**Ntabgoba v Editor-in-Chief the Newvision Newspaper and another**

**Division:** High Court of Uganda at Kampala

**Date of Judgment:** 17 March 2004

**Case Number:** 113/03

**Before:** Tinyinondi J

**Sourced by:** LawAfrica

**Summarised by:** C Kanjama

*[1] Tort – Libel – Defamatory matter – Meaning of defamation – Elements of libel –Whether Plaintiff*

*had suffered any damages – Compensatory damages, including aggravated element, and exemplary*

*damages – Measure of damages.*

*[2] Tort – Libel – Defence of fair comment – Distinction between statement of fact and comment.*

*[3] Words and phrases – “Defamatory matter” – Perception of the ordinary man.*

**JUDGMENT**

**TINYINONDI J:** I propose to set down the pleadings *extenso*. On 28 February 2003 the plaintiff filed his plaint in this Court. It reads:

“1. The plaintiff is a made adult of sound mind, a judge of 25 years standing and for the last 15 years he has been the principal Judge in charge of the High Court and. He is ranked third in the hierarchy of the Courts of judicature. He is the Courts below. His duties *inter alia* are to ensure that there is no corruption in the judiciary resident in Kampala and his address of service for purposes of this suit is C/o Babigumira and Co Advocates, ground floor, total house plot 29/33, Jinja road. 2. The first defendant is the Editor-in-Chief of the new vision newspaper and the second defendant is a printing and publishing corporation of the same newspaper which is widely read in Uganda and the world at large. The plaintiff’s advocates undertake to effect service of court process upon all the defendants. 3. T he plaintiff’s claim against the defendants jointly and/or severally is for libel, for reckless, falsely and maliciously printing and/or publishing and/or causing to be published and concerning the plaintiff, an article in the New Vision newspaper. 4. T he facts constituting the plaintiff’s cause of action are as follows: ( *a*) I n the New Vision newspaper volume 17 number 304 of 21 December 2002 on page 9, under the heading “corruption alive and well in judiciary”, the second defendant published a libellous story against the intended plaintiff. ( *b*) T he story stated, *inter alia*, (i) President Yoweri Museveni has time and again criticised the judiciary for corruption and the Judges have been quick to deny it. (ii) Those of us in practice can tell you that if you apply for bail today in the High Court, you will be extremely lucky to get a hearing date within a fortnight. ( iii) On November 4, Dr William Ngwanwa and Dr *Lule* were charged at Buganda Road Court for abuse of office and cause financial loss to the National Drug Authority. (iv) Because the Chief Magistrate has no powers to grant bail in the two charges, both accused were remanded. (v) Dr Nganwa is said to be 65 years old while Dr *Lule* is 51 according to the charge sheet. (vi) Under the law, both would qualify for release on bail on account of their age. However, to the surprise of many, on 6 December, Dr Nganwa was produced before the principal Judge, Herbert Ntabgoba and granted bail. But his application was not on the cause list for that week. Advocates are always told that once a case does not appear on the cause list then nothing can be done for a client. (vii) It is also worth noting that there were many earlier applications filed before the principal Judge and which had been allocated dates beyond 5 November because his diary was crowded. So, how did Dr Nganwa’s application that was filed on the same day he appeared for plea before the Magistrate, get a hearing date on the third day? ( viii) What is even more intriguing is that Dr Nganwa’s co-accused, Dr Lule, had his application fixed for hearing two weeks later! What is the yardstick? (ix) Did Nganwa get favourable treatment because of legal reasons a young lawyer like me cannot understand? We have now heard rumours that there is a judge of the Supreme Court who offered to make ‘things easier’ for Nganwa. Dr Nganwa is now back in his office working as if nothing ever happened! (x) Corruption in high places can only be inferred from the action of those in the chair. Is there no corruption in the High Court amongst some Judges? A photocopy of the said article is hereby annexed and marked ‘A’. 5. T he said words were and are in their natural and ordinary meaning highly defamatory of the plaintiff. 6. A lternatively but without prejudice to the foregoing, by the said words, the defendants jointly and/or severally meant and/or were understood to mean that the plaintiff: ( *a*) I s a corrupt judicial officer/Judge. ( *b*) A bused his office. ( *c*) C ommitted the offence of corruption and/or abuse of office ( *d*) W as not fit to hold the office he then held. ( *e*) N ot fit to be a judge let alone a principal Judge. 7. T he article is outrageous, malicious and defamatory because of the following: (i) The intended defendants knew very well or ought to have known that the above very serious allegations were being made against a judicial officer who is the third ranking in the judiciary hierarchy, yet they were comfortable to publish the article whose author withheld his/her name. (ii) The editor made special emphasis that the letter demands special attention. ( iii) The photograph of the Honourable Chief Justice CJB Odoki was introduced in the middle of the article to attract wild attention. (iv) The intended defendants did not bother to cross-check the allegations for if they had done, they would have discovered the following: ( *a*) T he policy of the intended plaintiff in handling cases which affect human rights (for example *Habeas Corpus* or bail application) is not to put them in the queue. ( *b*) T hat Dr Nganwa’s application is number 82 of 2002 filed on 19 November 2002 and the main ground for his application was advance age. ( *c*) T hat Dr Lule’s application was not filed until 20 November 2002 and his only ground was for the application was grave illness. ( *d*) T hat Dr *Lule* needed a medical report from Luzira where he was detained which was not received until 21 November 2002 and was not forwarded to Court until 27 November 2002. ( *e*) T hat the hearing notice for hearing the application was issued on 2 December 2002 and his application was heard and he was granted bail on 4 December 2002. ( *f*) That when Dr Nganwa’s application was heard, there was no other bail application pending before the principal Judge. ( *g*) T hat the two applications having been filed separately, on different dates and on different grounds, they could not be heard together. 