

UGANDA / JUDGMENT

Kachontori v Kirunda (Civil Suit No. 62 of 2009) [2012] UGHC 203 (2 October 2012)

[2012] UGHC 203**COURT**

High Court of Uganda

BEFORE

Anglin, J

CASE / FILE NUMBER

Civil Suit No. 62 of 2009

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA AT JINJA****CIVIL SUIT NO. 62 OF 2009****DAVID KACHONTORI BASHAKARA ::::::::::::::::::::::::::: PLAINTIFF****VERSUS****KIRUNDA MUBARAK ::::::::::::::::::::::::::::::::::: DEFENDANT****BEFORE THE HON. LADY JUSTICE FLAVIA SENOGA ANGLIN****JUDGMENT**

By this suit, the Plaintiff David Kachontori Bashakara sought general damages for defamation which he alleges was committed by the Defendant Kirunda Mubarak on 29/03/2009, during the course of a radio programme at FM Radio. The radio belongs to Nile Broadcasting Services Ltd (NBS).

It is the contention of the Plaintiff that the Defendant maliciously and falsely broadcast and published or caused to be broadcast and published by radio in Lusoga defamatory words against the Plaintiff.

The words complained together with their translation are set out in full in the Plaintiff paragraph 4.

The Plaintiff asserts that, in their natural and ordinary meaning, the words complained of meant and were understood to mean that the Plaintiff is a real criminal/thief of unprecedented magnitude, an embezzler, who was got rid of from his former station at Mbarara; heads a thieving and corrupt technical committee, is not fit to be employed as a Town Clerk and or serve in Busoga and deserves punishment and death; is a crook, criminally collecting money to

sponsor his future elections; corrupt to unprecedented magnitude; guilty of disgraceful conduct; and is a persona non grata and should be shunned on sectarian grounds.

At the time of the said broadcast, the Plaintiff who had served in Public Service for 31 years was about to retire. He has a family of 7 children of mature age, who were capable of hearing the Defendant's radio broadcast.

The said radio broadcast programs have a general reception throughout Uganda, especially in Busoga Region.

The Plaintiff therefore states that his reputation was very seriously damaged and he suffered considerable distress and embarrassment.

Further that, although the Defendant was given notice of Intention to sue and an opportunity to apologise, he refused to do so, and hence this suit.

In addition to the general damages, the Plaintiff also sought a permanent injunction restraining the Defendant and his servants/agents from publishing further libel against the Plaintiff, costs of the suit and any other relief.

In his defence, the Defendant denied the allegations of the Plaintiff. While admitting appearing on the said radio programme, he denied any false or malicious publication or that the words he uttered have the meaning attributed to them.

The Defendant states that the comments he made constitute criticism of matters of public interest, being comments made honestly believing them to be true and that they were not activated by malice.

Further that, the comments were based on the statement of the area Member of Parliament to the Minister of Local Government and they were therefore not activated by malice – see Annexures A, B, C, D, E, F, G, , I, J, K and L to the defence.

In the alternative, but without prejudice to the above defence, the Defendant denied any knowledge of the publication of the words complained of, and prayed Court to dismiss the Plaintiff's claims with costs.

The Scheduling Conference was held on 13/09/2011 in the presence of both parties and both Counsel and the following were the agreed issues:

1. ***Whether or not the statements were defamatory of the Plaintiff.***
2. ***Whether the statements constituted fair comment on matters of public interest.***
3. ***What remedies are available to the parties*?**

The suit was then adjourned to 13/12/2011 for hearing on agreement of both Counsel.

When the suit was called on that date, Counsel for the Defendant applied that the audio recordings intended to be relied upon by the Plaintiff be availed to him and to the Court, to ease the following of proceedings.

Further that, there were documents that he and the Defendant needed to avail to Court in addition to what had been agreed upon but that they had not yet obtained them. That without them, Counsel would not be able to properly cross-examine the Plaintiff.

The suit was accordingly adjourned to 13/02/2012 for hearing. In between the parties were urged to try and reach an amicable settlement.

