



IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY
PERSONAL INJURY CAUSE NUMBER 138 OF 2020

BETWEEN

GOLDEN BANDA

CLAIMANT

-AND-

MALAWI POST CORPORATION

DEFENDANT

CORAM: HON. JUSTICE VIOLET PALIKENA-CHIPAO

Mr. Msuku/Kafere, Counsel for the Claimant

Mr. Namonde, Counsel for the Defendants

Ms. Mboga, Court Reporter

Mr. Banda, Court Clerk and Official Interpreter

JUDGMENT

Chipao, J

1. The Claimant commenced his action by way of summons seeking the sum of K9, 800, 000 as money which the Defendant converted and interest thereon, damages for loss of business from investment of the said sum of K9, 800, 000, cost of items (HP laptop, laptop bag, USB charger, 2 tables, 4 brand new shirts and various items), damages for loss of use of the listed items, false imprisonment, defamation, malicious prosecution and the costs of the action.

2. The Claimant's story is that he was the Defendant's employer and that's the defendant in or around July 2015, without the consent of the Claimant converted the Claimant's money amounting to K9,800,000 and the other items which the defendant had despite numerous reminders refused or neglected to release. The particulars of the other items are as follows; HP laptop, laptop bag, USB charger, 2 tables, 4 brand new shirts and various items.
3. The Claimant went further to state that he informed the defendant that he had borrowed the money at 20% monthly interest to invest in his Airtel money dealership business.
4. The Claimant went further to state that because of the defendant's conduct, he suffered loss whose particulars are as follows:
 - a. Loss of the said sum of K9, 800, 000;
 - b. Interest on the said sum of K9, 800, 000;
 - c. Loss of business from investment of the said sum of K9, 800,000; and
 - d. Loss of the listed items.
5. The Claimant went further to allege that around the same time, the defendant procured the arrest of the Claimant and caused him to be detained and to appear before the court which granted him bail.
6. The Claimant went further to state that on 27th October 2020 the court acquitted him the State having informed the court that the Defendant had no interest in proceeding with the case for lack of evidence. The Claimant stated that by reason of these he suffered loss and damage in form of deprivation of his liberty and presenting the Claimant as a criminal.
7. The Claimant therefore claims the following:
 - a. The said sum of K9, 800, 000;
 - b. Interest on the said sum of K9, 800, 000;
 - c. Damages for loss of use for investment of the said sum of K9, 800, 000;
 - d. Cost of items;
 - e. Damages for loss of use of the listed items;
 - f. Damages for false imprisonment;
 - g. Damages for defamation;
 - h. Damages for malicious prosecution; and
 - i. Costs of the action.
8. The Defendant denied the claims and the reliefs being sought. In the Statement of Defence, the Defendant argued that it was not under an obligation to take care the Defendant's goods and that the Claimant was under the terms and conditions of service under an obligation to take care of his own goods. The Defendant thus denied liability for loss and damage in relation to the money and the listed items.

9. The Defendant further denied that it procured the arrest of the Claimant and argued that the Claimant was arrested by the Police. The Defendant alleged that the Police acted on their own responsibility and initiative and not pursuant to any direction or action of the Defendant.

Issues for Determination

10. In view of the claims, the defence and the evidence, the following are the issues for court's determination:

- a. Whether the defendant is liable for false imprisonment.
- b. Whether the defendant is liable for defamation.
- c. Whether the defendant is liable for malicious prosecution.
- d. Whether or not the Defendant is liable for conversion.

Whether the Claimant in fact left to the claimed items and money in his office.

- e. Whether the defendant is liable for consequential loss emanating from locking up the Claimant's money.

The Law and Analysis of the Evidence.

Burden and Standard of Proof

11. It is trite law that in civil cases, the burden of proof lies with he who alleges. This is founded on the maxim "*ei incumbit probation qui decit non negat.*" The standard of proof required in civil cases is that of proof on a balance of probabilities which standard is lower than that required in criminal cases.

12. On standard of proof in civil cases this is what Lord Denning as he was then said in *Miller v. Minister of Pensions* [1974] All ER 373 @373-374;

"The degree is well settled. It must carry a reasonable degree of probability, not so high as is required in a criminal case. If the evidence is such that a tribunal can say: 'we think it more probable than not' the burden is discharged, but if the probabilities are equal, it is not."

13. Cases of *Malawi Telecommunications Ltd v Christopher Tukula* [2013] MLR 200 (HC) and *Harold Chigalu & 4 Others v. AG* Civil Cause No 114 of 2013 among others have referred to or applied the case of *Miller v. Minister of Pensions*.

14. Where the evidence of the parties is equal, the Defendant must be given the benefit of doubt. Under common law where both parties are equally at fault, the benefit of doubt is exercised in favour of the Defendant. This is reflected in the maxim "*pari delict potior est*

condition est defendantis. The case of *A. Musa Ali v. Circle Plumbing (Malawi) Limited* Civil Cause No. 3440 of 2006 illustrates this principle in the following terms;

"The matter herein is civil one. The standard of proof required in civil cases is the one that is expressed as proof on a balance of probabilities. The court should therefore look at the evidence, and if the evidence is such that the court can say that it thinks it is more probable than the burden is discharged. But if the probabilities are equal then it is not.

