IN THE SUPREME COURT OF ZAMBIA **APPEAL No. 013/2015**

HOLDEN AT LUSAKA **SCZ/8/288/2014**

(Civil Jurisdiction)

BETWEEN:

MUVI TV LIMITED APPELLANT

AND

KILLIAN PHIRI 1ST RESPONDENT

KENNEDY MUSWEU 2ND RESPONDENT

CORAM: Mwanamwambwa D.C.J., Hamaundu and Kabuka JJS

On 1st August 2017 and 12th January 2018

For the Appellant: *Mr. F.M. Sikazwe of Messrs Milner Katolo & Associates*

For the Respondents: *Mr. John Kapepe Jr. of Messrs Mak Partners*

J U D G M E N T

Mwanamwambwa, DCJ., delivered the Judgment of the Court.

Statutes Referred to:

1. ***Rules of the Supreme Court (White Book) 1999 Edition***

Cases Referred to:

1. ***Anderson Kambela Mazoka & Others v Levy Patrick Mwanawasa & Others 2005 ZR at Page 138***
2. ***Attorney General v Marcus Kapumpa Achiume (1983) ZR at Page 1***
3. ***Benny Hamainza Wycliff Mwiinga v Times of Zambia Newspaper Limited 1988/89 ZR at Page 177***

4. ***Ireen Chinjavata v The Administratror General 2004 ZR at Page 184***
5. ***Knupffer v London Express Newspaper Limited (1994) 1 All ER 495***
6. ***Munali Insurance Brokers Ltd & Another v The Attorney General & Others (2010), ZLR Vol 2 at Page 60***
7. ***Sata v Post Newspapers Limited and Another (1993/1994) ZR, 106***
8. ***William David Wise v E.F. Hervey (1985) ZR 179***
9. ***Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172 (S.C.)***

Other Works Referred to:

1. ***Gatley on Libel and Slander, Sweet & Maxwell, London (1967) 6th Edition***
2. ***Cambridge English Dictionary, Cambridge University Press***

This is an appeal from a judgment of the High Court delivered at Livingstone on 20th November, 2014.

The Respondents are traffic police officers stationed in Livingstone. They commenced this action, in the Court below, by way of Writ of Summons. Later, they filed an amended Statement of Claim, in which they alleged that the Appellant did air a television programme showing images of them. That the images

were accompanied by a reporter's commentary in the following words:

"i. *That the two Plaintiffs (now Respondents) are corrupt and that they have been soliciting money from public vehicles using a motor vehicle Registration Number AJC 6381 and fleet number LNK 4169 to carry out the alleged private monitory (sic) transactions.*

ii. *That the two Plaintiffs [were] spotted making an alleged transaction at Dambwa Central Market."*

The Respondents claimed from the Appellant, *inter alia*, damages for libel. Their contention was that the words uttered by the reporter, an employee of the Appellant, were defamatory and injured their reputations. That although their names were not mentioned in the commentary, images of them were shown, and they were identified by people who knew them. The Respondents claimed that as a consequence of that report, they were transferred from Dambwa Central Police Post to Livingstone Central Police Station. That the 2nd Respondent considered his transfer a

demotion resulting from his being portrayed by the Appellant as a corrupt officer.

The Appellant denied having defamed the Respondents. It contended that the report complained of was a general statement of what was being investigated. That there was no reference to the Respondents by name, but to a class of people, namely police officers. It was further argued that there was no evidence of any link between the report complained of and the Respondents' transfers.

After hearing the matter, the Court below found that the Respondents had proved, on a balance of probabilities that the Appellant, by the report complained of, had defamed the Respondents in their employment. Thus, the learned trial Judge awarded them K30,000.00 each as damages for libel.

Dissatisfied with the judgment of the Court below, the Appellant appealed to this Court. The following are the grounds of appeal:

1. ***The Court erred in law and in fact when it found that the Respondents had proved their claim when they***

failed to adduce evidence to show that the words and images complained of were published by the Appellant in the manner alleged by the Respondents.

