

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL APPEAL No. 0006 OF 2013
(Appeal from the judgment and decree of Yumbe Magistrates' Grade One
Court in Civil Suit No. 0001 of 2013)

TWAHA SEBBI OLEGA APPELLANT

VERSUS

ALIDRIGA ADINAN RESPONDENT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

This is an appeal from the decision of His Worship Toloko Simon, Magistrate Grade One of Yumbe in Civil Suit No. 01 of 2013 given on 21st February 2014, when he dismissed the suit with costs to the respondent.

By a plaint dated 28th January 2013 and filed in court on 28th January 2013, the appellant had sued the respondent claiming general damages for defamation, a permanent injunction against further publication of libelous material, an apology, interest on the general damages and costs. In the body of the plaint, the appellant pleaded that on or about 19th of December 2012, the respondent wrote and published a malicious letter against the appellant, which contained the following defamatory words;

Twaha Sebi Olega is a thief who stole solar panels in Matuma Health Centre in the year 2007 and recently he also stole four solar panels from Yumbe Hospital, with the help of police, I arrested him, where he was prosecuted and sentenced to two years' imprisonment or a fine of 250,000/= (a copy of the letter dated 19/12/2012 is hereto attached and marked Annexure A).

The appellant further contended that those words as contained in the letter were made in bad faith and maliciously against him and that the respondent published those words to some radio journalists, well knowing that the appellant had on 18th November 2012 been acquitted of those

charges upon the quashing of his conviction and sentence of the Grade II court by the Chief Magistrates' Court. He contended that the words complained of in their natural and ordinary meaning meant that he was a thief who was not fit to hold public office. As a result, his reputation as a professional electrician had been severely injured causing him to be shunned and exposing him to public ridicule and odium. His wife had as a result deserted him and he suffered mental anguish and emotional stress, all because of the defamatory words.

In his written statement of defence dated 11th February 2013 and filed in court on the same day, the respondent denied ever having made any defamatory statement against the appellant. He admitted having written the letter complained of but denied that it was defamatory of the respondent. He contended that he wrote the letter in his capacity as L.C.I Chairman Renanga village, in good faith and for the good of the community. He denied having met any news reporter or journalist nor published to them the content of that letter but that such reporters may have been attracted by the appellant's public investigation and subsequent trial over the incident. He affirmed the appellant's conviction by the Grade II Magistrate's Court and denied any knowledge of the respondent's subsequent acquittal on appeal.

The appellant testified at the hearing of the suit, and called two other witnesses. The defendant too testified and called two witnesses. In his judgment, the trial magistrate found that the words published by the respondent were true and therefore not defamatory of the respondent since they were communicated before the appellant's conviction was quashed by the Chief Magistrate. He found that the statements were not published maliciously and that the appellant had not suffered any damage to his reputation, since no member of the public had testified to that effect. He found that although the respondent had written the letter, he had not communicated it to the Chief Administrative Officer. In writing the letter, the respondent had done so in his official capacity in a matter where the community had an interest. The learned trial magistrate was of the view that the appellant had initiated the proceedings maliciously as a means of getting back at the respondent who had testified as one of the witnesses during the criminal prosecution. He therefore did not find any merit in the suit and dismissed it with costs to the respondent.

Being dissatisfied with the decision of the court, the appellant appeals against the whole of the said judgment on the following grounds, namely;

1. The learned trial magistrate erred in law and fact and failed to see the issues raised by the respondent / defendant to the CAO and in the video coverage amounted to defamation and thus came to the wrong decision thereby occasioning a miscarriage of justice to the appellant.
2. The learned trial magistrate erred in law and fact in holding that the defamatory words were uttered before the appellant / plaintiff was acquitted whereas they were uttered after the acquittal of the appellant / plaintiff thus wrongly evaluating the evidence thereby occasioning a miscarriage of justice to the appellant.
3. The learned trial magistrate erred in law and fact in holding that the recording which lasted ten minutes cannot amount to defamatory engagement and further that the video recording cannot be relied on as the person who recorded it was not an expert thus arriving at the wrong decision which occasioned a miscarriage of justice to the appellant.
4. The learned trial magistrate erred in law and fact in failing to evaluate the evidence that the appellant was neither a suspect nor a convict but a prosecution witness in the case involving theft at Matuma Health Centre and that the utterance that the appellant is a thief of solar panels amounted to defamation thus at a wrong decision which occasioned a miscarriage of justice to the appellant.
5. The learned trial magistrate erred in law and fact in holding that the statement made was substantially true of the plaintiff and further that the utterances referred to by the defendant against the plaintiff does not reflect any malicious damage to his reputation thus arriving at a wrong decision which occasioned a miscarriage of justice to the appellant.

Order 43 r (2) of *The Civil Procedure Rules* requires the memorandum to set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative. All the grounds as stated in the memorandum of appeal offend this requirement since they lack precision, are verbose, argumentative and presented in a narrative form. These are the sort of grounds which the Court of Appeal in *National Insurance Corporation v Pelican Air Services*, CA No.15 of 2005, held should be struck off for non-compliance with the requirements of that provision. However, in the desire to administer substantive justice without

undue regard to technicalities, counsel for the appellant was allowed to present his arguments in support of the grounds.

In his submissions, counsel for the appellant, Mr. Madira Jimmy who appeared jointly with Mr. Donge Opar, argued that the trial court erred when it found that the respondent had authored the letter complained of in his capacity as Chairman L.C.1 when there was no evidence that he occupied that position following any bye-election. The court ought to have found that he wrote the letter in his personal capacity. He argued in the alternative that the respondent had no obligation to make that communication and therefore cannot rely on immunity or qualified privilege as a defence. He contended that the letter was written after the appellant had been acquitted on appeal. The respondent did not act reasonably when he failed to ascertain this fact before writing the letter and therefore it was not written in good faith. Regarding the theft which occurred at Matuma Health Centre, the appellant was only a witness and not an accused. He therefore prayed that the appeal be allowed.

In response, counsel for the respondent Mr. Richard Bundu appearing jointly with Mr. Samuel Ondoma, submitted that the letter written by the respondent was not defamatory of the appellant since it was true that the appellant had been convicted. The respondent did not write it maliciously since he was unaware of the subsequent acquittal. In respect of the theft which occurred at Matuma Health Centre, there was evidence that at one point the appellant had been arrested as a suspect. The respondent did not communicate the letter to the Chief Administrative Officer since it went missing before the L.C.I Committee could approve it as had been planned. The respondent relied on qualified privilege at the trial since he wrote the letter in his capacity as Acting Chairman L.C.I and in good faith in advancing the good of the community

This being a first appeal, I have to bear in mind the duties of a first appellate court as stated in *Selle v Associated Motor Boat Co. [1968] EA 123*, thus:

An appeal is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow

the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif vs. Ali Mohamed Sholan* (1955), 22 E. A. C. A. 270).

In light of the manner in which the grounds were framed, and considering that the grounds as framed raise cross-cutting issues, I have chosen instead to address the grounds not individually but within the context of the specific issues raised by the appeal, which are as follows;

1. Whether the words complained of were defamatory of the appellant.
2. Whether the respondent published the words complained of.
3. Whether there were any defences available to the respondent.
4. Whether the appellant was entitled to any remedies he sought.

