IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

APPEAL NO.161/2014
SCZ/8/21/2016

BETWEEN:

ATTORNEY GENERAL	1ST APPELLANT
TEMBO (MALE POLICE OFFICER-LUNDAZI POLICE STATION)	2ND APPELLANT
FRED CHILUFYA (MALE POLICE OFFICER-LUNDAZI POLICE STATION)	3RD APPELLANT
NYIRENDA (MALE POLICE OFFICER-LUNDAZI POLICE STATION)	4TH APPELLANT

AND

MASAUSO PHIRI	RESPONDENT

CORAM: Mwanamwambwa, DCJ and Kaoma and Mutuna, JJS

On: 9th May, 2017 and 29th June, 2017

For the Appellants: Major F. Chidakwa–Assistant Senior State Advocate
For the Respondent: N\A

JUDGMENT

Kaoma, JS delivered the Judgment of the Court

Cases referred to:

1. **Attorney General v Sam Amos Mumba (1984) Z.R. 14**
2. **David Zulu v The People (1977) Z.R. 151**
3. **Richman Chulu v Monarch (Z) Limited (1983) Z.R. 33**
4. **Hicks v Faulkner (1878) QBD 161**
5. **Hermiman v Smith (1938) 1 All ER**
6. **Attorney-General v Kakoma (1975) Z.R. 273**
7. **Gaynor v Cowley (1971) Z.R. 50**
8. **Simposya v Eric Masauso Phiri and others – Appeal No. 158/2009**
9. **McArdle v Egan (1933) ALL. ER 611**
10. **Kawimbe v Attorney-General (1974) Z.R. 244**
11. **Gertrude Munyonsi and another v Catherine Ngalabeka (1999) Z.R. 117**

12. Attorney-General v Felix Chris Kaleya (1982) Z.R. 1
13. Attorney-General v Mwaba (1975) Z.R. 218
14. Paul Roland Harrison v The Attorney General (1993) S.J. 58

Statutes referred to:

1. Constitution, Chapter 1 of the Laws of Zambia

Other works referred to:

1. Winfield & Jolowicz on Tort W.V.H Rogers 17th Edition, Sweet & Maxwell, London, 2006 at pages 866-867
2. Oxford Companion to Law by David M. Walker, Clarendon Press, Oxford, 1980 at page 458
3. Clerk & Lindsell on Torts, 20th Edition, Sweet & Maxwell, London, 2010 pp. 998-999, at para. 15-23
4. United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

The appellants have appealed against part of the judgment of the High Court awarding the respondent damages for false imprisonment.

The background to the appeal is that the respondent commenced an action by writ against the appellants, claiming damages for: false imprisonment; assault and battery; and malicious prosecution. He testified that on 17th January, 2007 he was at Lundazi Trading Centre where he was attending a funeral when a Land Cruiser came. The occupants of the vehicle ordered him to get into the vehicle. He refused but one of them pulled a pistol forcing him to jump into the vehicle. They went to Lundazi General Hospital, got some documents and proceeded to Lundazi Police Station where he was detained by the 2nd, 3rd and 4th

appellants. The next day, he was taken to the CID office where he was unclothed and beaten with two axe handles by the three police officers and was informed about theft of solar panels. He sustained swellings all over his body. As a result, he was hospitalised for a month at Lundazi General Hospital. He was discharged on 19th February, 2007; taken back to the Police Station and was granted bail.

It was also his testimony that he was detained without any justifiable cause or reasonable ground for suspecting that he had committed an offence and instead of making him appear before a court of law, he was battered and hospitalised. On 23rd February, 2007 he appeared before the Subordinate Court and pleaded not guilty to a charge of theft of solar panels. On 11th July, 2007 he was found with no case to answer and was acquitted.

In their defence, the 2nd, 3rd, and 4th appellants refuted that they assaulted the respondent. Their position was that they picked four suspects from Lumezi Trading Area in connection with theft of solar panels at Lumezi Mission hospital. They handed over the suspects to the Officer in Charge - CID. They did

not know what happened to the respondent thereafter and only heard that he was taken to the hospital.

In the judgment appealed against, the learned trial Judge found that the respondent was battered by the 2nd, 3rd, and 4th appellants on 18th January, 2007, to such an extent that he had to seek medical attention and was hospitalised as a result. She also found that the respondent was falsely imprisoned from 17th January, 2007 until 18th January, 2007, when he was informed of the reason for his apprehension. In arriving at this conclusion, the Judge addressed her mind to our decision in the case of **Attorney General v Sam Amos Mumba**[1]. She awarded the respondent damages for assault and battery and false imprisonment, to be assessed by the Deputy Registrar. However, the Judge dismissed the claim for malicious prosecution on the basis that the facts upon which he was prosecuted by the police gave rise to reasonable and probable cause to prosecute and that there was no malice.

