

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION  
HELD AT OSHAKATI

JUDGMENT

Case no: I 132/2015

In the matter between:

**DAVID KASHULULU**

**PLAINTIFF**

and

**JOOLOKENI PENEYAMBEKO NAKALE**

**DEFENDANT**

**Neutral citation:** *Kashululu v Nakale* (I 132/2015) [2018] NAHCNLD 44 (14 May 2018)

**Coram:** CHEDA J

**Heard:** 07 November 2017 and 27 February 2018

**Delivered:** 14 May 2018

**Flynote:** In a claim for defamation, plaintiff must prove that there was wrongfulness and false publication about him/her which publication has infringed his/her dignity - The said publication was unlawful – Defendant can then raise legal defences.

**Summary:** Plaintiff sued defendant for having accused him of witchcraft. Plaintiff a police officer was executing his duty as a traffic officer when he attempted to issue defendant with a traffic offence ticket. Defendant refused to co-operate and laid false

criminal charges against the plaintiff and at the same time called him a witch. This was in the Charge Office where there were other police officers. Plaintiff's colleague corroborated his evidence. Defendant denied. Plaintiff claimed damages for loss of promotion. Plaintiff proved on a balance of probabilities that he was defamed. Plaintiff failed to prove that he was going to pass the interview which would have led to his promotion. Defamation was proved and defendant was found liable.

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### **ORDER**

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1. Defendant is found liable for defaming plaintiff.
  2. Defendant shall pay the sum of N\$80 000 as defamatory damages with costs.
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### **JUDGMENT**

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CHEDA J:

[1] Plaintiff in this matter issued out summons for defamation against defendant on the basis of alleged false statements uttered by defendant to the police. The said statements resulted in plaintiff being arrested and charged. However, the Prosecutor-General declined to prosecute him.

[2] Plaintiff was a Constable at the time of this incident. He was a Traffic Officer and was based at Ohangwena Regional Head Quarters. He was represented by Ms Kishi while defendant was represented by Ms Mainga.

[3] Defendant is a lady teacher in the Ministry of Education, Arts and Culture and was based at Ongwa Secondary School. It is plaintiff's case that on 15 October 2013 defendant unlawfully and intentionally accused him of having insulted her by saying that 'she is a witch' and further said 'foko' or words to that effect. Defendant further opened a criminal case against plaintiff under CR 39/10/2013 for allegedly pointing a finger at her.

[4] It is his averment that the said allegations were false and were meant to tarnish his otherwise good image and standing in the community and as a traffic officer. He therefore claimed defamatory damages in the sum of N\$100 000.

[5] These allegations were denied by the defendant. Defendant in her plea stated that on the day in question, plaintiff insulted her by stating that she was a witch and also used the "f" word. She went further and stated that defendant slapped her on the face while holding keys which resulted in her sustaining injuries.

[6] It is also her averment that plaintiff indeed pointed a threatening finger towards her, presumably in a threatening manner. It was as a result of this incident that she opened a criminal case against him.

#### Plaintiff's Case

[7] Plaintiff told the court that he is a Traffic Officer employed by the Ministry of Safety and Security and stationed at the Regional Head Quarters, Ohangwena Region. One of his duties as a Traffic Officer was to conduct patrols on public roads.

[8] On the 15<sup>th</sup> October 2013 at about 11h30 he was driving his police motor vehicle from Ohangwena to Eenhana. When he was at Onhuno, he observed that there were two vehicles in front of him and the one in the centre was being driven by defendant. She was driving a Toyota Hilux (bakkie). The defendant overtook an Iveco bus on a prohibited line.

[9] There was a Corolla that was coming from the opposite direction and the driver of the Corolla flashed lights warning her of her dangerous overtaking. Upon overtaking, she cut in front of the Iveco bus crossing the white continuous line in order to avoid a collision with an oncoming vehicle. She sharply cut in front of the Iveco bus, thereby, endangering other people's lives. He stopped her and advised her of her dangerous driving to which she denied any wrongdoing.

