Munthali v Mwakasungula (Civil Cause Number 125 of 1987) [1991] 14 MLR 298 (HC)

Judgment

Court:	High Court of Malawi
Registry:	Civil Division
Bench:	Honourable Justice Mkandawire
Cause Number:	Civil Cause Number 125 of 1987
Date of Judgment:	December 06, 1991
Bar:	Counsel for the Plaintiff: Mr. Nakanga Mr. Mhango, Counsel for the Defendant

The plaintiff is claiming damages for trespass to his land. He is also claiming the sum of K1 168-78, which represents the value of goods allegedly converted by the defendant. It is pleaded in the statement of claim that in or about June 1985, the defendant wrongfully broke and entered certain land of the various properties as detailed in paragraph 4 thereof, which he converted to his own use.

On his part, the defendant denies the allegation. It is pleaded that he entered the plaintiff's land with the latter's licence. He denies having converted any of the

properties to his own use. He has filed a counter-claim alleging that on two separate occasions the plaintiff published defamatory words of the defendant.

The plaintiff denies having published any defamatory words at all, but goes on to plead that if any defamatory words were ever published, then such publication was made on an occasion of qualified privilege.

I will start with the plaintiff's action. The plaintiff gave evidence as the first witness on his own behalf. He told the court that he is the owner of the house situate at plot number KA 255 at Karonga. As he works in Blantyre, he left the house in the care of Mr Baxton Medi in September 1984 and he kept it up to June 1985. Mr Medi was not paying any rent. Actually, he was not living in the house.

Perhaps it should be mentioned that Mr Medi was working for UTM Ltd as a depot supervisor and he was living in a company house. So he put some conductors in the plaintiff's house. These conductors did not pay any rent. The plaintiff, however, had left the keys of the house with Mr Medi, whose responsibility was to look after the house. The plaintiff himself kept the keys to the bedroom where he kept some valuables.

It was the plaintiff's evidence that sometime in June 1985, he got a letter from Mr Medi, saying that he (Mr Medi) had been approached by the defendant, who stated that he had been instructed by the plaintiff to get the keys to the house. The plaintiff was surprised to learn this, because he had not given such

instructions to the defendant. The plaintiff then rang the defendant and told him that what he had done was wrong and requested him to return the keys to Mr Medi. The defendant agreed to return the keys, but he did not do so.

Three days later the plaintiff rang again to check, but the keys had not been returned. The defendant assured him not to worry, as he would take proper care of the house. He said he would put his children in the house. Despite these assurances, the plaintiff insisted that the keys be returned. He then rang Mr Medi asking him to get back the keys, but Mr Medi refused to get them back, as a misunderstanding had arisen between him and the defendant.

The plaintiff then contacted Mr Kampunga to collect the keys. It was only in December 1985 that the defendant handed the keys to Mr Kampunga. This means that the defendant was in possession of the house against the plaintiff's will from June to December 1985.

In August 1986, the plaintiff went home to Karonga and got the keys from Mr Kampunga. When he went to the house he found the following properties missing:

Item 1 double mattress 2 single mattresses at K81-00 each 2 steel window frames at K141-70 each 6 buckets at K5-00 each 4 steel window frames at K100-55 each 1 bicycle light 2 bicycle wheels at K22-50 and K21-00 4 shelves at K17-50 each 1 head lamp Value K142-68 K162-00 K283-40 K30-00 K402-20 K15-00

K43-50 K70-00 K20-00 K1 168-78

The properties have not been recovered. It was the plaintiff's evidence that these properties were stolen from the locked bedroom whose key was in his possession in Blantyre. He then reported the matter to Police.

In cross-examination, he said that when he went to the Police he did not name anybody as having stolen the properties. He went on to say that he did not know who stole the items. However, the defendant's house at Karonga was searched, but nothing was found. The police also searched the defendant's other house at Kasoba and removed some household properties, but these did not belong to the plaintiff and so they were returned. When pressed, he explained that the window frames were left in a storeroom which had not been locked. It was also revealed in cross-examination that although actual possession of the house changed from Mr Medi to the defendant and from the defendant to Mr Kampunga, and that when it was with Mr Medi, conductors lived there, it was only the defendant's houses which were searched.

