

IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NO. 956 OF 1994



BETWEEN:

Mrs J. Ng'oma ..... Plaintiff

- and -

People's Trading Centre Limited ..... Defendant

CORAM:

TEMBO, J

Mhone, Counsel for the Plaintiff

Hanjahanja, Counsel for the Defendant

Mtchera, Official Interpreter

Katunga (Mrs), Recording Officer

J U D G M E N T

Mrs J. Ng'oma, the plaintiff in this case, is a Radio Announcer of long standing with the Malawi Broadcasting Corporation. She had at all material times been so employed by the Malawi Broadcasting Corporation at its head offices which are situated at Chichiri in the City of Blantyre. The defendant is a limited liability company engaged in the retail and wholesale trade throughout Malawi. In this judgment, I shall hereinafter refer to the defendant as "PTC"; and to the Malawi Broadcasting Corporation as "MBC". Mrs Ng'oma is claiming exemplary damages from PTC for libel and costs for this action. On its part, PTC has denied any liability therefor on the grounds that the publication of the alleged libellous letter was innocently and honestly effected on an occasion of qualified privilege without any malice whatsoever. PTC, therefore, prays to the Court that Mrs Ng'oma's claim for exemplary damages for libel be dismissed with costs. During the trial, I heard three witnesses for the plaintiff, including Mrs Ng'oma, herself. The others were Mrs Edith Kaliati, Personal Secretary to the General Manager of MBC, to whom I refer as PW2 and Mr. Henry Chirwa, General Manager of MBC, to whom I refer as PW3. The two witnesses for PTC were Mr. M.P. Mussa, PTC's Debt Collector, who is referred to as DW1 and Mr. A. Bhana PTC's Financial Controller, who is referred to as DW2.

The following facts are not disputed by both Mrs Ng'oma and PTC: that PTC, through DW1, had prepared and issued the alleged libellous letter to PW3. The subject of the letter was indicated to be "Mrs Joyce Ng'oma's Indebtedness to PTC K3926.27". Then, the rest of the letter contained the following: "We advise that Mrs Joyce Ng'oma, an employee of your organisation, who is also the proprietor of Kapitalikize Estates Limited, owes this Company the above sum in respect of dishonoured cheques as detailed below:-



<u>Cheque No.</u>	<u>Date</u>	<u>Amount</u>
448755	12.03.93	1545.00
448761	19.03.93	1063.86
448768	05.04.93	1157.08
448781	14.04.93	1055.23
Sub Total		4826.27
less Cash paid on 30.05.93		900.00
		<u>3926.27</u>

We have contacted **Mrs Ng'oma** several times to no avail. Letters were addressed to her on 17.04.93 and 20.01.94. It is our belief this debtor is simply avoiding us. We therefore ask, if you could assist us to recover the debt from **Mrs Ng'oma** in view of the fact that our recovery efforts have been in vain." The letter was marked private and confidential signed by DW1. It was tendered in evidence and marked Exhibit P1. It is further not disputed that the letter marked Exhibit P1 was prepared by DW1's secretary who also typed letters for other employees of PTC. Upon receipt of that letter, PW3 personally opened it and then read it. He later gave it to PW2, his personal secretary, for filing. PW3 then inquired from PW2 if she was aware that **Mrs Ng'oma** owned an estate or any business at all. PW2 informed PW3 that she did not know anything about that. PW3 then dictated a letter to PW2, in response to PTC's letter referred to above marked Exhibit P1. In his letter, tendered in evidence and marked Exhibit P2, PW3 informed PTC that he had checked with **Mrs Ng'oma** of MBC about her alleged indebtedness to PTC, that **Mrs Joyce Ng'oma** of MBC did not remember to have owed PTC the alleged debt and further that **Mrs Ng'oma** of MBC did not know the firm Kapalikuze Estates Limited and that she did not receive the two letters referred to and mentioned in the letter marked Exhibit P1. PW3 then suggested that the matter be discussed amicably between **Mrs Ng'oma** and PTC for which PW3 had copied that letter to **Mrs Ng'oma**.

Consequent thereupon, **Mrs Ng'oma** phoned DW1, to enquire from DW1 if DW1 ever knew **Mrs Ng'oma** personally. DW1 had replied that he did not know **Mrs Ng'oma** personally. Then **Mrs Ng'oma** informed DW1 that she was the person who was accused of having been indebted to PTC in the sum of K3926.27; that as a matter of fact she was not so indebted to PTC, and that she had not owned the Kapalikuze Estates Limited. Besides that, **Mrs Ng'oma** told DW1 that she did not have a bank account with the Commercial Bank in Lilongwe and Balaka.

