IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 214/2012**

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

MAPULANGA OSKIM CHIBALE *(Suing as Administrator of the Estate of Chibale Augustine Chomba)* **APPELLANT**

AND

PRAFUN OBHATI SONI **1ST RESPONDENT**

(Alias Soni Profun Orchandra)

ZAM-IMPORTS LIMITED **2ND RESPONDENT**

BRENDA NGANDWE **3RD RESPONDENT**

DARIUS MUSONDA **4TH RESPONDENT**

THE ATTORNEY GENERAL **5TH RESPONDENT**

Coram: Phiri, Wood and Kajimanga JJS.

On 7th June, 2016 and 9th June, 2016.

For the Appellant	:	*Mr. K. Muzenga – Deputy Director Legal Aid Board*
For the 1st 2nd 3rd	:	
and 4th Respondents	:	*Mr. Z. Muya – Muya & Company*
For the 5th Respondent	:	*N/A*

JUDGMENT

Wood, JS, delivered the judgment of the Court.

CASES REFERRED TO:

1. *Claude Samuel Gaynor v Cyril Robert Cowley (1971) Z.R. 50.*
2. *Mbandangoma v Attorney General (1979) Z.R. 45.*
3. *Martin Nyandoro v Attorney-General (1979) Z.R. 278.*
4. *Mubita Mbanga V The Attorney General (1979) Z.R. 234*
5. *Richman Chulu v Monarch (Z) Ltd (1983) Z.R. 33.*
6. *Chimba v The Attorney General (1972) Z.R 165*
7. *Hicks V Faulkner (1878) QBD 161*
8. *Hermiman V Smith (1938) 1 ALL ER*

LEGISLATION REFERRED TO:

1. *Article 13 (1) (e) and Article 13 (2) of the Constitution of Zambia, Chapter 1 of the Laws of Zambia.*
2. *Rule 58 of the Supreme Court Rules, Cap 25 of the Laws of Zambia.*

OTHER WORKS REFERRED TO:

Paragraph 16-06 of Clerk and Lindsell on Torts, 19th Edition.

This an appeal against a decision of the High Court which dismissed the appellant's claim for, *inter alia,* damages for false imprisonment, malicious prosecution, defamation of character and loss of business and profit.

The facts of this case are that on or about 5th September, 2006 the appellant was apprehended by Police Officers who were armed with AK 47 rifles at a public place along the Ndola-Kabwe road in broad day light. The appellant was apprehended on suspicion of having committed the offence of aggravated robbery contrary to *Section 294 of the Penal Code, Chapter 87 of the Laws of Zambia.*

The particulars of the allegation were that the appellant had robbed the 1st, 2nd and 3rd respondents of the sum of K25, 000.00 belonging to the 2nd respondent, along the Ndola-Kitwe dual carriage way.

The appellant claimed that during his apprehension, Police Officers assaulted him using their guns and this assault continued whilst in custody, where he was subjected to torture by electric shock, an act that went on for four days. On 14th September, 2006, the Police conducted an identification parade after deliberately exposing the appellant to the 2nd and 3rd respondents who, it was alleged, were present during the robbery and called as witnesses at his trial. These two witnesses identified him as their assailant. The appellant was subsequently tried before the High Court, which acquitted him on grounds that the circumstances under which the robbery was committed made the identification of the appellant unreliable. The learned trial Judge also questioned the fairness of the identification parade that was conducted.

Following his acquittal, the appellant commenced a civil action claiming damages for false imprisonment, malicious prosecution, defamation of character, loss of business and profit, exemplary, punitive and special damages, interest and costs. The appellant

claimed that the respondents had no justification for suspecting that he had robbed the 1st, 2nd, 3rd and 4th respondents to warrant his apprehension, torture and subsequent imprisonment for close to four years. He alleged that the behavior of the respondents was propelled by malice or reckless disregard for the appellant's liberty and other rights. It was further alleged that due to the respondents' malicious accusations, the appellant's reputation was destroyed as he was now labelled a dangerous criminal, his health was injured and his business had collapsed as the person who was left to run it died during his stay in prison.

