

defamatory publications against him in the daily Monitor, Saturday monitor and the Sunday monitor under the following title heads;

- 1) *Auditors target Bigirimana in cash probe*; a publication of 14th October 2012;
- 2) *MPs Order Government to remove Bigirimana*; a publication of 2nd November 2012;
- 3) *Government remains undecided on calls to suspend Bigirimana*; a publication of 5th November 2012;
- 4) *MPs give ultimatum over PS Bigirimana*; a publication of 7th November 2012;
- 5) *Law makers want First Lady to defend self in OPM scam*; a publication of 9th November 2012;
- 6) *The Treasury Officials accuse OPM PS of covering money scam*; A publication of 16th November 2012;
- 7) *Bigirimana contradicts himself on purchase of Ministers' cars*; publication of 30th November 2012;
- 8) *Bigirimana's wife acquires shs 250m Mercedes Benz*; a publication of 4th December 2012;
- 9) *Police to question Bigirimana today*; a publication of 28th December 2012;
- 10) *Bigirimana refuses to meet detectives*; a publication of 29th December 2012;
- 11) *OPM inquest hits new set back*; a publication of 21st February 2013;
- 12) *OPM officials survive lynching*; a publication of 7th March 2013;
- 13) *Denmark warns of aid cut over OPM scandal*; a publication of 26th March 2013;
- 14) *Money, Drugs eat up police Force*; a publication of 5th November 2017; and
- 15) *Corruption Ledger*; a publication of 10th March 2013-.

The plaintiff contended that the different stories portrayed him as; a smart criminal who was untouchable in any circumstances; an embattled civil servant who made illicit expenditure on OPM funds; a person who thrives on State house pampering and patronage, and who obstructs police investigations and above all a liar.

The defendants never at all reached the plaintiff or called him to verify the veracity of the said allegations, despite the fact that as, a public servant the plaintiff was accessible to anybody but decided to go ahead and publish the stories wantonly without regard to the negative impact they would have on the plaintiff.

The plaintiff further averred and contended that the said publications were false and intended to tarnish his name as the then Director of Public Prosecutions, Justice Mike Chibita wrote a letter on 28th May 2019 clearing the plaintiff and stating that in all the cases that have been prosecuted so far, the role of the plaintiff was that of a complainant and prosecution witness.

The publications of the defendants as set out in the plaint in their natural and ordinary meaning, meant or were understood to mean in the minds of right thinking members of the public that the plaintiff;

- i) was a beneficiary of illicit dealing in a public office.*
- ii) Is a disdainful and arrogant Public Servant,*
- iii) Is person with no respect for due process,*
- iv) Is a person with no regard to civil authority,*
- v) Is a person too exalted to heed summonses of the police,*
- vi) Is a person who obstructs the course of Justice,*
- vii) Is a person who interferes with and obstructs the course of Police Investigations,*
- viii) Is a person who is above the law with an untouchable mentality and personality,*
- ix) Is culpable for fraud but disguises himself as a whistle blower,*

x) *A person who thrives on presidential pampering and patronage.*

The plaintiff contended that as a direct consequence of the false and malicious publications, has suffered damage and injury (lost public reputation and has been shunned) as result from taunts and malicious publications at his place of work, family, general public and the world at large.

The defendants admitted having published the words pleaded in the paragraph 6 of the plaint but denied that the stories were spiteful, malicious, odious, unprofessional and defamatory to the plaintiff or that there is no grain of truth in said stories and the plaintiff shall be put to strict proof thereof.

The defendant further admitted having published the words but deny that the said words are false or defamatory of the plaintiff or that they bear the alleged meaning attributable to them or that it is relevant as to what meaning is ascribed to them or that the plaintiff was defamed thereby.

The defendant further averred that the publication was in respect of issues concerning the running of public offices in which a colossal amount of money was lost, the plaintiff was the overall accounting officer in the said ministry, the amount was lost over time, the loss caused public and donor community outcry, the loss resulted in police investigations and accordingly the defendant has a social, moral and legal duty to make publication in that respect to the public which similarly had a corresponding moral and social duty to receive the publication and each of the impugned publication was made on an occasion of qualified privilege and is not actionable.

The defendant further contended that the publications were not made in a cavalier fashion and were commentaries on an issue of public importance and it would be a breach of duty being a public watchdog for the defendants to keep mum on the events of the day.

The Plaintiff was represented by *Mr. Godfrey Himbaza* while the defendant was represented by *Mr. James Nangwala and Ms Diana Kwesiga*.

The parties filed a joint scheduling memorandum and the following facts and issues were agreed upon and the documents agreed upon were exhibited;

Agreed Facts

The defendants made publications about the plaintiff.

Agreed Issues

1. *Whether the plaint discloses a cause of action against the defendants.*
2. *Whether the defendants' publications about the plaintiff were defamatory?*
3. *Whether the publication was made on account of qualified privileged.*
4. *What remedies are available?*

The plaintiff led evidence of 3 witnesses to prove his case to wit; Komurubuga George (Police Officer) PWI, Pius Bigirimana (Plaintiff) PWII and Frank Kanduh Rwabosy (Lawyer) PWIII. The defendants led evidence of Yasin Mugerwa (News Editor) DWI and Nalugo Mercy- (Regional Editor) DWII.

Parties filed written submissions which have been considered by this court in writing this judgment.

The first issue was abandoned by the parties (defendants).

ISSUE 2 AND 3

Whether the defendants' publications about the plaintiff were defamatory?

&

Whether the publication was made on account of qualified privilege?

Plaintiff's Submissions

The plaintiff's counsel submitted that In a defamation law suit, the duty of a complaining party is to address Court on the natural and ordinary

meaning of the actual words used in an impugned publication and a demonstration to the Court that the impugned words when looked at in their natural and ordinary meaning, had the effect of injuring one's reputation. Once the plaintiff has discharged this duty, the burden of qualifying the impugned publication(s) whether as true or privileged shifts to the defendants.

This was Court's stand point in the case of AK OILS & FATS (U) LTD VS BIDCO UGANDA LIMITED HCCS 0715 OF 2005, to the effect that;

"In defamation suits, for Court to determine whether the words complained of are capable of a defamatory meaning, one must first look at the words themselves. Then one has to consider the circumstances under which they were published. In all this, the Plaintiff does not shoulder the burden of proving falsity or Malice in order to establish a cause of action. If the words are defamatory or capable of being so construed, the law presumes that they are false. The burden shifts to the defendants to show that they are true."

The plaintiff did complain that *the defendants made malicious, spiteful, false and defamatory publications against him in The Daily Monitor, The Saturday Monitor and the Sunday Monitor, which publications were accessed and read by people all over the world given the readership coverage that these publications enjoy.*

The plaintiff counsel particularly contended and submitted that the impugned stories published about and against him *were numerous* intuitively suggesting that the motive was malicious so far as the defendants did not, at any moment in time, through their various reporters care to reach out to him for his side of the story in informing the balanced coverage of the stories outed about and against him.

On the test of the decision in ADAM -vs- WARD [1917] AC 309, as per Lord Atkinson, at page 334:

“Qualified privilege is when a 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 made has a corresponding duty to receive it”. Qualified privileged operates only to protect statements which are made without malice”

Further, the House of Lords in *REYNOLDS -vs- TIMES NEWSPAPER LTD [2001] AC 127, 205* set out multiple factors to be considered when deciding whether a defendant has established privilege. Those factors were stated to be;

- i) The seriousness of the allegations. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegations are not true.
- ii) The nature of the information and the extent to which the subject matter is a matter of public concern.
- iii) 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.
- iv) The steps taken to verify the information.
- v) The status of the information. The allegation might have been the subject of an investigation which commands respect.
- vi) The urgency of the matter.
- vii) Whether a comment was sought from the plaintiff.
- viii) Whether the article contained a gist of the plaintiff's side of the story.
- ix) The circumstances of the publications including the timing.

In the case of ENG. BARNABAS OKENY & 4ORS -vs- PETER ODOK W'OCENG CIVIL SUIT NO. 12 OF 2009, (Gulu High Court Circuit) Hon. Stephen Mubiru. J held that:

“a person alleging in good faith must establish the fact that before making any allegations, he had made an enquiry 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.

