

4. The learned trial Magistrate erred in disregarding the defence of qualified privilege raised by the appellants
5. The learned trial Magistrate wrongly and erroneously exercised her discretion in awarding damages and interest without being supported by evidence on record.

The brief background to the suit is that the respondents both residents of Mityana filed a suit against the appellants in the Chief Magistrates' Court of Mengo seeking damages for defamation arising out of an article published in the bukede Newspaper, a subsidiary of the New Vision Printing and Publishing Company Ltd in the issue of 8th April 2006. The content of the article which was written in Luganda and translated in English was as follows:-

“Two young men said to have tried to steal a cow that was at the Police Station in Mityana have been caught. Godfrey Sekandi and Muhammed Kikaawa who picture appears on the right hand side of this article are the ones who have been caught by the Police where it is said that they were stealing a cow. The officer in charge of Criminal Investigation Department Mityana Police Station Angello Okello said that the catching of these people followed the recovery of the said cow from thieves and kept at the Police Station. That these young men went with a rope and tied it. Mwebe tipped the police officers who caught them.”

The above translation was what was pleaded in the plaint filed by the plaintiffs now respondents. The defendants/appellants contended that the publication was not defamatory in fact or by innuendo but that it was based on the truth and justified in the circumstances.

The learned trial Magistrate was invited to determine the following issues:-:

- a. Whether the publication was defamatory of the plaintiffs.
- b. Whether the defendants have any defence.
- c. Whether the parties are entitled to any remedy.

She determined all the issues in the affirmative and held that the defence of justification was not available to the defendants and awarded the plaintiffs shs 7.000.000= (seven million shillings only) to the 1st plaintiff and shs 5.000.000= (five million shillings only) to the 2nd plaintiff. She also made an award of interest at the rate of 10% from the date of the cause of action till payment in full. The defendants being dissatisfied with the above instituted this appeal.

This is a first appeal. It is the duty of the first appellate court to re-evaluate the evidence on record for itself in order to determine whether the conclusion reached upon the evidence by the trial court should stand. It is trite that if the conclusion of the trial court has been arrived at on conflicting testimony after seeing and hearing the witnesses, the appellate court in arriving at a decision would bear in mind that it has not enjoyed this opportunity and the view of the trial

court as to where credibility lies is entitled to great weight. The authority of *Peters vs Sunday Post Limited [1958] EA 424* is instructive.

In their written submission, Mr. John Mugarura, learned counsel for the appellants contended that the conclusion reached by the trial Magistrate was not consistent with the evidence adduced at the trial or on the application of the law to the article published by the appellants hence arriving at a wrong conclusion. Commenting on this matter, learned counsel drew the attention of this court to page 6 of the judgment in the trial court where the trial Magistrate came to the following conclusion:-

The evidence of Dw4 was to the effect that the plaintiff stole a cow and were arrested and imprisoned and a report was made. This was not controverted on cross examination. What remains in issue is not the fact of the arrest but whether it was indeed true that the plaintiffs stole the cow. Since the cows belong to the plaintiffs, I will hold issue 2 in the affirmative and hold that the defence of justification is not available to the defendants. Much as the plaintiffs were formally arrested and charged, the article was put in the newspaper out of malice since the plaintiffs were released on the same day, the publication two weeks later was malicious...

On page 5 of the judgment the trial Magistrate stated;

... by the time of publishing the article, the defendants ought to have known that what they were publishing was not the truth. The only reason the article was published was malice, therefore, although it is true that the plaintiffs have ever been arrested in respect of a cow, the defence of justification is not available to the defendants. What is in issue is not the fact that the arrest occurred but the fact of ownership...

