

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

2022/HP/0124

IN THE MATTER OF: ARTICLES,11,13(1)(2)(3), 15,18, 22 & 28(1) OF
THE CONSTITUTION OF ZAMBIA, CHAPTER 1
OF THE LAWS OF ZAMBIA.

IN THE MATTER OF: PROTECTION OF FUNDAMENTAL RIGHTS
RULES, STATUTORY INSTRUMENT NO. 156
OF 1969.

BETWEEN:

ANDY MUMBO BANDA

AND

ATTORNEY GENERAL



PETITIONER

RESPONDENT

Before: ***The Hon. Mr. Justice Charles Zulu.***

For the Plaintiff: Mr. G. Tembo & Mr. M. Mulinda, Messrs
James & Doris Legal Practitioner.

For the Defendant: Mrs. A. T. Msiska-Lungu, Assistant Senior
State Advocate.

J U D G M E N T

Cases referred to:

- 1. Daniel Chizoka Mbandagoma v Attorney General (1979) Z.R. 45 (H.C.).***
- 2. In Re Siuluta & Three Others (1979) Z.R. 18 (H.C.).***
- 3. Attorney General and Others v Masauso Phiri (SCZ Appeal No. 161 of 2014).***
- 4. Simposya v Eric Masauso Phiri and others (SCZ Appeal No. 158 of 2009).***

5. ***AB and Other v South West Water Services Ltd [1992] 4 All E.R. 588.***
6. ***Martin Nyandoro v Attorney General (1979) Z.R. 276.***
7. ***George Peter Mwanza and Another v Attorney General (SCZ Selected Judgment No. 33 of 2019).***

Legislation referred to:

1. ***Constitution of Zambia, Chapter 1 of the Laws of Zambia.***
2. ***Cyber Security Act No. 2 of 2021.***
3. ***Criminal Procedure Code Chapter 88 of the Laws of Zambia.***
4. ***State Proceedings Act Chapter 71 of the Laws of Zambia.***

Other works referred to:

1. ***McGregor on Damages Eighteenth Edition*** at page 1571 paragraph 37-011.

1.0 INTRODUCTION

1.1 The Petitioner, Andy Mumbo Banda, aged 31 years, took out a petition supported by an affidavit dated January 27, 2022, against the Attorney General for the enforcement of protective provisions of the ***Constitution of Zambia***. The Petitioner seeks the following reliefs:

- (i) ***that it may be determined by this court that the detention of the Petitioner by the Zambia Police officers is and was illegal and an infringement of the Petitioner's protected rights under Articles 11, 13, 15, 18 and 22 of the Zambian Constitution Chapter 1 of the Laws of Zambia;***
- (ii) ***that this honorable court awards damages, including punitive damages to the Petitioner for***

the infringement of the Petitioner's protected rights and suffering;

(iii) that this honorable court awards interest on any amounts payable to the Petitioner; and

(iv) costs

1.2 The Petitioner alleged that, his detention by the Zambia Police was illegal and an infringement of his protected rights under Articles 11, 13, 15, 18, and 22 of the ***Constitution of Zambia Chapter 1 of the Laws of Zambia***. It was alleged that following the recording of a warn and caution statement the police refused or neglected to formally charge him, and denied him police bond.

1.3 The Respondent filed an answer and an affidavit, alleging that the arrest and detention of the Petitioner was legal.

2.0 THE PETITIONER'S CASE

2.1 The Petitioner, Andy Mumbo Banda testified and called two witnesses (PWs). In his testimony, the Petitioner stated that he was apprehended, detained and dumped at Woodlands Police Station on January 12, 2022, and was only released from custody on January 28, 2022, on police bond. And in his affidavit, he alleged that when he was detained at Woodlands Police Station, he was not informed of the reason for his detention. That a warn and caution statement was only recorded after a week on January 21, 2023, and then he became aware that he was detained on allegations relating to unauthorized access to computer data and theft of \$20, 000.00.