[10] Plaintiff asked for her driver's licence and she gave him. When he tried to issue her with a traffic ticket she did not take kindly to this and she drove off to the

direction of the bus. He followed her and on his way he received a telephone call from his Regional Commander to the effect that he had confiscated her driver's licence. He was ordered to drive back to his station wherein he found defendant already there.

[11] While he was in the process of completing the ticket he asked for certain particulars from defendant, but, she refused to furnish him with the said information. She insisted that unless the plaintiff brought back the Iveco bus driver she was not going to furnish him with the information he required. Altercation took place between the two of them in the charge office and in the presence of other police officers. She later laid criminal charges against him. He was charged with the allegations made by defendant against him. The matter was referred to the Prosecutor-General's Office who, however, declined to prosecute. He denied insulting, assaulting or pushing her.

[12] Plaintiff went further and stated that his name was withdrawn from the promotion consideration list because of the allegations that were made by defendant. Plaintiff stated that he had been recommended for promotion from sergeant 2 to warrant officer, but, he lost that opportunity to attend an interview, due, to the pending case which was under investigation. He also stated that these allegations were false and were intended to injure and tarnish his otherwise good name.

[13] It is for that reason that he suffered defamatory damages in the sum of N\$100 000. When asked as to what were the exact words defendant had used against him, he stated that she said 'David Kashululu, are you bewitching people?' Thereafter, she picked up a cellphone and called the Regional Commander and informed him that plaintiff had called her a witch.

[14] This took place in the charge office at Ondobe Police Station in the presence of other police officers. He further stated that at that stage, one constable Komeya intervened and said 'meme, Kashilulu is just repeating what you said.'

[15] Ms Shailemo intensely cross-examined him and he maintained that defendant made a false report against him which resulted in him being defamed in his good

name. It was also his evidence that the consequences of the said defamation resulted in him losing out on promotion.

[16] In addition to this, he is of the view that his esteem has suffered as he is now viewed as an unfit public officer and that his colleagues were laughing at him and insinuating that he will remain behind in terms of promotion. He denied ever provoking the defendant at any stage. It is his view that defendant was uncooperative throughout his time with her.

[17] In his evidence in chief he claimed an amount of N\$100 000 but did not say how he came to the figure of N\$100 000. Under cross examination he was asked as to how he arrived at the figure of N\$100 000, all he could say was that the figure was calculated with the assistance of a staff member in the Department of Finance at his workplace. This therefore was not enough as the said staff member was not called to testify.

[18] He further stated that he lost out because those who were in the same rank with him were now earning N\$18 000 ± per month. It was further his evidence that he was due to be promoted in October 2013. Despite Ms Shailemo's request, he was unable to furnish the court with a letter showing that he was due for promotion in October 2013.

[19] That was the gist of his evidence. Plaintiff's next witness was Sergeant Rachel Komeya. She is a sergeant at Nampol and is based at Ondobe Police Barracks. It was her evidence that on the day in question she was at Ondobe Police Station when she met plaintiff. While she was in the office, she observed a misunderstanding between plaintiff and defendant regarding defendant's refusal to furnish the plaintiff with her full particulars.

[20] She also stated that while this was going on defendant stood up and beat her chest and uttered words 'Kashululu, do you want to bewitch me?' or words to that effect. After that she began to insult plaintiff and was speaking in a loud voice. She did not hear plaintiff uttering any insult to defendant.

[21] It was further her evidence that when she saw the two at their offices, she enquired as to what the problem between the two of them was, as both of them had come from Onhuno. She was advised by plaintiff that defendant was refusing to be issued with a ticket for her improper overtaking. She also stated that defendant was uncooperative at the police station.

[22] She did not witness plaintiff either insulting or pointing a finger at defendant in a threatening manner or at all and that plaintiff was not aggressive. Under cross examination, she stuck to her evidence and stated that defendant had said 'Kashululu, do you want to bewitch me?'

