

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)**

2015/HP/0544

BETWEEN:

ISAAC CHIPAMPE

1ST PLAINTIFF

BRYSON MUMBA

2ND PLAINTIFF

LULATO K. NYENDWA

20 SEP 2017

3RD PLAINTIFF

VS

ANTHONY MUKWITA

1ST DEFENDANT

KASABO KALUSA (*Sued as Proprietor of an
Online Media Publication known as Mwebantu New Media*)

2ND DEFENDANT

BILLY KAZOKA

3RD DEFENDANT

RADIO PHOENIX(1996) LIMITED

4TH DEFENDANT

BEFORE HONORABLE JUSTICE MR. MWILA CHITABO, SC

*For the Plaintiffs: Mr. N.N Mbao of Mesdames Nkusuwila
Nachalwe Advocates*

For the Defendants: Ms. M. Mbuyi of Messrs Ituna Partners

JUDGMENT

Cases Referred to:

- 1. John Namashoba Muchabi v Aggrey Mwanamufwenga (1987)
ZR 110*

2. *Jonathan W.M Kalonga and Zambia Printing Company Limited V Titus Chisamanga and Joyce Vinkumba (1988-1989) ZR 52*
3. *Michael Chilufya Sata v Chanda Chimba III, Zambia National Broadcasting Corporation, Muvi TV Ltd., Mobi TV International Limited 2010/HP/1282*
4. *Rodger Chitengi Sakuhuka v Sassassali Ningu. Attorney General, Times of Zambia Limited, Times Printpak Zambia and Limited Newspaper Distributors Limited (2005) ZR 39 SC*
5. *Times Newspapers Zambia Ltd v Lee Chisulo (1984) ZR 83 (SC)*
6. *Wacha v Zambia Printing Co. Ltd (1975) ZR 199*
7. *Zambia Publishing Company Limited v A. Zaloumis and K. Mathis (1978) ZR 10(SC)SC*
8. *Zambia Publishing Co. Ltd. v Kapwepwe (1978) ZR15*
9. *Zambia Publishing Company v Kakungu (1982) ZR 167*

Legislation:

1. *The Defamation Act Chapter 68 of the Laws of Zambia*

Works Referred to:

1. *Gatley on Libel and Slander 6th Edition*

The Plaintiffs instituted this action against the Defendants by way of Writ of Summons accompanied by a Statement of Claim. The Plaintiffs claimed the following reliefs:

1. Against the Defendants and each of them:
 - i. Compensatory damages

- ii. Exemplary damages
 - iii. Interest on the damages claimed
2. An Order of injunction restraining the 1st, 2nd and 3rd Defendants whether by themselves or agents or otherwise and the 4th named Defendant by its directors its servants or otherwise from further writing or publishing or causing to be aired or distributed any words or news referred to in paragraph 4 of the Statement of Claim herein or any similar words defamatory of the Plaintiffs.
 3. An Order that the Defendants broadcast both on air and by way of printed media specifically the Zambia Daily Mail Newspaper an apology and retraction of the defamatory publication and broadcast.
 4. Any other relief the Court may deem fit.
 5. Legal costs.

In the Plaintiff's Statement of Claim revealed that the 1st Plaintiff was a former Managing Director of Zambia Daily Mail while the 2nd and 3rd Plaintiffs were at all material times employees of Zambia daily mail as Managing Director and Human Resource and Administrative Manager respectively.

It also revealed that the 1st Defendant was at all material times the author of defamatory words and statements that were published on the 2nd Defendant's electronic news website known as "Mwebantu New Media" and broadcast on the 4th Defendant's radio station.

The 3rd Defendant was at all material times a News Editor and an employee of the 4th Defendant that published and broadcast defamatory words and statements authored by the 1st Defendant on the news aired by the 4th Defendant.

It was contended that on 24th February, 2015 at 18:00hrs the 2nd Defendant caused to be posted on his electronic news website and the 3rd and 4th Defendants caused to be broadcast on air a malicious story authored by the 1st Defendant which contained statements that were economical with the truth.

The Statement of Claim contended that the words in these articles in their natural and ordinary meaning meant that Plaintiffs were guilty of corrupt practices, abused their authority and that there were still on-going investigations currently being done in order to take executive action on the matter against the Plaintiffs.

