

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA

2013/HP/1389

(Civil Jurisdiction)



BETWEEN:

KENNETH MWABA KAMANDA

PLAINTIFF

AND

MIKE CHIBWE

1ST DEFENDANT

ATTORNEY GENERAL

2ND DEFENDANT

For the Plaintiff: Ms. N. Liswaniso of KBF & Partners

For the Defendant: Major F. Chidakwa, Assistant Senior State Advocate

J U D G M E N T

Cases referred to:

1. *Mubita Mbanga vs The Attorney-General (1979) Z.R. 234 (H.C.)*
2. *Whittaker vs Sandford 110 Me. 77, 85 A. 399 (1912)*
3. *Merring vs Graham White Aviation (1919) 122 LT 44 MA*
4. *Attorney-General vs Chipango (1971) Z.R. 1.*
5. *Shipanga vs Attorney General (1976) Z. R. 224*
6. *Richman Chulu vs Monarch (Z) Lt (1983) Z.R. 33*
7. *Daniel Chizoka Mbandangoma vs The Attorney General (1979) Z. R. 45 (H.C.)*
8. *Claude Samuel Gaynor vs Cyril Robert Cowley (1971) Z.R. 50 HC*
9. *Khalid Mohammed vs The Attorney General (1982) ZLR P 49*
10. *Hicks vs Faulker (1881) 8 QBD 167*
11. *The Attorney General vs Sam Amos Mumba (1984) ZR 14*
12. *Christie vs Leachinsky [1947] A.C. 573*

Other works referred to:

1. Clerk and Lindsell on Torts (17th edn, 1995)

This is an action for false imprisonment commenced by way of writ of summons. In the accompanying statement of claim, the plaintiff avers that on 27th May, 2013, at 07:00 hours, he was driving along Winstone Road in Choma. As he approached the market, he slowed down to 0km/h so that he could park the motor vehicle at his shop when the 1st defendant approached him and requested him to accompany him (the 1st defendant) to the police station. The plaintiff was detained in police cells and at 11:02 hours, he was requested to sign a document headed notice of intended prosecution. He was released between 17:00 to 18:00 hours that very day.

The plaintiff alleges that the reason the 1st defendant detained him was because he had reported him to his superior over an accident which occurred at the plaintiff's residence which the 1st defendant did not want to record in the Occurrence Book. This made the 1st defendant very angry hence the plaintiff's detention for an offence that did not warrant an arrest.

As the plaintiff did not open his shop that day, he claims for loss of sales amounting to K60,000.00. He contends that as Choma is a small town, the arrest tarnished his image. As a result of the 1st defendant's actions, the plaintiff suffered loss of business, inconvenience and mental anguish. He

claims for damages for false imprisonment, exemplary damages, interest, any other relief the Court may deem fit and costs.

In their defence, the 1st and 2nd defendant deny the plaintiff's claims and aver that while conducting traffic patrols along Winstone Road in Choma, the 1st defendant came across a Toyota Ipsum Registration Number AJC 6087 parked on the road. The plaintiff was charged with the offence of Obstruction of Road by a motor vehicle. The plaintiff refused to drive his motor vehicle to the police station until he was forced to do so. It is contended that there was reasonable and probable cause to detain the plaintiff who later willingly signed an Admission of Guilt Form and paid a fine for the offence committed. The defendants reiterate that there was lawful justification for the plaintiff's detention.

At the trial, the plaintiff testified that on 21st August, 2011, at around 21:48 hours, a government ambulance for Choma General Hospital rammed into his wall fence pulling the wall and electric fence down. Dissatisfied with the manner in which the Police handled the matter, the plaintiff reported the matter to the District Commanding Officer, one Mr. Simfukwe, who ordered a meeting in which he reprimanded the traffic officer in charge, the now 1st defendant, for failure to deal with the accident professionally.

The plaintiff testified that on 27th May, 2013 at around 07:00 hours, when driving to his place of business, he slowed down to park, when a police vehicle

stopped him. The Police commanded him to take the vehicle to the Police station. At the station, the 1st defendant grabbed his car keys and confined him the in cells without any explanation. At around 11:00 hours, the 1st defendant forced the plaintiff to sign a form headed '**notice of intended prosecution**'. At around 16:30, the station inspector interviewed him while the 1st defendant was out of the station. When he later returned, and was questioned over the Plaintiff's detention, the defendant's response was to the effect that the plaintiff was stupid.