2. ***The Court below erred in law and in fact when it found that the Appellant published words and pictures in a manner that was defamatory of the Respondents in their employment when the Respondents did not plead that they were defamed in their employment in the pleadings.***
3. ***The Court erred in law and in fact when it awarded K30,000.00 each to the Respondents as damages when there was no evidence adduced by the Respondents to show how their reputations in their employment were injured and lowered or damaged in the estimation of right-thinking members of society.***

On ground 1, the Appellant, through Counsel, submitted that in an action for defamation, the Statement of Claim must contain a concise statement of the material facts. That a concise statement of facts consists in the exact words complained of. We were referred to

pages 441 - 443 of ***Gatley on Libel and Slander 6th Edition***, where the learned authors state the following at paragraph 983:

> *"In libel, the words used are the material facts and must therefore be set out in the Statement of Claim. It is not enough to describe their substance, purport or effect. The Law requires the very words of the libel to be set out in the declaration in order that the Court may judge whether they constitute a ground of action whether they are a libel or not."*

Counsel contended that the Respondents failed to set out in the Statement of Claim the exact words used in the footage which is claimed to have been defamatory. He pointed us to page 85 of the record of appeal, where PW1 conceded that the Statement of Claim was "***summed up***". That this means the words in the Statement of Claim were deliberately not captured exactly as used in the footage.

It was submitted by Counsel for the Appellant that nowhere in the video in question were the words complained of said or used in the manner alleged by the Respondents. He invited us to listen to the footage, which formed part of the record of appeal. It was his

submission that the Court below ought to have found that the Statement of Claim disclosed no cause of action as it did not set out particulars of the defamatory words uttered about the Respondents.

In addition, the Appellant submitted that the Court below made a wrong finding of fact when it stated that "*alongside the pictures, words to the effect that the two police officers were corrupt, that they were soliciting money from public service vehicles and that they were using a taxi registration number AJC 6381 were published.*" According to Counsel for the Appellant, this finding is not supported by the evidence contained in the video footage in issue.

He further submitted that it was a misdirection for the Court below to have found that "*...the pictures, taken alongside the accompanying commentary, were capable of being understood in the manner the [Respondents] claim.*" That the Respondents did not plead that the words and the images had a simultaneous effect of being understood as referring to the Respondents. Nor did they plead **defamatory innuendo** for the Court below to hold that the words and the images simultaneously had such an effect. Further,

that since the footage in question referred to a class of people, a member of that class cannot sue for defamation unless it is shown that the footage was defamatory of him as an individual. Counsel cited the case of ***Knupffer v London Express Newspaper Limited*** in support of this argument.

Counsel for the Appellant also submitted that the Court below ought to have recognized that the words complained of were expressed as "*allegations*"; not as statements of fact. An excerpt in support of this submission was quoted from page 105 of ***Gatley***, and it is reproduced later in this Judgment.

For their part, the Respondents started off by responding to the Appellant's argument that the Statement of Claim did not show the exact words used in the footage. They submitted, through their Counsel, that if the Appellant felt that the Writ and the Statement of Claim did not disclose a cause of action, the Appellant should have applied in the Court below to strike them out. That the Appellant raised the issues relating to pleadings too late in the day. In support of this submission, the Respondents referred us to our

holding in the case of ***Munali Insurance Brokers Ltd & Another v The Attorney General & Others***,[6] that:

> "*once both parties to an action submit to a trial, after the exchange of pleadings, the inference to be drawn is that the pleadings have disclosed a cause of action fit for trial*".

Further, the Respondents submitted that the amended Statement of Claim did, in fact, contain a concise statement of the words complained of. That according to the Cambridge English Dictionary, Cambridge University Press, "**concise**" means "*short and clear, expressing what needs to be said without unnecessary words*". This, according to the Respondents, is synonymous with the words "***summed up***" as put by PW1.

