

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

5 **CORAM:**

HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA

HON. JUSTICE S.G. ENGWAU, JA

HON. JUSTICE C.K. BYAMUGISHA, JA

HON. JUSTICE S.B.K. KAVUMA, JA

10 **HON. JUSTICE A.S. NSHIMYE, JA**

CONSTITUTIONAL REFERENCE NO. 1/2008

(Arising out of Criminal Case No. 41 of 2008 in the Chief Magistrates Court at Nakawa)

15 **1. JOACHIM BUWEMBO**

2. BERNARD TABAIRE

3. EMMANUEL DAVIES GYEZAHO

4. MUKASA ROBERT ::::::::::::::::::::::::::::::: APPLICANTS

VERSUS

20 **ATTORNEY GENERAL ::::::::::::::::::::::::::::::: RESPONDENT**

(Statutory interpretation - Whether Section 179 of the Penal Code Act (Cap 120) is inconsistent with Article 29(1) (a) of the Constitution. - Whether or not Sections 179 of the Penal Code Act is a restriction permitted under Article 43 of the Constitution as being demonstrably justifiable in a free and democratic society.)

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Ruling of the Court

This Constitutional Reference arose out of Criminal Case No. 41 of 2008, instituted at Nakawa Magistrates Court, wherein the four applicants, namely Joachim Buwembo, Bernard Tabaire,
30 Emmanuel Davies Gyezaho and Mukasa Robert, were jointly charged with libel, contrary to *sections 179* and *22* of the *Penal Code Act*.

The facts giving rise to this charge are that the said applicants who are journalists with the Monitor Newspaper, published articles in their Sunday issues of 19th and 26th August 2007 captioned “**IGG IN SALARY SCANDAL**” and “**GOD’S WARRIOR FAITH MWONDHA STUMBLES**” respectively. Following a complaint to the police by the Hon. Lady Justice Faith Mwendha, the IGG, the applicants were investigated and later charged, at the Chief Magistrate’s Court at Nakawa, with the offence of unlawful publication of defamatory matter under **sections 179 and 22** of the **Penal Code Act (Cap 120)**.

When they appeared for trial their counsel, James Nangwala, invoking **Article 137(5)** of the Constitution, pointed out that there was a point of law for interpretation by the Constitutional Court, namely that **Section 179** of the **Penal Code Act** under which the applicants were charged was inconsistent with **Article 29(1)(a)** of the Constitution of the Republic of Uganda.

The learned trial Magistrate thus framed the following question which he referred to this court for determination:

“ **Whether section 179 of the Penal Code Act is not inconsistent with Article 29(1)(a) of the Constitution of the Republic of Uganda.**”

Hence this Reference No. 1 of 2008.

By consent of all counsel, this Court directed that the reference be decided on the following two agreed issues:-

(1) **Whether Section 179 of the Penal Code Act (Cap 120) is inconsistent with Article 29(1)(a) of the Constitution.**

(2) **Whether or not Sections 179 of the Penal Code Act is a restriction permitted under Article 43 of the Constitution as being demonstrably justifiable in a free and democratic society.**

This court further directed that the matter be determined partially on affidavit evidence with a brief written summary of legal arguments and short oral submissions.

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The case for the applicants, as stated by their counsel Mr. Nangwala James, was that *S. 179* of the *Penal Code Act* makes libel a criminal offence punishable by imprisonment thereby restricting the right to freedom of speech which is provided for under *Articles 29(1)(a)* of the Constitution. He asserted that although freedom of speech is not defined under the said article, the Supreme Court in *Constitutional Appeal No. 2 of 2002, Charles Onyango Obbo & Another Vs. Attorney General* outlined the extent of the freedom of speech. He cited the lead judgement per Mulenga, J.S.C at pages 9 and 10 where the learned Justice stated that the right to freedom of expression extends to holding, receiving and imparting all forms of opinions, ideas and information. It is not confined to categories such as correct opinions, sound ideas or truthful information.

