

ALIAS ANDREW KASHITA (1982) Z.R. 162 (S.C.)

SUPREME COURT

NGULUBE, D.C.J., GARDNER AND MUWO, JJ.S.
1ST AND 24TH SEPTEMBER, 1982
(S.C.Z. JUDGMENT NO. 27 OF 1982)
APPEAL NO. 5 OF 1981.

Flynote

Civil procedure - Appeal - Reassessment of damages - Powers of appellate court
Damages - Assessment of - Powers of appellate court to interfere with.
Damages - Mitigation - Factors of.

Headnote

The appellant appealed against the award of K10,000 damages awarded to the respondent for libel. The alleged libel arose out of an article published by the appellant which in short termed the respondent

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a liar. The appeal was based on the sum awarded being out of all proportion to the gravity of the defamation in the circumstances and the mitigatory factors.

Held:

- (i) Although an appellate court will not normally interfere with an assessment of damages it will do so where the lower court has misapprehended the facts or misdirected itself on the evidence.
- (ii) It is a mitigating factor for a defendant to prove that he was not the original author of the defamation but merely published by way of repetition defamatory matter originated by a person named in the publication complained of.
- (iii) Though slander on the defendant maybe a mitigatory factor it is only so where the slander was uttered by the plaintiff to the defendant and not to a third party who has not been joined in the action as joint tortfeasor.

Cases cited:

- (1) Kawimbe v The Attorney-General (1974) Z.R. 244.
- (2) Zambia Publishing Co. Ltd v Pius Kakungu 1982 Z.R. 167
- (3) The Attorney-General v Felix Chris Kaleya (1982) Z.R. 1
- (4) The Attorney-General v Kapwepwe (1974) Z.R. 207.
- (5) Times Newspapers Zambia Ltd v Kapwepwe (1973) Z.R. 292.
- (6) Zambia Publishing Co. Ltd v Kapwepwe (1974) Z.R. 294.
- (7) Kapwepwe v Zambia Publishing Co. Ltd (1978) Z.R. 15.
- (8) Cobbett Tribe v Zambia Publishing Co. Ltd (1973) Z.R. 9.
- (9) Zambia Publishing Co. Ltd v Mwanza (1979) Z.R. 76.

For the appellant: J. H. Jearey, D. H. Kemp & Co.

For the respondent: Dr R. K. Mushota, Lusaka Partners.

Judgment

NGULUBE, D.C.J.:

This is an appeal against an award by the Deputy Registrar of the sum of K10,000 damages for libel. For convenience I will refer to the respondent as the plaintiff and to the appellant as the defendant, such having been their respective designation in the court below. There was evidence that the plaintiff is an engineer of considerable professional standing. He has served this country in various capacities, including that of Cabinet Minister and, as such, he was and still is a well-known and highly respected member of the community. The plaintiff was at the relevant time Chairman of a Commission of Inquiry investigating Zambia Railways accidents. On 5th November, 1976, the defendant carried a story in which it was alleged that the plaintiff in his capacity as such Chairman had complained to the relevant

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Minister that the management of Zambia Railways had not been co-operative and consequently had not supplied the answers to certain questions put to them by the Commission. The offending article appeared in the defendant's paper of 10th November, 1976, under the unfortunate heading "KASHITA LIED". The report carried what was alleged to be the reaction of Mr Soko, then General Manager of Zambia Railways, to the article of 5th November, 1976. There were several direct quotations of what Sir Soko was alleged to have said, the net result of which was that the plaintiff was allegedly called a liar by Mr Soko. The plaintiff sued and obtained a judgment in default of defence. The damages were assessed at K10,000, a sum which we have been asked to find to be out of all proportion to the gravity of the defamation in the circumstances of this case.

In dealing with appeals against assessments of damages this court has frequently been guided by the principle that an appellate court should not interfere with the finding of the trial court as to the amount of damages unless it is shown that the trial court has applied a wrong principle or has misapprehended the facts or that the award was so high or so low as to be utterly unreasonable or was an entirely erroneous estimate of the damages (*see, for instance, Kawimbe v The Attorney-General* (1), which has been cited with approval in a number of subsequent decisions of this court, for example, *Zambia Publishing Co. Ltd v Pius Kakunga* (2) and *The Attorney-General v Felix Chris Kaleya* (3). Mr Jearey makes a number of submissions in his attack upon the award. He submits, in the first place, that the learned Deputy Registrar misdirected himself on the facts when he found that the article complained of was not a correct version of Mr Soko's interview with the defendant's reporter. In his ruling the learned Deputy Registrar made reference to the fact that both the reporter and Mr Soko had been vague as to what was alleged to have been said. Though the reporter had stated that he had relied at the time both on his notes and on his memory, the learned Deputy Registrar doubted that he could have a superb memory and found that it was therefore impossible for him to have quoted verbatim what Mr Soko had said. The court below further found that, since the reporter had admitted to placing reliance on his memory and since Mr Soko could not recollect whether or not he had made the statement attributed to him, the article was not a correct version of their conversation, and consequently it would be a miscarriage of justice if support were given to the proposition that the article was in fact a correct version of the conversation.

In his evidence the reporter had stated:

"Most of what I wrote was from memory. I didn't write down what he had said. This is why I didn't bother to write the things correctly."

Again, later he said:

"The statements I put in inverted commas in the article are those Mr Soko said."

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Mr Soko's evidence on the point reads:

"I cannot recall the exact words. I might have said any words in para. marked 2 in the article dated 10.11.76."

