BENNY HAMAINZA WYCLIFF MWINGA v TIMES NEWSPAPERS LTD (1988 - 1989) Z.R. 177 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER. AND CHAILA, JJ.S.
8TH JUNE,1989 AND 28TH FEBUARY,1990.
(S.C.Z. JUDGMENT NO 11 OF 1989)

Flynote

Tort - Defamation - Libel - Whether defamatory imputation refers to plaintiff---Onus of proof.

Headnote

The appellant, a Zambian resident in Britain, brought an action for defamation. The action arose out of articles published by the respondent based on reports received from their London correspondent concerning criminal proceedings in Britain against some Zambians and their confederates charged with smuggling drugs. The articles which the trial judge found to be clearly defamatory in their natural and ordinary meaning, imputed that the appellant was one of those Zambians involved in smuggling drugs. The trial judge found that the appellant had failed to prove that the articles referred to him.

The issue before the court was the finding of non-reference.

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Held:

(i) It is for the trial judge as trier of both fact and law to determine whether, as a matter of law, the words complained of were capable of being understood to refer to the plaintiff and if so whether, as a matter of fact, the words were reasonably understood to refer to the plaintiff.

(ii) It is for the plaintiff to prove reference to him and this is so whether his identity has been put in issue by the pleading or not, for unless he can prove that the defamatory imputation was published of and concerning him, he has no cause of action.

Cases referred to:

(1) Sadgrove v Hole [1901] 2 K.B. 1
(2) Hulton and Company v Jones [1910] A.C. 20
(3) Simon Kapwepwe v Zambia Publishing Co Ltd (1978) Z.R. 15
(4) Zambia Publishing Co Ltd v Eliya Mwanza (1979) Z.R. 76

For the appellant : K.F. Bwalya Esq, Ellis and Company.
For the respondent : E.G. Tembo Esq, Legal Counsel, Times Newspapers.

Judgment

NGULUBE,D.C.J.: delivered the judgment of the Court.

For convenience, we will refer to the appellant as the plaintiff and the respondent as the defendants.

This is an appeal by the plaintiff against the dismissal of his action against the defendants for damages for libel. It was not in dispute that the defendants published in their issues of the Times of Zambia Newspaper of 19 and 20 July 1984, articles based on reports received from their London correspondent concerning criminal proceedings in Britain against some Zambians and their confederates charged with smuggling drugs. The articles, which the learned trial judge found to be clearly defamatory in their natural and ordinary meaning, imputed to the effect that a Mr B H W Mwiinga was an associate of the drug peddlers; had stood bail for one of them; lived in a drug-peddling neighbourhood of Birmingham; had business relations with named drug pushers and was a boy-friend to a named female Zambian drug trafficker. The article of 20 July,1984, in particular stated to the effect that there was speculation in London that Mr B H W Mwiinga could be involved in the Zambian drug smuggling ring. The plaintiff denied having any dealings with any of the drug offenders and denied standing bail for one of them or being boy-friend to one of them as alleged.

The defence, as pleaded, denied the defamatory imputations but the learned trial judge's finding, referred to above, put paid to this. The defendants also pleaded qualified privilege, contending that the articles were fair and accurate reports of proceedings in a Crown Court in Britain. Alternatively, that the words complained of were fair comment on a matter of public interest, namely the arrest and trial of the wife of a prominent Zambian politician and the existence of drug syndicates operating between Zambia and overseas countries. The learned trial judge did not consider it necessary to deal with these defences because he found that the plaintiff had failed to prove that the articles referred to him and so dismissed his action.

The finding of non-reference stood out as the major issue in this appeal. Mr Bwalya argued that this finding should be reversed pointing out that in all but one minor detail, the particulars in the articles described the

