 days in police cells at Kabwata Police and on 8th March, 2015 he was charged with threatening violence and was taken to Court alone. Before plea could be taken, he was discharged but re-arrested and slapped with additional charges involving 0.5 grams of heroin, unlicensed fire arm, possession of fire arm and altogether was charged with 5 counts.

On the 9th March 2015, PW1 was jointly charged with PW2 and he became A2 and were remanded at Kamwala Prison where he started complaining about the beating and was told he would be taken to the hospital the following day. On the 10th March, 2015, he was taken to the clinic after obtaining a police medical report form from Kabwata appearing at page 1 of the Plaintiff's bundle of documents and he was treated at Kamwala Clinic and taken back to prison.

It was PW1's further testimony that he was acquitted at the no case to answer Ruling dated 10th September 2015 and a Notification of acquittal issue dated 17th April, 2015 and that was how he went home. He continued going to Court for the charge of Threatening Violence for which he was put on his defence and was subsequently convicted of the said offence and sentenced to 40 days from date of arrest.

Finally, when asked the specific roles each of the Defendants played, PW1 stated that the 4 Defendants were the ones who were beating him up and tarnished his name as he could not do any business because he was in prison. PW1 then reiterated his claims to be paid for what the Defendants did to him.

Under cross examination, PW1 admitted that he went to buy drinks whilst carrying a pistol. When asked about the purpose he carried a gun, PW1 stated that he was a businessman and needed protection from criminals and at that time he was carrying a lot of money although the money was in his car. Again, when asked the type of business he was engaged in which needed a gun, PW1 stated that he was involved in buying cars from Tanzania for resale although he had no evidence to show that he was involved in such a business.

PW1 further confirmed in cross examination that he obtained a medical report form on 10th March 2015 from Ridgeway Police Post and went to Kamwala Clinic on the same day 10th March 2015. When asked as to why his medical report form bore the date of 10th February 2015, PW1 insisted that he got the form on 10th March 2015 and because there was no doctor to sign, it was only signed on the 17th March 2015. He admitted that there was no explanation as to why it bore the date of 10th February 2015 when he had obtained it on 10th March 2015.

In relation to his beatings, PW1 stated that he was beaten on 27th February 2015 and It was the date he was taken to the cells. PW1 then insisted that people were refusing to ask him to collect their vehicle or sell a vehicle on their behalf because of the notification of the acquittal.

In his re-examination, PW1 confirmed that he was arrested and assaulted on 27th February 2015 and went to the hospital on 10th March 2015 and conceded that 10th February came earlier.

PW2 was **NTAMANYILE LYAMBAULA** an Aluminum Installer with Sun Share Limited. PW2's testimony was that he was running a liquor store business from a domestic home along Devils street in Emmasdale Lusaka. The store could only be accessed from the main gate and had a window in the wall fence.

On the 27th February, 2015 PW2 had opened his shop at around 16:00 hours and started operating as usual. At around 21:00 hours, one officer walked into the shop and introduced himself as a DEC Officer and later closed the window but he could hear noises from outside. The said officer did not tell him what his name was and neither did he show him any identification card but he was armed with a gun which frightened him.

Then another officer came into the shop addressed himself aggressively and handcuffed him and was moved out of the gate. These officers were just searching all over the place and dropping things down but he did not know what they were searching for and neither was he told.

PW2 was then taken outside to a Toyota Land cruiser and found one person who was being manhandled by three (3) officers. When he was put in the Land cruiser, one officer stepped on his neck and he could not see but the other person was just being manhandled and was later handcuffed.

Afterwards, they proceeded straight to their offices around Civic Centre area without passing through Emmasdale Police. PW2 was not shown anything at the shop but when he tried to question them, he was slapped and that was how he kept quiet. At the DEC Offices

in Ridgeway, they spent some time and were photographed and only taken to the police station close to midnight. He complained that the officers were hostile to them without giving them any chance to say something but were just left in the cells.

PW2 stated that 12 days passed without the officers showing up at the police station and only showed up later with a warn and caution statement alleging that he was trafficking in narcotic substances marijuana and cocaine which he declined to sign. He started appearing alone from 17th March 2015 until 15th April, 2015 when he was discharged but later re-arrested and jointly charged with the Plaintiff. The trial took about 9 months and he was acquitted of both counts at the ruling of no case to answer and the Plaintiff was also acquitted of the drug charge but was put on his defence on the second charge.

PW2 concluded his testimony by stating that they were being assaulted at various stages and were being beaten and manhandled from point A up to Kabwata and that the Police refused to release them without the DEC officers being present. He also complained that they were not allowed to seek medical attention and lastly that they were taken to the prison after the case was mentioned between 5th and 6th March 2015.

When cross examined, PW2 stated that although he was beaten, he was not availed a police medical report form but only the Plaintiff went to the clinic. That for him he was more focused on his case and wanting to go out.

The last witness the Plaintiff called as **PW3** was **JOEL MWANZA**, a Supervisor at a Ginery along Mumbwa Road. His unchallenged testimony was that he knew the Plaintiff during the period between February and April 2015 who was a Youth Chairman in Matero Constituency for the Patriotic Front. At that time PW3 was the Information and Publicity Secretary for Lusaka District in the same political party.

PW3 then stated that on the 27th February 2015 he received information that the Plaintiff was charged with an offence related to drugs. Upon receiving such information, PW3 caused a message to be sent to Matero Constituency for the Plaintiff to stand down or suspend him from his position so that the name of the party was not brought into disrepute. Finally, that a resolution was passed for the Plaintiff not to stand and he never saw him again until he heard that he had been acquitted. However, the Plaintiff was not reinstated because the matter was before Court. That marked the close of the Plaintiff's case.

In their defence, the Defendants called four (4) witnesses. **DW1** was **LAMECK PHIRI** an Investigations Officer with DEC, the Head of Lusaka Province. His duties involved gathering information and receiving information relating to drugs and anything illegal.