The witness went on to state that on that very day, his brother went to the Police Station with some money upon learning that the plaintiff had committed an offence. The 1st defendant asked for a payment of K270 without proffering any explanation, and forced the plaintiff's brother to sign a document, unknown to him. The plaintiff was also forced to sign the document as a condition for his release. As he was eager to leave the police cells due to embarrassment and the risk of losing his reputation, the plaintiff signed the document and was released at between 17:00 and 18:00 hours.

He testified further that on the day of his arrest, he did not open his shop. As an agent for Lafarge Cement and dealing in other hardware products, the plaintiff incurred a loss, as on a normal day, he made between K60,000 and K80,000 from sales. He stated, regarding the document at page 2 of the

defendant's bundle of documents, that he did not willingly sign the admission of guilt form.

In cross examination, the plaintiff testified that the Hospital built the wall fence but the electric fence was never repaired. He was convinced that the defendant arrested him in 2013 because he was reprimanded over his behaviour in 2011. It was a way of punishing him. He testified that the defendant was with his colleague who refused to participate in the arrest. He did not resist the arrest but was still dragged by the defendant. As regards the admission of guilt form, the plaintiff reiterated that his signature was the condition for his freedom. He never read the contents and neither did his brother, who signed as a witness.

The plaintiff went on to testify that he reported the 1st defendant to the new commanding officer over his unjustified arrest but the 1st defendant did not attend the meetings that were scheduled. On the day of his arrest, his business was closed as the other two people he was working with were not aware that he had been arrested since he was not allowed to communicate with anyone. The plaintiff's brother found out by other means that he had been arrested.

PW2 was Sydney Sitambuli. He testified that in May, 2013 he reported at his place of work early in the morning to clean the plaintiff's shop. When his boss, the plaintiff arrived, he went to free his parking slot so that he could park. Some Police officers approached and ordered the plaintiff to drive his vehicle to the Police Station. He did not hesitate to follow the instructions. PW2 stated

that on that day the shop did not open. His job was to load cement and so he did not know how much money the business made per day.

In cross examination, PW2 testified that he did not know the exact time that the Police picked the plaintiff. He saw him the following day. The two of them worked in the shop.

The defendants also called two witnesses. DW1 was the 1st defendant. He testified that on 27th May 2013, whilst on duty with two other police officers from Choma Police station, they were doing motorized patrols when they came across a vehicle that was parked on Winstone Road. When they approached this vehicle, the driver was disembarking to open his shop. They approached him and the offence of obstruction of roadway by motor vehicle was preferred against him. After the charge was explained to him, he was asked to accompany the police to the police station but was very uncooperative and so he was forced to go to the police station. When asked for his details at the station he was still very uncooperative until he was deposited in the cells and a notice of prosecution was issued. At around 14:00 hours, the plaintiff's wife went to the station and the plaintiff agreed to pay and sign for admission of guilt. The defendant testified that the plaintiff was informed that he had two weeks in which to reverse the decision he had made by bringing back the receipt so that prosecution could take its course. His testimony was that the plaintiff was in custody from 07:00 to 14:00 hours.

The 1st defendant denied having been taken to Mr. Simfukwe. He testified that at the time he was transferred to Choma, Mr. Simfukwe was in Northern Province having been transferred in 2010. He also denied having dealt with the plaintiff in any other matter.

Under cross examination, DW1 testified that he had worked in the traffic department for seven years. The plaintiff was detained because of his uncooperative conduct. He was approached as he was opening his shop. He stated that because the plaintiff had denied the charge, a notice of intended prosecution was given to him to sign at around 11:02 hours. He was later released at 14:00 hours after signing the admission of guilt form. When referred to page 1 of the defendant's bundle of documents, the DW1 testified that the road traffic offence report indicated the time of offence as 11:45. He explained that it was when the plaintiff was told why he was arrested. He however stated that he was not the one who prepared the document. According to that document, the offence was committed at 11:48 hours.

The defendant testified that the admission of guilt form was dated 30th May, 2013 because that was the day the money was banked. He stated that on 27th May, 2013, the plaintiff signed the admission of guilt form voluntarily. The contents of the document were explained to him. The witnesses stated that he did not deal with the plaintiff in 2011.

