

**IN THE COURT OF APPEAL FOR ZAMBIA
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

APPEAL 129/2018

BETWEEN:

ZAMBIA TELECOMMUNICATIONS LIMITED

APPELLANT

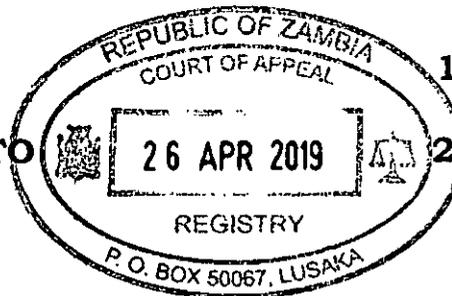
AND

PENIAS MWALE

1ST RESPONDENT

COSMAS CHIPOLOKOTO

2ND RESPONDENT



CORAM: Mchenga DJP, Chishimba and Mulongoti JJA

On 20th February, 2019 and 26th April, 2019

For the Appellant: Mr. M. Mwaba, In house counsel.

For the Respondents: N/A

J U D G M E N T

Mulongoti, JA, delivered the Judgment of the Court

cases referred to:

1. Levy Hamalala Chulu v Attorney General 2007/HP/344 (HC) (unreported)
2. Birdman v Jones (1845) 7 QB 742
3. Attorney General and others v Phiri SCZ Appeal No. 161/2014

4. *Anti-Corruption Commission v Charles Sambundu SCZ Appeal No. 054/2013*

Other works referred to:

1. *Halsbury's Laws of England, vol. 97, 5th edition, paragraph 733*

2. *Bullen & Leake & Jacob's Precedents of Pleadings, volume 1, 16th edition paragraphs 2-12*

This is an appeal against the High Court decision which awarded the respondents damages for malicious prosecution, false imprisonment and defamation.

At this stage it is necessary to say a little about the background of the case. The Plaintiffs (now respondents) had sued the appellant Zambia Telecommunications Limited (ZAMTEL) and the Attorney General in the High Court, alleging that the appellant's servants or agents caused the plaintiffs to be arrested and detained at Mazabuka Police Station for vandalism of the appellant's cables. The plaintiffs further alleged that the complaint was false and malicious.

At trial, the respondents testified that on 8th February, 2010, an agent of the appellant, Francis Liambazi, caused the police to arrest and detain them for charges of vandalism of the appellant's cables which they were found digging.

They were detained by the appellant's agents from 09:00 hours to 16:00 hours and then taken to the police station. They were subsequently remanded in prison for seven months.

They were tried before the Mazabuka High Court on the criminal charge of vandalism. They were found not guilty and acquitted on 13th August, 2010.

According to the 1st respondent, on the day in question, he was at the field with the 2nd respondent, digging for sweet potatoes.

Later, the 2nd respondent went to buy cigarettes. He, (1st respondent) was then approached by the three neighbourhood watch officers who accused him of stealing cables.

He started arguing with them then the 2nd respondent returned and they were both beaten and taken to the appellant then Zambia Police at Mazabuka.

On the claim for damages for defamation of character, the 1st respondent alleged that while in custody, ZANIS journalists visited him and interviewed him over the case and broadcasted the story.

And, that the 2nd respondent, an electrician, lost contracts with Zambia Sugar who no longer give him work.

DW1 was Francis Liazambi (a former employee of the appellant) who testified that in February, 2010 the person who was in charge of the appellant's security, took the respondents to his office because they were exhuming the appellant's cables. The appellant's security personnel was in the company of a police reserve and a Mr. Musole when the respondents were taken to his office.

DW1 conducted investigations and he took the respondents to the scene where he saw the appellant's cables exposed at one end. He, later had the respondents taken to Mazabuka Police Station.

DW2 a police officer stationed at Mazabuka, testified that he interviewed the respondents but they denied the charge of vandalism of the appellant's cables. They visited the scene with DW1 and they found three wires which were cut or exposed at one end, which DW1 said belonged to the appellant.

In cross examination, he said he went to the scene to ascertain if the cables belonged to the appellant and took photographs at the site.

He said the respondents were not on the pictures. He conceded that he found freshly dug out potatoes when the respondents showed him the place they were digging from.

After analysing the evidence the trial Judge found for the respondents and awarded them damages as prayed.

We note that the trial Judge relied heavily on the Judgment of the criminal trial Judge, in finding the appellant's culpable. The trial Judge found that the cables were not found in the possession of the respondents. Further, that the respondents were apprehended by agents of the appellant on false and malicious information that they were found digging the appellant's cables.