- 2.2 He said he was supposed to be released on January 27, on police bond, but was not released on the pretext that one of his sureties was not present.
- 2.3 He explained his ordeal in custody as follows: he had no access to food except what he called "scrap food" shared with him by his inmates; no proper sleeping material, bitten by lice; and that he was exposed to inhuman treatment from his inmates. He said he had no access to communication, to communicate to his parents, and only communicated with them after a week through a third party, visiting another inmate.
- 2.4 PW2 was Charles Banda, the Petitioner's father. He said Andy Banda was detained at Woodlands Police Station. He said, they only learnt of his detention after a week through a neighbor who had visited a cousin in detention. He said when they visited Woodlands Police Station to inquire into the reason for his detention; he discovered that what was recorded in the Occurrence Book was theft of motor vehicle.
- 2.5 He said when his brother (PW3) and he met the Arresting Officer, Mr. Zyambo (DW) somewhere into the third week of Andy's detention, after being unavailable for about a week, the Arresting Officer advised him to produce working sureties to secure the release of his son, but only managed one. He said consequently he managed to organize another surety, a day before his release from custody on police bond on January 28, 2022.

2.6 PW3 was John Banda, the brother to PW2 and the uncle to the Petitioner. His testimony is materially similar to that of PW1 and PW2. I will not labour to extensively summarize the same, save to record that, he said the Arresting Officer informed PW2 and he, that the reason for the Petitioner's detention was that the Petitioner was allegedly involved in some criminal cartel.

3.0 THE RESPONDENT'S CASE

3.1 The only Defence Witness (DW) for the State was Geoffrey Zyambo, the Arresting Officer hereinbefore mentioned. He said he was stationed at Police Headquarters in the department of Anti-Fraud and Cyber Crime Unit.

3.2 He said on January 8, 2022, a merged docket was brought to his attention, involving a complaint by Mr. Kumar, who complained that a sum of USD\$92, 000.00 was stolen from his bank account held at Standard Chartered Bank, using mobile services. He said that investigations revealed that fraudsters accessed his account by swapping (replicating) his SIM Card, accessed the account and transferred money from his account to various accounts and mobile money accounts.

3.3 He said his investigations led to the arrest of Costine Ngoma, at the material time a banker with Standard Chartered Bank, who implicated the Petitioner. He said eventually, the Petitioner, a former employee of Standard Chartered Bank, was arrested on January 12, 2022.

- 3.4 He said initially he recorded a mere statement from the Petitioner. According to him, the Petitioner was a good witness, because he was connecting the banker, Costine Ngoma to one Dominic Kambole. However, he added that it was later learned that after the Petitioner was warned and cautioned, the Petitioner was as well connected to the fraud, because he was a beneficiary of the sum of K10, 000.00. He made reference to the warn and caution statement taken on January 21, 2022. It was recorded that in the first count, the Petitioner was being investigated with his accomplices for the offence of unauthorized access to data and interception of data contrary to section 49 of the ***Cyber Security Act No. 2 of 2021***.
- 3.5 In the second count, it was alleged that the Petitioner with his accomplices was warned and cautioned for theft of USD\$92, 000.00 cash, allegedly stolen from the bank account of Mr. Kumar.
- 3.6 He said at the time he was introduced to the Petitioner's legal representative, Mr. Matarilo, he was in constant communication with him, and was updated at every stage of the investigations.
- 3.7 He said a warn and caution statement was recorded, and the Petitioner was charged with theft. He said since he had no authority to release the Petitioner on police bond, he advised the Petitioner and his relatives to secure two sureties, and connected them to the officer-in-charge. He said the Petitioner

only managed to secure sureties on January 27, 2022, leading to the release of the Petitioner on police bond.

3.8 When asked as to the allegations of inhuman treatment, no access to food and, and unsanitary conditions, he stated that Woodlands Police Station had a lot of detainees, and that relatives to inmates were allowed to take food as prescribed by the timetable. According to him, the cells had sanitation facilities that allowed a suspect to take a bath. He added that, the cells also had mattresses and blankets, and suspects were allowed to have their own beddings, if they prefer using their personal beddings.

