

IN THE HIGH COURT FOR ZAMBIA
HOLDEN AT LUSAKA
[Civil Jurisdiction]

2012/HP/0754



BETWEEN

RICHARD MUTONDO NYAMBWATU

Plaintiff

AND

REUBEN MUYUTU

Defendant

CORAM: Honorable Mr. Justice Mubanga Kondolo, SC

MARSHAL: Ethel Phiri

FOR THE PLAINTIFF: Mr. O. Sinkamba of Messrs Sinkamba Legal
Practitioners

FOR THE 1st & 2nd DEFENDANTS: Mr. D.B. Mupeta of Messrs D.B. Mupeta &
Company

JUDGEMENT

AUTHORITIES

LEGISLATION & PUBLICATIONS

1. Halsbury's Laws of England, 4th Edition, Volume 28, p. 22. Para 43

CASES

1. Haonga And Others V The People (1976) Z.R. 200 (S.C.)
2. Mwanza v Zambia Publishing Company Limited [1981] ZR 234.

The Plaintiff sued the Defendant for defamation and commenced the process by a Writ of Summons claiming the following;

1. Damages for slanderous statements published against the Plaintiff about and after May 2012 that, among other things, the Plaintiff criminal, "***uze big tree chiwanga***".
2. The said words were and are being calculated to disparage the Plaintiff as a businessman commonly known as bigtree in Kabompo.
3. Interest on any award that the court may give at the current Bank of Zambia determined lending rate from the sate of the Writ until settlement.
4. Costs.

The Plaintiff called 2 witnesses;

PW 1 – RICHARD MUTONDO NYAMBWATU

PW1, the Plaintiff, testified that on 16th May, 2012 he was summoned to Lukulu Police Station where he was informed that he was a suspect together with Cephas Maumba and Goliat Makayi in an incident in which the Defendant herein, Reuben Muyutu was shot with an AK 47 rifle.

He further testified that sometime in July the Defendant in this matter went to the shop of Goliat Makayi and Cephas Masumba and told them that they together with the Plaintiff had organized people to kill him.

The Plaintiff said he was not there when the words were spoken but the words used were "***uze big tree Chiwanga***" which is Luvale and means "***You are***

murderers". He explained that the word "*uze*" means "*you*" and the word "*chiwanga*" means "*murderer*".

The Plaintiff told the court that on account of those words, people were shunning his shop and his business had been affected and his quality of life had reduced. He also said that the Defendants children regularly insulted him and they were appearing in Kabompo Magistrates court for that reason. He said he had never been arrested for or convicted of murder.

Under cross examination the Plaintiff said his business comprised a bar and guesthouse. The Plaintiff also reiterated what the police had told him at Lukuku Police Station. He said that they had spoken to him in Nyanja telling him that Kabompo police suspected his involvement in the shooting of the Defendant. He said he went to the police station in the company of Goliat Makai and Cephias Masumba and the three of them were told that they were suspects.

When asked what "*Big Tree*" meant, The Plaintiff explained that it was the name of his business. He said he was aware of the shooting as members of the public had been speaking about it. He also said that the Defendant was like a parent to him and was the one who taught him business and that he had known him for a very long time.

Under further cross examination the Plaintiff agreed that he was just told of the defamatory words by his brother Mr. Masumba though he couldn't remember the exact date. He also said that the shooting incident was known by many people

and they were saying that he was the gunman. When asked if he knew who shot the Defendant, he said he didn't.

Under Re-Examination the Plaintiff said the words uttered by the Defendant, "**Uze Big Tree Chiwanga**" were directed at him because Big Tree is the business name for his Guest House, Bar, Restaurant and Construction Company.

PW 2 – MR CEPHAS CHISAMBWE MASUMBA

PW2 testified that the Defendant visited his shop and said to him that Big Tree is a criminal. He said that at the time, the Plaintiff, Big Tree, had travelled to Lukulu. When he came back PW2 told him what the Defendant had said and wondered if people would continue sleeping at his guest house.

Under cross examination PW2 said that his Salaula shop was located opposite the Plaintiffs shop and the Plaintiff was his friend. He also said the Plaintiff was his elder brother in business and he had known him for years.

Under further cross examination, PW2 said the Defendant, for no reason, accused both him and Big Tree of being criminals. PW2 further alleged that the Defendants children had also insulted him and he took them to court where they were ordered to pay him KR2, 000.