15. There are no closing submissions from the Claimant on record. The Court will however refer to the Claimant's skeleton arguments which were filed in support of the claims. The Defendant on the other hand filed closing submissions.

Whether the Defendant is Liable for False Imprisonment

16. Before dealing with the question of whether or not the Defendant is liable for false imprisonment, we will have to appreciate the Claimant's evidence.
17. The Claimant, Golden Banda, was employed by the Defendant as Controller of Courier Services nationwide in 2011. He said that in 2015 the business having grown, he (the Claimant) just saw communication on the notice board that the Defendant had recruited another person by the name Zacchaeus Meke as Controller for Courier Services in the Central and Northern Regions while the Claimant remained the Controller for the Southern Region. The Claimant said that he raised a query with the then Postmaster General, Mr. Godfrey Itaye indicating that this was a demotion reducing his work from a National Controller to a Regional Controller.
18. The Claimant went further to say that the Postmaster General said that there was nothing he himself could do as he had only received instructions from higher authorities to find a position for Mr. Meke who was at that time a chairman for the Blue League, a youth wing for the then ruling Democratic Progressive Party (DPP). He said that the said Mr. Meke who was employed without any interviews and on a position that never existed before. He tendered GB1 as copies of Mr. Meke in pictures in DPP activities.
19. The Claimant went further to say that the Defendant approached him to intervene in the Central and Northern Regions when business started going down in the two regions. He said it was however difficult for him to do so as his mandate had been limited to the Southern Region. He said that said that in view of this the defendant promoted him to the post of Deputy Director for Courier Services nationwide so that he could oversee courier

services for all regions. His grade moved from M4 to M3 and GB2 is it letter evidencing this promotion.

20. The Claimant went further to say that later, the government appointed a new Postmaster General Mr. Henry Shamu whom the Claimant said, was a diehard DPP and a close friend to Mr. Meke. The Claimant tendered copies of social media posts by Mr. Shamu on his political allegiance as GB3.
21. The Claimant further said that Mr. Shamu upon his appointment as Postmaster General displayed serious negative attitude towards those whom he perceived to be Anti-DPP inclusive of the Claimant. He said that one time in 2017, Mr. Shamu accused the Claimant of being invincible simply because he came from the same area with the then Vice President Dr Saulos Chilima and that if he was not careful, he would go down together with the Vice President.
22. The Claimant also said that Linda Mpando was promoted to the post of Deputy Director for Courier services responsible for the Centre and North thereby reducing the jurisdiction of the Claimant to only the South. The Claimant said he protested but to no avail.
23. The Claimant further stated that in 2018, there were some deep disputes amongst employees in Lilongwe and he was chosen to travel with the Postmaster General to Lilongwe to resolve the disputes. He said that instead of addressing the issues they had gone there for, the Postmaster General started accusing the Claimant of theft. The Claimant said that had no idea as to where the allegations were coming from and he was surprised.
24. The Claimant said that he was embarrassed and considering that the accusations were made before his juniors and not wanting to engage the Postmaster General he decided to leave the meeting so that it could proceed in his absence.
25. The Claimant said that upon return to Blantyre, he approached the Postmaster General and expressed his concern on how the Postmaster General handled the issue especially accusing him of theft and he challenged the Postmaster General to bring forth evidence if they had any. Instead of addressing the issues the Claimant raised, the Defendant issued a suspension letter allegedly on grounds of insubordination and walking out of a meeting. It will be noted that this letter the Claimant did not produce this letter in his evidence.
26. Whilst the Claimant was on suspension the defendant engaged auditors to look into some of the Claimant's activities which was done in his absence. The Claimant said he was called for a disciplinary hearing on charges of insubordination where the Postmaster General was part of the panel. The Claimant said he personally protested the presence of

the Postmaster General on the panel as an interested party but no avail. After the disciplinary hearing, the Claimant said he was warned and transferred to Lilongwe on the same position as Deputy Director for the Centre and North and that Linda Mpando would go back to marketing. He went further to say that the next day, he received another warning later from the Director of Finance and Administration where it was again repeated that he takes himself as invincible. He said this letter was only copied to the Postmaster General but he is unable to exhibit all these letters because they were in his office which the Defendant sealed and has refused to allow him access to date.

27. The Claimant went further to say that as he was waiting for his moving to Lilongwe, he received another letter reversing the decision and shifting him to the head office as Deputy Director Planning. The Claimant said that when he was moved to the head office, Mr. Meke took up his position and was immediately promoted to full director responsible for courier. He said the new position of Deputy Director Planning had never existed before and had no job description. The Claimant said that he moved to the head office and for two months he just stayed doing nothing. He said he kept pushing for job description but no avail. Later he was told that his position was changed to Deputy Director of Operations Planning who would be reporting to the Director of Operations, yet he had no experience in operations. He went further to say that after he queried, his position was changed to Deputy Director responsible for sales where he would oversee national sales.
28. The Claimant went further to say that since he was deputy director his position could be change to deputy director for anything even for positions that never existed before so long as it was called deputy director.
29. The Claimant also said that after the audit, it was alleged that he was involved in some transactions which could not be accounted for. And he was called for a disciplinary hearing in August 2018. He said the hearing was based on the said purported audit report he said he explained every item that they said was unaccounted for and he challenged the auditors that a proper audit requires seeking explanations from those involved before a final report is produced. He informed the auditors that if they had sought his explanations before producing the report all the items could have been duly explained but this was not done because the exercise was done to find faults. He said the results of the second disciplinary hearing did not come out until he left employment a year later.
30. The Claimant further said that on Friday 28th June 2019, whilst was he was in his office, he was approached by Mr. Kazembe from National Police Headquarters who asked him for his phones. He surrendered the phones and Mr. Kazembe went through the phones for

a while and then handed them back to the Claimant. The Claimant asked what Mr. Kazembe was looking for but he did not respond, and he just left.