They will be addressed in that order and decisions made in a manner that addressed material that is relevant to the issues which may, by necessary implication address aspects of the different grounds of appeal at a time.

1. Whether the words complained of were defamatory of the appellant.

The law of defamation seeks to protect a person's right to an unimpaired reputation and good name. Cave J. put it succinctly in the English case of *Scott v. Sampson* (1882) 8 Q.B.D. 491 at p. 503. He said: "the law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statement to his discredit; ..." A plaintiff in a suit for defamation has to prove that the relevant statement is defamatory, but he or she does not have to prove that it was a lie. If a statement is defamatory, the court will simply assume that it was untrue. Salmond on *The law of Torts 13th Ed.*, P. 355, states that the test of defamatory nature of a statement is its tendency of excite against the plaintiff the adverse opinions or feeling of other persons. McBride and Bagshaw in their book *Tort Law, 3rd edition* (Longman, 2008) state that a statement is defamatory if reading or hearing it would make an ordinary, reasonable person tend to: - think less well as a person of the individual referred to; think that the person referred to lacked the ability to do their job effectively; shun or avoid the person referred to; or treat the

person referred to as a figure of fun or an object of ridicule. Lord Wensleydale in *Parmiter v Coupland* (1840) 6 M & W 105 at 108, 151 ER 340 at 341-342, said of libel was defined as “a publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule.”

In *Ssejjoba Geoffrey v Rev. Rwabigonji Patrick* [1977] H.C.B 37 a defamatory statement was defined as one which has a tendency to injure the reputation of the person to whom it refers by lowering him in the estimation of right-thinking members of society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike and disesteem. In *Scot v Sampson* (1882) 9 QBD 491 Justice Cave defined it as “a false statement about a man to his discredit”. This definition is concise yet it encompasses everything about the concept. The defamatory statement must be understood by right thinking or reasonable minded persons as referring to the plaintiff.

It is a statement which imputes conduct or qualities tending to disparage or degrade any person, or to expose a person to contempt, ridicule or public hatred or to prejudice him in the way of his office, profession or trade. It is a statement which tends to lower a person's reputation in the eyes of or the estimation of right thinking members of society generally or which tends to make them shun and avoid that person. The typical form of defamation is an attack upon the moral character of the plaintiff attributing to him any form of disgraceful conduct. A statement becomes defamatory if it is made about another without just cause or excuse, whereby he suffers injury to his reputation and not to his self-esteem. Reputation is the state of being held in high esteem and honor or the general estimation that the public has for a person. Reputation depends on opinion. It is nothing but enjoyment of good opinion on the part of others. So, the right to have reputation involves the right to have reputation intact. Defamation is nothing but causing damage to the reputation of another.

The important issue is not how the defamatory statement makes the person referred to feel, but the impression it is likely to make on those reading it. The person defamed does not have to prove that the words actually had any of these effects on any particular people or the public in general, only that the statement could tend to have that effect on an ordinary, reasonable listener

or reader. Character and reputation are not synonymous. Character is internal; it is that set of personality traits and moral values actually possessed by an individual. Reputation, however, is external. It is the community's perception of an individual's character. Character is what a person is, reputation is what the person's neighbors think he or she is (See A. Wigmore, *Evidence* 1147–48, § 5233 (1978).

In Gatley on Libel and Slander (9th editin) where (at p 7 para 1.5) the learned authors state:

What is defamatory? There is no wholly satisfactory definition of a defamatory imputation. Three formulae have been particularly influential: (1) would the imputation tend to "lower the plaintiff in the estimation of right-thinking members of society generally?" (2) Would the imputation tend to cause others to shun or avoid the plaintiff? (3) Would the words tend to expose the plaintiff to "hatred, contempt and ridicule?" The question "what is defamatory?" relates to the nature of the statement made by the defendant; words may be defamatory even if they are believed by no one and even if they are true, though in the latter case they are not of course actionable.

They further state at para 2.26 that if the claim is that the plaintiff was injured in terms of his or her trade or profession, "to be actionable [in defamation], words must impute to the claimant some quality which would be detrimental, or the absence of some quality which is essential, to the successful carrying on of his office, profession or trade. The mere fact that words tend to injure the claimant in the way of his office, profession or trade is insufficient. If they do not involve any reflection upon the personal character, or the official, professional or trading reputation of the claimant, they are not defamatory".

The statements complained of were in two forms, a letter dated 19th December 2012 and a video recording. In paragraph 4 (b) of the plaint, the appellant referred to words contained in a video recording as being defamatory. An attempt was made to introduce this recording in evidence and it was received as I.D.2 and at line 10 of page 16 of the record of appeal it is indicated that it was played before the court. This was erroneous, the recording should have been played to court only after receiving it as part of the evidence. Nevertheless, in his judgment at page 9 line 19 of the record of appeal, the trial magistrate considered it as part of the evidence and in his view "a recording which lasted 10 minutes cannot amount to defamatory engagement."

The learned trial magistrate misdirected himself on this point for three reasons. Firstly, according to *Rutare Leonidas S. v Rudakubana Augustine and Kagame Eric William* [1978] HCB 243 when a statement is complained of as being defamatory, the actual words must be set forth verbatim in the plaint and the persons to whom publication was made should be mentioned in plaint. Paragraph 4 (b) of the plaint did not comply with this requirement. The words complained of as contained in that recording were not reproduced verbatim in the plaint. Secondly, the recording was only received as an identified item and not as an exhibit. It therefore did not form part of the body of evidence to be evaluated. Thirdly, the manner in which the court received it violated the law of evidence regarding the admissibility of such items.

A video recording is in law regarded as a document (see *R v Daye* 1908 KB 330 at 340 and *Seccombe v Attorney-General* 1919 TPD 270, 272, 277-278). It has been decided by courts that there is no difference in principle between a tape recording and a photograph (See *R v Senat* (1968) 52 Cr. App. Rep 282 and *Regina v Maqsud Ali*, 1965 [1966] 1 QB 688, [1965] 2 All ER 464). Being a document, like any other document being offered in evidence, a recording must be authenticated: a witness must offer evidence establishing that the object is what that witness claims it is. One frequently cited authentication regime was first articulated by the Georgia Court of Appeals. In *Steve M. Solomon, Jr., Inc. v. Edgar* 88 S.E.2d 167 (Ga. Ct. App. 195), where the court stated:

A proper foundation for [the use of a mechanical transcription device] must be laid as follows: (1) it must be shown that the mechanical transcription device was capable of taking testimony. (2) It must be shown that the operator of the device was competent to operate the device. (3) The authenticity and correctness of the recording must be established. (4) It must be shown that changes, additions, or deletions have not been made. (5) The manner of preservation of the record must be shown. (6) Speakers must be identified. (7) It must be shown that the testimony elicited was freely and voluntarily made, without any kind of duress.

