IN THE COURT OF APPEAL FOR EAST AFRICA

AT KAMPALA

CORAM: (DE LESTANG, AG. P.., DUFFUS, AG. V-P, & SPRY, J.A.)

CIVIL APPEAL NO 33 OF 1968

BETWEEN

FELIX ONAMA} ……..……APPELLANT

AND

UGANDA ARGUS LTD}……RESPONDENT

(Appeal from the judgment and decree of the High Court of Uganda at Kampala (Mead, J.) dated 20th June, 1968 in Civil Suit No. 524 of 1966)

13th November, 1968.

The following Judgments were read:-

SPRY, JA.

On 4th February, 1966, the late Mr. Ocheng, then a Member of Parliament, made certain allegations in the House of a very grave nature regarding certain persons, of whom the present appellant was one. The allegations were denied by the appellant, who challenged Mr. Ocheng, "if they were true" to repeat them in a place where parliamentary privilege would not apply. The allegations, the denial and the challenge were published the following day in a newspaper, known as the Uganda Argus, which is published by the respondent company. I shall refer to the publication as "the first report".

On 11th February, 1966, Mr. Ocheng held a Press conference, a report of which appeared the following day in the Uganda Argus. I shall refer to this as "the second report". As a result, the appellant instituted proceedings *in* the High Court for libel against the respondent company, based on the second report. The suit was dismissed and it is against that decision that the present appeal is brought. The following is an extract from the second report

> *"He said he was holding the Press conference as a reply to a challenge by the Minister of Defence that he would not repeat his allegations outside the House.*
> *'The reason that I have done this is because I have checked and cross-checked my information have been convinced that the sons of Uganda who were killed in the Congo were killed not in the defence of our territorial integrity, but because certain individuals had personal interests in the conflict that was going on between the Congolese people themselves*.'

He said the people of Uganda "would like who started the fight between Uganda Congo, when this took place, and why it took place.

They would like to know how many Congolese soldiers were captured, killed and wounded, and where and when this happened. They would like to know how many Ugandan soldiers were captured, killed and wounded.
They would like to be told what gold was brought into Uganda and where it was smelted in Uganda. They would like to know what steps the Government took to arrest the persons responsible for importing bold illegally into the country.
They wanted to know what steps had been taken to recover the tax due on the gold, because any importation of mineral was taxed.
'All these questions we would like the commission mentioned in Parliament to go into,' he said.

He said the Prime minister and the minister of Defence were both members of the Defence Council, and so when the commission was appointed these two Ministers should not be concerned.
'I would personally find it extremely difficult to give evidence to a commission appointed by a body of which the Prime Minister of Defence were members,' he said."

Put very briefly, the grounds for the learned judge's decision were that the first report was privileged and could only be relied on if the allegations in it were expressly or impliedly repeated, approved or adopted in the second report; that such allegations had not been repeated but instead other allegations had been made; that the first report could not be relied on to establish the identity of the appellant as one of the persons referred to in the second report and that there was nothing in the second report itself which pointed to the appellant. The learned judge discounted the evidence of the only witness called because he thought the witness had unconsciously been influenced by his close connection with the persons concerned and by public talk.

Mr. Clerk, who appeared for the, appellant and whom I would congratulate on his careful and thorough argument, attacked the judgment in several respects. In the first place, the learned judge held of the first report that “there was no evidence that the report is not fair and accurate or that in publishing the report the defendant was actuated by malice" and consequently that its publication was privileged.

This finding was attacked by Mr. Clerk on the ground that the onus of proof was on the respondent company, that no evidence had been called and therefore that the learned judge was not entitled to find privilege. In its written statement of defence, the respondent company had asserted that the first report "was an occasion of absolute privilege" (this was amended by leave to qualified privilege) as being contemporaneous and fair and accurate report of the proceedings held in public in the National Assembly and was a publication without malice".
The appellant did not exercise his right of reply.
The basic position, as I understand it, having regard to Order 8, rule 18(4) of the Civil Procedure Rules, was that it was then for the respondent company to prove facts estab1ish qualified privilege, except that it was for the appellant to prove malice, if he alleged it.

