KAKUNGU MUSIWA v MOSES CHANDA (1985) Z.R. 244 (H.C.)

HIGH COURT
(COMMR. N.N. KABAMBA): (NOT DATED)
(CASE NO 86/HN/CA 1)

Flynote
Tort - Libel - Qualified privilege - Malice - False report by superior officer to protect friend - Whether privileged.
Tort - Libel - Proof of damage - Necessity for.

Headnote
For the purpose of protecting the actual culprit who was his friend and a fellow superior officer, the respondent made and communicated to the employer false accusations against his junior officer, the appellant. The false accusations led to the suspension of the appellant who was later re-instated when the employer discovered that the accusations were false. Although the appellant did not suffer any material damage as a result of the false accusations and the subsequent suspension, he nonetheless brought an action for libel.

The trial magistrate dismissed the action on the ground that the defamatory communication having been made in the course of duty, was privileged; and that even if the said defamatory communication had not been privileged an action for libel could not have succeeded because there was no proof of damages. The plaintiff appealed.

(i) Where motives other than duty or interest alone caused the marking of the communication privilege could not attach.
(ii) Libel is actionable per se and no proof of damage is necessary.

Cases Cited:
1. Rex v Rule [1937] 2 K.B. p.379.
2. Davies v Swad [1970] Q.B. 608.

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3. Langton v The Bishop of Sodor and Mann [1872] IV P.C.A. 495.
4. Wason v Walter [1868] IV.Q.B.73.
5. Cook v Alexander [1973] All E.R.1037.
6. Webb v Times Publishing Co. Ltd. [1960] 2 All E.R.789.

For the appellant: In person.
For the respondent: Mr Sifanu of Mporokoso and Company.

Judgment
KABAMBA,COMMISSIONER:

This is an appeal against the decision of the Magistrates Court of the Chingola District in which the learned magistrate of the first class dismissed the appellant's action on the grounds that the respondent had laid his charges against the appellant in the line of duty and that the communication complained of was therefore privileged.

The facts of the case are these: Both the appellant and respondent are employed by ZCCM as security policemen. The respondent holds the rank of chief inspector while the appellant is a sergeant. On 1st November, 1981, the respondent detailed the appellant to transport mine policemen to Mimbula Fitula, an out post on the outskirts of Chingola Town. For this purpose, he allocated to the Appellant a Toyota Land-cruiser bearing Registration Number AGA 3483. Its mine identification number was G1. The respondent then detailed Inspector London to also drive another group of the Mine Policemen to nearby Nchanga Open-pit. He issued to Londoni AGA 2898 for that exercise. Having accomplished his mission, Inspector Londoni secretly sneaked into the Town-centre with the Company vehicle and parked it near bakery. This activity on the part of Inspector Londoni did not go unnoticed. The Assistant Chief Geologist, Mr Roger Nalton Rhodes spoted the vehicle and went to report the culprit. In an attempt to try and get Inspector Londoni out of the trouble the respondent picked on the appellant, the junior officer, as the person to attribute that behaviour to. He accordingly and cunningly suspended the appellant for 14 days without pay and framed charges against him for misuse of a company vehicle and absenteeism frown duty. These charges were thrown out by the mine management for want of evidence and the appellant was paid for the days he was suspended. He decided to institute these proceedings against the respondent for libel. It is in these circumstances that the learned magistrate held that the written accusations which formed the basis of this suit were communicated in the course of duty and the appellant cannot therefore recover. The learned magistrate added that the appellant had suffered no damage having been paid for the 14 days he was suspended. Hence for this appeal.

The summary of his argument contained in his grounds of appeal is that the learned magistrate misdirects himself in law in deciding that the communication was privileged to the extent of not being actionable and in stating that no recovery of damage can be made in libel cases without proof of damage. The contention is that the insertion of a deliberate falsehood puts the communication outside the sphere of activities

protected by privilege. Mr Sifanu, acting for the respondent, argued that the communication was privileged and the appellant could only succeed in his claim if he established that motives of malice extraneous to the line of duty, caused the respondent to make the said communication. There having been no evidence to prove malice in fact, the decision by the magistrate to dismiss the action should be upheld.

I disagree. There was abundant evidence of actual malice. The general rule on this aspect of the wide law of libel was laid down more clearly in the case of *Rex v Rule* (1937) 2 K.B. 375 at page 379 (1) in the following words:

"A communication made bonafide upon any subject matter in which the party

communicating has an interest or in reference to which he has duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminatory matter which without privilege, would be slanderous and actionable."

