THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO. 415 OF 2002

HON. MOSES ALI :::::::::::::::::::::::::::: PLAINTIFF

VERSUS

THE MONITOR PUBLICATIONS LTD :::::::::::::: DEFENDANT

BEFORE: THE HON. MR. JUSTICE R.O. OKUMU WENGI.

JUDGMENT:

The Plaintiff, a senior government official and politician sued the defendant Newspaper damages for defamation. The offensive article as contended by the plaintiff appeared in the paper's issue of 9/2/2002. The title of the article was "Diabetic men more prone to importance (sic)," according to the Plaint. But what really disturbed the Plaintiff was the full size photograph accompanying the article. In the photograph an amiable plaintiff stood smiling and next to him was a rather hefty white man. Below the photograph were these words "People who are overweight are more likely to suffer from diabetes than their lean counterparts (file photo). There were no names of the plaintiff and no reference to him or even to the photograph in the body of the Article that gave a dire rendition of the devastation of diabetes disease and in particular the problem of impotence associated to it. According to paragraph 5 of the plaint it was contended:-

"5. The Plaintiff shall aver and contend that

(a) Although the body of the story did not make particular mention of him the juxtaposition of the plaintiffs photograph, who is by usual standards a big man (no pun intended) meant and/or was understood to mean by innuendo or otherwise that the plaintiff is overweight, obese and impotent.

(b) By the same story and picture in their natural and ordinary meaning, the defendant meant and was understood to mean that he was diabetic and impotent."

The plaint further contended that the publication disparaged the plaintiff in his social standing was and false. That as a result the plaintiff had suffered injury to his character, credit and reputation and ridicule while the defendant reaped profit from it. They prayed for general and exemplary damages and an injunction restraining such further publications of the plaintiff.

The defendant denied liability, and, though admitting the publication, contended that it was not defamatory, was true in fact and was a fair comment. It prayed that the suit be dismissed. At the trial the publication was exhibited and 3 issues were framed namely:-

1. Whether the words pleaded and the picture published are defamatory of the plaintiff.

2. Whether the publication is fair comment made in public interest.

3. Whether the plaintiff is entitled to any remedies.

The Plaintiff testified on his own behalf and the defendant also called one witness.

On the first issue the Plaintiff complained that the title of the article the photograph and the caption below it made an offending combination. He said

> "According to them I am one of them. They give wrong information to the public that the owners of that photograph are to be impotent. They mislead people of my health status of being impotent…"

He denied these implications:

> "I am not diabetic. I am also not overweight because according to my height and personally I don't feel overweight. I am equally not impotent."

The plaintiff was incensed by any possible reference to past or present impotence. He said:-

> "I have four wives and over thirty children. Unless Monitor says my women go out to look for these children… people were dismayed as to why I have hidden from them this information…"

He was able to provide several spin offs about his own children and wives getting disturbed about such a critical situation surrounding them. The witness told court that he is 6’1x2” tall and between 90 – 100 Kgs weighed two months earlier. He went on to declare when bravely dared by Mr. Nagwala:-

> “I am physically fit. I do exercises every morning. My training requires physical fitness. A soldier must be fit so I am ready to go and fight. You can’t go fight when you are weak.”

From the evidence it became clear that the witness was quite wounded in his ego and detested the Publication greatly. The defence witness Dr. Vincent Karuhanga a G.P described the diabetes disease and the disability of impotence. He told court about the body Mass Index (BNX) formula as the weight in Kilograms divided by height in metres squared. If one were less than 19 BMX then he was low in weight with a normal being 19 – 25 and 25 – 30 being overweight. He told court that above 30 was obese and more than 40 was grossly obese. When he looked at the photograph subject of the complaint he declared without reference to his BMX formula that the individuals were grossly overweight, that they had potbellies and were not lean. He justified this by using the observation method. The witness is a medical writer for the Monitor.

The publication of a person's photograph or likeness without his consent is not actionable however much annoyance it may cause to his personal feelings. Unless it is published in such a context or in such circumstances as to injure his reputation or bring him into contempt or ridicule. And ridicule may be incurred even accidentally as when a person is made to cut an absurd figure: **Vander Zalm vs Times Publishers**) 1980) 109 DLR 531.

On the other hand Imputation of disease with few exceptions was only maintainable in the primitive law of insult. In **Col (Rtd) Dr**. **Besigye Kizza vs Museveni Yoweri Kaguta.** Election Petition No. 1 of 2001 (S.C) by a majority vote it was held that on account of what was called community diagnosis of HIV an allegation that a candidate for elections was diseased did not constitute an election offence of an illegal practice. It was again the Monitor Newspaper the defendant in this case that constituted the exhibit in that case. For the defendant in the present case it was substantially contended that the publication of the photograph associated with a heading and caption were part and parcel of an exercise in community medicine. That it was intended to educate the public on the dangers of obesity, diabetes and its complications and were not defamatory of the plaintiff as such. Like it was a consequentialist stance that obesity predisposes one to diabetes and one of its grave complications. As a stance it depended on perception and clearly the photograph was suited for the demonstration and the plaintiff was picked.

