

IN THE COURT OF APPEAL FOR ZAMBIA
HOLDEN AT NDOLA
(Civil Jurisdiction)

192/5/50/2017
Appeal No 45/2017

B E T W E E N :

KILLIAN IVES MULENGA

APPELLANT

AND

THE ATTORNEY GENERAL

RESPONDENT

CORAM : Mchenga DJP, Chishimba and Kondolo, JJA
1st August, 2017 and 8th December, 2017

For the Appellant : Mr. Ives Mulenga - In Person
For the Respondent : Major C. Hara Deputy Chief State Advocate – Attorney
General's Chambers.

J U D G M E N T

CHISHIMBA, JA, delivered the Judgment of the Court.

CASES REFERRED TO:

1. Trade Kings Limited Vs. Unilever Plc and Others (2000) Z.R. 16 (SC)
2. Robson Banda Vs. Evaristo Mulenga (2003) Z.R. 121 (SC)
3. Mwanza Vs. Zambia Publishing Company Limited (1981) Z.R. 234 (SC)
4. Rose Vs. Plenty [1976] 1 WLR 141
5. Attorney General Vs. Marcus Kampamba Achiume (1983) Z.R. 1 (SC)
6. Augustine Kapambwe Vs Danny Maimbolwa and The Attorney General (1981) Z.R. 127 (S.C.)
7. Briscoe Vs. Briscoe [1966] 1 ALL ER 465
8. Machobane Vs. The People (1972) ZR 101 (CA)
9. Eddie Christopher Musonda Vs. Lawrence, SCZ Appeal No. 41/2017

LEGISLATION AND OTHER WORKS REFERRED TO:

1. Winfield and Jelowicz on Tort
2. Gatley on Libel and Slander

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3. Caster-Ruck on Libel and Slander
4. R.K. Bangia on Law of Tort 7th Edition
5. Halsbury's Laws of England 4th Edition
6. The Rules of the Supreme Court of England (White Book) 1999 Edition
7. Phipson on Evidence 17th Edition

This is an appeal against the Judgment of the lower Court dismissing the Appellant's claim for damages in the sum of K250, 000, 000.00 arising from an action for slander against the Respondent.

The brief background of the facts in the lower Court are that; the Appellant is an Advocate practicing under the name and style of ~~Kumasonde Chambers~~. He ~~was retained to act on behalf of Bornwell~~ Katita Kamoya and 3,520 others. His instructions were to pursue a claim in respect of underpayment on the calculation of accrued interest arising from the case of ***Nasando Isikanda and Others Vs The Attorney General 2002/HP/1055***. In the course of negotiations, several letters were written to the Permanent Secretary under the Ministry of Justice. Meetings were held with technical staff to resolve the Appellant's clients' claims. In addition, the issue of the unpaid sum of K10, 000,000,000.00 was brought to the Permanent Secretary's attention on 29 May, 2015.



On 4th June, 2015, the Appellant went to the Ministry of Justice to inquire on the progress, if any, on the aforesaid issues.

According to the Appellant, after explaining how the claimed amount arose, the Permanent Secretary, in the presence of Mr. Evans Mumbi, an Assistant Accountant, promised to revert back. However, upon the Appellant making further inquiries on the progress of the claim of underpayment in respect of the accrued interest, the Permanent Secretary became emotional and started shouting at the Appellant. The Permanent Secretary was restrained by Mr. Evans Mumbi from physically assaulting the Appellant. The Permanent Secretary then uttered the following words in the presence of Mr. Evans Mumbi namely that;

"because you have no clients that is why you are making false claims, you are a thief."

According to the Appellant, the words meant that he was a dishonest and fraudulent person claiming money from the Government. Further, that the Appellant is not fit to practice law.



At trial, the Appellant testified that he had been greatly injured in credit and reputation as an Advocate by the words uttered by the Permanent Secretary.

PW2 stated in his evidence that he had computed the accrued interest claimed by the Appellant's clients.

