

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

AT MASINDI

CIVIL APPEAL NO. 0022 OF 2021

(Arising from the Chief Magistrate's Court, Masindi Civil Suit No. 062 of 2011)

AMANYIRE JOSHUA ::: APPELLANT

VERSUS

NYABONGO APOLLO ::: RESPONDENT

JUDGMENT

Before: Hon. Justice Byaruhanga Jesse Ruyyema

[1] This is an Appeal from the Judgment/Decree of the Grade 1 Magistrate of Chief Magistrate's Court of Masindi at Masindi dated 4th February, 2021.

Facts of the Appeal

[2] The Plaintiff/Respondent's claim against the Defendant/Appellant was for recovery of General and Exemplary damages for inter alia, defamation arising from a radio broadcast on Bunyoro Broadcasting Services (BBS) F.M. Radio Station on the 26th April 2011 between 8.30-9.30 p.m. It is alleged that the said Radio Station has a coverage of over 5 Districts including Masindi District and during the programme of "NYATABWONGO" the Appellant uttered slanderous statements in Runyoro language that were defamatory of the Defendant.

- [3] The Defendant on the other hand denied the Plaintiff's allegation and contended that the Plaintiff was at the material time his political rival especially after his electoral loss for the post of Mayor, Masindi Municipality and has therefore raised various false accusation against him and he was to put the Plaintiff to proof of his allegation.
- [4] The trial Magistrate on her part, upon correctly disclosing herself on the burden of proof that in all Civil Cases the Plaintiff must prove his/her case on a balance of probabilities and the elements of defamation, proceeded and relied on an article in the Daily Monitor Newspaper (**P.Exh. 1**) in which the slanderous statements were allegedly published and found that the Defendant uttered the defamation statements against the Plaintiff and were true and defamatory of the Plaintiff. She issued a **Permanent Injunction** restraining the Defendant and his agents from further publication of the defamatory content, **General damages** of Ugx. 10,000,000=, **Punitive damages** of Ugx. 2,000,000=, costs of the suit and interest at the rate of **6% per annum** on the general and punitive damages from the date of Judgment till full payment.
- [5] Dissatisfied with the trial Magistrate's Judgment and orders, the Defendant/Appellant filed the present Appeal on the following grounds as contained in his Memorandum of Appeal:
1. **The trial Magistrate erred in law to rely on the Plaintiff's evidence of the Daily Monitor Newspaper.**
 2. **The trial Magistrate erred in law when she held that the Plaintiff proved all the elements of the tort of defamation thereby rendering a miscarriage of justice.**

3. **The trial Magistrate erred in law by allowing the Plaintiff to differ from his pleadings thereby rendering a miscarriage of justice.**
4. **The trial Magistrate erred in law when she held that the Plaintiff discharged the burden of proof.**

Counsel legal representation

- [6] On Appeal, Appellant was represented by **Mr. Richard Akugizibwe** of **Ms. Kabalega Advocates & Legal Consultants, Masindi** while the Respondent was represented by **Mr. Tugume Moses** of **Ms. Tugume-Byensi & Co. Advocates, Kampala**. Both Counsel filed their respective written submissions for consideration of Court.

Counsel Submissions

- [7] Counsel for the Appellant submitted that the lower Court wrongly relied on the statements ran in the Daily Monitor paper dated 29th September, 2011 at page 8. That the veracity of the statement ran in the Daily Monitor and the connection it had to the radio programme was not led in evidence, that there was no assessment between the similarities and/or disjunction between what was ran by the Daily Monitor and what was said by the Appellant and /or aired by Bunyoro Broadcasting Station (BBS) on 26th April, 2011 between 8.30 and 9.30 p.m.
- [8] He concluded that the trial Magistrate erred in law and fact in finding that the Daily Monitor Article (**P.Exh. 1**) was enough to prove that the Appellant uttered defamatory statements of the Respondent/Plaintiff. That what was reported in the Daily Monitor was hearsay as the article was not authored by the Defendant/Appellant but by a 3rd party who neither attended the radio programme or listened to the same. That

notwithstanding the fact that it was tendered in evidence without objection from the defence Counsel, the entire article was wrongly admitted in evidence and its contents were not of probative value to prove the Plaintiff's case.

- [9] Counsel for the Respondent on the other hand submitted that the evidence from witnesses who listened to the radio programme in issue and testified in Court all proof to the fact that the Appellant uttered the defamatory statements against the Respondent while on a radio talk show which evidence Court relied on, the absence of the recording of the programme notwithstanding.

Consideration of the Appeal

- [10] This being a first appeal, the legal obligation of the first Appellate Court is to re-appraise the evidence as adduced in the trial Court. It is a well settled principle that on a first appeal, the parties are entitled to obtain from the appeal Court its own decision on issues of fact as well as of law. Although in case of conflicting evidence, the Appeal Court has to make due allowance for the fact that it has neither seen nor heard the witnesses; **Fr. Narsensio Begumisa and 3 Ors Vs. Eric Tibebaga S.C.C.A. No. 17 of 2002.**

- [11] In the instant case, it is clear from the Judgment of the lower Court that the trial Magistrate relied entirely on the Daily Newspaper Article (**P.Exh.1**) in which the alleged slanderous statement was published and found it sufficient to show that the Defendant uttered the defamatory statement.

