

ELLIOT KASU
versus
ROBSON SHARUKO
and
ZIMBABWE NEWSPAPERS LIMITED

HIGH COURT OF ZIMBABWE
MTSHIYA J.

HARARE, 17, 18, 19 June 2013, 16 July 2013, 8 August 2013, 11 September and 4
December 2013

Kawonde, for the plaintiff
Gasva, for the defendant

MTSHIYA J.

“UTTER RUBBISH!

Lifeless warriors throw away two valuable points. ZIFA Board to blame for display”.

The above was the headline on pp 14 of the Sport page of the Herald of 11 October 2010 after the warriors drew nil with Cape Verde in the qualifying match of the Group A of the 2012 African Cup of Nations. The soccer match, played on 10 October 2010, was reported by Augustine Hwata. That heading, in a way, depicts the mood of soccer lovers, if not the nation as a whole, following the failure by the National Team to the beat Cape Verde National Team.

This action is based on events that occurred on the date the above described soccer match was played Two parties to this action, namely the plaintiff and the first defendant, attended the said soccer match. Furthermore, apart from attending as mere spectators, the plaintiff and first defendant attended as ZIFA Board member and Herald Sports Reporter respectively.

In this action the plaintiff's claim against the defendants is for:-

- “1. Payment of the US of US\$300 000.00 being damages suffered by plaintiff to his reputation arising out three defamatory articles published by the defendants the Herald newspaper.
2. Interest thereon from the date of service of summons to the date of final payment.
3. Costs of suit.”

I must, however, hasten to say that at the close of his case the plaintiff reduced his claim from US\$300 000.00 to US\$21 000.00.

This action is anchored on three articles that appeared in the second defendant's newspaper, the Herald. For the sake of clarity, I shall reproduce the three articles hereunder. On 13 October 2010 (not on 11 October as reflected in the plaintiff's papers) the following article appeared in the second defendant's paper, the Herald:

“Sharuko threatened

ZIFA board member for finance, Elliot Kasu, on Sunday allegedly threatened to “fix” Herald Sports Editor Robson Sharuko with unspecified action just after the goalless draw soccer match between Zimbabwe and Cape Verde at the National Sports Stadium.

A police report has since been on the alleged threat and the matter is being investigated. Harare provincial police spokesperson Inspector James Sabau yesterday said, “We have received the report and we are investigating the case”.

According to Sharuko, he was in the VIP Enclosure at the National Sports Stadium when the threat was made.

“I filed a report at Mabelreign Police Station this afternoon (yesterday) centred on the threats made to me, which I consider serious.

“They were made by Zifa board member Elliot Kasu after the end of the game,” he said. Kasu is reported to have told a gathering, while Sharuko was standing just a few metres away, that the Herald – and particularly Sharuko – were responsible for the chaos in the Warriors camp and that day's poor result.

He said he was fed up with Sharuko questioning things that Zifa did as well as the organisation's choice of personnel for certain posts.

Kasu allegedly said he was going to hunt down Sharuko and fix him.

“I felt the threat was serious enough to warrant a report to the police, given his emotional state that day, and I have since that day been living in fear that something terrible could happen to me anytime.

“I felt, as I said in my police report, that Kasu’s threat was a threat to my life, my profession and my family,” Sharuko said.

“But I remain committed to reporting the truth and the threats will now sway me from that line.”

On 16 October 2010 the Herald again published the following article:

“ZIFA board member Kasu in court

ZIFA board member Elliot Kasu yesterday appeared in court for allegedly threatening Herald Sports Editor Robson Sharuko with unspecified action over a story he published.

Kasu (50) was not asked to plead when he appeared before Harare magistrate Ms Memory Chigwaza who remanded him out of custody to October 27 this year on US\$50 bail.

Prosecutor Mr Nathaniel Chigoro opposed bail arguing that it was in the interest of public that perpetrators of violence be removed from the society.