It went further to state that the said words meant that the Plaintiffs were so corrupt that they even went a step further and illegally terminated the 1st Defendant's contract to enable them to easily facilitate corrupt practices in the manner they outsourced the printing company when in actual fact the 1st Defendant's contract of employment was terminated lawfully.

The Plaintiffs contended that the ACC had cleared them of any allegations of wrongdoing or abuse of authority of office and the Defendants had in their possession a letter to that effect but still went ahead and maliciously broadcasted and published distorted information.

In the Defendants defence it was admitted that the 2nd Defendant published the article complained of but denied that the same was defamatory in nature nor was it maliciously broadcasted by the 4th Defendant. It was contended that the 4th Defendant broadcasted the said article with the sole intent of informing the general public about current affairs and what goes on in government institutions.

It must be noted that the Plaintiffs filed in a notice of discontinuance of the action as against the 1st Defendant only on 16th June, 2016. The matter is therefore with respect to the 2nd, 3rd and 4th Defendants.

The Plaintiff had two witnesses the first of whom was **Mr. Isaac Chipampe**, the 1st Plaintiff herein who testified that on 24th February, 2015 he was on his way home when he was alerted by a former colleague to tune to the 4th Defendant's radio station where they were about to read a story about him. The story was that the ACC had established a case against himself and two other Directors at the Zambia Daily Mail. The story said the 3 directors abused K350million unrebased and that they single sourced a company for printing works.

He testified that the story also said that they did not consult the Permanent Secretary in the Ministry of Information and Broadcasting, Mr. Emmanuel Mwamba. Further that no consultations were made with the 1st Defendant who was the Deputy Managing Director at the time. The ACC was said to have directed the Permanent Secretary to take executive action against the three and that the three Plaintiffs would be prosecuted.

He narrated that he then called the Permanent Secretary of Information and Broadcasting at the time Mr. Charles Kasolo to inquire over the story he had just heard but Mr. Kasolo did not comment. He then called the 3rd Defendant and asked him if he had facts over the story they had just run and he informed him that there were people who were working against him and he that he had a letter from the ACC, a copy of which he would avail to him. They agreed to meet at PW1's office on 25th February and indeed on the morning of the 25th February, 2015 the 3rd Defendant went to his office and showed him the letter he was referring to.

According to the witness, the contents in the letter from the ACC and the contents of the news item were different particularly that the letter said that the Director General had actually stated that the ACC would not continue the case against the three Plaintiffs. Further, that the letter did not mention the name of Mr. Emmanuel Mwamba who was mentioned in the news item neither did the letter mention Mr. Anthony Mukwita nor that the three would be prosecuted as broadcasted.

When he queried the 3rd Defendant over the concerns he had, he mentioned that the 1st Defendant was the author of the story that was read on Radio. He narrated that he then went to see the Permanent Secretary and showed him the said letter which according to him did not show much interest and told him that when you are in public office some fighting was expected. He contacted his colleagues the 2nd and 3rd Plaintiffs and they said that the only way they would know that the letter was authored

by the 1st Defendant was if the story was forwarded to PW1 which would show the source of the original story. The 3rd Defendant forwarded the email containing the story to the Plaintiff and indeed it revealed that the emails were from Lubinda Lubinda which was the name the 1st Defendant used on his emails. He said he knew this because he was his deputy at the Zambia Daily Mail.

He said that because of the said publication he and the other Plaintiffs instituted this suit against the four Defendants as they felt that their reputations were seriously injured by the publication as this was seen by the outpour of negative comments and insults where the three were branded as thieves.

The letter from the 1st Defendant was produced and admitted into evidence and marked P1. The same read as follows:

Isaac Chipampe, Bryson Mumba in Corruption Scandal

"The Anti-Corruption Commission (ACC) has established a case against former Zambia Daily Mail Managing Director Isaac Chipampe together with the current Managing Director Bryson Mumba after the duo abused up to K350,600 rebased or more than K350million unrebased.