Body forms and size have for ages evoked both fondness and scorn. But it is also true that direct insults or ridicule can have serious consequences. In **R vs Bedder** (1954) 1 WLR 1119. The accused pleaded provocation in the murder of a woman who had taunted him with his impotence. The facts as put forth by Glanville Williams were that:-

> "Bedder a youth of 18 was impotent. He visited a prostitute in an effort to reassure himself as to his masculinity. The effort was unsuccessful and the prostitute jeered at him and attempted to get away; he tried still to hold her but she kicked him in the genitals. Bedder took out a pocket knife and stabbed her to death."
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> (Textbook of Criminal law, Stevens, London 1978 at 492)

In the present case I am not able to say that the publication directly imputed impotence. Overweight is not exactly obesity. The publication centred on a medical probability or even fact that obesity can predispose one to diabetes one of whose dire complications is impotence. The publication did not go as far as to impute the diseases or abnormalities themselves. It did however go on to place the Plaintiff in the potentially complacent or admirable state of a happy well nourished man in a context where it should be realized that real danger lurks amid sheer or apparent well being. It is arguable that a direct statement or innuendo suggesting that a politician is impotent would lower his

reputation as reasonable men and women would expect a leader to be a potent one and to be whole some of it not an example. To this extent it could be considered defamatory to make a statement that a leading figure were impotent.

It is arguable that some mischief lies in the use of a person of the defendant's status to highlight a possibly hidden weakness or its potential. Unfortunately public officials are placed at an awkward position in defamation law since the promulgation of the 1995 Constitution. To that extent while the Supreme Court in **Teddy Sezi Cheeye Uganda Confidential and anor vs Emmanuel Tumusime Mutebile and others** 1995 put the onus on the newspaper to show that there was no malice, it is the court to determine if indeed there was actual malice and for the public official to show its existence. In the present case I am not able to say that the publication complained of was defamatory of the Plaintiff as no reasonable person would upon seeing the same conclude that the reputation of the Plaintiff had been lowered. When it comes to metabolic questions and morbidity the law has looked more to imputations of infectious diseases in certain limited contexts as being defamatory. But a statement that a person may be a giant and to impute an unseen Achilles heel is no libel in my view. In the present case there was no malice either but literary mischief only. For a political leader this can do no harm to his reputation and an apology is all that is needed to

tone down the editorial mischief. In the **Teddy Sezi Cheeye** case the Supreme Court commented:-

> "What was the point of this protracted litigation which has now become extremely costly? An apology at the right time would have saved a great deal of expense."

In times of transition Politics Newspapers will dare where angels don't tread to highlight their considered (public) opinion. In the process they will nibble at leaders of all categories with needling publications and assert the "stand by our story" position. But they should know that the mouse uses apology and insults carried too far though not attracting court sanction is part of the primitive law. That regime has its own primitive remedies, the use of which is undesirable but may not be prevented. This has consequences for the much cherished freedom of the press when making vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials. For libel can claim no talismanic immunity from constitutional limitations: **New York times vs Sullivan** (1974). In the **Teddy Sezi Cheeye** case the Supreme Court admonished that:-

> "The press has great rights and duties in dealing with the matters of public interest if it is intended to correct what is seen as an abuse. It is necessary for it to be accurate on the facts of the case... journalists who abuse freedom of the press should not expect to be protected by the courts of law..."

The courts will not adjudge primitive law insult or all media mischief as actionable where no malice is discernible. But it cannot also in the same case preempt the remedies and the bottled anger in victims of mischievous bounty writers or literary assassins. It is for both the public official and media practitioner to set out the limits of engagement. Some victims have thick skin and humour. Others are eggshell skulls. But it is the purpose of this Judgment to state those extremes in the continuum of media public official relationship if only to raise awareness of the issues. In short, public officials are also being made aware of these limits so that they need not resort to court as if newspapers writer gospel truth. Far from it. Facts are facts. No amount of rabid mischief can erase them.

In dismissing the Plaintiff's case I have answered all issues framed for the hearing in the negative. But just like the article published by the defendant was educative so was this case immensely educating not only to the parties but to the general public. For this reason each party will bear his own costs. It is so ordered.

R.O. Okumu Wengi
JUDGE
29/6/2005.