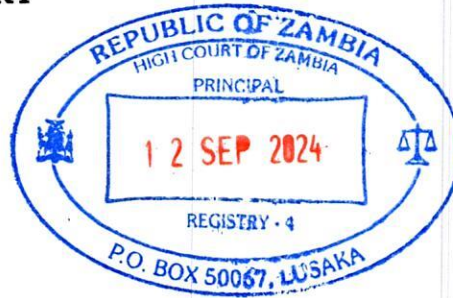


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

2021/HP/0381



BETWEEN:

STEBBY KAINGU

PLAINTIFF

AND

NSONGA GAME MANAGEMENT AND LODGES LIMITED 1ST DEFENDANT

VAUGHAN HUMPHREY

2ND DEFENDANT

Before the Honourable Mrs. Justice R. Chibbabbuka on the 12th September, 2024.

For the Plaintiff: Mr M. Chitundu & Mr M. Bwalya, Messrs Barnaby
Chitundu & Khunga Advocates

For the Defendants: Mr R. Katambo, Messrs Dzekedzeke and Company

JUDGMENT

Cases referred to:

1. *Muvi TV Limited vs Charity Katanga Appeal No. 77 of 2018*
2. *Zambia Publishing Company Limited vs Eliya Mwanza (1979) ZR 76 (SC)*
3. *Sim vs Stretch [1936] 2 All ER 1237, 1240*
4. *Bevin Ndovi vs Post Newspapers Limited, Times Printpak Zambia Limited S.C.Z Judgment No. 8 of 2011*
5. *Benny Hamainza Wycliff Mwiinga vs Times Newspaper Limited (1988-1989) ZR 177*
6. *Simon Kapwepwe vs Zambia Publishing Company Limited (1978) ZR 15*
7. *Huth vs Huth (1915) 3 KB 32*
8. *Chief Bright Nalubamba and Zambia Co-operative Federation Limited vs Muliyaunda Wakunguma Mukumbuta (1987) ZR 75*
9. *Warard Harold Phiri vs The Programmes Manager Radio Maria Zambia-Chipata (2002/HJ/31) [2006] ZMHC 1*
10. *Clark vs Molyneux (1877) QB 237 at 246*
11. *Slim vs Daily Telegraph [1968] 2 QB 157*
12. *Horrocks vs Lowe [1975] AC 135*
13. *Abraham Lodewikus Viljoen vs Mwamba Musambo and Stanbic Bank Zambia Limited Appeal No. 89/2020*
14. *Robert vs Bass (200) HCA 57 212 C.L.R. 1*
15. *Kakungu Musiwa vs Moses Chanda (1985) Z.R 244 (H.C)*

Legislation referred to:

The Supreme Court Rules of England and Wales (1999) volume 1

Other works referred to:

Winfield and Jolowicz on Torts Winfield and Jolowicz on Tort, 13th edition, Sweet and Maxwell, London, 1961

Salmond on the law of Tort, 12th edition, Sweet & Maxwell, London 1951

Halsbury Laws of England, 24th Edition

1.0 Introduction

By a writ of summons and statement of claim taken out on 12th April, 2021 the plaintiff sought, the following reliefs;

- (i) An order for damages for libel;
- (ii) An order for retraction of the defamatory letter dated 2nd September, 2020;
- (iii) An order for an apology whose content and publication is to be approved by the plaintiff;
- (iv) Interest on item (i) above;
- (v) Costs; and
- (vi) Any other relief the court may deem fit.

2.0 Statement of claim

In his statement of claim, the plaintiff avers that on or about 2nd September, 2020, the 1st and 2nd defendants falsely and maliciously authored, published and circulated a letter to senior warden Mumbwa, Mr Jarton Shawa and copied the same to area warden Ngoma, Mr Kasempa Elliot, area warden Chunga, Ms Mirriam Namushi and the Itumbi Palace, His Royal Highness (HRH) Chief Kaingu, concerning the plaintiff. The said letter complained of contained false and malicious statements deliberately calculated, designed and fashioned to bring the reputation of the plaintiff into hatred, ridicule, disrepute and contempt in the minds of right-thinking members of society. Particulars of the letter complained of are as follows:

"i. It has been brought to my attention that survey beacons have been placed in the Mabilia hot springs Area as well as other areas.

ii. It is my understanding these have been surveyed and placed by Headman Momba and Stebby Kaingu with the intention of selling land in the hunting area

iii. This area does not fall into Headman Mombas' however he is known to sell land in the GMA which does not fall into his jurisdiction.

iv. Please can you URGENTLY.....

v. As it is Nsonga has already lost 65% of the hunting area in the Namwala GMA due to encroachment in the conservation area of the Namwala GMA.

vi. Attached please find photographic evidence."

The above words contained in the said letter complained of referred to and were understood to refer to the plaintiff and in their ordinary meaning meant and were understood to mean that the plaintiff is an illegal dealer in land.

The particulars pursuant to *Order 82 Rule 3* of the *Supreme Court Rules* are:

- a. The plaintiff illegally surveyed and placed beacons in the Mabilia Hot Springs Area and other areas in the Game Management Area when in fact not true;
- b. The attached photographs purporting to evidence placement of surveyed beacons by the plaintiff in Mabilia Hot Springs when in fact not true.
- c. The plaintiff illegally surveyed and placed beacons in areas mentioned in (a) above with the intention to selling land in the hunting area when in fact not true.
- d. The plaintiff is known to sell land in the Game Management Area.
- e. The words complained of imply in their ordinary meaning that the plaintiff is engaged in illegal land transactions when in fact not.

- f. Nsonga Game Management and Lodges Limited has already lost sixty five per cent (65%) of the hunting area at the instance of the plaintiff when in fact not true.

By reason of the foregoing, the plaintiff has suffered damage, loss and or injury to his reputation.

Particulars of the damage, loss and or injuries are as follows:

- i. The plaintiff has suffered loss of confidence and trust in his leadership role from the people of Maunga Village in particular, and the rest of Chief Kaingu's chiefdom.
- ii. The plaintiff's reputation has suffered exposure to hatred, ridicule and contempt in the eyes of right thinking members of the people of Maunga Village and the rest of Chief Kaingu's chiefdom.
- iii. The plaintiff has suffered loss of chance of being appointed as chief of the Ila people due to the dent, with irreparable damage to his reputation.
- iv. The plaintiff is now seen by the people of Maunga and Chief Kaingu's chiefdom with a sense of dishonesty on his part.

It is for these reasons that the plaintiff made the aforementioned claims.

3.0 The plaintiff's witness statement

In his witness statement, filed on the 27th July, 2021, the plaintiff averred that in the month of September, 2020 he received a phone call from his uncle Rams Kaingu who is also the current Headman Moomba. His uncle informed him that he had received a letter from their uncle Chief Kaingu stating that the plaintiff and Headman Moomba had placed beacons in Mabilia hot springs and other places with the intention of selling the land and that they were known for selling land. The said letter stated that they have sold over sixty five per cent (65%) of the land in the area.

Upon hearing this, he felt bad that his reputation was being exposed to ridicule and contempt in that people will look at him with a sense of hatred because he was selling traditional land when in fact not. He immediately advised his uncle, Headman Moomba to forward the said letter to him which he did. When he received the letter, he read through and saw that it was written by Nsonga Game Management and Lodges and Vaughan Humphrey. He tried to engage Mr Vaughan Humphrey to compensate him, apologise and retract the letter but to no avail.