In re-examination, DW1 clarified that the admission of guilt form has two parts. In the first part, the actual date is not inserted but the date the money is banked. The box for the official date stamp is the one that contains the date when the offence was committed.

DW2 was John Chisanga Tundwe. He testified that in 2013 he was the deputy officer in charge of Choma Police Station. As deputy in charge, he was the chief administrative officer at that station. As administrative officer, he would have been aware of any complaints against DW1. He could not recall receiving a report concerning a traffic offence between the DW1 and the plaintiff. He was transferred to Choma in 2011 from Gwembe and did not find Mr. Simfukwe.

In cross examination, DW2 testified that he went to Choma in the early months of 2011. If an incident occurred before his transfer, it was possible that he would not know about it. He did not receive any report about a vehicle ramming into the plaintiff's wall fence. He knew DW1 very well as they serve together in Choma. Even though he was not in the traffic department, he would handle reports from there administratively. He also stated that once money is received, it must be banked immediately unless it is a weekend.

Both parties filed in written submissions. In the plaintiff's submissions, Counsel relied on the learned authors of **Clerk and Lindsell on Torts (17th edn, 1995)** for the definition of false imprisonment as 'complete deprivation of

liberty for any time, however short, without lawful cause'. Clerk and Lindsell then quote **Termes de la Ley** as follows:

'Imprisonment is no other thing but the restraint of a man's liberty, whether it be in the open field, or in the stocks, or in the cage in the streets or in a man's own house, as well as in the common gaols; and in all the places the party so restrained is said to be a prisoner so long as he hath not his liberty freely to go at all times to all places whither he will without bails or mainprise or otherwise.'

It is submitted that for a claim of false imprisonment to succeed, restraint of the Plaintiff must be total. The cases of **Mubita Mbanga vs The Attorney-General**¹ and **Whittaker vs Sandford**² have been relied upon.

The second limb of the tort of false imprisonment has been identified as knowledge of detention. Counsel has cited the case of **Merring vs Graham White Aviation**³ in which the Court stated that a person detained on aerodrome premises in order to be interrogated was held to be falsely imprisoned although he was not aware that he was not at liberty to leave.

As regards the third element to be proved, unlawful restraint, counsel has relied on the case of **Attorney-General vs Chipango**⁴.

Learned counsel has submitted that the plaintiff has proved his case on a balance of probabilities. That the first limb was proved when the plaintiff testified that he was incarcerated for about 10 hours. This evidence was corroborated by PW2 who testified that he only saw the plaintiff the following

day. It is contended that although the Police have a right to arrest without a warrant, the decision by DW1 to detain the plaintiff and thereafter force him to sign an admission of guilty was unlawful and marred with hatred and the need to satisfy his anger. It is the plaintiff's contention that DW1 could have charged the plaintiff and taken him to Court. However, he chose not to and decided the best punishment would be to throw the defendant into the cells until he agreed to have committed the offence he was charged with. It is argued that the decision to incarcerate the plaintiff for over 10 hours was not only unlawful but a breach of his constitutional right to move freely.

In response, it is submitted for the defendant that the Plaintiff has failed to prove the tort of false imprisonment on a balance of probabilities as he failed to show the Court why his detention was unlawful. **Clerk and Lindsell on Torts 19th Edition London: Sweet and Maxwell 2006** define false imprisonment at:

“the unlawful imposition of constraint on another’s freedom of movement from a particular place. The tort is established on proof of; the fact of imprisonment; and absence of lawful authority to justify the imprisonment.”

The case of ***Shipanga vs Attorney General***⁵ has been cited in which Baron DCJ as he then was stated that:

“.....in the absence of some legal justification for the deprivation of a person’s liberty, whether legislative or under the common law, that deprivation is unlawful.”

And that of ***Richman Chulu vs Monarch (Z) Ltd***⁶ where the 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.”

Learned counsel is of the view that the Plaintiff admitted being charged with a traffic offence as stated on Pages 1 and 2 of the Defendant’s Bundle of Documents as well as on the notice of intended prosecution. It is also clear that the Police did not act arbitrarily as the Plaintiff was interviewed before the Police made the decision to arrest and charge him with the traffic offence. It is submitted that the arrest was lawful as it was made upon a reasonable and probable suspicion of an offence known by the law.

