

RE-EXAMINING THE CHALLENGES OF THE LAW OF DEFAMATION IN NIGERIA

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Abstract

The essence of the tort of defamation is to protect reputation. Section 39 of the 1999 Constitution of the Federal Republic of Nigeria and some international instruments on human rights have guaranteed the right to freedom of expression. The Nigerian Constitution in some ways, limited the exercise of this right under section 45 in order to ensure that the right is exercised with caution, and where the effect of the defamatory words seems to cause a breach of peace, the Police or the Attorney General may prosecute the defendant for offence of criminal libel under sections 60, 373-380 of the Criminal Code. It is disreputable to arrest a journalist over civil issues, in Nigeria; the Defamation Law has not been encouraging to the Media. Victimisation due to interests of the governments, coupled with the issue of jurisdiction, remain a critical issue and constitute an impediment to the guaranteed right to freedom of expression. Also, the distinction between libel and slander is outdated; hence most legal systems have jettisoned it. Using primary and secondary sources of law in addressing these challenges, and noting the importance of freedom of expression in promoting democratic virtues and mitigating incidents of arbitrary arrests, this paper finds some loopholes in contemporary practice and law of defamation in Nigeria and advocates having in place, comprehensive legislations on defamation designed to rectify the current systems.

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1.0 Introduction

Defamation relates to injury to the claimant’s reputation resulting from fabricated statements, written or spoken by the defendant for the purpose of discrediting the claimant or discredits his trade or his profession or exposes him to hatred or ridicule, or causes others to avoid him, and lower his reputation in the estimation of right-thinking members of the society generally.²

The presence of freedom of expression is not a license to damage the reputation of another person or entity. The African Commission on Human and People’s Rights at its 65th Ordinary Session in 2019 in Banjul (The Gambia) adopted the Declaration of Principles of Freedom of Expression and Access to Information in Africa, in conformity with the fundamental human right enshrined in Article 9 of the African Charter and Article 19 of both the Universal Declaration of Human Rights (UDHR), and the International Covenant on Civil and Political Rights (ICCPR). The first part of this paper addresses the scope of the law of defamation while second part of it analysed the contemporary challenges likely to be encountered in proving defamation especially as it affects the past, the present and the future. The latter part of the paper examined various jurisdictional issues in terms of statutory and judicial application of the similar laws and the paper ended with recommendations on the need for amendment of some laws on criminal defamation and adoption of global best practices.

2.0 The Concept and Elements of Defamation

Generally, defamation may be classified as ‘Slander’ or ‘Libel’:

Slander is defamation through the medium of spoken words or gestures. It is in a transient form, usually through the medium of spoken words or gestures. Hence, it has a slighter effect than permanent statements, therefore it is not actionable *per se* except the claimant shows that he has suffered ‘actual damage’, or in such instances where the defendant impute that the claimant has committed

² Winfield, “*Law of Tort*” 1950, 5th Ed. 242

a criminal offence punishable by death, imprisonment, or canning. But Such words must be looked at in their context and in the light of the circumstance in which they were uttered. If the plaintiff has to rely on the secondary meaning of the word spoken, he must prove that the words might reasonably mean that a crime punishable corporally (by death, imprisonment, or canning) was imputed. The basis for this is that such words would tend to render the plaintiff ostracized socially and thus cause others to avoid him.³

It is defamatory to attribute to a professional or businessman, lack of qualification, knowledge, skill, capacity, or efficiency in the conduct of his trade, business or his professional activity which thus culminates in loss of esteem, integrity, or profits. However, what may be defamatory in a particular society in Nigeria might not necessarily be defamatory in another, thus, in considering whether a statement is defamatory or not, one must take into account, circumstances of time and place. A statement which is not defamatory at a private dinner party may become defamatory if repeated in the newspaper.⁴Insults directed to the plaintiff himself do not constitute defamation, unless the defamatory statement has been communicated to a third party.⁵

In *Agoaka v Ejiofor*,⁶ the defendant falsely accused the plaintiff at a village gathering of having stolen his Coco yams. It was held that the plaintiff was entitled to recover general damages for slander on the ground that, the very speaking of such words constitutes infringement of the plaintiff's right and, a wrong from which the law presumes general damages. However, a mere allegation of suspicion is not sufficient.

³ Ese Malemi, *Law of Torts in Nigeria* (Lagos: Princeton Publishing Company, 2013), p. 568.