The trial Judge reasoned that the criminal trial Judge did not find that the respondents could have been responsible for vandalising the cable and that the appellant misunderstood the criminal Judgment.

She concluded that the appellant had no basis to charge the respondents and the prosecution was not justified.

Dissatisfied the appellant appealed against the Judgment on four grounds as follows:

- 1. That the Learned trial Judge erred in Law and in fact when she found, contrary to the evidence on record, that the persons who apprehended and accused the Plaintiffs of digging the 1st defendant's cables were Agents of the 1st defendant.***

- 2. That the learned trial Judge erred in law and fact when she found the 1st defendant liable for malicious prosecution despite the fact that there was evidence on record to show that there was probable cause for the 1st defendant to report the matter to the police.**
- 3. That the learned trial Judge erred in law and in fact when she held that the plaintiffs were falsely imprisoned by the 1st defendant notwithstanding the evidence on record of the sequence of events from their apprehension to being handed over to the police.**
- 4. That the Learned trial Judge erred in law and in fact when she held that the plaintiffs were defamed by the 1st defendant when there were no particulars of the alleged defamation provided in the pleadings neither was evidence adduced before the court to show that any statement attributed to the 1st defendant was issued.**

Both parties filed heads of argument.

The appellant argued, in ground one, that the finding that the respondents were apprehended by the appellant's agents was not supported by the evidence on record. The 1st respondent's testimony was that he was apprehended by the neighbourhood watch and not the appellant's employees. However, the trial Judge without explanation, chose to believe the testimony of the 2nd respondent that the neighbourhood watch was given a mandate by the appellant to catch people who dig their cables. This was hearsay as the 2nd respondent was allegedly also just told by the person who

apprehended them. We were urged to interfere with this finding as it is contrary to the evidence on record.

The respondents contended that the finding that the appellant's agents apprehended the respondents was supported by the evidence. As can be seen at page 97 of the record of appeal, line 20, the respondents mentioned that the people who apprehended them were given a mandate by the appellant to catch vandals who dig their cables.

It is the further submission of counsel, that after apprehension, the respondents were taken to the appellant's offices instead of the police as per normal practise. This fact also confirms that they were apprehended by the appellant's agents.

In ground two, the appellant's argued that the trial Judge misdirected herself when she found that the respondents had proved that they were maliciously prosecuted despite the fact that there was probable cause for the appellant to report the matter to the police.

Reliance was placed on the case of **Levy Hamalala Chulu v Attorney General**¹, on the elements of malicious prosecution.

According to counsel the appellant acted reasonably by reporting the matter to the police so that an investigation could be

conducted. This is so because according to the members of the public who apprehended them, the respondents were found digging cables belonging to the appellant.

Additionally, that even if the court below found that they acted without any reasonable or probable cause, the claim should have still failed because there was no evidence led to show that the appellant's actions were malicious.

The respondent's argued that ground two ought to be dismissed because the plaintiffs proved malicious prosecution as they were prosecuted and the proceedings terminated in their favour.

Regarding reasonable and probable cause, it is argued that the evidence was that the respondents were not found digging cables neither were they found in possession of the appellant's cables. The appellant established that they were digging sweet potatoes but still went ahead and reported them to the police.

In ground three the appellant's contend that the trial Judge erred when she found that the respondents were falsely imprisoned. Learned counsel referred to the case of **Birdman v Jones**² which held that false imprisonment is a restraint on the liberty of the person without lawful cause.

According to counsel, the question the lower court ought to have considered is whether there was a justification or reasonable cause for the appellant to have kept the respondents before reporting the matter to the police. That in *casu*, there were reasonable grounds for the suspicion that the respondents vandalised the cables. In addition that the record of appeal at page 101 lines 9-12 shows that the respondents were not detained nor kept at the appellant's premises until they were handed over to the police.

It is contended that what transpired was that the respondents were taken to the appellant's premises by members of the public on allegations that they were vandalising cables. After that they proceeded to the site to determine whether there was credence in the allegation. It was only after verification that the vandalised cables belonged to the appellant, that the respondents were reported to the police.

Therefore, the act of the appellant, going to the alleged crime scene with the respondents, cannot be said to amount to false imprisonment. This is because there was reasonable suspicion that the neighbourhood watch had found the respondents vandalising the cables. Based on the neighbourhood watch's allegations, the appellant had reasonable grounds to suspect that the respondents

plaintiff. The rationale for this being that if it is not communicated to any other person, then it cannot lower the reputation of the plaintiff in the eyes of the public.

