

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF GANDA AT KAMPALA

CIVIL SUIT NO. 67 OF 1991

CONSTRUCTION ENGINEERS & BUILDERS:.....PLAINTIFF

VERSUS

1. THE NEW VISION NEWSPAPER

2. THE EDITOR-IN CHIEF

3. YUNUSU ABBEY

4. THE NEW VISION PRINTING

& PUBLISHING CORPORATION:.....DEFENDANTS

BEFORE: THE HON. MR. JUSTICE G.M. OKELLO

The Plaintiff brought this action in defamation against the four defendants.

Proprietor of the New Vision Newspaper,

Editor-in-Chief of the New Vision Newspaper;

Author of the relevant articles;

(4) Printer and Publishers of the New Vision Newspaper respectively jointly and severally in respect of a lead story entitled "shs. 257 M. Lost in A.T.M. deal" which was published in the New Vision Newspaper of Wednesday November 7th 1990 Vol. 5 No. 264. The Plaintiff complains that the articles were false and libelous of it. He thus claims

General damages for defamation, and libel.

Aggravated damages for defamation and libel

Permanent injunction to restrain the defendants from

publishing defamatory matter of and concerning the plaintiff;

Interest on the decretal amount from the date of filing this suit till payment in full

at the rate of 12% E A. and

(e) Costs of this suit.

The background to this suit appears to be as follows: - In 1983 the plaintiff which is a foreign company but registered in Uganda, entered into a contract with A.T.M. whereby the plaintiff was to rehabilitate A.T.M. Factory Government of Uganda which is a majority shareholder of A.T.M. was to provide the funding for the rehabilitation project. Payment to the contractor was to be effected against interim payment certificate issued by the Resident Engineer and approved by the Engineer in Chief Ministry of works for the works done. Once the interim certificate was issued and approved, A.T.M. would present it to Ministry of Finance, secure the money which it would pass to the contractor. It would appear that work progressed well at first and the Plaintiff was paid in accordance with the approved interim certificates. But problem stated in 1985 with interim certificates Nos 12-14. When these certificates were issued and approved, A.T.M. presented them to the Ministry of Finance and received the funds against them to the sum of shs, 294 million but did not pass the money to the contractor.

In the meantime on 1/7/85 the contract was terminated by A.T.M. apparently on the insistence of the Government. Following that termination, the plaintiff filed civil suit No. 1155/85 in this court against A.T.M. claiming damages for breach of contract. By a third party proceeding, A.T.M. successfully the A.G. on behalf of Government as the second defendant in the suit A.T.M. was thereby seeking indemnity against the Government. That suit which was filed, in 1985 was not heard until 1989 when it was settled out of court.

A consent Judgment (Exh.P2) was entered for the plaintiff in the sum of Uganda shs.257m and US \$ 159321. According to the Decree (Exh. P3), the second defendant drawn from the consent variation order (Exh.P5), the second defendant (A.G on behalf of the Government was alone to pay decretal amount of:

(a) Uganda shs. 257, 10662/=

(b) US. \$ 15932/= and

(c) Interest at court rate of 6% on (a) and (b) above from 1st

March 1990 till payment in full if the amounts were not paid by 31/1/90. A certificate of order against the Government (Exh. P4) was eventually issued by the Deputy Registrar of this court on 21/11/89.

The order was to the effect that the above decretal amount was due and payable by the defendant to the Plaintiff in pursuance of the decree (Exh. P3). Then the local component of the decretal amount of shs. 257 million were paid to the Plaintiff.

After that payment, the solicitor-General wrote to the Plaintiff to the effect that the amount paid was in excess of the amount payable. The amount payable to the Plaintiff was only Ug. Shs. 8,023,460/= and requested the refund of the excess. The excess payment is quite colossal. It stands at about 249 million shillings. It is not clear how the figure of the amount payable to the Plaintiff was arrived at. However, the Plaintiff received the letter from the solicitor-General but refused to make the refund requested.

The the authorities in the Ministries of Justice and Finance turned their wrath to the officials who directly handled that H.C.C.S. No. 1155/85.

The relevant officials in both Ministries were suspended from their employment and investigatory machinery was set in motion to probe into the handling of that case. Some C.I.D. officers even interviewed the managing Director (PW1) of the Plaintiff company. But no further lee-al action was taken in the matter. Some of the suspended officials were later reinstated in their jobs.

However, on 7/11/90 an article appeared as the lead story in the New Vision of that date (Exh. P6) under the headier referred to earlier in judgment. The words complained of are contained in paragraph 7 of the plaint. They are:-

"Government has lost 257 m/= inflated by officials in the Ministry of Finance and paid to contractors who carried out substandard work on the African Textiles Mills (A.T.M. Mbale.

