

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

2016/HP/1490

Between:

JACK KALALA



PLAINTIFF

AND

DAILY NATION NEWSPAPER LIMITED

1ST DEFENDANT

ZAMBIA DAILY MAIL LIMITED

2ND DEFENDANT

TIMES PRINTPAK ZAMBIA LIMITED

3RD DEFENDANT

FEM ZAMBEZI LIMITED

4TH DEFENDANT

BEFORE HON. MRS. JUSTICE G.C. CHAWATAMA
ON 19TH JUNE, 2020 - IN CHAMBERS

For the Plaintiff : *Dr. M. Mwanawasa- Messrs. Levy Mwanawasa & Company*
For the 1st Defendant : *Mr. Kanga- Messrs. Makebi Zulu Advocates*
For the 2nd Defendant : *Mrs. Tafuna Phiri- In House Counsel*
For the 3rd Defendant : *Mr. J.C. Chilenge- In House Counsel*

JUDGMENT

CASES REFERRED TO:

1. *Mwanza v Zambia Publishing Company Limited (1981) ZR 234*
2. *Roger Chitengi Sakuhuku v Sassassalu Nungu, AG, Times Printpak (2005) ZR 39*
3. *Michael Chilufya Sata v Wallen Simwaka, Rebecca Chileshe, Zambia Daily Mail Limited, 2011/HP/577*
4. *Michael Chilufya Sata v Chanda Chiimba III and Others 2010/HP/1282*
5. *Zambia Publishing Company Limited v Eliya Mwanza (1979) ZR 76*
6. *Muvi TV Limited v Killian Phiri and Kennedy Musweu, Appeal No. 13/2015*
7. *Lewis v Daily Telegraph Limited (1963) 2 ALL ER 151*
8. *Simon Kapwepwe v Zambia Publishing Company Limited (1978) ZR 15*
9. *Tolley v Fry & Sons Limited (1931) AC 333*
10. *Sebastian Saizi Zulu v Times Newspaper (Zambia) Limited (1985) ZR 30*

11. *Bevi Ndovi v Post Newspaper Limited and times Printpak Zambia (SCZ Judgment No. 8 of 2011)*
12. *Sata v Chiimba and Others*
13. *Getz v Robert Welch, Inc*, 418 U.S 323, 94 S. Ct. 2997. 41 L. Ed. 2d 789 (1974)
14. *Evans v London Hospital Medical college* (1981) 1 WLR 184
15. *Mwanza v Zambia Publishing Company* (1981) ZR 234
16. *Gulf Oil (GB) Limited v Page & Others* (1987) 3 ALL ER 14
17. *Fungamwango and another v Nalishebo (Appeal No. 133/99) (2000) (unreported)*
18. *Mumba vs Zambia Publishing Company* (1982) ZR 53
19. *Sata v Post Newspaper Limited and Another* (1995) ZR 203

AUTHORITIES & OTHER WORKS REFERRED TO

1. Sections 7, 8 and 9 of the Defamation Act, Chapter 68 of the Laws of Zambia.
2. Halsbury's Laws of England, 3rd Edition, Volume 28 & paragraphs 82 and 1357
3. Phipson on Evidence, 17th edition in paragraph 6-06 at page 15

In this matter commenced by writ of summons and statement of claim plaintiff seeks the following reliefs:

1. Damages for libel;
2. Interest;
3. Costs of and incidental to these proceedings; and
4. Any other relief the court may deem fit.

In the statement of claim filed into court on 27th July, 2016, the plaintiff claim arises out of publications by the 1st to 3rd defendants on 8th April, 2016 in their respective newspapers which the plaintiff finds defamatory.

On the said date, the 1st defendant caused to be published a story under the heading: "*Ex-State House Aide faces arrest*". The story partly read: "*Particulars of the offence were that Mr. Kalala between February and May, 2015 with intent to defraud or deceive, obtained*

explosives and explosive accessories valued at K143,025.99 from Mr. Mposha pretending that he would pay for them when in fact not. On 11th March, 2015, Mr. Kalala willfully and dishonestly with intent to defraud or deceive, did issue a First National Bank cheque number 000082 in the sum of K40,000.00 to Mike Bilton Mposha by pretending that he would pay for them when in fact not.”

