

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)

CIVIL SUIT NO. 426 OF 2017

MACDOSMAN W.KABEGA:..... PLAINTIFF

VERSUS

1. THE EDITOR IN CHIEF BUKEDDE NEWSPAPER
2. THE NEW VISION PRINTING AND PUBLISHING COMPANY LTD}..... DEFENDANTS

Before: Hon. Dr. Justice Douglas Karekona Singiza

JUDGMENT

1.0 Introduction

In the earlier stages of the development of the law on defamation in 19th century England, the caution from the courts was always clear: “[e]very man has, but for the law of libel, a right to write and say what he pleases. His pen and tongue are his own, and the only law that restrains the use of them is the law of libel”.¹ The application of the English law principles on defamation in Uganda even within the context of constitutional guarantees on freedom of speech, limits the right to freedoms of speech within specific confines of civility and mutual respect of others. Indeed, the principles surrounding the subject on defamation have changed in many common law jurisdictions. What has remained unchanged is

¹ *The Capital and Counties Bank Limited v George Henty and Sons: HL 1882 (1881-82) AC 741.*



that a person's reputation, not his esteem, will always almost be protected by the courts of law.

2.0 Brief facts

The plaintiff herein is an Advocate of the High Court and all subordinate Courts in Uganda, and a partner in a law firm, Ms. Tumusiime, Kabega & Co Advocates. His suit against the defendants is for damages for alleged defamation, as well as a permanent injunction to prohibit the defendants from publishing defamatory matter of the plaintiff, an order to publish a retraction of the story complained of and costs. The publication complained of was published in the defendant's issue of *Bukedde Newspaper* Volume 22, No 081 of (sic) Wednesday April 5, 2017, at page 8.

On their part, the defendants do not dispute the publication of the impugned content. However, they contend that publication in question was made without any malice or falsehood against the plaintiff, that it was incapable of bearing any innuendo or defamation as alleged, and that they have a moral and social duty to inform the public on matters of public interest. The defendants prayed for the suit to be dismissed with costs.

Both parties filed witness statements in Court. The plaintiff presented two witnesses: Samuel Semanda (PW1) and MacDosman Kabega (PW2) while defendants presented one witness Ms. Alice Namutebi (DW1).

3.0 Issues for determination

The parties filed a joint scheduling memorandum in which two issues were framed for determination:

1. *Whether the defendants' publication in the Bukedde newspaper dated the 5th April 2017 is defamatory?*

2. *What remedies are available?*



4.0 The Law

The framework on defamation presents subtle fears in many common law jurisdictions because of the perception that defamation is an unjustifiable infringement to freedom of speech. This criticism is mostly premised on the fact that defamation may undermine public scrutiny of those in positions of power. That said, civility and open debates in society require that only proven factual truths remain essential and foundational for the success of a constitutional democracy and the protection of citizens civil liberties. In dealing with defamation cases, the courts of law usually take cognizance of the protection of freedom of speech on the one hand, and the constitutional guarantee on the right to privacy on the other hand.

Case law on defamation reveals diverse approaches on what amounts to defamation, the defences thereof and the remedies available to the parties. The Court in the case of *John Nagenda*,² restates the English law on defamation, and defines defamation with reference to statements that have certain inclinations towards an individual's standing in society to whom the statement refers

*"by lowering him in the estimation of right-thinking members of society generally and in particular cause him to be regarded with feelings of hatred, contempt, ridicule, fear dislike..."*³

In other words, the publication must have the effect of other people stationed in his life to avoid him. Thus, a statement is not defamatory simply because it imputes a person's improper conduct. The statement must have a propensity to make a person shunned but not that it has made a person to be shunned in fact.⁴

² *John Nagenda v Editor of Monitor Publication & Anor SCCA No.5/1994*,

³ *Ibid.*

⁴ *Ibid.*



The legal test in defamation cases essentially takes three strands: (1) that the words in a statement are defamatory; (2) that the words referred to the plaintiff; and (3) that the words must have been published by the defendants. The question whether the words complained of are defamatory is one of law while the question whether the impugned words in fact referred to the plaintiff is one of fact.⁵

A further inquiry is usually made to determine who the right-thinking members are. The test here is not to act irrationally or in a manner that is inward looking to the social needs, rather one that is rational. Thus, if a big number of people of good standing in a community would consider a person referred to in a story to be short of good behavior, then the statement shall be considered defamatory.