It is to be noted that the interview took place on 9th November, 1976. The article appeared the following day and Mr Soko did not at any stage say he had been misquoted in the substance of his statement. In these circumstances I find that there is a great deal of force in Mr Jearey's submission that the conclusions reached by the court below, conclusions which in effect amounted to a finding that the reporter had fabricated the story, must be regarded as conclusions reached on a view of the evidence which cannot be supported. Dr Mushota submits that the learned Deputy Registrar was in a better position than this court to know what the reporter and Mr Soko meant when they spoke in the terms I have quoted above, and that accordingly the finding that was made was fully justified. I do not see how that evidence can possibly support a conclusion that the story was fabricated. Quite clearly the reporter's recollection of the conversation which Mr Soko did not dispute must have been reliable at the time where the interview had just taken place and when the article was being compiled ready for publication the very next day. I would not accept that on a proper reading of the evidence of the two witnesses there was any admission as found by the court below that the article did not represent the correct version of the conversation. The opposite is in fact the case. I would in the circumstances uphold the submission made on behalf of the defendant and hold that finding as he did the learned Deputy Registrar not only misapprehended the facts but also misdirected himself on the evidence.

Having found that there was a misdirection this court is at large and therefore entitled to look at the question of assessment of damages *de novo*. Apart from the heading, the plaintiff had complained of the following passages in the article:

"Mr Soko said he had kept quiet since the allegations in the hope that Mr Kashita would be 'decent enough' to refute the statement. An angry Mr Soko said he was puzzled by Mr Kashita's 'panic statement'. 'In my view, the statement cannot be correct. Unless Mr Kashita is prepared to refute the statement, I have a right to call him a liar, he added."

I have found that the article was a correct version of the conversation. It follows therefore that there is merit in the submission made that it is a mitigating factor for a defendant to prove that he was not the original author of the defamation but merely published by way of repeating defamatory matter

originated by a person named in the publication complained of (*see* para 1334 to 1336 *Galtey on Libel and Slander*, 7th edn.) Indeed this court has adopted this approach in a number of cases, including the recent case of *Zambia Publishing Co. Ltd v Kakungu* (2), already referred to above, where the fact that the defendant had reported the correct version of an interview with a Cabinet Minister was held to be mitigatory. We were also asked to find as mitigatory the fact that the

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article complained of was provoked by a prior public attack on the conduct of Zambia Railways management by the plaintiff. Reliance was placed on para. 1337 of *Gatley libel and Slander*, 7th Edn. where it is suggested that the fact that the plaintiff has himself published some libel or slander on the defendant is a factor in mitigation of damages. It was argued that though the plaintiff in this case attacked a third party the principle should be extended to the defendant on the basis that Mr Soko and the defendant may be considered to be joint tortfeasors who should be able to benefit from each others circumstances and positions in the case. This argument does not commend itself to me. I do not see how the principle can be extended on a notional fiction so as to benefit a party who was neither attacked nor under any obligation to intervene. It was also argued that the failure to sue the original author of the defamation should be regarded as mitigatory. I do not agree. A defendant cannot derive any benefit from a plaintiff's failure to sue other joint tortfeasors since to do so would be to deprive the plaintiff of his proper damages when it is now accepted that not only is there no obligation upon the plaintiff to sue more than one tortfeasor but that the plaintiff is in fact free to select, if he wishes, one defendant whom he considers good for the total amount of damages which may be awarded. The onus is therefore on the defendant to recover contributions from any joint tortfeasor (*see The Attorney-General v Kapwepwe* (4)). There is certainly no basis upon which a proposition can be entertained which suggests in effect that a court should apportion damages recoverable by a plaintiff between a defendant and another alleged tortfeasor who has not even been sued.

I have already said that this court is at large. I have given careful consideration to the matters complained of which basically boil down to one objectionable allegation, namely that the plaintiff was called a liar. The nature and quality of the article was, in my view, such that read in its proper overall context, quite apart from the inexcusable headline, there was only the possibility rather than the probability of actual damage to the plaintiff's reputation in the eyes of right-thinking members of the community. However, that possibility alone must lead to an apprehension of potential damage to reputation which entitles the plaintiff to an appropriate sum by way of solatium. Dr Mushota contends that to call man of the plaintiff's stature a liar must be viewed as a serious matter. I would agree, but then on the other hand there is the consideration that the defendant only repeated what someone else had said, and there is also the nature and quality of the defamation as already noted. Both counsel cited a number of authorities but as far as I was able to ascertain none dealt with an allegation that the plaintiff was a liar. Most of the *Kapwepwe* cases (5) to (7) were concerned with serious imputations such as treason or treachery. In *Cobbett - Tribe Zambia Publishing Co. Ltd* (8) the plaintiff, well-known lawyer, was accused of dishonesty and greed, while in *Zambia Publishing Co. Ltd v Mwanza* (9) the allegation against the plaintiff was one of dishonesty and fraud. I consider that the allegations in those cases were far more serious than the one in this case. The value of referring to those precedents becomes limited in that

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I find they only assist as guide-lines on general propositions and trends. For instance, a plaintiff who is known to fewer people would generally recover less than one known to more people, but this again would depend on the nature of the particular libel or slander involved. Another example would be the trend which emerges from the authorities in favour of the development of Zambian concepts and standards which generally favour more modest sums of damages than would perhaps be awarded in a similar situation in a developed country. In the absence of any aggravating feature but taking into account all the foregoing, I believe that a sum of K6,000 would adequately compensate the plaintiff.

In the result I would allow this appeal, set aside the award of K 10,000 and in its place make an award of K6,000. The defendant who has been successful in this appeal should also have his costs in this court, while the plaintiff who was successful in the court below should have the costs of the proceedings below, the costs to be taxed in default of agreement.

Damages reduced

ZAMBIA PUBLISHING COMPANY LTD v