

UGANDA / JUDGMENT

Besigye v Amama Mbabazi

(Hct-05-cv-cs-0104-2002)

[2010] UGHC 185 (2 July 2010)

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COURT

High Court of Uganda

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CV-CS-0104-2002

REV. STEVEN BESIGYE PLAINTIFF

VS

HON. AMAAMA MBABAZI DEFENDANT

BEFORE: THE HON. MR. JUSTICE LAWRENCE GIDUDU

JUDGMENT

The Plaintiff sued the Defendant for defamation contending that the Defendant had uttered words that portrayed him as a rebel collaborator, a security threat and not fit to hold office of chairman. He claimed damages and costs. The Defendant denied uttering defamatory words.

Briefly the Plaintiff's case is that on 3/8/2002 during the Annual General Meeting of Kayonza Growers Tea Factory, the defendant who was the area member of Parliament and Minister of Defence addressed the AGM and during his speech, he uttered words in Rukiga which when translated in English read as follows:-

"Besigye is a member of Reform. I mean Rev. Besigye. Him and Musinguzi. While Musinguzi accepts that he is a member of reform, Besigye does not. He (Rev. Besigye)

accommodated rebels, he trains rebels Besigye is

blacklisted. If you did not know, know it now and don't vote him in the chair."

It was the Plaintiff's evidence that these words embarrassed him and he walked out of the AGM with about 1800 members in protest and missed out standing for election as chairman. He had since been shammed by his friends and his esteem lowered in public. That he was understood to be a rebel collaborator and a criminal who was not fit to hold office as chairman of Kayonza Growers Tea Factory.

In his defence, the Defendant admits attending the said meeting but as guest of honour, area MP and Minister of Defence. He admits addressing the meeting on a range of issues including matters of security that fell under his docket as Minister of Defence and are MP. His evidence is that due to the insecurity in the neighbouring DRC where rebels of ADF, PRA and others internal to DRC were operating with the intention of attacking Uganda and given the fact that the Factory was just one kilometer from the border with DRC and in view of the fact that the Plaintiff had a few weeks to the AGM been arrested by the Police on allegations of receiving visitors from the DRC who had not cleared with the Immigration at the border, he felt the occasion was best suited to warn those present of the need to be security conscious and gave the Plaintiff's arrest, detention and subsequent release by the Police as an example of careless dealing with Congolese whose country was at war. He denies decamping the Plaintiff or uttering the words as quoted in paragraph 4 of the plaint.

During the conferencing, the following issues were framed:

1. Whether the Defendant uttered the words complained of in para 4 of the plaint.
2. Whether the said words are defamatory.
3. Whether the defence of truth, fair comment and privilege are available.

Issue No. 1

It was the Plaintiff's case that the Defendant uttered the words contained in para. 4 of the plaint while the Defendant denies using those words in his speech.

Mr. Nester Byamugisha, learned counsel for the Plaintiff submitted that the Plaintiff's evidence read together with that of PW2 proves that the defendant uttered the words complained of. He submitted further that the Defendant does not deny in toto that he did not speak negatively about the Plaintiff and that even his witnesses like DW2 confirm that words to that effect were uttered during the AGM.

Mr. Mwene-Kahima learned counsel for the Defendant disagreed and referred to the various versions in the Notice of Intention to sue, the plaint and the testimony as evidence that no particular words were uttered by the Defendant as alleged by the Plaintiff. He gave the various versions as follows:-

1. The Notice of Intention to sue contained the following words:

“Instead of attending and observing, you addressed and told the gathering not to elect our client as chairman because he belonged to Reform Agenda, is a rebel collaborator and was engaged in recruitment of rebels and taking them to the DRC to join rebels Lt Col Kyakabare and Mande to fight the Movement Government under the leadership of President Museveni.”

1. Yet the version in para 4 of the plaint reads:-

“Besigye is a member of Reform. I mean Rev. Besigye. Him and Musinguzi. While Musinguzi accepts that he is a member of Reform, Besigye does not. He (Rev. Besigye) accommodates rebels, trains

rebels Besigye is back-listed. If you did not know,

know it now and don't vote him in the chair.”

