

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

2006/HP/0551

EMMANUEL MUSONDA



PLAINTIFF

AND

RICHARD SIABULA (Male Police Officer)
MACHI (Male Police Officer)
ZULU (Male Police Officer)
THE ATTORNEY GENERAL

1st DEFENDANT
2nd DEFENDANT
3rd DEFENDANT
4th DEFENDANT

Before the Honorable Mr. Justice C.F.R. Mchenga

For the Plaintiff: K Tembo, Legal Resource Chambers

For the Defendant: D. Shamabobo, State Advocate, Attorney General's
Chambers

JUDGMENT

Cases referred to:

1. Murray v Ministry of Defence [1988] ICLR 692.
2. Joyce Banda v The Attorney General [1978] Z.R. 233
3. Letang v Cooper [1965] 1QB 232
4. Richman Chulu v Monarch (Z) Ltd [1983] Z.R. 33
5. Herinan v Smith [1938] 1 All ER.
6. Abraham Mwanza and Others v The People [1977] Z.R. 221

Materials referred to:

1. **Halsbury's Laws of England 4th Edition Volume.**
2. **Clerk and Lindsell on Torts (Sweet and Maxwell, London)**
3. **Winfield and Jolowicz on Tort, W.V.H. Rodgers, 17th Edition (Sweet and Maxwell, London, 2006)**

Legislation referred to:

1. **The Criminal Procedure Code, Chapter 88 of the Laws of Zambia**
2. **The Penal Code, Chapter 87 of the Laws of Zambia**
3. **The Evidence Act, Chapter 43 of the Laws of Zambia**

The plaintiff, by writ of summons, seeks the following reliefs:

1. **Damages for false imprisonment.**
2. **Damages for assault and battery.**
3. **Exemplary damages**
4. **Interest at the bank lending rate from date of assessment to the date of payment.**
5. **Costs**

According to his statement of claim, the plaintiff was on 15th June 2005, arrested and detained at Shikoswe Police Station for loitering. During the course of his detention, the 1st defendant told him that he would not be released until he indicated the whereabouts of a welding machine. He was also questioned and beaten by the 1st, 2nd and 3rd defendants. As a result of the beatings, he suffered injuries on his hand and legs. He was also denied medical attention. He was only released on 20th June 2005, after promising to pay K100,000.00 to the 1st defendant.

He itemized the injuries he suffered as being:

- 1. Swollen and fractured right hand**
- 2. Cut on right heel**
- 3. Painful joints**

In support of his claim for exemplary damages, he pleaded that:

- (i) The defendant continued to batter the plaintiff even after he started bleeding from the injuries and lost consciousness.**
- (ii) The defendants denied the plaintiff medical attention despite being aware that he was injured.**
- (iii) The defendant detained the plaintiffs for three days solely for the purposes of extortion.**

In their defence, the defendants admitted that the plaintiff was initially detained for loitering but pleaded that he was not released because he was facing a charge of breaking into a building and committing a felony. He also had the habit of changing his residence. They admitted that he was questioned on the whereabouts of the welding machine but they denied assaulting him. They denied that he suffered injury and was denied medical attention.

At the hearing, the plaintiff gave evidence and called one witness. His evidence was that on 14th June 2005, while returning from a drink, he was apprehended by police officers and detained. The following morning, he was asked to pay an admission of guilt fee but he failed. He was then assigned to sweep at the police post.

After he finished sweeping, the 1st defendant appeared and accused him of embarrassing him by not appearing in court as a witness. He said he did not go to court because he could not be a witness in a matter he did not know. The 1st defendant gave instructions that he be taken back to the cells for not turning up at court. He also demanded that he shows him where the welding machine was. When he maintained that he did not know, he transferred him to Zambia Compound Police Post where they continued to detain him.

Around 19:00 hours on the same day, the 1st defendant went to the police station with his friends and demanded for the welding machine. When he denied knowing where it was, they handcuffed him and started beating him. A plank and pipe were used. He sustained a deep cut on the leg and lost consciousness. He was then put back in the cells.

The following morning he asked for a medical report but they denied him one. His wife, who visited him that morning, bought him paracetamol. He remained in detention from 16th to 19th June 2005. On 19th 2005, the police demanded K100,000.00 to release him and he sent his wife to look for the money but she did not return. On 20th June 2005, around 17:00 hours, he was released from police custody after he signed some documents. To support his claim that he suffered injury, he referred to his medical report, outpatient attendance form from Kafue District Officer. He also referred to his x-ray form and produced all the documents.

When he was cross examined, he said the police wanted him to be a witness in a matter concerning a stolen welding machine that he did not know about. The police thought a young man they had arrested had sold him the welding machine. He confirmed that having been in custody from 14th June to 20th June 2005. He also admitted that prior to that, he had been arrested and released.

