

**THE AWARD AND ASSESSMENT OF DAMAGES IN DEFAMATION CASES: A
ZAMBIAN LEGAL PERSPECTIVE.**

BY

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Being a Directed Research Essay submitted to the University of Zambia Law Faculty in partial fulfillment of the requirements for the award of the Bachelor of Laws (LLB) Degree.

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DECLARATION

I, **MWABA MULAWO**, computer number **27026795** do hereby declare that the contents of this dissertation are based on my own findings. I further declare that the information used herein that is not my own I have endeavored to acknowledge. I, therefore declare that all errors and other shortcomings contained herein are my own.



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ABSTRACT

This essay considers the current position of the law of defamation in Zambia. The paper considers the fact the courts in Zambia mostly rely on common law when it comes to the law of defamation as the statute which regulates defamation is not very comprehensive. It is an attempt to establish whether the courts in Zambia have appreciated the core principles underlying the law of defamation. It is very evident from the Zambian jurisprudence that the courts have appreciated the core principles underlying the law of defamation. The research revealed that despite the fact that the courts have appreciated the principles underpinning the law of defamation the defamation act is not comprehensive. It is therefore recommended that the Act should be reviewed to make it more comprehensive

Additionally, the courts may be faced with some difficulties when the law of defamation comes into conflict with the right to freedom of expression bearing in mind that the Constitution guarantees the right to freedom of expression. In this instance, the courts have a duty of balancing the interest of an individual on the one hand to express him or herself freely and the interest of the other individual not to have their reputation ruined. It is argued that the court should not give unnecessary weight to any of the two conflicting interests. In other words, the court has to treat the two interests with equal importance. In trying to balance the two interests, the Zambian courts have held that the right to freedom of expression is not absolute. This research has revealed that if in the course of exercising your right to freedom of expression you injure someone's reputation, then liability will arise. This is because freedom of expression is not synonymous with the right to defame others.

However, the paper also revealed that the Zambian courts tend to favour the view that it is only in exceptional circumstances that public interest immunity will be claimed as regards public figures. However, it is recommended that in the interest of making those who hold public offices accountable, public interest immunity claims should only fail if the publisher had malice when he published the article. It is light of this fact that the paper examines the current position of the law of defamation in Zambia with a view of improving the situation.

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This paper is dedicated to my dear parents, Ignatius Lwaminda Mwaba and Mercy Malata, for the enormous support they rendered both financially and emotionally throughout my stay in law school. I would not have managed without their valuable support.

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CHAPTER ONE

THE DEFINITION AND NATURE OF DEFAMATION

1.1 Introduction

The term defamation generally covers any statement that hurts someone's reputation. Many are the times when people make derogatory statements about other people without realising that it can give rise to a suit for defamation. The above statement is aptly illustrated by the instance where Namwala District Director of Health Charles Chishimba sued Parliamentarian, Robby Chizyuka, for alleged defamation of character. Dr. Chishimba alleged that Major Chizyuka who is Namwala Member of Parliament labeled him as a person unfit to hold the position of District Director of Health. This was when four people died in Namwala from a suspected plague¹.

It is essential from the onset to note that people have the right to freely express themselves as guaranteed by the Constitution.² However, the right to freedom of expression is not a warrant for making false or defamatory statements about other people. This proposition is supported by the case of *Fred Mme'mbe, Bright Mwape v The People*³ where the court stated that freedom of speech and press cannot be synonymous with freedom to defame. In addition, the Constitution in Article 20 (3) (b) also recognises the need to protect the reputations of other people.

In view of the aforementioned, the essence of this paper is to establish the point at which a person becomes liable for the false or defamatory statements that one issues against another person. Furthermore, this paper seeks to examine the elements that have to be proved in order for one to be entitled to damages in defamation cases in Zambia. The research will also address the issue of how the courts assess damages once the case of defamation has been established. The paper will also take note of the fact that the Constitution has guaranteed the right to freedom of expression. Therefore, the paper also has the objective of establishing how a balance can be struck between freedom of expression and defamation.

¹ Zambia Daily Mail, 3rd December 2007, Doctor Sues Namwala MP Chizyuka.

² Article 20 of the Constitution of Zambia, Chapter 1 of the Laws of Zambia

³ S.C.Z. Judgment No. 4 of 1996

1.2 Statement of the Problem

A good legal system has to possess certain attributes and one of them is that it must have certainty. Certainty means that one should be able to ascertain the likely outcome of the case by just looking at the facts of the case. The need for certainty entails the need for several other attributes. For instance, the law should be written down, that is, all the potential problems that may arise must be covered by the law.⁴

In Zambia the Defamation Act is not comprehensive enough to cover all the potential disputes that may arise in defamation cases. The law of defamation is mainly covered by common law which is supplemented by the Defamation Act.⁵ For instance, the Act does not deal with the elements that one has to prove in a defamation suit. Additionally, the Act does not give the definition for the term defamation. This leads to flexibility in the way cases of defamation are handled by the Zambian courts. Munalula argues that sometimes flexibility runs into conflict with the need for certainty.⁶ This is because it is not possible to determine the future by recourse to past events. It is therefore submitted that certainty of the law on defamation is compromised as a result of the Defamation Act not being comprehensive.

However, it has to be conceded from the onset that even where the law is codified or regulated by a comprehensive statute there is no guarantee of absolute certainty as each case comes before the court with different facts and circumstances.

1.3 Significance of the Study

The main purpose of the study is to examine the elements that are supposed to be established before a case of defamation is proved. This is in light of the fact that the statute regulating civil defamation in Zambia does not comprehensively lay down the elements that have to be proved for one to succeed in cases of defamation. To this extent heavy reliance is placed on common law. In light of this fact, it is the purpose of this paper to establish the consistency of the Zambian judiciary in dealing with cases of defamation.

⁴ M Munalula, Legal Process: Zambian Cases, Legislation and Commentaries, UNZA Press, Lusaka, 2004. page 5

⁵ Chapter 68 of the Laws of Zambia

⁶ M Munalula, Legal Process. Page 7

It is expected that this paper will be of great help especially to lay individuals, interested in learning the law of defamation. This is due to the fact that in determining defamation cases, Zambia mainly relies on common law principles. The paper also has the objective of establishing the way the Zambian judiciary assess damages once a case of defamation has been proved.

In addition, this paper also seeks to establish the practical difficulties the court may face in dealing with cases of defamation bearing in mind that the Constitution guarantees the right to freedom of expression. In other words, the paper seeks to establish where the line is drawn between freedom of expression and defamation such that once you go beyond that line then you will be liable for defamation.

1.4 Justification and Rationale for the Study

The rationale for undertaking this research is that it is a step further towards having a comprehensive law on civil defamation in Zambia. The result of having a more comprehensive codified statute on defamation is that it will lead to more certainty in cases of defamation which is one of the attributes of a good legal system.

This research paper is also justified in light of the fact that the statute which regulates the law of defamation is not comprehensive and it is hoped that this paper will fill this lacuna. In addition, this paper is also timely in that Zambia is a democratic state and one of the characteristics of democracy is freedom of expression. In the case of *Christine Mulundika and 7 others v the Attorney General*⁷ it was stated that freedom of expression is one of the important attributes of a democratic society. Thus, this paper is needed to clarify exactly how one can enjoy his right to freedom of expression without being liable for defamation.

1.5 Research Questions

1. What is Defamation?
2. Is defamation actionable per se?
3. What principles have the courts developed in the award of damages in defamation cases?
4. How do the courts balance freedom of expression with defamation?

⁷ (1995) Z.R 85

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5. Where is the line drawn between freedom of expression and defamation?
6. What are the possible defences to a defamation claim?
7. How do the courts quantify damages in defamation cases?

1.6 The Objectives of the Study

1. To highlight the principles developed by the courts in assessing the quantum of damages in defamation cases.
2. To find out establish how freedom of expression is balanced with the law of defamation.
3. To bring to the fore how the courts quantify damages in defamation cases.
4. To establish if the Defamation Act is satisfactory in its present form and whether there is need for law reform.

1.7 Methodology

The major method of data collection used in this paper is desk research. The data for this research was also sourced from books, the internet, student obligatory essays, and newspaper and journal articles.

1.8. 1 What is Defamation?

It is essential to define and understand what the term defamation means from the beginning. It has to be noted that there is no single definition for the term defamation and that it has been defined by many scholars and judges in various ways. The classic definition of the term defamation was given by Lord Wensleydale in *Parmiter v Coupland*⁸ where he defined defamation as:

A publication, made without justification or any lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule.

This definition is not satisfactory in that it is not always that a defamatory imputation will lead to a man being exposed to hatred, contempt or ridicule. This statement is supported by the case of *Tournier v National Provincial Union Bank of England Ltd*⁹ where Scrutton LJ stated that he did not think that this ancient formula was sufficient in all cases, because words might damage the

⁸ (1840) 6 M & W 105 at 108

⁹[1924] 1 KB 461 at 477

reputation of a man as a business man which no one would connect with hatred, ridicule or contempt.

The realisation of the fact that it is not always that a person would be exposed to hatred, ridicule, or contempt made the judge in the case of *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd*¹⁰ to expand the *Parmiter v Coupland* definition. He stated that:

. . . not only is the matter defamatory if it brings the plaintiff into hatred, ridicule, or contempt by reason of some moral discredit on the plaintiff's part, but also if it tends to make the plaintiff be shunned and avoided and that without any moral discredit on the plaintiff's part. It is for that reason that persons who have been alleged to have been insane, or to be suffering from certain diseases, and other cases where no direct moral responsibility could be placed upon them, have been held to be entitled to bring an action to protect their reputation and their honour.