That the record of appeal at pages 94-107 shows that the respondents never called any witnesses to prove that the statement complained of was communicated to any other person. The trial Judge erred when it held that the claim for damages for defamation was meritorious as the respondents had shown that the radio announcement and publicity the respondents were subjected to, had a negative effect on their livelihoods.

In response to ground four, the respondents argued that the respondents proved that they were defamed as the news of the 1st respondent's arrest was broadcast on radio and a journalist from ZANIS visited him while in detention to get details of the arrest.

We have considered the arguments and submissions by counsel on behalf of the respective parties.

The issues the appeal raises are whether the respondents were arrested by agents of the appellant. And, whether they were maliciously prosecuted, falsely imprisoned and defamed as a result of the criminal proceedings on a charge of vandalism.

The respondents' testified that they were apprehended by three neighbourhood watch officers. And that it was the neighbourhood watch who took them to the appellant's premises where they met DW1. At page 95 lines 4 to 5, the 1st respondent clearly stated that three neighbourhood watch people approached him.

The 2nd respondent in his testimony confirmed this fact when he said that he found the 1st respondent being beaten by neighbourhood watch officers, when he returned from buying cigarettes. According to DW1, the respondents were then taken to his office at the appellant's premises by the man in charge of security. The respondents were in the company of a police reserve. After that, he, together with the security officer, the respondents and the police reserve went to the site to ascertain if indeed the appellant's cables had been vandalised. After confirming this fact, the security officer reported the matter to the police and surrendered the respondents to them.

It is therefore clear that the people who arrested the respondents were not the appellant's agents. They were arrested by the neighbourhood watch officers.

The trial Judge erred when she found that the respondents were arrested by the appellant's agents. Ground one therefore succeeds.

The issue in ground two is whether the respondents were maliciously prosecuted, and whether all the elements of malicious prosecution were proved. According to the book **Bullen & Leake & Jacob's Precedents of Pleadings, volume 1, 16th edition**, the elements of malicious prosecution which a claimant must prove and establish are that:

"(a) he was prosecuted by the defendant, i.e that proceedings on a criminal charge were instituted or continued by the defendant against him;

(b) the criminal proceedings were terminated in the claimant's favour;

(c) the proceedings were instituted without reasonable and probable cause;

(d) the defendant instituted the proceedings; and

(e) the claimant suffered loss and damage as a result."

From the facts of the appeal before us, it was not disputed that the respondents were prosecuted before the High Court sitting at Mazabuka and later acquitted after the defendant failed to prove the criminal charge against them beyond reasonable doubt. The first two elements of malicious prosecution were therefore, proved by the respondents.

The third element is that the criminal proceedings were instituted without reasonable and probable cause. In the case of **Anti-Corruption Commission v Charles Sambundu**⁴, the Supreme Court observed that: "***reasonable and probable cause for the prosecution has been said to be an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead 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.***"

The Supreme Court further stated that "***it is important to note the presence of reasonable and probable cause for a prosecution does not depend on actual existence, but upon a reasonable belief held in good faith in the existence of such facts as would justify a prosecution.***"

In this matter, before us, the respondents were found in the field, with a hoe, near to where the appellant's cables were found cut or exposed on one end. The respondents' evidence was that they were in the field digging sweet potatoes and indeed they were found with sweet potatoes. However, their field of sweet potatoes was nearby and in the same locality as the appellant's (ZAMTEL) cables with some being found cut or exposed.

We are of the considered view that there was reasonable and probable cause for prosecuting the respondents for vandalism of the appellant's cables. The third element was thus not proved. The trial Judge misdirected herself when she found that there was no reasonable and probable cause for the prosecution and awarding the respondents damages for malicious prosecution.

We note that in finding no reasonable and probable cause, the trial Judge heavily relied on the criminal Judgment by which the respondents were acquitted. At page J28 (35 of the record) lines 9 to 12, she stated as follows:

"It is incorrect to argue that the plaintiff could have been responsible for vandalising the cable because the High Court did not reach such a conclusion. The defendants clearly misunderstood the findings of the High Court which acquitted the plaintiffs of the offence of vandalism."

This was a serious misdirection on the part of the trial Judge. She was hearing the civil case and not the criminal case. It is settled law that the burden of proof in civil matters is different from criminal matters. The burden of proof for civil matters is on a preponderance of probabilities while for criminal matters it is proof beyond reasonable doubt, which is higher than for civil matters. The trial Judge erred in law and fact, when she concluded that because the

respondents were acquitted on the criminal charge of vandalism, then the prosecution was without reasonable and probable cause.

