THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)

HCT-00-CC-CS-244 OF 2002

PETER KAGGWA ……..……. PLAINTIFF

VERSUS

1. NEW VISION PRINTING &
   PUBLISHING CORPORATION ……. DEFENDANTS
2. WILLIAM PIKE
3. TIMOTHY BUKUMUNHE

BEFORE: HON. JUSTICE LAMECK N. MUKASA

JUDGMENT:

The Plaintiff, Peter Kaggwa, an advertising and promotion coordinator with the Uganda Telecom Limited, filed this suit against the Defendants, jointly and severally, seeking general damages, exemplary damages and costs for libel contained in an article published by the first defendant in Volume 17 No. 76 of the New Vision Newspaper dated Saturday 30th March 2002. The first defendant is statutory corporation carrying on business of a daily newspaper publication called "New Vision". The second defendant is the Chief Editor or Editor in Chief of the New Vision and the Chief Executive Officer of the 1st Defendant. The third Defendant was a columnist for the New Vision. The article complained of run as follows:-

"UTL'S PETER KAGWA PAYS SHS 2M FOR A FROLIC

> Will the real Slim Shady please stand up? Hot whispers from the scandal corridors of our dusty town have it that we have a new bad boy in the house. Peter Kaggwa a.k.a PK of UTL, was apparently caught pants down with a Tender Ronnie (an under age girl) by the TR (Tender Ronnie's) mother. The good woman threw a fit and called the police. It was not so quietly settled out of court for a paltry Shs2m. Who knew virgins came so cheap."

At the scheduling conference it was agreed as a fact that the publication complained of was made, that it was false and that the Plaintiff was entitled to damages. Only one issue was framed for the Court's decision being quantum of damages. In his pleadings the plaintiff prayed for general damages, exemplary damages, interest on the above and cost of the suit.

In paragraph 6 of their written statement of defence the defendants pleaded as follows:-

> "Following the plaintiffs threat to sue, the defendant's offered to compensate him. In the course of subsequent negotiations and meetings of the parties, the plaintiff insisted on payment of Ugshs4,000,000/= ---- in consideration for his forbearance to sue, which counter – offer was accepted by the defendants in a letter dated 22/4/2002 attached hereto as annex "A"

Referenced letter exhibit D3 stated:-

> "Please refer to your various correspondences and our meeting regarding this matter. Your proposal of four million shillings as damages in full and final settlement of this matter is acceptable to us"

The only defence witness Mr. Robert Kabushenga testified that he had, on behalf of the defendant's, held the negotiations towards a settlement, first with Mr. Mathias Sekatawa and later Mr. Daudi Mpanga advocates in M/S Mugerwa Masembe & Co Advocates Counsel for the Plaintiff with whom the said compensation was agreed upon. That the defendants' acceptance was further confirmed by the defendants' letter to the Plaintiff exhibit D3 but that the plaintiff and his Counsel in their letter of 29th April 2002, exhibit D1 reneged on the agreement and opted to file this suit. That in their letter dated 29th April 2002, exhibit D2, the defendants protested the Plaintiff's rescission of the agreement. Mr. Denis Owori, Counsel for the defendant, submitted that the negotiations between the plaintiff's counsel and the defendants which resulted into the offer for settlement by the Plaintiff, which offer was accepted by the defendants, resulted into a valid and binding settlement under the contractual doctrine of Accord and Satisfaction. He contended that the Plaintiff was estopped from bringing this suit. He relied on the case of British Russian Gazette ltd V/S Associated Newspapers Ltd (1933) 2 K. B. 616 where accord was defined in the following holding:-

> "--- the purchase of a release from an obligation, whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself, the Accord is the agreement by which the

obligation is discharged. The satisfaction is the consideration which makes the agreement operative"

Counsel argued that the offer verbally discussed with Mr. Daudi Mpanga, the Plaintiff's Counsel and therefore agent with authority to act on the plaintiffs behalf, which offer was in writing accepted by the defendants vide exhibit D3 amounted to a valid agreement binding on the plaintiff and the defendants and was thus a valid "accord." That the sum of UgShs4,000,000/= verbally communicated by the Plaintiff's Counsel, which the defendants agreed to pay was the "satisfaction."

