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**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA**

APPEAL 151/2020

(Civil Jurisdiction)



BETWEEN:

RICHARD MUCHAKA MWANAMBULO

APPELLANT

AND

DONOVAN MUSOKA HIKAKONKO

RESPONDENT

CORAM: KONDOLO, SC, CHISHIMBA AND NGULUBE, JJA

*On 25th August, 2021, 23rd September, 2021, 9th November,
2021 and 16th December, 2021.*

For the Appellant : In person

For the Respondent : In person

J U D G M E N T

NGULUBE, JA delivered the judgment of the court.

Cases referred to:

1. *Anderson K. Mazoka and others vs Levy Mwanawasa (2005) Z.R.38*
2. *Christopher Lubasi Mundia vs Sentor Motors (1982) Z.R.66*
3. *Bevin Ndovi vs Post Newspapers Limited, S.C.Z Judgment No. 8 of 2011*
4. *Zambia Railway Limited vs Pauline S. Mundia, Brian Sialumba (2008)
Z.R.287*

Other works referred to:

1. *Halsbury's Laws of England Volume 97, 5th Edition*

INTRODUCTION

1. This is an appeal against a Judgment of the High Court delivered by Maka-Phiri, J. on 28th May, 2019, in which the court dismissed the appellant's appeal from the Subordinate Court for lack of merit.

BACKGROUND

2. The brief background to the appeal is that the appellant commenced a civil action in the Subordinate Court at Namwala claiming that the respondent defamed his character on 10th June, 2013 at Niko Police Station. The allegation was that the appellant tampered with the respondent's steer by branding his brand mark on its right and left sides. The appellant also sought costs of the suit.
3. The evidence in the Subordinate Court was that in February, 2012, the appellant sold a grey branded steer to one Shamukwele Lobwe, which went missing but was later found at Niko Police Station. The appellant went to the Police Station where he learnt that the respondent claimed that the brand mark on the steer that

he sold to Shamukwele Lobwe was defaced with the appellant's brand mark, which was not the original one.

4. According to the appellant, the veterinary officer who examined the animal found that the brand mark was not interfered with and the steer was subsequently given to the appellant. The court viewed the steer at the close of the appellant's case but did not make any comments regarding its observation.
5. The evidence of the respondent in the lower court was that he purchased a branded steer from one Stephen Chizyuka in February, 2013, which he marked with his brand mark, but it later went missing. The animal was recovered in May 2013, bearing another brand mark. He took the steer to Niko Police Station so that the Police could identify the owner of the brand mark. Subsequently, the appellant claimed the animal as his but the respondent's witnesses maintained that the brand mark on the steer had been tampered with. The Police later released the animal to the appellant because they were of the view that the brand mark on the animal was clear.
6. The Subordinate Court considered the matter and accepted the evidence that was led by the respondent on the origins of the steer. The court was of the opinion that the appellant had not led

evidence regarding where he obtained the steer from and merely stated that he sold it to Shamukwele Lobwe. It found that the respondent had proved his defence on a balance of probabilities and dismissed the appellant's action for lack of merit.

THE APPEAL IN THE HIGH COURT

7. The appellant was dissatisfied with the lower court's decision and lodged an appeal in the High Court advancing three grounds.
 1. ***The lower court erred in law and fact when it departed from the issues in dispute which were the cause of the appellant's suit.***
 2. ***The lower court erred when it ignored the professional findings of the Zambia Police at Niko Police Post as well as those of the veterinary officer regarding the defacing of the brand marks.***
 3. ***The lower court erred in law and fact when it chose to ignore the inconsistencies in the testimony of the appellant and his witness, Kennedy Chizyuka.***
8. The appellant's arguments in the High Court were to the effect that the lower court departed from the issues which resulted in the defamation as pleaded by the appellant, thus leading in the court arriving at a wrong decision.
9. According to the appellant, the Police and the veterinary officer established that the brand mark was not tampered with. The appellant also submitted that the trial court ignored the evidence

regarding the inconsistencies in the testimony of the respondent on when he bought the steer and sold it.

10. The respondent filed heads of argument in response and argued that the brand mark on the animal was defaced by the appellant. He also submitted that the appellant refused to do a DNA test on the steer or hire a brand detector to ascertain the origins and ownership of the steer. The respondent stated that the appellant had been using his steer and prayed for aggravated damages amounting to sixty animals with costs of K21,465.00 for the mental anguish and economic stress that the appellant inflicted on him.
11. The High Court considered the matter and was of the view that there was no evidence before the lower court which it could have used to resolve the dispute regarding the ownership of the steer. The High Court opined that the evidence of the respondent was more credible than that of the appellant as the person who sold the steer to the respondent testified in the lower court. The High Court also observed that the evidence on record was that it was the respondent who took the steer to the Police Station so that the owner of the brand mark that the animal bore could be traced.