He said Kasi, who is also ZBC general manager (finance) was a reputable member of the community with a respected record in the military, and in many cases civilians felt insecure when threatened by such people.

However, Ms Chigwaza ruled that Kasu was a suitable candidate for bail

He is being charged with contravening section 41(b) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*].

The law criminalises threatening, abusive or insulting words or behaving in a threatening, abusive or insulting manner.

Mr Chigoro alleges that on October 10 at about 5.20 pm after a soccer match at the National Sports Stadium between Zimbabwe and Cape Verde, Sharuko was standing in the VIP Enclosure.

On the step below him was Kasu, who was talking to a group of people, the court heard.

It is alleged that Kasu said “he was fed up with football system where only one man, Robson Sharuko, was holding influence.”

He was allegedly holding Sharuko responsible for the chaos at Zifa through his articles in which he criticised certain personnel appointments.

Kasu allegedly said the time had come for him to put a stop to that.

It is alleged he said he was “was going to hunt Sharuko and would get to fix him once and for all”.

Kasu’s words, the State alleges, inspired a reasonable sense of fear on the complainant’s part.

It is alleged that the utterance was intended to provoke a breach of peace, or realising that there was a real risk or a possibility that a breach of peace would be provoked on the person of Sharuko.”

The third and last article, authored by the first defendant and titled “**Tears from the Heart**”, was published on the sports page of the Herald on 23 October 2010. The allegedly offensive parts of the article read as follows:

“-----The second report, concluded after the Saintfelt wars and other events related to threats issued to me by a member of that investigating team at the National Sports Stadium after the Cape Verde game, now has all the innuendoes related to the media’s imaginary participation in the match-fixing scandals.

-----I’m determined to serve my country, as well as I have done all these years, and I can assure you that a bunch of funny characters, whose administrative capacity has already been questioned and exposed, will not intimidate me into the shell.”

As already indicated the plaintiff’s claim is based on the above three articles carried by the second defendant’s daily Newspaper, the Herald. The plaintiff averred that the articles were wrongful and defamatory of him.

With respect to the publication on 13 October 2010, the plaintiff alleged that the article was intended to be understood by the readers to mean that;

“6. -----

- 6.1. The plaintiff is a bully with propensity to resort to violent behaviour when aggrieved.
- 6.2. The plaintiff was an incompetent administrator who instead of concentrating on the good management of the game, spent time intimidating those persons who would question his decisions.
- 6.3. The plaintiff was a ruthless and unscrupulous man who would not stop even at violence or murder to get his way and,
- 6.4. The plaintiff was a scoundrel who was determined to use violence to stop truth from being told by a journalist.”

The plaintiff asserted that the article of 16 October 2010 meant that he:-

“9. -----

- 9.1. Was a person given to abusing his military past to bully and threaten civilians in this case Robson Sharuko.
- 9.2. Was an intolerant criminal and a person of low moral fibre who would stoop so low as to threaten, abuse and insult a journalist in order to hinder him from performing his duties.
- 9.3. Was a common criminal given to provoking a breach of the peace in short, just another football hooligan.”

As for the last article of 23 October 2010 the plaintiff said readers would understand same to mean that the plaintiff:-

“12. -----

12.1 Is a liar who falsely imputed to the 1st defendant allegations of match fixing in order to escape the consequences of a prosecution that 1st defendant had initiated against him.

12.2. Is an incompetent and contemptible administrator and that his administrative capacity has been discredited and exposed by the 1st defendant.”

For the three articles, deemed wrongful and defamatory, the plaintiff claimed US\$100 00.00 on each publication. This brought the total of damages, claimed to US\$300 000.00 (i.e. before being revised to US\$21 000.00 at the close of the hearing).

In the main the defendants pleaded truth in the public interest, privilege and fair comment.

In their Joint Pre-Trial Conference Minute filed on 13 June 2012 the parties listed the issues for determination as follows:-

“1.1. Whether or not the articles referred to by the plaintiff were wrongful and defamatory towards the plaintiff.