At this point, he decided to defend his reputation by seeking compensation for defamation and instructed his lawyers to help him, as he has suffered damage to his reputation. He has maintained his reputation as an honest man who is reliable, transparent and does not involve himself in illegal activities. He is a member of the royal family of Chief Kaingu with the potential of being appointed as Chief Kaingu in the future. The likelihood of being appointed Chief Kaingu is diluted by serious allegations that he is involved in the illegal selling of land as the people in the chiefdom will look at him with a sense of ridicule, contempt, untrustworthiness and not fit to be appointed as Chief Kaingu or indeed as a headman or any position in the administration of their chiefdom.

Currently, he serves in the affairs of the chiefdom as the secretary of the Ikubi-lya-Chishi ceremony, where he performs secretarial duties and lobbies for resources from various institutions to support the activities of the ceremony. As a farmer, he owns a farm in Itezhi-tezhi and he interacts with his fellow farmers in the area and all the subjects of their chiefdom. These fellow farmers and all the subjects of their chiefdom will look at him with a sense of ridicule, disrepute and hatred because of the false allegations that he is involved in the illegal selling of their land.

The allegations of being involved in illegal selling of land are of a serious nature because in their chiefdom, selling land is a big issue as it is the prime asset both for the individual subjects of the chiefdom as well as the

community at large. Without land, there will be no chiefdom. They regard land as the most important asset and as such Chief Kaingu will look at him with a sense of disrepute, contempt, ridicule and hatred because of the false but serious allegations of his being involved in illegal land transactions made by the defendants.

He has tried to engage the defendants to offer an apology, retract the defamatory statement and compensate him for defamation so that he may have his dented reputation cleaned up and restored but his efforts have proved futile as the defendants have not been cooperative. Hence he has taken out this costly court action so that he may defend his name and integrity against the defendants' serious allegations which also border on criminality. He seeks to be granted the reliefs as endorsed in the statement of claim.

3.1 The second witness statement

The second witness statement filed by the plaintiff on the 4th October, 2021 is made out by Rams Kaingu, Headman Moomba who avers as follows:

On 2nd September, 2020 at about 17:00 hours, while he was at the palace, he witnessed Obert Shankumbu deliver a letter to Chief Kaingu. Upon the chief reading the letter, he passed it on to him to read through as well. The chief also asked Obert Shankumbu about the contents of the letter. He read the letter after which he told the chief that, since the letter stated that he sold the land, he asked to make a copy of the letter. The letter mentioned that he and Mr. Stebby Kaingu had placed beacons in Mabilia hot springs and other places with the intention of selling the land and they were known for selling land. The said letter stated further that they have sold over sixty five (65%) of the land in the area. The foregoing contents were disturbing and injurious on their reputations.

As such he called Mr. Stebby Kaingu to inform him of the contents of the letter after which he sent a copy of the letter to him. The contents of the letter exposed them to hatred by the people of Maunga village as they would see them as people involved in illegal land transactions and that

they were not trustworthy. Land in their chiefdom is a great asset which is administered by the chief on behalf of his subjects. No one has the authority to sell any part of the land except under the chiefs' authority and consent. This is because land is the greatest asset in their chiefdom as such, they guard it with serious care and protectiveness.

They had a meeting with Mr. Stebby Kaingu in Lusaka as they both felt injured by the contents of the letter to the effect that their names have been exposed to disrepute, their images were tarnished before right-thinking members of the village. Their names were placed into ridicule because people who heard the same will think of them as people involved in illegal selling of land. They decided to defend their names against the defamatory statements which are by no means true but false and calculated to tarnish their names against their people in their chiefdom. Despite intentionally exposing their names to ridicule, contempt and disrepute the defendants never bothered to apologise as they earlier demanded, in that they never received any letter of apology. In any case the defendants intended to damage their names in the eyes of right thinking members of the community because they never approached them to hear them on the information they had received.

He has not brought an action for defamation against the defendants because he went to the chief to ask for the chiefs' indulgence and help to resolve the matter. The chief invited him to discuss the issue and he agreed to resolve it out of court whereby the defendants agreed to compensate him with a sum of K140,000.00 for exposing his reputation to ridicule, contempt and disrepute which amount the defendants are paying in instalments as agreed. After they reached the said consensus he forgave them and moved on.

4.0 The Defence

The defendants filed a defence on the 29th April, 2021 wherein they aver that: the publication and circulation of the letters was devoid of malice. The statements in the said letter were not intended as alleged as the defendants

were only communicating information received from monitor scouts of beacons being placed at Mabilia hot springs area as well as other areas where the plaintiffs' involvement was alleged.

The defendants are concession lease holders for the conservation (hunting) portion of the Namwala Game Management Area, GMA, and as such are mandated and rightfully required to inform the Department of National Parks and Wildlife, DNPW, and the area Chief Kaingu of any reports or allegations of wrongdoing within the conservation area. Upon establishing the veracity of the reports received by the defendants from the monitor scouts, an apology and retraction was rendered within two (2) days of the fact. The intention of the letter was to bring to light an issue requiring the attention and investigation of the relevant stakeholders of which the subject letter was circulated to. The defendants believe that the plaintiff has not suffered any damage, loss and or injury to his reputation owing to a report containing allegations of wrongdoing.

4.1 The defendants first witness statement

The defendants first witness statement filed on the 25th February, 2022 was by Obert Shankumbwe who avers as follows:

He is the Head Tracker for Nsonga Game Management and Lodges a company incorporated in Zambia and which has a concession agreement signed in 2018.

On the 2nd September, 2020, he advised, Mr. Vaughan Humphrey that survey beacons had been found in the Mabilia area which is part of the designated concession area. He further advised Mr. Humphrey that the said beacons and pegs were allegedly mounted on behalf of Mr. Stebby Kaingu and Headman Moomba. As part of his duties, he is to report any unusual activities in the concession area.

4.2 The defendants second witness statement

The defendants second witness statement also filed on the 25th February, 2022 was by Vaughan Humphrey, the 2nd defendant who avers as follows:

He is the Managing Director and a shareholder of Nsonga Game Management and Lodges, a company incorporated in Zambia and which has a concession agreement signed in 2018.

On the 2nd September, 2020 he was advised by their head tracker, Mr. Obert Shankumbwe that beacons had been surveyed and pegs placed inside the designated concession area. He was further advised that the said beacons and pegs were allegedly mounted on behalf of Mr. Stebby Kaingu and Headman Moomba.

As a concession leasehold holder, they are mandated and rightfully required to inform the Department of National Parks and Wildlife and HRH Chief Kaingu of any report, or allegations, of wrong doings within the conservatory area. Premised on the foregoing, on the material date, he wrote a letter informing HRH Chief Kaingu and the Department of National Parks and Wildlife about the information he had just received. The said letters were written to the said authorities in confidence and in good faith.

On 4th September, 2020 he was advised by HRH Chief Kaingu that the beacons and pegs in question were in fact mounted by Komaco, an organisation involved in farming. HRH Chief Kaingu further advised him that the Village Action Group and Community Resource Board should have informed him prior to placing the beacons within the conservatory area.

Having been guided as such, he immediately wrote letters to HRH Chief Kaingu and the Department of National Parks and Wildlife respectively in which he rendered his apologies for the misunderstanding. He was therefore surprised to receive summons for defamation when he had in fact retracted the purported defamatory statement and has rendered his apology.

As alluded to above, his communication to His Royal Highness as well as to the Department of National Parks and Wildlife was not intended to injure the reputation of the plaintiff but to bring to the attention of the stakeholders an issue requiring their attention and investigation. It is therefore his considered opinion that the plaintiff did not suffer any damage, loss and injury to his reputation.