Apparently Chipampe who was entitled to approve only K50,000 in tenders as MD of state run company that depends on tax payers money went on the limb while working with Mumba and a Lutato Nyendwa, the Director Human Resource raising suspicions from colleagues from the production department.

Chipampe, Nyendwa and Mumba however, without consulting fellow directors such as the Deputy Managing Director Anthony Mukwita and without consulting the Permanent Secretary Mr. Emmanuel Mwamba engaged a private firm called Rank Graphics whom they paid tax payers money amounting to more than K350,000.”

At page 2 of the publication it went further to state that:

The trio led by Chipampe were responsible for illegally terminating the contract of the former Managing Director Mr. Anthony Mukwita due to his strong adherence to following laws”

Chipampe is now a Junior Director at the Ministry of Information while Mumba and Nyendwa remain at the Zambia Daily Mail despite the deep scar of corruption that hangs over them:

Mr. Chanda Kasolo, the information Permanent Secretary is expected to take executive action on the matter in order to send a clear message that graft state institutions involving tax payers’ money will not be tolerated.”

The witness told the Court that in his 25 years of practicing journalism it was unethical for a journalist to use a source to publish a story without investigating or calling to verify the story. He said that the story in the first paragraph said that the ACC had established a case against the Plaintiffs but according to the witness it was the Court that could establish a case against them. He said there was no evidence to support the assertion

that the Plaintiffs abused K350million old currency. He denied being unprofessional officers who went the whole way to terminate the appointment of the former Managing Director, the 1st Defendant, in order to continue their illegal activities.

The witness felt greatly injured by the story and sought for compensation by the Defendants for injury caused to his reputation.

In cross examination the witness told the Court that he was injured by the statement saying that the trio led by the witness were responsible for terminating Mukwita's contract but admitted that the same statement was not in document No. 1 of the Defendant's bundle of documents. He however mentioned that that was not the only defamatory statement that he had been injured by. He said that contrary to the statement in issue there were no charges against the Plaintiffs.

He explained that while he was Managing Director at Zambia Daily Mail the image setter broke down and to ensure production because newspapers come out everyday, they outsourced many companies and Graphic was one of those companies. He denied paying them K350, 600 rebased for services. He did not remember how much was paid but he remembered that they were paid in bits and pieces. He said as Managing Director of Zambia Daily Mail he did not have authority to offer contracts beyond K50, 000 which was stated in the letter from the ACC. He however said that the sum of K350, 000 was not in excess of the authority he had to offer contracts.

He further stated that with respect to the termination of the 1st Defendant, Mr. Mukwita was not mentioned. He explained that he called Radio Phoenix on 24th February, 2015 and he lodged a complaint the following day. He however noted that the 3rd Defendant apologized and there was an apology broadcasted on the News bulletin of Radio Phoenix.

In re-examination the witness clarified he gave an order to Rank Graphics and it was for less than K50,000. He further clarified that the apology he referred to was from the 3rd Defendant and not from the 4th Defendant.

PW2 was **Bryson Mumba**, the 2nd Plaintiff herein. He testified that on 24th February 2015 he received a call from the 1st Plaintiff at around 19:00hrs in the evening who asked him if I had listened to Radio Phoenix news at 18:00. He told him that there was a story that had been run on Radio Phoenix about himself the 1st Plaintiff and the 3rd Plaintiff about a scandal that had happened at Zambia Daily Mail.

The witness said they decided to have a meeting the following day over the issue. That evening he received calls from his brother and a friend over the story. The three Plaintiffs had the meeting where they discussed the matter and decided that because of the falsehoods contained in the report they would write to the 4th Defendant to retract the story and apologise. The letter was written by PW1 and during the discussions they agreed that they had to get to the source of the document. He said that PW1 got the source of the story through emails that were sent to him by

the 3rd Defendant and it was discovered that the story was authored by the 1st Defendant.

There was also a letter that was written by the Director General of the ACC marked secret which was sent to the 4th Defendant. After referring to that letter the 3rd Defendant apologized. He narrated that they moved the Court because they felt defamed by the story that was authored by the 1st Defendant and was broadcast on radio by the 4th Defendant and on the internet by the 2nd Defendant.