⁴ *Dolby v Newnes* (1887) 3 TLR, p. 393

⁵ *Vanguard Media Ltd v Adebiyi Olafisoye* (2011) 14 N.W.L.R., (Pt. 1267) p. 207, C.A

⁶ (1972) 2 ECSR, p. 109

2.1 The Law of Slander

A slanderous statement in respect of profession, business, etc. is actionable *per se* if such words impute some want of integrity or some corrupt or dishonest conduct in the discharge of that office or profession (i.e. to say that a banker is fraudulent; a trader is insolvent; a surgeon is incompetent).⁷

Regarding slander which is not actionable *per se*, the plaintiff will be able to claim damages only if he can prove that he has suffered actual damage, (i.e. loss of employment, loss of money, loss of hospitality that involves financial or material value). In *McManus v Beckham*,⁸ the defendant told three of the claimant's customers that the claimant usually sells fakes and advised them not to buy anything from the shop. The claimant successfully claimed that the defendant had done severe damage to his business (however, the matter was eventually settled out of court).

Where slander is actionable *per se*, the plaintiff can recover general damages for injury to his reputation without any actual damage and may also recover special damages in addition if he can prove actual damage, e.g. loss of money or loss of some material advantage. However, words spoken as mere vulgar abuse or insult, especially while the parties were exchanging words in the heat of anger, are not actionable slander, except it is published, written, or printed or communicated to a third party. In *Ibeanu v Uba*,⁹ the plaintiff (Josiah) saw the defendant passing and was merely greeting him when the defendant spoke the following words in the presence of witnesses: "Josiah! Josiah! you brought the thieves with whom you stole my goat and you have now come to ask me". It was clear from the evidence

⁷ It is necessary to note that, imputation that a person has a contagious venereal disease, such that induces moral condemnation or loathing, is a slander that was actionable *per se*, however, this was repealed by Section 14(2) of the Defamation Act 2013; also, imputation of infidelity or adultery concerning a woman or a girl, was actionable *per se*, but it has been repealed by Section 14(1) of the Defamation Act 2013.

⁸(2002) EWCA, p.939

⁹(1972) 2 ECLR, p.194.

that there was no quarrel between the parties. Thus, it was held that the words were not mere vulgar abuse but constituted actionable slander. But in *Bakare v Ishola*,¹⁰ at the height of a violent quarrel, the defendant, in the presence of on-lookers said: “You are a thief, Ex-convict, you who have just come out of prison”. Jibowu C.J. held that:

It is a matter of common knowledge of which the court takes judicial notice that people commonly abuse each other as a prelude to a fight and call each other ‘Thief’! ‘Ex-convict’! which abuse no one takes seriously as they are words of heat and anger. Hence, the onus is on the defendant to satisfy the court that: (i) the alleged words were words of heat and anger; and that (ii) the words were so understood by the on-lookers”.

However, where such words are written or published, this defence would fail.¹¹

2.2 The Law of Libel

Whereas, ‘Libel’ is a defamatory matter / statement in a permanent form (this implies that it exists for a period longer than the time it was initially communicated. i.e. books, newspaper, letters, effigies, cartoon, photography, statute, film, radio and television broadcast).¹²Hence, it is actionable per se. The plaintiff in a libel action is required to prove the following¹³:

*“(a) that the defendant published a statement in a permanent form;
(b) that the statement referred to the claimant;
(c) that the statement was defamatory of the claimant in the sense that it lowered him in the estimation of right-thinking members of the society, or it exposed him to hatred, ridicule or contempt, or it injured*

¹⁰ (1959) WNLR, P. 106.

¹¹ See *Benson v. west African Pilot Ltd.*(1966) NMLR, p. 3

¹² See Robert J, David C., “*Security and the Law*”, 10th ed. (2019)

¹³ The plaintiff is required to prove his case on the preponderance of evidence as affirmed in *Nsirim v. Onuma Construction Co. Ltd.* (2001) 7N.W.L.R. (Pt. 713) 742 S.C.

*his reputation in his office, trade or profession, or it injured his financial credit.”*¹⁴

However, the test for determining whether the alleged words convey a defamatory meaning, is based on the estimation of a reasonable person under the circumstances in which the words were written or published. In this regard, the language used must be looked into as a whole as well as the circumstances in which they were made or published, and the words should be given their ordinary meanings in their interpretation. In *Nthenda v Alade*,¹⁵ Bello S.P.J. held that:

*“In an action for libel, the plaintiff need not prove malice in law and need not prove that he has suffered any actual damage as the result of the publication. Both malice and damage are presumed from the publication itself, in the absence of lawful excuse...once a publication has been found to be a libel, the law presumes damage”.*¹⁶