[23] Plaintiff's next witness was Phillipus Anghuwo. He is employed by Nampol as a Unit Commander of the Traffic Department and is stationed at the Ohangwena Regional Head Quarter. His testimony was that plaintiff was his subordinate since 2002 and had never been promoted before due to the fact that there were no openings until the period of 2014 – 2015. During the 2014 - 2015 vacancies surfaced and he recommended plaintiff for a promotion to Warrant Officer Class I, through a letter of the 31<sup>st</sup> January 2014.

[24] The promotion was going to result in plaintiff to be a Unit Commander at Eenhana Traffic Division. This however, did not materialise as plaintiff had a pending case which had been reported by defendant. He, further, stated that, the Inspector-General did not get a chance to exercise his promotional discretion on plaintiff as his name did not reach the Inspector-General's Office. This was the gist of his evidence.

#### Defendant's case

[25] Defendant gave evidence. She stated that on the 15<sup>th</sup> October 2013 she was driving her motor vehicle when she passed a stationery bus whose driver was on the telephone. She stated that plaintiff who was also along that road took issue with her driving and invited her to follow him to Eenhana Police Station.

[26] At that juncture, plaintiff had confiscated her driver's licence. He gave her an option to pay him in order for him to return the said licence. She refused. She neither

gave him the money nor followed him to Eenhana Police Station. Instead she drove to Ondobe Police Station as she was running low on fuel.

[27] At that Police Station, she was given a telephone number for the Regional Commander Kampolo whom she contacted. He instructed her not to leave Ondobe Police Station as he was going to come there.

[28] While she was there, plaintiff arrived and found her leaning on the car. He accused her of obstructing him from performing his duties and started poking her on her forehead and at the same time pushing her. He also quizzed her as to why she had reported him to the Regional Commander.

[29] It was her further evidence that plaintiff threatened her with assault and went further to hit her on her left eye with keys. As a result of this assault, it is her evidence that she received medical treatment at Oshakati Hospital and also obtained spectacles from Kapia Optics. As a consequence of this assault she laid charges against plaintiff, but, the case was later thrown away by the Prosecutor-General who declined to prosecute.

[30] It was also her evidence that Sergeant Komeya ended up issuing her with a traffic offence ticket. She further stated that plaintiff opened up two criminal cases against her. She denied calling plaintiff a witch but stated that in fact it was plaintiff who called her a witch as he said she was obstructing him from executing his duties as a police officer. To support her evidence she called Chief Inspector Kampolo.

[31] His evidence was that indeed he received a list of names of Police Officers who were to be considered for promotion which he submitted to the Inspector-General. He however, did not scrutinise it and as such he cannot say whether plaintiff's name was on the list. This was despite the fact that he signed the said letter.

The Law

[32] Defamation is a wrongful and intentional publication of a false statement about another person which statement tends to infringe another person's right to his good name, see *Kambwela v Mbadhi* (I 185/2016) [2018] NAHCNLD 16 (12/2/2018); *Tap Wine Trading CC v Cape Classic Wine CC (Western Cape)* [1998] 4 SA 86 (C) and *Langa CJ & others v Hlophe* 2009 (4) SA 382 (SCA) at 3981. It is in the above cases that the following essential elements were regarded as a necessary ingredient in order for a defamation claim to succeed;

- a) injuria, i.e. the act (publication of words or conduct and/or behaviour);
- b) an injury to personality;
- c) wrongfulness, which is the infringement to one's *dignitas*; and
- d) the intent (*animus injuriandi*)

[33] The court finds the following facts to have been proved by the parties.

#### Analysis of plaintiff's evidence

[34] Plaintiff is a police officer who approached defendant on an alleged traffic laws violation. He tried to issue her with a traffic offence ticket and in that process he asked for her driver's licence which she gave him but refused to co-operate with other subsequent questions from plaintiff.