He told the Court that the three were defamed because the story contained falsehoods which were that:

1. That the ACC had established a case against them which was not true because in the letter from the ACC it was stated that they were not going to prosecute the suspects
2. The story had referred to Mr. Emmanuel Mwamba was the permanent secretary of the Ministry of Information and Broadcasting.
3. The story said the trio were responsible terminating illegally the contract of the 1st Defendant was not true because the 1st Defendant's contract was terminated by the Board of Directors and not the Plaintiffs.
4. The story further stated that they ACC were considering whether to prosecute the Plaintiff or not but was not true.
5. That the Plaintiffs had sidelined the Deputy Managing Directors during the procurement for the services of printing the plate was not true because management meetings were held to consider the procurement.

6. The story also said that the Managing Director had exceeded his authority of awarding contracts up to K50,000 which was not true because the contract was a rate based contract which contract involved agreeing a rate for each unit of production and the rates were within the Managing Director's threshold and payments were made as per contract weekly for less than K50,000.
7. Further that the title of the story talked about corruption when there was no corruption involved.

It was for these reasons that the Plaintiffs felt they were defamed and came to Court to consider damages from the defamation for the injury caused to him and his colleagues and that his reputation had been ruined. He said he lost his job as Managing Director and if anyone was to search for his name on the internet, the false stories come up.

It was his testimony that without the truth being told the stories that were on the internet would be taken for the truth when in fact not.

In cross examination he told the Court that they got two documents through PW1 that came from the 3rd Defendant which were a letter from the ACC and the story that was offered by the 1st Defendant. He said he was not found guilty of abuse of authority.

He said he did not listen to the news on the 24th of February nor was he given a script that was read that day. He admitted that the things he had said in relation to the 4th Defendant were based

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referred to him and his colleagues as having been responsible for the termination of the 1st Defendant's contract which was a falsehood that was contained in the story authored by the 1st Defendant.

He said that in terms of his termination of employment, no reasons were given to him and he was of the view that what had been written about him had affected the termination of his contract as this came two months after the story was published. He said that it the Minister of Information and Broadcasting who terminated his contract and not the 4th Defendant. He denied that the claim against the 4th Defendant was hearsay because he had requested for the transcript for the story that was broadcast which was given through his lawyer.

In re-examination he told the Court that he was not found guilty of abuse of authority by ACC and the last but one paragraph in the letter from the ACC said they were not going to prosecute the suspects.

PW3 was **Mr. Lulato Kenneth Nyendwa**, the 3rd Plaintiff herein. He testified that on 24th February, 2015 he was driving home along Kafue Road when he heard the 18:00hrs news on Radio Phoenix. One of the news items shocked him so much which said that they were being investigated by the ACC. He narrated that he remembered the news item saying that the three Plaintiffs had been found with a case of abuse of office and the matter was being handled by the Permanent Secretary for the Ministry of Information Services for executive action.

That evening he received calls from concerned colleagues and wondered how the news got to radio phoenix. The following day he met with PW2 and agreed to write a letter to the 4th Defendant asking them to retract the story and apologise. They also wanted to know the source of the story and they asked PW1 to request the News Editor for the 4th Defendant to forward the email that they had received the story from.

He said he later learned that the email was sent to PW1 by the 3rd Defendant where it was discovered that the 1st Defendant authored the story and it was published by on Mwebantu news media and was broadcast on the 4th Defendant radio station. He asserted that he felt greatly injured by the story as their reputations were in tatters.

According to him the 1st Defendant received the letter and rewrote it so that it could portray a bad image of the Plaintiffs. He said the story in part stated that the three of them were responsible for terminating the contract of the 1st Defendant and that the ACC had established a case against them. The story further stated that they did not consult the 1st Defendant and the Permanent Secretary before giving a contract to Rank Graphics.

He testified that these allegations were false because as Senior Management they were not responsible for terminating the contract as the same was terminated by the Board. He further stated that there was no need to consult Mr. Mwamba because the Permanent Secretary at the time was Mr. Amos Malipenga. It was his assertion that they were accused of going on a limb to promote corruption in the articles which went to the core of their

reputation and hence this suit was instituted to seek compensation for defamation.