31. The Claimant further said that on Monday after he knocked off, he received a phone call from his office colleague that security personnel were changing locks to the Claimants office and he wondered what was going on. The Claimant called the defendants security head who confirmed to have been advised by the Postmaster General to seal the Claimant office and never to allow him into the premises. The Claimant said he tried to call the Postmaster General to understand what was going on, but he never picked his calls.
32. On Tuesday 2nd July 2020 he was called by clerk that he had a letter for him. He was handed a suspension later on allegations that he was being used investigated by the police. The Claimant said that he had no idea at that point as to what the investigations was all about. He said the letter alleged that they were there was an article on social media alleging that some members of the defendant institution printed ballot papers in favour of the DPP and the Claimant wondered how he was connected to the say that ego which he had not even seen. He tendered GB 4 as a copy of the suspension letter. The letter alleged that the Claimant was being investigated by police in connection with the four Santiago that appeared on the social media shortly after the elections in May 2019 and that as such, he would be on suspension with full pay pending the conclusion of investigations.
33. The Claimant went further to say that from Brendan August 2019 whilst he was on suspension he was arrested by police who were in two land cruisers full of police officers heavily armed and he was taken to Blantyre police. The Claimant said that the officers who arrested him said they were only under instructions to arrest him and that his issue would be dealt with by police headquarters. After two days Mr. Kazembe from police headquarters came to grant him bail and told him that they had not received any tangible information from the defendant, and they would be granting him bail without any conditions he exhibited a copy of the bail bond as GB5.
34. Also said that he continued to interact with his colleagues from the office. Through such interactions he learnt that the defendant was paying allowances for Mr. Kazembe to travel from Lilongwe to Blantyre. Exhibit GB 6i and ii copies of documents showing payment to Mr. Kazembe.
35. The Claimant went further to say that on 27th August 2019 he received another letter GB 7 lifting the suspension. He said this again was a demotion was from national office. His

office remained sealed and all the items they are in including his personal items and cash were locked up there. He said he tried his efforts to access his items but to no avail.

36. The Claimant said that the treatment he suffered under the hands of the defendant clearly showed that he was not needed in the organization and he was only forcing himself in he said that could be seen from GB7 he was being posted to Mzuzu with no position and no job description. The Claimant said he queried the defendant but he was already informed that he would be responsible for sales in Mzuzu. He found this to be a serious demotion because this position was being held by someone on the M8 which was 5 grades below him. He said in response he wrote the defendant declining transfer to Mzuzu and asking that they arrange his exit as it was clear that his position was unattainable. He exhibited the letter as GB8. The Claimant said that in the letter he highlighted the ill-treatment he suffered at the hands of the defendant.
37. The Claimant went further to say that after GB8, he asked the Defendant to open his office to take out his items but the Defendant has not complied to date.
38. The Claimant further said that he tried all his efforts to get back his items from the office including calling the Postmaster General on several occasions but the Postmaster General could not pick his calls. He went to the Defendant's office to ask the Postmaster General to allow him access to his office, but access was denied and the Postmaster General refused to meet him but ordered security personnel to throw him out. The Claimant also said that the Postmaster General, blocked his calls.
39. The Claimant went further to say that since he could not meet the Postmaster General and could not call him, he sent a message to the Postmaster General expressing his disappointment and he indicated that the Postmaster General should not push him to the extreme. He went further to say that after the text, the Postmaster General reported to police claiming that the Claimant was intimidating him as a result of which on 9th October at around 3am over 15 police officers stormed his house and bundled him into a police vehicle and took him to Blantyre police where he was locked up. The case was called up for hearing over a number of times but the Postmaster General or any other of the Defendant officers, never went to court to testify. Subsequently, the case was withdrawn and the court acquitted him.
40. The Claimant said that the Police duly communicated the withdraw of the case to the Defendant who initiated the case. GB9, a copy of the communication from police to the Defendant and copied to the Claimant was tendered in evidence to sport this point.