The learned trial Judge dismissed all of the appellant's claims. He held that for the appellant to succeed in his claim for false imprisonment, he ought to have proven that he was deprived of his liberty unlawfully and without justifiable cause. The learned trial Judge found that the evidence showed that the police had conducted investigations which led them to apprehend the appellant on suspicion of aggravated robbery although the record did not reveal who their informant was. This suspicion was clear because of the questions the police put to the appellant concerning a firearm when he was taken to the police station. The learned trial

Judge found that the police had reasonable suspicion which led them to apprehend the appellant and he was, therefore, not deprived of his liberty without just cause. On the claim for malicious prosecution, the learned trial Judge found that the appellant had failed to prove that the 1st, 2nd, 3rd and 4th respondents had given false and malicious information to the police which led to his prosecution. This was more so because the record did not reveal who gave information about the appellant's alleged involvement to the police. There was also no evidence that the claim by the 2nd respondent that it was robbed of the sum of K25, 000. 00 was false or malicious. On the allegations of torture, the learned trial Judge found that despite the letter from Human Rights Commission showing that the appellant's wife had lodged a complaint that the appellant was tortured whilst in police custody, there was no confirmation of this claim by way of a medical report from the Doctor that treated the appellant. On the claim for defamation of character, the learned trial Judge found that since the claim for false imprisonment and malicious prosecution had failed, the question of damage to the appellant's character could not arise. The appellant's acquittal did not necessarily entitle him to

damages for injury on his personal character. The learned trial Judge also refused to consider the appellant's claim for special damages as these were not specifically pleaded. He dismissed all of the appellant's claims on grounds that there was no malice in the manner of his detention and subsequent prosecution. The appellant was not satisfied with the judgment and filed in 10 grounds of appeal.

Ground one of the appeal was that the learned trial Judge erred in law and fact when he refused to accept the appellant's evidence which showed that the 1st, 2nd, 3rd and 4th respondents connived and colluded to have the appellant maliciously prosecuted. Ground two of the appeal was that the learned trial Judge erred in law and fact when he refused to accept evidence showing that the appellant was falsely imprisoned despite proof that he was apprehended on 5th September, 2006 and only taken to court on 20th September, 2006, after intervention from the Human Rights Commission. Ground three of the appeal was that the learned trial Judge erred in law and fact when he disregarded the report from the Human Rights Commission showing that the appellant was tortured, abused and falsely imprisoned. Ground four

of the appeal was that the learned trial Judge erred in law and fact when he refused to grant the appellant the remedies prayed for. In ground five, it was contended that the learned trial Judge erred when he disregarded the appellant's evidence detailing the pain, stress, torture and abuse suffered from the time of apprehension. Ground six of the appeal was that the learned trial Judge erred when he ignored the fact that the 5th respondent did not appear before court, in arriving at his decision as it may have adduced evidence favorable to the appellant. Ground seven of the appeal was that the learned trial Judge erred in law and fact when he disregarded the evidence of the appellant. Ground eight of the appeal was that the learned trial Judge erred in law and fact when he overlooked the fact that the appellant had shown consistency in his evidence during the civil and criminal trial as opposed to the inconsistencies shown by the 1st, 2nd, 3rd and 4th respondents. Ground nine of the appeal was that the learned trial Judge erred in law and fact by refusing to consider the appellant's submissions at the close of the trial. In ground ten, it was contended that the learned trial Judge erred in law and fact when he disregarded the

appellant's explanation on why he did not produce the medical report form issued to him at Railway Clinic.

Counsel for the appellant argued the ten grounds of appeal at once. In the submissions in support of this appeal, counsel submitted that the appellant had proved the four essential elements of malicious prosecution in that he had shown that he was prosecuted by the respondents, that the prosecution terminated in his favour, that the prosecution was without reasonable cause and lastly that the prosecution was malicious. In support of the argument that the appellant had proved his case at trial, counsel cited the case of *Claude Samuel Gaynor v Cyril Robert Cowley*[1] in which it was held that:

> *"(i) 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.*
>
> *(ii) In an action for malicious prosecution the onus is on the plaintiff to prove his cause of action."*

Counsel held the view that the learned trial Judge held a wrong and incompetent view of the facts and events which led to the appellant being apprehended and subsequently arrested as the police had no justification for arresting the appellant. Counsel relied

on the case of *Mbandangoma v The Attorney General*[2] in which it was held that:

> *"In order to justify the arrest of the plaintiff, the defendant must show that at the time of the arrest, the arresting officer had reasonable suspicion that the plaintiff had committed an offence."*

In this case, the police did not have reasonable suspicion on which to base their decision to arrest the appellant because they had failed to explain what led them to suspect that the appellant had committed the offence of aggravated robbery. It was argued that it was not proper for the police to pick anyone whenever a criminal offence was reported to them without fully investigating the matter, which is what they did in this case. Further, none of the persons that reported the crime gave the name or description fitting that of the appellant.