5.0 The plaintiff's reply to defence

The plaintiff filed a reply on the 26th May, 2021 in response to the defence, wherein, the plaintiff joined issue with the defendant and asserted as follows:

1. The 1st and 2nd defendants negligently and maliciously authored, published and circulated the letter complained of without care or taking steps to establish the veracity or truth of the contents of the said letter.
2. The defendants are not rightfully required to author, publish and circulate false statements against the plaintiff or to bring into disrepute and/or contempt the reputation of the plaintiff.
3. The plaintiffs demand for an apology and retraction of the defamatory letter has not been complied with by the defendants contrary to the contents of the defendant's defence.

6.0 The trial

At the trial the plaintiff called two witnesses whilst the defendants only called one witness.

6.1 The plaintiff's evidence

6.1.1 PW1's testimony

PW1 was the plaintiff himself who testified as follows:

The defendants are Vaughen Humphrey who is the Director of Nsonga Game Management and Lodges Limited and Nsonga Game Management and Lodges Limited. They operate from Itezhi-tezhi at Nsonga Safari Lodge.

This action was commenced because the defendants said lies against him in a letter. According to the letter it states that they are two, but in this case

before court he is just alone. The lies relate to the placing of beacons at a hot spring called Mabilia. However, the responsibility of placing beacons is done by the Ministry of Lands through its surveyors.

The letter states that 65% of the land of Chief Kaingu, in the Game Management Area has been sold by Lewis Kaingu and Stebby Kaingu. There is no truthfulness in this letter, as what the 2nd defendant stated is a lie and that is why the 2nd defendant wrote a letter seeking for forgiveness. The letter was addressed to four people; the Mumbwa warden who is in charge of the Zambia Wildlife Association (ZAWA); the one in charge of the area called Ngoma; Mirriam who is in charge of Chunga warden and the chief who is his uncle, Chief Kaingu.

The letter was written by Vaughen Humphery on the 2nd September, 2020 which appears at page 4 of the plaintiffs' bundle of documents and the names of people appearing there are; Jarton Shawa, Kasempa Elliot, Mirriam Namushi and Chief Kaingu. The letter is signed by Vaughen Humphrey the Managing Director of the Nsonga Game Management and Lodges. The letter mentions Headman Moomba and Stebby Kaingu. Although they are mentioned in the letter, he never went to this point at Mabilia hot springs. The letter states that Stebby Kaingu placed the beacons with the intention of selling the land.

He became aware of the letter when his uncle, Headman Moomba called him on the phone over it and he asked his uncle to send it to him so that he could see it. When he saw the letter, he saw his names. As he is from Chief Kaingu's area, he felt bad because his name was defamed. According to all the headmen in their area, they heard that he is selling the land together with Headman Moomba, which is not true.

He was born in Itezhi-tezhi and currently he is the vice secretary in an organisation called Ikubi-lya-chishi. He is also the son of Maunga where the chief comes from. As a result of the letter, in the sight of his family members and all the people in Maunga or Itumbi his name has been defamed because of the allegations, which are not true.

The reason why he is raising the issue of his being part of the royal family before court is because with the chief who is currently on the throne, they sat down to choose someone who is trusted who can lead the people and not someone who is crooked. As such this is what is so painful as the chances for him to be chosen to be chief have been affected. They have about 90 headmen who decide who can be chief and if they discover that there is a complaint against him, such as the one made by the defendants herein, then he cannot be selected as a chief.

When he received the letter, he engaged counsel who wrote a letter to Nsonga concerning the letter Humphrey had written, but the 2nd defendant's lawyers never responded in time. The defendants later admitted that they had made a mistake regarding Headman Moomba and himself in their letter that appears at page 7 of the plaintiff's bundle of documents. In that letter, the 2nd defendant states that Komaco placed the beacons on behalf of the Village Action Group.

Despite the letter from the 2nd defendant which highlighted the defendants' mistake, PW1 instructed his lawyers to sue as his name had already been defamed. The defendants have not done anything to address his complaint as they have not even issued him any letter or proposed to meet him to apologise. Even though in their defence they state that they rendered an apology and retracted their statement, they have not apologised. The letter in the defendant's bundle of documents at pages 24 to 26 is not an apology to him. He still stands on his demand and wants the defendants to pay him for defaming his name.

6.1.2 Cross examination of PW1

In cross examination PW1 replied as follows:

In his statement, he averred that his uncle informed him that he had received a letter which states that he was known for selling land and the said letter at page 4 of the plaintiffs bundle of documents states in paragraph 2 that beacons were placed by Headman Moomba and Stebby Kaingu with the

intention of selling land in the hunting area. Paragraph 6 of the said letter refers to Headman Moomba and not Stebby Kaingu.

In his statement he avers that the said letter at page 4 of the plaintiff's bundle of documents states that they have sold 65% of the land in the area. The said paragraph reads that:

"As it is Nsonga has already lost 65% of the hunting area in the Namwala GMA due to encroachment in the conservation area of the Namwala GMA."

According to his understanding the said sentence means that they sold the 65%. Stebby and Rams are not mentioned in the said sentence and neither is the selling of land.

He is not aware that the defendants have a Concession Agreement with the Department of National Parks which gives them the responsibility to report any suspicious things happening in the Game Management Area (GMA) as is provided at page 7 of the defendants' bundle of documents. He agrees that the letter of the 2nd September, 2020 written by the defendants was written in accordance with the provision in the Concession Agreement of recording incidences. He disputes that when the defendants wrote the said letter, they had no ill malice but were just doing what the agreement requires. There is no malice in paragraph one of the said letter, however there is malice as the letter does not end at paragraph one but it continues.

The letter was addressed to four people being senior warden Mumbwa-, Jason Shawa, warden Ngoma - Elliot Kasempa, warden Chunga- Mirriam Namushi and Chief Kaingu. He agrees that the first three are officers of the Department of Parks and Wildlife who were written to in their capacity as officers of National Parks which letter was written in line with the agreement under clause (t). Apart from these four people, no other persons were communicated to by this letter.

On page 7 of the plaintiffs bundle of documents, there is an admission letter by the defendants dated 4th September, 2020 which was written two days after the first letter. The said letter was written to the same four people. There is

no malice in paragraphs 1 and 2 of the said letter. He does not agree that the 2nd defendant acted as he did based on the reports he received. He agrees that in that letter the 2nd defendant apologised after two days although he does not agree that the 2nd defendant retracted the initial letter. The initial letter came to his attention on the 2nd September, 2020 when the said letter was taken to the palace. He did receive a call from Rams Kaingu regarding the letter of 2nd September, 2020, at which time he was in Lusaka. The said letter he is complaining of was written to the people of Maunga village and hence his claim under the particulars of damage being for loss and injury suffered as well as loss of confidence and trust in his leadership role by the people of Maunga village. In paragraph 4 of the letter at page 4 of the plaintiff's bundle of documents is where the people of Maunga are referred to.

In his third claim, he indicates that he has suffered loss of being appointed the chief of the Ila people due to the dent on his reputation and even though Chief Kaingu who represents the Maunga people and the defendants apologised to Chief Kaingu, he still has lost the chance of becoming chief. The chance is coming after the death of a king. He is not a prophet and cannot talk of future events. He does not agree that he has failed to show this court how he has been defamed and is only speaking of future events. He does not agree that he has failed to demonstrate how his reputation has been dented. He does agree that the letter of apology was brought to his attention and that the 2nd defendant asked for forgiveness.