- [12] In the pleadings the alleged Runyoro defamatory statement was pleaded with its English translation as follows:

“I know the people fighting me. They are led by Mr. Kanyamu and their lawyer Mr. Tugume. Others are Mr. Kawanguzi Musa who owns a Stationery Shop on Talemwa Building called Good Stationers, Mr. Hakim Kabagambe, Zaina Byenkya, Apollo Nyabongo, Businge Joab, Bagada John and Hajji. They are always holding meetings and raising funds for killing me at Kabalega Resort and others in their homes. However, I am also armed and prepared for them”.

[13] It is the evidence of both **Byabakama Jackson** (Pw2) and **Isingoma Sowed** (Pw3) who were both Campaigning Managers of the Respondent during the Mayoral race that pitied the Plaintiff/Respondent and the Defendant/Appellant that the above alleged defamatory was aired on BBS F.M. Radio “**NYATABWONGO**” programme and that they heard the uttered words. However, the Respondent was not able or failed to produce and present the recording of the programme. The explanation given is that the recordings of the programme had been erased for the mandatory time for storage of the recording had elapsed and there was need to create space for fresh recording. (See letter from the Station Manager BBS addressed to the trial Magistrate dated 27th February, 2013).

[14] I am not able to appreciate the reasons given by the Respondent and why Court believed the Respondent as to the failure by the Respondent to produce and present the recording of the programme. By the 26th June, 2014, the Radio recording was in the hands of either the Respondent himself or his advocates. This is evidenced by what the Respondent’s Advocate addressed Court at **page 12 of the Proceedings;**

“Tugume: We have secured the Radio recordings and I pray that they be admitted in evidence, it is the Plaintiff that recorded the statement on Radio:

At page 19, Counsel Tugume reiterated his other statement about the radio recording thus:

“Tugume: I am closing the 3rd Plaintiff witness testimony. I pray to recall Pw1 for purposes of exhibiting the tape record and I have it played in Court”.

[15] Eventually the Plaintiff/Respondent closed his case without any attempt to tendering evidence of the so called Radio recording wherein are the alleged defamatory statements. In the twist of events, the Plaintiff presented **Muzoora George** (Pw4) as the last witness through whom the **Daily Monitor Article** wherein alleged defamatory statement was published was exhibited. It is **P.Exh.1**. I find this to be a departure from the slanderous pleadings to libel which is not permissible under the law, see **Semalulu Vs. Nakitto, H.C.C.A No. 04 of 2008**.

[16] However, upon perusal of the Monitor Newspaper Article (**P.Exh.1**), I find that neither the Plaintiff/Respondent, nor any other person named in the alleged defamatory statement was mentioned in the Article. The trial Magistrate could not therefore rely on it entirely as sufficient proof of the defamatory statement yet as she had rightly directed herself, the essential elements of defamation included:

1. **The Defendant made a statement about the Plaintiff to another**
2. **The statement was injurious to the Plaintiff's reputation in the eyes of the right thinking members of society**
3. **The statement was false.**

[17] In this case, the name of the Plaintiff was never at all disclosed in the Daily Monitor Newspaper Article (**P.Exh. 1**) to prove that the statement was made about him to the radio listeners. On this ground alone, the trial Magistrate ought to have dismissed the Plaintiff's claim since the Newspaper Article purported to publish what was uttered on BBS F.M. Radio.

[18] Secondly, the law on admissibility of Newspapers is now settled. In **Constitutional Appeal No. 1 of 1997: A.G. Vs. Major General Tinyefuza** it was held that Newspaper Articles are inadmissible as being hearsay statements since they are reported statements of persons who are neither parties to, nor witnesses in the case. They are also not admissible under the *res-gestae* principle in terms of **Sections 6,9 and 10 of the Evidence Act.**

[19] In the instant case, the author of the Article **Mr. Muzoora George** (Pw4) clearly stated at p.23 of the proceedings;

"..... In the course of my work, I did find a story involving Apollo Nyabongo and Amanyua Joshua.... I did report that story on Daily Monitor of 29th September, 2011 pg. 8".

[20] Though he claims that in the story, the Defendant/Plaintiff mentioned **Tugume Moses, Apollo Nyabongo, Zaina Byenkya** among others that wanted to kill him, he never disclosed their names in the Article. Then, the question is, how can the alleged defamatory statement be said to had been referring to either of them? In cross examination, **Pw4** claimed that he did not begin with the radio programme wherein the Defendant/Appellant allegedly uttered the defamatory statement. Surely, no reasonable tribunal would rely on him (**Pw4**) and his Article to find that the Appellant uttered the alleged words about the

Respondent. The right witness should have been the Radio Presenter or Moderator for the “**Nyatabwongo**” programme that allegedly hosted the Appellant on the eventful day.

[21] All in all, I find that the trial Magistrate failed to evaluate all the evidence on record and as a result, wrongly found that the Plaintiff had proved his case on the balance of probabilities thus led to a miscarriage of justice.

[22] The 4 grounds of appeal are found to be having merit. The Appeal is in the premises allowed, the Judgment and orders of the lower Court are set aside with costs of this Appeal and in the lower Court to the Appellant.

Dated and Delivered at Masindi this **20th day of October, 2022.**

Byaruhanga Jesse Rugyema
JUDGE