

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)**

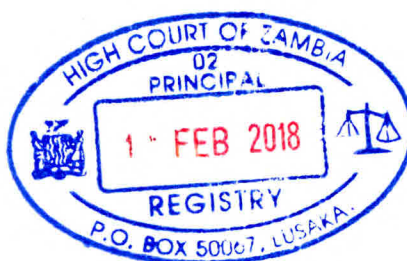
2013/HP/943

BETWEEN:

CHARITY KATANGA

AND

MUVI TV LIMITED



PLAINTIFF

DEFENDANT

**Before the Honourable Mr. Justice Mathew L. Zulu in Open
Court on the day of, 2018**

*For the Plaintiff: Mr. S. Lungu of Messrs Shamuwana and Company
For the Defendant: Mr. M. Katolo with Mr. M. Sitali of Milner & Paul
Legal Practitioners*

J U D G M E N T

Cases cited:

- 1. Rodger Chitengi Sakuhuka v. Sassassali Nungu, Attorney General Times of Zambia Limited, Times Printpak Zambia Limited Newspaper Distributors Limited (2005) Z.R. 39 (S.C.)**
- 2. Khalid Mohammed v. Attorney General (1982) ZR 49**
- 3. Zulu v. Avondale Housing Project (1982) ZR 179**

4. *Bevin Ndovi v. Post Newspapers Ltd. and another* (2011) ZR 472 Vol. 1
5. *Sata v. the Post Newspapers* (1995-96) ZR
6. *McCarey v. Associated Newspapers Ltd* (1964) 3ALL ER 937 CA

Works referred to:

1. *Halsbury's Laws of England*, 5th edition, Vol. 32
2. *Gatley on Libel and Slander*, 5th edition, London: Sweet & Maxwell
3. *Clerk & Lindsell on Torts* 19th edition, London: Sweet & Maxwell

This is an action for defamation. The facts giving rise to this case are that the plaintiff, a lawyer in the Zambia Police Service, who at the material time was serving as Commissioner for Southern Province was caught up in an aspersion allegedly at the instance of the defendant. The Plaintiff alleges that on 7th June, 2013, the Defendant aired a news article during its prime-time news segment between 18:30 and 19:00 which ran with the headline **"Katanga involved in punch up with her subordinate Assistant Superintendent Lukonde"**. The headline was repeated during the vernacular news segment the following day 8th June, 2013 between 06:00 and 07:00. The Plaintiff asserts that by their natural and ordinary meaning, the

words contained in that headline were understood to mean that she is a violent person who has bad leadership qualities and is guilty of engaging in violent behavior whilst on duty. The Plaintiff claims that in consequence, her reputation within the Zambia Police Service and the community at large has been gravely injured. As a result, she has suffered distress and anxiety because after the news headline she received queries from her superiors at work, members of the legal profession and the community at large regarding the broadcast. The Plaintiff now seeks to recover damages for libel, distress and anxiety as well as an unreserved apology.

In its defence, the Defendant admits that it broadcast or published the article as alleged by the Plaintiff but denied that it defamed the plaintiff. The Defendant has raised the defence of fair comment on ground that those persons who hold public office like the Plaintiff are amenable to public scrutiny. The Defendant has also pleaded justification on ground that the words contained in the article are true in substance and in fact because on the material day the Plaintiff was in fact involved in a punch up with her subordinate Assistant Superintendent Lukonde.

In reply, the Plaintiff states that the publication of the words complained of is defamatory as the alleged fight never took place. Thus, the words complained of are not true because the alleged incident never occurred and the publication was actuated by malice. Further, that the publication cannot be fair comment as the publication was not made after a thorough investigation.

