

UGANDA / JUDGMENT

Okello v Odongo (Civil Suit No. 67 of 2017) [2020] UGHC 139 (8 June 2020)

[2020] UGHC 139

COURT

High Court of Uganda

BEFORE

Stephen Mubiru, J

CASE / FILE NUMBER

Civil Suit No. 67 of 2017

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IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable Civil Suit No. 0067 of 2007

In the matter between

ROSEMARY OKELLO PLAINTIFF

And

MARRIETHA ODONGO DIYA DEFENDANT

Heard: 18 September, 2019 Delivered: 8 th June 2020.

Civil Procedure— Cause of action— A plaintiff discloses a cause of action if its averments show that the plaintiff enjoyed a right which has been violated and the defendant is responsible for that violation. A cause of action arises when a right of the plaintiff is affected by the defendant's act or omissions — The pleadings therefore must disclose that; the plaintiff enjoyed a right known to the law, the right has been violated, and the defendant is liable. In determining whether or not a plaintiff discloses a cause of action, the court must look only at the plaint together with anything attached so as to form part of it.

*Defamation — A defamatory statement is one which imputes conduct or qualities tending to disparage or degrade any person, or to expose a person to contempt, ridicule or public hatred or to prejudice him or her in the way of his or her office, profession or trade. — The test is the general impression of the words on the right-thinking person and it is from that perspective that the words are to be considered before determining whether they are defamatory or not —In all suits for libel the actual words complained of must be set out in the plaint. Defamation does not

[illegible]

Introduction:

- ### The plaintiff's evidence:

alleged she had been subjected to a disciplinary committee proceedings whereas not. In the letter of 3rd May, 2002 it was alleged she was a trouble maker and making the defendant's work very hard, whereas not. She was summoned by the Chief Administrative Officer who required her to explain herself in light of the allegations made in both letters. The working environment became too hostile that she had to find another job.

- [4] P. W.2 Ateng Florence testified that during the year 2002 she worked as a Senior Nursing Officer at the Lira Regional Referral Hospital, and board member of the Lira School of Nursing and Midwifery. She attended a meeting convened on 2nd May, 2002 during which the defendant accused the plaintiff of inciting students to strike, being undisciplined and of being a trouble maker. The defendant followed up the accusation with two different letters. As a result of what was said and written about the plaintiff, students and other staff shunned her. When the defendant was replaced, the new Principal Tutor developed a negative attitude against the plaintiff based on the correspondences she found on her personal file.
- [5] P. W.3 John Jimmy Otim testified that during the year 2002 he was a police officer attached to Lira Central Police Station. Around May or June, 2002 the plaintiff took to him the two letters written by the defendant about her during the year 2002. The letters prompted him to meet the defendant and warn her about a possible strike by the students. He had been investigating the defendant, as an undercover agent for alleged mismanagement, overcharging of students, poor feeding at the school and misuse of funds.
- [6] P. W.4 Ruth Molly Ondoru Lematiya testified that during May 2002 she was the Commissioner for Business Training at the Ministry of Education. She was responsible for overseeing the defendant as Principal Tutor at the Lira School of Nursing and Midwifery. In the course of her work, she came across two letters written by the defendant concerning the plaintiff. It is the plaintiff who took her the

letters, seeking for advice. The plaintiff was labelled a trouble causer at the school. The letters should have been preceded by verbal and written warnings. The plaintiff was entitled to copies of the latter but she claimed no to have been given copies. The letters portrayed the plaintiff as a very troublesome person.

The defendant's evidence:

- [7] In his defence, D. W.1 Odogo Diya Marrieta, the defendant, testified that it is true that she wrote both letters on 3rd May, 2002. She called a staff meeting in 2002 to enable the plaintiff explain why she was not teaching but she refused to come to the meeting. The meeting went ahead nevertheless to discuss other matters. Students were complaining that she was not teaching yet she was taking some of them to attend classes in her home outside the school. It was alleged that she was charging shs. 20,000/= per head per month but optional. Those who would go to her home would get knowledge. She needed to take action on the complaint to avert a possible strike. Subsequently P. W.3 John Jimmy Otim came to her, less than four days after the IGG personnel had come from Gulu to investigate her, accusing her of being a weak administrator and misusing government funds. That is what prompted her to write to one letter to the Chief Administrative Officer of the district, asking him to use his office to solve the problem. She wrote another to the commissioner.

