

IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY
(Civil Jurisdiction)

2009/HK/642

BETWEEN:

ELIJAH NYONDO - **PLAINTIFF**

AND

ZESCO LIMITED - **1ST DEFENDANT**
ATTORNEY GENERAL - **2ND DEFENDANT**

Before the Honourable Mrs. Justice R.M.C. Kaoma in Open Court this 28th day of October 2011

For the Plaintiff: Mr. G. Nyirongo – Nyirongo & Co.
For the 1st Defendant: Mr. N. Chiwale – Legal Counsel
For the 2nd Defendant: N/A

J U D G M E N T

Authorities referred to:

1. *Mubita Mbangwa v The Attorney General (1979) Z.R. 234*
2. *Richard Chulu v Monarch (Z) Limited (1983) Z.R. 33*
3. *Bird v Jones (1845) 7QB 742*
4. *Sewell v National Telephone Co. Ltd (1904-1907) ALL ER. 457*
5. *Claude Samuel Gaynor v Cyril Robert Cowley (1971) Z.R. 50*
6. *Hogg and Ward (1858) 27 L.J. EX 443*
7. *Davidson v Chief Constable of North Wales and another (1994) 2 ALL E.R. 597*
8. *Associated Picture House Limited v Wednesbury (1948) 1 K.B.223*
9. *Attorney-General v Felix Chris Kaleya (1982) Z.R. 1*
10. *Clerk and Lindsell on Torts, Twentieth Edition, Sweet and Maxwell, 2010*

On 11th November 2009, the plaintiff Elijah Nyondo issued these proceedings against the two defendants, ZESCO Limited and the Attorney General claiming (i) damages on the footing of aggravated damages; (ii) special damages for the return and/or replacement value of all the items in para 8 of the statement of claim; (iii) written apology from the 1st defendant; and (iv) costs.

In para 4 of the statement of claim, the plaintiff has pleaded that the 1st defendant whilst working together with Zambia police officers based at Wusakile police station, arrested him and took him into custody at the police station on a charge, made by the 1st defendant, that he had stolen a 25KVA 11/0.4KV Three Phase Code No. 050705-0001 transformer from the 1st defendant's premises at Kitwe. In para 5 he has pleaded that upon the said false charge and acting upon the 1st defendant's instructions, the Zambia police officers arrested him and took him in custody to Wusakile police station where he was detained until he was released on police bond on 27th February 2009 and that it was later discovered that the said transformer was in fact in the 1st defendant's custody and installed at their Masaiti Area Plot 9291 Kafulafuta and that the plaintiff upon that discovery suffered distress, anguish, pain, bewilderment and great anxiety.

In its defence filed on 24th November 2009 at pages 7 and 8 of the Bundle of Pleadings, the 1st defendant has admitted the contents of para 4 of the statement of claim only to the extent that it reported a missing transformer 25KVA 11/0.4 KV Three Phase Code No. 050705-0001 to the Zambia Police which had been removed from its Stores Office without following the laid down procedure and averred that after the Zambia Police made their investigations, it was established that the plaintiff had a hand in how the transformer was removed from Stores and that they had reasonable grounds to arrest him. The 1st defendant has further alleged in para 4 that after the plaintiff was arrested and was due to appear in court he revealed that the transformer had been installed to a customer in Kafulafuta area a fact which led to the prosecution being dropped; in para 5 that the defendant acting on this information and after people identified him as a person who had collected the transformer from the Workshop in Ndola, the transformer was recovered; and in para 6 that it never facilitated the detention, if at all the plaintiff was detained and never took the items claimed to have been lost.

The 2nd defendant filed a defence on 24th March 2010, but which is not included in the Bundle of Pleadings. In para 3 the 2nd defendant has admitted para 4 of the statement of claim and averred that it will show Court that police officers from Wusakile police station were acting on a report of theft of a transformer made by the 1st defendant.

In para 4 the 2nd defendant pleads that police investigations revealed that on 29th October 2008, five faulty transformers were taken to Ndola transformer workshop for refabrication, however closer scrutiny revealed that six and not five transformers had been received at the workshop and amongst them was the transformer subject of this cause; in para 5 that the transformer was later picked up by the plaintiff; and in para 6 that there was reasonable and probable cause to arrest and detain the plaintiff as there was reasonable justification to believe that a crime had been committed.

The plaintiff has testified on his own behalf and called three other witnesses. In brief his evidence is that he joined the defendant on 17th January 2000 as electrical technician and in 2008 was promoted to principal electrical technician in the same grade. On 25th February 2009 he was summoned by the security sergeant at the defendant's security office in town through a telephone call. He went to the security offices and found Mr. Maoma, the security sergeant and Mr. Musonda from Zambia police. He was asked by Mr. Maoma what he knew about a missing ZESCO 25KVA transformer. He responded that he had learnt of the missing transformer a week earlier when Mr. Kabeya reported that he had collected a transformer from Lusaka in October and had offloaded it at the ZESCO loading bay where the plaintiff had also put some transformers he had collected within Kitwe and that Mr. Kabeya told him and everyone at Kitwe Central Stores that he had probably collected the transformer and taken it to Ndola.

He said he told the police that his office documents movement of transformers they collect for repair and that his record did not show that he collected the transformer or take it to Ndola; that Mr. Maoma recorded a statement which he signed and told him that he would assist them with investigations and should accompany them to Ndola which he did on the same day. They went to the ZESCO transformer workshop where Mr. Maoma asked the workshop supervisor, Mr. Kansengu to identify from among them, the person who had collected the transformer from Ndola and Mr. Kansengu pointed at him. He asked Mr. Kansengu when he collected the transformer from Ndola but before he could answer, the arresting officer interjected that an identification parade was not a platform for cross-examining a witness and that he should look for the platform in court.

He said that they went back to the ZESCO vehicle Nissan Pickup, registration number ABK 1883 which they had used and went straight to Wusakile police station where the arresting officer took out the Penal Code and a police notebook and read from the notebook that he was arresting him on a charge of theft by servant involving a 25 KVA ZESCO transformer. He said he refused the charge by signing in the notebook. The arresting officer then told him to remove all his belongings as he was taking him into police custody. He said he surrendered 1 wrist watch, shoes, belt, stockings and a bunch of keys. He was detained in police cells from 25th to 27th February 2009 when he was released on police bond around 15.00 hours. He identified the police bond at page 23 of his Bundle of Documents.

