IN THE SUPREME COURT OF APPEAL

CIVIL APPEAL NUMBER 2 OF 2022

(Being High Court of Malawi, Mzuzu Registry, Civil Cause Number 85 of 2017)

BETWEEN

CHARLES DENVAR ..... APPELLANT

AND

STRABAG INTERNATIONAL GmbH..... RESPONDENT

CORAM: HON. CHIEF JUSTICE R.R. MZIKAMANDA SC
HON. JUSTICE L.P. CHIKOPA SC, JA
HON. JUSTICE F. E. KAPANDA SC, JA
HON. JUSTICE H.S.B. POTANI JA
HON. JUSTICE J. KATSALA JA
HON. JUSTICE I.C. KAMANGA JA
HON. JUSTICE M.C.C. MKANDAWIRE JA
G. Kadzipatike, of counsel for the Appellant
Chibwe/Lupande, of counsel for the Respondent
Minikwa/Fundani, Court Clerks
Chiusiwa/Msimuko, Court Reporters

JUDGMENT

Katsala JA,

The appeal before us is brought by Mr Charles Denvar seeking the reversal of the decision made in a judgment, delivered by Honourable Lady Justice De Gabriele sitting in the High Court at

Mzuzu Registry, dated 26 February 2019 dismissing the appellant's claim for damages for defamation.

The appellant filed four grounds of appeal which state as follows:-

1. The court below misdirected itself in law when it held that the respondent is not vicariously liable for the tort of defamation committed by one of its managers when there was overwhelming evidence that the said Manager uttered the defamatory words not only during the discharge of his duties for the respondent, but also in the course of the said Manager describing the manner in which the claimant was driving an official motor vehicle at the respondent's own workplace.

2. The learned Judge below totally misapprehended and misapplied the law on vicarious liability when she held that the respondent's Manager who uttered the defamatory words and who is at large, having been deported by the Malawi Government, should have been made a party to the proceedings in order for the claimant to succeed in the matter.

3. The learned Judge unduly diluted and abandoned the law on vicarious liability when she refused to hold the respondent vicariously liable for defamation on the basis that doing so would be punishing innocent employers.

4. The finding that the respondent is not liable for defamation is by all accounts against principles of law on vicarious liability and against the weight of the evidence that was before the court.

At the hearing of the appeal, we took the position that the grounds of appeal could have been drafted better. After careful scrutiny, we decided that this Court would hear grounds 1, 2 and

4, and that it would not waste time on ground number 3 because it does not pass the test laid down in Order III rule 2(1) of the Rules of the Supreme Court of Appeal and as expounded in *Dzinyemba t/a Tirza Enterprise v Total (Malawi) Ltd* MSCA Civil Appeal No. 6 of 2013 (unreported). The test was reiterated in *JTI Leaf (Malawi) Ltd v Kad Kapachika* MSCA Civil Appeal No. 52 of 2016 (unreported), *Mutharika and Electoral Commission v Chilima and Chakwera* MSCA Constitutional Appeal No. 1 of 2020 (unreported) and many other cases decided by this Court which we need not list down.

The facts of the case are that the respondent was contracted by the Malawi Government to construct the Mzuzu – Nkhata-bay road. The respondent set up a camp at Mpamba in Nkhata-bay District. The appellant was employed by the respondent as a truck driver. It was alleged by the appellant that on 17 March 2017, while performing his duties as such at the respondent's camp, he accidentally drove his truck over a sharp object which caused one of the tyres to burst. Exasperated by this, Mr Hinteregger Jurgen (hereinafter "Mr Jurgen"), one of the respondent's Managers present at the scene, is alleged to have repeatedly uttered the words "*You are a monkey. No wonder you drive as a monkey. You are a monkey like your State President*". It was alleged that these words were directed at the appellant and were uttered in the presence of several other employees of the respondent.

The appellant contended that in their ordinary meaning these words mean and were understood to mean that the appellant is a monkey and that he conducts himself as a monkey. That these words were false because he is not a monkey and does not conduct himself as a monkey. He also contended that the words complained of were published in newspapers of wide circulation in Malawi and on the internet such that the damage caused to him was big. The damage included, his dismissal from the respondent's employment, loss of respect as a human being,

public scandal and odium, lowering of his status in society to levels of a monkey. And as a result thereof, he was shunned and ridiculed by his friends on the basis that he was a monkey.

On the other hand, the respondent contended that the words complained of were never uttered by its employee as alleged or at all. And that even if they were uttered, they were not defamatory. Further, the respondent contended that it has a written code of conduct binding on all its employees which prohibits the use of words such as those complained of. If indeed such words were spoken, they were spoken without the respondent's authority and were spoken by Mr Jurgen in his personal capacity and outside the course of his employment.

Further, the respondent counterclaimed for damages for defamation contending that the appellant had himself defamed it when he told the members of the public and the press about the remarks allegedly made by its employee.