DW1's testimony was that a week before February 2015 he was tasked to follow up a case in Emmasdale along Devils Street where two (2) members of the public had complained against a person who was selling drugs along the said street. The name of the dealer given was TAMANYILE and he went to the said street to verify the information and managed to buy drugs as samples from the said

TAMANYILE namely heroin, one rock of cocaine and codeine. The said dealer did not have cannabis at the time.

Upon verification of the report, DW1 advised DEC office to conduct the operations on a Friday evening because that was the time there were a lot of activities. A team of officers was formed and an operation order was written and approved by the command. DW1 then led a team as Intelligence Officers working side by side with Mr. Ndelemeti Alex as Head for the entire operations. They proceeded to the targeted area and given the volatility of the area they were supposed to quietly conduct the operations and used a Toyota Venture while the other officers used a Toyota Land cruiser which was left at Matero Police.

As intelligence Officer, DW1 was not supposed to be seen in public so he just blended near a bar where there were about seven (7) people outside. Whilst there, DW1 saw one person from the group advising that there was an operation at Tamanyile's place. Another person from the group decided to go and attack the officers and proceeded to the targeted place. At that point DW1 followed his colleagues as he sensed potential danger of the officers being attacked. He picked up the fire arms from their car and alerted his colleagues of people outside planning to attack them.

As DW1 positioned himself, he just heard his colleague FRANCIS PHIRI shouting at him that there was a man with a pistol behind him. DW1 then turned and opened fire and the person who had a pistol was the same person from the group who had planned to attack the officers whom he later came to know as the Plaintiff.

It was DW1's further testimony that when the Plaintiff was about to point the pistol at him, DW1 ordered the Plaintiff to drop the pistol down. Several attempts were made ordering the Plaintiff to drop the pistol but yielded no positive results until another warning shot. The Plaintiff then dropped the pistol and knelt down and immediately Mr. ALICKS NDALAMETI picked it up and performed a normal safety precaution and one (1) live ammunition was ejected from the pistol. That was how Mr. NDALAMETI as Investigations Leader took over the matter.

When cross examined, DW1 confirmed that he lived in Matero and did his training at Lilayi and Uganda and had worked for the DEC for a continuous period of 15 years. DW1 also confirmed that he had taken down the particulars of the two (2) informants whom he did not know but they were specific on the person dealing in drugs as being PW2. DW1 confirmed that during his two (2) days surveillance and investigations, he only bought drugs from PW2.

In his further cross examination, DW1 confirmed obtaining the operation order which he said remained with the officer in charge. He denied carrying out operations contrary to the operation order and explained that it included anything illegal. DW1 insisted that he did everything in accordance with the operation's order and maintained that he came into contact with the Plaintiff when he produced a gun behind him. He explained that the Plaintiff was at first in a group and later attacked the officers. At that time, he stated that it was not possible to arrest the Plaintiff from the group as the Devils Street was a volatile area. DW1 stated that he picked up the fire arm to alert his colleagues that they were in danger which he did.

Regarding the pistol, DW1 stated that he did not hear the corking sound but his colleague heard and fired a warning shot but that did not threaten the Plaintiff. DW1 denied knowing the Plaintiff before as at that time he was staying in Zingalume and denied that the Plaintiff had called him by name. DW1 explained that the Plaintiff only came to learn of his name after he had testified in the subordinate Court.

Finally, DW1 confirmed that there was only one live ammunition in the gun although it had a caliber of 18 rounds of ammunition. He then denied examining the fire arm to check if it had been fired.

In his re-examination, DW1 explained that an operation order contained tasks each officer was allocated and the equipment to be used in the operation. He insisted that he had complied with the operation order and all procedures were followed except that the Plaintiff did not drop the gun when ordered to.

DW2 was **FRANCIS PHIRI**, an Investigations Officer with DEC whose duties involved investigating drugs and money laundering offences. It was DW2's testimony that on the 27th February, 2015, he was informed by the Team Leader that his name appeared on the operation order to go and conduct an operation on Devils Street in Emmasdale.

DW2 explained that when they reached the targeted area, he was assigned to remain outside and give security to his fellow officers who had gone inside the wall fence. After a while DW2 saw a mob of people which was mobilized outside and also saw DW1 go to their vehicle and got two (2) fire arms one of which he gave to Mr. MWAKOMESHA.

In the said crowd, he saw one person who carried a pistol and shouted to DW1 to watch out as someone had a fire arm.

DW2 testified further that DW1 turned quickly and fired one warning shot in the air but the Plaintiff still had his pistol pointing into the air. The warning shot that was fired caused some commotion and people were moving around. At that point DW2 took his pistol and pointed it at the Plaintiff ordering him to drop the gun but he did not do so. DW2 then fired a warning shot in the air and pointed the gun at the Plaintiff's head, that was when the Plaintiff dropped the pistol and knelt down. DW1 then kicked the pistol away and the Team Leader performed a normal safety precaution and a bullet ejected from the pistol.

At that point the Team Leader instructed Mr. NJOVU to handcuff the Plaintiff and conduct a body search on him and a transparent plastic was recovered from him. The mob started mobilizing and wanting to mete out mob justice on the Plaintiff but he was whisked him away to their Land cruiser. The mob insisted on meting out mob justice but they fired warning shots in the air to scare them away and that was how they drove to their regional office.

DW2 then explained that when the Plaintiff was handcuffed, he walked freely to the vehicle and jumped into the van. He stated that it was not easy to deal with the situation as they had surrounded the Plaintiff to protect him from the mob which wanted to mete out mob justice on him.

At their offices DW2 was allocated to handle the matter by their Team Leader and the Plaintiff was later detained at Kabwata Police Station.

At the time of his detention, the Plaintiff had no injuries nor did he have any blood stains on the white shirt he wore.

On Monday 2nd March, 2015, DW2 took the drug for analysis which confirmed to be heroin of 0.51 grams. At around 11 hours the same day DW2 went to Kabwata to record a warn and caution statement in Nyanja but he opted to have legal representation. DW2 then gave the Plaintiff his number so that he could call him whenever he had secured the services of a lawyer.