The 2nd defendant on even date caused to be published on page 3 the following words under the headline: “*Kalala faces arrest*”: *In this case, Kalala, 64, a businessman of Ibex Hill, is charged with two offences of obtaining money by false pretences and issuing a cheque on insufficiently funded account when he bought explosives worth K140,000. In the first case, it is alleged that Kalala on unknown dates but between February and May last year in Lusaka, with intent to defraud or deceive, obtained explosives and explosive accessories valued at K143,025 from Mike Mposha by pretending that he would pay for them when in fact not. In the second count, it was alleged that Kalala on March, 11th last year, in Lusaka, willfully and dishonestly issued a cheque from a named bank in the sum of K40,000 to Mr. Mposha on an insufficiently funded account”.*

The 3rd defendant, also on even date caused to be published a story under the heading: “*Jack Kalala arrested*”. The story read as follows, in part: “*Kalala is charged with two offences of obtaining money by false pretences and issuing a cheque of an insufficiently funded account. He is alleged to have between February, 2015 and May, 2015 with intent to defraud or deceive, obtained explosives and*

explosive accessories valued at K143, 025.99 from Patriotic Front (PF) Munali aspiring candidate Mike Mposha by pretending that he would pay for them when in fact not. Kalala is in the second count, alleged to have on March 11th, 2015 in Lusaka, willfully and dishonestly with intent to defraud or deceive, did issue a First National Bank cheque number 000082 in the sum of K40,000.00 to Mr. Mposha on an insufficient account”.

That the words were released, distributed by the 1st, 2nd and 3rd defendants whose newspapers enjoy readership throughout Zambia.

The words False Pretences in their natural and ordinary meaning, meant and were meant and were understood to mean that:

“The plaintiff is very dishonest and cannot be trusted in the eyes of the public.”

It was averred that this has destroyed the plaintiff’s integrity and trustworthiness as former ambassador and Special Assistant for Policy and Project Implementation in the eyes of an ordinary Zambian. His reputation, character and integrity have been seriously injured and he has suffered considerable distress and embarrassment.

The 2nd defendant filed their defence on 10th August, 2016, in which the allegations were denied and pleaded that the publication was

fair comment, in good faith and without malice. Further that the publication was based on a court record from the Lusaka Magistrate Court. The 2nd defendant as a public media institution has a duty to inform the public on matters of public interest in general which include matters before the courts of law.

The 3rd defendant in its defence filed on 28th October, 2016 pleaded a similar defence to the one pleaded by the 2nd defendant and so did the 1st defendant in its defence filed on 1st November, 2016.

The plaintiff at trial testified that the publications of the defendants had no substance of truth. He found the action injurious to his reputation as he held public office as Consul General from 1992 to 1999 in Lumbashi. He represented the Government of Zambia from 2002 to 2008. He served at State House as Principal Private Secretary to the President. Thereafter, he held a position of Special Assistant to the President. He further testified that a company where he has shares, Mufulande Stone Works and Concrete Products, is what had dealings with the Firm Zambezi, where Mike Mposha is a General Manager. He explained that Mufulande had been approached by the Firm Zambezi to supply them with explosives and they did so on three occasions, as far as he could remember.

It was his position that what the defendants had published was not what was on the court record. It's not fair comment and it was malicious. He refused having knowledge of the case. It was further

his testimony that he had written to the respective defendants over the matter but had not been written back to.

The plaintiff testified that if the intention of the defendants was to inform the public as claimed, they would have done the same a few days later when he was acquitted. He was further not contacted for clarification.

In cross examination by Mr. Kanga, he admitted that the charge was as presented in the charge sheet on page 1 of the plaintiff's bundle of documents. He, however, further testified that the charge sheet had been amended and his name substituted by Mufalande Stone Works, but omitted to bring the amended charge sheet. He confirmed that he was charged with two counts at the Subordinate Court. It was his testimony that Mufalande was taken to court and that he was acquitted.

In cross examination by Mrs. Phiri, it was his testimony that he was in the first instance charged with obtaining goods but the charge was dropped by the prosecution, but unfortunately one year later the papers brought it up.

The plaintiff confirmed that all three respective newspapers of the three defendants reported the case on the same day, 8th April, 2016.

He further confirmed that the words which the plaintiff considered defamatory arose from a charge but had been dropped. On his

acquittal, it was his testimony that the reporter should have followed the story to its logical conclusion.

In cross examination by Mr. Chitenge, he reiterated that he was acquitted but that he did not bring the evidence to court.

In re-examination he told the court that the charge was dated 30th July, 2015 but the publication was 8th April, 2016.

