

IN THE HIGH COURT FOR ZAMBIA
AT THE DISTRICT REGISTRY
AT CHIPATA

2002/HJ/31

BETWEEN:

WARARD HAROLD PHIRI

PLAINTIFF

AND

THE PROGRAMME MANAGER
RADIO MARIA – ZAMBIA CHIPATA

DEFENDANT

For the Plaintiff:

Mr F. Jere – Fred Jere & Co.

For the Defendant:

Professor P. M. Mvunga – Mvunga & Associates

J U D G M E N T

Cases referred to:

1. Rookes v Barnard (1964) 1 ALL E.R. 367
2. Cassell and Co. Ltd v Broome (1972) 1 ALL E.R. 801
3. Cobbet-Tribe v Zambia Publishing Co. Ltd 1973 Z.R. 9
4. Kapwepwe v Zambia Publishing Co. Ltd 1974 Z.R. 294
5. A.G. v Mpundu 1984 Z.R. 6.

Other Works referred to:

1. Gatley On Libel and Slander (8th Edition, 1981). Pages 5, 6, 185, 330, 331, 340, 385, 592, 594, 595
2. Winfield and Jolowicz On Tort. (15th Edition, 1985). Pages 391, 397
3. Atkin's Court Forms (2nd Edition) Volume 39, Page 255

The Plaintiff is claiming

1. Damages for libel contained in News broadcast by the Defendant, between 4th May 2000 and 3rd June 2006.
2. Exemplary damages over the same News item.
3. Aggravated damages over the same News item.
4. Special damages for having suffered demotion, allegedly as a result of the same News item.

The Plaintiff testified that he is a Clinical Officer under Chipata District Health Management Team (hereinafter referred to as "D.H.M.T."). That in May 2000 he was the Clinical Officer in Charge of Champhande Rural Health Centre. The Centre is about 54 Kilometres from Chipata. That he was assisted by a Mrs T. M. Phiri, a Zambian Enrolled Nurse. That this Mrs Phiri is his wife. That as the incharge of the Health Centre his main duties were:-

1. **To procure medicines and other supplies for the Centre and to keep them properly; and**
2. **To attend to patients.**

He explained that the procedure was that the District Health Director would deliver medicines and other supplies to the Centre and other Centres. That such delivery would be made to his Centre at his request. That in 2000 only him and Mrs Phiri were running the Centre. That on 4th May 2000, at about 7.00 hours, he went to attend a funeral some 4 kilometres away. So he assigned Mrs Theophister Mukonge Phiri, the Nurse, to take care of the Health Centre. That on 3rd June 2000, the District Director of Health visited the Centre and told him that there was a News item on Radio Maria that

morning about him. That the News item alleged that he had turned away a named pregnant woman from the Clinic. As a result, she gave birth under a tree unattended to. That the Director told him that the two of them go to see the woman. That he declined to escort the Director because it was not him who had turned her away. That he did not regard his refusal as insubordination because despite being the Incharge, it was not him who had caused the problem. He conceded, however, that what happened to the pregnant woman was bad. He added that as the Clinical Officer in charge of the Health Centre, he was answerable for what goes on there. That it was his wife who had turned away the pregnant woman on the day he was away from the Centre, for a funeral. That the wife escorted the Director. That later at his request, the woman was brought to the Centre and he treated her. He explained that the pregnant woman was turned away by his wife because the Centre did not have surgical gloves to handle child delivery.

That in March and April 2000, medical supplies, including gloves, were not delivered to the Centre by the District Office, despite him having requested for them. That he had no transport to go to Chipata to get them. He added that in March and April 2000, a motor vehicle and a District Official came to the Centre for routine inspections. That it did not occur to him that he could have used that vehicle to go to Chipata to procure medical requirements. That on the instructions of the Director, he made a report on the incident. The report is at pages 1-2 of his Bundles of documents.

It reads as follows:

**"A REPORT ON MRS. HILDA BANDA GIVING BIRTH ON HER WAY
BACK FROM CHAMPHANDE RURAL HEALTH CENTRE**

TO: THE ACTING TEAM LEADER – CHIPATA D.H.MT
FROM: WARARD HAROLD PHIRI, P.C.O. INCHARGE –
CHAMPHANDE R.H.C
DATE: 3RD JUNE 2000

INTRODUCTION

1.1. You have asked me to give more details to the earlier report that I sent you over Mrs. Banda having been denied services at this Centre by Mr. Warard Harold Phiri as reported by Radio Maria recently. The report aired by Radio Maria was incorrect. I write this report to give factual information.

