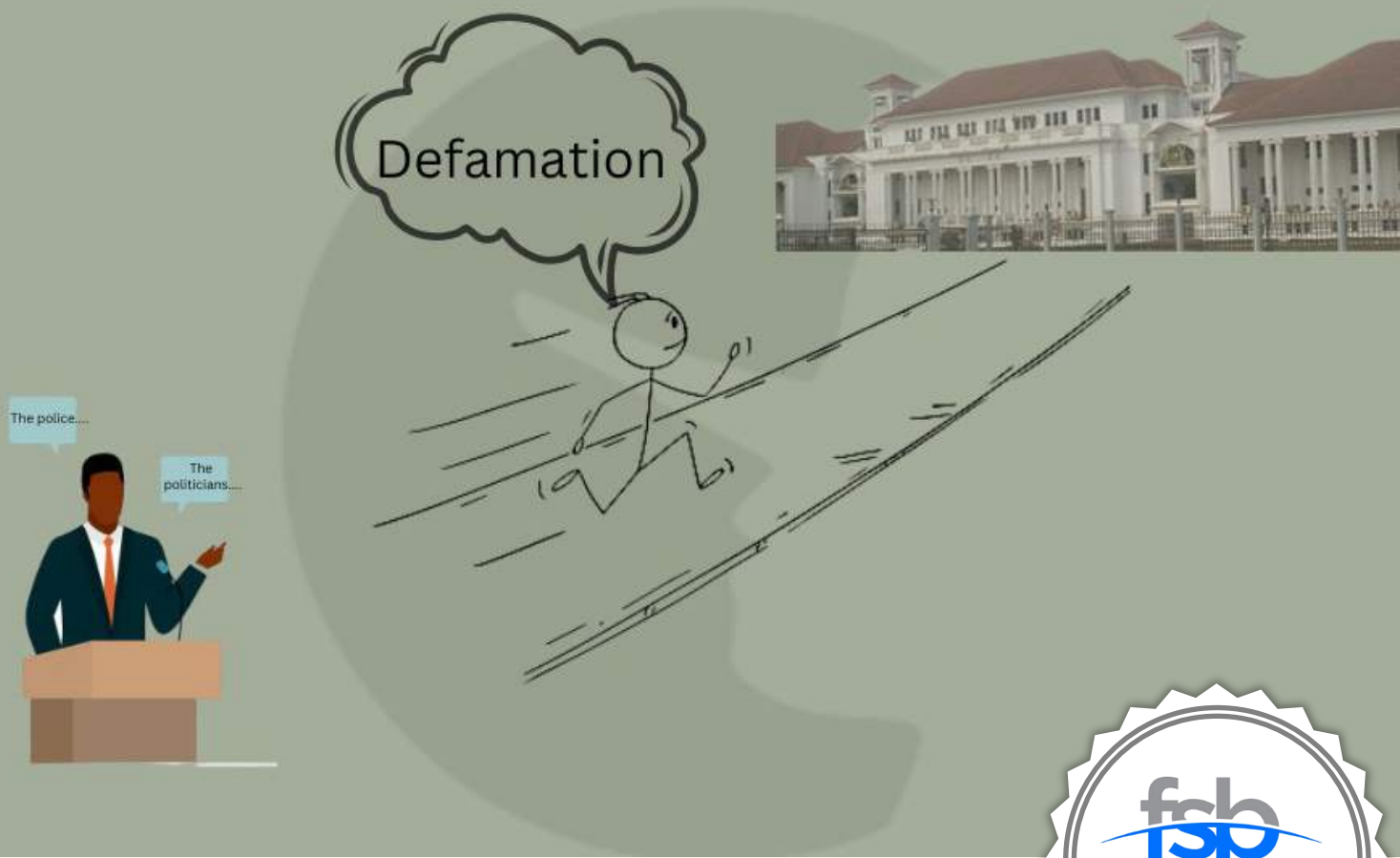


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Public Officials and Public Figures Suing for Defamation in

Ghana: A Chilling Effect on Free Speech?



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A: Introduction

Defamation is a subject that sounds very common in the ears of many of our citizens. Not a day passes that we do not hear of one person or the other threatening to sue someone for defamation for

ruining their reputation. Needless to say, Ghana still does not have a law on defamation¹. For that reason, the courts rely on the Constitution, common law principles on defamation, as well as customary laws to decide cases of defamation.

Every citizen has the right to protect their reputation against false publications. In recent times, there appears to be an increasing number of cases where 'public officials' and 'public figures' have sued journalists, media houses or other public officials or figures for damages for defamation. In many of those cases, the Courts have awarded huge amounts in damages in favour of such public officials.

This article discusses the trend where public officials and public figures are increasingly suing in defamation and successfully recovering huge amounts in damages. The article further discusses whether this development, if left unchecked, will not have a chilling effect on free speech in Ghana.

B: What is defamation and why it is necessary in society?

What is defamation? As the Supreme Court observed in *Owusu Domena v Amoah*², what constitutes defamation has been the subject of several interpretations by judges, academics and commentators alike. It is difficult to attempt a single definition that will capture all facets of defamation. For instance, the editors of Halsbury's Laws of England³ define a defamatory statement as follows: "[a] defamatory statement is a statement 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 disparage him in his office, profession, calling, trade or business." So, for a statement to qualify as defamatory, it must meet, at least, one of the tests in the definition.

