Chatsika J

file

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL APPEAL NO. 3 OF 1989

BETWEEN:

SIMON PETROS C KUWALI.....APPELLANT

- and -

OWEN MSUKU.....1ST RESPONDENT
- and -
NYAMAWALA NYAUSISYA.....2ND RESPONDENT
- and -
MONICA MSUKU.....3RD RESPONDENT

CORAM: UNYOLO, J.

Chiume, for the Appellant
Nyimba, for the Respondents
Kalimbuka Gama,, Court Clerk
Longwe, Court Reporter

J U D G M E N T

This is an appeal against a judgment of the Resident Magistrate, Mzuzu dismissing the appellant's action.

The history of the matter is as follows: The appellant brought an action in the Court below claiming damages from the respondents for defamation. The statement of claim reads:

> "That it was on 4-7-88 when the 1st Defendant came with a letter from Chikanga that I am wanted there on the allegation of Witchery.
>
> That on 15-7-88 I did go to Chikanga just to be told that I was not summoned there by Chikanga but his workers did so without the approval of Chikanga.
>
> That the Defendant still insisted that I do go to Chikanga because I was a Witchcraft.
>
> That I did go there five times and on the 5th time Chikanga denied entirely that he summoned me on the allegation of Witchery.
>
> That I therefore claim for defamation to be assessed by the court."

The respondent denied the allegation. The case went to trial and both sides led evidence. As things turned out, the appellant failed to produce in evidence the letter mentioned in the statement of claim, just reproduced, and further he failed to call the person or persons to whom the alleged defamation was communicated. The learned Magistrate found that the appellant's case was not made out in the circumstances and proceeded to dismiss the action out of hand. It is from that decision the appellant now appeals to this Court. The grounds of appeal are:

> "(a) The learned Magistrate's finding that the name of the appellant was not mentioned by any of the Respondents cannot be supported by the evidence.
>
> (b) The learned Magistrate's finding that the letter containing the defamatory material, if it had been written by the Respondent was written to the Plaintiff cannot be supported by the evidence.
>
> (c) The learned Magistrate should have found, on the evidence, that a letter containing the defamatory material was in fact written by the Respondents.
>
> (d) The learned Magistrate's finding that there was no publication cannot be supported by the evidence.
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> (e) The learned Magistrate failed to give due weight to the summing up of the second and third Respondents.
>
> (f) The learned Magistrate erred in failing to guide the Appellant properly through his evidence, the Appellant being unrepresented in the Lower Court.
>
> (g) The whole judgment cannot be supported by the evidence."

Mr Chiume argued ground (f) first. He submitted that the trial Magistrate should have pointed out to the appellant that the letter already mentioned was a very material document and the linch-pin of the appellant's case. Learned Counsel contended that the trial Magistrate should have advised the appellant to get the letter and tender it in evidence. Generally, I would agree that a court has a duty to assist unrepresented litigants in matters of procedure. There are, however, limits to which a court can go. It is definitely not the province of the court to conduct cases for litigants and the court should always avoid creating the impression that it was biased. Further, I note from the facts of the present case, the appellant failed to produce the letter simply because it could not be found. He did

produce three other letters, but it turned out that the letter which was material to the case had got lost. The person who had the letter last was Chief Msiska, but when asked for it the Chief reported that it was lost and could not find it. There is a letter on file dated 1st April 1989 in which the Chief says this. It would, therefore, appear to me that in the circumstances there was no point in the learned Magistrate compelling the appellant to make the letter available and produce it in evidence. Indeed, it appears from the evidence of DW3 that the Court below did at some stage ask the appellant if he could go and bring the letter. Page four of the typed record refers. All in all, I do not think that the learned trial Magistrate can be faulted on this aspect.

I now turn to grounds (a) to (d), which I will deal with together. I have considered with meticulous care all that learned Counsel on both sides said in argument. I will look at the matter first in relation to the statement of claim. To be frank, I have much difficulty to decipher what precisely the cause of action is in this matter. In one breath, it appears that the appellant was alleging a libel and that such libel was contained in the letter he describes in the first paragraph of the statement of claim. In another breath, it also looks as if the appellant was alleging slander. Be that as it may, it is trite that in libel the words used by the party complained against are material facts and must be set out in the statement of claim and it is not enough to simply give their substance, purport or effect. See Collins -v- Jones (1955) 1 Q.B.564. Let me add this, if the words complained of are said to be in a letter, the plaintiff need not set out the whole letter. It will suffice if he sets out the libellous passage only. Gatley on Libel and Slander, 5th Edn, Page 446, Paragraph 808. In the case of slander, it is also trite that the words spoken must be set out verbatim. It is not sufficient to simply allege that the defendant used such and such a word or words to that effect. Gatley, paragraph 809.

It is also trite that the statement of claim should give the name or names of the persons to whom the words were published. See Davey -v- Bentinck (1893) 1 Q.B.185. In the present case the actual words allegedly used by the respondents are not set out in the statement of claim. It is also not clear there precisely to whom the words were published. And on this latter point it is trite that the statement of claim which does not allege publication discloses no action. Per Gatley, para. 805 and the case of Hall -v- Geiger is cited there. It is also to be noted that nowhere are the 2nd and 3rd respondents mentioned in the said statement of claim. To make a long story short, it would appear to me that the appellant's case was a non-starter right from the beginning. And then referring to the evidence, the failure to have the letter containing the alleged libel before the Court was, to my mind, fatal to the action, as was the failure to call the person or persons to

whom the alleged defamatory words were published. And to make matters, the appellant's own evidence was in disarray. Frankly, I can see no reason to suppose that the learned trial Magistrate came to a wrong decision in this case.

Mr Chiume did appreciate the problems in this matter. In the end, he urged the Court to set aside the decision of the trial Court and order that the case should be re-tried. With respect, I am unable to accept this. To start with, as I have earlier pointed out, the trial Court cannot be faulted in this case. Further, if we are talking about legal representation, it is to be noted that even the respondents were unrepresented at the trial and I think that it would be unjust to have them go back for a fresh trial really for the sake of letting the appellant have a second bite of the cherry. It is also significant that the letter which would be crucially material to the appellant's case is, as I have already indicated, not available. For all these reasons, I think that it would be wrong and futile to make an order for re-trial.

To conclude, the appeal fails and it is dismissed in its entirety, cum costs.

PRONOUNCED in open Court this 27th day of March 1992, at Blantyre.

L E Unyolo
JUDGE