The evidence of Mr Baxton Medi was quite brief. It was in 1984 that the plaintiff asked him to take care of his house. He was given keys for the house. But the plaintiff kept one key for the bedroom which was locked. Mr Medi was informed that certain properties were left in the room, but he did not see the items, nor was he told what was there. Apart from this room, all the other rooms were open and had no keys. The only properties Mr Medi saw were some three or four chairs and a table. It was his evidence that he was not paying any rent; his duty was to

see that all was well at the house.

In June 1985, the defendant approached him saying that the plaintiff had requested the defendant to collect the keys and take care of the house, since he (Mr Medi) was not doing a good job, as the house was being damaged. The witness refused to hand over the keys, since he had had no communication from the plaintiff. He tried to reach the plaintiff on the phone for confirmation, but he failed. The defendant made three approaches and in the end he released the keys because the defendant said the plaintiff was his nephew. When the plaintiff heard of this, he wrote Mr Medi to get back the keys, but he refused, since misunderstandings had arisen between him and the defendant.

In his defence, the defendant dwelt at some considerable length on the question of relationship. The issues of relationship, however, are irrelevant. The real question is whether the defendant had the plaintiff's licence to enter upon the land. If I may comment on the question of relationship, what came out quite clearly is that there is no blood relationship between the plaintiff and the defendant, although the two families have been close to each other for a long time.

The defendant was the third witness for the defence. His evidence was that in June 1985, he talked to the plaintiff on the phone and the plaintiff asked him to collect keys from Mr Medi and keep the house because Mr Medi was damaging it. It was his evidence that the plaintiff rang several times. In one of their telephone conversations the plaintiff said that he had already told Mr Medi to hand over the

keys. He then went to Mr Medi to get the keys, but Mr Medi explained that he had no communication from the plaintiff. The defendant had approached Mr Medi three or four times and finally the keys were handed over. What happened was that when Mr Medi could no longer stand the pressure, he called the defendant and took him to the house, where he handed over everything.

According to the defendant, the house was handed over to him in August 1985. They went through the house and he noted that one room was locked and was informed that the plaintiff kept the keys for that room. He was shown the three or four chairs and a table and that was all the property handed over to him. He did not see the items which, it is alleged, he took. It was his evidence that he did not break any door and he did not remove any property from the house. He did not even see the window frames; as a matter of fact, there was no storeroom. After getting the keys, he never went back to the house.

In about September 1985, he got a message from his son that the plaintiff had rung requesting that the keys be handed over to Mr Kampunga. At that time the defendant was attending a funeral. It was only in December 1985 that he handed over the keys to Mr Kampunga. There were attempts to hand over the keys earlier, but that failed due to other engagements. It was his evidence that from the time he got the keys from Mr Medi, he never went back to the house until he handed it over to Mr Kampunga.

On 9 August 1986, he was called to the Police, where he found the plaintiff. There was an allegation that he stole the plaintiff’s property and he denied that.

Then the Police went to search his house at Mwiba, but nothing belonging to the plaintiff was found. At a later date, inspector Phalula went to search his other house at Kasoba, where some properties were removed. When these were shown to the plaintiff, he said they did not belong to him and so they were returned.

That was the evidence relating to the plaintiff's action. I must now consider this evidence and I choose to start with the allegation of conversion. I hasten to point out that I do not see any merit in this claim. To begin with, it is only the plaintiff who knew of the existence of these properties. Mr Medi did not see them and certainly they were not handed over to the defendant when he took over the house. All Mr Medi and the defendant saw was that a certain room was locked and the plaintiff kept the key. The very existence of those properties is, therefore, questionable.

Secondly, the statement of claim says that the defendant "broke and entered" when, in fact, there is no evidence of breaking at all. There is absolutely no evidence of breaking at all. There is absolutely no evidence that the room in which the items were kept was broken into. Mr Kampunga, who took over from the defendant, was not called to testify on the state of the locked room. The Police, who carried out investigations, were not called. There is, therefore, no evidence of breaking and if there was no breaking, it remains a mystery as to how the properties were stolen, since the plaintiff had the keys to that room.

Finally, it is alleged in paragraph 4 of the statement of claim that the defendant took the properties as itemised earlier in this judgement. In his evidence,

however, both in chief and in cross-examination, the plaintiff told the court that he did not know who took or stole his properties. In cross-examination, he went on to say that when he went to Police he made a general statement that this properties were missing without pinpointing anybody. If the plaintiff does not know who took his properties, how then can he say that the defendant did?