8. B y the publication of the said words, the defendant jointly and/or severally intended to and did, for financial gain, jointly and/or severally greatly injure the credibility and reputation of the plaintiff by lowering him in the eyes of right-thinking members of the judiciary, international legal organisations, and society generally, causing him to be brought into public scandal, hatred, ridicule and contempt, thereby suffering loss and damage for which the defendants are liable. 9. S tatutory notice to intended defendants was served on the defendants but no apology has been published. (A copy of the affidavit of service is hereto attached and marked annexure ‘B’). 10. T he cause of action arose at Kampala within the jurisdiction of this Honourable Court”. On 13 March 2003 the defendants filed a joint written statement of defence which read: “1. Save as herein admitted the defendants deny each and every allegation and claim in the plaint in total. 2. T he defendants admit paragraph 2 save for the wide circulation, and paragraph 9 of the plaint and add that their address for purposes of this suit shall be C/o Messrs Dodere and Nalyanya advocates, third floor Impala house, 13/15 Kimathi avenue, PO Box 22490, Kampala. 3. The defendants deny paragraphs 1, 3, 5, 6 and 7 and shall put the plaintiff to strict proof thereof, in particular that it is not true: ( *a*) that the president has not time and again criticised the judiciary for corruption; ( *b*) that hearing dates for bail are within a fortnight of filling; ( *c*) that there are no earlier applications before the Court heard after Dr Nganwa’s. 4. The defendants shall also at the trial contend that the publication appeared as a letter of a concerned advocate citizen and therefore merely an opinion of a subscriber. 5. The defendants shall also contend that the plaintiff is a public officer, holding a public constitutional, office and is not above public comment. 6. The defendants shall also aver that the publication was substantially true in exposing the delays in the administration of justice in general for which there is a well-known public outcry, and as such is a fair comment. 7. I n the alternative, but without prejudice to the foregoing the defendants shall aver the letter was a fair comment in the interest of the public. 8. The defendants deny the insinuations alleged in paragraph 7 of the plaint and shall put the plaintiff to strict proof thereof. 9. The defendants deny the injury allegedly suffered and shall contend that the plaintiff is not liable for any act done in the discharge of his official duties as a judicial officer, and as such could not have suffered the injury alleged. 10. The jurisdiction of the High Court of which the plaintiff is himself the direct head is not admitted, in light of the plaintiff’s position in the High Court, and the defendant shall seek for arbitration”. We held a scheduling conference in accordance with Order XB of the Civil Procedure (amendment) Rules of 1998. Accordingly: 1. The agreed facts were: ( *a*) that the defendants published the article complained of; ( *b*) the status of the plaintiff. 2. The following documents were admitted: ( *a*) *The “New Vision” Issue* Volume 17, number 304 dated 21 December 2002. ( *b*) The Court files of Dr Ngawa and Dr Lule. ( *c*) The cause list of 16-20 November 2002 as Exhibit “D1”. ( *d*) “ *The Judiciary Today*” newsletter article in: (i) issue number 8 of October 2002 (ii) issue number 9 of November 2002 ( iii) issue number 1 of January 2003 Collectively as Exhibit “D2”. At the hearing the following issues were agreed and framed. 1. W hether the publication was defamatory of the plaintiff; 2. W hether the publication was a true and fair comment; 3. W hether the plaintiff suffered any injury; 4. W hat remedies would the successful party be entitled to. PW1, Jeremiah Herbet Ntabgoba, testified as hereafter. He was the principal Judge of the High Court of Uganda, having held that position for the last 15 years. Since 14 June 1978 he had been a *puisne* judge of this Court. In his capacity of Principal Judge the plaintiff headed the High Court, assisted the Chief Justice in the administration of the High Court and all the Courts below. This was in accordance with article 141 of the Constitution. His duties as the Judge of the High Court entailed allocation of duties to the Judges and assigning Judges to outpost stations. He also heard cases like any other Judges. The plaintiff further testified as follows. He was in the habit of reading newspapers and download news on the internet. He had read the “New Vision” of 21 December 2002 and the article therein where the editor of the paper demanded special attention to be given to that article. The article “Corruption alive and well in the Judiciary”. In the midst of the article a photograph of the Chief Justice, in his professional wig, was posed. The article alleged that two doctors applied for release on bail and continued. “Sir - I am an advocate working in some small chambers in Kampala. President Yoweri Museveni has time and again criticised the Judiciary for corruption and the Judges have been quick to deny it. Those of us in practice can tell you that if you apply for bail today in the High Court, you will be extremely lucky to get a hearing date within a fortnight. On 4 November Dr William Nganwa and Dr *Lule* were charged at Buganda Road Court for abuse of office and causing financial loss to the National Drug Authority. Because the Chief Magistrate has no powers to grant bail in the two charges, both accused were remanded. Dr Nganwa is said to be 65 years old while Dr *Lule* is 51 according to the charge sheet. Under the law, both would qualify for release on bail on account of their age. However, to the surprise of many, on 6 December, Dr Nganwa was produced before the principal Judge, Herbert Ntabgoba and granted bail. But his application was not on the cause list for that week! Advocates are always told that once a cause does not appear on the cause list the nothing can be done for a client. It is also worth noting that there were many earlier applications filed before the principal Judge and which had been allocated dates beyond 5 November because his diary was crowded. So, how did Dr Nganwa’s application that was filed on the same day he appeared for plea before the Magistrate, get a hearing date on the third day? What is even more intriguing is that Dr Nganwa’s co-accused, Dr Lule, had his application fixed for hearing two weeks later! What is the yardstick? Did Nganwa get favourable treatment because of legal reasons a young lawyer like me cannot understand? We have now heard rumours that there is a judge of the Supreme Court who offered to make “things easier” for Nganwa. Dr Nganwa is now