[35] He invited her to come to the Eenhana Police Station but she refused and choose to drive to Ondobe Police Station where she went to make a call to the Regional Commander. The Commander then asked her to remain where she was at Ondobe Police Station and at the same time ordered plaintiff to go to Ondobe Police station to meet defendant.

[36] Upon arrival, a confrontation took place resulting in defendant accusing him of being a witch. The utterance that plaintiff was a witch was witnessed by Sergeant Komeya who took over the case and issued her with a ticket.

#### Analysis of defendant's evidence



[37] Defendant overtook and/or passed a stationary Iveco bus which plaintiff formed the impression that it was parted in a dangerous manner. This resulted in plaintiff attempting to issue defendant with a traffic ticket which she refused. Defendant became uncooperative and was rowdy. She refused to comply with an invitation to go to Eenhana Police Station, but, chose to go to a different police station. She stated that it is plaintiff who insulted her and assaulted her with keys resulting in her receiving medical treatment.

[38] Defendant's behaviour and/or conduct on the day in question leaves a lot to be desired. I noted the following in that regard:

- a) she refused to co-operate with a police officer on duty and in uniform by refusing to furnish him with her particulars;
- b) she refused to go to Eenhana Police Station, but, instead drove to Ondobe Police Station where she made a report to the Regional Commander who ended up ordering plaintiff to go to where she was, instead of her going to Eenhana Police Station where plaintiff the arresting detail had gone asked her to do;
- c) She received medical attention which she claims, the particulars of such medical treatment was endorsed on her medical passport, but, she failed to produce such proof;
- d) She claims to have bought spectacles from Kapia Optics, but, again there was no proof produced; and
- e) There was a material contradiction in her evidence about the assault which cannot be ignored. The defendant on page 146 and 147 of her evidence stated as below:

In her statement to the police she stated:

'Upon his arrival at the Ondobe Police Station he asked me my full name and I told him that I will not tell him my name before the (sic) bring the driver of that bus which was parking (sic) on the road. He stood up and he started saying apparently I am a witch and he again mentioned the words 'foko' to me and started pointing (sic) me in the face and I am (sic) thinking maybe he went (sic) to slap me.'

Whereas in her evidence she stated:

'He pushed me on my forehead. Asking me why I am obstructing his duty, he was only executing his duties and why should (sic) I report him to the Commissioner. When he pushed me he uttered the words do not witch me. I then left from (sic) the car following him asking him why he is pushing me, then he hit me with the keys he had in his hand on my left eye.'

[39] I find that defendant was not truthful in her testimony as to what happened. This contradiction is so glaring that it goes towards her credibility. It can only lead to the conclusion that she was trying to manufacture her evidence, but, forgot to narrate the correct sequence of events.

[40] Further to this defendant was very uncooperative with the police and was very angry on the day in question. There is only one independent witness with regard to the defamation that is Sergeant Komeya. She was at the charge office and she observed what was going on. It is her evidence that she did not hear plaintiff insulting or see him assaulting defendant.

[41] Looking at all the evidence before me, I find that defendant uttered defamatory statements to plaintiff imputing witchcraft and used a swear word. Plaintiff's evidence was corroborated by that of Sergeant Komeya. Further, that, she indeed falsely laid criminal charges against him and was only exonerated by the Prosecutor-General's Office who declined to prosecute. It is clear therefore that defendant had been malicious and intended to injure plaintiff's dignity.

[42] The fact that plaintiff's dignity was impaired admits of no doubt as he consequently lost out on the consideration for promotion. It should be borne in mind that plaintiff lost out in the consideration of a promotion only and not on the

promotion itself because being recommended for promotion does not in my view automatically result in the promotion itself. The Inspector-General was the determining factor and therefore to hold that plaintiff lost a promotion as a result of this incident would be preposterous.

[43] I find that plaintiff has proved on a balance of probabilities that defendant defamed him. Defendant's version of events is accordingly rejected.

