THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 0128 OF 2017

1. THE RED PEPPER PUBLICATIONS LTD
2. THE EDITOR IN CHIEF,
THE RED PEPPER PUBLICATIONS LIMITED:::::::::::: APPELLANTS

VERSUS

RTD CHIEF JUSTICE
SAMUEL WILLIAM WAKO WAMBUZI:::::::::::::::::: RESPONDENT

(An appeal from the decision of the High Court of Uganda at Kampala (Civil Division) before Basaza-Wasswa, J. delivered on the 4th day of May, 2017 in Civil Suit No. 0305 of 2015.)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA.
HON. MR. JUSTICE STEPHEN MUSOTA, JA.
HON. MR. JUSTICE REMMY KASULE, AG. JA.

JUDGMENT OF ELIZABETH MUSOKE, JA.

I have had the benefit of reading in draft, the lead judgment of Hon. Justice Stephen Musota,JA., as well as the judgment of Hon. Justice Remmy Kasule, Ag. JA in this matter; I agree with the manner of the disposal of the appeal proposed in both judgments. I only wish to express, by way of addition, the comments in this judgment.

Background

Following the conclusion of the trial in a suit for defamation instituted by the respondent against the appellants, the High Court (Basaza-Wasswa, J.), in a judgment delivered on the 4th day of May, 2017 awarded a combined sum of Ug. Shs. 425,000,000/= as damages, of which, Ug. Shs. 375,000,000/= was compensatory damages, and Ug. Shs. 50,000,000/= was exemplary damages, with interest at the rate of 6% per annum from the date of the

judgment till payment in full, to the respondent herein. The High Court also issued a permanent injunction against the appellants restraining them and their agents or persons under their control and direction from further publishing similar defamatory statements about the respondent.

The damages awarded to the respondent were in respect of an article written in the Sunday Pepper Newspaper of October 11, 2015 for which the appellants were responsible. The article entitled "100 Most Indebted Personalities Revealed," a copy of which was exhibited in the trial Court as (P. Exhibit 1) reads as follows:

> **"Many of you think top personalities/tycoons are in comfort zone, living a luxurious life. However, maintaining and sustaining the Status quo has pushed some of them to borrow from banks and other money lenders, a development that has seen some of them live in fear and misery over failure to pay back. Today Salt N' Pepper unveils a list of 100 highly respected personalities who are having sleepless nights over debts, collapsing businesses and financial woes in general. These will be published in series every Sunday until the list is exhausted. We hope you will learn a thing or two about this investigative story.**
>
> **Retired three-time Chief Justice Samuel Wako Wambuzi needs no mention in the Ugandan legal circles where he served in very precarious times. After retiring from the judicial services, he diverted all his energies to his investment in the education sector. He is the proprietor of the posh Namuwongo based Greenhill schools. Sources reveal that the brilliant learned fellow is struggling with almost Shs10bn loan from a top city commercial bank. An insider intimated to us that the former judge secured a business loan to expand his Green Hill school in Buwatte and failed to service the loan like in the projected bank loan that is giving him sleepless nights.**
>
> **It is said that he is under pressure over the loan interest rates yet he had envisioned a peaceful retirement free from the court case pressures."**

The learned trial Judge held that the above publication was false and defamatory, and had the effect of disparaging the respondent, in his highly esteemed reputation as three (3) time Chief Justice of the Republic of

Uganda. The learned trial Judge further held the view that the publication lowered the respondent in the estimation of right thinking members of society, as "the picture painted of him by far breached all tenets of professional ethics and conduct of a retired Judicial Officer of his stature."

The appellants contest, both the finding that the publication had any defamatory meaning, as well as the quantum of damages of Ug. Shs. 425,000,000/= awarded to the respondent, which they contend was: 1) awarded based on wrong principles of law and wrong application of precedents by the learned trial Judge and; 2) the amount awarded in compensatory and exemplary damages was excessive.

The grounds of appeal and the submissions in support and in opposition to the said grounds, and the legal representation for both sides, have been set out in the lead judgment of Musota, JA., and I find it unnecessary to repeat them here. I will make a few additional observations in this judgment.

There are two underlying questions for examination in the instant appeal: first, whether the words written in the publication against the respondent have any defamatory meaning; and secondly, if the words were defamatory as such, whether this Court should interfere with the award of damages by the trial Court against the appellants.

Whether the publication against the respondent was defamatory.

In examining this question, we must first remind ourselves about the nature of the tort of defamation. It has been said that "the tort of defamation is an ancient construct of the common law. It has accumulated, over the centuries, a number of formal rules with no analogue in other branches of the law of tort." **(See: Lachaux vs. Independent Print Ltd and another [2019] UKSC 27.)**

At common law, a distinction was made between libel and slander, and the former was regarded to be more serious and actionable per se. Libel constituted in permanent communication. The gist of the tort is injury to the

claimant's reputation and the associated injury to his or her feelings. **(See Lauchaux (supra)).**

In **Lauchaux (supra)**, Lord Sumption while discussing the principles of common law on defamation further observed:

> **"...a working definition of what makes a statement defamatory, derived from the speech of Lord Atkin in Sim vs. Stretch [1936] 2 All ER 1237, 1240, is that "the words tend to lower the plaintiff in the estimation of right-thinking members of society generally." Like other formulations in the authorities, this turns on the supposed impact of the statement on those to whom it is communicated. But that impact falls to be ascertained in accordance with a number of more or less artificial rules. First, the meaning is not that which other people may actually have attached to it, but that which is derived from an objective assessment of the defamatory meaning that the notional ordinary reasonable reader would attach to it. Secondly, in an action for defamation actionable per se, damage to the claimant's reputation is presumed rather than proved. It depends on the inherently injurious character (or "tendency", in the time-honoured phrase) of a statement bearing that meaning. Thirdly, the presumption is one of law, and irrebuttable."**

The principles from the above passage, which I find applicable to defamation cases, may be summarized as follows: 1) what makes a statement defamatory is that the alleged defamatory words tend to lower the plaintiff in the estimation of right-thinking members of society generally; 2) the meaning of the defamatory words is not that which other people may actually have attached to it, but that which is derived from an objective assessment of the defamatory meaning that the notional ordinary reasonable reader would attach to it; 3) in an action for defamation actionable per se, damage to the claimant's reputation is presumed rather than proved. It depends on the inherently injurious character (or "tendency", in the time-honored phrase) of a statement bearing that meaning; 4) the presumption is one of law, and is irrebuttable.

The learned trial Judge was alive to most of the above principles and applied them in her Judgment. Indeed, upon re-evaluation of the evidence on

record, I am convinced that an objective assessment of the publication in issue gives the impression that the respondent is a person who lives a luxurious life, which he maintains by borrowing from commercial banks, including in this particular case, borrowing Ug. Shs. 10,000,000,000/=. There is an imputation that the respondent is unable to afford the luxurious life he leads; and an imputation of bankruptcy on the respondent, as a person who is unable to pay his debts. The conclusion from reading the publication in issue, in my view, is that there is an obvious lowering of the estimation of the respondent in the eyes of right thinking members of society,

The learned trial Judge, too, held that the publications in issue could be taken to have the absurd meaning that the respondent is of a dishonest and pretentious character. She therefore took a negative view with respect to the meaning of the words used in the publication in issue. The learned trial Judge's conclusions were justified in my view. I therefore reject as misconceived the contentions for the appellants that the learned trial Judge never considered the alleged defamatory words, and instead adopted the meanings given to the publication by the plaintiff and his advocates. Acceptance of the plaintiff's case was not a sign of abdication of judicial duty and or responsibility by the learned trial Judge, it means that the learned trial judge took the view that a reasonable person would give to the alleged defamatory words the interpretation given them by the plaintiff. She was fully entitled to do so. There is no question, in my view about the defamatory character of the publication in issue (P. Exhibit 1).

It was contended for the appellants in their written submissions that no evidence whatsoever was adduced to show that the respondent was shunned, ridiculed or otherwise exposed to hatred by reason of the impugned publication. I think this contention too was misconceived because, in actions for defamation per se, damaged is presumed and needs not be proved as required in other civil actions, especially where it is concluded by the Judge that on an objective assessment, the meaning of the alleged

defamatory words tends to lower the estimation of the plaintiff in the eyes of reasonable members of the society.

I would therefore uphold the conclusion of the learned trial Judge that the publication in issue was false and defamatory.

The above observations are to be read in addition to the reasoning expressed in the lead judgment of Hon. Justice Musota, JA on the point which I respectfully agree with.

Whether this Court should interfere with the award of damages made by the learned trial Judge.

I will now turn to consider the question of damages. Here it will be relevant to discuss the approach which the courts at common law took in matters regarding allegedly excessive awards of damages by the trial Court.

I will start by referring to the following passage from the judgment of Sir Thomas Bingham, M.R in **Eton Hercules John vs. MGN Limited [1995] EWCA Civ. 23**, where he was examining the question of damages in defamation cases:

> **"The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damage to his reputation; vindicate his good name; and take account of the distress, hurt and humiliation which the defamatory publication has caused. In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel; the more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people. A successful plaintiff may properly look to an award of damages to vindicate his reputation: but the significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libellous**

publication took place. It is well established that compensatory damages may and should compensate for additional injury caused to the plaintiff's feelings by the defendant's conduct of the action, as when he persists in an unfounded assertion that the publication was true, or refuses to apologise, or cross-examines the plaintiff in a wounding or insulting way. Although the plaintiff has been referred to as "he" all this of course applies to women just as much as men."

In **Cassell & Company Limited vs Broome & Another [1972] AC 1027**, Lord Hailsham observed that:

"In actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of restitutio in integrum has necessarily an even more highly subjective element. Such actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but, in case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge. As Windeyer J.well said in Uren vs John Fairfax & Sons Pty. Ltd. 117 C.L.R. at p. 150:

" It seems to me that, properly speaking, a man defamed does not " get compensation for his damaged reputation. He gets damages " because he was injured in his reputation, that is simply because he was " publicly defamed. For this reason, compensation by damages operates " in two ways, as a vindication of the plaintiff to the public, and as " consolation to him for a wrong done. Compensation is here a solatium " rather than a monetary recompense for harm measurable in money." This is why it is not necessarily fair to compare awards of damages in this field with damages for personal injuries. Quite obviously, the award must include factors for injury to the feelings, the anxiety and uncertainty undergone in the litigation, the absence of apology, or their affirmation of the truth of the matters complained of, or the malice of the defendant. The bad conduct of the plaintiff himself may also enter into the matter, where he has provoked the libel, or where perhaps he has libeled the defendant in reply. What is awarded is thus a figure which cannot be arrived at by any purely objective computation. This is what is meant when the damages in defamation are described as being " at large"."

I will, here, observe that at common law, damages in defamation were said to be at large, because, as Lord Hailsham observed, they could not be arrived

at by any purely objective computation. However, in arriving at the computation of damages, Lord Hailsham stated that, "the award must include factors for injury to the feelings, the anxiety and uncertainty undergone in the litigation, the absence of apology, or the reaffirmation of the truth of the matters complained of, or the malice of the defendant. The bad conduct of the plaintiff himself may also enter into the matter, where he has provoked the libel, or where perhaps he has libeled the defendant in reply."

Another important point to note is that awards of damages in defamation cases at common law were made by the jury, and there often was judicial reluctance to interfere with the awards when appealed against.