Evidence of inadequate investigation would show intent to inflict harm through falsehoods. 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.”

The plaintiff's counsel further submitted that it is therefore trite to approach the matter now before Court from both the perspective of malice or the lack thereof in order to establish whether the plaintiff can sustain a claim of defamation or whether indeed the defendants are entitled to qualified privilege. This would require that the second issued is not segregated from the third issue and vice versa. In effect, the resolution of both would lead to the same result whether for or against the plaintiff.

In the instant case, DW1 in cross examination conceded that as a journalist, he owed a duty of care onto the plaintiff to ensure responsible reporting. It is therefore presupposed that DW1 is a man sufficiently tooled with the necessary skill and expertise to discern reckless reporting from cautious, fair and balanced reporting.

Applying the test established in the decisions afore-cited, the best approach to take in resolving the case now before court would be a joint resolution of issues 2 and 3.

The daunting question in the mind of the judge when faced with a defence of qualified privilege would be:

1. *Whether the defendants have demonstrated that they carried out adequate investigations prior to the impugned publication(s)?*
2. *Whether the defendants have demonstrated that they reached out to the plaintiff to source his side of the story?*
3. *Whether the defendants have demonstrated relevance of materials in their story to the overall theme of the story?*
4. *Whether the defendants have demonstrated that steps were taken to verify the story complained of on a bar of its ingredient(s) of truth and accuracy?*
5. *Whether the defendants have demonstrated that their sources were credible?*

With that test in mind, the court would proceed to examine the story complained of and weigh the plaintiff's contention on a balanced bar of malice on the one hand and privilege on the other hand.

he publication of **14th October 2012**, to the effect that:

“AUDITORS TARGET BIGIRIMANA IN CASH PROBE”

Sources revealed that Mr. Bigirimana's name is expected to feature prominently in the audit report...with a case to answer... all I can say for now is that the PS has a case to answer. A source said, we are still investigating him and other officials in the OPM but I can assure you when the report finally comes out, heads are going to roll. We have found unaccounted for funds and forged accountabilities for advances among other irregularities where tax payers lost money”.

The operative words prominent in the impugned story are:

- i. *“the PS has a case to answer”*
- ii. *we have found unaccounted for funds and forged accountabilities”*

Going by the script of the impugned publication, the intention was to malign the person of the plaintiff. This is especially so given that the course of investigation(s) had just been oscillated. No interviews had been conducted. No witnesses had testified whether at police or elsewhere.

The publication of 4th December 2012, exhibit PE5A, so far as the said publication was to the effect that:

“ Just Weeks after 12 European nations suspended budget support to Uganda until 2015, parliament has taken an interest in reports that the wife of one of the embattled senior civil servants in the office of the Prime Minister acquired a brand new \$ 100,000 (Shs 250 Million) car which was paid for in cash....the four wheel drive is now registered in the names of Mrs. Elizabeth Bigirimana, the wife of the Permanent Secretary in the OPM Mr. Pius Bigirimana...Mr. Bigirimana is in the eye of the storm in which according to a special audit by the Auditor General, over 500bn has gone missing under his watch”

The story went on to state under a sub-headline that;

“Suspicious expenditure.

...all payments were made in US Dollars and in cash and by December 9, 2010, the vehicle had been fully registered in Ms. Bigirimanas’ name”.

The plaintiff did contend in his evidence-in-chief and during his unchallenged evidence during cross-examination that the said story was false so far as it portrayed him not just as a thief but also as a person who deploys public resources towards illicit enrichment for self and his spouse.

The plaintiff, in explaining the malicious content of the impugned publication relied on Exhibit PE 7 which shows that Spear Motors the vendor of the questioned motor vehicle handed it over to the plaintiff’s spouse after receipt of the last installment of USD 20,000, indicative that the subject motor vehicle was procured in installments contrary to the Newspaper publication which indicated that the vehicle was paid for in cash.

The plaintiff contended that, to a reasonable newsreader, the impugned story painted a picture of;

a. A motor vehicle bought using proceeds of graft,

- b. *A motor vehicle paid off at one go on account of availability of money from an illicit source,*
- c. *A motor vehicle bought by the plaintiff for his spouse using illicit funds.*

The plaintiff submitted that there were more defamatory remarks in the publication of **28th December 2012, PE5B**, whereby, the Daily Monitor bore a headline title:

“POLICE TO QUESTION BIGIRIMANA TODAY”

and a sub headline:

“This Follows several attempts to have him quizzed but only for top government officials to block the police.

The Police will today question Permanent Secretary Pius Bigirimana over the massive fraud in the office of the Prime Minister...it is the first time that Mr. Bigirimana will be questioned over his role in the fraud...senior government officials blocked previous attempts by the police to interview Mr. Bigirimana.

Although Mr. Bigirimana says he is the whistleblower in the matter, several workmates, MPs and an Audit report by the Auditor General point to his knowledge and involvement in approving many payments. Investigations continue”

It was the plaintiff’s evidence and that of PW1, SP Komurubuga that by the time the impugned story was done, he had fully cooperated with the police and that he had indeed recorded many statements. The plaintiff insisted that the intention of the Daily Monitor in publishing such a malicious story was to portray him as a man who was being pampered and protected by government.

The publication of **29th December 2012, PE5W** whereby the Saturday Monitor bore a story to the effect that;

“ Bigirimana refuses to meet detectives-

Permanent Secretary in the OPM tells Police he’s not ready to record a statement over fraud in his office...the Permanent Secretary Pius Bigirimana yesterday

refused to be interrogated by Police detectives investigating a multi-billion shilling fraud in the office of the Prime Minister.... yesterday was supposed to be the first time Mr. Bigirimana was facing the police to assist them in their investigations which started more than five months ago..... sources told this newspaper that Bigirimana did not report at the Police Station or record a statement, instead the source said the Permanent Secretary wrote and submitted a document to the Police to support the charges against Mr. Kazinda... .. Mr. Bigirimana's refusal to meet detectives is likely to raise fresh questions about whether he's benefitting from preferential treatment in the investigation..... Although Bigirimana says he is the whistle blower in the matter, several workmates, MPs and an audit report by the Auditor General point to his knowledge and involvement in approving many of the payments"

The natural and ordinary meaning of the words herein employed in this publication is that;

- 1. The plaintiff had made it a habit not to cooperate with police,*
- 2. The plaintiff had been snubbing police summonses and five months have gone downhill without him recording a single statement,*
- 3. Even when the police thought it was going to interact with the plaintiff for the first time, he still declined to render his cooperation.*
- 4. So, to speak, the plaintiff was untouchable.*

The plaintiff equally complained that vide exhibit PE5BB, a story of 21st Feb 2013, the Daily Monitor injured his reputation when it wrote against him as follows:

"OPM Inquest hits new setback"

...appearing in Court last week as the main state witness and complainant in a forgery case against Mr. Kazinda, Mr. Bigirimana denied a statement that the prosecution produced and attributed to him. The disputed statement later disappeared from the court registry under unclear circumstances."

The plaintiff contends that the said publication, in its natural and ordinary meaning, meant or was understood to mean that;

1. *The plaintiff, who appeared for the prosecution, turned a hostile witness by denying a document that the prosecution had “attributed” to him.*
2. *The plaintiff used underhand methods leading to obscurity in the disappearance of the alleged document,*
3. *The plaintiff so did in order to avoid being implicated in the scam.*

The plaintiff contends that the publication of **2nd November 2012**, exhibit **PE5X**, by the Daily Monitor about and against him was defamatory.

That impugned story went as follows:

“MPs ORDER GOVERNMENT TO REMOVE BIGIRIMANA.

On Monday the government interdicted 17 senior officials from OPM, Bank of Uganda and Ministry of Finance over the theft of donor funds meant for reconstruction of Northern Uganda and Karamoja sub region. However, Mr. Bigirimana was spared on claims that there was no evidence linking him to the theft of the money. State House yesterday also jumped into Bigirimana’s defence”.

In and through the said story, the plaintiff contended, in its natural and ordinary meaning, meant or was understood to mean that he was one of the culprits in the scam, who only thrived on State House protection.

The plaintiff further submitted that the content of the Daily Monitor story of **5th November 2012** wherein it was published of and about him as follows;

“Government remains undecided on calls to suspend Bigirimana.