Where the plaintiff proves that he has suffered actual damage in a libel action, he will be entitled to claim further sum in addition to the general damages. In *Guardian Newspapers Ltd. and Michael Simire v C. I. Ajeh*,¹⁷ the 2nd appellant wrote an article titled “Lessons from a pastor”, and published it in the 1st appellant’s newspaper. He stated that he left the respondent (the pastor of a church) at home and went to work, when he returned, the door was locked and he opened it with the spare key, and discovered that several items had been stolen, meanwhile, the pastor was nowhere to be found. Consequently, the respondent sued the appellant for libel, claiming the sum of ten million naira as damages and an injunction to restrain further publication of the libel. He pleaded that the article was false, malicious and portrayed him as a thief and a dishonest person, thus, damaged his reputation, and he lost his congregation. The 2nd appellant pleaded that the content of the article was correct and that it was a fair comment on a matter of

¹⁴ Held by the Supreme Court in *Sule v Orisajimi* (2019) 10 N.W.L.R. (Pt. 1681) 513 at 516 S.C.

¹⁵(1974) 4 ECCLR, P. 470.

¹⁶ See also *Lardner v. Sketch Publishing Co. Ltd.* (1979) 3 LRN, p.276 at 280

¹⁷(2011) 10 N.W.L.R, (pt. 1256) p. 574, S.C.

public policy. The trial court awarded N500, 000.00 as damages to the respondent and restrained the appellant from further publication of the article. His appeal to the Court of Appeal was dismissed, hence he appealed to the Supreme Court. The Supreme Court, unanimously dismissing the appeal held that:

From the established facts which are extant in the record, the words complained of were written in 1st appellant's edition of Sunday, 3rd December, 1995. The publication was false as same was not substantiated at the trial of the matter at the Magistrate court. The words which referred to the respondent clearly convey defamatory meaning that the respondent is a thief. The appellants, who maintained that they stood by what they wrote and that they banked their assertion on fair comment, failed to substantiate same. They clung to their malicious publication to blacken the respondent, exposed him to hatred; ridicule and contempt. It is therefore imperative that they should pay for same as dictated by law.

The court went further to hold that considering the compensation for the claimant's loss of interest or reputation in this case, inter alia:

The award of damages, once libel is established, is an exercise of discretion by the trial court. However, the trial court must consider the following factors when exercising its discretion:

- (a) the standing of the plaintiff in the society;*
- (b) the nature of the libel;*
- (c) the mode and extent of the publication;*
- (d) the refusal to retract or render an apology to the plaintiff;*
- (e) the value of the local currency.*

In its evaluation of the available evidence, the Supreme Court found that before awarding N500.000.00 as damages for libel against the appellants, the trial court already found that the Guardian Newspaper has a very wide circulation and the offensive article affected the plaintiff's church drastically since he lost most of his congregation

after the publication. The court also found that the appellants remained defiant, showing no sign of remorse... to my mind, the sum of N500.000.00 seems fair and just in the circumstances of this case.

In this wise, a defendant will be held liable appropriately for the natural and probable consequences of his defamatory statement. However, where there is a *novus actus* breaking the chain of causation (i.e. where the defamatory matters have not been sent or published, but another person takes it without been authorized, and sends it out to be published), the chain of causation has been broken and the defendant will not be liable.¹⁸.

In proving that the words or the matter complained of were used in a defamatory sense other than their ordinary meaning, the plaintiff must give particulars of the facts and matters on which he relies in support of his allegation, and it is for the judge to decide whether the words are defamatory. In this regard, Adefarasin J. stated the approach which the court would adopt as follows:

*“The judge...has to consider the natural and ordinary meaning in which these words would be understood by reasonable men to whom they were published. In determining whether words are capable of a defamatory meaning, the Judge should construe the words according to the fair and natural meaning which would be given them by reasonable persons of ordinary intelligence who are neither unusually suspicious nor unusually naïve”.*¹⁹

Production of a copy of the book or paper containing the defamatory statement will be generally accepted as evidence of publication.²⁰In *Cruise v Express Newspapers Plc.*,²¹ a couple (Mr.& Mrs. Tom Cruise) won damages from Express Newspapers for falsely stating that their marriage was a sham designed to cover up the fact that they were

¹⁸ See *Weld-Blundell v. Stephens* (1920) A.C. p. 956, H. L.

¹⁹ see *Omo-Osagie v. Okutubo*(1969) 2 ALL. NLR, p175 at 179; *Mitchell v. Faber & Faber* (1998) EMLR, p 807

²⁰ See *Nsirim v. Nsirim*(1990) 3 NWLR, (pt. 138) p. 285

²¹(1999) Q.B., p.931

both gay. Also, in *Parker v. News Group*,²² Parker won \$50,000.00 as damages from the defendant for publishing a false story to the effect that Parker had been sacked by his employer after refusing to see a psychiatrist.

