THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA (COA) AT KAMPALA

CIVIL APPEAL NO.10 OF 2011

(ARISING FROM CIVIL APPEAL NO.29 0F 2009 HOLDEN AT THE HIGH COURT OF UGANDA)

(itself arising out of Civil Suit No.117 of 2007)

BETWEEN

LUBANGA JAMADA :: APPELLANT

VS

DR.DDUMBA EDWARD :: RESPONDENT

CORAM :HON. MR JUSTICE REMMY KASULE, JA

HON.LADY JUSTICE SOLOMY BALUNGI BOSSA, JA

HON.JUSTICE PROF. LILLIAN EKIRIKUBINZA TIBATEMWA, JA.

JUDGMENT OF HON. PROF. LILLIAN EKIRIKUBINZA TIBATEMWA, JUSTICE OF APPEAL.

I have read the judgment of the court drafted by my brother, Hon. Justice Remmy Kasule but I respectfully dissent from the analysis and the decision reached therein.

I note that this is a second appeal from the decision of the High Court at Kampala delivered by Hon. Mr. Justice V.F.Musoke-Kibuuka on the 27th October 2010 at 9.00 a.m wherein the Hon. Judge reversed the decision of the lower court dated 30/4/2009 vide civil suit No.1177/2007 by Her Worship Agnes Nabafu –Magistrate Grade 1 at Nakawa Court in a suit for general damages for defamation.

The brief background to this appeal is that: the appellant worked with Mulago Hospital for over 15 years from 1994 to 2009. In 2009, the respondent who was the Director of Mulago Hospital at the time wrote letters stating that the appellant was mad. The respondent was quoted in the Daily Monitor Newspaper dated 2nd July 2007 stating that the appellant was mentally ill. The appellant subsequently sued the

L Tibatemwa

respondent for defamation in the Chief Magistrate's Court which found in the appellant's favour and awarded him general damages of Ushs. 20,000,000/=. The respondent appealed to the High Court which overturned the decision of the Chief Magistrate's Court hence this present appeal.

The appellant in his Memorandum of Appeal raised the following four grounds:

1. The Learned appellate Judge erred in law and in fact when he held that the words "mentally ill" were not defamatory of the Appellant, capable of lowering him in the eyes of reasonable thinking members of society.

2. The Learned appellate Judge erred in law and in fact when he based on the Appellant's transfer, probe and dispatch to Butabika Hospital to justify his finding that the words uttered by the Respondent about the Appellant were not defamatory of the Appellant.

3. The Learned appellate Judge erred in law and fact when he held that the alleged defamatory words were prompted by the Appellant himself, who had used the same during his interview with Chris Obore at Butabika Hospital much earlier before the Respondent used them.

4. The Learned appellate Judge erred in Law and fact when he held that the Respondent uttered the alleged defamatory words while carrying out his public duty of defending Mulago Hospital thereby, coming to a wrong conclusion that the Attorney General should have been sued.

The appellant prayed that this Court allows his appeal and that the judgment for the respondent against the appellant in the High Court be set aside and the respondent pays the costs of this Appeal and in the Court below.

Both Counsel for the appellant and the respondent filed written submissions on the above grounds. Each ground was argued separately save for grounds 2 and 3 which were argued in tandem. This Court shall proceed to address the grounds as raised and argued in the written submissions of both parties.

Ground 1

On ground 1, it was submitted for the appellant that a statement is said to be defamatory if it lowers the person in the eyes of reasonable thinking men. Counsel for the appellant relied on the reknown case of **ODONGOKARA V ASTLES [1970] EA 374**. Counsel for the appellant further submitted that this being libel, there was no need for the appellant to adduce extrinsic evidence to show the injurious meaning or effect of the words "mentally ill" used by the respondent; that the Learned appellate Judge should have relied on the **ODONGOKARA CASE** (supra) and not have based his decision on opinionated reasoning not based either on law or evidence available before him.

In addition to this ground, it was further argued that the Judge did not consider the law and its elements on defamation in coming to his conclusion and instead based his judgment on baseless claims that the appellant's transfer to Masaka as well as his dispatch to Butabika Hospital were for his own good.

In reply, the respondent invited this Court to take judicial notice of the fact that, for a human being, illness whether physical, mental or psychological is simply part of the natural trend of life. The respondent relied on **Section 56 (2) of the Evidence Act Cap 6** which stipulates the facts which court must take judicial notice to include: ***"... matters of public history, literature, science or art, ..."***

Counsel for the respondent also submitted that the appeal in general was barred by law under **Section 74 (1) of the Civil Procedure Act Cap 71 which provides that: "Subject to section 73, no appeal to the Court of Appeal shall lie except on the grounds mentioned in section 72."**

Section 72 provides that:

> **(1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely that—**

Kiyaterus.