On 13/02/2010 Counsel for the Defendant with personal conduct of the case did not appear and neither did the Defendant. Counsel holding brief sought adjournment on the ground that the Defendant's Counsel was in Kitgum attending to his sick mother. The reasons for the absence of the Defendant were unknown. Adjournment was granted with costs to the Plaintiff, to 14/03/2012.

On that date, both Counsel for the Defendant and the Defendant were absent and no reasons were advanced for their absence. Court directed hearing to proceed *ex parte*.

The Plaintiff testified that he retired from Public Service after 33 years of service and the highest rank attained was that of Commissioner.

As a Town Clerk he was in charge of administration of urban authority. He had worked in Bundibugyo, Masindi, twice in Mbarara, twice in Jinja, Lugazi, Bombo, Iganga and Arua Town Councils. That he is therefore well known in a wide area of Uganda.

The Plaintiff confirmed that he has 7 children, five of whom are married and 2 are completing University. It was also his assertion that in the course of his career he made many friends.

During the year in question the Plaintiff was working in Jinja upon being posted there for the second time.

On 29/03/2009 between 9pm – 11pm he was at home in Jinja, when the Defendant then Chairman of Jinja Central Division went on radio and maliciously uttered the words complained of. The words already set out herein included calling the Plaintiff a thief, corrupt and therefore not fit to be Town Clerk in Jinja among others.

That the Defendant also threatened to mobilize people to throw the Plaintiff in River Nile, at the bridge.

The Plaintiff claims that, the Defendant had information that he (Plaintiff) was intending to contest for the seat of Mayor of Mbarara Municipality. The Defendant accordingly vowed to go down to Mbarara and decampaign him using all his means and powers.

The Defendant in the broadcast appealed to the people of Mbarara not to elect the Plaintiff as he was a thief and corrupt.

Denying the allegations of the Defendant as untrue as he had never committed any of the offences attributed to him or at all, the Plaintiff asserted that the utterances were activated by malice.

It was pointed out that, the Jinja Central Division where the Defendant was Chairman was under the Plaintiff's administration. However, that the Plaintiff was not accountable to the Defendant as he was not under him. The Plaintiff was accountable to the Mayor. To the Plaintiff's knowledge, the Defendant had never reported the said allegations to any authority.

Commenting about the letters Annexed to the Defendant's written statement defence in paragraph 5, the Plaintiff stated that Annexure A thereof dated 04/05/09 was not relevant, since the Defendant went on radio on 29/03/09. While the other Annexures do not justify what the Defendant stated on radio.

The recording of the radio broadcast was transcribed into 3 tapes from the CDs. The CDs were tendered in evidence as Exhibits P1 and P2 and the tapes as Exhibits P3, P4 and P5.

While the broadcast was made in Lusoga, the Plaintiff confirmed that translations were made into English as indicated in paragraph 4 of the Plaintiff.

The Plaintiff maintains that the broadcast made him very unhappy. While the radio station is in Jinja, it is heard throughout Uganda more so in the Eastern and Central Regions. He knows this for a fact as friends and family rang him from Jinja, Kampala and Masaka respectively. The broadcast was on a call in programme where people called in from Iganga and Jinja.

Since the broadcast, asserts the Plaintiff, his image has been damaged. He has been embarrassed greatly having worked for all those many years. For a long time after the broadcast he was always on the defensive among his friends, denying the allegations.

Also that the appeal of the Defendant to the people in Mbarara may have contributed to the Plaintiff's failure to be elected as Mayor of Mbarara Municipality. He lost the elections, and he attributed it to the damaging utterances of the Defendant.

The Defendant refused to apologize although given an opportunity to do so. The Plaintiff prayed Court to give him Judgment against the Defendant as set out in the Plaintiff. Adding that, considering his many years of service as a public servant and that his family and friends were also scandalized, Shs.100,000,000/= would be reasonable compensation.

PW2 Charles Rwaribwija an Engineer, self employed is a friend of the Plaintiff. The two have been friends for about 30 years.

During the time in question this witness was a resident of Njeru Town, next to Jinja.

During the night of 29/03/2009 between 9-11pm he heard the radio broadcast complained of by the Plaintiff.

