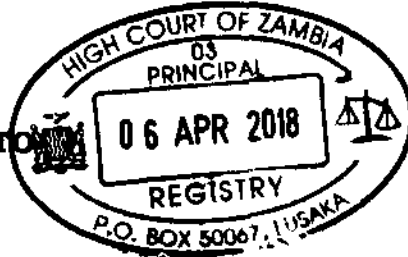


**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LIVINGSTONE  
(CIVIL JURISDICTION)**

**2010/HL/78**

**BETWEEN:**

**PENIAS MWALE  
COSMAS CHIPOLOKOTO**



**1<sup>ST</sup> PLAINTIFF  
2<sup>ND</sup> PLAINTIFF**

**AND**

**ZAMBIA TELECOMMUNICATION COMPANY LIMITED  
THE ATTORNEY GENERAL**

**1<sup>ST</sup> DEFENDANT  
2<sup>ND</sup> DEFENDANT**

**Delivered Before Hon. Mrs. Justice G. Milimo - Salasini on the 6<sup>th</sup> day of April 2018.**

For the Plaintiffs : Mr. J. Kapepe Jnr, MAK Partners  
Mr Mweemba, Messrs Mweemba & Company

For the 1<sup>st</sup> Defendant : Mr Malama Legal Counsel, Zambia  
Telecommunications Company, Limited

For the 2<sup>nd</sup> Defendant : Attorney-General Chambers

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## **J U D G M E N T**

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**Cases referred to:**

1. **Stapely v Annetts (1969) All. ER 1541**
2. **Gertrude Munyonsi, Attorney General v Catherine Ngalabeka (S.C.Z No. 22 of 1999)**
3. **Bevin Ndovi v Post Newspapers Limited, Times Printpak Zambia Limited**
4. **Martin v Watson**
5. **Stapley v Annetts and Another**
6. **Murray v Ministry of Defence (1988) 1W.L.R at 703 to 704, Lord Griffiths**
7. **Richman Chulu v Monarach (Z) Limited (1981) Z.R 33**
8. **Claude Samuel Gaynor v Cyril Robert Cowley, (1971) Z.R. 50**
9. **Attorney-General, Tembo, Chilufya and Nyirenda v Masauso Phiri (SCJ No. 28 of 2017)**
10. **Oxford Companion to Law by David Walker, Clarendon Press, Oxford, (1980)**
11. **Scott v Sampson (1882) 8 QBD at page 491**

12. **John Namashoba Muchabi v Aggrey Mwanamufwenga (1987) Z.R. 110(SC)**
13. **Bevin Printpak Zambia Limited (2011) Z.R Vol2)**
14. **Attorney-General V Mumba (1984) Z.R 14 (SC)**

**Legislation referred to:**

**Penal Code Chapter 87 of the Laws of Zambia  
Defamation Act, Chapter 68 of the Laws of Zambia**

**Works referred to**

1. **Mvunga and Ngambi on Torts, Unza Press**
2. **Street on Tort**
3. **Winfield and Jolowicz on Tort**
4. **Clerk and Lindsell on Torts., Butterworths, London**

This is an action brought by one **Penias Mwale** (hereinafter called "the 1<sup>st</sup> Plaintiff") and **Cosmas Chipolokoto** (hereinafter called "the 2<sup>nd</sup> Plaintiff") on 28<sup>th</sup> October 2010 by Writ of Summons.

In the Writ of Summons, the 1<sup>st</sup> Plaintiff and 2<sup>nd</sup> Plaintiff seek the following;

- (i) Damages for malicious prosecution;
- (ii) Damages for false imprisonment;
- (iii) Damages for defamation of character;
- (iv) Interest thereon and costs; and
- (v) Any other relief that the Court may deem fit in the circumstances.

Accompanying the Writ of Summons was a Statement of Claim in which the Plaintiffs stated that they are residents of Mazabuka who are involved in small scale businesses. They stated therein that on 8<sup>th</sup> February, 2010, one **Francis Liambazi**, an employee and agent of the Zambia Telecommunications Company Limited (hereinafter referred to as "the

Defendant") caused the Plaintiffs to be arrested and detained at Mazabuka Police Station. That the agent of the Defendant conveyed the Plaintiffs to be arrested and detained at Mazabuka Police Station where the said agent of the Defendant made a false and malicious complaint to the police that they were digging out the Defendant's cables in Mazabuka. That the agent of the Defendant conveyed the Plaintiffs to the police after detaining them and savagely beating them at the Defendants' premises from 09: 00 hours to 16:00 hours. That the agent instructed and caused the police to remand the Plaintiffs in custody for seven (7) months. That the High Court found the Plaintiffs not guilty of the offence and acquitted them on 13<sup>th</sup> August, 2010.

The Plaintiffs stated that the acquittal was seven (7) months after they were apprehended and detained. The Plaintiffs claim that they were deprived of their liberty and are still being regarded as criminals by members of society hence the prayer for damages as stated in the Writ of Summons.

The Defendant entered Conditional Appearance on 18<sup>th</sup> November, 2010 without filing a Defence. On 30<sup>th</sup> November, 2010 the Defendant, Zambia Telecommunications Company Limited, filed Summons for an Order to Strike Out the Writ of Summons and Dismiss the Action for an Abuse of Court Process, pursuant to *Order, 18 rule 19 of the Rules of the Supreme Court, 1999 edition (RSC)*. The Affidavit in Support was deposed to by one Mangala Zimba, the Assistant Human Resource Officer of the Defendant in which he deposed that the claim of the Plaintiffs for damage for malicious prosecution, false imprisonment and defamation following their acquittal in

the case of **The People v Penias Mwale and Cosmas Chipolokoto HL/26/2010** disclosed no cause of action against the Defendant.