The appellants have appealed only against liability for false imprisonment on two grounds as follows:

1. **That the learned Judge erred in law and in fact when she failed to take into account that the person who interrogated the**

respondent at the Police Station and possibly informed of the reasons for his arrest was not before Court (he is deceased).

2. **That the learned Judge erred in law when she failed to take into account whether there was unlawful detention.**

In support of the appeal, counsel for the appellants filed written heads of argument which he augmented orally. The respondent did not file any response or attend the hearing, although his advocates were served with the notice of hearing. In respect of ground 1, counsel for the appellants invited us to take judicial notice of the fact that the dealing officer is deceased and could not be before court and was the only person whose evidence could have rebutted that of the respondent. It was argued that the trial Judge ought to have taken cognisance of this fact and attached some weight to it but she took the respondent at his word and made certain inferences from his evidence. The case of **David Zulu v The People**[2] on circumstantial evidence was cited together with the second holding in the **Sam Amos Mumba**[1] case.

According to counsel, the question is what constitutes a '**reasonably practicable**' time to inform the accused of the reason(s) for his arrest. He argued that what is **'reasonably practicable'** differs depending on the particular circumstances of

each case; that the respondent's testimony was that he was informed of the reasons for his arrest the day after he was arrested (less than 48 hours after his arrest); and that this was not so unreasonable that the trial Judge could have held that the action by the appellants constituted false imprisonment.

In ground 2, it was argued that the trial Judge failed to take into account other factors relevant to proving false imprisonment; and that in a plethora of Zambian cases it has been repeatedly held that for a claim of false imprisonment to stand, the defendant must prove that the imprisonment was justified. Counsel cited the case of **Richman Chulu v Monarch (Z) Ltd**[3] where Commissioner Mumba (as she then was) held that:

> **'False imprisonment only arises where there is evidence that the arrest which led to the detention was unlawful, since there was no reasonable and probable cause'.**

Counsel also gave an exposition of reasonable or probable cause by citing the cases of **Hicks v Faulkner**[4] and **Hermiman v Smith**[5] and **Winfield and Jolowicz on Tort, 17th edition at pages 866-867**. He argued that the theft of the solar panels was reported by a member of the neighbourhood watch who had followed bicycle tracks to the accused's house; that the same person led the police to where the accused persons were and had

them picked up; and that based on the information given to the police, there was sufficient reason for them to believe that the respondent and his co-accused had committed the said offence.

Counsel further submitted that although the respondent was detained, such detention was lawful, given the circumstances and that the trial Judge fell into grave error when she held that the respondent had been falsely imprisoned based only on the fact that he was not informed of the reason for his arrest on the day of arrest. We were implored to quash the decision of the court below as regards false imprisonment.

We have considered the record of appeal and the arguments by counsel for the appellants. The only question raised on this appeal, particularly by ground 2, is one of liability, i.e., whether the trial Judge was right to find the appellants liable for false imprisonment. In resolving this issue, we have also considered the appellants' arguments in respect of ground 1.

According to the **Oxford Companion to Law by David M. Walker, Clarendon Press, Oxford, 1980 at page 458**, false imprisonment consists in unlawfully and either intentionally or recklessly restraining another person's freedom of movement

from a particular place. The restraint must be total for a time, however short. Further, there is no false imprisonment if a person is arrested in circumstances where arrest is justifiable or if there is reasonable and probable cause for the restraint.

Clerk & Lindsell on Torts, 20th Edition, Sweet & Maxwell, London, 2010, also state at para. 15-23 that the tort of false imprisonment is established on proof of: (1) the fact of imprisonment; and (2) the absence of lawful authority to justify that imprisonment and for these purposes, imprisonment is complete deprivation of liberty for any time, however short, without lawful cause. It is also clear from the case of **Attorney General v Kakoma**[6] where we confirmed the holding in **Gaynor v Cowley**[7], 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.