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Learned counsel, therefore, submitted that if a law criminalized writing, printing and imparting ideas such as *section 179* of the *Penal Code Act* does, that law is prima facie inconsistent with *Article 29(1)(a)* of the Constitution. This Court should therefore hold issue No. 1 as framed in the affirmative.

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On the second issue, whether *section 179* of the *Penal Code Act* is a restriction permitted under *Article 43* of the Constitution as demonstrably necessary in a democratic society, learned counsel pointed out that *Article 43* has *2 clauses* limiting the enjoyment of rights. He submitted that no person shall prejudice the enjoyment of the rights and freedoms provided under the Constitution beyond what is acceptable and demonstrably justifiable in a free and democratic society. He stated that *Article 29(1)(a)* does not have specific derogatory clauses other than the general one. The freedom of expression is not observed when the enjoyment thereof prejudices other fundamental human rights.

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He stated that under the 1995 Constitution reputations of persons are not protected specifically or by necessary implication unlike under the 1967 Constitution ... and neither is a person's reputation inherent. It is self created and may be destroyed by others. Learned counsel argued that a person's reputation is protected under the civil law of defamation rather than by criminal prosecution. He cited the case of *Charles Onyango Obbo & Another Vs. Attorney General (supra)* as the authority for that view. According to him, criminal libel does not protect any known freedom of any individual other than the reputation of the complainant. Therefore, the first leg of limitation is irrelevant and cannot be used to justify criminal libel.

Turning to the second leg of limitation under *Article 43*, Mr. Nangwala pointed out that this prohibits any enjoyment of human rights and freedoms which prejudice public interest. In his view, although public interest is defined by the Constitution, *Article 43(2)* provides for what public interest does not include. He cited *Charles Onyango Obbo & Another Vs. Attorney General (supra)* per Mulenga JSC where the Hon. Justice stated at pp 16 that *clause (2)* of *Article 43* provides a limitation on the enjoyment of the right to freedom of speech and expression and the yardstick of public interest is that the limitation must be acceptable and demonstrably justifiable in a free and democratic society. The public means the community. He went on to say that the tort of defamation affects a person individually and does not involve the community interest in the slightest degree. An action in defamation dies with the person defamed.

Counsel submitted that for *section 179* of the *Penal Code* to be upheld, or as to what qualifies libel to be a crime, the court must be satisfied that the offence is against the public. A crime is defined as an offence against the public whose objective is to punish. Criminal law defines duties owed to society. Criminal libel therefore is derived out of the protection of public interest.

He went on to say that under community interest falls freedom of expression which must be protected over and above that of defamation. He cited the Mulenga, J.S.C judgment (Supra, page 17) where he quoted the case of *Rangarajan vs. Jagjivan Ram and Others; Union of India and Others vs. Jagvan Ram and Others (1990) LRC (Const.) 412* and stated that freedom of expression should not be suppressed except where allowing its exercise endangers community

interest. In his view, defamation is a tort and it affects a person individually and does not involve community in the slightest degree. Thus, actions in defamation died with the death of the person defamed. He cited *Gatley on Libel and Slander in Civil Litigation*, (4th edition, page 11, para 3) as the authority for the principle.

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Counsel submitted that for a person to be indicted for libel, the provocation complained of must be a breach of peace, that is, it must amount to a crime. He cited *Halsbury's Laws of England, 3rd Edition, Vol. 10, para. 501* which is to the effect that for something to amount to a crime, it must be an offence which affects the public. He further cited *Rupert Cross on An Introduction to Criminal Law* (4th Edition Chapter I, pages 1 to 2) which states that a civil wrong is concerned with the rights and duties of individuals whereas criminal law defines duties which a person owes to the society. In his view, the State should not indict a person for a wrong whose redress is provided for by civil courts.

