

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
CIVIL SUIT NO. 482 OF 2018

YUSUF SEMBATYA KIMBOWA:.....:PLAINTIFF

VERSUS

- 1. THE EDITOR, THE OBSERVER**
- 2. THE OBSERVER MEDIA**
- 3. SIRAJE LUBWAMA :.....:DEFENDANTS**

BEFORE HON. JUSTICE MUSA SSEKAANA

JUDGMENT

The plaintiff brought this suit in defamation against the defendants jointly and severally for general damages, exemplary damages, a permanent injunction to restrain the defendants from further publication of the complained of articles, interests plus costs of the suit, arising out of the defamatory articles sub headed “Free Money” published in the fifth page of the issue of the Observer dated Friday, July 3rd to 5th, 2015, Vol. 10 Issue: 079, which reads, “another board member named in the whistle-blower’s report is Yusuf Sembatya Kimbowa, the chairman of the audit committee. The whistle-blower accuses Kimbowa of using his position to arm- twist secretariat staff into acquiring credit facilities that are not extended to business clients”.

This matter was coming up for formal proof after an interlocutory judgement was entered.

The plaintiff was represented by *Mr. Siraj Ali* whereas there was no representation for the defendants.

The following issues were proposed for determination by this court.

1. *Whether the publications were false and defamatory of the plaintiff.*
2. *Whether the plaintiff is entitled to the remedies prayed for?*

The plaintiff was ordered to file written submissions and accordingly filed the same.

The party's submissions were considered by this court.

DETERMINATION OF ISSUES

Issue 1

Whether the publication were false and defamatory of the plaintiff.

Submissions

Counsel for the plaintiff submitted that the suit proceeded *ex parte* and plaintiff was the only witness in this matter and he produced his evidence in court by the way of a witness statement which was admitted unchallenged. The plaintiff stated that in order to magnify and draw attention to the allegations against him the defendants published the defamatory matter under the sub-heading "Free Money". The plaintiff further stated that on the 10th day of July, 2015, his lawyers wrote to the defendants seeking an apology and compensation for the publication

of the said libelous article, that however, in response to the said letter, the second defendant's lawyers, AF Mpanga Advocates, wrote to request the plaintiff to stay any action for the purpose of consulting and clarifying the 2nd defendant's position. The 2nd defendant did not however revert to the plaintiff.

The plaintiff testified that the publication was false and the defendants felt unease to present themselves to court and defend themselves. The plaintiff stated that the natural and ordinary meaning of the publication were understood to mean that the plaintiff in abuse of his position as chairman of the audit committee of National Drugs Authority, he is in the habit of acquiring credit facilities that would ordinarily not be extended to him, by arm twisting staff at National Drug Authority and that he is unethical person who is unjustly enriching himself at the expense of honest businesses by abusing a position that requires him to exhibit the highest level of integrity.

Counsel submitted that for court to determine whether the words complained of are capable of a defamatory meaning, one must first look at the words themselves and then consider the circumstances under which they were published. He stated that the plaintiff does not shoulder the burden of proving falsity or malice in order to establish a cause of action; if the words are defamatory or capable of being so construed, the law presumes that they are false and the burden shifts to the defendant to show that they are true.

He laid down the grounds that have to be proved in respect of defamation and stated that on the defendants making a defamatory statement about the plaintiff, this was stated on the fifth page of the issue of the Observer dated Friday, July 3rd

to 5th July, 2015 Vol.10 Issue: 079. He stated that the natural and ordinary meaning of the publications were understood to mean that the plaintiff in abuse of his position as chairman of the audit committee of the National Drugs Authority, is in the habit of acquiring credit facilities that would ordinarily not be extended to him and is an unethical person. He stated that the test used to determine whether a statement is capable of giving defamatory meaning is; would the words tend to lower the plaintiff in the estimation of the right thinking members of the society generally? (*see: A.K Oils & Fats (U) Ltd v Bidco Uganda Ltd HCCS No. 715 of 2005*). Counsel stated that the publication was highly damaging to the plaintiff's trading reputation and integrity and was therefore apparent that the statement published was defamatory as it lowered him in the estimation of the right thinking members of the society.

