



IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Suit No. 12 of 2009

In the matter between

1. **ENG. BARNABAS OKENY** }
2. **WALTER OKIDI LADWAR** }
3. **JAMES ONYING PENYWII** }
4. **DAVID OKIDI** }
5. **BEST SERVICES CO. LIMITED** }

PLAINTIFFS

And

PETER ODOK W'OCENG

DEFENDANT

Heard: 12 February 2019

Delivered: 28 February 2019

Summary: libel and the defences of qualified privilege and qualified immunity.

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

- [1] The plaintiffs jointly and severally sued the defendant for general damages for libel, exemplary damages, an injunction restraining him from further publication of slanderous and libellous material against them, interest and costs. The defendant was at the material time Chairman of Pader District Local Government
- [2] Their claim is that on diverse occasions starting on 3rd December, 2007 the defendant wrote a series of letters of and about them, addressed to the IGG calling for investigations into the financial mismanagement in the District (exhibit

P.E.1). On 6th October, 2008 he wrote a letter addressed to the Minister of Local government over a similar subject (exhibit P.E.2); on 25th November, 2008 he wrote another letter addressed to IGG over a similar subject (exhibit P.E.3); on 19th January, 2009 he wrote another letter addressed to IGG on the same subject (exhibit P.E.4). The letters were copied to several people including personnel from the print (exhibit P.E.5) and electronic media. The subject of the defendant's complaint in those letters received wide media coverage in both forms. The contents of those letters was defamatory of the plaintiffs and as a result of their publication, the reputation and public image of each of the plaintiffs was damaged.

- [3] In his written statement of defence, the defendant denied writing or publishing any defamatory letters to the named publishing houses and electronic media. He admitted writing letters to government agencies concerned with the subject of his complaint that included the IGG, the Minister of Local Government, the Permanent Secretary to the Ministry of Local Government, the Resident District Commissioner of Pader, the Chief Administrative Officer of Pader, the Attorney General and the Chairman of the Local Government Accounts Committee, all of which offices he was accountable to. He contended that nothing contained in those letters was defamatory of the plaintiffs. In the alternative he pleaded qualified privilege. The letters were not malicious but were rather written for purposes of initiating investigation into suspected public corruption. The plaintiffs did not suffer any injury to their reputation or credit as a result of those letters. He prayed that the suit be dismissed with costs.

The plaintiffs' evidence:

- [4] The third plaintiff Onying Penyii testified as P.W.1 and stated that at the material time he was Director of Operations at the office of the IGG and director in Best Services Co. Limited (the 5th plaintiff). On receiving the letter dated 3rd December, 2007 the Deputy IGG called him to his office and sought his comment. Subsequently the IGG showed him the letter dated 6th October, 2008.

The practice is that complaints are channeled to the IGG who then allocates each to a member of staff to investigate. The letters damaged his reputation. The reputation of the company which has been in business since the year 2002 too has been dented. It has not been able to secure any work in Pader District since the publications. He is not involved in the day to day running of the 5th plaintiff but is a co-signatory to its account. The defendant in his communications threatened to take copies of the letters to the press and also appeared on FM radio stations. At the time the letters were written, there were ongoing investigations by the IGG into financial issues in Pader District involving inflated bills for construction of a garage, recruitment and so on.

- [5] The first plaintiff Engineer Barnabas Okeny testified as P.W.2 and stated that he is the chairman Board of Directors and Managing Director of the 5th plaintiff. The defendant wrote letters concerning all the plaintiffs whose content was defamatory. The letters contained a lot of false allegations. The defendant supplied the information to the New Vision and also was on air on Mega FM radio station. Since the year 2007, the 5th plaintiff has been unable to secure any contracts from Pader District and the last one it had secured around the time of those publications, worth shs. 100 million for building a Polytechnic in Gulu, was withdrawn.
- [6] The fourth plaintiff David Okidi testified as P.W.3 and stated that he was at the material time the Manager of Mega FM and shareholder in the 5th plaintiff. He was defamed by the defendant through an article published in The New Vision Newspaper. The company was accused of diverting funds meant for UPE in Pader District. He was called by his line Minister to explain his position since his company was involved. Radio Stations in Northern Uganda gave wide coverage to the story. The company was accused of securing contracts in the district fraudulently and it has since lost business.