Regarding the negotiation the Plaintiff's counsel submitted that they were without prejudice negotiations and thus inadmissible in evidence. He referred to the Defendant's letter to the Plaintiff's counsel dated 22nd April 2003, Exhibit D3 which he termed the originator of the whole matter and contended that it was marked "without prejudice"

It is the uncontradicted evidence of the defence witness Robert Kabushenga that he on the Defendant's behalf held meetings with the Plaintiff's Counsel in one of which held with Mr. Daudi Mpanga compensation to the Plaintiff was proposed at Shs4,000,000/=. The law is that so long as Counsel is acting for the party in a case and his instructions have not been terminated, he has full control over the conduct of the case and has apparent authority to compromise all matters connected with the matter See B.N. Technical Services Ltd V/S Francis X Rugunda H.C. Misc. Appl. No. 75 of 1998, Bulandina Nankya & Anor V/S Bulasio Konde (1979) HCB 239, Roberts Nakaana & Anor V/S Joyce Nayiga H.C. Misc. Appl. 829 of 2001. The Plaintiffs Case before this court was handled by M/s Mugerwa & Masembe Advocates and all correspondence exhibited were either to or from the said firm

of advocates. Therefore they had instructions at all material times to conduct this matter with apparent authority to bind the Plaintiff.

However, the defendant's evidence shows that the proposal made on behalf of the Plaintiff in the meeting the defence witness held with Mr. Daudi Mpanga was still subject to the defendant's written acceptance. The defendant's acceptance was communicated in the letter dated 22nd April 2002, Exhibit D3. This letter was headed "WITHOUT PREJUDICE."

The general rule is that letters written during a dispute between parties which are written for the purposes of settling a dispute and which are expressed to have been made "without prejudice" cannot generally be admitted in evidence. See Halsbury's Laws of England 4 Ed Vol. 17 page 151 para 121, Smith Shropshire District Council V/S Amos (1987) 1 ALLER 340. Section 22 of he Evidence Act deals with admissions made on condition that evidence of thereof shall not be given. The section states:-

> " In civil cases, no admission is relevant if it is made either upon an express condition that evidence of it is not to be given or circumstances from which the court can infer that the parties agreed together that evidence of it should not be given."

By heading the acceptance letter "without prejudice," the defendants made clear to the plaintiff that the acceptance had been made upon an express condition that evidence of that acceptance was not to be given in the event of any future proceedings. Therefore neither the Plaintiff nor the Defendants can rely on that

letter to prove that compensation to the Plaintiff in the sum of Shs4,000,000/= had been agreed upon by the parties.

The defence witness's evidence shows that following the defendant's letter, exhibit D3, the Plaintiff in his Counsel's letter exhibit D1 reneged on the agreement but that in the defendant's reply, exhibit D2, the defendants protested the plaintiff's recession of the agreement. This time the defendant's letter was not written "without prejudice." Such a situation was delt with in Sakar on Evidence 11th Edition at page 215 where the learned authors states:-

> "where a letter was sent by an attorney to the opposite party containing an offer to "purchase peace" and headed "without prejudice", it cannot be given in evidence , nor the reply though not guarded in a similar manner. A letter marked "without prejudice" protects subsequent and previous letters in the same correspondence".

Therefore the communication in the defendants letter exhibit D2 did not provide a cure to the defendants' "without prejudice" acceptance in exhibit D3, the effect of which acceptance was that if the plaintiff was not to stand by his proposal in the negotiations, the defendants having accepted it was to have no effect at all.

In the circumstances there was no compromise agreement concluded between the parties. I therefore find that the contractual doctrine of accord and satisfaction is not applicable to the circumstances of this case. The above settles the issue whether the defendants acceptance to settle the plaintiffs claim in the sum of Shs4,000,000/= is binding on the plaintiff.

That now brings me to the sole issue framed by the parties - the quantum of damages. The plaintiff in this case seeks both general damages and exemplary, damages. On the law on assessment of damages in defamation the Plaintiffs Counsel referred me to the English case of John V/S MGN Limited (1996) 2 All ER 35 where at page 4 the court stated this on compensatory damages:-

> "The successful plaintiff in a defamation action is entitled to receive as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must compensate him for he 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 libelous took place.---"

On exemplary damages it was stated in the same case at page 55 as follows:-

> "A summary of the existing English law on exemplary damages in actions for defamation, accepted by the Court of Appeal in Riches V/S News Group Newspaper Ltd (1985) 2 All ER 845 at 850, --- as concise, correct and comprehensive, appears in Duncan and Neill on Defamation (2nd edn, 1983) para 18.27. The passage remains a correct summary of the relevant law. So far as relevant to this case, -----, the passage reads:-
>
> (a) Exemplary damages can only be awarded if the plaintiff proves that the defendant when he made the publication knew that he was committing a tort or was reckless whether his action was tortious or not, and decided to publish because the prospects of material advantage outweighed the prospects of material loss. What is necessary is that the tortious act must be done with guilty knowledge for the motive that the chances of economic advantage outweigh the chances of economic or perhaps physical penalty.
>
> (b) The mere fact that a libel is committed in the course of a business carried on for profit, for example the business of a newspaper publisher, is not by itself sufficient to justify an award of exemplary damages.

