IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 173/ 2015
HOLDEN AT NDOLA
(CIVIL JURISDICTION)

BETWEEN:

JAMES KASAMANDA **APPELLANT**

AND

KAREN MICHELLE VAN BOXTEL **RESPONDENT**

CORAM : Hamaundu, Kaoma and Kabuka, JJS
On the 5th June, 2018 and 22nd February, 2019

For the appellant : Messrs EBM Chambers
For the respondent : No appearance

JUDGMENT

Hamaundu, JS, delivered the Judgment of the court.

Cases referred to:

1. **Khalid Mohammed v Attorney General (1982) ZR 49**
2. **Nkhata & others v Attorney General (1966) ZR 124**
3. **Mususu Kalenga Building Limited and Winnie Kalenga v Richman's Money Lenders Enterprises (1999) ZR 27**
4. **Roger Sakuhuka v Sassassali Nungu (2005) ZR 48**
5. **Attorney General v Kapwepwe (1974) ZR 207**
6. **Times Newspapers Zambia Ltd v Kapwepwe (1973) ZR 292**
7. **Simon Kapwepwe v Zambia Publishing Company Limited (1978) ZR 151**

Works referred to:

1. **Gately on Libel and Slander, Eleventh Edition; 2008, London: Sweet & Maxwell**
2. **Mc Gregor on Damages, Sixteenth Edition; 1997, London: Sweet & Maxwell**

This appeal is by the appellant against a judgment of the High Court which found him liable for damages in libel against the respondent. There had been also a cross-appeal against the same judgment by the respondent. However, the respondent and her advocates did not file any heads of argument; and neither did either of them appear at the hearing of this appeal. The cross-appeal therefore is deemed to have been abandoned.

The background to this appeal is this:

The appellant carries on business as a private investigator under the business name **Van Guard Investigations**. The respondent, at the material time, was employed at the British High Commission as a Consular Officer. In 2010, the respondent and her husband were going through a turbulent phase in their marriage. On 9th August, 2010, the respondent's husband hired the appellant to carry out a surveillance on the respondent's movements. On 28th

August, 2010 there was a quarrel between the respondent and her husband at a club known as *Lusaka South Country Club.* In the course of that quarrel the respondent's husband was assaulted. Following the assault, the respondent and two other people were arrested and charged with a criminal offence relating to the assault. The incident was reported in the Times of Zambia and Zambia Daily Mail newspaper editions of the 2nd September, 2010 and 3rd September, 2010, respectively. In both reports, the appellant was reported as confirming that he had been hired to investigate the respondent. The respondent and her co-accused were now due to appear in court.

On 20th September, 2010, the Times of Zambia newspaper edition of that day published an article in which the respondent's husband alleged that his wife had disappeared with their three children. He further said that the wife's accomplices and sureties had also disappeared in suspicious circumstances. In that article the appellant was reported to have said that he had alerted the police on the planned disappearance of the suspects but that the police had done nothing about it. He was also reported to have said

that he had trailed the suspects and the sureties and had seen them board a Zambezi Airlines aeroplane.

Angered by that report, the respondent arranged for an interview with a reporter from the Times of Zambia newspaper in order to refute the allegations in that article. This was held at her lawyer's offices. Her story was carried in the Times of Zambia edition of the following day, the 21st September, 2010. In that article, she accused her husband of having maliciously made the allegation with intent to influence the police. She was reported as having said that the appellant had been lying on her movements because he wanted to please her husband who had paid him. That story was also carried online, on the website for Times of Zambia. This attracted comments from several people. Two comments, among those posted, upset the appellant. One comment linked him to the American Secret Service, the Central Intelligence Agency (CIA), while the other described him as a liar whose habit would never die.

The appellant sued the respondent for libel, claiming that the words attributed to the respondent, as well as the comments posted by third parties online, were defamatory of him.

The respondent denied that she had uttered the words that were attributed to her in the story, but said that what she had told the reporter was that other articles that had been published in the newspapers had contained malicious statements about her. She, however, counter-claimed for defamation also with regard to the statements that were attributed to the appellant in the story to which she had reacted.