Arguments of Counsel for the plaintiff:

- [8] In his submissions, counsel for the plaintiff, submitted that the plaintiff was portrayed as a trouble causer which was defamatory of her. As a result she was shined by students and fellow staff. Both letters referred to the plaintiff. They were published to multiple persons. The letters were motivated by a personal vendetta and do not contain the student complaint the defendant raised in her testimony to justify having written them. She never wrote the letters in good faith and therefore cannot avail herself of the defence of qualified privilege. The

defendant is liable for the damage caused to the plaintiff by her writings. She should be awarded general damages of shs. 100,000,000/= and exemplary damages in the same amount, a permanent injunction and the costs of the suit.

Arguments of Counsel for the defendant:

- [9] In response, counsel for the defendant, submitted that the letters complained of were written in the ordinary course of discharge of administrative duties of the defendant and there is nothing defamatory contained therein. By those letters, the defendant sought the intervention of the Chief Administrative Officer since the plaintiff was a part time employee at the school, whose transfer elsewhere was sought. The letters were written in an attempt to find a solution for the plaintiff's failure to teach yet she was conducting classes from her home at a fee. The plaintiff never set out in her plaint the defamatory words complained of. Although the letters complained of were written on 3rd May, 2002 the plaintiff did not file the suit until 10th November, 2015. This indicates that they did not expose her to any ridicule and she filed the suit only as an afterthought. The suit should be dismissed with no order as to costs. In the alternative, since the circulation of the letter was limited and the incident occurred in the year 2002, the plaintiff should be awarded only nominal damages of shs. 300,000/= Exemplary damages are not justified.

Issues:

- [10] The parties at the scheduling conference agreed upon the following issues for the determination of this court, namely;
- 1. Whether the plaintiff has a cause of action against the defendant.
- 2. Whether any of the words complained of are defamatory of the plaintiff.
- 3. Whether the defendant is liable.
- 4. Whether the plaintiff is entitled to the remedies sought, and if so, the quantum.

First issue; Whether the plaintiff has a cause of action against the defendant:-

- [11] A plaint discloses a cause of action if its averments show that the plaintiff enjoyed a right which has been violated and the defendant is responsible for that violation (see *Auto Garage v. Motokov (No3) [1971] EA 514* and *Joseph Mpamya v. Attorney General, [1966] II KALR 121*). It is alternatively defined as every fact which is material to be proved to enable the plaintiff succeed or every fact which if denied, the plaintiff must prove in order to obtain judgment (see *Cooke v. Gull, LR 8 E. P 116* and *Read v. Brown 22 QBD 31*); in the further alternative, it is defined as a bundle of facts which if taken together with the law applicable to them give the plaintiff a right to a relief against the defendant (see *Attorney General v. Major General Tinyefuza, Constitutional Petition No.1 of 1997*). A cause of action arises when a right of the plaintiff is affected by the defendant's act or omissions (see *Elly B. Mugabi v. Nyanza Textile Industries Ltd [1992-93] HCB 227*). The pleadings therefore must disclose that; the plaintiff enjoyed a right known to the law, the right has been violated, and the defendant is liable (see *Auto Garage and others v. Motokov (No.3) [1971] E. A 514*).
- [12] In determining whether or not a plaint discloses a cause of action, the court must look only at the plaint together with anything attached so as to form part of it (see *Onesforo Bamuwayira and two others v. Attorney General [1973] HCB 87*; *Nagoko v. Sir Charles Turyahamba and another [1976]HCB 99* and *Kebirungi v. Road Trainers Ltd and two others [2008] HCB 72*). Under Order 7 rule 11 (a) and (d) of *The Civil Procedure Rules*, a plaint that does not disclose a cause of action or where the suit appears from the statement in the plaint to be barred by any law, must be rejected.
- [13] The essence of a defamation suit is that certain specific words used by the defendant were defamatory of the plaintiff. In all suits for libel the actual words complained of must be set out in the plaint. In libel and slander the very words complained of are the facts on which the action is grounded. Where the alleged libel is in any language other than English it must be set out in that language followed by a literal translation into English (see *Nkalubo v. Kibirige [1973] 1 EA 102*). In paragraphs 4 (b) and (c) of the amended plaint, the plaintiff reproduced verbatim the words complained of, attributed those words to the defendant, disclosed the identities of the persons to whom they were published and the fact that they lowered her reputation and esteem among right thinking members of the public. The plaint therefore discloses a cause of action against the defendant.

Second issue; Whether any of the words complained of are defamatory of the plaintiff.