Payment was made after officials in the Ministry of Justice, Finance and works settled out of court a civil suit which M/.S construction Engineers and Builders Ltd. (CSS) had filed against A. T? M. and the Attorney General for nonpayment,

"Those allegedly involved in the shoddy deal were named as Mr. Jacob Anyali and Ogol of the Ministry of Finance, a principal state Attorney in the Ministry of Justice, Mr. Deus Byamugisha and Engineer Paul Sebowa from the Ministry of works.

Deus Byamugisha has already been suspended while Anyali and Ogol are both still working.

CEB was awarded the contract in March 1983 and was supposed to renovate the entire

A.T.M. factory. "Unfortunately, between late 1983 and 1985, the project clients started expressing, dissatisfaction over the work the contractors had carried out,

And according to sources, differences ensued between the clients and the contractors. On May 1, 1985 Government and A.T.M. eventually decided to terminate the contract.

In 1985, the then Government reportedly advanced 295,278,000/= to A.T.M. for onwards payment to contractors. But A.T.M. refused to, release the money because of substandard work done.

And in 1986, the contractors lawyers Obol-Ochola & Co. Advocates filed, a civil suit against A.T.M. and the Attorney General for nonpayment and subsequent termination of the contract.

The New Vision reliably learnt that Obol-Ochola and Co. Advocates later approached officials in the Attorney General's chamber and insisted that the matter be settled out of court.

On June 7, 1988, a meeting was reportedly held in the former solicitor- General's chambers Mr. Francis Ayume in which was resolved that the contractors would be paid the equivalent of the outstanding debt in new currency. This meant that C.E.B. would have received 8,023,460/= (New currency) said the source

But surprisingly, it was recently discovered that a total of 257,103, 662/= was paid to the contractors in March this year payment was made without the knowledge and consent of A.T.M., the project clients.

When A.T. M. officials learnt about the payment recently, they wrote and complained to the Prime Minister, Dr. Samson Kisekka and the Inspector General of Government (IGG) Mr. Augustine Ruzindana. They also complained about settlement of the case out of Court without consulting them.

Both the Prime Minister and the IGG immediately instructed the attorney General to investigate the matter. It was eventually discovered that a total of 257,103,662/= had already been paid out to the contractors. Contacted in their offices on Monday, the Minister of Justice and Attorney General, Prof. George Kanyeihamba and the solicitor General, Mr. Peter Kabatsi confirmed the Reports. Kanyeihamba said the deal involved officials in his Ministry, Finance and works.

Kabatsi said that a Principal state Attorney in the chambers Mr. Deus Byamugisha had already been suspended and investigations continued. The solicitor General expressed dismay over the payment. Kabatsi said when Kanyeihamba summoned and grilled the officers, recently, Anyali who did the calculations, allegedly told the Minister that he had miscalculated. Anyali allegedly further said that the correct figure would have been 8,023,460/= with all the accumulated interest.

But as responsible officers, who are in the rank of clerks, they would have at least realised such a highly inflated figure before payment was approved he said.

He said those officials would also have not settled the matter out of court before consulting A.T.M. They would also have realised that Government gave A.T.M. 295m/= in 1985 to pay the same contractors.

On Monday this week, Finance Minister Dr. Crispus Kiyonga wrote to the secretary to the Treasury Mr. James Kahooza and instructed him to take action against Anyali and Ogol. The letter was copied to Dr. Kisekka, Kanyeihamba and the IGG.

"One of the A.T.M. directors, Mr. Patel told The New Vision last week that he was surprised to hear that government recently paid off the contractor

without consulting A.T.M.

"Whereas it usually takes about two months to get paid through the Treasury, CEB were paid within ten days" said Patel. He said A.T.M. would still file a civil suit against the contractor to get compensation for damages.

He said the substandard work carried out included among others, wrong casting of the foundations where the machines were installed".

The Plaintiff further alleged that the substance of the above publication was subsequently published and repeated in the Editorial of New Vision, Newspaper of the 8th November 1990 (Exh. P7j cartoon on Page 5 of the same Newspaper of the 8/11/90 (Exh. P8) and another article of the 4th December 1990.