- [7] The second plaintiff Walter Okidi Ladwar testified as P.W.4 and stated that he is director and Secretary of the 5th plaintiff. The 5th plaintiff obtains contracts through an open bidding process. Payments go through certification as per contract terms. He was called on phone by a lady journalist of The New Vision in Kampala and when they met she showed him nine letters from the defendant addressed to the IGG and the Minister of local Government and asked for his side of the story. She had copies of the correspondences written by the defendant. He told her the allegations were false. An article was later published relating to that story. Several concerned people who read the article from within and outside the country called expressing their concern. The defendant was the source of information given to the press.
- [8] P.W.5 Ambrose Ochen is a former Assistant Chief Administrative Officer of Pader District. He testified that the 5th plaintiff was contracted to construct a Doctors' house at Pader Health Centre and a primary School. The company secured the contract by following the bidding process. On completion, the defendant occupied the house and did not raise any complaints about defects. The defendant never raised any complaint concerning the 5th plaintiff in Council. No funds were diverted to pay the 5th plaintiff. The allegations contained in exhibits P.E.1, P.E.2 and P.E.3 are false. This information was published in The New Vision Newspaper and on Mega FM. He too has a pending defamation suit against the defendant arising from those publications.
- [9] P.W.6 Mwa Christopher testified that the 5th plaintiff executed construction work in Pader District involving the construction of classrooms and supply of school furniture under his supervision on behalf of the District. No queries were raised about their work. Although money would at times be diverted from the UPE fund for other services, but it was not necessarily to the 5th plaintiff. The prices quoted by the 5th plaintiff were not inflated and it never entered into negotiations with the District before the contract award.

The defendant's evidence:

- [10] In his defence as D.W.1 the defendant, Peter Odok W'Oceng, stated that he is the former L.C.V Chairman of Pader District. An audit report published by the Auditor General had contained a number of recommendations. After the report had been adopted by Council, a meeting of the Executive had opted for court action but he chose to involve the IGG first, hence the letter (exhibit P.E.1). Complaints arose regarding the diversion of UPE funds. He then wrote to the Minister of Local Government (exhibit P.E.2). He never convened any press conference or gave copies of the letters to the press and he does not know how the plaintiffs obtained copies. Copies were only given to stakeholders and he never instructed any of them to publish them in the media.
- [7] D.W.2 Otai Charles, a former Chief Administrative Officer of Pader District testified that the three letters complained of were copied to him. It is true that there had been diversion of funds from the School Facilitation Grant but he did not know who the beneficiary was. The letters were written in good faith following recommendations by the Public Accounts Committee. He did not recall though the 5th plaintiff having done shoddy work or the issue having come up for discussion by Council.

The plaintiffs' final submissions:

- [8] In their final submissions on behalf of the plaintiffs, Byamugisha Gabriel and Company Advocates argued that all the plaintiffs are private persons and letters to the IGG were misplaced. In his letter of 25th November, 2008 the defendant indicated that if the IGG did not take action, he would proceed to hold a press conference to expose the rot. It is not by coincidence that on 12th December, 2009 the allegations were published in The New Vision (exhibit P.E.5) who quoted the defendant as their source of information. The allegations were proved to be false by the plaintiffs and their witnesses. The words in their natural and

ordinary meaning conveyed meanings that are defamatory of the plaintiffs. In exhibit P.E.1 the third plaintiff was portrayed as a person using his office to cover up wrongs committed by his company. In exhibits P.E.2 and P.E.3, he portrayed the rest of the plaintiffs as unscrupulous and unprofessional in their methods of work in the procurement and execution of construction contracts with Pader District Local Government. The communications both to the IGG and the Minister of Local Government were made in bad faith. None of the offices communicated to had authority to investigate private persons. The defendant acted maliciously in that he knew the statements to be false. He did not involve any of the organs of the District in taking the decision to communicate that information. The plaintiffs reputation has been lowered as a result of the publications and hence they are entitled to the remedies sought against the defendant. They proposed shs. 600,000,000/= as general damages for the plaintiffs collectively, shs. 100,000,000/= as punitive damages and interest on both awards from the date of judgment. They also sought permanent injunction to issue against the defendant with an order to meet the plaintiff's costs.

The defendant's final submissions:

[9] In response, KGN Advocates on behalf of the defendant submitted that none of the publications complained of concerned any of the plaintiffs in their office, profession, calling, trade or business. They were written calling upon the responsible officers to investigate corruption within the district. The defendant having written multiple times without receiving a response from the IGG, was justified to and correctly surmised that it was the third plaintiff, who was employed in that office, that was blocking access to these complaints by the IGG. Inviting investigation into the plaintiffs' wealth was justified considering the circumstances in which the plaintiff had been paid with funds diverted from the School Facilitation Grant sent to the District. The words were not defamatory since they were stated within the context of inviting an investigation to establish their truth. They were not addressed to the whole world but to the persons with a duty to initiate such investigations. There is no proof that any of the plaintiffs was

injured in his reputation. Both the Minister of Local Government and the office of IGG are mandated to investigate mismanagement of funds within Local Governments. The persons to whom the letters were copied received them in their official capacities. In any event, there is no evidence to show that any of the persons to whom the letters were copied received the copies in fact. There is no evidence that it is the plaintiff who published the letters to the press. Ms. Barbara Among of The New Vision to whom the article is attributed was never called as a witness. Although in one of the letters the defendant issued a threat of convening a press conference, there is no evidence that he ever did so. Ms. Barbara Among only quoted from the letters and did not disclose who gave her copies. There is no evidence of a malicious intent. None of the plaintiffs was defamed. None is entitled to any relief and the suit should be dismissed with costs to the defendant

Issues to be decided:

- [10] The following issues were agreed upon by counsel for both parties during the scheduling conference, namely;
1. Whether the letters complained of are defamatory of the plaintiffs.
 2. If so, whether the statements are privileged..
 3. If so, whether the statements complained of were published by the defendant to the press.
 4. Whether the statements were malicious.
 5. Whether the plaintiffs are entitled to the reliefs sought.