back in his office working as if nothing ever happened! Corruption in high places can only be inferred from the action of those in the chair. Is there no corruption in the High Court amongst some Judges Justice Benjamin Odoki, the Chief Justice should look into such practices”. The plaintiff further testified that these allegations insinuated that he was corrupt since the heading was “corruption alive and well in the Judiciary”. That he last sentence of the article paused the question: “Is there no corruption in the High Court amongst some Judges?” The plaintiff testified that the paper circulates all over Uganda and is also posted on the internet. That he was a married man with children; three of them in USA who telephoned him asking him what they read about. Many of his friends including Judges in Kampala contacted him about the article. When the plaintiff’s lawyers contacted the defendants, the latter’s cynical reply was that they would call the Chief Justice as their witness. The plaintiff contacted the Chief Justice as his boss to find out if he would testify against him when he had not contacted him before about the allegations. PW1 further testified about his official policy regarding the hearing of cases. With regard to human rights cases (*habeas corpus* and bail applications) he did not put these in the queue that is according to the date of filling. Provided both sides are ready for the hearing, he would hear them. He heard these cases mainly in the afternoons after he had dealt with other types of cases. As a person administering justice, he believed that if a person applies for release on bail that person is anxious to get out of prison or to know his fate if the application is rejected. So it would be unjust to keep that person in suspense unless there be no time to hear the case. The plaintiff further testified that he did not favour Dr Nganwa. In fact his case was heard before Dr *Lule* applied for a date. He did not hear Dr Nganwa’s case on 6 December 2002 as claimed in the offending article. He heard it earlier, on 20 November 2002. No one prevailed over him to hear Dr Nganwa’s application. When Dr Nganwa’s lawyers asked for a hearing date the plaintiff told them he was handling another case. When the case did not continue the plaintiff informed the staff in the criminal registry that he was in a position to hear Dr Nganwa’s case. He in fact did so that afternoon. On 21 November 2002 Dr *Lule* applied to have his case heard. Thus the two applications were different. Dr Lule’s staggered because he was yet to obtain a medical certificate. The plaintiff could not therefore be said to have acted to the prejudice of Dr *Lule* because Dr *Lule* could not ask for a hearing date when he was not ready with a medical certificate. When Dr *Lule* obtained the certificate, the plaintiff who was then in Kisoro, was contacted on telephone by this clerk. The plaintiff replied that he would return to Kampala on Monday. He would hear a *habeas corpus* case on Tuesday and hear Dr Lule’s application on Wednesday. That is what actually transpired. The plaintiff also testified that the publication had adverse effect on him personally. After reading it, he had an agonising and sleepless weekend because all along he thought he would be the last person to be accused of corruption given that one of his duties was to fight corruption on which subject he had written extensively and addressed both the Judges and Magistrates. He felt dejected because: (i) So many people read the article; ( ii) His CV, which is on the Internet, was gravely damaged; (iii) No one came out to retract the defamatory article or offer an apology. That at the dusk of his life someone was damaging his whole life which caused the plaintiff the greatest worry. He would be retiring in 2004 after serving the government in key positions of Administrator General and Registrar General without being accused of corruption. Referring to his prayers in the plaint, the plaintiff testified that the most important was contained in paragraph 9(*d*). Prayer (*b*) was necessary because the defamation was false, reckless and outrageous. He noticed also that the author’s name was withheld. That for any paper worth its salt once it received such allegations it should have verified with him in which case he would have willingly given them the files which spoke for themselves. That instead, the defendants went ahead and recklessly published the falsehood and when the plaintiff’s lawyer contacted them they refused/neglected to apologise. Hence the prayer in his paragraph 9(*b*) which was further aggravated in the written statement of defence. In cross-examination PW1 testified as follows. There could be corruption in the Judiciary as in any other government department. He had written extensively on the subject and also stated that there were delays both on the bench and at the bar. The delays on the bench were many and due to lack of Judges and other factors. As a result there was a huge amount of backlog. It was not Court practice to hear cases which were not cause listed, save where the parties agreed. Other exceptions were where the case involved human rights like bail applications and *habeas corpus* applications; provided, always, that the parties agreed to the hearing. In the case of Dr *Lule* there was no delay because he relied on grave illness as his only ground but had to await a medical certificate from Luzira Prison and thereafter apply for a hearing date. When he obtained one he applied for a date which coincided with the hearing of *habeas corpus* application. Dr Lule’s application was heard and a release on bail granted on the very day the plaintiff fixed it. Thus there was no delay. These events were no record. It was a lie that both Dr Nganwa’s and Dr Lule’s application were filed at the same time but that Dr Nganwa’s was heard first. Dr Lule’s was filed after Dr Nganwa’s had been heard. PW2, Edward Kangaho, testified as herebelow. He was a clerical officer in the Judiciary attached to the principal Judge since 1998. He recollected bail applications by both Dr Nganwa and Dr *Lule* which applications were before the principal Judge in 2002. They were heard separately because they were filed on separate dates. Dr Nganwa’s was criminal miscellaneous application number 82 of 2002 filed on the 19 November 2002 while Dr Lule’s was criminal miscellaneous application number 83 of 2002 filed on 21 November 2002 – (Both files were recovered as Exhibits “P1”and “P2” respectively). The grounds for Dr Nganwa’s application were mainly advanced age in which case he did not need to produce a medical certificate in Court. Dr *Lule* required such a certificate