Clerk & Lindsell on Torts further state at para. 15-24 that:

> **"If the requirements of the law as to making it clear to the arrested person that he is under lawful restraint, or informing him of the grounds of his arrest or taking him before the appropriate authorities within a reasonable time are not complied with, an arrest which might otherwise have been justified will be unlawful, grounding an action in false imprisonment" (underlining is ours for emphasis only).**

The learned authors also write at paragraph 15-65 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, as in an action for malicious prosecution, but the burden of proof is different. Whilst in an action for malicious prosecution the onus is on the plaintiff to prove the absence of reasonable cause, 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".**

In the case of **McArdle v Egan**[8] it was also held that:

> **"In an action for false arrest, the defendant is entitled to judgment if he proves that at the time of effecting or ordering, the arrest he had reasonable and probable cause to suspect that a crime had been committed and that the person arrested was guilty of it".**

Indeed, in **Richman Chulu v Monarch (Z) Ltd**[3], the High Court held that false imprisonment only arises where there is evidence that the arrest which led to the detention was unlawful, since there was no reasonable and probable cause'. However, many authorities, particularly the **Sam Amos Mumba**[1] case, which was applied by the trial Judge, show that this is not the only consideration. In that case, the respondent was arrested without warrant by the Police. He was not told of the grounds of his arrest until six hours after his arrest. In a claim for false imprisonment, the High Court upheld his claim, and awarded him a sum of K6,500 as damages for false imprisonment. On appeal against liability, the Attorney-General conceded that the

respondent had been taken into custody, but argued that his arrest and detention by the police had been based on a reasonable suspicion of his having committed a treasonable offence and that the arrest and detention were thus legally justified. This is the same argument the appellants are making in this case. We held, inter alia, that:

> (1) **Where a Police Officer makes an arrest without warrant, it is incumbent upon him to inform the person so arrested of the grounds for his arrest unless he himself produces a situation which makes it practically impossible to inform him.**
>
> (2) **Failure to inform the arrested person as soon as is reasonably practicable to do so of the true reason of his arrest will, in a proper case, constitute false imprisonment.**
>
> (3) **It is not enough where a Police Officer makes an arrest without warrant, that a Police Officer has reasons for effecting an arrest without a warrant if such reasons are kept to himself, or if the reasons given are not true. In either situation, such a Police Officer may be held liable for false imprisonment.**

What was in issue in this case is not that the police officers had no reasonable grounds for suspicion. The real issue was whether or not the respondent was given the reason for his detention. While we agree, as regards the false imprisonment, that the trial Judge did not explicitly find that the appellants had reasonable grounds for suspicion, on malicious prosecution, she

correctly held that the facts known to the police gave rise to reasonable and probable cause to prosecute.

Clearly, the trial Judge was alive to the fact that the police officers were doing their duty in investigating allegations of theft of solar panels. We find no misdirection by the trial Judge since it is generally accepted that factors and considerations that go to establish reasonable and probable cause or conversely the want of it in an action for malicious prosecution are substantially the same as those which go to prove or disprove reasonable and probable cause in an action for wrongful arrest.

Now, regarding the real question of whether the respondent was given the ground for his detention, the learned Judge believed the respondent's uncontradicted evidence that he was not informed of the grounds for his detention on 17th January, 2007 and that he was only given the reason on 18th January whereupon he was severely battered.

We have considered the appellants' argument that the trial Judge should have taken into account a deceased witness who could have rebutted the respondent's evidence that he was only informed of the reason for his arrest the next day. Unfortunately,

for the appellants, a trial court is entitled to make findings of fact only on the evidence before it. The court is not in a position to discover what kind of evidence could have been given by witnesses who are not called to testify, whether they are alive or dead. The case of **David Zulu v The People**[2] relied on by the appellants is irrelevant to this case.

In any case, police officers use note books and enter occurrences at a police station in an 'Occurrence Book' and a docket of the case was definitely opened since the respondent was prosecuted. There is nothing on the record to show that the appellants attempted to produce any of these documents to justify the detention of the respondent by the late dealing officer.

The evidence on record shows that the respondent was merely apprehended by the 2nd, 3rd and 4th appellants and handed over to the dealing officer. There is no evidence of his arrest before he was detained on 17th of January, 2007 or evidence that he was given the reason for his detention that day. The allegation that the dealing officer could possibly have given the respondent reasons for his detention is speculative and unsubstantiated.

Furthermore, we cannot accept the appellants' argument that it was not unreasonable, to have given the respondent the ground for detention the next day because this argument was never made in the court below and cannot be made on appeal. In any case, the case of **Simposya v Eric Masauso Phiri and others**[9] heavily relied on by counsel for the appellants in his oral argument does not help the appellants at all. In that case, we found that the respondents had failed to justify the detention of the appellant and that mere suspicion without investigation cannot justify the detention of any person.