Requirements as to pleadings:

- [11] As a preliminary observation, this being a claim in libel, the plaintiff was under a duty to; (a) plead that the defendant made a false and defamatory statement concerning the plaintiff, (b) the defendant made an unprivileged publication of that statement to a third party, and (c) except where the libel is actionable *per se*, the plaintiff must plead and prove special damages. For a statement complained of as being defamatory, the actual words must be set forth verbatim in the plaint

and the persons to whom publication was made have to be mentioned in the plaint (see *Rutare S. Leonidas v. Rudakubana Augustine and Kagame Eric William* [1978] H.C.B. 243). A plaint in a defamation suit that does not allege persons to whom publication was made nor that the words uttered were false and were published maliciously, which are matters essential in a plaint, does not disclose any cause of action and is bad in law (see *Karaka Sira v. Tiromwe Adonia* [1977] H.C.B. 26). the plaint in this suit meets all these basic requirements.

First issue; Whether the letters complained of are defamatory of the plaintiffs;

Third issue; If so, whether the statements complained of were published by the defendant to the press.

[12] The above two issues are intertwined and therefore will be considered concurrently. In a suit for libel, a plaintiff 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. The test of defamatory nature of a statement is its tendency of excite against the plaintiff the adverse opinions or feeling of other persons.

[13] 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. If words have been proved to be defamatory of the plaintiff, general damages will always be presumed slander imputing criminal conduct 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*). In *Gatley on Libel and Slander* (9th edition) 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.

- [14] 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 such as crime, dishonesty, untruthfulness, trickery, ingratitude or cruelty. 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.
- [15] Once a statement is capable of being interpreted as an assertion of fact, the question then will be whether it imputes any moral fault or defect of personal character. For professional aspects, it will be deemed so if it imputes lack of qualification, knowledge, skill, capacity, judgment or efficiency in the conduct of one's trade or business or professional activity. 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). 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.

[16] Allegations are defamatory of the plaintiff if they impute the commission of a criminal offence for which the plaintiff would be liable to imprisonment under the laws of Uganda (see *Odongkara v. Astles* [1970] EA 377). *Gately on Slander and Libel* (supra) 8th Edition at page 114 paragraph 115 states that; “where words complained of are defamatory in their natural and ordinary meaning, the plaintiff need prove nothing more than their publication. The onus will then lie on the defendant to prove from the circumstances in which the words were used, or from the manner of their publication, that the words would not be understood by reasonable men to convey the imputation suggested by the mere consideration of the words themselves.”

[17] Then, it must be proved that the statement referred to the plaintiff. In *Onama v. Uganda Argus* [1969] EA 92, the Court of Appeal of Eastern Africa held in deciding the question of identity, the proper test is whether reasonable people who knew the plaintiff would be led to the conclusion that that the report referred

to him. The question is not whether anyone *did* identify the plaintiff but whether persons who were acquainted with the plaintiff *could* identify him from the words used. In the instant case, the words were not only used in reference to the defendant but they were uttered directly at her in her presence during a series of incidents. They were capable of being regarded as referring to the plaintiff since there was no evidence that they were directed at any other person. These words would lead reasonable people who know the defendant to the conclusion that they referred to her.

[18] In the instant case, reference to the first plaintiff, Engineer Barnabas Okeny, is to be found in the letter of 6th October, 2008 (exhibit P.E.2) addressed to the Minister of Local Government. In that letter he is identified as a Shareholder of the 5th plaintiff, Best Services Company Limited in respect of whom it is alleged in that letter that most of the Universal Primary Education funds for the years 2002 - 2006 were diverted. The author invites that office to investigate the circumstances in which the first plaintiff accumulated property alleged to be situated in a number of towns in Uganda, including a radio station. In the letter of 19th January, 2009 to the IGG (exhibit P.E.4), the first plaintiff is again identified as an associate in the formation the 5th plaintiff company, Best Services Company Limited, which company has "atrociously" defrauded Pader District Funds.

[19] Reference to the second plaintiff, Walter Okidi Ladwar, is to be found in the letter of 6th October, 2008 to the Minister of Local Government (exhibit P.E.2). He is identified in that letter as a shareholder of the 5th plaintiff, Best Services Company Limited in respect of whom it is alleged in that letter that most of the Universal Primary Education funds for the years 2002 - 2006 were diverted. The author invites that office to investigate the circumstances in which the first plaintiff accumulated property alleged to be situated in a number of towns in Uganda, including a radio station. In the letter of 19th January, 2009 to the IGG (exhibit P.E.4), the first plaintiff is again identified as an associate in the formation of the

5th plaintiff company, Best Services Company Limited, which company has "atrociously" defrauded Pader District Funds.

