THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

CIVIL SUIT NO. 369 OF 2002

1. **FRANK KATUSIIME**
2. **RANK CONSULT UGANDA LTD :::::::::::::::::::::::::::::::::: PLAINTIFFS**

VERSUS

1. **THE EDITOR IN CHIEF OF**
   THE EAST AFRICAN NEWSPAPAER :::::::::::::::::::::::::::: DEFENDANTS
2. **THE NATION MEDIA GROUP LIMITED**

BEFORE: LADY JUSTICE LYDIA MUGAMBE

JUDGMENT

A) Introduction

1. The Plaintiffs' claim against the Defendants jointly and/or severally is for aggravated/exemplary and general damages for libel; a permanent injunction restraining the Defendants or their agents from publishing words which are defamatory to the Plaintiffs; an appropriate apology published on a conspicuous part of the front page of the Defendants publication and website; interest at 25% per annum on all awards from the date of judgment till payment in full, costs of the suit and any other relief the court deems fit.

2. The Plaintiffs claim that between 4th and 10th March 2002, the Defendants falsely and maliciously wrote, printed and published or caused to be written, printed and published, on page one of the East African newspaper issue No. 383 an article defaming them. The publication was false, unfounded and carried expressions and innuendos deliberately

calculated to lower their high esteem and integrity in the eyes of right thinking members of society generally and imputed commission of multiple criminal actions by the Plaintiffs which is actionable *per se* and was calculated to increase the circulation of the newspaper and its advertising space.

3. The Defendants published the said words out of malice or spite towards the Plaintiffs and the expressions and/or innuendos were false, malicious with no scintilla of truth. By reason of this malicious and false publication, the Plaintiffs have been greatly injured in their credit, character, reputation and honor, profession, occupation, business and international standing and have been brought into public scandal, odium, ridicule, contempt and hatred. They have been shunned and ostracized and have therefore suffered substantial loss and damage as a direct consequence of the defamatory statement.

4. In their amended written statement of defence, the Defendants deny the Plaintiffs claims. They admit that the said article was run in the said newspaper but deny that it was false or malicious. They aver that the facts printed in the article were true, accurate and printed without malice or spite. The article was honestly written on a matter of public interest, which the Defendants are under a duty to disclose. Any loss of reputation is the Plaintiffs own doing and making.

5. The Plaintiffs are represented by Mr. John Mary Mugisha of M/s. Mugisha & Co. Advocates and the Defendants are represented by Mr. Bwogi Kalibala of M/s. MMAKS Advocates.

6. The parties proceeded by witness statements in lieu of examination in chief. The Plaintiffs called four witnesses. The first Plaintiff testified as PW1, Hajji Aziz Kasujja, the then Electoral Commission Chairman testified as PW2, Mr. Charles Wilberforce Mushabe, an orthopedic surgeon in South Africa and brother of the first Plaintiff was PW3 and Mr. Augustine Ruzindana, a retired public servant testified as PW4. The Defendants called two witnesses. Mr. Micheal Andrew Wakabi, the then bureau chief of the first Defendant was DW1 and Mr. Basil Tyaba a director in IT Trends was DW2.

7. The issues agreed for resolution at the scheduling conference are:
    i) Whether the words contained in the article were defamatory of the Plaintiffs.
    ii) Whether the Plaintiffs suffered any damage.
    iii) Whether the words complained of are true.
    iv) Whether the article complained of was a fair comment on a matter of public interest.
    v) Whether the Plaintiffs are entitled to the reliefs sought.

B) The law

8. In Francis Lukooya Mukoome & Anor v. Editor in Chief Bukedde Newspaper & 2 others, Civil Suit No. 351 of 2006**,** Justice Yorokamu Bamwine defined defamation to be an injury to one's reputation and that reputation is what other people think about a man and not what a man thinks about himself. He further held that in order to determine whether or not the statement is defamatory, the test is whether the words complained of would tend to lower the Plaintiff in the estimation of the right-thinking members of society and for a statement to be defamatory it must not be true. (See also Gitley on Libel and Slander, 8th Edition Para 31).