In cross examination the witness told the Court that 4th Defendant should compensate him for carrying out any falsehoods on the 24th of February, 2015. He said he did not read the bulletin but that there was falsehood in the story that the Plaintiff did not consult the 1st Defendant and the Permanent Secretary.

He explained that the reason why the Permanent Secretary and the 1st Defendant were not consulted was because procedurally there was no reason to consult them. According to him the statement that the 1st Defendant and the permanent were not consulted was not defamatory in itself. However, when it was put in a story and put on social media and was trying to make them look like they were carrying out deeds without due authority.

He stated that the statement that procedure was not followed in terms of procurement because the quotations were supposed to be collected and evaluated by the technical committee which was not done was inaccurate. The witness stated that procurement fell under his directorship and they had a crisis to manage a crisis and the Procurement Act provides for single sourcing in such circumstances.

He stated that it was only the Court that could establish a case against the Plaintiffs. He admitted that the letter did not include the story that the trio went on a limb of corruption.

The Defendants called one witness **Mr. Moemedi Owen Rampha** a Broadcast Management Consultant. He testified that at the time of the broadcast in issue he was Managing Consultant. It was his testimony that he believed that the station was innocent of any claims lodged by the Plaintiffs because to his knowledge the station followed the journalistic principles and media ethics. These ethics were prescribed in the Media Code of Ethics which is instituted and driven by MISA Media Institute of South Africa which was distributed to all media houses freely to assist and guide them.

He stated that there was fair, accurate and balanced reporting affording an aggrieved party a right of reply and offering an apology. According to him the news bulletin in question contained information which was fair and accurate as per the findings that were published in the ACC letter. The subsequent issue of balanced reporting was covered the following day in another bulletin that afforded the Plaintiff the opportunity to respond to the contents of the broadcast in the bulletin in question.

He testified that the 2nd bulletin was the one that referred an opportunity to respond. The third aspect which was an apology by the 3rd Defendant to the 1st Plaintiff was also carried out in the 2nd bulletin. These bulletins were aired the very next day with the same amount of prominence as the first bulletin and was also aired at the same time as the earlier bulletin. The said apology was contained at page 2 of the Defendant's bundle of documents.

He stated that with respect to the letter from ACC, he would not say that the Plaintiffs were cleared of charges levelled against them.

In cross examination the witness told the Court that the media had a responsibility to report issues of public interest and these were issues which the public was directly or indirectly affected by and the public was in need of such information. He said that these usually revolved around public office, state owned institutions, individuals of high public profiles, accountability and governance issues. He further stated that the 4th Defendant issued an apology not because they were wrong but because the parties had not been given a right to reply in the first bulletin which was remedied in the 2nd bulletin.

When the Defendants closed its case the Court issued an Order for Directions and the 4th Defendant filed its submissions on 15th August, 2017 while the plaintiff with leave to file out of time filed in written their submissions on 6th September 2017.

The Plaintiffs submitted that according to the case of **Zambia Publishing Co. Ltd. v Kapwepwe (1978) ZR15** it was stated that where words were alleged to be defamatory in their ordinary meaning, a Plaintiff needs only to prove that they were published. That if the words are alleged to bear a defamatory innuendo, it was necessary to prove no more than the extrinsic facts known to one or more of the persons to whom the words were published which would cause the words to convey the defamatory imputation.

They further referred to the case of ***Rodger Chitengi Sakuhuka v Sassassali Ningu. Attorney General, Times of Zambia Limited, Times Printpak Zambia and Limited Newspaper Distributors Limited (2005) ZR 39 SC*** on the meaning of libel. They also cited the case of ***Wacha v Zambia Printing Co. Ltd (1975) ZR 199*** where it was held that a statement of suspicion was defamation and that it was even more so where it amounted to an imputation of guilt.

It was the Plaintiffs' submission that it was evident that the nature of the underlying matter was such that the defamatory article by the Defendants proved to disparage the Plaintiffs in their profession as they are all prominent figures in the media sector. They argued that the said article brought them into disrepute especially with regards to their peers, subordinates and the populous as a whole. They submitted that it was obvious that a prudent and right thinking person would conclude, from the articles complained of, that the Plaintiffs were corrupt individuals who had no regard to procedure and could do anything to champion their cause of corruption.