Regarding the Appellant's request that we view the video in question, the Respondents submitted that the request was misconceived. They referred us to the case of ***Benny Hamainza Wycliff Mwiinga v Times of Zambia Newspaper Limited***.[3] In that case, we held that "*it is for the trial judge as trier of both fact and law to determine whether, as a matter of law, the words complained of were capable of being understood to refer to the*

plaintiff and if so whether, as a matter of fact, the words were reasonably understood to refer to the plaintiff".

The Respondents submitted that being an appellate court, this Court is not a trier of facts. That the learned trial Judge, who had an opportunity to watch the video, was on firm ground when he stated the following at **page 16 lines 10 - 15** of the record of appeal:

> "*While I agree that the pictures which were shown showed the two police officers performing their duties, the commentary that accompanied the pictures in the programme gave the pictures a different complexion than that of officers performing their duties...*"

It was also submitted by the Respondents that the footage in question was not about mere *allegations*. Rather, the words used by the Appellant were direct to the point that the Respondents were involved in corrupt activities. Thus, the Court below correctly found that "*alongside the pictures, words to the effect that the two police officers were corrupt, that they were soliciting money from public*

service vehicles and that they were using a taxi registration number AJC 6381 were published."

The Respondents added that the foregoing finding by the learned trial Judge is one of fact, and is based on the evidence of the video and the witnesses' testimonies. That an appellate Court will not reverse a finding of fact made by a trial court unless it is satisfied that the finding is perverse or made in the absence of any relevant evidence. The case of ***Attorney General v Marcus Kapumpa Achiume*** [2] was called in aid of this submission.

It was the Respondents' further submission that the Court below did not misdirect itself when it found that the pictures, taken alongside the commentary, were capable of being understood in the manner alleged by them. That although they were not named in the commentary, they were shown in the video, and were directly referred to as being involved in corrupt activities using a taxi registration number AJC 6381. That, in fact, ***Knupffer v London Express Newspaper,*** [5] which the Appellant seeks to rely on, supports the Respondents' case since they proved in the Court below that the Appellant defamed them as individuals.

On ground two, the Appellant is challenging the finding of the Court below that the Respondents were defamed *in their employment*. Counsel for the Appellant contends that there was no pleading, in the Respondents' Statement of Claim, to the effect that they were defamed in their employment. He submitted that if defamation in the Respondents' employment was intended to be an issue, it ought to have been pleaded. That the Court below misdirected itself by finding that the Respondents had proved a claim which they did not plead, and which the Appellant had no notice of, or opportunity to respond to. Counsel relied on the case of ***William David Wise v E.F. Hervey***,[8] in which this Court held the following:

> "*Pleadings serve the useful purpose of defining the issues of fact and of law to be decided; they give each party distinct notice of the case intended to be set up by the other; and they provide a brief summary of each party's case from which the nature of the claim and defence may be easily apprehended*".

In response on ground 2, Counsel for the Respondents concedes that in their Statement of Claim, the Respondents did not

plead defamation *in their employment.* However, he submits that PW1 did testify at trial about the effect of the footage on the Respondents' employment. That the Appellant raised no objection at that stage. Counsel quotes part of PW1's testimony at **page 83 lines 35-39** and **page 86 lines 25-30** of the Record of Appeal in support of this submission. He further cites the case of ***Anderson Kambela Mazoka & Others v Levy Patrick Mwanawasa & Others***[1] for the principle that where a matter not pleaded is let in evidence, and not objected to by the other side, the Court is not precluded from considering it.

On ground 3 of the appeal, the Appellant contends that the K30,000.00 awarded to each of the Respondents as damages for libel was without basis. This is because the Respondents did not lead any evidence showing how the footage complained of injured their reputations in their employment or, at the very least, that it tended to lower them in the estimation of right-thinking members of society. Further, there was no link established between the footage in issue and the message from police command, which transferred not only the Respondents but other officers too.