Furthermore, it must be established that the defamatory words referred to the plaintiff either by his correct name or his initial, or his nickname, his office or post, or by photograph, drawing, or by verbal description of the plaintiff or by reference to a particular group of persons of which he is a member, or by a cartoon,²³ and it must be proved that the defamatory words can be reasonably understood as referring to the plaintiff. However, where the defamatory word is in respect of a group or class of people (either written or spoken), no individual member of that group or class can bring action on it except if he can prove that he was particularly addressed, or if it can be understood by reasonable men that the statement refers to each and every member of the class.²⁴ In *Knupffer v London Express Newspapers Ltd.*,²⁵ the House of Lords rejected the plaintiff's claim on the ground that the alleged defamatory statement was aimed at a large class of people and the plaintiff could not prove that he was particularly addressed. However, each case will depend on the particular fact and the circumstance (for instance, the size of the group, the proximity of the defamatory statement to the individual in that group).

Also, it must be proved that the statement was published, or was communicated by the defendant to a third party.²⁶ However, this excludes communication of defamatory matter between a husband and his wife, as they are regarded to be one person. But if one spouse publishes a defamatory matter concerning his / her spouse to a third party, it constitutes defamation.

²²(2005) Unreported

²³ See *Bakare v. Oluwide* (1969) 20 ALL. N.L.R., p.321; *Ukpoma v. Daily Times of Nigeria Ltd.* (1979) 2 L.R.N.p.357

²⁴ See *Dalumo v The Sketch Publishing Co Ltd.* (1972) ALL. NLR., p. 130

²⁵(1944) A.C., p. 116

²⁶ See *Godfrey v Demon Internet Ltd.* (2000) 3 W.L.R., p. 1020

3.0 Contemporary Defences in Defamation Cases

3.1 Unintentional Defamation

This defence is available where the defendant proves that he could not have known that the alleged defamatory statement which appears innocent on its face can be understood as referring to the plaintiff as well as defamatory of him, having taken all reasonable care in the circumstances.²⁷ The defendant may escape liability if he offers to retract the defamatory words ('Offer of amends').

3.2 Innocent Dissemination

Booksellers, news vendor, etc. who sell or circulate libelous matter without knowledge of the libel, are not liable for such acts. According to Romer L.J. in *Vizetelly v Mudie's Select Library Ltd*:²⁸

"A person who is not the printer or the first or the main publisher of the work which contains a libel but has only taken what I may call, a subordinate part in disseminating it, is not liable... if he succeeds in showing:

(i)that he was innocent of any knowledge of the libel contained in the work disseminated by him:

(ii)that there was nothing in the work or the circumstances under which it came to him or disseminated by him which ought to have led him to suppose that it contained a libel; and

*(iii)that when the work was disseminated by him, it was not by any negligence on his part that he did not know that it contained the libel"*²⁹

In *Huth v Huth*,³⁰ the butler secretly read the defamatory letter sent in an unsealed envelop by the defendant to the claimant (his divorced wife), and the defendant was sued for defamation. However, he escaped liability as he was able to prove that a reasonable man could not have foreseen the butler's behavior.

²⁷ See *Cassidy v Daily Mirror Newspaper Ltd*.(1929) 2 K.B., p. 331; *Eyo v. Eastern Nigeria Information Services*.(1963) 7 ENLR, p. 144

²⁸ (1900) 2 QB 170 (CA)

²⁹(1900) 2 Q.B. p. 170 at 180; See also, *Awolowo v. Kingsway Stores Ltd* (Supra)

³⁰(1915) 3 K.B.p.32

3.3 The Plea of Justification

If the defendant can prove that the alleged statement is substantially true, therefore it is justified, as the plaintiff could not have suffered damage to a reputation he does not possess (*damnum absque injuria* - it is an injury without a legal remedy). In *Sule v Orisajimi*,³¹ the court said that where the defence pleads justification, it is admitting the fact that the publication is libelous of the plaintiff but the plaintiff has no reputation whatsoever.

However, the defendant does not discharge this burden by proving that he honestly believed it to be true, he must prove that it was actually true. In *Wakley v Cooke*,³² the defendant called the plaintiff a 'libelous journalist'. Though the defendant was able to prove that there was a judgment against the plaintiff for libel, but as the alleged defamatory statement meant that the journalist habitually libeled people, it was held that the defendant did not justify it.