According to paragraph 8 of his plaint, the Plaintiff alleged that by those words he complained of, the defendant meant and were understood by right-thinking members of society to have meant:-

- (a) that the Government has in a shady deal fraudulently and illegally lost to the Plaintiff the colossal sum of Ug. Shs. 257 m/=.
- (b) that the Plaintiff company is inept, incompetent and in-efficient as construction Engineers and builders and that the Plaintiff carried out sub-standard work on the African Textiles Mill renovation project to the detriment and dissatisfaction of the project client;
- (c) That the Plaintiff company, manipulated certain government officials in order to perpetuate fraud against the Government and to its monetary and beneficial advantage;
- (d) that the Plaintiff company never obtained court judgment in its favour but used subterranean and illicit means to cheat the government of colossal sum of money;
- (e) that the plaintiff company is a cheat, a swindler and a corrupt business entity with no capacity to execute building construction and Engineering works,
- (f) to subject the Plaintiff company to great contempt, Hatred, ridicule, humiliation, harassment, scorn and odium as well as to subject the plaintiff company to great loss of honour, reputation, dignity and credibility and generally to lower the Plaintiff company in the eyes and in the estimation of right thinking members of society.

The Plaintiff alleged in paragraph 9 of his plaint that the words he complained of were grossly false and malicious. That the Plaintiff has thereby suffered great and prodigious damages and faces a bleak future in his business.

The defendants admit that they published the words complained of but they deny that the story is defamatory of the Plaintiff or that the words were capable of bearing the meaning ascribed to them by the Plaintiff in paragraph 8 of the Plaint. They raised the defence of justification and fair comment on matter of public interest.

At the commencement of the hearing of the case, the following six issues were framed for determination of the court. They are:-

(1) whether the publications complained of are capable of being understood to bear the meaning ascribed to them in paragraph 8 of the Plaint.

(2) If so whether the publications are defamatory of the Plaintiff;

(3) whether the publications complained of are true in substance

(4) whether the publications complained of or any of them are fair comment on a matter of public interest made in good faith.

(5) whether the publications were made on a privileged occasion without malice.

(6) what remedies if any is the Plaintiff entitled to.

Before I start to tackle the above issues there is a preliminary point which was raised by counsel for the defendant at the beginning of his submission. I had reserved the ruling on that issue to be incorporated in this judgment. I now propose to deal with it first.

In the course of his cross examining PW1, counsel for the defendant asked questions which established that there was no specific resolution

of the Plaintiff Company in its General Meeting or of its Board of meeting

Directors meeting authorising the institution of this suit answered that he and other Directors of the Company met in Nairobi and decided that a legal proceedings be instituted in the name of the company to seek redress against the publication. But that no such

resolution was registered here in Uganda where the company is operating under his sole Directorship. That he gave the instruction to their lawyer to sue.

Mr. Katteba submitted that a resolution of a company in its General Meeting or of its Board of directors in their meeting was necessary to authorise the institution of a suit in the company's name. That since there was no such resolution, this suit was misconceived and ought to be dismissed with cost. He cited Bugerere Coffee Growers Ltd. vs. Sebaduka and Another (1970) SA 147; Walugembe Lugobe & Co. Ltd. vs. Zziwa (H.C.CS. No. 34-9/67; Nambera Trading Co. Ltd. Vs. Yosufu Ssemanije (1974) HCB. 212 as his authorities for the above proposition.

Mr. Mulenga replied for the plaintiff that instruction file a suit was a management matter which can be done by a single director and such instruction would be sufficient authority. That there was no legal requirement for a company to pass a resolution either by general meeting of share holders or by board of Directors before instructing an advocate to file a suit in the name of the company. He cited Court of Appeal No. 1/86 United Assurance Co. Ltd. Vs. A.G. particularly the judgments of Wambuzi C.J. page 11 and the judgment of Lubogo A.g as he then was page 7, as his authorities for his proposition.

I did have the chance to read the authorities cited by both counsels. The gist of the decision in Bugerere Coffee Growers Ltd vs. Sebaduka and Another above is that a resolution passed either at the company or Board of Directors Meeting authorizing the institution of a suit in the name of a company was necessary to prove that authority to file the suit in the name of the company was given. This was the view in the other two cases cited by Mr. Kateeba. These are High Court decisions.