At trial, the plaintiff, Charity Katanga, gave oral evidence as PW1 and called two witnesses. It was PW1's testimony that in 2013 she was working as Commissioner of the Zambia Police Service for Southern Province stationed in Choma District. She was working from the Provincial Administration office which houses the Minister, the Permanent Secretary, Deputy Permanent Secretary, and Accountants from Cabinet Office, among others. She narrated that on one occasion, she was in a meeting around 09:00 hours with Doris Chibomba then legal director at Zambia Police Service. During the meeting, Assistant Superintendent Lukonde knocked at the door and attempted to enter the room where PW1 was having a meeting. PW1 said she advised Lukonde not to enter and asked her to return after

the meeting. No other words were exchanged. Lukonde went outside and stood at the door at a distance of 6 to 8 meters from where PW1 sat. A few minutes later, PW1 heard loud noises outside but within the office premises. When she enquired, she was informed that it was Lukonde who was crying hysterically. She said she wondered why the officer was crying. She testified that she later left for Livingstone that day to attend another meeting.

While she was Livingstone, she was approached by Mwape, a Muvi Television reporter who alleged that she (PW1) had fought with her subordinate Lukonde. She denied the allegation and told the reporter that she did not fight with Lukonde at all because during her encounter with Lukonde that day, Lukonde stood at the door while she sat in her office. She testified that she advised the reporter to inquire from the Provincial Administrator because the alleged incident occurred at a public office.

Despite having explained herself to the reporter, the Respondent aired the article during their prime-time television programme at 18:30 hours with the headline **“Katanga involved in a punch up with her subordinate Assistant Superintendent Lukonde”**. This

annoyed her because it injured her reputation as a person appointed to office by the head of State and as a Lawyer. According to PW1, this put her job and profession in jeopardy and brought her morality into question. The headline was repeated the following morning. This triggered phone calls to her from lawyers and officers in high command. According to PW1, the story skewed the trust the appointing authority had in her and triggered her transfer to Northern Province. Incensed by what had transpired, she sought the advice of Counsel through whom she demanded an apology from the Defendant but to no avail. She emphasised that the story which the Respondent aired was false.

In cross examination, she testified that about 3 minutes elapsed between Lukonde leaving the office and her hearing loud noises of Lukonde crying. She stated that she had worked with Lukonde for one and half years and did not know her to be a mental patient and had no disciplinary issues with her. She explained that she did not call Lukonde to find out why she was crying because she was not her immediate supervisor although there was nothing stopping her from asking. PW1 confirmed that she asked for a written report from the

supervisor. When questioned whether the report would have assisted to establish what transpired if it was produced, PW1 said she was not in a position to tell. She denied that she hid the report because it would confirm the punch up.

PW1, testified that she was transferred to Northern Province, 6 months after the alleged incident. That the transfer happened after the article complained of was published. When asked whether she was the only one who was transferred she said she exchanged with another officer. She was subsequently transferred to Lusaka after which she underwent another transfer because there was already a Commissioner in Lusaka. She was later posted to Copperbelt Province where she took over from Joyce Kasosa. When further cross examined, PW1 conceded that she did not plead in her statement of claim that the article complained of caused her to be transferred several times and she had no proof that the transfers were caused by the article. She, however, admitted that her transfer back to Lusaka was a show of confidence by the appointing authority and that as Commissioner of Police she could be transferred to work anywhere at any time. PW1 testified that she had no proof to show that the article

complained of injured her standing as Commissioner and Lawyer, or that she suffered stress and anxiety as a result of the publication.

In re-examination, PW1 explained that she said she was stressed because she was receiving a lot of phone calls after watching the news. She stated that she was transferred to a smaller division and the transfers occurred after the article was published. She clarified that reports of the alleged incident were prepared but not presented before court.

PW2, Chief Inspector Mwamba Enock, testified that in 2013 he was stationed in Choma where he was working as aide-de-camp (ADC) to the Commissioner of Police, the office held by the Plaintiff at the time. On 7th June, 2013, he was sitting on the lawn between the offices for Zambia Police Service and the Provincial Administration. During that time, the Plaintiff was in a meeting with officials from Lusaka. Whilst on the lawn, he saw Lukonde going to the plaintiff's office. Then he suddenly heard a loud cry from the Plaintiff's secretary's office. He testified that he thought Lukonde had received bad news. Lukonde continued to cry so much that she attracted a lot of attention. The Plaintiff's secretary, Mrs. Kapepe was present when Lukonde was

crying loudly. The Deputy Chief Inspector of Police ordered him and another officer to take her away. They took her away to the room where she was living at the time and returned to the office.