Therefore, the principles at common law, upon which an appellate court could interfere with an award of damages by the trial Court in defamation are not really coherent. But the appellate Courts often took the view that the awards made should be reasonable. **See: Cassell Co. Ltd case (supra). See also: Elton Hercules John (supra)** where Sir Thomas Bingham commented that: "Any legal process should yield a successful plaintiff appropriate compensation, that is, compensation which is neither too much nor too little. That is so whether the award is made by judge or jury. No other result can be accepted as just."

Sir Bingham also commented that in order to come up with the appropriate quantum of damages to be awarded in defamation cases, reference may be made to awards approved or made by the Court of Appeal, which provide a valuable pointer to the appropriate level of award in the particular case. He encouraged that practice because such awards would have been subjected to scrutiny in the Court of Appeal and should be able to provide some guidance to a jury called upon to fix an award in a later case.

I, therefore, draw the following principles from the above cases: 1) Damages in defamation cases are at large, meaning that there is a subjective element in their being awarded, which depends on the Judge hearing the case; 2) the subjective element must, however, be exercised in a manner that ensures that a just result is reached in each case, bearing in mind the need to award appropriate compensation which is neither too much nor too little; 3) decisions of appellate courts which have scrutinised previous awards offer

useful guidance on amounts which may be considered as appropriate awards.

I will now consider the appellants' objections to the respective awards, by the trial Court, of compensatory and the exemplary damages, separately below.

Compensatory damages.

Counsel for the appellants objected to the award of compensatory damages of Ug. Shs. 375,000,000/=, contending that the award was ridiculously large and unfair and was disproportionate and far greater than any previous award of damages for defamation in this country. Counsel submitted that the disproportionality of the award is in itself evidence that the learned trial Judge wrongly applied the principles on consistency in award of damages, and that the learned trial Judge should have considered awards made in similar cases.

As I have noted earlier, the law on defamation is a construct of the common law. At the common law, there was no recognized principle requiring the tribunals, in awarding damages in defamation to take into consideration previous awards made in similar cases. It was the practice that each case would be considered on its own merits. In **Rantzen v Mirror Group Newspapers (1986) Limited [1994] QB 670**, the court concluded stated that at that time it would not be right to allow reference to be made to awards by juries in previous cases of defamation.

But, as mentioned earlier, the awards made by the appellate Courts, after thorough scrutiny of the jury awards were accepted as guidance for future awards. This necessarily means that in reaching a decision on whether the award of damages is excessive, the awards approved by appellate Courts are a useful guiding factor.

This Court was not referred to any decision of either the Court of Appeal or the Supreme Court, to show the quantum of damages which has been approved as reasonable by those two appellate Courts. I have not been able to come across such a case either. However, I have noted the following High Court decisions:

Hon. Rebecca Kadaga vs. Richard Tusiime & 2 others, High Court Civil Suit No. 0056 of 2013 before **(Yasin Nyanzi, J.)** The successful plaintiff was, and still is, the Speaker of Parliament. She was awarded Ug. Shs. 80,000,000/= as general damages, the Court considering that she is

the "third ranking citizen (sic) of the country." She was also awarded Ug. Shs. 40,000,000/= as exemplary damages. Date of Judgment was 2nd September, 2016.

Ntabgoba v Editor-in-Chief the Newvision Newspaper and another [2004] 2 EA 234 (HCU), Tinyinondi, J. deemed it appropriate to award the successful plaintiff, then Principal Judge of the High Court with "compensatory general damages" inclusive of exemplary damages of Ug. Shs. 30,000,000/=. Date of Judgment was 17th March, 2004

Esther Kisaakye vs. Sarah Kadama, High Court Civil Suit No. 194 of 2013 before **(Musota, J. (as he then was))**, the successful plaintiff, a Justice of the Supreme Court was awarded Ug. Shs. 20,000,000/= as general damages; and Ug. Shs. 5,000,000/= as punitive damages. The Court stated that the claim of Ug. Shs. 200,000,000/= was on the "high side". Date of Judgment was 13th July 2017.

Faith Mwondha vs. Monitor Publications Ltd, High Court Civil Suit No. 11 of 2012 before **(Nyanzi, J.),** an award of Ug. Shs. 75,000,000/= was deemed appropriate to the plaintiff, then a Judge of the High Court and Inspector General of Government, in a successful suit for defamation.

In my view, however, the above awards were made by trial courts which were scrutinizing the peculiar facts in those cases, and can barely be said to offer any useful guidance in this matter. It is therefore necessary for this Court as an appellate Court to make a reasonable award in this matter, which will offer some guidance in future cases.

In order to make the decision on the appropriate awards, I would consider the following factors: 1) the injury to the feelings of the respondent; 2) the anxiety and uncertainty undergone in the litigation in the lower Court by the respondent; and 3) the absence of apology, or continuous affirmation of the truth of the defamatory publication even in this Court.

In the **Elton Hercules John case (supra),** Sir Bingham observed that before arriving at an appropriate award of damages, it was recommended for trial judges to draw the attention of juries to the purchasing power of the award they were minded to make, and of the income it would produce. This

was thereafter done, and juries were always reminded of the cost of buying a motor car, or a holiday, or a house.

After considering all the above factors, I am of the view that Ug. Shs. 375,000,000/= (Three Hundred Seventy-Five Million Shillings) is excessive. I would set it aside. For the reasons given in the lead judgment of Hon. Justice Musota, JA., on this point, with which I agree, I would substitute an award of Ug. Shs. 150,000,000/= (Ug. Shs. One Hundred and Fifty Million), for the award by the trial Court.

I will round off by commenting on the suggestion by counsel for the appellants that a large award of damages in defamation cases has the effect of restricting the right of freedom of expression. I highly doubt that defamatory expression is protected expression under the law of this country. There is a legitimate limitation on the enjoyment of rights, if such enjoyment will prejudice the rights and freedoms of others. **(See Article 43 (1) of the 1995 Constitution.)**

Exemplary damages

The respondent prayed for exemplary damages for the libel in issue. In his examination in chief at page 32 of the record, the respondent testified that his entitlement to exemplary damages was due to the harm done to his reputation by the appellants' conduct, when they intentionally published a false and defamatory article about him.

The learned trial Judge's decision to award exemplary damages to the respondent has been attacked by counsel for the appellants as having been based on wrong principles, specifically because: 1) it was erroneous to hold that the conduct of the appellants was calculated to make a profit, an issue which was neither pleaded nor proven by the respondent; 2) the learned trial Judge had reached her decision while ignoring the alleged apology by the appellants which showed that they had no ill motive to justify the award of special damages.

Denning, L.J in **Broome v Cassell & Co Ltd and another [1971] 2 ALL ER 187** quoted with approval the following passage in Mayne and McGregor on Damages, 12th Edition pp 196, 197, paras 207, 208 stating the law on exemplary damages at common law by 1961:

> **"Such damages (exemplary damages) are variously called punitive damages, vindictive damages, exemplary damages, and even retributory damages. They can apply only when the conduct of the defendant merits punishment, which is only considered to be so where his conduct is**

wanton, as when it discloses fraud, malice, violence, cruelty, insolence, or the like, or as it is sometimes put, when he acts in contumelious disregard of the plaintiff's rights...Such damages are recognised to be recoverable in appropriate cases of defamation."

In **Rookes vs. Barnard [1964] 1 All ER 367 at 410**, Lord Devlin stated that there are three categories of cases where it may be justified to award exemplary damages: The first category is cases where there has been oppressive, arbitrary or unconstitutional action by the servants of the government; Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff; thirdly, cases where exemplary damages are expressly authorised by statute.

Lord Devlin further stated that:

"In a case in which exemplary damages are appropriate, a jury should be directed that if, but only if, the sum which they have in mind to award as compensation (which may of course be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then they can award some larger sum."

Applying the above stated principles on exemplary damages to the present case, I would begin by considering whether the appellants herein can be said to have acted in contumelious disregard of the respondent's rights. It is worth mentioning that the respondent enjoyed a right to his good reputation which ought to have been respected by the appellants. The appellants knew or ought to have known that they would be violating the respondent's rights when they published the defamatory publication in issue. When they received a letter from the respondent's advocates demanding an apology (P. Exhibit 2), the appellants ought to have taken the letter seriously and published a sincere apology, and not the evasive apology (P. Exhibit 3) which they published titled "I don't have any debts in Bank-Wako Wambuzi."

The appellants need to be made an example of, to show everyone: 1) that libel does not pay; 2) to always think twice before taking a casual attitude when it comes to showing respect to the right of other Ugandans to their good reputation, by desisting from publishing defamatory statements against them; 3) if you publish the said defamatory statements, you must take all steps to assuage their hurt feelings resulting from the published defamatory statements. Nothing short of that is acceptable.

In view of the above analysis, I have not been persuaded to interfere with the award of Ug. Shs. 50,000,000/= as exemplary damages against the appellants. I would uphold that award.

As Hon. Justice Stephen Musota, JA., Hon. Justice Remmy Kasule., Ag. JA and myself are in agreement with the disposal of this appeal as proposed in the lead judgment of Hon. Justice Stephen Musota, JA, this appeal is hereby disposed of in the manner proposed in the lead judgment.

Dated at Kampala this .....20th.....day of .....July..... 2020.

.....

Elizabeth Musoke

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 128 OF 2017

(Arising from the decision of Hon. Lady Justice Patricia Basaza Wasswa in High Court at Kampala Civil Suit No. 305 of 2015)

1. THE RED PEPPER PUBLICATIONS LTD

2. THE EDITOR IN CHIEF, :::::::::::::::::::::::::::::::: APPELLANTS

THE RED PEPPER PUBLICATIONS

VERSUS

RTD. CHIEF JUSTICE SAMUEL WILLIAM:::::::::::: RESPONDENT

WAKO WAMBUZI

Coram: Elizabeth Musoke, Stephen Musota JJA, Remmy Kasule Ag.JA

JUDGMENT OF JUSTICE STEPHEN MUSOTA, JA

Background

On 11th October 2015, the appellants, in their Sunday Pepper Newspaper Vol.15, No.155 at pages 16 and 17 the appellants published the following story:

> ***"EXPOSED!100 Most Indebted Personalities Revealed",***
>
> ***Many of you think top Personalities/tycoons are in the comfortable zone, living a luxurious life.*** *However, maintaining and sustaining the status quo has pushed*

some of them to borrow from banks and other money lenders, a development that has some of them live in fear and misery over the failure to pay back. Today, Salt N' Pepper, unveils a list of top 100 highly respected personalities who are having sleepless nights over debts, collapsing businesses and financial woes in general. These will be published in series every Sunday until the list is exhausted. We hope you will learn a thing or two about this investigative story.....

CHIEF JUSTICE SAMUEL WAKO WAMBUZI

Retired three-time Chief Justice Samuel Wako Wambuzi needs no mention in the Ugandan legal circles where he served in very precarious times. After retiring from judicial service, he diverted all his energies to his investment in the education sector. He is the proprietor of the posh Namuwongo based Greenhill schools Sources reveal that the brilliant learned fellow is struggling with almost Shs. 10bn loan from a top city commercial bank. An insider intimated to us that the former judge secured a business loan to expand his Greenhill Schools in Buwatte and failed to service the loan like in the projected bank loan assessment program that is giving him sleepless nights. It is said that he is under pressure over the loan interest rates yet he had envisioned a peaceful retirement from Court case pressure".

