

LAZARUS MUMBA v ZAMBIA PUBLISHING COMPANY (1980) Z.R. 144 (H.C.)

HIGH  
SAKALA,  
10TH  
1978/HP/1402

COURT  
DECEMBER,1979

J.

Flynote

Tort - Defamation - Privilege - Defence of by Newspaper - Publication of judicial proceedings -  
When defence of privilege available.

Words and phrases - Contemporaneously - Meaning of word.

Words and phrases - Judicial proceedings - Meaning of phrase.

Headnote

The plaintiff claimed that he was defamed in a newspaper report which reported proceedings of a divorce cause in which he was a party. The court found that the article was based on an extract from a form LC 11, a court document and not from the statement of the petitioner given in open court. The defence was that the words complained of formed part of a fair and accurate report of judicial proceedings publicly heard on the 27th June, 1978, and published contemporaneously and therefore was absolutely privileged. However the court found that the article was published fifteen days before the proceedings took place.

**Held:**

- (i) The word "contemporaneously" means existing or occurring at the same time and therefore the subject of contemporaneous publication must come first and not before the publication.
- (ii) Judicial proceedings mean proceedings of any properly constituted court of justice open to the public.
- (iii) Privilege will attach to a fair and accurate report in any news paper of a document read out in open court or proceedings on the hearing of a case open to the public.

**Case referred to :**

(1) R v Astor (1913) 30 T.L.R. 12.

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**Legislation referred to:**

Defamation Act, Cap. 70, s. 8.

For the Plaintiff: A.R. Lawrence, Esq., Sony Patel, Hamir and Lawrence.

For the defendant: N. R. Fernando, Esq., Gib Chigaga and Company.

This is a libel action.

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Judgment

**SAKALA, J.:**

On the 12th June, 1978, the *Zambia Daily Mail*, the defendant's national daily newspaper carried in the first column at p. (1) an article headed "Magistrate's wife seeks divorce." The article reads as follows:

"Wife of a prominent Lusaka magistrate Mr Lazarus Mumba is suing her husband for divorce because of alleged cruelty and negligence.

The magistrate's wife Anna Mwansa told Kitwe's Wusakile court over the weekend that she wanted to divorce Mr Mumba because "he is cruel and negligent."

Mrs Mumba told the court that since 1971, Mr Mumba "has not been kind and he has neglected the family to an extent of the family living on the verge of starvation."

She also told the court that she has been going in tattered clothes since 1971 "as if I am not married to a magistrate."

Mr Mumba was not in court on Friday to answer the allegations and the case was adjourned to July 5 when Mr Mumba is expected to appear in court - and this time, in the accused's box."

The plaintiff has pleaded that the said article was falsely and maliciously printed and published of him by way of his profession. He has further pleaded that the article had gravely injured him in his character, credit and reputation and in the way of his profession as a magistrate and has been brought into public scandal, odium and contempt and therefore claims damages.

The defendant admits publishing the said article in its *Zambia Daily Mail* issue of Monday, 12th June, 1978, but denies publishing it falsely and maliciously and further denies printing and publication as being in respect of the plaintiff's profession. It is the contention of the defendant that the words published were a fair comment on a matter of public interest, namely, the proceedings held publicly before the court of law exercising judicial authority within Zambia. It is further the defendant's contention that the words complained of are and or form part of a fair and accurate report of the proceedings publicly held in local court number one "A" Division, case number 476 of 1978 sitting at Wusakile in which Anna Kwenda Mwansa was the plaintiff and Lazarus Charles Mumba (the plaintiff in this case) was the defendant and the said report was published contemporaneously with such proceedings and is absolutely privileged. The defendant also pleaded absolute privilege under s. 8 of the Defamation Act, Cap. 70 of the Laws of Zambia, and contends that the plaintiff has suffered no loss or damage.