Thus, the term defamation is now generally defined as the publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of the right-thinking members of the society generally, or tends to make them shun or avoid him.¹¹ This is because this definition at least covers all the possible situations that may arise. For instance, if a person is not hated, brought into contempt or ridiculed, he may be shunned or avoided as a result of the defamatory statement. To illustrate this point is the case of *Berkoff v Burchill and another*¹² where Phillips LJ had to consider whether referring to a person as being hideously ugly could amount to defamation. He found that this would amount to defamation in that the statement still exposed him to ridicule even though it cannot lead to him being shunned, avoided, or hated.

However, this definition is also not satisfactory in that it is not always that the statement has to refer to the plaintiffs' reputation for it to be defamatory. For instance, in the case of *Berkoff v Burchill and another*¹³ the statement just referred to the plaintiffs' appearance and it was found by the Court of Appeal to be defamatory. Thus, it is argued the definition that aptly defines defamation is the one given by the Faulks Committee on Defamation. In their report they recommended that for the purpose of civil cases, defamation shall consist of the publication to a third party of matter which in all the circumstances would be likely to affect a person adversely in the estimation of reasonable people generally.

¹⁰ (1934) 50 TLR 581 at 587

¹¹ W Rodgers, Winfield and Jolowicz on Tort, 7th ed., Butterworths, London, 1992. Page 274

¹² [1996] 4 All ER 1008

¹³ [1996] 4 All ER 1008

Despite the difficulties in coming up with a single definition of the term defamation, there has been a consensus among scholars and jurists that three elements must be proved in order for the plaintiff to succeed in a suit for defamation. Firstly, the defamatory statement must refer to the person claiming to have been defamed. Secondly, the plaintiff must also show that the words complained of were published, that is, communication at least to more than one person other than the plaintiff. Lastly, the statement complained of must be defamatory.¹⁴

It is apparent from the definitions that have been given above that it is not enough that the statement complained of is false. This is because a statement may possibly be defamatory even if it does not excite in reasonable people's feelings strong hatred, contempt or ridicule.¹⁵ If the statement does not lower the plaintiff's reputation in the eyes of the right- thinking members of the society then it is not defamatory. In other words, apart from being defamatory the statement should also lead to a person who has been defamed being shunned, ridiculed, avoided or hated by reasonable members of the society. This was affirmed in the case of *Drumond-Jackson v B.MA*¹⁶ where it was held that for a statement to be defamatory the words must tend to give rise to hatred, contempt or ridicule unnecessarily.

In support of the above statement is the dictum by Lord Atkin in the case of *Sim v Stretch*¹⁷ where he stated that the question is:

Would the words tend to lower the plaintiff in the estimation of the right- thinking members of the society generally?

What this means is that the plaintiff must not only prove that the statement is defamatory but must also show that it tends to bring him into contempt, ridicule or hatred. In addition, the statement must not only discredit him with one special class of people, but all the reasonable people in general.¹⁸

1.8.2 Forms of Defamation

Defamation is made up of two torts, that is, libel and slander. Libel is a defamatory statement or representation in permanent form for instance, a picture, statue, waxwork effigy, or any writing,

¹⁴ Harold Phiri v Radio Maria 2002 /HJ/31
¹⁵ W Rodgers, Winfield and Jolowicz on Tort. Page 274
¹⁶ [1970] 1 W.L.R 691 at 700, per Gordon Willmer
¹⁷ [1942] 2 ALL.E.R 1237 at 1240
¹⁸ W Rodgers, Winfield and Jolowicz on Tort. Page 275

print, mark or sign expressed to view.¹⁹ Broadcasting, both radio and television and theatrical performances are, by statute, treated as publications in permanent form.²⁰ On the other hand, slander is a defamatory statement or representation conveyed by spoken words. Thus, the main distinction between the two is that libel is communicated in a permanent form while slander is not communicated in a permanent form.

It is settled law that defamation in the manual language of deaf and dumb generally would be slander, because the movements are temporary. For instance, in the case of *Cook v Cox*²¹ it was held that holding up an empty purse to indicate that the plaintiff has robbed the defendant is slander. On the other hand, in *Youssoupoff v Metro-Goldwyn Mayer Pictures Ltd*²² the Court of Appeal had no doubt that the defamatory matter embodied in a talking cinematography film was libel. This is because the photographic film is permanent matter to be seen by the eye.

Basically what the two cases illustrate is that libel is in permanent form while slander is not. For instance, in the Cook case the gestures made to show that the plaintiff had been robbed by the defendant were not permanent. On the other hand, the cinematography film in the Youssoupoff case was permanent. One of the justifications for the distinction between libel and slander is that libel is a more severe form of defamation on the basis that it has a greater potential of harm and it is more likely to be premeditated.²³ Since libel is in permanent form, the number of people who are likely to see and hear the defamatory imputation is high. Consequently, the damage that is going to be caused will be more severe. On the other hand, slander is not permanent and the only people who are likely to see or hear the defamatory statement are those that are present at the time the defamatory statement is being made.

1.8.3 Is Defamation Actionable Per Se?

It is settled law that libel is actionable per se. This means that it is actionable without proof of special damages. However, slander is not actionable per se, that is, for one to succeed in an action for slander there has to be proof of special damages. A special damage signifies that no

¹⁹ W Rodgers, Winfield and Jolowicz on Tort. Page 275
²⁰ Section 18 of the Defamation Act, Chapter 68 of the Laws of Zambia
²¹ [1814] 3 M and S. 110
²² [1934] 50 T.L.R 581
²³ W Rodgers, Winfield and Jolowicz on Tort. Page 276

damages are recoverable merely for loss of reputation by reason of slander. The plaintiff must prove loss of money or some temporal or material advantage estimable in money.²⁴

In addition to general damages which are recoverable in an action for libel without proof of injury, the plaintiff can also plead for special damages. It is necessary to note that special damage has to be proved whether an action is for libel or slander if the plaintiff is to be entitled to special damages. Where there is need to prove special damage in an action for libel, the plaintiff can recover general damages for the injury to his reputation without adducing any evidence that it has in fact been harmed. It is enough that the immediate tendency of the words is to impair his reputation.²⁵ In other words, it entails that even if the plaintiff fails to prove special damage he can still recover general damages.

A case in point is *Harold Phiri v Radio Maria*.²⁶ In this case apart from general damages, special damages were pleaded on grounds that the plaintiff had been demoted in that he had been transferred to a smaller clinic instead of a bigger clinic where he was supposed to be transferred. The court held that contrary to the pleadings, the plaintiff was not transferred to Kapata Urban Clinic on Promotion. His letter of transfer neither talked of the alleged promotion nor was there any evidence that currently he was earning a lower salary than he was before the transfer. Consequently, the court found that special damage had not been proved and thus special damages could not be awarded.

It has to be noted that despite the fact that the transfer letter did not state that he had been moved to a smaller clinic because of the incident that had occurred, it is apparent from the facts that he was moved because of the same reason. Therefore, it can be respectfully argued that some special damage had occurred as a result of the publication.

1.8.4 Exceptional Cases in which Slander is Actionable Per Se

The general rule is that libel is actionable per se while slander is not. However, there are some exceptional cases in which slander is also actionable per se. The following are the instances in which slander is actionable without proof of special damage.

²⁴ W Rodgers, Winfield and Jolowicz on Tort. Page 278
²⁵ R Mc Ewen and P Lewis, Gatlley on Libel and Slander, 7th ed., Sweet and Maxwell, London, 1974. Page 105
²⁶ 2002 /HJ/31

A. Imputation of unfitness

Imputation of unfitness, dishonesty or inconsistency in any office, calling, trade or business held or carried on by the plaintiff at the time when the slander is published is actionable per se. For instance, in the case of *Jones v Jones*²⁷ it was held that the statement that the school master had committed adultery with the cleaner was held to be actionable without proof of special damage.

This common law position has been codified by the Defamation Act²⁸. Section 3 of the Act provides that in an action for slander in respect of words calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of the publication, it shall not be necessary to allege or prove special damage, whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business.

B. Unchastity of women

An imputation of unchastity of women is actionable without proof of special damage. In *Kerr v Kennedy*²⁹ the court held that an imputation of lesbianism was actionable without proof of special damage. This position is also reflected in the Defamation Act in section 4. It provides that in an action for slander in respect of words imputing unchastity or adultery to any woman or girl, it shall not be necessary to allege or prove special damage.

C. Imputation of a disease.

An imputation of a contagious or infectious disease likely to prevent other people from associating with the plaintiff is actionable per se³⁰, that is, without proof of special damage. A sexually transmitted disease certainly falls within this exception³¹ and this may include all venereal diseases and leprosy. However, a statement that the claimant previously had such a disease is not actionable per se.³²

[1916] 2 A.C 481

Chapter 68 of the Laws of Zambia

[1942] 1 K.B 409

W. Rodgers, Winfield and Jolowicz on Tort. Page 281

Bloodworth v Gray (1844) 7 Man. & Gr 334

Taylor v Hall (1742) 2 Strange 1189

D. Imputation of a criminal offence punishable with imprisonment

This must be a direct imputation and not a mere suspicion of it and the offence must be punishable in the first instance by imprisonment. In the case *Hellwig v Mitchell*³³ the court held that it is not enough that imprisonment may be imposed for failure to pay the fine that has been imposed. Thus, an imputation that one has committed an offence which is punishable by a fine at the first instance will not suffice, that is, it will not be actionable per se.