1. During his testimony in court, the Plaintiff stated that the Defendant uttered the following words:-

“My complaint arises out of his address. In it he said to my surprise he decampaigned me that I should not be elected as chairman of their company because I belong to Reform Agenda. That I accommodate rebels. That I train rebels. I am back listed. And that if they elect me I will be arrested.”

1. Yet PW2 (Alfred Kagyema) told court that the Defendant uttered the following words:-

“This Besigye you see here, I mean Rev. Besigye cooperates with rebels. He trains rebels, accommodates them and sends them to Zaire to Mande and Kyakabare so that they fight the Government. This Besigye is wanted by the Government. So don't give him votes for your company.

1. PW3 (George Rushokye) told court that the Defendant uttered the following words:-

“This Besigye Stephen Reverend is a rebel. He trains rebels and takes them to Mande and Kyakabare in Congo. Therefore don't vote for him. And he will be arrested. He is listed in a black book. This Reverend you don't vote for him.”

Learned counsel for the Defendant contended that the above five versions are different and the Defendant is unable to know the exact words complained of and that this means he did not utter the words attributed to him.

He referred to Winfield and Jolowicz on Tort 12th edition at page 302 for the proposition that for the issue to be decided it is essential to know the very words on which the Plaintiff found his claim. He also referred to Libel and Slander in Civil Action with precedents of pleadings (3rd edition) by Clement Gattey at page 499 for the proposition that in slander the actual words spoken must be set out verbatim in order that the Defendant may know the certainty of the charge and may be able to shape his defence. That it is not sufficient to allege that the slanderer used such and such words or to that effect.

Counsel also referred to a failed application before conferencing of this case when learned counsel for the Plaintiff attempted to get the words spoken from the Defendant and was overruled that it is the Plaintiff to prove his case and not the Defendant to help in building the case for the Plaintiff.

The case before me is one of slander where the defamatory statement is made or spoken in words or in some transitory form. I have reviewed in sufficient detail the five versions which have been cited or quoted by learned defence counsel and with respect, I am unable to find serious contradictions or differences in the plaint and ordinarily meaning of those words so as to conclude that the Defendant did not utter them. When words are spoken to an audience from an unwritten speech, different people in attendance may not quote the exact words spoken in the order in which they were said. All the versions put forth are specific on the following words irrespective of the order and what is important, in my view is that they carry the same meaning in their plain and ordinary sense. There was no innuendo. These were direct words.

That the Plaintiff is a Member of Reform Agenda, he collaborates and trains rebels and sends them to the DRC where renegade Colonels Kyakabare and Made were waging a war against the Government of Uganda and should not be elected to a position of responsibility to chair the company.

I am unable to appreciate all the labour learned counsel for the Defendant put on this issue. From the evidence, it is clear that this part of Uganda borders DRC where there was fighting due to the weak central government in Kinshasha. Even Uganda had troops there to fight rebels and both the Defendant and his witnesses admitted that the Defendant's speech touched on the questioning of the Plaintiff by the Police about some Congolese Nationals who had entered Uganda and even slept at his (Plaintiff's) house. It is not in dispute that the Plaintiff was given as an example during the Defendant's speech about the need to be more vigilant on matters of security. How then could the Defendant use the Plaintiff as an example without referring to rebels, insecurity and elections at the AGM? It would be illogical for me to hold otherwise. I therefore answer the first issue in the affirmative.

Issue No.2

It was submitted for the Plaintiff that those words were defamatory while the defence laboured on justification of the utterances which forms Issue No. 3 and not this issue.

A person publishes a slander who speaks words defamatory of another to or in the presence of a third person and a statement is defamatory of a person of whom it is published if it is calculated to lower him in the estimation of ordinary, just reasonable men. The test is whether under the circumstances in which the words were published, reasonable men would be likely to understand that in a defamatory sense. Words are normally to be construed in their natural and ordinary meaning as popularly understood.