On the falsity of the publication, the counsel for the plaintiff stated his evidence was uncontroverted as the defendants never filed a defense despite being served with summons. Counsel stated that the plaintiff does not shoulder the burden of proving falsity or malice in order to establish a cause of action. It was stated that the defendants could have verified the truth of the whistle blower's allegations against the plaintiff by checking the list of suppliers enjoying credit facilities from the records at National Drug Authority offices in Kampala before publishing the story but their failure to do so is a clear manifestation that they published the said words with malice and knowledge that were false and reckless. Counsel therefore concluded that the publication was false.

Counsel further submitted that the statement was injurious to the plaintiff's reputation in the eyes of the right thinking members of the society since he was

subject of various discussions among members of his profession and the general public from which he was able to read in social media that his reputation and esteem had been lowered.

Counsel stated that the plaintiff is a public figure and a member of the Board of Directors of National Drug Authority working with a public body which deals with public interest matters and despite that being within the knowledge of the defendants, they proceeded to publish false statements against him with reckless disregard of the plaintiff's rights and reputation.

The defendants never appeared in court to defend themselves. It was therefore submitted that the publications by the defendant were false and defamatory of the plaintiff and prayed that this court holds so.

Determination

The right to reputation is acknowledged as an inherent personal right of every person. A man's reputation is his property and perhaps more valuable than any other property. Indeed, If we reflect on the degree of suffering occasioned by loss of character and compare it with that occasioned by loss of property, the amount of injury by defamation far exceeds that of loss of property.

The essence of defamation is 'publication' which excites others against the plaintiff to form adverse opinions or exposes him to hatred, contempt or ridicule, or injure him in his trade, business, profession, calling or office or to cause him to be shunned or avoided in society.

According to *Black's Law Dictionary 11th Edition 2019*, defamation means; Malicious and groundless harm to the reputation or good name of another by the making of false statement to a third party.

In defamation suits, for court to determine whether the words complained of are capable of a defamatory meaning, one must first look at the words themselves. Then one has to consider the circumstances under which they were published. In all this, the plaintiff does not shoulder the burden of proving falsity or malice in order to establish a cause of action. If the words are defamatory or capable of being so construed, the law presumes that they are false. The burden shifts to the defendant to show that they are true (see: *AK Oils & Fats (U) Limited vs BIDCO Uganda Limited HCCS 0715 of 2005.*)

The defamatory articles sub headed “Free Money” published in the fifth page of the issue of the Observer dated Friday, July 3rd to 5th, 2015, Vol. 10 Issue: 079, which reads, “another board member named in the whistle-blower’s report is Yusuf Sembatya Kimbowa, the chairman of the audit committee. The whistle-blower accuses Kimbowa of using his position to arm-twist secretariat staff into acquiring credit facilities that are not extended to business clients”.

From the evidence, it is not contested that a story in respect of the plaintiff was made published depicting a person who had used his position to arm-twist secretariat staff into acquiring credit facilities not extended to other business clients. In his testimony the plaintiff stated that he wrote to the defendants seeking an apology and compensation for the publication of the said libelous article; however was requested to stay any action for the purpose of consulting and clarifying the 2nd defendant’s position.

The plaintiff further testified that he is a civil servant and a member of the Board of Directors of National Drug Authority, the chairman of the Authority’s audit

committee and managing director of Kimsy Meds Ltd, a supplier of medical drugs to the National Medical Stores and the Cancer Institute. He stated that the said article led to several prestigious pharmaceutical companies querying about the plaintiff and many others with whom he was having discussions about the prospects of purchasing their drugs for supply in Uganda and were reluctant to associate with him and his company in light of the allegations made.