As accounting officer at OPM Mr. Bigirimana has been held personally liable in particular instances of the reported fraud by the Auditor General”

Vide Exhibit DE3, which is the report of the Auditor General, there is nowhere where a “holding” was made to the effect that the plaintiff was **“personally liable in particular instances of the reported fraud.”** What appears in the said report, at page 177, the Auditor General faults the plaintiff for not ensuring that closure of accounts on a daily basis. This does not amount to “personal liability in instances of the reported fraud” as reported by the Daily Monitor. Intuitively, the story was false.

The deliberate usage of the terms *“held personally liable in the instances of the reported fraud”* was calculated to portray the plaintiff as a fraudulent person. It is not explainable on any hypothesis of common sense why the Daily Monitor chose, of all diction, such damning phraseology.

The plaintiff further contended that he was defamed by the content of the story ran by [the Daily Monitor of November 7th 2012, exhibit PE5 O](#).

The impugned story went as follows:

“MPs give ultimatum over PS Bigirimana.

The Lawmakers say they will not rest until the OPM Permanent Secretary is removed from office.

MPs yesterday accused the government of pampering suspects in the office of the Prime Minister.

“ Even if the government decides to protect Bigirimana, the angry spirits of the people whose lips were cut and those who were killed by rebel leader Joseph Kony will not allow him rest”. Said Haruna Kasolo.

“Those shielding Bigirimana should know that the ghosts are not sleeping and they will not let him off”

“Mr. Bigirimana knew about the stealing and he must leave office. He must take responsibility unless government wants to tell us that he is immune...”.

The said story carried material falsehoods as there was no evidence to prove that the plaintiff had stolen any funds.

The defendants cannot benefit from qualified privilege when they opted to publish a story that lacked truth in material particular. Their failure to conduct investigation(s) before the story could be published renders them liable for the impugned malicious publication.

The publication of 9th November 2012, PE5E, in which a story was carried to the effect that;

“Lawmakers want First Lady to defend self in OPM scam.

At Yesterday's closed door meeting, MPs also heard that when auditors asked PS Pius Bigirimana to explain why he authorized the suspect spending of 20.1 Billion off the Crisis Management account, he replied ' I thought the money had come from heaven and we started spending it'."

The Plaintiff avers that the said statement was false and malicious. There is no record that attributes the words highlighted to the plaintiff.

The fact that the meeting was closed door necessitated the defendants to do much more than they did to establish whether indeed the plaintiff had said that *"the money came from heaven"*. For the defendants to have gone ahead to publish such a story and attribute such words to the plaintiff, a right thinking member of society was suffered to believe that the plaintiff is reckless in his application of public resources. The plaintiff came out as a person who haphazardly goes about the discharge of his public functions without the care to verify sources of funding.

The Daily Monitor bore on November 16th 2012, exhibit PE5C headlined: **"Treasury Officials accuse OPM PS of covering money scam.**

The Deputy Treasury Secretary Mr. Keith Muhakanizi, said OPM Permanent Secretary Pius Bigirimana was the architect of removal of an official who detected the scam...Top bureaucrats from the Treasury department yesterday pinned down the Permanent Secretary OPM Mr. Pius Bigirimana over the suspected cover up of the scam in which billions of shillings in foreign aid was lost...the former principal internal auditor Shaban Wejula who had detected the fraud in OPM was removed on orders from above but the Deputy PS/ST said Mr. Bigirimana was the architect of his removal."

The plaintiff complains that if the Daily Monitor had cared to double check its sources, it would have established that Keith Muhakanizi did not utter the alleged outbursts. He contends that if the Daily Monitor had cared to establish well, it would have established that it was him and not Wejula who had detected the fraud.

The plaintiff did complain that he was defamed by the content of the story, exhibit PE5H, which was ran on 30th November 2012 titled;

“Bigirimana Contradicts himself on purchase of ministers’ cars.

Events of the past few days suggest that Mr. Pius Bigirimana, Permanent Secretary in the OPM may have lied when he publicly refuted reports that money was diverted from the Northern Uganda Peace Recovery Development Programme to buy cars for Ministers.”

By the content of the said story, the plaintiff contends that a picture was painted of and about him to the right thinking members of society that he is a liar and unfit to hold a public office.

The plaintiff also contends that he took offence with exhibit PE5CC, a publication of the Daily Monitor of 7th March 2013 to the effect that:

“OPM OFFICIALS SURVIVE LYNCHING.

Mr. Bigirimana remains in office months after Parliament resolved that he be suspended because of the scandal at OPM. He has also recently been handed additional duties to monitor other Ministries and Departments by President Museveni, whom MPs accuse of protecting some suspects.”

The plaintiff contended that this story defamed him in the manner it portrayed him as a smart a man who had presided over scandals at OPM but on account of being untouchable he could not be suspended.

The plaintiff further took offence with the story carried in the Sunday Monitor of 10th March 2013, exhibit PE5GG, headed:

“Corruption Ledger.

MPs in a bid to get down the nitty gritty in the theft of donor money in the office of the OPM are inspecting supposed projects in northern Uganda and Karamoja. They have apparently managed to uncover ghost projects and some that do not measure up to the expenditure attached to them. Interestingly, Mr. Pius Bigirimana disputes the findings as usual for example a review of the resettlement

exercise for Bududa landslide survivors in Kiryandongo found ghost food deliveries and suspicious accounting in agriculture expenditures”

In this story, the choice and use of phrases such as “*Bigirimana disputes the findings as usual*” , “*for example a review of the resettlement exercise for Bududa landslide survivors ... found ghost food deliveries and suspicious accounting...*” would be central in interrogating the defamation attendant to the impugned story.

The choice of a phrase “*as usual*” connotes that the Sunday Monitor had, over time, studied patterns regarding the plaintiff’s public conduct and it had come to the conclusion that he is habitually evasive and refutes the obvious.

The plaintiff further takes exception with the Daily Monitor’s story of March 26th, 2013, **exhibit PE5AA** under the subject caption:

“Denmark warns of aid cut over OPM scandal.

OPM Principal Accountant Geoffrey Kazinda, his middle level colleagues and their alleged accomplices in the finance ministry and the central bank were either interdicted or arrested but Permanent Secretary Pius Bigirimana, who is the accounting officer remains in office. Some of his bosses say he blew the whistle on the cash bonanza but there has been no explanation as to why he never prevented it in the first place”.

The plaintiff’s counsel submitted that had the Daily Monitor not been motivated by malice it would have carried out independent investigations and come up with the truthful version regarding how the diversion was brewed and fermented.

The Sunday Monitor publication of 5th November 2017, exhibit PE5UU, another malicious story was authored about and against him through the 5th defendant. The impugned story ran as follows:

“But M/ Akullo’s attempt to move further against corruption suffered a blow when officials in the Ministries fought back. For example, Mr. Pius Bigirimana, the then Permanent Secretary in the OPM who has since been transferred to the Ministry of Gender, Labour and Social Development again as Permanent Secretary, declined to record a statement with the police about the cases in the OPM. MS Akullo and her CID team were rendered helpless.....Ms Akullo’s response was that she could not proceed without senior officers in the OPM recording statements. “We have written to PS Bigirimana to record statement with our detectives to help us understand how the funds were used but up to now, he has refused, how can we fast track the investigations when people who claim to be whistle blowers don’t want to cooperate”. Akullo’s letter said in part”

The 5th defendant, had earlier in May 2013, written and published another false story in the Daily Monitor, **Exhibit PE5 VV**, that read follows;

“ Ms Akullo said that investigating fraud is not as easy as is the case with catching chicken thief, it takes time and resources. We have over 180 case files we are investigating which we can’t do overnight.....senior officers in the OPM and other ministries including Permanent Secretary Pius Bigirimana have refused to record statements in regard to mismanagement of funds...we have written to Bigirimana to record a statement with our detectives to help us understand how the funds were used but up to now he has refused. How can we fast track the investigations when people who claim to be whistle blowers don’t want to cooperate?”

The Plaintiff avers that the said stories were false considering that at the time they were published, Police, in particular, CIID, already had in its possession more than one score statements.