DW2 then explained further that on Tuesday 3rd March, 2015, he went back to Kabwata Police Station where the Plaintiff informed him that he had engaged a Lawyer by the name of CHISANGA but was busy with High Court matters. On Wednesday 4th March, 2015, DW2 was summoned at Kabwata Police Station where he explained that he was waiting for the Plaintiff's Counsel who was engaged in High Court matters. That was when DW2 warned the Plaintiff that he would proceed the following day on Thursday with or without the Plaintiff's Counsel.

On Thursday, the Plaintiff had engaged another Lawyer ZUKANI SIMPOSYA and DW2 recorded a warn and caution statement from the Plaintiff who elected to remain silent on both counts of trafficking and threatening violence. DW2 then compiled the docket which he handed over to the prosecutors on 6th March, 2015.

It was DW2 further testimony that he took up a search on the fire arm because the Plaintiff had indicated that it belonged to the PF whose Secretary General at the time denied and distanced the party

from the matter. A search with the police revealed that it was licensed in the Plaintiff's name under Chilanga District.

In concluding his testimony, DW2 stated that the Plaintiff took plea on 9th March, 2015 but he was later acquitted of the offence of trafficking but was convicted of the offence of threatening violence and his fire arm was forfeited to the state. DW2 then testified that after the Plaintiff's acquittal, the Defendants were sued and he was surprised to see a medical report form as no such issues were raised at the subordinate Court. DW2 pointed out that the said medical report form was issued on the 10th February 2015 before the Plaintiff's arrest and was attended to by the medical staff on 17th March 2015.

Under cross examination, DW2 confirmed that he was the dealing officer in this matter and his role was to provide security to other officers when they specifically followed PW2. He admitted that they were armed even though PW2 was unarmed as that was the standard procedure when conducting operations. That he stood outside directly opposite the main gate across the road. He could not see what was happening in the shop as immediately the officers entered the trading stopped.

In relation to the Plaintiff, DW2 stated that he never saw the Plaintiff walk to the shop but confirmed having known the Plaintiff whom they grew up in the same area. That he saw the Plaintiff when he coked the gun during the commotion. DW2 then confirmed that DW1 fired the warning shot first after being alerted that someone was pointing a gun at him. He also confirmed firing a warning shot and pointing

his gun to the Plaintiff's head and that was when the Plaintiff put down his fire arm.

Having been knowledgeable about fire arms, DW2 confirmed that the corking of a gun puts the bullet into the chamber and if disturbed it would fire depending on the type of gun or if its safety catch was on. He also explained the role that NJOVU played being in the search party. DW2 was not aware if NJOVU complied with all the professional requirements to conduct a body search and explained that in a hot pursuit a search was a search. DW2 was not aware of the need of the presence of another person during a search and confirmed that there was no independent person to verify the Plaintiff's search.

DW2 insisted that his testimony was based on what he saw about the fire arm and that they never arrested any one from the mob as the safety of the Plaintiff at the time was of particular concern. He also stated that it was not possible to arrest the mob as they were only nine (9) in number and their concern was to protect the suspect and preserve the exhibits.

DW2 confirmed that they had asked the Plaintiff to jump into the van while handcuffed as the officers were surrounding him from being beaten by the mob. He denied assaulting PW1 and PW2 and insisted that his evidence that the Plaintiff was admitted into cells at Kabwata without any injury or blood stains constituted rebuttal of the Plaintiff's claims of assault. DW2 explained that no injured persons are admitted in cells and denied the allegation as being false. He also explained that he never mentioned any search in his testimony because he was not the one who searched the Plaintiff although he

saw NJOVU searching the Plaintiff. DW2 explained further that after the operation they went straight to DEC offices having accomplished their mission and they only informed Emmasdale and Matero Police which was a normal procedure.

DW2 thereafter confirmed that there was an exhibit room at DEC but denied the suggestion that drugs were gotten from there. DW2 explained that the Plaintiff was deposited at Kabwata police station because it was convenient for the DEC officers. He denied the suggestion that the officer in charge at Kabwata had ordered him to give the Plaintiff medical report form explaining that such forms were issued by the police and not DEC. Nevertheless, DW2 stated that he had issued the Plaintiff with a seize notice even if it was not before court.

DW2 confirmed that the Plaintiff was acquitted of drug charges which was not bailable but the charge of threatening violence was bailable. It was DW2's position that he only saw the medical report in the High Court and confirmed that same are prepared by the police. His contention was that it was issued on 10th February 2015 and if it had a mistake the person who issued it and the person who brought it to Court were accountable for the mistake. DW2 questioned the authenticity of the medical report and refused to comment on the findings which purported being attended to on the 17th March 2015.

Regarding the investigation of ownership of the fire arm, DW2 stated that he had requested the Plaintiff to avail him ownership documents which he didn't provide hence he undertook to establish ownership of the same. He insisted that he had gone to the PF Secretariat but he may have been mixed up with who the Secretary General was at

the time. He explained that they investigated the ownership of the fire arm because the Plaintiff did not say he owned it but that he was given the fire arm.

Lastly, DW2 denied having any attitude problems with the Plaintiff and explained that he went to PF offices merely to put things in place according to his investigations. He also confirmed that there was only one (1) bullet from the Plaintiff's gun but he did not know how the Plaintiff intended to execute his threat.

In his re-examination, DW2 explained that the crowd was not shouting and as such he was able to hear the corking of a gun. He also explained that they carried guns on operations as drug dealers were unpredictable. He further explained that they challenged members of the public who removed guns and that the search on the Plaintiff was done by NJOVU in the presence of all the officers and he observed the search.

DW3 was **ALICKS NDELEMETI** a Security Officer with DEC at Kenneth Kaunda International Airport whose duties involve investigating drug and money laundering offences and other related cases as assigned to him. It was DW3's testimony that while he was still stationed at the DEC regional office, on the 27th February 2015 he was assigned to lead a team of officers listed on the operations order. The assignment was to go and verify the report received of a named suspect who was dealing in drugs in a makeshift stand along Devils Street in Emmasdale.