15 Mr. Nangwala submitted that the State should not waste resources by prosecuting libel because in a democratic society those who hold public offices in government and who are responsible for public administration must always be open to criticisms. He relied on the Judgment of Mulenga, J.S.C. in *Charles Onyango Obbo & Another Vs. Attorney General* (*supra*, page 29) as the authority for that view. He further argued that the Constitution limits the State power to institute
20 both criminal and civil proceedings by a civil servant for criticism of his official functions. In support of this view, counsel cited the judgment of Brennan, J., in the *United States Case of Garrison vs. Louisiana, No. 379 U.S. 64; 85S. Ct. 209; 13 l. Ed. ed 125; ed 125 1964 U.S. LEXIS 150; 1 Media L. Rep. 1548.*, where it was held that penal sanctions cannot be justified merely by the fact that defamation is evil or damaging to a person in ways which entitles him to
25 a civil action because criminal prosecution should be reserved for harmful behaviour. Thus, learned counsel submitted that under the community interest, freedom of expression should be protected over and above that of a defamed person.

He further submitted that the restriction of the right to freedom of expression must be centered
30 on public interest. He cited the case of *Rafael Marques de Morais vs. Angola, Communication No. 1128/2002 U.N. Doc. CC.PP/C88/2002 (2005)* which is to the effect that the scope of

restrictions imposed on the freedom of expression must be proportional to the values which the restrictions serve to protect, that is, protection of the public. In counsel's view the wording of *section 179* of the *Penal Code* is not demonstrably justifiable in a democratic society.

5 He stated that an indictment will not lie in respect of injuries of a private nature unless, they in some ways, amount to breach of the peace. He relied on *Russell on Crime: A Treatise on Felonies and Misdemeanor (9th Edn., Vol. I*, p. 8, para 2 as the authority for the principle. He also cited *Gatley on Libel and Slander in a Civil Action with Precedents of Pleadings, (4th Edn., Sweet & Maxwell, p. 10)* which is to the effect that although the publication of a written
10 defamation is a crime as well as an actionable wrong, a man whose private character has been attacked should, as a general rule, content himself with his civil remedy unless the words are clearly of a kind calculated to provoke a breach of peace. He submitted, therefore, that libel should not be an indictable offence because committing it does not amount to breach of peace.

15 The learned counsel referred to *paragraphs 7 and 14* of the affidavit of Bernard Tabaire, the second applicant, which are to the effect that the applicant had already submitted to civil litigation but the State decided to prosecute him for criminal libel instead which was contrary to what is demonstrably justifiable in a democratic society. Therefore, if the offence of criminal libel is left on the statute, it will be selectively used to curtail the freedom of expression, press
20 and other media. This will have a chilling effect on the values the public derives from the press.

The learned counsel further argued that the affidavit in reply which the Hon. Inspector General of Government (IGG) filed should have been filed in a civil action. It is a denial of the truth of the facts complained of and therefore suitable for damages. It also has legal arguments and thus
25 not of any evidential value. He went on to state that the affidavit in reply by Keith Muhakanizi should also have been filed in a civil action and not a criminal matter. He further argued that the affidavit of Hon. Ruhindi is not an affidavit strictly but legal arguments on oath.

Learned counsel submitted that the remedies for defamation which are damages (money) and
30 injunction are sufficient redress for defamation. He prayed this Court to hold the second issue that *section 179* of the *Penal Code Act* is a restriction not permitted under *Article 43* of the

Constitution. It is not demonstrably justifiable in a democratic society. Thus, it is unconstitutional under *Article 29(1)(a)* of the Constitution and should be struck out under *Article 2(2)* of the Constitution as being null and void.

5 On the third issue, Counsel contended that should *section 179* be struck out, the rest of the sections in *Chapter 17* of the *Penal Code Act*, that is, *sections 180* to *186* will remain redundant. They should also be struck out. Learned counsel for the applicants concluded that the above detailed submissions were good reasons for the application to be allowed.

