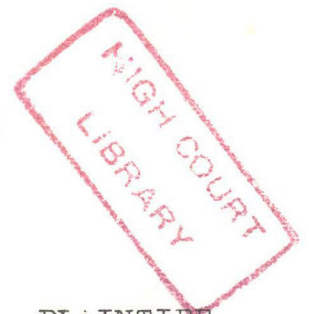


IN THE HIGH COURT OF MALAWI AT BLANTYRE
CIVIL CAUSE NO. 848 OF 1979



BETWEEN:

WELLS KAZEMBE PLAINTIFF

- and -

LAWRENCE KASHITIGU..... DEFENDANT

Coram: JERE, J.

For the Plaintiff	:	Nakanga of Counsel
Defendant, absent	:	Unrepresented
Court Reporter	:	Manda
Official Interpreter	:	Sonani

JUDGMENT

Mr. Wells Kazembe, the plaintiff in this case, is a Butcherman running his business at New Ndirande Market in the City of Blantyre. Mr. Lawrence Kashitigu, the defendant, is also a businessman and owns Green Valley Butchery at Ndirande Flats in the City of Blantyre.

On the 19th December, 1979, the plaintiff filed his statement of claim against the defendant in the High Court. He is represented by Mr. Nakanga of A.B. Munthali, Nakanga and Company. A notice of appearance was entered on behalf of the defendant by Mutuwawira and Company on 4th January, 1980. However a judgment in default of appearance was obtained against the defendant on the 21st February, 1980. This judgment was set aside on the 1st April, 1980. Mutuwawira and Company entered a defence on the 1st April, 1980, and a reply thereto by the plaintiff was filed on 9th April, 1980. This case was set down for hearing on the 1st September, 1980. However on the 15th August, 1980, Mr. Mutuwawira and Company applied to the court to cease to act for the defendant. This was before the Registrar of the High Court. He made the necessary orders.

The case then came before Justice Villiera on 1st September, 1980. The defendant was not present. At that time the learned judge held that since the defendant was previously represented, it appeared to the learned judge that there was a possibility that the defendant's lawyers did not notify the defendant of the day of hearing. He therefore ordered that he be served personally. The case was adjourned to the following day, 2nd September, 1980. When the court assembled

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the case was adjourned to a date to be fixed by the Registrar. The next date for hearing was the 21st of October, 1980, when the case came before me. Again Mr. Kashitigu was not present. He had not been served. It was adjourned for a month to see that another attempt was made to serve the defendant. When the case came on the 24th November, 1980, both parties were not present and the case was adjourned. On 18th February, 1981, Mr. Nakanga informed the court that the defendant had been personally served and accordingly he applied that the case should proceed under Order 35, rule One. I am satisfied that the defendant was served. I have seen the affidavit of service sworn by Mr. Fumulani. In these circumstances I did proceed to hear the case.

The plaintiff claims for damages for defamatory words which were alleged to have been uttered by the defendant. By paragraph three of the claim the defendant states "On or about 12th December, 1979, while buying meat at Blantyre Cold Storage the defendant falsely and maliciously spoke and published of and concerning the plaintiff to Messrs Kalulu, Mwapatila and Roy Zakeyu and other by-standers whose names are at present unknown to the plaintiff the words following, that is to say, "Muhambula" (meaning the plaintiff) cannot speak English, he cannot speak to a European, he steals cattle. He was banned at Balaka and Lisungwi and was nearly shot dead at Chikwawa for stealing cattle." The defendant in his defence denies ever making these allegations and by his third paragraph pleads in the alternative that the words complained of were true and justified. In other words he pleads truth and justification. In paragraph four he went on to say that the plaintiff had been in trouble with the Malawi Police on cattle theft matters connecting him, and that there is a Police criminal file opened in respect of the plaintiff at Chikwawa Police Station. The plaintiff denied that the words were true, or in any way justified.