1.9 Conclusion

From the foregoing and on the strength of the authorities given, it can be stated that for a statement to be defamatory it has to refer to the person claiming to have been defamed. In addition, the plaintiff must also show that the words complained of were published, that is, communicated at least to more than one person other than the plaintiff and that statement should be defamatory. The statement must also have the effect of lowering the plaintiff's reputation in the estimation of the right-thinking members of the society generally. It can also be safely submitted that of the two types of defamation, libel has the potential of causing more damage to the reputation of a person than slander. This is probably one of the reasons why libel is actionable without proof of damage.

³³ [1880] 6 A.C 156

CHAPTER TWO

DEFAMATION VIS-À-VIS FREEDOM OF EXPRESSION

2.1 Introduction

This chapter's objective is to critically analyse how a balance can be struck between freedom of expression and the law of defamation. Zambia is a democratic state and one of the fundamental elements of a democratic state is freedom of expression. The Supreme Court in the case of *Christine Mulundika and 7 others v the Attorney General*³⁴ endorsed this proposition. The court stated that freedom of expression constitutes one of the essential foundations of such a society, it is not only applicable to information or ideas that are favourably received or regarded as inoffensive, but also those which offend, shock, or disturb the population.

This view was also endorsed by ^{Madam} Justice Mambilima in the case of *Resident Doctors Association of Zambia v The Attorney General*³⁵ when she stated that:

The right of free speech...is not only fundamental, but central to the concept and ideal of democracy.

Glenn also shares this view and argues that freedom of speech and press occupies a very particular position relative to the democratic process.³⁶ The question that arises from this statement is that does it mean that in a democracy people should express themselves without limitations?

The International Covenant on Civil and Political Rights provides that the exercise of the right to freedom of expression carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall be such as are provided by law and are necessary for the respect of the rights or reputations of others and for the protection of national security, public order, public health or morals.³⁷ The restrictions provided by the International Covenant on Civil and Political Rights are a confirmation of the realisation of the fact that if left unchecked, the right to freedom of expression can hurt other people.

³⁴ SCZ Judgment No. 25 of 1995

³⁵ (2003) Z.R. 88

³⁶ A Glenn, *Civil Liberties under the Constitution*, Dodd, Mead and Co, New York, 1990. Page 330

³⁷ Article 19 (3) of the International Covenant on Civil and Political Rights

Thus, it is the duty of the law to ensure that in the exercise of free speech one does not injure others. In this regard, the curtailment of freedom of expression on the basis that it is likely to injure the reputation of others is not unconstitutional.³⁸ In other words, there is need for a balance to be struck between the right to freedom of expression and the right not to have ones reputation injured. In light of the aforementioned, this chapter's objective is to establish how one can enjoy the right to freedom of expression without infringing on another person's rights by defaming them.

2.2 What is Freedom of Expression?

Having defined defamation in the first chapter, it is also very important to define and understand freedom of expression before examining how a balance can be struck between defamation and freedom of expression. The Constitution guarantees the right to freedom of expression and it provides that except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression. The Constitution further states that freedom of expression includes the freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to impart and communicate ideas and information without interference, whether the communication is to the public generally or to any person or class of persons, and freedom from interference with his correspondence.³⁹

The Universal Declaration of Human Rights also provides everyone has the right to freedom of opinion and expression. Additionally, it defines freedom of expression as the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.⁴⁰ Furthermore, the International Covenant on Civil and Political Rights in Article 19 (1) states that freedom of expression includes the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

From all these definitions, it is clear that there is no general definition for freedom of expression. However, what is apparent from all the definitions is that freedom of expression is simply the

³⁸ Article 20 (3) b of the Constitution of Zambia, Chapter 1 of the Laws of Zambia

³⁹ Article 20 (1) of the Constitution of Zambia, Chapter 1 of the Laws of Zambia

⁴⁰ Article 19 of what?

liberty to hold, communicate and impart information or opinions. Alternatively, freedom of speech can be defined as the freedom to speak without censorship or limitation.⁴¹

2.3 The Importance of Freedom of Expression in a Democracy

It is indeed a valid proposition that in a democratic dispensation like Zambia, people should have the right to freely express themselves. This is because freedom of expression enhances the capacity of an individual to participate in a democratic society. Freedom of expression is the means through which people are able to express their views on certain important issues of public interest. Meiklejohn argues that:

*The principle of freedom of speech springs from the necessities of the program of self-government. It is not a law of nature or reason in the abstract. It is a deduction from the basic ... agreement that public issues shall be decided by universal suffrage.*⁴²

Freedom of expression is also important in that it provides a mechanism of establishing a reasonable balance between stability and social change.⁴³ In addition, punishing people for their free speech only drives it underground and encourages conspiracy. Therefore, it important to realise that in the battle for public order, free speech is the ally and not the enemy.⁴⁴

Furthermore, freedom of expression is essential not only to the development of a person's rational faculties, but also to effective governance and the proclaimed ideal of democracy.⁴⁵ Freedom of expression enhances good governance in that this is one of the ways in which government institutions are scrutinized and checked by the general populous. Another classic argument for protecting freedom of speech as a fundamental right is that it is essential for the discovery of truth. Justice Oliver Wendell Holmes stated that:

⁴¹ wikipedia.org/wiki/Freedom of Expression, 16th December, 2010.

⁴² A Meiklejohn, Political Freedom, in Vol. 1 of Political Rights in the United States, 4th ed., Little Brown, Boston, 1976. Page 9.

⁴³ Indian Express Newspapers (Bombay) v. Union of India, AIR (1986) SC515.

⁴⁴ J Nowark and R Rotunda, Constitutional Law, 5th Ed., West Publishing Company, St Paul, 1995. Pages 992-993.

⁴⁵ wikipedia.org/wiki/Freedom of Expression, 16th December, 2010.

I did (and always do) forbid you from trying it; with you I did it; with

The best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.⁴⁶

The importance of freedom of expression cannot be overemphasized. However, if this right is left unchecked it may harm other people or the society at large. Hence, in trying to protect this right it is essential to make sure that safeguards are put in place to protect the reputation of other people. In light of the aforementioned, it is imperative that the paper examines how a balance can be struck so that in protecting the reputation of others the right to freedom of expression is not infringed upon.

2.4 **Balancing Freedom of Expression with Defamation**

Much as freedom of expression is necessary in a democratic society like Zambia, the law of defamation is equally important as it aims at protecting the reputations of other people. The Constitution of Zambia, in Article 20 (3) (b), and International Covenant on Civil and Political Rights in Article 19 (3) both recognise the need to protect the reputations of other people. This is because freedom of expression is not a warrant for destroying the reputations of other people. This proposition is given credence by the case of *Fred M'mbe, Bright Mwape v The People*⁴⁷ where the court stated that freedom of speech and press cannot be synonymous with freedom to defame. This case is evidence of the fact that much as people have the right to express themselves freely, there is need that this right is exercised cautiously. This is where the need to strike a balance between freedom of expression and the law of defamation arises from.

Failure to have a balance between the two may have negative effects on the country as a whole. For instance, the rigorous implementation of defamation law may have a negative consequence on the right to freedom of expression. This in turn may undermine, transparency and accountability, for instance, the press may not publish certain information for fear of being sued for defamation. Similarly, members of the public may be unwilling to give information to the press or the authorities for the same reason. Defamation law may thus be a hindrance to the right to freedom of expression. Therefore, when the law of defamation comes in conflict with freedom of expression there is need to strike a fine balance so that none of the two is given more weight to the detriment of the other.

⁴⁶ *Abrams v United States*, 250, US, 616 (1919)

⁴⁷ S.C.Z. Judgment No. 4 of 1996

Consequently, the challenge in a democratic state like Zambia is to strike an optimum balance between the legitimate interests of individuals not to have their reputations tarnished or destroyed and the interest of the public to have unimpeded debate. This is especially important with regard to public leaders who should be accountable to the people they are leading. Therefore, the question that arises is how can a balance between the two interests be struck since they are both essential elements of a democratic society?

The Constitution in Article 20 guarantees the right to freedom of expression. However, the right guaranteed by the Constitution is not an absolute one and this is due to the fact that it goes on further to give limitations as to the extent to which one can exercise his right to freedom of expression. Of relevance to this paper is Article 20(3) (b) which provides that nothing contained in or done under the authority or any law shall be held to be inconsistent with or in contravention of this article to the extent that it is shown that the law in question makes provision that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other people. It can clearly be seen that even the Constitution recognises the need not only to protect the right to freedom of expression but also the need to protect the society from being injured by an individual in the course of exercising same right. Chief Justice Ngulube endorsed this view when he stated that Article 20 of the Constitution recognises both the freedom of the press and the right to reputation.⁴⁸

What is apparent from the provision of the Constitution is that in enjoying his right to freedom of expression, one should not injure the reputation of other people. If the reputation of another individual is injured in the course of exercising this right then one is going to be liable for defamation and the Constitutional right guaranteed will not act as a defence. This is because the Constitution expressly provides that curtailment of the right to freely express oneself on the basis that it will injure the reputation of other people is allowed.⁴⁹

What arises from the above exposition is that when the law of defamation comes head to head with freedom of expression the court will have the task of trying to balance between the interests of an individual who wants to express him or herself with that of the interest of an individual who has

⁴⁸ Michael Chilufya Sata v. Post Newspapers Limited and Printpak Zambia Limited, 1993/HP/1823

⁴⁹ Article 20 (3) (b)

been defamed. The court will always try to ensure that both interests are not prejudiced. A balance between freedom of expression and defamation can only be struck by ensuring that both interests are served. This is done by letting a person to freely express oneself on condition that in exercising his right to freedom of expression he or she takes into account the interests of other people, that is, he should not tarnish the reputation of other people.