If a participant in the conversation is available to testify, it suffices for the witness to testify that he or she recalls the conversation, has listened to the recording, and is satisfied that the recording accurately captured what was said. It is thereafter sufficient to show a chain of custody which establishes the reasonable probability that no tampering occurred. Minor infirmities in the chain of custody are insufficient to bar admissibility of a recording, but are relevant as to the weight

the court chooses to give to it. This requirement can be met when a witness with knowledge testifies generally about how the equipment was set up, the procedures employed, and the records that were kept documenting the process. The evidentiary value of a recording depends in large measure on who said what, but a court's ability to use that information depends upon two qualities of the recording: audibility and intelligibility. Audibility relates to whether the listener is able to hear what is on the recording. Intelligibility relates to whether the listener is able to understand what the conversants said.

The issue courts most often focus on is intelligibility. The ultimate test of audibility and intelligibility is whether the party offering the recording has been able to produce a transcript of the recording which accurately reflects the recording's contents (see *R v Rampling* [1987] *Crim LR* 823). For that reason, as required by s. 88 of *The Civil Procedure Act*, since evidence in all courts has to be recorded in English as the official language of courts, if the recording is in any other language the transcript of the recording should be translated into English before it can be received in evidence. The recording in this case was never transcribed. It therefore was not tested for intelligibility and audibility. For the reasons stated above, that part of the pleadings and evidence relating to the video recording ought to have been disregarded by the trial court.

As a result, what was left of the appellant's claim was the libel based on the letter of 19th December 2012. In paragraph 4 (e) of the plaint, the appellant contended that by the words complained of, in "their natural or ordinary meaning or by innuendo, the defendant meant that the plaintiff was a thief and does not deserve to serve in public office." In *Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094 at 1104, [1970] 1 WLR 688 at 698-699, it was held that;

Words may be defamatory of a trader or business man or professional man, although they do not impute any moral fault or defect of personal character. They [can] be defamatory of him if they impute lack of qualification, knowledge, skill, capacity, judgment or efficiency in the conduct of his trade or business or professional activity... *South Hetton Coal Company Limited v North-Eastern News Association Limited* [1894] 1 QB 133.

There are certain established rules to determine whether statement is defamatory or not. The first rule is that the whole of the statement complained of must be read and not only a part or parts of

it. The second is that words are to be taken in the sense of their natural and ordinary meaning. The Court must have regard to what the words would convey to the ordinary man. In *Ssonko Gerald v Okech Tom* [1978] HCB 36, it was held that the test is the general impression of the words on the right thinking person and it is from that perspective that the words are to be considered before determining whether they are defamatory or not. The determination depends on answering the question; “would the words tend to lower the plaintiff in the estimation of right-thinking members of society?” The defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinions or feelings of other persons. A typical form of defamation is an attack upon the moral character of the plaintiff attributing to him any form of disgraceful conduct, such as crime, dishonesty, untruthfulness, trickery, ingratitude or cruelty (see *Ssejjoba Geoffrey v Rev. Rwabigonji Patrick* [1977] H.C.B 37). For example in *Sekitoleko Edirisa v Attorney General* [1978] HCB 193, allegations in newspaper that the plaintiff was a robber and had been beaten to death were found to be defamatory.

First, it must be proved that the statement referred to the appellant. In *Knupffer v London Express Newspaper Ltd* [1944] 1 ALL ER 495, the House of Lords had to determine whether the defendants' publication of words in their newspaper could refer to the plaintiff, who was not specifically mentioned at all in the article. Their lordships (Viscount Simon LC) held that when defamatory words are written or spoken of a class of persons, it is not open to a member of that class to say that the words were spoken of him unless there was something to show that the words about the class refer to him as an individual. As there was nothing to show that the words referred to the appellant as an individual, his claim / appeal failed. The following passage from the judgment of Viscount Simon LC (at 497F) is particularly relevant to our case:

There are two questions involved in the attempt to identify the appellant as the person defamed. The first question is a question of law – can the article having regard to its language, be regarded as capable of referring to the appellant? The second question is a question of fact, namely, does the article in fact lead reasonable people who know the appellant to the conclusion that it does refer to him? Unless the first question can be answered in favour of the appellant, the second question does not arise, and where the trial judge went wrong was in treating evidence to support the identification in fact as governing the matter, when the first question is necessarily, as a matter of law, to be answered in the negative.

The question is not whether anyone *did* identify the appellant but whether persons who were acquainted with the appellant *could* identify him from the words used. In the instant case, the following words as stated in the letter dated 19th December 2012 exhibited as P.E.X.2 at page 16 of the record of appeal, and pleaded in paragraph 4 (b) of the plaint as follows; - “Twaha Sebi Olega is a thief who stole solar panels....he was prosecuted and sentenced for (sic) two years’ imprisonment or a fine of U shs 250,000/=” The words were not only used in reference to the appellant by name but the letter also contained his description as “the electrician attached to Yumbe hospital.” They could be regarded as capable of referring to the appellant since there was no evidence of any other electrician by that name at the mentioned hospital. These words would lead reasonable people who know the appellant to the conclusion that they referred to him.

Secondly, these words would in my view convey to the ordinary man, in their natural and ordinary meaning, that the appellant had committed the offence of theft. In the letter which was tendered in court, the appellant is referred to by both names and specifically identified as an electrician attached to Yumbe Hospital of Yumbe District Local Government. Words are defamatory if they impute fraud, misconduct or incompetence in one’s business or occupation or the commission of a crime or acts which constitute an offence. Allegations are defamatory of the plaintiff if they impute the commission of a criminal offence which he would be liable to imprisonment under the laws of Uganda (see *Odongkara v Astles* [1970] EA 377). On the face of it, imputation of theft of public property would have the tendency to lower the appellant in the estimation of right-thinking members of society generally, or to cause others to shun or avoid him or to expose him to hatred, contempt and ridicule. The words imputed lack of honesty and fitness to perform as an electrician at Yumbe Hospital. This is more particularly so considering the appellant was alleged to have stolen solar panels from two public health facilities, first in 2007 and later during 2011.

However, it is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. In that respect, whether or not it is for the public good is a question of fact. On the other hand, if a person has an extremely bad reputation in one particular respect, and the false allegation is in the same vein and does not make that reputation worse, that person might well have difficulty proving that they have been

lowered in the estimation of right-thinking people. In paragraph 8 of his written statement of defence, the respondent contended that the words complained of were true since the appellant was on 21st May 2012 convicted of the offence of theft by the Grade II Magistrates' Court at Yumbe in Criminal Case No. 0473 of 2011 and sentenced to a fine of shs 250,000/= or one year's imprisonment in default. The record of proceedings of that trial was annexed to the written statement of defence and was also tendered in evidence as exhibit D.E.X.1 as indicated at page 22 of the record of appeal.

The question then is whether at the time of the words complained of were written, this was still the status. The appellant adduced in evidence and exhibited in court the judgment in Yumbe Chief Magistrates' Court Criminal Appeal No. 0010 of 2012 received as Exhibit P.E.X.1 as indicated at page 15 of the record of appeal, which showed that on 8th November 2012, the Chief Magistrate quashed the conviction and set aside the sentence which had been imposed on the appellant by the Grade II Magistrates' Court, thereby acquitting him of the offence of theft. Therefore, by the time the respondent wrote the letter of 19th December 2012, more than a month had elapsed since the conviction he was referring to had been quashed. That the appellant was a convict therefore was no longer a true statement. In his judgment, the learned trial magistrate at lines 23 – 24 of page 8 of the record appeal found that; "the words said by the defendant were uttered before the plaintiff was acquitted. This clearly was a misdirection since the finding is not supported by the facts before him.