1.2. Whether or not the plaintiff suffered any damages as a result of the aforesaid articles. If so what is the quantum of the damages.”

The plaintiff tendered two exhibits, namely the article of 23 October 2010 entitled “Tears from the Heart,” as exh 1 and a schedule of documents as exh 2.

In addition to himself, three other witnesses gave evidence in support of the plaintiff’s case.

The plaintiff, who, I must say, was composed throughout his testimony, told the court that he is a retired Brigadier General and is currently employed by the Zimbabwe Broadcasting Corporation (ZBC) as General Manager, Finance and Administration. He said

in that capacity he is part of the Executive Management of the ZBC. The plaintiff, an active Catholic, said he is an associate member of the Chartered Institute of Secretaries and Administrators of Zimbabwe and is currently pursuing Phd studies with Davinci University. In addition to being a Board Member of the Zimbabwe Football Association, he is also a Trustee of the Zimbabwe Army National Schools and Welfare Trust.

The plaintiff said he was before the court to seek damages for his damaged image following the publications quoted herein at pages 2, 3 and 4.

The plaintiff said he had read the article published by the second defendant on 13 October 2010. He was shocked by the contents of the article and denied having ever said the words in question. He said the article was a fabrication which did not reflect the truth.

The plaintiff said following the report made to the police by the first defendant he was prosecuted but found not guilty at the end of the trial in the Magistrates Court. The second defendant, according to the witness, did not publicise his acquittal.

The plaintiff went further to state that he was part of the team that investigated what became popularly known as the “Asiagate Scandal” and that being the case the ‘offensive’ parts of exh 1 (Tears from the Heart) referred to him in particular.

Under cross examination the plaintiff said he knew the first defendant as a Sports Reporter. He agreed that the report on court proceedings was generally accurate.

The plaintiff said he was present in the stadium when the late journalist, Roy Matiki, was interviewing Mr Ndumiso Gumede (Gumede), the ZIFA Vice President. He said he saw the first defendant who was 9 metres away from him.

On the quantum of damages i.e. US\$300 000.00, the plaintiff said it was for the court to decide.

After the plaintiff, Lazarus Riva (Riva), a photo journalist, gave evidence on behalf of the plaintiff. He said he watched the soccer match between Zimbabwe and Cape Verde on 10 October 2010. He watched the soccer match whilst seated in the VIP stand. He had seen both the plaintiff and the first defendant. He said the plaintiff was 10 metres down the stairs whilst the first defendant was 5 metres up the stairs. He did not hear the plaintiff say the words contained in the article published by the second defendant on 13 October 2010. He said the plaintiff was, at the alleged time, busy talking to Gumede. According to his evidence the plaintiff and the first defendant were 15 metres apart. He was therefore surprised and shocked to read the report.

Riva said he was also a witness in the criminal trial of the plaintiff and that after the acquittal of the plaintiff the second defendant had not published the said acquittal.

The third witness to testify was, Terence Antonio (Antonio), a Lecturer at Harare Polytechnic College. He said after the soccer match he descended onto the pitch to take photographs and thereafter interviewed a few people. He said he used the VIP enclosure for exit and as he was going up the stairs he saw the plaintiff. The plaintiff, according to him, was 6 to 8 metres away from him. He also saw the defendant who was also 10 metres away from him. Antonio said he never heard the plaintiff swearing at or threatening the first defendant (i.e. saying what was reported by the second defendant on 13 October 2010). He further said the plaintiff never went nearer to where the first defendant was standing and that if the threats had been made, he would have heard them. He was therefore surprised to read the article as published.

Antonio said he had followed the criminal trial and had read about the acquittal either in the Daily News or Newsday.

Under cross examination, Antonio said Riva, the other witness, was his uncle. He said they had not discussed the evidence they would tender in court and to that end, and as far as he was concerned, his evidence was independent. He confirmed that other ZIFA executives who were present at the soccer match were Benedicto Moyo and a Mr Munya.

