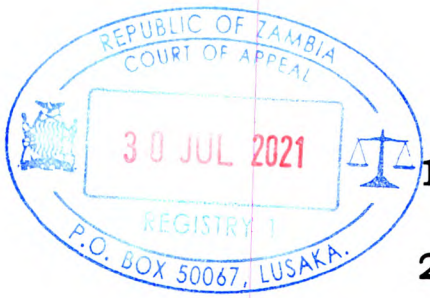
IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 203 OF 2019**

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

MWIYA MUTAKATALA	**1st APPELLANT**
SOVIET MUNSAJE	**2nd APPELLANT**

AND

DR. LEWIS SAIWANA	**1st RESPONDENT**
JOSIUS MUNGABWA	**2nd RESPONDENT**
ZAMBIA WILDLIFE AUTHORITY	**3rd RESPONDENT**
ATTORNEY GENERAL	**4th RESPONDENT**

CORAM: **Chashi, Lengalenga and Ngulube, JJA**

ON: **25th March and 30th July 2021**

For the Appellants: *F. S. Kachamba, Messrs EBM Chambers*

For the Respondent: *B. Msimuko, State Advocate, Attorney General's Chambers*

J U D G M E N T

CHASHI JA, delivered the Judgment of the Court.

Cases referred to:

1. **Attorney General and 3 Others v Masauso Phiri - SCZ Selected Judgment No. 28 of 2017**
2. **Mwanza v Zambia Publishing Company Limited (1981) ZR, 234**

Legislation referred to:

1. **The Zambia Wildlife Act, No. 12 of 1998**

Rules referred to:

1. **The Court of Appeal Rules, Statutory Instrument No. 65 of 2016**

Other works referred to:

1. **Clerk and Lindsell on Torts, 20th Edition (2010) London, Sweet and Maxwell**
2. **Halsbury's Laws of England, 4th Edition, Volume 28 (Re-issued)**
3. **Black's Law Dictionary, 8th Edition, Thomson West**

1.0 INTRODUCTION

1.1 When we heard this appeal on 25th March 2021, we sat with Honourable Mrs. Justice F. M. Lengalenga. She has since retired. Therefore, this Judgment is by the majority.

1.2 This appeal is against the Judgment of the Honourable Mr. Justice E. L. Musona, High Court Judge, which was delivered on 24th May 2019.

1.3 In the said Judgment, the learned Judge dismissed the Appellant's claim for damages for false imprisonment and defamation, with costs.

2.0 BACKGROUND

2.1 The Appellants, who were the plaintiffs in the court below, commenced an action by way of writ of summons, claiming the following reliefs:

(i) Damages of K450,000.00 (rebased) for false imprisonment from 28th February 2009 to 3rd March 2009, resulting from arbitrary detention of the plaintiffs at Musamba Police post, Linda Police post,

Kabwata Police station and Muchinga Police post, Lusaka;

(ii) Damages of K450,000.00 (rebased) for libel contained in the Times of Zambia newspaper of 2nd March 2009, in a headline article titled *"two cops nabbed over K1 billion (unrebased) ivory"* published on front page;

(iii) Costs of and incidental to the proceedings; and

(iv) Any other reliefs as the court may deem fit

2.2 According to the attendant statement of claim, the Appellants had on 28th February 2009, gone on official duty from Kanyama Police station to Kafue, where they recovered six metal trucks containing ivory, rhino horns, hippo teeth and amethyst stones. On their way back, they were falsely imprisoned by the 2nd Respondent for no justifiable cause and all the recovered items were confiscated. That they were only released on police bond on 3rd March 2009, awaiting prosecution.

2.3 According to the Appellants, they have since not been prosecuted. It was the Appellants' averment that the detention amounted to false imprisonment and deprived them of the freedom of movement. It was further averred

that the 1st Respondent on 1st and 2nd March 2009 falsely caused to be published on the front page of the Times of Zambia, a story titled *"two cops nabbed over K1bn Ivory."* That due to the scandalous allegations, the Appellants were suspended from work.

2.4 In its defence, the 2nd, 3rd and 4th Respondents (the Respondents) averred that the Appellants never booked out from their station to show that they had gone on official duties. It was in addition averred that the criminal investigation officer, did not assign this particular assignment to the Appellants. According to the Respondents, there was justifiable cause for the Appellant's arrest as they were unlawfully in possession of prescribed trophy, an offence under **The Zambia Wildlife Act**[1] and they did not identify themselves as police officers at the time they were being apprehended.