It is further not disputed that upon receipt of letter Exhibit P2 from PW3 and upon telephone conversation with **Mrs Ng'oma**, DW1 issued a letter to PW3 dated 8th April, 1994, which was marked private and confidential. The letter was tendered in evidence and marked Exhibit P4 whose contents were to the following effect: "While I appreciate your effort and prompt action, I wish to advise that **Mrs Ng'oma** phoned me and stated that she had no knowledge of any debt with us. Following that



conversation, I made further investigations and I have confirmed that the **Mrs J. Ng'oma** in question is not the one in your corporation. I would be very grateful therefore if my previous letter could be treated as null and void. I personally apologised to **Mrs Ng'oma** on 7th April, 1994 for my actions and once again, I sincerely apologise to **Mrs Ng'oma** for the embarrassment caused thereof. My actions on this matter should please not reflect unfavourably upon her and I sincerely regret any inconvenience this might have caused."

Immediately after her telephone conversation with DW1, **Mrs Ng'oma** referred the matter to her legal practitioners who issued a letter of demand for exemplary damages for libel. That letter was dated 11th April, 1994, tendered in evidence and marked Exhibit P3. DW2 issued a reply thereto in the form of a letter dated 14th April, 1994, which was to the following effect: "We hereby advise that our communication with your client's employers was made with the purpose of an enquiry and attempt to seek assistance in recovering a debt. Unfortunately, the culprit in question and your client are both named '**Joyce Ng'oma**' which led to some confusion. A letter from her superiors clarifies the situation, and in this regard, a letter of apology was forwarded to your client's superiors together with a personal apology to your client. At no stage was it our intention to cause any defamation to your client." The letter was tendered in evidence and marked Exhibit P5.

However, on her part, **Mrs Ng'oma** disputes the fact that an apology was personally offered to her by DW1 during their telephone conversation. **Mrs Ng'oma** further contended that DW1 merely stated that the matter was a tricky one. Besides that, she also disputed the fact that a written apology was issued to her, as it appears to be suggested by the letter issued by DW2, thus, Exhibit P5. By the evidence of PW2 and PW3, **Mrs Ng'oma** demonstrated that she had suffered damage to her reputation, in that PW2 and PW3 had clearly stated in their respective testimony in Court that, consequent upon their perusal of Exhibit P1, they no longer held **Mrs Ng'oma** in high estimation, in particular, with regard to her management of financial matters. Both PW2 and PW3 told the Court that inquiries of the type made by PTC were only made to PW3 relative to members of staff of MBC in respect of business transactions guaranteed by MBC or entered into by the members of staff with approval of MBC. The inquiry in the instant case was an exception to those ordinary cases in that MBC was not involved in the arrangement of the business transactions alleged to have been entered into by **Mrs Ng'oma** and PTC. Hence PW2 and PW3 told the court that upon perusal of Exhibit P1, they no longer held **Mrs Ng'oma** in high estimation, especially in regard to her management of financial matters.

To the greatest extent, the foregoing is the evidence by which I have to determine the claim of **Mrs Ng'oma** for exemplary damages for libel from and against PTC. Where it becomes expedient, in this judgment, I will make further and specific reference to some other evidence which was adduced before me during the trial.



To begin with let me start by disposing of legal questions in regard to which the evidence of both Mrs Ng'oma and PTC is not in dispute. It has been admitted that the letter, marked Exhibit P1, being the alleged libellous material, was published to PW3 who subsequently further published it to PW2. It is not disputed that Exhibit P1 was typed by a secretary for DW1 who also typed correspondence for other employees of PTC. Proof that a libellous letter was sent through the post is *prima facie* evidence of publication to the person to whom it was addressed: Warren -V- Warren (1834) 1c.m. & R.250; Shipley -V- Todhunter 1836 7 C & P 860. Moreover publication of a libel to one person is sufficient: Per Lord Penzance in Capital and Counties Bank -V- Henty (1882) 7 A.C. 765; and Malawi Railways Limited -V- Malange and Bhadurkhan Civil Cause NO. 196 of 1985 (unreported).

Next, I have to note that DW1 was an employee of PTC at the time in question and that he issued the letter marked Exhibit P1 in the course of his employment. This fact too has not been disputed. It is trite law that a principal is liable for defamatory words published by his agent with his authority or consent: Per Skinner CJ. in Madumise -V- Press Furniture and Joinery Limited Civil Cause No. 502 of 1981 (unreported).