The appellant denied that the statement that was attributed to him was malicious.

The court below found as a fact that the respondent caused the publication of the statement complained of by the appellant. Similarly, the court found that the appellant caused to be published the statement complained of by the respondent. The court then found the words attributed to the respondent to be defamatory of the appellant in that they portrayed him as someone who would lie about anyone in his investigative work for as long as he has been paid money; and would implicate anyone for that matter. Similarly, the court found the words attributed to the appellant to be defamatory of the respondent in that they portrayed her as a person

who would abscond court in breach of her bail conditions and was, therefore, not trustworthy.

Although the respondent in her pleadings did not plead the defences of justification and qualified privilege, the court below considered them. The court found that the story alleging that the respondent had fled the country was false and that, to that extent, the respondent had partially established justification. However, the court found that the respondent's statement implied that the appellant had been lying even on other occasions and yet she had failed to prove that that had been the case on those other occasions. Therefore, the court held that the defence of justification had failed.

With regard to the defence of qualified privilege, the court found that the respondent said the words complained of in a careless manner, with exaggeration. In the court's view, that defeated the defence of qualified privilege.

With regard to the comments posted by third parties, the court found that the same were not on the respondent's facebook page but were posted on the Lusaka Times online page by the followers of that online publication. In the court's view, those comments could

not be said to have been published or caused to be published by the respondent.

With regard to the counter-claim, the appellant, like the respondent, did not, in his pleadings, plead the defence of justification. The court below, however, considered it. The court found that the defence could not stand in the light of the appellant's own evidence that he never saw the respondent or her surety board the aeroplane; or leave the country.

With regard to damages, the appellant was awarded K10,000 as compensatory damages while the respondent was awarded K20,000 as compensatory damages and K5,000 as exemplary damages. Both parties appealed. Since the respondent's cross-appeal is deemed abandoned, we shall only consider the appellant's appeal. The same is based on five grounds of appeal.

The first ground faults the court for finding and holding that the respondent had proved that the appellant had uttered the defamatory words complained of when, according to the appellant, there was no evidence to that effect.

The second ground faults the court below for awarding the respondent the sum of K20,000 as compensatory damages. It faults the court also for awarding exemplary damages, in addition.

The third ground faults the court below for finding that the respondent's defence of justification had partially succeeded with regard to the words that she said of the appellant in the article published on 21st September, 2010.

The fourth ground faults the court below for holding that the postings by third parties could not be said to have been published or caused to be published by the respondent.

The fifth ground faults the court below for awarding the appellant only K10,000 as compensatory damages when he deserved more.

We remind ourselves here that, the respondent having abandoned her cross-appeal, the words that she was found to have uttered as appearing in the Times Newspapers article of 21st September, 2010 are no longer in issue, except to the extent that the appellant complains that, according to his view of the gravity of the words that he complains of, he should have been awarded damages which are much higher than K10,000. What is in issue

now are the words which the appellant is said to have uttered against the respondent.

However, we were rather puzzled by the approach which both parties took: The words complained of by either party were printed and published by well known and established publishers. Yet neither party sued the said publishers; instead, they opted to sue each other only. That left us wondering whether the parties could be said to have published the respective words attributed to them and, for that reason, whether the parties had any cause of action for defamation against each other.