The said publication, the plaintiff contends, in its natural and ordinary meaning meant or was understood to mean, in the minds of the right thinking members of the public that;

- i) *he was a beneficiary of illicit dealings in a public office,*

- ii) *he is a disdainful and arrogant Public Servant,*
- iii) *he is a person with disrespect for due process and has no regard for civil process,*
- iv) *he obstructs Police investigations with an untouchable mentality.*

Both from the perspective of the flow of evidence and the pleadings before Court, it did not feature that the defendants ever bothered to reach out to the plaintiff to verify the veracity of the above allegations, despite the fact that, as a public servant the plaintiff, as he does aver, was accessible to anybody desirous of consulting him for whatever reason.

The plaintiff rightly complains that the 5th defendant decided to go ahead and publish the stories without regard to the negative impact they would have on his person.

The malice that colors the impugned stories is driven home by the falsehoods attendant to exhibit PEB5 to the effect that the plaintiff had *“refused to meet detectives”* and that it was meant to be the first time he was recording a statement, yet, as discerned from collective exhibit PE4, the plaintiff had actually recorded several statements with Police before this publication.

The plaintiff prayed for the reliefs sought in the plaint.

Defendants' submissions

The Defendants have contended mainly that the publications complained of were made on an occasion of qualified privilege which, when established, is a complete defence to an action for libel.

The most recent English decision which summed up the defence is the House of Lords case of **Jameel and others –v- Wall Street Journal** 2006 UKHL 44. The court departed from its earlier decision of **Reynolds v**

Times Newspaper Ltd. which was extensively relied upon by Counsel for the Plaintiff and noted as follows;

“A defence of privilege in the usual sense is available when the defamatory statement was published on a privileged occasion and can only be defeated by showing that the privilege was abused”.

A statement by Lord Diplock in **Horrocks –v- Lowe** [1975] AC 135, 149 quoted.

“The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny has nevertheless to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters in respect of which the law recognizes that they have a duty to perform or an interest to protect in doing so. What is published in good faith on matter of these kinds is published on the privileged occasion. It is not actionable even if be defamatory and turns out to be untrue.. the privilege is not absolute but qualified. It is lost if the occasion which gives rise to it is misused”.

The Judge elucidated further that misuse of the privileged occasion is malice and the burden is on the Plaintiff to prove it. In paragraph 48, Lord Hoffman, in dealing with the question whether an article was a matter of public interest had this to say:

“.... One should consider the article as a whole and not isolate the defamatory statement”

In paragraph 51, His Lordship had this to state to sum up the defence.

“.. if the article as a whole concerned a matter of public interest, the next question is whether the inclusion of the defamatory statement was justifiable. The fact that the material was of public interest does not allow the newspaper to drag in damaging allegations which serve no public purpose. They must be part of the story. And the more serious the allegation, the more important it is that it should

make a real contribution to the public interest element in the article. But whereas the question of whether the story as a whole was a matter of public interest must be decided by the Judge without regard to what the editor's view may have been, the question of whether the defamatory statement should have been included is often a matter of how the story should have been presented. And on that question, allowance must be made for editorial Judgment. If the article as a whole is in the public interest, opinions may reasonably differ over which details are needed to convey the general message. The fact that the judge, with advantage of leisure and hindsight, might have made a different editorial decision should not destroy the defence. That would make the publication of articles which are, ex hypothesi, in the public interest, too risky and would discourage investigative reporting".

In paragraph 56 the Judge held that *"the standard of conduct required of the newspaper must be applied in a practical and flexible manner. It must have regard to practical realities"*.

Still on the principles underlying the defence of qualified privilege, Lord Hope of Craighead had this to emphasize in the Jameel case in paragraph 107.

"Responsible journalism" is a standard which everyone in the media and elsewhere can recognize. The duty-interest test based on the public's right to know, which lies at the heart of the matter, maintains the essential element of objectivity. Was there an interest or duty to publish the information and a corresponding interest or duty to receive it, having regard to its particular subject matter? This provides the context within which, in any given case, the issue will be assessed. Context is important too when the standard is applied to each piece of information that the journalist wishes to publish. The question whether it has been satisfied will be assessed by looking to the story as a whole, not to each piece of information separated from its context".

In paragraph 108, Lord Hope further emphasized that *in assessing whether the public had a right to know, each piece of information in the article should not be assessed piece by piece. That a piece of information may lose colour in the context of the entire article when evaluated.* Further that, “Weight will be given to the Judgment of the editor in making the assessment, as it is the article as a whole that provides the context within which he performs his function as editor”.

Reference is made to **Gatley on Libel and Slander in a Civil Action 4th Edition published by London Sweet & Maxwell Limited.** At page 287 the learned author tackles jurisprudence on Report of Parliamentary Proceedings and has this to state:

*A fair and accurate report in a newspaper or otherwise of any debate or proceeding in either House of Parliament, or in any committee thereof, is privileged at common law. ... The publication is privileged on the same principle as a fair and accurate report of the proceedings in a court of justice, viz, **that the advantage of publicity to the community at large outweighs any private injury resulting from the publication.** “The analogy between the two cases is in every respect complete..... whatever will deprive a report of proceedings in a court of justice of immunity, will equally apply to a report of proceedings in Parliament”.*

By the above extract one infers that the jurisprudence covering qualified privilege of a report of judicial proceedings will equally apply to a report of Parliamentary proceedings without exception.

The author makes extensive coverage on reports and broadcast of judicial proceedings, which as seen above extends to reports out of Parliamentary Proceedings. From Page 294 to 295, the learned author has this to say:

“The privilege given to reports of proceedings in courts [read parliamentary proceedings] is based upon this, that, as everyone cannot be in court, it is for the public benefit that they should be informed of what takes place substantially as if

they were present.” “Such publication is merely enlarging the area of the court, and communicating to all that which all have the right to know.” “It is important that the country should know what goes on in courts of justice and there is also this consideration, that justice is often assisted by publication of reports of proceedings.” “Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconvenience to the private persons whose conduct may be the subject of such proceedings.”

The defendants’ counsel submitted that; The preamble to the Constitution sets down National Objectives and Directive Principles of State Policy. Under **Directive Principle II**,

The state shall be based on democratic principles which empower and encourage the active participation of all citizens at all levels in their own governance.

Directive Principle XXVI provides as follows:

- i. *All public offices shall be held in trust for the people.*
- ii. *All persons placed in positions of leadership and responsibility shall, in their work, be answerable to the people.*
- iii. *All lawful measures shall be taken to expose, combat and eradicate corruption and abuse or misuse of power by those holding political and other public offices. [emphasis added]*

It was counsel’s contention that the above principles embodied in the Constitution are an instrumental juxtaposition with the extract above cited in the landmark case of **Jameel and others –v- Wall Street Journal** which should inform court in the decision it is to make in this case concerning the role of the Plaintiff and the sources of the publications made by the Defendants concerning him, which were mainly Parliament and the Office of the Auditor General. Exposure of abuse of office and public funds is not

only a moral and social duty but is a Constitutional duty as can be discerned from the National Objectives and Directive Principles of State Policy which are embodied in the Constitution. It is submitted that when analysing the defence of qualified privilege, a court of justice in Uganda should consider the Common law and the above cited directive principles concurrently.

Investigations and inquiries by the office of the Auditor General, the Criminal Investigations Department of the Police and Public Accounts Committee of the Parliament of Uganda regarding those funds took place. The office of the Auditor General and the Public Accounts Committee of Parliament produced Reports which were exhibited in court.

The Plaintiff and many of the officers working under him, including but not limited to officers from Bank of Uganda and Ministry of Finance appeared before the Auditor General, the Criminal Investigations Department of the Police and Public Accounts Committee of the Parliament of Uganda. A good number of them were charged convicted and jailed. In his evidence under cross examination, the Plaintiff admitted that he came under scrutiny and was therefore the subject of investigations. See Page 84 and 85 of the Proceedings.

Was there recklessness and hence malice in the publication? The finding can best be made by briefly analyzing each of the articles which is the subject of the suit.