His evidence is further that there are two ZESCO date stamps on the flip side of the page and that ZESCO security was responsible for his detention and that he was instructed on his police bond to appear in court on Monday 6th March, but when he appeared at court, the arresting officer told him that they were not proceeding in Court and extended the police bond to 10th March. He said his police bond was further extended to 20th March 2009, then to 6th April using a ZESCO security date stamp, but they have never gone to court.

He testified that being an employee it was paramount that he be cleared of the allegation of theft, so on 9th April 2009, he wrote to the Human Resources Manager the letter at pages 25 to 26 of his Bundle of Documents over his arrest and detention, but there was no official response. On 18th May 2009 he wrote to the Director Human Resources the letter at pages 27 to 28 of the same Bundle, but still there was no response. On 18th June 2009 he wrote to the Managing Director the letter at page 29 addressing the same issue, but never got a response. Eventually he received a response from Mrs. Shapi, the Human Resources Manager which appears at page 30 of his Bundle, but which did not clear him of the allegation. The letter simply informed him that the charges were not levelled by ZESCO, but by law enforcement officers and that as a company, they were not able to clear him.

He felt it necessary then to engage the police. On 23rd July 2009, he wrote to the District Commanding Officer Zambia police, Kitwe the letter at page 31 of the same Bundle raising the same issues. He was summoned by the Commanding Officer who informed him that the matter was investigated by Zambia police together with ZESCO and that he may not know why the matter did not go to court because the docket was not in police custody, but in the custody of ZESCO, and that they would ask ZESCO to establish its position on the matter and that he was privileged to see the letter by the Commanding Officer to the Human Resources Manager before it was sent, but what followed was an atmosphere of silence.

He testified that he discovered that the transformer was in fact still with the defendant and was installed by Luanshya Office at a client Elijah Luka Chimfupa's farm in Kafulafuta. He said he got stock transaction forms on the movement of the transformer from Kitwe Central Stores to Luanshya including one form on which an employee of ZESCO, Mr. Golden Mulenga got the transformer from ZESCO Luanshya and delivered it to Mr. Chimfupa's farm. He also obtained the Article Movement document which is like a foot print of how the transformer moved from the time it entered ZESCO to the time it was installed at Mr. Chimfupa's farm. He further got pictures of the transformer at the farm which are at pages 32 to 36 of his Bundle. He pointed out the description of the transformer at page 32 as 25KVA11KV 415, and the serial number at the bottom of page 36 as DC0105/0297 and the transformer as the one he allegedly stole.

He said that he also got documents identifying the serial number of the transformer. He identified the document at page 42 of his Bundle dated 14th November 2008 as the stores transaction form which shows that an employee of the defendant at Kitwe, Felix Mulenga gave the transformer to the defendant at Luanshya and that the Regional Manager Mr. Abadon Mwenda collected the transformer to Luanshya. He also identified the document at page 44 of the same Bundle as another stores transaction form. He said that the issuing store in the top right corner of the document is Kitwe Central Store and that the receiving store is Luanshya and that the date is 8th November 2008, which corresponds with the date he has alluded to at page 42.

He said that the item described is transformer 25 KVA 11/0.4 KV and below that item is a conductor 50m. He also identified the document at page 17 of the same Bundle as another stores transaction form dated 18th November 2008 explaining the movement of the transformer from Luanshya Store to Mr. Luka Elijah Chimfupa in Kafulafuta and that the description of the item is transformer 25KVA11/0/4 KV Three Phase. He said that Mr. Golden Mulenga, senior technician collected the item from Luanshya Store to Mr. Chimfupa's farm; that the transformer has trade mark of the same serial number of the transformer he was alleged to have stolen; and that the transformer was taken to Mr. Chimfupa's farm on 18th November 2008.

He also identified the documents at pages 43 and 45 of his Bundle as one Articles Movements document which is moving the transformer from Lusaka Central Stores to Mr. Chimfupa's farm and that the original author of the document is Lusaka Central Stores and the last place is Mr. Chimfupa's farm. He said that entry 14/11/2008 G04CR1017335 shows that the store is transferring the transformer from Lusaka Central Stores to Kitwe Central Store; that entry 14/11/2008 F06CR1018646 defines the movement of the transformer from Kitwe Central Stores to Luanshya; and that entry 18/11/2008 F01CR1158583 at page 45 defines that the transformer had been issued to a particular job from Luanshya Store to Mr. Chimfupa's farm.

He said that the transformer entered Lusaka Central Stores on 20th October 2008 under entry No. GO5CR1001110, goods receipt from operation and that entry GO4CR1017335, inter-store transfer receipt shows the date it moved to Kitwe. He said that the document does not show that the transformer ever entered the Ndola transformer workshop. He said that he was not working on 14th November 2008 when the transformer moved to Kitwe as he took his annual leave from 3rd November to 12th December 2008 as shown on the application for leave and the pay slip for October 2008 at pages 40 and 41 of his Bundle. He said that the allegation in para 3 of the 1st defendant's defence is false as he was on annual leave when the events took place. He agreed as stated in para 4 of the defence that he informed the arresting officer that the transformer was in Kafulafuta after he got the information from Mr. Kabeya.

He said that the charge was not dropped after his correspondence to management and the police and that there has been no correspondence from ZESCO or the police to that effect. He said that the allegations against him were false as he had nothing to do with the transformer and that the manner he was treated and detained, taken to Ndola and thrown into police custody was quite embarrassing and that his colleagues and family still wonder if he is innocent, and would like the matter to be ended publicly. He reiterated his claims in the statement of claim.

In cross-examination by Mr. Chiwale, counsel for the defendant, he reiterated that as at 29th January 2009 he had knowledge of a missing transformer given to him by Mr. Kabeya, but he did not know that it was in Kafulafuta. He said that he reported to the ZESCO security on 25th February 2009 just after 09.00 hours and met Mr. Maoma; that he told the arresting officer that he was actually on leave at the time the transformer allegedly went missing; and that the transformer was allegedly taken to Ndola from Kitwe Central Store on 31st October 2008 which was his last working day.