In fact, the matter seems to have been taken for granted and the respondent company called no evidence. I have considered whether it could be said that the appellant was himself relying on the accuracy *of* the report in that his attempt, with which I shall deal later, to link up the two reports was based very largely on a statement in the first report that the appellant had issued a challenge and that according to the second report, the Press conference was held in answer to that challenge.

I think, however, that the argument was equally valid whether the report of the challenge was true or not.

I think, therefore, that the learned judge misdirected himself on the onus of proof and erred in holding that privilege had been established. I have thought it proper to deal with this, although I am doubtful if it affects the outcome of the appeal.

It must, of course, be kept constantly in mind that the libel alleged by the appellant is to be found, if at all, in the second report, since that was the appellants case. The first report is only relevant if and so far as it can be used to establish the identity of the appellant as one of the individuals with personal interests referred to in the second report and if and so far as allegations in it by reference included in the second report.

Normally, if a libel is contained partly in one publication and partly in another, the plaintiff would rely on both and the court would be entitled to look at their cumulative effect. Here, the appellant relied only on one (probably because he thought the other was privileged) and to show that the publication was defamatory of him. It was conceded that at least one sentence in the second report, the sentence referring to the use of troops to serve the personal interests of certain individuals was capable of being defamatory. The only real issue was whether the appellant could be properly identified as one of those persons referred to in that sentence.

. Clerk criticised the learned judge for not distinguishing sufficiently clearly between questions of law and fact, as would a judge in England sitting with a jury. I was at first inclined to think that, since in Uganda the judge has to decide both law and fact, it is not obligatory on him to take these as successive stops.

On further consideration, I think there is merit in Mr. Clerk's submission, although it may not ultimately assist his case. The position was set out succinctly by Viscount Simon, L.C., in ***Knupffer v. London Express Newspaper Ltd. (1944) A.C. 116 at page 121,*** and I would respectfully adopt his words, when he said

> "*There are two questions involved in the attempt to identify the appellant as the person defamed. The first question is a question of law can the article, having regard to its language, be regarded as capable of referring to the appellant. The second question is a question of fact - Does the article, in fact, lead reasonable people, who know the appellant, to the conclusion that it does refer to him? Unless the first question can be answered in favour of the appellant, the second question docs not arise, and whore the trial judge went wrong was in treating evidence to*

support the identification in fact as governing the matter, when the first question is necessarily, as matter of law, to be answered in the negative."

It was submitted, but not strongly argued, by Mr. Clerk that the appellant was sufficiently identified in the second report taken by itself, since it contained an express reference: to him, not by name but by the office he held, saying that he ought not to be concerned in the appointment of the proposed commission, the implication, according to Mr. Clerk, being that he was one of the "guilty" men.
This was not expressly dealt with by the learned judge, although it docs appear at least to have been touched on in the lower court.
In my view, there is no merit in this submission. The allegations were basically concerned with, or arose out of, conduct of the Uganda Army and the appellant was Minister of Defence.

It seems to me not unreasonable for Mr. Ocheng, if he believed there had been grave misconduct, to object to the Minister of Defence being concerned in any way in the inquiry, without imputing any fault to him personally.
Suppose there had been improper conduct, possibly by quite a junior officer acting without authority it might be thought, however wrongly , that members of the Defence Council would be influenced by a kind of service loyalty and therefore that the investigation should be completely independent.
In my opinion, as a matter of law, the second report in itself could not be read as defamatory of the appellant.
The main ground on which it was sought to identify the appellant as a person defamed was by reference to the first report. This raises two questions, first, whether such reference is proper and, if so, whether the effect would be to indicate to the render that the alle6ations in the second report relation to the appellant.
The learned judge's approach to this question was inevitably affected by his finding that the first report was privileged, which led him to treat it on similar lines to publications by third parties.
It was, I think, largely for this reason that he directed his mind to the case of ***Astaire v. Campling (1965) 3 All E.R.666.***

Mr. Clerk criticised both the fact that the principles of that case were applied by the learned judge and the way in which they were applied. If as I think, the first report was not proved to be privileged; much of the basis for this argument disappears, and I do not think it necessary to deal with it.

It seems to me that the first question is whether there is anything in the second report which necessarily refers the reader back to the first report.
I think there is, in the reference to the Press conference being held as a reply to a challenge by the Minister of Defence that he (that is, Mr. Ocheng) would not repeat his allegations outside the House."
There is no suggestion that there had been more than one challenge and since the second report was published just a week after the first, any reader would inevitably conclude that Mr. Ocheng had been referring to the challenge mentioned in the first report.