(a) the decision is contrary to law or to some usage having the force of law;
(b)the decision has failed to determine some material issue of law or usage having the force of law;
(c)a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, has occurred which may possibly have produced error or defect in the decision of the case upon the merits.

Counsel relied on the case of **MITWALO MAGYENGO V MEDAD MUTYABA SCCA 11 of 1996** to support his argument that on second appeal, the grounds raised should be of law and not against findings of fact.

The respondent's counsel further argued that the appellate Judge re-evaluated the evidence on record and subjected it to the test as set out in the case of **ODONGOKARA** (supra) and that the words "mad or mentally ill" in their natural and ordinary meaning were not defamatory. That this being so, it was necessary for the Plaintiff to plead an explanatory averment known as an innuendo to prove that the words were defamatory of him.

Analysis

This being a second appeal, I am guided by **Rule 32 (2) of the Judicature (Court of Appeal Rules) Directions** which provides that:

"On any second appeal from the decision of the High Court acting in exercise of its appellate jurisdiction, the court shall have power to appraise the inferences of fact drawn by the trial court, but shall not have discretion to hear additional evidence."

Interpretation of this rule was given by the Supreme Court in **KIFAMUNTE HENRY V UGANDA CRIMINAL APPEAL NO.10 of 1997,** that:

"... it does not seem to us that except in the clearest of cases, we are required to re-evaluate the evidence like a first Appellate court. On second appeal, it is

L Nabatanzi.

sufficient to decide whether the first Appellate court on approaching its task, applied or failed to apply such principle. *This Court will no doubt consider the facts of the appeal to the extent of considering the relevant part of law or mixed law and fact raised on appeal.*" (Emphasis by this Court)

Having thoroughly read the submissions of both counsel, I do not agree with the respondent that this appeal is barred by law for raising findings of fact rather than law. The authority quoted by Counsel is distinguishable from the present appeal. The case of **MITWALO MAGYENGO V MEDADI MUTYABA (supra)** involved a dispute over kibanja land. The trial Chief Magistrate found in favour of the respondent and granted a permanent injunction and damages for trespass against the appellant. The appellant appealed to the High court who agreed with the Chief Magistrate and dismissed the appeal; hence the appeal to the Supreme Court on grounds against findings of fact in the lower Court. The grounds *interalia* included the following: that the learned Judge failed to find that the appellant was settled on the said land in the kibanja long before the Plaintiff acquired ownership thereof and could therefore not have been a continuing trespasser; ground 6 stated that, the Learned Judge erred in upholding the trial Magistrate's finding that the appellant had all long been a trespasser on the suit land. The Supreme Court held that:

"Section 74 (1) Civil Procedure Act precludes second appeals against findings of fact made by the High Court acting as an appellate court. Therefore the grounds of appeal against findings of fact by the High Court would not be entertained."

I find that the **MITWALO** case was decided the way it was after the appeal was challenged for raising findings of fact because the issue of physical presence on the land was a question of fact. Thus, in the instant appeal, the grounds in the memorandum of appeal could not be raised without reference to the facts because in determining whether the words "mentally ill" are defamatory, the circumstances (facts) and context under which the statements were made must necessarily be referred to. In line with the **KIFAMUNTE** case (supra), this Court has had to "***consider the facts of the***

appeal to the extent of considering the relevant part of law or mixed law and fact raised on appeal."

I am also fortified in my opinion by **Rule 66 (2) of the Judicature (Court of Appeal Rules) Directions** which provides that:

> **"The memorandum of appeal shall set forth concisely and under distinct heads numbered consecutively without argument or narrative, the grounds of objection to the decision appealed against, specifying, in the case of a first appeal the points of law or fact or mixed law and fact and, in the case of a second appeal, the point of law or mixed law and fact, which are alleged to have been wrongly decided ..."**

Therefore, it is my finding that the memorandum of appeal did raise grounds of mixed law and fact and not purely findings of fact as alleged by the respondent. The point of law being whether the words mental illness or mad were defamatory in nature and the point of mixed law and fact being whether the appellant, by being called mentally ill or mad, was defamed.

The instant appeal is thus not barred by law.

On the record, the Learned Judge found that the words "mentally ill" constituting the alleged defamation were never clearly ascertained either in pleadings or the evidence. However, my finding is to the contrary; the evidence of PW2, PW4, PW5,D1,DW3 on the whole denote the fact that the appellant was defamed by the words "mentally ill" as spoken by the respondent.