2.0 INFORMATION

2.1. On 4th May 2000 the fateful day, I left the centre at about 08:00 hours to attend burial in Masiwa village of late Patricia Banda. Mrs. T. M. Phiri (ZEN) was left to man the centre. It was during this time of my absence that Mrs. Hilda Banda of Kandananai village, expecting mother to be, came to the centre.

2.2. Mrs T. M. Phiri was at the OPD attending to patients and the under five clinic when a lady came to call her that she (lady) had brought an expecting mother at the maternity section. Hurriedly Mrs Phiri stopped what she was doing and went to the maternity section. She found Mrs. Banda who told Mrs. Phiri that she was in labour. Upon hearing this Mrs Phiri told Mrs. Banda that the centre had no gloves and further asked where her husband was, with a view of sending him either to Chikwanda or Jerusalem with a letter to ask for gloves or may be go to Saili Village where she has been told

some one is selling some. Mrs. Phiri then went back to fetch keys for labour ward which she had let behind as she had hurried upon being called. She (Mrs. Phiri) was told that the husband was coming behind before leaving the clients to fetch the keys.

2.3 Upon return, Mrs. Banda and her escortee had gone – away. Mrs. Phiri asked other admitted patients who were sitting on the corridor where Mrs. Banda had gone. The other patients said the they had left. Mrs Phiri did not follow up, as she was alone.

2.4. However, at a later date Mrs. Phiri went to see Mrs. Banda to apologise for the break in communication.

2.5. I also went to Kondanani Village with the view of seeing how she and the baby are. However, Mrs. Banda, at the time was out washing clothes at the stream. An appointment was made with the husband that he brings her the following day to the centre for further check up (of both mother and baby). Which was done and both were alright. However, Mrs. Banda had some palmar pilos for which ferrous sulphate tablets were supplied and further advised to come back after that course for further check up.

3.0 REMEDIAL MEASURES

3.1. A packet of Gloves to be always kept for maternity clients in future.

3.2. Mrs. Phiri has been told that in future she should be extra careful and double check whether the information she communicates is received correctly by asking questions after giving information to the clients. Secondly to keep keys always in pockets.

He said that what followed was his transfer to Namuseche Prison Clinic. That before then, he was transferred to Kapata Mini Hospital. That the earlier transfer was with a view to promotion from Principal Clinical Officer to Senior Clinical Officer. His letter of transfer is at page 11 of his Bundles of Documents. It reads as follows:-

"MH/CD/MA 2104

REPUBLIC OF ZAMBIA

District Health Management Team,

P. O. Box 511205,

CHIPATA

29th June, 1999

Mr. W. H. Phiri,

Champhande Health Centre

P. O. Box 511205

CHIPATA

RE: TRANSFER YOURSELF

As per our earlier discussion, I am pleased to inform you that you have been transferred to Kapata Urban Clinic.

Your transfer is with immediate effect and transport will be sent to you by 29th June, 1999.

We wish you well at your new station.

Yours in public service.

Josias Enos Zulu

Principal Clinical Officer

for/ACTING TEAM LEADER".

That he learnt later that the promotion transfer to Kapata was cancelled and the new one to Namuseche made because of the incident involving the pregnant woman.

That he suffered loss of salary as a result of suspension of promotion. That had he been promoted, his salary would have been at a higher notch. It was his position that he lost promotion because of Radio Maria. He conceded that the letter of transfer to Kapata does not mention promotion.

He said that Lucas Zulu, a villager in the neighbourhood called on him over the Radio Maria News item. That the reaction of the Community was to demand his removal from the area. That they threatened to harm him. He confirmed that the pregnant woman was turned away unattended to and delivered under a tree. That that was because the Centre did not have the necessary gloves. He conceded that as the person in charge, he was supposed to ensure that the Centre had gloves. He blamed the District Health Director for not delivering medical supplies for three months, March-May 2000. That to go to Chipata by public transport, he had to walk for 12 kilometres to Jerusalem, to catch a lift. That he did not have money for a lift

to Chipata and that was why he didn't do it. He conceded that it was important for Radio Maria to broadcast news of the incident but should not have mentioned his name but that of his wife, who turned away the pregnant woman. That later, he came to know that the story about the incident was originated by Zambia Information Services. That he demanded an apology from Radio Maria. That Radio Maria did not reply for a month. That they finally replied before legal action was instituted. That an apology only from Radio Maria would not have been acceptable to him. That he wanted an apology plus compensation for K15 million, which could have been negotiated to a minimum of K7 million. But page 5 of the defence bundle of documents shows that in a face to face discussion with Radio Maria, the Plaintiff's former Lawyers had demanded a minimum of K60 million as compensation. That was in addition to an apology. He confirmed that before the news item he had had no quarrel with Radio Maria or it's staff.