It is not defamation to publish a substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings. A criminal trial is a public event. The public interest may be as much involved in the circumstances of a remarkable acquittal as in a surprising conviction (see *Re S [2005] 1 AC 593*). A person may report on the proceedings themselves without independently investigating the matters involved. Requiring a person to independently investigate the underlying facts before reporting on official court proceedings would ill serve the public's interest in the administration of justice. The gist of an allegedly defamatory publication of such proceedings must be compared to a truthful report of the official proceedings, not to the actual facts. In this case, the official record indicated that the appellant had appealed the

conviction of 21st May 2012 and had on 8th November 2012 been acquitted. The respondent omitted the latter aspect, allegedly because he was unaware of it.

However, common law requires a defendant to prove that his conduct in making the publication was “reasonable in all the circumstances of the case”. To establish reasonableness, a defendant must generally establish that he had reasonable grounds to believe the publication was true, that he did not believe the publication was false, and that he had made proper inquiries to verify the information published. In *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 574, the High Court of Australia stated that as a general rule, the defendant’s conduct in publishing defamatory matter will not be reasonable unless the defendant “had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue.”

In the instant case, the respondent failed to make any or any proper, inquiry of the facts or any steps to verify the information prior to publication, notwithstanding that he knew or ought to have known, the gravity of the allegations and the width of publication they would achieve, indicating reckless disregard as to whether the allegations in the letter were libelous. Although a statement need not be perfectly true, it should be substantially true in order not to be false. Slight inaccuracies of expression are immaterial if the defamatory statement is true in substance. In this case, what are contained in the respondent’s letter of 19th December 2012 are not slight inaccuracies but an entire distortion of the status of the court proceedings as at that date. The statements contained in the respondent’s letter of 19th December 2012 were therefore not a fair, accurate, true, and impartial account of the entire court proceedings relating to the appellant’s prosecution or state of affairs by that date.

Since there was no evidence led to show that the conviction by the Grade II magistrates’ Court had generated an extremely bad reputation in respect of the appellant, such that the subsequent false allegation in the same vein did not make that reputation worse, I find that the words complained of were defamatory of the appellant.

2. Whether the respondent published the words complained of.

There must be publication of the defamatory statement, that is to say, it must be communicated to some person other than the plaintiff himself. There can be no tort of defamation unless the defamatory statement is published or communicated to a third party, that is to a party other than the person defamed and that publication must have been done maliciously. Publication is a two-way process that results in a shared meaning or common understanding between the sender and the receiver. Any act which had the effect of transferring the defamatory information to a third person constitutes a publication. Publication occurs when information is negligently or intentionally communicated in any medium.

In the Canadian case of *Dow Jones & Company Inc v Gutnick (2002) 210 CLR 575*. Gleeson CJ, McHugh, Gummow and Hayne JJ said:

Harm to reputation is done when a defamatory publication is comprehended by the reader, the listener, or the observer. Until then, no harm is done by it. This being so it would be wrong to treat publication as if it were a unilateral act on the part of the publisher alone. It is not. It is a bilateral act -in which the publisher makes it available and a third party has it available for his or her comprehension

In *Pullman v Hill & Co [1891] 1 QB 524 (CA)*, the plaintiff claimed publication of a defamation when the defendant was said to have dictated it to his typist. Lord Esher MR and Lopez LJ held that it was sufficient publication. The Court considered what would amount to publication in the law of defamation. Lord Esher MR said:

The first question is, assuming the letter to contain defamatory matter, there has been a publication of it. What is the meaning of 'publication'? The making known of the defamatory matter after it has been written to some person other than the person of whom it is writtenif the writer of a letter shews it to his own clerk in order that the clerk may copy it for him, is that a publication of the letter? Certainly it is shewing it to a third person; the writer cannot say to the person to whom the letter is addressed, "I have shewn it to you and to no one else". I cannot, therefore, feel any doubt that, if the writer of a letter shews it to any person other than the person to whom it is written, he publishes it. If he wishes not to publish it, he must, so far as he possibly can, keep it to himself, or he must send it himself straight to the person to whom it is written. There was therefore, in this case a publication to the type-writer.'.....where the writer of a letter locks it up in his own desk, and a thief

comes and breaks open the desk and takes away the letter and makes its contents knownno intentional publication by the author occurs.....Here a communication was made by the defendant's Managing Director to the typewriter. Moreover, the letter was directed to the plaintiff's firm and opened by one of their clerks. The defendants placed the letter out of their control and took no means to prevent it being opened by the plaintiff's clerks. In my opinion, therefore, there was a publication of the letter, not only to the typewriter but also to the clerks of the plaintiff's firm.

This ingredient involves a physical and a mental element. The physical element is that the defendant by his or her conduct objectively participates in communication of the work to a third party. It is sufficient participation if the defendant takes one step in the overall process of communication which requires concurrent or cumulative steps by others. The mental element is that the defendant intends or knows that the work will be communicated to a third party or is reckless or careless as to such communication occurring as a result of her or his conduct (see *Huth v Huth* [1915] 3 KB 32 at 38-39 per Lord Reading CJ 42-45 per Swinfen Eddy LJ and 46-47 per Bray J). However, a man is responsible for the publication which has arisen through the curiosity of a person into whose hands a libel in the letter happens to pass in a letter which the bearer, who had no authority to do so, happened to open.

For example that case *Huth v Huth* [1915] 3 KB 32, the defendant sent through the post in an unclosed envelope a written communication which the plaintiffs alleged was defamatory of them. The communication was taken out of the envelope and read by a butler who was a servant at the house to which the envelope was addressed in breach of his duty and out of curiosity. In an action for libel brought by the plaintiffs against the defendant, the court of Appeal held that there was no evidence of publication by the defendant of the communication, and that therefore the action would not lie. The butler's curiosity could not make the defendant liable for the publication to him of the contents of the envelope. The butler opened it in breach of his duty, outside the ordinary course of his business. Where a communication is enclosed in a cover, and is, by some unauthorized act, withdrawn from the cover and perused, the author is not liable for the publication except where the perusal of this communication was in the ordinary course of discharge of his duty by that third party. The court commented that "in the absence of some special circumstances, a defendant cannot be responsible for a publication which was the

wrongful act of a third person. He cannot be said, except in special circumstances, to have contemplated it. It was not the natural consequence of his sending the letter, or writing, in the way in which he did.” In his judgment Bray J., at page 46, said:-

In my opinion it is quite clear that, in the absence of some special circumstances, a defendant cannot be responsible for a publication which was the wrongful act of a third person. He cannot be said, except in special circumstances, to have contemplated it. It was not the natural consequence of his sending the letter, or writing, in the way in which he did.

Similarly in *Weld-Blundell v Stephens* [1920] AC 96 it was held that: - “no duty can be imposed on one person in respect of loss or injury occasioned to another by a third party, even if that loss or injury is already foreseeable and preventable.”