See **Odonakaravs Bob Astles (1970) EA 374**.

I have already found that the Defendant uttered the words complained of which are not even intricate but in their plain meaning and ordinary sense expose the Plaintiff to liability for criminal prosecution on charges of treason or misprision of treason. The words complained of unless qualified would lead to damages. There is uncontroverted evidence that a number of the Plaintiffs supporters walked out in protest or in solidarity with the Plaintiff. They were reacting to the Defendant's speech. Words that impute criminal offences on the Plaintiff are defamatory and I resolve issue No. 2 in the affirmative.

Issue No.3

Was the Defendant justified in making these utterances? It was the Defendant's case that if the statements were uttered, then the same are true, fair comment and privileged. This amounts to the defence of justification and the burden of proof shifts to the Defendant to prove that the statements were all true.

Learned counsel for the Defendant submitted that the Defendant was the area Member of Parliament and Minister of Defence in the Uganda Government. Further, that there was insurgency in the DRC and the factory which was one kilometer from the border was an easy target and for that reason security had been beefed up in the area with an army detach stationed at the factory. That it was the responsibility of the Defendant as Minister of Defence to talk about security matters and since the Plaintiff had been arrested and detained by the Police in connection with hosting DRC nationals at his home yet DRC was at wars, the reference to the Plaintiff was a perfect example making the Defendant's speech both true and privileged. Counsel cited Source book on Torts by Grahem Stevenson (2nd edition) at p. 522 for the proposition that Truth is a complete defence and if the Defendant proves the substantial truth of the words complained of, he thereby establishes the defence of justification.

Counsel argued at length that security was a matter of public concern and fell under the docket of the Defendant as Minister of Defence. It was his view that the Defendant's comments were fair in the circumstances of the prevailing insecurity. He cited Source book on torts (Supra) at page 522 for the proposition that an honest comment on a matter of public interest is a defence in a suit of this kind. He also quoted Lord Denning (MR) in *London Artists Ltd. Vs Littler* (1969) 2 All. ER thus

"Whenever a matter is such as to affect a people at large, so that they may be legitimately interested in or concerned at, what is going on or what may happen to them or others, then it is a matter of public interest on which everyone is entitled to make fair comment."

It was counsel's view that the Defendant as area member of Parliament and Minister of Defence was fully entitled to address the meeting on security matters to safeguard their lives and their property like the tea factory in their area.

On the other hand, Mr. Byamugisha Nester, learned counsel for the Plaintiff contended that the Defendant failed to discharge the burden of proving both the truth and fair comment of the contents of his speech. He argued that the Defendant failed to prove that the Plaintiff was detained in connection with Congolese nationals who had illegally entered Uganda. It was the Plaintiffs' evidence that though he was summoned to the Police, he explained away the allegations and was never arrested.

It was counsel's submission that one Abdalaziz who is alleged to have stood surety for the Plaintiff did not testify meaning the allegations were false. He cited The law of Torts by John G. Fleming (4th edition) at page 545 and Nekemia and another vs Teddy Ssezi Cheeye & another HCCS.1047 of 1995 (unreported) for the proposition that a Defendant should never place a plea of justification on the record unless he has clear and sufficient truth of the imputation for failure to establish this defence at the trial may properly be taken to aggravate damages.

It was counsel's submission that the defence of fair comment is equally not available due to the falsity of the words uttered by the Defendant.

Before I dwell on the defence of privilege also set up by the Defendant, let me first resolve the defences of truth and fair comment which were ably submitted upon by both counsel.

It is trite that justification is a complete defence once the Defendant proves on the balance of probabilities that the statements are true.

The Plaintiff and his witnesses denied that the Plaintiff was arrested by the police and detained in connection with hosting foreigners who had not cleared with Immigration. The Defendant on the other hand testified that he was briefed about the security situation in which it was revealed that the Plaintiff had hosted Congolese nationals under suspicious circumstances and had been arrested and detained by the Police and released on Police bond. DW2 Tumwesimire Kipande, supported the Defendant's testimony thus:-

"The Plaintiff had been detained for some two days at the Police because he had aided people from Congo to enter Uganda without official documents.