The Respondent in defence stated that it had called for a meeting between its technical staff and the claimants which revealed that the Appellant's clients' claims were false and baseless. A fact explained to all in the presence of Mr. Mumbi, who also explained to the Appellant. In a nutshell the Respondent denied uttering the alleged slanderous words but merely informed the claimants that the claim was false and would not be entertained by the Government.

At trial DW1, Mr. Evans Mumbi testified that after explaining to the Appellant that the claims had already been settled, the Permanent Secretary released him from the office where the meeting was held leaving the Appellant behind. DW1 denied that the Permanent Secretary uttered the words alleged by the Appellant. He further, refuted the fact that he restrained the Permanent Secretary from physically assaulting the Appellant. He maintained that the Permanent



Secretary had been seated behind his desk throughout the meeting. He added that in fact the Permanent Secretary had a problem with his legs restricting his movements and could only move with aid.

The Learned Trial Judge found that the Appellant had failed to prove that the Permanent Secretary uttered the slanderous words attributed to him. In addition, the lower court found that the Appellant failed to prove that he has been shunned, avoided or ridiculed by society as a result of the slander. Further, that no evidence was led to show that the slander was communicated to the world at large.

The Learned Trial Judge found that the evidence of DWI was credible as he appeared composed and truthful. The court consequently accepted his version of the events on the date in issue and dismissed the Appellant's claim.

Being dissatisfied with the Judgment of the court the Appellant advanced the following grounds of appeal;

- 1. That the Court below erred in both law and fact when it held that, after carefully analyzing the evidence adduced, I have come to the inescapable conclusion that the Plaintiff has failed to prove his case.*
- 2. That the court below erred in both law and fact when it held that, further there is no proof that has been presented to court to show that*



the Plaintiff has been shunned, avoided or ridiculed by society as a result of the slander. In addition, the Plaintiff has not led evidence to show that the slander was communicated to the world at large.

- 3. That the Court below erred in both law and fact when it held that, I would dare to say that by removing the Permanent Secretary from this action, the Plaintiff weakened his case in that he denied himself an opportunity to challenge the Permanent Secretary Mr. Joseph Akafumba in Court.*
- 4. That the Court below erred in both law and fact when it held that, the Plaintiff sought to rely on the evidence of DW1 which was unhelpful to this cause.*
- 5. That the Court below erred in both law and fact when it held that, it had the opportunity of observing DW1 in court and he appeared to be composed and truthful. As a result, I have no basis for discrediting this evidence and not accepting his account of the meeting of 4th June, 2015.*
- 6. That the court below erred in both law and fact when it decided on its own not to hear the appellant's application for committal of the contemnor when the court had already granted leave to commence contempt proceedings.*

The Appellant filed into Court heads of arguments dated 3rd May, 2017. Under ground one, the Appellant argued that his testimony was unshaken in cross examination. Further, that DW1 was biased against the Appellant therefore his testimony ought to have been treated with caution. In fact, the Appellant had caused to be issued a *subpoena duces tecum* requiring DW1 to give evidence on the Appellant's behalf. DW1 had refused to testify in the matter on behalf of the Appellant.



The Appellant contended that the lower court did not analyze the evidence. In addition, that the Court preferred the evidence of the Respondent without stating the reasons. We were referred to the cases of *Trade Kings Limited Vs. Unilever Plc and Others* ⁽¹⁾ and *Robson Banda Vs. Evaristo Mulenga* ⁽²⁾ where the Supreme Court stated the need for trial courts to analyze all the evidence before it.

Under ground two the Appellant argued that there was no need for him to prove that he has indeed been shunned by any person or persons. The Appellant referred to the definition of defamatory statement in the *Halsbury's Laws of England 4th Edition*. Further the case of *Mwanza vs Zambia Publishing Company Limited* ⁽³⁾ was cited in which the Supreme Court stated that any imputation which may tend to injure a man's reputation in employment, calling or office carried out by him is defamatory.