from Luzira where he was detained. Dr Nganwa’s application was heard on 20 November 2002 and he was released on the same day. The hearing of Dr Lule’s application was initially 2 December 2002; but on that day the trial Judge was not around. So it was fixed for hearing on 4 December 2002, when it was heard and allowed. In cross-examination PW2 testified that he had served in the Judiciary since 1996 and as PW1’s clerk since 1998. PW1’s workload was heavy. PW1 was always in Court, save when on leave or he had no case fixed for hearing before him. Matters of very urgent nature could be heard even when they were not cause listed. Such matters included bail applications which affected human rights. A bail application could be heard even one month after filing like where a medical report took as long to obtain. When referred to Exhibit “P2”, PW2 testified that Dr Lule’s application was received in the High Court on 20 November 2002. The medical report was received on 27 November 2002. The application was first fixed for 2 December 2002 but adjourned to 4 December 2002 when it was heard and granted the same day. When referred to Exhibit “P1”, PW2 testified that Dr Nganwa’s application was filed on 19 November 2002 and heard on 20 November 2002. With this evidence the plaintiff rested his case. The defendants offered not to call any evidence. Both counsel agreed on filing written submissions which they duly did according to their scheduled times. I will now address the first issue. I propose to split into two. (*a*) Whether or not the publication was defamatory; and (*b*) if it was, whether or not it was defamatory of the plaintiff. With regard to (*a*) I start with an important preface. Under our law and, I believe, in all civilised jurisdictions, a man is entitled to his good name and to the esteem in which he is held by others. He also has a right to claim that his reputation shall not be disparaged by defamatory statements made about him to a third person or persons without lawful justification. The other civilisations so found long ago. (See *Scott v Sampson* [1882] 8 QBD 203). If a defamatory statement is made in writing or some permanent form the tort of libel is committed and the law assumes damages. (See *Ratcliffe v Evans* [1892] 2 QB 524 at 528). A defamatory statement is one which tends to lower a person in the estimation of right thinking members of society generally 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, disparaging or injurious to him in his office, profession, calling, trade or business. (See “*Gatley on Libel and Slander*” (8 ed) para 31). There is, however, a rider to the above statement. In *Astaire v Campling* [1966] 1 WLR 34 at 41, Diplock LJ stated: “A statement does not give rise to a cause of action against its publisher merely because it causes damage to the plaintiff. *The statement must be false and it must be defamatory of the plaintiff,* that is to say, 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 posses”. (emphasis is mine) The burden to prove that the words complained of are defamatory rest on the plaintiff. In paragraph 115 of Gatley (*ante*) it is stated: “Where the words complained of are defamatory in their natural and ordinary meaning the plaintiff need prove nothing more than their publication. The onus will then lie on the defendants to prove from the circumstances in which the words were used, or from the manner of their publication or other fact known to all those to whom the words were published, that the words would not be understood by reasonable men to convey the importation suggested by the mere consideration of the words themselves”. And in *Newstead v London Express Newspaper Ltd* [1940] 1 KB 377 it was stated: “Whether the plaintiff is referred to by name, or otherwise clearly identified, the words are actionable even if they were intended to refer to some other person”. I will quickly dispose of this matter here and now. At the beginning of the hearing I conducted a scheduling conference. The first of the agreed facts was that the defendants published the article complained of. This fact is backed by the statement in paragraph 115 of *Gatley* (*ante*) that the plaintiff discharged the burden on him. Moreover, after the plaintiff testified about the criminal proceedings he conducted, he went on to state: “At the dusk of my life someone was damaging my whole life. I would be retiring in 2004 after serving the government in the key positions of administrator general and Registrar general without being accused of corruption”. It would be at this point that the defendants would come in to discharge their burden of proving that “from the circumstances in which the words were used or from the manner of their publication the words would not be understood by reasonable men to convey the importation by the mere consideration of the words themselves” (see the *Newstead* case (*ante*)). Counsel for the defendants cross-examined the plaintiff to some extent. The defendants did not call any evidence. After due consideration of the plaintiff’s evidence and the defendants’ default in calling evidence I find and hold that the defendants failed to discharge the burden that had shifted on to them. I go on to discuss the role of the Court in this type of case. In *Morgan v Odhams Press* [1970] 1 WLR 820 (CA) it was reiterated: “It was well settled that *the question whether* the words complained of are capable of conveying a defamatory meaning is a question of law and, *is therefore, one calling for the decision of the Court*”. (emphasis added) In *Shah v Uganda Argus* [1971] EA 362 at 365D, Youds J had the following to say: “Of *course I am not bound to accept the evidence or opinions expressed by witnesses and must form my own opinion and make my own finding as to whether or not the newspaper article was defamatory of the plaintiff*, but having listened to the evidence and bearing in mind that I must consider the position of the reader of the article (who might be reasonably excepted to possess knowledge that the plaintiff) I have come to the conclusion and so find that the newspaper article was defamatory of the plaintiff”. (emphasis is mine) In deciding whether or not the statement is defamatory, the Court must first consider what meaning the words would convey to the ordinary man (see *Rubber Improvement Ltd v Daily Telegraph Ltd*, *Rubber Improvement Ltd v Associated Newspaper Ltd* [1964] AC 234 at 258). Having determined the meaning the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand it in a defamatory sense. (See *Capital and Counties Bank Ltd v George Henry and Sons* [1982] 7 AC 741 at 745). This approach was earlier stated in *Tolley v JB Fry and sons Ltd* [1930] 1 KB where Scutton J said this: “The Judge has to decide whether the publication complained of is capable of being understood by reasonable people as bearing the meaning alleged or a defamatory meaning. He is not to decide what its meaning is but what it is capable of bearing to reasonable people”. Further, decided cases indicate that the meaning of words for the purpose of the law of defamatory is not a question of legal construction since laymen will read into words an implication more freely than a lawyer. The meaning is that which the words would convey to ordinary persons. The Court must not put a strained or unlikely construction upon words. (See *Rubber Improvement Ltd v Daily Telegraph Ltd*, *Rubber Improvement Ltd v Associated Newspapers Ltd* [1964] AC 234 at 258). In paragraph 58 of *Gatley* (*ante*) it is stated: “It is defamatory to impute to a man in any office any corrupt, dishonest, or other misconduct and this is so whether the office is public or private”. With the hindsight of the above principles I now proceed to decide whether the article was defamatory. I find that without “any strained or unlikely construction” the words in this were capable of bearing to an ordinary reasonable person that the plaintiff acted corruptly when handling the applications of Doctors Nganwa and *Lule* by favouring Dr Nganwa at the expense of Dr Lule. My answer to (*a*) of the first issue therefore is that the publication (Exhibit “P1”) was defamatory. Was the publication defamatory of the plaintiff? There is no gainsaying that the article mentioned the plaintiff both by his office and his full names. There is thus no question or doubt about the identity of the plaintiff. To the ordinary and reasonable person the article was capable of conveying the message that the plaintiff corruptly conducted the application of Dr Nganwa favourably while sidelining Dr Lule’s application. The article imputed to the plaintiff that, of all the Judges in the Uganda Judiciary, the Principal Judge acted corruptly, dishonestly and disgracefully. My answer to (*b*) of the first issue is that the article was defamatory of the plaintiff. I now turn to the second issue. To succeed in a defence of fair comment the defendant must show that the words are comment and not a statement of fact. He must show that there is a basis of fact for the comment contained or referred to in the matter complained of. He must also show that the comment is on a matter of public interest, one which has expressly or implicitly put before the public for judgment or is otherwise a matter with which the public has a legitimate interest. If, however, the plaintiff can show that the comment was not made honestly or was actuated by malice, he will defeat the plea. (See *Gatley* (*ante*) paragraph 692 and *Salmon and Heuston on the law of torts* (21 ed) at 185). Thus, in may considered view, the burden of proof starts in the defendants’ courtyard to prove the three ingredients above cited. Where the publication was comment is a question of the Judge in our circumstances where the trial is conducted without a jury. In *Salmon and Heuston* (*ante*) at 181 it is stated: “It is essential to the plea of fair comment that the matter must appear on the face of it to be a comment and not a statement of fact. The facts on which the comment is based must be stated or referred to and the imputation must appear as an expression of the defendant’s opinion on the facts. *It is a quest for the jury* (read “Judge”) whether the words on their true construction in their context, amount to a positive statement of fact or an expression of opinion or an inference. If they are the former they must be justified. If the defendants cannot justify them, then the only issue for the jury (read “Judge”) is the amount of damages”. Furthermore it is the law that the facts on which the comment is based must be true. If they do not exist the defence of fair comment must fail (see *Lefroy v Burnside* (number 2) [1879] 4 LR TR 556 at 565 and 566). The comment must not misstate facts because a comment cannot be fair which is built on facts which ate not truly stated. (See *Joynt v Cycle Trade Company* [1904] 2 KB 294). In the case before me the defendant refused/failed/neglected to call any evidence to prove his allegations contained in paragraphs 6 and 7 of the written statement of defence. Of course the plaintiff and PW2 testified and tendered Exhibit “P1” and “P2”. The plaintiff’s evidence stood unchallenged, even in cross-examination. It clearly showed that the publication was not based on any true facts. One of the blatant falsehoods in the article was that the plaintiff heard Dr Nganwa’s application on 6 December 2002 which in fact he heard on 20 November 2002. Even after the plaintiff gave evidence of this and other facts and was not contradicted, no attempt was made by the defendant to peruse the Court record, salvage by amending the written statement of defence or call evidence in rebuttal. It cannot be gainsaid that Court proceedings are matters of public interest which a newspaper may criticise; but if the comment is on facts which are inaccurately reported or do not exist cannot be fair comment (see *Gatley* (*ante*) paragraph 718) and *Hibbins v Lee* [1864] 4F and F 243. In the absence of defence evidence but in the face of the plaintiff’s evidence, I find and hold that the defendant failed to prove that the publication was both comment and fair comment at that. I now address the third issue. In cases of libel actionable “*per se*” the plaintiff need not prove actual damage for “the law presumes that some damage will flow in the ordinary course of things from the mere invasion of his absolute right to reputation (see *Ratcliffe v Evans* [1892] 2 QB 528). The present case is one where, in my considered view, the libel is actionable “*per se*”. I rely on *Gatley* (*ante*) paragraph 143 where it is stated: “If the plaintiff proves that a libel has been published of him, his cause of action is complete”. From the discussion I have gone through hereinabove I repeat that I find and hold that the plaintiff had proved, on a balance of probabilities, that he was defamed by the publication in question. Of course the plaintiff testified, at great length, about the adverse and devastating effect the publication had on him physically (sleepless nights pondering over the ruin the article had reigned on his long and impeccable career as a public servant) and his achievements in the office. This, in my view, was to supply more meat to the skeleton. I hold for the plaintiff on the third issue. I now turn to the remedies. In paragraph 9(*a*) of the plaint