He testified that he did not know the time they left for Ndola as he was in a room where he sat for many hours; that the identification parade at Ndola took only a few minutes; and that he was taken to Wusakile police station in the afternoon around 15.00 hours. He said it was a rainy day and he sat at the back of the vehicle; and that he was arrested by Mr. Maoma a few minutes after their arrival and taken into police custody. He said that Mr. Chilombo and Victor Magaya were present; that Mr. Chilombo delivered cash home for him and that Victor Magaya was telling him that at his level he could steal. He admitted that the police did the arrest and that he was detained for 48 hours and not 72 hours. When referred to para 3 of the letter to the Human Resources Manager at page 25 of his Bundle of Documents, he said that state police officers were stationed at ZESCO and that he never went to the police station. He said that his first encounter with the police was at ZESCO and that his police bond was being renewed at ZESCO as shown on the flip side of the police bond at page 23 of his Bundle. He said that he could have lost the items he is claiming anywhere during investigations as he was taken to Ndola and then to the police station and that the items were on him.

He said that he personally processed the photographs of the transformer from the printer; and that he was given the documents on the movement of the transformer by Kitwe Central Store and he printed them from the ZESCO system. He denied knowledge that entries in the computer can be changed, but admitted that the documents require interpretation by a stores man. He stated further that the whole purpose of arresting and charging him was for him to be prosecuted, but said that does not clear his true conscience. He insisted that he wants to be cleared from the allegations and that his employment status cannot be equated to the criminal allegations which should be handled separately. He admitted that he has not been charged under the disciplinary code by the defendant with theft of the transformer. He reiterated that the Commanding Officer told him that the docket was with ZESCO and not at the police. He admitted that he never wrote to the Director of Public Prosecutions over the matter.

Malungo Cheelo a stores officer with the defendant and the in-charge of Copperbelt area is PW2. His duties include issuing and receiving of materials. He testified that transformers are centrally bought from Lusaka and distributed to other ZESCO centres throughout the country and that his department facilitates the distribution from one store to another using stores transaction forms which are generated from the issuing point and are signed by the persons issuing and receiving the transformer.

He testified that on 18th October 2008 a transformer 25KVA was issued from Lusaka Central Stores to Kitwe Store together with two other materials and that two officers were involved, the issuer Lackson Mwanza and the receiver Maxwell Kabeya and that the document at page 12 of the plaintiff's Bundle of Documents came from Lusaka and shows that the items issued were going to Kitwe Store. He said that at Kitwe Store Maxwell Kabeya received the items as his name is indicated in the bottom right corner of the document; that the items issued are described as transformer 25KVA 11/04/KW, mini substation 11/04 KV 750 KV and single phase energy meter; and that the serial number of the transformer is indicated in the bottom left corner of the document as DC 0105/0297. He said that this is an authentic document.

He testified further that when materials arrived at stores they were supposed to be taken physically into stores and a Goods Received Note (GRN) raised by the stores officer who collected the materials. He said that Maxwell Kabeya who collected and received the goods raised the GRN at page 13 of the plaintiff's Bundle of Documents indicating the goods received as transformer 25KV 11/0.4 KW Three Phase, serial number DC 0105/0297. He testified that the transformer was issued to Luanshya Stores by Felix Mulenga who was stores officer and was physically collected by Abadon Mwenda, the Regional Manager for Luanshya.

He identified the document at page 44 of the same Bundle as the stores transaction form which transferred the transformer to Luanshya, and the document at page 18 as the GRN raised by Isaac Kachepele upon receipt of the transformer. He said that upon the transformer reaching Luanshya Store; it was requested for by an end-user Golden Mulenga, an electrician and employee in construction who is still in the employ of the defendant. He said that all the documents he has referred to are genuine and authentic and approved ZESCO documents; that the procedure he has highlighted is the only way a transformer moves; and that the plaintiff was not involved at any stage in the movement of the transformer.

In cross-examination, he said that he took up his role on the Copperbelt in 2009. He reiterated that the document at page 13 of the plaintiff's Bundle is a GRN, although it is titled stores transaction form and that Maxwell Kabeya brought the transformer to Kitwe together with other items on 20th October 2008. He said that he authorised the transformer transfer from Lusaka to Kitwe on 14th November 2008. He admitted that according to his evidence the transformer was taken by Mr. Kabeya on 18th October 2008. He said that they have two systems, a manual and a computer or online system and that the transformer was taken through a manual system which is used when the online system is not working and that there was authority to pick the transformer through an e-mail. He said that when they were online on 14th November 2008 they updated the system because the transformer had already moved.

He admitted that the stores transaction form dated 8th November 2008 at page 44 of the plaintiff's Bundle is a manual record showing when the transformer was given to Mr. Mwenda; that in the system the transformer was received by Mr. Kabeya on 14th November 2008, but physically it was already in Luanshya; and that there was a total discrepancy in the movement of the transformer in the manual and online systems which raised alarm over the whereabouts of the transformer. He said that the person in his position at the time was Felix Mulenga, but denied knowledge that Felix Mulenga reported to management that the transformer was missing or that after ZESCO reported the matter, the police conducted an identification parade where the plaintiff was identified as the person who got the transformer or that it was the police that actually arrested and detained the plaintiff at Wusakile police station and not ZESCO.

He denied that the record was put right only after the transformer was located in Luanshya. He said that the system would still point to the people responsible whether the system was updated before or after the transformer was traced to Luanshya and that the updating normalised the system. In re-examination he insisted that the document at page 13 is a GRN, and that there is an X to mark it as such.

Golden Mulenga, a senior construction technician with the 1st defendant at Luanshya Region is PW3. He testified that between 14th October and 30th November 2008 they had a project in Masaiti where they were connecting a customer, Elijah Luka Chimfupa. They had to construct lines to the farm and to install a 25 KVA 1100 to 400 volts transformer. He said that the transformer serial No. DC0105/0297 came from Luanshya Store and was issued to him as head of department by Pascal Bwembya on the stores material issue document at page 17 of the plaintiff's Bundle. He said that he went to stores with the job number and requisition number; and that they took the transformer to the site and installed it and that the transformer appears in the pictures at pages 32 to 36 of the same Bundle. He too said that the plaintiff was not involved in the collection of the transformer from Luanshya Central Store or the installation at the farm. In cross-examination he said that he did not attend the identification parade at Ndola or know who arrested the plaintiff or where the plaintiff was detained in custody.

