

**IN THE HIGH COURT OF MALAWI
MZUZU DISTRICT REGISTRY**

CIVIL APPEAL CAUSE NO. 4 OF 2008

BETWEEN

LIMBANI KONDOWE APPELLANT

AND

KACHIGAMBA KUMWENDA..... RESPONDENT

CORAM : **HON. JUSTICE R.R. MZIKAMANDA**
: Unrepresented, Counsel for the Appellant
: Unrepresented, Counsel for the Respondent
: R.S.D. Kahonge, Official Interpreter
: C.B. Mutinti, Court Reporter

JUDGMENT

This is an appeal against the judgment of the First Grade Magistrate sitting at Uliwa in Karonga finding the appellant liable in defamation and awarding the sum of K8,350.00 in damages. The appellant was not satisfied with the judgment. He appealed to this court.

The grounds of appeal show that

- (i) The allegation of defamation was not true and that even the complainant's own witnesses denied that the alleged defamatory words were uttered.
- (ii) Other witnesses whom the respondent had alleged were present when the defamatory words were uttered refused to come to court.
- (iii) The complainant brought in his wife as a witness but her evidence contradicted that of the respondent in material particular.

According to the evidence of the respondent in the lower court in 2006 the appellant shouted the words **"He will teach my son witchcraft wizardly"** directed at the respondent and within the hearing of Mambiba Mkandawire. Later Chankwawura Harawa was sent by the appellant to the respondent to apologise for the utterances.

A witness of the respondent, named Richard Mkandawire testified that he never heard the words **"Be careful, he is likely to teach you wizardly."**

Ndima Harawa who had been said to have accompanied the appellant to the house of the respondent to offer an apology failed to attend court.

According to the wife of the respondent the appellant insulted the respondent by saying **"Greet him for me, but be careful he can teach you wizardly."** She indicated that she was present when the defamatory words were being uttered.

The appellant denied ever uttering the defamatory words and to have offered an apology. He denied ever having been taken to Councillor Dinala to discuss the matter. He said that Mathambisa denied in court to have heard the defamatory words although he had been present when they were allegedly uttered. He said that the respondent and his wife contradicted each other on the time of the uttering of the words with one saying it was a year before and the other saying it was during the year of the trial.

The lower court lamented the fact that Ndimba Harawa and the Councillor did not testify. The court also observed that Ndimba Harawa was a material witness as to the alleged apology. The court however was satisfied that the words complained of were uttered by the appellant. The court then found the appellant liable and ordered him to pay K8, 350.00 including costs.

I have examined the record from the lower court. I have also examined the arguments the parties made in the present court. It is clear to me that not only is the record from the court below difficult to read but also that it does not reflect everything that might have been said in that court. It is clear in the arguments made on appeal by both parties that the parties did meet at the material time. There is no dispute that the respondent was in the company of others who included his wife PW3 and PW2. The lower court was satisfied that the appellant uttered the alleged defamatory words directed at the respondent. The lower court had the opportunity of observing the witnesses and making its own assessment as to who was being truthful and who was not. This court has not had the same benefit of seeing the witnesses to assess their demeanour. This court

has no basis for contradicting the finding of the lower court. The words uttered clearly were not uttered once on the material day and this accounts for the different versions quoted by the respondent and his wife. I do not see any contradiction in the words quoted by the two witnesses for the respondent. Then the lower court made a specific finding on the time the defamatory words were uttered despite that the respondent and the PW 3 had talked of different times. Again what appeared as a contradiction in the times given was properly resolved by the lower court. The critical part of the evidence of PW3 is that she was present when the appellant pronounced the defamatory remarks against the respondent. She was also present when the appellant and a village councilor approached the respondent to offer an apology. There is clear evidence that there had been a lot of effort to resolve the matter out of court. Yet the appellant was evasive.

Like the lower court I am satisfied on a balance of probabilities that the appellant uttered the alleged defamatory words against the respondent. The appellant never retracted those words. To merely say he was joking when he said those words is not to retract or apologise for the defamatory remarks. The defamatory words were shouted in a public place and they lowered the estimation of the respondent in the mind of right thinking members of the society.

This appeal is not made out and is dismissed in its entirety with costs.

R.R. Mzikamanda

JUDGE