[20] Reference to the third plaintiff, Onying Penywii, is to be found in the letter of 6th October, 2008 to the Minister of Local Government (exhibit P.E.2). He is identified Chairman the 5th plaintiff, Best Services Company Limited in respect of whom it is alleged in that letter that most of the Universal Primary Education funds for the years 2002 - 2006 were diverted. He is further accused of having issued threats in the name of the IGG. He is also alleged to have vindictively, and unscrupulously persistently set traps intended to cause the arrest of the Chief Administrative Officer of Pader District. It is stated therein that he was not carrying out any genuine investigation but only covering up for the misdeeds of his company.

[21] Further reference to the third plaintiff is to be found in the letter of 25th November, 2008 addressed to the IGG (exhibit P.E.3). In that letter it is alleged that he uses his company the 5th plaintiff, Best Services Company Limited, to commit a lot of financial frauds on Pader District Council. He is accused of creating diversions by coming up with bogus reasons for counter investigation with the intention of intimidating the District authorities. Letter of 19th January, 2009 to the IGG (exhibit P.E.4), the third plaintiff is again identified as an associate in the formation of the 5th plaintiff company, Best Services Company Limited, which company has "atrociously" defrauded Pader District Funds.

[22] Reference to the fourth plaintiff, David Okidi, is to be found in the letter of 6th October, 2008 to the Minister of Local Government (exhibit P.E.2). He is identified Chairman the 5th plaintiff, Best Services Company Limited in respect of whom it is alleged in that letter that most of the Universal Primary Education funds for the years 2002 - 2006 were diverted. The author invites that office to investigate the circumstances in which the first plaintiff accumulated property alleged to be situated in a number of towns in Uganda, including a radio station.

In the letter of 19th January, 2009 to the IGG (exhibit P.E.4), the first plaintiff is again identified as an associate in the formation of the 5th plaintiff company, Best Services Company Limited, which company has "atrociously" defrauded Pader District Funds.

[23] Since a corporation has independent legal existence from that of its directors, officers and shareholders, a corporation is not necessarily defamed by statements directed against the individual directors, officers or shareholders. Defamatory statements may harm the individuals' reputations and have no impact on the business, or they may harm the business' reputation and have no impact on the individuals. A corporation is defamed only if material is published about it that would tend to negatively impact its standing in the business in which it operates. Statements that would impact the public's view of a corporation's financial soundness, managerial integrity or its ability to deliver goods and services are generally considered defamatory to a corporation's business reputation. A corporation may sue for defamation if such statements would tend to deter others from dealing with it. Corporations may sue for defamation if they can show that the published material has caused them or is likely to cause them financial loss.

[24] In the instant case, reference to the 5th plaintiff, Best Services Company Limited, is to be found in the letter of 3rd December, 2007 (exhibit P.E.1) where it is alleged that there was a diversion of funds from the School Facilitation Grant to the company so that a kick-back is given to members of the contracts Committee. Juxtaposed against this is the statement that the company has consistently been ranked number one among prequalified contractors. In the letter of 6th October, 2008 to the Minister of Local Government (exhibit P.E.2), it is alleged that most of the Universal Primary Education funds for the years 2002 - 2006 were diverted to the 5th plaintiff. In the letter dated 25th November, 2008 to the IGG (exhibit P.E.3), this company engaged in lots of financial frauds on Pader District Council. Finally in the letter of 19th January, 2009 to the IGG

(exhibit P.E.4), it was stated that the company has atrociously defrauded Pader District Funds.

[25] The meanings attributed to the expressions complained of that were used by the defendant in each of the above mentioned letters are that;- the first four plaintiffs pay bribes to Pader District Officials in order that their company, the 5th plaintiff receives preferential treatment; the plaintiffs collude with Pader District Officials to divert funds from the School Facilitation Grant for payments to the 5th plaintiff; the first four plaintiffs have used the 5th plaintiff as a tool to defraud Pader District Local Government of its funds; the plaintiffs have accumulated wealth under suspicious circumstances; the 3rd plaintiff has abused his office, practiced nepotism and perverted the course of investigations. The defendant was unable to rebut the imputation suggested by the words themselves.

[26] The words of complained of were capable of being regarded as referring to each of the plaintiffs since there was no evidence that they were directed at any other person. I find that the words complained of in their natural and ordinary meaning and by way of innuendo are capable of bearing those meanings attributed to them. To the extent that they constitute an attack upon the moral character of the first four plaintiffs, attributing to each of them disgraceful conduct, criminal conduct, dishonesty, untruthfulness, fraud, and lack of professionalism for the third plaintiff specifically; and with regard to the 5th plaintiff by questioning its financial soundness and managerial integrity, the statements tend to lower the first four plaintiffs in the estimation of right-thinking members of society while they tend to negatively impact on the 5th plaintiff's standing in the business of civil construction in which it operates and harm its business reputation. The words complained of as stated in the plaint are therefore defamatory of each of the plaintiffs to the extents demonstrated above.