The last witness for the plaintiff was Mrs Kudakwashe Mhaka, (Mhaka). She is a neighbour of the plaintiff. She said she had known the plaintiff for 10 years and the plaintiff was someone people looked to for help in the neighbourhood. She confirmed that the plaintiff was a church goer. She was therefore shocked and disturbed by the second defendant's report of 13 October 2010 concerning the alleged threats against the first defendant, which threats were attributed to the plaintiff. She said she did not believe that the plaintiff could have said what the second defendant published. The report, she went on, portrayed a totally different character of the plaintiff.

Mhaka concluded by saying she had been asked to come and testify on the plaintiff's character.

The plaintiff closed its case after Mhaka's evidence.

The first defendant gave evidence on his own behalf and also on behalf of the first defendant.

Like the plaintiff, the first defendant gave his evidence confidently. He said he is a Sports Journalist and has been in the employ of the first defendant since 1 November 1992.

He currently holds the position of Senior Sports Editor at the Herald. In the main, his duties involve gathering sports related news and making commentaries in the field of soccer.

The witness said he attended the football match between Zimbabwe and Cape Verde on 10 October 2010, which ended in a goalless draw. He said as he was exiting the VIP enclosure after the match, he got attracted by people who were on the right side of the VIP enclosure. The attraction was due to the fact that the Vice President of ZIFA, Gumede, who was the most senior ZIFA official attending the football match, was being interviewed by the late Ray Matiki. He said as a journalist he was drawn by instinct to go closer to the scene of the interview. He said as he was standing near the scene of the interview, 1 – 2 metres away, he was struck by a conversation that was going on between the plaintiff and a group of people gathered around him. He said the group of people included the ZIFA board member Patrick Hokonya and Gift Banda (who is not on the ZIFA Board). He said the group was discussing how Zimbabwe had failed to beat Cape Verde. It was during those discussions that he then heard the plaintiff say what he then reported to the police. He said after hearing the plaintiff's utterances he was traumatised and immediately phoned the ZIFA President, Mr Cuthbert Dube, (Dube) informing him of what had happened.

Confirming what he said, as reported by the second defendant on 13 October 2010, the witness said on 12 October 2013 the issue was discussed at conference level at his place of work and the Editor of the Herald then recommended that he should report the matter to the police – as he later did. He said the report was being made for security purposes.

He agreed that if the report was false, it would certainly have an adverse impact on the character of the plaintiff. He, however, maintained that what he had reported to the police was correct and that the article published on 13 November 2011 accurately captured what he reported to the police.

He also said the article that was published on 16 October 2010 was also accurate. He said although he is not the one who authored the court report, the report, however, captured what actually transpired during the court proceedings.

The witness further confirmed that he wrote the article in exh 1 (i.e. **Tears from the Heart**). He did not find it problematic to write about an issue or threats that had already been made against him and indeed of a matter that was already in the public domain.

On “funny characters in football”, the witness said he was qualified to describe people in charge of “our soccer” and the public had a right to know what was happening in the administration of national soccer. He went on:-

“If you have a group of individuals mandated to run an institution as important as National Football and then employ a foreign coach and do not undertake to get him a work permit, and that coach is eventually deported, I think they fit the description of funny characters.”

The witness said the remarks were not directly aimed at the plaintiff in particular but at the entire ZIFA Board, of which the plaintiff is a member. He said he had nothing personal against the plaintiff and had after all, assisted him in his studies at some point.

He said due to the long time that the criminal court proceedings took, the second defendant’s court reporter had lost track of the story. That is what led to the non-reporting of the plaintiff’s acquittal. He said the story was, however, covered by the Newsday. The second defendant could not therefore repeat what had already been reported by another national publication. However, notwithstanding that, the witness went on to say the court reporter in question was reprimanded for failure to report the plaintiff’s acquittal.