3.4 Fair Comment regarding matters of Public Interest

A fair comment is an impartial expression of opinion or a conclusion in respect of matters that concern the public generally, it must not be an assertion of facts, but an honest expression of opinion, observation, or conclusion, based on genuine facts. It is a defence to an action for defamation concerning affairs of government, administration of justice, affairs of public institutions (such as hospitals, university, etc.). Such a comment must be of opinion and not a statement of fact, and it must be proved that the facts upon which the comment is founded or based, is true and the comment was fair, and was made in good faith and not being used as a cloak for personal attack on the plaintiff.³³ The comment must not be imputations of immoral character, or dishonorable motive against the plaintiff. i.e. "The Bank Manager admitted misappropriating the money deposited into the AAUA bank account, he is fraudulent"- this statement consists of fact, comment, observation / conclusion. However, this defence will not avail the defendant if it is a false assertion / allegation, such as: "Shola is a

³¹ (2019) 10 NWLR (Pt. 1681) 513 at 516 S.C,

³²(1849) 4 Exch. P. 511

³³ See *Thomas v. Bradbury Agnew and & Co. Ltd.* (1906) 2 K.B. p 627

thief”, without indicating how or why, or the basis of the opinion / conclusion. In *Nthenda v Alade*,³⁴ the defendants Newspaper publishers alleged that the plaintiff (a university Lecturer) was having immoral association with a female student. The defendant made a plea of fair comment but failed, as the court held that: “the whole of the alleged publication, from its caption to the last sentence contains salient and plain statements of fact and there is no iota of comment”

3.5 Privilege

The defence of privilege is designated to protect certain defamatory statements from legal action on grounds of public policy. In *Sule v Orisajimi* (supra), the Supreme Court stated that the defendant pleading the defence of privilege in a defamatory action, must specifically plead the facts on which the defence is based, whether ‘absolute’ or ‘qualified’, and in considering the defence of privilege, whether qualified or not, certain factors should be taken into consideration: the interest of any of the persons to whom the document was published and the circumstances of the matter in question:

3.5.1 Absolute Privilege

This relate to instances where public interest in freedom of communication is paramount, and thus demands that everyone should be able to speak or write without fear. This privilege is enjoyed by members of parliament (in line with the Bill of Rights 1689, as amended), and members of the judiciary (in terms of section 14 of the Defamation Act 1996, as amended) i.e. statement made with reference to judicial proceedings by any judge, advocate, parties or witnesses in the witness box, statement made in the course of proceedings of the legislature by members, a fair and accurate comment concerning proceedings publicly heard before a court, etc. This privilege does not extend to bodies exercising purely administrative functions such as medical function.³⁵

3.5.2 Qualified Privilege

This covers instances where an individual is obliged morally or statutorily to communicate information in terms of Section 15 of the

³⁴ (1974) ECSLR, 470

³⁵ *Saraki v. Soley* (1972) 2 U.I.L.R, p, 17

Defamation Act 1996 (as amended). i.e.a confidential report concerning an employee to an employer or to the relevant authority.³⁶ The basis for this defence is that, the defendant is under a legal, moral or social duty to communicate the defamatory matter to the relevant party, who also has a corresponding interest in receiving it.³⁷ The defendant may voluntarily communicate the defamatory statement without being solicited by the recipient, but the person who makes the communication and the person to whom it is made, must have corresponding interest / duty. According to Lord Atkinson, this reciprocity is essential.³⁸ Thus, the duty to communicate a defamatory statement, depends on the circumstances of the particular case. The inquiry in this regard is: ‘would a reasonable right-minded person in the position of the defendant have considered it his duty under the circumstances to communicate such a defamatory matter’? In *Greenlands v Wilmhurst*,³⁹ Hamilton J. held: “*There is no general rule that a statement which would be privileged if made in answer to an inquiry ceases to be so when the information has not waited to be asked*”. In *Economides v Thomopoulos*,⁴⁰ the defendant, a director of a company which was the former employer of the plaintiff, stated (in a letter) that the plaintiff was evading tax, and sent the letter to the Assistant Commissioner of Income Tax (though, the Tax office did not request for the information). Jibowu J. held that the letter was privileged. In *Ayoola v Olajure*,⁴¹ the plaintiff was a former employee of the defendant and later employed by another company who asked the defendant to forward to him, a confidential report concerning the ability and character of the plaintiff. The defendant revealed in the report that the plaintiff was dismissed based on poor performance and other improper conducts, and concluded that: “*we therefore doubt if she would be an asset to your company*” The plaintiff sued for defamation of character, but the court held that the defence of qualified privilege availed the defendant.

³⁶ *Jameel v Wall Street Journal*(2006) U.K.H.L, p. 44

³⁷ *Ayoola v Olajure* (1997) 3 C.C.H.C.J. p. 315

³⁸ Lord Atkinson in *Adam v Ward* (1917) A.C. 309 at 334.

³⁹ (1913) 3 K.B. 507 at 535.

⁴⁰ (1956) FSC, 7.