12. The learned Judge went on to state that the onus was on the appellant to prove that the steer was his and that the brand mark on the animal was not defaced. The learned Judge stated that the appellant failed to discharge the burden of proof. Regarding the findings by the Police officer and the veterinary officer on the authenticity of the brand mark, the learned Judge noted that their evidence was not before the Subordinate Court since they were not witnesses in that Court. The court further opined that the disparity in the evidence regarding when the respondent bought the animal from Chizyuka did not go to the root of the case.
13. The court stated that the appellant should have proved the elements of defamation but did not do so, opting to divert from his pleadings and focusing on issues that were not relevant to the tort of defamation. The court went on to dismiss the respondent's claims in the High Court as he did not advance a counter claim in the Subordinate Court. The court ultimately dismissed the appeal for lack of merit. It awarded costs to the respondent in the Subordinate Court and in the High Court.

THE APPEAL IN THIS COURT

14. The appellant was dissatisfied with the decision of the lower court and advanced three grounds of appeal couched as follows-

1. ***The court erred in fact and law when it decided that the appellant did not prove the element of defamation when in fact the appellant did.***
2. ***The court erred in fact and law when it held that the appellant diverted from his pleading by focusing on proving issues that are irrelevant to the tort of defamation.***
3. ***The court erred in fact and law when it held that there was no sufficient evidence upon which to adjudicate the matter because even after the animal was viewed the trial court did not pass any comment.***

APPELLANT'S CONTENTIONS

15. In support of the first ground of appeal, it was submitted that the respondent defamed the appellant when he alleged that the brand marks on the steer were defaced by the appellant. It was argued that the court delivered judgment in favour of the respondent notwithstanding his failure to provide evidence that the brand marks in issue were defaced. It was contended that the court did not consider the alleged defaced brand marks. According to the appellant, the police officer at Niko Police Station, a Mr. Mbokoshi and the veterinary officer, a Mr. Sinkende investigated the matter and resolved that there were no defaced brand marks on the steer

and it was then handed over to the appellant by the police officer as the evidence regarding the authenticity of the brand mark was overwhelming. Based on the allegations by the respondent, the appellant commenced a matter in the Subordinate Court for defamation as he was accused of defacing the brand marks on the steer.

16. In support of the second ground of appeal, it was contended that the lower court departed from the issues in dispute which were the cause of the defamation suit as pleaded in the writ of summons. The appellant referred to the cases of **Anderson K. Mazoka and others vs Levy Mwanawasa**¹ and **Christopher Lubasi Mundia vs Sentor Motors**² on the function of pleadings. Specifically, the appellant submitted that in the case of **Anderson K. Mazoka**, the Supreme Court held that-

“The function of pleadings is to give fair notice of the case which has to be met and define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties. Once the pleadings have been closed, the parties are bound by their pleadings and the court has to take them as such.”

17. The appellant submitted that in the case of **Christopher Lubasi Mundia**, the Supreme Court re-affirmed the case of **Mazoka (supra)** and held that-

“Where the pleadings are at variance with the evidence adduced in court, the case fails since the plaintiff’s case is completely re-cast without actual amendment of the statement of claim and not only will the court record be incorrect as a reference thereafter but the other party will be unable to meet the case having had no correct notice.”

18. On the third ground of appeal, the appellant submitted that on 15th August, 2013, the lower court viewed the steer in issue particularly the brand marks and observed that they were visible on the right and left hind legs as well as on the belly. According to the appellant, the Subordinate Court deliberately ignored this evidence in its judgment and came to a wrong conclusion. After the steer was viewed, the lower court did not pass any comment on its findings. The appellant prayed that the judgment of the High Court be set aside and that this court allows the appeal.

RESPONDENT’S CONTENTIONS

19. In opposing ground one, the respondent submitted that on 10th June, 2013 at Niko Police Station, he had disapproved of the

opinion of the veterinary officer, Mr Sinkende and that of Detective Sergeant Mbokoshi and he requested that the matter be sent to the District Criminal Investigations office for further investigation.

20. The respondent requested that the court refers to his submissions in the Subordinate Court and in the High Court regarding the ownership of the animal in issue.
21. On the second ground of appeal, the respondent submitted that the appellant has no legal basis to sue for defamation as the steer in issue was not his. The respondent contended that he was the claimant and Shamukwele Loobwe also made a claim for the animal, while the appellant claimed to have bought the animal from his wife, Gertrude Muchaka. It was submitted that court's balance upon analysis of the evidence was tilted in the respondent's favour.
22. Responding to ground three, the respondent submitted that the lower court did not err when it held that there was insufficient evidence upon which to adjudicate the matter. The respondent submitted that the steer was given to him by the Subordinate Court by way of restitution and he retrieved the animal from the appellant by writ of *fifa*. The respondent prayed that this court

dismisses the appeal for lack of merit and that it awards him costs and any other remedies applicable in the circumstances.