4.0 THE PETITIONER'S SUBMISSIONS

4.1 The Petitioner's Counsel, Mr. Matarilo streamlined the issues for determination in the following manner:

- a. whether or not the detention of the Petitioner by the Police was lawful; and***
- b. whether the Petitioner is entitled to damages for unlawful detention.***

4.2 The Petitioner's Counsel cited the applicable statutory law and case law to strengthen his arguments. Firstly, section 33 of the **Criminal Procedure Code Chapter 88 of the Laws of Zambia** (CPC) was cited, which provides:

33. (1) When any person has been taken into custody without a warrant for an offence other than an offence punishable with death, the officer in charge of the police station to which such person shall be brought may, in any case, and shall, if it does not appear practicable to bring such person before an

appropriate competent court within twenty-four hours after he was so taken into custody, inquire into the case, and, unless the offence appears to the officer to be of a serious nature, release the person, on his executing a bond, with or without sureties, for a reasonable amount, to appear before a competent court at a time and place to be named in the bond: but, where any person is retained in custody, he shall be brought before a competent court as soon as practicable. Notwithstanding anything contained in this section, an officer in charge of a police station may release a person arrested on suspicion on a charge of committing any offence, when, after due police inquiry, insufficient evidence is, in his opinion, disclosed on which to proceed with the charge.

- 4.3 And placing reliance on the cases of ***Daniel Chizoka Mbandangoma v Attorney General (1979) Z.R. 45*** and ***In Re Siuluta & Three Others (1979) Z.R. 18***, it was argued that, section 33 of the CPC does not allow a police officer to apprehend a suspect and detain a suspect for purposes of apprehending his accomplices, or conducting an investigation while the suspect was in detention. It was noted that in the former case, the Court lamented the culture of “arrest now and investigate later”. And while acknowledging the challenges faced by the police in investigating criminal matters, it was submitted that, the challenge cannot be used to justify unlawful detention.
- 4.4 The case of ***Attorney General and Others v Masauso Phiri (SCZ Appeal No. 161 of 2014)*** was also adverted to, and Counsel summarized the facts of the case. That the police were informed by a member of a neighborhood watch regarding the theft of solar panels, and based on the information provided,

the police were led to the location of the respondent, and the arrest of one Phiri. That Phiri was arrested based on suspicion of his involvement in the theft of the solar panels, and was only informed a day later regarding the reason for his arrest. The Supreme Court held:

On the basis of our decision in the Sam Amos Mumba case, we find that the learned trial Judge was on firm ground when she held that the respondent was unlawfully detained from 17th January to 18th January, 2007 when he was informed of the reason for his detention. It was irrelevant that the police had a reasonable suspicion connecting the respondent to theft of the solar panels. Both grounds of appeal must fail. Consequently, we dismiss the appeal and uphold the judgment of the court below.

4.5 Additionally, reference was also made to the case of *Simposya v Eric Masauso Phiri and Others (SCZ Appeal No. 158 of 2009)* wherein it was stated that:

Mere suspicion without investigations cannot justify the detention of any person.

4.6 It was contended that where the police arrest a suspect without a warrant of arrest, the police had an obligation to inform the suspect of the reason for his arrest, and present the suspect before a court of competent jurisdiction within a reasonable time. And that anything beyond the time frame set by section 33 of the CPC would amount to unlawful detention.

4.7 It was argued that the Petitioner's detention was unlawful. According to Counsel, the Petitioner was not immediately informed of the reasons for his arrest and detention. And that

5.0 DETERMINATION

5.0 I have carefully considered the evidence adduced and the respective submissions by Counsel. I am satisfied that on January 12, 2022, the Petitioner was apprehended by the police, and detained at Woodlands Police Station, and remained in custody until his release on January 28, 2022.

5.1 The primary question as rightly put by Mr. Mataliro is: whether or not the detention of the Petitioner by the Police was lawful. The test as to the legality, or otherwise of the detention starts with the citation of Article 13 (1) of the Constitution, which in part provides:

A person shall not be deprived of his personal liberty except as may be authorized by law...