2.5 Freedom of Expression versus Defamation: Analysis of Case Law

At this point it is very cardinal that the paper looks at and analyses how the courts have tried to balance freedom of expression with defamation. This is because the main objective of this chapter is to critically analyse how the Zambian courts have dealt with instances where defamation law comes into conflict with freedom of expression. However, reference will also be made to case law from other countries in order to compare how the other jurisdictions have handled similar situations.

The first case in point is *Michael Chilufya Sata v. Post Newspapers Limited and Printpak Zambia Limited*,⁵⁰ where the court had to consider whether the law of defamation as currently applied derogates from the right to freedom of expression and in particular, freedom of the press guaranteed by Article 20 of the Constitution and, if so, what modifications would reasonably be required to be imported or imposed in order to give effect to the intention of the Constitution. The facts of the case were that the plaintiff, who was at all times a politician and a public official holding a Ministerial position, commenced three separate suits for defamation which were later consolidated against the defendants for publishing in their newspaper various articles.

The defendants pleaded the defence of justification and fair comment on matters of public interest. The defendants argued that because Article 20 of the Constitution of 1991 specifically recognises the principle of the freedom of the press, time had come to modify the common law principles of the law of defamation in their application to plaintiffs who are public officials as to their right of action, the burden and standard of proof, and the latitude the press should be permitted to subject public officials to criticism and scrutiny. Chief Justice Ngulube stated that:

⁵⁰ 1993/HP/1395

Let me make it clear that I fully endorse the view that some recognition ought to be given to the constitutional provisions in Article 20 and I accept that impersonal criticism of public conduct leading to injury to official reputation should generally not attract liability if there is no actual malice ... however, I would reject the proposition in *Sullivan* to the extent that it sought to legalise character assassination of public officials or to shift the burden of proof so that knowledge or falsity or recklessness should be proved by the plaintiff and to a degree of convincing clarity.

It is apparent from the above given statement that the court was alive to the fact that the right to freely express oneself encompasses two things; freedom of expression on the one hand and the right not to be defamed on the other hand. The statement implies that much as much as the press has the right to scrutinise public leaders, they are not allowed to defame them unnecessarily. Therefore, it is the function of the court to balance between the two rights. In trying to strike a balance the court refused the argument that it was the plaintiff who was supposed to prove malice or knowledge of the falsity of the publication on the part of the defendants as this would be unfair to plaintiff.

The court further stated that if a public interest immunity claim is raised, and it is usually only raised on sound or solid ground, it is necessary for those who seek to overcome it to demonstrate the existence of a counteracting interest calling for disclosure of the particular documents involved. It is then and only then, that the court may proceed to the balancing process. The court was of the view that there is a need for the people to put their leaders to public scrutiny but this does not mean that it is a passport to defame the leaders unnecessarily. This is because the fact that the press has the right to free speech does not mean that they should be allowed to defame public leaders in the name of bringing them under scrutiny.

In the case of *Fred Mm'embe, Bright Mwape v The People and Fred Mm'embe, Masautso Phiri, Goliath Munkonge v The People*⁵¹ the court stated that freedom of speech and press cannot be synonymous with freedom to defame. This statement essentially means that there has to be a balance between the right of an individual to freely express himself and that of the other to equally enjoy his rights to dignity, privacy and reputation. In fact, the Constitution does not confer an absolute right on an individual to freedom of expression.⁵² This is due to the fact that there is need to balance between freedom of expression and the law of defamation.

⁵¹ S.C.Z. Judgment No. 4 of 1996

⁵² Article 20 (3) of the Constitution of Zambia, Chapter 1 of the Laws of Zambia

The court in the same case further elaborately stated that in view of public figures no one could seriously dispute that side by side with the freedom of speech was the equally very important public interest in the maintenance of the public character of public men for the proper conduct of public affairs which requires that they be protected from destructive attacks upon their honour and character. This statement illustrates the point that freedom of speech is not an absolute right. This is because freedom of speech goes side by side with the right of others not to be defamed and it should be curtailed the moment it starts to encroach on other people's interests.

The position taken by the Zambia Courts in relation to public figures is slightly different from the one adopted in the case of *New York Times v Sullivan*⁵³ where the Supreme Court held that in order to sustain an action for defamation, public officials must prove the falsity of the allegedly defamatory statement as well as actual malice, that is, that the defendant published a falsehood with knowledge that it was false or with reckless disregard of its truth or falsity. Further, in *Curtis Publishing Co v Walker*⁵⁴ the Supreme Court extended the Sullivan rule to apply to all public figures, reasoning that public figures have access to the media to counteract false statements and, at least to some degree, invite the comment to which they are exposed.

In arriving at this decision, the court took into account the fact that there is need to scrutinise the public leaders. The court was of the view that it is for the good of the society as a whole that the public men are put to scrutinized by the people they serve. From the two United States cases it is clear that in trying to balance between freedom of expression and defamation, the American Courts are likely to protect the freedom of expression in order to bring the public figures under scrutiny. It is only when a public figure proves malice on the part of the publisher that a he will succeed in a suit for defamation. In Zambia, Ngulube CJ rejected the view that the plaintiff (public figure) has to prove the falsity of the allegation as well as malice on the part of the publisher if he is to succeed in an action for defamation.⁵⁵

In a bid to balance between the two interests the court in the case of *Michael Chilufya Sata v. Post Newspapers Limited and Printpak Zambia Limited*⁵⁶ was of the view that even if the statements published are false, the defendant will not be liable if sound or solid ground are raised

⁵³ 376 U.S. 254 (1964).

⁵⁴ 388 U.S. 130 (1967).

⁵⁵ *Michael Chilufya Sata v Post Newspapers Limited and Printpak Zambia Limited*, 1993/HP/1395

⁵⁶ 1993/HP/1395

demonstrating the existence of a counteracting interest calling for disclosure of the particular documents involved. Further, the court rejected the contention that in order for a public figure to succeed in defamation, he has to prove malice or knowledge of the falsity on the part of the defendant because this would amount to legitimising defamation of public figures in the name of freedom of expression.

Therefore, the constitutional guarantee of free speech confers no immunity for crime. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing panic.⁵⁷ It is the view of the author of this dissertation that even if civil defamation is not a crime the position is the same, that is, freedom of expression does not confer immunity for defamation. This view is given credence by the obita dicta in the case of *Fred M'mbe, Bright Mwape v The People*⁵⁸ by Ngulube CJ when he stated that freedom of speech and press cannot be synonymous with freedom to defame.

In addition, in the case of *Alberts v California*⁵⁹ the court was of the view that all ideas having even the slightest social importance, unorthodox ideas, controversial ideas or even hateful ideas to the prevailing climate have full protection of the constitutional guarantees, unless they are excludable because they encroach upon the limited areas of more important interests. The above statement is in line with the case of *Christine Mulundika and others v the Attorney General*⁶⁰ in which the court stated that freedom of expression ... is not only applicable to information or ideas that are favorably received or regarded as inoffensive, but also those which offend, shock, or disturb...the population. Therefore, the only qualification is that in a person's exercise of free speech he should not encroach upon the rights of others.

What can be deciphered from the above statements in the cases of *Alberts* and *Mulundika* is that the right to freedom of expression is not absolute or unlimited. Therefore, it is the duty of the court to ensure that an optimum balance is struck when the law of defamation comes head to head with freedom of expression. The balance as stated in the *Alberts* case is only struck by ensuring that in exercising ones right to free speech, a person should not encroach upon the

⁵⁷ W Lockhart and Y Kamisar, *Constitutional Rights and Liberties: Cases and Materials*, West Publishing Company, Chicago, 1967. Page 360

⁵⁸ S.C.Z. Judgment No. 4 of 1996

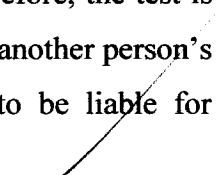
⁵⁹ 344 U.S.543 (1957)

⁶⁰ SCZ Judgment No.25 of 1995

rights of other people. Once a person encroaches upon another man's interests, then he is going to be liable.

2.6 Conclusion

Freedom of expression is a very important component of a democratic society like Zambia. However, this right is not absolute as it has some limitations. Therefore, it is important that one takes into account the interests of others in the exercise of the right to freedom of expression. The court also has a duty to ensure that they strike a balance between the right to freedom of expression and the various interests of the other members of the society. Therefore, the test is whether or not in a person's exercise of free speech he or she has encroached on another person's rights or interests. If the answer is in the affirmative then one is going to be liable for defamation.



CHAPTER THREE

AWARD OF DAMAGES IN DEFAMATION CASES

3.1 Introduction

An imputation which has been made against the plaintiff may be or may not be defamatory. Thus, in order to succeed in a suit for defamation the one who alleges that he or she has been defamed has to furnish evidence to that effect. In order to succeed the plaintiff has to prove three elements, that is, reference to the plaintiff, publication of the statement, and that it is defamatory.⁶¹ In light of the aforementioned, the objective of this chapter is to discuss the elements that are supposed to be proved in order to succeed in a case for defamation. The chapter will also discuss the main defences that are available to the defendant once a case of defamation has been proved.

3.2.0 Main Elements in Defamation

There are basically three elements that have to be proved in order for a defamation suit to succeed. However, in an action for slander a fourth element has to be proved, that is, injury to the plaintiff. This is due to the fact that slander is not actionable per se. What this means is that some form of loss estimable in monetary terms has to be shown if an action for slander is to succeed. It is essential to note that there are some exceptional cases where there is no requirement to prove any form injury even in a suit for slander.

