

PIUS KAKUNGU (1982) Z.R. 167 (S.C.)

SUPREME COURT
BRUCE-LYLE AG C.J., NGULUBE, D.C.J. AND MUWO, J.S.
14TH APRIL, AND 4TH MAY 1982.
(S.C.Z. JUDGMENT NO. 9 OF 1982)
APPEAL NO. 16 OF 1979.

Flynote

Civil procedure - Appeal - Assessment of damages - Right of appellate court to interfere with findings of trial court.

Damages - Assessment of in libel cases - Mitigatory factors - Reliability of source of information.

Damages - Libel - Character of plaintiff - When relevant - Influence of extraneous matter in assessing amount of damages.

Headnote

The defendants appealed against an award of K10,000 damages for libel, by the High Court. The libel arose out of an article published by the defendants which was found to be defamatory of the plaintiff. The defendants pleaded that the damages awarded were in excess of what the plaintiff was entitled to and should be reduced since the plaintiff was not of good character and the information contained in the defamatory article was from a responsible source. Further in assessing damages extraneous matter was taken into consideration.

Held:

(i) An appellate court will only interfere with the assessment of damages of the trial court if it is convinced that the trial court acted on some wrong principle or has misapprehended the facts or that the award was so high or so low as to be utterly unreasonable.

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(ii) 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.

(iii) Evidence of the plaintiff's good character is irrelevant and unnecessary for the law presumes that his character good until the contrary is proved.

(iv) Taking into account extraneous matter which does not flow directly or naturally out of the act or omission complained of is misapprehension of the facts and entitled the appeal court to interfere with the amount awarded.

Cases cited:

(1) Zambia Publishing Company v Mwanza (1979) Z.R. 76.

(2) Times Newspaper Zambia Ltd v Kapwepwe (1973) Z.R. 292.

(3) Flint v Lovell [1934] All Z.R. 200.

(4) Kawimbe v The Attorney-General (1974) Z.R. 244.

For the appellant: W. M. Muzyamba, Chigaga and Co.

For the respondent: S. S. Zulu, Zulu and Co.

Judgment
NGULUBE, D.C.J.:

This is an appeal against an award by the High Court of the sum of K10,000 damages for libel. The appellant who was the defendant the court below, and to whom I shall continue to refer as the defendant, is the proprietor of the Zambia Daily Mail newspaper. The respondent the plaintiff in the court below and to whom I shall continue to refer as the plaintiff) was at all material times a professional boxing and wrestling promoter at national and international level, and as such was a fairly well-known personality in the country. The action arose out of an article which appeared in the issue of the Zambia Daily Mail on 7th February, 1977, under the heading "Kakungu Stranded In Germany". The relevant paragraphs of the article complained of read:

"Zambian promoter Mr Pius Kakungu is stranded in Frankfurt, West Germany, after allegedly failing to pay his hotel bills, Home Affairs Minister Mr Aaron Milner confirmed yesterday. He said that arrangements were now being made through the Ministry of Foreign Affairs to have Mr Kakungu's bills settled by the Zambian Government so that he can come back to Zambia.

Mr Milner, who said Mr Kakungu is now destitute, said he (Mr Milner) would now be very strict in the granting of passports in order to avoid similar cases from happening in the future.

The plaintiff, who had in fact arrived in Zambia on the date that the offending article appeared, demanded a retraction and apology but none was offered. In the ensuing litigation arising out of the said article which is clearly defamatory the defendant set up an ill-fated plea of justification. On the evidence the learned trial judge found as a fact that the plaintiff was not stranded in Germany as he had a valid visa

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and a valid return air ticket and was able to pay his hotel bills. He further found that the plaintiff was not at the material time a destitute but had merely asked the Zambian Embassy in West Germany to assist him in obtaining additional funds from his friends in Zambia for the purpose of doing some shopping for his expected new baby, and that in order to obtain quick results the Embassy official concerned, as he himself freely admitted at the trial, sent a telex message to the Ministry of Foreign Affairs in which he deliberately distorted and misrepresented the plaintiff's situation. The learned trial judge he also found as a fact that the Government had in fact not bid a single ngwee towards the plaintiff's hotel bills. In the event this appeal is limited to the quantum of damages awarded.

On behalf of the defendant, Mr Muzyamba has asked this court to find that the damages awarded were far in excess of what the plaintiff was entitled to and should be reduced. Mr Muzyamba's first submission was that since the plaintiff had not adduced evidence to show that he enjoyed a very good reputation the damages ought to have been considerably less. He cited *Zambia Publishing Co. Ltd v Mwanza* (1) as authority for the proposition that plaintiff is obliged to adduce such evidence.

With greatest respect to learned counsel that case lays down no such proposition nor is such a proposition valid in this case. The established principle which has been followed from time immemorial is that, as a general rule, evidence of the plaintiff's good character is irrelevant and unnecessary for the law presumes that his character is good until the contrary is proved. The plaintiff can safely rest on that presumption unless the defendant has specifically imputed that the general character of the plaintiff is bad. This not having been the case the defendant's first argument must fail.