The gist of a defamatory statement, as rightly submitted by the appellant's counsel and reiterated by the Learned Appellate Judge, is "if such statement is calculated to lower a person in the estimation of other reasonable persons". The Learned Judge found that PW2, PW3, PW4's evidence did not in any way show that the present appellant's reputation was lowered by the alleged defamatory words because illness is a natural event in life. With the greatest respect, the Learned Judge misdirected himself on this. Although the Learned Judge found that PW1, PW2 and PW3 may not have shunned the present appellant as a mentally ill person, the fact that PW5 in cross-examination testified that he thought that the appellant was actually mad, upon reading the published defamatory words, is enough evidence to show that the appellant was actually defamed.

Lusaka

Indeed **CLERK & LINDSELL ON TORTS, 20th Edition, at page 1416** interalia sates that **if the words published have a defamatory tendency, it will suffice even though the imputation is not believed by the person to whom they are published.** Also, contrary to the Learned Judge's finding that PW1, 2 and 3 did not discredit the Appellant, a careful examination of their respective testimonies on record shows that their opinion of the appellant was affected enough for them to find it necessary to make personal inquiries about the matter by making telephone calls.

Learned author **GATLEY in "LIBEL AND SLANDER" (8th edition) at page 17 paragraph 37** states that:

> **An imputation or words may be defamatory even though it does not tend to cause others to think worse of the person to whom it refers. If it would tend to cause others to shun or avoid him, or exclude him from the society of his fellow men, it is defamatory.**

Although being sick is human and calls for sympathy, I do not accept the respondent's submission that this Court should take judicial notice of the fact that being mentally ill is not defamatory as it is a natural occurrence of life.

I also, with the greatest respect disagree with the Learned Judge's finding that since "illness" is part of the natural event in the span of life, being referred to as mentally ill would not be defamatory. I am in agreement with **GATLEY (supra)** that words such as mental illness have a tendency to exclude the person alleged to be insane from the society of his fellow men.

It is a known fact that in our society a person considered mad or mentally insane is held in low esteem. Such perception has also found its way in some of the laws of the land with the consequence that a mentally incapacitated or mentally unsound person may not occupy certain positions of office and mental illness is a ground upon which a person can be adjudged incompetent for particular offices or responsibilities.

For example **Article 107 (1) (c) of Uganda's Constitution** provides that mental incapacity can be a ground for removing an individual from a presidential position and **Article 144 (2) (a) of the Constitution** provides that a judicial officer may be removed from

office for infirmity of mind. See also **Regulation 88 (d) of Table A of the Second Schedule of the Companies Act No.1 of 2012** which disqualifies an individual from the office of a director if he or she becomes of unsound mind. I also note that mental illness is a ground upon which parental responsibility may be taken away from a biological parent as was done in **THE MATTER OF ALOZIOUS AGABA (INFANT) FAMILY CAUSE 259 of 2013.** And under **Section 36 (1), (5) and Section 50 of the Succession Act Cap 139,** only a person of sound mind may by will dispose of his or her property.

Consequently, I find that since being declared mad has many negative legal consequences, it leads one to be shunned not only by members of society but also by the law.

Therefore on ground 1, I find that the words "mental illness" or "insanity" or "mad" were defamatory in nature, lowering the appellant in the eyes of reasonable thinking members of society.

The appeal therefore succeeds on this ground.

Grounds 2 & 3

It was submitted for the appellant that by declaring him mentally ill to the journalist before the official findings of Doctor Tom.S. Onen to whom the appellant was officially referred for examination at Butabika Hospital showed the respondent's predetermined motives. That, basing on such evidence, the Learned Judge should have found that there was evidence of malice or the possibility of it.

In reply, the respondent submitted the following: firstly, that the Learned appellate Judge looked at the evidence on court record and observed that the respondent's problem had been one of long standing and therefore it was wrong to say that the statement was made before any prior findings. Secondly, that the Learned appellate Judge rightly found when evaluating evidence that it was the respondent who had first used the words mentally ill in the interview with the Doctor. Thirdly, that the appellant (current respondent) was only defending the institution and self defence is permissible as expounded in the case of **EL HOARE & OTHERS V ERIC JESSOP [1965] 1 EA 218.**

For both these grounds, the Learned trial Judge found that the evidence relating to the transfer of the Respondent (now Appellant), the commission of inquiry into the Appellant's work behaviour and ethics, his referral to

Butabika hospital did not constitute any probability of malice. He further found that since it was the appellant who first mentioned the defamatory words of mental illness to Doctor Chris Obore at Butabika hospital and not the Respondent, there was no defamation.