It was further submitted that it was not the duty of the Plaintiffs to prove the statement was false but had to prove that the statement was defamatory. They argued that according to the case of ***John Namashoba Muchabi v Aggrey Mwanamufwenga (1987) ZR 110*** it was not necessary for the Plaintiffs should speak of defamatory statement verbatim. It was merely enough for the Plaintiffs to show that the Defendants meant that the

Plaintiffs were corrupt, breached procedures and that they neglected the law in their duties.

With regard to the apology rendered by the 4th Defendant it was submitted that the Defamation Act provides for the effect of such an apology. It was submitted that section 10 of provides for requirements in order to validate an apology.

The Plaintiff argued that the Supreme Court while considering the effect of an apology in a claim for defamation in the case of **Jonathan W.M Kalonga and Zambia Printing Company Limited v. Titus Chisamanga and Joyce Vinkumba (1988-1989) ZR 52 SC** stated that:

“Where publication of the defamation is restricted, that was a matter which should be taken into account to reduce the damages. An adequate apology, no matter that it was tendered late, has the effect of exterminating the seriousness of the defamation and therefore of the quantum of damages.”

It was their submission that the 4th Defendant radio station exhibited gross negligence in its broadcast by virtue of which the station waived qualified privilege thus have no defence whatsoever for the defamatory statement made on the 24th of February, 2015 against the Plaintiffs alleging that they were being investigated for corruption and the 4th Defendant's purported apology was lacking in the sense that it did not satisfy the requirements of section 10(2) of the Defamation Act.

They urged the Court to disregard the apology as it was not sufficient to the Plaintiffs reputation. They added that the effect of an apology was not to exterminate liability in defamation. They submitted that the Supreme Court had guided that an apology merely reduced the seriousness of the defamation and speaks to damages to be awarded by the Court.

It was the Plaintiffs further submission that the defence of justification could only lie successfully if the imputation was true not only in substance but also in fact. This was the effect of the holding of the Supreme Court in the case of **Zambia Publishing Company Limited v A. Zaloumis and K. Mathis (1978) ZR 10(SC)**. They argued that the Defendants at trial could not speak to the truth of the contents of their bulletin including the 4th Defendant which admitted that even though it was expected to verify the news before airing it.

They argued that the Defendants did not practice responsible journalism as per good practice in the media industry and cited the English case of *Reynolds v Times Newspaper Ltd* (2001) 2 AC 127.

The 4th Defendants submitted that the news aired by the 4th Defendant was exactly in line with the finding of the ACC. They cited the case of **Michael Chilufya Sata v Chanda Chimba III, Zambia National Broadcasting Corporation, Muvi TV Ltd., Mobi TV International Limited 2010/HP/1282** which addressed various issues relating to defamation.

They submitted that the 4th Defendant Broadcasted news that was fair, accurate and substantiated by facts which the ACC had investigated, published the findings thereof. They argued that the Plaintiffs had admitted the findings of the ACC were accurate. They submitted that the 4th Defendant behaved as responsible journalists without malice or intention to defame the Plaintiffs.

The 4th Defendant also submitted that they offered the Plaintiffs with a right of reply and subsequently broadcasted an apology the very following day. They stated that this was for the sake of clarifying any words which appeared in accurate according to the Plaintiffs. They cited the case of ***Times Newspapers Zambia Ltd v Lee Chisulo (1984) ZR 83 (SC)*** where it was held that:

“an adequate apology will, in most cases virtually expunge the damages arising out of any defamation. This is so even where such apology is tendered late”

It was the 4th Defendant's final submission that in view of the authorities cited and the evidence on record, the Defendants were not liable for anything and the Plaintiffs' claim for libel had no leg to stand on and their claim should be dismissed with costs.

I have carefully considered the evidence on record and the submissions by the Plaintiffs and the 4th Defendants.

The uncontested facts are that:

1. The Plaintiffs were former employees for the Zambia Daily Mail.

2. There were two articles that were published by the 2nd and 4th Defendants on corruption allegations against them.
3. That the 3rd Defendant met with the Plaintiffs after they broadcast the news bulletin and an apology was subsequently issued.
4. That because the Plaintiffs felt injured by the statements published they instituted these proceedings against the Defendants.