Mr Muzyamba's second submission was that the damages ought to have been reduced having regard to the undisputed evidence that the plaintiff owed some money to the Professional Boxing and Wrestling Control Board which, he argued, positively established that the plaintiff did not in fact have a good reputation as a promoter. On behalf of the plaintiff Mr Zulu asked us to find that such a conclusion could not be supported since no evidence had been adduced to suggest that the debt to the Board had arisen other than in the normal course of business between promoter and the responsible Board. I find Mr Zulu's argument to be entirely valid, more especially that the only specific suggestion put to the plaintiff at the trial concerned an alleged non-payment to a boxer called McClusky. The plaintiff's assertion that the Board had subsequently discovered that he did not owe any money to this boxer was not challenged, and since no other transaction was referred to and no detailed evidence was adduced with regard to the unspecified amount owed to the Board it would be unreasonable to assume that the debt arose in disreputable circumstances. Mr Muzyamba's second submission therefore cannot succeed.

The third submission made by Mr Muzyamba was that assessing the damages the learned trial judge must have been influenced by

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extraneous matter, namely, the deportation of the plaintiff's wife prior to the publication complained of, which deportation must have been taken into account as an aggravating feature. The relevant extract from the judgment of the High Court reads:

"The plaintiff said that he has suffered a lot as a result of this article. He said as a result of this his wife was taken out of the country without his authority. While it may be said that his wife was taken out of the country before the article, I have no doubt that it was also as a result of the events that led to the publication of the article."

There is force in Mr Muzyamba's submission on this point. The extract I have just quoted from the judgment of the High Court plainly reveals that the deportation of the plaintiff's wife was not discounted as irrelevant to this case. It must therefore have influenced the trial court when it was not and could not conceivably have been a consequence of the subsequent publication. There is not even the remotest connection in the chain of causation between the actions of the authorities and the publication complained of. That this extraneous consideration influenced the trial court is confirmed by the learned trial judge's finding immediately after the extract that I have quoted in the following terms:

"I find it however difficult to accept without direct evidence that the plaintiff's father nearly

collapsed when the article was translated to him in Bemba."

The plaintiff was listing the consequences of the publication and as can be seen the allegation that the father collapsed was discounted while that concerning the deportation of the wife was as not. Quite clearly the defendant can only be liable for his own publication and the results of it.

Mr Muzyamba's fourth and final submission was that the learned trial judge ought to have considered as mitigatory the fact that the defendant's source of information had been a responsible Government minister. Once again, I would find that there is substance in this submission. Mr Zulu's reply to the third and fourth submissions made by his learned brother was that the aggravating features such as the attempt to justify and the absence of an apology far outweighed any such considerations. This argument is demonstrably untenable. In assessing the damages and in arriving at the sum of K10,000 the learned trial judge did take into consideration all the aggravating features and indeed must have included the extraneous fact of the deportation of the plaintiff's wife. On the other hand, it is quite clear that the aspect raised in Mr Muzyamba's submission was not so considered. In *Times Newspapers Zambia Ltd v Kapwepwe* (2), Baron, D.C.J., said at p. 296:

"I am prepared to accept, as did the Deputy Registrar, that the fact that the news item came from an agency and not from the defendant's own reporter is to some degree a mitigating factor."

The other members of the court in that case did not disagree, and I

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would respectfully concur with those sentiments and hold that it is a factor to be taken into consideration in mitigation of damages for a defendant to show that he had reported a story from an otherwise impeccable source. In the instant case the source was a minister of Government respect of whom it is reasonable to assume an absence of irresponsibility and deliberate falsehood.

We have been asked to reduce the damages and in considering whether or not to do so I have borne in mind the well-established principle which was so aptly stated by Greer, L.J., in the oft-quoted case of *Flint v Lovell* (3), in which he said at p. 202:

"This court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given lesser sum. To justify reversing the trial judge on the question of the amount of damages it will be necessary that this court should be convinced either that the judge acted on some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damages to which the plaintiff is entitled."

This statement of principle has been followed with full approval in a number of cases decided by this court. For instance, in *Kawimbe v The Attorney-General* (4), where Baron, D.C.J., said at p. 247:

"An appellate court should not interfere with the finding of a trial court as to the amount of damages 'merely because they think that if they had tried the case in the first instance they would have given lesser sum' (Greer, L.J., in *Flint v Lovell* (3)). Before this court will interfere it must be 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".

It is trite law that a defendant in any action in tort can be held accountable only for the consequences which flow directly or naturally out of the act or omission complained of. Quite obviously the deportation of the plaintiff's wife did not flow from the publication so as to have entitled the learned trial judge to be influenced by it, as I find he was. I consider that the finding that the deportation and the publication were linked together so as to attach responsibility to the defendant for the purpose of assessing damages in this case amounted to a misapprehension of the facts entitling this court to interfere with the amount awarded. There is also the additional mitigatory factor arising from the fact that the defendant had published a correct version of a story given to the defendant by minister of Government. The defendant's carelessness in not investigating the truth of the story did not, in my view, negative the absence of recklessness or malice, nor was it proof of the absence of honest belief, all of which are relevant in mitigation or otherwise.

In my view and proceeding on the footing that the learned trial judge had taken all the aggravating factors into consideration, the

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two submissions that have been upheld entitle the defendant to a reduction. In all the circumstances I would set aside the award of K10,000 and in its place I would award K8,000 compensatory damages. The appeal should be allowed in those terms.

The advocates for the parties have indicated that they consent to an order that costs follow the event. Accordingly and by consent the successful appellant will have his costs of this appeal while the respondent who was the successful party in the court below will have his costs of the proceedings in the court below, such costs to be taxed in default of agreement.

Damages reduced

WILSON MASAUSO ZULU v