Lucas Zulu was the only witness for the Plaintiff. He said that he knew the Plaintiff when he was the Clinical Officer at Champhande Rural Health Centre. That in June 2000, he listened to Radio news broadcast by Radio Maria mentioning the Plaintiff. That the news said that the Plaintiff had turned away a pregnant woman from the Centre and she ended up giving birth under a tree. That he went to see the Plaintiff because he was surprised by the news knowing how the Plaintiff works at the Centre. He confirmed that the story about a pregnant woman being turned away was true. That the story spread out in the Community. That people there demanded his transfer. That he considered the matter important; that was why he went to see the Plaintiff over it.

The Defendants called one witness, Gabriel Mwanza. He said that he was a Catholic Priest at St Ann's Catholic Parish, Chipata and Programme Director of Radio Maria. That Radio Maria was a Christian Radio Station run by the Catholic Church. That it is a Community, and not Commercial Radio Station. That it is a charitable institution that depends on donations. That its Radio Equipment was donated by World Family of Italy. That its main objective is to do evangelical work by spreading the word of salvation. That it broadcasts spiritual, educational and health programmes.

That the News item that gave rise to this case is at page 1 of the defence bundle of documents. It reads as follows:

"TITLE: VILLAGERS PROTEST OVER THE TURNING AWAY OF AN EXPECTANT MOTHER

Date: 10/05/2000

Script/Delia/ZIS

VILLAGERS IN CHIEF SAILI AREA IN CHIPATA ARE DEMANDING FOR THE IMMEDIATE REMOVAL OF A CLINICAL OFFICER FROM CHAMPINDE CLINIC (FOR TURNING AWAY) AN EXPECTANT MOTHER WHO WAS IN LABOUR.

THE EXPECTANT MOTHER WHO HAS BEEN IDENTIFIED AS A MRS JERE IS REPORTED TO HAVE GIVEN BIRTH IN A NEARBY BUSH SOME 900 METRES AWAY FROM THE CLINIC.

ACCORDING TO COUNCILLOR EDISON JERE REPRESENTING PARAMOUNT CHIEF MPEZENI IN CHIPATA MUNICIPAL COUNCIL SAID THE EXPECTANT MOTHER WAS TURNED AWAY

BECAUSE THE CLINIC HAD NO SURGICAL GLOVES TO USE IN THE PROCESS OF DELIVERY.

HE FURTHER SAID PEOPLE IN THE AREA HAVE NOW LOST CONFIDENCE IN THE GOVERNMENT BECAUSE OF THE IN HUMAN TREATMENT THEY ARE RECEIVING FROM THE CLINICAL OFFICER WHO WAS IDENTIFIED AS A MR. PHIRI."

That there has never been any quarrel between Radio Maria and the Plaintiff before the News item. That the source of the News item was Zambia Information Services, who had verified it. That Radio Maria was willing to apologise that it was not the Plaintiff who had turned away the pregnant woman, but somebody else who was directly under him. That Z.I.S. got the story from Councilor Jere who lived in the area.

That Radio Maria felt it had a duty to report the incident because the matter was one of public interest. That he regretted the fact that the news item mistakenly named the Plaintiff as the person who turned away the pregnant woman. But it enabled him not to have shortage of essential tools.

Counsel on both sides filed written submissions. I am grateful to them for their valuable research. I will deal with their submissions in due course.

Defamation is defined as the publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of right-

thinking members of society generally, or tends to make them shun or avoid him: See:-

1. Winfield and Jolowicz On Tort (15th Edition, 1998), page 391 and
2. Gatley On Libel and Slander. (8th Edition, 1981), page 6

Defamation has three main elements. A Plaintiff must establish these to succeed. These are:-

1. **Reference to the Plaintiff**
2. **Publication and**
3. **Defamatory imputation.**

I am now going to discuss these in detail and in relation to this case.

1. **Reference to the Plaintiff.**

The Plaintiff must show that the words complained of refer to him. They must identify him. In the instant case, it is not dispute that the broadcast complained of refers to the Plaintiff because he is mentioned by name. So this element has been established.