The plaintiffs' case is that the articles made were defamatory and consequentially injured their reputations. They therefore asked the Court for damages for defamation from the 1st Defendant who they alleged authored the defamatory articles and the 2nd, 3rd and 4th defendants who published the articles.

There was no witness called by the 1st and 2nd Defendants and the 3rd and 4th Defendants in response to the allegation said they conducted themselves in accordance with media ethics and afforded the Plaintiff a right of reply to the publication. They further stated that they went a step ahead and issued a public apology the following day during the same time that the earlier news bulletin was aired. They argued that because of the said apology they were exonerated from any liability for libel or slander.

The starting point is the definition of libel which is being alleged by the Plaintiffs. The supreme Court in the case of **Rodger Chitengi Sakuhuka vs Sassassali Nungu and Others** cited by the Plaintiffs defined libel as the publication of a matter, usually words, conveying a defamatory imputation as to a

person's character, office or vocation. They went further and held that any imputation which may tend to injure a man's reputation in business, in employment, calling or office carried on or held by him is defamatory.

Matibini, J sufficiently discussed the defences to defamation in the case of **Michael Chilufya Sata v Chanda Chimba and Others** referred to by the Defendants. He highlighted justification, fair comment and qualified privilege.

Firstly, section 6 of the Defamation Act, provides for a statutory defence of justification as follows:

"In an action for libel or slander in respect of words contained in two, or more distinct charges against the plaintiff a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true, do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges."

In the *Michael Chilufya Sata* case the Court held that a defendant should not plead justification unless the words complained of are true and the defendant has reasonable evidence and grounds to prove the allegation.

In the present case the 4th Defendant in its submissions argued that the Plaintiff had admitted that the ACC was investigating them and that they had found them wanting for abuse of authority of office and that at the ACC's discretion they were not

prosecuted. They argued that this was the very news that was broadcasted by the 4th Defendant.

In the present case it was clear that the Plaintiffs did not agree with the contents of the letter from the ACC nor is there evidence that the Plaintiffs were asked prove the said allegation. In any event a copy of the said letter is not before court to establish its authenticity and its truth.

The defence of justification does therefore not stand because it is a fact that the articles were published without establishing whether the allegations were true or not. The truth of the articles has therefore not been established by the evidence on record.

With regard to the defence of fair comment, section 7 of the Defamation Act provides that:

"In an action for libel or slander in respect of words consisting partly allegations of fact, and partly of expressions of opinion, a defence of fair comment shall not fail by reason that the truth of every allegation of fact is not proved if the expression of opinion is a fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved."

I will again call in aid the case of Michael Chilufya Sata where with respect to fair comment it was held that:

"the defence of fair comment is concerned with the protection of comment, and not imputation of fact. To be within the purview of this defence, the fair comment must

be shown or demonstrated to be distinct from imputation of fact. The comment must be based upon facts truly stated. Where some of the facts stated are true and some are false, the defence will succeed if the defendant would have been entitled to make the same comment solely on the basis of the true facts."

In the present case the publication by the 2nd and 3rd Defendant was not a comment on an issue but rather a publication of facts which facts are strongly disputed and which facts the Plaintiffs are alleging were defamatory. The defence of fair comment therefore fails.

Lastly with respect to the defence of qualified privilege, Justice Matibini held that *the defence of qualified privilege applies to certain occasions when a person(s) should be free to publish defamatory material provided they act in good faith or are made honestly. This is the rationale behind the defence of privilege. However, the defence of qualified privilege may be defeated by proof that the defendant was malicious.*

He cited Lord Atkins who defined a privileged occasion as *an occasion where the person who makes a communication has any interest or duty legal, social, or moral to make it to the person to whom it is made and the person to whom it is made has a corresponding interest or duty to receive it. This reciprocity is essential.*

In my view there was no duty on any of the defendants to publish the information alleged because they claimed that the Plaintiffs

were corrupt but the evidence on record is that the letter where the information came from was termed to be secret and that in the same letter there was an indication that the investigating authority were not going to prosecute the Plaintiffs. This in my view leaves no conclusive facts as to the truth and indeed the value of the information contained in the letter that led to this publication.