When the application was heard on 23<sup>rd</sup> December, 2010 the Defendant was represented by **Mr P. Muyatwa**, the Litigation Specialist. The Plaintiffs did not file an Affidavit in Opposition and the Court delivered a Ruling dismissing the application to Dismiss the action as it found that there was in fact a cause of action against the Defendant. The Court further ordered that the Attorney-General be joined as a second Defendant as from 11<sup>th</sup> January, 2011. Thus Attorney-General was joined. A copy of the Ruling of the Court and Order are at pages 44 to 52 and 59 respectively, of the Plaintiffs Bundle of Pleadings. Consequently the Court entered Interlocutory Judgment in Default of Defence pursuant to Order 19 rule 3 of the Rules of the Supreme Court wherein the Court dismissed the 2<sup>nd</sup> Defendant's application to set Aside the Writ of Summons for irregularities and the 1<sup>st</sup> Defendant's neglect or failure to file a Defence, on 2<sup>nd</sup> February, 2011. The Court awarded damages to the Plaintiffs and ordered that the Plaintiffs recover from the 1<sup>st</sup> Defendant the reliefs sought in the Writ subject to assessment by the District Registrar.

However, on 6<sup>th</sup> February, 2011, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed Joint Summons for an Order to set Aside Judgment by Default. There was also an application for an extension of time within which to settle and file Defence pursuant to *Order 20 rule 3 and Order 2 rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia*. The supporting Affidavit was

deposed by **Gregory Lungu**, a Benefits and Compensations Manager in the 1<sup>st</sup> Defendant Company. He also filed a Defence with his Affidavit. An Ex-parte Order for Stay of Execution of the Default Judgment was granted by the Court on 11<sup>th</sup> March, 2011 and the matter was adjourned to 24<sup>th</sup> March, 2011.

What followed was a number of interlocutory applications wherein the record shows that the Defendant demonstrated inertia towards the matter. This is seen from the fact that on 24<sup>th</sup> March, 2011 the Court struck out the matter and the Stay earlier granted by it, and also discharged the said Stay. Shortly after, on 31<sup>st</sup> March, 2011 the defendant filed an application to restore but again it was struck out when the Defendant did not attend. The Defendant then filed another application to restore on 14<sup>th</sup> April, 2011 and the application was granted on 10<sup>th</sup> May, 2011, on the basis that an *ex-curia* settlement was being explored by the parties. The result was a Consent Order signed by the parties on 30<sup>th</sup> May, 2011. However, the defendants did not comply with the Consent Order and judgment in default of Defence was entered in favour of the Plaintiffs.

What followed was Consent Order for Directions on 9<sup>th</sup> December, 2011.

The Plaintiffs filed their Plaintiffs' Bundle of documents comprising the Judgment of the High Court in the criminal case, Notice of Acquittal and a letter of Demand on 10<sup>th</sup> January, 2012 but the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not file any pleadings or documents. The 2<sup>nd</sup> Defendant only filed a Defence

on 26<sup>th</sup> July, 2012. The Plaintiffs then filed a Reply to join issue with the Defendants.

Trial commenced on 17<sup>th</sup> July, 2013.

The 1<sup>st</sup> Plaintiff, Penias Mwale, began his testimony by narrating the events of 8<sup>th</sup> February, 2010. He told the Court that on the material day he and his friend, Cosmas, the 2<sup>nd</sup> Plaintiff, were coming from the field and upon reaching the show grounds in Mazabuka, his friend went to buy cigarettes. That he was approached by three (3) neighbourhood watch persons who accused him of stealing cables. He stated that he and the neighbourhood watch persons started arguing and when his friend returned, he was also picked and they were beaten and then taken to Zamtel offices. He testified that at Zamtel offices he and his friend were again beaten from 09:00 hours to 16:00 hours. That they were then taken to the Police where they were reported to have vandalized cables supplying power to Stage 2. He stated that he and his friend told their captors that they were planting sweet potatoes and that they took the captors to the field where they were planting sweet potatoes, and that the captors, Zamtel officers and police confirmed that they were digging sweet potatoes. The 1<sup>st</sup> Plaintiff informed the Court that he and his friend were then put in custody and charged for malicious damage. He stated that they were taken to the Subordinate Court for Seven (7) months and later committed to the High Court. The High Court heard the matter and acquitted him and his friend. The 1<sup>st</sup> Plaintiff believes he was maliciously prosecuted by Zamtel because the information was based

on lies. The 1<sup>st</sup> Plaintiff stated that he wants the Court to order compensation. He also said that his character was tarnished and that he was put in custody and beaten.

In cross-examination by the Zamtel Legal Counsel, the 1<sup>st</sup> Plaintiff was asked whether he was found with a hoe, he responded that he was found with a hoe. He disputed the assertion that where he stood there was an area which had been dug. When asked if he had been taken to the scene during the criminal trial the 1<sup>st</sup> Plaintiff told the Court that he was taken to the scene during the trial but the people who took him failed to locate the place. When asked what happened when he was taken to the scene, he testified that at the scene the Zamtel technician was asked by the Court to show the Court the cables but the Zamtel officer apologized and told the Court that what he had said in Court was untrue. When asked if he was taken to the scene and shown where it was suspected that they had been digging, the 1<sup>st</sup> Plaintiff maintained the fact that they were taken to the scene and shown the place where it was suspected that they were digging. When asked who conducted the investigations he told the Court that it was Zamtel. When asked to state which officer went to the scene, 1<sup>st</sup> Plaintiff told the Court that there were Zamtel and Zambia Police officers and the Court who went to the scene to see the place. When asked if he had had any previous relationship with Zamtel, the 1<sup>st</sup> Plaintiff testified that before that incident he had no relationship with Zamtel. When asked if the neighbourhood watch persons were employees of Zamtel the 1<sup>st</sup> Plaintiff replied that they were not employees of Zamtel but are just ordinary

citizens. When asked if Zambia Police interrogated him and his friend upon apprehension he responded that Zambia Police did not interrogate them. When asked who charged him he responded that they were charged by Zamtel for damage to property. When he was asked who the complainant was, the 1<sup>st</sup> Plaintiff said that it was Zamtel and that Zamtel arrested and charged them. When asked if he had evidence to show that the officer from Zamtel arrested him and took him to Court, he responded that he did have the evidence. When asked by Zamtel if he was found with a case to answer, he stated that during the criminal trial the Court found him with a case to answer. When asked whether he knew that the police officer had testified in the criminal trial that he had decided to arrest after hearing evidence of neighbourhood-watch persons, the 1<sup>st</sup> Plaintiff stated that he would not know. When asked whether Zamtel suspected he stole, he replied that Zamtel told him that they were very sure that he had cut the cables. When asked whether he was told that he was detained on reasonable suspicion, he answered that he was not told that he was detained on reasonable suspicion but that he was told that his captors were sure that he and his friend had cut the cables. The 1<sup>st</sup> Plaintiff emphasized the fact that the reason for their detention was not known.