5.2 And Article 13 (3) of the Constitution provides:

(3) Any person who is arrested or detained-

(a) for the purpose of bringing him before a court in execution of an order of a court; or

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Zambia;

and who is not released, shall be brought without undue delay before a court...

5.3 While Article 22(1) of the Constitution guarantees the protection of the freedom of movement, it is lawfully permissible to deprive a person of his/her liberties on account of Articles 13(3) and 22(2) and (3) of the Constitution, and section 26 of the CPC. A person so detained without a warrant of arrest, particularly on

account of being suspected of committing an offence must be furnished with the reasons for his arrest and detention, that is to say, particulars of the offence. A detention that is ultra vires the Constitution is amenable to be declared null and void. Accordingly, in line with section 33 of the CPC, I am directed to Article 18 (2) (d) of the Constitution, which states:

Every person who is charged with a criminal offence shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence charged.

- 5.4 It was assertively argued by the State that, the arrest and detention of the Petitioner was based on reasonable ground and suspicion. This is not the only criterion to be applied. The detention of a suspect on mere suspicion or reasonable suspicion without informing the suspect the reason for his or her detention does validate the detention. This conforms to the holding of the Supreme Court in ***Attorney General and Others v. Masauso Phiri*** (supra).
- 5.5 Indeed, it is immaterial to rely on the argument that the police had reasonable suspicion connecting the suspect to an offence, if the suspect is not informed of the offence for which he is detained. Therefore, the conception of reasonable suspicion to instigate an arrest and detention, and timely disclosure of the reasons for detention of a suspect are mutually inclusive and symbiotic.

5.6 In the present case, I find it probable that at the time of the Petitioner's arrest and detention, he was not furnished with the reasons of his detention, and no charge was leveled against him. I am fortified in this resolve, because the Petitioner was only warned and cautioned on January 21, 2022, eight (8) days after his detention. In fact, the Arresting Officer, Mr. Zyambo said that at the time of detaining the Petitioner, he only recorded a mere statement, because according to him: "Andy Banda was a good witness to the matter as he was connecting the banker and the outsider, namely, Dominic Kambole".

5.7 Furthermore, and of material attention is the testimony of Mr. Zyambo to the effect that, while the Petitioner was in detention, it was discovered that the Petitioner was allegedly connected to the offence. Typically, this is a manifestation of the decried culture of "arrest now and investigate later". In decriing this conduct Hadden J., in the case of ***Daniel Chizoka Mbandagoma v Attorney General*** (supra), held:

It is improper for the police to detain a person pending further investigations without bringing them before court as soon as practicable...

5.8 The detention of the Petitioner from 12 to 20 January, 2022, was unconstitutional, on account that he was not furnished with the reasons for his detention, and the omission thereof was inexcusable and unjustifiable. Ordinarily, the true object of putting in motion the initiation of criminal process is to seek the ends of justice, and not to abuse the process. And those

driving the state machinery, must *ab initio* afford the suspect(s) involved in the criminal process the guarantees of a fair legal process.

5.9 Therefore, the Petitioner is entitled to general damages for wrongful detention from January 12 to January 20, 2022. An award of damages for wrongful detention under the Bill of Rights is generally comparable to an award of damages for false imprisonment under Common Law. Regard is had to the learned authors of ***McGregor on Damages Eighteenth Edition*** at page ***1571 paragraph 37-011***, they submit as follows:

The details of how the damages are worked out in false imprisonment are few: generally it is not a pecuniary loss but a loss of dignity and the like, and is left much to the jury's or judge's discretion. The principal heads of damage would appear to be the injury to liberty, i.e. the loss of time considered primarily from a non-pecuniary viewpoint, and the injury to feelings i.e. the indignity, mental suffering, disgrace, and humiliation, with any attendant loss of social status and injury to reputation. This will be included in the general damages which are usually awarded in these cases; ...