Analysis

The law on malice in defamatory imputations is well expounded in **GATLEY ON LIBEL AND SLANDER (supra) at page 5** that "... from the mere publication of defamatory matter, malice is implied, unless the publication was on a privileged occasion."

The question then to be determined is whether the respondent's words of "mental illness" were mentioned on a privileged occasion and in good faith without being actuated by malice. In **STUART V BELL (1891) 2 QB 341 at p.350**, it was stated that it is for the Judge to determine whether an occasion is privileged and therefore to decide whether the defendant was under the duty to make the communication. Though there is no legal formula or criteria for determining which circumstance is a qualified privilege, guidance is sought from Erle C.J's words in **WHITELEY V ADAMS (1863) 15 C.B. (N.S) P.418** that:

> **in considering the question whether the occasion was an occasion of privilege, the court will regard the alleged libel and will examine by whom it was published, when, why and in what circumstances it was published, and will see whether these things establish a relation between the parties which gives rise to a social or moral right or duty, and the consideration of these things may involve the consideration of questions of public policy.**

A brief recap of the facts on the record is necessary in establishing whether the words were mentioned on privileged occasion. On the record, the defendant (now Respondent) during examination- in -chief testified that "***a journalist called me asking me about mental illness in relation to employment. He asked me whether the Plaintiff had a problem and I told him that he had a mental illness which was still being investigated at Butabika hospital.***" On cross examination, the defendant contradicts his earlier testimony by saying," ***I did not talk to anybody about your mental illness.***" It is imperative to note that such

contradiction was not cleared during re-examination. From the foregoing, it is true that the respondent did mention the words "mental illness" to a journalist in response to an inquiry made by a journalist who later wrote a column in the newspaper of the same. It is noted that the respondent did not say the words in the execution of his public duty by virtue of his office as an Executive director. He was answering inquiries or questions from a chance journalist over the telephone.

It is a well settled principle of law that the defence of qualified privilege in defamation cases arises where the defendant has an interest in making the communication to the 3rd person and the 3rd person has a corresponding interest in receiving it. **(MANGAT V SHARMA [1968] EA at p.626, HUNT V GREAT NOTHERN RAILWAY CO. [1891] 2 QB 189).** The effect of the successful plea of qualified privilege is to exonerate the defendant from liability of the libel complained of. However, this plea is unavailable to the defendant if it is proved that he was actuated by malice. **MANGAT V SHARMA (supra).**

The mere fact that an inquiry is made about the character or position of another as in this present appeal does not necessarily render the answer privileged. It is pertinent to emphasize here that this defence is not absolute but qualified. **GATLEY ON LIBEL AND SLANDER (supra) at page 455 states that: "It is no part of a man's duty to go into the confessional to every chance person who may choose to ask impertinent questions."** Therefore, it is no defence that the respondent spoke the words upon being asked by a journalist over a telephone conversation or interview.

In order to be protected by the defence of privilege, there ought to be a duty and interest to make such statement. In **STUART V BELL (supra),** Court held that: **"statements made where the publisher had a duty to make them or interest in making the statement to the person to whom it was made, that person had a corresponding duty or interest to receive it."** In other words, there must be reciprocity of interest or duty.

Tindall J. in **HOLZGEN V WOOLLWRIGHT (1928) T.P.D at page11** explained the meaning of reciprocity of interest in these words:

> **"... reciprocity of interest does not mean that there must be some special relationship between the**

Defendant and the person to whom he makes the communication. All it means is that interest must exist in the party to whom the communication is made as well as in the party making it."

Further, in **STUART V BELL (SUPRA) at page 349** court stated that:

"... where privilege is claimed on the ground that there was a duty on the Defendant to make the communication, and an interest in the party to whom it is made, such duty and such interest must have existed in fact. It is not sufficient that the Defendant honestly and reasonably believed that he was under a duty to make the communication or that the person to whom he made it had an interest in the subject-matter."

In the instant appeal, the respondent did infact have a duty to make such statements to the Permanent Secretary since there was corresponding interest between the two parties by virtue of their managerial roles of the employees at Mulago Hospital; but the fact that he did go ahead to publish such words to a chance journalist who had no corresponding duty or interest in receiving the statement without having conclusive reports of the Doctor who examined the appellant was reckless in nature, tainted with malice or ill motive and does not accord him protection from the defence of privileged occasion. The Appeal Court in **LONDON ASSOCIATION V GREENLANDS LTD [1916] 2 A.C at page 35** held interalia that: **"no privilege will attach where the common interest is one which springs from idle gossip or curiosity only."**

Therefore from the foregoing, the defence of qualified privilege fails for the reasons of lack of reciprocity of interest and duty between the respondent and the journalist and it being made recklessly establishes malice.