From the above decisions, it becomes evident that the *animus injuriandi* (desire to offend) necessary for a defamatory action requires the deliberate making of the defamatory statement and also its deliberate communication to a third party. There should be both the deliberate making of the defamatory statement and a definite intention to send it. Nevertheless, a communication made recklessly, negligently, inadvertently or by omission may as well give rise to liability as well. For example in *Byrne v Deane* [1937] 1K.B. 818, Greene L.J. made the following observation at page 837:-

Now on the substantial question of publication, publication, of course, is a question of fact, and it must depend on the circumstances in each case whether or not publication has taken place. It is said that as a general proposition where the act of the person alleged to have published a libel has not been any positive act, but has merely been the refraining from doing some act, he cannot be guilty of publication. I am quite unable to accept any such general proposition. It may very well be that in some circumstances a person, by refraining from removing or obliterating the defamatory matter, is not committing any publication at all. In other circumstances he may be doing so. The test it appears to me is this: having regard to all the facts of the case is the proper inference that by not removing the defamatory matter the defendant really made himself responsible for its continued presence in the place where it had been put?"

In that case, a notice which contained innuendo about a club member who notified the police of a possible crime, had been displayed on a golf club notice board. The court considered whether

this constituted publication for defamation purposes and if the non-removal of the notice by the directors of the club amounted to publication of the notice.

A person who did not intend that his or her statement be published must still show that he or she took reasonable care in relation to its publication, which may very well be lacking. The authors of *Gatley on Libel and Slander*, 9th edition at p 136 included the following passage;-

6.12 Loss of defamatory document and mistake at common law

The defendant is liable for unintentional publication of defamatory matter to a third person unless he can show that it was not due to any want of care on his part.

The Supreme Court of Canada in *McNichol v. Grandy*, [1931] S.C.R. 696 decided, as Per Duff J. that: when the defamatory matter is intended only for the plaintiff but is unintentionally communicated to another person, the responsibility must, generally speaking, depend upon whether communication to that other person, or to somebody in a similar situation, ought to have been anticipated. Where the communication is the direct result of the defendant's act, the burden is upon him to show that the communication was not the result of his negligence. As regards proof of publication, the law recognizes no distinction between cases in which express malice in uttering the defamatory words is proved and those in which it is not.

In that case, during an interview between defendant and plaintiff in the dispensary of plaintiff's drug store, the defendant, in a loud angry tone used words which, plaintiff alleged, slandered her. The conversation was overheard by an employee of plaintiff who was in an adjoining dressing room and was able to hear because of a small hole (covered over) which firemen had cut in the wall. Neither defendant nor plaintiff knew that the employee was in the dressing room or that a person there could overhear what was said in the dispensary. Per Lamont J.:

The defendant must be taken to have intended the natural and probable consequence of his utterance, which was that all persons of normal hearing who were within the carrying distance of his voice would hear what he said. When, therefore, it was established that W. did hear what he said, a prima facie case of publication was made out, and, to displace that prima facie case, the onus was on defendant to satisfy the jury, not only that he did not intend that anyone other than plaintiff should hear him, but also that he did not know and had no reason to expect that any of the staff or any

other person might be within hearing distance, and that he was not guilty of any want of care in not foreseeing the probability of the presence of someone within hearing range of the speaking tones which he used.

In *Weld-Blundell v Stephens* [1920] AC 956, the plaintiff had been successfully sued for a libel contained in a document which he had supplied to his accountant. The majority of the House of Lords held that he could not recover the damages he had had to pay to the defamed party due to his accountant, who had negligently left the document about so that it came to the former's attention. The court stated that what a defendant ought to have anticipated as a reasonable man is material when the question is whether or not he was guilty of negligence, that is, of want of due care according to the circumstances. The author will be found negligent if the resultant publication is reasonably foreseeable taking into account all relevant circumstances or is a natural and probable result of his actions.

In all the above cases, there was an "act" of the defendant that resulted in the communication reaching an unintended third party. This suggests that in a clear case of *novus actus interveniens*, the defendant will not be liable where the defamatory matter is made known by the act of a third person for which the defendant can in no way be held responsible. Where, without any apparent fault on the part of the defendant, an accidental publication of a libel on the plaintiff to a third person is made, no responsibility rests upon the defendant. Where the communication is the direct result of the defendant's act, it seems reasonable, as well as in consonance with the general principles of liability that the burden should be upon the defendant to show that the communication which is the subject of complaint was not the result of his negligence. The burden is thrown upon the defendant to prove that it was not due to any negligence on his part that the defamatory matter was made known to a third person.

In the instant case, the evidence was that the letter was not addressed to the appellant but rather to The Chief Administrative Officer of Yumbe District Local Government. Therefore from the very beginning, the respondent had the intention to publish this letter to a person other than the appellant. According to the respondent as indicated in his testimony at lines 17 – 20 of page 23 of the record of appeal, he wrote the letter on 19th December 2012 but subsequently when he called a Local Council I meeting for consideration and approval of the letter, he found it was missing from the office, only to receive a copy subsequently from the appellant's advocates.

Under cross-examination at line 3-4 of page 24 of the record of appeal, he claimed that the letter was stolen together with all the files. DW2 Ijoga Noah, who was the then L.C.1 Secretary for Defence, testified that he was suspected for complicity in the missing letter since he had the key to the office (see line 18 p 26 of the record of appeal).

From that evidence, it is not clear how the letter got to the office of the Chief Administrative Officer, where the appellant retrieved a copy from the Commercial Officer in that office (see lines 26 and 35 at p 16 of the record of appeal). The appellant did not disclose the date on which he retrieved this letter. What the evidence established was that it was published to both the Chief Administrative Officer and the Commercial Officer on an unspecified date. The question then is whether the respondent can be held responsible for that publication.

The respondent's claim that the letter was stolen together with all the files after it was written on 19th December 2012 cannot be believed. There was no evidence of any break-in adduced at the trial. It would be a most peculiar thief who would ensure that the letter is delivered to the addressee. The plaintiff claimed that the letter was stolen along with all other files yet he was able to produce in court the minutes of L.C.1 meeting of 19th December 2012 which authorized the writing of that letter. These were exhibited as D.E.X.3. In any event, when he wrote the letter he addressed it to the Chief Administrative Officer and intended it to be delivered to that officer. He intended it to be published to a person other than the appellant and indeed it was so published. When the respondent wrote the letter he does not appear to have taken any reasonable care to avoid acts or omissions which he could reasonably foresee would be likely to injure the appellant, in case the letter was received by the addressee. Since he intended the letter to be delivered to the Chief Administrative Officer, the acts of a third party, if there was one, would not absolve him of liability under the doctrine of *novus actus interveniens*, since there was no break in the chain of transmission between the writing and final delivery of the letter to its intended destination.

Where human action forms one of the links between the original wrongdoing of the defendant and the plaintiff's loss that action must "at least have been something very likely to happen if it is not to be regarded as *novus actus interveniens* breaking the chain of causation" (see *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, [1970] 2 WLR 1140, [1970] 2 All ER 94). A defendant is not liable for a consequence of a kind which is not foreseeable. But it does not

follow that he is liable for every consequence which a reasonable man could foresee. What can be reasonably foreseen depends almost entirely on the facts of each case. Not only must the new cause come in but the old must go out; there must no longer be any cause or connection between the original act and the resultant injury for an act of a third party to be deemed as having broken the chain of causation (see *Hogan v Bentinck Collieries*[1949] 1 All ER 588).