Defamation as a branch of law is hinged on an objective test of right-thinking members of the society. A court of law must therefore interpret the word(s) as used in the publication complained of using an objective test. The guide is that the article must be read as a whole and that the ordinary words in the impugned article must be given their natural meaning.⁶

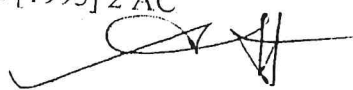
The courts are alive to the fact that there are people who read only the headline and there are those who read both. If an alleged defamatory article were to be read in bits, different meanings by different categories of people would be attached to a story because there may be newspaper readers who peruse the entire article and those that 'bend' so to speak and read only the headlines.⁷

The other tool available for interpretation of defamatory words is found in situations where the words on their face value used in an article are per se not

⁵ See *Sim v Stretch* [1936] 2 All ER 1237

⁶ *Mayanja v Cheeye* (Civil Suit 261 of 1992) [1992] UGHC

⁷ *Charleston v News Group Newspapers Ltd* [1995] 2 AC



defamatory but are nonetheless defamatory by association. This is generally referred to as *innuendos*. *Innuendos* operate in two ways:

1. First, is that the impugned words while innocent in usage may have acquired a secondary meaning that is in fact defamatory - or a false *innuendo*; and
2. Second, is that the words in the impugned article may not be capable of any defamatory meaning but for their extraneous factor outside the words themselves - true *innuendo*.

There is consensus in the available jurisprudence that if a statement is published in public interest, then the courts will usually make a finding against the plaintiff because there is a moral and public duty to publish information already in the public domain provided always that the information is concerned with the public and published for the public interest.⁸

The courts seem to take the balanced view on the defence of justification to the extent that such a defence is only available to a publisher once the story is true or accurate. In *Sarah Kanabo* case,⁹ the impugned story was that the Sarah Kanabo was a murderer, a criminal, a witch, and a greedy woman who could destroy human life for money. Further that she was a bad wife who had failed to manage her home because she was quarrelsome and a thief and therefore dangerous to society. Kityo J rejected the argument that the above statements were justified, amounted to fair comment, and therefore protected under qualified privilege.

The above decision, progressive as it may appear, seems to be constricted by the decision of *Rhoda Kalema v William Pike* [1994] UGHC 6 which introduced a two-stage system check. First, that the publisher must check the story to be

⁸ *Sha V Uganda Argus* 1972 EA 80.



truthful and secondly, that the publisher must also ensure that the headline is justified. The Court's caution to the publishers is to ensure that not only should the story in an article published be truthful but also that the headline must be justified.

There may be circumstances where a defendant may suggest that all he or she did was to repeat a publication which was already in public domain. The position of the law seems to be that a defendant remains liable even if he or she 'merely' republished a defamatory article. The exception here is that a re-publisher must be an 'innocent disseminator'. The defence of an innocent disseminator is rationalized by three main arguments. First is the proof of innocence of any knowledge of the impugned publication, secondly is that nothing should have alerted the publisher on the possible defamation risk there is and thirdly that the failure to detect the possible risk of defamation is not attributable to the carelessness of the re-publisher.¹⁰

5.0 Analysis and Resolution of Issues by Court

As earlier stated, two issues were framed for determination:

1. *Whether the defendants' publication in the Bukedde newspaper dated the 5th April 2017 is defamatory?*
2. *What remedies are available to the parties?*

The Court will now proceed to resolve the issues as framed.

1. *Whether the defendants' publication in the Bukedde newspaper dated the 5th April 2017 is defamatory?*

¹⁰ See *Vizetelly V. Mudie's Select Library, Ltd.* ([1900] 2 Q. B. 170). In this case, the defence of innocent dissemination failed because the publisher was negligent in failing to verify that the story, he had relied on had been retracted from circulation with a notice.