In cross examination, PW2 testified that he found Lukonde crying when he went to the plaintiff's secretaries' office. She continued crying even after they took her to the vehicle to take her away. He stated that he had worked for the Zambia Police Service for 21 years and knew Lukonde for over 5 years. He said he could not say she was mad. It was PW2's evidence that this was the only time he saw her crying because he was not close to her and he did not find out why she was crying. He added that it was not his duty to find out why she was crying.

PW3, Lizzy Kapepe, testified that she was the Plaintiff's secretary at the material time. On 7th June, 2013, she was in the office when she heard a knock on the Plaintiff's door. She went to check who was knocking and found Lukonde who had already opened the door. The Commissioner told her there was a meeting and told her not to enter. PW3 said she called Lukonde to sit in her office. After 3 minutes, Lukonde started crying on top of her voice. PW3 asked her what was

wrong but she continued crying loudly which attracted attention from other officers. Later, the Deputy Chief Inspector of Police instructed other officers to remove her from the office because she was disrupting work and Lukonde was taken away by officers. That was the last she heard of her.

In cross examination, PW3 stated that Lukonde's office was about 3 to 4 kilometers from hers. She testified that when Lukonde knocked, the Plaintiff did not go to the door because she was having a meeting. When PW3 heard the knock, she went to check and found Lukonde standing at the door and she (PW3) helped to close the door to the Plaintiff's office after the Plaintiff told Lukonde to wait outside. PW3 maintained that Lukonde is the one who opened the door because she was still holding the handle. That she found Lukonde holding the door handle after 3 to 4 minutes from the time she heard the knock. According to PW3, the plaintiff's desk was far from the door because the Commissioner's office is a big room.

PW3 further testified that she knew Lukonde well. She said she found it strange that Lukonde was crying and does not know why she cried like that.

That was the Plaintiff's case.

The Defendant called one witness, Oswald Yabani (DW1), a journalist. DW1 testified that on 7th June, 2013, he was in his office in Livingstone where he was operating as news editor. Two senior police officers approached him and gave him information of what transpired in Choma regarding a fracas that interrupted work at Cabinet office in Choma involving the Plaintiff and a police officer in charge of Interpol named Lukonde. The officers informed him that there was public outcry concerning an instruction to relocate the Interpol office from Livingstone to Choma.

DW1 told the Court that he processed the news content from the facts gathered. He testified that when they receive information as journalists, they try by all means to balance it so that there is fairness. He called the Plaintiff to confirm the veracity of the information. The Plaintiff confirmed that there was confusion at the office because Lukonde was not working but denied that there was a punch up. After receiving the Response from the Plaintiff, they aired the story through the Respondent. When asked how the story was

actually aired, DW1 said the story was that the one who was in charge went to complain and picked up a quarrel with the Plaintiff which resulted in a fracas and that caused Lukonde to cry. According to DW1, the news was fair comment in the sense that there was a problem because the fracas interrupted work, and the story was balanced because the Plaintiff's response was incorporated it. DW1 went on to state that, the extra information was obtained from people that were actually present. That it was obtained from senior police officers and confirmed by the senior intelligence officer.

In cross examination, DW1 maintained that the Plaintiff's response was incorporated in the story which was aired. He confirmed that the Plaintiff expressly stated that there was confusion but there was no punch up. When referred to the pleadings, particularly the Defendant's defence, DW1 confirmed that the Defendant pleaded that the verbatim statement published was **"Katanga involved in a punch up with the Subordinate Assistant Superintendent Lukonde"**. He conceded that there was no other statement published which included the Plaintiff's response. He denied that to an ordinary member of society that would mean that the Plaintiff was involved in

a punch up with her subordinate because the statement was simply a "headline". When asked whether including the word "allegedly" in the headline would bear the same meaning, DW1 said no. However, he insisted that the statement was merely a headline and for one to get the full story, they needed to listen to the news in detail. DW1 insisted that in journalism, the use of the inverted commas in the headline connotes that the statement is "alleged". When asked what percentage of journalists formed the audience to whom the story was published, he said they were few and the majority were just ordinary citizens who watch Muvi Television who would not know the import of inverted commas. When further cross examined, DW1 accepted that the headline without anything else suggests that there was a punch up. He agreed that anyone else who saw the publication would say that the Plaintiff was fighting with her subordinate. DW1 admitted that he had two statements; one from his informant that there was a punch up and the other from the Plaintiff who denied the allegation but only the former part of the story was published. No other story was published regarding the alleged incident after the article complained of. In short, DW1 did not publish the Plaintiff's side of the story.