A similar question was considered by Chief Justice Wambuzi in United Assurance Co. Ltd. vs. The AG. above. He dealt with the question at length. He said said on page 11 of this Judgment thus,

“the only question for decision is whether the single director of private of a private company is obliged to pass a resolution before he can give instruction to counsel to bring an action in the name of the company. I regard the proposition as ridiculous to say the least. I must hasten to add, however, that where a decision of the board of directors is required, one way of ensuring that such a decision has been taken is if a resolution has been passed in that regard. The important thing is whether authority is given in my view it is irrelevant as to how it was given”

He cited EMCO Plastica International Ltd. Vs. Freeberne (1971) EA 412 as his authority for that decision. Then after reviewing that case, the learned chief Justice on to say:-

“Every case must be decided on its facts. Looking at the authorities and the law, I would say that one way of proving a decision of a Board of a Board Directors is by a resolution of the Board in that behalf. Butas is suggested in Bugerere Coffee Growers Ltd. Vs. Sebaduka, unless of course, the law specifically requires as appears to be the case in instances specifically provided for in the companies Act and authority to bring an action in the name of the company is not one of those instances where a resolution is required”.

The above quotation is clear. It shows that a resolution of the company or Board of directors is not required to give authority to file a suit in the name of the company. Resolutions are one way of proving that the authority was given.

Lubogo J.A. as he then was while dealing with the same case shared the views of his learned brother the Chief Justice in the following manner at page 8 of his judgment.

"In the result I find that a resolution of the shareholders or that of the board of directors of the company was not necessary to clothe the sole director with authority to give instructions to Lawyer to institute the action”.

The facts of that case are similar to the facts of the instant case. There are no share holders of the Plaintiff Company in Uganda. PW1 is the sole Director of the company in this country. According to him (PW1) when the article in question appeared in the newspaper, he went to Nairobi and held a meeting with other directors of the company to decide on what course of action to take. They decided that a suit be filed against the defendants in the name of the Company for redress. Then he returned to Uganda and instructed a firm of Advocates to file this suit in the name of the company against the defendants. Considering the authority in United Assurance Ltd. Vs. AG. above by which I am bound and in view of the above evidence of PW1, I am of the view that the authority given by PW1 to a firm of Advocates to file this suit is effective authority for this suit to be instituted. In the result, the preliminary objection is overruled-.

I now turn to consider issue No. 1:- whether the publications complained of are capable of being understood to bear the meaning ascribed to them in paragraph 8 of the plaint.

Mr. Mulenga SC. contended for the Plaintiff that the- publications of 7/11/90 (Exh. P6) of 8/11/90 (Exh. P7) and the caricature on page 5 of the New Vision of 8/11/90 (Exh. P8) were all capable of hearing the defamatory meanings ascribed to them in paragraph 8 of the plaint.

Save for the caricature (Exh.p8), the plaintiff relies on the words used their ordinary and natural meaning for their defamatory meanings. For the caricature, the Plaintiff relies for its defamatory meaning on the assertion by the defendant that the three officials depicted had corruptly earned from the no called shady deal.

Mr. Kateeba submitted for the defendants that those publications were not capable of bearing the meaning ascribed to them in paragraph 8 of the Plaint because the story was true. As for the caricature he submitted that the Plaintiff was not depicted therein.

The above arguments raise the question of construction of the words complained of as libelous of the Plaintiff. The established principle of Construing such language was stated in the case of S& K Holdings Vs. Throgmolem Publication Ltd. (1972) 1 WLR 1036). In that case two rules were set to be observed when Construing the language of an alleged libel.

They are:-

- (1) that the whole publication is to be taken into account provided it relates to the same defamatory allegation
- (2) the words are to be taken in their most natural and obvious meaning in which those to whom they are published will be sure to understand them.

The term ordinary and natural meaning of words was explained to mean either the literal meaning or an implied or inferred or indirect meaning. That is any meaning that does not require the support of extrinsic facts passing beyond general knowledge, but is a meaning which can be detected in the language used. These can be part of the ordinary and natural meaning of words.

Lewis Vs. Daily Telegraph Ltd, (1964) AC 234

"The test applicable is whether under the circumstances in whether the writing was published, reasonable man to whom the publication was made would likely to understand in a libelous sense".

- Lewis V. Daily Telegraph Ltd above at page 259

With the above principle in mind, I now proceed to consider the publications complained of in this case. The first is the title "shs 257m lost in A. T .M. deal" which appeared in the New Vision Newspaper of Wednesday November 7th 1990 (Exh. P6). This is capable of defamatory meaning. From the word "lost" in the above title can be inferred the word "cheated".

Thus by their ordinary and natural meaning the words used in that title convey the meaning that 257m/= was cheated in A.T.M. deal. On a proper construction, this is the meaning which these words are likely to convey. That is what an ordinary man reading that title would be likely to understand. In my view therefore the title is capable of a defamatory meaning.