The plaintiff's second witness was Elida Kasimba Musonda. Her evidence was that on 14th June 2005, the plaintiff, who is her husband, left home and he did not return. The following morning, she started looking for him and she ended up at Shikoswe Police Post. She found him sweeping outside the post and he informed her that he was going to be released but he wasn't. She went back to the police post in the evening and found that he had been transferred to Zambia Compound Police Post.

She went back to Zambia Compound Police Post on 16th June 2005, and the inmates he was locked up with in the cells told her, through the burglar bars, that he was lying down because he could not stand. When the cells were opened, she noticed that he had blood stains. He had a cut on the leg and his hands were swollen. He was not even able to take the tea she had taken for him.

On 17th June 2005, she went back to the police post with pain killers and porridge. She also took him pain killers on 18th June 2005. On the 19th June 2005, the plaintiff

told her that the police were asking for K100,000.00. She managed to find the money and on 20th June 2005, she gave it to the 1st defendant. Between 17:00 and 18:00 hours, on the same day, the plaintiff came home.

When she was cross examined, she said though she paid K100,000.00, she did not sign for it nor was she given a receipt. When she took the Panadol to the plaintiff, it was given to him with the permission of the police.

The plaintiff closed his case after his wife testified.

The only witness the defendants called was the 1st defendant. His evidence was that in 2004, he was the Criminal Investigations Officer at Kafue Gorge and he was handling a case of breaking into a building and committing a felony. A Mr. Kawina lost a welding machine and investigations led him to an informer who told him that it was seen with a man who was in the company of the plaintiff. He was led to Kafue town but they failed to find the plaintiff and his accomplice.

He left word that should they see the plaintiff, they should apprehend him. A few weeks later, Shikoswe Police called him and told him that they had apprehended the plaintiff. He picked him and took him to Kafue Gorge where he interviewed him. The plaintiff initially denied seeing the welding machine but later admitted having seen it and said it was bought by one James Zimba. The plaintiff led him

to Soweto Market in Lusaka where he apprehended, and subsequently arrested and charged, James Zimba for the theft of the welding machine.

He decided to turn the plaintiff into a witness and the matter was taken to court. The case collapsed because the plaintiff failed to turn up to testify and he started look for him. He did not find him because he moved out from where he used to stay. He subsequently received information of the plaintiff's apprehension and he went to Kafue where he arrested him and jointly charged him with James Zimba. He started looking for Zimba and after three days he decided to free the plaintiff because he could not find him.

The 1st defendant said when he went to see the plaintiff at the police station, he told him that he was not feeling well because he had been beaten by some police officers.

When he was cross examined, the 1st defendant said he could not remember how long the plaintiff had been in custody when he went to see him. The plaintiff told him that he was unwell on the day he saw him. He did not take him anywhere, he questioned him from the police post where he found him. He denied beating him or the other defendants doing so.

The plaintiff told him that he was beaten at the time of his arrest but he did not see any bruises on him. He admitted that he looked like someone who was not in good health. He denied moving him to a different police station.

Both parties filed in written submissions. The plaintiff's submissions were filed on 23rd June 2016, while those for the plaintiff were filed on 8th September 2016.

On behalf of the plaintiff, and in support of the claim for damages for false imprisonment, counsel referred to **Halsbury's Laws of England, 4th Edition, Volume 45, at paragraph 442 at page 299** and **Clerk and Lindsell on Torts page 592 paragraph 12 to 17** and submitted that an action for false imprisonment lies against any person who causes the unlawful imprisonment however short the period is. Reference was also made to the case of **Murray v Ministry of Defence (1)** and it was submitted that false imprisonment is actionable even in cases where special damages have not been proved. Counsel then referred to the case of **Joyce Banda v The Attorney General (2)** and submitted that where the defendant admits the imprisonment, the onus is on him to justify it and where he fails to establish the legal justification for the deprivation of the liberty he fails on the merits.

Counsel submitted that through his evidence and that of his wife, the plaintiff has established that he was unlawfully detained from 15th to 20th June 2005, by the 3rd

defendant. Since the 4th defendant admitted that the 1st and 2nd defendants were their agents, it was for them to prove the legality of the detention. Counsel also submitted that other than claim that he was facing charges of breaking into a building and committing a felony, the 1st defendant failed to furnish the court with the charge sheet or other documents.