The Appellant contended that the publication of a slanderous statement does not necessarily have to be to the world at large as held by the lower Court but to at least any one person other than the defamed. We were referred to extracts from the learned authors of *Winfield and Jelowicz on Tort, Gatley on Libel and Slander* and

Caster-Ruck on Libel and Slander as authority for this position of the law. The Appellant went on to argue that DW1 was in attendance at the meeting held with the Permanent Secretary where the slanderous words were uttered by the Permanent Secretary. Therefore the slander was communicated to a third party.

Under ground three the Appellant argued that it is a general principle of law that as long as a wrong is committed by the employee in the course of his employment, the employer is responsible for his wrongs. We were referred to the case of **Rose Vs. Plenty** ⁽⁴⁾ as authority. Further, that on this principle of the law, the Permanent Secretary, Mr. Joseph Akafumba, was removed from the proceedings as a Defendant by way of a Consent Order.

In arguing ground four, the Appellant contended that the Appellant did not in any way rely on the evidence on DW1. Despite a *subpoena duces* having been issued, DW1 had refused to testify on behalf of the Appellant. DW1 instead testified on behalf of the Respondent. Further, that the Court ought to have taken into account the fact that the Respondent failed to call the permanent secretary who was at the centre of the litigation. According to the Appellant, the



remarks by the Court that the Appellant sought to rely on the evidence of DW1 showed an unbalanced evaluation of the evidence. We were referred to the case of *The Attorney General Vs. Marcus Kampamba Achiume* ⁽⁵⁾ where the court frowned upon unbalanced evaluation of evidence where only the flaws of one side and not the other are considered.

Under ground five the Appellant argued that DW1's testimony was a fabrication which was not supported by any evidence. Further, that although omitted in the record of proceeding, the Appellant had asked DW1 if he had any medical evidence proving that the permanent secretary could only move when aided. DW1 did not adduce any evidence to support his assertion. Further, that DW1's evidence was in fact contradictory.

In arguing ground six, the Appellant contended that the lower court's refusal to hear the committal proceedings denied the Appellant the opportunity to know and appreciate the reason why DW1 refused to testify on his behalf.

The Appellant argued that the lower court took into account matters that it ought not to have taken into account and in the process

misdirected itself. The Appellant urged the court to allow the appeal in line with the decision of the Supreme Court in **Augustine Kapambwe Vs Danny Maimbolwa and The Attorney General** ⁽⁶⁾.

The Respondent filed into Court heads of argument dated 25th July, 2017. In response to ground one the Respondent contended that the Appellant failed to establish the requisite elements of the tort of slander.

In response to ground two the Respondent referred us to extracts from the following texts; **R.K. Bangia on Law of Tort 7th Edition** and **Halsbury's Laws of England 4th Edition**, where the learned authors discuss the elements to be proved in an action for defamation, namely that;

- (i) The statement must be defamatory;
- (ii) It must refer to the plaintiff
- (iii) The statement must be published or communicated to at least one person other than the complainant.

The Respondent argued that the Appellant did not establish the element relating to publication as DW1 did not recall the Permanent Secretary uttering the slanderous statements. Further, that there was



no communication to a person other than the plaintiff, therefore the lower court was on firm ground.

In response to ground three, the Respondent argued that even though the permanent secretary was removed as a party to the proceeding, the Appellant was at liberty to call him as a witness in line with the provisions of **Order 38/4/3 of the Rules of the Supreme Court of England (White Book) 1999 Edition**. We were further referred to a passage from **Phipson on Evidence 17th Edition** and the case of **Briscoe Vs. Briscoe** ⁽⁷⁾ where it was stated that a party has the right to choose which witnesses to call and in what order.

The Respondent, in response to ground four, argued that DW1's evidence could not assist the Appellant's case as DW1 had denied having heard the alleged uttered slanderous statement made by the Permanent Secretary.

In response to ground five, on the issue of demeanour, the Respondent drew our attention to the case of **Machobane Vs. The People** ⁽⁸⁾ in which the Supreme Court stated that demeanour of a witness is an item of evidence. A court must take note of the demeanour of a witness in deciding whether or not that witness' evidence is credible or



not. The Respondent argued that the court below was on firm ground by referring to the witness' demeanour as part of the evidence.