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The original case recorded before the local court at Kitwe was produced in these proceedings by DW2 a witness called by the defendant. To the record are attached various court documents. The first document is Form LC11, a notice of commencement of the action. It consists of two parts. According to DW2 the first part is completed when the complainant buys the summons while the second part is completed when the case has been finalised. For reasons which will emerge later in my judgment I find it convenient to set out in full the two parts of Form LC11 as appear from the record:

"IN THE WUSAKILE No. 1 LOCAL COURT GRADE A DIVISION commencing on the 3rd May, 1978, Case No. 476 of 1978.

Plaintiff Anna Kwenda Mwansa (39) of Musukwa. c/Munkanta D/Kawambwa  
R/A 1426 Ndeke.

Defendant Lazarus Charles Mumba (40) v/Litalatala c/Chitanda D/Kabwe  
R/A 7, Ntoyo Road, Woodlands Lusaka

Act complained of, with time and place: it is alleged that the defendant is cruel and negligent in feeding and clothing since 1971 at Kitwe

What is claimed: divorce,

(*Record of Proceedings Overleaf*)

Judgment (verdict and Order): Granted

Defendant to pay K4 court fee 20n S/C, 25n D/certificate.

I.R.A.

W/30

days."

The case record shows that the case resumed on the 9th June, 1978. The plaintiff was present in court. The court messenger had called three times for the defendant, but was not present. As a result an order for criminal summons was made to the defendant to appear on 5th JULY, 1978 (according to summons). But the divorce case was adjourned to 26th June, 1978, for hearing. For reasons not necessary to mention, the defendant did not appear to the criminal summons. The case resumed on the 27th June, 1978. The plaintiff was present in court. The claim was fully read in Bemba. The court clerk informed the court that the defendant had signed a consent to judgment form. The record then goes on to show as follows:

*"Plaintiff's Statement:*

It was in 1956 when the defendant married me. Up to now we have (5) children. The defendant used to beat me very much and he couldn't give me ration money. In 1966 the defendant went to London when he came back from there after 5 years he came and told me that I was to surrender all the men I was meeting sexually. I was beaten very much. The other day the defendant took me to Mwekera in the bush where he beat me very much for almost 15 minutes he even threatened to kill me. The other day again the

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defendant came to beat me at my working place. I was taken in the vehicle before we reached the town centre he threatened to kill me. I came out of the vehicle and hurt myself. That is why I want divorce to be granted.

Guardian - Elisina Muyembe 7999 Chimwemwe.

I propose that divorce should be granted on grounds that the defendant used to beat the plaintiff my sister very much and because of that I feel plaintiff should be left freely.

Defendant had paid K2 dowry.

XXD: BY COURT

We separated in 1971.

Judgment:

The findings of the court is that divorce granted on grounds that the couple have been lining

in conflict. Therefore about the children who are grown up and are being kept at the defendant's house, he cannot pay compensation at all. It is quite surprising to learn that the man of that experience could rough up the woman in that way .

*Order:*

Defendant to pay K4 court fee, 20n summons costs, 25n divorce certificate.

I.R.A. W/30 days.

Justices: V. Mulenga (sgd:)

J. Mbangu (sgd:)

And there is J.K. Chibwabwa, who is the court clerk, signed 27th June, 1978."

I am satisfied from the court record that the above proceedings were recorded on the 27th June, 1978, and not on the 9th June, 1978. On the 27th June, 1978, judgment for divorce in favour of the plaintiff was entered. I am equally satisfied that the article complained of was printed and published in the issue of Zambia Daily Mail of 12th June, 1978. The article did not report the conclusion of the case.

The plaintiff testified that he has been a magistrate for over fifteen years. He was still a magistrate on the 12th June, 1978, stationed in Lusaka. Apart from being a magistrate he is a secretary of the Magistrates Association of Zambia as well as the secretary for the Working Committee of the African Magistrate and Justices Association, an association for administrators and adjudicators of justice in the whole of Africa. He said he read the *Daily Mail* newspaper of the 12th June, 1978, published by the defendant. He told the court that he was involved in a matter with his ex-wife in Wusakile. He denied that the name of his wife was Ennah Mwanza. He gave the name of his wife as Anna Kwenda Mwansa from Kawarnbwa. He said the report in the newspaper distressed him. In June, 1978, he was not living with his wife. They separated in 1973.