Under cross examination, the witness denied having attended a meeting at No 20 Lanark Road, Avondale, Harare, where it was alleged he wanted to influence the ZIFA Board Committee seized with the investigation of the “Asiagate scandal”. He said although he was at the place and saw members of the committee, he did not attend their meeting. He did not therefore know what the committee discussed. He said if at all he had to plead for mercy, he would direct his efforts to FIFA and not ZIFA. To that end, he had no vendetta against the members of the ZIFA Board who were investigating “Asiagate.”

The witness testified that since he was only a metre away from the plaintiff, he was able to clearly hear what he said about him. He denied that he had fabricated a story about the plaintiff and maintained that despite the movement of time, what he was telling the court was the same story that he gave in the criminal court.

The witness went further to say to date the plaintiff had not demanded any apology from the second defendant for failure to publish his acquittal. Such a request, he said, would have been entertained.

The defendants closed their case after first defendant’s testimony.

In his closing submissions, *Mr Kawonde*, for the plaintiff, submitted that evidence adduced in court indicated that the plaintiff had proved that the words contained in second defendant’s publications of 13, 16 and 23 October 2010 were wrongful and defamatory. He said the onus was on the defendants to show that the plaintiff indeed uttered the words in question and that the publications were justified. Furthermore, he argued, the defendants had

to show that fair comment and qualified privilege applied. He said the defendants had failed to prove that the published words were true and that the relevant defences were available to them

Mr Kawonde went on to say:-

“38. There is no doubt that the words in the article published, in their ordinary meaning and in the context in which they were used, were defamatory. A person who, ‘hunts down’, ‘fixes’ another, a person who makes threats against life. Careers and family life of persons whom is disliked is a very dangerous person indeed. Plaintiff described such a person as a ‘murderer’ and a ‘terrorist’. Such a description is not farfetched. This explains why in Annexure ‘B’ the prosecutor called for the ‘removal from Society’ of just such a person in his submissions opposing bail. The third article ‘Tears from the Heart’ spoke of a brave journalist who is hounded by vindictive and incompetent administrators, ‘bunch of funny characters whose administrative capacity has been questioned and exposed’. At the epicentre of such characters is the plaintiff.”

In support of his submissions he referred the court to *Manyange vs. Mpofu & Ors* HH 162-2011, Wherein at page 11 PATEL J, as then was, said:- ‘For the defence of public interest or justification to succeed, the following requirements must be satisfied. In essence, the statement alleged to be defamatory must be true and must be made in the public interest. See *Johnson v Rand Daily Mails* 1928 AD 190; *Neethling v Du Preez & Ors*; *Neethling v The Weekly Mail & Ors* 1994 (1) SA 708 (A); *Ndewere v Zimbabwe Newspapers (1980) Ltd & Another* 2001 (2) ZLR 508 (S). It is necessary for the truth of every word to be established. It suffices that the statement is substantially true in every material respect. See Johnson’s case supra at 205.

The element of public interest lies in telling the public something of which it is ignorant and which is in its interest to know. See *Mahommed v Kassim* 1973 (2) SA 1 (RAD) at 9 – 11. As for the element of truth, it is well established that what must be true is the, ‘sting of the charge’ or the material allegation only. See *Kennedy v Dalasil* 1919 EDL 1 at 9; Johnson’s case, supra at 197. As is succinctly summarised by Burchell, op. Cit, at pp 211 – 212: ‘*The truth of the statement means that truth of such statement in so far as it is of a defamatory nature*’.

As for qualified privilege, *Mr Kawonde* relied on the following quotation from Professor G Feltoe’s “*A Guide to The Zimbabwean Law of Delict*”

“The report of a court case must be fair and balanced. Both sides of the case must be reported impartially.’..... qualified privilege would not attach for instance where the newspaper has concentrated exclusively on the prosecution case and has ignored the defense case. So too in a criminal case if the charge is withdrawn or the accused is acquitted or its found guilty of a lesser charge if the newspaper has reported the original charge, it is obliged to report the subsequent developments relating to that charge.”