In the alternative, Counsel for the Appellant invited us, should we take the view that the Respondents deserved damages, to hold that nominal damages ought to have been awarded. He mitigated that the K30,000.00 awarded to each Respondent by the Court below was excessive. We were referred to a Judgment delivered on 13th February, 1995 by Ngulube CJ, as he then was, in the case of ***Sata v Post Newspapers Limited and Another***.[7] Sitting as High Court Judge, His Lordship held, *inter alia*:

> *"Where there was little actual loss suffered by a plaintiff exemplary or punitive damages were not appropriate, since the primary object of an award for defamation was to offer vindication and solatium rather than monetary compensation."*

In response on ground 3, the Respondents maintain that they were transferred to Livingstone Central Police Station as a result of the video aired by the Appellant. That the positions they hold at that station are inferior to those they held at Dambwa Central Police Post. Further, that considering the devaluation of the kwacha and the prospects of the Respondents not being promoted

as a result of the publication in question, the K30,000.00 awarded to each of them by the Court below is, in fact, inadequate. In inviting us to take into account the devaluation of the kwacha, Counsel relied on the case of ***Ireen Chinjavata v The Administratror General*** [4].

We have looked at the pleadings, the evidence on record and considered the submissions by the parties on the three grounds. We have also looked at the authorities cited in this appeal.

Foremost, the Appellant's contention on ground one is, as we see it, that the Court below erred when it found in favour of the Respondents despite their Statement of Claim not disclosing a cause of action. We agree with the Appellant that in an action for defamation, the law requires that the actual words complained of be set out in the Statement of Claim. (See ***Gatley*** at pages 441 - 443). It is clear that the Statement of Claim filed by the Respondents did not quote the words complained of exactly as published by the Appellant. Therefore, it did not disclose a cause of action.

Where a pleading discloses no reasonable cause of action, **Order 18 rule 19** of the Rules of the Supreme Court (White Book) 1999

Edition allows the Court, **at any stage of the proceedings**, to order the striking out or amendment of the pleading. We note, from **page 83 lines 11 - 15** of the record of appeal, that the Appellant did object to DW1 introducing, in his testimony, words which were not pleaded. However, no application was made to strike out the Writ and Statement of Claim for non-disclosure of a cause of action. It was only at the submissions stage that the Appellant raised the issue of non-disclosure of a cause of action. This, in our view, was too late in the day. We repeat what we said in the case of ***Munali Insurance Brokers Ltd & Another v The Attorney General & Others***,[6] that:

> *"once both parties to an action submit to a trial, after the exchange of pleadings, the inference to be drawn is that the pleadings have disclosed a cause of action fit for trial".*

Besides, it is not in dispute that the video footage complained of by the Respondents was received in evidence in the Court below. The learned trial Judge viewed the footage and heard the actual words complained of in the exact manner they were published by the Appellant. Therefore, we cannot fault the trial Court for the

findings it made based on pleadings which the Appellant never sought to be struck out, and also based on the video evidence before that Court.

Secondly on ground one, we will deal with the Appellant's submission that the Court below made a wrong "*finding of fact*" that "*alongside the pictures, words to the effect that the two police officers were corrupt, that they were soliciting money from public service vehicles and that they were using a taxi registration number AJC 6381 were published.*" As pointed out by the Appellant, the foregoing finding by the Court below is a finding of fact. It is a finding made by the learned trial Judge after he, as trier of facts, viewed and listened to the video footage. We are not persuaded that he could have found, as a fact, that the words above were uttered by the Appellant when, in fact, they were not.

This Court has repeatedly stated that it will not reverse findings of fact unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon misapprehension of the facts: *See* ***Wilson Masauso Zulu v Avondale Housing Project Limited.***[9] In the

present case, we find nothing in the Appellant's submissions to satisfy us that the finding of fact being challenged by the Appellant is perverse or was made in the absence of relevant evidence.

The Appellant further contends that since the Respondents did not plead defamatory innuendo, the Court below misdirected itself when it found that the footage was capable of being understood as referring to the Respondents rather than to a class of people. Again, this is a finding of fact. Our position in the ***Masauso*** case applies.