- [14] A defamatory statement is one which imputes conduct or qualities tending to disparage or degrade any person, or to expose a person to contempt, ridicule or public hatred or to prejudice him or her in the way of his or her office, profession or trade. It is a statement which tends to lower a person's reputation in the eyes of or the estimation of right thinking members of society generally or which tends to make them shun and avoid that person. The typical form of defamation is an attack upon the moral character of the plaintiff attributing

to him or her any form of disgraceful conduct such as crime, dishonesty, untruthfulness, trickery, ingratitude or cruelty. The person defamed does not have to prove that the words actually had any of these effects on any particular people or the public in general, only that the statement could tend to have that effect on an ordinary, reasonable listener or reader.

- [15] Once a statement is capable of being interpreted as an assertion of fact, the question then will be whether it imputes any moral fault or defect of personal character. For professional aspects, it will be deemed so if it imputes lack of

qualification, knowledge, skill, capacity, judgment or efficiency in the conduct of one's trade or business or professional activity. There are certain established rules to determine whether statement is defamatory or not.

- [16] The Court must have regard to what the words would convey to the ordinary man. In **Ssonko Gerald v. Okech Tom* [1978] HCB 36*, it was held that the test is the general impression of the words on the right thinking person and it is from that perspective that the words are to be considered before determining whether they are defamatory or not. The determination depends on answering the question; "would the words tend to lower the plaintiff in the estimation of rightthinking members of society?" The defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinions or feelings of other persons. A typical form of defamation is an attack upon the moral character of the plaintiff attributing to him any form of disgraceful conduct, such as crime, dishonesty, untruthfulness, trickery, ingratitude or cruelty (see **Ssejjoba Geoffrey v. Rev. Rwabigonji Patrick* [1977] H. C. B 37*). Although a statement need not be perfectly true, it should be substantially true in order not to be false. Slight inaccuracies of expression are immaterial if the defamatory statement is true in substance.
- [17] Where the words complained of are defamatory in their natural and ordinary meaning, the plaintiff need prove nothing more than their publication. The onus will then lie on the defendant to prove from the circumstances in which the words were used, or from the manner of their publication, that the words would not be understood by reasonable men to convey the imputation suggested by the mere consideration of the words themselves (see **Gately on Slander and Libel** (supra) 8 th Edition at page 114 paragraph 115).
- [18] In the instant case, the plaintiff complains of the following expressions; "...she has been and continues to be a trouble causer to Management.....by inciting various investigative bodies including students to get mistakes on me so that I am punished.....if

possible... she replaces her position.....her constant uncalled for confrontational attitude.....her negative attitude has not been sudden...each time it recurs it is more pronounced and calls for disturbances within the school."

These words were stated in paragraph 5 of the amended plaint to mean that the plaintiff is "a trouble causer, irresponsible, unreliable, rebellious, disloyal and unfit to retain her said employment. I find that the expressions complained of are capable of carrying the meaning attributed to them which imputes a defect of personal character of the plaintiff. The words therefore are defamatory of her.

- [19] Defamation does not take place until the words complained of are published. Publication occurs when information is negligently or intentionally communicated in any medium. To succeed, the plaintiffs must prove that the defendant deliberately communicated the libellous material to a third party or that the defendant was at fault when he or she published the defamatory statement, i.e. that the defendant failed to do something he or she was required to do that resulted in the material being published to a third party. In the instant case, the letters were addressed to the Chief Administrative Officer, Lira District. They were copied to Commissioner for Business Training at the Ministry of Education (P. W.4 Ruth Molly Ondoru Lematiya) and several other persons. The plaintiff therefore has proved the fact of publication.
- [20] It must further be proved that the statement referred to the plaintiff. In **Onama v. Uganda Argus* [1969] EA 92*, the Court of Appeal of Eastern Africa held in deciding the question of identity, the proper test is whether reasonable people who knew the plaintiff would be led to the conclusion that that the report referred to him. The question is not whether anyone **did** identify the plaintiff but whether persons who were acquainted with the plaintiff **could** identify him from the words used. In the instant case, the words were not only used in reference to the defendant but they were uttered directly at her in her presence during a series of incidents. The plaintiff is named as the subject of both correspondences. . They

were capable of being regarded as referring to the plaintiff since there was no evidence that they were directed at any other person. These words would lead reasonable people who know the defendant to the conclusion that they referred to her. This fact therefore has been proved too.

