

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

JUDGMENT

Case no: HC-NLD-CIV-ACT-CON-2020/00231

In the matter between:

FRANS ALUDHILU KAYAWALA

PLAINTIFF

and

VITALIS PEWAADHA NEMUSHI

DEFENDANT

Neutral Citation: *Kayawala v Nemushi* (HC-NLD-CIV-ACT-DEL-2020/00231) [2023]
NAHCNLD 88 (24 August 2023)

CORAM: **MUNSU J**

Heard: 21 April 2023

Delivered: 18 August 2023

Reasons: 24 August 2023

Flynote: Action – Law of Delict – Defamation – Claim for damages – Defamatory statement issued at a public place referring to the plaintiff as a puppet and someone in debt and without a home – Statements defamatory in nature – General damages.

Summary: The plaintiff sued the defendant for alleged defamatory statements made by the defendant concerning the plaintiff. It was alleged that the defendant referred to the plaintiff as a puppet and someone in debt and without a home. The plaintiff claimed damages in the amount of N\$ 100 000. The defendant defended the matter. The court found the remarks as false and defamatory.

Held, that the defendant's case was marred with material contradictions.

Held further, that the plaintiff established on a balance of probabilities that his version is true and therefore acceptable and the defendant's version is false and falls to be rejected.

Held further that, when properly weighed, the said remarks, which were made in front of the plaintiff's colleagues and bystanders who were attracted by the defendant's ranting, have the effect of diminishing the plaintiff's good name and reputation in the eyes of right-thinking members of society.

Having considered the defendant's subsequent conduct and awards in like cases, the court awarded damages in the amount of N\$ 25 000.

ORDER

1. The Defendant is ordered to pay the Plaintiff damages in the amount of N\$ 25 000.
2. Interest at the rate of 20% from the date of judgment to the date of final payment.
3. Costs of suit.
4. The matter is removed from the roll: Case Finalised.

JUDGMENT

MUNSU J:

Introduction

[1] The plaintiff, a police officer instituted action against a civilian defendant, seeking payment in the sum of N\$ 100 000, in damages for alleged defamatory remarks the defendant allegedly made against the plaintiff.

[2] The plaintiff is Mr Frans Aludhilu Kayawala, an adult male person and resident of Outapi. He is employed as a police officer.

[3] The defendant is Mr Vitalis Nemushi, an adult male person and resident of Outapi. He is a businessman and owner of K-Zone Bar where the incident is alleged to have taken place.

Particulars of claim

[4] The plaintiff alleges that the incident happened when the country was in stage 3 of the COVID-19 State of Emergency, during which time liquor outlets were only permitted to sell alcohol between the hours of 12h00 and 18h00 and exclusively on takeaway basis.

[5] The plaintiff alleges that on 19 June 2020, while on duty (Operation Kalahari), he and his colleagues came upon the defendant's K-Zone bar, which was still operating and serving alcohol to customers beyond 18h00.

[6] The plaintiff states that the defendant was instructed to close the bar, and it is claimed that in response, the defendant made the following defamatory remarks against the plaintiff:

- (a) That he is a puppet just like his father; who was also a puppet and who died as a result of being a puppet;
- (b) That he is a stupid Kwambi boy with no manners;
- (c) That he has something against the defendant's establishment K-Zone bar;
- (d) That he must watch his back because the defendant will send his son to beat him;
- (e) That he has a debt due and payable to the defendant's cash loan and that the defendant took the plaintiff's Barcelona T-shirt as security; and
- (f) That he has no house, and that he is cohabitating with his girlfriend who is a b*tch.

[7] The plaintiff alleges that the above statements were wrongful, unlawful and defamatory to the plaintiff in that they were intended to humiliate him and were understood by the general public and the plaintiff's colleagues to mean that: (a) The plaintiff is a puppet; (b) The plaintiff is deceitful and untrustworthy; (c) The plaintiff carries out his duties with ulterior motives; (d) The plaintiff owes money to the defendant's cash loan company; (e) The plaintiff is a man of straw; (f) He has nothing to him and owns no home; and (g) The plaintiff's girlfriend is a b*tch.