According to him the broadcast generally portrayed the Plaintiff as a thief, yet for all those years they have known each other he has never known the Plaintiff to be a thief. He wondered how the plaintiff could have developed the habit.

It was also the testimony of PW2 that he has since met other friends of the Plaintiff and also his family and they were equally saddened by the broadcast.

Upon the close of the Plaintiff's case, his Counsel submitted that the case had been proved to the required standard in civil matters. He added that, the Plaintiff's burden had been lessened by the Defendant's admission of the broadcast, and therefore that there can be no doubt that the words uttered are defamatory.

Urging Court to look at the defence, Counsel stated that the Defendant attempts to justify the defamatory statements, but the justification failed considering that the documents he relied upon do not support the defence.

It was further submitted that the defamation that was by way of a radio broadcast was preserved in material as evidenced by the CDs and tapes (Exhibits P1-P5). That therefore this qualifies it as a libel.

Stating that from the evidence there is no doubt that the Plaintiff's reputation was injured, and yet no apology was made by the Defendant, Counsel called for condemnation by way of heavy damages. The case of **Kanabo vs. Chief Editor of Ngabo Newspapers & Others**, SCU was relied upon for the holding that **"anyone who falsely accuses another of a heinous crime should be condemned heavily in damages."**

Corruption and theft by a public servant are heinous crimes Counsel added, and that from the evidence adduced by the Plaintiff, the case calls for heavy damages.

That considering the circumstances, the Shs.100,000,000/= requested for by the Plaintiff is a fair assessment of the damages and Court should be pleased to award the sum and enter Judgment for the Plaintiff.

I now proceed to determine the issues in the order that they were set out.

As to whether or not the statements were defamatory of the Plaintiff, I find that from the evidence adduced by the Plaintiff in form of pleadings, his oral testimony and that of his witness PW2 and from the submissions, it is evident that the Defendant's utterances portrayed the Plaintiff as a incorrigible criminal, extremely corrupt, a thief/embezzler not fit to hold public office either in Busoga or elsewhere and who because of his disgraceful conduct deserved a punishment no less than death by being drowned in the River Nile!

The Defendant did not produce any cogent evidence to justify his utterances which were discussed by a number of callers to the programme that night. The documents the Defendant attached to paragraph 5 of his defence and which he wished to rely upon were never exhibited in evidence as neither he nor his lawyer appeared at the hearing. His Annexure A bore a date later than when he made the utterances.

The broadcast made by the radio airing the utterances of the Defendant was defamatory as it resulted in injuring of the Plaintiff's reputation lowering him in the estimation of right thinking members of society. It caused him to be regarded with feelings of suspicion, ridicule, hatred, dislike or disesteem.

The innuendos drawn from the Defendant's utterances were that Plaintiff was guilty of numerous crimes and yet there was no evidence to support the statements of the Defendant.

Although the Defendant was given an opportunity through the notice of intention to sue to apologise and thereby remedy the damage, he refused to do so. Instead he vehemently denied liability and refused to apologise. According to decisions in a number of decided cases, such conduct is evidence of malice. See **Khasakhala vs. Aurali & Others** [1995-98]1 E. A 117. I therefore find as a fact that in making the utterances the Defendant was activated by malice.

The next issue to whether the statements constituted fair comment on matters of public interest.

It has been established by decided cases that **"to succeed in a defence of fair comment the Defendant must show among other things that each and every statement of fact in the words complained of was true."** - see the case of **Figueredo vs. Editor of Sunday Nation & Others...** [1968]1 E. A 501 HCU.

The use of the words **"corrupt, thief, embezzler, unfit to hold public office"** among many others without any evidence to support the statements as true were unjustified.

The inference that the Plaintiff was a criminal without any proof posed the risk of great injustice to the Plaintiff. The Defendant's mere denial that the words he uttered did not have meaning attributed to them cannot be sustained nor can his claim that the comments were based on the statement of the area member of Parliament to the Minister of Local Government.

As already pointed out, the Defendant did not tender in the said documents as exhibits. And Annexure A was discredited for the reasons already stated earlier.

For all those reasons, the defence of fair comment on matters of public interest fails.

What is left to determine is the remedies available to the parties.