The editors of the works, **Gatley on Libel and Slander, eleventh edition**, discuss the general principles of publication as follows:

> "*General Principles: Publication.* **No civil action can be maintained for libel or slander unless the words complained of have been published....In order to constitute publication, the matter must be published by the defendant to (communicated to) a third party, that is to say, at least one person other than the claimant.....**
> **Since publication to one person will suffice it is clearly not necessary that there should be a**

> *"publication"* **in the commercial sense, though the scale of the publication will of course affect the damages. The writer of a defamatory letter is therefore a** *"publisher"* **of it and a person who whispers a slander in the ear of an acquaintance also publishes"** (para 6.1)

It is clear that publication relates to communication and not necessarily the printing of matter and publishing it to other persons. It is said that defamatory matter which is communicated in spoken words only is *slander* and not *libel.* In this case, it is not in dispute that the words attributed to either party were communicated to the publishers in spoken form only. Can it then be said that the parties would have only committed a *slander* in communicating the words complained of to the publishers and were not responsible for the subsequent printing and publishing by those publishers of the same words complained of? The learned editors of **Gatley on libel and Slander** again discuss as follows:

> **"where the defendant dictates a defamatory statement to another, who takes it down, the defendant publishes a slander to that other: although a writing then comes into existence, it was not a writing when it was published.... Of course where the dictated material has been transcribed and sent out there will be a publication of a**

libel to the recipient by the originator of the material provided that is intended or authorized by him" (para 3.8)

On the issue of republication, the learned editors state this:

"(b) *Liability of the original publisher.*

General Principle. **Where a defendant's defamatory statement is voluntarily republished by the person to whom he published it or by some other person, the question arises whether the defendant is liable for the damage caused by that further publication. In such a case the claimant may have a choice: he may (1) sue the defendant both for the original publication and for the republication as two separate causes of action, or (2) sue the defendant in respect of the original publication, but seek to recover as a consequence of that original publication damage which he has suffered by reason of its repetition so long as such damage is not too remote.....**

The question is essentially the same as that in any other tort where it is sought to make the defendant liable for harm which is directly attributable to the voluntary act of a third person. That is a question of causation but it is not a pure question of fact, nor is the inquiry a value-free one: the '*reality is that the court has to decide whether, on the facts before it, it is just to hold [the defendant] responsible for the loss in question'.* **No doubt it is true that the starting point is that the defendant is prima facie not liable for the further damage, because it is incumbent on the claimant to show that there is an adequate causative link between the tort and the**

> **damage, but subject to that, the defendant will be liable if he is actually aware that what he says or does is likely to be reported or if a reasonable person in his position should have appreciated that there was a significant risk that what he said would be repeated in whole or in part and that that would increase the damage caused by what he said."** (para 6.36)

It seems clear that even if the original publication was by spoken words only the original publisher will still be liable for the voluntary republication in permanent form by the recipient of the original publication if the original publisher had intended or authorized it to be repeated; or if he had been, or ought to have been, aware that what he was saying was likely to be reported. The situation given in the last passage that we have cited is the situation that we have in this case. So, if indeed the parties uttered the respective words complained of then they certainly were aware, or ought to have been aware, that what they had said would be reported by the publishers to whom they had given interviews. So, indeed, the parties had respective causes of action against each other.

We now deal with the appellant' grounds of appeal. The second and fifth grounds of appeal deal with damages. We shall consider

them together at the end. The fourth ground of appeal goes towards the enhancement of damages. Therefore, it will be the second last issue that we shall consider.

The appellant's advocates did not appear at the hearing. However, since they had filed heads of argument, we decided to resolve this appeal based on them.

In the first ground of appeal the argument by the appellant is that he had denied having published the alleged defamatory words. The appellant argued that, in order to prove that he had said those words, the respondent should have called witnesses from the Times of Zambia newspaper to confirm the allegation. It was argued that the failure by the respondent to do so meant that she had failed to prove her case. We were referred to the proposition that a plaintiff has a duty to prove his case, which is stated in the case of **Khalid Mohammed v Attorney General**[1].