Gatley in his book *Gatley on Libel Paragraph 31, 8th Edition, states that:*

“a defamatory statement is one which tends to lower a person in the estimation of right thinking members of society or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey an imputation on him which is disparaging or injurious to him in his office, profession, calling, trade or business”

In the case of *Shah vs Uganda Argus [1971] EA 362* Youds J stated that;

“.....any words or imputation which may tend to lower a person in the estimation of right thinking members of society or expose a person to hatred, contempt or ridicule have been held to be defamatory and it is a general impression that the words are likely to create in the minds of reasonable persons which must be considered rather than making a lose and precise analysis of the words used.”

After analyzing the plaintiff’s evidence, it is my finding that the different captions complained of portrayed the plaintiff as one in abuse of his position as the chairman of the audit committee of National Drug Authority and as an unethical person who is unjustly enriching himself at the expense of honest businesses.

The article published by the defendants lowered the plaintiff in the estimation of the right thinking members of society because the plaintiff was depicted as an unethical person. The defendants did not justify why they published the story without verifying it first from the National Drug Authority offices.

I find that the words used in the publication by the defendants portrayed the plaintiff to be an unethical person and one in abuse of his position as the chairman of the audit committee of the National Drug Authority.

Following the holding in the case of *A.K oils & Fats (U) Ltd Vs Bidco Uganda (HCT-0715-2005*(supra), the defendant has not proved on a balance of probabilities that the publications were not defamatory of the plaintiff. I hold that the publication was defamatory of the plaintiff.

Issue 1 is resolved in the affirmative.

Issue 2

Whether plaintiff is entitled to the remedies prayed for?

The plaintiff in his pleadings and written statement prayed for an apology and retraction of the offending article, general damages for libel, loss of earnings for libel and costs of the suit

Counsel stated that the plaintiff's pleadings and evidence overwhelmingly demonstrate that he suffered very severe and unspeakable injuries to his reputation, pain, mental anguish and depression which would in effect entitle the plaintiff to a commensurate award of damages.

It was submitted that the plaintiff suffered loss and injury as a result of the defendants' publication and owing to the injury, the plaintiff suffered to his reputation due to the false and defamatory statement. That his supply reduced as several pharmaceutical companies started fearing to associate with him and could not give him business. He therefore prayed for general damages of worth UGX. 100,000,000/=.

I have already held that the plaintiff was defamed. What remains is assessment of the quantum of general damages to be awarded. It was held in *Samwiri Lugogobe Vs Hussein Lukaga [1980] HCB 18* by Allen J (as he then was) that:

".....in a defamation case when considering the quotation of damages, what matters is the injury done to the plaintiff's reputation and character taking into account his wounded feelings and any insulting or malicious conduct on the part of the defendant. In absence of evidence of any of those factors an award of nominal damages only would be made for injury done to the plaintiff's good name."

In the instant case, some damage was occasioned to the plaintiff businesses due to the publication where he was seen as an unethical person among his business colleagues and companies that he was having discussions with for supply of his products. Since, however, no malicious intent has been proved as against the defendants, in the circumstances of this case, I think that an award of UGX.20, 000, 000/= would be reasonable general damages not too high, not so low. It is so awarded, with interest at court rate from the date of judgment till payment in full and costs.

Exemplary damages

The rationale behind the award of exemplary damages: exemplary damages should not be used to enrich the plaintiff, but to punish the defendant and deter him from repeating his conduct.

An award of exemplary damages should not be excessive. The punishment imposed must not exceed what would be likely to have been imposed in criminal proceedings, if the conduct were criminal. Per Spry V.P. in *Obongo vs Municipal Council of Kisumu [1971] EA 91*.

Bearing those principles in mind I find that an award of **UGX 3,000,000** sufficient as exemplary damages.

The plaintiff is awarded costs of the suit.

I so order.

SSEKAANA MUSA
JUDGE
13th March 2020