As for the main article under that title, (Exh. P6) the ordinary and natural meaning of the words used shows that Government lost 257m/= in a shoddy deal. That the sum was inflated from 8m/= in 257/= and was hurriedly and fraudulently paid out to the Plaintiff company without the knowledge of A.T.M. as a result of a shoddy deal involving some officials of Government for substandard work done by the Plaintiff on A.T.M. Factory in Mbale.

PW2 testified that he had known about the Plaintiff's case with A.T.M. when he read the article Exh. P6 the impression he got was that the story was false. That the impression created by article was that 257m/= was not genuinely paid to the Plaintiff. This is the view of an ordinary man reading that article. He is likely to understand the article in defamatory sense. It is my view that on a proper construction, the article in the ordinary and natural meaning of the words used, is bearing a defamatory meaning.

The Editorial of 8/11/90 (Exh. P7) merely emphasised the story which appeared in the article of 7/11/90. It reiterated that the evidence of corruption which resulted into the loss in this case was incontrovertible. It further emphasised that though it was decided in the Ministry of Justice that the Plaintiff be paid 8 m/= the latter corrupted some officials in the Ministry of Finance who inflated the amount and hurriedly paid the Plaintiff 257m/= without the knowledge of A.T.M.

PW2 testified that he also read this editorial and understood it in a defamatory sense. True, like the publication of 7/11/90 (Exh. P6) the above editorial (Exh. P7) too on a proper construction of the work used therein their ordinary and natural meaning, is capable of

bearing a defamatory meaning.

The cartoon on page 5 of the New Vision Newspaper of 8/11/90 (Exh. P6) depicted three officials walking away with 2m/=, 5w/= and 7m/= respectively from poverty to success. At the top of the cartoon was printed caption which shows one of the three officials saying.

"It is the last time I am Dealing with contractors. Then at the top left hand corner of the cartoon was printed the following caption.

"Government has lost 257m/= inflated by official in the Ministry of finance and paid to the contractors who carried out substandard work on the Africa Textiles Mills (A.T.M) Mbale".

The above quotations explain the cartoon. The cartoon dramatises that officials were corrupted in the sum each was walking away with from poverty to success for inflating the amount which they paid to the contractors for substandard work which the contractors had done on A.T.M..

PW2 testified that he had seen the cartoon and the caption, top and below it. That he understood the cartoon to mean that the Plaintiff had paid bribes to the officials. Looking at the cartoon and reading the captions at the top and below the cartoon would be likely to convey a defamatory meaning. It conveys the meaning the plaintiff had corrupted these officials for inflating the money which was paid to the Plaintiff who did substandard work on A.T.M. These answer issue No. 1 in the affirmative. That the publications complained of were capable of bearing defamatory meaning.

The next is issue No. 2. It is that if the publications were capable of defamatory meaning whether they were defamatory of the Plaintiff.

Mr. Kateeba contended that on the basic of the truthfulness of the story contained in those publications, there was nothing defamatory of the Plaintiff company. That the defendant published a true story.

On his part, Mr. Mulenga SC. held the view that the publications including the caricatures referred to the Plaintiff company as the one that received the colossal sum of money as a result of a shoddy deal, corruptly manipulated the deal and carried out substandard work. He submitted that the publications were therefore defamatory of the

Plaintiff.

A publication however defamatory, cannot be defamatory of the plaintiff unless it refers to him. PW2 testified that he read these publications of 7/11/90 (Exh. P6 the Editorial of 8/11/90 (Exh. P7) and the cartoon on page 5 of the paper of 8/11/90 (Exh. P8) and that he understood them to refer to the plaintiff company. I have had the opportunity to read their publications complained of. They were tendered in evidence. There is no doubt that all these publications refer to the Plaintiff company.

They either referred to the Plaintiff company as CEB or as the contractors in such a manner as to leave no doubt to the reader as to who the articles meant. Even the cartoon, the captions above and below the caricature were clear. They left no doubt as to who they meant to have corrupted the officials, to make them walked away from poverty to success. It was the contractors. For these reasons I agree with Mr. Mulenga SC. that these publications referred to and were defamatory of the Plaintiff Company.

Thin now loads me to consider issue No.3. It is whether the publications complained of wore true in substance.

Mr. Kateeba contended for the defendant in the affirmative. He pointed out that ___ whs paid out to the Plaintiff, that a request was subsequently made by the office of the Solicitor General to the Plaintiff to refund the excess payment arid-that some officials in the Ministries of Finance and Justice were suspended over the loss. Counsel submitted that the above facts show that there had been a shady deal in which Government had lost a colossal sum of money to the Plaintiff.