Having cited a number of authorities on the question of damages *Mr Kawonde* prayed that damages of US\$21 000.00, together with interest and costs, be entered in favour of the plaintiff.

On his part, *Mr Gasva* for the defendants, noted that, in their plea the defendants, pleaded as follows:-

- (a) that the story reported was substantially true and of public interest;
- (b) that qualified privilege applied since they had merely reported what transpired in court i.e. publication of 16 October 2010; and
- (c) “Tears from the heart” presented fair comment on the happenings in the administration of the national sport (soccer).

He went on to say the plaintiff and his witnesses had failed to prove that the words attributed to the plaintiff had not been uttered. He said the plaintiff’s witnesses could not be relied on because they clearly appeared to be saying that they were in fact policing the first defendant and yet they also testified that they were attending to their businesses of the day. The witnesses were taking photographs and distributing some pictures from the Liberian soccer match. They failed, he argued, to corroborate each other.

Mr Gasva further submitted that:-

- “13. The plaintiff failed dismally to show that the words complained of were not true. It is submitted that the plaintiff has failed to prove its claim against the 1st and 2nd defendants on a balance of probabilities. This is clearly indicated by its own admission that its own claim of USD300 000.00 has been substantiated. Moreso, having failed to satisfy the court with enough evidence to arrive at a decision that, a reasonable and average reader would have understood the words complained of as defamatory towards the plaintiff.
14. Without conceding that the words complained of are defamatory towards the plaintiff, the damages claimed by the plaintiff are outrageous and grossly unjustified even at the plaintiff’s concession that, it has failed to prove damages of USD300 000.00. The defendants still insist that damages of US21 000.00 in the event that the court finds in favour of the plaintiff on whether or not he was defamed are still too high and unjustified.”

Given the foregoing, *Mr Gasva* prayed for the dismissal of the plaintiff’s claim with costs.

At page 5 of this judgment I listed the agreed issues for determination as follows:-

- “1.1. Whether or not the articles referred to by the plaintiff were wrongful and defamatory towards the plaintiff.

- 1.2. Whether or not the plaintiff suffered any damages as a result of the aforesaid articles. If so what is the quantum of the damages.”

The evidence adduced herein was, indeed, meant to assist the court in the determination of the above issues.

Given the above issues, I believe that the first task *in casu* is to determine whether or not the words allegedly attributed to the plaintiff were ever uttered/said. The next step, if at all the words were uttered/said, would be to determine if the words themselves and the subsequent publication of same was wrongful and defamatory of the plaintiff.

At paragraph 6 of his written closing submissions, *Mr Gasva* made the following observation:-

- “6. The plaintiff’s evidence was in short to the effect that he never threatened the 1st defendant. Hence the report to the police contained in exhibit ‘1’ was false and defamatory of him. It is important to note that, it is in the plaintiff’s word against that of the 1st defendant as the witness brought by plaintiff to court, failed to lead evidence to the effect that such words were not uttered.” (I believe exhibit 1 was meant to be Annexure ‘A’ to the summons).

The plaintiff and his first two witness did not give the same evidence with respect to the distance that separated the plaintiff and the first defendant when the words were allegedly uttered. The plaintiff’s witnesses gave a distance of between 9 and 15 metres whilst the first defendant said he was 1 metre away from the plaintiff. The plaintiff’s witnesses then went further to say they themselves were very close to the plaintiff so as to be able to hear whatever he might have said. They thus gave the impression that they themselves and not the first defendant, were close to the plaintiff. I deemed same to be deliberate lies.