On the basis of our decision in the **Sam Amos Mumba**[1] case, we find that the learned trial Judge was on firm ground when she held that the respondent was unlawfully detained from 17th January to 18th January, 2007 when he was informed of the reason for his detention. It was irrelevant that the police had a reasonable suspicion connecting the respondent to theft of the solar panels. Both grounds of appeal must fail. Consequently, we dismiss the appeal and uphold the judgment of the court below.

The question now is whether we should send the matter back to the Deputy Registrar for assessment of damages, bearing

in mind that this matter commenced on 25th January, 2008 at the Chipata District Registry and was handled by eight judges before it was finally heard on 19th December, 2012 whilst judgment was only rendered on 31st December, 2013.

The position we took in the **Kakoma**[6] case was that since we had all the relevant facts before us, we were in just as good a position as the trial judge to resolve the issue. We observed that we would be doing the parties no service whatever if we were to involve them in the expense which would be incurred if the matter were to be sent back on the issue of damages. We proceeded to assess the damages. We shall do the same here as there is sufficient evidence of the circumstances of both the detention and the assault and battery.

In dealing with the quantum, we have looked at the various awards we have made over the years spanning from 1974 when **Kawimbe v Attorney-General**[10] was decided to 1999 when we decided the case of **Gertrude Munyonsi and Attorney-General v Catherine Ngalabeka**[11]. It is clear from the authorities that the quantum of damages cannot be resolved with any precision and that awards in other cases must always be treated with caution if

it is sought to rely on them as guides. But in the **Kawimbe**[10], **Kakoma**[6] and **Sam Amos Mumba**[1] cases we held that:

> **"The award of general damages in cases of false imprisonment must where these factors are present, always take into account the circumstances of the arrest and detention, the affront to the person's dignity and the damage to his reputation."**

Further, in the case of **Attorney-General v Felix Chris Kaleya**[12], the respondent was arrested by the police as a suspect in a case involving the killing of a police officer and assaulted in custody. He was released nine hours after witnesses failed to identify him. In dealing with the quantum of damages regarding the false imprisonment for the period of nine hours, the trial judge found that there had been no evidence with regard to the circumstances of the initial arrest and detention to suggest damages other than a sum limited solely to the loss of liberty for a period of nine hours and relying on **Kawimbe**[9] and **Kakoma**[6], the trial judge awarded the sum of K100. On appeal, counsel for the respondent argued that the damages awarded in respect of the false imprisonment were totally inadequate. Conversely, the Attorney-General, urged this Court to follow **Kawimbe**[9] and **Kakoma**[6] and uphold the award. We said on the facts as found by the court and going by the local precedents which favour moderate figures

consistent with Zambian values under the prevailing economic and social situation, the award of K100 in respect of the false imprisonment was entirely reasonable. However, we held that:

> **"(ii) 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 respect of the assault, counsel for the appellant had argued that the award was totally inadequate having regard to the aggravating circumstances. Counsel for the respondent conceded that police officers are not entitled to beat up suspects but opted to leave the question of damages to the Court. We found that the respondent was assaulted by many police officers who suspected him to be involved in a robbery in which a police officer was killed; that there is no law which authorises the police to beat up members of the public whom they have detained for investigations, and any assault by police in these circumstances must necessarily be viewed as a serious matter; and that the beating up of suspects, however serious the crime, neither advances the cause of justice nor does it reflect to the credit of the Police Force. In view of the fact that the assault was carried out by police officers, that the injuries were painful and taking

into account that fists, short batons and rifle butts were used, we found that the award of damages in the sum of K50 was totally inadequate and substituted it with an award of K300. The respondent was also awarded costs both in this Court and in the court below.

In the **Sam Amos Mumba**[1] case (whose facts we have set out above), on appeal, the Attorney General had submitted, relying on **Kawimbe**[10] and **Kakoma**[6] that the award was extremely excessive, even if one took into account the respondent's professional status. On the other hand, counsel for the respondent, argued that the general damages were not excessive; that what was crucial was not the period of false imprisonment, but the conduct of the police, especially at the time of taking the respondent into custody, which conduct was damaging to the respondent's status as his source of income was dependent on what his clients thought of him. Counsel relied on **Attorney-General v Mwaba**[13] where we upheld an award to the plaintiff, a medical doctor, of damages in the sum of K8,000 for false imprisonment and assault. After distinguishing the case of **Mwaba**[13] we concluded that since there was no evidence of ill-

treatment or any other aggravating features, the sum of K6,500 compensatory damages was excessive. We allowed the appeal, set aside the award made by the trial judge and substituted an award of K1,500.