[27] That aside, there can be no libel 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 occurs when information is negligently or intentionally communicated in any medium. In the instant case, in his defense the defendant admitted publishing the letters complained of to the office of the Inspector General of Government, the Minister of Local Government, the Permanent Secretary to the Ministry of Local Government, the Resident District Commissioner of Pader District, the Chief Administrative Officer of Pader District Local Government, the Attorney General of Uganda and the Chairman of the Local Government Accounts Committee of Parliament. He refutes the allegation that he published the same letters to The New Vision Newspaper, the Rupiny Newspaper, and FM Radio stations including, MEGA FM in Gulu. As regards proof of publication, the law recognises no distinction between cases in which express malice in uttering the defamatory words is proved and those in which it is not. The defendant must be taken to have intended the natural and probable consequence of his action.

[28] The *animus injuriandi* (desire to offend) necessary for a suit in defamation requires the deliberate making of the defamatory statement and also its deliberate communication to a third party by the defendant. There should be both the deliberate making of the defamatory statement and a definite intention to send or communicate it to a person other than the plaintiff. Nevertheless, a communication made recklessly, negligently, inadvertently or by omission may as well give rise to liability (see for example *Byrne v. Deane* [1937] 1K.B. 818). The authors of *Gatley on Libel and Slander*, 9th edition at p 136 has the following passage at 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.

[29] Therefore, 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 communication, which may very well be lacking. Communication of the defamatory material to a third party involves both a physical and a mental

element. The physical element is that the defendant by his or her conduct objectively participates in communication of the defamatory material 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 material 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 person is not responsible for a publication that arises through the curiosity of a person into whose hands libelous material happens to pass in a letter or other sealed medium, which the bearer, who had no authority to do so, happened to open.

[30] To succeed, the plaintiffs must prove that the defendant deliberately communicated the libelous material to a third party or that the defendant was at fault when he or she published the defamatory statement, i.e. that the defendant failed to do something he or she was required to do that resulted in the material being published to a third party. Depending on the circumstances, the plaintiff will either need to prove that the defendant acted negligently, if the plaintiff is a private figure, or with actual malice, if the plaintiff is a public figure or official. By the nature of their offices, duties and standing, the actions public figures and officials are matters of public interest. Everyone, including public figures and officials, is entitled to privacy.

[31] But when a person goes into public life, he or she must understand that certain issues that might be considered private, for a private individual, can become matters of reasonable public interest, especially where such private matters affect the performance of the officeholder's duties. Behaviour that might impede performance, like substance abuse, is a matter of public interest. The public should also be aware of ways in which a public figure or official may use his or her office to gain advantage in personal life. Therefore, public figures and officials

are fair targets for criticism and critics deserve extra protection, hence the requirement of actual malice. Public officials must expect and are deemed to have accepted a degree of public interest in the performance of their duties, and thus that they have accepted the risk of being involved in public speech.

[32] Since article 29 (1) (a) of *The Constitution of the Republic of Uganda, 1995* guarantees freedom of speech and expression which shall include freedom of the press and other media, a public figure or official may succeed in a suit for defamation only if he or she proves on a balance of probabilities that that the publication was made with "actual malice," as a compromise between the law of defamation and the Constitutional privilege. A public official is a person who occupies a position in government that is of high apparent importance, or one that appears to have substantial responsibility for or control over some aspect of government that attracts society's interest. The actual malice standard applies when a defamatory statement concerns public officials (which includes politicians and high-ranking governmental figures, but also extends to government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs) since it is generally accepted that they occupy positions that invite attention and comment. These are people who hold positions of such persuasive power and influence that they are deemed public figure for all purposes. Among the plaintiffs, it is the third plaintiff that fits the description and therefore he bears the burden of proving that the defendant was motivated by actual malice.

[33] Publication of a defamatory matter is its communication intentionally or by negligent act to one other than the person defamed. A person will be accountable for any publication which he or she intends to publish, he or she can reasonably anticipate to be published or where there is unintentional publication as a result of want of care. A person is not liable for unintentional publication of defamatory matter to a third party unless it can be shown that such publication occurred due to want of care on his or her part.

[34] Where a communication is enclosed in a cover, and is, by some unauthorised 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.

[35] 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.” 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 (see *McNichol v. Grandy*, [1931] S.C.R. 696). 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. This 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.

- [36] In *Weld-Blundell v. Stephens* [1920] AC 956 for example, 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.
- [37] In those cases where an author of defamatory material has been found responsible for unintended publication, 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.
- [38] A defendant is not liable for a consequence of a kind which is not foreseeable. By being author of something defamatory, it does not follow that he or she is liable for every consequence which could be foreseen. What can be reasonably foreseen depends almost entirely on the facts of each case. In a clear case of *novus actus interveniens*, not only does a new cause come in but the old one goes 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 such cases, the act that was not reasonably foreseeable breaks the chain of causation.