10 In reply, the learned State Attorney, Ms. Mutesi argued all the three issue concurrently. She asserted that freedom of expression is not an absolute right. It is subject to limitation. She contended that *section 179* of the *Penal Code Act* falls under *Article 43(1)(2)(c)* and therefore, not inconsistent with *Article 29(1)(a)* of the Constitution. *Section 179*, of the *Penal Code* aims at restricting freedom of speech which prejudices the right to reputation of others. The right to
15 reputation is protected under *Article 45* of the Constitution.

Relying on *R. vs. Lucas, [1998] 1 S.C.R. 439*, where the Canadian Court of Appeal held that the protection of an individual's reputation from willful and false attacks recognizes both the intimate dignity of the individual and the integral link between reputation and the fruitful participation of an individual in society, thus preventing damage to reputation as a result of
20 criminal libel is a legitimate goal of criminal law. The court emphasized that it is of fundamental importance in a democratic society to protect the good reputation of the individuals because good reputation is closely related to the innate worthiness and dignity of the individual; and a person's reputation is a tribute that must, just as much as freedom of expression, be protected by a democratic society. The learned state attorney submitted, therefore, that the offence of
25 criminal libel is a necessary protection of the right to reputation because it is of fundamental importance.

The learned state attorney further submitted that the test to be used in deciding to prosecute for criminal libel is whether there is a *prima facie* case in the sense that there was a case to go
30 before a criminal court. She cited the case of *Goldsmith v. Pressdram Ltd and Others [1976] 1 QB 83*. In this case, Wien J held that where libel was so serious that it was proper to invoke the

criminal law and where the public interest required the institution of criminal proceedings, and where a prima facie case of serious criminal libel is manifest, it would be irrelevant whether a respondent had the means to satisfy an award for damages in civil proceedings. Wien J further held that where the respondent held a position of considerable importance and his integrity had been impugned in circumstances against any background of vilification, the public interest required that criminal proceedings be brought against the respondents. The rationale is to avoid lampooning persons holding public offices with impunity. The State attorney submitted that criminal prosecution for libel should not be instituted if the libel complained of is of a trivial character which is unlikely to disturb the peace of the community or seriously affect the reputation of the person defamed.

She further argued that libel is a criminal offence in Uganda because it is inadequate, in the law of torts, to redress the injury caused to an individual when a writing which tends to injure his/her reputation exposes the defamed person to public hatred, ridicule and contempt. She relied on **Smith & Hogan on Criminal Law** (4th edn, Butterworths 1978, at p. 793), where the learned authors argued that criminal proceedings should be instituted if it is shown that the publication seriously affected the reputation of the defamed person regardless of whether or not the publication would breach the public peace. She cited paragraph 9-14 of the Hon. IGG's affidavit which were to the effect that the IGG's reputation was seriously ridiculed, injured and made a subject of public hatred. She therefore contended that reputation is a public inherent right which should be protected.

The learned state attorney cited *section 180* of the *Penal Code* to the effect that criminal libel involves fraud and malice. Thus, the person's reputation should be protected by penal sanctions from such malicious attacks.

She also recited a number of democratic societies that have criminal libel laws like all the African states, Western Europe, Latin American and Central Asian countries except Cyprus; all these have special protection for public officials against defamation. Thus, Uganda is no exception to be enforcing criminal libel.

The learned state attorney challenged the view advanced by learned counsel for the applicants, that the priority given to the enforcement of criminal libel by the police and the State does not render it unconstitutional and or ineffective. She cited paragraphs 52 to 56 of the case of **R. vs. Lucas (Supra)** as the authority for this view. The minimal impairment of the offence of criminal libel is that the offender should have knowledge of the falsity of the publication and the intention to defame. This minimally impairs the right to freedom of expression.

She further stated that criminal law and civil law serve different purposes. Criminal law deals with offences against the public whereas civil law deals with redress between individuals. Criminal libel is a criminal offence which requires a high standard which normally impairs the right to freedom of expression. It is very dangerous in a democratic society not to limit the freedom of expression because there may arise circumstances of public interest where unlimited freedom of expression is very dangerous to public peace. She cited paragraphs 88 and 89, 90, 92, and 96 of the case of **R. vs. Lucas (Supra)** as the authority for this legal position.