Before conducting the operation, DW3 and his team passed through Emmasdale Police where they booked themselves and proceeded to

the targeted makeshift stand where the suspect was identified. As team leader, DW3 introduced himself and informed the suspect (PW2) the purpose of their visit and produced a search warrant. He assigned a Mr. KAPOTWE who executed a search warrant. Nothing was found on the body of the suspect but a transparent plastic was discovered in the makeshift stand.

During the search, DW3 heard gun shots from outside the said stand and rushed outside only to find a person kneeling down. He then enquired about the gunshot and was informed that the suspect wanted to shot DW1 with a gun which he had kicked. DW3 then performed a normal safety precaution on the said gun and one live ammunition ejected from the chamber. At that time DW3 instructed MR NJOVU to handcuff the person and body search him in case he was carrying other weapons.

Mr. Njovu body searched the Plaintiff and discovered a transparent plastic containing six (6) sachets of suspected drugs wrapped in assorted papers. Thereafter the Plaintiff was instructed to jump into the Land cruiser while the officers were shielding him from a mob who wanted to deal with him. On the way to DEC offices, the Plaintiff started pleading with the officers that he would take them to an Indian who was the supplier of heroin as he was just a user.

DW3 then lamented that seeing the way the operation turned out, they could not conduct any further operation. At their offices, the case was assigned to FRANCIS PHIRI to continue with investigations.

Under cross examination DW3 confirmed that he led operations side by side with MR LAMECK PHIRI and that he was inside the makeshift

stand. DW3 denied it being his duty to call for an independent person to witness the search and confirmed that he had explained to the Plaintiff his rights to have an independent person but he merely kept quiet.

DW3 also confirmed that the gun shots were fired by the officers and the search warrant was for PW2 and not the Plaintiff. He denied the suggestion that a bullet in a chamber can discharge if disturbed as that dependent on the nature of the gun. That the gun was assigned to MR FRANCIS PHIRI to conduct further investigations.

DW3 denied that the Plaintiff was assaulted or bleeding. He also confirmed that the Plaintiff had requested to take them to the supplier which information DW1 and DW2 did not mention as they were in another motor vehicle. That the other officers did not hear what the Plaintiff said but were just informed.

In re-examination, DW3 explained that there was no issuance of a body search warrant but the search warrant allows entry on any property to be searched and does not include any body search.

The last witness the Defence called was **ISAAC NJOVU**, an Assistant Investigation Officer with DEC who testified as **DW4**. His duties also involved investigating drugs trafficking, money laundering and other related offences. Like the other witnesses, DW4 also testified how he was part of a team of DEC Officers who on the 27th February 2015 conducted an operation at a makeshift stand on Devils Street in Emmasdale.

It was DW4's testimony that while he was conducting a search in the said makeshift store, he heard gunshots and rushed outside where

he found a person kneeling on the ground with a pistol lying nearby. DW4 then came to learn that the suspect, who turned out to be the Plaintiff, had produced a pistol and the gunshots were fired in order to stop him and disarm him. DW4 saw Mr. Ndalemetsi pick up the fire arm and perform a normal safety precaution where one (1) live ammunition was ejected from the chamber.

DW4 was then ordered to handcuff the suspect and conduct a body search on him. The body search led to the discovery of a transparent plastic in the Plaintiff clothes with six (6) sachets wrapped in assorted papers. When showed the substance, the Plaintiff expressed ignorance and was then led to a van as a mob wanted to beat him up. On the way to their offices, the Plaintiff started pleading with them that he was just a user of heroin and not a supplier and offered to take them to an Indian supplier in exchange for his freedom.

In his cross examination, DW4 stated that his role was to conduct a search and confirmed being in possession of a search warrant and the person to be searched was PW2. DW4 also confirmed that PW2 was inside the shop and that he conducted a body search on him. DW4, however, could not recall if he had asked PW2 to have an independent person present. Nonetheless, DW4 admitted that he was never searched by PW2 and explained that the gun shots were fired at a spur of the moment when he had collected something which he had given KAPOTWE.

DW4 denied seeing the Plaintiff holding the pistol but that he found him in a kneeling position and the pistol was lying down. DW4 also confirmed that he first handcuffed the Plaintiff and thereafter conducted a body search on him. He also confirmed that he never

gave the Plaintiff an opportunity to have an independent person present or for the Plaintiff to search him before conducting a search.

In his further cross examination, DW4 confirmed that the Plaintiff had expressed ignorance of the substance shown to him. He also confirmed that Mr. FRANCIS PHIRI had prepared a seizure notice and explained that there was no time for them to consider arresting any person from the mob for attempting to assault the Plaintiff as they were preserving his life.

Lastly, DW4 denied that the Plaintiff was assaulted and confirmed that the Plaintiff pleaded to be released in exchange for information relating to an Indian. DW4 then insisted that he had found drugs on the Plaintiff's body.

In re-examination, DW4 explained that all the officers and other people were present and watching when he conducted a body search on the Plaintiff. In this particular instance DW4 explained that they did not need a search warrant or a seizure notice as this was a hot pursuit. Finally, DW4 explained that they had no mandate to negotiate the freedom of suspects and that if they had arrested any person from the mob they would have risen against them.

That marked the close of the Defendants case. Both parties expressed a wish to file written submissions but only the Plaintiff filed his submissions. If the Defendants had filed any written submissions, then same was not placed on record nor was it brought to my attention.

It was submitted on behalf of the Plaintiff that he had proved his case on the balance of probability entitling him to the damages on all the

heads of his claims as per his statement of claim. Even then it was conceded that the quantum of those damages fell within the jurisdiction of the Court to determine and not for the Plaintiff as the nature of his claims are for unliquidated damages.