The 1<sup>st</sup> Plaintiff was then cross-examined by the Counsel from Attorney-General, the 2<sup>nd</sup> Defendant. He confirmed that he was arrested on 8<sup>th</sup> February, 2010 and a warn and caution statement was read to him. He also confirmed that he was granted bail on 5<sup>th</sup> March, 2010 but that his bail was revoked upon committal to the High Court. He stated that he was told by



the prosecutor that he was supposed to go to jail. When asked if he knew that the prosecutor had no power to revoke bail, the 1<sup>st</sup> Plaintiff replied that he did not know that the prosecutor had no power to revoke bail. He also testified that he did not know whether or not the Court had revoked the bail but was told of the revoking when he was in Court. When asked if it was correct to say that there was probable cause for the police to indict him, the 1<sup>st</sup> Plaintiff said there was probable cause because he was put on his defence. The 1<sup>st</sup> Plaintiff testified further that his character had been tarnished because when he was arrested it was broadcast on radio. He stated that he heard the broadcast and people from ZANIS came to get some details, and ZANIS broadcast what was going on in Court.

In re-examination the 1<sup>st</sup> Plaintiff told the Court that he was given a chance to tell his side of the story and he understood being put on his defence to mean that he was to explain what happened.

The 2<sup>nd</sup> Plaintiff also testified. According to one Cosmas Chipolokoto, he and the 1<sup>st</sup> Plaintiff, on 8<sup>th</sup> February, 2010 went to a field to plant sweet potatoes. That they returned at about 09:00 hours via the show grounds and as he went to a "Ntemba" shop to buy tobacco, he heard a noise behind him. He went back and found the 1<sup>st</sup> Plaintiff being beaten. When he asked the people he found why his friend was being beaten he was told that his friend, the 1<sup>st</sup> Plaintiff wanted to dig for cables. That when he asked where the cables were he was informed that Zamtel had given the captors the mandate to catch people who dig cables. He testified that the captors did

not show him where the cables were. The 2<sup>nd</sup> Plaintiff testified that he and the 1<sup>st</sup> Plaintiff were then taken to the Zamtel offices where they were beaten from 09:00 hours to 16:00 hours. He stated that they were then taken to the 'cells'. That the next morning at about 08:00 hours the Zamtel officers, Zambia Police officers and other persons came and they all went to the field to confirm whether or not he and 1<sup>st</sup> Plaintiff had planted sweet potatoes. The 2<sup>nd</sup> Plaintiff told the Court that it was confirmed that they had gone to the field. After that the Plaintiffs were returned to the "cells". A docket was opened and the Plaintiffs stayed in custody for seven (7) months. He stated that they were going to Court for mention and finally committed to the High Court. That at the High Court the Plaintiffs were acquitted.

The 2<sup>nd</sup> Plaintiff told the Court that he wanted compensation for being defamed, detained and prosecuted. He told the Court that he was beaten and contracted tuberculosis while in custody. The 2<sup>nd</sup> Plaintiff refuted the argument that Zamtel had probable and reasonable cause to apprehend him. He referred the Court to paragraph 4 of the 1<sup>st</sup> Defendant's Defence which stated that "the accusation was not brought tainted with *mala fide* or maliciously but for probable and reasonable cause". He also refuted the defence outlined in paragraph 5 of the Defence, which states that "having attempted to elicit satisfactory information from the Plaintiffs as a mark of prudence the Defendants' agent had to hand over the Plaintiffs to the Police as agents for crime detection". He testified that there is a case against Zamtel and if not for Zamtel the Zambia Police had no case against him. He

concluded by stating that the Zamtel cables cost Two Hundred and Sixty Nine Thousand (K269, 000.00).

In cross-examination by the 1<sup>st</sup> Defendant the 2<sup>nd</sup> Plaintiff testified that the neighbourhood watch people said that they thought his friend wanted to dig cables and that during the trial at the High Court, the neighbourhood watch people had lied. He told the Court that when he and the 1<sup>st</sup> Plaintiff were taken to the Zamtel offices they were later taken to Zambia Police because they were being forced to admit to what they did not do. That they gave a statement to the police and in the High Court case, the police officer testified that he was convinced that what the neighbourhood watch people had told him was correct. He reiterated the fact that the Court visited the scene of the alleged crime.

When asked how he was defamed the 2<sup>nd</sup> Plaintiff testified that he was indeed defamed because he and the 1<sup>st</sup> Plaintiff were falsely accused that they had vandalised cables worth Two Hundred and Sixty Nine Thousand Kwacha (269, 000.00). He stated that the fact that his friend was found with a hoe was not reasonable suspicion.

The 2<sup>nd</sup> Plaintiff was also cross-examined by the 2<sup>nd</sup> Defendant through Counsel for the Attorney-General. He told the Court that he is an electrician by trade and that he was acquitted after a trial. When asked to narrate what transpired, he testified that he had gone to buy cigarettes but was able to see where his friend was as the "Ntemba" was six (6) meters away. He

also stated that what the neighbourhood watch people alleged, that they found his friend digging was what they also told the Court. When asked how he found his friend when he returned from the "Ntemba" he told the Court that he found the neighbourhood watch people beating his friend. He also testified that he did not think there was any reasonable suspicion as to whether there were any cables. He agreed with the Attorney General that a warn and caution statement was taken and that he was charged with the offence of vandalism. He stated that his name and reputation were destroyed and after contracting tuberculosis in custody, he is unable to be employed in institutions like Zambia Sugar Company. He also told the Court that he has a Certificate of Acquittal. The 2<sup>nd</sup> Plaintiff maintained that there was defamation of character. He stated that he was not granted bail during his imprisonment because he was unable to provide three (3) sureties. The Plaintiffs then closed their case.

The 1<sup>st</sup> Defendant opened its case led by Mr Malama the Zamtel In-house Specialist on 30<sup>th</sup> October, 2013.