6.1.3 Re-examination of PW1

In re-examination, PW1 clarified as follows: There is malice in paragraphs 2 to 3 of the letter at page 4 of the plaintiff's bundle of documents. The apology in the letter at page 7 of the plaintiff's bundle of documents is to the three persons addressed in the letter, together with the chief. In relation to the letter of complaint and apology being written to the people of Maunga, reference is being made to the chief who is at Itumbi Palace in Maunga as that is where the chief comes from. For example in Zambia, when a letter is written to the president, it is written to the people of Zambia. So when this letter was written to the chief it means that it was addressed to the people.

6.2.1 PW2's testimony

PW2, Rams Kaingu, also known as Headman Moomba of Maunga Village testified as follows:

It was on the 2nd September, 2020 around 17:00 hours when he saw Obert Shankumbu a worker who works for Nsonga Safari Lodge who came with a letter in his hands. After that he handed the letter over to the chief and the chief read the letter. After reading the letter the chief complained and handed it over to him to read. The letter stated that Headman Moomba and Stebby Kaingu had sold land. The chief complained after hearing that the headmen were selling the land. Afterwards he got the letter from the chief so he could make inquiries. He called and informed the plaintiff of the letter and its contents. He further informed the plaintiff that the chief was angered by the contents of the letter. The letter in question was written by Mr Humphrey Vaughan of Nsonga Safaris and was addressed to four people as appears at page 4 of the plaintiff's bundle of documents. Reference to him and Stebby selling the land is found at line 12 from the bottom of the letter.

He engaged lawyers with the intention of commencing an action against the defendants. The contents of the letter of 2nd September, 2020 embarrassed him and he could die as people in this area kill each other over land. However, he did not commence an action as he was stopped by the chief, who told him that he was the headman for the people and he should lead by example in forgiving people so that in future when he tells someone to forgive, they will listen since he had also forgiven. The matter was settled between him and the defendants, and the defendants agreed to reimburse him the money he had spent on lawyers. PW2 could not recall the amount but that it was either K80,000.00 or K40,000.00.

6.2.2 Cross examination of PW2

In cross examination PW2 replied as follows: It is true that he had forgotten whether he was paid K40,000.00 or K80,000.00. In paragraph 2.4 of his witness statement, he indicates that the defendants agreed to pay him K140,000.00 and that is the money he was paid. He told his lawyers that this

is roughly what he was paid. It can be true that he was paid K40,000.00 and that is why he had said maybe.

Stebby Kaingu is his uncle. He did read the letter authored by the 2nd defendant as is indicated at paragraph 2.1 of his witness statement. According to the letter at page 21 of the defendant's bundle of documents, the letter towards the end mentions that he, Headman Moomba, is known for selling land and not Stebby Kaingu, although the second sentence of the said letter mentions Stebby Kaingu. However the other sentence only refers to him and maybe he missed it as he did not understand the English.

The part of the letter that refers to him and Stebby selling 65% of the land is where it states that:

"As it is Nsonga has already lost 65% of the hunting area in the Namwala GMA..."

He did tell his lawyers about the statement, though they never explained to him about what the word encroachment meant, as he never consulted them. Encroachment and selling of land are different. He has not lied to both the court and his lawyers about what was in the letter, because according to what the letter states, the intention is selling. According to the 2nd defendant's explanation in the letter, he said they should go and remove the beacons.

Earlier in his cross examination, he agreed when he was told that it was K40,000.00 that he received as he refunded the money that he spent on the lawyers which was K40,000.00. It is difficult to explain why there is K140,000.00 appearing in his witness statement, one cannot go to lawyers without money. He recalls that in his agreement with the defendants, he agreed to be paid K40,000.00 which was to be disbursed as follows; K20,000.00 to his lawyers and K20,000.00 for his personal use and he signed the agreement on the 24th May, 2021. However, these are not the only lawyers that he started with as there are other lawyers. He did give the lawyers instructions based on the contents of the letter complained of as is found at paragraphs 5(iii) and 5(vi) of the plaintiff's statement of claim.

6.1.3 Re-examination of PW2

In re-examination PW2 clarified as follows: The amount of K140,000.00 he referred to in his witness statement was a refund he spent on two sets of lawyers, although according to what he paid, it can't amount to that. He cannot explain about the 65% encroachment upon the land in Namwala GMA and he does not know the people that have encroached upon the same.

That was the case for the plaintiff.

7.0 The defendant's evidence

7.1 DW's testimony

DW was Vaughan Farai Humphrey, the 2nd defendant in the matter who testified as follows: He is the owner and managing director of Nsonga Game Management and Lodges as well as other ventures in Zambia. Nsonga GMA is a hunting safari organisation catering for international hunters. Everything in the GMA revolves around the hunting and the lodge. He did file a witness statement into court and would want the court to throw out the plaintiff's claim and reimburse him for his costs.

Nsonga GMA has a 10 year concession agreement which is running at the moment. The current agreement was from 2018 to 2023 a copy of which is on the court's record. It is actually a quad agreement, between the Department of National Parks and Wildlife Zambia, Nsonga GMA Company, 3 chiefdoms in the area, and the 3 community resource boards. There is a signed agreement between all of these parties which appears at page 1 of the defendant's bundle of documents.

By this agreement he is mandated to report any unusual activity, in the conservation area including poaching, deforestation and any other unusual activities. As clause 6 (2) (t)- reads:

"6.2 Without prejudice to the generality of the foregoing, the Company covenants with the Department as follows;

(t) To report any poaching incidents or suspected poachers or other violations of wildlife laws or regulations to the Department Police

Officer, Zambia Police Officer or other authorised persons without delay."

With regard to the matter at hand, he went to the location where the beacons had been placed took photographs of them and wrote a letter to the Department of National Parks and Wildlife in Mumbwa, that is the regional head office and the area wardens at Ngoma and Chunga. He attached the photographs of the beacons. He learnt about the placing of beacons by the game scouts in their area who reported the same to him. After he received the report, he visited the location, took the photographs, and wrote a letter which he copied to Chief Kaingu.

The said letter does not indicate that he wrote that the plaintiff sold 65% of the land in the GMA. In relation to the 65% that he mentioned he was trying to communicate to the authorities that they are losing a lot of ground primarily due to encroachment. He did not refer to anyone in that letter, as having encroached on the land. However, encroachment in the Namwala and Mumbwa areas is well known by the Zambian Government as a whole. His area as indicated in the contract exhibited in the defendant's bundle is what he pays for. Currently he cannot use 65% of the said land due to encroachment, but the letter he wrote does not implicate anyone as he does not know who the encroachers are, or where they came from.

In the said letter he referred to Rams, PW2, who runs the palace and is known for selling land as per what has been told to him. In this case he has been sued by Stebby Kaingu. He never purported that the plaintiff sold land and it is not true that in the letter he referred to the plaintiff as being known to sell land in the GMA.

After he authored the letter, two days later the Village Action Group advised Nsonga GMA that the beacons were put in place by a company known as Komaco which does Agri-development and the beacons were put into monitor the bee hives and forest area. Immediately he wrote a letter to all the previous recipients explaining as to who put the beacons in, and apologised for any inconvenience. The letter of apology is on page 29 of the

bundle of documents and it was directed to the same recipients that were written to in his earlier letter.

Although the plaintiff has claimed damages for libel, he does not see any libel in the letters as he acted on his responsibilities in terms of the contract that he has with Government and the community. The plaintiff is also asking that he retracts the letter, and the said letter was retracted two days later with the apology letter that he wrote.

He wants the court to dismiss this case against the defendants and award the costs he has incurred to defend it.