It was contended that the Plaintiff was falsely imprisoned and was subjected to a malicious prosecution. It was also contended that the Plaintiff was assaulted at the hands of the Defendants and the totality of the events the Plaintiff was subjected to amounted to defamation of his character. I was urged to find all the Defendants as joint tortfeasors for which the 5th Defendant ought to be found vicariously liable as the witnesses who testified were on duty on the material date.

On the issue of false imprisonment, I was referred to its definition as postulated by the Learned authors of **CLERK & LINDSELL ON TORTS 20TH EDITION** in paragraph 15 – 23 to the effect that: -

“False imprisonment is the unlawful imposition of restraint on another’s freedom of movement from a particular place; that the tort is established on the proof of fact of imprisonment and the absence of lawful authority to justify the imprisonment; and for these purposes imprisonment is the complete deprivation of the liberty for any time however short, without lawful cause.”

The case of **MUBITA MBANGA V THE ATTORNEY GENERAL**¹ was also relied upon where Muwo J, as his Lordship then was, justified the award of damages for false imprisonment as follows: -

“...a restraint is one of the essentials of the action of false imprisonment... the Plaintiff need not know that he is being detained because the other essential is that he is not free to go where he likes... the fact that the Plaintiff accepted to go to the police station does not make the imprisonment lawful as he was at the time under the influence of the police and was no longer a free man.”

Similarly, the case of **RICHMAN CHULU V MONARCH (Z) LIMITED²** was also referred to where the Court held as follows: -

“False imprisonment only arises where there is evidence that the arrest which led to the detention was unlawful since there was no reasonable and probable cause ... a person shall not be held liable for trespass for merely setting into motion the machinery of the law; he must be the direct and immediate cause of the false imprisonment. Reporting a crime and signing a charge sheet which may lead to an arrest is insufficient to make the giver of the information liable for the imprisonment even where there is insufficient evidence to prosecute, unless the report was malafide.”

In terms of who bore the burden of proof in an action for false imprisonment, I was referred to the holding of Baron J, as his Lordship then was, in the case of **CLAUDE SAMUEL GAYNOR V CYRIL ROBERT COWLEY³** as follows: -

“In an action for false imprisonment it is necessary for the Plaintiff to prove nothing but imprisonment itself, it is for the Defendant to discharge the onus of justifying it.”

I was again referred to the Learned authors of **CLERK AND LINSELL** at paragraph 15 where they opined as follows: -

“Where what is in issue is whether the arrest had reasonable grounds for suspicion it is for the Judge to rule whether there were such reasonable grounds; in an action for false imprisonment the burden lies on the Defendant to justify the arrest; that he must prove affirmatively that he acted on reasonable grounds; and that the test is simply whether in all the circumstances the objective information or constable supports reasonable grounds for suspicion of guilt.”

The discretionary powers of the police to detain or arrest was acknowledged on the basis of the opinion of the learned author of **CLERK AND LINDSELL** at paragraph 15 – 72 as follows: -

“That police officers have discretion as to whether or not to exercise the power to detain or arrest which discretion must be exercised in good faith and can only be challenged as unlawful if it can be shown that it was exercised unreasonably under the principles laid down by Lord Green in ASSOCIATED PICTURE HOUSE LIMITED V WEDNESBURY⁴.”

It was however, pointed out that an officer who carried out an arrest knowing that that there is no possibility of a charge being made does

it unlawfully and that the Court should be reluctant to find justification for detention in cases where none exist upon the evidence.

In justifying the award of damages for false imprisonment, I was again referred to the learned authors of **CLERK AND LINSELL** paragraph 15 – 137 where they observed as follows: -

“Any trespass to a person however slight, gives the right of action to recover at least nominal damages; that where there has been no physical injury substantial damages may be awarded for indignity, discomfort or inconvenience; and that where the liberty has been interfered with damages are given to vindicate the claimant’s right even though no pecuniary damages has been suffered.”

The said authors were also referred to when they asserted as follows:-

“Apart from any special damages alleged and proved, the damages are at large; and time, place and manner of trespass and the conduct of the Defendant may be taken into account and the Court may award aggravated damages on theses grounds.”

The guidance given by the Supreme Court in the case of **ATTORNEY GENERAL V FELIX CHRIS KALEYA**⁵ was also relied upon where it was held as follows: -

“In assessing damages for wrongful detention, the factors to be considered include duration, sanctity of personal liberty, presence or absence of the suffering of anxiety or

indignity, manner and circumstances of detention and the reasonableness of the explanation for the detention.”

On the claim for malicious prosecution, it was contended that the Defendants initiated the prosecution in the absence of facts justifying such prosecution and were actuated by malice. It was pointed out that the prosecution of the Plaintiff resulted in an acquittal and relied on the holding in the case of **WILLERS V JOYCE**⁶ as follows: -

“It seems instinctively unjust for a person to suffer injury as a result of the malicious prosecution of legal proceedings from which there is no reasonable ground and yet not be entitled to compensation for the injury intentionally caused by the person responsible for instigating it. It was that consideration which led the judges to create the tort of malicious prosecution, as can be seen in the case law.”

It was argued on the claim for damages for assault and battery that the Plaintiff was entitled to the enjoyment of his civil rights to security of person not to be subjected to any form of unwanted physical contact. It was pointed out that an intention to injure was not essential to an action for trespass to the person. “It is mere trespass itself which is the offence.” **WILSON V PRINGLE**⁷.

Lastly, it was submitted that the Plaintiff was defamed and relied on the authorities that established defamation on untruthful statements calculated to cause hatred, contempt or ridicule of the Plaintiff. I was pointed to the test laid down in **SIM V STRETCH**⁸ where Atkin LJ opined as follows: -

“Would the words tend to lower the Plaintiff in estimation of right-thinking members of society generally or which would cause him to be shunned or avoided.”

The learned authors of **CLERK & LINDSELL** were again referred to at paragraph 21 – 62 where they opined as follows:

“It is not necessary for a Plaintiff in all cases to prove directly that the defamatory matter was brought to the actual knowledge of anyone. If he makes it a matter of reasonable inference that such was a fact, he establishes a sufficient prima facie case ... but in these cases, there is only a presumption which may be rebutted, if the person to whom publication is alleged denies that the defamatory matter came to his knowledge.”