The 1<sup>st</sup> Defendant testified through Mr Francis Liazambi, DW1 a former employee of Zamtel, Mazabuka. He testified that he left Zamtel in August, 2010. Before that, he was a technician whose duties included being in charge of the external engineering department, which was responsible for clearing of faults, installations and works attached to the external plant. He stated that he knew the Plaintiffs to the extent that in February, 2010, the man in charge of security at Zamtel exchange, Mazabuka, took two men

together with one Mr Musole and a police reserve officer, and that the Plaintiffs were purported to have been found within the service line of Zamtel, exhuming cables. He testified that the Plaintiffs were apprehended by a police reserve and a vigilante and that the Zamtel security officer then brought the Plaintiffs to DW1's office to ascertain whether the cables belonged to Zamtel or not. The witness, DW1 did not however, state in his testimony whether he was shown cables to ascertain that cables belonged to Zamtel or not. DW1 went further to state that he went to the site and found that a cable was exposed at one end. He stated that the security man then went to the police and reported the incident after which the police opened a docket. He narrated that he was later called to Court as a witness for Zamtel at a High Court session held in Mazabuka. He also testified that he only met the investigating officer in Court and at the site of the exhuming. He refuted the allegation by the Plaintiffs that they were beaten at Zamtel.

In cross-examination DW1 informed the Court that the Complainant was Zamtel at the time the matter was taken to the police. He stated that he was not aware that the Plaintiffs were fully prosecuted because he was just a witness giving technical support. He told the Court that he did not know what the Plaintiffs were charged with but he knew they were found with "sabotage" of Zamtel cables. He further stated that he was not aware that the Plaintiffs were acquitted by the High Court as he left Zamtel in 2010 and did not take interest in the outcome of the Plaintiffs' case. He explained that as Zamtel, the investigation involved getting to the scene to ascertain that the cables belonged to Zamtel. That he took photographs at the site. When

asked by Counsel for the Plaintiffs who apprehended the Plaintiffs, DW1 stated that the persons who apprehended the Plaintiffs brought them to Zamtel offices and he, DW1 was to ascertain that the cable was a Zamtel cable on the technical part. He told the Court that he did not recall a cable being taken to him for comparison. DW1 denied falsely imprisoning nor defaming the Plaintiffs. He also denied making a malicious report to the police.

Having outlined the evidence of DW1 and considered his testimony, I am compelled to raise the question whether the evidence of DW1 in relation to his role in the apprehension of the Plaintiffs was sufficient for the 1<sup>st</sup> Defendant to claim that there was no malice in the apprehension of the Plaintiffs. DW1 stated that his role was to ascertain that the cables were Zamtel cables, from the technical point of view: His evidence did not state if there were cables found in the Plaintiffs' possession and he told the Court that he did not recall a cable being taken to him. He stated that he went to the site and found that a cable was exposed at one end. In relation to the cable, the High Court, in the Criminal case observed at page J9 line 22 that "in fact the cables were not seen in the ground....." and the Court had also earlier commented at page J3 line 12 that ".....when (PW3) went to the scene he found that the cables were still in the ground although they had been cut....". The judgment of the Court also shows that when the Court moved to the scene of the crime, in cross-examination, PW3 (DW1), had difficulty in explaining whether the line in question was still in service or not.

The second witness for the Defendants was an agent of the 2<sup>nd</sup> Defendant. The evidence of DW2, the investigation officer, currently based in Chongwe was that on 8<sup>th</sup> February, 2010 he received a report of Vandalism which was brought to the front desk of Mazabuka Police Station by DW1 an officer from Zamtel. He testified that DW1 arrived with two suspects whom he later came to learn were the Plaintiffs herein. DW2 told this Court that he interviewed the suspects who denied the allegation. DW2 stated that he was led by the Plaintiffs to the scene of the crime and that he was told by the Plaintiffs that they had been digging sweet potatoes. That at the scene, DW2 testified that he found that three wires had been vandalized. He, DW2 told the Court that he was told by the complainant that the wires had been for Zamtel. DW2 took photographs and returned to the station, with the Plaintiffs and then decided to warn and caution them in the Nyanja language and the Plaintiffs denied the charge after they were charged with the offence of Vandalism. DW2 testified that the Plaintiffs appeared in Court the following day.

The testimony of DW2 continued on 30<sup>th</sup> June, 2016 with cross-examination of DW2 by the 1<sup>st</sup> Plaintiff. When asked by the 1<sup>st</sup> Plaintiff who apprehended the Plaintiffs, DW2 answered that he was not the person who apprehended them but that the Plaintiffs took him to the field where they were planting sweet potatoes. When asked by the 1<sup>st</sup> Plaintiff about the cables that the Plaintiffs were supposed to have taken, DW2 responded that the Plaintiffs were not in the pictures that he took.

DW2 was also cross-examined by the 2<sup>nd</sup> Plaintiff and when asked whether he was the officer who apprehended the Plaintiffs, DW2 stated that he was not the officer who apprehended him but that he (2<sup>nd</sup> Plaintiff) took DW2 to the field where he was planting sweet potatoes. Regarding the cables the Plaintiffs were supposed to have taken, DW2 again responded that the Plaintiffs were not in the pictures he took.

In re-examination, DW2 clarified that what he found when he was taken to the field by the Plaintiffs, and where they claimed to be digging sweet potatoes was the same place where he found the three damaged cables. He concluded by stating that he found sweet potatoes at the scene.

The 1<sup>st</sup> Defendant also cross-examined DW2 by way of clarity concerning what DW2 found at the scene of the crime. DW2's testimony was that the place he found the cables at was not the place where he found sweet potatoes. He stated that the sweet potatoes were freshly dug out. DW2 then decided to arrest the Plaintiffs and formally charge them. DW2 informed the Court that he carried out investigations prior to arresting them. He stated that the investigations were interviews from independent witnesses who saw the Plaintiffs.

The Defence then closed its case.



Submissions were filed into Court by the Plaintiffs on 31<sup>st</sup> August, 2016 while the 1<sup>st</sup> Defendant's final submissions had been filed earlier on 24<sup>th</sup> August, 2016. No submissions were filed by the 2<sup>nd</sup> Defendant.

The 1<sup>st</sup> Defendant advanced his argument by arguing the reliefs sought by the Plaintiff, as stated in the Writ of Summons.