I have now to determine, a question of law for me as a judge, whether the letter marked Exhibit P1 is capable of bearing a defamatory meaning. If I decide that question in the affirmative, then the question whether the letter marked Exhibit P1 is defamatory of Mrs Ng'oma or not is a question of fact which I have to determine as a judge of fact, as distinct from a judge of law: Madumise -V- Press Furniture and Joinery Limited (supra). I must ask myself, in relation to the letter marked Exhibit P1, whether to publish of a person that she owes a company K3,926.27 in respect of dishonoured cheques; that such a person has for that purpose been contacted for several times to no avail; that the creditor, therefore, believes that such a person is simply avoiding payment of the debt; that in the circumstances some other person to whom those words are addressed is being asked to assist in the recovery of the debt from the debtor in view of the fact that the creditor's efforts in trying to recover the debt have been in vain, that such publication, is capable of a defamatory meaning. It has been pleaded in the statement of claim that those words, in their ordinary meaning, are defamatory; in that they among other things mean that the plaintiff failed to pay her debts; that the plaintiff could not pay her debts except under compulsion; that the plaintiff is unreliable and did not honour her debts; that the plaintiff failed to pay the sum of K3,926.27; that the sum of K3,926.27 was rightly and properly due from the plaintiff to the defendant. It is further pleaded that, by way of an innuendo, those words conveyed an extended meaning to those who read them, that is to say that, the plaintiff was dishonest and crooked.

In its defence, PTC has in paragraph 1(a) thereof simply denied that it falsely accused the plaintiff of failing to pay



her debts. And as to the innuendo, PTC In paragraph 6 of its defence states that the allegation that the plaintiff was dishonest and crooked was fully denied. It is my considered view and I am satisfied that the words, in letter marked Exhibit P1, in their ordinary meaning are capable of a defamatory meaning pleaded in the statement of claim. Besides that, in the absence of a defence of justification, I am further satisfied that those words had conveyed the extended meaning pleaded in paragraph 5(iii) of the statement of claim, namely that the plaintiff was dishonest and crooked.

Having determined that the letter marked Exhibit P1 conveyed a defamatory meaning, do I further hold that it was in fact defamatory of the plaintiff, Mrs Ng'oma? This is a question which I must answer as a judge of fact. I am satisfied that indeed the letter marked Exhibit P1 was actually defamatory of Mrs Ng'oma. The letter was read by PW3, Mrs Ng'oma's superior at MBC and PW2, the Personal Secretary to Mrs Ng'oma's superior at MBC. Both PW2 and PW3 consistently stated before the Court that, consequent upon perusal by them of the libellous letter in question, they no longer held Mrs Ng'oma in high estimation especially in regard to her management of financial matters. I do not think that the statement by PW2 and PW3 in that regard was merely rehearsed for purposes of securing damages for Mrs Ng'oma in this case. Both, PW2 and PW3 appeared to be credible witnesses and I in fact believed in what they said in that regard.

This does not mark the end of the case. PTC has pleaded the defence of qualified privilege and apology, which I must now determine. An occasion is privileged where the person who makes the communication has an interest or a duty, legal, social or moral to make it to the person to whom it is made and the person to whom it is made has a corresponding interest or duty to receive it. This reciprocity is essential for the defence of qualified privilege to succeed: Watt -V- Lorgsdon (1930) 1K.B.130. In the words of Lord Usher M.R. at page 191(1891) 2Q.B. in Hunt -V- Northern Ry "A privileged occasion arises if the communication is of such a nature that it would be fairly said that those who made it had an interest in making such a communication, and those to whom it was made had a corresponding interest in having it made to them. When those two things co-exist the occasion is a privileged one". Also see Malawi Railways Limited -V- Malange and Bhadurkhan (Supra). It has been contended by Counsel for PTC that DW1 had a duty to communicate the libellous letter to PW3 and that PW3 had a corresponding interest to receive it as he did, that in such a case, the communication of the letter marked Exhibit P1 was on an occasion of qualified privilege. In arguing that PW3 had a corresponding interest in the receipt of the communication, it was pointed out on behalf of PTC that both PW2 and PW3 had testified in Court that members of the public do contact PW3, in his capacity as General Manager of MBC, to assist them in collecting debts owed by MBC members of staff, where they did not honour their debts. Whereas it might be conceded that DW1 had a