It is also no defence to say that the appellant was the first to mention the libelous statements himself as submitted by the respondent. In this, I am persuaded by **Tindall C.J cited in GATLEY IN LIBEL AND SLANDER** (supra) that:

It is quite agreeable that there is a wide distinction between a man's telling a ludicrous story of himself,

in the private circle of his friends and acquaintances, and the publication of it to the world at large, through the medium of a newspaper.

I am further persuaded by the holding in **COOK V WARD (1830) 4 MOO at page 99** that:

> ***... it was libelous to publish a story in which the Plaintiff was made to look ridiculous, although the Plaintiff had told the story of himself in the first place.***

The Common law principles also protect such representations or communication made in fiduciary relationships between a doctor and patient as in the present appeal under the doctrines of confidentiality. The principles of confidentiality in modern medical practice are ethical in order to foster these communications and relationships that are integral to the just operation of society. To use such privileged communication against the maker would be to prejudice them and defeat the aim of law. Therefore, the fact that it was the appellant who first stated the words "mental illness" to the doctor for purposes of seeking diagnosis cannot be used to prejudice him and is thus protected as privileged communication.

Ground 4

In regard to ground 4, the appellant submitted that the respondent is not a Government spokesperson in the ministry of health or Mulago hospital. It would be far-fetched to say that he was acting for and on behalf of Government in a representative capacity in the due course of his employment. His job does not entail being a mouth piece of the government of Mulago hospital. That the remarks made by the respondent were personal remarks and therefore the doctrine of vicarious liability is not applicable in this case. On the other hand, the respondent submitted that he spoke the words in course of employment and was performing a public duty. Therefore, the right party to sue was the Attorney General in accordance with Section 3 (1) (a) of the Government Proceedings Act.

Analysis

Before delving into the submissions on this ground, it is instructive to note that **Order 1 rule 3 of the Civil Procedure Rules S.I 71-1** stipulates that:

> **All persons may be joined as defendants against whom any right to relief in respect of or arising**

out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against those persons, any common question of law or fact would arise.

The proper interpretation of this rule as I understand it, is that, it gives a Plaintiff the right to sue an unlimited number of persons who she/he perceives to have infringed her/his right. The decision to join the defendants in one suit is however not obligatory. Therefore, the non-joinder of the Attorney General to this suit will not lead to dismissal of the case against the respondent.

I also note that **Order 9 of the Civil Procedure Rules** provides that:

> **No suit shall be defeated by reason of the ... non-joinder of the parties, and the court may in every suit deal with the matter in controversy so far as regards *the rights and interests of the parties actually before it.***

So, I shall proceed to determine the rights and interests of the parties in the matter at hand.

The general principle of law is that, an employer is liable for the acts of his employees or agents while in the course of the employer's business or within the scope of employment. The test is whether or not the employee or agent was acting in the course of his authority or whether or not the employee was going about the business of his employer at the time the damage was done to the Plaintiff. (See: **MUWONGE V AG [1967] EA 17).**

In **BROWN V CITIZEN'S LIFE COMPANY (1902) 2 NSWR at page 212,** court held interalia that: **"where an agent or servant, acting within the scope and in the course of his employment, publishes a libel on a privileged occasion, and it is proved that the agent or servant was not actuated by malice, the principal is liable".**

Can it therefore be said that the respondent was going about his employer's business when he picked the telephone to answer a chance

journalist's inquiry to which he answered defamatory statements that he could not verify? In my opinion it is not so. As per the record, the respondent was given instructions from the Permanent Secretary to have the appellant's mental health and status checked and also conduct a commission of inquiry into his work ethics and behaviour and submit a report to him; the doctors' evidence viz DWI, DWII, DWIII and DWIV all clearly state that their findings were to be handed to the Permanent Secretary upon completion. It cannot therefore be said that the respondent was acting on his employer's (Permanent Secretary) authority when he picked and answered the journalist's questions. At this point, the respondent was not in course of employment or defending the hospital as a public duty. The respondent cannot therefore be absolved of liability by pleading vicarious liability. I, therefore find that he is personally liable for the defamatory words that he spoke.

For the reasons given herein, I would set aside the judgment of the Learned appellate Judge and affirm the judgment of the Chief Magistrate's Court in the terms stated by that Court.

I would also order the respondent to pay costs to the appellant in this Court, in the High Court and in the Chief Magistrate's Court below.

Dated at Kampala this ....4th..... day of ..January..... 2016.

.....L. Tibatemwa.....

HON. JUSTICE PROF. LILLIAN EKIRIKUBINZA TIBATEMWA,
JUSTICE OF APPEAL