In **Paul Roland Harrison v Attorney General**[14], the appellant was served with a deportation order and detained in Prison for 21 days. In an action for false imprisonment, judgment was entered in default of appearance and the Deputy Registrar awarded general damages in the sum of K150,000 and exemplary damages amounting to K60,000. On appeal by the appellant against the award we held, inter alia, that:

> **(i) Where the tortious circumstances are more serious, then the awards must reflect this, as well as the impact of inflation in order to arrive at a fair and reasonable amount.**

We further put the matter as follows:

> **"We have already indicated that damages for false imprisonment are not calculated on daily basis, but obviously imprisonment for 21 days is much more serious than for one day and this must be reflected in the award. In this case at the date of trial the appropriate award, taking into account inflation, should have been K400,000 and this is the figure we award the appellant...."**

Five years later, in the case of **Gertrude Munyonsi and Attorney-General v Catherine Ngalabeka**[11], the respondent was picked up by the police including a female Constable who were

looking for her son who was suspected of having committed an offence. She was handcuffed and detained in filthy police cells. After three days, she was released and ordered to look for her son. She took leave and an advance from her employers to go and look for her son who was living independent from her. She went to several towns in search of her son. On being unsuccessful, she was again detained by the same female Constable first at the same dirty police cells and then at remand prison. She was not charged with any offence. The Deputy Registrar was alive to the decisions of this court on damages awarded, but observed that it was common cause that since 1991, the value of the Kwacha had suffered serious fluctuations and concluded that taking into account all the circumstances of the case including the exemplary element and the serious fluctuations of the value of the Kwacha compensatory damages of K15 million would be adequate compensation and at the same time to serve as a punitive measure to over-zealous law enforcement officers. On appeal by the Attorney General, we confirmed the award of K15 million. We took the view, that this was the worst case of false

imprisonment and unlawful detention involving a woman plaintiff by a woman constable who should have been more humane.

In this case, the trial Judge did not find anything wrong in the manner the respondent was apprehended and taken to the police station and there is no evidence regarding damage to his profession or reputation. The only evidence on record is that he was a businessman but it is not known what kind of business he conducted. In respect of affront to the respondent's dignity, there is clear evidence that he was assaulted and battered but this is the subject of a separate award. Therefore, as regards the false imprisonment, we shall proceed simply on the basis of unlawful detention for the period between 17th and 18th January, 2007 when the respondent was not informed of the reason for his detention and we take this as detention for one day.

We have also considered what we said in the **Felix Chris Kaleya**[12] case, that local precedents favour moderate figures consistent with Zambian values under the prevailing economic and social situation. We further take into account inflation, and what would today be the equivalent of the K15,000 (rebased) which we confirmed in the **Getrude Munyosi**[11] case, although

that amount included some exemplary damages. We consider the sum of K10,000 to be appropriate and we award the respondent this amount as damages for the false imprisonment.

Coming to the assault and battery, we recapitulate what we said in the **Felix Chris Kaleya**[12] case that:

> **"There is no law which authorises the police to beat up members of the public whom they have detained for investigations, and any assault by police in these circumstances must necessarily be viewed as a serious matter. The beating up of suspects, however serious the crime, neither advances the cause of justice nor does it reflect to the credit of the Police Force".**

We must add that the conduct of the police officers amounted to torture of a suspect in police custody which will not be condoned by the courts, especially that **Article 15 of the Constitution, Chapter 1 of the Laws of Zambia** proscribes torture or inhuman or degrading punishment, and Zambia is a party to international human rights instruments, including the **United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment** which are concerned with the prohibition and eradication of torture.

The learned trial Judge accepted that the respondent was beaten by three police officers, using axe handles and found that the battery inflicted on him was so severe as to warrant

hospitalisation for a month. Although the medical report is not on the record, the evidence shows that the respondent sustained swellings all over his body and sores on both legs. We find that these are aggravating factors that justify an award higher than any of our previous awards. Therefore, we award the respondent a sum of K20,000 as damages for the assault and battery.

We also award interest on the total sum of K30,000 at 6% per annum from date of writ till full payment. The respondent will also get his costs both in this Court and in the court below. To further register our disapproval of the conduct of the police officers, in this case, we direct that the 2nd, 3rd and 4th appellants be surcharged.

M.S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE

R.M.C. KAOMA
SUPREME COURT JUDGE

N.K. MUTUNA
SUPREME COURT JUDGE