Even, however, if the two reports can be linked in this way, it still has to be shown that the result is to identify the appellant as a person defamed in the second report.
This would have presented no problem if Mr. Ocheng had said "I have checked my information and am satisfied that 'what I said in the House was true." But Mr. Ocheng did not say this. Neither (did he say that he ", as withdrawing his allegations. He made allegations which were somewhat different, although still concerned ', with the activities of the Uganda Army in the Congo and the arrival in Uganda of illicit gold) but he named no-one as responsible for or as having profited by those activities. Instead, he referred to "certain individuals "with "personal interests".

In this connection, Mr. Clerk made two points. One "was the reference to checking and cross-checking carried the implication that he had found his earlier allegations to be true.
The second was that although Mr. Ocheng posed various questions, not one of them was as to the identity of the persons concerned.
I find both arguments to have merit. Mr. Mackie-Robertson's submissions in this respect were, briefly, that although Mr. Ocheng purported to reply to the challenge, he very pointedly refrained from confirming or re-iterating his allegations; he was convinced that there had been wrong-doing, but having succeeded in his object of having a Commission of Inquiry appointed, he was prepared to leave it to the Commission to implicate the individuals responsible.

It is, of course, elementary that a publication may be libelous of a person not named in it. As Lord Campbell said in ***Le Fanu v. Malcomson 1 H.L.C. 6379 9 E.R. 910 at page 923,***

> *"Whether a man is called by one name, or whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on, know well who is aimed at, the very same injury is inflicted, the very same thing is in fact done as would be done if his name and Christian name were ten times repeated."*

I would, however, emphasise the words "know well" in that passage. As I understand the law, it is not enough to support a suit for libel that a man's friends may say "I wonder if this refers to so-and-so" or even "This might refer to so-and-so" they must say to themselves "This does refer to so-and-so".
Obviously an ordinary reader, reading the second report, would be reminded of the first, which had appeared only a week earlier, but that in itself is not enough to make the second report libellous.
As Diplock L.J. said in ***Astaire V Campling (supra)***

> "*It may be that the publication of the second statement, whether it identifies the plaintiff to the reader for the first time as having been the subject of a previous defamatory statement or merely causes the reader to remember a previous defamatory statement about the plaintiff, does have the consequence that the plaintiff's reputation is lowered in the estimation of the reader; but that does not of itself give to the plaintiff a cause of action against its publisher merely because it causes damage to the plaintiff the statement must itself contain, whether expressly or by implication, a statement of fact or expression of opinion which would lower the plaintiff in the estimation of a reasonable reader who had knowledge of such other facts, not contained in the statement, as the reader might reasonably be expected to possess."*

The first report was mainly an attack on Colonel Amin, the Army Commander, alleging that he and “a few individuals in the Government" were planning a coup to overthrow the Constitution.
There was also a specific allegation that throe senior Ministers, including the appellant, had received the illicit proceeds of gold and ivory derived from the Congo and that the reason they had not taken action against Colonel Amin was fear of exposure.

The second report, while posing a number of questions, contained only one positive statement, which was, that Ugandan soldiers had been killed in the Congo, not for the defence of Uganda's territorial integrity "but because certain individuals had personal interests in the conflict that was going on between the Congolese people themselves."

The question is whether, on a fair reading, the second report1 following on the publication of the first, was capable of being interpreted as pointing to the appellant. I have found this a very difficult question, but after weighing all the arguments, I am not prepared to differ from the learned judge's finding that the allegation in the second report was different from those in the first report.
A personal interest in the conflict that was going on between the Congolese people themselves does not seem to me necessarily connected with the receipt of ill-gotten gains from the Congo, although obviously it might be. A personal interest might just as well be political as financial. If the allegations are materially different, they cannot be coupled together for purposes of identification.

Again, it is perhaps not without significance that the appellant, according to the first report, when denying the allegations, said in the Rouse that the Ministers in question had never been involved in "the gold affairs”. The first report, as I have said, related not only to the four named persons but also to other unnamed members of the Government. The second report refers to "certain individuals" without expressly connecting them 'with the persons named in the first report or even identifying them as members of the Government. In my opinion, there is no sufficient link between the two reports to make it Possible as a matter of law to say that the second points to all or any of the persons named in the first.