On the issue of committal of the alleged contemnor raised in ground six, it was submitted that the record of proceedings on 24th January, 2017 do not make any mention of contempt proceedings on the part of the plaintiff. The Appellant ought to have reminded the court below about the contempt proceedings against DW1 before trial begun. We were urged to dismiss the appeal.

We have considered the grounds of appeal, the arguments by the Learned Counsel and the authorities cited. It is not in dispute that a meeting was held on the 24th June, 2015, at the Ministry of Justice to discuss the Appellant's clients' claims against the Attorney General. In attendance was the Appellant, the Permanent Secretary and Mr. Evans Mumbi. The issue in dispute is the allegation by the Appellant that he was slandered by the Respondent in the presence of Mr. Mumbi when he uttered the following words; ***"because you have no clients that is why you are making false claims, you are a thief."***

Ground one and two will be dealt with together as both raise the issue of whether the Appellant had adduced evidence to prove his



claim. Simply put, whether the requisite elements of the tort of slander had been established.

Defamation is a tort that seeks to protect the reputation of a person. The learned authors of **Clerk and Lindsell on Torts 12th Edition** in respect of defamation state as follows;

"The law recognizes the right of every person, during life, to possession of a good name. A person who communicates to a third party a matter which is untrue and likely in the course of things substantially to damage the reputation of a third person is, on the face of it, guilty of a legal wrong for which the remedy is a claim in tort for defamation."

Further, the learned author of **Gatley on Libel and Slander 7th Edition** at paragraph 57 state that;

"Any imputation which may tend to injure a man's reputation in a business, employment, trade, profession, calling or office carried on or held by him is defamatory."

Defamation consists of two distinct torts namely libel and slander. In this instance, we are only concerned with slander which was alleged by the Appellant in the lower court. **Halsbury's Laws of England 4th Edition** at paragraph 1 & 12 define slander as follows;

"If the defamation is oral or in some other transient form, it constitutes the tort of slander... A slander for which an action will lie is a defamatory statement, made or conveyed by spoken words,



sounds, looks, signs, gestures or in some other non- permanent form, published of and concerning the plaintiff, to a person other than the plaintiff by which the plaintiff has suffered actual damages... which he must allege and prove..."

The elements to be proved in an action for defamation are as follows;

- 1) The words or statement uttered must be one that tends to injure the reputation of the Appellant by lowering the person in the estimation of right thinking members of society generally causing him to be shunned or avoided or to expose him to hatred, contempt or ridicule, injurious to his Profession.
- 2) The uttered words must refer or make reference to the complainant.
- 3) The words uttered must be communicated to at least another person other than the complainant.
- 4) That the plaintiff suffered some injury to his or her reputation.

The issues to be determined are as follows;

- (i) Whether the alleged slanderous words were uttered by the Respondent and would tend to injure the reputation of

Appellant by lowering him in the right thinking minds of members of society, generally causing him to be shunned or ridiculed.

- (ii) Whether the uttered words refer to the Appellant
- (iii) Whether the words were communicated to at least one other person other than the Appellant.

The evidence on record is that the alleged slanderous words were uttered in the presence of a third party, Mr. Mumbi. Mr. Mumbi denied that the Permanent Secretary uttered the words alleged in the meeting.

In our view, the alleged words if proved to have been uttered and communicated to another person other than the Appellant would no doubt tend to injure the reputation of the Appellant, imputing that he is a thief and would lower him in the minds of right thinking members of society and cause one injury to his profession as a legal Practitioner.

The important issue to be determined is whether the alleged slanderous words were uttered by the Respondent. DW1 in cross examination stated that ***"I do not remember the Permanent Secretary uttering the words.... because you have no clients that is why you are making false claims, you are a thief"***

DW1 further stated that he never restrained the Permanent Secretary from assaulting PW1. That he left the Permanent Secretary's office after being released, leaving PW1 there. We refer to pages 65 to 66 of the record of appeal.

The Appellant contends that there was unbalanced evaluation of evidence by the Court, that DW1's evidence was a fabrication and lacked credibility.