7.2 Cross examination of DW

In cross examination DW replied as follows: He is aware that the plaintiff, is a trustee to Headman Moomba, a trustee to Chief Kaingu and a vice secretary to the Ikubi-lya-chishi ceremony.

He confirms that on the 2nd September, 2020 he wrote a letter in which he spoke of the plaintiff as the said letter is on record. He confirms that the said letter was written on behalf of the 1st defendant as well. The letter was addressed to the Department of National Parks and Wildlife, Chief Kaingu, the wardens in charge in Mumbwa, Chunga and Ngoma. The said letter was addressed to four people

It is not correct that in the letter, he complained that the plaintiff had placed beacons in the hunting area. As far as he recalls, the scouts reported about the beacons and he did not state that Stebby Kaingu had placed the said beacons. According to what he read in the letter the said letter stated that Headman Moomba and the plaintiff placed the beacons with the intention of selling land in the hunting area. Selling land in the hunting area is not permitted. To this letter were attached photographs of the beacons and of the survey equipment. The survey equipment was used for surveying although he did not know who the surveyor was.

He agrees that the serious allegation of the beacons having been placed by the plaintiff was false and the content of his letter to that extent was false.

The beacons were not placed by the plaintiff and he is not aware that the plaintiff had an intention to sell the land. In the second letter that he wrote on the 4th September, he was apologising. The said letter was not approved by the plaintiff, neither was it copied to the plaintiff nor was the plaintiff mentioned in it. There were two people that he accused in his letter of the 2nd September, which included the headman. He confirms that he has since compensated the headman for defaming him and that this defamation arose from the contents of his letter of the 2nd September, 2020.

He confirms that on the 23rd February, 2022, he filed a witness statement which contains the facts that he deems to be true. He is placing reliance on the said witness statement which he filed in this court. He confirms that it is not in dispute that he defamed the plaintiff in his letter of 2nd September, 2020 to which he purportedly apologized. He got the information in the defamatory letter from the game scouts known as Obert and Dennis. These two scouts came to him and said they had found beacons at Mabilia and they believed that they were placed by Headman Moomba and Stebby Kaingu. He was also advised by them that the land was surveyed, and the beacons and pegs were placed inside the designated concession area. Obert Shankumbu, informed him that the beacons were placed on behalf of Headman Moomba and Stebby Kaingu by the surveyor.

After he received this information from the game scouts, he proceeded to write the letter. He does not agree that the right course of action for him would have been to consult the chief, as he is mandated by his arrangement with Wildlife and Parks to immediately report any such activities. On the 4th September, 2020, he was advised by Chief Kaingu that the beacons and pegs in question were in fact mounted by Komaco an organization involved in farming. The Chief further advised him that the Village Action Group and Community Resource Board should have informed him prior to placing the beacons within the conservatory area. He agrees with what the chief advised him although this advice was written to him on the 4th September, 2020 and he wrote the first letter on the 2nd September, 2020. He did not apologise to Stebby Kaingu in his letter of the 4th September, 2020 instead in that letter he was

apologising because he had raised an issue which was in the hands of the Chief and the Department of National Parks and Wildlife. Further, that the issue he had raised was an incorrect assumption on his part although it had a reasonable basis as it had been reported to him by the scouts.

He did take the photographs of the same area where it is alleged that the plaintiff had placed beacons and it would be wrong to state that he was lying about this. There are two locations where he took photographs as is indicated in the letter of the 4th September, 2020 at page 24 of the defendants' bundle of documents. Although he wrote the letter, the reference to the plaintiff in the said letter was not his idea, further he did not attach photographs from another location in bad faith. He is mandated to do what he did in terms of the Agreement so it was his idea. When writing this letter, he wrote what he thought was the correct position to the stakeholders. He is mandated to investigate any activity in the Game Management Area. The placement of the beacons was in a concession area. He did not say that the beacons were placed by Stebby Kaingu and Headman Moomba.

7.3 Re-examination of DW

In re-examination, DW clarified as follows: He did mention two people in his letter being Stebby Kaingu and Headman Moomba and he has since compensated Headman Moomba but not Stebby Kaingu. He compensated Headman Moomba because the Chief stated that they are one family and that they should settle the matter, which he did with Headman Moomba.

He is the one that wrote the letter, but he did not defame the plaintiff and there is no defamation in the letter. When he wrote that "it was his understanding that these have been surveyed and placed by Headman Moomba and Stebby Kaingu," he was acting on a report that came in from his scouts. In the advice from the Chief in response to his letter, the Chief was not asking him to do anything, rather the Chief was saying that the Village Action Group should have informed him about the placing of beacons which they did not do.

In relation to the photographs that he took, the first two photographs are of the beacon that was put up and a GPS to show the location. The next two photographs are what he refers to as the survey equipment.

That was the evidence of the defence.

8.0 Submissions

8.1 The Plaintiff's Submissions

The plaintiff filed submissions on 3rd November, 2022 wherein counsel outlined the legal issues for this court's determination as being:

- (i) Whether the defendants by authorizing and publishing the letter of 2nd September, 2020 defamed the plaintiff;
- (ii) Whether the letter of 4th September, 2020 amounted to an apology to the plaintiff and has any effect on the plaintiff's case.

As regards the first outlined issue, counsel argued that the letter of 2nd September, 2020 contained defamatory statements pointing to the plaintiff being involved in illegal dealings thereby exposing the plaintiff's reputation to ridicule, contempt and disrepute. That the defendants thus committed the tort of defamation, specifically libel, against the plaintiff. Counsel referred this court to **Winfield and Jolowicz on Tort, 13th edition** wherein the authors, at page 294, define defamation in the following manner:

"Defamation is the publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of right-thinking members of society generally or tends to make them shun or avoid them."

Counsel further referred to **Salmond on the law of Tort, 12th edition at page 322** wherein the authors define defamation as;

"A false statement or suggestion of fact to the prejudice of a man's reputation."

That the Court of Appeal in the case of **Muvi TV Limited vs Charity Katanga**¹ guided that libel refers to a defamatory statement made in permanent form

and is actionable per se. Counsel submitted that the court further held, at page J27, that the claimant must prove the following:

- 1) The statement must be defamatory;
- 2) The statement must refer to the claimant, viz identify him/her;
- 3) The statement must be published, that is, communicated to at least one person other than the claimant.

Counsel argued that from the court's holding, it is clear that in cases of libel, there is an irrebuttable presumption that damage has been caused to the plaintiff. That in the case of **Zambia Publishing Company Limited vs Eliya Mwanza**² the court held that injury to reputation and natural hurt to feelings need not be pleaded or proved. Counsel relied on the cases of **Sim vs Stretch**³ and **Bevin Ndovi vs Post Newspapers Limited and Another**⁴ for the submission that a defamatory statement is one that lowers the reputation of a person in the estimation of right-thinking members of the society by exposing him to hatred, contempt or ridicule. Counsel submitted that the contents of the letter of 2nd September, 2020 are defamatory of the plaintiff in that they were and are understood to mean, in their ordinary sense, that the plaintiff is involved in illegal land transactions when in fact not. That the defendant's witness, DW, confirmed in cross examination that the allegations contained in the letter of 2nd September, 2020 complained of are false. Counsel referred to the case of **Benny Hamainza Wycliff Mwiinga vs Times Newspaper Limited**⁵ wherein the Supreme Court guided that:

"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."

