

IN THE SUPREME COURT OF ZAMBIA  
HOLDEN AT LUSAKA

APPEAL NO. 152/2005

(CIVIL JURISDICTION)

B E T W E E N:

ERNEST INAMBAO MUKUMBUTA

APPELLANT

AND

GEOFFREY LUYANGA NAKULYA

RESPONDENT

CORAM: LEWANIKA, DCJ, CHIBESAKUNDA, MUSHABATI, JJS  
On 27<sup>th</sup> June 2006 and 14<sup>th</sup> August 2007

For the Appellant: M. KABESHA of Kabesha & Co.

For the Respondent: M.M. MUYENGA of Muyenga & Associates

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JUDGMENT

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LEWANIKA, DCJ delivered the judgment of the court.

Authorities referred to:

1. THE ATTORNEY-GENERAL VS MARCUS K. AHIUME, 1983, ZR1
2. ARM COR SECURITY LTD VS GIVEN LUBINDA T/A EKE'S LITTLE SHOP SCZ NO. 176/2003
3. MULENGA CHUNGU (As administrator of the estate of the late Lovestone Chanda) VS MOPANI COPPER MINES, SCZ NO. 24/2004
4. GOODWELL MUDENDA VS BELITA MICHELO, SCZ No. 66/2000

This is an appeal from the decision of a Judge of the High Court dismissing the Appellant's claim for damages for slander.

The brief facts before the learned trial Judge were that on 31<sup>st</sup> December, 1995 the Respondent's son passed away at his village. Following the demise of his son, the Respondent on 15<sup>th</sup> January, 1996 went to consult a witch finder to ascertain what had led to his son's death. The witch finder gave the Respondent a letter to give to the Appellant. The Respondent gave the letter to a village headman who convened a meeting at which the letter was read by one Munyinda Kalaluka. The Appellant had been summoned to attend the meeting and was present when the letter was read. The evidence of the Appellant was that the letter named him as a wizard who had finished people. He said that following this incident people, including his relatives were shunning him and refusing to associate with him. This is what prompted the Appellant to institute these proceedings.

It was common cause that the author of the letter, '*Dr. Kabuka*' did not attend the meeting, neither was he called upon to give evidence in the court below. There was also a dispute as to whether the letter that was read out in the court below was the same letter that was read out at the meeting. The learned trial Judge dismissed the claim on the ground that the Appellant had not produced the letter in question in evidence in the court below. Hence this appeal.

Counsel for the Appellant has filed two grounds of appeal, namely:

- 1. That the learned trial Judge erred in law and in fact in holding that the *'document, the subject matter of the Plaintiff's claim was never produced by the Plaintiff.'***
- 2. That the learned trial Judge erred in law and in fact in not advertg to the testimony of the witnesses at the public gathering where the letter was read.**

At the hearing of the appeal, both Counsel for the Appellant and for the Respondent informed us that they would rely entirely on their heads of argument and did not make any oral submissions.

In his heads of argument Counsel for the Appellant submitted that the document in issue appears on page 23 of the record. He said that the original of the document was produced and its contents translated and read in English and the translation is at page 47 of the record. Counsel said that the Appellant's action as endorsed on the writ was for damages for slander and that the said letter by the witch doctor on which the learned trial Judge focused was only part of the evidence. That the letter from the witch finder was addressed to the Appellant and was in his possession from the time he received it after it was read. Counsel said that it is trite law that the recipient or the custodian of a document is a competent person to produce it, that the Appellant produced the letter and translated it into English. He further submitted that the letter upon which the learned trial Judge rested his judgment was only part of the evidence placed before the court and that it

was a serious misdirection on the part of the learned trial Judge to look at the document in isolation instead of considering it on the totality of the evidence. That the learned trial Judge in his evidence does not refer to the events surrounding the letter, an account of which the Appellant and PW 2 gave at pages 46 to 52 of the record. Counsel said that had the learned trial Judge considered the testimony of the Appellant and the Respondent he would not have come to the finding that, *'consequently, in the absence of that critical evidence, the Plaintiff's case cannot stand.'*

Counsel further said that it was settled law that an Appellate Court cannot disturb findings of fact by a trial court except in certain circumstances, **THE ATTORNEY-GENERAL VS MARCUS K. ACHIUME (1)**. Such as where the Appellate Court is satisfied that the trial court did not properly evaluate the evidence, **ARMCOR SECURITY VS GIVEN LUBINDA, T/A EKE'S LITTLE SHOP (2)** or where the Appellate Court is satisfied that a finding is based upon a misapprehension of the facts, in which case the Appellate Court is in as good a position as the trial court to make conclusions and draw inferences from admitted facts, **MULENGA CHUNGU (As administrator of the estate of the late Lovestone Chanda) VS MOPANI COPPER MINES (3)**. He said that the finding by the learned trial Judge that, *'as such, the authenticity of the*

*document relied upon the Plaintiff in pursuing his claim against the Defendant has been proved,*' is not supported by the evidence on record. He said that the facts of this case are similar to those in the case of **GOODWELL MUDENDA VS BELITA MICHELO (4)** where the court made an award of K15,000,000.00. He urged us to allow the appeal and make a similar award.

In reply Counsel for the Respondent submitted that a document cannot produce itself notwithstanding that it appears in the pleadings. That it must be produced and oral evidence adduced in order that the court may rule on its admissibility or otherwise. He said that ordinarily a party seeking to rely on a document may serve a notice on his adversary that ~~the~~ intends to produce the document at the trial of the matter. But in this case if the document is included in the pleadings, then this is deemed to be notice. That even where the document is admitted by the other party, it does not make it evidence, and it must be formally put in at the trial. He said that in this case since the letter by the witch finder was not produced and was disputed by the Respondent, there is no question of the learned trial Judge having misdirected himself as alleged. He urged us to dismiss the appeal.

We have considered the submissions of Counsel for the Appellant and for the Respondent as well as the evidence on record.

It is common cause that following the demise of his son, the Respondent went to consult a witch finder to ascertain what had led to his son's death. The witch finder gave the Respondent a letter addressed to the Appellant. The Respondent gave the letter to a village headman who convened a meeting at which the letter was read by one Munyinda Kalaluka. The Appellant had been summoned to attend the meeting and was present when the letter was read. The witch finder who had authored the letter did not attend the meeting. The evidence on record shows that the Appellant read out the contents of the letter during the proceedings in the court below and a translation of the same appears on page 47 of the record. However, the Appellant did not produce this letter to the court. The evidence also shows that the Respondent disputed that the letter which appeared on page 1 of the Appellant's bundle of documents which letter was read by the Appellant to the court was the same letter that the witch finder had given him. In fact he went so far as to assert that he had not seen that letter before. We also note that neither of the parties to this litigation called the author of the letter as a witness. More importantly however is the fact that the person who read the letter to the gathering was not the Respondent but one Munyinda Kalaluka and any slander arising from the contents of that letter could not have been committed by the Respondent. For these reasons we are

satisfied that there is no merit in this appeal and we dismiss it accordingly with costs. The costs are to be taxed in default of agreement.

D.M. Lewania  
DEPUTY CHIEF JUSTICE

L.P. Chibesakunda  
SUPREME COURT JUDGE

C.S. Mushabati  
SUPREME COURT JUDGE