The state attorney submitted that **section 179 of the Penal Code Act** is a justifiable restriction. He cited page 21 paragraph 2 of the lead Judgment per Mulenga, J.S.C. in **Charles Onyango Obbo & Another vs. Attorney General (supra)**, where the learned justice states that for a limitation to fit within the conditions of Article 43, it must be directed to prevent or remove 'prejudice' to the public interest, and it must be a measure that is acceptable and demonstrably justifiable in a free and democratic society. The learned state attorney argued that the present case has to be distinguished from the decision of **Charles Onyango Obbo's** case. She also cited the case of **George Worme & Grenada Today Limited vs. The Commissioner of Police, Privy Council Appeal NO. 71 of 2002** where the Court of appeal held (paragraph 7) that every person is entitled to fundamental rights and freedoms but subject to respect for the rights and freedoms of others and for the public interest. The present case deals with the rights of individuals. Therefore, the restriction under **section 179** is justifiable under **Article 43** because it safeguards the enjoyment of individual's rights as well as public rights.

However, in view of **Charles Onyango Obbo's** case, defamation based on false news has no place in criminal law. The **sections (180-186)** following **section 179** of the **Penal code** are

defences to criminal libel. They are defences to a tort of defamation, such as fair comment. The reputation of a public officer is for public good and should be open to public criticism than private individuals. The defences are so wide that they allow the press to make value judgements on the right to impart and receive information.

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The above is the summary of the submissions of both parties.

The applicants have petitioned this Court under *Article 137 (3)(a), (5) and (6)* of Constitution to interpret *section 179* of the *Penal Code Act* in light of *Articles 29 (1)(a)* and *43* of the Constitution.

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Article 29(1) reads:

“29 (1) Every person shall have the right to-

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(a) freedom of speech and expression, which include freedom of the press and other media;”

Article 43 provides thus:

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“43. (1) In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.

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(2) Public interest under this article shall not permit

(a) political persecution;

(b) detention without trial;

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(c) any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.”

However, *section 179* of the *Penal Code Act, (Cap. 120)* provides as follows:

“ *Any person who, by print, writing, painting, effigy or by any means otherwise than solely by gesture, spoken words or other sound, unlawfully publishes any defamatory matter concerning another person, with intent to defame that other person commits a misdemeanor termed libel.*”

This section of the *Penal Code* criminalizes libel in Uganda. In their prayer, the applicants have asked this Court to declare that it is inconsistent with *Article 29(1)(a)* of the Constitution.

The parameter of this article (the fundamental right to freedom of speech and expression) was outlined by the Supreme Court in *Charles Onyango Obbo & Another Vs. Attorney General, Constitutional Appeal No. 2 Of 2002*. Here the issue on appeal was whether section 50 of the Penal Code Act, which makes publication of false news a criminal offence contravened the said Article 29 of the Constitution. At page 10 of his lead judgment, Mulenga, J.S.C had this to say:

“ *...it is evident that the right to freedom of expression extends to holding, receiving and imparting all forms of opinions, ideas and information. It is not confined to categories, such as correct opinions, sound ideas or truthful information. Subject to the limitation under Article 43, a person’s expression or statement is not precluded from the constitutional protection simply because it is thought by another or others to be false, erroneous, controversial or unpleasant. Everyone is free to express his or her views. Indeed, the protection is most relevant and required where a person’s views are opposed or objected to by society or any part thereof, as “false” or “wrong”.*”

It is trite that the right to freedom of expression should be enjoyed within the parameters/restrictions set by *Article 43* of the Constitution. It does not fall within the non-derogable rights enshrined in *Article 44* of the Constitution.