There is no doubt in my mind that the publications made by the 2nd, 3rd and 4th Defendant were in fact defamatory because the information was neither justified, nor was it a fair comment nor was it privileged information because the truth of the said statement was not ascertained by any evidence on record.

I am therefore satisfied that the statement published by the 2nd, 3rd and 4th Defendants without verifying the truth of the article before publication. This in my view was not responsible journalism contrary to the submissions by the 4th Defendants.

Having therefore established that the Plaintiffs were defamed by the Defendants I will now consider the issue of damages and I will take into account the following:

1. The presence or absence of an apology
2. The reliability of the defamation, i.e. was it reasonable to rely on it or was it reckless to do so.
3. Failure to investigate the truth of the facts raised in the article.
4. Whether the Defendants were or were not the original authors of the publication.

The Supreme Court has given guidance in instances where an apology has been issued in the case of ***Times of Newspaper Ltd v Lee Chisulo*** cited by the 4th Defendant. In that case they held that an adequate apology would in most cases virtually expunge the damages arising out of any defamation. The evidence on record is that the 4th Defendant issued an apology in a publication where they addressed the Plaintiffs concerns and after they asked for an apology to be issued. This apology is a mitigating factor in considering damages.

In considering exemplary damages I call in aid the case of ***Rookes v Banard (1964) 1 ALL ER 367*** where it was held that *exemplary damages could be awarded where the Defendants' conduct was calculated to make a profit for itself which it thought will exceed the compensation payable to the Plaintiff.*

Further, according to the learned author Gatley on libel and Slander in paragraph 1384 of his publication, he stated that where the Defendant publishes a falsehood in the knowledge that that the profits to be made from this libel are higher than the damages which would be awarded by the Court, the Court should in fact inflict sever damages. However, there is no evidence the publication in issue gave the 2nd and 4th Defendant high profits and therefore the claim for exemplary damages fails.

I am further guided by the case of ***Zambia Publishing Company v Kakungu (1982) ZR 167*** where it was held that *the fact that the defamatory matter came from an otherwise impeccable source and was correctly published is factor to be taken into consideration mitigation of damages.*

In the present case the evidence is that the initial source of the information was the ACC and the article was modified by the 1st Defendant which as I have already established has not been challenged. The 1st Defendant being a person who worked with the Plaintiffs at the material time in my view made him and impeccable source more so that there was unchallenged evidence that the ACC in fact wrote a letter stating that the Plaintiff had been investigated for the alleged offences. This in my view should mitigate the damages.

On the totality of the evidence and having established that the 2nd, 3rd and 4th Defendants defamed the plaintiffs I find that there is force in the arguments that the 3rd and 4th Defendants by virtue of their apology should be exonerated from damages. However, I am of the firm view that media houses should have a duty of care and follow responsible journalism by ensuring that they hear both sides of stories before they are broadcasted. Therefore while they are entitled to leniency in the determining damages, they cannot be left to go scot free.

With regard to the 2nd Defendant, there has been nothing to show that there was an apology rendered over the defamatory statements nor was there evidence to show that they had made attempts to contact the Plaintiffs to hear their side of the story. In a society where social media reports are made carelessly on a daily basis, it is the duty of the Court to ensure that there is sanity and that the laws regarding protection of every citizen's reputation are enforced.

In my view it is very reckless to make a report on a website which is viewed the world over without confirming the facts as true or indeed affording the affected individuals an opportunity to be heard. This is more so that innocent citizens have no way of rebutting such stories on such platforms when the media houses are the ones with the better platform to correct such perceptions.

It is this reason that I am of the view that the 2nd Defendants should be condemned to pay damages without any mitigation as well as interest on damages. The damages are in the sum of K100, 000. I further Order that an apology be rendered on the same platform of the 2nd Defendant that was used to make the publication in the first place.

With respect to the 4th Defendant, considering the apology rendered, I order that they pay the sum of K5, 000 in damages. I order that costs be for the Plaintiffs which costs will be taxed in default of agreement.

Leave to appeal is granted

Delivered under my hand and seal this 20th day of September,

2017



Mwila Chitabo, S.C.

JUDGE