2. **Publication**

The Plaintiff must show that the words complained of were published. Publication here means communication to at least one person other than the Plaintiff. In this case, the statements complained of were broadcast as news in Chipata District, up to a distance more than 50 kilometers. So I find that this element has been established.

3. Defamatory imputation

The words or statement complained of must be defamatory. On this element Gatley observes:

“Any imputation which tends to lower the Plaintiff in the estimation of right-thinking members of society generally or to cut him off from society or to expose him to hatred, contempt or ridicule is defamatory of him”: See page 6.

Whether given words are defamatory is a question of law. The law states that untrue imputations about a person in relation to his office, occupation or profession are defamatory. In this regard, Winfield observes: *“A statement which disparages a person in his reputation in relation to his office, profession, calling, trade or business may be defamatory, for example the imputation of some quality which would be detrimental or the absence of some quality which is essential to the successful carrying of the office etc, such as want of ability, incompetence, conduct which breaches widely recognized canons of business ethics and of course fraud or dishonest conduct”*: See Gatley on Libel and Slander, at page 397.

In the case at hand, the words complained of disparage the Plaintiff's reputation in relation to his profession or occupation as a clinical officer. They falsely impute to him callous and uncaring behaviour towards a named pregnant woman, who needed baby-delivery service. The news item exposed him to hatred and resentment. The local community demanded for his immediate removal from Champhande Clinic.

I find that the words complained of in their plain and natural meaning, are defamatory of the Plaintiff. Indeed, Counsel on both sides agree on this issue.

The Defendants have pleaded the defence of qualified privilege. On this defence Gatley states, at paragraph 441, on page 185:

"There are occasions which on grounds of public policy and convenience, a person may, without incurring legal liability, make statements about another which are defamatory and in fact untrue. On such occasions a man, stating what he believes to be the truth about another, is protected in so doing, provided he makes the statement honestly and without any indirect or improper motive. These occasions are called occasions of qualified privilege, for the protection which the law, on grounds of public policy, affords is not absolute but depends on the honest of purpose for which the defamatory statement is made. The rule being founded on the general welfare of society, new occasions for its application will necessarily arise with continually changing conditions."

On behalf of the Defendants, Professor Mvunga, S.C., agreed with Mr Jere, the learned Counsel for the Plaintiff, on the authorities the latter cited on qualified privilege. Professor Mvunga, S.C., quoted a passage from the 4th Edition of volume 8 of Halsbury's Laws of England, at page 54 paragraph 108, which states:

“On grounds of public policy the law affords protection on certain occasions to a person acting in good faith and without any improper motive who makes a statement about another person which is in fact untrue and defamatory. Such occasions are called occasions of qualified privilege. It is not possible to set out all the occasions at Common Law, which will be held, to be privileged but, as a general rule, there must be a common and corresponding duty or interest between the person who makes the communication and the person who receives it.”

On behalf of the Plaintiff Mr Jere submits that the defence of qualified privilege should fail because there is no reciprocity of duty or interest between Radio Maria Community Station and P.W.1., Mr Lucas Zulu, who heard the broadcast. That the broadcast was not only made to the Plaintiff's superiors but to all the people who know the Plaintiff and who had no interest to hear the story. In support of his submissions he referred me to Isaac Nyirenda V Kapiri Glass Products Ltd 1985 Z.R. 167.

In reply Professor Mvunga submits that the incident that gave rise to this case involves delivery of health services. That the subject of health delivery services, their inadequacy and short comings is a topic that has attracted the interest and concerns of the Zambian citizenry, day in and day out. He invited the Court to take judicial notice of the present public criticism of the health delivery services in the country. He points out that P.W.1, Lucas Zulu, a Community resident exhibited a sense of concern and interest in what happened at the local Clinic which was servicing local villages. That because of the interest and concern the incident generated, the Plaintiff's superiors immediately went to the Clinic and took remedial

measures by transferring the Plaintiff. That the humiliating and unsatisfactory manner Mrs Hilda Banda was treated raised the interest and concern of people in the area. He added that the incident would be of concern and interest to the Minister of Health, the Zambian Government and the entire Zambian nation because it touches on a citizen's right and access to health services. Therefore, there was a reciprocal common interest and duty between Radio Maria and those that heard the broadcast. I have considered the evidence, authorities and arguments on the issue.

The question of reciprocal common interest and duty, or otherwise, between Radio Maria and the listeners, can be answered by an examination of the law and evidence. The passage from Gatley above states that qualified privilege is founded on general welfare of society or public policy. It is not easy to give a precise definition of public policy. But for purposes of this case, I would define it as principle that ordinary people in society believe in; that influences how they behave.