[8] The plaintiff further claims that the aforementioned defamatory remarks are false, insulting, and demeaning and were made with the intent of harming the plaintiff's character, dignity, integrity, and reputation as they were false, humiliating and degrading.

The plea

[9] According to the defendant, he was approached by the plaintiff who confronted him and a verbal altercation ensued. The defendant denies any of the plaintiff's claims that he used vulgar or abusive language. According to the defendant, he tried to advise the plaintiff that what he was doing was harassment and/or abuse of power as they disagreed on the manner in which the plaintiff approached the bar lady.

[10] The defendant further pleaded that the plaintiff came to K-Zone bar at around 17h00, and at the time there were no customers drinking on site. He asserted that the bar was operating in compliance with the state of emergency regulations.

[11] Furthermore, the defendant claimed that the initial verbal altercation between the parties took place in the defendant's office and that there were no spectators. He further pleaded that the plaintiff had misconstrued and gave an incorrect interpretation to the words allegedly said by the defendant.

The evidence

Plaintiff's case

[12] The plaintiff testified that on 19 June 2020, at around 18:30, he and his colleagues were on duty patrolling when they came across the defendant's establishment, K-Zone Bar. He stated that the defendant's bar was operating contrary to COVID-19 regulations, as liquor outlets were to close at 18h00. He further testified that he used the vehicle's loudspeaker to inform the patrons of the bar to vacate the premises as it was already 18h30.

[13] It was the plaintiff's testimony that, as the customers began leaving, he walked around the bar to see if there were still people. He recounted that he found one Mr Malakia Shikongo, Mr Petrus Andreas and an unidentified female person. The plaintiff went on to narrate how the defendant approached him as he was speaking with Mr. Shikongo. The plaintiff claims that the defendant said the words alleged in the particulars of claim, and same were directed at him.

[14] The plaintiff testified that neither of his clothes were taken by the defendant, nor did he ever borrow money through the defendant's cash loan. He added that he never cohabitated with anyone in his life.

[15] In addition, the plaintiff recounted that the defendant uttered the aforementioned words in the presence of the plaintiff's colleagues, Mr Malakia Shikongo, Mr Petrus Andreas as well as bystanders who were drawn by the defendant's ranting.

[16] It was the plaintiff's testimony that the defendant merely attacked him when he had done nothing to him. Finally, the plaintiff claimed that the defendant informed Mr. Andreas not to respond to inquiries regarding the beer bottle.

[17] Mr Aipinge Festus, a police officer, corroborated the plaintiff's evidence in material respects. He testified that on 19 June 2020 he was out on patrol together with his colleagues, including the plaintiff. The patrol was aimed at ensuring that liquor outlets were adhering to the state of emergency regulations. At about 18h30, they visited the defendant's bar, K-Zone where they found customers consuming alcohol. He testified that the plaintiff announced via the loudspeaker telling the patrons to vacate. He further testified that the customers complied and moved away. According to him, he then walked around the bar to satisfy himself that no one remained behind. It was his testimony that he found Mr Shikongo eating, while he had a beer bottle next to him.

[18] Mr Festus further testified that while the plaintiff was talking to Mr Shikongo, he witnessed the defendant call the plaintiff a puppet similar to his father, and that he also took away the plaintiff's Barcelona T-shirt for failing to repay the money borrowed from the defendant's cash loan. According to the witness, the defendant also threatened to beat the plaintiff by sending his son. Despite his intervention, the witness claimed that the defendant refused to cooperate.

[19] Mr Uushona Shiimi also testified on behalf of the plaintiff. He confirmed that he was on official duties together with the plaintiff and others when they came across the defendant's bar. He testified that there were a lot of cars parked and that the plaintiff informed the people to leave the premises since it was past closing time.