duty to make the communication in question, it does not appear to me that PW3 had a corresponding interest in receiving it. Indeed, both PW2 and PW3 had testified that members of the public do contact PW3 to assist them in collecting debts owed by MBC members of staff where they do not honour their debts. However, it was also the clear evidence of both PW2 and PW3 that such was the position only in cases where MBC had facilitated the arrangement for business transactions concerned. In those cases, MBC either merely approved the transactions or guaranteed payment in relation thereto. In either case, PW3 would indeed have a corresponding interest in receiving a communication seeking PW3's help in the recovery of a debt in the case of any staff member actually being in default of payment thereof. In relation to such transactions, this indeed ought to be and is in fact so because MBC has had a prior opportunity of being a party to the debt arrangement by way of its approval or guaranty thereof. As I have noted above, such was not the case in regard to Exhibit P1. As a matter of fact, **Mrs Ng'oma** did not enter in any business dealings with PTC for which approval had been received from MBC nor was there any guaranty offered by MBC. **Mrs Ng'oma** was not in any way a debtor as alleged by PTC in its letter marked Exhibit P1. In that situation, I find and hold that PW3 had no corresponding interest in receiving the communication of PTC's libellous letter in question. That being the case, I find and hold that the communication of the libellous letter was not upon an occasion of qualified privilege. The defence of qualified privilege, therefore, does not succeed in the circumstances, and it is so decided. Strictly that is the end of the case of PTC in so far as its defence was based on qualified privilege. But I have resolved to deal with issues of malice in relation to the defence of qualified privilege, in the event of an appeal against this decision and if, then, it might be held that the occasion was privileged. It seems to me that even if I were to hold that the communication was upon an occasion of qualified privilege, that defence in the instant case was nonetheless bound to fail in that the conduct of DW1 displayed malice. Upon making inquiries as to what the initial "J" stood for in regard to the words inscribed on the dishonoured cheques, DW1 was convinced that the debtor in question must have been the well known Radio Announcer, **Mrs Ng'oma** of MBC. It is quite clear on the evidence before me that DW1 was aware of the location of the offices of MBC within the City of Blantyre, that indeed the offices of PTC from where DW1 operates from were close to those of MBC. That according to his work procedural rules, DW1 could in fact have first phoned **Mrs Ng'oma** before resorting to the publication of the libellous letter; that in fact DW1 did not do that at all upon realising that the alleged debtor was **Mrs Ng'oma** of MBC. Besides that, the purported mode of inquiry by way of Exhibit P1 was no inquiry at all, if I may put it that way. It was an affirmative assertion of facts against **Mrs Ng'oma**. This, surely, in the circumstances must indeed have evidenced malice on the part of DW1 against the Radio Announcer whom he well knew through MBC radio broadcasts and whom he could have easily reached by phone. That being the case, a defence of qualified privilege would nonetheless not have been sustained in the



circumstances of this case. I would in that respect have so decided. This would indeed have been my decision in that regard even in the face of the further defence of apology, which I will now consider and determine.

The position with regard to the effect of the plea of apology appears to be well summarized by Gatley on Libel and Slander in paragraph 1441 of the Eighth Edition as follows -

"An apology is no defence to an action for libel or slander. But by section 1 of Lord Campbell's Libel Act 1843 it is enacted that 'in any action for defamation it shall be lawful for the defendant (after notice in writing of his intention so to do, duly given to the plaintiff at the time of filing or delivering the plea in such action) to give in evidence in mitigation of damages that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity of doing so in case the action shall have been commenced before there was an opportunity of making or offering such apology.' Moreover, quite apart from this provision, a defendant may show in mitigation of damages that he has published or made a retraction of, or apology for the defamation complained of even though he did not publish, make or offer to make such retraction or apology until after the commencement of the action."

However, if an apology is to be used to mitigate damages it must be promptly offered: Per Lord Goddard C.J. in Bevan -V- Spactator Ltd, The Times, November, 23, 1957. The evidence on this point is to the effect that DW1 maintains that he had offered personal apology for the publication of the libellous letter in question during his telephone conversation with Mrs Ng'oma. On her part, Mrs Ng'oma vehemently denies that she was offered any apology as asserted by DW1. I have had the occasion of observing both DW1 and Mrs Ng'oma make their testimony before me. Besides that I have carefully examined Exhibit P4. In it there is a statement to this effect: "Following that conversation, I made further investigations and I have finally confirmed that the Mrs J. Ng'oma in question is not the one in your corporation". It is my considered view that it is unlikely that any such apology was offered during the telephone conversation, it being clearly expressed by DW1, in letter Exhibit P4, that it took him the undertaking of further investigations in order for him to be satisfied that Mrs Ng'oma, plaintiff in the instant case, was not the alleged J. Ng'oma, actual debtor to PTC. On that account, I would reject the submission that DW1 had made the alleged apology to Mrs Ng'oma during the telephone conversation in question. Be that as it may, soon thereafter DW1 and DW2 had clearly established that Mrs Ng'oma, plaintiff in the instant case, was not the person indebted to PTC in the alleged sum of K3926.27. It is indeed abundantly evidenced by Exhibit P4 and P5 that, thereupon, PTC had offered its apology to PW3, and through PW3 to Mrs Ng'oma, for the publication of the libellous letter to PW3. Of course,