2.5 It was in addition averred that the detention was not arbitrary and was in accordance with the laid down procedures and the law.

That the Appellants knew that matters relating to Wildlife are supposed to be reported to the 3rd Respondent. That

therefore the Appellants were lawfully arrested for unlawfully being in possession of protected and prescribed trophy and this was in public domain.

3.0 DECISION IN THE COURT BELOW

3.1 After considering the evidence and the authorities, the court below formulated the issues for determination as *"whether the Appellants were entitled to the claims for false imprisonment and defamation owing to the events that occurred."*

3.2 On the claim for false imprisonment, the learned Judge took note of the definition of false imprisonment by the learned authors of **Clerk and Lindsell on Torts**[1] were it is defined at page 998 as follows:

> *"False imprisonment is the unlawful imposition of constraint on another's freedom of movement from a particular place. The tort is established on proof of; (i) the fact of imprisonment and (ii) absence of lawful authority to justify that imprisonment. For those purposes, imprisonment is complete deprivation of*

liberty for any time, however short, without lawful excuse."

3.3 The learned Judge also addressed his mind to the various authorities in our jurisdiction, amongst them the case of **Attorney General and 3 Others v Masauso Phiri**[1] where the Supreme Court at page J8 stated as follows:

"... it is also clear from the case of Attorney General v Kakoma, where we confirmed the holding in Gaynor v Cowley, 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."

3.4 The learned Judge then reverted to **Clerk and Lindsell on Torts**[1] at paragraph 15-65 where the learned authors observed that:

"Where what is in issue is whether the arrestor had reasonable grounds of suspicion, it is for the Judge to rule on whether there were such reasonable grounds... in an action for false imprisonment the burden lies on the

defendant to justify the arrest. He must prove affirmatively that he acted on reasonable grounds."

3.5 The learned Judge took the view that, it was not in dispute that the Appellants were detained by the 2nd Respondent and the 3rd Respondents' officers. That what was in dispute was whether the Respondent's had reasonable cause to detain them. The learned Judge after considering the fact and circumstances of the case, found that the 2nd Respondent had reasonable grounds in detaining the Appellants and had to that effect succeeded in discharging the onus of justifying the detention. The learned Judge accordingly found that there was no false imprisonment.

3.6 On the claim for defamation (libel), the learned Judge cited the case of **Mwanza v Zambia Publishing Co. Limited**[2] where defamation was defined as:

"Any imputation which may tend to injure a man's reputation business, employment, trade, profession, calling or office carried or held by him."

3.7 The learned Judge then referred to **Halsbury's Laws of England**[2] where the learned authors at paragraph 10 observed that:

> *"A defamatory statement is a statement which tends to lower a person in the estimation of right-thinking members of society generally or to cause him to be shunned or avoided or expose him to hatred, contempt or ridicule or to disparage him in his office, profession calling, trade or business."*

3.8 In respect to libel, the learned authors at paragraph 11 state that:

> *"A libel for which an action will lie is a defamatory statement made or conveyed by written or printed words or is some other permanent form published of and concerning the plaintiff, to a person other than the plaintiff."*

3.9 The learned Judge observed from the pleadings that this particular claim was directed specifically against Dr. Lewis Saiwana, who was no longer part of the proceedings as he had accordingly been misjoined by a consent Order dated 3rd March

2017 filed under SCZ Appeal No. 108 of 204. Based on the aforestated, the learned Judge opined that the removal of Dr. Saiwana entailed that the claim for defamation cannot therefore succeed, as he was the person specifically sued. The claim was accordingly dismissed.