The Appellant did invite us to view the footage in question, as it was part of the record of appeal. We recognize that this is primarily the trial Court's role, in line with the case of ***Mwiinga v Times of Zambia***.[3] However, using our discretion, we took the liberty to view it. Below is an excerpt from the commentary in the footage:

> "*While government tries to fight corruption in Zambia, however this particular footage is a clear testimony that the scourge is far from being curbed. Following numerous concerns among motorists in Livingstone, of alleged corrupt practices among some traffic police officers, this investigative report shows an undercover assignment in which these unidentified traffic officers [were] spotted*

making an alleged illegal transaction at Dambwa Central Market. These officers, believed to be from Dambwa Central Police Post, are known for their routine collection of money from overloaded motor vehicles that ferry passengers from Livingstone to Mulobezi and Sichili..." [Emphasis ours].

The very first sentence in the extract above speaks for itself and sets the stage for the imputation that the two officers shown in the footage were engaged in acts of corruption. We are therefore constrained from interfering with the trial Court's finding that the footage was capable of being understood to refer, specifically, to the Respondents as being corrupt.

We also find the Appellant's submission that the words complained of were expressed as "*allegations*", rather than statements of fact, to be less than persuasive. In fact, our view is that the passage quoted by the Appellant from page 105 of ***Gatley*** is an own goal. That passage reads, in part, as follows:

"Many cases of defamation arise from statements which connect the claimant in some way with criminality and provide illustrations of what imputations will, in the eyes of the law be conveyed to the ordinary reader. A statement by D that X says that C is guilty of a crime conveys the imputation that C is guilty and the same is generally true if D says that there is a rumour that C is guilty. In other words, such imputations must be justified by proof of guilt, not by proof that the statement was made by X or that the rumour exists..."

Clearly, the law will not allow the Appellant, while hiding in derivatives of words such as "*allege*", to make unjustified imputations of criminal conduct against other persons. The statement that "*these unidentified traffic officers [were] spotted making an alleged illegal transaction at Dambwa Central Market*" clearly referred to the Respondents. We also take the view that the Court below, as trier of both fact and law, properly found that the footage in question was defamatory of the Respondents.

Given the foregoing, we find no basis on which to reverse the findings being challenged by the Appellant in ground one. This ground lacks merit, and it fails.

We now turn to ground two. A perusal of the pleadings confirms the submission that the Respondents did not plead that the Appellant defamed them **in their employment**. However, the record also confirms that at trial, PW1 gave testimony to the effect that the Respondents were defamed in their employment. The Appellant raised no objection. We reiterate what we said in the case of ***Mazoka v Mwanawasa***,[1] that where a matter not pleaded is let in evidence, and no objection is raised by the other side, the court is not precluded from considering it. Therefore, it is our view that the Court below did not misdirect itself when it considered the evidence that the Appellant defamed the Respondents in their employment, or when it so found. For that reason, ground two must also fail.

We move on to ground three. From the Appellant's submissions, it is evident that ground three rests on the merits of grounds one and two. That is to say, in respect of ground one, that

the Respondents failed to show the exact words by which the Appellant defamed them. And in respect of ground two, that the Respondents did not plead defamation in their employment.

We have already upheld the finding, by the Court below, that the Appellant defamed the Respondents in relation to their employment. And we have given our reasons for taking that position. The question we must now consider is whether damages were awardable to the Respondents. And if so, whether, on a proper assessment, the K30,000.00 awarded to each of the Respondents was appropriate.

After reading the Judgment which is the subject of this appeal, we note that the learned trial Judge did not conduct any assessment as the basis for awarding damages of K30,000.00. We must state here that in assessing damages in a defamation claim, a court must consider a number of factors. The first factor is the conduct of the Plaintiff. ***Gatley*** has the following to say at page 385, paragraph 881:

> *"Much will depend on the character and conduct of the Plaintiff. If he has attacked or in any way provoked the*

Defendant, or if his own imprudent conduct has given rise to the publication of which he complains, he is hardly likely to receive much sympathy at the hands of the jury. If he is not altogether blameless in the matter, he may be well advised not to bring an action. A man who brings an action in defence of his reputation must be ready and willing to go into the witness-box and deny the charge against him. If he fails to do so, the jury may express their opinion by awarding him nominal or even contemptuous damages only."