the plaintiff prayed for general damages. In *Walkin v Hall* [1968] LR 3 QB at 399 Blackburn J said: “Where disparaging words are spoken of a person, and either actual injury has flowed from them or they were spoken of him in the way of his trade, in contemplation of law, damage had accrued to the person defamed”. The principle governing the award as stated in *John v MGN Ltd* [1996] 2 All ER 35 at 47: “The successful plaintiff in a defamation action is entitled to recover, as general compensation damages, such sum as will compensate him for the wrong he has suffered. *That sum must compensate for the damages to his reputation; vindicate his good name; and take account of the distress, hurt and humiliation which the defamatory publication has caused*”. (emphasis is mine) I repeat the plaintiff’s evidence here. In his evidence-in-chief he said: “The publication had adverse effect on me. I had an agonising and sleepless weekend because all along I thought I would be the last person to be accused of corruption because one of my duties is to fight corruption”. These are hurt feelings, in my view. In his further evidence-in-chief the plaintiff stated: “I still feel dejected because: (*a*) So many people read the article. (*b*) Under the internet I have a CV which was gravely damaged by the article. (*c*) No-one has come out to apologise or retract the article. At the dusk of my life someone damaging my whole life that is my greatest worry”. This, in my considered view, is clear evidence of injury both to feelings and reputation. In cross-examination this evidence was neither alluded to nor dented in any other manner, especially so because the defendant did not call any evidence. I therefore hold that the plaintiff is entitled to his head of damages, to wit, compensatory general damages. In paragraph 9(*a*) the plaintiff prayed for general damages. Learned counsel for the plaintiff submitted for 100 000 000 (one hundred million shillings only). He cited *Biwot v Clays Ltd* [2000] 2 EA 334 at 340 (HCKO) where the Kenya High Court awarded the plaintiff KShs 15 million which counsel for the plaintiff alleged was equivalent to UShs 700 million. He also cited *Machira v Mwangi* [2001] 1 EA 110 when the Kenya High Court awarded the plaintiff KShs 2 million. Counsel converted this to UShs 250 million. Counsel further cited several cases of this Court including *Wavamuno v Cheye* (*ante*) where this Court awarded the plaintiff UShs 15 million and *Sempa v Cheye and another* High Court civil suit 644 of 2001 where this Court awarded UShs 15 million. Of course counsel for the defendants prayed for dismissal of the suit. In the alternative he submitted that the Court should, if, at all it was to award any damages, award “very nominal damages only to assuage his (plaintiff’s injured self-estimation of himself”. Counsel’s argument was that the “plaintiff did not lead any evidence showing that the publication complained of lowered him in the estimation of right-thinking members of society. No such right-thinking members of society were called to give evidence”. I have already covered this aspect when dealing with the first issue and need not repeat myself. Counsel for the defendants further submitted that in paragraph 2 of their written statement of defence they denied wide circulation of the “New Vision” and that the plaintiff failed to prove it. It is to be noted that the defendant did not call any evidence to contradict or challenge PW1’s evidence that the “New Vision” circulates all over Uganda and is also posted on the Internet. This evidence was not even cross-examined on by defendants’ Counsel. The defendants have better knowledge of the circulation of their paper. However this Court takes judicial notice that the paper has wide circulation in the whole of Uganda, and is read in the countries of East Africa. In *Wanetosi v Okware and others* High Court civil suit 575 of 1996. William Edward Catkat Pike testified, *inter alia*: “I am the Editor-in-Chief and managing director of the New Vision Publishing Company at the material time (18 October 1996) the second defendant was publishing 30 000 (thirty thousand only) copies of the “New Vision”. The second defendant is the leader in the market. The “New Vision” is read throughout East Africa”. With the foregoing I do not subscribe to counsel for the defendants’ submissions which were not backed by any evidence. I dismiss them. Counsel for the defendants further submitted that although the nature of the libel could be a guide in assessing damages the publication in the present case referred to corruption “in regard to the judiciary as a whole and not the plaintiff”. I have already dismissed this matter when dealing with issue number 1(*b*). There I have stated that the article referred to the plaintiff both by his office and full names. It went ahead to point out only two applications which were handled by the plaintiff. It made the conclusion: “Is there no corruption in the High Court amongst some of Judges?” No other Judge’s name was mentioned expressly or implicitly. No other court file was referred to explicitly or implicitly. It is my holding that even the blindest of the blind could have “seen” that this article expressly referred to the plaintiff alone. Counsel for the defendants’ submission, therefore, has no merit. A spate of cases on damages for defamation have been decided. I will cite only a few: (*a*) *Wavamuno v Cheye* High Court civil suit number 651 of 1995 where the plaintiff prayed for UShs 50 million but was awarded UShs 15 million in general damages. (*b*) *Odongkara v Astles* [1970] EA 374 where the plaintiff was awarded 5 million. (*c*) *Mayanja v Editor of Mulengera Newspaper and others* where the plaintiff was awarded UShs 6 million in general damages and UShs 2 million as aggravated damages. (*d*) *Matembe and another v Cheye and another* High Court civil suit number 104 of 1995 where the two plaintiffs were awarded UShs 11 million each in general damaged. (*e*) *Biwott v Clays Ltd* [2000] 2 EA 334 where the plaintiff was awarded UShs 15 million in compensatory an exemplary damages and a permanent injunction was granted restraining the defendants from selling and circulating the book complained of. The plaintiff in this case, I repeat, is the third highest-place in the hierarchy of the Uganda Judiciary. He commands a highly respectable standing both locally and internationally, having previously “served as the administrator general and Registrar general without being accused of corruption”. In *Wavamuno* (*ante*) AE Mpagi-Bahigeine J said: “In this regard I have to consider the plaintiff’s position and standing, the nature of the libel