(c) If the case is one where exemplary damages can be awarded the court or jury should consider whether the sum which it proposes to award by way of compensatory damages is sufficient not only for the purposes of compensating the plaintiff but also for the purpose of punishing the defendant. It is only if the sum proposed by way of compensatory damages (which may include an element of aggravated damages) is insufficient that the court or jury should add to it enough to bring it up to a sum sufficient as punishment".

(d) The sum awarded as damages should be a single sum which will include, where appropriate, any elements of aggravated or exemplary damages---

(e) A jury should be warned of a danger of an excessive award

(f) The means of the parties, though irrelevant to the issue of compensatory damages, can be taken into account in awarding exemplary damages."

The plaintiff's Counsel also referred to the Kenyan case of Machira V/S Mwangi (2001) EA 110 wherein Mulwa J. stated at page 113:-

"A person who considers himself defamed can bring an action against the person who authorized the defamatory material or caused it to be published. He can claim damages for injury to his reputation and for the hurt to his feelings. These are

> compensatory damages and are termed damages at large. "See the English case Cassel and Co. Ltd V/S Broone and Another (1972) 1 All ER 801 where the Judge observes: 'The whole process of assessing damages where they are 'at large' is essentially a matter of impression and not addition.'
>
> The awarding of damages to the plaintiff is for the purposes of vindicating him to the public for the wrong done to him."

The learned judge went on to quote part of the portion already herein above quoted from the case of John V/S MGN Ltd (supra)

In his submission Counsel for the Defendants referred to the case of Roakes V/S Barnard (1964) AC 1129 wherein the House of Lords held that:-

> "apart from any statutory provision, exemplary damages may only be awarded where there is oppressive, arbitrary or unconstitutional action by servants of the Government or where the defendants conduct was calculated to procure him some benefit, not necessarily financial at the expense of the plaintiff."

The above case was in the Kenya case of Obonyo and Another V/S Municipal Council of Kisumu (1971) EA 91 accepted by Spry V.P as authoritatively setting out the law as to exemplary damages in tort. And at page 96 the learned Judge stated:-

> "---- It is well established that when damages are at large and a court is making a general award, it may take into account factors such as malice or arrogance on the part of the defendant, and this is regarded as humiliation or distress. Damages enhanced on account of such aggravation are regarded as still being essentially compensatory in nature. On the other hand, exemplary damages are completely outside the field of compensation and although the benefit of them goes to the person who was wronged, their object is entirely punitive"

In his submissions Counsel for the Plaintiff argued that, in the circumstances of this case, the Plaintiff is entitled to both compensatory and exemplary damages. He suggested that, considering the gravity of the defamation, the extent of the publication and the comparative awards in similar cases, the Plaintiff was entitled to an award of Ugshs45,000,000. Further that the article was maliciously published for gain and contended that exemplary damages are thus justified in the sum of Ugshs50 million to punish the defendants.

On the other hand Counsel for the defendants contended that the Plaintiff is only entitled to nominal damages if any at all. He relied on the authority of Samwiri Lugogobe V/S Hussein Lukaga (1980) HCB 18 where in Allen J. held that in a defamation case, when considering the quotation of damages, what matters is the injury done to the plaintiff's reputation and character taking into account his wounded feelings and any insulting or malicious conduct on the part of the defendant. In absence of evidence of any of those factors an award of nominal damages only would be made for injury done to the plaintiffs good name.

The offending article stated that the Plaintiff " was apparently caught pants down with a Tender Ronnie (an under age girl) –" In his evidence the plaintiff stated that having sexual intercourse with an underage girl is immoral and criminal. The Concise Oxford Dictionary (7th Ed.) defines "underage" to mean "not old enough, esp. not yet of adult status." Under Section 129(I) of the Penal Code Act it is a criminal offence to have unlawful sexual intercourse with a girl under the age of eighteen years, the maximum sentence for which is death. The implication of the article is that the Plaintiff was caught by the victims mother in the act of committing a serious criminal offence of defilement.

The article further stated "--- the good woman threw a fit and called the police. It was not so quietly settled out of Court for a partty the 2m ---" The implication is that the Plaintiff corruptingly avoided prosecution by bribing the police and paying for the silence of the complainant. The alleged plaintiffs corrupt conduct in the article also amounts to an offence under Sections 2(b) and 6 of the Prevention of Corruption Act punishable by imprisonment for a term not exceeding ten years or fine not exceeding three hundred currency points or both. Such criminal implications show the gravity of the defamatory article.