It is the policy of the Zambian Government to provide health services to its people. In pursuance of that policy, the Zambian Government built the Rural Health Centre at Champhande. The Plaintiff was posted to run it.

Public policy, no less than common sense, demands that when a pregnant woman calls at Rural Health Centre, like Champhande for delivery, she be given due medical attention. On 4th May 2000, Mrs Hilda Banda, in labour, went to Champhande Rural Health Centre with a view to delivering a baby. She was not admitted for delivery. She was turned away by a Mrs T. M. Phiri, because the Centre had no surgical gloves for use in delivery. Mrs

Hilda Banda gave birth to a baby, unattended to, under a tree, some metres away from the Centre. Mrs T.M. Phiri is a Nurse at the Centre and wife to the Plaintiff.

People in the area protested at the incident. They called for the removal of the Plaintiff from the Centre. They were told that the Plaintiff was the person who had turned away the pregnant woman.

In my view, people in the area reacted in the manner they did because they felt aggrieved at the failure of health delivery. Their protest was expression of concern at the failure of health delivery. I agree with Professor Mvunga that health delivery, or the failure thereof, are issues of concern and interest to the Zambian people and their Government. This is because health delivery is a need and a human right.

The evidence of D.W.1, Gabriel Mwanza, is that Radio Maria is a Community Radio Station that broadcast on matters of salvation, spiritual education and health. It broadcast the offending news in that capacity.

For the foregoing reasons, I find that there was a common and corresponding duty or interest between Radio Maria and the people of Champhande area and Chipata District, over the news broadcast, that highlighted the failure of health delivery at Champhande Health Centre on 4th May 2000. Therefore, I hold that the occasion of broadcast of the statements complained of was an occasion of qualified privilege.

I have looked at the case of Nyirenda v Kapiri Glass Products Ltd, cited by Mr Jere. The brief facts of the case were that the Plaintiff was summarily dismissed from his job as a Purchasing Manager. The dismissal letter stated that he was dismissed for failing to perform his duties satisfactorily. The letter was circulated to senior members of the defendant, the Chairman of the Works Council and other members of the work force in the Defendant Company and to the Senior Labour Officer. It was held that communication to senior members of staff, the Chairman of the Works Council and other members of the workforce in the Company, was privileged because the competence or otherwise of Managers were of common interest to both management and workers of the Company.

It was also held that there was no statutory duty on the Defendant Company to notify the Senior Labour Officer and therefore, he had no common interest in the circumstances and reasons for dismissal of the Plaintiff. That the publication to the Senior Labour Officer was not made on a privileged occasion.

I think that case is distinguishable from this case. What makes it distinguishable is the fact that there was no duty on the Defendant to inform the Labour Officer, of the performance of the Plaintiff. In my view, the performance of the Plaintiff in that case was not an issue of public concern because it did not involve delivery of services to the public. In this case, by contrast, delivery of health services is to the public. When it fails, the public needs to know because they are affected.

The next issue for my consideration is whether the news was broadcast with malice. Malice destroys the defence of qualified privilege. Malice here does not necessarily mean personal spite or ill will. It means an improper motive or an indirect motive. Any indirect motive other than a sense of duty is malice. Mere carelessness or negligence in publishing the defamatory statements is not in itself malice. Failure to make an inquiry or investigation that might verify a statement is not malice. It is for the Plaintiff to prove malice: See Gatley at page 5 (*paragraph 6*), at page 330 (*paragraph 765*) at page 331 (*paragraph 766*) and at page 340 (*paragraphs 777 & 778*).

In the present case, the Plaintiff conceded under cross-examination that he had had no quarrel with Radio Maria or its staff before the News item. There is no evidence of improper or indirect motive in connection with the News item. The News item was broadcast purely to inform the public about the incident at Champhande Rural Health Centre. Given the foregoing, I find that the Plaintiff has not proved malice. Therefore, the defence of qualified privilege succeeds. The case is hereby dismissed with costs to the defendants. These shall be taxed in default of agreement.

Finally, in the event of an appeal, I am going to assess damages.

In assessing damages in a defamation claim, a number of factors may be taken into consideration. One is the conduct of the Plaintiff. On this factor, Gatley, at page 385, paragraph 881, observes:

“Much will depend on the character and conduct of the Plaintiff. If he has attacked or in any way provoked the Defendant, or if his own imprudent conduct has given rise to the publication of which he complains, he is hardly likely to receive much sympathy at the hands of a jury. If he is not altogether blameless in the matter, he may be well advised not to bring an action. A man who brings an action in defence of his reputation must be ready and willing to go into the witness-box and deny the charge against him. If he fails to do so the jury may express their opinion by awarding him nominal or even contemptuous damages only.”