After a full trial, the Judge in the court below found that on the evidence before her, the words used by the respondent's employee were "you drive like a monkey". She also found that the words were used in relation to the way the appellant performed his duties since the evidence before the court showed that the tyre burst was caused by the appellant's driving the truck over a sharp object. The evidence also showed that prior to this incident, the appellant had been warned in writing about his negligent driving. Thus, the Judge held that the words "you drive like a monkey" though offensive to the appellant were uttered due to his negligent driving and were meant to impute careless driving and nothing more. She discussed at length the concept of vicarious liability and concluded that on the facts before her, the respondent could not be held liable for Mr Jurgen's conduct because the words were said out of his own value system, personal belief and conceitedness. She proceeded to dismiss the appellant's action with costs. The Judge also found

that the respondent's counterclaim was abandoned since the respondent did not adduce any evidence on it.

In determining this appeal, we think the approach should be that before this Court can discuss and determine those grounds of appeal which have survived, we need to first determine whether there was defamation. If we find that indeed there was defamation, then we can proceed to determine whether the Judge in the court below erred in holding that the respondent could not be held vicariously liable for the conduct of its employee. If we find that there was no defamation then that will be the end of the matter.

In *Katunga v Auction Holdings Ltd* [2000 – 2001] MLR 226 Tambala J (as he then was) at page 230 stated the law on defamation as follows: -

> "... a defamatory statement is one which has the tendency to injure the reputation of a person to whom it refers; it tends to lower him in the estimation of right-thinking members of society generally and in particular cause him to be regarded with feelings of hatred, contempt, ridicule, fear and dislike. The statement is judged by the standard of the right-thinking members of society and the test is an objective one."

And in *Mhango v Raiply Malawi Ltd* [2016] MLR 179 this Court stated that defamation occurs when one by conduct or statement falsely portrays to others as to undermine the character or reputation of another. In the context of this appeal, we do not think there is anything more we can add to the law on defamation as stated in these cases.

Looking at the words complained of, we need to ask ourselves if they are defamatory of the appellant. We need to ask ourselves if the words complained of have the tendency to injure the appellant's reputation in the eyes or minds of right-thinking members of the society around him. We must also ask ourselves

if the words complained of have the potential of lowering the appellant in the estimation of right-thinking members of the society around him. Further, we should ask ourselves if the words complained of can cause the appellant to be regarded with feelings of hatred, contempt, ridicule, fear or dislike in the eyes of the right-thinking members of the society around him.

Having so asked ourselves, sadly, it is our view that our response to each one of these questions should be in the negative. We would agree with the Judge in the court below that the words complained of, though offensive, are not defamatory of the appellant. It is clear that the words were uttered due to the appellant's negligent driving and in their ordinary meaning were meant to describe the appellant's careless driving of the motor vehicle and nothing more.

We do accept that in the context of the situation, the words complained of were deemed abusive, racist and insulting to the appellant. It must be remembered that the respondent's employee who uttered these words, Mr Jurgen, is a white man and the appellant is a black man. Obviously, in that context, the words complained of must have generated a sense of anger. They may have been perceived to be a relic of colonialism, slavery and their racial prejudices. Thus, it is not surprising that following this incident, some of the appellant's workmates refused to work and demanded that Mr Jurgen be removed from employment and or the country.

However, that should not blind us to the task of construing the words correctly and giving them their true and ordinary meaning. Having considered the words thoroughly it is our view that these words are not defamatory. We do not think they speak anything about the character or reputation of the appellant. They are simply insulting. We do not think by calling the appellant a monkey or saying that he drives like a monkey in the presence of other people, those people really started seeing the appellant as a monkey or that he conducts himself as a monkey. With due

respect, we do not agree with his contention that the words complained of caused him to be regarded with feelings of hatred, contempt, ridicule, fear or dislike in the eyes of the right-thinking members of the society around him. It must have been apparent to those in the hearing that the words complained of were nothing more than an angry racist rant by their manager.

Further, the evidence before the court below does not support the contention that as a result of the publication of the words complained of, the appellant was shunned and ridiculed by his friends on the basis that he was a monkey. In fact, the evidence suggests that the opposite is true. The evidence is that soon after the incident, the respondent's employees at the Camp refused to work. They demanded that Mr Jurgen must be removed from the project and or the jurisdiction. The situation became out of hand such that the respondent had to call in the Police to maintain order.

In the circumstances, we would dare say that the conduct of the appellant's co-workers and the anger and hostility which they demonstrated to Mr Jurgen and the respondent following the incident, in a way, vindicates the conclusion that at no point did his fellow employees think or believe that the appellant was a monkey or that he drives like a monkey. In fact, it seems like the respondent's employees became more endeared to him than they were before the incident – hence they decided to stand by him.

In our judgment, we do not think that would have been the case if consequent to the publication of the words complained of the appellant's co-workers started holding him with feelings of hatred, contempt, ridicule, fear or dislike. The reaction of the people around the appellant, his workmates, in our judgment, clearly contradicts all the assertions the appellant makes about the effect of the publication of the words complained of.

