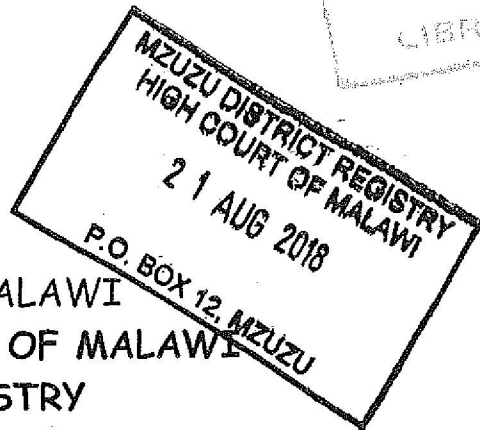




REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
MZUZU REGISTRY
CIVIL CAUSE NO. 153 OF 2017



BETWEEN:

GOODWELL MWASE.....1ST PLAINTIFF
RODWELL MWASE.....2ND PLAINTIFF

- And -

RADSON MWASE.....1ST DEFENDANT
ELISA BANDA2ND DEFENDANT

CORAM: HH Brian Sambo, Ag. Assistant Registrar
Mathews Msiska, of counsel for the Plaintiff
Bridget Kumwenda, of counsel for the Defendant (Appearing on brief for
Kawelo Lawyers)
Kachingwe, Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES FOR DEFAMATION

Sambo, B;

This is a notice of appointment for an order of damages following an interlocutory default judgment the plaintiffs obtained against the defendant on 10th October, 2017. The plaintiffs' claim against the defendant is for" general and exemplary damages for slander.

The two plaintiffs are chiefs. The first plaintiff is Traditional Authority Kabunduli while the second plaintiff is G.V.H Kapila.

The evidence in relation to the assessment is also uncontroverted. Goodwell Mwase told the court that the publication was malicious to his reputation as a senior chief. He said he was called false names which were too malicious to his reputation as Traditional Authority Kabunduli. He was shocked and hurt when he heard that the Defendants had insulted and abused him in public. He said he was living in the same area ~~where the incident took place, and the community was no longer~~ respecting him as before.

The second plaintiff also said that he too was seriously hurt by the publication as it was false. That the names they were calling him were malicious and false as he had abandoned them long time ago. As a consequence of the publication, he lost the respect people attributed to him as a chief. The article greatly lowered his estimation in the eyes of his community members.

Both the plaintiffs testified that they remonstrated with the publishers of the false statements complained of but the defendants never apologised nor withdrew the statements.

The plaintiffs struck me as truthful witnesses and I accept their evidence. I find some of the facts to which it relates as established.

I am aware that damages for any tort including defamation are or ought to be fixed, at a sum of money which will compensate the plaintiff so far as money can do it, for all the injury which he or she has suffered. This principle was laid down in Livingstone v Rawyard Coal Company [1850] A App Case 25 and has been re-affirmed in a number of cases. The fundamental principle underlying the law of damages is therefore one of compensation. This means that the damages to be recovered must, in

money terms, be no more and not less than the plaintiff's actual loss. Of course where the injury is material and has been ascertained, it is possible to assess damages with same precision. But this is not so where a person's reputation has been attacked where, to use the traditional phrase, he has been held up to hatred, ridicule and contempt. Not only is it impossible to ascertain how far peoples' minds have been affected, it is almost impossible to equate damage to a sum of money. In such situations, courts simply strive to arrive at an estimate most likely to provide fair and reasonable compensation.

The principle governing awards of damages are of fundamental importance in ensuring that justice is done to the plaintiffs and defendants and that account is taken of the public interest that may be involved.

It was stated in the case of **Reverend Chikwaza and others v Now Publications t/a The Independent**, Civil Cause No 1975 of 1998 that in assessing the award, the court has to take into account the conduct of the plaintiffs, their positions and standing, the nature of the defamation and the mode and extent of the publication. The court must also take into account the absence and refusal of any retraction or apology and "the whole conduct of the defendant from the time the libel was published down to the very moment of the verdict," per Lord Esher M.R. in Paed v Graham [1889] 24 Q B.D. at p. 55. "He may have behaved in a high-handed malicious, insulting or oppressive manner in committing the tort or he or his counsel may at the trial have aggravated the injury by what they said" per Lord Reid in Cassell and Company Limited v Broome [1972] 1 All E.R. p.

The plaintiffs' claim is for both general and exemplary damages. As I said, general damages are compensatory. I am aware that in defamation, the wrongful act is the damage to a person's reputation and the injuries he sustains may be classified under two heads:

- (1) the consequence of the attitude adopted to him by other persons as a result of diminution of the esteem in which they hold him because of the defamatory statement and
- (ii) the grief or distress or humiliation or annoyance caused by the defamatory statement to the plaintiff.