PW2 said the Defendant uttered the words as he was touching the clothes being sold in PW2's shop. He said he couldn't tell if the Defendant was angry and he added that, that was the first time the Defendant had entered his shop.

When pressed further, PW2 said he was aware of the shooting and that he had never been friends with the Defendant who was much older than him and was his big man in business. It was put to him that he was very aggrieved because Mr. Muyutu's children attacked him and called him a criminal. He replied that he was not aggrieved as such but they had defamed him and he sued them and they were ordered to pay him K2 million. He said if he was aggrieved, he would have beaten them.

PW2 said that some customers were present when the words were uttered, he knew them but didn't know their names.

It was put to PW2 that ever since the case between Kangombe and him, PW2 had a bad attitude towards the Defendant. He denied this and said that Kangombe was about a totally different person. It was further put to PW2 that he was lying because it was unlikely that somebody who was not his friend and who never visited his shop would suddenly go to his shop and utter those words to him. PW2 insisted that he was telling the truth.

Under re-examination PW2 said the Defendant was purporting to buy a slumber jacket when he said that Big Tree is a criminal.

At this point learned counsel for the Plaintiff closed his case.

DW 1 – REUBEN MUYUTU

DW1 was Reuben Muyutu, the Defendant who denied that he uttered the alleged defamatory words, that big tree is a Chiwanga. He said that all he knew is that he was shot at with an AK 47 on 15th May, 2012.

The Defendant explained that he was shot by a man he knew as Nyumbu and people took him to Chitokoloki mission hospital with a gunshot wound where he was hospitalized for a about a month and neither the Plaintiff nor any of his friends visited him.

The Defendant further testified that the Plaintiffs father was his good friend and the Plaintiff had grown in his eyes and he had never differed with the Plaintiff and he, in fact, used to help the Plaintiff resolve his problems but ever since he came back from the hospital the Plaintiff had never visited him.

The Defendant said he was surprised when officials from the court served him with a summons because ever since this incident he never used to move but just stayed at home. He further said that the police told him that they had apprehended Nyundo who had told them that he was just hired to shoot the Defendant.

The Defendant said Nyundu told him that he had been hired by the Plaintiff to shoot him and there was even a letter addressed to him to that effect but the suspects were all acquitted by the High Court. He named those that were taken to court as having been Nyumbu, Phillimino, the Plaintiffs nephew and others. He said his life was still in danger but he never uttered any defamatory words against the Plaintiff.

The Defendant denied ever speaking to the Defendant and said he had no time to go to where he was as he was as he was weak and not moving around during that

period. He said he didn't know why the Plaintiff who had been like a son to him came to Lusaka to take out an action against him.

The Defendant testified that he was a witness against PW2 in a case before the chief which PW2 lost and maybe that's why he lied against him to the Plaintiff with whom he had never argued.

The court reminded the Defendant that he earlier testified that Nyumbu had told him that the Plaintiff was the one who hired him to kill the Defendant. The Defendant replied saying that maybe he had made a mistake.

Under cross examination the Defendant said he was unhappy that the Plaintiff never visited him whilst he was sick. He also said that Nyumbu never told him that the Plaintiff had hired him to kill the Plaintiff but had just made a mistake in his earlier testimony. He also said that neither he nor his children had any differences with the Plaintiff.

When pressed on the relationship between his children and the Plaintiff, the Defendant recanted and said that his children had been convicted over problems they had with Plaintiff. When pressed further, he said he didn't know the details of the problem between his children and the Plaintiff he was aware it had something to do with him. He however insisted that he had no problems with the Plaintiff.

At this point the Defendant closed his case and counsel for both parties agreed to file submissions within 14 days. Learned counsel for the Plaintiff filed his

arguments but learned counsel for the Defendant has not filed his arguments to date. I have taken the submissions into account.

This is a classic case of *"he said she said"* in that only PW2 was called to attest to the defamatory statement whilst the Defendant denied the accusation and called no witnesses. This matter requires the court to make a finding of fact and under these particular circumstances the court can only seek help from the demeanor of the witnesses and other secondary evidence.

The Defendant did not seek the defence of justification but simply denied that he ever uttered in the Luvale language the words, *"Uze Big Tree Chiwanga"* which means *"Big Tree is a Murderer."* There was no dispute as to the meaning of the words.

The Plaintiff testified that he was informed by the police that he was a suspect in the shooting of the Defendant but he was never arrested nor charged with any offence associated with the shooting. PW2 testified that he was in his shop when the Defendant who had come there and uttered the defamatory words in the presence of other customers.