The 1st and 2nd defendants did not call any witnesses and informed the court that they would rely on the defences before court. The 3rd defendant called one witness, Perpetual Sichikwenkwe. She told the court that on a date she could not remember very well but between the 7th and the 9th April, 2016, she was informed that Mr. Jack Kalala, former State House Chief Policy Analyst had been arrested. She conducted a search at the Magistrate court where she found a record containing the charge. The court notes stated that the court had issued a bench warrant against Mr. Kalala for not attending court on two occasions. It was following that bench warrant that the plaintiff was arrested and was supposed to appear before court to explain his absence. She further stated that the charge was for issuing a cheque on an insufficiently funded account. She wrote the story after getting that information.

It was her testimony that she covered the acquittal of the plaintiff up to no case to answer stage. She was in court when the Magistrate acquitted the plaintiff after establishing that he was not the one who

issued the cheque but the company. She wrote the story and submitted to the news editor but later discovered that the story was not published in the newspaper. The discretion to publish a story was for the editorial team.

All parties filed written submissions.

The plaintiff submitted quoting paragraph 8 of the ***Halsbury's Laws of England, 3rd Edition, Volume 28*** that a defamatory statement is:

“One which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt, or ridicule, or to convey an imputation on him disparaging or injurious to him in his office, profession, calling or trade or business.”

I was referred to the case of ***Mwanza v Zambia Publishing Company Limited (1981) ZR 234¹***, where the word defamation was defined as:

“Any imputation which may tend to injure a man’s reputation in a business, employment, trade, profession, calling or office carried or held by him.”

It was submitted that the plaintiff was injured by the publication as the story talked about him in his person capacity instead of the company where he is a director. The defendants should have verified before publishing.

It was submitted that clearly this is libel. I was referred to the case of *Roger Chitengi Sakuhuku v Sassassalu Nungu, AG, Times Printpak (2005) ZR 39*², in which the court defined libel as:

“The publication of a matter usually words conveying defamatory imputation as to a person’s character, office, vocation.”

The court 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.”

I was further referred to the case of *Michael Chilufya Sata v Wallen Simwaka, Rebecca Chileshe, Zambia Daily Mail Limited, 2011/HP/577*³ where it was held, inter alia, that:

“The law of defamation is concerned with protecting the claimant against harm caused by words. When fair comment or qualified privilege are pleaded in defence, evidence of malice defeats the defence. Fair comment as defence rests on honest comment and is defeated where there is overwhelming evidence of malice.”

Counsel submitted that the articles in issue cannot be said to be fair comment because in order for fair comment to avail the defendants, the article must be accurate. The defendants failed to produce search evidence before this honourable court which stated that the ‘*plaintiff had obtained explosives and accessories from Mike Mposha, the PF candidate for Munali Constituency*’ and neither did

they state from whom the plaintiff obtained money by false pretences and the amount alleged to have been obtained. In the charge sheet, which is in the plaintiff's bundle of documents, there was no mention of Mike Mposha, the aspiring PF candidate, this was added by the 3rd defendant for unknown reasons as the relevancy of attributing his political ambition and affiliation was not demonstrated.

A due diligence search would have revealed that the charge was amended. Curiously, the three newspapers published the stories at the same time and using the same wording implying that the story came from one source with a hidden agenda. It can be concluded from this that the defendants reported fictitious, imagined, unauthentic and a concocted version of the state affairs with a clear intention to put the plaintiff's name as they did in disrepute and disgrace.

It was submitted that fair and honest comment as pleaded by the defendants cannot stand because, firstly there is overwhelming evidence to show malice and this can be deduced from the fact that the charge of obtaining goods by false pretences against the plaintiff were withdrawn for lack of merit by the prosecutors, and secondly, this withdrawal happened 8 months before the defamatory publication was made by the defendants. The only charge which was left to be determined by the courts of law, was that of issuing a cheque on insufficient funds, which cheque was issued by the plaintiff in his capacity as a director for and on behalf of Mufulande

Stone Works and Concrete Products Limited. Suffice to mention that the Subordinate court later acquitted the plaintiff of this charge but still the defendants did not deem it necessary to publish a story on his acquittal or the verdict of the charges as is required by them to fortify their allegations or statements against the plaintiff.