If I am right in this, it is unnecessary to consider the evidence but since this was argued at length, I think I ought to deal with it.

The appellant relied on the evidence of one witness. This was a Mr. Akena-Adoko, Chief General Service Officer to the Government and secretary to the Security Committee and consequently in contact with the appellant 1 who was at the material time Minister of Defence. He testified that he had read both reports and that he had no doubt that Mr. Ocheng at the Press conference had been reiterating all he had said in Parliament and that the specific allegations in the second report related to the appellant.
The learned judge found Mr. Akena-Adoko an honest and sincere witness but considered that by virtue of his position, he was not representative of "the general public as exemplified by the reasonable man” He therefore disregarded his evidence.

Mr. Clerk attacked this finding arguing that the learned judge had erred in holding that the person to whom a libel is published must not be in a special position and in holding that such a person must be ignorant of any previous publication and unaware of surrounding circumstances.

The question was not whether the witness was "representative of the reasonable man" but only whether his interpretation of the statements complained of was reasonable. It was immaterial whether he had any special knowledge. In support of this proposition, Mr. Clerk relied on ***Tolley v. J.S Fry & Sons Ltd. (1931) A.C. 333*** but, with respect, I do not think it relevant.
It is true that in that case the witnesses may be said to have had special knowledge but their evidence was directed to the question whether the publication was defamatory, not to the issue of identification.
I think with respect, that Mr. Clerk ,and possibly also the learned judge were confusing two different aspects of the case, on the one hand the question whether the appellant was identified as one of the persons referred to in the second report and, on the other whether the allegations were defamatory.

In deciding whether words are defamatory the test is what the words could reasonably be regarded as meaning, not only to the general public, but so to all those "who have a greater or less special knowledge about the subject matter"

(***Holdsworth v. Associated Newspaper Ltd. (1937) 3 All E.R. 872 at page 880)***. In deciding the question of identity, the proper test is whether reasonable people who knew the appellant would be led to the conclusion that the report referred to him (***Knupffer v. London Express Newspaper Ltd. (sup_).***
I think, with respect, that the learned judge was wrong to reject the evidence of Akena-Adoko on account of the position he held, although he was entitled to take it into account in weighing his evidence.
At the same time, I cannot agree with Mr. Clerk that the judge was bound to accept that evidence, once he found the witness honest, there being no evidence to the contrary.
This was not evidence of fact, where honest, uncontroverted evidence would normally be conclusive.
The fact that a particular individual believed the report to relate to the appellant could not, in itself, be decisive.
The test is whether, in the opinion of the court "a substantial number of persons who knew the plaintiff, reading the article" would believe it related to him ***(Jones v. E. Hulton & Co. (1909) 2 K.B. 444 at page 454).***

Evidence by such persons is admissible (***Jozwiak v. Sadek (1954) 1 All E. R.3*** and the judge will give it such weight as he thinks fit, but it is for the court to decide whether the words complained of would lead reasonable people to conclude that they point of the appellant.

I would agree with Mr. Clerk that such witnesses may be people with a knowledge of surrounding circumstances, but that must, I think, mean a knowledge of facts.
The learned judge found that the witness, in thinking that the appellant was the subject of the allegations *in* the second report, had been influenced by public talk following the debate in the House, and there has been no appeal against that finding, which is clearly supported by the evidence.
In my view, and I know no authority on the subject, previous public talk cannot be used to identify

an unnamed person in a possibly defamatory statement, unless, of course, the statement itself refers to such talk.

This factor certainly diminished the value of Mr. Akena-Adoko's evidence. If, however, I am right in thinking that the second report is not, in law, "having regard to its lan6'uage" capable of referring to the appellant, it is immaterial whether in fact the appellant's friends and acquaintances would have read it as referring to him.
For the reasons I have given, I would dismiss this appeal.

DUFFUS, AG. V-P.

The facts have been fully stated in the judgment of Spry, J.A. which I have had the advantage of reading in draft form.
The appellant's claim for libel is based on the report of a Press Conference held by Mr. Daudi Ocheng, now deceased, published on the 12th February, 1966 in the Uganda Argus a newspaper owned, printed and published by the respondent company.