41. The Claimant argued that as seen that the Defendant was responsible for the arrest of the Claimant as it was the Defendant who was paying for the police officers responsible for the arrest and the police in GD9 were reporting to the Defendant as the initiator of the case.
42. In GB9, the Police informed the Defendant that the natter against the Claimant was withdrawn at the instance of the complainant and that the court discharged the Claimant under section 247 of the CP & EC on 11th October 2019 with the effect that by 20th October 2020, the Claimant was acquitted under section 247(2) of the CP & EC.
43. The Claimant argued that having been arrested at the instance of the Defendant twice, the Defendant having paid for allowances of police officers responsible for the arrest and in view of GB9, it is apparent that the arrest was all at the instance of the Defendants.
44. The parties cited a number of cases on the issue of false imprisonment which the court found useful. Some of the cases will be referred to in this judgment. However, the Defendant also raised issues with the Claimant's pleadings as well as an issue of absence of material witnesses.
45. On the first issue of pleadings, the Defendant argued that where at the trial, the evidence establishes facts different from those pleaded, the action will be dismissed. The defendant cited a number of cases including the Malawi Supreme Court of Appeal Case of *Malawi Railways Limited v. Nyasulu* [1998] MLR 195 (MSCA). In the *Malawi Railways Limited v. Nyasulu Case*, the court held that in adversarial system of litigation, it is the parties themselves who set the agenda for the trial by their pleadings and that neither party can complain if the agenda is strictly adhered to. In so holding, the Court referred to an article by Sir Jack Jacob from the (1960) Current Legal Problems entitled "The present importance of pleadings," where the author stated as follows at 174:

"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings . . . for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings.

46. The position that the parties are bound by their pleadings was reaffirmed in the case of **National Bank of Malawi v. Right Price Wholesalers Ltd** [2013] MLR 276 where the Supreme Court of Appeal had this to say at page 282:

We acknowledge that pleadings define the issues for determination between the parties. Each party to a case is bound by their respective pleadings.

47. The Defendant also cited the Kenyan case of **Daniel Otieno Migore v. South Nyaza Sugar Co. Ltd** Civil Appeal No. 52 of 2017 which holds to the effect that parties are bound by their pleadings and that where the evidence is at variance with the pleadings, is to be rejected.
48. The Defendant referred to the Claimants statement of case in paragraphs 3 and 6 where the Claimant stated as follows;

‘In or around July 2015, the Defendant without the consent of the Claimant converted the Claimant’s money amounting to K9,800,000 and the other items which the defendant had despite numerous reminders refused or neglected to release to the Claimants the said money and goods.’

‘Further around the same time, the Defendant procured the arrest of the Claimant and caused him to be detained and to appear before the court which granted him bail.’

49. As rightly observed by the Defendant, it is clear from the pleadings that the false imprisonment and the conversion of the money and the property took place in or around 2015 and yet in the evidence, the Claimant said that the arrest and conversion took place in 2019. The Claimant in the pleadings mentions one arrest but, in his evidence, he refers to two arrests; one which he said occurred on 21st August 2019 and the second arrest which he said occurred on 9th October 2019. The Defendant submitted that that the evidence of the Claimant is at variance with his pleadings and that on the authorities above, the evidence should be rejected.

50. We agree with the Defendant’s submission on the issue of pleadings and we reject the evidence of the Claimant which seeks to prove different arrests from the one pleaded. We will still however despite that finding proceed to deal with the merits of the Claimant’s case.

51. False imprisonment is the restraint of a person’s liberty without any justification at law. In the case of **Fida Faiti and 9 others v Malawi Telecommunications Ltd** [2006] MLR 156 (HC) the court described false imprisonment as follows;

The wrong of false imprisonment consists in the act of arresting or imprisoning any person without lawful justification or otherwise

preventing him without lawful justification from exercising his right of leaving the place in which he is. It may also be committed by continuing a lawful imprisonment longer than is justifiable See Cobbet v Grey (1849–50) 4 Ext 729 or by imprisoning a person in an unauthorized place. See Mee v C Mikshank (1902) 86 LT 708. The wrong of false imprisonment is in most cases that of assault also, but not necessary so; locking a man up in a room in which he already is by his own act amounts to false imprisonment but is no assault. To constitute the wrong in question there need be no actual imprisonment in the ordinary sense i.e. incarceration. It is enough that the plaintiff has been in any manner wrongfully deprived of his personal liberty. A mere unlawful arrest for example, amounts in itself to false imprisonment, and so does any act whereby a man is unlawfully prevented from leaving the place in which he is; for example, a house or a ship See Warner v Riddiford (1858) CB (NS) 180.

52. For the Defendant to be guilty of false imprisonment, it must be shown that the Defendant laid a charge against the Claimant as opposed to merely reporting a crime and allowing the police to do their own investigations (see *Kazombo v Reserve Bank of Malawi* [2004] MLR 140 (HC); *Mvula v. Norse International Ltd* [1993] 15 MLR 331). In the case of *Pearson Chafuli v. Chibuku Products Limited* Civil Cause No. 3795 of 2001, this is what the Court said;

In saying this I am alive to the settled principle of law that where a person makes a charge against another on which it becomes the duty of the police to act, the person making the charge is liable for false imprisonment. Further, this court is aware that if a person merely gives information to the police and the police act accordingly to their own judgment, no liability for false imprisonment arises. In the absence of evidence to the contrary, I conclude that the Police put the Plaintiff in custody on their own. Indeed, it was perfectly possible for the Police not to arrest the Plaintiff if it thought that there was no case against him notwithstanding any report by the Defendant. Indeed, I doubt if the Defendant's agents and/or servants had control over what should happen to the Plaintiff upon making the report to the Police. Consequently, the Defendant cannot be held liable for the detention of the Plaintiff by the Police.