I must state, however, that, to a large extent, I agree with the defendants that Riva and Antonio, who admitted being related, gave evidence which appeared to have been “rehearsed”. I did not find both of them to be credible witnesses. They indeed appeared to have been at the soccer match “to take care” of the first defendant – a most unlikely situation. They testified that they were busy with their photographic equipment and yet at the same time the effect of their evidence is that they ‘kept an eye’ on the first defendant’s movements. I did not find that to be probable. Despite apparent ‘coaching’, the two witnesses also differed on the distances separating the plaintiff and the first defendant. The one gave a distance of 15 metres whilst the other gave a distance of between 16-18 metres.

The first defendant, in my view, gave a credible story. As a journalist he moved to the group where Gumede was being interviewed and it was not denied that other Board members,

including the plaintiff, were part of that group. The first defendant said he was a meter away from the plaintiff who he knew very well. I believe that a metre away is a distance that would never militate against the first defendant's hearing of whatever the plaintiff is alleged to have said. It was reasonable for him to move close to Gumede so as to hear the interview. The plaintiff was where Gumede was being interviewed.

In making any observations in this matter, it is important to take into account the following factors which existed at the material time:-

- (a) Zimbabwean supporters of the National Football Team, as depicted by the Headline on the sports page of the Herald of 11 October 2010, were not happy with the way the National Team had performed and hence the description "UTTER RUBBISH" – highlighted on the first page of this judgment. They were angry and so was the management (i.e. the ZIFA Board itself, of which the plaintiff was a member.) It would be crazy and unsportsmanlike for them to be the only ones who were happy.
- (b) It was common cause that, generally the public were not happy with the way the ZIFA Board had managed the affairs of the coaching department of the National Team, leading to the deportation of Tom Saintfiet. That subject had been a public and topical issue before the soccer match. The press, to the obvious anger of the ZIFA Board, was having a field on the issue and it was not all praise for the ZIFA Board, as depicted on the headline of the Herald on 11 October 2010 (i.e "ZIFA Board to blame for display"); and
- (c) 'Asiagate' was also under public debate

The above factors lead me to the reasonable conclusion that, as a person who was heavily involved in the affairs of the ZIFA Board, the probability that the plaintiff uttered the words is not a far-fetched conclusion. There was every reason to be angry with those involved in what appeared to be a hostile press, especially the first defendant who runs a weekly column in the Sports Herald.

I did not find the first defendant to be somebody carrying a vendetta against members of the ZIFA Board and worse still, against an individual member of the ZIFA Board whom he had even assisted in his studies. That fact was never refuted.

I further did not read a different story from the record of the lower court. The first defendant's story, in my view, remained the same and intact even after extensive cross examination from the plaintiff's counsel.

I am, in making the above observations and conclusions, mindful of the fact that, whereas the standard of evidence required in criminal cases is proof beyond reasonable doubt, *in casu* I am guided by a balance of probabilities. To that end therefore, my finding *in casu*, on a balance of probabilities, is that, the only inference I can draw from the evidence before me, is that the plaintiff uttered/said the words attributed to him. He was, in my view an angry man and had every reason to be angry. The press was negative about ZIFA and the National soccer team had failed to beat Cape Verde.

An immediate report of what he was alleged to have said against the first defendant, was immediately made to his boss, the ZIFA President, Dube. That important point was never refuted in these proceedings. I can only conclude that the ZIFA President was told the truth and hence the absence of his reaction in these proceedings. The report was undeniable.

Having made a finding that, on a balance of probabilities, the plaintiff uttered the words; that the first defendant's story was true and that the same was published accurately by the second defendant, the issue of wrongful publication and defamation falls away I believe the same applies to the report on court proceedings. The plaintiff admitted that the report accurately captured what transpired in court. I did not, at any stage of the trial, hear the plaintiff deny that as long as the court report is accurate, qualified privilege, as relates to proceedings in courts of law, does not apply. The reports being true and in the public interest, were, as per *Manyange supra*, justified. The plaintiff occupies a public office. Furthermore, the court report fell within the requirements alluded to in the quotation from Professor G. Feltoe at page 10 herein.