Section 33(1) of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia and the case of ***Daniel Chizoka Mbandangoma vs The Attorney General***⁷ have also been relied upon. In the *Mbandangoma* case, the Court stated the following:

“Under s. 33 of the Criminal Procedure Code the release on bond of a person arrested without a warrant is mandatory if it does not appear practicable to bring the person concerned before an appropriate competent court within 24 hours of his being taken into custody unless the offence is one of a serious nature. Where a person is retained in custody he must be brought before such court as soon as practicable.”

It is Counsel’s contention that the undisputed evidence indicates that the Plaintiff was arrested for the traffic offence of Obstruction of Roadway by a Motor Vehicle Contrary to section 188 of the Road Traffic Act No. 11 of 2002. There was therefore legal justification for the deprivation of the plaintiff’s

liberty. He was also released the same day within 24 hours in accordance with the law. It is submitted further that there was no malice on the defendant's part. As regards the loss of business on the plaintiff's part, it is argued that the claim was not specifically pleaded and no evidence was lead to that effect at trial.

I have considered the evidence led in this case by both parties, as well as the submissions. It is undisputed that the plaintiff was directed to drive to the police station on the morning of 27th May 2013. He says this was while he had stopped, and about to park his vehicle in front of his shop. I find PW2's testimony unreliable, as the plaintiff himself testified that no one knew that he was in the cells as the other two persons he worked with did not know of this, as he was not allowed to communicate with anyone. If that be the case, how then could PW2 say he witnessed the incident? His testimony can only be a concoction.

According to **Halsbury's Laws of England, Third Edition Volume 38, paragraph 1266**, an action for false imprisonment requires the plaintiff to show infliction of bodily restraint not authorised by law. When the plaintiff proves that he was imprisoned by the defendant, a prima facie case for false imprisonment is established. The onus then shifts to the defendant to plead and prove reasonable cause as his justification for depriving the plaintiff of his liberty.

The plaintiff testified of an earlier encounter with the 1st defendant. He insinuates that it is that incident of August 2011 that led to the alleged false imprisonment of 27th May, 2013. This brings to mind the case of **Claude Samuel Gaynor vs Cyril Robert Cowley**⁸, in which Baron J held that in an action for false imprisonment, it is necessary for the plaintiff to prove nothing but the imprisonment itself; it is then for the defendant to discharge the onus of justifying it. In that case, the defendant and plaintiff were partners in a business of building contractors. 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 his vanette had been stolen, and later added that the plaintiff was seen heading towards Kasama. The plaintiff was arrested by the police. The plaintiff sued for false imprisonment and malicious prosecution. The onus resting on the parties was stated as cited above.

In the present case, the plaintiff testified that upon being directed to drive his vehicle to the police station, he obliged without question. But he later said, in cross examination, that he was dragged by the police. This piece of testimony tends to confirm that of DW1, that the plaintiff was very uncooperative. You can only be dragged if you are uncooperative. I also accept DW1's testimony that he explained the charge to the plaintiff. I doubt that the plaintiff, who was uncooperative, was not informed of the reason he was being directed to go to

the police station. The evidence reveals that the plaintiff was availed a Notice of Intended Prosecution. That notice indicated that it was intended to prosecute the plaintiff for the offence of obstruction of a road by a vehicle, on 27th May 2013 at 07.00 hours.

Although the Traffic Offence Report dated 30th May 2013, indicates the time of the offence as 11:45 hours, the fact remains that the Notice of Intended Prosecution indicated that it was allegedly committed on the 27th May 2013 at 07:00 hours.

The plaintiff signed the Admission of Guilt Form. That form states in part as follows:

“WITH REFERENCE to the charge of OBSTRUCTION OF ROADWAY BY A MOTOR VEHICLE C/SEC 188 ACT NO 11 OF 2008 in answer I have been required to appear before the subordinate Court Class PRMS on the 30th May 2013 I hereby admit that I am guilty of the offence charged and request that the sentence may be passed in my absence. I deport herewith –

(a) The sum of K270 kwacha and ngwee being the maximum amount of the fine which may be imposed by the court (or as the case may be the amount fixed by the prescribed officer).”