Why are defamation laws necessary in society?

The Constitution recognizes the need to promote freedom of speech among citizens and the media and at the same time, protect the reputation of persons from false publications⁴. "The purpose of defamation law has been described as the reconciliation of 'mutually incompatible interests of freedom of speech and protection of reputation.' It could be said that freedom of speech, as a fundamental principle of democracy, should be protected primarily as a matter of public interest and that personal reputations should be protected as a matter of private interest. However, the protection of freedom of speech and the protection of personal reputations may both have a public and private purpose. ... [F]reedom of speech has a role to play in the maintenance of personal human dignity. The reputation of a politician ... may be crucial to the public interest. Therefore, defamation law aims to strike a balance in the protection of a complex set of public and private interests."⁵

C: Why public officials and public figures are held to higher standard of proof in defamation cases

In most countries with entrenched democracy and rule of law, it is very difficult for public officials to sue citizens who criticize their actions. In those countries, there is a defence in law known as 'the public official defence.'

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The defence states that, it is in the public interest that the actions of public officials are exposed to the public in a democracy. After all, the power to act as a public official emanates from the people. Publications are actuated by malice.

One famous US Supreme Court case - *New York Times Co. v Sullivan*⁶ - established the public official defence. The facts of the case were that, the New York Times newspaper published an 'advertisement' which included some false statements about police action and maltreatment of some students on demonstration in Alabama. The plaintiff, Sullivan, was one of three elected Commissioners of Police who were responsible for supervising the Police Department. Sullivan's name was not mentioned in the advert but he sued for defamation. Sullivan lost the case. The Court took the view that, there was a need to uphold free speech as a means of dispersing power, which is otherwise concentrated in the hands of government officials. The Court added that, "injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error." The only exception where a public official can succeed in an action for defamation is where she can prove actual malice.

Later, the public official defence was extended to cover 'public figures' as well⁷. This meant that, unless a public official or public figure could prove **actual malice**, - that is, that the alleged defamatory statement was made with knowledge that the statement was false or that the statement was made with a reckless disregard as to whether it was true or false - their case will fail.

It was in the light of the public official defence, and the inability of the plaintiff to prove actual malice, that the plaintiff's case was dismissed in *Agyapong v Loud Silence Media LLC & Others*⁸. In that case, the plaintiff, a Ghanaian MP called Agyapong, sued in the US for damages of US\$9.5 million for defamation

against Kevin Taylor and Loud Silence Media, the defendants. The defendants were said to have published defamatory matters about Agyapong, including allegations of murder, drugs, corruption, etc. When the defendants were served, the defendants filed an application to have the case dismissed for disclosing no cause of action. The Court dismissed the case and held that, as a public figure, Agyapong's case could only succeed if he could prove actual malice on the part of Kevin Taylor and his company (the defendants). Once Agyapong could not prove actual malice, his case could not stand and it was thus, dismissed. In reaching its conclusion, the Court relied on the case of *New York Times Co. v Sullivan*⁹.

D: Public officials and public figures in Ghana win defamation cases with ease: The chilling effect.

Contrary to the public official/public figure defence as used successfully in the cases discussed above¹⁰, in Ghana, there does not appear to be any distinction between citizens and public officials/public figures where the law of defamation is concerned. As such, cases of defamation that are filed by public officials are handled by the courts just like any other cases of defamation filed by ordinary citizens - the Yaa or Yaw on the streets of Ghana.

As will be demonstrated shortly, many public officials/public figures have won their defamation case without any *ratio* deciding that, they won because they had proved actual malice against their defendants. What is normally gleaned from the decision of the High Courts is the general opprobrium for the use of insulting or other deprecating words. But deprecating words do not prove actual malice. In fact, from most of the decisions, it appears the Courts rather find in favour of the public officials mainly because they are public officials and their reputations must be maintained!

E: Defamation cases won by public officials

It is worth mentioning a few of the recent cases in which public officials/public figures have won defamation cases.

1. *Mathew Opoku Prempeh v Samuel Gyamfi*¹¹
2. *Baba Kamara v Ibrahim Dey Abubakari*¹²
3. *Ibrahim Mahama v Ernest Owusu-Bempah*¹³
4. *Gabby Otchere-Darko v Kevin Ekow Baidoo Taylor*¹⁴
5. *Asiedu Nketiah v Western Publications Ltd (Daily Guide)*¹⁵
6. *Prof. Aryeetey v Prof. Owusu Oduro*¹⁶

F: Conclusion

Defamation laws are there to ensure that there is a fair balance between citizens' right to free speech and the need to protect people's hard-won reputation. But when it comes to public officials and public figures who sue for defamation, the notion is to hold them to a stricter standard of proving actual malice as was held in cases such as *New York Times Co. v Sullivan* and *Agyapong v Loud Silence Media LLC & Others*. But in Ghana, there does not appear to be any such requirement for public officials and public figures to prove actual malice before they can win defamation cases as demonstrated in a number of cases.