Counsel for the appellant contended that the claim for malicious prosecution had been proved in the court below because the 5th respondent had failed to successfully prosecute him, and that their actions resulted in damage to his reputation. He was, therefore, entitled to damages. In support of the claim for damages, counsel cited the case of *Martin Nyandoro v Attorney-General*[3]

which outlines the factors to take into account when determining the quantum for damages in a case of false imprisonment.

Counsel for the appellant also attacked the quality of the identification parade at which the appellant was identified as the assailant. His argument was that the appellant was shown to the identifying witnesses prior to the identification parade. He contended that the actions of the police and the two identifying witnesses were malicious and intended to implicate the appellant.

Counsel for the appellant also complained that the learned trial Judge erred when he disregarded the appellant's evidence which showed that he had been assaulted during apprehension as well as in detention and that the police refused to have him see a medical Doctor who could issue him with a medical report. He also complained that the appellant was apprehended in full view of members of the public, an act which has caused damage to his reputation.

Counsel for the 1st, 2nd, 3rd and 4th Respondents submitted that the learned trial Judge did not proceed on a wrong principle of the law when he found that there was no malicious prosecution and

false imprisonment of the appellant and relied on the case of *Claude Samuel Gaynor v Cyril Robert Cowley*[1] in support of this argument. Counsel also relied on the case of *Mubita Mbanga v The Attorney General*[4] to support the argument that there was no malice on the part of the 1st, 2nd, 3rd and 4th respondents when they reported the aggravated robbery to the police. With regard to false imprisonment, Counsel submitted that the case of *Richman Chulu V Monarch (Zambia) Limited*[5] supported the argument that reporting a crime which may lead to an arrest is insufficient to make the giver of the information liable for the imprisonment. Counsel concluded his argument by submitting that the appellant was imprisoned in an authorized place and as such on the authority of *Chimba v The Attorney General*[6] could not argue that he had been falsely imprisoned.

Mr. Muya informed the court that Ms Mulenga was appearing before another court but had indicated that the appeal could proceed in her absence as she was in any event relying on the 5th respondent's heads of argument.

The 5th respondent submitted that the learned trial Judge did not err in law and fact when he held that the police had reasonable

suspicion to apprehend the appellant in the manner which they did and could not be said to have erred. There was therefore reasonable or probable cause for the appellant's arrest as defined in the case of *Hicks V Faulkner*[7] and adopted in the case of *Herminan v Smith*[8] as *"an honest belief in the guilt of the accused based upon full conviction founded upon reasonable grounds of the existence of a state of circumstances which assuming them to be true would reasonably lead any ordinary prudent and not cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed."*

The plaintiff in his own evidence under cross-examination did not dispute that the 1st, 2nd, 3rd and 4th respondents were robbed. The appellant further admitted that he did not know the 3rd and 4th respondents prior to the robbery. It follows therefore that the respondents had no malice and the report made to Ndola Central Police was not *mala fide*. There was therefore reasonable and probable cause for the arrest of the appellant and as such it was not unlawful.

When the appeal was heard all the parties relied on their Heads of arguments.

We have considered the judgment appealed against, the record and the submissions in support of this appeal.

Before we delve into the merits of this appeal, we wish to comment on the manner in which the memorandum of appeal was prepared. While we have not set out verbatim the memorandum of appeal on account of its lengthy nature, we would like to caution counsel on the repetitive nature of the arguments and the lack of observance of *Rule 58 of the Supreme Court Rules, Chapter 25 of the Laws of Zambia,* which states in mandatory terms that the 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..."*

We must stress, as we have done before, that litigants should scrutinise their grounds of appeal prior to filing of the memorandum of appeal to avoid repetitiveness which invariably leads to arguing grounds of appeal "together" as has been done in this appeal. We express the hope that the advocates will adhere to these rules in future

Concerning the merits of the appeal, *Paragraph 16-06 of Clerk and Lindsell on Torts, 19th Edition*, states that in an action for malicious prosecution, the claimant must show firstly that he was prosecuted by the defendant, that is to say, that the law was set in motion against him 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.

