**Obbo and another v Attorney-General**

**Division:** Supreme Court of Uganda at Mengo

**Date of judgment:** 11 February 2004

**Case Number:** 2/02

**Before:** Odoki CJ, Oder Tsekooko, Karokora, Mulenga, Kanyeihamba

JJSC and Byamugisha AJSC

**Sourced by:** LawAfrica

**Summarised by:** A Mwanzia

*Constitution – Fundamental rights – Freedom of expression and press – Section 50 of Penal Code Act*

*proscribing publishing false statement likely to cause fear and alarm – Whether section 50 of Penal Code*

*Act inconsistent with article 29(1)(*a*) of Constitution.*

**Editor’s Summary**

The Appellants were an editor and a senior reporter of the *Monitor* newspaper. On 24 October 1997, the two were jointly charged in the Magistrate’s Court on two counts of the criminal offence of “publication of false news” contrary to section 50 of the Penal Code Act (Chapter 106). The charges arose out of a story that the Appellants extracted from a foreign newspaper and published in the Sunday Monitor Newspaper of 21 September 1997 under the headline “Kabila paid Uganda in Gold, says report”. On 24 November 1997, the Appellants filed a joint petition to the Constitutional Court, under article 137 of the Constitution, seeking *inter alia*, declarations: (a) that the action of the Director of Public Prosecutions (DPP) in prosecuting them under section 50 of the Penal Code Act, was inconsistent with the provisions of articles 29(1)(*a*) and (*e*), 40(2) and 43(2)(c) of the Constitution; and (b) that section 50 of the Penal Code Act was inconsistent with the provisions of articles 29(1)(*a*) and (*b*), 40(2) and 43(2)(*c*) of the Constitution. The Court postponed consideration of the petition pending conclusion of the criminal case in the Magistrate’s Court. The Appellants were later acquitted of the criminal charges by the Magistrate’s Court. Subsequently, the Constitutional Court considered the petition and decided: (a) unanimously, that the DPP’s action in prosecuting the Appellants was not inconsistent with the Constitution, and (b) by a majority of four to one, that section 50 was not inconsistent with article 29(1)(*a*) of the Constitution. The Appellants appealed against the latter holding.

**Held** – Protection of the guaranteed rights including freedom of expression was a primary objective of the Constitution. Limiting their enjoyment was an exception to their protection and therefore a secondary objective. Although the Constitution provided for both, the primary objective was dominant and could only be overridden in the exceptional circumstances that give rise to that secondary objective. In that eventuality, only minimal impairment of enjoyment of the right, strictly warranted by the exceptional circumstance could be permissible (*Rangarajan v Jagjivan Ram and others* [1990] LRC (Const) 412 adopted). The freedom of expression ought not be suppressed except where allowing its exercise would directly endanger community interest. Section 50 of the Penal Code Act was a limitation on the enjoyment of the right to the freedom of expression, and was concerned with public interest rather than the rights of others. As such, the limitation in section 50 had to satisfy two conditions; that it must be directed to prevent or remove prejudice to public interest and it must be a measure that was accepted and demonstrably justifiable in a free and democratic society as per article 43 of the Constitution. Section 50 of the Penal Code Act was directed in order to avert speculative or conjectural mischief or danger to public interest. On the face of it therefore, section 50 did not fall within the description of the purpose for which limitation on enjoyment of rights was permissible under article 43(1) of the Constitution. Under article 43(2) of the Constitution, democratic values and principles were the criteria on which any limitation on the enjoyment of rights and freedoms guaranteed by the Constitution had to be justified. In determining the validity of the limitation imposed by section 50 of the Penal Code Act on the freedom of expression, the court had to be guided by the values and principles essential to a free and democratic society (*Regina v Oakes* 26 DLR (4) 200 and *Mark Gova and another v Minister of Home Affairs and another* SC 36 of 2000 civil application number 156 of 1999 adopted). Section 50 of the Penal Code Act was inconsistent with article 29(1)(*a*) of the Constitution for it infringed the right of freedom of expression and was therefore void. Appeal allowed. **Cases referred to in Judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*Arutu v Attorney* constitutional petition number 4 of 1997

*Attorney-General v Abuki* constitutional appeal number 1 of 1998

*Kanabi v Uganda* criminal appeal number 12 of 1995

*Tinyefuza v Attorney-General* constitutional appeal number 1 of 1997 (SCU) (UR)

*Uganda v Commissioner of Prisons* ex parte *Matovu* [1966] EA 514

***Canada***

*Edmonton Journal v Alberta* (AG) [1989] 2 SCR 1326

*Edmonton Journal v Alberta* [1989] 45 CRRI

*Hunter v Southam Incl* [1985] II DLR (4) 644 (SCC)

*Ontario Film Appreciation Society and Ontario Board of Censors, Re* 147 DLR

*Regina v Oakes* 26 DLR (4) 200 – **A**

*Thomson Newspaper Company v Canada* [1998] 51 CRR (2) 189

*Zundel v the Queen and others* [1992] 10 CRR (20)

***India***

*Ghandi v Union of Indi*a [1978] 2 SCR 621

*R v Zundel* [1992] 10 CCR (2) 193

*Rangarajan v Jagjivan Ram and others* [1990] LRC (Const) 412 – **A**

***Nigeria***

*State v The Ivory Trumpet Publishing Company Limited*

***South Africa***

*De Klerk v Du Plessis and another* (1994) 6 BCLR 124

***United Kingdom***

*E Lingens* (number 12/1984/84/131)

*Handyside v The United Kingdom* [1979–80] 1 EHRR 737

*Hector v Attorney-General of Antigua and Barbuda* [1990] 2 AC 312

*Re Hallett* [1880] 13 Ch D 712

*Schering Chemicals v Falkman Limited* [1981] 2WLR 848

***United States of America***

*Thornhill v Alabama* 310 US 88

*Troop v Dulles* US ZL Ed 785 of 590 [1956]

***Zambia***

*Muhindika and others v The People* appeal number 95 of 1995

***Zimbabwe***

*Chavunduka and another v The Minister for Home Affairs and another* civil application number 156 of

1999

*Mark Gova and another v Minister of Home Affairs and another* SC 36 of 2000 civil application number