After the publication of the story, the respondent through his advocates, wrote to the appellants a letter asserting that the story was false because the respondent has never been a shareholder in Greenhill Holdings LTD, did not make it fail to service any loan and that the respondent does not have any debt with the bank. The letter demanded an immediate apology and damages of Ug. Shs 750,000,000/= (Seven hundred fifty million Shillings) only.

Subsequently the respondent sued the appellants in the High Court for libel claiming general and exemplary damages, interest,

injunction and costs of the suit and contending that the appellant's purported apology given by the defendant did not amount to an apology at all.

The High Court heard the suit *inter-parties* and decided it in favour of the respondent and awarded him general damages for libel in the sum of Ug.Shs. 375,000,000/= (Three hundred seventy five million Shillings), exemplary damages in the sum of Ug. Shs. 50,000,000/= (Fifty million Shillings) and interest at the rate of 6% p.a on general and exemplary damages from the date of judgment till payment in full, permanent injunction and costs of the suit.

The appellants were dissatisfied with the judgment of the High Court, and filed this appeal on six grounds, four of which were substantive and two in the alternative. In the memorandum of appeal they are stated as follows;

1. "The Learned Trial Judge erred in fact and law when she failed to properly evaluate the evidence on record and came to a wrong decision that the publication was defamatory of and had defamed the respondent and awarded damages both general and exemplary damages to the respondent.
2. The Learned Trial Judge erred in fact and law when she assigned and attributed a meaning to the publication, viz that the publication meant and was understood to mean that the respondent is dishonest and of pretentious character whereas the publication did not bear and could not be interpreted to bear such a meaning by right thinking members of society thereby coming to a wrong decision.
3. In the alternative but without prejudice to ground 1 &2 above, the Learned Trial Judge erred in fact and law when she relied on wrong principles of law and misinterpreted and wrongly applied precedents and awarded general damages of Ug. Shs.375,000,000/= (Three seventy million shillings) to the respondent which was erroneous and highly excessive.

4. The Learned Trial Judge erred in fact and law when she held that EXP P3 tendered in Court did not amount to an apology and disregarded it when considering an award of damages thereby coming to a wrong decision.

5. The Learned Trial Judge erred in fact and law when she awarded exemplary damages to the respondent of Ug.Shs 50.000.000/= (Fifty million Shillings) whereas there were no conditions/circumstances warranting the award of exemplary damages.

6. In the alternative but without prejudice to the aforesaid ground of appeal, Learned Trial Judge erred in fact and law when she awarded exemplary damages of Ug. Shs. 50,000,000/= to the respondent which was erroneous, based on wrong principles of law and which was highly excessive".

Representation

At the hearing of the appeal, Mr. Michael Obua appeared for the appellants while Mr. Masembe Kanyerezi and Mr. Timothy Lugayizi appeared for the respondent.

Issues

At the conferencing, the parties raised two issues (as they referred to them) for this court to resolve, to wit:

1. ***Whether the appellant's publication in the Sunday Pepper Vol. 15 No. 115 at pages 16 and 17, under the title "Exposed! 100 most indebted personalities revealed" was defamatory of the respondent and false. (grounds 1 and 2)***
2. ***Whether the respondent is entitled to the general and exemplary damages that were awarded (grounds 3, 4, 5 and 6).***

Duty of this court

This is a first appeal arising from the decision of the High Court. The duty of a first appellate court is well settled. In the case of ***Kifamunte***

Henry v Uganda (Supreme Court Criminal Appeal No.10 of 1997) it was held that:

> ***"The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial Judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises as to which witness should be believed rather than another and that question turns on manner and demeanour the appellate Court must be guided by the impressions made on the Judge who saw the witnesses. However there may be other circumstances quite apart from manner and demeanour, which may show whether a statement is credible or not which may warrant a court in differing from the Judge even on a question of fact turning on credibility of witness which the appellate Court has not seen. See Pandya vs. R. (1957) E.A. 336 and Okeno vs. Republic (1972) E.A. 32 Charles B. Bitwire ys Uganda - Supreme Court Criminal Appeal No. 23 of 1985 at page 5.***

The duty of the Court of Appeal to re-appraise evidence on an appeal from the High Court in its original jurisdiction is set out in Rule 29 Rules of the Court of Appeal as follows;

> **"29(1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may;**
>
> **(a) re-appraise the evidence and draw inferences of fact, and**
>
> **(b) in its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial Court or by a commissioner;**
>
> **(2) .....**

(3) ....."

I shall abide by this duty as I resolve the issues in this appeal.

Appellants' submissions

Counsel for the appellant relied on the case of **Morgan Vs Ohams Press [1970] WLR** in which it was held that the question whether the words complained of are capable of conveying a defamatory meaning is a question of law and is therefore one calling for the decision of court. Counsel argued that the trial court did not interpret the meaning of the words claimed to be defamatory and submitted that a defamatory statement is one which may tend to lower the plaintiff in the estimation of right-thinking members of society generally. That untruth alone does not render an imputation defamatory. From the said article, it is not mentioned anywhere that the respondent took any loan from any commercial bank for personal purposes and did not attribute the alleged default in the loan payment on the respondent.

In addition, Counsel submitted that no evidence was adduced to show that the respondent was shunned, ridiculed or otherwise exposed to hatred or contempt by reason of the impugned publication.

While arguing issue two, counsel submitted that the trial Judge did not follow established principles in awarding general damages. The damages are disproportionate, unjust, unfair and unreasonable in the circumstances of the case. The award of Ug. Shs. 375 million was so large to the point that it was unfair to the appellants and it has the effect of restricting freedom of expression enjoyed by the media. The trial Judge took into account the reputation of the respondent yet the article was published over 14 years after his retirement. Secondly as to the circulation of the appellant's newspaper, no evidence was adduced at the trial of the number of copies averagely published in a day. The apology was also not considered by the trial Judge hence the enormous award of damages to the respondent.

Respondent's submissions

In reply, counsel for the respondent submitted that the impugned article was understood to mean that the respondent, in common with 100 others, was extravagant, fickle and lived beyond his means and financed that lifestyle through borrowing for consumption from Banks and other money lenders. It also portrayed the respondent as an irresponsible individual who failed to plan for his retirement during his working life. In addition, the evidence of the respondent was that the publication was false and he has never been a shareholder in Greenhill Schools.

Counsel referred to the definition of a defamatory statement in **Halsbury's Laws of England 4th Edition Vol. 28** as a statement which tends to lower a person in the estimation of right thinking members of society generally or to disparage him in his trade or business. The appellants were given an opportunity to publish an apology but what was published did not amount to an apology but was an attempt to mock the respondent. The article differed in its body and text by including several items that were not in the pre-agreed text.

Counsel relied on the Supreme Court decision in **Crown Beverages Ltd Vs Sendu Edward S.C.C.A No. 01 of 2005** on the legal position that an appellate court will not interfere with an award of damages unless such award was arrived at having acted on the wrong principle of law. He submitted that there is no basis for interference with the trial Judge's award of general damages as it was arrived at based on clearly articulated principles of law and was not erroneous considering the law on damages for defamation.

Resolution by Court

Issue 1 ***Whether the appellants' publication in the Sunday Pepper Vol. 15 No. 115 at pages 16 and 17, under the title "Exposed! 100 most indebted personalities revealed" was defamatory of the respondent and false? (Grounds 1 and 2)***

For ease of reference, I will re-state the publication by the appellants in their Sunday Pepper;

"EXPOSED! 100 Most Indebted Personalities Revealed,

Many of you think top Personalities/tycoons are in the comfortable zone, living a luxurious life. *However, maintaining and sustaining the status quo has pushed some of them to borrow from banks and other money lenders, a development that has some of them live in fear and misery over the failure to pay back. Today, Salt N' Pepper, unveils a list of top 100 highly respected personalities who are having sleepless nights over debts, collapsing businesses and financial woes in general. These will be published in series every Sunday until the, list is exhausted. We hope you will learn a thing or two about this investigative story.....*

CHIEF JUSTICE SAMUEL WAKO WAMBUZI

Retired three-time Chief Justice Samuel Wako Wambuzi needs no mention in the Ugandan legal circles where he served in very precarious times. After retiring from judicial service, he diverted all his energies to his investment in the education sector. He is the proprietor of the posh Namuwongo based Greenhill schools. Sources reveal that the brilliant learned fellow is struggling with almost Shs. 10bn loan from a top city commercial bank. An insider intimated to us that the former judge secured the business loan to expand his Greenhill Schools in Buwatte and failed to service the loan like in the projected bank loan assessment program that is giving him sleepless nights. It is said that he is under pressure over the loan interest rates yet he had envisioned a peaceful retirement from Court case pressure".

This Court holds the opinion that ***"Every man or woman is entitled to have his or her reputation preserved and inviolate."*** A person's reputation is his or her property. Depending upon the perception of that man or woman, reputation may be more valuable to him or her than any other property. Reputation is the state of being held in high esteem and honour or the general estimation that the public has for a person. Reputation depends on opinion, and opinion is the main basis of communication of thoughts and information amongst humans. In other words, reputation is nothing

but enjoyment of good opinion on the part of others. So, the right to have reputation involves right to have reputation inviolate or intact.

Defamation is the act of harming the reputation of another by making a statement to a third person. The wrong of defamation consists in the publication of a false and defamatory statement concerning another person without lawful justification. see ***Black's Law Dictionary 9th Ed. pages 479 and 480***. Defamation can be in many forms. It can be in words, written or spoken or it can be through pictures or cartoons among others.

Gatley on Libel and Slander, 8th Edition at page 15 paragraph 31 has this to say;

"The gist of the tort of Libel and slander is the publication of a matter (usually words) conveying a defamatory imputation. A defamatory imputation is one to a man's discredit, or which tends to lower him in the estimation of others, or to expose him to hatred, contempt or ridicule or to injure his reputation in his office, trade or profession, or to injure his financial credit. The standard of opinion is that of right thinking people generally."

In a defamation suit, the plaintiff must prove the following elements:

1. The defendant made a statement about the plaintiff to another.

2. The statement was injurious to the plaintiff's reputation in the eyes of the right thinking members of society.

3. The statement was false.

4. If the plaintiff is a public figure, or was involved in some newsworthy event or some other event that engaged the public interest, then the defendant must have made the false statement intentionally or with reckless disregard of the plaintiff's rights.

5. That there are no applicable privileges or defences.

In ***Black's Law Dictionary 8th Edition, a*** defamatory statement means one that tends to injure the reputation of a person referred to in it. The statement is likely to lower that person in the estimation

of reasonable people and in particular to cause that person to be regarded with feelings of hatred, **contempt, ridicule,** fear or dislike.

The test used to determine whether a statement is capable of giving defamatory meaning was discussed in the persuasive case of ***A.K. Oils & Fats (U) Ltd Vs Bidco Uganda Limited HCCS No. 715 of 2005 where Bamwine J (as he then was), relied on Sim Vs Stretch [1936] 2 ALL ER 123 A.C.***, where Lord Atkins held that; the conventional phrase "exposing the plaintiff to hatred, ridicule and contempt" is probably too narrow. The question is complicated by having to consider the person and class of persons whose reaction to the publication is the test of the wrongful character of the words used. He proposed in that case the test: "would the words tend to lower the plaintiff in the estimation of the right thinking members of society generally? This position has been adopted with approval in Uganda in ***Honourable Justice Peter Onega Vs John Jaramoji Oloya HCCS No. 114 of 2009.*** And I agree with this position of the law as stated by the High Court Judge.