The fourth element which a claimant must prove is that the defendant acted with malice in prosecuting the plaintiff. To prove malice, the Supreme Court in the case of **Anti-Corruption Commission v Charles Sambundu**⁴ stated that the plaintiff has to prove that the defendant was actuated either by spite or ill-will or by indirect or improper motives. In addition that *"...the existence of malice is always a question of fact and the absence of reasonable and probable cause affords some general evidence of the presence of malice. The proper motive for any prosecution is to secure the ends of justice. If securing the ends of justice in a prosecution was not the true and predominant motive, then malice is proved."*

We have already determined, there was reasonable and probable cause for prosecuting the respondents in this case. It follows as held in the **Anti-Corruption Commission v Charles Sambundu**⁴ case, that there was therefore no malice. As such the fourth element was also not proved.

The fifth element is that the claimant must prove that he has suffered damage as a result of the prosecution. Having found that there was reasonable and probable cause and no malice in

prosecuting the respondents we are inclined to find that there was no damage suffered by them. According to **Halsbury's Laws of England, vol.97, 5th edition, paragraph 733** (referred to in **Anti-Corruption Commission v Charles Sambundu**):

"To support a claim for damages for malicious prosecution, one of three heads of damage must be shown. The damage may be (1) damage to a man's fame, as where the matter of which he is accused is scandalous: or (2) damage done to the person, as where his life, limb or liberty is endangered: or (3) damage to his property, as where he is put to the expense of acquitting himself of the crime with which he is charged. The claimant must show that any damage to fame suffered was a necessary and natural consequence of the charge itself. And as regards the second head of damage, that actual loss of liberty was suffered. Once one of these heads of damage is proved, damages are at large and may include compensation for loss of reputation and injured feelings."

This actually, brings us to ground four in which it is contended that the trial Judge erred in awarding the respondents damages for defamation.

It was encumbered upon the respondents to prove one of the three elements of damage. The trial Judge found that they proved the first element because for the 1st respondent his testimony was that *"his character was tarnished when he was arrested and it was broadcast on radio, which broadcast he also heard and that ZANIS went to get the*

some details from him. And for the 2nd respondent because he testified that ***"he is an electrician by trade and he cannot be employed when seeking employment and he is no longer called as a contractor to companies such as Zambia Sugar."*** The trial Judge accepted this evidence, and awarded damages for defamation.

After reviewing the evidence and considering the arguments by counsel on whether the respondents were defamed, we are inclined to agree with the appellant's counsel in *toto*. Furthermore, having found that there was reasonable and probable cause and no malice in the prosecution of the respondents, the question of defamation does not even arise.

Therefore, grounds two and four equally succeed.

Turning to ground three on false imprisonment, we have already determined that the neighbourhood watch officers apprehended the respondents. Then they were taken to the appellant's premises, where the respondents alleged they were detained from 09:00 to 16:00 hours. DW1 said the respondents were not detained at the appellant's premises as they were taken to the scene to verify if the cables belonged to the appellant, which verification was positive. It was then that they were surrendered to the police.

The question is were they falsely imprisoned by the appellant? In **Attorney General & others v Phiri**³ the Supreme Court elucidated that *"there is no false imprisonment if a person's arrest is justifiable or if there is reasonable and probable cause for restraint."* In this matter the appellant's officer, DW1 detained the respondents as he had to verify if the cables they were accused of vandalising belonged to the appellant. This entailed going to the scene and also interviewing the respondents. They found that the cut cables belonged to the appellant. We find that the appellant was justified in keeping them for hours as they verified if the cables were theirs and to do preliminary interviews.

Thus, as held in **Attorney General and others v Phiri**³ that *"in an action for false imprisonment, it is necessary for the plaintiff to prove nothing but the restraint itself, it is then for the defendant to discharge the onus."* We opine that the appellant in this matter discharged the onus.

Consequently, the trial Judge erred when she found the appellant liable for false imprisonment of the respondents and condemning them to pay damages. Accordingly ground three also succeeds.

In the net result, we find merit in all the four grounds and allow the appeal. We award costs in this Court and below to the appellant, to be taxed in default of agreement.


C.F.R. MCHENGA
DEPUTY JUDGE PRESIDENT


F.M. CHISHIMBA
COURT OF APPEAL JUDGE


J.Z. MULONGOTI
COURT OF APPEAL JUDGE