Further that the failure by the 1st, 2nd and 3rd defendants to verify the facts of the charges alleged against the plaintiff in the Subordinate Court clearly shows and establishes the defendant's malice to cause injury to the plaintiff by bringing his character, reputation, office or business into dishonor as the plaintiff has now been qualified as a dishonest person by his peers or business counterparts.

It was submitted that the reports were bitter, malicious and unjustifiable attack on the plaintiff and were clearly defamatory of him.

I was referred to the case of *Michael Chilufya Sata v Chanda Chiimba III and Others 2010/HP/1282*⁴, where it was stated that:

“Where the defence of justification is pleaded, it must be supported with full particulars of the facts. The defence of fair comment on a matter of public interest is available to everyone. The facts on which the comment is based must be pleaded and properly particularized. This defence is of particular importance to the media. Freedom of expression and press freedom is largely protected by this defence.”

Counsel submitted that the justification by the defendants is one without particulars of facts.

I was further referred to the case of *Zambia Publishing Company Limited v Eliya Mwanza (1979) ZR 76*⁵ where the court held that:

“...to impute dishonesty of a man when he is holding a particular office which he has since left is still defamatory of him in general.”

Further the case of *Muvi TV Limited v Killian Phiri and Kennedy Musweu, Appeal No. 13/2015*⁶ were the court held that:

“In addition, the wider the publication, the more damage it causes to personal reputation.”

It was submitted that the defendants’ newspapers have an online or internet website presence and as such the articles were widely read across the world where the plaintiff is known when he served as Consul General in the Democratic Republic of Congo from 1992 to 1999 and also various people that he interacted with when he was serving as Special Assistant to the Late Republican President Dr. Levy Patrick Mwanawasa, SC.

Counsel referred me to the case of *Lewis v Daily Telegraph Limited (1963) 2 ALL ER 151*⁷, where it was stated that:

“It is a grave thing to say that someone is fraudulent. It is a different thing to say that someone is suspected of being fraudulent. How much less wounding and damaging this would be must be a matter of opinion

depending upon the circumstances...the only question that arises is not whether the words did bear but whether they were capable of bearing the meanings to which I have referred. What could ordinary reasonable readers think?"

Counsel submitted that because of the foregoing, the plaintiff is entitled to damages for libel, interest thereon, costs of and incidental to the proceedings and any other relief the court may deem fit. On damages I was referred to the case of **Simon Kapwepwe v Zambia Publishing Company Limited (1978) ZR 15^s** where the court held the following:

"In Zambia exemplary damages may be awarded in any case where the defendant has acted in contumelious disregard of the plaintiff's rights."

I was urged to consider that the primary object of awarding damages for defamation is to offer vindication and solatium and that money cannot really be compensation in cases like the present one.

On behalf of the 1st defendant, it was submitted that the burden to prove the case on a balance of probabilities in civil matters solely rest on the plaintiff. I was referred to the learned authors of **Phipson on Evidence, 17th edition in paragraph 6-06 at page 15**, where it is stated that:

"So far as that persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts that affirmative of the issues. If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him. It is an ancient rule founded on

considerations of good sense should not be departed from without strong reasons."

It was stated that the above principle has also been well articulated in a plethora of authorities including the case of ***Khalid Mohamed v The Attorney General (1982) ZR 49.***

Counsel submitted that the plaintiff has failed to prove to this court's satisfaction on a balance of probabilities that indeed the publications complained of are defamatory.

The plaintiff by his own admission, in relation to the articles, testified that he was indeed arrested and that it was his name appearing on the indictment (charge sheet) appearing on page 1 of the plaintiff's bundle of documents. The 1st defendant reported on facts which emanated from court proceedings at the Lusaka Magistrate Court.

It was submitted that the plaintiff did not adduce any evidence to show that the publication complained of lowered the plaintiff in the estimation of society. For the plaintiff to succeed on a claim of defamation, the plaintiff must prove firstly, that the statement is defamatory. Secondly, that the statement referred to the plaintiff and thirdly that the statement was published to one other person than the plaintiff.

I was referred to a number of authorities to the effect that the words complained of must amount to disparagement of the plaintiff's reputation.

I was referred to the case of *Tolley v Fry & Sons Limited (1931) AC 333*⁹ where it was stated that:

“Words are not defamatory however much they may damage a man in the eyes of a section of the community, unless they also amount to disparagement of his reputation in the eyes of right thinking men generally.”

