



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Law, Miller & Potter JJA)

CIVIL APPEAL NO. 28 OF 1981

BETWEEN

AWILI.....APPELLANT

AND

ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

The appellant, as plaintiff in High Court Civil Case No 72 of 1977, filed a suit at Kisumu against the Attorney-General claiming damages for a slanderous statement allegedly uttered at a public baraza by Chief Aloo Obare of East Alego Location, Siaya District. The respondent, as defendant, admitted in his defence that the Chief spoke and published the words complained of, but denied that they were defamatory, and claimed that even if they were defamatory, they were not actionable without proof of special damage. He also pleaded that the words were true in substance and in fact, and alternatively that the occasion of publication was one of qualified privilege, in that the Chief had a legal, moral, public and social duty to publish the words complained of. Another ground of defence was pleaded in paragraph 2 of the defence as follows:

“2.The defendant contends that the plaint does not disclose a cause of action against the defendant insofar as the same does not aver or disclose that Chief Aloo Obare was acting in the course of and within the scope of his employment and that the plaint should be struck out.”

The suit came on for hearing on March 3, 1981, at Kisumu. The appellant who was unrepresented, gave evidence and was the sole witness called for the plaintiff. The defendant was represented by a State Counsel who submitted at the close of the appellant’s case that there was no case to answer —

a) because of the failure of the plaint to allege that the Chief was acting within the scope of his employment; and

b) because slander is not actionable without proof of special damage, which was not pleaded or proved, and state the counsel elected to stand on these submissions and call no evidence.

The learned judge in a short ruling on these submissions held that submission (b) failed, as the words complained of charged the appellant with the commission of a crime punishable by imprisonment and were accordingly actionable without proof of special damage. We respectfully agree; see *Gray v Jones* [1939] 1 All ER 798 and, the cases cited therein. Furthermore, the plaint alleged, and the defence did not deny, that the words were spoken of the appellant “in the way of his office” as Honorary Secretary of

Harambee Dip Project. In such a case, special damage does not have to be alleged or proved, see Section 3 of the Defamation Act (Cap 36).

The learned judge however dismissed the suit as disclosing no case to answer, because (in his words) “for a master that is to say the Government to be liable for its servant’s utterances which happen to be defamatory, the plaintiff has to prove that the words were uttered with the principal’s authority and consent.” This holding is challenged in paragraph 3 of the memorandum of appeal in these words —

“3. The learned judge erred in law in holding that for the defendant to be liable he (the defendant) must have authorized the Chief to use the words complained of herein.”

In our view this ground of appeal is well founded. It is not in dispute that a Chief is a government servant, and in the course of his evidence the plaintiff deposed that a “Chief as Government Servant has a duty to go to Baraza and mention names.” There was thus some evidence, which is of course rebuttable, that when the Chief published the words complained of, he did so in the course of and within the scope of his employment as a chief employed by the Government. The law as to the vicarious liability of a master in tort for the acts of his servant was stated by sir Charles Newbold P In *Muwonge v Attorney-General of Uganda* [1967] EA 17 as follows —

“An act may be done in the course of a servant’s employment so as to make his master liable even though it is done contrary to the orders of the master; and even if the servant is acting deliberately, wantonly, negligently or criminally, or for his own benefit, nevertheless if what he did is merely a manner of carrying out what he was employed to carry out then his master is liable.”

We know of no authority, nor have we been referred to any, for the proposition relied on by the learned judge in dismissing the suit, that in the case of the tort of slander, “it is for the plaintiff to prove that the words were uttered with the principal’s authority and consent” before a master can be held vicariously responsible for his servant’s tort. In this case, it was established that the words complained of were spoken by a servant of the government, ostensibly in the course of and within the scope of his employment at a public baraza.

As was said by Sir Raymond Evershed MR in *Canadian Pacific Railway v Lockhart* [1942] All ER 464, cited with approval by this Court in *Patel v Yafesi and others* [1972] EA 28 at p 31 —

“A master ... is liable even for acts which he has not authorized provided they are so connected with acts which he has authorized that they may rightly be regarded as modes - although improper modes - of doing them. In other words, a master is responsible not only for what he authorizes a servant to do, but also for the way in which he does it ...”

In our view, it was *prima facie* established on the pleadings and evidence that the Chief, as a government servant, was acting within the scope and in the course of his employment in addressing a public baraza, at which he admittedly spoke the words complained of, and with respect we think the learned judge erred in dismissing the plaint at the close of the appellant’s case as disclosing no cause of action. We allow this appeal, with costs here and in the High Court proceedings at Kisumu of the hearing held on March 3, 1981, set aside the judgment and decree appealed from, and we direct that the suit be remitted to the High Court, at Nairobi, before another judge, to be continued from the stage at which it terminated, for the completion of the hearing of the suit and for the determination of the remaining issues raised by the pleadings.

Dated and Delivered in Nairobi this 1st day of October 1981.

E.J.E.LAW

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JUDGE OF APPEAL

C.H.E.MILLER

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JUDGE OF APPEAL

K.D.POTTER

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JUDGE OF APPEAL

I certify that this is a true copy
of the original.

DEPUTY REGISTRAR