A copy of the article in the *Bukedde* newspaper dated the 5th April 2017 was exhibited as PEX1. The publication was in the luganda language with the plaintiff's picture. The translated version of the story prepared by the Centre for Languages and Communication at Makerere University was tendered as PEX2. The English translation of the contents of the article alleged to be defamatory is reproduced hereunder:

"Relatives of the late High Court Judge Amos Twinomujuni have attacked Tumusiime Kabega's company and they stress that it is for mafias.

In a letter dated 10th February 2017, which Reuben Kajwarire wrote to police, the Chief Justice Katureebe, the Prime Minister of Uganda, Uganda Law Society, Minister for Constitution Affairs and other government bodies, he asserts that Tumusiime Kabega and Company Advocates is filled with mafias, and it takes charge of capital offences that lead to the killing of key witnesses, while the offenders go untouched. However, Tumusiime disputes the allegations and says they are unfounded.

Some of the high-profile persons whose cases are being handled by the company include Sarah Nabikolo who was being charged of murdering her husband Eria Bagambe Ssebunya (she survived the charges), the tycoon Kato Kajubi who is at Luzira on charges of sacrificing Joseph Kasirye (he won the case but the DPP appealed). Dr. Aggrey Kiyingi who was being charged of murdering his wife Robina Kiyingi and he won the case, former member of Parliament for Arua Municipality God Akbar who was convicted of murdering his wife Rehema Ceasor (he initially won the case and later the government appealed). Lt. General Henry Tumukunde who was on charges of conducting himself against the law, Capt. Ramathan Magara who shot people at Bulange Mengo and other high-profile persons.

Tumusiime says these allegations brand them as lawyers who are murderers and who take charge of capital offences with a hidden motive, something which is not true because he follows the law as well as his colleagues.

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Some of the prominent lawyers working for the company include McDusman Kabega, Tom Magezi and others. Tumusiime has filed charges with the High Court against Kajwarire for tarnishing his image and the image of the company which they have struggled to build for so long. He would like Court to punish him.

Kajwarire says that Tumusiime has withheld the will of the former High Court Judge Amos Twinomujuni.

He has underlined that after the death of the judge Twinomujuni, the Judge Bamwine took charge of the burial ceremonies and together with his group members, they executed all ceremonies without giving people a chance to get involved."

The Plaintiff contends that the said content was defamatory, which is contested by the defendants. The words alluded to referred to the Plaintiff and carried his photograph. They also referred to the Plaintiff's law firm that it is

"...is filled with mafias, and it takes charge of capital offences that lead to the killing of key witnesses, while the capital offenders go untouched"

Given its plain, ordinary and natural meaning, the word "mafia" is defined with reference to an organized criminal syndicate or organization that operates heavily in secrecy but very brutal and violent.¹¹ When this term is adopted in the manner used in the impugned article, especially in reference to a law firm, then it is in law defamatory, as no person would wish to associate with a law firm that has designed its operations in a criminal syndicate. Like it was emphasized in cross-

¹¹ See Hornby, A. S., et al (Eds) *Oxford Advanced Learner's Dictionary* (8th Ed) Oxford University Press (2010).

examination of Pw1, a single publication is sufficient to make one's peers shun a defamed person.

This court also notes that the Plaintiff is a senior partner in the said law firm with an impressive professional record and experience. His illustrious curriculum vitae and long list of national and regional awards exhibited as PEX4 and PEX5 respectively were not contested. He also adduced evidence that some of his peers in international bar organizations called him wondering if the story was true.

This court is satisfied that the impugned article was not only scandalous of the plaintiff but could make the plaintiff a laughingstock amongst his legal peers. Further, the plaintiff's evidence through the testimonies of Pw2 and Pw3 in cross-examination sufficiently proves that his friends and clients shunned him too. There is no doubt that the impugned article had the ability to cause the plaintiff mental pain given its ability to lower his reputation amongst his peers in the legal fraternity. I therefore hold that the impugned article in its published form was defamatory of the plaintiff.

Having found as I have, it remains for the court to establish whether the defence advanced by the defendants is plausible. While the defendants did not dispute publishing the impugned article, they contended that the publication was made without any malice or falsehood against the plaintiff, that it was incapable of bearing any innuendo or defamation as alleged, and that they have a moral and social duty to inform the public on matters of public interest.