The caption **Auditors Target Bigirimana in cash probe**. Counsel contended that the plaintiff singled out the phrase, “the PS has a case to answer”. it is **the ordinary meaning of the words used** and not the technical meaning thereof that should be employed in the interpretation unless the publisher contextually used them in a technical sense. The use of the phrase “the PS has a case to answer” should be interpreted using the

ordinary meaning attached to those words and in the context of the fact there was an ongoing audit. The audit was not in respect of some petty cash expenditure but in respect of abuse of public funds in excess of UGX 20,000,000,000=. In carrying out the audit there was a case to explain on how the funds ended up in the Department to which he was the accounting officer and how they were abused. In that case, a case to answer should be interpreted to mean that there was heavy explanation to make to convince whoever was auditing the questioned expenditure.

The Publication of 4th December 2012 Exhibit PE5A. This was in respect of acquisition of a United States Dollars 100,000 Mercedes Benz by a one Mrs. Elizabeth Bigirimana, wife of the Plaintiff. It transpired in evidence that the wife of the Plaintiff is a civil servant working with Uganda Broadcasting Corporation (UBC). The Plaintiff did not deny that Mrs. Elizabeth Bigirimana is his wife. It was not denied that the vehicle was paid for in cash deposits. Of course, the sources of the funds were not explained. This story was true in fact and in substance and one would wonder why the Plaintiff complained about it.

The Plaintiff has no problem with the above details but has a problem with the opening statement that the vehicle was paid for in cash of \$ 100,000. Besides the article cites Parliament as having been interested in the said acquisition using that mode of payment. It is submitted that the said article which is true in fact and in substance is not actionable. The defence of justification may not have been framed as an issue, but in this respect, the plea of justification was raised by the defence in their pleadings.

Publication of 28th December 2012, Exhibit PE5B under the heading POLICE TO QUESTION BIGIRIMANA TODAY

The Court is invited to analyse the entire article as a whole. The article was not about recording statements but about interviewing the witness which was supposed to be done at his office and not at CID headquarters. The article is in respect of interviewing the Plaintiff to shed light on how Shs. 6.9 billion was fraudulently diverted to the National Policy, Disaster

Management Account and not statement recording. The article was about interviewing the Plaintiff as a possible suspect and not merely recording a statement as a witness. It is submitted that the context in which the article was published was on a matter of public interest given that the Plaintiff was the Accounting Officer in the Office of the Prime Minister and massive fraud involving funds in a public office to which he was the Accounting Officer had taken place. There was nothing wrong with appearing at police for questioning.

Publication of 29th December 2012, Exh PE5 – Bigirimana refuses to meet detectives.

Without delving so much into the merits of this publication, the alleged cause of action founded on this publication was introduced in the Plaintiff's pleading pursuant to the amendment of the Plaint filed on 20th November 2020. The latest time that it should have been filed in court is 29th December 2018. The submissions in Paragraph 16 apply to this action and it should also be dismissed with costs.

Publication of 21st February 2013 under the caption, OPM Inquest hits new set setback

It is unclear why the Plaintiff is complaining about this one and half sentence extract out of the entire article. This was a report of Court proceedings. Nevertheless, action on this article was initiated as a cause of action on 20th November 2020. The last date on which action founded on this publication should have been filed was 21st February 2019. The submissions in Paragraph 16 apply to this action and it should also be dismissed with costs.

Publication of 2nd November 2012 under the caption, MPS order Government to remove Bigirimna.

The main substance in the article was a detailed story on how Donors froze aid to Uganda in view of the previous massive fraud in the Office of the Prime Minister. In his evidence in chief, DW1 in Paragraph 20 testified that the story was based on Parliamentary Proceedings which the witness

covered. He even mentions the Members of Parliament who contributed to the debate. The publication is privileged. To single out three sentences and claim they were defamatory is in flagrant deviation of the principles enunciated in the case of **Jameel and others –v- Wall Street Journal**

The Publication of 5th November 2012 (Exh. PE 5 t) under the caption, Government remains undecided on calls to suspend Bigirimana.

The complaint from the entire article is only one sentence! The sentence when read in the context of the entire article falls squarely under the defence of qualified privilege. The commentary stems from the report of the Auditor General. For example, the Court is referred to Page 177 of Exhibit DE3 on which the Plaintiff as Accounting Officer is faulted for having failed to carry out his duties. The Accounting officer is also faulted on Page 100 to 101 of the proceedings. Nevertheless, this plea only came into the court as a cause of action on 20th November 2020 with the filing of the amended Plaintiff. The latest time that an action arising out of the publication should have been filed was 5th November 2018. The action is time barred.

Publication of November 7, 2012 (Exhibit PE 5O) under the caption, MPs give ultimatum over PS Bigirimana.

This is an extract is from a very long article authored by DW1, Yasin Mugerwa. The sources of the publication are disclosed as coming from Members of Parliament after a debate. The story was published on an occasion of qualified privilege. Nevertheless, the cause of action was introduced in the amended plaintiff filed on 20th November 2020. The latest time that an action arising out of the publication should have been filed was 7th November 2018. This action is time barred.

Publication of 9th November 2012 (Exh PE5E) under the caption, Law Makers want First Lady to defend self in OPM scam.

The Plaintiff singles out one sentence from an article spilling over to 2 pages and alleges that it is defamatory. The publication names the sources of the story as being Parliamentary Proceedings and the therefore it was

published on an occasion of qualified privilege. To single out one sentence out of the entire article offends the rule in **Jameel's** case. However, the cause of action was first initiated in the amendment of the Complaint filed on 20th November 2020. The latest time that an alleged cause of action arising out of the publication should have been filed in court was 9th November 2018.

Publication of 16th November 2012 (Exh PE5C) under the caption Treasury Officials accuse OPM PS of covering money scam

The story was about the removal of an auditor who is reported to have detected the scam. The source of this story is the Report of the Public Accounts Committee of Parliament- Exh DE 1. The publication is therefore privileged. Nevertheless, the alleged cause of action was first filed in court in the amended complaint filed on 20th November 2020. The latest time that a cause arising out of the publication should have been filed was 16th November 2018. The action is time barred.

Publication of 30th November 2012 (Exh PE5H) under the caption, Bigirimana Contradicts himself on Purchase of ministers' cars.

The publication is a long one but the Plaintiff has singled out one sentence. The publication gives a background to the impugned statement. The Plaintiff had earlier responded to questions from Odonga Otto MP on the expenditure concerning procurement of a vehicle for the then Prime Minister where he denied that the funds were from PRDP. Later during the Public Accounts Committee hearing, he admitted spending the money from PRDP after the diversion. The statement is therefore a fair and accurate comment on the contradictory statements.

Publication of 7th March 2013 (Exh PE5CC) under the caption, OPM officials survive lynching.

This is yet another long story covering almost half a page but only two sentences are singled out and it is alleged that the publication is defamatory. It is a fact that notwithstanding, money being defrauded in a government department in which he was the Accounting Officer, the

Plaintiff was not removed from office. Probably it should have been the President to complain about the publication. The statements complained about constitute fair comment.

Publication of 10th March (Exh PEGG) under the caption, Corruption Ledger

The story was a proper description of the conduct of the Plaintiff during the inquiry. He attempted to distance himself from the expenditure of PRDP funds and yet they were fraudulently spent by the Government Department in which he was the Accounting Officer.

Publication of 26th March 2013 (Exh PE5AA) under the caption, Denmark warns of aid cut over OPM scandal

This was a comment to the effect that many officials from the Ministry of Finance and Bank of Uganda were interdicted or arrested but the Plaintiff remained in office. That his bosses claimed that he blew the whistle but it is not known why he did not prevent the scandal. This was a fair comment on the facts as they unfolded. This was not a one-off loss. It was protracted and in many instances the Plaintiff signed off money which had not been appropriated to the Office of the Prime Minister.

Publication of 5th November 2017 (Exh PE5UU), under the caption Money, Drugs eat up police Force

This is the only cause of action which is not subject to the bar by the limitation period. Indeed, it is the cause of action which was filed originally before the amendment. The article was highlighting the weakness of the police force following the arrest and charging of three (3) senior police officers, Nixon Agasirwe, Joel Aguma and another who is not mentioned in the article. The article was published as a critique mainly of the then CID under its Director Ms. Akullo. The Plaintiff featured in this Article when Ms. Akullo was responding to the general criticism.