Counsel submitted that the contents of the letter in question refer to the plaintiff and do impute a negative image on the plaintiff's reputation in that in their ordinary meaning, they are understood to mean the plaintiff is involved in illegal land dealings by illegally placing beacons and selling land in the hunting areas which the law forbids. That the letter is defamatory and

exposes the plaintiff's reputation to hatred, ridicule, disrepute and contempt. That based on the foregoing, the plaintiff is entitled to an award of damages as a way of vindicating his name as was guided in the case of **Simon Kapwepwe vs Zambia Publishing Company Limited**.⁶

As regards the issue of whether the letter of 4th September, 2020 amounted to an apology to the plaintiff, counsel argued that the said letter offered no apology to the plaintiff as the same was not addressed to the plaintiff nor did it make any reference to the plaintiff. That the purported letter of apology appearing at page 24 of the plaintiff's bundle of documents was addressed to Senior Warden Mr Jarton Shawa and copied to Area Warden Mr Kasempa Elliot, Area Warden Chunga Ms Mirriam Namushi and Itumbi Palace Chief Kaingu. That the defendants had not produced any proof of acknowledgment of service of the letter. The plaintiff demanded for a retraction of the defamatory words and an apology but to no avail. Counsel submitted that the alleged apology falls short of the requirement for it to be relied on. That the defence admitting in evidence that Headman Moomba, who was defamed together with the plaintiff in the same letter complained of was compensated for defamation, is in itself a demonstration of the defendant's defamatory conduct.

In conclusion, counsel submitted that the letter of 2nd September, 2020 contained defamatory statements pointing to the plaintiff, and that an apology if given is not a defence at law but a mitigating factor. Counsel argued that in this case, no apology was given. Counsel prayed that judgment be entered in favour of the plaintiff.

8.2 The Defendants' Submissions

The defendants filed submissions on 20th November, 2022 wherein counsel outlined the following issues as issues for determination by this court;

1. Whether or not the statement was published;
2. Whether or not the publication by the defendants was privileged and so whether or not the defence of qualified privilege is available to the defendants;

3. Whether or not the defendants' actions were actuated by malice; and
4. Whether or not the plaintiff is entitled to the remedies sought.

Counsel relied on the definition of defamation as defined by the authors of **Winfield & Jolowicz on Tort**, which definition I have reproduced under the plaintiff's submissions. Counsel referred to the **Sim vs Stretch** case for the submission that a defamatory statement tends to lower the estimation of right-thinking members of the society. Counsel submitted further that in *casu*, it must be shown that the defendants made a defamatory statement, which statement must be false in its entirety. Further that the statement published must refer to the plaintiff, and that the statement was published to another person other than the plaintiff. A statement will be regarded as having been published if it is made to a person other than the aggrieved plaintiff or his or her spouse. That publication only occurs once the addressee has no legitimate right to receive the information which is subject of the publication. Counsel referred to the case of **Huth vs Huth**⁷ wherein the court held that:

"The court was of the view that where a defamatory letter is sent by a defendant and the content of the letter is read by a third party, which the defendant did not foresee, he will not be liable for defamation."

From the foregoing case counsel argued that in *casu*, the defendants did not foresee that the letter would be shown to "PW2", because the letter was addressed to specific persons who were legitimately interested in the subject matter. To that end, counsel submitted that there was no publication of the statement on the part of the defendants.

Additionally that the plaintiff must also show that he suffered harm, monetary or otherwise, as a result of the defamatory statement.

As regards whether or not the publication was privileged, counsel submitted that defamation is the publication of a false statement without lawful justification. That it follows that lawful justification is a defence to defamation. That lawful justification includes common law defences such as absolute and

qualified privilege. That the defendants herein have raised the defence of qualified privilege which permits the publication of otherwise defamatory statements on the basis that the person who said the defamatory words had a duty to say them, and that the person who heard the defamatory words equally had a reciprocal duty to hear them. Counsel further relied on the case of **Chief Bright Nalubamba and Zambia Co-operative Federation Limited vs Muliyunda Wakunguma Mukumbuta**⁸ wherein the Supreme Court held that:

"Where there is a common interest between the Defendant and all the addressees of a circulated letter, without plea of malice, the defence of qualified privilege must succeed."

Counsel argued that in *casu* the defendants have established that the alleged defamatory statement was made to Senior Warden -Mumbwa, Mr Jarton Shawa, and copied to Chief Kaingu, the Area Warden -Nagoma, Mr Kasempa Elliot, and Area Warden Chunga -Ms Mirriam Namushi, all of whom had legitimate interest in the issue at hand. Based on the foregoing submission, counsel stated that the defence of qualified privilege must thus succeed. This is because the defence of qualified privilege seeks to protect defamatory material of public importance where the defendants have publisher responsibility, irrespective of the materials' truth or falsity. Counsel referred to the case of **Warard Harold Phiri vs The Programmes Manager Radio Maria Zambia-Chipata**⁹ wherein the court quoted a passage from the 4th edition of the Halsbury's Laws of England at page 54 paragraph 108 wherein the authors state that:

"On grounds of public policy, the law affords protection on certain occasions to a person acting in good faith and without any improper motive who makes a statement about another person which is in fact untrue and defamatory. Such occasions are called occasions of qualified privilege. It is not possible to set out all the occasions at Common Law, which will be held, to be privileged but, as a general rule, there must be a common and corresponding duty or interest

between the person who makes the communication and the person who receives it."

Counsel submitted that the 2nd defendant acted in good faith when he wrote the letter informing the relevant authorities of the information that had come in his possession. That there is no evidence led by the plaintiff to suggest that the defendant acted with malice. Counsel argued that the class of statements which come under the defence of qualified privilege at common law are:

- (a) statements made in the discharge of a public or private duty;
- (b) statements made on a subject matter in which the defendant has a legitimate interest;
- (c) statements made by way of complaint about those with public authority or responsibility;
- (d) reports of parliamentary proceedings; and
- (e) reports of judicial proceedings.

Counsel argued that the defendants had a legal, social and moral duty to report the suspected wrong doing in the conservatory area to the named authorities.

As regards the question of whether or not the publication was actuated by malice, counsel argued that qualified privilege operates to protect statements which are made without malice. Counsel relied on the case of **Clark vs Molyneux**¹⁰ for the submission and argued further that the defence of malice works to nullify the presumption of malice. Counsel referred to the **Chief Bright Nalubamba** case for the submission that where there is a common interest between the defendant and the addressee of a circulated letter, without plea of malice, the defence of qualified privilege must succeed. The defendants' goal was to preserve the conservatory area and not to harm the plaintiff.

As regards whether the plaintiff is entitled to the reliefs sought, counsel argued that a successful claimant in a defamation action is entitled to recover general compensatory damages. Punitive or exemplary damages are only

awarded in exceptional circumstances. That the defendants in this case have raised a defence which lawfully excuses them from liability and thus the plaintiff is not entitled to damages as prayed. In conclusion, counsel prayed that the plaintiff's claim for defamation be dismissed.

9.0 The Decision of the Court

I am indebted to counsel for the submissions and arguments which I have taken into consideration.

The undisputed facts:

1. The 2nd defendant wrote a letter on the 2nd September, 2020 which he sent to four people concerning allegations of placement of beacons in the conservation area of Mabia hot springs.
2. On the 4th September, 2020, the 2nd defendant wrote a letter which he sent to the same four people where he stated that his assumptions contained in the letter of 2nd September, 2020 were incorrect.

The facts in dispute are:

1. Whether the letter dated 2nd September, 2020 defamed the plaintiff for the defendants to be liable.
2. If the answer to (1) is yes, whether the defendant has a valid defence.

The term 'defamation' is defined by the learned authors of **Winifield and Jolowicz on Torts** on page 294 of their book as:

"...the publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of right-thinking members of society generally or tends to make them shun or avoid him."