The evidence of DW1 in this regard was to the effect that her story published in the impugned article followed a complaint by Mr. Reuben Kajwarire, a son of late Justice Amos Twinomujuni against Mr. Enos Tumusiime, a partner in the plaintiffs' law firm. That it also covered a suit in which Mr. Enos Tumusiime had sued Mr. Reuben Kajwarire in the high court relating to the same complaint. That the complaint had been filed in the high court.

withheld the Will of the late Justice Amos Twinomujuni against the interests of the family members.

DW1 asserted that the complaint was in writing, dated the 10th of February 2017 and made certain references to the allegations about the plaintiff's law firm, and that it was addressed to the Inspector General of Police, and copied to several key stakeholders in the Justice Law and Order Sector (JLOS) institutions, as well as to the Rt. Hon. Prime Minister and the Hon. Minister of Justice and Constitutional affairs.

According to DW1, since the complaint had been communicated to all the persons copied to, it was already in the public domain. DW1 informed the court that the fact that Mr. Enos Tumusiime had filed a case against Reuben Kajwarire in the High Court Civil Division vide HCCS. No. 126/2017 (see DEX1) over Reuben Kajwarire's written complaint further put the story in the public domain.

In any case, DW1 further testified that since Mr. Enos Tumusiime had referenced the very complaint by Mr. Kajwarire, her attention as a journalist had been drawn to the suit by Mr. Enos Tumusiime because it dealt with the allegation of a loss of a "Will of a Judge" (sic) to the prejudice of the deceased judge's family, and that the story was "of great significance and importance to the public." Moreover, DW1 added that her story was preceded by the suit by Mr. Enos Tumusiime in the High Court of Uganda, which is a public registry, and that her story which covered the suit and the complaint was reasonable in the circumstances.

According to her, her story was balanced because it mentioned both parties in the suit filed by Mr. Enos Tumusiime in defamation to enable the public to have a fair and accurate understanding of the case. DW1 denied any malice or bad intention in the story because in any case he never knew the plaintiff personally and neither did he have anything to do with his law firm. She maintained that the story could not have injured the plaintiff.

The thrust of the defendants' case is that they were justified in publishing the story as they did in public interest. They also seemed to put forward the defence of innocence dissemination of the words complained of, because according to them, the impugned words were already in the public domain anyway. The plaintiffs on the other hand attacked the above defence based on the defendants' failure to afford them a chance to give their side of the story prior to the publication. The plaintiff counters the above defence by insisting in cross-examination that what the publication did was to escalate the already defamatory contents in the impugned letter.

I have had the opportunity to look at a copy of Mr. Reuben Kajwarire's written complaint (which forms part of a separate suit by the plaintiff's legal partner Mr. Enos Tumusiime against Reuben Kajwarire in the High Court Civil Division *vide* HCCS. No. 126/2017) (see DEX1). I have also looked at the impugned published story. Initially while cross-examining Pw1, the defence questioned the ability of the defendant's article to defame the plaintiff because the challenged article referred to a partnership and not an individual. I, however, find that the use of the plaintiff's picture points to an individual person and not to the partnership.

It is my finding that the suggestion that the defendants considered the plaintiff's side of the story is not borne out by the available evidence. It is also generally understood that a defamatory story does not cease to remain so simply because it had been already published elsewhere.

It was open to the defendants to seek the views of the plaintiff to verify if the contents of the complaint by Mr. Reuben Kajwarire were true. Further, publishing a story which was already a subject of another defamation suit was a repeat of the defamation itself. The suggestion that the defendants were at liberty to repeat the defamatory story simply because it was allegedly in the public purview is misconceived.



the defence of public interest is only available to the defendant if the story is accurate. By the time the defendants published the impugned article, no verifiable truth had been presented to the defendant that the plaintiff and his legal partner were a criminal syndicate.¹² In any case the assertion that the defendants were repeating what was already published is misleading because they were already aware of the original defamatory complaint. I have no doubt in my mind that the defence of public interest is not available to the defendants. Considering this finding, this court holds that the defendants are liable to the Plaintiff for the defamatory publication.