With regard to the extent of the publication Counsel for the Plaintiff submitted that the article was published in a leading national newspaper with wide circulation and particularly in a popular column entitled "Have you heard". Exhibit P3 shows that before the introduction of the "Have you hear" Column for the July- December 1998 period the average daily sales of the New Vision was 31,704 copies and after the introduction of the column the average daily sale of the paper was 33,472 for the period January – June 1999. The above evidence shows that there was increase in the sales following the introduction of the "Have You Heard" column. The

Plaintiff did not produce any evidence to show the circulation of the New Vision paper, particularly there is no evidence to show the circulation of the paper on 30th March so as to show the article's effect to the publication. However, it was pleaded in paragraph 2 of the plaint that the New Vision is a national daily newspaper distributed widely throughout Uganda and posted on the internet. Paragraph 2 above was admitted by the defendants in paragraph 2 of their written statement of defence. It is trite that each party is bound by his or her pleadings. I therefore agreed with the Plaintiff's Counsel that the fact of wide circulation is conceded by the defendants.

In David Etuket & Anor V/S The New Vision Printing and Publishing Corporation H.C.C. S. No. 86 of 1996 (unreported) it was held:

> "In order to prove the reduction of reputation or esteem, the plaintiff must adduce evidence from either his or her colleagues or from any member of the society who knew the plaintiff before the publication of the statement complained of and who read the article. The court can then judge as to how the right thinking members of society regarded the plaintiff following the publication of the article. The plaintiff's evidence alone cannot prove that important element of defamation which is also so crucial in the determination of quantum of the general damages"

Sir John Spray while dealing with the law governing the assessment of damages for defamation in his book Civil Law of Defamation in East Africa stated at paragraph 118 pages 45-46 thus:-

> "The status of the person to whom the defamatory statement is published may also be relevant. Thus publication to a person's employer, especially of an allegation of dishonesty is regarded as particularly serious, since it might lead to dismissal or prosecution. The fact that the person to whom the statement is published is in position to dismiss it out of hand or even to check its accuracy is not ground for awarding nominal damages, indeed if a libel is sufficiently outrageous, it may be that no one in the world will believe it, but that is no reason for depriving the victim of the appropriate damages."

In the defamatory article the plaintiff is described as "UTL's Peter Kaggwa." It is a fact that the Plaintiff was at all material time an employee of Uganda Telecom Ltd (UTL) as an Advertising and Promotions Coordinator. The Plaintiff testified that as part of his duties he was the Coordinator of his employers sponsorship of the Kampala Kids Link a league which comprised of underage children. That the article was not taken lightly by his superiors at work. For example the plaintiff testified that he was directed by the Human Resource Manager to communicate his explanation on the article to his co-staff numbering about six hundred. PW1, the Plaintiff's co-staff stated that he had received an email in that regard. However, no such email was exhibited in Court. It is also the plaintiff's testimony that the Human Resource Manager appreciated the state the Plaintiff was in following the publication. The Plaintiff also testified that the Company Secretary and the Commercial Director Mobile Division of UTL contacted him about the article. That the Company Secretary advised him to file all his correspondences about the article with the Resource Department. I am however, of the view that this advice

must have been intended to safeguard the Plaintiff against any eventuality. In cross-examination the Plaintiff admitted that he was not subjected to any disciplinary proceedings by his employer, that he was still holding the same job, so his employment status was not effected,. In fact he was voted one of the best employees of his department in December 2002, the exact year of the publication.

Francis David Obela (PW1) testified that he had no reasons to doubt anything published in the New Vision. That he believed the article and has since tried to distance himself from the Plaintiff. However, the witness contradicted his belief in the New Vision when he stated in cross- examination that he did no believe in the apology carried in the same paper. One wonders whether the witness was not in his evidence in chief only exaggerating his reaction to the article.

The plaintiff testified that his mother, Esther Byarugaba (PW2), was devasted by the article and blamed him for the immoral act portrayed by the article. PW2 stated that when she read the article she was annoyed and cried due to the damage by the Plaintiff's conduct to her entire family. That she believed the story as it was carried by her favourite newspaper. However, when she was cross-examined about the effect of the apology on her, her reaction was that she had already believed the Plaintiff's explanation that he had not done what had been reported. The plaintiff's mother believed in he Plaintiff's innocence even before the apology, she believed the plaintiff's explanation.

The Plaintiff further testified that he received several calls from friends and relatives about the article. That he also received emails, though none was exhibited in court. However it is his testimony that despite the publication he could still be

called upon to chair wedding meetings which shows that his friends still regarded him highly.