3.2.1 Reference to the Plaintiff

The plaintiff must show that the words complained of referred to him or her. In other words, the alleged defamatory imputation must identify the plaintiff. Therefore, the question that the court will be faced with at this stage will be whether the imputation directly or by necessary implication refers to the plaintiff. In the case of *Hutton and Co. v Jones*⁶² the House of Lords confirmed the holding of the Court of Appeal that the test is whether or not sensible and reasonable people reading the article who know of the plaintiffs' existence would think it was the plaintiff the article was referring to.

⁶¹ *Harold Phiri v Radio Maria* 2002 /HJ/31

⁶² [1910] A. C. 20

council. Consequently, the plaintiff brought an action to recover compensatory and exemplary damages from the defendants for the libelous statements made concerning him.

The court held that where defamatory words refer to a limited class of persons of which plaintiff is one; each and every member of the class has a right of action for defamation. What can be discerned from this case is that reference to the plaintiff does not mean that he or she has to be referred to by name. In the instant case, the statement referred to the council as a whole and not the individuals consisting of the council. The court was of the view that where a class of persons has been defamed, every member or individual belonging to that class of persons has a right of action.

In addition, apart from proving that the statement referred to the plaintiff, it is important that the plaintiff proves that the statement complained was actually uttered. This usually happens in instances where the defendant denies having uttered the statement complained of by the plaintiff. In an action for slander, it is sufficient if he proves a material and defamatory part of them or words which are substantially to the same effect. For instance, in *Tournier v National Provincial Union Bank* ⁶⁵ it was held that in slander actions it is no longer necessary for the plaintiff to prove the precise words that were uttered.

Similarly, in the case of *John Muchabi v Aggrey Mwanamufwenga* ⁶⁶ the Supreme Court passed a ruling which is in line with the Tournier case. Gardner, J.S stated that:

In slander actions it is no longer necessary for the plaintiff to prove the precise words that were uttered. It is sufficient if he proves a material and defamatory part of them or words which are substantially to the same effect.

This is probably because slander is not in permanent form and thus, it would be unreasonable to expect the plaintiff to prove the precise words that were uttered by the defendant.

3.2.2 Publication of the Defamatory Imputation

The other element that the plaintiff must prove is that the statement complained of was actually published. Publication in this case means there must have been communication to at least one

⁶⁵ [1923] All E.R. 550

⁶⁶ (1987) Z.R. 110

person other than the plaintiff.⁶⁷ Thus, an action for defamation cannot succeed if the statement complained of was only communicated to the plaintiff. The plaintiff will usually find this element not difficult to prove.

The rationale for the above statement is that the defamatory statement complained of must have the effect of lowering the reputation of the plaintiff in the eyes of the members of the society. If the defamatory imputation complained of is not communicated to anyone apart from the plaintiff, then no one will know about it. Consequently, it will not have the effect of lowering the plaintiffs' reputation in the eyes of the people due to the fact that they do not know about the imputation.

In order to prove this element, all the plaintiff has to show is that apart from him and the defendant, there is at least another person who is aware of the defamatory imputation. For instance, in the case of *Harold Phiri v Radio Maria*⁶⁸ the judge stated that the statements complained of were broadcast as news in Chipata District up to a distance of more than 50 Kilometers and it was on this basis that he found that this element had been established. The mere fact that the defamatory statement was broadcast as news meant that all those who were listening to the radio at the time the news was broadcast were aware of the statement complained of and thus rendered this element established.

3.2.3 Defamatory Imputation

The words complained of must be defamatory. What this means is that the imputation complained of must have the effect of lowering the plaintiff in the estimation of right-thinking members of the society generally or to cut him off from society or to, contempt or to expose him to hatred, contempt or ridicule.⁶⁹ Thus, apart from showing that the imputation refers to the plaintiff and that it had been published, the plaintiff has to show that the statement has the effect of lowering his reputation or exposing him to hatred.

Whether the words complained of are defamatory is a question of law. The position of the law is that untrue imputations about a person in relation to his office, occupation or profession are

⁶⁷ *Harold Phiri v Radio Maria*, 2002 /HJ/31

⁶⁸ 2002 /HJ/31

⁶⁹ W Rodgers, *Winfield and Jolowicz on Tort*. Page 274.

defamatory. A statement which disparages a person in his reputation in relation to his office, profession, calling, trade or business may be defamatory, for example the imputation of some quality which would be detrimental or the absence of some quality which is essential to the successful carrying out of the office.⁷⁰ This may include want of ability, incompetence, conduct which breaches widely recognized business ethics, fraud and dishonest conduct.

The case of *Harold Phiri v Radio Maria*⁷¹ is also illustrative on this point. The statement complained of was that the plaintiff as the person in-charge of the clinic had chased away a pregnant woman, who needed baby-delivery service as a result of which she gave birth under the tree. The judge came to the conclusion that the news item exposed him to hatred and resentment. This is because the local community demanded for his immediate removal. Therefore, the words complained of were defamatory to the plaintiff in their natural and plain meaning.

It is clear from section 3 of the Defamation Act and the Radio Maria case that any statement which statement which disparages a person in his reputation in relation to his office, profession, calling, trade or business is defamatory. However, it is pertinent to note that it is not only statements which disparage a person in relation to their profession or calling that are defamatory. Any false statement which has the effect of lowering the plaintiff in the estimation of right-thinking members of the society generally or to cut him off from society, expose him to hatred, contempt or ridicule is defamatory.

The above statement is given credence by the case of in the case of *Benny Hamainza Wycliff Mwinga v Times Newspapers Ltd*⁷² where the defamatory imputation complained of did not refer to his business or occupation. The statement had referred to the plaintiff as being connected to drug dealers in England. The court found the statement to be defamatory and awarded damages to the plaintiff.

3.2. 4 Proof of Injury

In the case of an action for libel, the above mentioned elements will be enough to prove a case of defamation. However, when dealing with slander the plaintiff has to go an extra mile and prove

⁷⁰ Section 3 of the Defamation Act, Chapter 68 of the Laws of Zambia
⁷¹ 2002 /HJ/31
⁷² (1988-1989) Z.R. 177

to the court that as a result of the defamatory statement by the defendant he or she has suffered some form of damage or injury. In other words, the plaintiff must prove loss of money or some temporal or material advantage estimable in money.⁷³

Damage in the general sense includes loss of life and personal injury. It also implies harm or injury done to a person by the wrongful act of the defendant.⁷⁴ In the case of a suit for defamation the wrongful act will be the false publication or statement by the defendant. Therefore, damage refers to the injury that the complainant suffers as a result of the defamatory statement issued or published by the defendant.

The court in the case of *Zambia Publishing Co. Ltd v Kapwepwe*⁷⁵ had the opportunity to determine whether it is a requirement in all cases of defamation to prove some form of injury before being entitled to damages. Baron, D.C.J stated that:

It is not necessary for a politician, of whom a statement has been published which is likely to damage him politically, to prove that he has in fact been damaged or that he is likely to be so damaged in the future; the law presumes these consequences.

It is important to note that in the above mentioned case, the type of defamation was libel which is actionable per se. Had it been slander the plaintiff would have been required to prove some damage before being entitled to damages.

3.3.0 Defences

Once a case of defamation has been proved damages are consequential. The defendant in this case will pay an amount determined by the court to the plaintiff for the harm that he has caused to the plaintiffs' reputation. However, there are some instances in which even if evidence has been adduced to the extent that it is shown beyond doubt that the plaintiff has been defamed the defendant will not be liable. This will only happen if the defendant can in the circumstances of the case invoke and prove one of the defences that are available to the defendant in a defamation suit.

⁷³W Rodgers, Winfield and Jolowicz on Tort. Page 278

⁷⁴Section 11 of the Law Reform (Miscellaneous Provisions) Act, Chapter 74 of the Laws of Zambia

⁷⁵(1974) Z.R. 294

3.3.1 Qualified Privilege

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 occasions at common law, which will be held, to be qualified privilege 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.⁷⁶

These are occasions which on grounds of public policy and convenience, a person may, without incurring legal liability, make statements about another which are defamatory and in fact untrue. On such occasions, a man stating what he believes to be the truth about another is protected in so doing, provided he makes the statement honestly and without any indirect or improper motive. The protection offered is not absolute but depends on the honest of the purpose for which the defamatory statement is made. The rule being found on general welfare of the society, new occasions for its application will necessarily arise with continually changing conditions.⁷⁷

In Zambia, the newspapers can plead the defence of qualified privilege. However, this defence will not suffice if in an action for libel in respect of any such report or matter it is proved that the defendant has been requested by the plaintiff to publish in the newspaper in which the original publication was made a reasonable letter or statement by way of explanation or contradiction, and has refused or neglected to do so, or has done so in a manner not adequate or not reasonable having regard to all the circumstances.⁷⁸ Thus, refusal by a newspaper to explain that they actually published a false statement will render the defence of qualified privilege inadequate.

For a defence of qualified privilege to suffice, the defendant has to show the court that he published the statement in honest belief that it was true and that there was no malice on his part. Furthermore, the defendant should prove that there was a reciprocal duty or interest between the publisher and the recipients of the information. The case of *Nyirenda v Kapiri Glass Products*⁷⁹ is instructive on this point. The court held that the defence of qualified privilege could not stand

⁷⁶ *Nyirenda v Kapiri Glass Factory*, (1985) Z.R. 167

⁷⁷ R Mc Ewen and P Lewis, *Gatley on Libel and Slander*. Page 185

⁷⁸ Section 9(2) of the Defamation Act, Chapter 68 of the Laws of Zambia

⁷⁹ (1985) Z.R. 167

because there was no statutory or reciprocal duty on the part of the defendant to notify the senior labor officer as he had no common interest in the circumstances and reasons for the dismissal of the plaintiff. Thus, in addition to having an honest belief, the defendant should show that there was a duty to publish the statement to the recipients of the information.