Given the foregoing I do not think that much turns on on the failure by the second defendant's failure to publish the plaintiff's acquittal. In any case, I believe a reasonable explanation was proffered. The court proceedings took long resulting in the court reporter losing track of the story.

The above findings dispose of the purported wrongful and defamatory nature of the publications of 13 and 16 October 2010. The plaintiff cannot therefore succeed in its claim in respect of the said publications.

I now come to the last article under the title "**Tears From The Heart.**"

With respect to that article, the defendants have pleaded fair comment.

I am satisfied that, apart from the reference to the ZIFA Board in general, there was indeed specific reference to the plaintiff. That reference, however, was made with respect to threats which I have found to have been indeed made by the plaintiff against the first

defendant on 10 October 2010. It therefore means that, although the plaintiff was singled out in the form of words like “other events related to threats issued to me by a member of that investigating team at the National Sports Stadium,” those threats, were true and were already public knowledge. There was nothing new about them. In the main, the comments complained of were directed at the ZIFA Board in general.

In paragraph 10 of defendant’s closing submissions *Mr Gasva* states:-

“10. The plaintiff has failed to substantiate the defamatory aspects of 3rd Exhibit as it constitutes Fair Comment. The evidence of the 1st defendant clearly established that, the article complained of was to be read in whole and the meaning of the same be taken from the full context of the Article not in paragraph fashion. Surely any reasonable and average reader would not have attributed Exhibit “3” to the plaintiff as there is no reference at all to the plaintiff by name in the said Article. It is further submitted that all the three (3) witnesses who testified on behalf of the plaintiff failed to give evidence relating to the 3rd Exhibit and only focused on the 1st Exhibit. As it stand plaintiff has failed to adduce an evidence to prove the defamatory element of the words complained of an Exhibit “3 “hence its claim should be dismissed in that respect.” (correct reference should be exhibit 1)

He then also urges the court to follow *Madhimba v Zimbabwe Newspapers 1980 Limited 1995* (1) ZLR 391 (H) where the following quote appears.

“A court deciding whether a Newspapers report is defamatory must ask itself what impression the ordinary reader would be likely to gain from it. In such an inquiry, the court must eschew any intellectual analysis of the contents of the report of its implications, and must also be careful not to attribute the ordinary reader a tendency towards such analysis or an ability to recall more than an outline impression of what he or she has just read. Further in view of the mass of material in a newspapers, it is in general unlikely that the ordinary reader would peruse and ponder a single report in isolation.”

The above guide lines are important in the determination of the plaintiffs claim, particularly the last aspect of his claim.

My view is that any ordinary reader would clearly see that “**Tears From The Heart**” was a commentary on the operations of the ZIFA Board in general. The article had to be read and understood in its full context and not in terms of isolated paragraphs. Surely the subsequent deportation of a newly recruited coach spoke volumes of operations at ZIFA, which operations could not escape public attention and scrutiny.

The plaintiff admitted that he is a public figure. I therefore want to believe that any member of our society who accepts public office renders himself or herself to public scrutiny. The public has a right to fairly judge the performance of the holder of any public office. The

only limitation is that any judgment or comment must remain fair and reasonable. It must also be based on true facts. The first defendant's comments were directed at what was happening at ZIFA, a Board charged with the administration of a National sport (soccer).

In light of the situation that was obtaining at ZIFA at the material time, I am of the view that, if the paragraphs complained of in "**Tears From the Heart**" are read in the full context of the whole article, the defendants are entitled to the defence of fair comment. I believe the first defendant was making a fair comment on the unfortunate happenings at the ZIFA Board and in the institution of national soccer in Zimbabwe.

In view of the foregoing, I order as follows:-

1. The plaintiff's claim is dismissed in its entirety; and
2. The plaintiff shall pay costs of suit.

Messrs Kawonde & Company, plaintiff's legal practitioner
Messrs Chirimuuta & Associates, defendant's legal practitioners.