LAZARUS MUMBA v ZAMBIA PUBLISHING COMPANY (1982) Z.R. 53 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., MUWO, J.S. AND BWEUPE, AG. J.S.
16TH JULY AND 26TH AUGUST, 1982
(S.C.Z. JUDGMENT NO. 24 OF 1982)
APPEAL NO. 3 OF 1980

Flynote
Civil procedure - Pleadings - Departure from - Effect of Tort - Defamation - Libel - Defences to - Plea of absolute privilege under the Act - When available.

Headnote
The appellant appealed against the dismissal of a libel action arising out of an article published by the respondent. The article referred to a suit for divorce filed by the appellant's wife and was found to be not contemporaneous or fair i.e. an inaccurate account. The trial judge nevertheless extended the defence of absolute liability to an alternative set of facts which were not pleaded or relied upon.

Held:

(i) Although the trial court has a duty to admit and decide a case on variation modification or development of what has been averred a radical departure from the case pleaded amounting to separate and distinct new case cannot entitle party to succeed.

(ii) For a defence under s. 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,.

(iii) Compensatory damages could be awarded since there were no aggravating features and the lack of cross-appeal obliges the court to proceed on the basis that the findings below entitle the appellant to some damages.

Cases cited:

(1) Lloyde v West Midlands Gas Board [1971] 2 All E.R. 1240.
(2) Waghorn v George Wimpey and Co L*td* . [1970] 1 All E.R. 474.

Legislation referred to:

Defamation Act, Cap. 70 s. 8.

For the appellant: L. R. Lawrence, Solly Patel, Hamir and Lawrence.
For the respondent: W. M. Muzyamba, Chigaga and Co.

Judgment

NGULUBE, D.C.J.: This appeal is against the dismissal of libel action arising out of an article published by the respondent in their issue of 12th June, 1978, which reads:

> "Wife of a prominent Lusaka Magistrate Mr Lazarus Mumba suing her husband for divorce because of alleged cruelty and negligence.
> The magistrate's wife Anna Mwansa told Kitwe's Wusakili court over the week-end that she wanted to divorce Mr Mumba because 'he is cruel and negligent.'
> Mrs Mumba told the court that since 1971, Mr Mumba 'has not been kind and he has neglected the family to an extent of the family living on the verge of starvation'.
> She also told the court that she has been going in tattered clothes since 1971, as if I am not married to magistrate'.
> Mr Mumba was not in court on Friday to answer the allegations and the case was adjourned to July 5 when Mr Mumba is expected to appear in courted this time, in the accused's box."

The learned trial judge found as fact that the article imputed to the appellant dishonourable qualities detrimental to his profession as a magistrate, and that it reflected on his personal character, and Was, therefore, defamatory of him as a person and as a magistrate. The respondent had pleaded fair comment but, in the event, this defence did not call for consideration as it was neither substantiated nor pursued.
The respondent had also pleaded the defence of absolute privilege in the following terms:

> "(4) The said words are and/or form part of a fair and accurate report in the said newspaper of proceedings publicly heard before a court exercising judicial authority, namely, Local Court No. 1 Court 'A' Division, (ss No. 476 of 1978 sitting at Wusakile, the action tried before Local Court Justices, Mr V. Mulenga and Mr Mbangu on the 27th day of June, 1978, in which Anna Kwenda Mwansa the plaintiff and Lazarus (Charles Mumba (the plaintiff in this cause) was defendant which said report was published contemporaneously with such proceedings and is absolutely privileged; (5) The defendant further pleads absolute privilege under s. 8 of the Defamation Act - Cap. 70 of the Laws of Zambia."

Section 8 of the Defamation Act reads:

> "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 authorise the publication of any blasphemous or indecent matter."

I think it will be, necessary to bear in mind both the pleadings and the section in

reviewing the evidence and the findings made so far as they arise in this appeal. It will also be necessary to bear in mind that there is no cross-appeal and that therefore those findings which have not been challenged will be accepted as of course.

It was found as fact that the appellant's wife did not give any evidence on 9th June, 1978, and that accordingly the respondent's allegation that she had given a brief summary of her ease to the local court on that day was untrue. It was found also that the notes made by the respondent's reporter in his notebook had been created after this action had commenced, and that therefore the offending article which was defamatory of the appellant must have been based on extract from the summons, the relevant portion of which reads:

> "Act complained of, with time and placed: It is alleged that the defendant is cruel and negligent in feeding and clothing since 1971 at Kitwe.
> What is claimed: Divorce."

The learned trial judge further found, and in the circumstances quite rightly so, that what was published on 12th June, 1978, was not and could not possibly have been a contemporaneous report of evidence

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given by the wife some fifteen days later, namely, on 27th June, 1978, as pleaded. This last finding coupled with the finding that the-wife had not given any statement to the local court on 9th June, 1978, effectively dismissed the whole of the defence as pleaded. This is so even if one were to accept a submission made by Mr. Muzyamba that the date of the proceedings the defence should have read as 9th June, 1978.

Notwithstanding that the effect of those findings was a complete failure of the defence of absolute privilege as pleaded, the learned trial judge nevertheless went on to find that the respondent had merely "over-blown" the contents of the summons read out in open court, that there was no malice, and that accordingly the defence under s. 8 of the Act availed in favour of the respondent.