Therefore A defamatory statement is one which has a tendency to injure the reputation of a person to whom it refers by lowering him or her in the estimation of the right thinking members of society generally and in particular to cause him/her to be regarded with feelings of hatred, contempt, ridicule, fear or dislike and typical examples are an attack upon the moral character of the plaintiff attributing to him/her any form of disgraceful conduct such as crime, fraud, dishonesty among others; ***per Justice Allen in Geoffrey Ssejjoba Vs Rev. Patrick Rwabigonji HCCS No. 1 of 1976.***

In this case counsel for the appellants faults the trial Judge for failing to determine for herself whether or not the words used in the publication were actually defamatory and that nowhere in the judgment does the learned trial Judge attempt to interpret any meaning by herself of the words complained of so as to determine whether they convey any defamatory meaning.

First I must disagree with counsel for the appellants on this allegation. At page 61 of the record of appeal the Learned Judge states while resolving issue 1 which was couched in the same terms as the issue 1 in this appeal that and I quote;

> ***"...under this issue I am required to determine whether the words of the publication were false and whether the publication which unequivocally referred to the plaintiff, brought him into hatred, contempt or ridicule or if the publication lowered him in the estimation of right-thinking members of society generally or if it caused him to be shunned or avoided. To-wit; whether the words in the publication mean what the plaintiff alleges them to mean, as viewed in the mind and eyes of the reasonable reader/person"***

The learned trial Judge goes on at page 62 of the record of appeal to find and I quote

> ***"From the outset, it is apparent that the assertions and evidence of the plaintiff that the publication was false were uncontroverted. I agree with the Plaintiff's Counsel that the publication was true as contended in their written statement of defence. In converse the gist of DW1's evidence was an acknowledgment that the publication was false..."***

On the alleged defamation of the plaintiff by the Publication the learned trial Judge had this to say at pages 63-65 of the record of appeal;

> ***"The Plaintiff (PW1) invited court to conclude that what was meant by the words published by the Defendant in EXB P.1 was that;***
>
> ***He is a kind of person who pretends to do one thing, when he is doing something else and that the sum total being that he is dishonest person that borrows***

money to improve a school but instead uses the money to live a luxurious life and worse still, fails to pay.

In their submissions plaintiff's counsel also assigned a similar meaning to the publication (refer to paragraph [9] (i) – (iii) above)

I agree with the plaintiff and his counsel. I am satisfied that in the mind and in the eyes of reasonable reader/person, the same natural and ordinary meanings they assign to the false statements in the publication, would be imputed. Particularly the absurd meaning that the plaintiff is of dishonest and pretentious character...

...I hold the view therefore that the publication no doubt, disparaged the plaintiff in his highly esteemed reputation as three (3) time Chief Justice of the Republic of Uganda. It lowered him in the estimation of right-thinking members of society. The picture painted of him by far breached all tenets of professional ethics and conduct of a retired Judicial Officer of his stature"

Clearly the learned trial Judge agreed with counsel for the respondent/plaintiff on the meaning of the publication and made it clear in the Judgment. I therefore do not find any reason to fault or disagree with the findings of the trial Judge. The trial Judge also evaluated the evidence and gave reasons why she agreed with the plaintiff's case and disagreed with the defendant's case.

I have also re-evaluated the evidence and it appears the appellant/defendant did not put up any legally recognizable defence. The falsity of the publication was simply unopposed and the question of whether or not the publication was defamatory was for the court to decide as a matter of law and the court did so. The principles on which the learned trial judge relied in making her decision to agree with counsel for the respondents are clearly stated in the judgment at pages 59-62 of the record of appeal.

Therefore I am satisfied, on a balance of probabilities, that the statements complained of by the respondent/plaintiff are defamatory. The respondent being a retired Chief Justice, Judge in more than one Jurisdiction in the East African Region and Justice of the Supreme Court of Uganda and an outstanding professional in Law has a sensitive reputation which naturally would be harmed by any sort of allegation that he is a dishonest and pretentious person who does not pay his debts. The defendants/appellants did not deny that they made the publications. People and publishers must be careful before they speak or publish anything. Before they publish any allegations they must have the evidence to back up whatever perceptions they put out to the public.

If this court condones the conduct of the appellants against the respondent then a person of good repute will suffer at the mercy of reckless speakers or publishers who have audience.

The respondent, as a person, is entitled to his reputation and has a right to keep the same inviolate. The appellants were reckless with their words especially in the headline that suggested that the respondent is among the 100 most indebted personalities who are under pressure over loans. Specifically the most damaging of all the words used by the appellants are on page 12 of the record of appeal;

"...sources reveal that the brilliant learned fellow is struggling with almost Shs 10bn loan from a top city commercial bank"

The ordinary meaning of these words is that the respondent holds himself out as brilliant and reputed person but he is struggling to meet his loan obligations. The falsity of these statements was undisputed both at the trial in the High Court and in this appeal. In fact the statement still pushes the narrative/innuendo that the respondent is pretentious.

The appellants therefore should suffer the consequences of that absolute disregard of the effect of their words. Any right thinking members of society would lower their estimation of the respondent upon reading or hearing the said toxic words of the appellants or reading them.

The respondent, in his evidence at pages 28-32 of the record of appeal stated that the appellant's publication included him amongst the '100 most indebted tycoons' which was a defamatory imputation to the respondent. In addition, the respondent stated that he is not the proprietor of Greenhill schools and that his wife, who is now deceased, together with other people founded the school and her interest went to their children when she died.

He stated further that he does not have any loan with any bank which he is struggling to settle and the 3 billion loan that Greenhill Academy had was settled 6 months ahead of the publication made by the appellant. PW1 also testified that he does not live an extravagant life and does not finance his life through borrowing like was portrayed by the appellant in their publication.

PW1 at page 30 of the record of appeal stated that he worked in the legal sections of government, Ministry of Justice and was on the Bench in 1969 as a Judge of the High Court. In 1972-1975, the respondent became Chief Justice of Uganda and between 1975 and 1977, he was President of the Court of Appeal for East Africa until the East African Community collapsed. He served as a Judge of the Court of Appeal of Kenya between 1977 and 1979. He returned to Uganda and again served as the Chief Justice of Uganda between 1979 and 1980. From 1980 to 2001, he served as Chief Justice of Uganda, heading the Uganda Judiciary until when he retired as Chief Justice upon clocking the compulsory age of 70.

PW2 testified that he has known the respondent as a very organized person and when he read the publication, he was perplexed because the person he knew was not the person portrayed by the publication.

For the appellants, DW1 testified that the respondents have always associated the respondent's name with Greenhill and their intention was to write about businesses with loans and the people behind the businesses. That upon receiving the respondent's notice of intention to sue, the appellants sincerely apologized and also discovered that the loan had been paid six months back.

I therefore find no fault in the trial Judge's conclusion and finding that the statements published by the appellants as stated in the plaint were defamatory in nature.

It is therefore my finding that the trial Judge properly evaluated the evidence before her, properly attributed and assigned a meaning to the publication that the respondent was a dishonest and pretentious character and accordingly did not err in law and fact in making the findings she made.

The Apology

The appellant, in ground 4 of the appeal, argues that exhibit P3 amounted to an apology.

The appellants were given an opportunity to mitigate their wrong by publishing an apology to the respondent entitled 'APOLOGY TO RTD CHIEF JUSTICE SAMUEL WAKO WAMBUZI'. It was transmitted by the respondent's lawyer's notice of intention to sue letter dated 16th October 2015. The appellants did not do so, but thay instead published an article whose title was a denial by the respondent of his indebtedness. The Article was marked Exh. P.3 and was published on 1st November 2015 and it stated;

> ***"I DON'T HAVE ANY DEBTS IN BANKS-WAKO WAMBUZI***
>
> ***In our newspaper of the 11th October 2015, we published an article under the title: EXPOSED! 100 MOST INDEBTED PERSONALITIES REVEALED, which included a caption referring to Rtd Chief Justice Samuel William Wako Wambuzi and Greenhill Schools. We have since established that neither Rtd Chief Justice Samuel Wako Wambuzi nor Greenhill Schools have any indebtedness as referred to in the article and the statements in the article (in regard to Wambuzi and Greenhill Schools) were incorrect.***
>
> ***We sincerely apologize to Rtd Chief Justice William Wako Wambuzi and Greenhill Schools for any embarrassment the publication may have caused.***

However, according to his lawyers MMAKS Advocates, Greenhill Holdings Ltd, under which Greenhill Schools fall, "does not have any borrowing with any commercial bank that it failed to service and the facilitythat it had borrowed for Greenhill School in Buwatte was fully paid off over six months ago leaving the School with no borrowed exposure to speak of." According to the lawyers, Wambuzi is not a shareholder in Greenhill Schools for when his Late wife Gladys Wambuzi passed on, the shareholding was taken over by the children".

This court in its duty to review the evidence adduced at the trial notes that the publication title of the apology was framed as a quote of what the respondent contends as opposed to an expression of regret or remorse by the appellants after having defamed the respondent. In addition, the title of the alleged apology included several items that were not in the pre-agreed text from the respondent's lawyer. It was even stated in direct speech of the respondent.

An apology is an admission of error or discourtesy accompanied by an expression of regret. According to **Black's Law Dictionary 2nd Edition**, an apology is a public plea for forgiveness to undo some damage. The appellants herein fault the learned trial Judge for finding that the appellants' alleged apology did not amount to an apology.

The learned trial Judge held that and I agree with her;

"I have carefully read EXB P.3 and I hold the view that an article whose;

a) Heading is written in direct speech purportedly by the plaintiff as follows; "I don't have any debts in Banks- Wako Wambuzi",

b) Content (the bulk) is written in reported speech referring to words by the plaintiff's lawyers,

Cannot by any measure, amount to an apology by the defendants.

In addition, the defendant's unsuccessful plea of truth of the publication in itself, defeats any suggestion that the article of November 1st 2015 (EXB P.3) was an apology. The defendants cannot be allowed to rely on a plea of truth when it is convenient to do so, then rescind that position and rely on a purported apology in anticipation of the benefit of mitigation. In my view, that amounts to approbation and reprobation and the defendants are estopped."

From the above excerpt, I agree entirely with the holding of the trial Judge that both the title and text of the article published on November 1st 2015 was not an apology in itself. Even if it were to be deemed an apology it would not remove the liability of the appellants for defaming the respondent. Apology is not a legally recognized defence to a suit grounded in the tort defamation. My understanding of an apology in a suit of defamation is that an apology is not a defence to a claim of defamation. If a publisher apologises, that apology does not constitute an admission of fault and cannot be used to determine liability in a defamation action. It is only supposed that a properly published apology minimises the damage done by the original publication. This is a factor that may have some relevancy in the assessment of damages to be awarded for the defamation done.

However, in this case the alleged apology was not an apology, and even if it were, it was not properly published, as the appellants edited the same and made it look like any other article in their newspaper. It was as if they were reporting news rather than making a proper apology. Counsel for the respondents took the trouble to draw for the appellants the apology which the respondent was interested in but the appellants decided to maneuver and publish something not even close to an apology.