Nelson Phiri Assistant Commissioner of police and Officer Commanding, Kitwe District is PW4. He testified that there are police officers attached to ZESCO Limited whose duties are to do patrols and to investigate cases of vandalism of ZESCO property and any other cases that ZESCO may avail them. He said that ZESCO provides all logistics such as transport and usually pay a meal allowance if police officers miss lunch and that ZESCO has a security wing from which the officers operate. He said that there is a contract in writing because the arrangement was entered into between ZESCO Headquarters and Police Headquarters.

He testified that the plaintiff's case only came to his knowledge when he received the summons because not all cases pass through his office. He said that he was told that a docket was opened, but he did not look at it and cannot know whether it was closed because he had to attend to other pressing matters. He said that Mr. Mtonga, assistant superintendent who was in charge of investigations would know better and that he does not recall receiving a letter from the plaintiff. He said that it could have been dealt with by somebody else especially if he was away and the matter was urgent. He said that it could be true that the plaintiff was referred from his office to Mr. Ndakala, the District Criminal Investigations Officer now based at Headquarters in Lusaka who may have written to ZESCO asking what he should do with the plaintiff's case, but he does not recall seeing the correspondence. He said that he has not seen any police bond where police officers based at ZESCO use ZESCO date stamps and that he has not seen the docket for the plaintiff. On the ZESCO date stamp on the plaintiff's police bond, he said that the police officers should have used the date stamp at the front of the document.

In cross-examination, he admitted that there are police officers attached to various sensitive institutions, such as the High Court, who are still bonafide employees of Zambia Police Service and execute police duties; that police have challenges of transport in their operations and that it is very common for complainants to offer transport for the police to carry out investigations; and that the police officer or dealing officer who put the ZESCO security date stamp on the flip side of the police bond wrongly put the stamp. This in brief is the plaintiff's case.

The defendants have not adduced any evidence. In his submissions Mr. Nyirongo has contended, after evaluation of the evidence, that the defendants elected not to give any evidence to counter the plaintiff's evidence, and that the 1st defendant had a huge role to play in the plaintiff's imprisonment in the sense that: 1) They provided Zambia Police Officers with monetary allowances as confirmed by PW4; 2) They provided Zambia Police Officers with office space at the 1st defendant's premises; 3) They provided Zambia Police Officers with their own official stamp which the Zambia Police Officers used to extend Plaintiff's police bond; 4) They provided motor vehicle registration No. ABK 1883 to the Zambia Police Officers which was the vehicle used to transport the plaintiff from Kitwe to Ndola and back to Kitwe's Wusakile Police Station; 5) The 1st defendant's Mr. Kasengu a workshop supervisor at Ndola duly pointed and or identified plaintiff to the Zambia Police Officers as the one who had stolen the 25 KVA transformer from Ndola; and 6) PW1's uncontroverted evidence has shown that PW4 told him that Zambia Police would not further prosecute the case as they were awaiting further instructions from the 1st Defendant.

Counsel has referred me to *Mubita Mbanga v The Attorney General* (1) where Muwo, J (as he then was), found Zambia police officers guilty of false imprisonment for not having formally arrested the plaintiff but merely detained him for three and half hours and also in view of the affront to the plaintiff's personal dignity and damage to his reputation. He submitted that in this case there is no evidence by the defendants to the effect that the plaintiff was formally charged and arrested and subsequently taken to court and that the whole process came to a standstill when the police officers realised that the plaintiff had been wrongfully detained. He has also cited *Richard Chulu v Monarch (Z) Limited* (2) where Commissioner Mumba (as she then was), referred to the English case of *Bird v Jones* (3) which defined false imprisonment as a restraint on the liberty of the person without lawful cause, either by confinement in prison, stocks, house etc, even by forcibly detaining the party in the streets against his will. He has also submitted that in this case there was no lawful cause whatsoever upon which the plaintiff could be imprisoned as the transformer in issue was at all material times in the custody and use of the 1st defendant.

He further submitted that there was no formal arrest made on the plaintiff who was merely detained for 72 hours and that the liberty of the plaintiff was illegally restrained by both defendants. Counsel has referred to the statement of Pollock C.B in *Sewell v National Telephone Co. Ltd* (4) referred to by Commissioner Mumba in *Richard Chulu v Monarch (Z) Ltd* (2) and reiterated that the fact that the transformer was at all material times in the custody and use of the 1st defendant clearly establishes mala fide in the complaint lodged with the 2nd defendant.

He submitted that the identification of the plaintiff by the 1st defendant's officer at Ndola workshop clearly establishes that the 1st defendant directly and immediately caused the false imprisonment; and that the 1st defendant ought to have known that the transformer was in their custody and use. He cited *Claude Samuel Gaynor v Cyril Robert Cowley* (5) and contended that in this case imprisonment has been overwhelmingly established and that the defendants have opted not in anywhere whatsoever to justify the imprisonment.

Lastly he submitted that paras 6, 8 and 9 of the statement of claim show that the damages on the footing of aggravated damages being claimed arise from the false imprisonment established in the statement of claim and that no further or better particulars were requested for by the 1st defendant in this regard if they were not sure of the plaintiff's claim. He restated that the fact that the transformer was in the possession, custody and use of the 1st defendant shows that the whole detention episode is tainted with mala fide was without reasonable and justifiable cause and purely an act of gross negligence on the defendant's officers. He urged that the plaintiff's claims be confirmed with interest and costs.

I have considered the evidence and the submissions by counsel for the plaintiff. On the evidence, it seems to me that on 25th February 2009, the plaintiff was arrested for the offence of theft by servant contrary to section 278 of the Penal Code, Cap. 87 by the police at Wusakile police station and was detained in police custody for two days until 27th February 2009 around 15.00 hours when he was released on police bond, a copy of which is at page 23 of the plaintiff's Bundle of Documents.