In the cases such as *Huth v Huth* [1915] 3 KB 32, where a defendant was found not to be responsible for a publication which was the wrongful act of a third party, it was because in the circumstances of those cases, the act of the third party was not the natural consequence of his sending the letter, or writing the letters in issue. Such letters were addressed to different persons and without the fault of the authors, ended up in the hands of third parties in circumstances never contemplated by the authors. In the instant case, the circumstances are different. The respondent intended and must have contemplated that the letter would be read by the Chief Administrative Officer since he was the addressee. It was the natural consequence of his writing and addressing the letter in the way he did. The act of whoever delivered the letter was a completion of what was from the very beginning the intention of the respondent. I therefore find that the respondent published the letter containing the defamatory words.

3. Whether there were any defences available to the respondent.

The respondent raised a number of defences. His first defence was justification. The truth of the defamatory words was pleaded in paragraphs 8 and 10 of the plaint. At common law, justification is as a complete defence even when the words were published with spite and maliciously. A publication based on verifiable facts can extinguish liability for defamation. It negates the allegation of malice and it shows that plaintiff is not entitled to recover damages too. However, as found when answering the first issue in this appeal, the words as published were not true. This defence was therefore unavailable to the respondent.

The other defence relied on by the respondent was that of qualified privilege. Qualified privilege covers exchanges “for the common convenience and welfare of society”. A privileged occasion is one where the person who makes a communication has an interest, or a duty, legal, social or moral, to make it to the person to whom it is made and the person to whom it is so made has a

corresponding interest or duty to receive it (see *Adam v Ward* [1971] AC 309). This reciprocity is essential. Both these conditions must exist in order that the occasion may be privileged. There are occasions and circumstances when speaking ill of a person or uttering or writing words defamatory is not regarded as defamatory in law and for the reason that public interest demand it. It is regarded sometimes right and in the interest of the public that a person should plainly state what he honestly believes about a certain person and speak out his mind fully and freely about him. Such occasions are regarded as privileged and even when the statement is admitted or proved to be erroneous, its publication will be excused on that ground.

In those situations, even where the publication is based upon facts and statements which are not true, the defendant is not liable unless the plaintiff establishes that the publication was made by the defendant with reckless disregard for truth. In such cases, it is enough for the defendant to prove that he acted after a reasonable verification of the facts; it is not necessary for him to prove that what he has written is true. But where the publication is proved to be false and actuated by malice or personal animosity, the defendant would have no defence and would be liable for damages. Qualified privilege operates only to protect statements which are made without malice (i.e., spitefully, or with ill-will or recklessness as to whether it was true or false). According to *Gatley on Libel and Slander* (p 328 para 14.4), the main classes of statements which come under the defence of qualified privilege at common law are:-

1. statements made in the discharge of a public or private duty;
2. statements made on a subject matter in which the defendant has a legitimate interest;
3. statements made by way of complaint about those with public authority or responsibility;
4. reports of parliamentary proceedings;
5. copies of or extracts from public registers;
6. Reports of judicial proceedings.

The House of Lords in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 205 required multiple factors to be considered when deciding whether defendants have established privilege, with Lord Nicholls listing 10 illustrative factors; -

1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.

2. The nature of the information, and the extent to which the subject matter is a matter of public concern.
3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid.
4. The steps taken to verify the information.
5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.
6. The urgency of the matter. News is often a perishable commodity.
7. Whether comment was sought from the plaintiff. An approach to the plaintiff will not always be necessary.
8. Whether the article contained the gist of the plaintiff's side of the story.
9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
10. The circumstances of the publication, including the timing.

The case seeks to protect defamatory material of public importance where defendants have published responsibly, irrespective of the material's truth or falsity. It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation provided it is done in good faith. The person alleging in good faith must establish the fact that before making any allegations he had made an inquiry and necessary reasons and facts given by him must indicate that he had acted with due care and attention and that he was satisfied about the truth of the allegation.

There is no doubt that it is a defence to an action for defamation that the defamatory statement was published in the discharge of a duty to a person who has a corresponding right or duty to receive the information. The duty to communicate defamatory matter may be legal, moral or social. The respondent was a member of the L.C.1 and as such he had a duty in communicating to the Chief Administrative Officer any matters detrimental to the interest of the District Local Government. The matters in this case related to theft of hospital equipment and the conduct of a servant of the District Local Government. The Chief Administrative Officer had legitimate interest in receiving information on any matters which might be detrimental to the interest of the District Local Government. In those circumstances, the requisite duty to communicate the information and the reciprocal interest to receive it was adequately established. The letter was therefore published on a privileged occasion.

However, the defence of qualified privilege can be assailed if the respondent was actuated by an improper motive that is to say by "express malice" (see Lopes C.J. in *Royal Aquarium and Summer and Winter Garden Society Ltd. v. Parkinson* [1892] 1 Q.B. 431 at p.454). Whereas it was for the respondent to prove that the occasion was privileged, once he did that, his bona fides had to be presumed (see *Janouire v. Delmege* (1891) A. C. 73 at 79. The burden then shifted to the appellant to show express malice (see *Clark v. Molyneux* (1877) 3 Q.B.D. 237). But until then, the appellant had no such burden. Express malice, unlike legal malice, is never presumed; it must be proved as a fact. Malice in law, which is presumed in every false and defamatory statement, stands rebutted by a privileged occasion. In such a case, in order to make a libel actionable, the burden of proving actual or express malice is always on the plaintiff.

In one sense, malice is about the attitude of the respondent toward the appellant. In that sense, malice means personal hostility, animosity, ill will, bad motive, dislike, bias, or bad faith. In that sense it means the intentional commission of a wrongful act, without justification, with the intent to cause harm to another. The respondent would be found to have made the statements with "express malice" if he acted with knowledge that the statement was false or with reckless disregard of whether it was false or not. Evidence of inadequate investigation would show intent to inflict harm through falsehood. Such evidence would suggest that, because of his bias, the respondent knowingly or recklessly avoided the truth by performing an inadequate investigation. Deliberate or reckless falsity is evidence of express malice.

In another sense, malice is about the attitude of the respondent toward the veracity of his statements concerning the appellant. In that sense, the term does not necessarily imply personal hatred, a spiteful or malignant disposition or ill feelings of any nature, but rather, it focuses on the mental state which is in reckless disregard of the law in general and of the legal rights of others. Malice is present if the acts were done in the knowledge that the statement is invalid and with knowledge that it would cause or be likely to cause injury. It also exists if the acts were done with reckless indifference or willful blindness to that invalidity and that likely injury. Malice is presumed to exist, in law, when there is intention to bring disrepute or knowledge that the matter in question could bring disrepute to a person. Five important considerations must be kept in mind while establishing good faith and bona fides; - a. the circumstances under which the

letter was written; b. whether there was any malice; c. whether the appellant made any inquiry before he made the allegations; d. whether there are reasons to accept the version that he acted with care and caution; and e. whether there is preponderance of probability that the appellant acted in good faith.

The motive of the defendant becomes material where privilege is established and the burden has shifted to the plaintiff to show actual malice. Improper motive is the best evidence of malice. Malice in this sense means making use of a privileged occasion for an indirect or improper motive. Such motive can be inferred from evidence regarding the defendant's state of mind. If the defendant did not believe in the truth of what he stated, that fact is conclusive evidence of express malice, for no man can legitimately claim privilege if what he stated was a deliberate and injurious falsehood about another.