I was further referred to the case of *Sebastian Saizi Zulu v Times Newspaper (Zambia) Limited (1985) ZR 30*¹⁰ where it was held that:

“Where words are alleged to be defamatory in their ordinary meaning, it is neither for the plaintiff nor any witness to give evidence as to or to interpret the meaning of the alleged defamatory statement. This is the proper prerogative and function of the court.”

It was submitted that the 1st defendant has pleaded a denial that the words complained of bore or could be understood to bear the alleged or any other defamatory imputation.

The maintained that the words were published without any malice and a fair comment on a matter of public interest. The article was true representation of what transpired during the criminal proceedings against the plaintiff at the Lusaka Magistrates Court

and the same was confirmed by the plaintiff during his cross examination and also by the documents on page 1.

Counsel pointed out that in the **Bevin Ndovi** case, cited above, it was stated that:

“...there are three requisites of the defence of fair comment. First, the comment must be an observation, or inference from facts; not an assertion of fact. Second, is that the matter commented on must be of public interest. Third, the comment must be fair, or objective; it should not be actuated by malice.”

It was submitted that the plaintiff did not submit any evidence to show that he was shunned or disadvantaged as a result of the alleged defamation as stated in the case of **Bevi Ndovi v Post Newspaper Limited and times Printpak Zambia (SCZ Judgment No. 8 of 2011)**¹¹, where it was stated that:

“A defamatory statement is one which tends to lower a person in the estimation of right thinking members of society generally as to cause him to be shunned or avoided or expose him to hatred contempt or ridicule or convey an imputation on him disparaging or injurious to him, to his office, profession, calling or trade or business.”

I was further referred to the case of **Sata v Chiimba and Others**¹² where my learned brother, Matibini J, stated the following:

“...it is for the plaintiff to show that the utterances, and images are defamatory, false, and published with actual malice, proof of actual

malice will always be required before the words can be held to be defamatory.”

I was also referred to the case of *Getz v Robert Welch, Inc*, 418 U.S 323, 94 S. Ct. 2997. 41 L. Ed. 2d 789 (1974)¹³ where it was stated as follows:

“...public figures are those who thrust themselves into the public eye and invite close scrutiny. And that by voluntarily placing themselves in the public eye all public figures relinquish some of their priority rights.”

It was submitted that the law on libel requires striking a delicate balance and meticulously identifying the line between the freedom of the press and the protection of reputation.

It was further submitted that what comes out from these proceedings is that the statements complained of were an actual report of court proceedings and the action by the plaintiff is nothing more than a thinly veiled attempt to silence the 1st defendant by putting them through a costly and lengthy legal process.

The 1st defendant further relied on *sections 7 and 9 of the Defamation Act, Cap 68 of the Laws of Zambia*. It was their prayer that the plaintiff's claims be dismissed for lack of merit with costs to the defendants.

The 2nd defendant and 3rd defendants submitted in the same manner, citing similar authorities as to those cited by the 1st defendant. It was the 2nd defendant's submission that the plaintiff has failed to prove that the 2nd defendant's publication was defamatory, as well as to justify the claim for interest, costs and

other reliefs. It was their prayer that the claims should be dismissed with costs.

The 3rd defendant in addition referred the court to the case of *Evans v London Hospital Medical college (1981) 1WLR 184*¹⁴, where Drake J, stated that:

“Absolute privilege covered any statement or conduct that can fairly be said to be part of the process of investigating a crime or a possible crime with a view to a prosecution or possible prosecution in respect of the matter being investigated.”

This case was approved by the House of Lords, in *Taylor v Director Serious Fraud Office (1999) 2 AC. 177*, it was submitted by the 3rd defendant.

It was submitted that a fair and accurate report in any newspaper of proceedings publicly heard before any court exercising judicial authority within Zambia shall, if published contemporaneously with such proceedings, be absolutely privileged as provided in section 8 of the Defamation Act, Chapter 68 of the Laws of Zambia.

Further that the only witness the 3rd defendant had called was very categorical in her testimony in both examinations in chief and cross examination. She said that the story of the plaintiff's acquittal was covered but the decision to publish remained the sole discretion of the Editor in Chief as to what story should be published or not. The decision to publish is informed by a number of reasons one of them

is whether the story can sell the paper or not as the core business is to sell news to the public. The inability to publish the plaintiff's acquittal did not amount to defaming him at all.

According to the *Halsbury's Laws of England, fourth edition, Vol. 28 at paragraph 10 (cited above)*:

"A defamatory statement is a statement which tends to lower a person in the estimation of right-thinking members of society generally or cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to disparage him in his office, profession, calling, trade or business."