We think that the lower court's holding that the respondent had proved her case was based on it's finding of fact that the statement complained of was caused to be published by the appellant. In other words, the court below found that the appellant

had, indeed, published or communicated the words complained of to the Times of Zambia newspaper. The real issue being one of fact, the appropriate authorities that are applicable are cases such as **Nkhata & others v Attorney General**[2] where the principle is stated that an appellate court will not reverse findings of fact made by a trial court unless;

> **(a) the trial court accepted evidence which it ought not to accept; or**
>
> **(b) in assessing and evaluating the evidence, the trial court has taken into account some matter which it ought not to have taken into account or it has failed to take into account a matter which it ought to have taken into account; or**
>
> **(c) it appears from the evidence or the unsatisfactory reasons given by the court for accepting the evidence that the court cannot have taken proper advantage of its having seen and heard the witnesses; or**
>
> **(d) in so far as the court has relied on manner and demeanor, there are other circumstances which indicate that the evidence of the witnesses which it accepted is not credible, as for instance where those witnesses have on some collateral matter deliberately given an untrue answer.**

The appellant has not attacked the finding of fact in issue on any of the above principles. It follows that the appellant cannot now argue that the court below was wrong to hold that the respondent

had proved the case of defamation against him. In any event, in supporting its finding that the appellant had uttered those words, the court below said that the appellant did not deny or disassociate himself from the statement. Indeed, in his defence to the counter-claim, the appellant's response was merely to deny that the statement attributed to him was malicious. So, the court below was on firm ground when it stated that the appellant did not disassociate himself from the statement. Therefore, none of the above grounds for interference exist in order for us to reverse that finding of fact. The first ground of appeal, therefore, fails.

As for the third ground of appeal, we think that it is misconceived because, although the court below held that the respondent had established that the appellant's statement published in the newspaper of 20th September, 2010 was false, thereby partially proving the defence of justification, the court nevertheless held that that partial success was not enough to sustain the defence of justification. In the end, that defence was not available to the respondent. So, we do not see what the appellant hopes to achieve with this ground. The same fails.

The appellant's arguments in the fourth ground of appeal are that the two postings that he is aggrieved with were comments by members of the public which came about because the respondent allowed the Times of Zambia newspaper to post the story on the website of its online publication, the Lusaka Times.

The appellant's argument here is at variance with the way he had pleaded and argued this issue at the trial. In his pleadings, and at the hearing, the appellant alleged that the respondent posted the defamatory statements on her facebook page whereupon people started posting their comments. The court found that the comments were not on the respondent's facebook page. As we have stated earlier, the court refused to allow the appellant to rely on them on the ground that they could not be attributed to the respondent.

We have held in cases such as **Mususu Kalenga Building Limited and Winnie Kalenga v Richman's Money Lenders Enterprises**[3] that where an issue was not raised in the court below it is not competent for any party to raise it in this court. Clearly, the appellant contended before the court below that the defamatory statements were on the respondent's facebook page and that the

comments by other parties were posted on her facebook page. The court found otherwise. The contention which the appellant is now making, namely, that the respondent allowed the Times of Zambia newspaper to post the story on its website was not made before the court below. The appellant cannot, therefore, raise it now.

The last issue, which is on damages, is raised by the second and fifth grounds of appeal.

The appellant's arguments in these two grounds are these: that the court below erred when it awarded the appellant damages in the sum of K10,000 and the respondent damages in the sum of K20,000 without assigning any reasons for the award in either case. The appellant argued that his defamatory words did not impute the commission of any serious offence on the part of the respondent and, therefore, the damages awarded against him should not have exceeded K5,000. He referred us to the case of **Roger Sakuhuka v Sassassali Nungu & Others**[4]. On the exemplary damages awarded against him, the appellant argued that his defamatory words did not warrant the award of exemplary damages because the words

were said only once; and, further, that the defamation did not impute the commission of a serious crime by the respondent.

Coming to the award of K10,000 given in his favour, the appellant argued that the words spoken by the respondent of him should be the ones that should have attracted an award of K20,000.