CONSIDERATION OF THE MATTER BY THIS COURT AND VERDICT

23. We have considered the evidence on record, the heads of argument filed by the parties and the authorities to which we were referred. We shall address grounds one, two and three together as they all revolve around the issue whether the appellant was defamed by the respondent.
24. The appeal has been brought before us to challenge the decision of the lower court that the appellant needed to prove the elements of defamation which the court opined he did not do. The court was of the view that the appellant diverted from the pleadings by focusing on proving issues that were irrelevant to the tort of defamation.
25. To prove prima facie defamation, a plaintiff must show four things. These are that a false statement purporting to be fact was made, publication or communication of that statement to a third person, fault amounting to negligence and damages or some harm caused to the person who is the subject of the statement. In the case of ***Bevin Ndovi vs Post Newspapers Limited***³, it was held that-

“A defamatory statement is one which tends to lower a person in the estimation of right thinking members of society generally, as to cause him to be shunned or avoided or to expose him to hatred, contempt, or ridicule, or to convey an imputation on him disparaging, or injurious to him in his office, profession, calling, or trade or business.”

26. In civil matters, the plaintiff bears the burden of proving his case on a balance of probabilities as was stated by the Supreme Court in the case of **Zambia Railway Limited vs Pauline S. Mundia, Brian Simumba⁴** that-

“The old adage is true, that he who asserts a claim in a civil trial must prove on a balance of probability that the other party is liable.”

27. The issue for determination is whether the appellant proved that he was defamed by the respondent and whether he stuck to his pleadings in doing so. The appellant needed to prove that the assertions by the respondent that the brand mark on the steer in issue was tempered amounted to defamation of the appellant by the respondent. **Halsbury’s Laws of England Volume 97, 5th Edition, at paragraph 510** defines a defamatory statement as-

“A statement which tends to lower a person in the estimation of right-thinking members of the society generally or cause him to be shunned or avoided or

expose him to hatred, contempt or ridicule or to disparage him in his officer, professional calling, trade or business.”

28. The record from the Subordinate Court shows that the court ordered that scientific examination be carried out to ascertain the true parentage of the steer, but this was not done because the appellant expressed the view that the said scientific examination would take long and that it would be expensive. We agree with the learned High Court Judge that there was no material or evidence that the lower court would have utilized to ascertain the true parentage of the steer.
29. Further, the record shows that the appellant did not call any veterinary officer to testify at the trial of the matter to assist the Subordinate Court in determining the issue. It is clear from the record that no evidence was led by the appellant at trial to prove that the brand mark on the steer was not defaced and that it was that of the appellant.
30. We will now consider whether there is evidence on record to prove that the respondent defamed the appellant. The test that is used to establish whether a statement is defamatory is to examine how an ordinary, right-thinking person in the society

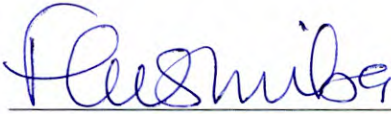
generally would respond to the statement that the appellant was defamed by the respondent when he reported the matter to the Police, in an effort to ascertain who the owner of the animal was.


31. The evidence of the respondent in the Subordinate Court was that sometime in 2013, he saw the steer that he lost in 2012, which was in a cattle camp at Chishokombwe. He made inquiries and eventually managed to get the steer, with a view of taking it to the Police Station so that ownership could be properly ascertained. Before he could report the matter to the Police, the appellant claimed that the steer was his, and he stated that he had earlier sold it to Shamukwele Lobwe, with the brand mark that belonged to his wife. A dispute arose over the ownership of the steer and this led to the appellant suing the respondent for defamation in the Subordinate Court.
32. We are of the view and agree with the lower court that there was no evidence on record that would have assisted the Subordinate Court in resolving the dispute regarding the ownership of the steer. The appellant led no evidence to prove that the steer belonged to him nor did he prove that the brand mark that the

animal bore when it was taken to the Police Station was not defaced.

33. We agree with the lower court's finding that the appellant failed to prove that the respondent defamed him as the ingredients of the said tort were not proved. We do not find merit in the three grounds of appeal and they are accordingly dismissed. The upshot of our judgment is that the whole appeal fails. We make no order as to costs.


M.M. KONDOLO, SC.
COURT OF APPEAL JUDGE


F.M. CHISHIMBA
COURT OF APPEAL JUDGE


P.C.M. NGULUBE
COURT OF APPEAL JUDGE