The conference was held by Mr. Ocheng as a result of allegations that he made in Parliament in support of a motion for an inquiry into certain activities over the Congo border and also to suspend a Colonel Amin.
A full report of the proceedings in Parliament appeared in the Uganda Argus on Saturday the 5th February, 1966.
It appears clear that a libel was published in the 7th paragraph of the article of the 12th February and the real issue in this appeal is whether the appellant has been sufficiently identified as being one of the persons so defamed.
The offending paragraph reads as follows

> *'The reason that I have done this is because I have checked and cross-checked my information and have been convinced that the sons of Uganda who were killed in the Congo were killed not in the defence of our territorial integrity, but because certain individuals had personal interests in the conflict that was going on between the Congolese peoples themselves."*

This paragraph read together with the rest of the article amounts to a definite charge against certain individuals that they have wrongly used a part of the Uganda Army and caused the sons of Uganda to be killed for their own personal interests.

The learned judge held that the publication of the report of the proceedings in Parliament of the 5th February was privileged at common law. Mr. Clerk for the appellant argued that the respondent company had not discharged the onus of proving that the publication was privileged.

With respect I cannot really see how this question affects the issue in this case. This action is not based on the publication of the 5th February, it is brought on the publication of the 12th February, and for the purpose of this case it does not matter whether the publication of the 5th was privileged or not.

The fact that it was privileged on the occasion of its publication on the 5th February would not in my view protect a subsequent publication or adoption of the defamatory statement.

The privileged publication would only be used as evidence, as part of the proof of the subsequent publication and not as a basis of the action for libel. In this case the question is whether the publication can be used as evidence to identify "certain individuals" referred to in the article of the 12th February and the simple test is whether the publication of the 5th February is relevant to that issue.

I do not consider that the case of ***Astaire v. Campling and Another (1965) 3 All E.R. 666*** helps in this issue except in so far as Sellers, L.J. refers to the fact that extrinsic evidence may be given to establish identity.

I entirely agree, 11th the trial judge and Spry, J .A. that the article of the 12th February did not repeat or adopt any of the defamatory statements contained in the report of the 5th February.
I agree with Spry, J .A. that the relevancy of the first article of the 5th February is shown, apart from any other consideration, by reference to the article of the 12th February itself.
This is made clear by the fact that Mr. Ocheng said that he was holding the press conference as a reply to a challenge by the Minister of Defence that he would not repeat his allegations outside the House. Earlier the article had stated that the appellant, Mr. Felix Onama, who was the Minister of Defence and throughout that article reference, is made to what had taken place in Parliament.
It is agreed by both parties that the report appearing in the Uganda Argus on the 5th February was a report of what had taken place in Parliament.
I am of the view, therefore, that the report published on the 5th February (Ex. 1) was relevant evidence and should be read together with the article of the 12th February to ascertain if the appellant's identity as one of the "certain individuals" having a personal interest in the conflict between the Congolese people was established.

The report of the 5th February did indeed show that the most startling accusations had been made in the Uganda Parliament. The appellant is referred to by name and as being the Minister of Defence, and the charge is made that he along with two other Ministers had shared shs. 2½ million as a result of activities in the Congo, and it is subsequently stated that this money resulted from gold and tusks from the Congo.

The report also charges a high ranking officer as being involved and also alleges a plot to overthrow the Uganda Constitution. According to the report of the 5th February, Mr. Ocheng's motion for an enquiry into the matter was accepted by Government and in winding up the debate; Mr. Ocheng is reported as saying that the matter raised the whole question of the Congo conflict along the border.
This report was published on page one of the Uganda Argus a newspaper admittedly having an estimated one hundred thousand readers.
There can be no doubt that this report conveyed the most sensational news which could not but be of the greatest interest to the citizens of Uganda.