Under head (ii) damages may be aggravated by the manner in which the ~~statement was made or persisted in and also by the conduct of the~~ defendant. Where the defamatory statement was deliberately published in the expectation of increasing circulation and profits by an amount which would exceed damages awarded by way of compensation alone, exemplary damages can be awarded.

Under head (i) i.e., the consequences of the attitude adopted by other persons, it is possible to prove pecuniary loss such as loss of practice or employment or inability to obtain fresh appointments. I hasten to point out that in the instant case the plaintiffs have not pleaded nor proved pecuniary loss. Consequently I make no award with regard to pecuniary loss.

In view of the above, what I have to assess therefore, are compensatory damages for injury to the plaintiffs under both heads (i) and (ii). The compensatory damages must compensate the plaintiff for damage to their reputation and also they must vindicate their good name and must take into account the distress, hurt, annoyance and humiliation which they have undergone. I must say that considering the high status in society of the plaintiffs, the slander touched closely on their personal integrity, professional reputation and loyalty which are the core attributes of their personalities.

Taking all the circumstances of this case into account and regard being had to comparable cases made in this court, I award each plaintiff K1, 500,000.00 as general damages.

Coming to the plaintiffs' claim for exemplary damages. The claim can be sustained if I find that the defendant's action falls within the second category of Lord Devlin's categories in Rookes v Barnard [1964] A.C. 1129, where it is appropriate to award exemplary damages. Lord Devlin said at p.410 that exemplary damages can be awarded in cases where ~~the defendant's conduct has been calculated by him to make a profit for himself~~ which may well exceed the compensation payable to the plaintiff. The rationale of awarding exemplary damages in such a case is to prevent unjust enrichment of the defendant at the plaintiffs' expense and to teach the defendant that tort does not pay.

Counsel Msiska cited a number of cases. I have gone through them, especially cases of *Hara v Malawi Housing Corporation* (1993) 16(2) MLR 527 (HC), *Jonathan Zinga v Airtel Malawi Ltd*, Civil Cause No. 74 of 2014 and *Shepherd Mumba v The Director of the Anti-Corruption Bureau*, Civil Cause No. 182 of 2015. I wish to state that, although these cases touch on defamation, the circumstances thereof are far removed from what obtains in the case at hand. I also wish to state that libel is more serious than slander.

In the instant case, while conceding that the slander was published in the presence of many people, there is no evidence that this was done with a view to make money or indeed increase profits in anything they were doing. My humble view is that the defendants' published the statements in a simple and unprepared manner. There is no evidence that they knew the statements to be false or that they published them recklessly careless. I also noticed that the Plaintiffs relied on hearsay evidence; they did not call any of the people who had constituted the audience when the statements were being published. Moreover, most of

the statements said by the Plaintiffs to be defamatory were not really offensive for purposes of this tort of defamation. If they were said to women, they would have sufficed as defamatory statements. Statements such as '*ufumu winu ngwa mavi*' which actually likens their chieftaincy to faeces, is nothing more than what in criminal law is termed as 'use of insulting language'. Using insulting language is punished under section 182 of the Penal Code. The Plaintiff should have just reported the same to police or to court in the light of section 83 of the Criminal Procedure and Evidence Code. Use of insulting language against men does not ~~constitute defamation, but when used against women, especially when~~ private parts of a woman are being mentioned to third persons, defamation suffices. It is not for me, now to say whether the law is fair to men or not, but if insulting language is used against men, there is no defamation, and therefore damages for defamation are not payable. The statement must be defamatory. According to Lord Atkin, the statement must tend to lower the claimant in the estimation of right-thinking members of the society generally, and in particular cause him to be regarded with feelings of hatred, contempt, ridicule, fear and disesteem. See **Sim v Stretch** (1936) 2 ALL ER 1237. As I have already stated above, vulgar abuse is not defamatory. Mansfield CJ stated "For mere general abuse spoken no action lies". See **Thorley v Kelly** (1862) 4 Taut 355, at 365 and also Pollock C.B. and Wilde B. in **Parkins v Scott** (1862) 1 H & C 153 at 158, 159). Winfield and Jollowicz , at page 406, states that spoken words which are *prema facie* defamatory are not actionable if it is clear that they were uttered merely as a general vituperation and were so understood by those who heard them. Further, the same applies to words spoken in jest. See **Donoghue v Hayes** (1831) Hayes R 265.

As such, the claim for exemplary damages fails and I make no award with regard to it.

Made in Chambers this 22nd day of January, 2018.

Brian Sambo
Assistant Registrar (Ag)