

WILFRED COLLINS WONANI (1983) Z.R. 131 (S.C.)

SUPREME COURT
SILUNGWE, C.J., NGULUBE, D.C.J., AND GARDNER, J.S.
6TH JULY AND 17TH AUGUST, 1983
(S.C.Z. JUDGMENT NO. 12 OF 1983)
Appeal No. 27 of 1983

Flynote

Damages - Libel - Seriousness of imputations - Effect on assessment.

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Damages - Mitigatory factor - Different origin - Reliability of source - Duty to verify.

Damages - Mitigation - Publication of apology - effect of.

Headnote

This was an appeal, against a High Court award of K15,000 damages, for libel arising out of an article published in the appellant's newspaper. The appellant contended that the imputation contained in the article in question were not serious and had in fact been quoted from a reliable source. Furthermore the publication of an apology subsequently should have been taken into consideration by the triad court as mitigatory.

Held:

- (i) The assessment of damages in a particular case must reflect the seriousness or otherwise of the imputation made and the consequences thereof, having regard to whether actual or only potential damage results.
- (ii) The effect of failure to verify the facts, on the damages recoverable must depend on its relationship, in any given circumstances with the factors that are relevant either in aggravation or in mitigation, thus if the source is reliable, failure to verify, does not on its own, negative honest belief and good faith.
- (iii) An adequate apology is an important mitigating factor, since the object of awarding compensatory damages is never the infliction of punishment on the defendant.

Cases cited:

- (1) Times Newspapers (Z) Ltd. v Kapwepwe (1973) Z.R. 292.
- (2) Zambia Publishing Company Ltd. v Kakungu (1982) Z.R. 167.
- (3) Times Newspapers (Z) Ltd. v Kashita (1982) Z.R. 162.

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

For the respondent: N. Kawanambulu, Shamwana and Co.

Judgment

NGULUBE, D.C.J.: Delivered the judgment of the court.

For convenience, we will refer to the respondent, who was the plaintiff in the action, as the plaintiff,

and to the appellant; as the defendant. The defendant has appealed against the award by the High Court of the sum of K15,000 damages for libel. The brief facts of the case were these:

The plaintiff was at the material time the Vice - Chairman of the Football Association of Zambia (hereafter called the association) and as such he was a well known personality. The Association was looking for a national coach and one Mr Wright of London was a candidate for the post. Mr Wright did not take up the job but in fact accepted a similar position in Saudi Arabia. In a letter to one Mr Lightfoot, Mr Wright explained the reasons why he could not take up the post offered by the Association. The defendant obtained copy of this letter and republished some of its contents in the Times of Zambia newspaper in an article headed "WHY MR WRIGHT TURNED DOWN THAT OFFER". The words complained of were extracted from that letter and were to the effect that the coach had

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found "the lack of communication from the Association very frustrating and 'because even FAZ Vice - Chairman, Wilfred Wonani who was in London at the time refused to see him'", and that the plaintiff had said he was busy and had to go to Baringstoke to see his son at school. It transpired that the reference to the plaintiff was a mistake since the Association's official concerned was different person. The plaintiff issued a press statement pointing out the mistake which the defendant had made. The defendant did not publish this statement although another paper (not owned by the defendant) did so, but subsequently, the defendant published an apology in, its Sunday Times newspaper.

We have been asked to find that the Award of K15,000 as damages in this case was so high as to be an entirely erroneous estimate of the damages to which the plaintiff was entitled. In this regard, counsel for the defendant has advanced a number of submissions. The first concerned the nature of the defamatory imputation in this case which, we agree, alleged no more than that the plaintiff had behaved irresponsibly in neglecting his duty as senior official of the Association. Indeed, it is not disputed that the learned trial judge did not find that the statement bore any of the extended, and more damaging, innuendo meanings which the plaintiff had put forward in his pleadings and in his evidence.

Quite clearly, the assessment in each particular case must reflect the seriousness or otherwise of the imputation made and the consequences thereof, having regard to whether actual damage or only potential damage results. We can see no justification for equating an allegation of irresponsibility with one of, say, treason which appears to have been the effect of citing, by the court below, the award in *Times Newspapers Zambia Ltd. v Kapwepwe* (1). The defendant's first submission must, be upheld.