[20] Mr. Shiimi further testified that he proceeded to the restaurant's side and discovered Mr. Andreas concealing a beer bottle. In the process, the defendant

appeared and went straight to the plaintiff, telling him that he is a puppet and that his father was also one, and that he will take action against the plaintiff to have him transferred just like Cst Amwele because he is a stupid Kwambi. He testified that the defendant added that the plaintiff does not have a place to stay and that he lives with his girlfriend who is a b*tch. According to the witness, the defendant further said that he confiscated the plaintiff's Barcelona t-shirt as security for money owed to his cash loan and that he would send his son to beat the plaintiff.

Defendant's case

[21] The defendant testified that on the day in question, the plaintiff and his colleagues visited his bar, K Zone at around 17h00. At the time, the bar was open with only the bar tender while defendant was in his office at the back of the bar. According to the defendant, there were no patrons in the bar due to the COVID-19 restrictions in place at the time.

[22] The defendant further testified that he heard noise emanating from the bar and went to investigate. He ran into the plaintiff as he yelled at the bar tender. According to the defendant, he immediately informed the plaintiff that what he was doing was harassment and abuse of power.

[23] The defendant further testified that there were no spectators or customers as the initial verbal altercation was in his office where only the defendant, bar tender and the plaintiff were present. In addition, the defendant recounted that he did not use any obscene words towards the plaintiff. According to him, all he did was to inform him in a respectful and courteous manner to stop harassing people and abusing his position of authority because no laws had been violated. The defendant denied having defamed the plaintiff.

[24] Ms Jakobina Ailenge testified on behalf of the defendant. She was employed as the bar tender. She testified that when the plaintiff and his colleagues arrived at the bar, the plaintiff got out of the police van and went through the bar to the back towards

the guest house. According to Ms Aiping, she immediately followed him to the back of the bar where she went to find him standing with the defendant.

[25] Ms. Aiping recalled hearing the defendant tell the plaintiff that while they had come a long way together, and had meals and drinks together, the plaintiff continued to visit and harass the defendant's establishment. She added that the plaintiff, in anger then told the defendant that if it's about the food he ate, he would compensate him, and then he went to the police van and drove off. According to Ms Aiping, she did not hear any insults or disparaging remarks uttered by the defendant towards the plaintiff.

[26] Mr Petrus Andreas used to work as a bar assistant at the bar. He testified that at around 17h30, the plaintiff found him seated outside the bar. Mr Andreas related that the plaintiff walked past him and entered the bar while his colleagues remained in the police van.

[27] Mr Andreas added that he went to find the plaintiff behind the bar where he heard him tell the defendant that he would pay for the food he had been eating at the defendant's establishment. Furthermore, Mr. Andreas stated that, despite hearing what sounded like a heated argument between the parties, he did not hear the defendant use derogatory language towards the plaintiff.

The applicable law

[28] Our law reports are replete with cases that deal with claims for defamation.¹ In *Nyambe v Mushabati*² this court held that defamation is the wrongful, intentional publication of words or behaviour concerning another person which has the effect of injuring his status, good name and reputation.

[29] The court went further to state that any words or conduct that have the effect of reducing or negatively affecting a person's status in the minds of right-thinking members of society, are regarded as defamatory.

¹ See *Nehoya v Haimbodi* (HC-MD-CIV-ACT-OTH-2022/00015) [2023] NAHCMD 393 (7 July 2023) and the cases cited therein at para 11.

² *Nyambe v Mushabati* (HC-MD-CIV-ACT-DEL-2021/04399) [2022] NAHCMD 389 (4 August 2022).

[30] To succeed in a claim for defamation, the plaintiff must establish on a balance of probabilities that the defendant had published a defamatory statement concerning him or her. In other words, the words or conduct of the defendant must negatively affect a person's *fama* or good name, meaning that the respect and status that he or she enjoys in the estimation of the right-thinking members of the society is diminished by the said words or conduct.³

Determination

[31] It is common cause that the parties had a verbal exchange on the day in question. The defendant denies having uttered the alleged words. According to him, he spoke to the plaintiff in a polite manner.