9. In David Etuket & Anor v. The New Vision Printing and Publishing Corporation HCCS No. 86 of 1996, it was held that in order to prove the reduction of reputation or esteem, the Plaintiff must adduce evidence from either his or her colleagues or from any member of the society who knew the Plaintiff before the publication of the statement complained of and who read the article. The Court can then judge how the right-thinking members of society regarded the Plaintiff following the publication of the article.

10. If a defamatory statement is made in writing or some permanent form, the tort of libel is committed. See Ratcliffe v. Evans (1892) 2QB 524 at 528**.** Libel is defined as defamation by written or printed words, pictures, or in any form other than by spoken words or gestures. Libel is therefore a published false statement that is damaging to a person's reputation.

11. In Halsbury's Laws of England 4th edition, it is explained that in order to constitute libel, the statement must be published and it must be concerning the Plaintiff. The plaintiff can rely only on the defamatory matter contained if he or she is referred to, whether expressly or by implication in the statement in respect of which the action is brought. Where the plaintiff is referred to by name or otherwise clearly identified, the words are actionable even if they were intended to refer to some other person and both the plaintiff and the other person may have a cause of action.

12. Secondly, the plaintiff must prove that the publication was defamatory. Again, there is no complete or comprehensive definition of what constitutes a defamatory statement. However, generally speaking, a statement is defamatory if it tends to lower a plaintiff in the estimation of right thinking members of society generally or if it exposes such person to public hatred, contempt or ridicule or if it causes him to be shunned or avoided as stated by Justice Allen in the case of Geofrey Ssejjoba v. Rev. Patrick Rwabigonji HCCS No. 1 of 1976.

13. In A.K Oils & Fats v. Bidco (U) HCCS No. 715 of 2005, Justice Yorokamu Bamwine held that in determining whether a word is defamatory the court must first consider what meaning the word conveys to an ordinary man. The fact that the person to whom the words were published did not believe them to be true is irrelevant and does not affect the right of action. Therefore the words have to be accorded their ordinary and natural meaning. The plaintiff therefore has to prove that indeed the words are defamatory, and once the ordinary meaning has been determined, the court must decide whether the words complained of are defamatory.

14. According to Giltley on libel and slander, 8th edition at paras 114 and 115, where the words are defamatory in their ordinary and natural meaning, the plaintiff needs to prove nothing more than their publication. This position was confirmed by Justice Gideon Tinyinondi in Ntabgoba v. Editor New Vision (2001 – 2005) 2 HCB 209.

15. There are defences in defamation. Justification is a complete defence to an action for the defendant to plead that the statement is true substantially. The Defendant can only plead justification where there is clear and sufficient evidence that the allegation is true.

16. Truth may be pleaded as a defence to the whole defamatory statement. In Chaina Movat and Voice of Kigezi v. Kyarimpa Enid, HCCA No. 42 of 2008, Justice Kwesiga held *inter alia*, that the defence of justification means that the Defendant is contending that the words complained of were true. The burden is on the Defendant to prove that the facts in these words were true.

17. Fair comment is another defence in defamation. The word "fair" embraces the meaning of honesty, relevance and free from malice and improper motive. The defence of fair comment was discussed in Figueredo & 4 others v. The Editor of Sunday Nation & 4 others (1968) EA 501 to enshrine matters dealing with affairs of the state, affairs of local institutions, books, pictures and works of art, theatres, concerts etc. However fair comment should have the following qualifications:

    i) The matter commented on must be of public interest. Lord Denning (MR) in London Artists v. Litler (1969) 2 ALLER stated:

    "Whenever a matter is such as to affect 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 a fair comment. This was quoted with approval in Rev. Besigye v. Amama Mbabazi HCCS No. 104 of 2002;

    ii) The statement in question must be an expression of opinion and assertion of facts and;

    iii) The comment must be fair and not malicious. It must be of facts that are truly stated. Fairness here is tested in two ways i.e. the subjective test and the objective test at the same time. There must be total absence of malice.