Kamushabe Caleb our board member helped secure him bail. The Defendant gave the Plaintiff as an example. The Plaintiff said it was bad for the Plaintiff with all his understanding to help people from another country to enter

Uganda without going through Immigration. . He also

said he had been hearing that the Plaintiff belongs to the

Reform Agenda and wondered if what he did was in connection with his affiliation to Reform Agenda which had links with PRA. The Defendant did not say that the Plaintiff was a rebel."

Yet DW3, Caleb Kamushabe, testified that 3 weeks to the AGM, the Plaintiff had been arrested and detained at Kanungu Police Station and that he and 2 other people who included Abdalaziz went to stand surety for the Plaintiff on the basis that he was a fellow board member.

Mr. Byamugisha attacked this evidence as false because the Plaintiff denied being detained and Abdul-Aziz never testified about the Police.

With respect, taking the evidence for the Plaintiff and that of the Defendant as a whole, I find that the fact of the Plaintiff being summoned by the Police in connection with his hosting at his residence Congolese nationals is true. It is also a fact that by August 2002, the security situation in DRC - Congo was fluid with several war lords and Uganda insurgents holding out in the vast jungles of that country which has a long porous border with Uganda and for this matter the UPDF was deployed both in parts of DRC Congo and on the Ugandan border including at the Tea Factory where the AGM of 30th August 2002 was held. It is also a fact that the Defendant was the area Member of Parliament and Minister of Defence of the government of Uganda.

Issues or matters of security fell within the jurisdiction of the Defendant and when making a speech to a gathering of that nature which had about 3,000 Tea farmers, local councillors and district leaders, it was incumbent upon him to speak about security as a matter of public concern in the discharge of his function as a Minister of Defence. The speech was relevant and within the context of the fluid security situation.

The Plaintiff's hosting of Congolese nationals and his subsequent summons to the Police provided a perfect example, in my view, to justify the Defendant's speech. The fact that the Plaintiff did not support the Defendant in the political campaigns of 2001 notwithstanding the fact of his questioning by the Uganda police for hosting undocumented persons from a country at war, was in my view fairly used by his political opponent to isolate him. By acting suspiciously, the Plaintiff placed himself in a situation where the Police made an inquiry into his actions and this was a factual situation that the Defendant, in my view, was entitled to seize on as an opportunity to discredit his opponents and warn others not to fall in the same category.

The Plaintiff may have treated the Defendant's address as a personal attack given that they belong to different political camps but that is the dynamics of politics. The Plaintiff's faults provided perfect fodder for consumption by the Defendant.

Indeed, a personal attack may, however, form part of fair comment upon given facts truly stated if it is warranted by those facts, that is to say, if it is a reasonable inference from those facts. See *Joyntvs Cycle Trade Publishing Co. (1904) 2 KB 292* Despite the Plaintiff's denials about being questioned and even detained by the Police, the evidence of his fellow board members like DW3 and that of his chairman who is DW2 raises a credible defence to the allegations in the plaint rendering the claim futile as against the Defendant.

Would one say that the Defendant went beyond what is fair by exaggerating the facts? In the circumstances of the prevailing security situation in that area and the neighbouring DRC Congo, the comments of the Defendant were equal to the situation and given the dynamics of political competition, the comments were within the limits of what an area MP and Minister of Defence would say at a public gathering in his Constituency.

I was also asked by the Defendant to find that the utterances were privileged on account of the Defendant's position and status as Minister and area MP on a privileged occasion where he was chief guest. He cited the speech of Lord Atkison in *Adam vs Ward* (1917) AC. 309 at page 334 thus;

"Privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social or word to make it to the person to whom it is made has a corresponding interest or a duty to receive it. This reciprocity is essential."

Learned counsel for the Plaintiff concedes that the occasion was important for the Minister in charge of defence to talk about security not only in Kanungu but in Uganda in general but contends that the Defendant went beyond and made malicious utterances in a reckless or distorted fashion for his political ambitions in view of the pending petition against his election.