The second factor is the Plaintiff's status. That is to say, his standing in society. The higher a person's social status or reputation, the more loss or injury he suffers when defamed. Accordingly, the more damages are awardable to him.

The third factor to be considered is the nature of the libel. A libel relating to a person's office, occupation, profession, calling or trade, for example, is considered serious. Ordinarily, a libel of that nature will attract colossal damages. And so will a libel that

imputes commission of serious crime such as murder or aggravated robbery.

Factor number four is the mode and extent of publication of the libel. Defamation which is in more permanent form is considered more damaging. For that reason, defamation in writing attracts more damages than defamation in verbal form. In addition, the wider the publication, the more damage it causes to a person's reputation; and the bigger the compensation.

The fifth factor is the absence of a retraction or apology, or the refusal by the Defendant to retract or apologise. This may be regarded as arrogance.

Factor number six is whether there was evidence led in aggravation or mitigation of damages (See ***Gatley***, at page 592, paragraph 1451; and page 595, paragraph 1452).

We now consider the above factors in relation to the case *in casu*, starting with the first factor. In our view, the Respondents are partly to blame for the defamatory report aired by the Appellant. The manner in which the Respondents carried out their duties in

the incident which gave birth to this action left much to be desired. It is not in dispute that the Respondents were receiving payments from erring motorists at Dambwa Central Market. No proper explanation was given as to why the transactions were not done at the Police Station which, as far as we know, is only a stone's throw from the market. From that viewpoint, the Respondents' own conduct provided fertile ground for suspicion.

With regard to the Respondents' social status, the only evidence on the record is that they were traffic police officers in Livingstone. For that reason, we take the view that they are of a humble social status.

In terms of the nature of the libel, we have stated that the learned trial Judge properly found that the Respondents were defamed in relation to their employment or occupation. It is also obvious from the record that, in this case, the defamation relates to the Respondents' occupation and execution of their duties as traffic police officers. However, we must comment, at this point, on the Respondents' claim that their transfer from Dambwa Central Police Post to Livingstone Central Police Station came as a consequence of

the Appellant's defamatory report concerning them. We are not convinced that this is the case. No evidence was adduced in the Court below, to that effect. As correctly observed by the Appellant, the Respondents are not the only officers that were notified of their transfer through the message from police command. In addition, the message did not provide reasons for the Respondents' transfer. Therefore, the reason proffered by the Respondents for their transfer must be treated as mere speculation.

Next is the mode and extent of publication. The record shows that the report complained of was a television broadcast. The footage shows that although the reporter's commentary was in English, the newscast itself was in a Tonga production. It would appear to us, therefore, that the newscast in question was not nationwide but limited, at the most, to the Southern region of Zambia, where Muvi TV has reception in the Province.

We now come to the question of apology or retraction. The Appellant has been consistent in its position that the report complained of was not defamatory of the Respondents. Thus, an apology or retraction from the Appellant would have been unlikely.

However, we are reluctant to attribute the absence of an apology or retraction to arrogance on the part of the Appellant. We take this view because, as we stated earlier, the Respondents' execution of their duties, which gave rise to this matter, was not entirely flawless. It aroused suspicion.

On the sixth factor, we note that there was no evidence led in aggravation.

Taking into account the first five factors above, we find merit in the Appellant's submission that the K30,000.00 awarded to each of the Respondents was excessive. To that extent only, ground three of the appeal succeeds.

Having stated the above, we hereby set aside the award of K30,000.00 as damages for each of the Respondents. Taking into account the devaluation of the kwacha, we instead award the Respondents K5,000.00 each as damages for libel.

For the avoidance of doubt, the order made by the Court below as to interest remains undisturbed. And so does the order relating

to costs. The appeal having partly failed and partly succeeded, we order that each party shall bear its own costs of this appeal.

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M.S MWANAMWAMBWA
DEPUTY CHIEF JUSTICE

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E.M HAMAUNDU
SUPREME COURT JUDGE

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J. K. KABUKA
SUPREME COURT JUDGE