There was a specific accusation that the appellant along with two other Ministers including the Prime Minister all of whom were mentioned by name had received some shs. 2 million resulting from old and tusks from the Congo.
A week after that report came the report of the press conference on the 12th February where Mr. Ocheng clearly connected the press conference with his accusations in Parliament and stated that he was holding the conference in a reply to a challenge from the appellant to repeat the allegations outside the House.
My impression from the reading of the report of the press conference is that Mr. Ocheng was trying to be very "cagey". He does not to in any way recede from his original accusations, but he was trying to avoid liability for any possible libel action by not mcIHioniniS any specific names.
He does, however make the definite charge that the conflict in the Canboand the death of the Uganda soldiers was not done in the defence of the Uganda Territory but was done to further the personal interests of certain individuals.

Later in the report he hints at what these interests were when he says ilthey 'rlould like to be told what e;'old was brought into Uganda". The only witness called Mr. Akena-Adoko was definitely of the view that the article of the 12th February referred to the Prime Minister and to the appellant, as being the certain individuals who had personal interest in the conflict.
With respect I cannot agree with Spry, J.A. that in law there was no evidence to show that the defamatory words applied to the appellant.
There was, in my view, clear evidence that the libel did apply to the appellant and indeed after reading both articles, I have no doubt that this must be the meaning necessarily placed on these words by any reasonable person who had previously read the report of the proceedings in Parliament of the 5th February. The persons mentioned in the report of the 5th February who could have been interested parties were the appellant and the two other ministers and Colonel Amin who according to the allegations in Parliament had received vast sums of money as a result of activities in the Congo.
That this is so follows especially when Mr. Ocheng has expressly stated that he is answering a challenge to repeat the allegation he made in the House outside, and when he makes no attempt to in any way retract or modify any of his accusations and when he again refers to the bringing of the Gold from the Congo a[] being a fact.
This is also borne out by the fact that the report again refer to the appellant as a Minister of Defence, and objects to the Prime Minister or himself as Members of Defence Council, taking any part in appointment of the Commission of enquiry, and there is also the fact that the appellant as Minister of Defence and as a Member of the Defence Council must have exercised some control over the army and the defence of Uganda.
Abbott, C.J. correctly sets out the principles to be applied in his judgment in the old case of **Bourke v. Harran and O_hers (172) E.R. 138 at 140** when he said;

"The question for your consideration is, whether you think the libel designates the plaintiff in such a way as to let those who knew him understand that he was the person meant; It is not necessary that all the world should understand the libel it is sufficient if those who know the plaintiff can make out that he is the person meant."
I am of the view therefore that any reasonable person living in Uganda and reading both the articles of the 5th February and of the 12th February would have come to the conclusion that the appellant was one

of the "certain individuals" who had used the Uganda Army and caused the death of some of sons of Uganda for his personal interest as set out in paragraph 7 of the article of thel2th February which I have already quoted.

It is conceded that these words would be defamatory of the appellant if they did in fact refer to him.

These are largely questions of Law, but the judge having accepted that the only oral evidence given was truthful, it then became a question as to whether the article of the 5th was relevant, and then as to the construction to be placed on these articles.

This Court has all the evidence before it, and is therefore in as good a position as the trial judge was to decide this case. I would therefore allow this appeal and find that the appellant has proved the libel as pleaded in paragraph 6(ii),(iv),(vii) & (viii) of the plaint.

On the question of damages, Mr. Clerk submitted that if the appellant succeeds there should be a retrial for the assessment of the damage.

The learned trial judge quite correctly proceeded to assess the damages. I am of the view that the judge's assessment of damages should stand.

The gravamen of the libel was that the appellant had abused his position as the Minister of Defence for his own personal gain and that he was unfit to hold various offices held by him.

The learned judge in his assessment appears to have also considered the allegations made in the report published on the 5th February of the proceedings in Parliament to the effect that the appellant was concerned in a plot to over-throw the Government.

This defamatory statement was not alleged or repeated in the article of the 12th February, the subject on this action, and should not have been considered in the assessment of damages.

There has, however, been no cross-appeal against this assessment and in my view the other allegations concerning the use of the army and the causing of death of the sons of Uganda by the appellant for his own personal interest were such as to impute such an improper and corrupt conduct in the appellant's discharge of his Ministerial office as to warrant the damages assessed by the learned judge.

I would, therefore, uphold the judge's assessment of the damages to be awarded.

I would allow this appeal with costs and set aside the judgment of the lower court and in lieu thereof enter judgment for the appellant for damages at shs.50, OOO/- with the costs of the trial.