Trespass and conversion are two different things and in so far as conversion is concerned, there is not a shred of evidence. I am aware that this is a civil case and the plaintiff must prove his case on a balance of probabilities, but what is before this Court falls far below that. It is my view that the claim for conversion is frivolous and I dismiss it with cost with the contempt it deserves.

I now move on to the trespass claim. The question is whether the defendant entered upon the plaintiff’s land with the latter’s licence or authority. I think that the defendant has contradicted himself on some very important point. In his evidence-in-chief he said that he talked to the plaintiff on the phone and the plaintiff asked him to get keys from Mr Medi and take charge of the house. He said he received several telephone calls from the plaintiff and this is precisely what is pleaded in the defence. And yet, in cross-examination, he said he did not talk directly with the plaintiff. He said he first heard of the plaintiff’s request from a telephone operator. He could not remember the telephone operator because they are many and they keep on changing.

Then he got messages from various other people, as none of the phones got him. The defendant could not remember any of the people who passed on the

messages to him. I found this to be very strange indeed. The impression I had was that there were no telephone calls from the plaintiff asking the defendant to take over the house from Mr Medi. Mr Medi testified that the defendant wanted to put his children in the house; so it is possible that explains the defendant's conduct, but it is not for me to speculate. My finding on the point is that the defendant entered upon the plaintiff's land without licence or authority. In law, the defendant's entry upon the plaintiff's land constitutes trespass.

Clerk & Lindsell on Torts (14 ed), paragraph 1311, defines trespass as any unjustifiable intrusion by one person upon land in the possession of another, and at paragraph 1318 the learned authors say that: "Trespass is actionable at the suit of the person in possession of land. A tenant in occupation can sue, but not a landlord, except in cases of injury to the reversion."

On the other hand, Mr Nakanga submits that the plaintiff is entitled to sue for trespass, since he had possession of the house. The plaintiff had keys to one room, which means that he retained possession. As for Mr Medi, he was not a tenant and so he could not sue for trespass. He was merely looking after the house. It is also Mr Nakanga's submission that Mr Medi did not have the authority, ostensible or otherwise, to release the keys.

On the question of authority, it is perfectly clear that Mr Medi did not freely and willingly release the keys. As a matter of fact, he was refusing to release them. The defendant approached him three or four times, and, according to Mr Medi, the defendant was claiming that the plaintiff was his nephew. It was also Mr

Medi's evidence that the defendant was bothering him and disturbing him at work. So it cannot be said that Mr Medi freely and willingly handed over the house, neither can it be said that in handing over the keys, he was acting within his authority. His duty was to look after the house and no more.

Now to the most important question: Was the plaintiff in possession of the house – can he maintain this action against the defendant? It is true that Mr Medi was in actual possession, but his possession was not to the exclusion of the plaintiff, since he was not a tenant. Mr Medi's possession was that of caretaker and no more. It is significant that the plaintiff kept keys to one room, which means that he was still in possession. It is my view the plaintiff was in constructive possession of the house. The position would have been entirely different if Mr Medi was a tenant.

In the case of Bristow v Cormican (1878) 3 App Case HL 641, it was held that the slightest proof of possession is sufficient as against a wrongdoer. At 657, Lord Hartherley said:

"There can be no doubt whatever that mere possession is sufficient against a person invading that possession without himself having any title whatever – as a mere stranger; that is to say, it is sufficient as against a wrongdoer. The slightest amount of possession would be sufficient to entitle the person who is so in possession, or claims under those who have been or are in such possession, to recover as against a mere trespasser."

Indeed, it is true that the plaintiff was not in actual possession of the house, but the fact that he kept keys to one room made a clear indication of his intention not to lose possession and so he continued to be in possession. In my view, that possession, though not actual, was sufficient to entitle him to maintain an action for trespass.