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At that time she was working as a supervisor at Z.C.B.C. She left later and trained as a teacher. She is still working as a teacher. The plaintiff explained that on his return from England he took his five children who have been with him since 1973. All of them are attending school except one girl who has since finished her Form V and has trained as a steno/ typist and living on her own. He told the court that the report of the newspaper of the 12th June, 1978, was completely different from the proceedings of the 9th June, 1978. He denied receiving criminal summons. He denied appearing in the dock in court. He agreed signing a consent to a judgment form. He said he consented to his wife's divorce but did not appear as an accused. He testified that the allegations anode in court by the wife were not true. He said his wife stated the things in court in order to secure a divorce. The plaintiff further testified that after he read the report of the 12th June, 1978, he wanted to see the Registrar of the High Court because the article affected his work and had put him off-balance. At the High Court he found a group of learned counsel. It struck him that there was a discussion of the same article. Among the group was Mr Fernando, counsel for the defendant in the instant action. According to the plaintiff, Mr Fernando advised him that the article that appeared on the front page of the Daily Mail was written in bad faith. Mr Fernando told him that he was the lawyer for the newspaper. The plaintiff said he explained to Mr Fernando that he found the article as being in bad faith and scandalous. He further told him that the woman mentioned in the article, Ennah Mwanza,

is unknown to him and had never had children with her. The plaintiff testified that he was claiming for exemplary damages. He said he had written to the defendant requesting for an apology and compensation through his lawyers.

In cross-examination, he admitted that the article did not state that the divorce was granted. He said the report was of proceedings in progress. With regards to the first paragraph, he said his complaint was that he was not married to the lady mentioned. He denied that he was cruel and negligent. He agreed that the proceedings in court indicated that there was a complaint of cruelty and negligence. In paragraph two, he said his complaint was that he has never been married to Ennah Mwanza. He said had the first name in the article appeared with an "A" and without an "H" and the second name with "S" instead of a "Z" he would not have complained because that woman was actually his wife who had petitioned for divorce. He said he did not regard that as a typographical error since the first name and the surname were all wrong. In the third paragraph he complained that the allegations of negligence and starvation are not true. He told the court that if the person reported suing him was Anna Mwanza he would not have complained.

DW1, Henry Mwakamwi, a journalist, with the *Zambia Daily Mail*, testified that on the 9th June, he was present in a Wusakile Local Court attending a divorce case between Anna Kwenda Mwanza and Lazarus Mumba. Anna Mwanza was the only one who gave evidence on that day. What he recorded on that date was published in the newspaper after sometime. He reported what transpired in court on the 9th June, 1978. He did not transmit the report to Lusaka on the same day because the

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telephones and the telex were out of order. When cross-examined he admitted that the allegation of the family starving and walking in tattered clothes was not in the case record. He said he wrote the article on the 9th June. It appeared in the newspaper on the 12th June and not the 27th June. He testified that the name Ennah Mwanza was a typographical error. He said the allegations of the family living on the verge of starvation were stated by Anna Mwanza in court when she was trying to explain to court why she was seeking divorce from her husband. In re-examination, DW1, explained that on the 9th June, after the name of Mr Mumba was called the messenger reported that he was not outside the court. The court then asked Anna Mwanza if she knew the whereabouts of Mr Mumba. Later the court asked her to explain briefly the nature of her case. She explained that she was seeking a divorce due to negligence and cruelty. She also told the court that she was not given ration money. In answer to questions by court, DW1 explained the procedure of reporting proceedings in court. It was during the questioning by court that the notebook containing the report dated 9th June, 1978, was produced and marked exhibit "D1". The witness's report as per his notebook exhibit "D1" reads as follows:

"Anna Mwanza - 39, 1426, Ndeke

Defendant - Lazarus Charles Mumba - 40

No. 7 Ntoyo Road, Woodlands

Charge: Claiming for divorce due to cruelty and negligence in clothing since 1971.