53. In the case of *Manda v Ethanol Company Ltd* [1993] 16 (2) MLR 572 where the defendant's employee not only took the plaintiff to Police, but clearly also told the police that the plaintiff had stolen computer paper, and where, against the Police's better judgment after investigation, he still pressurized them to prosecute the plaintiff, the court had no difficulty in holding that the defendant had laid charges against the plaintiff and that it was therefore liable for false imprisonment. Similarly, in *Matanda v. Sales Services Limited* [1990] 13 MLR 219, where the Defendant went beyond laying information before the police and sought further evidence when the police decided that

the case was spurious and acted in a manner to make it the duty of the police to act, the Defendant was held liable for false imprisonment.

54. The Claimant argued that the Defendant did not merely relay information, but it is obvious that they laid charges and that the police were merely agents of the Defendant. The Claimant argued that whilst the offence is alleged to have been committed in Blantyre, the Defendant opted to report the matter in Lilongwe and went as far as paying allowances for a police officer and his driver to travel to Blantyre from Lilongwe. The Claimant further argued that this shows that the whole process was initiated and being controlled by the Defendant. He further argued that the Defendant, having caused his first arrest, never charged him before any court of law and never prosecuted him.
55. In his evidence, the Claimant said that the suspension letter GB4 showed that there were discussions between the Defendant and the Police which he was not aware of. He also said that this was confirmed by the Postmaster General who confirmed in his statement to the police that he was the one who wrote the letter to the Inspector General to investigate the Claimant. According to the Claimant's evidence, the first arrest was effected by Mr. Kazembe of National Police Headquarters who told the Claimant that he was instructed by officers from National Police Headquarters to arrest the Claimant.
56. On its part, the Defendant acknowledged to have lodged a complaint with the police following a newspaper article in which some of its senior officers were mentioned as having been involved in vote rigging. This is clear from NF1. The Defendant argued that the police acted on their own and arrested the Claimant. The Defendant argued that although the Claimant said that it was Mr. Shamu who wrote the police to investigate the Claimant, the Claimant failed to substantiate the claim.
57. In cross examination, the Claimant conceded that he did not produce the letter which he said Mr. Shamu wrote to the Police to investigate him. When referred to paragraph 42 of his statement where he said that the police who arrested him told him that they had instructions from National Police headquarters to arrest him and asked as to who instructed the police to arrest him, the Claimant said he does not know. The Claimant also acknowledged that Mr. Kazembe whom he alleged told him that he would be released on bail was not in court, he conceded the same.
58. The Claimant also argued that the Defendant paid for allowances for Mr. Kazembe from Police Headquarters. This evidence was however denied by the Defendant's witness who was responsible for signing the requisition form (GB6) who denied having signed the

same and said that the Defendant did not have the document in its custody. The document cannot therefore be proof of what the Claimant alleges.

59. With the foregoing, the Court finds that the Claimant has not produced evidence to back up his claim that the arrest was initiated by the Defendant having failed to produce the alleged report of the complaint to the police by Mr. Shamu. It is also considered that in his own statement, in paragraph 42, the Claimant indicated that the officers who arrested him said that they were on instructions from National Police headquarters. The Court therefore finds that the evidence falls short of proving that the first arrest was initiated by the Defendant.
60. If after the arrest, no further actions were taken and the Claimant was never charged or prosecuted before any court of law, any wrong arising from his arrest cannot be taken upon the Defendant. It is the Police through the Attorney General which must be taken to task.
61. On the second arrest, the Claimant gave a background to the ill-treatment that he claimed suffered at the hands of the Defendant which included postings from Blantyre to other regions and demotions in his position which led him to conclude that his position was no longer attainable at the Defendant. He said he then wrote a letter GB8 explaining the ill-treatment and also requesting the Defendant to open his office to allow him access his items. He said he tried to call the Postmaster General but the Postmaster General could not answer him and blocked his calls so he decided to go to the office to meet the Postmaster General but the Postmaster General refused to meet the Claimant. In reaction, he said he sent a text to the Postmaster General expressing his disappointment, but the Postmaster General reported him to police claiming that the Claimant was intimidating the Claimant and as a result the Claimant was arrested on the morning of 9th October 2019 at 3:00am.
62. The Claimant said that he was released on bail after two days, and the matter was later withdrawn, and he was acquitted. He also said that the Defendant officers or the Postmaster General never went to court to testify. The Claimant relied on GB9 which is a letter written by Supt. Mwayiulipo which was addressed to the Director General Malawi Post Corporations and copied to the Claimant among others. Exhibit GB9 shows that the case against the Claimant was discharged under section 247 of the CP & EC on 11th October 2019 with a resultant acquittal after the expiry of 12 months as provided under section 247(2) of the CP & EC.