It was DW1's further evidence that he was not present at Choma when the alleged incident is said to have occurred. He declined to disclose his informants on ground that it would be unethical as the sources approached him in confidence. He, nonetheless admitted that he did not verify the truth of the statement before publishing it and if the sources lied to him then he published a false story. DW1 admitted that the headline cannot amount to fair comment.

That was the evidence adduced on behalf of the Defendant.

I have considered the pleadings and the evidence adduced by the parties.

It is not in dispute that the Defendant broadcast a news article with the headline **"Katanga involved in punch up with her subordinate Assistant Superintendent Lukonde"** on 7th June, 2013 during its prime-time news segment. The headline was repeated the following day, 8th June, 2013, during the vernacular news segment. It is not disputed that the person referred to in the headline as Katanga is the Plaintiff in this action. The Plaintiff has complained that the words

contained in the headline are defamatory as they depicted her to be a violent person who engages in violent behavior at work. The Defendant claims that the words are fair comment on a matter of public interest and justified as they are true in substance and in fact. Therefore, the issues that arise for determination are-

1. whether the words contained in the news headline published by the Defendant are defamatory;
2. whether the defences of fair comment and justification have been established; and
3. whether the Plaintiff is entitled to damages and an unreserved apology.

As regards the first question, the issue to be decided is whether the words in the article complained of which aired on the Defendant's television station on 7th and 8th June, 2013 are defamatory. Are the words **"Katanga involved in punch up with her subordinate Assistant Superintendent Lukonde"** libelous? Libel as defined by the Supreme Court in **Rodger Chitengi Sakuhuka v. Sassassali Nungu, Attorney General Times of Zambia Limited, Times Printpak Zambia Limited Newspaper Distributors Limited**¹ is the

publication of a matter, usually words, conveying a defamatory imputation as to a person's character, office or vocation. According to the learned authors of Gatley on Libel and Slander, 5th edition at page 17, any written or printed words which tend to lower a person in the estimation of right thinking men, or cause him to be shunned or avoided, or expose him to hatred, contempt or ridicule, constitute a libel. Thus, to amount to a libel, the words complained of must tend to lower the Plaintiff in the estimation of right thinking members of society generally. The words complained of must be considered in light of the surrounding circumstances as known to the person to whom they were published.

By their ordinary and natural meaning, the words complained of suggest that the Plaintiff was involved in a physical fight with her subordinate whilst on duty. DW1 accepted during cross examination that that was the ordinary meaning of the words. The Plaintiff is a lawyer by profession and an officer in the Zambia Police Service serving as Commissioner. By virtue of her profession and position at work, the Plaintiff is expected to uphold a high standard of professionalism and dignity. Given the circumstances, I find that the

news headline, asserting, without question that the Plaintiff was involved in a punch up, is defamatory. The Plaintiff has discharged the burden of proving, on a balance of probability, that she was defamed by the Defendant when it published an article with the headline **“Katanga involved in a punch up with subordinate Assistant Superintendent Lukonde”**. I am fortified by the cases on **Khalid Mohammed v. Attorney General²** and **Zulu v. Avondale Housing Project Limited³** on the burden on proof.