⁴¹ *Ibid.*

This defence will fail if the plaintiff proves that the defendant, in communicating the defamatory matter, was actuated by express malice, or the statement was unwarranted, false, unreasonable, or irrelevant for the occasion. Hence, it is labeled ‘qualified privilege’. In *Duyile v Ogunbayo & Sons Ltd.*,⁴² Nnaemeka Agu JSC held that material inaccuracy destroys a defence of qualified privilege. It is to be noted that the defence of qualified privilege under section 16 of the Defamation Law of Ogun State was designed to protect journalists who publish certain reports accurately. It affords no panacea for publication of libelous imputations and insinuations irrelevant to the said report. Once a newspaper goes into matters unconnected with, or irrelevant to the report, then that privilege which was designed for its protection to enable it do an honest and accurate reporting is gone.

3.6 Offer to Publish an Apology or Correction

This must be done before the court action or within a reasonable time afterwards. However, this is not a defence but, it can be used to reduce the damages payable. Thus, the offer should be entered before putting forward any other defence. If the offer is rejected by the aggrieved party, the defendant must prove that: the words were published innocently; the offer to retract the words by publishing an apology and amends was made timeously; and the offer has not been withdrawn.

3.7 Consent

Where the plaintiff expressly or impliedly, and unequivocally consented to the publication (i.e. where he invites the press for an interview, etc.); it is a good defence to defamation.

3.8 Death of the Plaintiff or Defendant

It is not possible to sue for defamation on behalf of a dead relative; hence this action is available only to living persons, unless the person bringing the action on behalf of a deceased is able to prove that the alleged defamation affected his own reputation as well. In *Momoh Bajehson v Captain Hakeem Otiko*,⁴³ the Supreme Court held that a non-existent / dead person cannot sue or be sued. Only proper persons,

⁴² (1988) 1 NWLR (Pt. 72) 601 at 614 SC

⁴³ (2018) 14 NWLR (Pt. 1638) 138 AT 142 SC

either natural or legal, can sue or defend an action. A dead human is no longer a person in the eye of the law, his personality has been extinguished by death.

3.9 Statute of Limitation

The limitation period for defamation actions varies. The action must be filed within a limited period after the publication, as specified by the Limitation Law of the particular state.

Other available remedy is injunction to prevent publication of the defamatory statement, and Seizure or destruction of defamatory matter or article.

4.0 Challenges of Use of Defamation in the 21st Century Administration of Justice

This paper reiterates the view that freedom of expression regarding matters of public interest is indispensable in a democratic society, being crucial for the actualization of socio-economic development of the society and realization of human rights and fundamental freedoms in conformity with the relevant provisions of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Human and Peoples' Rights, as well as other relevant provisions in national constitutions,⁴⁴ noting the importance of an independent and impartial judiciary to safeguard the rule of law and to protect human rights, including freedom of expression, and mindful of the need to protect people against damage to their reputation and not their subjective interests.

However, despite the aforementioned international provisions, in Nigeria, there are recurrent abuse of defamation laws by public officials and other persons in positions of authority whereby defamation laws are often utilized to pursue personal interests labelled "hate speech" 'blasphemy' 'suppression of protests' etc. and these are usually justified by governments as necessary to protect reputations,

⁴⁴ Lawrence Mute, Declaration of Principles on Freedom of Expression 2019: <https://achppr.au.int>>

According to Dapo Olorunyomi,⁴⁵ “Every law that constrains democracy, freedom and liberty cannot be sought to be morally legitimate even if they have notional political legitimacy” Meanwhile, defamation Laws, are allegedly still being used to victimise journalists and individuals,⁴⁶ thus discouraging criticism which is a vital factor that fosters accountability in a democratic society.

According to Garba Dambatta, the challenges posed by cyberspace defamation in Nigeria, include lack of a comprehensive demographic database, inadequate expertise in the area of cyber and security structure; inadequate inter-agency regional and international collaboration; lack of effective and functional forensic laboratories, techniques and manpower necessary for efficient investigation of cybercrimes cases.⁴⁷

There are various challenges which may impede the claims for defamation on the internet particularly where the defamatory statement relates to a pseudonym or in such instances where the defendant lives outside Nigeria. Cyber or internet defamation refers to any form of defamation committed on the cyberspace through the use of the internet.⁴⁸ The challenges with respect to defamation through cyberspace ranges from the issue of identifying the perpetrators and hold them accountable appropriately, variation in culture, and in such instances where the perpetrator is residing in another country, and the

⁴⁵Dapo Olorunyomi, Publisher, Premium Times: <https://thecjid.org/defamation-laws-and-the-media-what-you-need-to-know-about-the-defamation-law/>

⁴⁶Benedicta Akpede, “Defamation Laws and The Media: What You Need to Know About the Defamation Law” <https://thecjid.org/defamation-laws-and-the-media-what-you-needto-know-about-the-defamation-law/>