Such malice can be proved in a variety of ways, inter alia; (i) by showing that the writer did not honestly believe in the truth of these allegations, or that he believed the same to be false; (ii) or that the writer is moved by hatred or dislike, or a desire to injure the subject of the libel and is merely using the privileged occasion to defame (See *Watt v. Longsdon*, [1930] 1 KB 130 and the observations of Greer, L. J. at p. 154) and (iii) by showing that out of anger, prejudice or wrong motive, the writer casts aspersions on other people, reckless whether they are true or false (See observations of Lord Esher, M. R. in *Royal Aquarium and Summer and Winter Gardens Society v. Parkinson*, (1892) 1 QBD 431 at p. 444). Reckless publication of untrue defamatory matter without caring whether what is said was true or not would be treated as a deliberate lie and would thus be evidence of malice.

In *Adam v Ward* [1917] AC 309, [1917] All ER 151 Lord Dunedin closely considered the question of a communication published on a privileged occasion. At pp. 326, 327, he observed as follows:

What now is the situation? You have a communication issued on a privileged occasion and in that communication are used words which are in themselves defamatory. What test is to be applied? On the one hand it is said that, the occasion being privileged, the whole document is privileged, but that if in the document you find parts which are not really necessary to the fulfillment of the particular duty or

right which is the foundation of the privilege on the occasion, then these parts may be used as evidence of express malice. In other words, it stands thus: Malice, which is of the essence of libel, is presumed from defamatory words. Privilege destroys that presumption. But the place of the implied malice which is gone may be taken by express malice which may be proved. It may be proved either extrinsically or intrinsically of the document and such words in the document are apt as evidence.

Although a person making a communication on a privileged occasion is not restricted to the use of such language merely as is reasonably necessary to protect the interest or discharge the duty which is the foundation of his privilege and will be protected, even though his language should be violent or excessively strong, if, having regard to all the circumstances of the case, he might have honestly and on reasonable grounds believed that what he wrote or said was true or necessary for the purpose of his vindication, though in fact it was not so, if anything is found in the thing published which is not reasonably appropriate to that duty or right, then privilege cannot extend to that.

In his testimony at lines 32 – 35 on page 22 of the record of appeal, the respondent said he was sent by the village council following concerns by the people that thieves had continued to work at the hospital. At line 6 on page 23 of the record he said the Yumbe Hospital Administrator told him he had already informed the district officials. At line 38 on page 23 of the record, he said he wrote the letter to protect the interest of his people. At line 5 on page 23 of the record of appeal, the respondent admitted having briefed journalists from Radio Pacis that the appellant was involved in the theft of solar panels at Matuma Health Centre. While under cross-examination at line 26 on page 23 of the record, he said that regarding the theft at Matuma, he did not make any inquiries but heard that the appellant had committed theft at Matuma. At line 5 on page 23 of the record, he said he was authorized at a meeting of the Council on 12th December 2012 to write the letter complained of. He continued at lines 22 – 25 and 32 on page 23 of the record to say that at the time he wrote the letter he was not aware of the appeal which had been filed the appellant. While under cross-examination at lines 14 – 15 on page 24 of the record, he asserted that “I still maintain that Twaha is a thief.” If a person does not draw the obvious inferences or make the obvious inquiries, the question is, why?

The gist of the respondent's explanation was that his intention was to cause the allegations to be acted upon by dismissing the appellant who was a convicted thief. But it is well-settled that the fact that the defamatory publication might have been calling for an inquiry or investigation is no defence (See "*Truth*" (N.Z.) *Ltd. v. Holloway* [1960] 1 W.L.R. 997, P.C). On close scrutiny of his testimony, it is apparent that the respondent's dominant motive was not to inform the Chief Administrative Officer of the status of the appellant as a convicted thief, but to harm the appellant.

The desire to injure the appellant was shown to be the dominant motive for the respondent's defamatory on account of the fact that he and his Council, acted impulsively and illogically and perhaps irrationally in arriving at the belief he did that the appellant was involved in the theft which occurred in Matuma Health Centre. The appellant had never been prosecuted in connection with that theft let alone convicted. It is an incident which had occurred in the year 2007 and one wonders why he was drawing it to the attention of the Chief Administrative Officer in 2012, twelve years later without any evidence to support the allegation that the appellant was one of the thieves involved. To some degree he leapt to conclusions on inadequate evidence and without making any inquiries. His strong language in using such expressions as "he should be dismissed from the post he holds now" and "Twaha Sebi Olega must also be sacked," was not indicative of indignation and conviction but rather malice and intent to injure the appellant by causing his dismissal from employment.

The respondent also raised the defence of qualified immunity. Qualified immunity insulates governmental officials from liability for civil actions arising from discretionary conduct taken under the colour of law as long as their conduct does not violate clearly established rights of which a reasonable person in their position would have known.

Section 173 of *The Local Governments Act* provides as follows;

173. Protection against court action.

No act, matter or thing done or omitted to be done by—

- (a) any member of a local government or administrative council or a committee of a council;
- (b) any member of staff or other person in the service of a council; or

- (c) any person acting under the directions of a council, shall, if that act, matter or thing was done or omitted in good faith in the execution of a duty or under direction, render that member or person personally liable to any civil action claim or demand.

Membership on a Local Council Committee necessarily requires one from time to time to exercise discretion in the performance of one's duties. The respondent exercised such discretion when he chose to write the letter complained of. In *Roberts v Hopwood* [1925] AC 578, [1925] All ER 24 Lord Wrenbury said: "A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so, he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by use of his reason, ascertain and follow the course which reason directs."

Section 173 of *The Local Governments Act* confers a qualified immunity against personal civil liability for acts and omissions done of local council committee members done "in good faith." Just like qualified privilege, qualified immunity is a conditional defense. It affords immunity to those alone who use the official position for the purpose which the law deems of sufficient social importance to defeat the countervailing claim to protection of reputation. In other words the immunity is forfeited by the abuse of the occasion. It will not be availed if it appears that the defendant was, in fact, "actuated solely or predominantly by a wrong or indirect motive" (see *Webster v Lampard* (1993) 177 CLR 598, 606 (Mason CJ, Deane and Dawson JJ), citing *Trobridge v Hardy* (1955) 94 CLR 147, 162 (Kitto J).

In the instant case, there was express malice manifested in the respondent's desire to injure the appellant. While under cross-examination at lines 14 – 15 on page 24 of the record, he asserted that "I still maintain that Twaha is a thief." He said this even after evidence had been adduced by way of exhibit P.E.X.1 of the appellant's acquittal and evidence of the appellant's involvement in the incident at Matuma only as a witness. By that statement, the respondent demonstrated a very high level of indifference to the truth or a willful disregard of the importance of the truth of the statements he made in his letter. By that statement, the desire to injure the appellant was shown to be the dominant motive for the respondent's defamatory letter. The defendant acted

impulsively and illogically and perhaps irrationally in arriving at the belief he did. The evidence adduced at the trial showed that the respondent should be deemed to have had constructive notice of the judgment of the Chief Magistrates' Court Criminal Appeal No. 0010 of 2012 received as Exhibit P.E.X.2 in the sense that it was a public record which by the exercise of prudence he would have discovered and that in not doing so he acted with willful blindness when he wrote the letter without having first made the necessary inquiries to inform himself of its existence and contents. Devlin J in *Roper v Taylor Garages (Exeter)* [1951] 2 TLR 284 at 288 drew the distinction between constructive notice and willful blindness thus;

A vast distinction between a state of mind which consists of deliberately refraining from making inquiries, the result of which a person does not care to have [willful blindness], and a state of mind which is merely neglecting to make such inquiries as a reasonable and prudent person would make [constructive knowledge].