4.0 THE APPEAL

4.1 Disenchanted with the Judgment, the Appellants have now appealed to this court advancing one ground of appeal consisting of eleven paragraphs. From the onset, it is our view that the manner in which the grounds of appeal are couched contravenes Order 10/9 (2) of **The Court of Appeal Rules**[1], which provides as follows:

> *"A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the Judgment appealed against and shall specify the points of law or fact which are alleged to have been wrongly decided such grounds to be numbered consecutively."*

4.2 The Appellants are clearly on a tangent in the manner they couched the grounds of appeal. This is a classic example of

contravention of Order 10/9 (2) **CAR**. We were inclined to expunge the grounds of appeal for that reason, which would have culminated in the dismissal of the appeal. However, we note that the Respondents did not raise any objection to the memorandum of appeal, but instead proceeded to respond. Furthermore, we did not bring this issue to the attention of the parties at the hearing, as we allowed them to argue the appeal. For the aforestated reasons, we will proceed to determine the appeal. In doing so, we will not recapitulate the grounds of appeal. We will resolve the appeal, based on the claims which were before the court below; that is (i) false imprisonment and (ii) defamation (libel). In that respect we will only decipher from the Appellants heads of argument, what we will in our view find necessary.

5.0 ARGUMENTS IN SUPPORT OF THE APPEAL

5.1 As regards the dismissal of the claim of false imprisonment, Mr. Kachamba, Counsel for the Appellants submitted that the Respondents did not discharge the onus of justifying the imprisonment of the Appellant as the right to freedom is backed by the Constitution. According to Counsel, the learned Judge

misapplied the law by not taking into account that in its totality the reasonable grounds referred to must be backed by law. That the 2nd Respondent should have had the law backing his ground for suspicion before the grounds could be said to be reasonable.

5.2 It was Counsel's contention that the 2nd Respondent who was the principal witness for the Respondents in the court below based his testimony to validate the arrest of the Appellant on hearsay as none of the informants whom he relied upon to make his decision to arrest were called as witnesses.

5.3 It was submitted that the court below refused to see the evidence as contained in the occurrence book, which would have showed that the Appellants signed the book.

5.4 On the claim for defamation, Counsel submitted that the learned Judge agreed that the Appellants were defamed by the 1st Respondent but however his finding was that since the 1st Respondent was removed as a party by consent of the parties, the Appellants lost on the claim. It was submitted that in law, an employer is vicariously liable for the wrongdoings of an

employee if those wrongs are committed while the employee is conducting his duties for the employer.

5.5 According to Counsel, the 1st Respondent was removed as a defendant on the understanding that the 3rd Respondent would be vicariously liable. That, that was a practical decision to further the course of justice in the case.

6.0 ARGUMENTS IN OPPOSING THE APPEAL

6.1 In responding to the claim for false imprisonment, Mr. Msimuko, Counsel for the Respondents drew our attention to Section 116 of **The Zambia Wildlife Act**[1] and submitted that it provided authority for the 2nd Respondent to effect arrest on reasonable grounds. According to Counsel, the evidence on record, especially that of the 2nd Respondent reveals that there was adequate evidence that the 2nd Respondent, had reasonable ground to suspect that an offence was being committed. that therefore the learned Judge was on firm ground when he held that there was no false imprisonment.

6.2 In response to the claim for defamation, it was submitted that the learned Judge correctly addressed his mind to the law. That the learned Judge noted, that the action for libel as

captured in the statement of claim was clearly against the 1st Respondent. That the 1st Respondent having been removed from the proceedings by the Supreme Court, rendered the claim untenable. That in that respect, the learned Judge was on firm ground, when he held that the removal of the 1st Respondent from the proceedings entailed that the claim for defamation cannot succeed as the person specifically sued was the 1st Respondent and he accordingly dismissed the claim.

7.0 DECISION OF THIS COURT

7.1 We have considered the arguments and the Judgment being impugned. As regards the claim for false imprisonment, the learned Judge in dismissing the claim, looked at the definition of false imprisonment and what it constituted. The learned Judge then went on to assess whether there was reasonable ground for suspicion on the part of the 2nd Respondent. Apart from the information which was received from an informant, the learned Judge noted from the evidence that when the 2nd Respondent mounted a road block in Chilanga, the Appellants were using a private minibus, instead of an official Police vehicle. Further that when the vehicle was requested to stop,

it sped off prompting the 2nd Respondent and others to pursue it until they finally intercepted it and detained the Appellants.

7.2 The learned authors of **Black's Law Dictionary**[3] at page 636 define false imprisonment as:

> *"A restraint of a person in a bounded area without justification or consent."*

After acknowledging that the Appellants were indeed detained, the only issue which was left for the learned Judge's determination was whether the detention was justified. In doing so, the learned Judge had to inquire into whether the 2nd Respondent had reasonable grounds in detaining the Appellants.