Counsel also submitted that the allegation in the 4th defendant's defence, that the plaintiff was in the habit of changing residence, cannot be a lawful basis for detaining a citizen. In any case, there was no evidence led to that effect by the 1st defendant when he gave evidence. Further, the 1st defendant failed to substantiate his claim that he continued to change statements on the whereabouts of the welding machine. In the absence of documentary proof to that effect, the defendants have failed to justify the detention.

Coming to the claim for assault and battery he referred to **Halsbury's Laws of England, 4th Edition, page 294 paragraph 427 and 428** and pointed out that an assault is an intentional threat of violence against a person while a battery is the intentional use of violence. He also referred to the case of **Letang v Cooper (3)** and submitted that for a claim for Assault and Battery to succeed and party must prove that there was intentional physical contact without their consent.

He submitted that the plaintiff's claim that he was assaulted by the 1st, 2nd and 3rd defendants and this is confirmed by the plaintiff's medical reports. It shows that he was beaten using a heavy object. There is also the patient attendance card and the Radiography Request Form, they confirm that he was assaulted. Further, there is the evidence of the plaintiff's wife, she brought pain killers and saw bruises. This evidence is unchallenged and the court must uphold the claims for assault and battery.

Submitting on behalf of the defendants, counsel referred to the case of **Richman Chulu v Monarch (z) Ltd (4)** and pointed out that for the claim of false imprisonment to succeed, the plaintiff must prove that he was imprisoned and the imprisonment was unlawful. Counsel submitted that it is not in dispute that the plaintiff was imprisoned, what is disputed is whether the arrest was lawful. Reference was made to the cases of **Herinan v Smith (5)** and it was submitted that where there is reasonable cause to believe that a person has committed an offence and such person is arrested the arrest is lawful. Counsel also referred to **Winfield and Jolowicz on Tort at pages 866 to 867**, where the authors opined that reasonable cause does not entail belief that a conviction is probable.

Counsel submitted that there was probable cause for the defendants to arrest the plaintiff. There is evidence from the 1st defendant was to the effect that there was information linking the appellant to a stolen welding machine. He initially

denied knowing anything about it but subsequently admitted that he was approached to help find a market for it. The 1st defendant decided to turn him into a state witness but he did not turn up in court. He looked for him but did not find him. He only got him when he was apprehended him in connection with another offence. He decided to jointly charge him with James Zimba but ended up releasing him when he could not find James Zimba. She submitted that on the basis of this evidence there was reasonable and probable cause for believing that he was party to the theft of the welding machine and consequently for detaining him.

As regards the claim for damages for assault and battery, counsel pointed out that though the plaintiff was released on 20th June 2005, it was not until the 22nd June 2005, that he went to the hospital. He has not explained the delay and anything could have happened in between those two days. Counsel referred also referred to the case of **Abraham Mwanza and Others v The People (6)** and submitted that there was need to bring a medical doctor to explain the contents of the medical documents and how the conclusions in them had been arrived at. The failure to bring the doctor is fatal to the plaintiff's case.

In conclusion, she prayed that both claims be dismissed because the detention was lawful and the injuries he suffered are not clear and cannot be wholly attributed to the defendants.

From the evidence before me, I find that it is not in dispute that between 14th and 20th June 2005, the plaintiff was detained at a police post in Kafue. It is also not in dispute that he was detained by the 4th defendant's agents who were acting in the course of duty. What is disputed is whether the detention was with lawful justification and whether he was assaulted and injured during his detention.

The first issue I will deal with is how long the plaintiff was detained in connection with this case. I have already indicated that it is not in dispute that he was detained from 14th to 20th June 2005. However, the detention from the 14th to 15th June 2005, had nothing to do with the 1st defendant or this case because he was detained for loitering by police officers not connected to this matter. The 1st defendant and his co-defendants came into the picture on 15th June 2005 and I find that they detained him for 4 nights from the 15th to the 20th of June 2005.

The next issue I will deal with is whether the plaintiff's detention was without lawful justification to amount to false imprisonment. As was correctly submitted by his counsel, since the defendant does not dispute the detention, the onus is on them to prove that it was lawful as was found in the case of **Joyce Banda v The Attorney General (2)**. The standard of proof being on a balance of probability.

The plaintiff's evidence was that he was initially detained for loitering but when he was about to be released, the 1st defendant and his colleagues detained him

demanding money. Though he failed to pay the money they were demanding, they eventually released him. But his wife's evidence was that she actually paid the K100,000.00 the police officers demanded before the plaintiff was released.

On the other hand, the 1st defendant's evidence was that the plaintiff was initially a suspect in a burglary case but was turned into a witness. When the time for him to testify came, he absconded and did not turn up in court. When he heard that he was in police custody, he decided to charge him for the burglary. He detained him and started looking for one Zimba, the person he had committed the offence with. He released him when he failed to find Zimba.