The first claim was for damages for malicious prosecution. The 1<sup>st</sup> Defendant argued that the claim for malicious prosecution should not succeed for the following reasons:-

1. That the plaintiff had not satisfied the four elements that should be present and proved for a claim for malicious prosecution namely:
  - (i) that there must be a prosecution by the Defendant such that the law is set in motion against a Plaintiff on a criminal charge;
  - (ii) that the prosecution should end in favour of the Plaintiff;
  - (iii) that the prosecution should have been instituted without reasonable and probable cause; and
  - (iv) that the prosecution should have been instituted maliciously.

The 1<sup>st</sup> Defendant cited the words of Lord Denning in the case of **Stapely v Annelte** which I have noted. It was further argued that while the first and second elements were proved, the Plaintiff failed to prove that the prosecution was instituted without reasonable and probable cause. That the Plaintiffs also failed to prove that the prosecution was instituted

maliciously. The 1<sup>st</sup> Defendant has argued that there was reasonable and probable cause to arrest the Plaintiffs from the evidence of DW1, the technician, who testified, in cross-examination that he proceeded to the scene of the crime and confirmed that indeed cables had been cut.

The 1<sup>st</sup> Defendant further cited the Judgment of the High Court in the Criminal matter wherein the Plaintiffs were acquitted which judgment states at page J9 that:

**"Of course, the Court is alive to fact that what matter is that the property which was vandalized, and I do find that the cables which were vandalized belonged to Zamtel."**

Counsel for the 1<sup>st</sup> Defendant has argued that the criminal Court's finding (stated above) showed that there was probable cause that an offence had been committed, thus the third element had not been proved. He also argued that the Plaintiffs had failed to prove the fourth element; that the prosecution had been instituted maliciously. He argued that eye witnesses placed the Plaintiffs at the scene of the crime (thus) creating a probable and reasonable cause that they could have been responsible for vandalizing the cable. Counsel for the 1<sup>st</sup> Defendant further argued that there was no malice on the part of the 1<sup>st</sup> Defendant because, according to testimony of DW1, he did not know the Plaintiffs before and could not have had anything against them.

The 1<sup>st</sup> Defendant also argued that when the crime was allegedly committed, DW2 exercised independent judgment to arrest the Plaintiffs, and there was no proof that the 1<sup>st</sup> Defendant influenced DW2 to arrest the Plaintiffs. He again referred to the Judgment where the Court stated at page J10 that:

**"The arresting officer was not helpful to the Court either. He merely told the Court that he decided to arrest the accused persons relying on the evidence of eye witnesses (PW1 and PW4)"**

For the 1<sup>st</sup> Defendant, the statement of the criminal Court shows that the decision to arrest the Plaintiffs was the police officers' decision. The 1<sup>st</sup> Defendant argued that the eye witnesses were not Zamtel employees. In submitting that the claim for malicious prosecution cannot succeed, the 1<sup>st</sup> Defendant concludes by stating that the fact that they were found with a case to answer in the criminal Court shows that a *prima facie* case had been made against them.

Coming to the claim for damages for false imprisonment, the 1<sup>st</sup> Defendant has argued that the detention of the Plaintiffs on suspicion of having committed an offence was justified and they were charged, but not by the 1<sup>st</sup> Defendant. It is argued that the police have power to detain suspects and that the detention of the Plaintiffs who had been charged with an offence under the laws of Zambia, did not constitute false imprisonment as they were suspects. He cited the case of **Gertrude Munyonsi, Attorney General v Catherine Ngabeka** where the Supreme Court stated that:-

**"The police can only arrest for offences under the law. Police have no power to arrest people for purposes of making inquiries."**

The 1<sup>st</sup> Defendant's submission concluded with the argument that the claim for defamation of character could not succeed in the absence of particulars of the alleged defamatory statement being proved and attributed to the 1<sup>st</sup> Defendant. He relied on the case of **Bevin Ndovi v Post Newspapers Limited, Times Printpak Zambia Limited** where the Supreme Court had this to say:-

**"A defamatory statement is one which tends to lower a person in estimation of right thinking member of society generally; as to cause him to be shunned or avoided to expose him to hatred, contempt, ridicule or to convey an impartation on him disparaging, or injurious to him in his office, profession, calling or trade or business."**

The 1<sup>st</sup> Defendant has argued that no evidence of the Plaintiffs was given that was attributed to the Defendant. That the Plaintiffs merely testified that their names were broadcast on radio, and they did not state the radio station which broadcast their names.

He summed up his submission by stating that the case for Plaintiffs lacks merit and should be dismissed.

The Plaintiff filed submission on 31<sup>st</sup> August, 2016. According to the Plaintiffs, they were apprehended on 8<sup>th</sup> January, 2010 by some members of the community on suspicion that they had vandalized the property of Zamtel communication cables of the 1<sup>st</sup> Defendant. Upon apprehension, they were handed over to the 1<sup>st</sup> Defendant who subsequently handed them over to the police, the 2<sup>nd</sup> Defendant's agents. The Plaintiffs were then arrested and prosecuted in the High Court in Mazabuka. They were subsequently acquitted by the High Court and following their acquittal they commenced a civil action in the civil registry at Livingstone under cause 2010/HL/78 on 28<sup>th</sup> October, 2010 claiming damages for malicious prosecution, false imprisonment and defamation of character.

Counsel for the Plaintiffs, Mr Mweemba has argued that the first claim for damages for malicious prosecution should succeed because the evidence adduced in the criminal case from the Plaintiff and Defence witnesses showed that the Plaintiffs' prosecution on a charge of vandalism of the 1<sup>st</sup> Defendant's cables, contrary to *Section 341(D) of the Penal Code, Chapter 87 of the Laws of Zambia* was without basis and unjustified. It was argued that the apprehension by the 1<sup>st</sup> Defendant and subsequent report to the police was based on mere suspicion of vandalising the 1<sup>st</sup> Defendant's cables because the Plaintiffs were not found in possession of the cables. Counsel relied on the Judgment of the criminal court of 13<sup>th</sup> August, 2010 which is filed in the Plaintiffs' Bundle of Documents at pages 1 to 11, wherein the verdict of the court was an acquittal. It is argued that there was no tangible evidence to connect the Plaintiffs to the alleged vandalism.