The Plaintiff concluded his submission by urging me to find the 5th Defendant vicariously liable on the authorities of **ROE V MINISTRY OF HEALTH**⁹ and that of **CASSIDY V MINISTRY OF HEALTH**¹⁰. Finally, I was urged to find all the Defendants liable as joint tortfeasors.

I have considered the pleadings exchanged by the parties, the evidence before me and I have also taken into account the Plaintiff's written submissions.

It is a convenient starting point to remind myself that in civil matters parties are bound by their pleadings. The Supreme Court reiterated this position in the case of **MAZOKA & OTHERS V MWANAWASA & OTHERS**¹¹ when it held as follows: -

“The function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the Court will have to adjudicate in order to determine the matters in dispute between the parties. Once pleadings have been closed, the parties are bound by their pleadings and the court has to take them as such. The bounds of the action cannot be extended without the leave of court and the consequential amendments of the pleadings.”

And in order to succeed the Plaintiff bears the onus to prove his or her allegations contained in the pleadings on a balance of probabilities. Therefore, the Plaintiff is duty bound to prove his allegations on the balance of probabilities.

From the evidence on record, I find as a fact that on the 27th February 2015 the 1st to 4th Defendants whilst acting within the course and scope of their duties in carrying out an operation in relation to the suspected drug dealing activities of PW2 ended up apprehending the Plaintiff as well. The Plaintiff at the time of apprehension was armed with a pistol loaded with one live ammunition. The Plaintiff together with PW2 were then taken to the Defendant's offices and were later admitted into Kabwata Police cells and remained detained while being prosecuted for drug trafficking. In the case of the Plaintiff, he was also being prosecuted for threatening violence.

At the close of the prosecution's case the Plaintiff and PW2 were acquitted of the drug related charges. The Plaintiff, however, was found with a case to answer on the charge of threatening violence for which he was subsequently convicted of and was sentenced.

Indeed, the issues to determine is whether or not in the circumstances of this case the Plaintiff was subjected to a malicious prosecution and was falsely imprisoned. Also to determined is whether or not the Plaintiff was assaulted and battered and, in the process, defamed and as a result lost business entitling him to the reliefs he claimed.

It was argued and submitted that the Plaintiff proved his case to the requisite standard and prayed for judgment to be entered in his favour.

Before I proceed to determine the issues that fall for determination, I wish to observe that except for the claim of loss of business, the other heads of the damages were irregularly claimed as liquidated damages. The nature of those claims as rightly conceded by the Plaintiff's Counsel, those claims are unliquidated damages which are assessed and fixed by the courts once they have been proved and are awardable.

Coming back to the issues for determination, I wish to revert to the Plaintiff's case as pleaded setting out the cause of action. The following are the averments in the amended statement of claim: -

- “4. On 27th February 2015 at about 19:00 hours, the Plaintiff was buying cough syrup in a shop in Devils Street Emmasdale in Lusaka when he heard gunshots.***
- 5. In a matter of seconds from the time the Plaintiff heard gunshots the 1st to 4th Defendants, who were acting in the course of duty, stormed the shop in***

which the Plaintiff was and ordered everyone to kneel down.

- 6. The aforesaid Defendants singled out the Plaintiff and started beating him brutally with kicks, fists and iron bars.”**

From the above averments, the case as pleaded by the Plaintiff was that the Plaintiff was inside a shop buying cough syrup when the Defendants stormed the said shop and ordered everyone to kneel down except that they only singled out the Plaintiff. It was the Plaintiff's case that he was brutally beaten whilst in the said shop.

And in relation to the apprehension and the issue of a medical report form, the Plaintiff pleaded in his amended statement of claim as follows:

- “8. The Plaintiff was apprehended and taken to the Drug Enforcement Headquarters and was subsequently taken to Kabwata Police Station where he was issued with a medical report form on the same date of apprehension.”**

As pleaded, the Plaintiff found no difficulties with obtaining the medical report form which was issued to him immediately he got to Kabwata Police Station on the same date of apprehension.

Going by the settled principles of civil law, the Plaintiff is bound by his pleading to the extent that he was allegedly found inside a shop buying cough syrup when he together with other people in the shop were made to kneel down. Also that he was allegedly singled out and was beaten whilst inside the same shop and when taken to Kabwata

Police Station, the Plaintiff was issued with a medical report form there and then on the very day of his apprehension.

His testimony, however, was that after he had bought the cough syrup and two drinks, he heard gun shots and started running towards his car when he heard people ordering him to lie down. He then testified that his shirt revealed a gun which was in his waist and that was when someone shouted that he had a gun and they started beating him up.

In relation to seeking medical attention, the Plaintiff whilst he pleaded that he was given a medical report form on the same day of apprehension, his testimony was that he was not allowed to seek medical attention. That it was only after he had been transferred to remand prison that was the time he obtained a medical report form on 10th March 2015.

Clearly the Plaintiff's testimony on these crucial issues on which his cause of action is anchored, is at variance with the case as pleaded. This court long settled the effect of pleadings being at variance with the evidence which is that the case fails. This is so because it is the pleadings that define the issues which the court must adjudicate in order to determine matters in dispute between the parties.

Chirwa J, as he then was, held in the case of **CHRISTOPHER LUBASI MUNDIA V SENTOR MOTORS LIMITED**¹² as follows:-

“The function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties.”

His Lordship in that case continued as follows:-

“Where the pleadings are at variance with the evidence adduced in Court, the case fails since the Plaintiff’s case is completely recast without actual amendment of the statement of claim and not only will the court record be incorrect as a reference thereafter but the other party will be unable to meet the case having had no correct notice.”

I am totally in agreement with his Lordship’s holding and reasoning. For me the effect of pleadings being at variance with the evidence is totally different from matters not pleaded being let into evidence without objection. It is not a question of the Plaintiff not having pleaded the place and how he was allegedly assaulted and when the medical report form was obtained. Rather the issue is that the Plaintiff gave evidence which was contrary to the facts of the case as pleaded. To that extent his case has to fail on that score.