The plaintiff called three witnesses to support his case. The defendant never appeared to give evidence. The evidence of Mr. Kalulu was that he is a butcherman. He runs his butchery at Blantyre Market. He buys meat at Cold Storage. He goes personally to Cold Storage to buy meat. He has been in this business for three years. He took-over this business from his brother who had been running it for 29 years. Mr. Kalulu says that he knows Mr. Kazembe and he has known him for quite a long time. He knew him in 1959 when he was working for Coca Cola Company. On the 12th December, 1979, Mr. Kalulu left his house and went to Cold Storage, as usual, to buy meat for his business. It was his evidence that the practice was that all businessmen assembled near Cold Storage premises and started discussing their mutual problems. He said that they have a Butchermen Association, an organisation for protecting their interests.

While discussing a vehicle came from Lever Brothers and the Lever Brothers people wanted to buy 100 lbs. meat direct from the Cold Storage. In this Association the Chairman is Mr. Damba and the Vice Chairman is Mr. Kazembe, the plaintiff in this matter. Mr. Kalulu asked his fellow businessmen why Lever Brothers should buy meat from Cold Storage and not from the butchermen. Before anybody answered the question Mr. Kashitigu, the defendant, came in. Mr. Kashitigu said and I quote, "What are you doing here? You have a Butchermen Association which selects people who go stealing cattle in Chikwawa. You choose Muhambula, Mr. Kazembe, a man who steals cattle in Chikwawa, where he was nearly shot dead. At Lisungwi and Balaka, near Ntcheu, they are looking for him and they want to kill him." Everybody was surprised why Mr. Kashitigu started attacking Mr. Kazembe. They started murmuring saying that was a new issue and others went on to say that Mr. Kashitigu was spoiling somebody's name. The matter ended there.

Unfortunately for Mr. Kashitigu that very same day, Mr. Kazembe had sent his worker, Roy Zakeyu to go and buy meat at Cold Storage for the butchery business. Roy Zakeyu gave evidence in court. He said that he heard Mr. Kashitigu accusing Mr. Kazembe of being a thief and that he was almost shot at Chikwawa. He said substantially what Mr. Kalulu had told the court. It was his evidence that he grew very angry but said nothing. He telephoned his master not to come because there was somebody abusing him. He was afraid that there would be a violent quarrel if Mr. Kazembe went to the Cold Storage and was told what was alleged against him by Mr. Kashitigu. His master agreed and he (Roy Zakeyu), hired a vehicle and carried the meat to his master. He informed Mr. Kazembe all what he had heard against him by Mr. Kashitigu. His master went and complained to the Police of the matter and the Police summoned Mr. Kalulu. It appears that they were directed to see a legal practitioner. Mr. Kazembe's evidence is that he runs a butchery business, and that he sends his worker, Roy Zakeyu, to Cold Storage to buy meat and when the meat is bought by Zakeyu, Zakeyu rings Mr. Kazembe who sends his vehicle to collect Zakeyu. This was the case on 12th December, 1979. However Zakeyu told him (Mr. Kazembe) not to come because there was somebody who was abusing him. When Zakeyu came back to the butchery, he explained to him what had happened at Cold Storage. He was angry and saw Mr. Kalulu and went to a legal practitioner.

It was further his evidence that since those words were uttered he does not have all his previous customers. It was his evidence that the allegations against him were not true. Further, he stated that if customers hear the words that he steals cattle and sell stolen property, they will not come to buy meat from him. He agreed that he was the Vice Chairman of the Butchermen Association in the country, and that he was holding that post at all material times. This then is the evidence.

I have listened to the evidence by the plaintiff. There is no evidence to rebut the plaintiff's evidence. I accept the evidence by the plaintiff. In my view this is a classical example of defamation. The plaintiff was called a thief in front of many people, this is oral defamation and actionable per se. I have considered whether there is a defence to this defamatory statement. I find that there is none. There is nothing on evidence that the words were true. There is, further, nothing to show that the plaintiff was under the custody of the Police at Chikwawa. In these circumstances I hold that the plaintiff succeeds with costs.

Damages

I have considered damages in this matter. These words were unwarranted and designed to cause the maximum embarrassment and maximum damage to the plaintiff's reputation which would have effect on his business standing. In these circumstances, I award damages of K2,500.

PRONOUNCED in open court this 26th day of February, 1981, at Blantyre.


N.S. Jere
JUDGE