Third issue; Whether the defendant is liable;- **Fourth issue;** Whether the plaintiff is entitled to the remedies sought, and if so, the quantum;-

- [21] The two issues will be considered concurrently. Liability depends on the absence of a lawful defence. In the instant case the defendant raised the defence of qualified privilege. Qualified privilege operates only to protect statements which are made without malice (i.e., spitefully, or with ill-will or recklessness as to whether it was true or false). It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation provided it is done in good faith. The person alleging in good faith must establish the fact that before making any allegations he had made an inquiry and necessary reasons and facts given by him must indicate that he had acted with due care and attention and that he was satisfied about the truth of the allegation.

- [22] In the instant case, the defendant made the statements on a subject matter in which she had a legitimate interest; the perceived behaviour of a member of staff. She made the statements by way of complaint about those with public authority or responsibility over such matters including the Chief Administrative Officer, Lira District and the Commissioner for Business Training at the Ministry of Education. They were therefore made on an occasion where the person who made the communication had an interest, or a duty, legal, social or moral, to make it to the persons to whom it was made and the persons to whom it was so made had a corresponding interest or duty to receive it. The letters were therefore published on an occasion of qualified privilege. The burden then shifted to the plaintiff to show express malice on the part of the defendant (see **Clark v. Molyneux* (1877) 3 Q. B. D. 237*).
- [23] Once qualified privilege is established, even when it is demonstrated that the publication is based upon facts and statements which are not true, the defendant is not liable unless the plaintiff establishes that the publication was made by the defendant with reckless disregard for truth. The defendant is protected even though his language was violent or excessively strong if, having regard to all the circumstances, she might honestly and on reasonable grounds have believed that what she uttered was true and necessary for her purpose, even though in fact it was not so (see **Adam v. Ward* 119171 A. C. 309 at 339*). Malice in law, which is presumed in every false and defamatory statement, stands rebutted by a privileged occasion. In such cases, it is enough for the defendant to prove that he or she acted after a reasonable verification of the facts; it is not necessary for him to prove that what he or she has written is true.
- [24] Express malice, unlike legal malice, is never presumed; it must be proved as a fact. In such a case, in order to make a libel actionable, the burden of proving actual or express malice is always on the plaintiff. It may be proved either extrinsically or intrinsically of the document and such words in the document are apt as evidence (see **Adam v. Ward* [1917] AC 309, [1917] All ER 151*). The motive of the defendant becomes material where privilege is established and the burden has shifted to the plaintiff to show actual malice. Improper motive is the best evidence of malice. Malice in this sense means making use of a privileged occasion for an indirect or improper motive. Such motive can be inferred from evidence regarding the defendant's state of mind. If the defendant did not believe in the truth of what he stated, that fact is conclusive evidence of express malice, for no man can legitimately claim privilege if what he stated was a deliberate and injurious falsehood about another.
- [25] The defendant would be found to have made the statements with "express malice" if she acted with knowledge that the statement was false or with reckless disregard of whether it was false or not. Evidence of inadequate investigation would show intent to inflict harm through falsehood. Such evidence would suggest that, because of her bias, the defendant knowingly or recklessly avoided the truth by performing an inadequate investigation. Deliberate or reckless falsity is evidence of express malice. Malice is present if the acts were done in the knowledge that the statement is invalid and with knowledge that it would cause

or be likely to cause injury. It also exists if the acts were done with reckless indifference or wilful blindness to that invalidity and that likely injury.

- [26] Whereas in her testimony the defendant stated that what prompted her to write the letters was the fact that students were complaining that plaintiff was not teaching, yet she was taking some of them to attend classes in her home outside the school where she was charging shs. 20,000/= per head per month, and that the defendant needed to take action on the complaint to avert a possible strike, none of this was relayed in any of the two correspondences. Instead, she alleged that the plaintiff was inciting both staff and students to investigate the defendant for perceived personal weakness in her administrative role. The tone of the two correspondences indicates that the defendant felt insecure in her position and considered the plaintiff a threat to her tenure of office. Dishonesty in the communication is an indication of malice and deliberate or reckless falsity is evidence of express malice. The defendant used a privileged occasion for an indirect or improper motive, maligning the plaintiff whom she considered to be a threat to her position and authority over the rest of the staff and the students. The plaintiff therefore has proved express malice on the part of the defendant, which in effect disproves her defence.
- [27] It is trite that a person's reputation has no actual value, and the sum of be awarded in damages is therefore at large and the Court is free to form its own estimate of the harm taking into account all the circumstances (see **Khasakhala**

v. Aurali and Others [1995-98] 1 E. A. 112). General damages are to be determined and quantified, depending upon various factors and circumstances. Those factors are (i) the gravity of allegation, (ii) the size and influence of the circulation, (iii) the effect of publication, (iv) the extent and nature of claimant's reputation and (v) the behaviour of defendant and plaintiff. 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 (see **Kanabo Sarah v. Chief Editor Ngabo Newspaper and others, [1997] H. C. B 27**).