In case I am wrong on this score, I will still proceed to determine this matter on its merits.

This Court long established and settled the law on malicious prosecution. Baron J, as his Lordship then was, led the way when he held with approval in the case of **CLAUDE SAMUEL GAYNOR V CYRIL ROBERT COWLEY**¹³ as follows:

“The foundation of an action for malicious prosecution lies in abuse of the process of the Court by wrongfully setting the law in motion. The Plaintiff must prove that the proceedings instituted against him were malicious, without reasonable and probable cause, that they

terminated in his favour and that he has suffered damage.”

It is on this foundation that his Lordship Muwo J, as he then was categorically held in the case of **MUBITA MBANGA V THE ATTORNEY GENERAL**¹⁴ as follows:

“The essentials of malicious prosecution are four. They are prosecution, favorable termination of that prosecution, lack of reasonable and probable cause and malice.”

On the basis of the above authorities as well as the authorities cited and relied upon by the Plaintiff’s Counsel, for the Plaintiff to succeed, the Plaintiff must prove on the balance of probabilities that he was prosecuted without reasonable and probable cause which prosecution was actuated by malice and terminated in his favour. Although the Plaintiff had separately claimed for damages for malicious prosecution and false imprisonment, I will consider these claims together. This is because the factors to consider in respect of each head are substantially the same.

The Supreme Court came to the above conclusion in the case of **ATTORNEY GENERAL & OTHERS V MASAUSO PHIRI**¹⁵ when Kaoma JS held at page J11 as follows: -

“Clearly, the trial Judge was alive to the fact that the police officers were doing their duty in investigating allegations of theft of solar panels. We find no misdirection by the trial Judge since it is generally accepted that factors and considerations that go to establish reasonable and probable cause or conversely the

want of it in an action for malicious prosecution are substantially the same as those which go to prove or disprove reasonable and probable cause in an action for wrongful arrest.”

There is no dispute that the Plaintiff had been prosecuted for two counts, one for drug trafficking and the other was for threatening violence. For the drug trafficking prosecution, that prosecution indeed terminated in his favour while he was successfully prosecuted, convicted and sentenced for threatening violence.

Throughout the trial, the Plaintiff presented himself as “*the innocent biblical lamb silent to its slaughter*”. The Plaintiff never testified of any of his conduct that caused the Defendant to shift their attention from their targeted operation which was PW2 to himself. There was no shred of evidence led to show that the Defendants knew that the Plaintiff would be at the said shop at the time of their operations to have planned to attack him or plant drugs on him as alleged.

Therefore, there must have been a rational explanation as to how the Plaintiff who was not the subject of the operation ended up in the hands of the Defendants. Counsel for the Plaintiff characterized the Defendants testimonies as a chorus of lies. I, however, find the testimony of the Defendants more plausible and I believe the Defendants version of the material events of that night. This is more so because the Plaintiff offered no plausible explanation as to what led to his apprehension. To the contrary, the Defendants remained consistent with the version of events as pleaded in their defence.

Whilst the Plaintiff pleaded that he was in the shop buying cough syrup when the Defendants allegedly singled him out, his testimony, however, was that he had already bought the syrup from a drug store and was now buying drinks when he heard gunshots and started running to his car. It was in that process that he heard someone ordering him to kneel down and in the process his gun was revealed. From them onwards, the Defendants were alleged to have descended upon him beating him and apprehending him and taking him to their offices.

Like I observed earlier, in all these events, the Plaintiff portrayed himself as the innocent silent lamb that had done nothing for him to be arrested. And yet, the Plaintiff who was innocent and silent did not testify as to what point in the chain of events he had threatened violence the offence for which he was convicted and sentenced. According to his testimony, the Plaintiff only encountered the Defendants on Devils street and at their offices.

It stands to reason, therefore, that the Plaintiff must have conducted himself one way or another for him to be apprehended from the place of the Defendants were carrying out an operation which was already in the process as confirmed even by PW2. The Plaintiff himself gave no reason at all and the only explanation given was that of the Defendants.

Since the Plaintiff was not the target, I believe the testimonies of the Defendants that the Plaintiff he had gone to challenge and disturb the operations of the Defendants and the corking of his gun attracted their attention. Indeed, it was an odd coincidence that from the version of the Defendants testimonies, the Plaintiff had on his person

a loaded fire arm with one live ammunition. And it's more probable that the Defendants fired gunshots as a way of warning and disarming the Plaintiff of his fire arm.

This is more so because the Defendants were already conducting their operations inside the shop and the cause of the gunshots was not what was inside the activities that happened outside the shop. The successful prosecution and conviction of the Plaintiff of the offence of threatening violence attests to the credibility of the Defendants witnesses whose evidence is more believable than that of the Plaintiff.

Like I have said, I believed the Defendants explanation as the correct version of events and when the Plaintiff finally put the gun down, the Defendants had cause to apprehend him. And in doing so, they had cause to search him not because they were looking for drugs but as testified was to find out if he had any other weapons on him when they found the alleged drugs on his person. It is a combination of his conduct and the alleged drugs found on the Plaintiff that he was apprehended and was detained since drug trafficking is not aailable offence.

To that extent, I refuse to accept the Plaintiffs invitation that the drugs were planted on him as a cover up for the assault because as he testified he started appearing in court on one count of threatening violence. If that was the case, the Plaintiff would have secured bond as he had secured legal representation before he was charged with the offences as testified by the Defendants which testimony was not challenged regarding the delay in administering a warn and caution statement and subsequently charging the Plaintiff.

Needless to say that the Plaintiff did not indicate the point at which the purported drugs were planted on him as the cross examination suggested that the Plaintiff was found with the drugs upon being searched except that the Plaintiff did not search the Defendants prior to his search and there was no independent person to witness the search. It strongly follows that the Plaintiff was found with the alleged drugs at the time of his apprehension and same could not have been planted on him after the alleged assault as a way of covering up their actions. In fact his own witness PW3 testified that he heard that the Plaintiff had been charged with a drug offence on 27th February 2015.