In light of **Article 43**, the right to freedom of expression is restricted by public interest. The decision of the Supreme Court in the case of **Zachary Olum & Another vs. the Attorney General, Constitutional Petition No. 6 of 1996** gives an insight into the case at hand. In that case, the petitioners brought the petition under **Article 137** of the Constitution seeking declarations, *inter alia*, that **section 15** of the **National Assembly (Powers and Privileges) Act, Cap 249**, which prohibits members of Parliament from using evidence of proceedings in the Assembly having first to obtain permission is unconstitutional. The question before court was whether that restriction or the condition rendered the provisions of **section 15** unconstitutional? Manyindo, D.C.J as he then was, held that the import of **Articles 41** and **43** of the Constitution is that fundamental rights and freedoms conferred on individuals in Chapter 4 of the Constitution have to be enjoyed subject to the law of Uganda, in so far as such law imposes reasonable restrictions. The Hon. Justice also held that individual rights are protected but they can never override the public interest, state security and sovereignty. Thus, it is generally accepted that laws may restrict actions which involve the exercise of constitutionally protected rights. The test here is an objective one. The application of the proper test must be considered within the context of the subject matter or circumstances of each case. In this respect, Courts should endeavour to apply not only the letter of the law but also the spirit.

The issue at hand is whether the restriction imposed by **section 179** is unconstitutional. This section criminalizes the publication of a defamatory matter concerning another. Criminal Law deals with offences against the public. **Section 180(1)** of the **Penal Code Act** defines a defamatory matter as follows:

“(1) Defamatory matter is matter likely to injure the reputation of any person by exposing that person to hatred, contempt or ridicule, or likely to damage any person in his or her profession or trade by an injury to his or her reputation.”

This subsection protects the reputation of persons from defamatory publications. The issue here is whether any public interest is served by protecting a person’s reputation. **Black’s Law Dictionary (6th Edn. St. Paul Minn West Publishing Co. 1990, at page 1229)** defines public interest as:

“ *Something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as a mere curiosity, or as the interests of the particular localities, which may be affected by matters in question. Interest shared by citizens generally in affairs of local, State or national government.*”

Reputation has two rights embedded in it namely, the right of an individual to have his reputation protected by law, and secondly, the public interest embedded in the individual’s reputation by virtue of the fact that the individual is a member of the public and renders service to the public. It has been argued by Mr. Nangwala, learned counsel for the applicants, relying on the Judgment Mulenga, J.S.C. in *Charles Onyango Obbo & Another Vs. Attorney General (supra, page 29)* that in a democratic society those who hold public offices in government and who are responsible for public administration must always be open to criticisms.

Although the Constitution does not expressly protect the reputation of individuals, it is by necessary implication protected by *Article 45* of the Constitution which provides:

“45. *The rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned.*”

Thus, the reputation of persons is protected by this *Article (45)* as well as *Article 43* which places public interest as a limitation on the right to freedom of speech and expression which include freedom of press and other media. This restriction of the enjoyment of freedom of expression is within what is acceptable and demonstrably justifiable in a free and democratic society. The decision of the Supreme Court of Zimbabwe in **Mark Gova & Another vs. Minister of Home Affairs and Another, [S.C. 36/2000: Civil Appeal No. 156/99]** cited in Onyango Obbo’s case (supra) lays down the criteria for justification of law imposing limitation on guaranteed rights as follows:

- *The legislative objective which the limitation is designed to promote must be sufficiently important to warrant overriding the fundamental right;*
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- *The measures designed to meet the objectives must be rationally connected to it and not arbitrary, unfair or based on irrational considerations;*
 - *The means used to impair the right or freedom must be no more than necessary to accomplish the objective.*

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The impugned *section 179* of the *Penal Code Act* incriminates libel while *sections 183* to *186* lay down the defences to the offence. The phraseology of those sections does not show any kind of arbitrary restriction to the freedom of expression. As we have already stated above, protecting reputation is a matter of public interest as well as protecting the right of the individual concerned. In the case of *Gleaves vs. Deakin & Others [1979] AC 477 at 483*, Lord Diplock had this to say about restricting freedom of expression:

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“ *My Lords, under article 10.2 of the European Convention, the exercise of the right of freedom of expression may be subject to restrictions or penalties by a contracting State, only to the extent that those restrictions or penalties are necessary in a democratic society for the protection of what (apart from the reputation of individuals and the protection of information received in confidence) may be generally described as a public interest.*”

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25 Another consideration which makes the protection of reputation by way of criminalizing libel is the importance of the reputation of a person to the public. In the case of *R. vs. Lucas, [1998] 1 S.C.R. 439* (the Canadian Court of Appeal), relied on by Ms. Mutesi, **Lord Lamer C.J.** observed as follows:

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“ *The objectives of the impugned provisions, which is the protection of an individual’s reputation from willful and false attacks recognizes both the intimate*

dignity of the individual and the integral link between reputation and the fruitful participation of an individual in Canadian society. As well, the measures adopted are rationally connected to the objective in Question.”

5 On his part, Lord McLachlin stated:

“ *Is the goal of protection of reputation a pressing and substantial objective in our society? I believe it is. The protection of an individual’s reputation from willful and false attack recognizes both the innate dignity of the individual and the integral link between reputation and the fruitful participation of an individual in Canadian society. Preventing damage to reputation as a result of criminal libel is a legitimate goal of the criminal law.*

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Another judicial pronouncement that emphasizes the fundamental importance, in a democratic society, to protect the good reputation of the individual is the Canadian case *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, The unanimous opinion of the court at p. 1175 observes:

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“ *Although much has very properly been said and written about the importance of freedom of expression, little has been written of the importance of reputation. Yet, to most people, their good reputation is cherished above all. A good reputation is closely related to the innate worthiness and dignity of the individual. It is an attribute that must just as much as freedom of expression, be protected by a democratic society.*

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Democracy has always recognized and cherished fundamental importance of an individual. That importance must in turn, be based upon the good repute of a person...A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect their good reputation so long as it is merited.”

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Mr. Nangwala for the applicants argued that the protection of reputation can be adequately achieved through the use of civil law where the remedies of damages and injunctions are adequate instead of the use of punitive criminal sanctions which are not minimally impairing. We cannot agree. The continued existence of the parallel but distinct civil and criminal sanctions mean that while the victims of such wrongs may well deserve to be compensated, perpetrators who willfully and knowingly publish lies calculated to damage the public reputation of a member of a democratic society ought to be punished. This serves the objectives of criminal law. The general objectives of substantive criminal law in modern legal systems are provided by the *American Law Institute's Model Penal Code*. These purposes are:

- (1) *To forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individuals or public interest;*
- (2) *To subject to public control persons whose conduct indicates that they are disposed to commit crimes;*
- (3) *To safe guard conduct that is without fault from condemnation as criminals;*
- (4) *To give far warning of the nature of conduct declared to be an offence; and*
- (5) *To differentiate on reasonable grounds serious and minor offences.*

Section 179 of the *Penal Code* is, therefore, a safeguard against the infringement of a person's reputation. Criminal libel unlike theft affects the general public. Further, although many criminal offences make victims of individuals, criminal law treats all crimes as offences against the State. On the other hand, civil process envisions the victim herself or himself seeking vindication and compensation by confronting the individual who wronged her or him.

We would add that the existence of criminal sanctions for acts which are also considered tortuous ensures that those who commit acts society has deemed egregious are properly

punished. Examples of those offences include criminal negligence, acts of assault, sexual assault, fraud, trespass, and indeed murder and manslaughter. The same is true for defamatory libel. We accept the view of Lord McLachlin in **R. vs. Lucas (supra)** where he stated (at page 27):