Second is the Plaintiff's status – i.e. his position and standing in society. Defamation is an injury to a person's reputation. So the higher the social status or reputation, the bigger the loss when defamed. Hence, the higher the damages. For instance, a Cabinet Minister suffers more loss to his reputation when defamed than a street vendor.

Third is the nature of the libel. For example, a libel that relates to a person's office, occupation, profession, calling or trade is considered serious; and ordinarily attracts big damages. The same applies to a libel that imputes commission of a serious crime such as murder or aggravated robbery.

Fourth is the mode and extent of publication. Defamation in written form is considered more damaging because of it's in permanent form compared to defamation in verbal form. The wider the publication, the bigger the damage to one's name and hence the bigger the compensation.

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Gloves on the material date. It does not say that the Chipata Office failed to deliver the Gloves after he had requested for them. In my view, the Centre did not have Gloves due to the laxity of the Plaintiff and not the alleged fault of the Chipata District Office.

The person who turned Mrs Hilda Banda away is a Nurse under the control of the Plaintiff. As the Clinical Officer in charge of the Centre, the Plaintiff is answerable to the community and Chipata Health Office over her conduct on that incident. The nurse infact is his wife. To that must be added the Plaintiff's conduct after the incident. He told the Court that on 3rd June 2000, the District Director of Health visited the Centre. That the Director told the Plaintiff that the two of them go and see Mrs. Hilda Banda over the incident. He refused to accompany the District Director. The reason he gave is that he was not the person who caused the problem.

I find his refusal strange in two respects. Firstly, in my view, it amounts to insubordination. Secondly, the Nurse who caused the incident is a junior who works under him and is infact his wife. As earlier observed, the Plaintiff is answerable to his superiors and the community, for the lapses in medical delivery at the Centre. One would have expected him to urgently show concern over the incident. Visiting Mrs Hilda Banda in the Company of the District Director, on 3rd June 2000, would have afforded him the earliest and best opportunity for him to express his regret over the incident.

As regards the Plaintiff's status, the only evidence on record is that he was the Clinical Officer in charge of the Rural Health Centre at the time of the incident. On that basis, I find that he is of a humble social status.

Coming to the nature of the libel, it is obvious that it relates to his occupation and profession as a Clinical Officer.

As to the mode and extent of publication, I note that the news item was in written form and then broadcast on the Radio. The publication was limited mostly to Chipata District. It was not nationwide like that in the Newspapers or National Radio.

Next is the question of apology. An apology was not actually tendered. But there is evidence from the Defendants that they were prepared to apologise to the Plaintiff that it was not him who had turned away the pregnant woman but somebody else who was directly under him. That the apology could not be tendered because the Plaintiff's then Advocates demanded not less than K60 million, in addition to the apology. There is evidence that there was correspondence and a meeting between the Defendants and the Plaintiff's former Advocates over the possibility of an apology.

I am of the view that a demand of K60 million was excessive, and unreasonable on the facts of this case. I find that it is that unrealistic demand that killed the Defendant's wish to apologise. They did not refuse to apologise.

On the sixth factor, I find that there was no evidence led in aggravation. There is evidence from D.W.1, Father Mwanza, that the source of the story was Zambia Information Services. The Defendants were not the originators of the story. In my view this is a mitigating factor.

Taking into account all the above six factors, had the Plaintiff's claim succeeded, I would have awarded him general damages, at a nominal sum of K800,000. I would have awarded him this nominal sum mainly because of his conduct. He is substantially to blame for the incident that led to the publication of the statement he is complaining of. Due to laxity, he failed to procure Surgical Gloves for the Health Centre. That is what led to the Nurse serving under him, who also happened to be his wife, to fail to give Mrs Hilda Banda, maternity medical services.

Secondly, the Plaintiff claimed exemplary damages. Mr Jere submitted that the Defendants showed contumelious behaviour towards the Plaintiff in that they completely disregarded his letter of 12th May 2002, demanding an apology. That they did not show any sign of concern or remorse over the publication of the false story. In support of his argument he cited Cobbet-Tribe v Zambia Publishing Co. Ltd 1973 Z.R. 9.