It is common ground that the plaintiff was alleged to have stolen a transformer, 25KVA111/04 KV Three Phase, serial No. DC 0105/0297 the property of the 1st defendant, his employer. It is a fact that at the material time the plaintiff was employed by the 1st defendant as principal electrical technician. It is not disputed that after his release on police bond, the plaintiff was supposed to appear before the Subordinate Court at Kitwe on 6th March 2009, but he did not appear and was never prosecuted for the offence for which he was arrested and detained in police custody. It is clear that instead his police bond was extended to 10th March, then to 17th March, 19th March, 20th March, 24th March and finally to 6th April 2009. But there was no formal indictment.

I accept that the transformer in question was issued by Lusaka Central Stores to Kitwe Central Store on 18th October 2008. This fact is supported by the stock transaction form at page 12 of the plaintiff's Bundle of Documents. I accept that the transformer was issued by Lackson Mwanza together with two other items and was received by Maxwell Kabeya. I accept that Malungo Cheelo (PW2) who at the material time was assistant stores officer at Lusaka, authorised the transformer transfer from Lusaka to Kitwe on 20th October 2008 and that Maxwell Kabeya, stores assistant at Kitwe collected the transformer. The Article Movements Selection document at page 43 of the plaintiff's Bundle confirms inter-store transfer issue on 20th October. The document also shows inter-store transfer receipt and issue on 14th November 2008. But, I shall return to the disparity in the dates later in my judgment.

The fact that the transformer was received by Kitwe Central Store is confirmed by the store transaction form at page 13 of the plaintiff's Bundle. I do not hesitate to accept PW2's evidence that the document at page 13 is a Goods Received Note as there is no evidence to the contrary. Further, it is not disputed that once the transformer was in Kitwe, it was issued on 18th November 2008 to Luanshya Store by one Felix Mulenga, a stores officer or that the transformer was collected by one Abadon Mwenda the Regional Manager for Luanshya. The movement of the transformer from Kitwe to Luanshya is confirmed by the stores transaction form at page 44 of the plaintiff's Bundle.

I accept that the transformer was received by Luanshya Store on the same date under the GRN at page 18 of the same Bundle issued by Isaac Kachepele, a stores clerk. Furthermore, it is not disputed that at Luanshya, on 18th November 2008, the transformer was requested for and was issued to Golden Mulenga (PW3), a senior construction technician for Luanshya Region by Pascal Bwembya, a senior stores assistant under the stores transaction form at page 17 of the same Bundle. It is common cause that the transformer was installed by Golden Mulenga at a customer, Mr. Luka Elijah Chimfupa's farm in Kafulafuta, Masaiti District. Further still, it is not disputed that the transformer in question was the one captured by the plaintiff in the photographs at pages 32 to 36 of his Bundle of Documents. It is a clear fact that the plaintiff did not steal the transformer which on the evidence was never stolen at all.

On the pleadings and the evidence I am certain that this is an action for false imprisonment. Although the claim is not clearly stated on the writ of summons, para 6 of the statement of claim indicates that the defendant caused the plaintiff to be wrongfully imprisoned and deprived of his liberty for a period of about 72 hours. Para 9 further states that the 1st defendant acted out of spite and malice towards the plaintiff and caused him to be arrested in broad day light at the 1st defendant's work place and subjected him to humiliation and disgrace and brought him into ridicule and contempt in the eyes of his juniors at work and other workmates as they now regard him as a thief.

The learned authors of Clerk and Lindsell on Torts, Twentieth Edition state at para 15-23 that false imprisonment is "the unlawful imposition of constraint on another's freedom of movement from a particular place"; that the tort is established on proof of (1) the fact of imprisonment; and (2) the absence of lawful authority to justify that imprisonment; and that for these purposes, imprisonment is complete deprivation of liberty for any time, however short, without lawful cause. In *Mubita Mbanga v The Attorney-General* (1) cited by Mr. Nyirongo, the police had suspected the plaintiff of having stolen a University of Zambia vehicle, and took him to the police and detained him for three and a half hours. The plaintiff's action for false imprisonment caused to him by policemen at Chawama police station succeeded, but the action for malicious prosecution failed.

Muwo, J., pointed out at page 236, lines 22 to 31 that restraint is one of the essentials of the action founded on false imprisonment; and that the plaintiff need not know that he is being detained because the other essential is that he is not free to go where he likes. He also observed, and I agree entirely, that the fact that the plaintiff accepted to go to the police station does not make the imprisonment lawful as he was at the time under the influence of the police so he was no longer a free man. He also said that a lawful arrest is no false imprisonment, but in *Hogg and Ward* (6) a police officer was held liable for the arrest of the plaintiff on a mistaken charge of theft.

In *Richman Chulu v Monarch (Z) Limited* (2) also cited by Mr. Nyirongo, the plaintiff was arrested and detained on suspicion of theft, for two days, upon a complaint by his employers. Due to insufficient evidence he was discharged and released. He brought an action for false imprisonment since there was no reasonable cause for his arrest. The defendants contended that there was a reasonable and probable cause since a felony had been committed and the plaintiff was a suspect. It was held as follows:

- (i) 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
- (ii) A person will not be liable in trespass for merely setting into motion the machinery of law, he must be the direct and immediate cause of the false imprisonment
- (iii) Reporting a crime and even signing a charge sheet which may lead to an arrest is insufficient to make the giver of the information liable for the imprisonment even if there is insufficient evidence to prosecute, unless the report was made mala fide.

In *Sewell v National Telephone Co. Limited* (4) referred to by Commissioner Mumba in *Richard Chulu v Monarch (Z) Limited* (2), the plaintiff had brought an action for damages for false imprisonment. In his statement of claim, he alleged that the defendants gave him into the custody of a police officer upon a false charge of felony and caused him to be imprisoned for one night at a police station. The defendants, in their defence, denied that they caused the plaintiff to be imprisoned. The only witness called at the trial was the plaintiff, who proved that he was in the employment of the defendants when he was arrested by two police constables and taken to the police

station and charged with stealing a piece of metal; that he did not see the defendants' manager, there, and that he did not see who signed the charge sheet; that he was detained in custody and brought before the magistrate on the next day; and that he was committed for trial at the quarter sessions and was acquitted. The plaintiff appealed. It was held that the fact that, while the plaintiff was in the custody of the police, the defendant signed at the police station the charge sheet containing the charge against him is not evidence sufficient to support an action of false imprisonment by the plaintiff against the defendant, for the defendant did not commit a trespass against the plaintiff, but merely set in motion the machinery of the law.