"We have written to PS Bigirimana to record a statement with our detectives to help us understand how the funds were used, but up to now he has refused. How

can we fast-track the investigations when people who claim to be whistleblowers don't want to co-operate?" Ms. Akullo's letter said in part.

It is important to understand the context in which the quotation was published. The Plaintiff must have been required to record statements in respect of aspects which point to him and not merely as a witness. The Plaintiff tendered many statements (Exhibits PE4 A to PE4 GG) to show that he recorded statements. He stated that these statements were self-recorded. Akullo was not referring to these statements by context.

The Court is referred to the **Publication of 28th December 2012, Exhibit PE5B under the heading POLICE TO QUESTION BIGIRIMANA TODAY** and the **Publication of 29th December 2012, Exh PE5 – Bigirimana refuses to meet detectives**. These publications clearly show that there was a statement recording which was required of the Plaintiff and for which special arrangement had been made to meet him in his office which he allegedly snubbed. As the Accounting Officer he should have been the prime suspect. At no time was the Plaintiff treated as a suspect. The Court is further referred to Exhibit PE5UU which is under contention. In Column 4 last paragraph, the reporting is significant. It goes as follows:

As head of CID, she could not do much about a matter involving her subordinates. She identified the detectives in question as Mr. George Komurubuga and Mr. Moses Kato. She accused the duo of writing a second investigation report without her knowledge, which contradicted the official report she had signed off and submitted to the DPP. She said they wrote the second report "in order to account for the money they had received from the suspects."

Akullo said the operatives had since "deserted office" at the CID and taken up different working stations, signaling a house in disarray. Mr. Kato, one of the detectives Ms. Akullo accused of taking a bribe and abandoning his office at Kibuli to work from elsewhere, told this newspaper in a story published on April 22 2015: "it is true we are no longer at CID."

The above extract is relevant background to determine the manner in which PW1 testified defending the Plaintiff as if he had nothing to do with

expenditure of the diverted money. It is not surprising that Ms. Akullo expressed frustration as per language in the article. It is therefore submitted that in the context in which the article was written, it was not defamatory. It was merely quoting statements of a public officer.

Analysis

According to *Black's Law Dictionary 11th Edition 2019*, defamation means; Malicious and groundless harm to the reputation or good name of another by the making of false statement to a third party.

In defamation suits, for court to determine whether the words complained of are capable of a defamatory meaning, one must first look at the words themselves. Then one has to consider the circumstances under which they were published. In all this, the plaintiff does not shoulder the burden of proving falsity or malice in order to establish a cause of action. If the words are defamatory or capable of being so construed, the law presumes that they are false. The burden shifts to the defendant to show that they are true. See *AK Oils & Fats (U) Limited vs BIDCO Uganda Limited HCCS 0715 of 2005*.

The right to reputation is acknowledged as an inherent personal right of every person. A man's reputation is his property and perhaps more valuable than any other property. Indeed, if we reflect on the degree of suffering occasioned by loss of character and compare it with that occasioned by loss of property, the amount of injury by defamation far exceeds that of loss of property.

The essence of defamation is 'publication' which excites others against the plaintiff to form adverse opinions or exposes him to hatred, contempt or ridicule, or injure him in his trade, business, profession, calling or office or to cause him to be shunned or avoided in society. See *Yusuf Sembatya Kimbowa v The Editor, Observer & Ors HCCS 482 OF 2018*

Furthermore, Gatley in his book *Gatley on Libel Paragraph 31, 8th Edition*, states that:

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

In the case of *Shah v Uganda Argus [1971] EA 362* Youds J stated that;

“.....any words or imputation which may tend to lower a person in the estimation of right thinking members of society or expose a person to hatred, contempt or ridicule have been held to be defamatory and it is a general impression that the words are likely to create in the minds of reasonable persons which must be considered rather than making a loose and precise analysis of the words used.”

In the case of *Francis Lukooya Mukome and Anor versus The Editor in chief of Bukedde News Paper. HCCS NO 351/2007*, Hon Justice Yorokamu Bamwine as he then was stated

“That defamation is something more than insult or derogatory comment. It is not capable of exact definition. How far a person is affected by unkind words will depend not just on the words used, but also on the people who must then judge him.....Defamation is an injury to one’s reputation and reputation is what other people think about a man and not what man thinks about himself.”

The defendants admitted publishing the said articles but their defence is that it is a qualified privilege and that the articles are true. The defence counsel cited the case of **Jameel and others –v- Wall Street Journal** 2006 UKHL 44 noted as follows;

“A defence of privilege in the usual sense is available when the defamatory statement was published on a privileged occasion and can only be defeated by showing that the privilege was abused”..... that misuse of the privileged occasion is malice and the burden is on the Plaintiff to prove it.”

The defendants' counsel further submitted and justified that the published articles were made in public interest and furtherance of the Constitution's National Objectives and Directive Principles of State Policy. Under **Directive Principle II,**

The state shall be based on democratic principles which empower and encourage the active participation of all citizens at all levels in their own governance.

Directive Principle XXVI provides as follows:

- i. All public offices shall be held in trust for the people.*
- ii. All persons placed in positions of leadership and responsibility shall, in their work, be answerable to the people.*
- iii. All lawful measures shall be taken to expose, combat and eradicate corruption and abuse or misuse of power by those holding political and other public offices.*

A statement by Lord Diplock in **Horrocks -v- Lowe** [1975] AC 135, 149 quoted.

"The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny has nevertheless to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters in respect of which the law recognizes that they have a duty to perform or an interest to protect in doing so. What is published in good faith on matter of these kinds is published on the privileged occasion. It is not actionable even if be defamatory and turns out to be untrue.. the privilege is not absolute but qualified. It is lost if the occasion which gives rise to it is misused".

".. if the article as a whole concerned a matter of public interest, the next question is whether the inclusion of the defamatory statement was justifiable. The fact that the material was of public interest does not allow the newspaper to drag in

damaging allegations which serve no public purpose. They must be part of the story. And the more serious the allegation, the more important it is that it should make a real contribution to the public interest element in the article. But whereas the question of whether the story as a whole was a matter of public interest must be decided by the Judge without regard to what the editor's view may have been, the question of whether the defamatory statement should have been included is often a matter of how the story should have been presented. And on that question, allowance must be made for editorial Judgment. If the article as a whole is in the public interest, opinions may reasonably differ over which details are needed to convey the general message. The fact that the judge, with advantage of leisure and hindsight, might have made a different editorial decision should not destroy the defence. That would make the publication of articles which are, ex hypothesi, in the public interest, too risky and would discourage investigative reporting".

The defence counsel made reference made to ***Gatley on Libel and Slander in a Civil Action 4th Edition published by London Sweet & Maxwell Limited***. At page 287 the learned author tackles jurisprudence on Report of Parliamentary Proceedings and has this to state:

*A fair and accurate report in a newspaper or otherwise of any debate or proceeding in either House of Parliament, or in any committee thereof, is privileged at common law. ... The publication is privileged on the same principle as a fair and accurate report of the proceedings in a court of justice, viz, **that the advantage of publicity to the community at large outweighs any private injury resulting from the publication.** "The analogy between the two cases is in every respect complete..... whatever will deprive a report of proceedings in a court of justice of immunity, will equally apply to a report of proceedings in Parliament".*

The author makes extensive coverage on reports and broadcast of judicial proceedings, which as seen above extends to reports out of Parliamentary Proceedings. From Page 294 to 295, the learned author has this to say:

“The privilege given to reports of proceedings in courts [read parliamentary proceedings] is based upon this, that, as everyone cannot be in court, it is for the public benefit that they should be informed of what takes place substantially as if they were present.” “Such publication is merely enlarging the area of the court, and communicating to all that which all have the right to know.” “It is important that the country should know what goes on in courts of justice and there is also this consideration, that justice is often assisted by publication of reports of proceedings.” “Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconvenience to the private persons whose conduct may be the subject of such proceedings.”

It is the duty of this court to evaluate and analyse the said articles and establish whether the defence of qualified privilege can stand guided by the above authorities. As noted earlier, the privilege is not absolute and the court has a duty to establish whether the qualified privilege was not abused in the circumstances of the published articles. This court will be guided by the factors set out by the House of Lords in **REYNOLDS -vs- TIMES NEWSPAPER LTD [2001] AC 127, 205** which sets out multiple factors to be considered when deciding whether a defendant has established privilege. Those factors were stated to be;

- i) The seriousness of the allegations. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegations are not true.
- ii) The nature of the information and the extent to which the subject matter is a matter of public concern.
- iii) 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.