Although counsel for the appellants submits that the trial Judge did not rely on any authorities to come to the conclusion that the

publication did not amount to a proper apology, I do not find anything wrong with that. An apology is not a question of law. It is a question of fact and the ordinary meaning of the word apology is known. An apology is an expression of regret or remorse, pure and simple. It must not be marinated in statements of justification or denial of the wrong done. Those statements if carried together with the purported apology set the published statement on a collision course with its intended purpose. I agree with the holding by the trial Judge that the way the so called apology was given by the appellants amounted to approbation and approbation on their part. The appellants were estopped from doing so.

Ground 4 therefore fails.

Issue 2 (Grounds 3, 4, 5 and 6)

Whether the respondent is entitled to the general and exemplary damages that were awarded.

The learned trial Judge awarded the respondent general damages worth 375,000,000/= and exemplary damages of 50,000,000/=.

It is now well settled that an appellate Court will not interfere with the award of damages made by the trial Court unless the assessment of such damages by the trial Court was based either on an erroneous principle of law, or the award was outrageously high or ridiculously low, so as not to reflect the measure of damages the successful party to the suit ought to have been awarded. General damages are a sum representing the natural consequences of the wrong done to the respondent.

The case of **John Vs MGN Ltd [1996] 2 ALL ER 35** set down the measure and assessment of general damages for defamation. **Sir Thomas Bingham MR** stated that;

> ***"The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damage to his reputation; vindicate his good name, and take account of***

the distress, hurt and humiliation which the defamatory publication has caused. In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel; the more closely it touches the plaintiff's personal integrity, professional reputation, honor, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of the publication is also very relevant: A libel published to millions has a greater potential to cause damage than a libel published to a handful of people..."

It is my considered view that the respondent, having served on the bench in Uganda and East Africa and having been a Chief Justice of Uganda before retirement had his personal integrity pulled down by the appellant's publication.

Although this is so, the sum awarded by the trial Judge was not in keeping with trends in the award of damages in defamation cases at High court. I thus find the award of 375,000,000/= although not outrageous but unusual in such matters. The trial Judge did not explain why she departed from the trends in awards of damages in such cases. Although the reputation of the respondent as proved before her is indeed impeccable it is not enough to justify the departure from the trends for award of damages at High Court level.

In the case **Specioza Wandira Kazibwe v The Independent Publications Ltd & Ors (CIVIL SUIT NO. 105 OF 2010)** a total sum of Shs. 200,000,000 was awarded on both general and punitive damages. The plaintiff was a former vice president of Uganda. In **Best Kemigisha v The Red Pepper Publications Ltd (CIVIL SUIT NO. 162 OF 2012)** the High Court awarded a total sum of 83,000,000 shillings on both general and punitive damages. The plaintiff is a cultural leader. In **Katuntu v The Editor in Chief of the Red Pepper Newspaper & Another (CIVIL SUIT NO. 301 OF 2014)** the High Court awarded 90 million shillings on both general and punitive damages. The plaintiff is a public figure and a senior advocate of the High Court of Uganda of twenty –six (26) years standing and a Member of Parliament of the Republic of Uganda.

I do agree with the submission of counsel for the respondent that the contention/submission by the appellant that the respondent had retired from his position as Chief Justice 14 years earlier at the time he was defamed and that he was at that time only a mere director in a private limited liability company and no longer in the constitutional line of succession having ceased to be Chief Justice is cynical, absurd, disrespectful and mistaken and demonstrates why damages in defamation cases in Uganda ought to be escalated to a prohibitive level of awards.

It appears the appellants expected a small limited assessment of damages that is why they did not take the attempt to settle the matter seriously. They, in a playful manner, made a publication of a further statement and dubbed it an apology. I have considered the Kenyan case of **Samuel Ndungu'u Mukunya vs Nation Media Group Limited & Another High Court Civil Suit No.420 of 2011**, relied upon by learned counsel for the respondent, and agree with counsel for the respondent that there is need for our Ugandan courts to revise the awards of damages in defamation cases upwards especially for important personalities.

Indeed, Ugandan jurisprudence is lagging behind on this jurisprudence. The reputation of Ugandan personalities or public officers is no less worthy of protection or vindication than their Kenyan equivalent. The claim by counsel for the appellants that the respondent retired 14 years before the defamation is not tenable. It is no reason to allow his reputation to be abused.

The submission on circulation of the appellants' newspaper though important in assessment of damages was not supported by any evidence on the numbers of their newspaper circulation in order to mitigate the damages. The appellant cannot therefore turn around and fault the Judge for this. The fact that the article was run only once is also no basis for mitigating damages because defamation is defamation whether run once or twice. As I have already held in this judgment, the alleged apology was no apology. Instead of apologizing the appellants seized the opportunity to re-offend by republishing the

false information before they purported to say we are sorry. Therefore I do not find this to be a mitigating factor.

For the above reasons, I would reduce the award of Ug. Shs. 375,000,000= to Ug. Shs. 150,000,000= (one hundred and fifty million) but maintain the amount on the punitive damages awarded by the trial Judge because exemplary damages, also referred to as punitive damages, represent a sum of money of a penal nature given for pecuniary loss and mental suffering. They are deterrent in nature and aimed at curbing the repeat of the offending act and are given entirely without reference to any proved actual loss suffered by the respondent (see **WSO Davies v. Mohanlal Karamshi Shah [1957] 1 EA 352)**. Accordingly, I find that an award of Shs. 50,000,000/= as exemplary damages was appropriate in the circumstances of the case. Both general damages and punitive damages are to be paid by the appellants jointly and severally.

Consequently, issue 2 partially succeeds.

Having reduced the General damages awarded, the appeal partially succeeds. Since the larger part of the appeal has failed, I accordingly award the respondent only 3/4 of the taxed costs on appeal and the appellant shall pay the costs in the lower court.

Dated this 20th day of July 2020

Stephen Musota
Justice of Appeal.

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

Civil Appeal No. 128 of 2017

(An Appeal arising from the decision of the Hon. Lady Justice Patricia Basaza-Wasswa in High Court Civil Suit No. 305 of 2015)

1. The Red Pepper Publications
2. The Editor in Chief, the Red Pepper Publication Limited :::::::::::::: Appellants

Versus

Rtd. Chief Justice,
Samuel Wako Wambuzi :::::::::::::::::::::::::::::::::::::: Respondent

Coram: Hon. Lady Justice Elizabeth Musoke, JA
Hon. Mr. Justice Stephen Musota, JA
Hon. Justice Remmy Kasule, Ag. JA

Judgment of Remmy Kasule, Ag. JA

I have had the opportunity to read in draft the Judgments of the Honourable Lady Justice Elizabeth Musoke, JA and of the Honourable Justice Stephen Musota, JA. I agree with the conclusion in both Judgments that the learned trial Judge of the

High Court was right to hold that the Rtd. Chief Justice of Uganda, Samuel Wako wambuzi was defamed by the Article of the appellants published of him in the appellant's Sunday Pepper Newspaper dated 11th October, 2015 Vol. 15 No. 155 at pages 16 and 17. As such the Rtd Chief Justice is entitled to both general and aggravated damages for being so defamed. Grounds 1 and 2 of the appeal whereby the appellants contended that the publication in issue was not defamatory and therefore no damages should have been awarded by the learned trial Judge to the respondent therefore fail.

I too, in agreement with both Their Lordships, with the greatest respect to the learned trial Judge of the High Court, find the quantum of the general damages of Ug. Shs. 375 million awarded to the Rtd Chief Justice by reason of the said defamation to be too high and thus erroneous.

I take this position being conscious of the position of the law as to under what circumstances may an appellate Court interfere with an award and assessment of damages by the trial Court. The law is that an appellate Court will not interfere with an award of such damages made by the trial Court unless that trial Court has acted on a wrong principle of law, or that the amount awarded, is so high or so low, as to make the award to be an entirely erroneous estimate of damages to which the plaintiff is entitled. The application of this principle in our jurisdiction has been over a long history. The then Court of Appeal for Eastern Africa in **Rambhai Mahjibhai Patel vs The Patidar Samaj & Another (1944) EACA 1** enunciated and applied this principle. In the Supreme Court of

Uganda **Civil Appeal No. 01 of 2005: Crown Beverages Ltd vs Sendu Edward,** His Lordship Justice Oder, JSC (RIP) stated in his Judgment, with the concurrence of the rest of the Court on this point, that:

> *"In Owen vs Sykes (1936) IKB 192, the Court of Appeal of England felt that although if they had tried the case, in the first instance, they would have probably awarded a smaller sum as damages, yet they would not review the finding on damages as they were not satisfied that the trial Judge acted upon a wrong principle of law or that the amount awarded as damages was so high as to make it an entirely erroneous estimate of the damages to which the plaintiff was entitled".*

The same Supreme Court of Uganda also applied the same principle of law in **Civil Appeal No. 12 of 2007: Bank of Uganda vs Betty Tinkamanyire (unreported).**

Where the trial Court fails to act within the above stated principles in making an award of damages, then on appeal, the Court of Appeal of first instance, must re-assess the award of damages made by the trial Court, by giving a most careful consideration of all the pertinent factors in the case. While each case depends on its own facts, as no two cases are the same in all respects, the general picture, the whole circumstances, and the effect of the injury(ies), whether of character or physical on the body of the particular person seeking the damages, must be looked at. The award should keep in line with past relevant awards in comparable cases of other Courts of the country, and where appropriate, with those from other comparable jurisdictions for the sake of fairness

and certainty. The value of money and the cost of living in the country at the material time, are matters that can be taken into account by the Court in assessing the damages. See: **Bhogal v Burbidge and Another [1975] EA 285.**

As to the role of awards from foreign jurisdictions, the observation of Law, JA, in **Kimothia v Bhamra Tyre Retreaders and Another [1971] EA 81** gives some guidance. He stated:

> *"In my view awards made by foreign Courts, although helpful as a guide, do not necessarily represent the standards which should prevail in Kenya, where the conditions relevant to the assessment of damages such as wages, rents and cost of living generally may be very different".*

The above observation applies with equal force and effect to the circumstances of this case, as much reliance was put by the learned trial High Court Judge of Uganda on Court decisions of the Courts of Kenya in assessing the award of damages in this case. This aspect of the case shall be dealt with later on in this Judgment.

At this stage, it is appropriate to first resolve the issue of, whether or not, the learned trial Judge erred when she held that the apology offered by the appellants did not amount to an apology at all and thus disregarded it when assessing both the general and exemplary damages she awarded.

An apology, which is a regretful acknowledgment of wrong doing and or failure, properly made by the maker of a defamatory statement, may mitigate damages, but does not affect and is no defence to the liability for the maker of the defamatory statement.

At trial, in an action for defamation, the defendant, may give evidence in mitigation of damages that, with the knowledge of the plaintiff, the said defendant made and/or offered an apology to the plaintiff before the Court action was commenced.

A full apology should consist of a complete withdrawal of the defamatory imputation and an expression of regret by the maker of the imputation for having made it. See: **Winfield on Tort: 8th Edition pp321-322.**

On 16th October, 2015, the respondent, through his lawyers, MMAKS Advocates, demanded in writing of the Editor-in chief of the appellants, for an immediate apology to the respondent. The apology, according to the respondent's lawyers' demand letter, had to be in the wording and size set by the respondent and had to be made within five (5) days from the date of that letter. The same letter also demanded of the appellants to pay to the respondent damages of Ug. Shs. 750 million within ten (10) days.

