**Rwekanika v Binamungu**

**Division:** High Court of Tanzania at Mwanza

**Date of judgment:** 22 December 1973

**Case Number:** 21/1973 (107/74)

**Before:** Mfalila J

**Sourced by:** LawAfrica

*[1] Defamation – Privilege – Qualified – Report of crime – Report to police privileged.*

**JUDGMENT**

**Mfalila J:** The respondent sued the appellants jointly in the court of the resident magistrate at Bukoba claiming general and special damages amounting to Shs. 4,120/- for what he called “defamation of character”. He alleged in para. 4 of the plaint that the appellants jointly reported him to the police station Bukoba as a thief in that he had stolen their building poles, the fact which he said was “mere fabrication and absurd”. In the subsequent paragraphs he set out in detail his claim to these building poles, saying in effect that since he was the rightful owner of these poles, he could not steal them. The plaint of course is inelegant being as it is the product of a lay hand, the result is that there are a lot of gaps, but with effort, enough can be gathered to find out what exactly the plaint was about. The words “mere fabrication and absurd”, can be interpreted to indicate the presence of malice on the appellants’ part. This they denied in their respective defences. Nevertheless after the hearing, the resident magistrate found that the appellants had no legal justification for making the false report to the police. The report was false and malicious. He accordingly entered judgment for the respondent and awarded damages totalling Shs. 2,350/-. Hence this appeal by the appellants. The whole trial got off to a bad start. No issues were framed at the beginning of the hearing, with the result that the trial started in a rambling fashion. The magistrate who heard the evidence in the entire case, did not write the judgment. Unless the magistrate had left the country or had been transferred to another branch of Government, I do not see why the record was not sent to him for writing the judgment. Be that as it may, another magistrate embarked on the judgment writing. In the course of the judgment he framed issues as follows:

(1) Was the report (Criminal) of theft made by the defendants to the police and the subsequent prosecution a false one?

(2) If so was it defamatory of the plaintiff?

(3) Was there any legal justification on the part of the defendants?

(4) If the answer to (3) is no, are the defendants liable for damages?

(5) If (4) is in the affirmative, what should be the quantum of damages? Now, quite clearly these issues were neither sufficient nor relevant for the correct determination of this suit. Firstly, while it is true that certain categories of defamation turn on the falsity of the statement published, this particular one does not, so that the falsity or truth of the report made by the appellants to the police station was not relevant to their liability for defamation. Their liability turned exclusively on the presence or absence of express malice, because the occasion in which they uttered or published the defamatory words at the police station was qualifiedly privileged. It is settled law that statements made in aid of justice are privileged qualifiedly and in this category falls all information given to the police in order to detect crime. The reasons are obvious – the protection of public order. *Gatley on Slander*, 6th Edn. at pp. 218 – 19, quoting a number of authorities puts it succinctly: “It is the public duty of every one who knows, or reasonably believes that a crime has been committed to assist in the discovery of the wrongdoer. Any complaint made, or information given for that purpose to the police, or to those interested in investigating the matter, will in the interests of society, be privileged, and the mere fact that the defendant has volunteered the information will make no difference. So that when a person has reason to believe that a crime has been committed, it is his duty and his right to inform the police. If he states only what he knows, and honestly believes, he cannot be subjected to an action of damages merely because it turns out that the person as to whom he has given the information is after all not guilty of the crime. It is therefore a settled principle of law that where an individual gives information or makes a statement to an officer of the law, whose duty it is to detect and prosecute criminals . . . to the effect that someone has committed a crime, such information or statement has the protection of privilege. This is so in the best interest of society, and the suppression of crime could not otherwise be enforced. “If the charge is made honestly and to the proper authorities, the mere fact that it is found to be groundless, or that proceedings in respect of it are subsequently abandoned will not destroy the privilege. . . .” I unreservedly adopt these pronouncements as founded on good sense, for the preservation of public order through detection and punishment of crime must override individual convenience and quiet. Secondly the question of legal justification was also irrelevant, because in such cases as these defendants rarely if at all plead justification. They merely raise the privilege and plead absence of malice. As the resident magistrate based his judgment on wrong and irrelevant issues, it was almost inevitable that he should arrive at wrong conclusions. He concluded that the falsity of the report to the police, among other things, proved malice. It is settled law that an action for slander will lie without proof of special damage where the defendant publishes words which impute a crime for which the plaintiff can be made to suffer physically by way of punishment. In the present case the allegation of theft against the respondent falls in this category. There is therefore no question but that the report was defamatory of the respondent. The issues which should have been framed and determined by the District Court were as follows:

(1) Were the defamatory words or the substance of them uttered at all?