5.10 I am mindful that an award of damages is done once and for all. Therefore, the award must be adequate and fair. Having regard to the circumstances of the case, and the guidance drawn from the authorities cited above, and in particular to the period of the Petitioner's unlawful detention from January 12 to 20, 2022, I award the Petitioner the sum of K20, 000.00 as general damages for wrongful detention.

5.11 I now turn to the claim for exemplary or punitive damages. In the case of ***AB and Other v South West Water Services Ltd [1992] 4 All ER 588***, Lord Devlin had this to say regarding the head of exemplary damages:

Exemplary damages were limited not by the cause of action sued on but by the status of the defendant and the quality of his conduct. Accordingly, if the conduct complained of by the plaintiff consisted of a deliberate, calculated and willful attack upon his rights by a defendant whose status fell within the category of a government servant engaging in oppressive, arbitrary or unconstitutional action, or whose motivation was calculated by him to make a profit for himself which might well exceed the compensation payable to the plaintiff, then the defendant could be liable for exemplary damages regardless of the cause of action sued upon. Thus exemplary damages could be awarded in a claim of public nuisance against a public authority where the conduct complained of consisted of a deliberate, calculated and willful interference with a person's rights as a member of the public in circumstances which were oppressive, arbitrary or unconstitutional or where the authority intended to make a profit greater than the compensation which would otherwise be payable to the plaintiff.

5.12 And our own Supreme Court, in the case of ***Martin Nyandoro v Attorney General (1979) Z.R. 276***, held (head-notes):

In awarding exemplary or aggravated damages the conduct of the parties have always been taken into account. It would be difficult for the court to award damages where evidence has not been led to prove the conduct of the parties where torture and brutality are alleged.

5.13 It was submitted that; the Petitioner was equally entitled to exemplary damages given the despicable conduct of the police. The conduct was described as follows:

The police continually eluded the relatives who by the 19th January, 2022 were ready to execute police bond for the Petitioner. The police even chose to keep the Petitioner in custody for the sole reason that Thursday was a sports day. Really? If this conduct cannot be held to be contumelious then what else is described as such?

5.14 What I find probable is that, when the bail bond conditions were fully satisfied by the Petitioner, he was forthwith released from detention. However, the conduct of the Police, which I find aggravating in the present case, is that, the Petitioner was unjustifiably denied the opportunity to notify his relatives about his detention, when it was reasonably practicable.

5.15 The conduct was in contumelious disregard of the Petitioner's rights. His detention was only fortuitously discovered by his parents after a week through a third party, who was independently visiting an inmate at Woodlands Police Station. It is for reason the Petitioner was justified to complain that he was denied access to food for seven (7) days from his parents. He was forced to swallow his dignity, and had to depend on what he called 'scrap food' from his fellow inmates.

5.16 Parenthetically, the right of access to food for a detainee should not be taken casually as a mere socio-economic right or non-justiciable, but one that is unavoidably connected to the

right to life, and in that regard justiciable (see *George Peter Mwanza and Another v Attorney General (SCZ Selected Judgment No. 33 of 2019)*). It is for reason the Petitioner's remonstrations are significant. And in respect of exemplary damages, I award the Petitioner the sum of K10, 000.00.

6.0 CONCLUSION

6.1 In the light of the foregoing, the Petitioner's detention from 12 to 20 January 2022, was ultra vires the Bill of Rights, in particular Articles 13(1) as read with Article 22 and 18(2)(b) of the Constitution of Zambia. Therefore, the Petitioner's detention for the said period was unlawful. And an award of damages is tenable. Accordingly, the Petitioner is entitled to general damages in the sum of K20, 000.00, and exemplary damages in the sum of K10, 000.00. The total award is the sum of K30, 000. 00, which shall carry interest at the average short-term deposit rate from the date of the writ of summons to date of judgment, and thereafter at six (6) per centum until final payment as provided by section 20 of the *State Proceedings Act Chapter 71 of the Laws of Zambia*.

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

6.2 Leave to appeal is granted.

DELIVERED THE 17TH DAY OF JANUARY 2024.


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THE HON. MR. JUSTICE CHARLES ZULU