The second and third submissions relied on the mitigation afforded by the fact that the defendant was not the originator of the defamatory statement but had repeated information obtained from an otherwise reliable named source. In these submissions, Mr Jearey is on firm ground.

Indeed, our decisions in *Zambia Publishing Company Limited v Kakungu* (2) and *Times*

Newspapers Zambia Ltd. v Kashita (3) which have been cited, are in point. It is quite clear to us that the article complained of was originated by Mr Wright whose mistaken reference to the plaintiff was republished by the defendant. These are factors which ought to have been referred to by the learned trial judge when dealing with the question of damages. Mr Kawanambulu has argued that the defendant's reporter ought to have verified the report with the plaintiff before publishing and that the failure to do so aggravates the damages. He submits that the attempts that were made to spells to the plaintiff over the telephone were totally inadequate and that the defendant should have withheld the article until the plaintiff had been contacted. In the premises, so the argument went, the damages could not be mitigated by the factors to which we have referred. While we recognise a duty to verify the facts (*see*, for example, the *Kapwepwe* case referred to above), the effect of the failure to verify on the damages recoverable must depend on its relationship, in any given circumstances, with the factors that are relevant either in aggravation or

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in mitigation. Thus, where for example, a defendant repeats a defamatory statement from an unnamed or otherwise dubious source, his failure to verify the truth may, of its own, be evidence of some reprehensible attitude or motive which could aggravate the damages. Conversely, if his source can be regarded as reliable, his failure to verify does not, of its own negative his honest belief and good faith, which factors are relevant in mitigation (*see*, for example, the *Kakungu* case above). The defendant in this case falls within the second category in the illustration and the submissions made by Mr Jearey in this behalf, therefore, succeed.

The final submission made by Mr Jearey is to the effect that the learned trial judge ought to have found that the publication of an adequate apology is mitigating factor. This submission is entirely valid. However, Mr Kawanambulu urges us to find that, as the learned trial judge had mentioned the apology in his recital of the evidence and the submission made to him, he must have taken the apology into consideration when assessing the damages, even though he did not refer to it in terms. We have no hesitation in finding that, on a proper reading of that part of the learned trial judge's judgment dealing with the assessment, the apology was neither referred to nor taken into account. The failure on the part of the court below to deal with the apology was a misdirection and we are, therefore, at large.

The defendant had published an apology which we find to have been adequate in the circumstances. We agree with the submission that, an adequate apology does repair, to a considerable extent, the damage done to a plaintiff's reputation. We agree also that the news media, and indeed any other defendant, should be given every incentive to apologise when they have made a mistake. A very large award, therefore, is note such an incentive. In our opinion, an adequate apology, or a retraction and apology is by far the most substantial single mitigating factor since a full apology will usually vindicate the plaintiff to an extant which no amount of damages, alone, can possibly match, bearing in mind that the object of awarding compensatory damages is never the infliction of punishment upon the defendant. In the case now before us, we find that the plaintiff had been sufficiently vindicated by the apology. However, the plaintiff had suffered in the interval of a month or so between the publication of the article complained of and the publication of the apology. During that same period, the defendant did not publish the plaintiff's statement contradiction which they had the opportunity to do. We find, therefore, that though the subsequent apology had sufficiently

vindicated the plaintiff, he had suffered in the meantime and for this reason some damages should be awarded.

It follows from what we have been saying that we regard the award of K15,000 as being, in the circumstances, far in excess of the damages to which the plaintiff was entitled and that, therefore, this appeal must be allowed and the award made below set aside. We have also said that this court is now at large and must itself assess the damages. Having regard to the nature of the defamatory imputation and the various factors to which

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we have referred, but more particularly having regard to the apology and the effect thereof to which we have referred, we do not consider that this is a type of case which should attract any large sum of damages. In all the circumstances of this case, we consider that a proper award should be no more than a sum of K1,000 (one thousand Kwacha) and this is the amount which we award to the plaintiff.

Appeal allowed