[32] Counsel for the defendant argued that the issue of where the encounter took place is crucial. According to him, if the encounter took place at the 'back office', then there would not have been any spectators.

[33] Firstly, the defendant materially contradicted himself in his evidence. He is the only witness who pushed a narrative that the encounter took place in his office. However, on the other hand, he testified that while he was in his office, he heard noise emanating from the bar and he went to investigate, and then ran into the plaintiff who was shouting at the bar tender. He stated that he immediately informed him that what he was doing was harassment and abuse of power. He then contradicted himself by saying that there were no spectators as the initial verbal altercation took place in his office and continued in the bar where only he, the plaintiff and the bar tender were present. This evidence was never supported by any of his witnesses and is also not in line with the plaintiff's case.

[34] The defendant's own witness Ms Jakobina Ailenge testified that she did not argue with the plaintiff nor did the plaintiff shout at her. She also stated that the incident did not happen in the defendant's office. Further, she testified that she did not

³ Ibid at para 23.

see the defendant in the bar. According to Ms Ailenge, the plaintiff entered through the bar and proceeded through the restaurant to the side of the guesthouse where she went to find the plaintiff and the defendant. In cross-examination, she amplified to say that the words she heard were said while the parties were between the guesthouse and the office.

[35] Whereas Ms Ailenge testified that only she, the plaintiff and the defendant were present at the time of the encounter between the parties, another witness for the defendant Mr Andreas informed the court that he went to find the parties behind the bar and that Ms Ailenge lied when she said that it was only the three of them because he did not see her in the presence of the parties.

[36] Clearly, the defendant's case was marred with contradictions. Contrary to the plaintiff's case, the defendant and his witnesses were determined to exclude the presence of any member of the public from having witnessed the encounter between the parties.

[37] The plaintiff's case was that he announced for the people to vacate the premises. The people started leaving. He then got out of the police van and walked around the bar to ensure that everyone left. He then encountered Mr Malakia Shikongo at the side of the restaurant. The latter was eating while in the company of a female unknown to him. He further stated that Mr Petrus Andreas (defendant's witness) immediately stood up to go and hide the beer bottle he had, but Sgt Uushona (plaintiff's witness) went to pick it. There was also a bottle of Hunter's Gold where Mr Shikongo was seated with the female. It was at the time when he was busy asking Mr Shikongo about the Hunter's Gold that the defendant showed up and uttered the defamatory words.

[38] The plaintiff's evidence was confirmed by Mr Shiimi, who testified that he got out of the vehicle and went at the side of the restaurant where he saw Mr Petrus Andreas (defendant's witness) hide a bottle of Carling Black Label. He testified that it was at that stage that the defendant came straight to the plaintiff and uttered the defamatory remarks.

[39] The contention that because the incident happened behind the bar, therefore, there would not have been any spectators is misplaced as there is no factual basis for such contention.

[40] Firstly, it was not any of the parties' case that there could not have been any person at the back of the bar either because it was a restricted area. The plaintiff and his witnesses were clear that they went around the bar to ensure that no person remained behind, and in the process they met the individuals they specified in their testimony.

[41] Rather, the defendant's contention should be that, on his version, there was no other person present at the time of the encounter other than his witnesses.

[42] Secondly, not even the defendant's witnesses satisfactorily described the premises. In fact, neither party attached importance or based their case on the layout of the premises.

[43] The plaintiff's case was that the incident happened at the side of the restaurant where there was Mr Andreas, Mr Shikongo, and the female person. Whether the restaurant lies north, south or is at the back of the bar is immaterial in the context of this matter.

[44] The plaintiff established on a balance of probabilities that his version is true and therefore acceptable and the defendant's version is false and falls to be rejected.

[45] I have no doubt that the defendant uttered the words mentioned by the plaintiff and such words were directed at the plaintiff. Apart from the plaintiff, two other witnesses confirmed that the defendant uttered those words. I do not find that the plaintiff and his colleagues with more than ten years in service would have merely imagined the whole incident and concoct words and ascribe them to the defendant when in fact he never uttered them.