⁴⁷ The Executive Secretary was speaking at the 4th Edition of Security Experts Association of Nigeria yearly Conference, reported by Vanguard Newspaper, available at <<http://www.vanguardngr.com>>, accessed on 23/06/2022

⁴⁸ Dahiru Muhammad Sani, “Online Publications and the Challenges of Combatting Cyber Defamation in Nigeria” Cavendish University Law Journal Vol. 3 October 2023. Cyberspace mostly involves large computer networks made up of numerous worldwide computer sub-networks that assist in communicating and exchanging data. the internet is only one component of the cyberspace that helps in communicating information to an array of computers and other devices.

fact that the place where the material is downloaded is regarded as the place of publication.⁴⁹

Though, the Cybercrimes (Prohibition, Prevention) Act deals with some of the challenges and the law regulating defamation in the entire country is substantially uniform, there is no comprehensive legal framework to address issue of jurisdiction. Hence, where the perpetrator resides outside Nigeria, it will be an issue of inter-state conflict of laws, meanwhile, there is no comprehensive legislative provision under Nigerian laws regarding where defamation takes place on the internet.⁵⁰ Section 24 (2) (c) of the Cyber Crime (Prohibition, Prevention, etc.) Act, 2015 provides that:

“Any person who knowingly or intentionally transmits or causes the transmission of any communication through a computer system network containing any threat to harm the property or reputation of the addressee or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime, to extort from any person, firm, association or corporation, any money or other thing of value, commits an offence under this Act, and shall be liable for a term of 5 years imprisonment and/or a minimum of fifteen million naira.”

It is viewed that this legislative provision must be reviewed and updated.

In Australia,⁵¹ the applicable law is that of the place where the defamation emanates, which means the place where the defamatory material was downloaded into the computer of the person who used his browser to bring the material out of the web server.⁵² But in the United

⁴⁹ Aladokiye Emmanuel Gabriel-Whyte, *Towards Developing a Legal Framework for Internet Defamation*, *International Journal of Humanities and Social Sciences*, (May 2015) (4) (3) 94

⁵⁰ *Ibid.* Dahiru Muhammad Sani.

⁵¹ [2002] HCA 56, 210

⁵² Proomitr Sookdripaisarakit, *A Common Law Position for Choice of Law in Internet Defamation: The Case for Hong Kong*; *International Journal of Commercial*

States of America, the ‘single publication rule’ applies. This implies that the law of the place of publication of the material should be applied.⁵³

The various High Court Civil Procedure Rules in Nigeria address cases of internal conflict of law.⁵⁴ Accordingly, the Court with the requisite jurisdiction is the one where the defendant resides or carries on business.⁵⁵ The claimant must establish that the online defamatory material was accessed and downloaded by identifiable persons within the jurisdiction of the court.⁵⁶ The readers must be identifiable persons who may be called upon as witnesses. Also, the claimant bears the burden of establishing that the defamatory statement was seen or read by a third party.⁵⁷ In the United Kingdom, in the case of *Mohammed Hussein Almoudi v Jean-Charles Brisard & Anor*,⁵⁸ the Court held that “*the Plaintiff bears the burden of proving that the words complained of were read or seen by a third party. From that proposition it would appear to follow that, in the case of an Internet libel, it would be for the Plaintiff to prove that the material in question was accessed and downloaded.*”

However, in some jurisdictions such as India, the Supreme Court has held that “*Territorial jurisdiction does not remain confined to the place of actual defamation...the jurisdiction would be at both the places i.e. at the place where the actual defamation takes place and the place where such defamatory material is transmitted through website, telecast, etc.*”⁵⁹ In the Indian case of *Lankesh v Shirvappa*,⁶⁰ the

Law and Technology, (2014) (9) (3), available at <<http://www.rm.coe.int>>, accessed on 07/07/2022

⁵³ *Dow Jones & Co. Inc. v Jones Gutnick* [2010] 210 CLR 575

⁵⁴ See Order 4 Rule 4 *Lagos State High Court (Civil Procedure) Rules*, 2019, and Order 3 Rule 4, *FCT High Court (Civil Procedure) Rules*, 2018

⁵⁵ See Order 3 rule 4 of the High Court of the Federal Capital Territory (Civil procedure) Rules, 2018. The same is provided for in Order 4 Rule 4(1) of the High Court of Lagos State Civil Procedure Rules, 2019.

⁵⁶ Atoyebi. O.M, *Online Defamation: Emerging Jurisdictional Issues*, available at <https://www.omaplex.com.ng>. accessed on 02 February 2024

⁵⁷ *Ibid.* Atoyebi

⁵⁸ [2006] 3 All ER 294

⁵⁹ *SMC Pneumatics v. Joseph Kwatra* (Suit No. 1279/2001, District Court of Delhi).