and the mode and extent of the publication the absence of apology or retraction and the whole conduct of the defendant from the time the article was published down to the date of judgment and I think this it is pertinent to echo the words of Mackinnon LJ in *Groom v Crocker* [1939] 1 KB 194 at 231 that ‘A soiled reputation seems assured of more liberal assuagement than a compound fracture’. I however do not consider that money alone can assuage a tarnished image reputation of his (a man’s) name is much more important. But it may be observed that damages are at large because it is impossible to weigh closely the compensation which will compensate a person for an insult offered or the pain of false accusation. It is never possible to track a scandal and know which quarters the poison may reach.” (See Lord Atkin in *Ley v Hamilton* [1935] 1 53 LT at 386). I adopt these persuasive words. Given his undisputed status the plaintiff would be entitled to a higher award than the award given in *Wavamuno* and *Matembe*, Honourable Lugayizi J. I considered the “nature of the libel”. Corruption is being internationally hounded aggressively. I have told of the evidence the plaintiff gave about the damage the publication visited his hitherto untarnished reputation. I haveshown the extent of the publication and absence of apology or retraction. Shortly I will reflect on the conduct of defendants and their counsel before publication, after publication, when the statutory notice was served, after filing of the pleadings and during the hearing. I feel this is an opportunity point to reiterate to words of AE Mpagi-Bahigaine J in the *Wavamuno* case (*ante*) where she stated: “I do consider the defendants have turned investigative journalism into speculative and imaginary journalism. It is a matter of regret that they have developed a culture of disrespect and intimidation to the very people they are supposed to inform and educate. Failure to research and substantiate what they write leaves the Courts in no doubt that they are gradually abandoning their very important role of educating and informing the public and turning into an oppressive and persecuting machinery intended to demoralise and intimidate the public”. I adopt these sentiments without any gloss. These sentiments were voiced on 24 October 1995 when the judgment was delivered. Alas! Since then the journalists have not picked the cue. I have also taken into account the element of inflation since the awards I have cited were made. I find support in the matters I have considered, under this head of damages in the following statements of the law. In paragraph 1325 of *Gatley* (*ante*) it is stated: “At the trial of an action for defamation the plaintiff may show the mode and extent of the publication with a view to the amount of damages. If the libel is published in a newspaper the plaintiff may give in evidence the extent of the circulation. “Surely the proprietor of a newspaper, with a very large circulation, is to be visited with large damages for a libel published it than one of a more limited circulation” (see *Journal Printing v Maclean* [1896] 23 Ontarion app R 324. In paragraph 1327 of *Gatley* (*ante*) it is stated, *inter alia*: “The jury in assessing the damages are entitled to look at the whole conduct of the defendant from the time when the libel was published down to the very moment of the verdict. Quite obviously the award must include factors for inquiry to the feelings, the anxiety and uncertainty undergone in the litigation, the absence of apology or the malice of the defendant. Any evidence which goes to show that the defendant had no belief in the truth of his statement will be evidence of malice. If the defendant published untrue defamatory matter recklessly without considering or caring whether it be true or not, he is treated as if he knew it to. See “*Gatley*” (*ante*) paragraph 769 and 1342. The defendant’s recklessness or gross negligence in publishing an untrue defamatory statement may also be taken”. I have hereinbefore shown that from the unchallenged and uncontradicted evidence of the plaintiff at the circulation of the “New Vision” paper is all over Uganda and crosses to our sister republics and is even on the internet. I therefore hold that the paper has a wide coverage and publishes than 30 000 copies every day. The conduct of the defendants. Before the publication the defendants must have known that the article referred to two Court files. These are public documents available to anyone for perusal. The defendants did not bother to peruse them. They very well knew that the article concerned the third-highest placed Judge in the hierarchy of the country’s judiciary consisting of about forty bewigged Judges and is one of the three arms of the government. When publishing the editor demanded from the otherwise non-committed reading public to pay special attention to the highlighted article “Corruption alive and well in the Judiciary”. Furthermore the defendants withheld the name of the author of the article. In my considered view this amounted to calculated reckless malice and callousness. My further view is that by demanding the public to pay special attention the defendant’s intention was to increase their sales and make a profit at the expenses of the plaintiff. After publishing. The plaintiff issued a statutory notice to sue on the defendants. It was dated 23 December 2002. It was served on the defendants 23 December 2002 as evidenced by the affidavit of service of Niwandinda Kab Anthony sworn on 8 January 2003. This was pleaded in paragraph 8 of the plaint. This allegation was not denied in the defendant’s written statement of defence. And it was never denied throughout the proceedings. In the penultimate paragraph of the statutory notice the plaintiff’s counsel pointed out the contents of the articles complained of were *inter alia*, false. The notice subsisted till 28 February 2003, when the plaintiff filed this suit. For all this period the defendants did not bother to go out and find out the truth from the Court files, the plaintiff, or Court clerks. They never offered any apology. Instead they went ahead to file and filed the written statement of defence (*ante*). During the hearing: The hearing commenced on 20 August 2003. The plaintiff was ready to proceed. However counsel for the defendants sought an adjournment “with a view to negotiating a settlement”. He asked for two weeks. The hearing was adjourned and fixed for 5 September 2003. On 21 August 2003 counsel for the defendants wrote to the Registrar, High Court reference ODKI/VIS/163/97. In this letter defendants’ counsel wrote, *inter alia*, “Given the fact that:

1. The plaintiff as the principal Judge is the administrative head of the tribunal before which his matter is presented. 2. The nature of the “allegations” of delay and corruption in the High Court, being the subject of contention.

3. The Registrar himself, Mr Lawrence Gidudu is detailed as witness for the plaintiff, together with other officers of the High Court.

4. The trial Judge, the learned Justice Gideon Tinyinondi himself sometimes acts as acting principal Judge.

5. The trial Judge above, has himself filed a statutory notice of intention to sue the same defendants, for a similar cause of action, claiming UShs 50 000 000 (see notice attached). Our client is left with no option but to conclude that there is a manifest likelihood of bias, and or miscarriage of justice. For these reasons, the defendant’s hands are clearly tied and humbly request that its above concerns be brought to the attention of the trial Judge and that the Learned Judge steps down from the conduct of this matter if it is not stayed altogether and referred to arbitration, before an arbitrator if both parties’ choice preferably the right Honourable Mr Justice Wako Wakambuzi (retired), before the next hearing date”. This in may view, was unprofessional conduct by counsel. The legitimate procedure was: (*a*) To apply to the trial Judge to disqualify himself from hearing the case, give and defend the reasons and obtain a ruling. (*b*) Not to take it upon himself to appoint and assign Court work to a retired Judge whom the whole legal fraternity and many citizens of Uganda knew was not endeared to the plaintiff both officially and personally. However, on 5 September 2003 counsel for the defendants stated that a settlement was no longer possible. He then raised and repeated his objections in the said letter in open Court. It is noteworthy he abandoned the objection to my trying the case. On 10 September 2003 plaintiff’s counsel replied. I delivered my ruling, overruling the objections, on 17 September 2003. On 20 November 2003 when the case came up for hearing, defendant’s counsel sought the last adjournment to pursue settlement. He asked for one week. I granted it and fixed the case for hearing on 27 November 2003. On the fixed date the plaintiff and counsel were in Court. Neither the defendants nor their counsel were present. Counsel for the plaintiff applied *ex parte* stating that the defendants’ counsel had asked for the last adjournment promising to settle but had never communicated to the plaintiff or his counsel. I granted the request, being satisfied by the reasons advanced. Hearing started at 9:03am. At 9:50am counsel for the defendants materialised and asked Court to finish him with the Court record for him to peruse and cross-examine the first witness (the plaintiff.) I granted the request but the proceeding continued normally for the second witness who was cross-examined and closed the plaintiff’s case. Hearing was adjourned to 15 January 2004 for cross-examination of PW1. This was done. The proceedings in the case were closed and judgment reserved. I have gone to this length to show that the conduct of the defendants was cynical, spiteful and deplorable. They played delaying tactics of all sorts and, in cross-examination, persisted in an imputation they ought to have known, but for their being ostriches, that was unresearched and uninformed. I find support from *Gatley* (*ante*) paragraph 1329. I also find for malice on the defendants’ part. From the above discourse I find and hold that the plaintiff is entitled to compensatory damages. In his paragraph 9(*b*) of the plaint the plaintiff prayed for aggravated “damages for the outrageous publication”. In “Gatley” paragraph 1452 it is stated: “In awarding ‘aggravated damages’ the natural indignation of the Court at the injury inflicted on the plaintiff is a perfectly legitimate motive for making a generous, rather than more moderate award, to provide an adequate solatium; that is because the injury to the plaintiff is actually greater, and, as the result of the conduct exciting the indignation, demands a more generous solatium”. I have failed to trace any decided authority or authoritative treatise that states that general damages and aggravated damages are awardable under separate heads. On the other hands the statements and cases quoted in *Gatley* (*ante*) indicate that when the Court is considering the damages in both heads the same bases are used. It is in the light of this that I consider a sum of UShs 30 million (thirty million shillings only) adequate for both general and aggravated damages to which the plaintiff is entitled. In paragraph 9(*c*) of the plaint the plaintiff prayed for exemplary/punitive damages. In *Gatley* (*ante*) paragraph 1454 it is stated: “Exemplary damages, or punitive damages as they are otherwise described, may be awarded for two categories only (i) ... ( ii) Where the defendant’s tortious act has been done with guilty knowledge, for the motive that the chances of economic advantage outweigh the chances of economic, of perhaps physical penalty”. I need only emphasise that this branch of the law was long ago settled in *Rookes v Banard* [1964] AC 1129 and for the purpose of this case the pertinent speech of Lord Delvin is at 1227: “it” (that is the motive of making a profit) “ a factor also that is taken into account in damages for libel; one man should not be allowed to sell another man’s reputation for profit. Where a defendant with a cynical disregard for a plaintiff’s rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not confirmed to money-making in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object perhaps some property which he covets – which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay”. In *Broome v Cassell and Co* [1972] AC 1079, it was said: “It is true, of course, as was well pointed out by Windgery J in *Manson v Associated Newspapers Ltd* [1965] 1 WLR 1038, 1045, that the mere fact that a tort, and particularly a libel, is committed in the course of business carried on for profit is not sufficient to bring a case within the second category. Nearly all newspapers, and most books, are published for profit. What is necessary in addition is (i) knowledge that what is proposed to be done is against the law or a reckless disregard whether what is proposed to be done is illegal or legal, and (ii) a decision to carry on doing it because the prospectus of material advantage outweigh the prospects of material loss. It is not necessary that the defendant calculates that the plaintiff’s damages if he sues to judgment will be smaller than the defendant’s profit. This is simply one example of the principle. The defendant may calculate that the plaintiff will not sue at all because he has not the money (I suppose the plaintiff in a contested libel action like the present must be prepared nowadays to put at least 30 000 pounds at some risk), or because he may be physically or otherwise intimidated. What is necessary is that the tortious act must be done with guilty knowledge for the motive that the chances of economic advantage outweigh the chances of economic, or perhaps physical, penalty”. In the case before me the plaintiff in his evidence-in-chief, when referred to paragraph 9(*c*) of the plaint, merely stated: “The claim for exemplary damages was aggravated in the defence pleadings”. He did not expound on this statement. Probably after a long spell testifying he became exhausted. I have hereinabove stated that the manner/method used by the defendants where the editor of the paper made a clarion call demanding the public to give “special attention” could be motivated by a desire to make more bucks in his sales at the expense of the plaintiff. In passing I again mention that the defendants did not call evidence to contradict this. I hold that the plaintiff is entitled to this head of damages. In paragraph 14 of *Gatley* (*ante*) it is stated: *Relation to compensatory damages*. “In a case in which exemplary damages are appropriate, a jury should be directed that if, but only if, the sum which they have in mind to award as compensation (which may, of course, be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, them it can award some large sum. But there must be no double counting. The only practical way to proceed is first to look at the case from the point of view of compensating the plaintiff. He must not only be compensated for proved actual loss but also for any injury to his feelings and for having had to suffer insults, indignities and the like. And where the defendant has behaved outrageously very full compensation may be proper for that. So the tribunal will fix in their minds what sum would be proper as compensatory damages. Then if it has been determined that the case is a proper one for punitive damages the tribunal must turn its attention to the defendant and ask itself whether the sum it has already fixed as compensatory damages is or not adequate to serve the second purpose of punishment or deterrence. If they think that that sum is adequate for the second purpose as well as the first they must not add anything to it. It is sufficient both as compensatory and punitive damages. But if they think that sum is insufficient as a punishment then they must add to it enough to bring it up to a sum sufficient as punishment. The one thing which they must not do is to fix sums as compensation and as punitive damages and add them together. They must realise that the compensatory damages are always part of the total punishment”. After due consideration of the evidence in the case and the law I am satisfied that this is a proper case where punitive damages should be awarded. However considering the sum of UShs 30 million which I have awarded as compensatory and aggravated damages as being adequate I propose not to add anything more. In paragraph 9(*d*) the plaintiff prayed for a permanent injunction against the defendants restraining them from any future outrageous publication against him. I hereby grant if. To conclude, I hereby enter judgment for the plaintiff against the defendants for:

1. C ompensatory general damages inclusive of exemplary damages of UShs 30 million (thirty million shillings only).

2. A permanent injunction against the defendants restraining them from any future defamatory publication against the plaintiff.

3. I nterest at 18% on a(1) from the date of judgment till payment in full.

4. C osts of the suit.

For the plaintiff:

*Miss G Babihuga* instructed by *Babihuga & Co*

For the defendants:

*Mr D Owor* instructed by *Kituuma Magala & Co*