We got married in 1956 and have five children. Our happiness was shortlived he used to

beat me up. In 1966 my husband went for five years' course in London. When he came back life was hell.

He accused me of being unfaithful and told me to surrender all men I used to meet sexually. He beat me at random when he felt like. He could hardly give nice ration money and we were barely surviving. I was almost going naked as my clothes and those for children were tattered. The other day he drove me to Mwekera where he beat me for over 15 minutes and threatened to kill me. Luckily enough I jumped from the vehicle. "

The witness said he had heard about Lazarus Mumba of Lusaka in the papers. He checked with his head-office in Lusaka where he received confirmation that the name Lazarus Mumba referred to the magistrate.

DW2, was the court clerk at Wusakile Local Court. He produced the original record in the case of Anna, Kwenda Mwansa case No. 476 of 1978. It was marked exhibit "D2". According to this witness the case was first filed on the 3rd May, 1978. He said from the record the first appearance was on the 9th June, 1978. The case was then adjourned to the 26th June, 1978. It was not held on the 26th but on the 27th. On the 27th June, only two witnesses namely, the plaintiff and her guardian gave evidence. Judgment was delivered on the same day. He testified that the proceedings are recorded by the recording clerk who is trained.

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A consideration of both the plaintiff and the defence case reveals that it is not in dispute that on the 3rd May, 1978, a case involving the plaintiff's wife for divorce was filed with the Wusakile Local Court.

The case number according to the record was 476 of 1978. The plaintiff's name was recorded as Anna Kwenda Mwansa whilst the defendant (now the plaintiff in these proceedings) was recorded as Lazarus Charles Mumba. On the 9th June, the case came up for hearing. On that day, the defendant was not present. The record discloses that no evidence was recorded from either Anna Kwenda Mwansa or her witness. A criminal summons was issued to the defendant to appear on the 5th July, 1978. The divorce case was adjourned to 26th June, 1978. The case was not heard on that date. It was heard on the 27th June, 1978. On that day the record clearly discloses that evidence was recorded by the court from Anna Kwenda Waned and her guardian. Paragraph (4) of the statement of claim reads as follows:

"4. By reason of the premises the plaintiff has been gravely injured in his character, credit and reputation, and in the way of his profession as a Magistrate and has been brought into public scandal, odium and contempt. And the Plaintiff claims: Damages. Exemplary damages. "

In his evidence in cross-examination the plaintiff stated that although there was a complaint of cruelty and negligence in court he is not cruel and negligent and had never been married to a woman Ennah Mwanza. It would appear from the evidence that the plaintiff objects to the whole

article with emphasis on the name of Ennah Mwanza as a woman he was never married to. For my part, I have no doubt that the article was published with reference to Mr Mumba, the plaintiff, as "a prominent Lusaka Magistrate ". The learned author of *Gatley on Libel and Slander* 7th, edn. at para. 57 observed 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. To be actionable, words must impute to the plaintiff some quality which should be detrimental, or the absence of some quality which is essential, to the successful carrying on his office, profession or trade. The mere fact that words tend to injure the plaintiff in the way of his office, profession or trade is insufficient. If they do not involve any reflection upon the personal character, or official, professional or trading reputation of the plaintiff, they are not defamatory. "

In my opinion to suggest that " a prominent magistrate " is cruel and negligent imputes to him dishonourable qualities detrimental to his profession as a magistrate and goes beyond the mere fact that the words tend to injure him. It reflects upon his personal character hence undoubtedly defamatory of him. In the circumstances, I hold that the article complained of is defamatory to the plaintiff in his profession as a magistrate.

