



REPUBLIC OF KENYA



**KENYA LAW**  
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**Otike v Kagunza (Civil Appeal E021 of 2020)  
[2023] KEHC 352 (KLR) (24 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 352 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL E021 OF 2020  
JWW MONG'ARE, J  
JANUARY 24, 2023**

**BETWEEN**

**PROFESSOR JAPHETH OTIKE ..... APPELLANT**

**AND**

**STANLEY NGOSEYWE KAGUNZA ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Honourable S. Wewa Senior Principle  
Magistrate in Eldoret CMCC. No.166 of 2017 delivered on 12th October, 2020)*

**JUDGMENT**

1. The appeal before this court is against the judgment and decree delivered on October 12, 2020. The respondent instituted the suit against the appellant in the trial court by way of a plaint dated February 22, 2017 seeking the following orders;
  - a. General, exemplary and aggravated damages for defaming the plaintiff
  - b. General damages for breach of contract and special damages in the sum of kshs 30,000/=
  - c. Cost of the suit and interest.
2. The matter proceeded to full hearing and upon considering the evidence presented before the court, the learned trial magistrate delivered judgment in favour of the respondent for the sum of Kshs, 20,000/= being an award for exemplary damages and the sum of kshs 20,000/= as Aggravated damages, costs, and interest.
3. The appellant, being dissatisfied with the whole judgment preferred an appeal vide a memorandum of appeal dated November 9, 2021 on the following grounds;
  - i. That the learned trial Magistrate erred in law and fact in failing to apply and consider the law regarding Special damages in her Judgment.



- ii. That the learned trial Magistrate erred in law and fact in failing to apply and consider the law regarding defamation in her judgment.
- iii. That the learned trial Magistrate erred in law and fact in failing to consider, evaluate and take into account the evidence and submissions of the appellant hence a gross award in the circumstances.
- iv. That the learned trial Magistrate erred in law and fact in failing to analyse and consider the authorities cited by the appellants, hence the erroneous award.
- v. That the learned trial Magistrate erred in law and fact in basing its decision on wrong principles of law thereby awarding damages without any legal basis and or any explanation of how the same was reached at.
- vi. That the learned trial Magistrate erred in law and fact as she misapplied the law on libel and slander hence the erroneous award of the damages.

### **Appellant's Case**

4. The appellant filed submissions which were adopted at the hearing of the appeal. The appellant submitted that the respondent failed to prove that there was any defamation at all. It was the appellant argument that looking at the pleadings, the plaint did not indicate what the date when the act of defamation took place, what the time was when he was defamed and where the place was when the purported defamation took place, making it difficult to place the occurrence of the event from whence the act of defamation took place. The appellant as such submitted that the suit was defective for lack of clarity or specifics as to where and when the cause of action took place. The appellant further submitted that there is a distinction between the tort of slander and libel in defamation. It was the assertion of the appellant that Slanderous statements are only made orally while a libellous act only will be deemed to occur when a statement is made in writing. He submitted that it was not clear whether the claim brought was seeking damages for Slander or Libel. He further stated that the evidence brought by the respondent was insufficient to sustain a claim for defamation. It was the appellants submission that although the respondent had provided a long list of witnesses but none of them testified especially those touted to have been present when the defamatory act took place hence rendering his assertions unsupported and unsustainable.
5. The appellant submitted that that the award of special damages in this matter was irregular and a nullity, since it is a requirement of the law that special damages must not only specifically pleaded and also proved by evidence during the trial. The respondent/plaintiff had sought for kshs 30,000/= in the plaint but at paragraph 14 of the plaint the particulars enumerated add up to an amount of kshs 20,000/=. During trial, the only receipts produced to support the claim, the respondent produced only two (2) receipts amounting to kshs 10,000 instead. The receipts so produced did not bear stamp duty stamps rendering them as not useful documents for failure to comply with the provisions of sections 19, 20 and 21 of the *Stamp Duty Act* Cap 480 Laws of Kenya. The appellant submitted that the respondent receipts cannot therefore stand as a prove of special damages at all. Further the appellant stated that failure by the respondent to provide a written contract in support of the claim for breach of contract rendered the assertions a nullity as there was nothing to support his alleged loss, therefore he was not entitled to any aggravated damages without prove of any defamation. He urged that the appeal be dismissed with costs.