On behalf of the appellant Mr Lawrence has submitted that, having regard to the pleadings and the case set out, by the respondent who had specifically rejected suggestion that they had based the article on the contents of the summons, the learned trial judge ought not to have gone outside the respondent's pleadings and the evidence put forward by them. He submits that, in any case, there was no evidence to support the finding that the summons had been read out. In the alternative he submits that even if the summons had been read out the article bore little resemblance to the summons, and if the expression "over-blow" was meant to signify slight inaccuracies then the article in question which purported to report what the appellant's wife said court was plainly not fair and accurate report since it contained independent allegations which could not have flowed from the summons. On behalf of the respondent, Mr Muzyamba put up a valiant counter-argument. While acknowledging the difficulty he had in attempting to defend

findings which had not been part of his case in the court below, he nevertheless submitted that the learned trial judge was entitled to draw the inference from common knowledge of court procedures that the summons had been read out and that having done so it was open to the judge to find that the article complained of was not serious departure frown the basic allegations the summons.

We have here a situation where having found in effect that the article was not a contemporaneous, fair and accurate account of a thing said by the wife and accordingly not a report of proceedings as pleaded, the learned trial judge nevertheless extended the defence to an alternative set of facts which had neither been pleaded nor relied upon. Indeed, the record shows that the respondent's reporter had specifically denied having based his story on any extract from the summons. The rules and the authorities which research, unassisted by counsel, disclosed suggest that where a case comes to trial on pleadings which allege one set of facts and those facts are put forward but are defeated or rejected, the party putting them forum d cannot succeed on a different case which he had not raised and which the other side had not come to the trial prepared to meet; *see*, for instance, *Lloyde v West Midlands Gas Board* (1). While it is open to a trial court and, indeed, it is the duty of such -

court to admit and if thought fit to decide case on a variation, modification or development of what had been averred, nevertheless radical departure from the case pleaded amounting to a separate and distinct new case cannot entitle the party to succeed; *see*, for instance, *Waghorn v George Wimpey Company Ltd* (2). The grave men of Mr Muzyamba's contention, if I understand him correctly, is that an extension of the defence of absolute privilege to the new set of facts as found by the learned trial judge was in fact a legitimate variation, modification or development of the basic defence put forward. While there was no evidence that an extract from the summons was read out I would accept that judge is entitled to take judicial notice of the practice and procedures of the various courts Zambia. I would accordingly uphold the submission by Mr. Muzyamba that the finding that the summons was read out can be supported on the basis that an inference was drawn from common knowledge of the practice and procedure of the local court. This finding does not, however, assist the respondent and this is so for two basic reasons. The first, as already noted, is that the respondent's reporter had specifically denied having based his story on any extract from the summons, insisting instead that the appellant's wife had made a statement court, which allegation was not accepted. The respondent having disclaimed this extension to their case, I am of the opinion that it was not then open to the learned trial judge to foist such an extension upon them, and it is now too late in the day for the respondent to retract and to adopt a case which was never theirs. The principles in the cases I have already mentioned apply.

The second reason is that, even if the respondent were to be given the benefit of the doubt, and it could be said that the finding of privilege on the extended case based on an extract from the summons was a proper inference to draw from the material facts pleaded, the article, in my new, alas neither fair nor accurate. For a defence under s. 8 of

the Act to succeed the account must be contemporaneous, fair and accurate. A failure of any one of these three conditions destroys the absolute privilege. It was found that the report was not a contemporaneous account of anything the appellant's wife had said since she had not in fact made any statement to the local court on 9th June, 1978. While a reporter's legitimate duty is fulfilled once he has made a fair report of proceedings in a court of justice and while it is sufficient for him to state in his report a substantially accurate account and not necessarily a verbatim account of what took place, an article which purports to report what someone said wen that person had said nothing, an article which introduces independent allegations not contained the summons can be neither fair nor accurate. Slight inaccuracies such as the mis-spelling of the appellant's wife's name would not, in their own, detract from the substantial accuracy of a report. In this case, however, that consideration becomes irrelevant having regard to what in effect amounting to a finding that the report was largely a concoction. If by the expression "over-blown" it was intended to mean that the brief contents of the summons were sufficient material for the article as it came out, then I would have to

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express my reservations as to how far the product of a fertile imagination still remains a fair and accurate account.

One other matter deserves mention. There were submissions on the finding that the mis-spelling of the appellant's wife's name and the "over-blowing", of the contents of the summons did not raise malice so as to destroy the defence of privilege. My understanding of the judgment below was that the question of malice which is largely irrelevant on an occasion of statutory absolute privilege arose on consideration of the common law defence of qualified privilege which attaches to all first and accurate reports of judicial proceedings where the statutory defence has failed, for instance, because a report is not contemporaneous, and proof of express malice entitles a plaintiff to judgment. The common law defence did not arise and on the facts as found could not have succeeded even had it been pleaded, which it was not.

For the foregoing reasons I would allow this appeal and find for the appellant. It follows from this conclusion that the appellant would also be entitled to damages. Mr Lawrence submits that having regard to the appellant's position at the time, the nature of the allegations and the extent of the publication, damages be awarded on an aggravated footing. I must confess that I entertained some doubts regarding the nature and quality of the defamation alleged in this case. There was, however, no cross-appeal and the court is obliged to proceed on the basis that the findings below on which there has been no appeal entitle the appellant to some damages. I would not consider, however, that there was any particular aggravating feature in this case. Doing the best I can in all the circumstances of this case and in the absence of any provisional assessment by the court below, I would award compensatory damages in the sum of K1,000. The end result is that I would allow this appeal and award damages the sum of K1,000. The successful appellant would also have his costs in this court and in the court below.

Appeal allowed