It is further argued that the 1<sup>st</sup> Defendant failed to establish the status of the cables which were alleged to have been vandalized in relation to the said cables being in use to warrant the charge of vandalism. The Plaintiffs' Counsel argued that the 1<sup>st</sup> Defendant's officers did not diligently investigate the matter before apprehending the Plaintiffs. That the detention and later reporting of the Plaintiffs to police for prosecution was done with malice, spite and ill motive. He submitted that the 1<sup>st</sup> Defendant's evidence was so contradictory that it was discredited due to lack of evidence pointing the Plaintiffs to the offence of vandalism as outlined in the Penal Code.

It was submitted that the police acted in haste on the basis of scanty and unreliable information received from the 1<sup>st</sup> Defendant, and that the conduct of the police was malicious, rather than professional, in the manner of investigation, which should have been independent of the information given to them by the 1<sup>st</sup> Defendant. The prosecution of the Plaintiffs was with malice and lacked justification for which damages ought to be awarded as compensation for their ordeal.

The Plaintiff also sought damages for false imprisonment against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, alleging that their freedom was curtailed or restricted without justification. Counsel for the Plaintiffs referred to the definition stated by **Mvunga** and **Ngambi** on Torts in which the learned authors defined false imprisonment as "the unlawful deprivation of another's liberty by imposing restraint on the freedom of movement of an individual"

Counsel for the Plaintiff further referred to the definition by authors of Street on Tort as "an act of the Defendant which directly and intentionally or negligently causes the confinement of a Plaintiff within an area determined by the Defendant", Counsel invited the Court to also consider the definition in Winfield and Jolowicz which states that false imprisonment is the "infliction of bodily restraint which is not expressed or impliedly authorized by law."

On the basis of these definitions, Counsel argued that from the facts that emerged at trial, it is not in dispute that the Plaintiffs were apprehended by persons who took them to the 1<sup>st</sup> Defendant, where they were detained before they were finally handed over to the 2<sup>nd</sup> Defendant's agents, the police, where according to the Plaintiffs, they were incarcerated for over seven (7) months until they were acquitted by the High Court.

The Plaintiffs argued that the restriction of their freedom was unjustified and unlawful. That the conduct of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant warrants them liable for the tort of false imprisonment of the Plaintiffs. Counsel argued that the 1<sup>st</sup> Defendant, upon detaining the Plaintiffs had no power to so detain them and from the record, there is no evidence that the 1<sup>st</sup> Defendant had explained the reasons for detaining them at the time of taking the Plaintiffs into custody.

That furthermore, at the time of the apprehension and subsequent custody, the Plaintiffs had not been "caught red handed", nor found in possession of the allegedly vandalized cables. They were taken into custody based on the Defendant's report and the complaint raised by Zamtel, the 1<sup>st</sup> Defendant.

Counsel further argued that the Plaintiffs were detained without warrant and were not informed the reasons for their detention within a reasonable space of time. Counsel contended that there was no evidence to show that the reasons for the detention were formally furnished to the Plaintiffs. He cited the case of **Attorney General v Mumba** where the Supreme Court stated that "...even in an arrest without warrant....failure to inform the arrested person as soon as is reasonably practicable to do so, the reasons of the offence....will in a proper case constitute false imprisonment....a citizen is entitled to know on what charge or on suspicion of what crime he is seized. If the citizen is not so but is nevertheless seized, the police man is liable for false imprisonment".

According to Counsel for the Plaintiff the evidence on record shows that the Defendants caused the Plaintiffs to be detained without warrants and the reasons for their detentions were not furnished to them within reasonable time. It was also argued that apart from there being no proper reasons given to the Plaintiffs, the evidence shows that no cables were found in their possession nor were they caught in the act of committing the alleged of vandalism. Counsel prays that the claim for false imprisonment must succeed.



The Plaintiffs had also claimed for damages for defamation of character arguing that the events that surrounded the Plaintiffs were that they were apprehended by agents of 1<sup>st</sup> Defendant in a public place where people were able to see that the Plaintiffs had been arrested for the alleged vandalism of communication cables, that they were arraigned before a Court of law for a period of seven months until acquittal. That they placed the Plaintiffs in a public place where many people of society were found at such a place, a scenario which lowered the reputation of the Plaintiffs in the eyes or right thinking members of society. Before acquittal of the Plaintiffs the 1<sup>st</sup> Defendant's statement or communication on the radio showed that the Plaintiffs had vandalized communication cable belonging to Zamtel, and such statements were defamatory of the Plaintiffs and were found to be untrue. Counsel for the Plaintiffs has urged the Court to find that on a balance of probability, the Plaintiffs have proved their case and are thus entitled to damages for defamation as prayed. I have also noted the authorities relied upon in the case of **Scott v Sampson** and **Mvunga and Ngambi on Torts**.

Having outlined the submissions of the Plaintiffs and the 1<sup>st</sup> Defendant, it is necessary to point out that in civil matters the burden of proof is based on a preponderance of probabilities while in criminal matters the burden is based on proof beyond reasonable doubt.

The first claim of the Plaintiffs is damages for malicious prosecution. In such a claim the Plaintiff must establish four essential elements that are recognised by law. According to **Clerk and Lindsell**, the elements to show is that:

**"Firstly that the claimant was prosecuted by the defendant....that the law was set in motion against him by the defendant on a criminal charge;**

**Secondly that the prosecution was determined in his favour;**

**Thirdly, that it was without reasonable and probable cause; and**

**Fourthly that it was malicious."**

Regarding the first and second elements to be proved, the words of **Lord Keith** in the case of **Martin v Watson** demonstrated the tort of malicious prosecution. His Lordship stated that:

**"Where an individual falsely and maliciously gives a police officer information indicating that some person is guilty of a criminal offence and states that he is willing to give evidence in court of the matter in question, it is properly inferred that he desires and intends that the person he names should be prosecuted."**

In the case of **Stapley v Annetts and Another**, Lord Denning stated that:

**"in an action for malicious prosecution the burden is on the Plaintiff to prove malice and absence of reasonable and probable cause. If the defendant denies it, it is not the practice to require**

**the defendant to give particulars of his denial. It is only if he puts forward a positive allegation that he should be required to give particulars of it."**