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Paragraphs (2), (3), (4) and (5) of the defence read as follows:

"(2) The defendants admit publishing in their issue of the Daily Mail for Monday 12th June, 1978, the article alleged but denies that they did so falsely and maliciously and further denies that printing and publication was in respect of and to concern the plaintiff's profession as alleged in paragraph (3) of the Statement of Claim;

(3) The said words published are a fair comment on a matter of public interest, namely, the proceedings held publicly before a court of Law exercising judicial authority within Zambia;

(4) The said words are and/or form part of a fair and accurate report in the said newspaper of proceedings publicly heard before a court exercising judicial authority, namely, Local Court No. 1 Court 'A' Division, Case No. 476 of 1978 sitting at Wusakile, the action tried before Local Court Justices, Mr V. Mulenga and Mr Mbangu on the 27th day of June, 1978, in which Anna Kwenda Mwansa the plaintiff and Lazarus Charles Mumba (the plaintiff in this cause) was defendant which said report was published contemporaneously with such proceedings and is absolutely privileged;

(5) The defendant further pleads absolute privilege under Section 8 of the Defamation Act - Chapter 70 of the Laws of Zambia. "

DW1's evidence is that he was present in court on the 9th June, 1978, during the divorce proceedings between Anna Mwansa and Lazarus Murnba. He recorded the proceedings in his

notebook exhibit " D1 " which resulted in the article that appeared in the *Zambia Daily Mail* issue of the 12th June, 1978. A critical analysis of the article in the note book exhibit "D1" reveals that, with few omissions and additions, it is a substantially accurate account of the statement made by Anna Mwansa in court on the 27th June, 1978, and recorded by the court on that date and not the 9th June. If the matter was to end here I would have had no difficulty in arriving at the conclusion that the report was a fair and accurate report of judicial proceedings and thus absolutely privileged under s. 8 of Cap. 70 which reads thus:

"(8) A fair and accurate report in any newspaper of proceedings publicly heard before any court exercising judicial authority within Zambia shall, if published contemporaneously with such proceedings, be absolutely privileged:  
Provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter."

But a close examination of the offending article clearly discloses subject to certain additions that it was printed and published from an extract from Form LC11 but purported to be a direct statement made by Ennah Mwanza in open court. I am fortified on this view by the material omission of substantial details as contained in exhibit "D1" and the case record. For example the offending article does not mention the date of marriage, 1956. It does not mention the defendant having gone to London in 1966

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as per both plaintiff's statement in court and the notebook. It does not mention the Mwekera incident. What is more significant is that if the article in the notebook was recorded on the same day when Ann Mwansa made her statement in court the conclusion of the case would certainly have not been omitted since it was also made on the same day.

I am very suspicious of the article in exhibit "D1". In my opinion it must have been written sometime after this action was commenced to justify the publication. This is further supported by the fact that it was never disclosed in the bundle of documents. But only produced as a result of questions by court. Significantly again DW1 testified that the last portion of the article in the notebook was recorded in his diary. This diary was not produced in court. On the evidence before me I find as a fact that the offending article was based on an extract from Form LC11 a court document and not from the statement of Anna Mwansa given in open court on the 27th June, 1978. I am satisfied that DW1 was not in court on the 27th June, 1978, when Anna Mwansa made her statement and when the divorce was granted to her.