63. The Claimant argued that it is clear from the evidence that the police were acting as agents of the Defendant as it was the Defendant's Postmaster General who took the matter to police and caused it to be withdrawn and then the police had to report to the Defendant about the acquittal.
64. The Defendant argued in its submissions even with respect to the second arrest that the Claimant failed to show that the arrest was incited by the Defendant. The Defendant took the Claimant to task on GB9 in cross examination where upon the Claimant acknowledged that the complainant was Mr. Shamu and that Mr. Shamu was entitled to complain upon being insulted. When referred to paragraph 3 of GB9 where it is stated that the matter was withdrawn by Mr. Shamu, the Claimant said he did not know about the withdrawal. He also said he did not know if by then Mr. Shamu had left the Defendant organization.
65. The offence for which the Claimant was arrested on his second arrest was one of intimidation and use of insulting language according to GB9. The said GB9 also shows that the complainant was Mr. Henry Shamu and in cross examination, the Claimant acknowledged that the said Mr. Shamu was entitled to complain. What comes out clear from the evidence is that the issue giving rise to the second arrest was between the Claimant and Mr. Henry Shamu. The Defendant was not intimidated nor insulted as such the Defendant could not lay charges. We agree with the Defendant that in the circumstances, the Defendant cannot be faulted for having caused the arrest of the Claimant on the second arrest.
66. The claim of false imprisonment in relation to the second arrest therefore fails.

Whether the Defendant is liable for Defamation

67. On defamation, the Claimant argued that by causing his arrest, the Defendant presented him as a criminal. He argued that during the first arrest, he was arrested by armed police officers who blocked him with two police vehicles in full view of the members of the public in the middle of Blantyre CBD at National Bank of Malawi during peak hours when people were knocking off from work. During his second arrest, the Claimant said that 15 armed police officers stormed his house at 3 am banging the gate and almost all his neighbours woke up to see what was happening considering the awkward time this was happening. He said the incarceration portrayed his as a criminal a fact that the Defendant failed to prove before the court of law.

68. The Claimant went further to say that at the time all this was happening, he was a President of the Chartered Institute of Marketers in Malawi and the Defendant's conduct embarrassed him considering his position. For this, the Claimant exhibited GB10. GB10 is a media post showing that the Claimant was the President of Chartered Institute of Marketers in Malawi.

69. Several cases were cited by the Claimant in the skeleton arguments as well as the Defendant in the submissions to which the court has had recourse. Some of them will be referred to in the discussion below.

70. As to what constitutes, defamation, I have considered the case of **Nyirenda v AR Osman and Co** [1993] 16(2) MLR 681 (HC). In that case, this is what Chatsika J (as he then was said:

Defamation has been defined, in different terms, as the publication of a statement "which tends to lower a person in the estimation of right-thinking members of society generally; or which make them shun or avoid that person". It has also been defined as any imputation which may tend to lower the plaintiff in the estimation of right-thinking members of the society generally, to cut him off from society or to expose him to hatred, contempt or ridicule. Having established that the statement or imputation answers the above qualities, four things must be satisfied in order for the plaintiff, subject, of course, to the availability of any possible defence:

- (a) *That the words complained of were published maliciously;*
- (b) *That they are defamatory;*
- (c) *That they refer to the plaintiff;*
- (d) *That they were published.*

71. Both the Claimant and the Defence agree and rightly so to the proposition in the case of **Mtila & Others v. Stagecoach Malawi Limited** [1997] 1 MLR 97 that a publication can be by words or by conduct and that parading a person in handcuffs amounted to defamation. Apart from parading a person in handcuffs, the fact of incarceration has also been said to amount to defamation (see the case of **Fida Faiti and 9 others v Malawi Telecommunications Ltd** [2006] MLR 156 (HC)).

72. Just as with the first claim, the allegation was that the conduct amount to defamation occurred in or around July 2015. There was on the evidence no single piece of evidence pointing to any conduct of 2015 which would amount to defamation.

73. Be that as it may, even assuming that the claim is arising from the two arrests of August 2019 and October 2019, having found that the Defendant did not initiate the arrest, I wonder how the Defendant can be found liable for acts done by the Police on their own

votion following the receipt of a complaint. The claim would still fail for want of evidence.

Whether the Defendant would be liable for Malicious Prosecution.

74. The essential elements which must be proved on a tort of malicious prosecution are best explained in **Clerk and Lindsell on Torts 12th Edition, paragraph 1695** (at page 894) where it is provided as follows:

"In an action of malicious prosecution, the plaintiff must show first 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; fourthly, that it was malicious."

75. The above quote was cited with approval in the case of **Sulaimana & Another v. Attorney General** [2004] MLR 383 which highlighted the four elements which must be proved and expounded on the same. The four elements which the Claimant must establish to prove a claim of malicious prosecution are:

- a. That the Defendant prosecuted the Claimant;
- b. That the prosecution ended in favour of the Claimant;
- c. That the prosecution was without reasonable and probable cause; and
- d. That the prosecution was malicious.

(see also **Lapukeni v. Commercial Bank of Malawi** [1996] MLR 139; **E.K. Mithi & Others v. Reserve Bank of Malawi** [2006] MLR 118).

76. The Claimant argued that all the elements have been duly established. He argued that all the process was at the instance of the defendant and the police were only acting as Defendant's agents. It was argued that defendant could not cause arrest and prosecution of the Claimant and then at will discontinue it and then claim that they had valid cause to do so. The Claimant further argued that, from the background of the issue, the defendant's senior officials had had political scores to settle with the Claimant and opted to use the machinery of the state to achieve that.