It is submitted that the effect of the above would call for an irresistible conclusion that the appellants are discharged of libel if any, as the article so published was substantially true. Counsel further submitted that the cause of action arose from libel in an article published by the appellant and not the substantive question of ownership. The weight placed by the trial Magistrate on the effect of the date of publication of the article was an exaggeration. By relying on the issue of the late publication, the trial Magistrate relegated the truthfulness or falsity of the publication to the backyard yet she admitted that the respondents were actually arrested and charged. The language in which the article was published was clear that it was a past event. Counsel thus stated that this was a grave error that occasioned a miscarriage of justice and it is also a recipe for opening floodgate of suits against media companies on unmeritorious grounds

Counsel for the appellant maintained that the substance of the events was reported as it happened and no extraneous facts were imported into the article. Counsel further submitted that the reporter (DW2 in the trial court) of the defendant took such steps as were practicable to verify the truthfulness of what was reported. In his testimony, the reporter stated;

...I tried to talk to them but they were not cooperative because I wanted to get a comment from them...

This evidence was not controverted on cross examination. The date of publication of the said story in Bukedde newspaper did not prejudice the substance of the article or change the fact that all the events as reported actually happened. The truth and accuracy of the alleged attempted theft, arrest and imprisonment were not successfully challenged by the respondents in the lower court. What remains clear is the fact that the respondents were arrested in respect of a cow. This was the gist of the publication.

Mr. Mugarura counsel for the appellants submitted that the trial Magistrate failed to appreciate what constitutes a defamatory publication. **Gatley on Libel and Slander (8th Edn Para 31)** states that;

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

There is however a rider to this where in the case of **Astaire vs Campling (1966) 1 WLR 34, Diplock LJ** had this to say;

“...a statement does not give rise to a cause of action against its publishers merely because it causes damage to the plaintiff. The statement must be false and it must be defamatory of the plaintiff that is to say, the statement must itself contain, whether expressly or by implication, a statement of fact or expression of opinion which would lower the plaintiff in the estimation of a reasonable reader who had knowledge of such facts, not contained in the statement as the reader might reasonably be expected to possess.” (Underlining supplied)

Learned counsel contended that the defence of justification was available to the appellants. He stated that the issue at hand was not whether or not the cow belonged to the respondent. What

was in issue was that the respondents had taken the said cow from the custody of the police without permission.

The appellants proved that the purported defamatory statement was substantially true. Truth is a complete defence to an action for defamation. Learned counsel opined that the appellants successfully proved that what was published in Bukedde Newspaper was the truth and on this basis the issue of remedies did not arise.

At no point did the appellants learn that the cow belonged to the respondent, it was therefore wrong for the magistrate to conclude that “...*having learnt that the cow belonged to the plaintiffs, the plaintiffs are entitled to general damages...*” Learned counsel maintained that what was clear is that no ownership of the cow had been established at the time of the publication as the suspects were released on police bond.

Mr. Bagonza Enock counsel for the respondents did not agree with the appellants’ submission, contending that a statement that a person has been arrested on a criminal charge is defamatory (see **Shah New Africa press Ltd HCCS No. 221 of 1968**). He also cited the authority of **Lewis v Daily Telegraph Ltd (1964) AC 234** for the proposition that depending on the way a statement is phrased, a claim that someone is being investigated for a crime could potentially mean any one of these things:- that the person mentioned was guilty of the crime; that there is reasonable ground for suspecting that the person was guilty of crime or that there were reasonable grounds for an investigation into whether the person had committed the crime.

Learned counsel contended that, in its natural and ordinary meaning, the title and body of the article was convicting. The title depicted the plaintiffs/respondents as thieves who stole a cow. Although the trial Magistrate found that the police had arrested the respondents in respect of a stolen cow (on 23.3.2006) it was revealed that the cow belonged to the 1st respondent, the appellants maliciously published a defamatory statement on 8.4.2006 when the respondents had already been released (23.3.2006). Counsel thus opined that the only reason the article was published was malice which defeats the defence of justification. It was counsel’s submission that the learned trial Magistrate properly evaluated the evidence on record and came to the right conclusion when she held that the publication was malicious in nature. He maintained that the appellants had all the time to investigate the factual background before the publication of the said article but they chose not to as their aim was a malicious one; as such the defence of justification is not available in the circumstances. He cited the authority of **Harold Barter v Battomelly (1908)2 KB151** for the proposition that, cross checking the correctness of the information published is mandatory.