The authors of the *Halsbury's Laws* go on to describe what would amount to a defamatory statement, among other things, in *paragraph 50* as follows:

"It is defamatory to charge another with fraudulent, dishonest or dishonourable conduct or motives, or to call a person a villain, swindler, rogue or rascal, or to state that he is not conversant with business ethics. It is also defamatory, though considerably less serious, to suggest that a person is being investigated by the authorities, or is under suspicion of dishonesty or crime, even if the reasonable reader would not infer outright guilt."

This case concerns a libel as it emanates from a story carried out in the three defendant's newspapers on the 8th of April, 2016. Libel was defined in the case of *Rodger Chitengi Sakuhuka vs Sassassali Nungu and Others (2005) ZR 48*, quoting the case of *Mwanza v Zambia Publishing Company (1981) ZR 234¹⁵* as follows:

1. *"Libel is the publication of a matter, usually words, conveying a defamatory imputation as to a person's character, office or vocation.*
2. *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.*

3. *The article complained of was defamatory of the appellant and had injured his reputation as a diplomat because he was portrayed as someone who had committed a criminal offence of causing death by dangerous driving.*"

In the case before me, there is no dispute as to whether the words published were defamatory or not, the defence of all the three defendants is that the words published were an extract of a court record. They argued that it was fair comment or privilege or justification on matters of public interest, as the plaintiff is a public figure who once held high office.

The 3rd defendant went as far as citing the freedom of press which is guaranteed under *Article 20 of the Constitution of Zambia*. In the case of *Fraser vs Evans (1969)1 QB 349* Lord Denning stated the following concerning the freedom of speech:

"The right of speech is one which it is for the public interest that individual should possess and indeed, that they should exercise without impediment, so long as no wrongful act is done. There is no wrong done if it is true or if it is fair comment on a matter of public interest."

Furthermore, Lord Denning stated in the case of *Gulf Oil (GB) Limited v Page & Others (1987) 3 ALL ER 14*¹⁶ that:

"The principle has been established for many years ever since Bonnard v Perryman (1891) 2 CH 269. The reason sometimes given is that the defence of justification and fair comment are for the jury, which is the constitutional tribunal and not for a judge; but a better reason is the importance in the public interest that the truth should come out. As the court said in that case 'the right of free speech is one which should be exercised without impediment

so long as no wrongful act is done.' There is no wrong done if it is true or is fair comment on a matter of public interest."

The circumstances under which the defence of justification and fair comment can be upheld have been settled in a plethora of authorities.

It is stated by the ***Halsbury's Laws of England, paragraphs 82 and 135*** that:

"The defence of justification is that the words complained of were true in substance and in fact.

Since the law presumes that every person is of good repute until the contrary is proved, it is for the defendant to plead and prove affirmatively that the defamatory words are true or substantially true. If a defendant pleads justification, where the words complained of consist of statements of fact and comment, he must prove that the defamatory statements of fact are true or substantially true and that the defamatory inferences borne by the comment are true. Truth may be pleaded as a defence to the whole of defamatory statements or in the alternatives as a defence to the severable part of them.

The defence of fair comment is in the nature of a general right, and enables any member of the public to express defamatory opinions on matters of public interest. Such opinions must be based on true facts stated on a privileged occasion and the defence only applies to statements which are recognizable by the reader or listener as expressions of opinion rather than statements of fact. The defence is defeated on proof by the Plaintiff that the defendant made the defamatory comment maliciously."

The court has also held in the case of ***Fungamwango and another v Nalishebo (Appeal No. 133/99) (2000) (unreported)***¹⁷ that:

"The appellants did not try to check on the truthfulness or otherwise of the stories before publication.

The conduct of the appellants was such that one could infer their own malice because they published the articles recklessly without bothering to check the facts."

From the facts before me, there was no dispute that there was a court record containing the alleged charges on the plaintiff. The plaintiff's contention was that the charge was for 2015, and therefore, it was maliciously brought up by the defendants in 2016.

The other issue of contention by the plaintiff was that the charge had been amended by removing his name and replaced by the company, Mufulande Stoneworks Concrete Products Limited, in which the plaintiff is a shareholder, which issued the cheque that was the subject of the indictment. It was also the plaintiff's contention that the charge of obtaining by false pretences has been dropped. Further, the plaintiff found the publication malicious because after he was acquitted, his acquittal was not published.