We have considered the above arguments. In **Attorney General v Kapwepwe**[5] we held:

> **"Before an appellate court can interfere with an award of damages it must be shown that the trial judge has applied a wrong principle or has misapprehended the facts or that his award is so high or so low as to be utterly unreasonable. It is no ground for varying an award made by the trial judge that the judges in the appellate court would have awarded a different sum"**

We shall start with the exemplary damages. In **Times Newspapers Zambia Ltd v Kapwepwe**[5], we held:

> **"In Zambia exemplary damages may be awarded in any case where the defendant has acted in contumelious disregard of the plaintiff's rights."**

In this case the court below found that there was reckless disregard on the part of the appellant in issuing the defamatory

words. There and then, it awarded a sum of K5000. In **Times Newspapers Zambia Ltd v Kapwepwe**[6], which we have cited above, we guided as follows:

> **"The court should first consider what sum to award as compensatory taking into account the whole of any aggravating conduct of the defendant (i.e any conduct in contumelious disregard of the plaintiff's rights) and only then turn to consider whether this proposed award is sufficient to punish and deter the defendant, and if not, award some larger sum".**

In **Simon Kapwepwe v Zambia Publishing Company Limited**[7], we added to the above principle as follows:

> **"In cases where there has been aggravating conduct by the defendant the only factor which falls to be considered separately is the means of the defendant. The actual conduct of the defendant is not considered again; it should already have been taken into account in arriving at the compensatory award".**

Now we see that the approach taken by the court below is contrary to our guidance in the two cases that we have cited above.

However, the appellant in this case published a completely false allegation, knowing very well that it was false. He published the story without any regard as to the damage that it would do to

the respondent's reputation, especially when one considers the institution for which the respondent worked. We agree with the court below that the appellant's conduct was in contumelious disregard of the respondent's rights; and was, therefore, aggravating. It, consequently, called for damages that were not only compensatory, but punitive as well. In line with our guidance in the above two cases we have considered whether the sum of K20,000 that was awarded by the court below was sufficient to punish the appellant or, as argued by the appellant, was far in excess of the damages that were adequate to punish him. In this regard, we have considered the appellant's ability to pay the sum of K20,000. In so doing we have taken note of the fact that the appellant runs a private investigations business; by means of which he can easily pay the sum of K20,000 without feeling any punitive effect. Therefore, contrary to the appellant's contention that the sum of K20,000 was excessive, we find it insufficient to punish him. So, the court below was on firm ground in enhancing the damages, and we belive that the enhancement thereof by a sum of K5000 was sufficient to punish the appellant.

So, while we say that, in terms of approach, the court below should not have assessed the compensatory and exemplary sums separately, but should have pronounced a round figure of K25,000, we are nevertheless satisfied that the net effect was the same.

Therefore, notwithstanding the wrong approach by the court below, we do not find it necessary to disturb this award.

The appellant has also complained against the sum of K10,000 awarded in his favour. He would like it to be enhanced to the sum of K20,000.

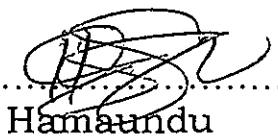
Although the court below did not appear to recognize the presence of a mitigating factor with regard to the respondent's defamation of the appellant, such factor did exist. The learned editors of the works: **M^{C} Gregor on Damages, sixteenth edition**, set out one such mitigating factor as follows:

> "(iii) *Provocation of the defendant.* **If the plaintiff has provoked the defendant into the defamatory statement, this is evidence to disprove malice in mitigation of damages".**

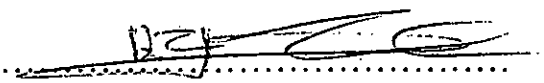
In this case, it was clear that the respondent was provoked into uttering the words complained of by the appellant's defamatory

statement which was made earlier. That was a mitigating factor which had the effect of significantly reducing the damages to be awarded. In the circumstances, we do not think that the sum of K10,000 awarded to the appellant as compensatory damages was so low as to be utterly unreasonable. We find no reason to disturb it.

The net result is that the whole of the appellant's appeal fails, and we dismiss it. Since the respondent took no steps to defend the appellant's appeal, we make no order as to costs.



E. M. Hamaundu
SUPREME COURT JUDGE



R. M. C. Kaoma
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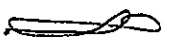

J. K. Kabuka
SUPREME COURT JUDGE