Perhaps I should refer to a West African case before I wind up. The facts are somewhat different, but in both cases there is the element of delegation. That is the case of Wuta-Ofei v Danquah [1961] 3 All ER 596. The brief facts as they appear in the headnote are as follows:

“D acquired land in Ghana by gift made by way of oral grant in 1939 according to native custom. The land was marked out, four pillars bearing D’s initials being placed at the four corners of the land. The land was not built on or used, and D delegated to her mother the task of looking after the land. In 1940 certain land, including this land, were vested by ordinance in the chief secretary in trust for the Crown free from all titles, but subject to provision for release when no longer required. In 1945 the gift to D was confirmed by indenture duly registered. This recited that D had entered into and had been in possession of the land ever since the gift. In 1948 the appellant started to build on the land. D protested by letter of her solicitors in March 1948, and in April 1956 the land was released by the Government and D’s title revived.”

It was held that D continued to be in possession and so was entitled to bring an action in the trespass. At 600 their Lordships said:

“In the indenture of 1945, which was registered, the respondent declared that she had entered into possession of the land and been in possession ever since. The only reasonable inference from her evidence is that, up to 1948, the date of the appellant’s entry on the land, she deputed her mother to look after the plot and that she was keeping watch on the land to see that no one intruded. At any rate, when she did notice the appellant’s blocks on the land she took prompt action to warn the appellant off the land. The evidence is exiguous, but, in their Lordship’s opinion, it is sufficient to satisfy the test and is adequate proof of the respondent’s intention to continue her possession after 1940 and establishes that, when the appellant entered the land in 1948, she was in possession. She is, therefore, entitled to maintain an action for trespass.”

As I have indicated above, the facts are somewhat different, but the common feature is the element of deputising. Just as the plaintiff in the Wuta case deputised her mother to look after the land, the plaintiff in the present case deputised Mr Medi to look after the house. Just as the mother took prompt action in reporting to the plaintiff when the intruder came, Mr Medi acted likewise; and immediately the plaintiff telephoned the defendant to quit and hand over the keys to Mr Kampunga. In these circumstances, I find that the claim for trespass has been made out and I enter judgment for the plaintiff.

I now come to the question of damages. In assessing damages, the general rule is that the plaintiff recovers the loss he has suffered, no more and no less. In certain circumstances, however, this general rule is departed from. In an action of trespass to land, such as the present, the plaintiff is entitled, on proof of the trespass, to recover damages even when he has not suffered any actual loss. Where actual damage has been occasioned, he is entitled to a full compensation.

In the instant case, the defendant entered upon the plaintiff's land in June 1985, by getting keys from Mr Medi, and surrendered the keys to Mr Kampunga in December 1985, which means that he was in possession, or in occupation of, the house for a period of six months. There is no evidence that the defendant caused any damage or injury to the property. This means that the plaintiff did not suffer actual loss. In such a case, the normal measure of damages is the market rental value of the property occupied or used for the period of wrongful occupation or use – see paragraph 1075 of McGregor On Damages (13 ed).

Turning to the market rental value of the property, the evidence before this Court is that Mr Medi was not paying any rent and there was no intention on the part of the plaintiff to put up the house for rent. The modern view, however, is that it matters not whether the owner was able to use it himself or to let it, as Denning LJ said in the case of Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd [1952] 2 QB 246, at 253:

"The rule there is that a wrongdoer, who keeps the owner out of his land, must pay a fair rental value for it, ever though the owner would not have been able to

use it himself or to let it to any one else. So also a wrongdoer who uses land to his own purposes without the owner's consent, as, for instance, for a fair ground, or as a way-leave, must pay a reasonable hire for it, even though he has done no damage to the land at all..."

In the earlier case of Whitwhem v Westminster Brymbo Coal and Coke Co (1896) Ch 538, the plaintiff trespassed on the defendant's land, causing damage assessed at £200-00 and it was submitted by the defendant's counsel that damages be limited to that amount. Rejecting this line of argument, Lindley LJ had this to say at 541:

"In this case we are all agreed that the principle acted upon by the learned judge is right. Let us consider what the defendants have done. They have done two things. They have, first of all, so used the plaintiff's land as to diminish its value, say by 2001. Mr Russell admits that the defendants must pay that, but contends that they are to pay no more. That leaves out of sight what more the defendants have done. What they have done more is this – they have been using the land for years. Why are not the plaintiffs to be entitled to some compensation in respect of that user? – The plaintiffs have been injured in two respects. First, they have had the value of their land diminished; secondly, they have lost the use of their land, and the defendants have had it for their own benefit. It is unjust to leave out of sight the use which the defendants have made of this land for their own purposes, and that lies at the bottom of what are called the way-leave cases. Those cases are based upon the principle that, if one person has without leave of another been using that other's land for his own purpose, he ought to pay for such user."