77. The Defendant on its part, argued that the Claimant failed to plead all the ingredients of the claim of malicious prosecution. The defendant argued that the Claimant did not plead the fact that the defendant prosecuted or caused him to be prosecuted and that the said prosecution was done maliciously and without reasonable cause.

78. The Defendant further argued that the Claimant whilst mentioning two arrests, did not state which arrests culminated into the prosecution and did not prove that the prosecution was done maliciously and without reasonable cause. The defendant argued that the

Claimant could not rely on GB 9 which was authored by Mr. Mwayiulipo which is an inadmissible as the author did not tender it himself. The defendant went further to argue that, if it was admissible the acquittal mentioned in the letter relates to proceedings that did not concern the defendant.

79. The Claimant in his evidence referred to two arrests. In the first arrest, the Claimant did not show whether he was prosecuted or how the prosecution ended. The evidence therefore does not amount to malicious prosecution as not all the elements have been established in relation to the first arrest.
80. In relation to the second arrest, contrary to the Defendant's submission, Exhibit GB9 (a letter written by Supt Mwayiulipo), is admissible as it was copied to the Claimant making him one of the addressees. However, although the letter is evidence of an acquittal, as already noted above, the proceedings were not instituted by the Defendant as the complaint was lodged by Mr. Shamu. The claim for defamation therefore fails even in respect of the second arrest.

Whether the Defendant is liable for conversion of the Claimant's items and Money.

81. In the skeleton arguments, the Claimant relied on the cases of *Msowoya v. Malawi Entrepreneurs Development Initiative* [1997] 1 MLR 278 and *Mpungulira Trading Limited v. Marketing Services Division* [1993] 16 MLR 346. In the case of *Msowoya v. Malawi Entrepreneurs Development Initiative*, this is what the court had to say on the tort of conversion;

Conversion is dealing with goods in a manner inconsistent with the rights of the true owner, provided there is an intention on the part of the person so dealing with the goods to negative the right of the owner to assert a right inconsistent therewith. See Lancashire and Yorkshire Railways v MacNicole [1919] 88 KB 601. This has been put in simple terms in the case of Chitungu and another v Napolu Ukana Breweries Ltd Civil Cause No. 601 of 1992 (unreported) where Mtegwa J said:

"Conversion is an act of wilful interference with any chattel in a manner inconsistent with the right of another without lawful justification, whereby that other is deprived of the use and possession of the chattel."

82. Where the Defendant asked the Claimant to collect his goods, there will be no conversion (see *Chimasula v Imperial Timbers Ltd* [1994] MLR 46 (SCA)).
83. The Claimant argued in the skeleton arguments that the Defendant locked his office where the Claimant had money and other items. He said the Defendant by refusing him access to his office to get the money was dealing with the Claimant's items inconsistent

with his rights as the owner. He argued that the Defendant has no right to keep the Claimant's items and money away from the Claimant. He therefore submitted that the Defendant is liable for conversion of the money and the items.

84. Just as with the other claims, the pleadings indicate that the conversion occurred in 2015 when the evidence points to 2019. The claim would therefore be dismissed on the basis that the evidence adduced is at variance with the claim. Just as with the other claims, I will still proceed to determine the claim on its merits.
85. On the issue of money, the Defendant argued that the Claimant did not show evidence that he received the money and that what the Claimant showed was a loan agreement not evidence that he obtained the money mentioned in the agreement. The Defendant further argued that it is very improbable that the Claimant would borrow such a huge sum of money and keep quiet about it for such a long period of time whilst repaying it using other sources. It is on record that he only started raising the issue of money and other items in September 2019. The Defendant also argued that the Claimant contradicted himself in that he said he knocked off at 16:30 and that after knocking off, he never went anywhere else yet he also sought to argue that he went back to work to study for his PhD. The Defendant further argued that the in paragraph 69 of his statement said that at the time he was arrested for the second time and his office had been sealed, he and his wife had just borrowed K10million. The Defendant argued that since the arrest took place on 9th October 2019, this contradicts the evidence that the Claimant took the loan on 1st July 2019.
86. As rightly observed by the Defendant, there is a clear contradiction in the evidence of the Claimant in that he said he obtained the loan on 1 July 2019 yet he also said that at the time of his second arrest which according to his paragraph 58 was on 9th October 2019, he had just borrowed K10 million with his wife. It is also considered that the Claimant did not call his wife as a witness considering that he said that they borrowed the money together or the other two people who signed the loan agreement were called as witnesses to confirm that the Claimant obtained the loan as claimed. These considered together raise doubts as to whether indeed the Claimant left any money in his office. It is also considered that the Claimant did not raise the issue of such substantial amount of money being in his office until two months later. The Court's conclusion from these facts is that there was no such money left in the office.
87. With the finding that the Claimant left no money in the office, the claim for consequential loss emanating from locking up the Claimant's money, cannot stand. It is dismissed.