On his part, Mr. Mulenga Sc. contended that the defendant did not defendant the burden cast upon him by law to prove that the publications complained of were substantially true to succeed in their defence of Justification. He pointed out that neither the Reporter nor officials from the Ministry of Justice who had been quoted so often was called to testify to substantiate the claim Further that even the persons who wore concerned with judging the work of the Plaintiff for example, the Resident Engineers were not called to testify on the standard of the Plaintiff's work on A..T.M. Counsel challenged the evidence of DW1 P.R. Pate as unreliable as it is hearsay based on what he read from the record well after the contract had been terminated. He dismissed those minutes (Ex D1-3) of meetings reviewing the progress work of the Plaintiff as inadequate to prove that the work was substandard. That these minutes merely showed errors in the course of carrying out the contract and that these errors were being corrected by the subsequent meeting. That there

was no evidence to show that the Plaintiff Company did substandard work on A.T.M.

As regards the alleged shady deal, Mr. Mulenga submitted that this was not proved. That it had to be proved that the story was true at the time of publication not merely believed to be true.

I have listened to the above arguments, It is pertinent to point out that It is trite law that whoever sets up justification as his defence to an alleged libel, bear the burden to prove that the story he has published is substantially true. He does not have to prove every aspect of it but he must show that it is true in substance, once he has done so, then the defence succeeds

Lewis v. Daily Telegraph (1964) AC 234

In the instant case, the defendant put justification as one of their defences to the alleged libel against them. The question to answer is whether the defendants have proved that their publications complained of were true in substance. The brief substance of the publications are:-

- (1) 257M/= was paid out to the Plaintiff.
- (2) that this amount was paid in excess of the amount payable to the Plaintiff.
- (3) this excess payment was the result of a shoddy deal Involving some officials of Government and the Plaintiff.
- (4) that the payment was for substandard work done by the Plaintiff on A. T. M .

There is no dispute that 257m/= was paid out to the Plaintiff. Counsel for the defendants argued that since there was a demand from the S.G. to the Plaintiff which was not disputed, to refund the excess payment and since some officials had been suspended over the loss, there was a shoddy deal in which Government lost a colossal sum of money. I think this is not enough. In the first instance there is the consent Judgment (Exh. P2), the consent variation order (Exh. P5), the Decree from the consent judgment (Exh. P3) and the certificate of order against the Government Exh. P4. All the above documents tend to show that the deal was genuine for the sum of shs. 257,103,662/=. A letter from the office of

The solicitor-General requesting refund of excess payment after the above amount as shown in the judgment was paid to the plaintiff was not enough to show that the deal was shoddy. It was necessary in the face of the above documentary evidence for other evidence to be called to show that the

amount payable to the Plaintiff was other than those stated in the judgment. In other words there was need for evidence showing that the consent judgment was not a judgment binding on the parties. But no such evidence was called. In the absence of evidence to contradict that consent judgment, I am unable to find that there was a shady deal in which Government cost a colossal sum of money. The amount was a result of a judgment.

On whether the Plaintiff did substandard work on A.T.M. Counsel for the defendant relied on the minutes of EX D1-3 of Meetings to review the progress work of Rehabilitation on A.T.M. to show that the plaintiff did substandard work:-

In the minute Exh. D1 of the Meeting which was held on 3/5/84, para 2 paragraph (8) under Steel structures it was pointed out that the fixation of steel purlins was not done up to standard. The Plaintiff conceded and promised to correct that.

Under paragraph (f) Guttering. The fixation of Gutters on the valley purlins was also pointed out as having been poorly done and the Plaintiff promised to correct it.

At the subsequent meeting held on 15/6/84 (Exh. D2) minute 7 paragraph 11 and 111 thereof showed complaint, about the slow speed at which the foundation for machine and Fixation of Gutters were being done. Paragraph (v) of the same minute pointed out that painting was being done where the walls had been cracked and Gutters were leaking. It warned that no payment would be made even if approved by the Resident Engineers if the painting continued without correcting the crack and leakage.

The Minute Exh. D3 of the meeting held on 15/4/86 when the contract had already been terminated, showed in paragraph 2 under Screeding; that

the plaintiff failed to achieve the necessary standard of screed.

It was observed that no contractors achieved the required standard of screed even under the supervision of the consultant (H.H.K.) It was pointed out by the consultant that the problem there was the absence of design. That without design it was difficult indeed to achieve high quality of work. H.H.K. promised to produce a design.