- [39] 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.
- [40] In the instant case, there is no evidence to show that the defendant deliberately leaked any of these letters to the press. It was the testimony of the second plaintiff P.W.4 Walter Okidi Ladwar that he was called on phone by a lady journalist of The New Vision in Kampala and when they met, she showed him copies of nine letters from the defendant addressed to the IGG and the Minister of local Government, and insinuated that the defendant was the source of information given to the press. Section 59 of *The Evidence Act* requires that oral evidence must in all cases be direct; if it refers to a fact which could be seen, it must be the evidence of a witness who says he or she saw it; if it refers to a fact which could be heard, it must be the evidence of a witness who says he or she heard it; if it refers to a fact which could be perceived by any other sense, or in any other manner, it must be the evidence of a witness who says he or she perceived it by that sense or in that manner.
- [41] Any statement made out of court that is offered in court as evidence to prove the truth of the matter asserted is generally inadmissible as hearsay. This is because statements made out of court normally are not made under oath, a judge cannot personally observe the demeanour of someone who makes such a statement outside the courtroom, and an opposing party cannot cross-examine such a

person. Such statements hinder the ability of the court to probe the testimony for inaccuracies caused by ambiguity, insincerity, faulty perception, or erroneous memory. Thus, statements made out of court are perceived as untrustworthy. There are a number of exceptions, none of which apply to this case.

[42] The requirement that evidence of a witness should be given orally in person in court, on oath or affirmation, so that he or she may be cross-examined and his or her demeanour under interrogation evaluated by the court, has always been regarded as the best evidence. The theory of the hearsay rule is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. In this case, Ms. Barbara Among, to whom disclosure of the nexus between the defendant and leakage of the letters to the press is attributed, was not called as a witness. What she told P.W.4 as to the source of her access to the letters is therefore inadmissible as hearsay.

[43] It appears to me that Ms. Barbara Among only quoted from the letters and did not disclose who gave her copies as gathered from exhibit P.E.5. It is suggested by counsel for the plaintiffs that since in the letter of 19th January, 2009 to the IGG (exhibit P.E.4), the defendant did express an intention to hold a press conference in the event that no action was taken in respect of his complaints, he must have been the one that leaked the letters to the press. I am afraid that the suggested conclusion based only on that tenuous premise would constitute conjecture. Conjecture is a theory based on evidence with only a slight degree of credibility. It is an idea of fact, or potential cause or occurrence, as suggested by another fact, which is too feeble to prove the idea. A conjecture is even less substantial than a hypothesis, which is generally based on well-accepted facts. Although consistent with the facts in evidence, it is not deducible from them as a reasonable inference and is accordingly rejected.

[44] That done, there is no evidence to show that publication of the letters to the press was as a result of a failure of the defendant to do something he was required to do or that that resulted in the material being published to a third party, or that he intended or knew that the letters would be communicated to the press, or was reckless or careless as to such communication occurring as a result of his conduct. The defendant never intended nor contemplated that the letters would be read by persons other than the addressees. It was not the natural consequence of his writing and addressing the letters in the way he did that they would end up with the press. The act of whoever delivered the letters to the press was not a completion of what was from the very beginning the intention of the defendant. There was thus a break in the chain of transmission between the writing and final delivery of the letters beyond their intended destination, and eventually to the press. When letters addressed to different persons and without the fault of the author, end up in the hands of third parties in circumstances never contemplated by the author, the author cannot be held responsible. The author will be found negligent only if the resultant publication is reasonably foreseeable taking into account all relevant circumstances or is a natural and probable result of his actions, which it is not in the instant case.

[45] I therefore find that the defendant did not publish the letters containing the defamatory words to the press. He only published them to the office of the Inspector General of Government, the Minister of Local Government, the Permanent Secretary to the Ministry of Local Government, the Resident District Commissioner of Pader District, the Chief Administrative Officer of Pader District Local Government, the Attorney General of Uganda and the Chairman of the Local Government Accounts Committee of Parliament.

Second issue; if so, whether the statements are privileged.

Fourth issue; whether the statements were malicious.

[46] The above two issues too are intertwined and therefore will be considered concurrently. 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. 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.

[47] 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.

[48] 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.

[49] The defence 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.

[50] In the instant case, the defendant was at the material time Chairman of Pader District Local Government. His communications were about perceived financial mismanagement of public funds and as such he had a duty in communicating to the Inspector General of Government, the Minister of Local Government, the Permanent Secretary to the Ministry of Local Government, the Resident District Commissioner of Pader District, the Chief Administrative Officer of Pader District Local Government, the Attorney General of Uganda and the Chairman of the Local Government Accounts Committee of Parliament such matters as are detrimental to the interest of the District Local Government. The addresses of the correspondences 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 letters were therefore published on a privileged occasion.