The key phrase to the proper application of this rule is "bonafide" meaning "in good faith," and the words "duty" or "interest". The two expressions complement one another in that the existence of one connotes the presence of the other. When it is the duty of a person to make given communication, "good faith" is inferred automatically on his part be cause the "duty" or "interest" is presumed to be his only motive for doing so. The presence of "duty" or "interest" rebuts the presumption of legal malice: the wrongful intention which the law always presumes as accompanying a wrongful act without any proof of malice in fact. It is here where a party is required to show that motives other than duty or interest alone caused the making of the slanderous communication. This is the area where there appears to have been most misunderstanding on the correct approach to the evidence required to prove malice in fact. While some believe that actual malice can be inferred from the language of the communication itself, others maintain that the language should not be examined. Only the genuineness of the occasion matters. (see *Davis v Swad* (1870) Q.B. 608 (2); *Langhton v The Bishop of Sodor and Mann*, (1872) IV P.C.A. 495 (3); *Wason v Walter* (1868) 4 Q.B. 73 (4); *Cook v Alexander* (1973) All. E.R. 1037 (5) and *Webb v Times Publishing Co. Ltd.* (1960) 2 All E.R. (789) (6).

I do not propose to exam the debate on the point but only state that to refuse to examine the language, the very subject of the complaint, would be naive. I cannot possibly conceive of the propriety of an investigation where it is directed to forget all about the matter under investigation and to concentrate only on other things which have nothing to do with the matter in issue. To, for instance, require the appellant in this case to adduce evidence of any quarrels which might have existed between him and the respondent quite independently of these circumstances as the valid evidence of actual malice would defeat the whole purpose of privilege: to enable all information relevant to the proper

maintenance and administration of the affairs of men, organisations, institutions and the entire society, to flow freely without any hindrance. It would leave the door wide open to flow of false information; and falsehoods cannot secure the proper maintenance and administration of human affairs, organisations, institutions and the society at large. They would instead ruin them.

Evidence of actual malice can be found, and this must be found, in the language used in the communication itself and in the relevancy of it to the occasion upon which it is made. Indeed, that language may be the only evidence available to a plaintiff. A man may be seething with the hatred of another, unknown to the other, for imaginary or actual reasons and may hold himself in check so as not to leave any ostensible evidence of that hate in his word or deed and decide at a later stage to hurt the other by coming up with falsehoods calculated to put the other in trouble. It cannot be entertained that society should condone such things. A man who sues on this kind of things ought to be allowed to rely on the language used itself as his only evidence of actual malice and to be able to demonstrate that the inference of malice exists in the body of the communication and both the occasion which gave rise to it and the occasion used in making the communication. Sir Robert

Collier seemed to have implied this very view in his judgment in the Langhton case I cited above:

> "It certainly is not necessary, in order to enable the plaintiff to have the question of malice submitted to the jury, that the evidence is such as necessarily leads to the conclusion that malice existed, or that it should be consistent with the non-existence of malice; but it is necessary that the evidence should raise a probability of malice and be more consistent with its existence than with its non-existence."
> (Pages 508-09).

The evidence he referred to here is that which it was to be inferred front the language used and the two occasions. The first occasion was that which gave creation to the thing complained of. The second occasion was that on which the communication was made in relation to the thing created on the first occasion and which communication was the subject of the suit.

In drawing the inference of actual malice from the language and, what I call for the purpose of convenience, primary and secondary occasions, it is not the presence of falsehoods or introduction of matters irrelevant to the secondary occasion, in the offending text that alone matters. It is also the outrage and extremity of the use to which it is put that matters. It is thus, excluded from consideration, the excess colouring of expression in the text to remain with :falsehoods of pure deliberacy which fall beyond the absolute exigency of both the primary and secondary occasions. All the circumstances surrounding the creation of the cause compose the primary occasion while those which surround the effect make up the secondary occasion. If the absence or presence of any

consistence between the two occasions, on the one hand, and the purity of the falsehood, the outrageousness and extremity of it, on the other, lead to the drawing of the inference, as the only reasonable conclusion, that there was abuse of the notion of duty or interest, actual malice will have been established. These are features which will rebut the presumption of "good faith" given to the communication by the notion of "duty" or "interest". This is why I do not agree with Mr Sifanu.

It was established in this case, that the respondent deliberately took the offences which had been committed by another person and clothed the appellant with them so as to bring trouble, without any justification whatsoever, upon the appellant's lead. Those offences were serious ones and could have led to the termination of the appellant's employment given the need by the company to lay off some if its workers, as a cost saving measure. That is, in fact, the reason why the respondent picked on the appellant, a junior officer, to save his friend Londoni. This was outrageous and extreme. It was complete abuse of duty on the part of the respondent. The communication is certainly libelous and actionable. libel is actionable per se. General damage need not be proved. I will award the appellant K400, the amount which the learned magistrate would have given the appellant had he directed himself properly on the law and the evidence. I allow this appeal and give the costs to the appellant, both here and below.

Appeal allowed

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