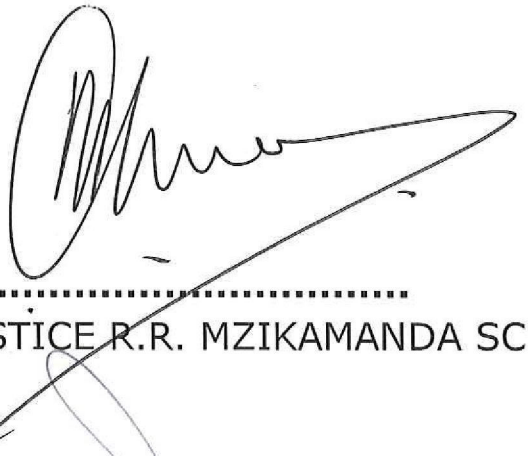
In our view, the words complained of constituted a criminal offence for which the respondent's employee could have been successfully prosecuted and convicted. It is clear from the evidence before the court below that the appellant tried to make a meal out of the incident by contending that the respondent's employee had insulted the President of this Country by calling her a monkey. And it would appear that it is this aspect which led to the deportation of Mr Jugen from the jurisdiction.

Whilst the appellant may have felt good to see Mr Jugen leave the country in such circumstances, what he may not have appreciated is that it deprived him of the opportunity of easily pursuing against Mr Jugen whatever claims he may have had arising from the incident. It is lamentable that those in authority who handled the matter allowed their emotions to take the better of them and opted to deport Mr Jurgen without first bringing him to book to face the law.

In conclusion we agree with the finding of the Judge in the court below to the effect that the appellant failed to make out a case of defamation. The words complained of though insulting, were not defamatory. And having reached this conclusion, we do not find it necessary to engage in a discussion of whether the respondent could have been held vicariously liable for the defamation by its employee. In the absence of the defamation, such discussion will only be moot.

We dismiss the appeal in its entirety with costs both here and in the court below.

Pronounced at Mzuzu this 30th day of June, 2022.



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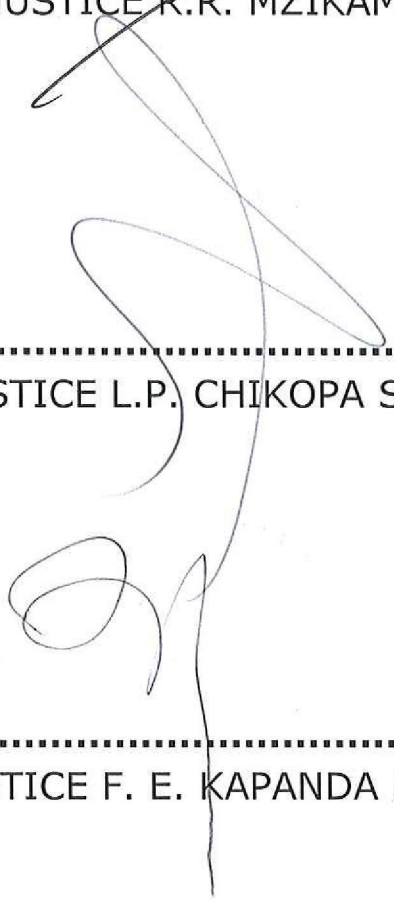
HON. CHIEF JUSTICE R.R. MZIKAMANDA SC



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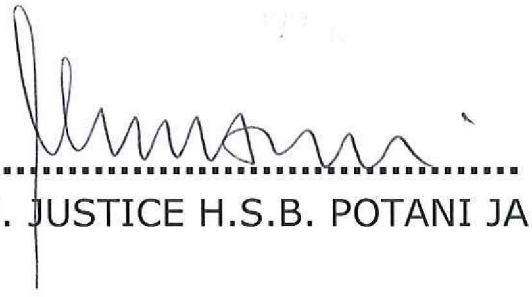

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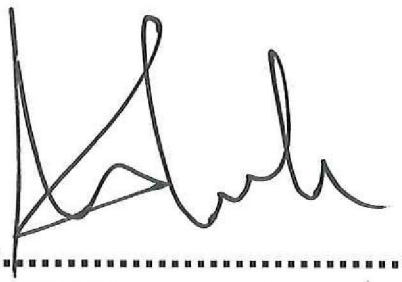

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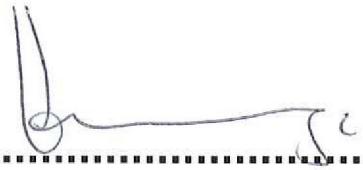

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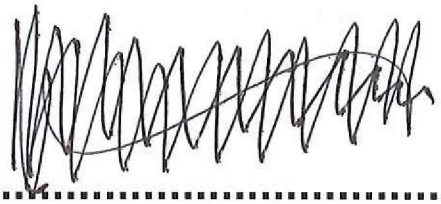

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HON. JUSTICE M.C.C. MKANDAWIRE JA