(copies of the 42 stories herein complained of are hereto attached collectively marked annexure AA)"

It can be seen from the above paragraph that the plaintiff's counsel set out clearly all the publications that he felt were defamatory and only amplified or selected the most damaging stories in the amended pleadings by setting out the specific words that are defamatory. The amended pleadings did not introduce any new cause of action as the defence counsel seems to suggest but rather provided further and better particulars to the original pleadings. Therefore, the introduction of the specific words from the different stories did not introduce any new causes of action.

The defendants' in their amended Written Statement of Defence did not raise the issue of limitation in their pleading and therefore never objected to the amended pleadings as introducing new causes of action outside the limitation period. This court does not agree with the defence counsel contention and argument that the stories as set out in the amended pleadings were time barred.

The defence counsel submitted that the publications are not defamatory since the defendants had a social, moral and legal duty to make the publication in that respect to the public which similarly had a corresponding moral and social duty to receive the publication and accordingly each of the impugned publications was made on an occasion of privilege and is not actionable.

The evidence on record clearly shows a systematic scheme to report specifically about the plaintiff and this was in a manner that would portray him as the key suspect in the financial scam which was under investigation. The publications seem to excite the public against the plaintiff to form adverse opinions or expose him to hatred, contempt or ridicule, or injure him in his employment and thus to cause him to be shunned or avoided in society. The stories as set in the pleadings are twisted,

skewed and crafted in a manner which portrayed the plaintiff in a negative sense as a corrupt person under investigations.

The publication of 2nd November 2012: *MPs Order Govt to remove Bigirimana.*
7th November 2012 MPs give Ultimatum over Bigirimana; “ Mr Bigirimana knew about the stealing and he must leave office. He must take responsibility unless government wants to tell us he is immune...”

5th November 2012: *Govt remains undecided on calls to suspend Bigirimana.*

The story seemed to implicate the plaintiff but State house jumped into Bigirimana’s defence. The stories are crafted in such a manner as to show that the plaintiff is guilty and especially when another story was written to confirm.....”As Accounting officer at OPM Mr. Bigirimana has been held personally liable in particular instances of the reported fraud by Auditor General”

9th November 2012: *Lawmakers want First Lady to defend self in OPM Scam.*

“...when Auditors asked PS Pius Bigirimana to explain why he authorized this suspect spending of 20.1billion....he replied I thought the money came from heaven and we started spending it..” This story was indeed false and verified from the plaintiff. It arose out of a closed meeting without the press.

16th November 2012: *Treasury Officials accuse OPM PS of Covering money scam-*“The Deputy Treasury Secretary Mr. Keith Muhakanizi said OPM Permanent Secretary Pius Bigirimana was the architect of removal of an official who detected the scam”

30th November 2012: *Bigirimana contradicts himself-* “Events of the past few days suggest that Mr. Pius Bigirimana could have lied when he publicly refuted reports that money was diverted.....”

4th December 2012; *Wife of one of the embattled civil servant in office of OPM acquired a brand new \$100,000(250,000,000):* The story insinuated that the lost

money at OPM could have been the source of money for the purchase of vehicle from illicit source.

28th December 2012: *The plaintiff refused to cooperate with police* and it infers guilt on the plaintiff

“Although Bigirimana says he is the whistleblower in the matter, several workmates, MPs and Audit report point to his knowledge and involvement in approving many of the payments.”

21st February 2013: *OPM Inquests hit new set back.* “Bigirimana denied a statement that the prosecution produced and attributed.....later disappeared from the court registry.” This story inferred the plaintiff had a hand in the disappearance of the document from the registry.

7th March 2013: *OPM Officials survive lynching;* Mr Bigirimana remains in office months after Parliament resolved that he be suspended because of OPM scandal.....was assigned other responsibilities by the President. This story seemed or was meant to infer that the plaintiff is protected by the President.

10th March 2013; *Corruption Ledger;* Bigirimana disputes the findings as usual. The usage of the words as usual insinuated that the plaintiff is in the habit of denying or that there is a usual pattern of denial.

26th March 2013; *Denmark warns of aid cut over OPM scandal.* OPM Principal Accountant Geoffrey Kazinda.....were either interdicted or arrested but Permanent Secretary Pius Bigirimana, who is the accounting officer remains in Office. Some of his bosses say he blew the whistle on the cash bonanza but there was no explanation why he never prevented it in the first place”

8th May 2013: *Permanent Secretary Pius Bigirimana has refused to record statements in regard to mismanagement of funds.*

5th November 2017: *Mr Bigirimana declined to record statements with the police about the cases in OPM.....he has refused to record a statement.*

These stories are materially false and only intended to portray the plaintiff as uncooperative in the investigation of corruption in OPM or that he has something to hide from the public. There is clear evidence on court record of the several police statements made by the plaintiffs and some of which have resulted in the conviction of the key suspects at the Anti-Corruption Court.

The stories when read as whole it becomes clear that they were made or reported in such a way that they were intended to tilt public opinion against the plaintiff or portray him as a corrupt fellow who is being protected by the government.

Defamation perpetrated by the media or a distribution of published material can be defined as: the unlawful (unreasonable), negligent publication of defamatory matter referring to the plaintiff which causes his or her reputation to be impaired. The test of whether a statement is defamatory or not is an objective one. The question to be asked is whether the statement tends to lower the respondent in the estimation of the ordinary reader. *See National Education, Health and Allied Workers v Tsatsi 2006 (1) All SA 583; See John Patrick Machira v Wangethi Mwangi and anor KLR 532*

The plaintiff bears the onus of proving the publication of the alleged defamation which, once proven, gives rise to the inference that such publication was wrongful and intentional.

The defendants' counsel contended that the published articles were made in public interest and furtherance of the Constitution's National Objectives and Directive Principles of State Policy. Therefore, according to counsel for

the defendants the publication was justified and the defence of qualified privilege is available to the defendants.

The conflict between freedom of expression and the right of the individual to his or her good name must be balanced and weighed against each other. In the case of *Argus Printing and Publishing Co Ltd v Esselen's Estate [1994] 2 All SA 160*; The court accepted that freedom of expression and the press are potent and indispensable instruments for the creation and maintenance of a democratic society, but added:

"The right of free expression enjoyed by all persons, including the press, must yield to the individual's right, which is just as important, not to be unlawfully defamed. I emphasize the word "unlawfully" for, in striving to achieve an equitable balance between the right to speak your mind and the right not to be harmed by what another says about you, the law devised a number of defences, such as fair comment, justification (i.e truth and public benefit) and privilege, which if successfully invoked render lawful the publication matter which is prima facie defamatory.....the resultant gives the due recognition and protection, in my view, to freedom of expression."

The courts have recognized the importance of the press to the maintenance and stability of a democratic society, the notion of press exceptionalism (in the sense of affording the press greater privileges than the individual has been rejected. It is thus consistent to reject "press exceptionalism" while at the same time emphasizing that, because of the critical role that the media play in modern democratic societies, the law of defamation must leave them free to speak on matters of public importance- though no more free than other citizens – as fully and openly as justice can possibly allow. See *Khumalo v Holomisa 2002 (8) BCLR 771 (CC)*

In considering a defence of public benefit or interest, there is a potential clash between constitutionally entrenched rights in the form of the

plaintiff's rights to the dignity and privacy on one hand and, on the other, the right of freedom of the press, freedom of expression and of receiving or imparting information. None of these rights should be regarded as permanently overriding the others. The weight to be attached to these rights in a given situation varies according to the circumstances.

The importance of the press is recognized but on the other hand, the right to dignity (and thus right to one's good name or reputation) is regarded as a founding value of the Constitution. Therefore, there must be a balancing act between the two rights and one cannot be used to violate the other. The defendants in this case cannot justify their actions that are negligent and reckless in nature to violate the plaintiff's reputation under the guise of informing the public.

The press like the defendants in this cannot go around soliciting for defamatory statements in form of interviews under the guise of their duty of informing the public. The public must be informed and the information must be straight and not skewed or tilted to bias the public against a specific person.