Sir Richard Henn Collins, M.R. observed as follows at page 459 lines A to C:

"In the present case the defendants seem to have had nothing to do with the initial charge against the plaintiff. There is no evidence as to what person, if any, made a charge against the plaintiff, and why the constables arrested him. It was not until the plaintiff was in custody at the police-station that the defendants' manager appeared and signed the charge-sheet. The only evidence as to what the defendants did is contained in the answers to the third and fifth interrogatories, which simply amounted to an admission that they took a step which was essential to the carrying on of the prosecution. There is no evidence as to the circumstances under which the defendants' manager signed the charge-sheet. As I have pointed out, that is not of itself an act of trespass; it is merely a step in the prosecution of the charge, and does not go beyond asking for a judicial decision. More must be proved to establish a false imprisonment. If the facts proved are equally consistent with the inference that the defendant was merely invoking the assistance of the proper tribunal as with the inference that he was taking the matter into his own hands, there can be no prima facie presumption either way."

Further Cozens-Hardy, L.J. referred to the passage in the judgment of Pollock, C.B, which has been quoted by Mr. Nyirongo in his submissions as follows:

"We ought to take care that people are not put in peril for making complaint when crime has been committed. If a charge be made mala fide, there are ample means of redress. But in the absence of mala fides we ought not to be too critical in our examination of the facts to see if something is not done without which the charge against the suspected person could not have been proceeded with. A person ought not to be responsible in trespass unless he directly and immediately causes the imprisonment."

Further in *Gaynor v Cowley* (5), also relied on by Mr. Nyirongo, the plaintiff was given the use of a Datsun vanette both for the work of the partnership and his private use.

Following a dispute between the partners over the return of the vanette, the defendant made a false report to the police that his vanette had been stolen, and later added to it that the plaintiff was seen heading towards Kasama. The plaintiff was arrested by police. Following representations by the plaintiff's lawyer that the dispute between the parties was of a civil nature the plaintiff was released from custody. In an action by the plaintiff for false imprisonment and malicious prosecution, Baron, J held, inter alia, 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.”

Finally in *Davidson v Chief Constable of North Wales and another* (7) H a friend of the plaintiff, purchased a cassette at a store and, having made the purchase, returned to the cassette counter where the plaintiff was waiting. They stood there talking before leaving the store. A store detective who had observed them standing at the cassette counter gained the impression that they had left without paying for the cassette and telephoned the police. When two police officers arrived the store detective told them that the plaintiff had taken the cassette without paying and pointed them out. The officers arrested the plaintiff and H on suspicion of shoplifting. H denied that he had taken anything dishonestly and produced the cassette but was unable to produce the receipt as he had thrown it away. The plaintiff remained silent. The plaintiff and H were taken to the police station but were released after two hours when the police received a message from the shop assistant who had served H confirming that he had paid for the cassette. The plaintiff brought an action against, inter alia, the store detective's employers for false imprisonment. At the trial of the action the police officers gave evidence that they had exercised their own judgment in arresting the plaintiff and H acting on the information received from the store detective. The judge withdrew the case from the jury on the grounds that the police officers were protected by s 24(6) of the Police and Criminal Evidence Act 1984 because they had had reasonable grounds to make the arrest and since they had acted independently of the store detective there was no case to answer. The plaintiff appealed.

It was held as follows:

“Since the police officers had been justified in arresting the plaintiff and H because they had had a reasonable suspicion, derived from the information supplied by the store detective, that the plaintiff and H had been shoplifting, the issue in relation to the liability of the store detective’s employers for her actions depended on whether the store detective had merely given information to a properly constituted authority on which that authority could act or not as it saw fit or whether she herself was the instigator, promoter and active inciter of the arrest and imprisonment. On the facts, there was no evidence that the store detective’s actions went beyond the giving of information to the police officers for them to take action as they thought fit or that it amounted to some direction, or procuring, or direct request, or direct encouragement that they should act by arresting the plaintiff and H. In those the judge had been right to withdraw the case from the jury.”

In the present case the fact of imprisonment has been overwhelmingly established. It is not disputed that the plaintiff was taken in custody to Ndola where a Mr. Kansengu identified him as the person who collected the transformer from Ndola. Thereafter, the plaintiff was arrested for the alleged offence of theft by servant by the police at Wusakile police station and was detained in police custody for two days from on 25th February 2009 to 27th February 2009 when he was released on police bond. It is clear that after his release on police bond, the plaintiff never appeared in court and was never prosecuted for the offence for which he was detained in custody.

In my view the question that arises for decision is whether there was reasonable cause to detain the plaintiff in police custody on a charge of theft by servant. The learned authors of Clerk and Lindsell on Torts (supra), state at para 15-69 that where what is in issue is whether the arrestor had reasonable grounds for suspicion, it is for the judge to rule on whether there were such reasonable grounds; that in an action for false imprisonment the burden lies on the defendant to justify the arrest; that he must prove affirmatively that he acted on reasonable grounds; and that the test is simply whether in all the circumstances the objective information available to the constable supports reasonable grounds for suspicion of guilt.

In this case, the 1st defendant reported a missing transformer to the police which they say had been removed from its stores office without following the laid down procedure. The 2nd defendant confirmed in the defence that the police officers from Wusakile police station were acting on a report of theft of a transformer made by the 1st defendant.

However, the defendants have adduced no evidence to support the allegations made in their respective defences or to justify the imprisonment. There is no evidence to show that after the Zambia police made their investigations, it was established that the plaintiff had a hand in how the transformer was removed from stores or that he was due to appear in court when he revealed that the transformer had been installed to a customer in Kafulafuta which led to the prosecution being dropped or that police investigations revealed that on 29th October 2008, five faulty transformers were taken to Ndola workshop for refabrication or that closer scrutiny revealed that six and not five transformers, had been received at the workshop including the transformer in question or that later the transformer was picked up by the plaintiff.