## Respondent's Case

6. The respondent submitted that he pleaded specifically for sh. 20,000 being a refund of the tenancy deposit and 10,000 comprising of sh 5,000 being fees for a demand letter and sh 5,000 being for service of the demand letter on two occasions. The total amount claimed in the prayers in the plaint was sh 30,000. The fact of receipt of sh 20,000 by the appellant from the respondent is not disputed being a fact admitted in the pleadings and as such no further form of proof of the same was required by the respondent. The appellant himself in his evidence at pages 29 of the proceedings also admitted being in receipt of the said sum of money.
7. The respondent submitted that in order for the appellant to be entitled to retain the said sum of money he was bound to prove that a term of lease had been agreed on so as to warrant the giving of notice and the duration of the same before the tenancy terminated. He submitted that the appellant did not prove that such a term had been agreed on by the parties. The respondent further alleged that the appellant was also bound to establish that he met electricity bills and water bills incurred by the respondent but remained unpaid which he did not. Further, the appellant did not produce any unpaid outstanding bill in the name of the respondent that he had settled. As to the repairs the receipts for the same were not produced in evidence. The witness brought to confirm carrying out repairs in his evidence confirmed that he did not buy the items.
8. On the claims for the demand and service fees, the respondent submitted that the respondent pleaded and proved the same by way of receipts which were produced in evidence without any objection by the appellant on account of want of stamping. The appellant cannot now raise on appeal a matter he did not object on during the stage of production of the documents.
9. The respondent submitted that at paragraph 9 of the plaint the plaintiff pleaded the mode of the publication of the defamation was through the spoken words thus a slander. The place of the publication of the slanderous words was at the Eldoret central police and the evidence on record established that the respondent and the appellant met at the Eldoret central police Station where the appellant uttered the words complained of in the presence of PW2. The words in their ordinary and natural meaning clearly depicted that the respondent was a witch and engaged in sorcery despite being an Advocate who was a respected member of the society. He invited the court to find that the defamation was proved. He urged that the trial Magistrate despite having found that the tort of defamation had been established omitted to award general damages and he prayed that this court in the exercise of its powers under order 42 rule 32 of the [Civil Procedure Rules 2010](#) does make the said award in favour of the respondent as against the appellant. He asked that the appeal be dismissed with costs.

## Analysis And Determination

10. It is settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions. (See *Stanley Maore -vs- Geoffrey Mwenda*;

“the duty of the appellate court is to re-evaluate the evidence, assess it and make its own conclusions...”

The following issues arise for determination;

Whether the respondent established the necessary ingredients to prove the tort of defamation. Whether there are grounds to set aside the award for damages in the sum of kshs 30,000/- Whether the respondent established the necessary ingredients for the tort of defamation



11. Defamation has been defined in *Black's Law Dictionary 8th Edition* at page 448 as;

“the act of harming the reputation of another by making a false statement to a third person.”

A defamatory statement is defined in *Gatley on Libel and Slander 11th Edition* at page 38 as;

“one which is to the claimant's discredit; or which tends to lower him in the estimation of others or causes him to be shunned or avoided; or exposes him to hatred, contempt or ridicule ....”

It is common ground that in a suit founded on defamation the plaintiff must prove:-

- (i) That the matter of which the plaintiff complains is defamatory in character.
- (ii) That defamatory statement or utterance was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.
- (iii) That it was published maliciously
- (iv) In slander, subject to certain exceptions, that the plaintiff has suffered special damage.”

See *Kenya Tea Development Authority Limited v B O Masese & Company Advocates*, Civil appeal No 95 of 2006(eKLR) and *Mikidadi v Halfan & another* [2004] 2 KLR 496 at page 503.

12. From the record of the appeal, the defamation in the trial suit is alleged to have occurred as a result of the utterances of the appellant towards the respondent. The utterances were allegedly made in the presence of his colleagues, Felix Mukabane, Bernard Lagat and Edward Ombima at the police station, and one John Kwambai, a police officer.

13. I note that only PW2 corroborated the evidence on the utterances of the respondent but was not mentioned as one of the friends present. The other witnesses did not testify as to the utterances made. Further, there is no establishment of the exact date the defamation occurred and there is a disparity as to what statements were uttered. Every witness gave a different date and a varied statement. It is not clear when the respondent was allegedly defamed or that his reputation was affected in any way among the general public, friends and the community. From the record provided, none was tendered to establish how the words so uttered affected the respondent or at all.

14. I find that the trial magistrate erred in principle in arriving at a finding that the ingredients for the tort of defamation were satisfied.

#### **Whether there was breach of contract**

15. A breach of contract is committed when a party, without lawful excuse, fails or refuses to perform what is due from him under the contract, or performs defectively, or incapacitates himself from performing. No contract was produced in evidence during the trial and therefore the trial court erred in finding that the claim for special damages was merited. The main reason is that in order for the appellant to have been found liable to pay special damages, the respondent would have had to prove that there was indeed a breach of contract. In the premises, I find that there was no breach of contract.



**Whether the award for damages should be set aside**

16. The assessment of General damages is discretionary and in the case of Butt v Khan [1981] KLR 349 Law, JA held as follows:

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

17. The trial court awarded kshs 20,000/- as exemplary damages arising from the defamation. Having found that the trial magistrate erred in its finding on the same, it follows that these damages are set aside. In the absence of proof of breach of contract, the award for special damages is also set aside as the trial magistrate proceeded on the wrong principles.

18. Upon considering the submissions, record of appeal and all the facts, I find that the appeal succeeds in its entirety with costs to the appellant.

Orders accordingly.

**DATED, SIGNED AND DELIVERED ON THIS 24TH DAY OF JANUARY 2023**

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**J.W.W.MONG'ARE**

**JUDGE**

Judgment read in open court in the presence of;

Mrs. Khayo for the appellant

Mr. Mogambi for the respondent

Mr. Kimathi Court Assistant

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**J.W.W.MONG'ARE**

**JUDGE**