The apology demanded to be published was tendered in evidence as exhibit P2. It was titled *"Apology to Rtd. Chief Justice Samuel Wako Wambuzi"*. The main demand of the respondent was for the Editor, Red Pepper, and not someone else, to publish an apology as regards the article in the Newspaper of the 11th October, 2015, titled *"Exposed! 100 Most Indebted Personalities Revealed"* which included a caption referring to the respondent and Greenhill Schools. The words of the apology had to be:

> *"We have since established that neither Rtd Chief Justice Samuel William Wako Wambuzi nor Greenhill Schools have any indebtedness as referred to in the Article and the*

statements in the Article were incorrect. We sincerely apologise to Rtd. Chief Justice Samuel William Wako Wambuzi and Greenhill Schools for any embarrassment the publication may have caused".

Dw1, who testified for the appellants at the trial, stated that the appellants complied with the respondent's demand by publishing an apology in their Sunday Pepper of 1st November, 2015, Exhibit P3, which reproduced the apology except in the following respects;

i. The demanded heading of the apology that is ***"Apology to Rtd Chief Justice Samuel Wako Wambuzi"*** was substituted with the heading ***"I don't have any debts in Banks – Wako Wambuzi".***

ii. At the end of the draft apology that was sent to the appellants by the respondent's lawyers, was added:

"However, according to his lawyers MMAKS Advocates, Greenhill holdings, under which Greenhill Schools fall, "does not have any borrowing with any commercial bank that it failed to service and the facility that it borrowed for Greenhill School in Buwatte was fully paid off over six months ago leaving the school with no borrowed exposure to speak of". According to the lawyers, Wambuzi is not a shareholder in Greenhill schools for when his late wife Gladys Wambuzi passed on, the shareholding was taken over by the children".

At trial, Pw1, the respondent and Pw2, Edward Sempa Lugayizi, a Rtd. Judge of the High Court of Uganda, maintained in their testimonies that the apology of the appellants as published, Exhibit P3, was a sham because:

i) The change in the heading made the article not to be an apology from the editor of the appellants, but rather a newspaper Article whereby the respondent was denying on his own that he was not indebted to any banks:
"Yes, I am denying having debts, but it is not an apology coming from the editor. It is a mockery". So testified the respondent.

As to Pw2, he stated under cross-examination:

"Yes, I read the apology also, the purported".

You only have to look at the heading to know that it is not an apology. An apology is to say "am sorry for the wrong I did to you" ..... I say purported apology, look at the heading. The Red Pepper was reporting him to have denied having debts".

Dw1, maintained in his testimony to Court that:

"We published an apology as the letter (from MMAKS Advocates) had demanded".

ii) As to the addition to the apology, Pw1 asserted in his testimony that:
"To think that I can accept this as an apology. Instead of the paper speaking they caused my Counsel to speak for them. In other words, they don't accept any wrong doing".
While for Pw2:
"The whole Article is a mockery of an apology. .....

The totality of it is a mockery when you take the heading and the contents, you will know that sincerely it was not an apology but something purporting to be an apology".

Dw1 in his testimony to Court justified the addition to the apology draft thus:

"According to any Editor, he said the letter of the lawyers clarified everything in the apology as the lawyers put it".

The learned trial Judge considered the evidence of Pw1, Pw2 and that of Dw1 as well as exhibits P2 and P3. She held that because the article, Exhibit P3, had a heading written in direct speech that: *"I don't have any debts in Banks – Wako Wambuzi"* and the rest of its contents were in reported speech referring to words by the plaintiff's lawyers, the article could not, by any measure, have amounted to an apology to the Rtd Chief Justice.

Further, the learned trial Judge also held that since the appellants had failed to prove the truth in the first publication itself, that fact itself alone, defeated the claim by the appellants that the article of 1st November, 2015, Exhibit P3, was an apology. The learned trial Judge thus concluded:

"The defendants cannot be allowed to rely on a plea of truth when it is convenient to do so, then rescind that position and

rely on a purported apology in anticipation of the benefit of mitigation. In my view, that amounts to approbation and reprobation and the defendants are estopped".

With respect to the learned trial Judge, she was not right to hold that because the appellants failed to prove the truth of the contents of the article, the subject of the defamation, Exhibit P1, therefore they could not issue and offer a valid apology to the respondent as they attempted to do through Exhibit P3. I so hold because it is not the law that for an apology to be valid and effective, the maker of that apology must first satisfy that the contents of the publication, the subject of the defamation, must be true. An apology being a regretful acknowledgement of wrong doing or failure, can be made by any one responsible for the publication of the defamatory matter, to the one injured by the defamation, even when one making and offering the apology acknowledges that the defamatory matter was not truthful.

The learned trial Judge was thus in error, to hold as she did and the said error adversely affected, to the prejudice of the appellants, the assessment of the damages awarded by the trial Judge for the defamation done to the respondent.

The learned trial Judge, again with respect, did not in any way explain, how the contents of the apology to the effect that:

".....we have since established that neither Rtd. Chief Justice Samuel Wako Wambuzi nor Greenhill Schools have any indebtedness as referred to in the Article and the statements in the

article were incorrect. We sincerely apologise to Rtd Chief Justice Samuel William Wako Wambuzi and Greenhill Schools for any embarrassment the publication may have caused",

ceased to have and to bear their natural and ordinary meaning as an apology to the respondent to one reading the whole article, exhibit P3, from beginning to end.

The learned trial Judge also did not explain how the fact that the heading of the said Article had been changed by the editor, but leaving the contents of the rest of the apology unchanged and in the same words as dictated by the respondent's lawyers, rendered the said apology not to be an apology at all.

On reviewing and re-assessing the evidence, I am unable to hold that the change of the heading of the apology from:

"Apology to Rtd Chief Justice Samuel Wako Wambuzi" to *"I don't have any debts in Banks-Wako Wambuzi"* in any substantial way deprived of this publication its natural and ordinary meaning of being an apology whereby the appellants acknowledged establishing, after the publication of 11th October, 2015, that the respondent and Greenhill Schools did not have any indebtedness with any of the banks referred to in the article and that statements to that effect in the article were incorrect. By reason thereof, they were sincerely apologizing to the respondent and Greenhill Schools for any embarrassment the publication may have caused.

On the same basis, the learned trial Judge did not show how the addition by the appellants to the draft of the proposed apology,

drawn up by Counsel for the respondent, changed the meaning of those particular paragraphs of the apology, so as to justify the conclusion of the learned trial Judge that the appellants' purported apology was no apology at all.

On reviewing the evidence on this point, I find that, though the appellants were in error to substitute the heading of the apology, and to add on the apology an additional section based on **"according to MMAKS Advocates",** lawyers of the respondent, as well as not showing that the apology is by the "Editor, Red Pepper", these errors did not deprive the apology given by the appellants of its total validity. May be this might have happened to a mere casual reader of the publication, just glancing at the same, without reading the same from beginning to the end. There was however no evidence of this at the trial. I, find, on the basis of the evidence adduced, that an ordinary reader of the Article, Exhibit P3, from beginning to the end, would come to the conclusion that, the errors pointed out notwithstanding, the appellants, who of course included their Editor in Chief, made an apology to the respondent by acknowledging in writing that the defamatory article of 11th October, 2015 was incorrect, thus false, expressed regret and sincerely apologized to the respondent and Greenhill Schools for any embarrassment so caused.

The learned trial Judge was thus in error to hold as she did. This made her to further err in assessing the damages for the defamation of the respondent. Ground 4 of the appeal therefore succeeds.

Grounds 3, 5 and 6, of the appeal fault the learned trial Judge for having erred in fact and law when she relied on wrong principles of law, misinterpreted and wrongly applied Court precedents when she awarded to the respondent general damages of Ug. Shs. 375,000,000= and Ug. Shs. 50,000,000= exemplary damages which amounts were unjust, excessive, disproportionate and unreasonable, having been based on a wrong application of legal principles.

I have already held that the learned trial Judge ought to have taken into consideration, when assessing the damages, as a mitigating factor, the fact that the appellants had made and published an apology to the respondent. The learned trial Judge, with respect, was in error for not having done so.

The learned trial Judge in assessing the damages considered the reputation of the respondent as a three-time Chief Justice of the Republic of Uganda. The learned trial Judge was correct in this regard.

The submission for the appellants implying that since the respondent had retired as Chief Justice and as a Judicial Officer in 2001, that is almost 14 years ago to the date of publication of the impugned article; and was thus no longer in the constitutional "line of succession", therefore his reputation could not have been damaged by the impugned article, is wrong and has no basis in law. The Rtd Chief Justice's entitlement to a well-earned stature and esteem as an outstanding Judicial Officer and a jurist in Uganda and in East Africa ought to be respected and protected by everyone, appellants inclusive. Whoever disparages the same is

liable in damages to the respondent, as rightly held by the trial Judge.

It is also my finding that the learned trial Judge was right, while assessing the damages, to take into consideration the gravity of the libel against the respondent.

The appellants published the defaming article without first taking any steps to find out from the respondent and other credible sources, whether the allegations in the impugned publication were true or false. The respondent, whose photograph also appeared in the newspaper as part of the article, was portrayed to the whole world as one of those Ugandans exposed by the appellants' newspaper as being pretentious, irresponsible and one who likes to live beyond one's means just through sheer borrowing from banks and failing to repay what he borrowed and irresponsibly spent on self-aggrandizements.

The appellants offered no plausible evidence to counteract the assertion of the respondent as to the gravity of the libel against the respondent. The decision of the learned trial Judge in this regard is thus upheld as correct.

The learned trial Judge also rightly considered the wide circulation of the appellants' newspaper that published the defamatory article as one of the considerations for assessing the damages awarded. The submission of Counsel for the appellants that it was erroneous of the trial Judge to find that the publication of the defamatory article against the respondent had been wide spread and extensive is not backed up with the evidence adduced at the trial.

The respondent, as plaintiff, in the suit, pleaded in paragraph 4(a) of the plaint that the defamatory article had been published in "Sunday Pepper" which was:

"A newspaper with very large circulation and even larger readership throughout Uganda and regionally and which is also published worldwide on the internet".

While, in the appellant's written statement of defence, there was a general denial of paragraphs 3,4,5,6,7,8,9 and 10 of the plaint, there was no specific denial of the particular assertions contained in paragraph 4(a) of the plaint as to the wide circulation of the "Sunday Pepper" in Uganda, East Africa and worldwide on the internet.

Dw1, the appellants witness, did not in his testimony to Court dispute what the respondent pleaded in paragraph 4(a) of the plaint. When cross-examined on the issue Dw1 just casually stated:

"I don't know the figures of our circulation of the Sunday Pepper".

He thus never denied the publication had been widespread and extensive.

The learned trial Judge was thus right, to take into consideration the fact of the wide circulation of the appellants newspaper throughout Uganda, East Africa and even elsewhere in the world on the internet, as one of the factors in assessing the general damages awardable to the respondent.

As to awards in other cases, as already stated earlier in this Judgment, a Court assessing damages is under a duty, unless

circumstances dictate otherwise, to maintain consistency with past Court awards in cases of similar circumstances. This is subject to the overall consideration that no two cases are similar in all respects.

The Court assessing damages may seek guidance from cases of foreign Courts applying common law jurisdictions, but in such instances, the guidance from those cases must be subjected to the local conditions, both economic and social, or otherwise, that obtain in Uganda.