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“ *Although it is important to recognize the right of the person defamed to sue for monetary damages it is equally if not more important that society discourage the intentional publication of lies calculated to expose another individual to hatred and contempt. The harm addressed by s. 300 is so grave and serious that the imposition of a criminal sanction is not excessive but rather an appropriate response. Defamatory libel can cause long-lasting or permanent injuries to the victim. The victim may be forever demeaned and diminished in the eyes of her community. The conduct which injures reputation by criminal libel is just as blameworthy as other conduct readily accepted as criminal, such as a deliberate assault or causing damage to property. Moreover, the offence requires an intent to defame and knowledge of the falsity of the publication. This state of mind is just as culpable and morally blameworthy as that of the perpetrator of many other offences. The harm that acts of criminal libel can cause is so grievous and the object of the section to protect the reputation of individuals is so meritorious that the criminal offence is of such importance that the offence should be maintained.*”

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The value of restriction of freedom of expression was highlighted in the case of **Rafael Marques de Morais vs. Angola, Communication No. 1128/2002 U.N. Doc. CC.PP/C88/2002 (2005)** cited by Mr. Nangwala which is to the effect that the scope of restrictions imposed on freedom of expression must be proportional to the values which the restrictions serve to protect, that is, protection of the public. We are of the view that it is in the interest of the public that the reputation of individual members of the public be protected.

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Similarly, it is noteworthy that a number of international conventions to which Uganda is a party contain explicit limitations of freedom of expression in order to protect the reputation of individuals. For example, **Article 17 of International Covenant on Civil and Political Rights**

(1966) provides that everyone has a right to the protection of law against attacks on his or her honour and reputation. Likewise, *Article 12 of the Universal Declaration of Human Rights (1948) provides that “No person shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor attacks upon his honour and reputation. Everyone has a*
5 *right to the protection of the law against such interference or attacks.”* We thus need hardly emphasize the fact that the reputation of an individual is of such great importance that it even attracts international recognition and protection.

It becomes clear that although freedom of expression is for enhancing public knowledge and
10 development, statements which defame members of the public do not enhance public knowledge and development. On the contrary, they stifle and retard it. This was the unanimous view of the Canadian Court in *Hill v. Church of Scientology of Toronto (Supra)*, cited in Lucas (supra):-

“
15 *...defamatory statements are very tenuously related to the core values which underlie s. 2 (b). They are inimical to search for truth. False and injurious statements cannot enhance self-development. Nor can it ever be said that they lead to healthy participation in the affairs of the community. Indeed, they are detrimental to the advancement of these values and harmful to the interests of a free and democratic society.”*

20 Most certainly therefore defamatory libel is far from the core values of freedom of expression, press and other media. It would trivialize and demean the magnificence of the rights guaranteed by the Constitution if individual members of the public are exposed to hatred, ridicule and contempt without any protection. In fact, the press would be doing a disservice to the public by
25 publishing defamatory libels.

The applicants in this case cannot say that they are being tried under an unconstitutional law. The applicants’ complaint and defence should not, therefore, be that *section 179* of the *Penal Code Act* is bad law. The freedom of expression in Uganda should be enjoyed within the restrictions
30 imposed by *section 179* of *Penal Code Act*. Holding that *section 179* is unconstitutional would

mean that the right of freedom of expression is unlimited and thus this would contravene *Article 43* of the Constitution. It serves the purpose achieved by the Canadian Criminal Code

5 In summary, *Section 179* of the *Penal Code Act (Cap 120)* is not inconsistent with *Article 29(1)(a)* of the Constitution. *Sections 180 to 186* of the *Penal Code Act* are, therefore, not redundant. *Section 179* of the *Penal Code Act* is a restriction permitted under *Article 43* of the Constitution as being demonstrably justifiable in a free and democratic society.

10 We would therefore dismiss this application and order that each party bears its own costs.

The trial court is hereby directed to continue with the trial.

Dated at Kampala this ...04th...day of ...June..... 2009.

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HON. A.E.N. MPAGI-BAHIGEINE

JUSTICE OF APPEAL

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HON. S.G. ENGWAU

JUSTICE OF APPEAL

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HON. C.K. BYAMUGISHA

JUSTICE OF APPEAL

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HON. S.B.K. KAVUMA

JUSTICE OF APPEAL

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HON. A.S. NSHIMYE

JUSTICE OF APPEAL