I accept that on 25th February 2009, when the plaintiff was summoned to the ZESCO security office and was asked about the missing transformer by ZESCO security and Zambia police officers, he told Mr. Maoma that he had learnt of the missing transformer a week earlier when Mr. Kabeya reported that in October he had collected a transformer from Lusaka and had offloaded it at the ZESCO loading bay where the plaintiff had also put some transformers he had collected within Kitwe and that Mr. Kabeya told everyone at Kitwe Central Store that the plaintiff may have taken the transformer to Ndola. However, there is no other evidence to show what raised suspicion that the plaintiff was involved in the removal of the transformer from the 1st defendant's stores without following the laid down procedure as pleaded in para 2 of the defence.

From the cross-examination of PW2, it seems that Felix Mulenga reported to management that the transformer was missing. But from the stores transaction form at page 42 of the plaintiff's Bundle of Documents, Felix Mulenga was the one who issued the transformer to Abadon Mwenda of Luanshya Store and this is confirmed by the Goods Received Note at page 18 of the plaintiff's Bundle of Documents. Therefore, Felix Mulenga knew where the transformer had gone and he ought to have advised management accordingly. If it were true as suggested by Mr. Chiwale to PW2 in cross-examination that Felix Mulenga reported the transformer missing to management, then the report was made mala fide.

In any case, Mr. Nyirongo in his very pertinent and cogent argument for which I am much obliged, rightly said that had the 1st defendant's management properly checked their records, they would have easily traced the movement of the transformer from Lusaka through to Mr. Chimfupa's farm in Masaiti. I believe PWs 2 and 3 that the plaintiff was not involved at any stage in the movement of the transformer from Lusaka and from Luanshya Central Stores or the installation of the transformer at the farm. Furthermore, PW2 has said that all the documents produced by the plaintiff and referred to are genuine, authentic and approved ZESCO documents. The said documents were printed by the plaintiff from the 1st defendant's system after they were brought to his attention by Maxwell Kabeya. There is no evidence that the plaintiff has altered, forged or tampered with any of the documents.

Mr. Chiwale had questioned PW2 about the disparity in the dates on the Article Movement Selection Form at page 43 and the GRN at page 13 of the plaintiff's Bundle of Documents. I said that I would return to this point later and I now do. PW2's explanation which I accept is that he authorised the transformer transfer to Kitwe on 20th October 2008 on a manual record because their computer system was offline at the time. I accept that there was authority to pick the transformer through an e-mail; and that later on 14th November 2008, they updated the system because the transformer had already gone, hence the latter date appearing on document 43 on inter-store transfer receipt and issue and on document 13 as date of receipt of the transformer at Kitwe Central Store. There is no evidence that the plaintiff had a hand in the preparation of any of these documents or the updating of the system on 14th November 2008.

Moreover, the plaintiff's evidence that he was given the documents by Kitwe Store and Mr. Kabeya in particular, and that that was how he knew that the transformer was installed in Kafulafuta by the 1st defendant is unchallenged. The plaintiff has also shown that he was on leave from 3rd November to 12th December 2008 when the transformer was issued to Luanshya Store and installed at Mr. Chimfupa's farm. I have no doubt that the report by the 1st defendant to the police that the plaintiff had stolen the transformer was a false report and was made mala fide.

Further, it is not disputed that the plaintiff was taken to Ndola by ZESCO security and Zambia police officers using a ZESCO motor vehicle where he was put on an identification parade and was identified by Mr. Kansengu the workshop supervisor as the person who had gone to Ndola and collected the transformer. However, there is no evidence of when the plaintiff collected the transformer from Ndola or that the transformer in question was ever taken to the Ndola workshop. I am left in a deep void of how Mr. Kansengu identified the plaintiff as there is no evidence connecting the plaintiff to the transformer movement from Lusaka to Luanshya. On the whole I do not hesitate to find that the identification of the plaintiff at Ndola was also made mala fide.

On the evidence I find that there was no reasonable cause for the 1st defendant to suspect the plaintiff to have stolen the transformer which the 1st defendant had installed at a client's farm and which was removed from stores following the laid down procedure highlighted by PW2. I am satisfied that the 1st defendant played a big hand in the identification, arrest and detention of the plaintiff on a false charge of theft by servant and directly and immediately caused his imprisonment. My finding on this point is supported by the use by the police of the 1st defendant's motor vehicle and security date stamp to extend the plaintiff's police bond as shown on the flip side of the copy at page 23 of the plaintiff's Bundle of Documents. PW4 is right that the police officers should have used a police date stamp. However, I cannot assume, as did PW4, that the police officer or dealing officer who put the ZESCO security date stamp wrongly put the stamp. Clearly both defendants have not justified the false imprisonment. Therefore, I cannot say that the 1st defendant merely set into motion the machinery of the law or that they only desired to obtain a judicial decision, and for that purpose merely made a report to the police who then intervened and acted upon the report.

In addition, although the 1st defendant pleaded in para 4 of its defence that the prosecution was dropped, in an attempt to clear his name, the plaintiff wrote to the 1st defendant's Human Resources Manager, to the Director Human Resources, and to the Managing Director, but he received no response until three months later on 15th July 2009 when Mrs. Shapi wrote to him.

In her letter she advised the plaintiff that the charges were made by Zambia police and not management and that management was not in a position to clear him from them. I believe that had the charge been dropped, Mrs. Shapi would have advised the plaintiff.

With regard to the 2nd defendant, I have no doubt that it is the duty of the police to investigate all suspected crimes, to temporarily restrain a person provided that there are reasonable grounds that a crime has been committed or that an arrest for the purpose of using the period of detention to confirm or dispel reasonable suspicion by questioning the suspect or seeking further evidence with his assistance is an act within the broad discretion of the police. As the learned authors of Clerk and Lindsell on Torts (supra), state at para 15–72, police officers have discretion as to whether or not to exercise a power to detain or arrest which discretion must be exercised in good faith and can only be challenged as unlawful if it can be shown to have been exercised “unreasonably” under the principles laid down by Lord Greene M.R. in *Associated Picture House Limited v Wednesbury* (8). However, an officer who carries out an arrest knowing that there is no possibility of a charge being made does it unlawfully and courts should be reluctant to find justification for detention in cases where none exist upon the evidence.