The learned trial Judge relied, in the main, on the Uganda High Court case of **Hon. Rebecca Kadaga vs I. Richard Tusiime, the Red Pepper Publications Ltd I & Isaac Tugume: High Court Civil Suit No. 56 of 2013** and the High Court of Kenya case of **Samuel Ndungu Mukunya vs the Nation Media Group Limited and Alphonse Shiundu: Civil Suit No. 420 of 2011 [2012] e KLR** in assessing the general damages that she awarded to the respondent.

In the **Hon. Rebecca Kadaga case (Supra),** the Sunday Pepper of 09.09.2012 defamed the plaintiff, the Speaker of Uganda Parliament, hence the head of the legislature, the number 3 arm of State in the Constitutional leadership set up in Uganda.

The defamation article was that Hon. Rebecca Kadaga was among the more than 300 tycoons to lose their properties through public auctions by reason of having failed to meet their financial obligations of re-paying the money borrowed. The article further alleged that Hon. Rebecca Kadaga had borrowed the money to

construct a hotel in Kamuli District, Uganda. The article turned out to be false.

The trial Court found that the defendants had been driven by malice to publish the article so as to tarnish the plaintiff's reputation and also to make money. The Court awarded Hon. Rebecca Kadaga general damages of Ug. Shs. 80 million.

As to the Kenya High Court case of **Samuel Ndungu'u Mukunya (Supra),** the facts were that the defendants had defamed the plaintiff, a Senior Advocate and Church Catechist, by publishing an article in the Sunday Nation newspaper of 10th July, 2011, titled: *"Act on this JSC Cronyism Lawyers Tell Mutunga".*

The article falsely implied that the plaintiff, who at the time of the trial, was an acting resident Judge in Bungoma, Kenya, had been fraudulently included in the list of persons to be interviewed for the post of a Judge, when his name had not been shortlisted as a candidate. The article further asserted that the explanation by the chairman, Judicial Service Commission, that the name of the plaintiff had not been included amongst those to be interviewed, was a mere error of omission by the Judicial Service Commission, was not a genuine explanation, because if it was, it would not have taken 22 days to correct such an error.

The article then further alleged that what had happened was due to the fact that the plaintiff was a close friend of the Chairperson, Public Service Commission, and the two had close connections with the political class, right up to State House. The plaintiff was thus corrupting his way into the Kenya Judiciary.

The plaintiff, who had been contacted by the defendant newspaper staff before the publication of the article, had clarified the position to the defendants, as to how he had applied in time to be a candidate as a Judge for the High Court or Supreme Court of Kenya, and that it was through a genuine error that his name had not been included in the list of candidates. The error had been genuinely corrected by later including his name in the list of candidates. The defendants had, inspite of the plaintiff's stated clarification, gone ahead with their publication. The plaintiff thus contended that the disregarding of the clarification he had given, constituted malice on the part of the defendants.

The learned trial Judge of the Kenya High Court found the article to have been totally false and awarded to the plaintiff general damages of K. Shs. 15,000,000= aggravated damages of K. Shs. 3,500.000= and damages in lieu of an apology K. Shs. 1,500,000= thus total damages of K. Shs. 20,000,000=.

Being guided by the awards of Ug. Shs. 80,000,000= general damages in the **Hon. Rebecca Kadaga case (Supra**) and K. Shs. 15,000,000= general damages in the Kenyan case of **Samuel Ndungu'u Mukunya (supra)** and also noting that general damages awarded by Kenya Courts involving important personalities that included a retired Court of Appeal Judge, a Cabinet Minister and prominent Advocates in Kenya were in the region of K. Shs. 6,000,000= to K. Shs. 15,000,000=, the learned Uganda High Court trial Judge proceeded to award to the respondent Rtd Chief Justice Ug. Shs. 375,000,000= general damages.

There is merit in the submission of Counsel for the appellants that the award made by the learned trial Judge is the highest award of damages for defamation in Uganda and is not consistent with past awards of general damages for defamation made by Uganda Courts.

While the learned trial Judge was entitled to consider awards by the Kenya Courts in cases having a resemblance to the case like that of the respondent, and also due to the fact that the respondent had in the past served in both the Kenyan and also due to in the East African Judiciaries, the learned Judge, with respect, had to interpret awards, by the Kenya Courts, as much as possible, in compliance with the economic and social conditions obtaining in Uganda and also in keeping with awards made by Ugandan Courts in comparable cases. The fact that, at the material time, the learned trial Judge delivered her Judgment on 4th May, 2017 in favour of the respondent against the appellants, the currency exchange rate was such that one Kenya shilling was equivalent to Uganda shillings 35.15= was one of such factors that the learned trial Judge ought to have considered. The learned trial Judge, with respect did not do so, although she noted in her Judgment this rate of exchange between the currencies of Kenya and Uganda.

With the greatest respect, the learned trial Judge was not justified to make an award of general damages of Ug. Shs. 375 million by reason of its being so excessive and disproportionate to past awards for defamation by Uganda Courts in cases having some similarity in a number of aspects like the case the subject of this Judgement. To that extent, grounds 3, 5 and 6 of the appeal as

relate to the quantum of general damages awarded to the respondent.

In respect of the quantum of exemplary damages of Ug. Shs. 50 million awarded to the respondent, the learned trial Judge justified the same on the basis that the same were to punish and deter the appellants from repeating the defamation and also because the conduct of the appellants was to make a profit beyond the compensatory damages payable to the respondent.

On reviewing the evidence adduced at trial, I find that in addition to the reasons given by the trial Judge, the conduct of the appellants justified the award of exemplary damages and the quantum assessed, to the respondent. There was absence of any evidence from the appellants of any attempt on their part to verify before publication the truth and accuracy of the defamatory statements from the respondent himself or some other independent reliable source. The appellants thus acted in violation of **Rule 2(1) and (2) of the Fourth schedule: Professional Code of Ethics for Journalists and Editors,** promulgated under the **Press and Journalist Act, Cap 105, Laws of Uganda.**

The quantum of Ug. shs. 50 million as exemplary damages is proportionate to the High Court award of Ug. Shs. 40 million exemplary damages awarded to **Hon. Rebecca Kadaga case (Supra).** As already stated, the case of Hon. Rebecca Kadaga (Supra) had some similarities with this case of the Rtd Chief Justice respondent.

Accordingly the award of Ug. Shs. 50 million by the learned trial Judge as exemplary damages to the respondent. Is upheld. Accordingly grounds 5 and 6 (in the alternative) of the appeal are disallowed as having no merit.

Having set aside the award of general damages of Ug. Shs. 375 million to the respondent against the appellants as being too excessive, it is now necessary to assess what in the circumstances is the appropriate award of general damages to the respondent, as plaintiff in the original suit, against the appellants, as original defendants.

The assessment has to be done on the basis of the principles that courts of law have applied in assessing damages in defamation cases. The principles were well enunciated upon by the **Court of Appeal** in England in the case of **John v MGN Limited [1997] QB 587** cited and followed by the High Court in Uganda in **Hon. Rebecca Kadaga's case (Supra).** These are that:

1. The Court has wide latitude in awarding damages in an action for defamation.
2. In assessing damages in an action for libel, the Court is entitled to look at the whole conduct of the defendant from the time the libel was published down to the time of Judgment.
3. An award in the case of defamation is not compensation for the plaintiff's damaged reputation but is rather an indication to the public and a consolation for a wrong done to that plaintiff.
4. Whether the defendant could have, with due diligence, verified the facts of the defamatory story or whether the said defendant was simply reckless or negligent, must be taken into account.

5. The level of damages should be such as to act as a deterrence and to instil a sense of responsibility on the part of the defendant.
6. The gravity of the libel; and
7. The extent of publication are also factors to be considered.

In addition to the above principles, there is the other principle that a Court of law assessing damages, should ensure that comparable injuries, defamatory or otherwise, shall, as far as possible, be compensated by comparable awards, keeping in mind, the correct level of awards made by Courts in past Court decisions. See: **David Kiprugut & Another V Peter Okebe Pango Kenya Court of Appeal CA 68 of 2004 [2007] e KLR.**

It follows therefore that where the comparable past Court decisions are not of local Uganda Courts, guidance may be sought from them as long as, and as much as possible, the said Court of Uganda relate the said guidance to the social-economic and other Uganda conditions.

Proceeding on the basis of the above stated principles, the person of the respondent was, as already noted at the time of the impugned publication, one of extreme esteem in Uganda, East Africa and in the whole world. He had served and excelled as a Uganda Government Public Servant, Judge of the High Court of Uganda, a three time Chief Justice of Uganda, a Justice of the East Africa Court of Appeal and at one time its head, with jurisdiction over Uganda, Kenya and Tanzania at that material time. He had also served as a member of the Kenya Court of Appeal. He had

retired from service as Chief Justice of Uganda, on clocking the mandatory 70 years.

At trial, as the learned trial Judge rightly found, the appellants failed to establish the truth of the assertions in the defamatory article written and published by the appellants against the respondent.

Therefore the holding of the trial Court that, on the basis of the evidence of the respondent Pw1, and his witness, Pw2, a retired Judge of the High Court of Uganda, which evidence was not rebutted by the only defence witness, Dw1, that the respondent was greatly defamed by the appellants through the impugned article was correct.

In the article the respondent was presented as a dishonest person, who borrows huge sums of money on the pretext that he is improving the Greenhill Schools, in which his late wife had some interests before she died, when in fact he was borrowing the money to support his luxurious, irresponsible life styles. He had, as a result, failed to repay that money to the lending bank. According to Pw2 the article suggested that the respondent:

"..... was living beyond his means, he had debts he could not pay and that he was irresponsible the way he was living".

The defamatory article thus greatly injured the reputation of the respondent. Yet the appellants were under an obligation to greatly respect him since, in retirement, he was being regarded as one whose achievements and reputaion are an inspiration to generations, both young and old.

As to the conduct of the appellants from the time the libel was published to the time of Judgment, the evidence adduced, contrary to what the learned trial Judge held, proved that the appellants offered an apology and published that apology in their newspaper issue of Sunday Pepper November 1st, 2015. In the said apology the appellants clearly admitted that the contents of the impugned publication were incorrect. They sincerely apologized to the respondent and the Greenhill schools for any embarrassment the publication may have caused. This apology minimizes in some measure the quantum of general damages that the appellants are to be ordered to pay to the respondent.

However, it is also a proved fact that the appellants did not verify the truth of the contents of the impugned article and did not offer any opportunity to the respondent to put right what was false, before publication to the general public. The appellants thus violated **Regulations 2 and 3 of the Professional Code of Ethics for Journalists and Editors**, as per the **Fourth Schedule to the Press and Journalist Act, Cap. 105, Laws of Uganda**. This misconduct and breach increases the amount of general damages to be awarded against the appellants.

As to circulation, the appellants publish and circulate the Red Pepper newspaper throughout Uganda, East Africa and on the internet elsewhere in the world. It is thus published to whoever chooses to read it, of the reading public. It is thus reasonable to conclude that the impugned article received wide circulation. This calls for a substantial award of damage because the circulation was wide, free, unrestricted and could be accessed by whoever

chose to access it, in Uganda, East Africa, and worldwide on the internet.

By way of examination for comparison purposes, The New vision Newspaper was found to have defamed a serving Principal Judge by publishing allegations that falsely implied that the said learned Principal Judge was corrupt in carrying out his official duties. This was in High Court of Uganda **HCCS No. 113 of 2003: Ntabgoba Herbert v the New Vision.** The Principal Judge, third in rank in the leadership of the Uganda Judiciary, was awarded general damages of Ug. Shs. 30 million.