[51] Once qualified privilege is established, even when it is demonstrated that 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. The defendant is protected even though his language was violent or excessively strong if, having regard to all the circumstances, he might honestly and on reasonable grounds have believed that what he uttered was true and necessary for his purpose, even though in fact it was not so (see *Adam v. Ward* 119171 A.C. 309 at 339). 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. The defence of qualified privilege therefore can be assailed if the defendant 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).

- [52] Whereas it was for the defendant to prove that the occasion was privileged, once he did that, his bona fides had to be presumed (see *Janoure v. Delmege* (1891) A. C. 73 at 79. The burden then shifted to the plaintiffs to show express malice (see *Clark v. Molyneux* (1877) 3 Q.B.D. 237). But until then, the plaintiffs 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.
- [53] 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 by establishment of the qualified privilege 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 (see *Adam v. Ward* [1917] AC 309, [1917] All ER 151). 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.
- [54] In one sense, malice is about the attitude of the defendant toward the plaintiffs. 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 defendant 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 defendant knowingly or recklessly avoided the truth by performing an inadequate investigation. Deliberate or reckless falsity is evidence of express malice.

- [55] In another sense, malice is about the attitude of the defendant toward the veracity of his statements concerning the plaintiffs. 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 wilful blindness to that invalidity and that likely injury.
- [56] 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 plaintiff 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 plaintiff acted in good faith.
- [57] 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.

[58] Such malice can be proved in a variety of ways, inter alia; (i) by showing that the author did not honestly believe in the truth of these allegations, or that he believed the same to be false; (ii) or that the author was 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 author 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.

[59] 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.

- [60] 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.
- [61] It was argued by counsel for the defendant that the intention of the defendant was to cause an investigation into the financial affairs of the District, 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). The desire to injure the plaintiff was shown to be the dominant motive for the defendant'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 plaintiff was involved in the theft.
- [62] "Malice" means that the defamatory statement was made for some ulterior purpose and was not the "honest communication" that qualified privilege is intended to protect. The existence of malice may be inferred by showing that the defendant knew the imputations or meanings of their statement were not true (or did not care if they were true or false). This is because a person who knowingly makes a statement with false imputations is unlikely to have a proper purpose. The defendant's negligence in not checking the truth of their statement does not amount to malice, unless such negligence amounts to reckless indifference to the

truth. Intending to cause harm to someone is an “improper purpose”, and is therefore usually considered to be malicious.

[63] Malice will be readily inferred when the author of defamatory material willfully and recklessly fails to make such inquiries as an honest and reasonable person in the circumstances would have made before writing the impugned material. 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.

[64] Akin to the defence of qualified privilege is that of qualified immunity provided for by section 173 (a) of *The Local Government Act*. By virtue of that section, no act, matter or thing done or omitted to be done by any member of a local government or administrative council or a committee of a council, may, 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. 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.

- [65] In order to take benefit of a qualified immunity of this nature, common law requires a defendant to prove that his or her conduct in making the publication was “reasonable in all the circumstances of the case.” To establish reasonableness, a defendant must generally establish that he or she had reasonable grounds to believe the publication was true, that he did not believe the publication was false, and that he or she 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 context of a suit for defamation, malice is constituted by publishing a statement while either; (a) knowing that it is false; or (b) acting with reckless disregard for the statement’s truth or falsity.
- [66] Section 173 of *The Local Governments Act* confers a qualified immunity against personal civil liability for acts and omissions done “in good faith.” Just like qualified privilege, qualified immunity is a conditional defence. 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). A deliberate intention to do wrong (actual malice) dispels both defences of qualified privilege and qualified immunity.

- [67] The "actual malice" standard focuses on the defendant's actual state of mind at the time of publication. The standard is not measured by what a reasonable person would have published or investigated prior to publication. Instead, the plaintiff must produce evidence proving on the balance of probabilities that the defendant actually knew the information was false or entertained serious doubts as to the truth of his publication. In making this determination, the court will look for evidence of the defendant's state of mind at the time of publication and will examine the steps the defendant took in researching, editing, and fact checking his or her material. It is generally not sufficient, however, for a plaintiff to merely show that the defendant didn't like him or her, failed to contact him or her for comment, knew that he or she had denied the information, relied on a single biased source, or failed to correct the statement after publication. In other words, it has to be a deliberate false accusation made on someone to harm his or her reputation.
- [68] The defendant's actual state of mind at the time of publication can be discerned from the letter dated 6th October, 2008 addressed to the Minister of Local government (exhibit P.E.2). In that letter, although the defendant called for an investigation into "the accumulated properties....houses in Pader, Kitgum, Lira, Gulu and Kampala...How did they find money to set up Radio Luo in Pader Town and where did they find money to build houses in towns mentioned above?" when he testified in his defence he stated that he never sought to confirm these allegations. This shows that at the time he wrote the letter, the defendant actually knew the information was false or entertained serious doubts as to the truth of that content, yet he never took steps to verify his suspicion. Indeed he did not present it as a suspicion but rather as an assertion of fact.
- [69] Determination of whether or not he wrote the letters in good faith basically turns on whether the defendant did everything reasonably necessary to determine whether the statements were true, including the steps the defendant took in researching, editing, and fact checking his material. The court will look for

evidence of the amount of research undertaken prior to publication; the trustworthiness of sources; attempts to verify questionable statements or solicit opposing views; and whether the defendant followed other good practices. He never presented any. He instead sought protection from that fact that it was a proper exercise of his discretion as the District Chairman. However, 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."