In my judgment the plaintiff was detained by the police at Wusakile police station for two days on a false charge of theft by servant. There is no evidence that the police officers had exercised their own judgment in arresting the plaintiff. The 2nd defendant’s defence in para 6 that there was reasonable and probable cause to arrest and detain the plaintiff as there was reasonable justification to believe that a crime had been committed cannot succeed without evidence to substantiate the defence. This cannot be a lawful arrest.

On the question of the prosecution being dropped, it is plain that the plaintiff wrote to the District Commanding Officer on 23rd July 2009 seeking to be cleared from the charges and he met PW4 a few days later. I accept that PW4 told him that the matter was investigated by Zambia Police together with ZESCO and that he may not know why the matter did not go to court because the docket was not in police custody, but in the custody of ZESCO and that he would ask ZESCO to establish its position on the matter.

Surprisingly, PW4 does not remember receiving a letter from the plaintiff. He does not know whether the docket was closed and he did not see the docket because he had to attend to other pressing matters. In my view he cannot even conclusively say that there was a docket. In the circumstances it is difficult to accept that the charge or prosecution was dropped and the 2nd defendant has not alleged that the charge was dropped.

I agree entirely with the plaintiff that his name should have been cleared by the defendants after it was discovered that the transformer was not stolen by the plaintiff, but was installed by the 1st defendant at a client's farm. As it seems to me the 1st defendant has offered no apology. On the basis of all the following it follows that the plaintiff's action against both defendants for false imprisonment should succeed. I am convinced that the Attorney General is vicariously liable for the actions of the police officers at Wusakile police station. The plaintiff has proved on a reasonable preponderance of probabilities that the actions of both of the defendants have caused him damage for which he should be compensated. I enter judgment in his favour.

I turn now to the issue of damages. The learned authors of Clerk and Lindsell on Torts (supra), state at para 15-137 that any trespass to the person, however slight, gives a right of action to recover at least nominal damages; that where there has been no physical injury, substantial damages may be awarded for indignity, discomfort or inconvenience; and that where liberty has been interfered with damages are given to vindicate the claimant's right even though no pecuniary damage has been suffered. They state also that apart from any special damages alleged and proved, the damages are at large; and that the time, place and manner of the trespass and the conduct of the defendant may be taken into account and the court may award aggravated damages on these grounds. At para 15-138, the learned authors state that in assessing damages for false imprisonment, the judge may consider as aggravating the damages any evidence that the defendant was persisting in the charge originally made in bringing about the false imprisonment and, in reduction of damages, any evidence showing that the defendant had withdrawn or apologised for the charge.

In the 1982 case of *Attorney-General v Felix Chris Kaleya* (9), the Supreme Court of Zambia held that in assessing damages for wrongful detention the factors to be considered include duration, sanctity of personal liberty, presence or absence of the suffering of anxiety or indignity, manner and circumstances of detention and the reasonableness of the explanation for the detention. In arriving at this holding the Supreme Court stated that there is no scale or table of damages per hour, per day, or for any period whatsoever and that while the duration of the wrongful detention is certainly a factor to be taken into consideration, all the circumstances of each individual case have to be taken into account bearing in mind the factors set out above. A sum of K100 was awarded for false imprisonment.

In *Mubita Mbanga v The Attorney-General* (1), referred to me by Mr. Nyirongo, Muwo, J., in awarding the sum of K500 for false imprisonment took into account the circumstances of the detention, the affront to the plaintiff's personal dignity and the damage to his reputation. It seems to me that there is no recent authority on the measure of damages and each case therefore falls to be decided on its own merits.

In the present case the plaintiff was detained for an offence which he never committed and when he had nothing to do with the transformer. He was never taken to court or prosecuted and both defendants have failed to justify the detention. In an attempt to clear his name he wrote three times to the 1st defendant and once to the Officer Commanding at Kitwe, but to no avail. I accept that that his colleagues and even members of his own family still wonder if he is innocent. I am convinced that the whole issue has been very embarrassing to the plaintiff, that he suffered affront to his dignity and great anxiety and embarrassment in the two days that he was in detention.

On the whole matter, taking into account the rate of inflation and all of the circumstances, I award the plaintiff a sum of K15,000,000.00 as damages for false imprisonment. I further award interest at 12 per cent per annum from date of judgment to date of full settlement.

I turn now to the claim for special damages pleaded under para 8 of the statement of claim. The plaintiff has stated that as a result of the wrongful detention he lost 3 cell phones, one gold wrist watch, one leather belt, duplicate car keys, Pierre Cardin leather shoes, leather coat and jersey and one leather wallet. However, it is not clear to me from the evidence at what point during investigations the plaintiff lost these items if they were on him though it is not disputed that he was taken to Ndola and then to the police station. He testified that at the time of his detention at Wusakile police station, he surrendered 1 wrist watch, shoes, belt, stockings and bunch of keys. He did not mention the leather coat, jersey, cell phones and, leather wallet. There was no evidence that he was beaten or searched. He does not suggest that he was not given back the items he had earlier surrendered to the police when he was released on police bond. On the evidence Mr. Chilombo delivered cash for him home. In my view it is possible that the cash may have gone home with the wallet, the cell phones and the coat and jersey. It is trite that special damages must be strictly proved. In this case I am not satisfied that the plaintiff lost the listed items during investigations. This claim fails and is dismissed.

Finally the plaintiff has claimed for a written apology from his employer. Although it is clear that the 1st defendant has not apologised for the ordeal it put the plaintiff through, in awarding damages as I have done, this fact has been taken into consideration. I think that the judgment in his favour sufficiently clears his name of the allegation made by his employer. Consequently there can be no separate order for a written apology. This claim also fails and is dismissed. Costs are for the plaintiff to be taxed if not agreed.

Delivered in Open Court at Kitwe this 28th day of October 2011

R.M.C. Kaoma
JUDGE