Evidence of malice on the part of the publisher will also render the defence of qualified privilege fall away. The case which illustrates this point is *Kakungu Musiwa v Moses Chanda*.⁸⁰ The brief facts were that for the purpose of protecting the actual culprit who was his friend and a fellow superior officer, the defendant made and communicated to the employer false accusations against his junior officer, the plaintiff. The false accusations led to the suspension of the appellant who was later re-instated when the employer discovered that the accusations were false.

The trial magistrate dismissed the action on the ground that the defamatory communication having been made in the course of duty was privileged. On appeal the High Court held that where motives other than duty or interest alone caused the making of the communication, privilege could not attach. Thus, the appellant was awarded damages as the defence of qualified privilege could not suffice on the basis that there was evidence of malice on the part of the superior officer.

Malice here does not mean personal spite or ill will but it means any improper or an indirect motive. However, it must be noted that mere carelessness or negligence in publishing the defamatory statement is not in itself malice. Equally, the failure to make an inquiry or investigation that might verify a statement is not malice.⁸¹

3.3.2 Justification

Justification is another defence that can be pleaded by the defendant in a case for defamation. If this defence is pleaded the defendant will be basically arguing that the words complained of are not defamatory because they are true. It is not part of the plaintiff's case to establish that the defendant's statement is untrue: the plaintiff merely has to prove the publication of the statement

⁸⁰ (1985) Z.R. 244 (H.C.)

⁸¹ R Mc Ewen and P Lewis, *Gatley on Libel and Slander*. Page 340

defamatory to him.⁸² In other words, it is the defendant who has to prove that what he said is true. Once he proves that the statement is true, then he has a complete defence whether he had malice or not.

What makes the defence to succeed is not that the defendant honestly believed that the statement was true but that it is in fact true. This is probably one of the differences between this defence and the defence of qualified privilege. In the case of *Frederick Mwanza v Zambia Publishing Company Limited*⁸³ the court stated that:

In a plea of justification the question is not whether or not the defendant truly made that inference, or truly held that opinion, but it is whether the opinion and inference are both of them true.

However, it is imperative to note that the defence of justification will not fail if the statement is not absolutely true but substantially true. What this means is that the statement does not have to be wholly true but there should be substantial truth in the statement that was uttered or published.

In the case of *Joseph Banda v Zambia Publishing Company Limited*⁸⁴ the court stated that a plea of justification is a complete defence to an action for libel but to establish this defence the defendant must establish and prove that the defamatory imputation is true in substance and fact. This basically means that once this defence is established, the defendant will not be liable in any way. By the court stating that the defamatory imputation should be true in substance, it can also be argued that the court was trying to reiterate the fact that the imputation does not need to be totally true for the defence of justification to succeed.

The case of *Clarke v Taylor*⁸⁵ illustrates clearly that there is no need for the statement to be absolutely true for the defence of justification to be proven. The facts of the case were the defendant had accused the plaintiff of taking part in swindling at Manchester and added that the plaintiff had been at Leeds before his arrival in Manchester. It is hoped however, his plans will be learnt to prevent serious losses from taking place. The court held that the fact that he had swindled at Manchester rendered the defence of justification proven and that the remaining words did not add any further alleged act of criminality.

⁸² H Street, *The Law of Torts*, 4th ed. (London: Butterworths, 1968), p. 311

⁸³ (1981) Z.R. 234 (H.C.)

⁸⁴ (1982) Z.R. 4 (H.C.)

⁸⁵ (1863) 2 Bing N.C. 654

In addition, section 6 of the Defamation Act provides that In an action for libel or slander in respect of words contained in two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges. This section basically reinforces what the case of *Clarke v Taylor* established, that is, there is no need for the imputation to be absolutely true.

3.3.3 Fair Comment

Sometimes the defence of justification and fair comment can be combined together as defences. The defence of fair comment may be raised in instances where there is criticism of a matter of public interest and such comment should be made honestly and without malice.⁸⁶ For instance, one can comment on government departments, religious institutions, and local government as all these are of public interest. Facts in a fair comment must also be substantially true but not absolutely true.

Further, section 7 of the Defamation Act⁸⁷ reiterates the common law principle that the minimum requirement for this defence to succeed is that the defamatory imputation must at least contain some substantial truth in them. It provides that in an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expressions of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such facts alleged or referred to in the words complained of as are proved.

In order for this defence to succeed, the defendant has to prove that he commented on a matter of public interest. Secondly, there is also need to furnish proof that the comment was made on true facts. However, it was established in *Mcquire v. Western Morning News Company*⁸⁸ that even if the defendant survives the objective test of fair comment his defence will fail if he is shown to have been actuated by malice. Thus, there is a prima facie case of fair comment only when the

⁸⁶ H Street, The Law of Torts. Page 327

⁸⁷ Chapter 68 of the Laws of Zambia

⁸⁸ [1903] 2 K.B. 100

comment is shown to be one which the defendant made honestly.⁸⁹ In other words, this defence will fail if the comment was actuated by malice.

3.3.4 Consent and Assumption of Risk

This may happen in a situation where the plaintiff consents to the publication of the article. An example where the plaintiff may be said to have given consent is where he telephones to a newspaper false news about himself. In this instance, he or she will not be able to sue for defamation when the newspaper publishes the news. It is sometimes a difficult question of fact to decide whether a plaintiff has consented to the repetition of a defamatory statement. For instance, if the plaintiff asked the defendant to repeat it because he did not understand on the first occasion, he would not be consenting.⁹⁰

The case that is instructive on this point is *Chapman v Ellesmere*⁹¹ where the plaintiff maintained that even if he had consented to the publication of a report of an inquiry by the Jockey Club, he had not consented to its publication in a form as to contain an innuendo against him. The court of appeal rejected this plea holding that in effect, the plaintiff had agreed to run the risk of the particular form that the statement may take. Thus, it can be seen that whether the defence of consent and assumption of risk has been proved is determined on a case to case basis.

3.3.5 Immunity of Proceedings in the National Assembly

Debates in the National Assembly are privileged. What this means is that a Member of Parliament cannot be liable for defamation for any words that he utters when parliament is sitting. The National Assembly (Powers and Privileges) Act provides that there shall be freedom of speech and debate in the Assembly. Such freedom of speech and debate shall not be liable to be questioned in any court or place outside the Assembly.⁹² It further provides in section 4 that no civil or criminal proceedings may be instituted against any member for words spoken before, or written in a report to, the Assembly or to a committee thereof or by reason of any matter or thing brought by him therein by petition, resolution, motion or otherwise.

⁸⁹H Street, The Law of Torts. Page 331

⁹⁰H Street, The Law of Torts. Page 330

⁹¹ (1932) 2 K.B.478

⁹² Section 3 of the National Assembly (Powers and Privileges) Act, Chapter 12 of the Laws of Zambia

The implication of section 3 and 4 of the National Assembly (Powers and Privileges) Act is that a Member of Parliament cannot be liable for defamation if he issues a statement or submits a written document to the national assembly. This means that no action for defamation can be instituted against a member whether it is libel or slander for any words spoken or written in the assembly.

3.3.6 Absolute Privilege

Some occasions are deemed to be so important that those making the statements are not liable in defamation even though their statements are untrue or even malicious.

A. Judicial Proceedings

Words that are spoken by a witness in court or other tribunals are privileged. This privilege extends to judges, parties, witnesses,⁹³ and counsel.⁹⁴ What this means is that one cannot be sued for defamation for any words spoken in the course of giving evidence in court. Similarly, judges are protected even if their statements are malicious or irrelevant.⁹⁵

B. Executive Matters

The case of *Szalasuy v Fink*⁹⁶ establishes the principle that communications of members of the executive are privileged. Similarly, in the case of *Chatterton v Secretary of State for India*⁹⁷ the court held that a letter from the secretary of state to his Parliamentary Under-Secretary providing material for the answer to the parliamentary question was absolutely privileged. However, it is essential to note that it is not clear as to how high in hierarchy of civil servants a defendant must be before he enjoys privilege. Thus, this is determined by the trier on a case to case basis.

C. Solicitor-Client Communication

Solicitor-client communications are generally not privileged. However, the communication between the solicitor and his client will be privileged if it relates to the judicial proceedings.⁹⁸

⁹³ *Seaman v Nethercliff* [1876] 2 C.P.D. 53

⁹⁴ *Munster v Lamb* [1883], 11 Q.B.D 588

⁹⁵ H Street, *The Law of Torts*. Page 332

⁹⁶ (1946) 1 All E.R 303

⁹⁷ [1895] 2 Q.B. 189, C.A.

⁹⁸ H Street, *The Law of Torts*. Page 317

Therefore, gossip between the solicitor and the client which does not relate to judicial proceedings is not privileged and one may be liable for defamation.

3.4 Conclusion

From the foregoing and a plethora of cases given it can be safely concluded that for one to be entitled to damages in a suit for defamation, he or she has to prove three elements. Firstly he has to prove that the imputation referred to him. Secondly, there must be proof that it was in fact published and lastly, he has to prove that it is defamatory. In a case for slander, apart from the exceptions, there is need to prove that as a result of the statement by the defendant, the plaintiff has suffered some form of damage. In addition, once the defendant establishes one of the defences, then he will not pay any damages to the defendant.