[44] The next question is that of quantum. The law of damages consists of principles regarding compensation to the wronged and also determines the content of an obligation to pay damages or satisfaction. In other words it is an attempt to make good the wrong caused on the plaintiff by the defendant.

[45] However, the courts are aware that there is no mathematical formula that can be used to the total satisfaction of the aggrieved party and it is, therefore awarding damages is nothing but an attempt to ameliorate plaintiff's damaged dignity. This is an *actio iniuriarum* which was traditionally regarded as an *actio vindictam spirans*, a revenge action whose objective is to neutralise the plaintiff's feeling of outrage, hurt or suffering as a result of the infringement of his/her personality.

[46] However, even if it can be viewed as compensation, *actio iniuriarum* is not aimed at compensation for patrimonial loss as that can be claimed separately under *actio legis aquiliae*. Therefore, the granting of defamatory damages has, as its main ingredient as vindication of the plaintiff in the eyes of the public and as consolation to him or her for the wrong the plaintiff has suffered, see *Esselen v Argus Printing and Publishing Company Ltd & others* 1992 (3) SA 764 (T) at 771 which approach was overly approved in *Mogale & others v Seima* 2008 (5) SA 637 (SCA) at 641-2 T.

[47] In this jurisdiction in *Trustco Group International Ltd & others v Shikongo* (SA 8/2009) [2010] NASC 6 (7 July 2010) the Supreme Court pronounced itself on the guidelines in approaching the question of quantum in defamation cases where it stated:

'One of the difficulties in applying this test is how one quantifies harm to reputation in monetary terms. As Sachs J noted in Dikoko's case in the South African Constitutional Court:

"There is something conceptually incongruous in attempting to establish a proportionate relationship between vindications of reputation on the one hand and determining a sum of money as compensation on the other. The damaged reputation is either restored to what it was, or it is not. It cannot be more restored by a higher award and less restored by a lower one. 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.

Sachs J has however also pointed out that awards of damages remain important:

"In our society money, like cattle, can have significant symbolic value. The threat of damages will continue to be needed as a deterrent as long as the world we live in remains a money-oriented as it is. Many miscreants would be quite happy to make the most fulsome apology (whether sincere or not) on the basis that doing so costs them nothing – 'it is just words'. Moreover it is well established that damage to one's reputation may not be fully cured by counter-publication or apology; the harmful statement often lingers on in people's minds. So even if damages do not cure the defamation, they may deter promiscuous slander, and constitute a real solace for irreparable harm done to one's reputation."

[48] In determining what should be reasonable damages in the circumstances, the following should be taken into account:

- a) plaintiff's standing in society;
- b) the consequences of the publication; and
- c) whether or not there has been an apology made by defendant (the list is in exhaustive)

[49] Each case will depend on its own merits. Plaintiff is a Police Detective, a man of good standing in society whose reputation sticks out like a sore thumb. It is injurious for him to be referred to as a witch. In as much as in some societies being referred to as a witch may not be cause for concern, but, for plaintiff as a Police Officer to be associated with the underworld and engaging in metaphysical practices

is, in my view injurious to his *dignitas*. Defendant must therefore clean plaintiff's name.

[50] Plaintiff claimed N\$100 000. He was, however, not able to substantiate this claim. He who asserts must prove. In the absence of such proof, the court is at large as to quantum. The imputation is no doubt serious, but, not to such an extent that it would justify the claim made.

[51] In the circumstances I am of the considered view that the figure is far too high. I find that plaintiff was indeed defamed and the reasonable amount in the circumstances should be appears in this order.

Order:

1. Defendant is found liable for defaming plaintiff.
2. Defendant shall pay the sum of N\$80 000 as defamatory damages with costs.

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M Cheda  
Judge

APPEARANCES

PLAINTIFF:

F Kishi  
of Dr. Weder, Kauta & Hoveka Inc., Ongwediva

DEFENDANT:

T Shalemo  
of Shalemo & Associates, Ongwediva