The rationale for the law on defamation is the protection of persons, both natural and corporate, from untrue and damaging statements that have the potential of ruining such person's reputation. To succeed in a claim for defamation, the Supreme Court in the **Bevin Ndovi** case guided that the plaintiff must prove, on a balance of probabilities, that:

1. The statement is defamatory;
2. The statement refers to the claimant, viz identify him/her;
3. The statement was published, that is, communicated to at least one person other than the claimant.

The foregoing reasoning of the Supreme Court was also adopted by the Court of Appeal in a more recent case of **Muvi TV Limited vs Charity Katanga**. It follows that this court is first tasked with the onus of examining the evidence on record to determine whether the elements highlighted above have been met.

9.1 Whether the statement is defamatory

The plaintiff contends that the defendant on 2nd September, 2020, maliciously authored and circulated a letter containing defamatory statements about the plaintiff to Senior Warden Mumbwa- Mr Jarton Shawa and copied the same to Area Warden Ngoma- Mr Kasempa Elliot, Area Warden Chunga- Ms Mirriam Namushi and Itumbi Palace -HRH Chief Kaingu. The defendants have not disputed authoring the letter in question but dispute that the same contained defamatory statements against the plaintiff. What needs to be determined at this stage is whether the statement is defamatory. In the **Bevin Ndovi** case, the Supreme Court opined that a defamatory statement is one that exposes a person 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. To establish whether the words complained of are in fact defamatory, it is essential to know the very words on which the plaintiff has based his claim. The letter of 2nd September, 2020 is therefore reproduced, verbatim, hereunder:

*“Senior Warden Mumbwa - Mr Jarton Shawa
Cc Area Warden Ngoma - Mr Kasempa Elliot
Area Warden Chunga -Ms Miriam Namushi
Itumbi Palace - HRH Chief Kaingu*

2nd September, 2020

Re: Survey Beacons in Mabilia hot springs area.

Dear Senior Warden,

It has been brought to my attention that survey beacons have been placed in the Mabilia hot springs area as well as other areas.

It is my understanding these have been surveyed and placed by Headman Momba and Steby Kaingu with the intention of selling land in the hunting area. The area of the Mabilia hot springs is a highly sensitive area falling into the conservation area and has been protected extensively by HRH Chief Kaingu to the exclusion of any people and cattle. This area is one of the most critical areas as it provides water for game in particular our buffalo population.

In dry years like 2019 and 2020 game has very few areas to access water, Mabilia being one of the main areas. Any development in this area will have a major negative impact on the game hot springs area and the GMA as a whole. This area does not fall into Headman Momba's however he is known to sell land in the GMA which does not fall into his jurisdiction.

Please can you URGENTLY assist with the removal of these beacons and ensure that it is made very clear to the headman involved that granting of land in the Conservancy area is subject to the approval of HRH Chief Kaingu

DNPW

The incumbent Outfitter.

Both the DNPW Ecologist and Planner would agree any development in the Mabilia Area will be highly detrimental to the game and environment.

As it is Nsonga has already lost 65% of the hunting area in the Namwala GMA due to encroachment in the conservation area of the Namwala GMA.

Attached please find photographic evidence. I will appreciate your assistance in resolving this matter.

Signed

Vaughan Humphrey"

In analysing the statement above, I am required to apply the 'ordinary and natural meaning test' which requires me to objectively establish the readers' ordinary and natural interpretation of the defendants' statement. In **Slim vs Daily Telegraph**¹¹, Lord Diplock stated that:

"What does matter is what the adjudicator at the trial thinks is the one and only meaning that the readers as reasonable men should have collectively understood the words to bear. That is 'the natural and ordinary meaning' of words in an action for libel."

In *casu*, the words contained in the letter which the plaintiff understood in their ordinary and natural meaning mean that he is an illegal dealer in land are reproduced earlier in this judgment at page J3. I have carefully studied the defendants' statement, and I find that of the 6 statements highlighted by the plaintiff in his statement of claim under paragraph 5 and reproduced at page J3 of this judgment, the statement numbered (iii) refers exclusively to Headman Moomba as the person who is known to sell land in the GMA, while statement (v) highlights the percentage of the hunting area that has been lost due to encroachment. In my view, it is statements numbered (i) (ii) and (vi) whose ordinary and natural meaning must be deciphered. After carefully evaluating statements, I find that in their natural and ordinary meaning, statements numbered (i) and (ii) above it can be understood to mean that the plaintiff unlawfully placed beacons in the hunting area with intention of selling the same. A reasonable man looking at the photographic evidence attached to the letter will interpret the same as depicting the beacons placed in the GMA by Headman Moomba and the plaintiff. I am convinced that the defendants' statements numbered (i) (ii) and (vi) are capable of negatively reflecting on the plaintiff's reputation and may tend to lower him in the estimation of right-thinking members of society. On the foregoing, I find that the defendants' statements, being (i) (ii) and (vi) highlighted under paragraph 5 of the statement of claim and reproduced at page J3 of this judgment to be defamatory.

9.2 Whether the statement refers to the plaintiff

The statement complained of must refer to the claimant. In *casu*, the letter complained of refers to a Steby Kaingu. The defendants have not disputed that the Steby Kaingu referred to in their letter and the plaintiff are one and the same person albeit the difference in spelling of the name. I find therefore that the second element has been satisfied.

I now turn to consider whether the third element for proof of defamation has been satisfied.

9.3 Whether the statement was published

A defamatory statement is published when it is communicated to a third party. The plaintiff contends under paragraph 4 of his statement of claim that the defendants' letter was communicated to Senior Warden Mumbwa- Mr Jarton Shawa and the same was copied to Area Warden Ngoma- Mr Kasempa Elliot, Area Warden Chunga- Ms Mirriam Namushi and Itumbi Palace -HRH Chief Kaingu. This assertion has not been countered by the defence, in fact the defendants have under paragraph 2 of their defence admitted to publication and circulation of the letter in question. I am satisfied that the third element needed to prove defamation has equally been met.

8.4 Whether the defendant has a valid defence

The elements that constitute the tort of defamation having been established, the question that follows is whether the defendants have a valid defence to the defamation.

Under paragraph 2 of their defence, the defendants while admitting to the publication and circulation of the letter in question, state that their action was devoid of malice. The defendants state further under paragraph 4 of their defence that:

"The defendants are concession lease holders for the conservation (hunting) portion of the Namwala Game Area 'GMA' and as such are mandated and rightfully required to inform the Department of

National Parks and Wildlife 'DNPW' and the area Chief Kaingu of any reports or allegations of wrongdoings within the conservation area."

The defendants further contend under paragraph 6 of their defence that:

"The 1st and 2nd Defendants deny the contents of paragraph 6 of the statement of claim and will aver that the intention was to bring to light an issue requiring the attention and investigation of the relevant stakeholders of which the subject letter was circulated."

The defendants are essentially raising the defence of qualified privilege, which protects certain occasions which would otherwise be defamatory. The authors of the **24th edition** of the **Halsbury Laws of England, state at page 56, paragraph 100**, that:

"As occasion is privileged where the person who makes a communication has an interest or duty, legal or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest to duty to receive it."