there was statement in both Exhibit P4 and P5 that personal apology had been made to **Mrs Ng'oma**. During the evidence adduced in court, this aspect was not clearly proved, and I therefore reject that assertion, as being untrue. Although such was, and ought to be, the position in regard to the question of a personal apology to **Mrs Ng'oma**, it is nonetheless quite important that an apology was otherwise made to PW3, and through PW3 to **Mrs Ng'oma**, as evidenced by Exhibit P4 and P5. This ought to be accepted and I do accept it as evidence of a mitigating factor in respect of the damages which I have to award to **Mrs Ng'oma** in this case. This must be so in that, as **Per Goddard, CJ** in **Bevan -V- Spectator (Supra)**, the apology was indeed promptly offered by PTC through PW3.

In the circumstances, I find PTC liable for libel. However, it does not appear to me that the circumstances of this case would indeed call for the award of exemplary damages as claimed by **Mrs Ng'oma**. Quite frankly, compensatory damages would suffice. In forming that view, I have in fact taken into account the views expressed by the Supreme Court of Appeal in its recent decision in the case of **Robert Dangwe and Malawi Congress Party -V- Aleke Banda M.S.C.A. Civil Appeal No. 8 of 1993 (unreported)** and also those expressed by Mwaungulu, learned Registrar as he then was, in the case of **Aleke Banda -V- Robert Dangwe and Malawi Congress Party Civil Cause No. 279 of 1993 (unreported)**. Since the award of damages I will make is compensatory in nature, there was no need to have such damages specifically pleaded. I will rest my consideration of this aspect with reference to a statement of law made by **Pearson, LJ** in the Case of **Mackerry -V- Associated Newspapers, (1965) 2 QBD 8C**, at P104 which statement of law was cited with approval by the Supreme Court of Appeal in the M.S.C.A. case of **Robert Dangwe and Malawi Congress Party (Supra)**:

"Compensatory damages, in a case in which they are at large, may include several different kinds of compensation to the injured plaintiff. They may include not only actual pecuniary loss and anticipated pecuniary loss or any social disadvantages which result, or may be thought likely to result, from the wrong which has been done. They may also include the natural injury to his feeling - the natural grief and distress which he may have felt at having been spoken of in defamatory terms, and if there has been any high handed, oppressive, insulting or contumelious behaviour by the defendant which increases mental pain and suffering caused by the defamation and may constitute injury to the plaintiff's pride and self confidence, those are proper elements to be taken into account in a case where damages are at large. ... To put it in another way, when you have computed and taken into account all the elements of compensatory damages which may be awarded to the plaintiff and arrive at a total figure of £x, then it is quite wrong to add a sum of £y by way of punishment of the defendant for his wrong doing. The object of the award of damages in tort nowadays is not to punish the wrong doer, but to compensate the person to whom the wrong has been done."



In the case of Praed -V- Graham (1889) Q.B.D.5 Lord Usher MR said that "I desire also to say that in actions of libel there is another rule, which is this:- the jury in assessing damages are entitled to look at the whole conduct of the defendant from the time the libel was published down to the time they gave their verdict. They may consider what this conduct has been before action, after action, and in court, during the trial." Having the foregoing principles of law in respect of award of compensatory damages, in mind, and taking into account all the circumstances of this case, including the apology offered by PTC, inflation and the value of the Malawi Kwacha, I think that an award of **K45,000** could adequately compensate **Mrs Ng'oma** and I also award her the costs for this action.

Delivered in open Court this 27th day of August, 1996, at Blantyre.



A.K. Tembo  
JUDGE

APPLICATION FOR STAY OF EXECUTION

**Mr. Chirwa**, who appeared on behalf of **Mr. Hanjahanja** Counsel for PTC, has applied for stay of execution for the duration of the time it would take **Mr. Chirwa** to communicate the fact of this judgment to **Mr. Hanjahanja**.

COURT: Stay of execution for that purpose is granted until 30th August, 1996.



A.K. Tembo  
JUDGE