The Plaintiff was at the time of the publication about 28 years old. He was and is still single. He complained that his chances of wedding were affected by the article. But the Plaintiff did not produce any evidence to show that he had had any girl friend or fiancé who had deserted him as a result of the article. He admitted that he was neither prosecuted nor investigated as a result of the publication.

With regard to the claim for exemplary damages, the Plaintiff's Counsel invited Court to consider the evidence of the defence's sole witness Robert Kabushega where he testified that the defendants after the publication carried out investigations and found that the story was untrue. Counsel argued that as the leading National Newspaper the defendants should have carried out their investigation before and not after the publication of the article. I was referred to John V/S MGN Ltd (Supra), wherein their Lordships at page 36 stated thus:-

> " On the facts the defendants total failure to check the story clearly contributed reckless with the result that the Judge was right to refer to the issue of exemplary damages to the jury"

Counsel submitted that the Defendants failure to investigate the story before its publication justified an award of exemplary damages. In my view it is only prudent that Newspapers should establish the truthfulness or justification of any story before its publication.

On the issue as to whether there was a calculation by the Defendant's that the prospects of material advantage outweighed the prospects of material loss the plaintiff's Counsel submitted that this can be evidenced by the prominence with which the article was placed in the newspaper. He contended that the article was extremely prominent being at the very top of the "Have You Heard" column and further that the Defendant is in the business of publication of news for gain. Exhibit P1, the pull out of the paper from the Newspaper in which the article was published, shows that it was at page 13. It was thus not one of the lead stories of the day. As I have already indicated herein, there was a general increase in sales following the introduction of the "Have You Heard" column but the Plaintiff did to produce any evidence to show the probable effect of the article to the sales of the day as compared to the usual sales.

It was among the agreed facts that the article was false and undisputed that having so established, the defendants published an apology in the "Have you Heard" column of the 6th of April 2002. The defamatory article was published on 30th March 2002 and the apology run in the next issue of the same "Have you Heard" column of 6th April 2002. I find this to have been the first most appropriate opportunity. The apology must have been intended to put right the impression the defamatory article had made on the people who had read the article. An apology should not have the effect of opening old wounds nor should it have the effect of aggravating the damage and it should avoid the readers of the apology who had not read the defamatory article becoming fully aware of the contents of the article being apologized for. An apology for the defamatory statement by the defendant may mitigate damages while its absence may aggravate them. The apologetic conduct of the defendants is further exhibited by the fact that they willingly held

discussions and communications with the Plaintiff's Counsel aimed towards an amicable settlement of the Plaintiff's claim.

The Plaintiff's Counsel has drawn my attention to the award in the Kenyan cases of Marcharia V/S Mwangi (supra) where the Plaintiff, an Advocate, was awarded KShs8,000,000/= (equivalent to Ugshs.184 million) as compensatory damages for having been depicted as dishonest and Biwot V/S Clays (2000) 2 EA 334 where a total of KShs30million (equivalent to Ugshs300,000million) was awarded for both compensatory and aggravated damages to a politician for depicting him a murderer and as corrupt.

On the local scene I have come across Sarah Kanabo V/S Ngabo Newspaper (1994) VI KALR 169 where the Plaintiff a businesswoman was depicted a murder and the defendant sought to justify the allegations but failed and the plaintiff was awarded Shs2,250,000/= as general damages. In Jeffrey Thompson & Anor V/S Teddy Cheeye & Anor (1995) IV KALR 158 where the first Plaintiff the Managing Director of the second Plaintiff Company was alleged by the defendants to have bribed the World Bank Officials and producing false invoices from competitors to gain business. The defendants failed to prove the truth of the allegations. The first Plaintiff was awarded Shs6 million general damages and Shs.2 million punitive damages. In Richard Kaijuka V/S Teddy Seezi Cheeye & Others (1995) 11 KALR 110 the Plaintiff was depicted a criminal, unfit to be a minister, corrupt and abusing his office. He was awarded Ushs15million as general and aggravated damages. The above Ugandan judgments are of 1994/1995. The financial conditions have since changed greatly.

Having viewed the principles of law governing the quantum of damages in defamation cases, taking into account the facts before this court and guided by earlier court awards in more or less similar circumstances I am inclined to award the Plaintiff Ugshs17million (seventeen million shillings) compensatory general damages with interest at the Court rate from the date of this judgment until payment in full. I decline to make an award for aggravated damages. The Plaintiff is awarded costs of this suit to be taxed. I so order.

Lameck N. Mukasa
Judge
17th February, 2006