7.4 The learned authors of **Black's Law Dictionary**[3] equate reasonable grounds to probable cause. They define probable cause at page 1239 as:

> *"A reasonable ground to suspect that a person has committed or is committing a crime..."*

7.5 The issue of reasonable ground brings into play the variable tool of the law of the reasonable person as a test for

blameworthiness by the courts. The court must ask whether that is what the litigant acting as a reasonable person would have done in the circumstances. If the answer is yes, then the conduct is legally blameless and does not attract liability. However, if the litigant fails to do what the court believes the reasonable person would have done, then the conduct is considered legally at fault.

7.6 The 2nd Respondent was a law enforcement officer in the employ of the 3rd Respondent. The 2nd Respondent's power of enforcement are spelt out under **The Zambia Wildlife Act**[1]. Under part 13 of the Act, in particular Section 112, shows that the 3rd Respondent's officers, have powers to search and inspect any vehicle. Under Section 114, they are empowered to arrest without warrant where a person has committed or is about to commit an offence. In doing all this work as law enforcement officers, they are not obligated to disclose their source of information leading to suspicion.

7.7 We have no doubt that the actions of the officers were backed by law. Furthermore, the circumstances as highlighted by the learned Judge which led to the arrest and detention of the

Appellants and culminated in the seizure of government trophy worth billions of Kwacha, were sufficient to convince and justify the action taken by the 2nd Respondent. We therefore find no basis on which to fault the learned Judge for dismissing the claim. As regards the issue of the occurrence book, its absence before the court cannot be blamed on the court. If the Appellants felt that they needed the book as part of their evidence, they could have engaged the assistance of the court, which they neglected to do.

7.8 As regards the claim for defamation, it is evident from the record, which is conceded by Counsel for the Appellants that the parties by consent Order dated 3rd March 2017, executed before the Supreme Court, misjoined the 1st Respondent from the cause of action. Forthwith the 1st Respondent ceased to be a party to the proceedings. It was therefore a misdirection for him to have continued being cited as a party in the court below and this Court.

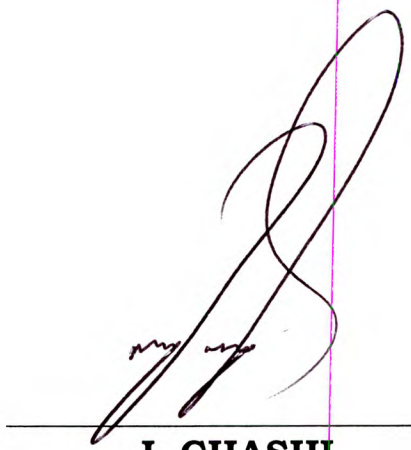
7.9 The argument by Counsel for the Appellant is that the 1st Respondent was removed on the understanding that the 3rd Respondent would be vicariously liable. Unfortunately, the

consent Order at page 63 of the record does not speak to what Counsel for the Appellant alleged. The Order clearly states that the Respondent was misjoined from the proceedings in the High Court and the Appellants were to have no further claim against the 1st Respondent in respect to the action. That being the case, we find no basis to fault the learned Judge when he found that the claim was targeted against a person who was no longer a party to the proceedings and dismissing it on that basis.

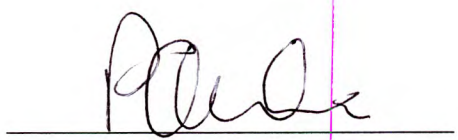
7.10 If indeed the intention was to proceed on the basis of vicarious liability, the Appellants should have amended the pleadings, so as to highlight the same and that would have given the court an opportunity to pronounce itself on this form of strict liability *vis a vis* the consent Order for misjoinder. However, as the matter stood, the 1st Respondent was misjoined and the claim which was directly directed at him, fell away. Therefore, the learned Judge was on firm ground when he held that the removal of the 1st Respondent from the proceedings entailed that the claim for defamation cannot succeed as he was the person who was specifically sued.

8.0 CONCLUSION

8.1 The appeal having been dismissed in its entirety, the Appellants will bear the costs of the appeal, which are to be paid forthwith. Same to be taxed in default of agreement.



J. CHASHI
COURT OF APPEAL JUDGE



P. C. M. NGULUBE
COURT OF APPEAL JUDGE