CHAPTER FOUR

QUANTIFICATION OF DAMAGES IN CASES OF DEFAMATION

4.1 Introduction

Once a case of defamation has been proved and the defendant fails to furnish or prove any of the defences discussed in the previous chapter, damages will consequently be awarded. At this stage, the court will now be faced with the question of quantifying the damages that the plaintiff should be entitled to. This is because the main function of the tort of defamation is to compensate the plaintiff for his loss of reputation to the extent to which he is held in less esteem and respect.⁹⁹ Thus, this chapter will discuss how the Zambian Courts have approached the problem of quantification of damages in defamation cases. Lord Blackburn in the case of *Livingstone v Rawyards Coal Co*¹⁰⁰ stated that:

Where any injury is to be compensated by damages in settling the sum of money to be given, you should as nearly as possible get at the sum of money which will put the person who has been injured in the same position as he would have been if he had not sustained the wrong.

Thus, the court will be faced with the problem of ensuring that the plaintiff gets what he deserves in the circumstances of case. In order to determine the damages the plaintiff is entitled to, the court will take into account a number of factors.

4.2 Factors Considered in the Quantification of Damages

In assessing damages in a defamation claim, a number of factors have to be taken into consideration. Common law has developed a number of factors that will help the courts in assessing damages. The following are the factors that the court will take into account when assessing damages in defamation cases.

A. The Plaintiffs Status

The court will look at the status of the person in society. The rationale is that defamation is injury to the reputation of the person and therefore, the higher the social status the bigger the loss the defendant will suffer. Consequently, the damages that a person with a higher social standing

⁹⁹ H Street, The Law of Torts. Page 338

¹⁰⁰ [1880] 5 A C. 25 ; 39

will get are going to be higher. Thus, a cabinet minister is likely to be awarded a higher amount than a police officer.

For instance, in *Harold Phiri v Radio Maria*¹⁰¹ the judge was of the view that had he awarded damages, he would only have awarded a sum of eight hundred thousand kwacha. One of the reasons for coming to the conclusion that only that sum could be awarded was that the appellant was of a humble social status. This can be clearly seen from the statement by the judge when he stated that:

It is on record that the plaintiff was the Clinical Officer in charge of a rural health centre and on this basis, I find that he is of a humble social status.

B. The Extent and Mode of the Publication

Libel is considered to be more damaging as compared to slander because it is permanent and thus it will attract a higher amount of damages. In addition, the wider the publication, the bigger the damage to one's name and thus, the damages will also be higher.¹⁰² In the case of *Kalunga and Zambia Printing Company Limited v Titus Chisamanga and Joyce Vinkumba*¹⁰³ the court held that where publication of the defamation is restricted, that was a matter which should be taken into account to reduce the damages. It can be seen from the holding in this case that the courts are likely to award higher damages in a case where the publication of the defamatory imputation is at a larger scale. Similarly, in the case of *Harold Phiri v Radio Maria*¹⁰⁴ the judge stated that:

As to the mode of publication, I note that the news item was limited mostly to Chipata District. It was not nationwide like that in newspapers or national radio.

This is a confirmation that in assessing damages, the court will also take into account the extent of the publication.

C. Refusal to offer an Apology

This shows the lack of regret for defaming the plaintiff and will often be regarded by the court as a sign of arrogance by the defendant. For instance, in *Cobbet-Tribe v Zambia Publishing Co. Ltd*¹⁰⁵ the plaintiff demanded an apology from the defendants. In reply the defendant's counsel stated that they would defend the action with utmost vigour. The court described the letter as a

¹⁰¹ 2002 /HJ/31

¹⁰² H Street, The Law of Torts. Page 337

¹⁰³ (1988-89) Z.R. 52

¹⁰⁴ 2002 /HJ/31

¹⁰⁵ (1973) Z.R. 9

pompous legal lecture. Thus, apart from awarding the general damages, the court also awarded exemplary and aggravated damages.

This case can be distinguished from the case of *Jonathan Kalonga and Zambia Printing Company Limited v Titus Chisamanga and Joyce Vinkumba*.¹⁰⁶ In this case an apology was offered to the plaintiff by the defendant. The court in awarding the damages to the plaintiff stated that an adequate apology, no matter that it was tendered late, has the effect of extenuating the seriousness of the defamation and therefore of the quantum of damages. By implication, the court was saying that the effect of an apology is to reduce the amount of damages that the plaintiff will receive.

D. The Plaintiffs Conduct

Here the court will be looking at the conduct of the plaintiff to see whether he conducted himself in a way that provoked the defendant, or whether the publication was as a result of his own imprudent conduct. The case that clearly illustrates this factor is *Phiri v Radio Maria*.¹⁰⁷ In this case the judge stated that:

In assessing damages in a defamation case a number of factors may be taken into account. One is the conduct of the plaintiff. The plaintiff is substantially to blame for the incident that led to the publication of the news. This is because the cause of the incident was lack of surgical gloves at the health centre. Miss Banda could not be attended to because of lack of gloves which as the officer in charge of the clinic, the plaintiff failed to procure from Chipata.

Thus, if the plaintiff is partly to blame, then the damages are likely to be lower than in a situation where the plaintiff has no fault at all.¹⁰⁸ This is probably one of the reasons why the judge said that had he awarded damages, he would only have awarded a sum of K 800,000. Thus, if the defendant is not altogether blameless in the matter he may he may well be advised not to bring the action.¹⁰⁹ In other words, if the plaintiff is partly to blame, then he will only receive nominal damages only.

E. The Nature of the Libel

The libel that relates to a person's occupation, office, calling or trade will attract big damages. Similarly, an imputation that the plaintiff has committed a serious crime will attract higher

¹⁰⁶ (1988-89) Z.R. 52

¹⁰⁷ 2002/HJ/31

¹⁰⁸ *Moore v Oastler [1836]*, 1 Mood. and R. 451

¹⁰⁹ R Mc Ewen and P Lewis, *Gatley on Libel and Slander*. Page 385

damages.¹¹⁰ This is probably because here what is endangered is a person's liberty if convicted of the crime inputted. This is probably why this is actionable without proof of any damages even if it is in cases of slander.

4.3 Exemplary Damages and Aggravated Damages

It is worth noting that both exemplary and aggravated damages are rarely awarded. These are only awarded when there are special grounds that dictate for their award. A case that illustrates an instance when these are awarded is *Cobbet-Tribe v Zambia Publishing Co. Ltd.*¹¹¹ In this case both exemplary and aggravated damages were awarded because the defendants' statements were sarcastic and ridiculed the plaintiff. In addition there was a refusal to offer an apology by the defendant. Although exemplary and aggravated damages are rarely awarded, the court may still award higher compensatory damages when the unmeritorious conduct of the defendant has exacerbated the injury to the plaintiff's feelings.¹¹²

Exemplary damages are awarded where the conduct of the defendant merits punishment as these are intended to punish the defendant as a result of his conduct. Examples of instances when these are awarded are where the defendant's conduct discloses malice, insolence, arrogance, or fraud. For instance, if the defendant did not have any belief in the truth of the statements he published, then he is likely to pay a higher amount as damages to the plaintiff.¹¹³ These are usually awarded in two situations, that is, arbitrary or unconstitutional action by the servants of the government and where the defendant's conduct has been calculated by him to make profit for himself which may exceed the compensation payable.

In the case of *Simon Kapwepwe v Zambia Publishing Company Limited*¹¹⁴ the court stated that simply because a defendant has acted in contumelious disregard of a plaintiff's rights does not mean that the court must automatically add to the compensatory award an additional sum by way of exemplary or punitive damages; the court should consider first what sum to award as

¹¹⁰ H Street, The Law of Torts. Page 337

¹¹¹ (1973) Z.R. 9

¹¹² Fielding v Variety Incorporated, [1967] 2 Q.B. 841

¹¹³ H Street, The Law of Torts. Page 337

¹¹⁴ (1978) Z.R.15

compensation and that this sum should take into account the whole of any aggravating conduct of the defendant (i.e. any conduct in contumelious disregard of the plaintiff's rights), and it should then turn to consider whether the proposed award is sufficient to punish and deter the defendant.

Thus, it is clear from this case that exemplary damages are awarded by the courts sparingly. They should only be awarded where the defendant has ignored the plaintiffs' rights continuously. In addition, it should be clear to the judge that the general or compensatory damages awarded to the plaintiff are not sufficient to punish the defendant for his continuous disregard of the plaintiff's conduct.¹¹⁵

Aggravated damages on the other hand are the highest possible damages that a plaintiff can get. In *Cobbet-Tribe v Zambia Publishing Co. Ltd*¹¹⁶ the court observed that aggravated damages are damages that are compensatory on the highest scale. In this case for instance, apart from the general and exemplary damages, aggravated damages in the sum of two thousand were awarded to compensate the plaintiff to the highest scale. This is because the statements complained of were sarcastic and they ridiculed the plaintiff.

In addition, *Rookes v Barnard*¹¹⁷ holds that aggravated damages are awarded where the injury to the plaintiff has been aggravated by the malice or by the manner of doing injury, that is, the insolence and arrogance by which it is accompanied. It has to be noted that even if this is not a Zambian authority, this is in line with the case of *Kapwepwe v Zambia Publishing Company*.¹¹⁸ In this case the defendant continuously published defamatory matter about the defendant for three days and when an action was commenced they filed a defence of justification which they later withdrew. The fact that they continuously published the articles was evidence of the fact that they had malice. Further, the defence of justification which they later withdrew was a sign of arrogance and therefore, punitive damages were awarded.