[70] In the instant case, the defendant 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, indicating reckless disregard to whether the allegations in the letter were libellous. 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 defendant's letters are not slight inaccuracies but an entire distortion of facts. The statements therefore were not a fair, accurate, true, and impartial account of the state of affairs. There is evidence that the defendant leapt to a conclusions based on inadequate evidence and without making any inquiries.

[71] On close scrutiny of his correspondences and testimony, it is apparent that the defendant's dominant motive was not to cause an investigation by the addressees of the letters. In the letter dated 25th November, 2008 addressed to IGG (exhibit P.E.3), he stated that "I beg anyone among those I have copied this letter, besides the IGG, to kindly tell me why James Penywii who I know by name and action against Pader should be allowed to continue with his pretentious acts

against the district." These were deliberate false accusations made to oust the plaintiffs from dealings with the district and to harm the reputation of the plaintiffs.

[72] His conduct in assertions of fact without reasonable suspicion was indicative malice and intent to injure the plaintiffs. He had no personal knowledge of any facts and circumstances which he reasonably considered to be trustworthy information such as would in itself be sufficient to warrant a man of reasonable caution in the belief that the plaintiffs engaged in conduct he was accusing them of. His conduct demonstrates indifference to the truth or a wilful disregard of the importance of the truth of the statements he made. I therefore find that although the statements were made under privileged circumstances, the defendant cannot take benefit of that defence because he was motivated by actual malice.

Fifth issue; whether the plaintiffs are entitled to the reliefs sought.

[73] A person aggrieved by a defamatory statement is entitled to general damages for loss of reputation as a result of the defamatory statement. 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*.

[74] 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 behaviour of defendant and plaintiff.

[75] 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.

[76] 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.

[77] 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 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.

[78] 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.

[79] I have considered the gravity of the allegations. The plaintiffs were generally accused of financial impropriety; an attack upon the moral character of the first four plaintiffs, attributing to each of them disgraceful conduct, criminal conduct, dishonesty, untruthfulness, fraud, and lack of professionalism for the third plaintiff specifically; and with regard to the 5th plaintiff its financial soundness and managerial integrity was attacked. I have also considered the multiplicity of the allegations made, their range in terms of each of the plaintiff's different aspects of life affected such as their social and professional lives, and the gravity of the accusations. The defamatory letters though were limited in circulation, to the addressees of the letters and the persons to whom copies were furnished.

[80] On account of all those factors, I have made an assessment of what would be adequate compensation to each of the plaintiffs as general damages. Apart from third plaintiff, James Onying Penywii, the rest of the plaintiffs are only directly attacked in their business dealings. The third plaintiff James Onying Penywii is additionally attacked in his professional work. He is also the most disparaged. I

also find that there is no proof of substantial impact on the business activities of the fifth plaintiff Best Services Co. Limited.

[81] I have also considered the claim of punitive damages. An award of this head of damages is typically justified by either of three reasons: (i) malice (a wrongful act committed intentionally to cause harm to someone else without just reason or excuse); wilful or wanton conduct (dangerous and reckless conduct committed purposefully without regard to consequences or the rights and safety of others); and (iii) fraud (intentional deception for personal gain or to intentionally damage another person). The rationale for awarding punitive damages is to dissuade the defendant from similar conduct in future where the defendant wilfully caused the harm or intended to gain some financial or other benefit from it. I find the deterrence element of awarding punitive damages to be speculative in this case and one that can be appropriately met by issuance of a permanent injunction. An award compensatory damages will fully and fairly compensate them.

Order :

[52] In the final result, judgment is entered for the plaintiffs against the defendant for;

- a) An award of General damages in the sum of;
 - i. Shs. 10,000,000/= to the first plaintiff Eng. Barnabas Okeny.
 - ii. Shs. 10,000,000/= to the second plaintiff Walter Okidi Ladwar.
 - iii. Shs. 25,000,000/= to the third plaintiff James Onying Penywii.
 - iv. Shs. 10,000,000/= to the fourth plaintiff David Okidi.
 - v. shs. 5,000,000/= to the fifth plaintiff Best Services Co. Limited.
- b) Interest on the above sums at the rate of 8% pa from the date of judgment until payment in full.
- c) A permanent injunction restraining the defendant from further publication of defamatory material against any of the plaintiffs.
- d) The costs of the suit.

Stephen Mubiru
Resident Judge, Gulu

Appearances

For the plaintiff : Mr. Gabriel Byamugisha.

For the defendant : Mr. Gilbert Nuwagaba.

HIGH COURT AT GULU