From the above evidence, counsel for the defendant submitted that the Plaintiff did substandard work. I do not find the above evidence sufficient to brand the entire work substantially substandard. As the above evidence show, it is for the work on fixation of steel purlins and Gutters on the valley purlins that the Plaintiff wholly stood to blame. The Plaintiff undertook to correct them and there was no evidence that they were not corrected. Exh. D2 Minute 7 paragraph 7 (11) (iii) complained of the slow speed at which the work was being done. This has nothing to do with quality of the work. work can progress slowly and yet be of high quality. The painting work itself was not complained of. Only the cracked walls and the leaking Gutters were to be attended to first.

In Exh. D3, the failure to achieve the necessary standard of screed was shown not to have been due to the Plaintiff incompetence. It was due to the failure of the consultant to produce a design. In view of the above, I am unable to find that the defendant has proved that plaintiff had substantially done a substandard work on A.T.M.

Then there is issue No. 4. It is whether the publications complained of or of them is fair comment on matter of public interest made in good faith.

Mr. Kateeba contended that all the publicatione complained of were fair comment made honestly without malice on a matter of public interest involving public funds. That fair comment can take the form of words or caricatures. He submitted that the cartoon (Exh. p8) was also fair comment made honestly without malice on a matter of public interest. Mr. Mulenga SC. however contended that none of the publications complained of contained expression of opinion. That only the Editorial (Exh. P7) contained a small portion of expression of opinion "that the officials were either criminally negligent or interested parties". But that even here, the comment was not fair because they never published the version of the Plaintiff.

I have considered the above arguments. Fair comment on a matter of public interest is a general right. It is thus a corner stone of the press-freedom and court have shown reluctance to stifle it. For this defence to be available, the defendant must show that the words

complained of are:-

- (1) comment as opposed to statement of fact,
- (2) Fail' comment on fact truly and accurately stated. It is not necessary that every allegation of the facts (however minor) on which the comment was based be proved to be true. The story must only be shown to be true in substance.
- (3) It is a fair comment on a matter of public interest honestly made without malice.

(See Salmondon Tort 17th Ed. Page 182-138).

Mr. Kateeba submitted that the publications complained of were fair comments. I think it really depends on the words, whether a given statement is a comment or a statement of fact. Regarding article of 7/11/90 Exh. P6, Mr. Kateeba did not specify which portions thereof were comments and which were not. He said the whole was a comment. I read the article but I could only find bald assertions of facts with some quotations of statements made to the author by Mr. Kabatsi and Mr. Patel. There is no comment or expressions of opinion in this article. I think comment was reserved for the editorial. The Editorial appeared on 8/11/9* Exh. P7. This contained some comments. For example:-

"Excess payment must not pass unchallenged"

Then after stating the facts regarding the excess payment the Editor commented thus,

"The country has lost a minimum of 249 million shillings. What else could that money have done? Build a few rural, clinics, provide textbooks. Reduce the Government deficit money supply and therefore inflation?"

The above are expression of opinion from the facts stated. Then after asserting some statements of facts the Editor again commented,

" At best the concerned officers were criminally negligent. At worst they were interested parties."

The above quotations are in my view expressions of opinions made by the Editor. There is no doubt that the matter at hand is of a public interest as it involves public funds. Given the facts stated, I am of the view that the comments were objective and fair. The question yet to be considered is whether those comments were made honestly and without malice.

Mr. Mulenga argued that failure of the defendant to publish the Plaintiff's version of the story given to them was evidence of malice.

It was held in Lyon Vs. Daily Telegraph (1950) 1 ALLER 449 at Page 475 that the test for honesty is,

" would any fair man however prejudiced he may be, however exaggerated or obstinate his view, have said that which this criticism has said of the work which he criticised"

Given those facts on which the comments were based, I am of the view that the Editorial comments were honest and fair on a matter of public interest. There was no evidence of malice. The defence of fair comment is therefore available to the Editorial of 8/11/90 Exh. P7.

The next is the cartoon Exh. P8. Mr. Kateeba submitted that the cartoon was also a fair comment. Reading the captions at the top and below the cartoon, one understands that the officials depicted were corrupted by the contractors and were walking away from poverty to success. These are statements of fact. I do not read any comment in this cartoon. In my view the defence of fair comment is not available to the cartoon Exh. P8.

The next is issue No. 5. It is whether the publications were made on a privileged occasion without malice.

Mr. Kateeba contended in the affirmative. He argued that the Newspaper published the article in the execution of its duty to inform the public on matter of public interest. That the public also had a reciprocal interest to receive the information. He submitted that the matter which the Newspaper published was qualified privilege.