On the last ground of appeal, Mr. Bagonza submitted that the appellants attacked the manner in which the learned trial Magistrate exercised her discretion in awarding damages and interest. Learned counsel for the appellant does not show how the trial magistrate erroneously failed to exercise her discretion when awarding damages and interest. In assessing damages, the court considers the plaintiff's position and standing, the nature of the libel, the mode and extent of the publication, the absence of an apology or retraction and the whole conduct of the defendant from the time the article was published down to the day of judgment. The authorities of **Lugayizzi v Szezi Cheeye & Anor (2001-2005) 2 HCB 114** and **Nekemia Matembe & Anor v Teddy Szezi Cheeye & Anor HCCS No.1047 of 1995.**

Learned counsel thus submitted that the 1st respondent was a candidate aspiring for elections, he is a politician as well as a businessman in the community. On the other hand the 2nd respondent was a business man dealing in skins and hides. The allegations of theft had far reaching consequences on them in their community, they were gravely injured. He also contended that the conduct of the appellants/ defendants was callous and contemptuous. He opined that the award of damages was not exorbitant neither did the appellants contest the award nor did they offer an alternative sum. As such there was no compelling reason/ ground justifying interference with the discretion of the trial Magistrate.

As regards the amount of interest awarded, counsel for the respondents maintained that the rate at 10% should be upheld as it was calculated to safeguard the value of the decretal sum against forces of inflation. He invited court to dismiss the appeal and uphold the judgment of the lower court.

From the evidence adduced at the trial and submissions of both counsel there is no doubt as to the publication of the story. There is also no doubt that following the arrest and subsequent release of the two respondents, investigations revealed that the cow in question belonged to the 1st respondent. Out of the issues framed for trial and the grounds of appeal raised in the memorandum filed in this court the contention is as to whether or not the defence of justification was available to the appellant. **Winfred & Jolowiz** in their book on Tort 18th Edition at page 601 para 12-26 describe the defence of Justification (or Truth) in the following words:-

"The claimant does not need to prove that the statement is false , for the law assumes that in his favour, but the defendant can plead justification (the technical name for truth here) and if he can establish it by evidence he has a good defence though he may have been actuated by ill will or spite. It is not that the law has many special relish for the indiscriminate infliction of truth on other people, but defamation is an injury to a person's reputation, and if people think

the worse of him when they hear the truth about him that merely shows that his reputations has been reduced to its proper level.....” (underlining added)

Then at page 602 para 12-27

“ must be true in substance. The defendant need not show that the charge he seeks to justify is precisely true in every particular: what matters is whether it is substantially true and it has been said that journalists, “need to be permitted a degree of exaggeration even in the context of factual assertions”. Subject to that, it is a general principle that justification must be as broad as the charge, and must justify the precise charge. To justify the repetition of a defamatory statement already made, therefore, the defendant must prove that the content of the statement was true, not merely that it was made.....”

In the instant case the story was factual. There was no exaggeration or distortion. The substance of the story was that the two respondents had been arrested and detained at Mityana Police Station on suspicion of stealing a cow and later releases. The events the story covered stopped at the release of the suspects from police station and did not extend to the investigations that established that the cow belonged to one of the respondents. The reporter testified that he tried to get the respondents’ side of the story but they were uncooperative. In any case their exoneration was not part of the story. It is also immaterial that the story was published after they had been exonerated because the timing did not in any way change the substance of the story covered in the publication and in my view the trial magistrate should have found that the defence of justification was available to the defendant which I do find.

In the circumstances I find merit in this appeal which is allowed with costs to the appellants in this Court and the Court below.

Eldad Mwangusya

J U D G E

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