2. What remedies are available to the parties?

The plaintiff's claim was for: (a) General damages for defamation; (b) Exemplary damages; (c) Special damages of UGX 150,000/= being the cost of translation of the article; (d) Interest on (a) and (b) above at 25% from the date of publication till payment in full, and on (c) from the date of filing this suit; (e) A permanent injunction against the defendants to restrain them from future publication of the defamatory matter of the plaintiff; (f) Publication by the defendants on a full page an apology to the plaintiff and a retraction of the defamatory article; (g) Costs of the suit.

The award of general damages is in the discretion of court in respect of what the law presumes to be the natural and probable consequence of the defendant's act

¹² The Supreme Court of Appeal of South Africa, in *National Media v. Bogoshi* (579/96) [1998] ZASCA 94, seem to offer an interesting guide on when journalist may rely on the truth as a defence. In this case the court takes the view that for as long as the journalists can demonstrate that they were reasonable or careful in their work, it is not necessary to prove the truth of allegedly libellous information. The case also recognised the media's public duty to publish information that is in the interest of the public.

or omission.¹³ According to PW2, the impugned publication affected his law firm's business inflow and led to his mental suffering and emotional strain for which he sought damages of UGX 100,000,000/=. This Court takes the view that this claim is excessive. Considering the plaintiff's reputation and the extent of publication, a sum of UGX 45,000,000/= will be an adequate remedy. It is hereby awarded.

Regarding the claim for exemplary damages, this represents a sum of money of a penal nature in addition to the compensatory damages given for pecuniary loss and mental suffering. They are deterrent in nature and aimed at curbing the repeat of the offending act. They are given entirely without reference to any proved actual loss suffered by the plaintiff.¹⁴

Apart from cases in which exemplary damages are expressly authorised by statute, the courts of law should only award such reliefs in cases in which the wrong complained of was oppressive, arbitrary, or amounted to an unconstitutional action by a servant of the government. Such awards may also be considered in cases in which the defendant's conduct was prompted by a calculated move to make a profit for himself which may well exceed the compensation made to the defendant.¹⁵

In the absence of any evidence of arbitrary conduct or ulterior commercial motive on the part of the defendants, this Court declines the prayer for exemplary damages.

¹³ See *James Fredrick Nsubuga v. Attorney General*, H.C. Civil Suit No. 13 of 1993.

¹⁴ *WSO Davies v. Mohanlal Karamshi Shah* [1957] 1 EA 352.

¹⁵ *Kanji Naran Patel v. Noor Essa and another* [1965] 1 EA 494


Special damages must be specifically pleaded and proved.¹⁶ The Plaintiff pleaded and adduced a receipt of payment of UGX 150,000/= exhibited as PEX3 issued by Makerere University for translation of the impugned article. The same is hereby awarded.

An award of interest is discretionary. The plaintiff prayed for interest at a rate of 25% but did not provide justification for that rate. Considering the effect of inflation and currency fluctuations, I consider a rate of 8% per annum appropriate and it is accordingly awarded. The orders for a permanent injunction, as well as an apology and retraction of the defamatory article are also granted since they directly flow from the court's finding on issue one.

The costs shall follow the event, and the plaintiff being the successful party is entitled to costs of the suit.

In the result, judgment is hereby entered for the plaintiff in the following terms:


- a. General damages of UGX 45,000,000/=
- b. Special damages of UGX 150,000/=
- c. Interest on (a) at a rate of 8% p.a. from the date of judgment until payment in full.
- d. Interest on (b) at a rate of 8% p.a. from the date of filing of the suit until payment in full.
- e. A permanent injunction issues against the defendants to prohibit them from further publication of the impugned defamatory content against the plaintiff.



¹⁶ See *Masaka Municipal Council v. Semogerere* [1998-2000] HCB 23 & *Musasa v. Departed Asians Property Custodian Board* [1998-2000] HCB 24.

- f. An order issues against the defendants to publish an apology to the plaintiff and a retraction of the defamatory article in *Bukedde Newspaper* with the same prominence as the impugned defamatory article within 15 days of this judgment.

Dated at Kampala this 12th day of October 2022.



Douglas Karekona Singiza

Acting Judge

12th October 2022