¹¹⁵ *Times of Zambia Ltd v Kapwepwe* (1973) Z.R. 292

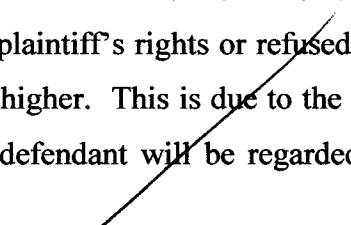
¹¹⁶ (1973) Z.R. 9

¹¹⁷ [1964] 1 All E.R. 367

¹¹⁸ (1978) Z.R.15

4.4 Conclusion

In quantifying the damages that the plaintiff should be entitled to the courts will have to determine this on a case to case basis. This is because they have to consider a number of factors before arriving at the sum that the plaintiff should be entitled to. The reason for doing this is to ensure that the plaintiff gets what is justifiable in the circumstances, that is, to compensate the plaintiff for his loss of reputation to the extent to which he is held in less esteem and respect. In addition, if the plaintiff acted in continuous disregard of the plaintiff's rights or refused to offer an apology to the plaintiff, then the damages are likely to be higher. This is due to the fact that the courts will consider refusal to offer an apology by the defendant will be regarded by the courts as a sign of arrogance.



CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

The aim of this chapter is to draw conclusions from what has been discussed in the previous chapters. It is also this chapter's objective to make recommendations with the aim of improving the current situation. The chapter will start by giving conclusions from the discussion on the current law of defamation and how it can be balanced with freedom of expression guaranteed in the Constitution and to further make recommendations as to how the situation in Zambia can change with regard to what is transpiring.

5.2 Conclusions from the Research Findings

It is essential to note that the law of defamation has been articulated very well by the courts in Zambia. There has been an appreciation by the courts of the elements that one has to prove if he or she is to succeed in a suit for defamation. Additionally, the courts also have appreciated the fact that the freedom of expression guaranteed in Article 20 of the Constitution is not absolute. This can be clearly seen from the case of *Fred Mm'embe, Bright Mwape v The People and Fred Mm'embe, Masautso Phiri, Goliath Munkonge v The People*¹¹⁹ where the court stated that freedom of speech and press is not synonymous with freedom to defame others. Thus, in the exercise of one's right to freedom of expression, there is need for one to take into account the rights of others as well.

Despite the fact that the Zambian courts have appreciated the core principles underpinning the law of defamation, it was discovered that the current scenario in Zambia is not very satisfactory. The research discovered that the Defamation Act¹²⁰ is not satisfactory in its current form. This is because it does not give any definition of the term defamation. This is left to the common law definitions that have been given by the court. The Act which regulates the law of defamation is at least supposed to give a definition of the term defamation.

¹¹⁹ S.C.Z. Judgment No. 4 of 1996

¹²⁰ Chapter 68 of the Laws of Zambia

The courts in Zambia and elsewhere have generally defined defamation as the publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of the right-thinking members of the society generally, or tends to make them shun or avoid him.¹²¹ This definition which has generally been accepted by the courts as well as scholars is not very comprehensive to cover all the situations. This can be seen from the difficulties that arise from trying to fit the case of *Berkoff v Burchil*¹²² into the definition. In this case, the defendant said that the plaintiff was hideously ugly. This statement does not clearly fit in the general definition of the term defamation. This is because the statement just referred to the plaintiffs' appearance and it was found by the Court of Appeal to be defamatory. In other words, it is argued that it is not always that the statement will refer to the plaintiff's reputation.

The research also discovered that the Defamation Act in its present state is not comprehensive. One of the attributes of a good legal system is that it should be comprehensive.¹²³ The Defamation Act which is the statute which regulates the law of defamation is not comprehensive. This is because the Act only deals with the defences that are available in a suit for defamation. It does not deal with the elements that are supposed to be proved for one to succeed in a case for defamation. Additionally, it also does not say anything on the factors to be considered in assessing damages. To this extent, heavy reliance is placed on common law.

It was also the finding of the research that there is a discrepancy between the Zambian and the American position when it comes to defamation vis-à-vis freedom of expression especially when it involves public figures. In Zambia, the courts tend to be more in favour of protecting the reputation of public figures. This can be seen from the case of *Michael Chilufya Sata v. Post Newspapers Limited and Printpak Zambia Limited*,¹²⁴ where the court had to consider whether the law of defamation as currently applied derogates from the right to freedom of expression and in particular, freedom of the press guaranteed by Article 20 of the Constitution and, if so, what modifications would reasonably be required to be imported or imposed in order to give effect to the intention of the Constitution.

¹²¹ W Rodgers, Winfield and Jolowicz on Tort. Page 274

¹²² [1996] 4 All ER 1008

¹²³ M Munalula, Legal Process. Page 5

¹²⁴ 1993/HP/1395

The court in this case came to the conclusion that if a public interest immunity claim is raised, and it is usually only raised on sound or solid ground, it is necessary for those who seek to overcome it to demonstrate the existence of a counteracting interest calling for disclosure of the particular documents involved. It is then and only then, that the court may proceed to the balancing process. Thus, it is only in exceptional cases that the publisher of an article can claim public interest immunity. The Zambian position is that the courts are of the view that public figures should be protected. It is only in exceptional cases that public interest immunity can be claimed. This view is supported by the case of *Fred M'mbe, Bright Mwape v The People and Fred M'mbe, Masautso Phiri, Goliath Munkonge v The People*¹²⁵ where the court stated that:

In view of public figures, no one could seriously dispute that side by side with the freedom of speech was the equally very important public interest in the maintenance of the public character of public men for the proper conduct of public affairs which requires that they be protected from destructive attacks upon their honour and character.

The position taken by the Zambia Courts in relation to public figures is slightly different from the one adopted in the case of *New York Times v Sullivan*¹²⁶ where the Supreme Court held that in order to sustain an action for defamation, public officials must prove the falsity of the allegedly defamatory statement as well as actual malice, that is, that the defendant published a falsehood with knowledge that it was false or with reckless disregard of its truth or falsity. Further, in *Curtis Publishing Co v Walker*¹²⁷ the Supreme Court extended the Sullivan rule to apply to all public figures, reasoning that public figures have access to the media to counteract false statements and, at least to some degree, invite the comment to which they are exposed.

The Zambian court did not take into account the fact that public figures have access to the media and can counteract false statements. Additionally, it is essential that public leaders be put under scrutiny and one way in which this is done is through criticism. That is why the court in *Sullivan* came to the conclusion that criticism of public figures should only attract liability if there is proof that the statements were false and that the publisher had malice or an ill motive against the public official who has been defamed.

¹²⁵ S.C.Z. Judgment No. 4 of 1996

¹²⁶ 376 U.S. 254 (1964).

¹²⁷ 388 U.S. 130 (1967).

It is also respectfully submitted that the case of *Harold Phiri v Radio Maria*¹²⁸ to some extent was not rightly decided. The judge stated that special damage had not been proved because the letter of transfer did not specifically mention that the reason for his transfer was because of the incident that transpired. With all due respect it is argued that even if the letter did not state the reason for his transfer, the reason he was transferred was because of the same incident that had transpired. The test should not have been whether the letter stated that he was being transferred because of that incident. In other words it is argued that the judge should have looked at all the circumstances that transpired up the time he was transferred.

5.3 Recommendations

A. Review of the Defamation Act

It is strongly recommended that the Act should be reviewed to make it more comprehensive. In the first place, it should give the definition of the term defamation. It should adopt a definition which encompasses all possible situations of defamation. It should adopt a definition such as the one adopted by the Faulks Committee on Defamation. In their report they recommended that for the purpose of civil cases, defamation shall consist of the publication to a third party of matter which in all the circumstances would be likely to affect a person adversely in the estimation of reasonable people generally. This definition at least takes into account all the possible situations of defamation.

B. Defamation vis-à-vis Freedom of Expression

The Zambian courts tend to favour the view that it is only in exceptional circumstances that public interest immunity will be claimed as regards public figures. However, it is recommended that in the interest of making those who hold public offices accountable, the Sullivan approach is the right one. In *Gertz v. Robert Welch Inc*, the Supreme Court stated:

An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer scrutiny than might otherwise be the case. Those classified as public figures stand in a similar position. Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that

¹²⁸ 2002 /HJ/31

public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehoods concerning them.¹²⁹

It can be seen from the above statement that the courts in America have appreciated the fact that it is in the greater interest of the society that those who hold public offices should be under scrutiny and that this is the risk they consent to by vying for those offices.

It is thus, recommended that the Zambian courts should follow the Sullivan approach when the law of defamation comes into conflict with freedom of expression. One should only be held liable if there is proof of the fact that the statements were false and that it was actuated by malice. In fact, public officials should be ready to be criticized by the people they are governing. It is one of the ways of ensuring that those holding public offices are held accountable.

C. Proof of Special Damage

It is also recommended that in assessing whether special damage has been proved by the plaintiff the court should take into account all the circumstances of the case. For instance, had the judge looked at all the circumstances of case he would have come to the conclusion the reason for the transfer of the plaintiff was the incident that had transpired even if the letter did not state the reason for the transfer.

5.4 Conclusion

The law of defamation has been well articulated by the Zambian courts. However, there is need to review the Defamation Act so that it can meet the present needs of the society and make it more relevant to the law of defamation. In addition, it is very important that the Zambian courts appreciate the rationale in the Sullivan case. In this way the leaders will be made more accountable to the people they are leading. It is in the interest of the whole society that people holding public offices are under scrutiny so as to ensure that they are carrying on their work in an acceptable manner.

¹²⁹ 418 U.S. 323 (1974)

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