18. There is also the defence of privilege available to the Defendants as publishers. In Adam v. Ward (1917) AC 309 at 334, Lord Atkinson held that "a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes the communication has an interest or a duty, legal, social or moral, to make it to the person to

whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential."

19. In Holzgen v. Woollwright (1928) T.P.D at page 11 the meaning of reciprocity of interest was explained as "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."

20. In Stuart v. Bell (1891) 2 QB 341 at 350, it was stated that it is for the judge to determine whether an occasion is privileged and therefore 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 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." See Lubanga Jamada v. Dr. Dduma Edward CACA No. 10 of 2011.

21. In Rev. Stephen Besigye v. Hon. Amama Mbabazi, it was held that "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." See Kimber v. Press Association (1873) 1 QB 65**.**

C) Analysis.

22. I have carefully read all the pleadings and submissions of the parties as well as the witness statements and corresponding cross examination of both sides at the oral hearing. All the four Plaintiff witnesses testified to the good reputation, image and professionalism of the Plaintiffs in their work at all material time. They also expressed that they were shocked when they read the article in issue as it depicted the Plaintiffs in a negative way.

23. On the other hand the two Defendant witnesses pointed to a credible story that was published. DW2 explained that he was part of the team of IT experts called in to rectify the mess that had been created by the Plaintiffs' company in preparation of a national register for elections. DW1 on the other hand explained that the story of a possible failed national voters register system which would affect the 2002 elections if not rectified timely was published truthfully and in public interest.

24. I have taken extra care and diligence in reading the material article published in the weekly East African newspaper issue of 4th-10th March 2002, in my assessment. In the publication titled "Uganda EC Scandal: Equipment Idle", the first Plaintiff was said to be the head of Rank consult/ Omicron consortium - a joint venture which was contracted to integrate various software and hardware supplied by other companies. It is presented that the IGG investigated and concluded that there was a conflict of interest when this consortium supplied this equipment. The publication raised concerns regarding the effectiveness of the equipment supplied and claimed that officials in the IGG's office said that conflict of interest and irregularities in tendering at the Electoral Commission (herein after the EC) were the principle reasons for the increase of the cost of the project from USD 6,000,000 to over USD 17,000,000. It also claimed that the voters register wasn't ready 16 months after the consultants were engaged and that delays in the project were partly to blame for the muddled local government elections earlier that year.

25. Further that during trials of the (Plaintiffs installed) PVRIS system between April and September 2001, the data processing staff of the EC discovered that there was a high prevalence of misinterpretation of characters, a problem that was compounded by lack of comprehensive documents detailing all aspects of the system. The consultants were ill prepared or lacked adequate knowledge of the system. The government's procurement advisor-SWIPCO had ruled on December 4th 2000 that none of the bidding firms for the consultancy for the PVRIS was qualified and none of the proposals were responsive to the requirement. SWIPCO recommended that the best option would be to cancel the tender and begin a new procurement process.

26. It was also claimed in the publication that the detailed technical evaluation indicated that none of the bidders was eligible for financial evaluation. Since the PVRIS was procured from various firms, there was need for an integrator to ensure the various components of the project could work as one system. The Plaintiffs consortium and Pan American Business Solutions Inc. were the two bidders. EC staff told the IGG that the consortium worked in total secrecy denying them access to the PVRIS integration system. Any view contrary to the consortium's was considered sabotage. While the Plaintiffs consortium indicated twelve consultants to work on the project, available information indicated that only four worked consistently and others had left in March. Technical staff at the EC data processing department did not take part in identifying the specifications and quantities of the required equipment and software for PVRIS.