88. As to the other listed items namely HP laptop, laptop bag, USB charger, 2 tables, 4 brand new shirts; and Various other items. There is no dispute that at the time the office was locked, the Claimant had his other items in the office which included the above listed items. The Claimant exhibited GB13 which contain list of items in the office of the Claimant which was signed by the Chief Security Officer and other officers of the Defendant. The list contains the following items;

- a. HP laptop,
- b. laptop bag,
- c. USB charger,
- d. Fan,
- e. 3 shirts
- f. 3 office chairs
- g. 2 tables,
- h. 3 receivers,
- i. Laptop charger.

89. The Claimant in his evidence said there were more items in the office than these but he did not say what other items were in the office except for money which we have already ruled on. In the absence of details of the other items which he left in the office, and in view of the list provided by the Claimant in the list, the Court finds that the items in GB13 are the items that were found in the office of the Claimant.

90. Exhibits GB9 and GB12 show that the listed items are still in the hands of the Defendant. The Defendant has not denied the fact that it is still in possession of the items belonging to the Claimant.

91. The Claimant argued that in September 2019 he wrote the Defendant demanding access to his items but the Defendant ignored the demand. The Defendant argued that as the Claimant's suspension was lifted on 27 August 2019, the Claimant had the liberty to go back to his office to collect the items but did not do so. The Defendant argued that the Claimant did not indicate as to why he chose not to collect his items. The Defendant acknowledged receipt of the letter of 6th September 2019 in which the Claimant was asking for his items but the Defendant argued that it ignored the letter because the Claimant was free to go to his office.

92. The Defendant's witness said that the letter of 6th September 2019 was addressed to him but the Claimant never went to him for the items but instead chose to engage with the

Postmaster General. Indeed it is clear from the letter that the Claimant was addressing the Director of Finance and Administration.

93. On the other hand, NF2 shows that the Defendant wrote the Claimant on 25th September 2019 informing him that he could go collect his property on 30th September 2019. The letter does not show that it was received by the Claimant although the Defendant's witness said that the letter was hand delivered by an officer of the Defendant. The Defendant officer who had delivered the letter was not invited to testify. Again, in GB9, the Police referred to the issue of Claimant's items which the Defendant was keeping. This was in 2020. The Court's conclusion from the foregoing is that the Defendant had as of October 2020 not given the Claimant access to his items.
94. What comes clear from the Defendant's evidence is that the Claimant's items are still in the possession of the Defendant. With exception of the issue of lack of access for the Claimant to access his items, there is no suggestion on the evidence that the Defendant used any of the Claimants items. Can it be said in the circumstances that the Defendant converted the property of the Claimant.
95. The definition of conversion as propounded by Mtegha J in the case of *Chitungu and another v Napolo Ukana Breweries Ltd* Civil Cause No. 601 of 1992 (unreported) where he stated as follows becomes handy said:

"Conversion is an act of wilful interference with any chattel in a manner inconsistent with the right of another without lawful justification, whereby that other is deprived of the use and possession of the chattel."

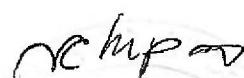
96. In *Mlombwa t/a Umodzi Transport v. Cotam Transport* [1999] MLR 206, the court describing conversion held as follows;

At law, conversion is an act of deliberate dealing with a chattel in a manner inconsistent with another's right whereby the other is deprived of the use and possession. To be liable the defendant need not intend to question or deny the plaintiff's rights; it is enough that his conduct is inconsistent with those rights. It is not possible to categorise exhaustively all modes of conversion, for while some acts are necessarily an absolute abrogation of the plaintiff's rights and deprive him of the whole value in the goods, there may be others where the courts retain a degree of discretion in deciding whether those acts amount to a sufficient deprivation. Nevertheless the principal ways in which a conversion may take place include the following: when property is wrongfully sold in market over although not delivered; when it is wrongfully retained; when it is so dealt with that it is destroyed or otherwise totally lost to the person entitled; and when it is

so dealt with that the manner of dealing constitutes a denial of title in the person entitled, that dealing being otherwise than the modes previously mentioned.

97. The Claimant was deprived of the use and possession of his items which are in the hands of the Defendant. I am mindful that as it was held in the case of *Chimasula v. Imperial Timbers Ltd* [1994] MLR 46 (SCA) that there would be no conversion if a Claimant is called to collect his goods. It is noted from the evidence that whilst the Defendant said that the Claimant was called to collect his items as seen in Exhibit NF2, the Claimant in his evidence indicated that was never given access to his items. The Author of NF2 was not called to testify. The Defendant said the letter NF2 was hand delivered to the Claimant but the person who delivered the letter was not mentioned by name and was not called in evidence to testify to that fact.
98. The Claimant has indicated in his evidence that he raised the issue of the property in the lower court at the time his matter was withdrawn which was well after NF2 was written. GB9 which was written a year later after NF2 also raised the issue of the items and the Claimants desire to access the same. The Court's conclusion from the facts, is that the Claimant was never given access to his items. The Defendant's conduct therefore amounted to conversion.
99. The Claimant therefore is entitled to recover his items. He is also entitled to damages for loss of use of his property.
100. The Claimant has succeeded in part only. He cannot be entitled to full costs of the action. He will only be entitled to 40% costs of the action. It is so ordered.

Made in Open Court on 19th day of March, 2024 at Zomba.



V. Palikena-Chipao

JUDGE