Both ways, the respondent cannot hide behind the shield of qualified immunity conferred by Section 173 of *The Local Governments Act*. Willful blindness and constructive knowledge negate the good faith requirement of that provision. He willfully and recklessly failed to make such inquiries as an honest and reasonable member of the local council committee would have made before writing the letter. In *Royal Brunei v Tan* [1995] 2 AC 378 Lord Nicholls said that an honest person does not:

Deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless ... Acting in reckless disregard of others' rights or possible rights can be a tell-tale sign of dishonesty. An honest person would have regard to the circumstances known to him, including the nature and importance of the proposed transaction, the nature and importance of his role, the ordinary course of business, the degree of doubt, the practicability of the trustee or the third party proceeding otherwise and the seriousness of the adverse consequences to the beneficiaries. The circumstances will indicate which one or more of the possible courses should be taken by an honest person. He might, for instance, flatly decline to become involved. He might ask further questions. He might seek advice, or insist on further advice being obtained.

I therefore find that none of the defences raised by the respondent could be sustained by the evidence adduced before the trial court. The trial court erred in not dismissing the defences.

4. Whether the appellant was entitled to any remedies.

General damages are such as the law will presume to be the natural and probable consequences of the defendant's words or conduct. They arise by inference of law and need not, therefore be proved by evidence. If words have been proved to be defamatory of the plaintiff, general damages will always be presumed since all libel is actionable per se. Imputation of commission of a criminal offence is actionable per se without any need of proving damage on the part of the plaintiff (See *Blaize Babigumira v Hanns Besigye HCCS No. 744 of 1992*).

A person's reputation has no actual value, and the sum of be awarded in damages is therefore at large and the Court is free to form its own estimate of the harm taking into account all the circumstances (see *Khasakhala v Aurali and Others [1995-98]1 E.A. 112*). General damages are to be determined and quantified, depending upon various factors and circumstances. Those factors are (i) the gravity of allegation, (ii) the size and influence of the circulation, (iii) the effect of publication, (iv) the extent and nature of claimant's reputation and (v) the behavior of defendant and plaintiff.

In *Kanabi v Chief Editor Ngabo Newspaper and others*, the Supreme Court commented as follows;-

It is not enough to consider the social status of the defamed person alone in assessing award of damages. It is necessary to combine the status with the gravity of or the seriousness of the allegations made against the Plaintiff. Anyone who falsely accuses another of a heinous crime should be condemned heavily on damages. Once an ordinary person is defamed seriously and is shunned by the public then it does not matter whether he or she is of high or low status.

In *David Kachontori Bashakara v Kirunda Mubarak, H.C.C.S No. 62 of 2009*, general damages of Shs.45,000,000/= were awarded to a plaintiff who had been a public servant for a period of 33 years and had during the course of his service been to various parts of Uganda. He had a family of seven mature children and lots of friends in many parts of the country who were saddened and scandalized by the utterances complained of made in Lusoga, imputing a criminal offence (the words were "corrupt, thief, embezzler, unfit to hold public office") and broadcast in many parts

of the country where the language is understood. He had as a result lost the Mayoral race in Mbarara.

In *Joseph Kimbowa Lutaaya v Francis Tumuheirwe H.C. Civil Suit No.862 of 2001*, general damages of shs 10,000,000/= were awarded to a plaintiff, a manager with Allied Bank, in respect of a defamatory memo written by the defendant to the Permanent Secretary to the Treasury explaining the reasons why the plaintiff's wife had been suspended. In that memo the defendant alleged inter alia that the plaintiff while still working with the Standard Chartered Bank connived with his wife to steal shs.50,000,000/= (fifty million) and was as a result was dismissed from the Bank while his wife was dismissed from USAID. In that case the publication was made only once and there was no repetition. The publication did not capture a wide publicity.

In *Abu Bakr K. Mayanja v Tedi Seezi Cheeye and another, H.C. Civil Suit No. 261 OF 1992*, the plaintiff who by then a Minister of Justice and Constitutional Affairs and Attorney General, was awarded a sum of shs 2,000,000/= in general damages for libel for an article published by the defendants alleging that he was a confused "third deputy Prime Minister." The court observed that a plaintiff who puts himself in public life must expect public scrutiny of his conduct as a public figure. The established principle though is that the higher the Plaintiff's social status, the greater is the likely injury to his feelings by a defamatory publication about him and therefore the greater is the amount of damages awardable. The amount is enhanced where the publication is extensive and where the defendant acted maliciously in the publication. In that case, it was found that the circulation of the Newspaper was limited to Kampala, Jinja and few main towns in Western Uganda.

Damages ought to have been assessed by the trial court. It is recommended judicial practice that in a trial involving a claim for damages, a trial court ought, even when it dismisses the suit, to make an assessment of what its award would have been, had the suit been successful. In this case it was not done but s 80 (2) of *The Civil Procedure Act* confers upon this court in exercise of its appellate jurisdiction, the same powers and as nearly as may be the same duties as are conferred and imposed on courts of original jurisdiction in respect of suits instituted in them.

In the instant case, I have considered the gravity of the allegation. The appellant was accused of the criminal offence of theft. However, the circulation of the letter does not appear to have exceeded the members of the Local Council Committee of Renanga village and the Office of The Chief Administrative Officer of Nebbi District. As a result of the publication though, he lost side income from private installations and maintenance service of solar powered installations. The claim that the information spread all over West Nile does not appear to have been a direct result of publication of the letter nor the radio programmes and announcements he referred to. In my view the letter did not receive wide circulation. The family troubles which he referred to as springing from this publication as well appear to be remote to the nature of his cause of action. There was no useful evidence led relating to the extent and nature of his reputation as a family man, an electrician and employee of the District Local Government. I have considered the fact that the respondent appeared adamant and unapologetic even when the true facts were disclosed to him during the trial. On account of all those factors, I am of the view that an award of shs. 9,000,000/= (nine million shillings) in general damages would be adequate compensation to the appellant. Considering the passage of time from the date of publication of the letter, the relief of a permanent injunction and a public apology may not serve any useful purpose now. These reliefs will not be granted to the appellant.

In the final result, the appeal succeeds. The Judgment and decree of the Magistrate's Grade One Court is hereby set aside and instead judgment is entered for the appellant against the respondent in the following terms.

1. Shs. 9,000,000/= (nine million) as general damages
2. Interest at the court rate on that sum from the date of judgment until payment in full.
3. The costs of this appeal and of the court below.

I so order.

Dated at Arua this 29th day of September 2016.

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Stephen Mubiru
Judge