In another case of **HCCS No. 0166 of 2008: Hon. Lady Justice L.E.M. Mukasa Kikonyogo vs the New Vision & Another,** the then Lady Justice of the Uganda High Court, was awarded general damages Ug. Shs. 52 million for being defamed again by the same New Vision Newspaper. The said paper carried out a publication that implied corruption on the part of the Honourable Lady Justice in carrying out her official judicial work.

The same High Court of Uganda in **HCCS No. 11 of 2012: Lady Justice Faith Mwondha vs Monitor Publications Ltd, the plaintiff** Lady Justice, then serving as a Judge of the High Court, was awarded shs. 75 million general damages for a defamation that disparaged her in the performance of her judicial work.

Earlier, before the above considered Court cases, in the case of **Justice Sempa Lugayizi vs Teddy Ssezi Cheeye and Uganda Confidential (Supra),** the defendants in the case published an article where they insinuated that the learned Judge had committed a crime of abusing his judicial office by being party to

a corrupt deal. He was then a Senior Judge of the High Court and very upright morally. The defendants, on the other hand, were throughout the trial callous and contemptuous. The Court awarded the plaintiff learned Judge Ug. Shs. 15 million general damages.

In the already considered case of **Hon. Rebecca Kadaga (Supra),** the defendants in the case in Sunday Pepper of 9th September, 2012, published an article, more or less on the same lines, as the one that the same Red Pepper Newspaper was to publish later on against the respondent Rtd Chief Justice on 11th October, 2015.

The High court awarded her, as being a third ranking citizen of the country by virtue of her office of being Speaker of Parliament, general damages of Ug. shs. 80 million for the damage caused to her reputation. An additional sum of Ug. shs. 40 million was awarded to her as exemplary damages.

The Judgment in **Hon. Rebecca Kadaga's case (Supra)** was delivered on 02.09.2016 while the one of the respondent in this appeal was delivered less than a year later on 04.05.2017.

In both cases of Hon. Rebecca Kadaga and that of the respondent, defamatory articles were more or less on the same subject matter of over borrowing, spending lavishly and failing to repay the money borrowed.

Those defamed in both cases are members of the legal profession who had pursued their respective careers to become leading citizens, the respondent in this appeal having been for three (3) times, the second highest citizen in the country after the President,

that is being a three time Chief Justice of Uganda and thus head of the Judiciary, the second Arm of State.

For Hon. Rebecca Kadaga, in the Rebecca Kadaga case (Supra) she was a very Senior Lawyer in private legal practice, the first female lawyer in Uganda to open up private chambers of legal practice. She was also a leading politician, a publicly elected Member of Parliament for many years. She was a leader of the people and also within her political party. She had attained the office of Speaker of Parliament, thus head of the third Arm of State, the Legislature.

It follows therefore that the general damages to be awarded to the respondent Rtd Chief Justice in this appeal, should be proportionate, as much as possible, to the awards in the past cases of the Uganda High Court cited above, as those cases share a number of aspects that have already been pointed out in common with the case of the respondent in this appeal.

However, the award of the learned trial Judge did not show this with regard to the award of general damages to the respondent in this appeal on the evidence available. The Rtd Chief Justice has more esteem in Uganda, East Africa and in the rest of the world than Hon. Rebecca Kadaga. But that esteem is not too far apart from that of Hon. Rebecca Kadaga. While in the **Hon. Rebecca Kadaga case (Supra)**, the award of general damages was Ug. Shs. 80 million, the learned trial Judge in the case of the respondent awarded Ug. Shs. 375 million general damages. This was an amount almost five times the award made in the **Rebecca Kadaga case (Supra)**, when the two cases happened close to each other in

terms of the time and also had some similarity in terms of subject matter of the publications and status of the two personalities involved.

The learned trial Judge put too much reliance on the **Kenya High Court Nairobi case No. 420 of 2011: Samuel Ndungu Mukunya vs the Nation Media Group Ltd & Alphonse Shiundu [2012] e KLR,** where a sum of K. Shs. 15 million was awarded as general damages, to the plaintiff, a Senior Advocate in Kenya, and who subsequently had become appointed a Judge of the High Court of Kenya and was also a Chancellor of a Church in Kenya. The same plaintiff had also earlier served as a Judge of the Interim Independent Constitutional Dispute Resolution Court of Kenya which Court was wound up in 2011. The facts of that case have already been stated earlier on in this Judgment.

At the rate of exchange obtaining at that time 29.06.2015 of 1 Kenya shilling to Ug. Shs. 35.15=, which fact this Court, like the trial High Court took judicial notice of, those damages, amounted to Ug. Shs. 537,250,000=. It follows therefore that due to the difference in the value of the Kenya and Uganda shilling when the economics of the two countries are compared with each other, at that material time, the award of damages made in the Kenya case of **Samuel Ndungu Mukunya case (Supra)** had no bearing at all in comparison with the award of Ug. Shs. 80,000,000= general damages in the **Hon. Rebecca Kadaga case** awarded by the High Court in Uganda only a year earlier on 02.09.2016, or for that matter with earlier smaller awards in Uganda made in **Ntabgoba Herbert vs The New Vision (Supra)** of Ug. Shs. 30 million, **L.E.M.**

Mukasa – Kikonyog vs New Vision & Another (Supra), of Ug. shs. 52 million, **Faith Mwondha vs Monitor Publications Ltd (Supra)** of Ug. Shs. 75 million, and the Ug. Shs. 15 million general damages awarded to Justice Lugayizi of the High Court in **Justice Sempa Lugayizi vs Teddy Ssezi Cheeye and Another (Supra).**

It is worth noting also that, even in comparison to past authorities of the Kenya Court of Appeal and the Kenya High Court, the award of K. Shs. 15,000,000= general damages in the **Samuel Ndungu Mukunya** case, was rather too high given those past Kenya Court authorities, which in spite of the stated rate of exchange between the Kenya and Uganda shilling, may be of some guidance to us in Uganda.

In **Kenya High Court at Mombasa Case No. 102 of 2000: Daniel Musinga t/a Musinga & Co, Advocates -vs- the Nation Newspapers Ltd [2005] e KLR** general damages of K.Shs. 10 million, equivalent at the time i.e. 06.05.2005 to about Ug. Shs. 351,500,000= were awarded to an advocate, who later became a puisne Judge of the High Court in Kenya for a published libellous statement in a local daily of the defendants.

The **Kenya Court of Appeal in Jonson Evans Gicheru vs Andrew Morton & Another (2005) e KLR**, made a composite award of K. Shs. 6 million i.e. equivalent to Ug. Shs. 210 million, damages to a Judge of the Court of Appeal who had been defamed by a publication.

The **Kenya High Court (Khamoni, J.) in Amrital Bhagwanji Shah vs the Standard Limited & Another Civil Case No. 1073 of 2004 [2008] e KLR,** awarded a retired Kenya Court of Appeal

Judge, general damages of K. shs. 6 million i.e. Ug. Shs. 210 million for being defamed in a publication. Exemplary damages of K. shs. 1 m, i.e. Ug. Shs. 35,150,000=were also awarded.

The **Kenya Court of Appeal in Nation Media Group Ltd & 2 Others V John Joseph Kamotho & 3 Others [2010] e KLR,** upheld an award of K. Shs. 6 million i.e. Ug. Shs. 210 million, general damages and K. Shs. 1 million i.e. Ug. Shs. 35,150,000= aggravated damages made by the Kenya High Court on 01.07.2005 in favour of a Cabinet Minister, who happened also to be a prominent politician with a reputation and who had been defamed by a publication.

Finally, in **Wilson Kalya & Another vs Standard Limited and 2 Others [2002] e KLR**, the Kenya High Court (Tunya, J.) awarded the 1st plaintiff, a prominent advocate, general damages of K. Shs. 9 million i.e. Ug. Shs. 316,635,000= for being defamed in a publication. He was also awarded K. Shs. 2 million i.e. Ug. Shs 70,300,000= aggravated damages and K. Sh. 300,000= i.e. Ug. Shs. 10,545,000= damages in lieu of apology.

From the above referred to Kenya Court authorities, it is safe to conclude that translated to the Uganda situation, the general damages awarded in Kenya equivalent to prominent people in the legal profession and in other Sectors, are on average in the range of K. Shs. 7,400,000= i.e. Ug. Shs. 260 million.

Taking into consideration the very high professional reputation of the respondent to this appeal both in Uganda, East Africa and elsewhere in the world, the fact that the appellants published the defamatory article without verifying its truth and without affording

the respondent any opportunity to react to the same before the same was published to the general public, all this entitles the respondent to substantial general damages on the one hand.

However, on the other hand, on re-appraising all the evidence adduced at trial, it was a proved fact that the appellants took steps to publish and did publish an acknowledgement that what they had published of the respondent was false and they made and published an apology to him.

While the changes that the appellants made in the heading of the apology as well as the failure to clearly indicate that the apology was from the editor of the appellant's publication, and also adding to the apology the words *"However, according to his lawyers MMAKS Advocates"*, may not have brought out the sharp message of the apology as demanded by their respondent through his lawyers' demand letter, it remains a proved fact that, to the reader who carefully read the whole article from beginning to end, the message of the apology that the publication about the respondent had been false and the appellants were apologizing to the respondent for that, came out clearly.

Account has also been taken of the past Court awards here in Uganda as well as those from Kenya, some of which the learned trial Judge relied upon in assessing the general damages she awarded to the respondent. For the reasons already stated, the awards from the Courts in Kenya need to be considered, taking into consideration the economic, social and other considerations pertaining to Uganda, in contrast to those obtaining in Kenya. The learned trial Judge thus erred in allowing herself to be over

influenced by the awards of general damages in the **Kenya High Court Case of Samuel Ndungu' Mukunya (Supra)** and the cases cited therein without subjecting the same to the economic, social and other conditions peculiar to Uganda.

Having considered all the relevant factors as set out above, the sum of Ug. Shs. 150,000,000= (one hundred fifty million shillings only) is assessed as appropriate general damages for the respondent for the injury done to him by being defamed by the appellants.

In conclusion, this appeal fails as to grounds 1 and 2 and both grounds stand dismissed as having no merit.

The appeal however succeeds in respect of grounds 3 and 4 in that the award to the respondent of Ug. Shs. 375,000,000= general damages for the defamation is held to be highly excessive. Accordingly the same is set aside and substituted with an award of Ug. Shs. 150,000,000= general damages for the injury suffered by the respondent as a result of the published defamation.

The appeal fails as to grounds 5 and 6 as to the award and the quantum of the exemplary damages awarded to the respondent. The learned trial Judge rightly proceeded to award and to assess the exemplary damages at Ug. Shs. 50 million, which decision is upheld.

The order of the learned trial High Court Judge that interest be paid on both the general and exemplary damages on the terms set and ordered by the trial Court is also upheld.

As to costs, the appellants have only partly succeeded in grounds 3 and 4 of the appeal in having the general damages reduced. Otherwise they have lost all the other grounds of the appeal. It is therefore only fair that the respondent is awarded ¾ of the costs of this appeal and the full costs of the suit in the Court below.

It is so order.

Dated at Kampala this 20th day of July **2020**.

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Remmy Kasule
Ag. Justice of Appeal