27. Overall the publication claimed that available information indicated that the system recommended by the bureaucrats was deficient. It was not tested before EC decided on using it yet it had not been used anywhere in the world. The EC's expert team that travelled to South Africa identified another complete system at MGX holdings Ltd which would have been more efficient and produced the register in 45 days at a cost of USD 7,000,000. MGX had demonstrated to the EC team how this system worked and it had been used in Turkey to process 18 million census records in 30 working days. Uganda's register had just over eight million voters.

28. The publication ends saying that the consortium had told the Minister of Justice and Constitutional affairs that the EC staff were sabotaging the project and as a result three top officials of the data processing department were suspended.

29. The context of the publication is important to understand. It was at a time when the 2002 elections were imminent and the operationalization of the voter register to be used for the first time in the country as one of the measures for a successful election was running behind schedule and bound to fail if nothing was done to rectify the situation.

30. The Plaintiffs do not dispute that they were involved as part of the consortium of consultants charged with implementation of the said voter register system. The first Plaintiff does not deny that he was the team leader of the said consortium. While the first Plaintiff splits hairs on what each member of the consortium did as part of this contract, the Plaintiffs did not satisfactorily counter the evidence of DW2 that he came as part of the team of experts to rectify errors that arose from the work of the consortium. I am also convinced by the testimony of DW1 that the story was based on information from the spokesperson of the IGG and staff of the EC.

31. Put simply, the publication broke the problems and delays related to the voter register system which Ugandans and the world needed to know about in order to have timely rectification. It would appear from the evidence on record that after the story run, DW2 and his team of experts were brought in to rectify the errors and the scandal, of a failed voter system and a resultant failed or problematic election, was averted. The story was therefore in public interest and on receiving it, the publisher had a duty to tell it to the public.

32. I consider that the mention of the Plaintiffs in the said publication was only to the extent of their involvement in the consortium. I see nothing overt or inferable in the story to impute malice, unfairness or any form of ill will or prejudice on the Defendants in the publication.

33. I find that the role played by the Plaintiffs who were part of the consortium was fairly and truthfully presented in the story. Moreover the story went on to raise other issues surrounding the voter register scandal. These included actions of the Minister, the EC staff, the IGG investigations, the bidding process and other potential contractors. It was less about the Plaintiff consortium *per se*. The consortium was simply inevitable to the story because of its role in the story subject. It therefore does not matter that PW3 and PW4 who were friends/relatives of the first Plaintiff were shocked by the story simply because they may not have known the truth about the involvement of the Plaintiffs in the voter register system.

34. The alleged clarification in the New vision of March 27 2002, by Stephen Musigire Kabbera (PW exhibit 2) that the IGG had not investigated the alleged scandal, in my view, on its own cannot successfully counter the Defendants' claim from the IGG spokesperson that the said investigation took place. Perhaps if the Plaintiffs had got the IGG spokesperson to dispute the claim, then their theory would be more credible. It is also possible that the said Musigire, even if considered as an employee at the IGG's, was not aware of the investigation. Moreover, the said Musigire never testified in court to have the veracity of his claims tested by the Defendants cross examination. It is not a credible piece of evidence in these circumstances for me to safely rely on.

35. The Plaintiffs may not have wanted the story to run and indeed may have been irked by its publication. However this is irrelevant for defamation. The legal test is more about other right thinking members of the public who read the story.

36. Based on all the above, I am satisfied that although the Plaintiffs did not want their names to appear in the near scandalous story, the story as ran was based on a truthful investigation and devoid of any malice, unfairness or ill will towards them. It was devoid of any damage to the reputation of any of the plaintiffs in the eyes of right-thinking members of society.

37. It relayed a matter of public interest that the first Defendant reporter had a duty to publish and the public too, had a duty to receive. I am satisfied that it was a truthful and justified publication. It passed the tests for fair comment and qualified privilege. The Plaintiffs' suit is therefore accordingly dismissed with costs for the Defendants.

I so order.

Lydia Mugambe.
Judge.
10th June 2020