[46] The defendant's case has a hollow that cannot be ignored. According to the defendant, he heard noise emanating from the bar and he went to investigate. He discovered that it was the plaintiff shouting at the bar tender (Ms Ailenge). He then told the plaintiff that what he was doing was harassment and abuse of power. Ms Ailenge refuted this evidence. She testified that it never happened. The question that lingers is, in the absence of that, what was the reason for the encounter between the plaintiff and the defendant.

[47] On the other hand, the plaintiff's case presents proven objective facts which also tend to serve as circumstantial evidence. At the time the police went to the defendant's bar, it was past the closing time for liquor outlets. Members of the public were still gathered at the bar. The COVID-19 regulations did not permit on-consumption. The plaintiff announced for everyone to vacate the premises, after which he went around the bar to satisfy himself that everyone left. He found individuals with beer bottles. In the process of engaging one of the individuals, the defendant showed up and expressed his displeasure with the plaintiff's frequent visits to his establishment and in the process uttered the words in question. I have no difficulties to reject the defendant's bare denial in this regard.

[48] The question that follows is whether the words uttered by the defendant are defamatory.

[49] Counsel for the defendant highlighted an important aspect for consideration i.e. police officers often find themselves in heated encounters with members of the public. He submitted that it is an occupational hazard of which the police are trained to handle.

[50] The plaintiff could not have been more clearer on this issue. As a police officer with more than 10 years in service, he said that he had been insulted by members of the public several times, but never filed lawsuits for that and would never. The difference according to him is that the defendant's words in this matter are not only insulting but are defamatory. This was the same tone reverberated by the plaintiff's witnesses.

[51] There is a difference between an insult and a defamatory statement. An insult could be a rude or offensive, disrespectful or scornful remark that can be true or a matter of opinion, while a defamatory statement contains a false assertion of fact that injures another's reputation. Insult may however, cross the line into defamation if they consist of false statements that damage another's reputation.

[52] The plaintiff testified that the aforesaid words uttered by the defendant were false. The defendant on the other hand distanced himself from any of the words that carry a sting. According to him, he was polite to the plaintiff, even under the circumstances that were described by his own witness Mr Andreas that the parties had a heated encounter. I have already rejected the defendant's denials in this regard. It follows therefore that the defendant's remarks concerning the plaintiff were false and unlawful.

[53] As shown earlier, any words or conduct that have the effect of reducing or negatively affecting a person's status in the minds of right-thinking members of society, are regarded as defamatory. Not all the words said by the defendant are defamatory. However, the statement that the plaintiff has a debt due and payable at the defendant's cash loan and that the defendant took the plaintiff's Barcelona T-shirt as security for failure to repay the loan; that he has no house, and that he is cohabitating with his girlfriend are defamatory. The said words convey the innuendo that the plaintiff has nothing to his name.

[54] Mr Aiping expanded on the issue to say that whether the parties loaned each other money, it was something between the two of them and not for public consumption. According to Mr Shiimi, he believes that there are rules and regulations relating to confidentiality that are applicable to cash loans. He also stated that the defendant did not provide proof of the loan to the public.

[55] Furthermore, the statement that the plaintiff is a puppet convey the innuendo that the plaintiff is a man of straw, pawn, stooge or tool exploited or used by others for their own purposes. The word also convey the innuendo that the plaintiff is a cat's paw

manipulated or used by others to carry out unpleasant tasks. This tends to give an impression that the defendant does not properly carry out his duties.

[56] The witnesses were convinced that the defendant uttered the aforesaid words in order to demoralise the plaintiff and discourage him from visiting his establishment. It was stressed that the members of the public could believe the defamatory statements made by the defendant *in casu*.

[57] The statements made by the defendant against the plaintiff had nothing to do with the issue for which the plaintiff visited the defendant's bar, but were an attack on the integrity and *persona* of the plaintiff.