The main defence, as I understand it, is that the words complained of form part of a fair and accurate report of judicial proceedings publicly heard on the 27th June, 1978, and published contemporaneously therefore absolutely privileged. In the same defence the defendant admits publishing the report on the 12th June, 1978. I find this to be a contradiction in the defence as pleaded. If the words admitted published on the 12th June, 1978, form part of a fair and accurate report of judicial proceedings of 27th June, 1978, contemporaneously published, how does one explain the publication of the judicial proceedings in open court fifteen days before they took



place? The commonness dictionary meanings of the adverb " contemporaneously " are " existing " or " occurring at the same time " [with]. In other words the subject of contemporaneous publication must come first and not before the publication. Thus the learned authors of *Gatley on Libel and Slander*, 7th edn. para. 652 observe as follows:

"There has been as yet no decision as to the meaning of the word"contemporaneously." It is submitted that the word means "as nearly at the same time as the proceedings as is reasonably possible having regard to the opportunities for preparation of the report and the time of going to press or making the broadcast." If this submission be correct, the issue of the newspaper in which the report appears is an all-important factor in deciding whether the report was published contemporaneously. A report published in the next edition of a daily paper, or in the issue from day to day, if the proceedings were extended, would be "contemporaneous" so, too, would be a report in the next issue of a fortnightly paper, even though published ten or twelve days after proceedings. But if a daily paper delayed its report for ten or twelve days, the report could clearly not be said to have been "published contemporaneously" with the proceedings."

There is no suggestion that the word "contemporaneous" includes *before the proceedings*. For my part therefore I cannot accept the argument

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that the word "contemporaneously" also means before the event as contended by the learned defence counsel.

I have already found as a fact that the article complained of was based on the extract from Form LC11, a court document. The crux of the matter therefore is whether Form LC11, a court document which can fairly be compared to a charge sheet in criminal proceedings, falls within the expression "judicial proceedings". "Judicial proceedings" have been defined to mean proceedings of any properly constituted court of justice open to the public (para.617, 7th edn. *Gatley on Libel and Slander*).In para. (643) of the same edition of *Gatley* it is observed that:

"Privilege will, of course attach to the publication in a newspaper of a document read out in open court and filed as an exhibit in an action or to a fair and accurate statement of the contents of such document, but privilege will not, seem, attach to the publication in a newspaper of the contents of pleadings, affidavits, or other papers filed in civil proceedings and not brought up in open court. "It would be carrying, privilege farther than we feel prepared to carry it, to say that, by the easy means of entitling and filing a statement of claim in a cause, a sufficient foundation may be laid for scattering any libel broadcast with impunity. The fact that the public is bound to become aware of the contents of the documents at the trial does not justify their prior dissemination on the ground of public interest."

In the case of *R. v Astor* (1) Scrutton, J. at pp. 12-13 had this to say:

"It seems to be established that while newspapers may report fully the proceedings on the hearing of a case, they ought not to publish in full the private proceedings before the case comes on for trial. For instance, they ought not to publish the Statement of Claim or the affidavit on which it was sought to wind up a company on the ground of fraud in the directors. I also think they ought not to publish a writ containing similar charges."

I entirely agree with all these views. In the instant case a complaint on Form LC11 was filed on 3rd May, 1978. The case was called for trial in open court on the 9th June, 1978. DW1 was then present I have no doubt in my mind that Form LC11 containing the complaint must have been read in open court before the court adjourned the case. In those circumstances I would hold that privilege would certainly attach to a fair and accurate statement of the contents of that document.

The next question is whether the report was a fair and accurate statement of the contents of Form LC11 ? I have no doubt that the report was overblown but I cannot say with malice. At any rate I find no evidence on which malice can be inferred. The plaintiff does not dispute being magistrate. He further does not dispute that there were divorce proceedings in Wusakile Local Court between him and his wife Anna Mwansa. He disputes ever being married to Ennah Mwanza, the name appearing in the offending article. In my humble opinion after a consideration on the whole evidence, I am satisfied that the inaccuracy in the spellings

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of the name can only be attributed to a typographical error regard being had to the method the message was transmitted and certainly not to malice. On the whole, I hold that the report was a substantially accurate account of the contents of the document that formed part of the case record at the trial. In the result I hold the report privileged and dismiss the plaintiff's claim.

The nature of this case taking into account the outcome of individual issues demands that in the interest of justice I make no order as to costs. Accordingly I make no order as to costs.

Claim

dismissed

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