It is submitted that, in a fledgling constitutional democracy such as ours, a vibrant media and the citizens' right to freely express themselves is the only sure way by which we can hold our public officials accountable for their actions. If we continue to slap hefty damages against citizens and journalists who raise issues about the conduct and actions of public officers (without actual malice), it will have a chilling effect on free speech. When that happens, we stand the real risk of losing our citizens' role as gatekeepers who watch the watchmen. Of course, if the public official can prove that the publication was motivated by actual malice, as was the case in *Joe Bedu-Ansah v New Times Corporation & 2 Others*¹⁷,

then, by all means, the defendants must pay the price for their recklessness. As a nation, we should direct our energy into building strong institutions, and not building strong men and women to oversee weak institutions.

Footnotes

1. A Defamation Bill was pending in Parliament during the life of the 7th Parliament in 2020. The Bill was not passed into law and till date, Ghana has no law on defamation
2. [2015-2016] 1 SCGLR 790
3. 4th Ed. (Re issue) vol. 28, para. 10
4. See: Articles 18 (protection of privacy of home and other property), 21 (general fundamental rights and freedoms), 162 and 163 (freedom and responsibility of the media) and 164 which states: "The provisions of articles 162 and 163 of this Constitution are subjects to laws that are reasonably required in the interest of national security, public order, public morality and for the purpose of protecting the reputations, rights and freedoms of other persons."
5. See: Vicki Mullen, "Defamation of Public Officials and Public Figures: Special Rules and Free Speech in the United States and Australia" Occasional Paper No. 2 (August 1995) available at <https://www.parliament.nsw.gov.au/researchpapers/Documents/defamation-of-public-officials-and-public-figure/Defamation%20of%20public%20officials.pdf> (accessed on 3rd March, 2023)
6. [1964] 376 US 254, see opinion of Justice Brennan.
7. See: *Curtis Publishing Co. v Butts* [1967] 388 US 130; *Gertz v Robert Welch, Inc.* [1974] 418 US 323 where the Court held thus: "in some instances, an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case, such persons assume special prominence in the resolution of public questions."
8. Civil Action No. 1: 21 –cv-1205 ruling dated 21st March, 2022, US District Court for the Eastern Region of Virginia (Coram: Hon. Liam O'Grady)
9. See: Footnote 10 above
10. *New York Times Co. v Sullivan, Agyapong v Loud Silence Media LLC & Others*, etc. (Above)
11. Suit No. GJ/15/10/2019 judgment dated 13th October, 2022, HC, where the defendant was slapped with damages of GH¢500,000 for saying at a political party press conference that, one Seidu, who had been arrested by the Police in connection with the kidnapping of two Canadian girls in Kumasi was 'an errand boy' of Opoku Prempeh (the plaintiff), a Minister of Education. As it turned out, the said Seidu was released by the Police and was never prosecuted, much less convicted for kidnapping
12. An unreported decision of the High Court, Accra given in or around 17th April, 2019. Available online: <https://www.graphic.com.gh/news/politics/ghana-news-baba-kamara-wins-defamation-case-against-former-ndc-mp.html> (Accessed on 3rd March, 2023) – Damages awarded was GHS1.5 million against the defendant, a former NDC MP
13. An unreported decision of the High Court, Accra given in or around October, 2019. Available online: <https://ghanapoliticsonline.com/court-slaps-gh%C2%A2300k-fine-on-owusu-bempah-despite-group-in-ibrahim-mahamas-defamation-suit/> (Accessed on 3rd March, 2023) - Damages awarded was GHS300,000 against the defendant
14. An unreported decision of the High Court, Accra given in or around October, 2020. Available online: <https://ghanaxtra.com/2020/10/gabby-otchere-darko-wins-gh%C2%A21m-defamation-suit-against-kevin-taylor.html> (Accessed on 3rd March, 2023) – Damages of GHS1 million awarded against the defendant
15. An unreported decision of the High Court, Accra given in or around 27th February, 2014. Available online: <https://www.graphic.com.gh/news/politics/daily-guide-ordered-to-pay-asiedu-nketia-gh-250-000.html> (Accessed on 3rd March, 2023) – Damages of GHS250,000 awarded against the defendant. This is the case that brought about the "Kwasea bi nti" saga
16. An unreported decision of the High Court, Accra given in or around 27th October, 2022. Available online: <https://www.graphic.com.gh/news/general-news/former-legon-vcs-fight-over-contract-prof-aryeetey-wins-defamation-suit-against-prof-oduro-owusu.html> (Accessed on 3rd March, 2023) – Damages of GHS300,000 awarded against the defendant. This case is a sad reflection of our increasingly aloof society. The University of Ghana, with all its alumni of repute, could not ensure that this case was settled out of court. The premier University looked on while two of its distinguished former Vice-Chancellors battled it out in the High Court over claims of defamation
17. Suit No. AD 25/2010 judgment dated 4th November, 2011, HC

FSB NEWS

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This beautiful picture was sent to us by our cherished client, Cliff. He was so full of praise for PERSPECTIVES which he says, is now his most favourite read.

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