In the case before me, it is an undisputed fact that the Plaintiffs were apprehended on 8<sup>th</sup> February, 2010 by agents of the 1<sup>st</sup> Defendant on an allegation of vandalism of Zamtel cables. After interrogating the Plaintiffs, the 1<sup>st</sup> Defendant handed them to the 2<sup>nd</sup> Defendant, where they were arrested and detained. The 1<sup>st</sup> Defendant gave the police, who are the 2<sup>nd</sup> Defendant, false and malicious information that the Plaintiffs were found digging Zamtel cables. I find that the conduct of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants constituted malicious prosecution. Thus the first and second elements were proved. On the third and fourth elements that it was without reasonable and probable cause and was malicious, the evidence on record regarding the conduct of the police poses the question of whether or not the police arrested and instituted the prosecution with reasonable and probable cause. The Defendants in their submissions argued that there was probable cause that an offence had been committed. The Defendants relied on the findings of the Criminal Court which were at page J9 of the Judgment. The Defendant has cited the finding that "of course, the Court is alive to the fact that what matters is that the property which was vandalized, and I do find that the cable were vandalized belonged to Zamtel".

The Defendants argued that the facts and the evidence of eye witnesses placing the Plaintiffs at the scene of the crime created a probable and

reasonable cause that they could have been responsible for vandalizing the cable. The Defendant further argued that the Plaintiffs admitted to having been digging, but is quick to state that they, however, were digging for sweet potatoes at the scene of the crime. The Defendants denied that there was malice, because DW1 had testified at the civil trial that he did not know the Plaintiffs previously and could therefore not hold anything against them.

At this stage I find that the Defendants' submissions contain facts which are incorrect. The facts and evidence of eye witnesses did not place the Plaintiffs at the scene of the crime. It is incorrect to argue that the Plaintiffs "could have been responsible for vandalizing the cable" because the High Court did not reach such a conclusion. The Defendant clearly misunderstood the finding of the High Court which acquitted the Plaintiffs of the offence of vandalism. The Plaintiffs, I find, did not admit to digging cables, and the Defendant acknowledges that they stated that they were found with a hoe because they were digging sweet potatoes. I find that the Defendant has advanced a feeble argument containing inferences as opposed to facts. It cannot be inferred, as the Defendant argues, that the Plaintiffs could have been responsible for vandalizing the cable. The Plaintiffs on the other hand argued that the prosecution of the Plaintiffs on a charge of vandalism of the Zamtel cable had no basis and was not justified. That evidence shows that the 1<sup>st</sup> Defendant had no basis to arrest and report to the police on mere suspicion of vandalizing of cables. The Plaintiff referred to the evidence in the Judgment, which is filed in the Plaintiffs' bundle of pleadings and the evidence of DW2 in the civil trial in which DW2 contradicted himself in

cross-examination, when he stated that the Plaintiffs were not on the photographs he took as an investigating officer and when he stated that he carried out investigations prior to arresting the plaintiffs; which investigations were interviews from independent witnesses who saw the plaintiffs. That the recorded statements were from the independent witnesses (not the Plaintiffs) His evidence revealed that he relied on the accounts of the independent witnesses when he ought to have exercised professionalism by verifying what he was told by the independent witnesses. I find that this conduct by the 2<sup>nd</sup> Defendant to arrest and charge the Plaintiffs was without reasonable and probable cause. I am satisfied that the Plaintiffs prayer for damages for malicious prosecution succeeds.

Coming to the relief for false imprisonment, the Plaintiffs argued that they were unlawfully detained without warrant for a period of seven months and that at the time of detention after their apprehension at Zamtel officers from 09:00 to 16:00 hours on the 8<sup>th</sup> February, 2010. They argued that the detention constituted false imprisonment.

The tort of false imprisonment is "an act of the Defendant which directly and intentionally or negligently causes the confinement of a Plaintiff within an area determined by the Defendant". The Plaintiffs argued that the 1<sup>st</sup> Defendant's agents, the neighbourhood watch people, took custody of the Plaintiffs, detained them and after seven (7) hours handed them over to the police yet the 1<sup>st</sup> Defendants had not ascertained that indeed the Plaintiffs had vandalized Zamtel cables. That no explanation is on record or was

tendered by the Defendants, to show that the Plaintiffs were informed the reasons for their being put in custody before appearing at the Magistrate Court. The Plaintiffs relied on the decision of the Supreme Court in the case of **Attorney v Sam Amo Mumba** at p16 where the Court stated that:

**"It is trite law that, even in a case where a police officer makes an arrest without a warrant upon a reasonable suspicion that a felony or some other arrestable crime not requiring a warrant, has been committed, it is incumbent upon him to inform the person so arrested of the true ground for his arrest."**

It is argued by the Plaintiffs that there is nothing on the record to show that they were informed of the true ground of their detention. I accept the argument of the Plaintiff because the police officer (DW2) who arrested and charged the Plaintiffs stated that when he returned from the place where the Plaintiffs had taken him to show him where they were digging sweet potatoes he merely arrested and detained them and took them to the Magistrate the following day.

The Defendant on the other hand cited the case of **Gertrude Munyonsi, Attorney-General v Catherine Ngalabeka** to justify the conduct of police in relation to arrest of the Plaintiffs. In that case the Court stated that "the police can only arrest for offences under the law: Police have no power to arrest people for purpose of making inquiries." That the detention by the 2<sup>nd</sup> Defendant was lawful.

Regarding the tort of false imprisonment it is actionable per se and in the case of **Murray v Ministry of Defence (1988) 1W.L.R at 703 to 704, Lord Griffiths** stated thus:

**"The law attaches Supreme importance to the liberty of the individual and if he suffers a wrongful interference with that liberty it should remain actionable even without proof of special damages."**

In the case of **Richman Chulu v Monarach (Z) Limited** it was held that:

**"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."**

In the case of **Claude Samuel Gaynor v Cyril Robert Cowley, Baron J** stated that "in an action for false imprisonment it is necessary for the Plaintiff to prove nothing but the imprisonment itself; it is then for the defendant to discharge the onus of justifying it.

In the case of **Attorney-General, Tembo, Chilufya and Nyirenda v Masauso Phiri** the Supreme Court considered the issue of false imprisonment when it stated citing the **Oxford Companion to Law by David Walker, Clarendon Press, Oxford, 1980 at page 488;** that false

imprisonment consists in unlawfully and either intentionally or recklessly restraining another person's freedom of movement from a particular place. The restraint must be total for a time, however short. Further, there is no false imprisonment if a person is arrested in circumstances where arrest is justifiable or if there is reasonable and probable cause for the restraint.