What the defendants' counsel seems to allude to as information from MPs appears to have been solicited interviews and not deliberations of Parliament (Parliamentary proceedings) which would ordinarily be privileged once published to the public. Therefore, Parliament should never be used to defame personalities and no justification can ever be made for statements not made in the course of execution of their mandate as people's representatives especially interviews in 'corridors' or 'parking areas' or 'canteen' of Parliament or any other idle talk not related to parliament work. The MPs may use such interviews to attack specific persons and some may have their own axes to grind or are being paid to attack personalities.

The defence counsel further contended that they were reporting about an Audit report-PAC report presented in Parliament on OPM to verify and investigate specific allegations of; Embezzlement of PRDP funds; Use of Personal accounts for implementation of activities; diversion of funds; Unaccounted funds. The report once presented to Parliament does not constitute a finding of fact or conviction but rather raises queries about unexplained actions or transactions. Once the unexplained or the unclear is later explained or cleared then the query is answered that closes the matter. The person who publishes information in a biased manner is deemed to be malicious and must carry responsibility for the publication and especially when he/she fails verify or get the other side of the story from the person directly affected. The defence counsel in his submissions contended as the *“Accounting Officer he should have been the prime suspect. At no time was the Plaintiff treated as a suspect”*. It appears it was the same view of the defendants while reporting about the plaintiff.

It can be deduced from the evidence on record that the defendants were interested in specific person in the entire investigation and reporting about the OPM audit. In his witness statement; Yasin Mugerwa (DWI) stated in paragraph 19: *Auditors close in on Bigirimana in probe’ I interviewed officials from Auditor General’s office who were probing alleged misuse of donor money in the Prime Minister’s Office and they indicated to me in confidence that in their report to Parliament, they were looking into the allegations of the involvement of the Permanent SecretaryThey told me that the Permanent Secretary’s name would feature in the final report to Parliament.....”* It is not surprising that the plaintiff in all the stories or publications, he was never asked about his side of the story and no verification of what was published was ever done.

The intention of the defendants in trying to leak what was to be in the final PAC Audit report before it is tabled in Parliament cannot be taken as an innocent reporting intended to inform the public under the duty to inform or fight corruption as they have argued. Such action and other reporting about the plaintiff where they failed to verify from him implies bad faith and malice that was intended to impair his reputation in the eyes of the

public and thus lower him in the estimation of the ordinary reader as a corrupt person. The publication was done with actual malice (with the knowledge of its falsehood or reckless disregard for its authenticity. The sources of the information are undisclosed and they are using blanket statements like MPs, 'Treasury Officials', 'several workmates' etc. Parts of what was reported were proceedings that were not open to the press or it was closed door.

The defendants acted negligently while reporting about the OPM scandal; a person is negligent once he has acted carelessly, thoughtlessly, or imprudently. They paid insufficient attention to their action or failed to adhere to the proper standard of care of required of them. The reporters failed to appreciate the nature of the fraud and how it was done, and resorted to make conclusive remarks about the plaintiff as the main suspect since he was the Accounting office and yet the PAC report had set out an elaborate procedure on how the scheme that led to the embezzlement was executed by officials of Ministry of Finance, Bank of Uganda and the Principal Accountant of OPM.

Reports of Parliamentary speeches are protected, provided they are fair and substantially accurate. Summaries of extracts published in accordance with decisions or approval of parliament are also provisionally protected, but the protection falls away where the summary or extract is not made in good faith. Whether it is parliamentary report like the PAC Audit report, the question of qualified privilege in reporting about it and its content must subjected to test of it being a true reflection and factual rendition of the proceedings that culminated in the report which is unbiased and a true account of the proceedings of the committee.

This court is mindful that sufficient latitude should be allowed to allow robust and frank comment in the interest of keeping members of the public informed about what government does. Errors of fact should be tolerated, provided the publication is justified and reasonable, namely published in the reasonable belief that the statements were true. The defendant

overstepped the bounds of what is permissible and they are thus liable for defamatory statements made in the different articles. The statements were defamatory against the plaintiff and the publication was not made on account of qualified privilege.

What remedies are available?

The plaintiff in his plaint sought General damages to the tune of 1,000,000,000/= and Exemplary damages of 900,000,000; An Order compelling the defendants to publish an apology in the said newspapers and online news channel and a Permanent Injunction restraining the defendants and or their agents, editors, publishers, from making, publishing, circulating any further defamatory stories against or about the plaintiff.

The following were pleaded by the plaintiff as the damage suffered to his reputation:

a) loss of reputation,

b) being shunned by the members of the public, his family, workmates and acquaintances in Uganda and throughout the whole world.

In the instant case, the allegations were very serious, given the amount of money they alleged got lost in the hands and under the watch of the plaintiff to the tune of 50.000.000.000/=

What made it even grave is that the said money was meant for Northern Uganda post-war rehabilitation, the said region having gone through decades of war and trauma.

Any person believed to have tampered with the said aid, in the eyes of reasonable and right thinking members of society would be equated to a mass murderer.

That was how grave the allegations made against the plaintiff were, and that also accounts for the extent of damage inflicted upon the plaintiff's reputation, which must be compensated for by a reasonable amount of damages.

Analysis

In the case of **YUSUF SEMBATYA KIMBOWA v THE EDITOR, THE OBSERVOR & ORS** (*ibid*), this honourable court cited the case of **SAMWIRI LUGOGOBE -vs- HUSSEIN LUKAGA** (1980) HCB 18, while assessing damages, where ALLEN. J held:

"...in a defamation case when considering the quotation of damages, what matters is the injury done to the Plaintiff's reputation and character taking into account his wounded feelings and any insulting or malicious conduct on the part of the defendant.

In absence of evidence of any of those factors, an award of nominal damages only would be made for injury done to the plaintiff's good name".

In **KANABO -vs- THE CHIEF EDITOR, ENGABO NEWSPAPER** the Supreme Court held that:

"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"

Reputation is the asset that one has and the law of defamation is meant to protect this reputation from injury without any just cause. See *Monitor Publications Ltd v. Ricky Nelson Asiimwe* SCCA No.16 of 2015

In the case of *John vs MGN Ltd [1997] Q.B 586*, it was stated by Thomas Bingham MR in giving the judgment of the Court of Appeal that;

“The successful Plaintiff in a defamation action is entitled to recover, as general compensatory damages such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damage to his reputation, vindicate his good name and take account of the distress, hurt and humiliation which the defamatory publication has caused.”

General Damages

I have reviewed the evidence adduced and the submissions of all parties and I resolve that the Plaintiff suffered damage to his reputation. I am inclined not to award the shs 1,000,000,000/= as claimed by the plaintiff because it is exorbitant and excessively high and out of range in defamatory cases.

This court is mindful of the fact that the defamatory statements were made in several publications and at different times, therefore I grant general damages amounting to 350,000,000/= to compensate for the damage caused on the Plaintiff's reputation, distress and humiliation the defamatory statements had on his dignity as a Permanent Secretary. The damage to his reputation was far reaching in Uganda and outside Uganda.

EXEMPLARY DAMAGES

The plaintiff sought 900,000,000/= as exemplary damages. This sum is equally high and excessive. The punitive damages are awarded to serve as a punishment to the defendant so that they do not repeat the same mistake or action, an award of 100,000,000/= is appropriate as exemplary damages to punish the defendants and discourage them from publishing any further defamatory statements about the Plaintiff in such a reckless and negligent manner.

INTEREST

The plaintiff is awarded interest at the rate of 10% on both general and punitive damages from the date of judgment to the date of payment in full.

APOLOGY

In regards to the order directing the publication of an apology, the 1st defendant ordered to publish an apology be published with equal publicity as the impugned defamatory publications for a period of two weeks atleast 2 times a week.

INJUNCTION

As held in the case of *Hon. Rebecca Kadaga vs Richard Tumusiime & 2 ors HCCS No. 56 of 2013*, this court also issues a permanent injunction restraining the defendants jointly or severally by themselves, their agents and assignees from publishing further defamatory statements about the Plaintiff.

COSTS

The Plaintiff is awarded the costs of the suit.

I so order.

SSEKAANA MUSA

JUDGE

10th December 2021