With regard to the second issue, the Defendant has pleaded two defences; fair comment and justification. As enunciated by the Supreme Court in **Bevin Ndovi v. Post Newspapers Ltd. and Another⁴**, there are three requisites of the defence of fair comment. First, the comment must be an observation or inference from facts not an assertion of fact. Second, the matter commented on must be of public interest. Third the comment must be fair or objective and not actuated by malice. Hence, the defence of fair comment does not cover misstatements of fact. It is a comment to say that a certain act which a man has done is disgraceful or dishonourable; it is an allegation of fact to say that he did the act so criticized. See: Gatley

on Libel and Slander, 5th edition at page 324. The words complained of by the Plaintiff appear to be a statement of fact and not opinion of a factual issue. As earlier stated in this judgment, the words **“Katanga involved in a punch up with subordinate Assistant Superintendent Lukonde”** in their plain and ordinary meaning suggest that it is a fact that the Plaintiff was involved in a punch up. It cannot be said to be an opinion or comment on a statement of fact. It was simply stated as though it were a fact. As the learned authors of Gatley on Libel and Slander put it at page 324, a comment is a statement of opinion on facts. A libelous statement of fact on the other hand is not a comment or criticism on anything.

It is significant to note that DW1 testified that as a journalist of over 5 years' experience, he made follow ups to obtain a comment from the Plaintiff so that the story was balanced before publication. According to him, he had verified the story and done all that was necessary to ensure that the publication was fair. He insisted that the publication was done responsibly and fairly. The learned authors of Halsbury's Laws of England at Paragraph 623 state as follows:

“The steps taken to gather and publish the information must have been responsible and fair. The requirements will depend on the communication in question and assessment to be made as a whole but particular regard may, according to the circumstances, generally be had to the following factors:

- (1) the seriousness of the allegation;**
- (2) the nature of the information and the extent to which the subject matter is a matter of public concern;**
- (3) the source of the information;**
- (4) the steps taken to verify the information;**
- (5) the status of the information;**
- (6) the urgency of the matter;**
- (7) whether comment was sought from the claimant;**
- (8) whether the article contained the gist of the claimant’s side of the story;**
- (9) the tone of the article; and**
- (10) the circumstances of the publication, including the timing.”**

Clearly, the Defendant did not follow all the steps outlined above in order to claim that the publication was responsible and fair. The headline was embellished. It did not capture the story as a whole. The fact that the Plaintiff’s response before publication as narrated by DW1 was not incorporated entails that the article did not contain

the gist of the Plaintiff's side of the story as required. There is no evidence of other steps taken to verify the information such as contacting any of the people that were present when the alleged incident occurred. I take judicial notice that the Provincial Administration offices for Southern Province where the alleged incident took place is a public place. The incident allegedly took place during working hours. Hence, the Defendant should have been prudent to verify the story with witnesses who were present before publication. DW1 admitted that he was not present when the incident occurred. The plaintiff's witnesses PW2 and PW3 who were present said there was no punch up. There are no facts to establish with due certainty that the alleged punch up occurred.

It is trite law that where the Defendant raises the defence of fair comment, the onus is on the Defendant to prove that the allegations of fact contained in the article published by the Defendant was true. It is not enough for the Defendant to say it believed the content to be true. For it is one thing to comment on acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct. See: Gatley and Libel on Slander at

page 325 at paragraph 588. In this case the Defendant has failed to prove that the allegations contained in the words complained of were true. Since the foundation upon which the comment could be made is nonexistent, the plea of fair comment must fail. A comment cannot be fair if it is built on facts which are not truly stated.

Further, the circumstances of this case are similar to the illustration referred to by the Supreme Court in **Ndovi v Post Newspapers Ltd. and Another, supra**, as follows:

“At paragraph 601, Gatley illustrates the operation of fair comment by citing Davis v Shepstone. In that case, the Respondent was the Resident Commissioner of Zululand, South Africa. The appellants published in their newspaper, serious allegations with reference to the official conduct of the Respondent. They stated that he had not only himself violently assaulted a Zulu Chief, but had set on his native Policemen to assault others. Upon the assumption that these statements were true, they commented upon his conduct in terms of great severity. At trial, it was proved that the allegations were absolutely without

foundation. And no attempt was made to support them by evidence. The defence of fair comment failed and the appellants were found liable.”