(2) If they were uttered, was the occasion privileged?

(3) If so were the words uttered with express malice?

(4) Lastly, and only on proof of express malice, what damages should be awarded? I think there can be no dispute regarding the first two issues. The appellants do not dispute the fact that they uttered these defamatory words at the police station. It is also true for the reasons that I have given that the occasion was qualifiedly privileged. Therefore in order to succeed, it had to be affirmatively shown that the words were uttered at the police station with express malice. As Cave, J., stated in *Scott v. Sampson* (1882), 8 Q.B.D. 491 at p. 503: “The law recognises in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit.” So that the publication of words defamatory of the plaintiff gives rise to a *prima facie* cause of action and the law presumes in the plaintiff’s favour that the words are false unless the defendant proves the contrary. All this is done in order to protect the existing reputation of everyone or in the words of Cave, J., the estimation in which he stands in the opinion of others. In such cases the plaintiff need not prove malice on the part of the defendant unless it is ruled that the words were published on a privileged occasion. But clearly this wide protection of the individual’s existing reputation could not be left so open without injuring public order. Hence there are occasions upon which on grounds of public policy and convenience, a person may without incurring any legal liability make statements about another which are defamatory and may in fact turn out to be untrue. Provided that he makes these statements honestly and without any improper or indirect malice. These are called privileged occasions, and may be absolute or qualified. This privilege must however not be abused by using it for purposes other than those for which it was established. If this is done malice will readily be inferred and the privilege will not avail the defendant. As Georges, C.J., as he then was, stated in *Chimala Stores v. Zambia-Tanzania Road Services* (1970), H.C.D. 232, “the concept of malice was clearly defined in the judgment of Brett, L.J., in *Clarke v. Molyneux* (1877), 3 Q.B.D. 237 at p. 246”: “If the occasion is privileged, it is for some reason, and the defendant is only entitled to the protection if he uses the occasion for that reason. He is not entitled to the protection if he uses the occasion for some indirect or wrong motive . . . malice does not mean malice in law, a term in pleading, but actual malice, that which is properly called malice . . . so if it be proved that out of anger, or for some other wrong motive, the defendant has stated as true that which he does not know to be true, and he has stated it whether it be true or not recklessly by reason of his anger or other motive, the jury may infer that he used the occasion not for the reason which justifies it, but for the gratification of his anger or other indirect motive. The only test is whether the defendant did, in fact, believe what he said, and not whether a reasonable man would have believed it.” This is the standard test by which the appellants’ report to the police will be judged to see whether it was made maliciously. The resident magistrate placed emphasis on three things. First the appellants’ apparent admission in para. 2 of the defence that they made a false report to the police. The magistrate should have realised that the parties being unaided, this was merely an error in the use of words of an unfamiliar language, in any case what they stated in the next line or so should have confirmed this to the magistrate. Secondly the fact of the respondent’s acquittal in the primary court. As I have stated, the outcome of the case was irrelevant, the only important consideration being the honesty with which the report was made. Thirdly the fact that on a previous occasion, the first appellant had failed to establish her claim to this land. This may be so, although no formal evidence was led, but the record of the criminal trial in the primary court shows that the poles in dispute were not all obtained from the land in question. Some of them had been purchased elsewhere by the appellants’ own money, and they put a guard over them. This being so, they had an unqualified right at least to some of them. The respondent came and started taking them away erroneously thinking that they had all been cut from “his” land. In these circumstances can it be said that when the appellants made this report to the police, they made it maliciously in that they knew it to be false and did not believe in its truth themselves? They had a right, a complete right to some of the poles, they were informed by the man they had put to guard these poles that the respondent was taking them away. They rushed to their cell leader to lodge a complaint, the cell leader in turn advised them to make a report to the police. This seems to me to be quite reasonable and I can find no malice in this. The respondent apparently filed this claim before the completion of the criminal proceedings in the primary court, this had the effect of making the allegations in paragraph 13 of the plaint inaccurate. The allegation in para. 8 is also not borne out by the evidence of the cell leader in the criminal trial. I am therefore satisfied that the defamatory statement or report made by the appellants at the police station Bukoba was made honestly and without malice – in any case no such malice has been shown to have existed. Accordingly the appeal is allowed with costs.

*Order accordingly*