- [28] I have drawn comparisons between the award in this suit and those made in similar suits before. For example in **David Kachontori Bashakara v. Kirunda Mubarak, H. C. C. S No. 62 of 2009**, general damages of Shs.45,000,000/= were awarded to a plaintiff who had been a public servant for a period of 33 years and had during the course of his service been to various parts of Uganda. He had a family of seven mature children and lots of friends in many parts of the country who were saddened and scandalized by the utterances complained of made in Lusoga, imputing a criminal offence (the words were "corrupt, thief, embezzler, unfit to hold public office") and broadcast in many parts of the country where the language is understood. He had as a result lost the Mayoral race in Mbarara.

- [29] In the case of *Joseph Kimbowa Lutaaya v. Francis Tumuheirwe H. C. Civil Suit No.862 of 2001*, general damages of shs 10,000,000/= were awarded to a plaintiff, a manager with Allied Bank, in respect of a defamatory memo written by the defendant to the Permanent Secretary to the Treasury explaining the reasons why the plaintiff's wife had been suspended. In that memo the defendant alleged inter alia that the plaintiff while still working with the Standard Chartered Bank connived with his wife to steal shs.50,000,000/= (fifty million) and was as a result

was dismissed from the Bank while his wife was dismissed from USAID. In that case the publication was made only once and there was no repetition. The publication did not capture a wide publicity.

- [30] Lastly in *Abu Bakr K. Mayanja v. Tedi Seezi Cheeye and another, H. C. Civil Suit No. 261 of 1992*, the plaintiff who by then a Minister of Justice and Constitutional Affairs and Attorney General, was awarded a sum of shs 2,000,000/= in general damages for libel for an article published by the defendants alleging that he was a confused "third deputy Prime Minister." The court observed that a plaintiff who puts himself in public life must expect public scrutiny of his conduct as a public figure. The established principle though is that the higher the Plaintiff's social status, the greater is the likely injury to his feelings by a defamatory publication about him and therefore the greater is the amount of damages awardable. The amount is enhanced where the publication is extensive and where the defendant acted maliciously in the publication. In that case, it was found that the circulation of the Newspaper was limited to Kampala, Jinja and few main towns in Western Uganda.
- [31] I have considered the gravity of the allegations in the current suit. The attack was upon the plaintiff's moral character, attributing to her disgraceful conduct, lack of professionalism and integrity. I have also considered the impact in terms of the respondent's different aspects of life affected such as her social and professional life. The defamatory letter though was limited in circulation, to the addressees of the letters and the persons to whom copies were furnished. It took her nearly three years after the event to file the suit, which in a way indicates that the impact may not have been that grave, Indeed the suit was filed more or less as an afterthought. On account of all those factors, I have made an assessment of what would be adequate compensation to the respondent as general damages and find the sum of shs. 4,000,000/= to be a more reasonable estimate.
- [32] I have also considered the claim of punitive damages. An award ounder this head of damages is typically justified by either of three reasons: (i) malice (a wrongful act committed intentionally to cause harm to someone else without just reason or excuse); wilful or wanton conduct (dangerous and reckless conduct committed purposefully without regard to consequences or the rights and safety of others); and (iii) fraud (intentional deception for personal gain or to intentionally damage another person). The rationale for awarding punitive damages is to dissuade the defendant from similar conduct in future where the defendant wilfully caused the harm or intended to gain some financial or other benefit from it.

- [33] I find the deterrence element of awarding punitive damages to be speculative in this case and one that can be appropriately met by issuance of a permanent injunction. An award compensatory damages will fully and fairly compensate her.

Order:

- [34] In the final result, judgment is entered for the plaintiff against the defendant for;
- a) An award of General damages in the sum of shs. 4,000,000/=
- b) Interest on the above sums at the rate of 8% pa from the date of judgment until payment in full.
- c) A permanent injunction restraining the defendant from further publication of defamatory material against the plaintiff.
- d) The costs of the suit.

Delivered electronically this 8th day of June, 2020Stephen Mubiru.....

Stephen Mubiru Resident Judge, Gulu

Appearances

| For the plaintiff | : Mr. Odongo Daniel. |

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| For the defendant | : M/s
Louis Odongo and Co. Advocates. |

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