From the above reasoning, I did not find the Defendants testimonies as being untruthful but that they were a mark of consistency. Even the aspect of whether a gun that was loaded could discharge at a slight disturbance did not amount to lying. As the Defendants testified, that discharge depended on the type of gun. And in any case contrary to the Plaintiff's counsel's submission that one need not be a specialist to know that a corked gun can discharge at a slight disturbance, that in my view needed ballistics expert's evidence on that score.

In the case at hand, the Plaintiff failed to show that there was no slightest justification by the Defendants to prosecute him. From the evidence on record, I find that the Plaintiff failed to prove that his prosecution lacked any reasonable and probable cause. Clearly, the Plaintiff sought to anchor his claims on no more than his mere acquittal.

It is legally settled and established that an acquittal *per se* does not necessarily amount to a malicious prosecution. It only results in a

malicious prosecution if that prosecution was motivated by ulterior motives and was devoid of any reasonable and probable cause. Hawkins J in **HICKS V FAULKNER**¹⁶ defined “*reasonable and probable cause*” at page 17 as being:

“An honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead to any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.”

Given the facts and peculiar circumstances of this case, can it reasonably be contended that the arrest and prosecution of the Plaintiff was without any reasonable and probable cause? And that such prosecution was with ulterior motives other than bringing the Plaintiff to justice? I think not. The Plaintiff was in a way caught “*red handed*” in the commission of the offences for which he was prosecuted and successfully so regarding one count. And as such, that the Plaintiff was guilty of the offences charged was the only reasonable conclusion in the minds of the Defendants.

I, therefore, come to the conclusion that on the available evidence before me, the Plaintiff’s arrest, detention and prosecution for the offence of trafficking was with reasonable and probable cause and was not actuated by any other ulterior motive other than bringing the Plaintiff to justice. The claims for malicious prosecution and false imprisonment therefore fail.

I now come to the claim for assault and battery. In doing so, I immediately note from the testimonies from both parties that the Plaintiff was admitted into the Police cells from the very moment of his apprehension by the Zambia Police Service. This is another law enforcement agency independent of DEC.

The Plaintiff alleged that he was beaten by the Defendants and produced a Zambia Police Medical Report Form as proof of his assault appearing at page 1 of his bundle of documents. The said medical report form purports to have been issued by the Zambia Police Service on 10th February 2015 and yet the Plaintiff alleged to have been assaulted on 27th February 2015.

Unfortunately, there was no explanation given why the said form bore the date of 10th February 2015 when the Plaintiff alleged to have gone to the clinic on the 10th March 2015. There was no attempt made by the Plaintiff to call the author of the same to come and clarify. Similarly, the said form bears the date of 17th March 2015 as the date when the medical officer is alleged to have signed it.

I still entertain doubt in my mind as to whether the said purported medical report was issued on the 10th March, 2015 as alleged and not the 10th February, 2015. Thus, it was not established that the alleged assault related to the Defendants actions of the 27th February, 2020. I say so mainly because, the allegation by the Plaintiff and PW2 was that the Plaintiff had been assaulted from the time of his apprehension up to the time he was admitted to Kabwata Police Station cells.

In any case the Plaintiff's evidence on this score is yet again at variance with the pleadings in that in his amended statement of claim the Plaintiff pleaded that he was given the medical report form the same day of arrest. What is even startling on this allegation is that the said medical report forms are the preserve of the Zambia Police Service and not DEC. If there was any delay in the issuance of the same, that cannot be blamed on the Defendants, as the evidence showed the purported medical report form to had been issued by the police and not the Defendants.

The claim for assault and battery equally fails.

Coming to the claim for defamation of character, the said claim was not proved as there was no evidence as to what the Defendants did which was defamatory of the Plaintiff. There was no evidence that the Defendants published and called the Plaintiff a drug dealer for example. Merely being accused of having committed an offence is not defamatory.

And in this case even if PW3 was not cross examined, his testimony was not proof of defamation. With respect, PW3 only testified of how after receiving information that the Plaintiff was charged with an offence in his wisdom, communicated to the Matero Branch for the Plaintiff to step down in order to protect the image and reputation of the political party.

In relation to loss of business, there was no shared of evidence led to prove that the Plaintiff had lost the sum of K 500, 000.00 for the period of his prosecution. It is trite law that a claim for loss of business is a claim for special damages and must be strictly proved.

The Supreme Court in the case of **MUHANGO V NGULUBE**¹⁷ guided as follows: -

“It is of course for any party claiming a special loss to prove that loss and to do so with evidence which makes it possible for the Court to determine the value of that loss with a fair amount of certainty. As a general rule, therefore, any short comings in the proof of a special loss should react against the claimant...”

Similarly, in the case of **ATTORNEY GENERAL V AMOS MUMBA**¹⁸, the Supreme Court yet again held as follows: -

“Where loss of business forms part of the claim, it must be pleaded as special damages and strictly proved.”

The Plaintiff failed to strictly prove that he lost business in the sum of K 500,000.00 claimed. This failure to prove must react against him and therefore this head of claim fails.

Lastly, regarding the claim for exemplary damages, this is not awardable. The Plaintiff failed to prove the conduct of the Defendants. When asked in his examination in chief to particularize what each of the Defendants did, he just answered generally that all of them were beating me.

From the above reasoning and conclusions, I am guided by the Supreme Court holding in the case of **ZULU V AVONDALE HOUSING PROJECT**¹⁹ where it held as follows: -

- *“A Plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponent’s case.”*

In the result, the Plaintiff has failed to prove his case on the balance of probabilities and its hereby dismissed.

I, however, exercise my discretion and order that each party shall bear its own costs as the Plaintiff was merely trying to vindicate his rights.

Leave to appeal is hereby grated.

Dated at Lusaka this 26th day of June 2020.



**C. CHANDA
JUDGE**