It is my finding that the plaintiff's evidence that he did not attend court as a witness because he knew nothing about the welding machine that he was supposed to give evidence on, gives credence to the 1st defendant's testimony that he detained him because he failed to attend court and not because the police wanted to extort money from him. If it was true that police officers demanded money after detaining the plaintiff and were paid, it is inconceivable that the plaintiff and his wife could have differed on whether money was paid to them to secure his release. I find that the extortion story lacks credibility.

It is also my finding that even if the defendants have not produced any documents to prove that there was a court case, it is immaterial because the

plaintiff does not dispute that there was one prior to his detention. His position is that he did not go to court to testify because he knew nothing about the matter. It does not surprise me that no charge sheet was presented by the defence because the 1st defendant's evidence is the plaintiff was not formally charged, he was released after they failed to find his accomplice.

I will now consider whether his failure to attend court would have been a basis for detaining the plaintiff. **Section 26 of the Criminal Procedure Code** provides that:

Any police officer may, without an order from a magistrate and without a warrant, arrest-

(a) any person whom he suspects, upon reasonable grounds, of having committed a cognizable offence;

(b).....

(c).....

(d).....

As regards the detention of persons arrested without a warrant, **section 33 of the Criminal Procedure Code** provides that:

(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.

(2)

The 1st defendant's evidence, which I accept, is that he decided to charge the plaintiff with the offence of breaking into a building and committing a felony. That offence is set out in **section 303 of the Penal Code** and attracts imprisonment of up to 7 years.

The question that follows is whether the plaintiff's detention from 15th to 20th June 2015 was justified. **Section 33 of the Criminal Procedure Code** allows a police officer to detain a suspect for more than 24 hours but the duration must be reasonable. In determining whether the period is reasonable regard must be had to the penalty that the offence attracts and the suspects antecedents. In this case, the offence attracted imprisonment of up to 7 years and the plaintiff had previously absconded. In the circumstances, I find that the detention of the plaintiff for 4 nights before releasing him was not unreasonable. Consequently, I find that the defendants have discharged the onus of justifying the detention and the claim for false imprisonment fails.

Coming to the claims for assault and battery, the plaintiff gave evidence of how he was assaulted and denied medical attention. He also talked about the injuries he suffered and referred to medical reports. In addition, there was evidence from

his wife. On the other hand, the 1st defendant denied the allegation that the plaintiff was ever assaulted.

I will first deal with the medical reports. **Section 3 of the Evidence Act** provides that:

(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say:

(a) if the maker of the statement either-

(i) had personal knowledge of the matters dealt with by the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

(b) if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is outside Zambia and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

(2) In any civil proceedings, the court may, at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence-

(a).....

(b).....

(3)

(4)

From the forgoing provision, it is clear that for the medical documents to be admitted into evidence, the maker should have had personal knowledge of their contents. In addition, where the maker is not called, evidence should be led on why the witness was not available at court; the maker is either dead, unfit to attend, outside the country or undue delay or expense will be occasioned if they are to be called to testify. In this case, no evidence was led on why the maker of the reports was not called to testify.

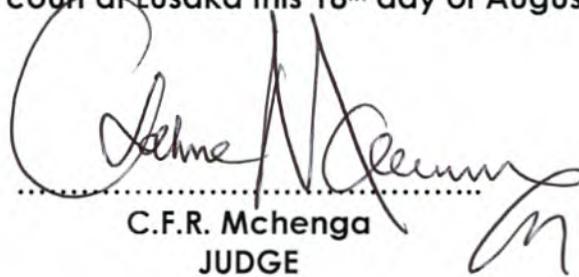
Worse still, the reports that the plaintiff seeks to rely on to confirm that he was assaulted and injured are in undecipherable "doctor's writings". I agree with defence counsel's submission that this is a case in which the attending doctor should have been called to tell the court what he saw and whether the he found injuries that could be attributed to an assault. In his absence, another doctor should have been called to interpret the documents. Consequently, I will place no reliance on the documents.

All I am left with is the testimony of the plaintiff and his wife. It is their word against that of the 1st defendant. I find these two witnesses not to be credible because of their claim, which I find to be false, that the plaintiff's detention was motivated by

police officers desire for money. Having lied on a material issue, that the plaintiff was detained because the police wanted to extort money, I don't find them to be credible witness. I accept the 1st defendant's evidence and I find that the plaintiff was not assaulted when he was detained. The claim is therefore dismissed.

The claims for false imprisonment and assault and battery having failed, the plaintiff's fall off. The suit is dismissed with costs.

Delivered in open court at Lusaka this 18th day of August, 2017


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C.F.R. Mchenga
JUDGE