In the case before me the undisputed evidence was that the Plaintiffs were detained by the 1<sup>st</sup> Defendant from 09:00 hour to 16:00 hours. I find that the conduct of the 1<sup>st</sup> Defendant was false imprisonment and are thus liable. The detention was unjustified because the 1<sup>st</sup> Defendant ought to have reported the matter to the 2<sup>nd</sup> Defendant immediately after apprehending the Plaintiffs. The claim for false imprisonment therefore succeeds and I award damages.

On the third relief sought of damages for Defamation of character. The Plaintiff argued that the 1<sup>st</sup> Defendant made statements to the police that the Plaintiffs were involved in vandalism of Zamtel cables. That when the Plaintiffs were apprehended by the 1<sup>st</sup> Defendants agent, the neighbourhood watch persons it was in a public place where people around were able to see that the Plaintiffs had been arrested for a criminal offence. It is further argued that when the Plaintiffs were arraigned before the Courts, they continued to appear for seven (7) months until they were acquitted. The Plaintiffs asked the Court to take judicial notice of the fact that Court premises are public places where diverse members of society converge. It is argued that this lowered the reputation of the Plaintiffs in the eyes of right



thinking members of society over a considerable length of time. That the statements were found to be untrue resulting in the acquittal.

The Plaintiffs relied on the statement by authors of Restatement, Torts (2<sup>nd</sup> Edition) paragraph 559 which states:

**"A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter theirs persons community or to deter their persons from associating or dealing with them."**

The Plaintiffs have also cited the case of **Scott v Sampson (1882) 8 QBD at page 491** which I have taken note of. I also note that the said case related to libel. The learned authors **Mvunga** and **Ngambi** in their book **"MVUNGA AND NGAMBI ON TORTS, (2011) UNZA PRESS at page 278** state that: "Such an accusation like adultery, a criminal act or an inability to carry on one's profession does follow the Plaintiff for the rest of their lives and could lead to the Plaintiffs being shunned or socially ostracized whether or not it Defamation is provided for in the Defamation Act, Chapter 68 of the laws of Zambia.

Section 3 states that:

*"Section 3: in an action for slander in respect of words, calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of*

*the publication, it shall not be necessary to allege or prove special damages, whether or not the words are spoken of the Plaintiff in the way of his office, profession, calling, trade or business.*

Section 5: *In an action for slander of title, slander of goods or other malicious falsehood, it shall not be necessary to allege or prove special damage-*

- (a) if the words upon which the action is founded are calculated to cause pecuniary damage to the Plaintiff and are published in writing or other permanent form; or*
- (b) if the words are calculated to cause pecuniary damage to the Plaintiff in respect of any office, profession, calling, trade or business held or carried on by him at the time of the publication".*

Section 18 (i) states

*"18 (i) for the purposes of the law of libel and slander, the publication of words by wireless broadcasting shall be treated as publication in a permanent form."*

In the case of **John Namashoba Muchabi v Aggrey Mwanamufwenga (1987) Z.R. 110(SC)** the Court held that:

**"(i) in slander actions it is no longer necessary for the Plaintiff to prove that the precise words were uttered. It is sufficient if he proves a material and defamatory part of them which are substantially to the same effect."**

The Plaintiffs argue that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants orchestrated the communication of the defamatory accusation.

The Defendants argued that the Plaintiffs' claim for damages for defamation of character should fail because no particulars of the alleged defamatory statement were given to the Court and attributed to the Defendants. The Defendant argued that the Plaintiffs failed to provide such particulars. It cited the case of **Bevin Printpak Zambia Limited (2011) Z.R Vol2**) where the Supreme Court stated;

**"A defamatory statement is one which tends to lower a person in estimation of right thinking members of society generally, as to cease him to be shunned or avoided or to expose him to hatred, contempt, ridicule or to convey an impartation on him disparaging, or injurious to him in his office, profession, calling or trade or business."**

The Defendant argued that the Plaintiffs failed to show evidence that any statement was attributed to the Defendant and that the Plaintiffs merely testified that their names were broadcast on radio. The Defendants state that the claims all lack merit and should be dismissed.

Considering the arguments of the parties regarding the relief of damages for necessary for the Plaintiffs to prove that the precise words were uttered, it is sufficient if he proves a material and defamatory part of them or words which are substantially to the same effect.

In the words of Gardner, J.S it was stated that *"it is no longer necessary for the Plaintiff to prove that the precise words were uttered. It is sufficient if he proves a material and defamatory part of them or words which are substantially to the same effect. However, the Plaintiff must provide witnesses to the fact in slander"*.

In the present case, **Penias Mwale** and **Cosmas Chipolokoto** testified that the ordeal they suffered resulted in a damage to their reputations in Mazabuka. The Plaintiffs can no longer walk as men of right standing as the 1<sup>st</sup> Plaintiff informed the Court that his character was tarnished when he was put in custody and beaten. In evidence-in-chief and in cross-examination he reiterated that his character was tarnished when he was arrested as it was broadcast on radio which broadcast he also heard and that ZANIS went to get some details from him.

Regarding the 2<sup>nd</sup> Plaintiff he stated, during cross-examination, that he was defamed because he and his friend were falsely accused that they had vandalized cables worth Two hundred sixty-nine thousand kwacha (K269, 000). 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. That the persons who know him no longer accept to employ him. In this case the Plaintiffs did not call witnesses to testify that they heard the broadcast. However, on the authority of (**John Namashobi v Aggrey Mwanamufwenga**), the claim for damages for defamation of character succeeds as they have shown that the radio announcement and publicity the Plaintiffs were subjected to has had a negative effect on their livelihood as they are regarded as criminals.

In conclusion I find that, on a balance probabilities, the Plaintiffs have proved their case and I award damages for malicious prosecution, false imprisonment and defamation, which damages shall be assessed by the District Registrar. I also grant costs to the Plaintiff to be taxed in default of agreement.

Leave to appeal is granted.

*G. Milimo*  
**G. Milimo-Salasini**  
**High Court Judge**