The response of the 3rd defendant's witness who covered the story on behalf of the 3rd defendant on 8th April, 2016, explained to the court that on the day, the case had come up because of the bench warrant which had been issued against the plaintiff for not appearing in court on two occasions. This evidence remains undisputed.

In their submissions the defendants stated that their defences fell within the provisions of *sections 7, 8 and 9 of the Defamation Act, Chapter 68 of the Laws of Zambia.*

The sections provide as follows:

7. *“In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expressions of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.*
8. *A fair and accurate report in any newspaper of proceedings publicly heard before any court exercising judicial authority within Zambia shall, if published contemporaneously with such proceedings, be absolutely privileged:*

Provided that nothing in this section shall authorize the publication of any blasphemous or indecent matter.
9. (1) *Subject to the provisions of this section, the publication in a newspaper of any report or other matter as is mentioned in the Schedule shall be privileged unless the publication is proved to be made with malice.”*

In the case of *Mumba vs Zambia Publishing Company (1982) ZR 53*¹⁸, the court held that:

“For a defence under section 8 of the Defamation Act to succeed, the account must be contemporaneous, fair and accurate; failure of any one of the three conditions destroys the absolute privilege.”

I have found that there was no evidence to counter the assertions of the defendants that the story published was based on the court record. Secondly, contrary to the plaintiff’s contention that the matter was published after about one year from when it happened, I find the undisputed evidence of the 3rd defendant’s witness that on the day the story was written the court had issued a bench

warrant against the plaintiff. The reporting was, in my opinion, contemporaneous.

There is further no dispute as to the accuracy of the court record. The plaintiff did not show any evidence that at the time of reporting, the information on the record did not read as stated by the defendants. His position was that his name was substituted by that of Mufulande Stoneworks Concrete Products Limited, one charge dropped and further that he was acquitted of the charges. He did not present any proof to show that this was the position at the time the articles complained of were published. In a way, the plaintiff affirms the accuracy and therefore fairness of what was published.

The law of defamation, together with defences was summed up in a seminal judgment in the case of *Sata v Post Newspaper Limited and Another (1995) ZR 203*¹⁹, where it was stated that:

“In order to give effect to Article 20 of the Constitution, which guaranteed the freedom of the press, the law of defamation as currently applied was to be interpreted as precluding impersonal attacks on governmental operations from being treated as libels of an official responsible for those operations. It was for the highest public importance that a democratically elected governmental body should be open to uninhibited public criticism, and since the threat of civil actions for defamation induced chilling effect or tendency to inhibit free discussion and placed an undesirable fetter on the freedom to express such criticism, it would be contrary to the public interest for governmental institutions to have any right at common law to maintain an action for damages for defamation. Since those in public positions were taken to have offered themselves to public attack, impersonal criticism of public conduct leading to injury to official reputation should not attract liability provided that criticism contained no actual malice and even if, pursuant to s7 of the Defamation Act,

the truth of all facts alleged was not established, the imputation complained of was competent on the remainder of the facts which were proved. Where an allegation of libel could properly be regarded as comment on the conduct of a public official in the performance of his official duties or on conduct reflecting upon his fitness and suitability to hold office, freedom of speech and the press could best be served by the court's insisting upon greater tolerance than in case of a private attack before an obvious comment based on substantially true facts could be regarded as unfair. A balance had to be struck between freedom of the press and the right to reputation guaranteed by Article 20, which was not possible by shifting the burden or standard of proof.

On established principles an allegation could be comment if it was an inference of fact which could legitimately be drawn from other facts stated or indicated in the publication complained of but where a bold allegation could not be distilled from other facts stated or indicated in the publication complained of but where a bold allegation could not be distilled from other facts stated or indicated, it could not even be called a comment....”

In view of the foregoing, it is my finding that the plaintiff has failed to establish that he was defamed by the newspaper articles reported by the defendants on the 18th of April, 2016, in their respective newspapers as the same were justified and fair comment of issues of public interest given the status of the plaintiff as testified by the plaintiff himself.

I further do not find any merit in the argument that the articles were maliciously published simply because the plaintiff's subsequent acquittal was not published.

I therefore order no damages.

Each party to bare its own costs.

Leave to appeal is hereby granted.

DELIVERED AT LUSAKA THIS 19TH DAY OF JUNE, 2020.


G.C. CHAWATAMA
HIGH COURT JUDGE