The Plaintiff and the Defendant are political animals in different camps. The Defendant was invited by the board to which DW2 was chairman to speak or address members and other district dignitaries during the AGM. Though the Plaintiff denied the invitation to the Defendant, he conceded that in the past, they had always invited government dignitaries to address them and according to DW2 who was the chairman, this occasion was no exception. The Defendant did not trespass but was invited to speak.

The Plaintiff has a duty to prove that the utterances were libellous in as much as they were unfair, malicious and inaccurate.

See *Kimber vs. Press Association* (1873) I. Q. B. 65.

For a defence of qualified privilege to succeed, the statements must be shown to have been made honestly and without any indirect or improper motive which in law is referred to as malice.

A statement is malicious when it is made for some purpose other than the one for which the law confers the privilege of making it. In proper cases of qualified privilege the defendant is protected even if his language was violent or excessively strong, having regard to all the circumstances, he might honestly and on reasonable grounds have believed that what he said was true and necessary for his purpose even though in fact it was not so.

Did the Defendant use the occasion for a malicious purpose to defame the Plaintiff? I would say no for the reasons that the Defendant was invited and the security challenges of the time required that he as Minister of Defence should instruct the population on how to conduct themselves to avoid falling into situation like the one the Plaintiff found himself in.

I have already found as a truth that the Plaintiff was subjected to Police inquiry and he admits this fact. The inquiry was in connection with giving hostage to Congolese nationals who had not cleared through Immigration. This court takes judicial notice of the volatile security threats that DRC Congo posed to Uganda on account of the presence of Ugandans rebels in Congolese territory and any cross boarder activity that avoids Immigration or documentation is in those circumstances suspicious and a subject of inquiry by authorities. The Defendant was not malicious in making reference to the Plaintiff in his speech. The defence of qualified privilege is

available to the Defendant and on the balance of probabilities he has successfully pleaded it.

In a nutshell, in view of my finding above, the defence of justification is available to the Defendant on account of the truth of his statements and the fair comments that followed because security is a matter of public concern and at the material time, it was the Defendant's legal duty as Minister responsible for the defence of Uganda to caution citizens to avoid activities that would lead to being questioned by authorities as had been the case with Plaintiff. It was a privileged speech for which the Plaintiff had no cause of action.

Issue No. 4 Remedies

Once the Defendant successfully pleaded justification and qualified privilege as I have found in Issue No. 3, then the question of damages becomes irrelevant and inapplicable.

It was the Plaintiff's case that he failed to become chairman of Kayonza Tea Growers Factory because of the Defendant's speech that decampaigned him. Frankly, on his own admission, the Plaintiff testified that he walked out with about 1800 members who were more than half of the 3000 members in the meeting and did not seek nomination nor did he stand and fail in the election. He was not nominated to stand for election because he opted out of the process.

On the other hand, the Defendant's case is that he felt as political head and Minister for security to guide the members to vote responsible persons that would not compromise the security of the state. I find this perfectly in order for a government Minister to tell members to vote people who are not a security threat to government. In fact in a multi party dispensation, a government Minister would be entitled even to ask members to vote into leadership government supporters. It would be up to members to heed that advice or to shun it. With a support base of 1800 members, the Plaintiff acted cowardly by walking out and his claim that he failed to get voted because of the Defendant's utterances is unproven because he did not stand nor was he nominated. The intention was in his mind and this court cannot speculate upon it. If the Plaintiff's claim that he had a following of 1800 voters out of 3000, then his fear to stand for election does not make sense mathematically. He could get nominated and win comfortably. He was just a coward.

In the result, the suit against the Defendant fails and is dismissed with costs.

Lawrence Gidudu Judge

17/6/2010

2/7/2010

Judgment read in the presence of:

Counsel Mwene-Kahima for the Defendant - states: My counterpart Mr. Nester Byamugisha asked me to stand in for him to receive judgment.

Court:

Judgment to be typed.

Tom Chemutai

Deputy Registrar

2/7/2010

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