Our view is that the appellant failed to show that the prosecution was without reasonable and probable cause and that it was malicious. To begin with, the appellant failed to show that the report made by the 1st, 2nd, 3rd and 4th respondents which set the prosecution of the appellant in motion was false and that the 2nd respondent had not been robbed. In the case of *Richman Chulu v Monarch (Z) Ltd*[5], it was held *inter alia* that:

> *"(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 this case, the appellant failed to show that the 1st, 2nd, 3rd and 4th respondents lied when they reported that the 2nd

respondent had been robbed. There was no evidence to suggest that the report they made was in bad faith.

The appellant also failed to show that there was no reasonable and probable cause for his apprehension and subsequent arrest. What amounts to reasonable and probable cause was discussed in the case of *Claude Samuel Gaynor v Cyril Robert Cowley*[1], whose facts were that the plaintiff and defendant were business partners. The plaintiff was given the use of a Datsun Vanette both for the work of the partnership as well as 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 the plaintiff had stolen the vehicle and was headed to Kasama. The plaintiff was arrested by the police, but later released from custody following representations by the plaintiff's lawyer that the dispute between the parties was of a civil nature. The plaintiff sued for false imprisonment and malicious prosecution. In delivering his judgment, Baron, J, observed as follows:

"Save as to the question whether there was prosecution, these essentials are clearly satisfied in the present case; the defendant did not have reasonable and probable cause in that he did not have a genuine belief based on reasonable grounds that a criminal offence had been committed,

and he was actuated by malice in that he had an improper motive, namely a desire to obtain through the machinery of the police some redress which should have been sought by civil process."

This was not the case with the respondents as the appellant had failed to prove that the respondents had an improper motive in prosecuting him. Further, the police had reasonable and probable cause to suspect that the appellant was involved in the robbery of the 2nd respondent because the record of appeal shows that during the period he was detained in custody, he confessed to the robbery. The Judge that determined his criminal matter even wondered why the prosecution simply abandoned the confession statement on objection from the defence, as opposed to proceeding to a trial within a trial. The fact that the appellant was acquitted based on the faulty identification parade did not in itself, connote malice against the appellant. As the learned trial Judge correctly observed, an acquittal on its own does not prove malicious prosecution. There is nothing on the record of appeal to suggest that the respondents were prompted by anything other than a desire to secure the ends of justice with regard to how the matter was prosecuted.

We also agree with the finding of the learned trial Judge that the appellant had failed to prove his claim of false imprisonment. In

a claim of false imprisonment, the claimant must prove the fact of the imprisonment and that there was no lawful authority to justify the imprisonment. Prior to the amendment of 5th January, 2016, *Article 13 (1)(e) of the Constitution of Zambia, Chapter 1 of the Laws of Zambia* stated that:

> *"A person shall not be deprived of his personal liberty except as may be authorised by law in any of the following cases:*
> *(e) Upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Zambia;"*

The fact that the appellant confessed to the robbery confirms that the police reasonably suspected that he was involved in the robbery. Even the questions put to him during apprehension point to the fact that the police had reasonable suspicion that he was involved in the robbery. Furthermore, the police also complied with *Article 13 (2) of the Constitution* which required a detainee to be informed of the reasons for his detention as soon as it was practicable to do so. The appellant testified that when he was taken to Ndola Central Police Station, the police told him that he was a suspect in a spate of robberies and demanded the firearm that he had been using. In the case of *Richman Chulu v Monarch (Z) Ltd*[5] it was held that:

"(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.

The evidence on record shows that the appellant was lawfully deprived of his liberty. His claim of false imprisonment lacks merit.

The appellant's claim for damages for assault and battery were equally not proved as he did not produce a medical report to prove that he was indeed assaulted by the police. Having failed on his claim for false imprisonment and malicious prosecution, the learned trial Judge properly found that the remainder of the appellant's claim collapsed. We cannot fault the learned trial Judge on his findings.

We find no merit in this appeal. We affirm the judgment of the court below. Costs to the respondents to be taxed in default of agreement.

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G.S. PHIRI

SUPREME COURT JUDGE

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A.M.WOOD

SUPREME COURT JUDGE

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C. KAJIMANGA

SUPREME COURT JUDGE