The plaintiff signed this form. Contrary to his assertion in evidence that he was forced to sign this form, the pleadings make no such allegation. The plaintiff's complaint in the statement of claim was that the law with regard to obstruction of road by vehicle does not warrant an arrest. The defendant decided to detain the plaintiff when all that was required was to pay a fine, which the plaintiff

paid on 30th May 2013. It will again be noticed that this averment is contrary to the plaintiff's evidence in that he testified that he was released on the same day, that is, the 27th May 2013 after his brother had paid the police. Yet, in the pleading, he averred that he paid the fine on 30th May 2013. The onus to prove his case on a balance of probabilities lies on him. When he pleads one fact, and asserts another in his testimony, the resulting inconsistency undermines his credibility, never mind the defendant's case. See ***Khalid Mohammed vs The Attorney General***⁹.

In my determination, the plaintiff having admitted that he committed the offence charged as shown above, and having failed to plead that he was coerced into so doing, the defendant's version is more credible. I thus accept that when the plaintiff was informed of the infraction, he was uncooperative, and had to be 'dragged' to the police station. In ***Hicks vs Faulker***¹⁰, Hawkings J restated the burden cast on the defendant when he said:

"...in false imprisonment, the onus lies upon the defendant to plead and prove affirmatively the existence of reasonable cause as his justification, whereas in an action for malicious prosecution the plaintiff must allege and prove affirmatively its non-existence."

Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the

position of the accused, to the conclusion that the person charged was probably guilty of the crime imputed.

On the state of the pleadings and the evidence, it is more probable than improbable that the plaintiff had obstructed the road. Paragraph 12 of the statement of claim avers that "*obstruction of road by vehicle does not warrant arrest. The defendant decided to detain the plaintiff when all that was required was to pay a fine, which the plaintiff did*". This averment tacitly affirms that the plaintiff committed the alleged offence, and paid the fine accordingly.

On the foregoing, I accept that there was reasonable cause for DW1 to conclude that the plaintiff had committed the offence. He informed the plaintiff at the time he was 'dragged' to the police station. Additionally, it is not automatic that when one has committed the stated offence, they will invariably be fined. It could be that the police would elect to prosecute.

In the present case, the plaintiff's testimony is that he had slowed down to 0 km/h waiting for his parking slot to be freed when the Police approached him. The 1st defendant's testimony was to the effect that he, in the company of two other officers, approached the plaintiff when he was about to open his shop. They pointed out the offence of obstruction of roadway by motor vehicle but he was uncooperative thus the necessity to arrest him. **Section 33** of the **Criminal Procedure Code Chapter 88 of the Laws of Zambia** gives the Police power to arrest without a warrant. In the case of *The Attorney General vs*

Sam Amos Mumba¹¹, the Supreme Court, relying on the case of **Christie vs Leachinsky**¹², outlined the duty of the Police when an arrest without a warrant is made. The respondent in that case was arrested without warrant by the Police but was not told of the grounds of his arrest until after about six hours of his arrest. It was held that:

- (i) *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.*
- (ii) *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.*
- (iii) ...

In my view, as earlier indicated, the plaintiff, having been informed of the offence of obstruction of roadway by motor vehicle, became uncooperative, and was forced to go to the police station. It cannot be said that the tort of false imprisonment was committed, as the plaintiff was informed of the offence he had committed.

In his statement of claim, the plaintiff mentioned a notice of intended prosecution which he signed at around 11:00 but omitted to refer to the admission of guilt form that he signed. It was at trial that he testified of the admission of guilt form and added that he did not have sight of its contents,

nor was it explained to him. I do not believe that the plaintiff did not read and understand the contents of the admission of guilt form. His failure to refer to that form in the statement of claim and the claim of ignorance of its contents appear to be intended to put this form out of the way, because of its implications. I am not persuaded by the plaintiff's assertion in that regard.

The form is in very clear terms. It gives a motorist the option to appear before a subordinate court to defend himself against the charge. A motorist is not obligated to pay the fine unless he admits the charge preferred against him.

On the whole, it is my determination that the plaintiff has failed to prove his case on a balance of probabilities and I dismiss it accordingly. Costs for the defendant to be taxed in default.

Dated ^{29th} day of ^{March} 2018



F. M. CHISANGA
HIGH COURT JUDGE