Having established that the utterances of the Defendant against the Plaintiff were defamatory and actuated by malice, I find that the Plaintiff is entitled to all the remedies he sought in the Plaintiff i.e. general damages, a permanent injunction and costs of the suit.

In determining the quantum of damages I have to take into account a number of considerations and these include whether the broadcast was libel or slander, the status of the Plaintiff and the seriousness of the allegations made against the Plaintiff, failure of the Defendant to apologise and failure of justification of the utterances.

From the evidence on record, I find that the broadcast was libel. I am fortified in my finding by the decision of **Alowo vs. AG [1972]1 E. A 311 (HCU)** in that case the Plaintiff claimed general damages for libel arising out of a broadcast for general reception. It was held that **“the recording of the defamatory words was of a permanent nature and the broadcast of the recordings was libel.”**

In the present case the defamatory words were also recorded as evidenced by the Discs and Tapes tendered in as Exhibits P1-P5. The broadcast thereof was therefore libel. The damages to be awarded in regard to libel that imputed the commission of serious criminal offences to the person of the Plaintiff should be substantial; and call for extra amounts because the Defendant declined to make an apology.

Courts have stated and I find no reasons to disagree that **“a person’s reputation has not actual value, and the sum of be awarded in damages was therefore at large and the Court is free to form its own estimate of the harm taking into account all the circumstances.”** - **Khasakhala vs. Aurali & Others [1995-98]1 E. A. 112 HCK).**

In that case, the Court took into account the plaintiff’s profile, his status in society, and the allegations against him in awarding damages for defamation coupled with the failure by the Defendants to public a correction and apologies. The case is of the High Court of Kenya where they have a Defamation Act, but I find it very persuasive.

In Uganda, the Supreme Court has gone a step further and laid down that **“it is not enough to consider the social status of the defamed person alone in assessing award of damages. It is necessary to combine the status with the gravity of or the seriousness of the allegations made against the Plaintiff. Anyone who falsely accuses another of a heinous crime should be condemned heavily on damages. Once an ordinary person is defamed seriously and is shunned by the public then it does not matter whether he or she is of high or low status.”** - **Kanabo vs. Chief Editor Ngabo Newspaper & Others (supra).**

In the present case it is on record that the Plaintiff was a long serving public servant. He had served for a period of 33 years and during the course of his service had been to various parts of Uganda as far as Bundibugyo and Arua. No such crimes as attributed to him by the Defendant were ever brought against him during his period of service.

He has a family of 7 mature children and friends in many parts of the country. They were all equally saddened and scandalized by the utterances.

Though the utterances were made in Lusoga there were broadcast in many parts of the country where the language is understood and friends and family alike rang him from Jinja, Masaka and Kampala out of concern. The comments were also discussed by different people from Iganga and Jinja during the call in period.

The allegations of a criminal nature made against the Plaintiff were very serious and yet false. And he attributed his loss of the Mayor's election in Mbarara to the special appeal the Defendant made to the electorate in Mbarara during Broadcast.

The defence of fair comment failed and the Defendant declined all demands by the Plaintiff to offer an apology.

The other principle in **Kanabo's case (supra)** is that **"where no apology is offered and the defence of justification fails, then high damages may be awarded on that account."** The Justices emphasised in that case that **"the offer of an apology is not a defence but it does mitigate the damages."**

For all those reasons I find that damages of Shs.45,000,000/= will suffice to atone for the damage occasioned to the Plaintiff.

The Plaintiff and his Counsel had prayed for Shs.100,000,000/= but I find it a bit excessive.

The permanent injunction against the Defendant shall also issue to restrain him, his servants and or agents from publishing further libel against the Plaintiff. While Court is aware of the freedom of expression enshrined in Article 29 (1) (a) of the Constitution of Uganda, it is apparent that if the injunction is not granted there is a substantial risk of occasioning the Plaintiff further grave injustice thereby denying him a peaceful retirement.

Costs of the suit are also granted to the Plaintiff together with interest thereon and on the decretal sum at Court rate from the date of Judgment until payment in full.

Judgment is given to the Plaintiff in those terms.

Flavia Senoga Anglin

JUDGE

02/10/2012

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