[58] When properly weighed, the said remarks, which were made in front of the plaintiff's colleagues and bystanders who were attracted by the defendant's ranting, have the effect of diminishing the plaintiff's good name and reputation in the eyes of right-thinking members of society. The aforementioned words are disparaging and demeaning.

Quantum

[59] There is no fixed formula in terms of which awards are made. Awards are assessed *ex aequo et bono* (according to what is right and fair).⁴ In *Muller v SA Associated Newspapers Ltd and Others*⁵ cited with approval by this court⁶ the court points out factors which ought to be taken into consideration when determining quantum of damages:

'...the character and status of the plaintiff, the nature of the words used, the effect that they are calculated to have upon him, the extent of the publication, the subsequent conduct of the defendant and, in particular, his attempts, and the effectiveness thereof, to rectify the harm done'.

⁴ See *Nyambe v Mushabati* footnote 2.

⁵ *Muller v SA Associated Newspapers Ltd and Others* 1972 (2) SA 589 (C) at 595A.

⁶ See *Platt v Apols* 2021 (2) NR 321 (HC); *Nehoya v Haimbodi* footnote 1.

[60] It has been held that the damaged reputation cannot be more restored by a higher award and less restored by a lower one. Rather, it is the judicial finding in favour of the integrity of the complainant that vindicates his or her reputation, not the amount of money he or she ends up being able to deposit in the bank.⁷

[61] The court, in assessing the damages takes into account whether there are extenuating or aggravating circumstances in the case at hand and previous awards in like cases may also offer a general guidance.⁸ In addition to these and other relevant factors, the court is entitled to take into account the declining value of money.⁹

[62] The plaintiff is a police officer of more than ten years in service. It is aggravating that the defamatory remarks were targeted at him while he was carrying out official duties of maintaining law and order.

[63] The defendant made no attempt to apologise, not even after being served with a summons. Instead, he continued to dispute the plaintiff's claim and defended the matter. This case was filed in 2020, and at all times, the defendant had legal representation. The plaintiff who also had legal representation from the beginning of the matter became a self-actor half way proceedings. On one occasion, he failed to comply with a court order, and consequent thereto, sanctions were imposed on him, the result of which was that he ended up paying a substantial amount for wasted costs. So, because of the stance adopted by the defendant, the plaintiff encountered challenges in prosecuting this matter.

[64] I have also considered awards in similar cases¹⁰ and the fact that there was no circulation of the defamatory words. However, the defendant's subsequent conduct cannot be ignored. That being said, I am of the considered view that an award for damages in the sum of N\$ 25 000 is appropriate in this matter.

⁷ See *Dikolo v Mokhatla* 2006 (6) SA 235 (CC) referred to in *Trustco Group International Ltd and Others v Shikongo* 2010 (2) NR 377 (SC).

⁸ *Nyambe v Mushabati* footnote 2.

⁹ See *Mbura v Katjiri* (I 4382/2013) [2017] NAHCMD 103 (31 March 2017).

¹⁰ *Nehoya v Haimbodi* footnote 1 and the cases referred to therein.

Costs

[65] As pointed out earlier, the plaintiff was represented until case management, at which point his counsel withdrew. He then proceeded to prosecute the matter unrepresented until the conclusion of the trial.

[66] In terms of rule 125(12), where costs are awarded in favour of a self-represented litigant, such litigant's costs are limited to disbursements necessarily and reasonably incurred. Having been successful, I find that the plaintiff is entitled to the costs he incurred in respect of legal representation and disbursements necessarily and reasonably incurred. Such costs must be taxed by the taxing officer.

[67] In the result, I make the following order:

5. The Defendant is ordered to pay the Plaintiff damages in the amount of N\$ 25 000.
6. Interest at the rate of 20% from the date of judgment to the date of final payment.
7. Costs of suit.
8. The matter is removed from the roll: Case Finalised.

D. C. MUNSU
JUDGE

APPEARANCES

PLAINTIFF: IN PERSON

DEFENDANT: DK NDANA
Of Jacobs Amupolo Lawyers, Notaries & Conveyancers,
Ongwediva.