I think that the principle enunciated in these authorities is clear. The defendant must pay, for the occupation and use of the plaintiff's house, although there was no damage to the property, This being a dwelling house, I think that the measure of damages would be the market rental value of the house. The defendant was in occupation for some six months, but there is no evidence as to how much the plaintiff would have got by way of rent had he let out the house. It was up to the plaintiff to lead such evidence as would assist the court in assessing damages. In the absence of anything to go by, I would assess damages in the sum of K100-00 and I enter judgment in that amount. The defendant is condemned in costs.

It is now time to look at the defendant's counterclaim. I will start with the alleged defamation of 9 August 1986. On that day Ms Kettie Namsukwa the first witness for the defence, was travelling to Ngerenge on church duties. She is a church elder in CCAP Church. The defendant is also a church elder in the same denomination. The first witness for the defence had a lift in Mr Chisiza's vehicle and the plaintiff was also a passenger in the same vehicle. It was the defendant's first witness's evidence that while in the vehicle, the plaintiff was complaining against the defendant. He was speaking in Nkhonde language. The words of complaint as put in the statement of claim were as follows:

"Ba Mwakasungula ba hiyi. Munyambala eghile katundu wangu. Unkikulu yope ubukristu wake waitolo."

Translated in the English language the words mean:

“The Mwakasungula’s (meaning the defendant and his wife) are thieves. Whilst the husband had stolen my goods, the wife condoned the theft and her Christianity was false and worthless.”

However, in her evidence she was not able to repeat the exact words as put in the statement of claim. According to her evidence, the plaintiff said:

“Utata uMwakasungula ahiilile katundu wangu munyumba.”

Meaning:

“Mr Mwakasungula has stolen my goods in the house.”

She went on to say that the plaintiff extended certain words to the defendant’s wife to the extent that she had condoned the theft and that he was a worthless Christian. It was her evidence that when she heard these words she was shocked, especially that the plaintiff is also a church elder. She wondered if she had heard right and so the plaintiff repeated the words and continued to say that he was going to Police to report. It was her evidence that she was very sorry for the Mwakasungulas. There were other people in the vehicle who had heard that.

When she returned from Ngerenge she asked the defendant about what she had heard, but he denied. She further testified that when members of the Church heard of the allegation, they were very sorry for the defendant. In cross-examination, she conceded that she was not able to remember and repeat the exact words the plaintiff had used as they appear in the statement of claim. She explained, however, that what she told the court materially and substantially mean what is in the statement of claim and that is that the defendant stole the plaintiff's properties.

The second witness for the defendant was Daison Mwenendeka. He was a labourer working for the defendant. On the morning of an unspecified day in August 1986, he was sweeping outside the defendant's house. There is a road nearby and as he was so sweeping he saw a motor vehicle passing by. The vehicle belonged to a Mr Mbisa and he saw the plaintiff therein. Then he heard the plaintiff saying: "Twabuka mukiba sona",

Meaning:

"We are going, you go and steal again."

Mr Mwenendeka said he knew these words referred to the defendant. He then reported to the defendant's wife who was washing plates outside the house. Mrs Mwakasungula's evidence was that when she got the report from Mwenendeka, she knew that the words referred to the defendant because his house had been searched a few days before. In cross-examination, she said that she too had

heard the words allegedly uttered by the plaintiff.

On his part, the plaintiff denied having said the alleged defamatory words as testified by the first witness and the second witness for the defence. He did meet Ms Kettie Namsukwa and they talked to each other after formal greetings. She had asked him when he had come to Karonga and he told her. He also told her that his property had been stolen and he was going to Police to report. He did not say it was the defendant who stole his properties. She asked him how the properties got lost and he told her the story. When cross-examined, he said he had told her that the defendant had collected keys from Mr Medi without authority.

I must hasten that I have grave misgivings about the evidence of Mwenendeka. How he was able to hear those words from a passing motor vehicle is something he failed to explain. The vehicle did not stop and there was no suggestion that the plaintiff, who was sitting in the cab, stood and shouted those words in the direction of the defendant’s house. It is difficult to apprehend what caught Mwenendeka’s attention that morning, as there was nothing special about that vehicle.