Mr. Mulenga SC. contended that Newspapers do not enjoy any special consideration when sued for libel. That the defence of privilege was attached to privileged occasion. He

submitted that in the instant case, the occasion in which the publications complained of were made was not privileged

I have considered the above arguments and studied the authorities cited by counsels. It is in my view pertinent at this Juncture to point out what constitutes a privileged occasion. The often cited definition of a privileged occasion is that given by Lord Atkinson in the case of Adam vs. Wards (191?) AC 509 at 334. It is,

"A privileged occasion is in reference to qualified privilege, an occasion, where the person who makes the communication, has interest or duty, legal, social or moral to make it to the person to whom it is so made has a corresponding interest or duty to receive it".

The reciprocity - a duty on the part of the person making the communication, to make it and interest or duty to receive on the part of the person to whom the communication is made.

In the case of Shah v. Uganda August to which counsel for the defendant referred me, Uganda August was specially asked by the Ministry of Information to publish a hand-out release from the Ministry for the information of the public and to appeal to the public to assist the police.

form. In an action for libel, the court held that the occasion was privileged. That the Newspaper had moral and public duty to publish Government pronouncement which was of public concern and for public benefit.

While considering Shah's case on appeal Mustafa J.A. referred to a head note in the case of Mangena v.s. Wright (1909) 2 KB 958. It reads,-

"A communication by a Public servant of a matter within his own province concerning the conduct of a person who is for the time taking public part, the matter being one of public interest as to which the public are entitled to information, may be a privileged communication on the part of that public servant and if sent by him to a Newspaper and published therein, it may also be the subject of privilege in the proprietor of the Newspaper as that is the ordinary channel by means of which the communication can be made public".

It was held in the case of Allbutt vs. General Council of Education (1889)

23 QBW 400 at P.412 that;

"The publication of a matter of a public nature and of public interest and for public information was privileged provided it was published with the honest desire to afford the public information with no sinister motive".

Each case must be decided on its peculiar facts. In my view Shah v. Uganda August above differs from the instant case on their facts. In Shah, the Newspaper was specially asked to publish a hand-out release from the Ministry of Information, to inform and appeal to the public to assist the police. That Government pronouncement was of a public nature. The Newspaper was therefore under moral duty to publish it. In the instant case there was no such request from any public servant or Ministry to the defendant to publish what was published. The defendant came by that information in the course of its journalistic research. Though the matter was of public interest, it was not of a public nature. On these facts, I am of the view that the occasion in which the publications complained of were made was not privileged.

This leads me to consider the question of damages. Mr. Kateeba submitted that there was need for the company plaintiff to prove special Damages In action of defamation to succeed in getting award of General Damages.

He cited D & L CARTERER LTD and JACKSON vs AJOU (1945) KB 364 his authority for the proposition. He then submitted that in the instant case, there was no proof of special damages or of any financial loss to the Plaintiff as a result of the alleged defamation. He suggested that in those circumstances the plaintiff be awarded nominal damages of if necessary.

For the plaintiff it was submitted that the Plaintiff suffered damages as a result of those publications. That New vision Newspaper has a wide circulation. That since those publications the plaintiff refrained from tendering for contracts with Government. That the Plaintiff has suffered in its reputation as an international firm and loss of income.

I have given my due consideration to the above arguments. I have studied D & H Caterer Ltd. and /in or. vs. D'Ajou above to which counsel for the defendant referred me. There is nothing in that case which says that in defamation, a company plaintiff must prove special Damages. This point was clearly answered in the judgment of D.U. PARCQLJ, who said at page 367,

"In the case of a Libel it is not necessary to prove special damages, and there can be no reason in principle why in the case of a slander it should be necessary to prove special damage".

It is clear from the above that a company plaintiff can sue for any defamation relating to its business and be entitled to damages without proof of special Damages.

In the instant case, the defamation is regarding the Plaintiff's business. The Plaintiff company was accused of incompetence and corruption. The Plaintiff is in my view entitled to damages without any proof of special damages.

It is always difficult to arrive at an accurate assessment of damage for Defamation. In Neudegger vs. The Telecast Newspaper and Others (1988-90 HCB the Plaintiff a catholic priest was labeled in the defendant Newspaper corrupt. In a libel action that followed, TabaroU. awarded the Plaintiff General damages of 3,000,000/=.

New Vision Newspaper has no doubt wide circulation and likely to cause more damage. Considering all the circumstances of this case, an award of 3,500,000/= is considered adequate General Damages for the defamation. The defendants are also ordered to pay cost of this suit.

G.M OKELLO

JUDGE

10/6/94

Judgment - Delivered in the Presence of Mr. Mulenga for the Plaintiff.

Mr. Turyasira for the Defendant.