Exemplary damages are punitive. They are awarded where the conduct of the defendant merits punishment. This is where his conduct is wanton; where he acts in contumelious disregard of the Plaintiff's rights. Examples are where the defendant's conduct discloses fraud, malice, vindictiveness, violence, cruelty, insolence or arrogance or the like. They are mostly awarded in two classes of cases. One is cases of offensive, arbitrary or unconstitutional action by the servants of the Government. The other is where the Defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable: See Rookes

v Barnard (1) Cassell and Co. Ltd v Broome (2) and Cobbet-Tribe v Zambia Publishing Co. Ltd (3).

Thirdly, the Plaintiff claimed aggravated damages. Rookes v Barnard (1), holds that aggravated damages are awarded where the injury to the Plaintiff has been aggravated by the malice or by the manner of doing the injury, that is, the insolence and arrogance by which it is accompanied: See also Kapwepwe v Zambia Publishing Co. Ltd (4).

In Cobbet-Tribe v Zambia, Publishing Co. Ltd (3), Doyle C.J. observed that aggravated damages are damages which are compensatory on the highest scale. They are awarded close to the maximum possible. That case illustrates circumstances under which aggravated damages are awardable. The facts of the case were these:

The Plaintiff was a Lawyer and Vice-President and one of the seven members of the Council of the Law Society of Zambia. On 24th September 1971, the Council held a meeting. Thereafter it issued a statement, urging the Zambian Government that certain persons who were recently detained be brought to trial or before a tribunal provided for by the law as soon as possible, in accordance with the Rule of Law. The persons in question were detained by the Republican President under the Presentation of Public Security Regulations. Following that statement, the Defendant published in their Zambia Daily Mail, an article that read as follows:

"It is therefore very disturbing to hear that a group of anonymous Lawyers are now calling upon the Government to bring the detainees to Court.

This, we are told, follows a secret meeting of the Law Society of Zambia which was not attended by the Press.

'In the first place, the public is entitled to know who these lawyers are. Secondly, why should they choose to refuse to invite the Press when they know they are going to discuss such a serious matter?

'The country is also entitled to know where the hell they were when Welensky and Arthur Benson were rounding up all the members of the then Zambia National Congress and putting them in detention and restriction without getting them to appear in Court?

'If they are so worried about the rule of law, why should it suddenly interest them now when they appeared to approve all the harsh measures that Arthur Benson and Welensky took against the masses of this country?

'If these lawyers are of British origin, surely the place to preach such platitudes is in Britain, where Heath is interning the Irish without getting them to appear in court and without even promising them that they would ever appear in Court.

'And if they are from the United States of America, they should go to that country and help Miss Davis and the Soledad remaining brother to get a fair hearing. There are many causes they can fight for in that country.

'And if these Lawyers are black, why do they not quit the country and settle in one of our many black countries where the soldiers are ruling. It

is in place like these where the soldiers are in control where their services are badly needed. Or are they so lily-livered that their big mouths would be shut on arrivals.

'The Attorney-General, Mr. Fitzpatrick Chuula, who is also a Lawyer, and perhaps one of the very few honest ones, has bluntly told the Law Society of Zambia to go to hell and get roasted.

'He has described the bunch as ignorant Lawyers who hardly understand the law they claim they know. Mr. Chuula is right. These are a bunch of fortune-seekers who see in the large numbers of the detained UPP men a very good source of their income.

'The only reason these Lawyers want to see the men brought before the Courts, and the reason they are now putting pressure on the Government to bring these men to Court is to ensure that they get their custom.

Nobody is going to bother asking them to return to this country. They should understand that it is their own living they are earning in this country that keeps them here.

'And if they are Zambians, there is no law in this country that bars them from joining the United Progressive Party. Let them come out in the open instead of hiding behind the formless Law Society of Zambia.

'It is time that some people in this country were told a few home-truths and these are that nobody is really important outside the organisation to

which he belongs. The student is only important when he is a student acting as a student body and a Cabinet Minister when he is Minister and a Lawyer when he is a member of the Law Society. Outside these organisations, they are nothing as individuals. Some people are learning this the hard way. We hope Lawyers do take note of this fact.”

The Plaintiff demanded an apology. The Defendants, through their Lawyers, refused to apologise. The letter from the Defendant's Lawyers stated that the Defendants would defend the action with the utmost vigour. The trial Court described the letter as a pompous legal lecture. The trial Court found that the statements complained of were malicious, extravagant, uniformed and unmannerly. It was held that the case deserved an award of aggravated and exemplary damages. Aggravated damages in the sum of K2,000 were awarded to compensate the Plaintiff to the highest scale. Exemplary damages were awarded in the sum of K750.00, to serve as a deterrent to the Defendant against repetition of similar conduct.