The learned trial Judge made a finding of fact as to the credibility of DW1. DW1 is the witness in whose presence the alleged slanderous words were uttered. On one hand, there was the evidence of the Appellant contending that the Permanent Secretary slandered him. Whilst on the other hand, DW1 vehemently refuted the allegations. The issue the Court was faced with was one of credibility. Which evidence she considered credible between the two competing evidence? The issues raised in grounds four and five by the Appellant relate to the acceptance of DW1's evidence as credible based on the Court's observation of the witness.



It is trite that in evaluating the testimony of a witness, a number of factors are worthy of consideration such as consistency of the evidence against prior statements or discrepancies.

Triers of facts are influenced by demeanour of witnesses, credibility and reliability, as these are relevant factors to take into account. The Learned trial Judge in respect of demeanour stated that;

"I had the opportunity of observing DW1 in Court and he appeared to be composed and truthful. As a result I have no basis for discrediting his evidence and not accepting his account of the meeting of 4th June, 2015."

We have perused the evidence by DW1 appearing at pages 64 to 66 of the record of appeal. Mr. Mumbi testified that he did not recall the Permanent Secretary uttering the words alleged nor restraining him from assaulting the Appellant at the meeting held in the Permanent Secretary's office. Further that he left the Appellant in the Permanent Secretary's office.

It is trite that an appellate court will not reverse a finding of fact unless made upon a misapprehension of fact or is perverse. The Learned trial Judge found DW1's evidence more credible. The issue is whether we can reverse the finding. In the case of **Eddie Christopher**



Musonda Vs. Lawrence ⁽⁹⁾ the Supreme Court in reference to demeanour of witnesses stated that;

"Also it is well established principle that the learned trial Judge is a trier of facts, he has the advantage of observing the demeanour of witnesses to determine as to who was telling the truth in the trial. Bearing that in mind, we cannot upset his findings."

Having combed the record, we find no material or basis upon which we can reverse the finding of fact made by the trier of facts on the demeanour and credibility of DW1. We are further of the view that there was balanced evaluation of the evidence by the Court below contrary to the contention by the Appellant. The Court below considered the evidence by both parties.

The Appellant in ground six had raised the issue of the contempt proceedings not having been heard by the Court below despite leave to commence having been granted. We are of the view that contempt proceedings can be heard at any time of the proceedings. The Appellant ought to have brought this issue to the attention of the Court. We are of the view that the Court below did not err in law or fact by proceeding to trial.



In regard to the issue of the removal of the Permanent Secretary from the proceedings raised in ground three, we see no merit in the arguments advanced. The record will show that there was a consent order by which the parties agreed to remove the Permanent Secretary as a party to the proceedings. Therefore any party was at liberty to call the Permanent Secretary as a witness. Having earlier held that we cannot reverse the finding of fact made by the Court below, we find no merit in the grounds raised.

We hold that the learned trial Judge was on firm ground when she held that there was no evidence shown that the Permanent Secretary uttered the alleged slanderous words. It is trite that in slander, the statement about a person must be communicated as a fact to one individual or more other persons. According to the learned authors of **Halsbury's Laws of England:**

"a person publishes a slander who speaks words defamatory of the Plaintiff to or in the presence of a third person who hears them and understands them in a defamatory sense."


The person alleged to have been present at the time the slanderous words were uttered, denied the allegation. In the absence of a third party having heard the statement, assuming it was uttered,

there cannot be defamation. The Court believed DW1's account of the version of events that transpired on the date in issue based on demeanour and credibility, a finding we cannot reverse for the reasons earlier stated.

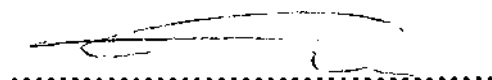
For the foregoing reasons, we accordingly uphold the Judgment of the Court below and dismiss the appeal. Costs to the Respondent to be taxed in default of agreement.



C.F.R. Mchanga
DEPUTY JUDGE PRESIDENT
COURT OF APPEAL



F.M. Chishimba
COURT OF APPEAL JUDGE



M.M. Kondolo, SC
COURT OF APPEAL JUDGE