



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(Coram: Gachuhi, Masime & Gicheru JJ A)**

**CIVIL APPEAL NO 118 OF 1990**

**SAMSON ODOYO .....APPELLANT**

**VERSUS**

**OJWANG' K'OMBUDO..... RESPONDENT**

(Appeal from the judgment of the High Court of Kenya at Kisumu

(Mr Justice R S C Omolo) dated 10<sup>th</sup> May, 1989, in

Civil Case No 59 of 1988)

**JUDGMENT**

This appeal arises from the decision of the superior court (Omolo, J) in a defamation suit by Samson Odoyo, (the appellant) against Hon Ojwang' K'Ombudo (the respondent). The appellant has by his petition of appeal challenged the learned trial judge's application of principle to the evidence adduced before him and his assessment and award of damages at Kshs 10,000/=. The respondent cross appealed and set out five grounds of appeal but the first four grounds were abandoned leaving the issue of quantum only for arguments before this Court.

The award of damages is a matter within the discretion of the trial court. However, as this is a first appeal it is incumbent on this Court to scrutinize and re-evaluate the whole evidence adduced at the trial and make its own independent findings thereon.

The learned trial judge found that the words complained of by the appellant were uttered by the respondent at the appellant's house late at night in the presence of the appellant's wife and daughters. It is common ground that those words were defamatory of the appellant in their ordinary meaning and amounted to slander. The effect of the slander was that the respondent in the presence of the appellant's family accused the appellant of planning to commit the criminal offence of murder. Such slander is actionable *per se* and no actual damage need be proved.

Section 3 of the Defamation Act cap 36 provides:-

“3. In any action for slander in respect of words calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of the publication, it shall not be necessary to allege or prove special damages, whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business.”

What damages ought to be awarded to the appellant for the slander? The trial judge was alive to the long list of public offices which the appellant had held and the fact that he was a man of substance. However, he held that the slander was published only to a very limited group who, in any event, did not believe it. The learned trial judge considered the fact that this group did not believe the slander was “a relevant fact to take into account in assessing damages”. Learned counsel for the appellant complains, and we agree with him, that in so holding the learned trial judge misdirected himself. In *J M Bendzel v Karta Singh* (1953) 20 EACA 53, the predecessor of this Court held following *Hough v London Express Newspaper Ltd* [1940] 2KB, 515 that a statement may be defamatory although the recipient may know it is unfounded. The respondent’s argument that the slander did not affect the appellant’s relations with his family to whom it was published is consequently untenable. On the contrary it appears to this Court that the appellant’s relations with his family as husband and father – a position of highest love, esteem, trust and faith was brought into question by the imputation to him of the serious plot to murder the respondent. It was thus relevant to the assessment of damages for the purpose not of minimizing the damages, as the learned judge held, but for enhancing them.

Regarding the status of the appellant, counsel complained that the learned judge’s approach was almost contemptuous and shows that he did not consider it at all. The learned judge said:

“I have taken into account the long list of public offices which the plaintiff says he has held and I suppose the plaintiff is a man of substance. But the slander of which the defendant is guilty was published only to a very limited group....”

As the appellant’s evidence about his business, membership of boards of governors of educational institutions, public offices including Parliament over nearly three decades remained uncontroverted, the learned judge’s remarks appear to misapprehend that evidence as, they suggest some doubt. He then goes on to water the evidence down by the limited publication of the slander.

Finally counsel submitted that the learned judge ought to have taken into account the conduct of the respondent before and during the proceedings as an aggravating factor in making an award of damages. In *Obongo v Kisumu Municipal Council* [1971] EA 93 this Court’s predecessor held that the case of *Rookes v Bernard* [1964] AC 1129 sets the law of Kenya as regards the award of exemplary damages. This latter case holds that exemplary damages are appropriate in two classes of case: oppressive, arbitrary and unconstitutional action by the servants of Government, and conduct by a defendant calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff, and that these classes should not be extended. The learned judge found that the parties were arch political rivals and that there was no justification whatsoever for the respondent’s visit to the appellant’s house late at night to utter the slander complained of. We are accordingly of the view that an award of exemplary damages was justified.

We have carefully analysed and re-evaluated the entire evidence adduced at the trial and considered the submissions of learned counsel and indicated our findings thereon. In all the circumstances we are of the view that had the learned judge not misdirected himself as indicated he would have awarded higher damages for the slander. Accordingly we enhance the damages to Kshs 40,000/-. We uphold the order of the superior court as to costs in that Court but allow the costs of this appeal as the appellant against the respondent.

Orders accordingly.

Dated and Delivered at Kisumu this 14<sup>th</sup> day of January, 1993

**J.M. GACHUHI**

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**JUDGE OF APPEAL**

**J.R.O. MASIME**

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**JUDGE OF APPEAL**

**J.E. GICHERU**

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**JUDGE OF APPEAL**