Mr Mwalwimba, who was building a pigsty nearby, did not hear the words. I find it quite significant that it was only in cross-examination that Mrs Mwakasungula said she also heard the words. What she said in her evidence-in-chief, was that the words were reported to her by Mwenendeka. Surely, if she had heard the plaintiff uttering the defamatory words, she would have mentioned that in her

evidence-in-chief. In the result, I dismiss this part of the counterclaim with costs.

As for the alleged defamatory words of 9 August 1986, I must say that I found Ms Kettie Namsukwa to be a witness of truth. Perhaps I must mention that I was not in any way influenced by the fact that she is a church elder, for some church leaders have been known to tell lies. After all, it was in evidence that the plaintiff is also a church elder, so that it was the word of one church elder against the word of another church elder.

In his evidence-in-chief the plaintiff said that Ms Namsukwa asked him how the properties got lost and he told her the story. According to the plaintiff, it was the defendant who stole the properties and surely that is the story he told her. The plaintiff's story was that it was the defendant who stole the properties and that is why the Police only searched his houses and no more. That is the story he told Namsukwa, that the defendant stole his properties. The plaintiff further denied that he could not have uttered those words, as he does not know the Nkonde language. This was a lie, because there was abundant evidence that he does know Nkonde. I, therefore, find it as a fact that the plaintiff did utter the words as alleged.

The words as they stand, no doubt, have a defamatory meaning, for the defendant did not steal and there is no evidence to suggest that he did, for the plaintiff told this Court that he does not know who stole his properties.

Mr Nakanga, however, submitted that this action cannot be sustained for three reasons; firstly, because there is no evidence that the defamatory words were published to Ms Namsukwa; secondly that there is a variance between what Ms Namsukwa told the court and what is pleaded in the statement of claim; and thirdly, that there is no proof of special damage.

I have already found that the alleged defamatory words were indeed published by the plaintiff. I have no difficulty in finding that the defamatory words were indeed published to Ms Namsukwa. The two were conversing. Ms Namsukwa told the court that when she heard the plaintiff saying that the defendant had stolen his properties, she was shocked. She was not sure if she had heard him right and so the plaintiff repeated, saying that, that was how things were. In his own evidence he said that when she asked how the things were stolen, he had told her the story. There can, therefore, be no doubt whatsoever that those words were published to her.

It is perfectly true that what the witness testified in court as defamatory words published by the plaintiff are at variance with what is pleaded in the statement of claim. I find the variance not to be fatal, for the two versions mean materially and substantially the same thing. That is to say, the defendant stole the plaintiff's properties. If the words proved convey to the mind of a reasonable man practically the same meaning as the words set out, the variance will be immaterial – Tabart v Tipper (1808) 1 Camp 350 (case cited at paragraph 1304 of Gatley on Libel and Slander – but report not available). Mr Mhango cited the case of Tournier v National Provincial and Union Bank of England [1924] 1 KB 461. I found this case to be very useful. At 469 Bankes LJ said as follows:

“The strictness of the old rule in reference to variance between proof and pleading in actions of libel and slander has long ago disappeared. It is still necessary to plead the exact language complained of, but proof of language substantially the same as that pleaded is admissible and should be submitted to the jury. Lord Coleridge CJ states that present rule in Harris v Warre (1) as follows:

‘In libel and slander everything may turn on the form of words, and in older days’ plaintiffs constantly failed from small and even unimportant variance between the words of the libel or slander set out in the declaration and the proof of them. For a long time it has been held to be enough to prove the substance of the words alleged in the declaration, but if there was difference between both the form and substance of the words alleged, and of the words proved, the defendant was entitled to succeed. In libel and slander the very words complained of are the facts on which the action is grounded. It is not the fact of the defendant having used defamatory expressions, but the fact of his having used those defamatory expressions alleged, which is the fact on which the case depends.’

And at 487 Atkin LJ observed as follows: “No slander or any complexity could ever be proved if the Ipsissima verba of the pleading had to be established.”

This means the defendant does not need to prove the precise words as pleaded in the statement of claim. It is sufficient if the words proved in court carry materially and substantially the same meaning as those in the statement of claim. It appears to me that to any reasonable man, the words “Ba Mwakasungula eghile, Munyambale eghile katundu wangu” and the words “utata Mwakasungula ahiyile katunda wangu” naturally and ordinarily mean that the defendant is a thief. He stole the plaintiff’s property. Mr Nakanga’s submission, therefore, fails.