Supreme Court of India stated that the test for the jurisdiction of the Court in online defamation cases is whether such statement has been downloaded by a third party. Thus, the aggrieved party must show that the online defamatory matter has actually been downloaded by a third party.⁶¹

5.0 Conclusion and Recommendations

In view of the aforementioned, the paper proposes as follows:

- (1) For effective enforcement of the defamation laws in Nigeria, it is viewed that the distinction between libel and slander be jettisoned. The court in England in the case of *Thorley v Lord Kerry*,⁶² disclosed its dissatisfaction with the age-long distinction between libel and slander, adding that “*it makes no sense but it has become well established for it to be removed from common law*”. In Scotland, in the case of *Brownlie v Thomson*,⁶³ it was held that all defamatory words whether written or spoken, is actionable. Also, the reviewer of the Defamation Act 2009 focused on how Irish defamation law can replace the old civil wrongs of libel and slander, which applied different rules as between written and spoken statements, with a single civil wrong of defamation.⁶⁴
- (2) Nigeria requires a comprehensive legal framework to regulate online defamation and harmonize the specific provisions of the laws regarding issues of jurisdiction.
- (3) The laws must be amended to compel ‘Internet Service Providers’ to track cybercrime perpetrators and reveal their identity where required.
- (4) No-one should be convicted of criminal defamation unless the claimant proves beyond a reasonable doubt, all the elements of the offence, as set out in the law. For instance, through previous legislative reforms, Ireland has abolished defamation as a criminal offence.⁶⁵

⁶⁰ 1999 (1) ALT. Cri.231

⁶¹ Ibid., Atoyebi. O.M; *Jameel v. Dow Jones Inc.* [2007] 1 WLR, 113

⁶² (1812) 4 Taunt 355

⁶³ [1859] 21 D 480

⁶⁴ Report of the Review of the Defamation Act 2009: Department of Justice. Pp. 12: <https://www.gov>

⁶⁵ S. 35 of the Defamation Act 2009 abolished the criminal offences of defamatory libel, seditious libel and

(5) The police and public prosecutors should not participate in the prosecution of criminal defamation cases.

(6) Imprisonment, deprivation of liberty, suspension of the right to practise journalism, unwarranted fines, and other severe penalties should never be applied by the court in defamation cases

(7) There should be legislative provisions for alternative dispute resolution mechanisms to facilitate settlements out of courts as such mechanisms are cheaper and faster alternative to court trial. In this respect, the reviewer of the Defamation Act 2009 focused on how Irish defamation law can develop the use of alternative dispute resolution processes and solutions, and avoid defamation as a “rich man’s law”: and tackle effectively the new and specific problems raised by online defamation”.⁶⁶

(8) Any arbitrary restriction on freedom of expression cannot be justified unless it can be established that it is necessary in a democratic society. Some countries have enacted legislative provisions to guarantee freedom of expression. It was revealed in the report of the review of the Defamation Act 2009 that Ireland ranks 12th globally for press freedom.⁶⁷

(9) In awarding costs in defamation cases, the courts should consider the effect of such award on freedom of expression, and the cost incurred by the defendants in defending such cases. Where the costs awarded to successful defendants cover only a small proportion of the actual legal costs of the defence, it can discourage further publication of information of public interest. In this respect, the reviewer of the Defamation Act 2009 focused on how Irish defamation law can best be reformed to avoid “*disproportionate awards and high legal costs exercising a “chilling effect” on freedom of expression, and particularly, on investigative journalism or public debate on issues of public interest.*”

(10) Under international law, it is well established that the guarantee of freedom of expression entitles journalists and others who obtain

obscene libel. See Cox, N. and McCullough, E., *Defamation: Law and Practice*, (2014), paras 1.25-1.26.

⁶⁶ Ibid. Report of the Review of the Defamation Act 2009, p. 11.

⁶⁷ “*Ireland ranks 12th globally in the Reporters Without Borders*” World Press Freedom Index for 2021: Report of the Review of the Defamation Act 2009: Department of Justice. Pp. 10:<https://www.gov>

information from confidential sources with a view to disseminating it in the public interest, to refuse to disclose the identity of a confidential source. Under no circumstances should this right be abrogated or limited in the context of a defamation case. However, where individuals do refuse to reveal confidential sources, they may still introduce evidence of the existence of these sources during trial in the court.⁶⁸

⁶⁸ Ibid. Dahiru Muhammad Sani, “*Online Publications and the Challenges of Combating Cyber Defamation in Nigeria*”