The Defendant having failed to prove the elements of fair comment, the defence fails. As regards the defence of justification, the learned authors of Halsbury's Laws of England, 5th edition, volume 32 state that the defence of justification is that the words complained of were true in substance and in fact. Since the law presumes that every person is of good repute until the contrary is proved, it is for the Defendant to plead and prove affirmatively that the defamatory words of which the claimant complains are true or substantially true. The Defendant must specify the defamatory meaning he seeks to justify and give details of the matters he relies on. This is because the law presumes that defamatory words are false and places the burden on the Defendant to prove that the statement justified is true in substance and in fact. Although the law recognizes inaccuracies, exaggeration, sloppy journalism or tastelessness of style which do not

affect the core essence of the libel, the focus is on the defamatory sting of the libel.

The Defendant has not adduced evidence to prove that the words complained of are true in substance and in fact. The facts relied upon were inaccurate because DW1 conceded that the headline did not contain the statement given by the Plaintiff when she was contacted for a response. DW1 chose to ignore her comment and only publish one side of the story in the absence of cogent evidence to support their take on the matter. The Defendant has failed to prove that the headline it published is true in substance and in fact. Consequently, the defence of justification fails.

I now turn to the third question relating to damages and an apology. The learned authors of *Gatley on Libel and Slander* at paragraph 732 state that in a claim for libel, damage is presumed, but the Defendant may give evidence of any injury to his reputation or any actual loss suffered. According to *Clerk & Lindsell on Torts*, 19th edition, at paragraph 23-224, in an action for defamation no proof of actual damage is necessary, and the damages are at large. These compensatory damages are a primary remedy, awarded to

compensate the claimant for damage to his reputation, vindicate his good name, and take into account the hurt, stress and humiliation which the public has caused. These compensatory damages include natural injury to feeling, grief and distress. Although damages to be awarded are at large, Clerk & Lindsell on Torts at paragraph 23-227, guide, that the damages must be proportionate to the loss suffered by the claimant. Three purposes for damages are identified, that is, consolation for the claimant's personal distress and hurt, reparation for the harm done to the claimant's reputation and vindication of the reputation.

It follows that the Plaintiff having proved that the article companioned of is libelous, she is entitled to an award of damages. However, the Plaintiff went further in her testimony to narrate how she received phone calls from lawyers and officers in high command enquiring about the news article. As earlier stated in this judgment, due to the Plaintiff's standing in society as Commissioner of the Zambia Police Service and a Lawyer, she is expected to exhibit exemplary behavior in the manner she conducts herself. The article alleging that she was involved in a punch up with her subordinate

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painted her in bad light especially that her job as Commissioner of the Zambia Police Service entails protecting citizens against crime. Depicting her as a violent, non-law-abiding individual injured her reputation which could reasonably be said to have caused her distress and anxiety.

However, I note that the Plaintiff did not suffer any grave injury as a result of the defamation. She retained her job and was transferred to Lusaka in the same position before she was eventually posted to the Copperbelt. The Plaintiff admitted in cross examination that her transfer to Lusaka was a show of confidence in her by the appointing authority. No evidence was led to show whether she was shunned or disadvantaged as a result of the defamation. I am cognizant of the fact that in an action for defamation, damage is presumed and there is no need for proof of actual damage. However, I have taken into account the sentiments by Ngulube CJ, as he then was, in **Sata v. the Post Newspapers**³ that where there is little actual loss suffered by a Plaintiff exemplary or punitive damages are not appropriate as the primary object of awarding damages for defamation is to offer

vindication and solatium as money cannot really be compensation in such cases.

In **McCarey v. Associated Newspapers Ltd⁴** it was held that-

“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 natural injury to his feelings, natural grief and distress.”

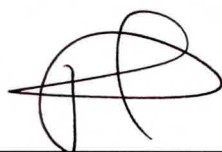
In view of the foregoing, I award the Plaintiff the sum of K20,000.00 as damages with interest at short term deposit rate from the date of the Writ to the date of judgment and thereafter at the current Bank of Zambia lending rate until full and final settlement.

As regards the relief sought for an unreserved apology, I am of the considered view that the Plaintiff's vindication will be achieved through this judgment which has been entered in her favour and the award of damages.

I award costs to the Plaintiff to be taxed, failing agreement.

Leave to appeal is granted.

Delivered at Lusaka this 15th day of Feb, 2018



**MATHEW L. ZULU
HIGH COURT JUDGE**