During the course of his testimony the Defendant said that a man by the name of Nyundu was apprehended for the offence and he told the Defendant that the Plaintiff had hired him to shoot the Defendant. The Plaintiff added that he even had a letter from Nyundu to that effect but the said letter was not produced as part of the Plaintiffs evidence.

Under cross examination the Defendant recanted and denied that he had said that Nyundu told him that he had been hired by the Plaintiff to shoot him. He further said that if that was indeed what he said, then it was just a mistake. This part of the cross examination was cardinal because the Defendant forgot that he had not only said that's what Nyundu told him but that he also had a letter to that effect. This was an outright lie.

The Defendant had earlier testified that the relationship between the Plaintiff and his children was okay but when pressed he admitted that there were in fact problems in the relationship which had resulted in the Defendants children being convicted for an offence against the Plaintiff. He further said that he was not aware of the details of the problem apart from the fact that it had something to do with him. The Defendant would have this court believe that his children were convicted of an offence arising from a dispute over something to do with him and he made no attempt to find out what it was. I throw out this assertion as a blatant lie.

Finally, the Defendant complained and said that he was unhappy that the Plaintiff had not come to visit as he was recovering from the shooting. Whilst this fact alone would not imply that the Defendant had reason to utter the words "**Uze Big Tree Chiwanga**", I find that when considered together with the two serious lies in the Defendants testimony I would find his evidence unreliable.

The case of **Haonga And Others v The People**¹ is instructive regarding material evidence found to be untruthful when the court said,

¹ *Haonga And Others V The People*¹ (1976) Z.R. 200 (S.C.)

“Where a witness has been found to be untruthful on a material point the weight to be attached to the remainder of his evidence is reduced; although therefore it does not follow that a lie on a material point destroys the credibility of the witness on other points (if the evidence on the other points can stand alone) nevertheless there must be very good reason for accepting the evidence of such a witness on an issue identical to that on which he has been found to be untruthful in relation to another accused.”

On the other hand the evidence of PW2 was precise, short and on point and he remained stable and coherent during cross examination.

I have no doubt that the Defendant did in fact utter the words, **“Uze Big Tree Chiwanga”** which mean that **“Big Tree Is A Murderer”**, I also have no reason to disbelieve PW2 that other customers were present when the Defendant uttered these words.

Regarding defamation, **Halsbury’s Laws of England**² says as follows;

“In deciding whether or not a statement is defamatory, the court must consider, what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom publication was made would be likely to understand it in a defamatory sense.”

² Halsbury’s Laws of England, 4th Edition, Volume 28, p. 22. Para 43

I find that the circumstances under which the words said by the Defendant who having been recently shot would only be understood as meaning that the Defendant either shot the Defendant or was involved in the shooting of the Defendant.

In his submissions, learned counsel for the Plaintiff submitted as follows;

"In the case of Mwanza v Zambia Publishing Company Limited [1981] ZR 234, it was held that inter alia, 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.

"In fact there is no proof that the Plaintiff is a criminal and to say a man is a murderer definitely implies he is dangerous and not fit to run a business where people will sleep, eat and socialize. This certainly injures his business, more so in a small town like Kabompo".

I agree with learned counsel for the Plaintiff because in making the defamatory remarks, the Defendant chose to use the Plaintiffs business name. I take judicial notice that it is not uncommon in rural Zambia and indeed to some extent, even in urban, for businessmen to be referred to by the names of their businesses.

In that context, people hearing and believing such accusations may decide to shun the Plaintiffs business establishments and this would result in harming the

Plaintiffs source of livelihood. This was an aggravating factor and is further aggravated by nature of the accusation.

Accusing somebody of a heinous and socially repulsive crime such as murder should not be taken lightly. People suspected of murder may be considered as enemies of society and can end up becoming outcasts. Further, their personal security can be put at risk.

In the premises, the Plaintiff is granted the following;

1. Damages for slander in the sum of Ten Thousand Kwacha (ZMW 10,000).
2. Interest on the awarded sum from the date of the writ to the date of judgment at the Bank of Zambia long term lending rate and from the date of judgment until payment at the Bank of Zambia short term lending rate.
3. Costs are awarded to the 1st and 2nd Plaintiff.

Dated at Lusaka this day of August, 2014.



MUBANGA KONDOLO, SC

JUDGE