In the Cobbet-Tribe case, the statements complained of were sarcastic. They ridiculed the Plaintiff. There was an express refusal to apologise. That refusal was accompanied by a vow to defend the case with utmost vigour. These were considered aggravating features, which warranted awards for exemplary and aggravated damages.

In this case, there are no aggravating features. The offending statements factually set out the incident involving Miss Hilda Banda, except that the Defendants attributed it to the Plaintiff instead of his wife. The offending statements were broadcast as news and purely informative. The Defendants

never got any financial gain from the broadcast. Therefore, I am of the view that this is not a case for an award of aggravated or exemplary damages. Had the Plaintiffs case succeeded, I would not have awarded them.

Fourthly, the Plaintiff claimed special damages. Claim (d) in the statement of claim reads:

“Special damages for having suffered demotion of his job as a result of the false broadcast. Instead of being posted to Kapata Mini Hospital which is a bigger place, the Plaintiff was demoted and posted to a smaller Clinic namely Namuseche Prison Clinic.”

In a defamation case, damages are awardable where the Plaintiff has suffered actual financial loss: See Gatley, page 594, paragraph 1453. But the general principles governing special damage or loss, apply. The general principle in this regard is that where the Plaintiff alleges that he has suffered special damage as a result of the wrongful conduct of the Defendant, such damage must be pleaded with particulars and proved: See Atkin's Court Forms. Volume 39, page 255, A.G. v Mpundu (5).

In the present case, the Plaintiff's claim for special damages is based on two letters. The first of these is dated 29th June 1999. It is at page 11 of his bundle of pleadings and reads as follows:

“

MH/CD/MA 2104

REPUBLIC OF ZAMBIA

District Health Management Team,

P. O. Box 511205,

CHIPATA

29th June, 1999

Mr. W. H. Phiri,
Champhande Health Centre
P. O. Box 511205
CHIPATA

RE: TRANSFER YOURSELF

As per our earlier discussion, I am pleased to inform you that you have been transferred to Kapata Urban Clinic.

Your transfer is with immediate effect and transport will be sent to you by 29th June, 1999.

We wish you well at your new station.

Yours in public service.

Josias Enos Zulu
Principal Clinical Officer
for/ACTING TEAM LEADER".

The second one is at page 3 of his documents. It reads as follows:

"MH/CD/MA 2104

REPUBLIC OF ZAMBIA

District Health Management Team,

P. O. Box 511205, CHIPATA

21st August, 2000

*Mr. W. H. Phiri,
Namuseche Prisons Clinic
P. O. Box 511205
CHIPATA*

*STAFF TRANSFER: MR W.H. PHIRI: MA 2104 – SETTLING IN
ALLOWANCES*

*I refer to your claims of settling in allowances for your transfer from
Champhande Rural Health Centre to Namuseche Prisons Clinic.*

*Your transfer was initiated by the fact that an officer under your
supervision failed to perform her duties in a proper and efficient manner.
This led to the patients delivering in the bush un attended to.*

Therefore for this reason, your claims are not honoured.

*Bertha Musukwa
Ag. Manager Administration
For/Ag. Team Leader
CHIPATA DISTRICT
rbm/*

Contrary to the pleadings, on 29th June 1999, the Plaintiff was not transferred to Kapata Urban Clinic on promotion. His letter of transfer does not talk of the alleged promotion. The letter of 21st August 2000 does not talk of the alleged demotion. It simply states the reason for his transfer from Champhande Rural Health Centre to Namuseche Prison Clinic, as therein specified. No evidence was adduced to show that at Namuseche Prison Clinic, the Plaintiff is earning a salary lower than what he was getting at Champhande Rural Health Centre. The Plaintiff was denied settling allowance over the transfer. This was so because the transfer was on the disciplinary ground that an Officer under his supervision failed to perform her duties in a proper and efficient manner; resulting into a patient delivering a baby in the bush unattended to. He does not dispute that fact. The failure by the Nurse under the Plaintiff's supervision to perform her duties in a proper and efficient manner, was not caused by Radio Maria. It was caused by lack of Surgical Gloves for which the Plaintiff was responsible.

From the evidence on record, I find that special loss against the Defendants was not proved. Had the Plaintiff's suit succeeded, I would not have awarded special damages.

Delivered in Open Court at Lusaka, this 17th day of August 2006.

M. S. Mwanamwambwa

Judge