plaintiff: he was indeed B.H. M. Mwiinga; he was a Zambian businessman then resident in Britain for at least five years; he was married to a West Indian wife; he was listed in the Birmingham Midlands telephone directory; his address was 10 Ruckley Avenue in Birmingham, all as stated in the articles. The only discrepancy concerned the district in Birmingham. The articles said the Mwiinga in the reports was listed in the telephone directory as residing at 10 Ruckley Avenue, Handsworth, Birmingham, while the plaintiff said he resided at 10 Ruckely Avenue, Newtown, Birmingham. Apparently, both districts are to be found in Birmingham. The learned trial judge held that the plaintiff and his witness had failed to establish that the articles referred to him on the grounds that, just as the plaintiff himself had felt that the defendants were not referring to him when they mentioned Handsworth and activities in which he was never involved, the court, too, felt the same since it was not established by him that there was no other Ruckley Avenue in Handsworth where another set of Mwiingas with identical particulars and who may have been the subject of the reports were living. The learned trial judge was fortified in coming to this conclusion by the additional fact that the plaintiff failed to exhibit in court the transcript of proceedings in the British courts which his advocates had obtained. The learned trial judge saw such failure to exhibit to be suspect and supportive of the assumption to be made that the plaintiff had discovered that there was a different Mwiinga meant in the articles.

In this country, it is for the trial judge as trier of both fact and law to determine whether, as a matter of law, the words complained of were capable of being understood to refer to the plaintiff and if so whether, as a matter of fact, the words were reasonably understood to refer to the plaintiff. It is, of course, for the plaintiff to prove the reference to him and this is so whether his identity has been put in issue by the pleading or not, for unless he can prove that the defamatory imputation was published of and concerning him, he has no cause of action: see *Sadrove v Hole* (1). Mr Tembo argued that the learned trial judge was right to find that the plaintiff had failed to establish the reference to himself because of the possibility that a different person was meant. Mr Bwalya argued as we have already summarised and added, citing *Hulton and Co v Jones* (2) and other cases, that it would not have mattered even had the defendants' intention been to refer to someone else if in fact those who knew the plaintiff understood the publication to refer to him, such as his wife and his relatives who had brought the articles to his attention.

We have given anxious consideration to the facts and the submissions and we are of the view that Mr Bwalya was on firm ground, both in relation to the facts as well as the authorities. We do not see how any identification difficulty arose when the plaintiff was actually named and personal particulars given which fitted the plaintiff so perfectly in all material respects, excepting one minor variance concerning the district of Birmingham, as allegedly indicated in a telephone directory. It is precisely in situations of such odd coincidences that the principles relating to unintended references to plaintiffs have evolved, although in this case, we consider that it would be stretching credulity too far, to suppose that there were in Birmingham two Zambians with identical personal circumstances

and particulars and with identical residential addresses in different districts. On authority and on the facts we find that we are unable to support the reasons given by the learned trial judge in coming to the conclusion that the plaintiff has failed to establish the reference to himself. The articles were clearly capable of referring to the plaintiff and it was not unreasonable for those who read them to understand them as talking about the plaintiff. We regret, therefore, that it is inevitable to reverse the finding of the learned trial judge who had otherwise given so much thought to his decision, especially in view of the fact that the plaintiff was not being candid when he withheld the transcript of proceedings which he had obtained, although of course, such failure could not support the presumption which was made below.

The appeal on the points just discussed must be allowed and we enter judgment for the plaintiff. We do so not without first considering the defences since this was a rehearing on the record. The defendants did not adduce any evidence capable of sustaining the defences which they had advanced. For instance, the defence of privilege was not established when the defendants themselves failed to produce the transcript of the proceedings or to lead any evidence from any witness in this regard. Fair comment failed when the defendant did not lead evidence to establish which words were comments and what were the supporting fact which were themselves true. All that they did was to show that they had received the texts from their articles from their usually very reliable and long standing correspondent, a factor which is relevant towards mitigation of the damages and which precludes the aggravation of such damages since the defendants' failure to investigate further the drug trafficking allegation was, in the circumstances, not unreasonable and

quite understandable.

With regard to the damages we take into account the mitigatory factors referred to and also the plaintiff's conduct during trial, despite the lack of apology. There is thus no occasion in our view to award other than compensatory damages. We take into account the nature of the imputations in this case which were criminal and involved drug trafficking, a scourge which is looked down upon and treated with utmost disdain throughout the civilised world. We have also considered previous awards where criminal activities were imputed, such as in *Kapwepwe* (3); *Mwanza* (4) and similar cases. Comparing the awards to the gravity of the imputations in this case and having regard to the present money values, we consider that a sum of K20,000 (kwacha twenty thousand) will be sufficient solatium and this we award as damages. The appeal is allowed and there will be judgment for the plaintiff as indicated with costs both here and below to be taxed in default of agreement.

Appeal allowed.