As has been submitted by Mr Nakanga, there is no evidence that the defendant has suffered any special damage. But the law is that the defendant does not have to prove that as a result of the slander he has suffered special damage, for this is a slander which is actionable per se. Words which impute a criminal offence on the plaintiff are actionable without proof of special damage – see the case of Webb v Beavan (1893) 11 QBD 609. The words complained of are that the defendant stole the plaintiff’s properties. Theft is not just a crime, but a serious one, to wit a felony, punishable with five years’ imprisonment. To call a person a thief is, therefore, a serious matter and the law presumes some damage must have occurred. This submission also fails.

Lastly the plaintiff has raised the defence of qualified privilege. It was pleaded that the plaintiff was under a duty to publish the slanderous words and the persons to whom they were published had a duty to receive them. It was also pleaded that it was necessary to publish the said words because he was protecting his property. Mr Kakanga submitted that in these circumstances the defence of qualified privilege would apply. The plaintiff was protecting his

property. Mr Kakanga also submitted that as the defendant has not served a reply, malice had been made an issue. He referred to Order 82 of the Rules of the Supreme Court.

I think I agree with Mr Mhango that the defence of qualified privilege has been totally misconceived. To begin with, the plaintiff was under no duty, legal, moral, social or otherwise to defame the defendant.

Mrs Namsukwa was under no duty whatsoever to receive the defamatory words. Perhaps it would have been different if she was a police officer, but even police officers are under no duty to receive false allegations.

It is true that the plaintiff was under a duty to protect his property, but he did not know who took his property. So what he should have done was merely to go to Police and report the alleged theft of his property. Reporting the alleged theft had nothing to do with slandering the defendant. As for malice, it is true that the defendant did not make any reply giving particulars of express malice, but this is a slander which was published without any lawful excuse and, accordingly, the law conclusively presumes that the publisher was activated by malice; it having been pleaded that the publication was done falsely and maliciously. This submission must also fail.

I, therefore, find that this head of claim succeeds and I enter judgment for the defendant.

I now have to consider the question of damages. There is no pecuniary loss in this case, but the defendant must be compensated for injury to his reputation and feelings – See the cases of Rook v Fairrie [1941] 1 KB 507, Fiedling v Variety Incorporated [1967] 2 QB 841. It is very clear from the evidence that the defendant suffered mental pain and anxiety. In the case of McCarey v Associated Newspaper Ltd and others [1965] 2 QB 86, Pearson LJ said as follows at 104 and 105:

(Damages) “May include the natural injury to his feelings – the natural grief and distress which he may have felt at having been spoken of in defamatory terms and if there has been any kind of high-handed, oppressive, insulting or contumelious behaviour by the defendant which increases the mental pain and suffering caused by the defamation and may constitute injury to the plaintiff’s pride and self-confidence, those are proper elements to be taken into account in a case where damages are at large.”

Indeed, there is no yardstick by which damages may be measured; they must be determined by a consideration of all the circumstances of the case, viewed in the light of the law applicable to them.

Now what were the circumstances of this case? Not only did the plaintiff publish the defamatory words by calling the defendant a thief, but he persisted in that false allegation and caused the Police to search his houses. Together with the

Police, the plaintiff combed every corner of the defendant's house at Bwiba. Then the police also searched his other house at Kasoba and removed some properties. These searches and removal of properties were not done at night but in broad daylight, when everybody was looking. It is evident from all this that the defendant suffered severe mental pain and anguish. His feelings were grieved and his reputation sank and he was put to great shame. It is in evidence that as a church elder, the defendant was held in high esteem by fellow Christians and the community at large. All that was shattered. It is true that the defendant had trespassed onto the plaintiff's land, but that did not justify the defamation. In the case of Malawi Railways Ltd and another v Bhandurckan Civil Cause No. 196 of 1985 (unreported), a sum of K10 000-00 was awarded for calling the second plaintiff corrupt and untrustworthy. In the instant case, however, I think a sum of K6 000-00 would be sufficient and I so order.

The plaintiff will pay the costs of the counterclaim.