The burden to prove that the occasion was privileged rests on the defendant, and once that is so proved, the burden shifts to the plaintiff to prove that in spite of the occasion being privileged, the defendant acted with malice. The question then is, have the defendants proved that the occasion was privileged? The defendants allege that they are concession lease holders for the conservation portion of the Namwala GMA who are under a mandate to inform the Department of National Parks and Wildlife and the area Chief Kaingu of any reports or allegations of wrongdoings within the conservation area. They allege further that the addressees of the letter in question are all interested stakeholders. I have carefully perused the hunting concession agreement, exhibited at page 1 of the defendants' bundle of documents, and executed between the Department of National Parks and Wildlife, Kaingu, Chilyabufu and Simbizhi Community Resources Boards of the one part and Nsonga Game Management and Lodges Limited of the other part and note that clause 6.2 (t) of the same provides as follows:

"Without prejudice to the generality of the foregoing, the Company covenants with the Department as follows:.....to report any poaching incidents or suspected poachers or other violations of the wildlife laws or regulations to the Department Police Officer, Zambia Police Officer or authorised persons without delay."

Premised on the above, I am persuaded that the defendants had a duty to report suspected violations of wildlife laws and regulations, and that the persons to whom this report was made had a corresponding interest to receive the information. As a matter of fact, the plaintiff, who was PW1 at trial, conceded in cross examination that senior warden Mumbwa-, Jason Shawa, warden Ngoma - Elliot Kasempa and warden Chunga- Mirriam Namushi are officers of the Department of Parks and Wildlife were written to in their capacities as officers of National Parks which letter was written in line with the agreement under clause (t). The fourth person was Chief Kaingu who also had a corresponding interest to receive the information. I am therefore persuaded that the occasion was a privileged one. It is trite however that the protection under the defence of qualified privilege is afforded on grounds of public policy or the general welfare of the society under circumstances where a person was acting in good faith and without malice. The authors of the 13th edition of **Winfield and Jolowicz on Tort** state at page 332 of their book that:

"Qualified privilege on the other hand, although it also protects the maker of the untrue defamatory statement does so only if the maker of the statement acted honestly and without malice. If the claimant can prove malice, the privilege is displaced and he may recover damages but it is for him to prove malice once the privilege has been made out, not for the defendant to disprove it. It is for the jury to decide whether malice has been proved but it is for the judge to rule whether or not the occasion was a privileged one."

There being no jury form of adjudication in our jurisdiction, it is for the judge to assess the evidence on record to decide whether or not the occasion was a privileged one, and whether or not the defendants acted maliciously. Having found that the occasion was privileged, it is now for the plaintiff to prove that

the defendants acted with malice in making and distributing the publication. The plaintiff is under *Order 82 rule 3 sub-rule 3* of the *Rules of the Supreme Court of England* obliged to give particulars of the facts from which the alleged malice can be inferred in his reply to the defence. I have carefully perused the pleadings on record and note that while the plaintiff herein has maintained that the defendants acted with malice in authoring and circulating the letter in question, the reply filed on 26th May, 2021 does not contain particulars of the alleged malice. That notwithstanding, I note that the plaintiff's statement of claim gives particulars, which the plaintiff has titled "*Particulars pursuant to Order 83 Rule 3 of the Supreme Court Rules.*" The said facts relied on by the plaintiff are reproduced at pages J3 to J4 of this judgment.

While *Order 82 rule 2 sub-rule 3* of the *Rules of the Supreme Court* requires a claimant to give particulars of the facts from which the alleged malice can be inferred in his or her reply to the defence, not giving the particulars will not prejudice the claimant where the same have been given in a statement of claim. I opine that in the statement of claim, the claimant is not obliged to give particulars of the facts from which the alleged malice can be inferred because at that stage of the matter, he does not know what defence will be made. Therefore, where the claimant does not give particulars of the facts from which the alleged malice may be inferred in his statement of claim, he is obliged to do so in his reply to the defence where a defence of qualified privilege has been made out. I am of the view that if the claimant gave his particulars in the statement of claim, not reproducing them in his reply should not prejudice him. Having highlighted the foregoing, I must now determine whether on the particulars of the facts pleaded by the plaintiff, malice may be inferred to defeat the defence of qualified privilege. In the case of **Horrocks vs Lowe**¹², Lord Diplock stated that:

"To destroy qualified privilege, the desire to injure must be the dominant motive for the defamatory publication."

In the case of **Abraham Lodewikus Viljoen vs Mwamba Musambo and Stanbic Bank Zambia Limited**¹³ the Court of Appeal approved the statement of the Court of Appeal of England in the case of **Robert vs Bass**¹⁴ that:

"An occasion, of qualified privilege must not be used for a purpose or motive foreign to the duty or interest that protects the making of the statement. A purpose or motive that is foreign to the occasion and activates the making of the statement is called express malice. The term "express malice" is used in contrast to presumed or implied malice that at common law arises on a false and defamatory statement. Proof of express malice destroys qualified privilege. Accordingly, for the purpose of that privilege, express malice ("malice") is any improper motive or purpose that induces the defendant to use the occasion of qualified privilege to defame the plaintiff In *Browne v Bunn* (1893) 6 R 67 at 72,) Lord Herschel LC said that "malice means making use of the occasion for some indirect purpose." Early in the history of the law of qualified privilege - which did not come into the common law until the end of the 18th Century - Lord Campbell CJ said that malice was "any indirect motive, other than a sense of duty" (*Dickson vs Earl*) similarly, in an -J23- action for slander of title, Parke B (*Brook vs Rawl* (1849) 19 LJ Ex at 115 said that "acting maliciously means acting from bad motive/9 'If the occasion is privileged, said Brett LJ(*Clark vs Molyneux* 1877) 3 QBD 237 at 247, 'it is so for some reason, and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason, In *Horrocks vs Lowel* the leading case on malice Lord Diplock said: "So the motive with which the defendant on a privileged occasion made a statement defamatory of the plaintiff becomes crucial. The protection might, however, be illusory if the onus lay on him to prove that he was actuated solely by a sense of the relevant duty or a desire to protect the relevant interest. So, he is entitled to be protected by the privilege unless some other dominant and improper motive on his part is proved. 'Express malice is the term of art descriptive of such a motive."

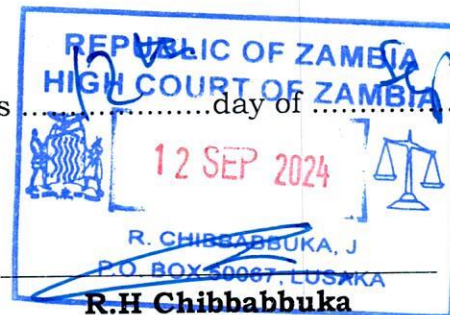
The question that follows from the reading of the foregoing is, how then can the plaintiff prove the malice. The court in the case of **Kakunga Musiwe vs Moses Chanda**¹⁵ held that:

“Evidence of actual malice can be found and this must be found in the language used in the communication itself and in the relevancy of it to the occasion upon which it is made. Indeed, that language may be the only evidence available to the plaintiff.”

I have carefully reviewed the language used in the letter in question, which I have reproduced earlier in this judgment, and find that the same is devoid of malice. The author of the letter was merely communicating suspected violations of the wildlife laws or regulations following the discovery of the beacons in the Namwala GMA. The discovery of the survey beacons, which are reference marks used to provide accurate land demarcations, was important information that needed to be reported to the relevant stakeholders especially in view of the author's knowledge of the heightened level of encroachment in the Namwala GMA. In any case, the plaintiff should take comfort in the fact that HRH Chief Kaingu ascertained that the beacons were not placed by him but by Komaco as per the defendants' letter of 4th September, 2020 which has been produced at page 24 of the defendants' bundle of documents. The defendants having not acted maliciously, the defence of qualified privilege succeeds.

Costs are awarded to the defendants, to be taxed in default of agreement.
Leave to appeal is granted.

Delivered at Lusaka this day of 2024



HIGH COURT JUDGE