



**Nyamunga & 2 others v Onsongo (Civil Appeal 86 of 2018)  
[2021] KECA 107 (KLR) (22 October 2021) (Judgment)**

Neutral citation: [2021] KECA 107 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 86 OF 2018  
S OLE KANTAI, HA OMONDI & M NGUGI, JJA  
OCTOBER 22, 2021**

**BETWEEN**

**ROSE OGENDO NYAMUNGA ..... 1<sup>ST</sup> APPELLANT**

**JOYCE OLWEYA ..... 2<sup>ND</sup> APPELLANT**

**PAUL OGENDO ..... 3<sup>RD</sup> APPELLANT**

**AND**

**RICHARD B.O. ONSONGO ..... RESPONDENT**

*(Being an appeal against the Judgment of the High Court of Kenya at Kisumu  
(E.N. Maina, J.) dated 27th February, 2018 in H.C.C.C. No. 9 of 2014)*

**JUDGMENT**

1. The respondent, Richard B.O. Onsongo, filed suit at the High Court of Kenya, Kisumu following the publishing of two letters by the appellants. These letters which were similar in content word for word save for the signatories were dated respectively 18th and 19th February, 2014. The letters were addressed to the Registrar, High Court of Kenya, Nairobi. In the letter dated 19th February, 2014 authored by Hon. Rose Ogendo Nyamunga (the 1st appellant) under the tile “SUCCESSION FILE ON THE ESTATE OF THE LATE MANASON OGENDO BODO CASE NUMBER 213 OF 1991” several facts were set out to the effect that in 1991 3 brothers Walter, Tobias and Paul Ogendo filed a succession cause for grant of letters of administration in respect of the estate of their late father; they obtained grant; Tobias died that very year and was followed in death in 1999 by Walter; there was intermeddling with the estate by nephews Richard and Willis Obiero Ogendo; for proper administration of the estate the succession Court was asked by application to allow Mama Grace Ajwang, a step mother, to be a co-administratrix of the estate but her entry into the matter did not improve matters as she was semi-literate and her signature was forged often in documents filed in Court. The family had had enough and in December 2009 they held a successful family meeting where distribution of the estate was agreed



and lawyer P.J. Otieno was appointed to formalize that distribution in Court but in that process it was found that one of the estate properties had been sold by a sister in law leading to a report to various authorities. That letter concluded:

The facts that led us to the opinion of moving the case from Kisumu High Court to Nairobi High Court are as follows:

1. From what we understand, normally it's the beneficiaries who are supposed to appoint administrators; this is not in our case.
2. The length of time the case has taken to be determined has been unusually long.
3. The documents have been constantly removed from the file to interfere with proceedings by the staff at the Kisumu High Court, Tina.
4. There is unusual interest by several lawyers in Kisumu and we suspect bribery is taking place; the lawyers are:  
Kimanga Onsongo Anyul Ogutu Mboya
5. Death threats from Richard Ogendo, Richard Guya the new tenant and advocate.
6. Hence reason or a neutral ground. Thank you.

Hon. Rose Nyamunga M.P. Kisumu county

c.c. – The Chief Justice

The Registrar of the High Court Nairobi.”

The letter dated 18th February, 2014 under the hand of Mrs. Joyce Olweya (the 2nd appellant) and Mr. Paul Ogendo (the 3rd appellant) were in the same words as the one by the 1st appellant.

2. In the suit filed by the respondent he claimed that the words published by the appellant in their natural and ordinary meaning meant that he was a corrupt individual and lawyer; he was of questionable moral character individually and professionally who conducted his affairs through bribery with no moral capacity to practice law; he was untrustworthy. He claimed that he had been injured in his credit and reputation; he had been brought into public scandal, odium and contempt. He claimed that the appellants were reckless in printing and publishing those words and particulars of that recklessness were set out in the plaint. It was finally claimed that the appellants caused to be printed and circulated the said letters with the view, aim and design to unjustly and unlawfully malign, discredit and portray the respondent in bad light by discrediting his person, character and status in the eyes of right thinking members of the legal fraternity, judiciary and the public. It was prayed that the Court award general damages for defamation and also award aggravated damages.
3. The appellants delivered a joint defence where publication of the letters was admitted but it was denied that the words were defamatory of the respondent. It was claimed that the words were published on occasion of qualified privilege because the 1st and 3rd appellants were beneficiaries of the estate of the late Manason Ogendo Bodo; the 2nd appellant was one of the administrators of the estate; that the respondent was the lawyer for one of the beneficiaries of the estate; that the letters were written to judicial officers responsible for efficient administration of the Judiciary; at paragraph 5(e) and (d):

5(e) In the premises the Defendants, the Honourable Chief Justice and the Registrars of the High Court in Kisumu and Nairobi respectively had a common or corresponding interest in the subject matter of the letter



complained of in the reasonable protection of their own legitimate interests to the Honourable Chief Justice and the Registrars of the High Court of Kisumu and Nairobi respectively.

- f. The Defendants were therefore under a legal, social and moral duty, or in the protection or furtherance of a legitimate interest, to write/or published and copied the Letters dated 18th February, 2014 and 19th February, 2014 to the Registrar of the High Court Kisumu, the Honourable Chief Justice and the Registrar High Court Nairobi respectively.”

It was denied that the published words were malicious and it was stated that the words were fair comment made in good faith upon a matter of expression of opinion by the appellants and particulars were set out in respect of how Kisumu high court succession cause no. 213 of 1991 had been handled and it was prayed that the suit be dismissed with costs.

4. The suit was heard by E.N. Maina, J. who in a Judgment delivered on 27th February, 2018 allowed the claim. The Judge assessed general damages for defamation at Ksh.2,500,000 and awarded aggravated damages at Ksh.500,000.
5. It is those orders that provoked this appeal which is premised on Memorandum of Appeal drawn for the appellants by their lawyers Mwamu and Company Advocates where 7 grounds of appeal are taken. The Judge is faulted in law and fact by incorrectly applying the law and legal test on the case and issues before her thereby arriving at an erroneous finding on the issue of libel and slander; the Judge is said to have ignored submissions by the appellant and for ignoring binding precedent cited before her; that the Judge ignored the defence of justification and privileged communication; that the Judge erred in law and fact by finding liability against the appellants. In the next ground the Judge is said to have erred in law and fact by lowering the standard required to prove defamation in law and, in the penultimate ground it is said that the awards were manifestly excessive against the constitutional principle of access to justice and, finally, that the decision was against the weight of evidence.
6. Rule 29 of the *Court of Appeal Rules* requires that on a first appeal like this one from a decision of the High Court acting in its original jurisdiction we have power to re-appraise the evidence and to draw inferences of facts. That mandate has been the subject of many judicial pronouncements and the following passage appears in the oft-cited case of *Selle & Another v Associated Motor Boat Company Limited & Others [1968] EA 123*:

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

In testimony before the Judge the respondent stated that he was an Advocate of the High Court of Kenya having been admitted to the Roll of Advocates on 28th November, 1991; he practiced law in the name and style of Onsongo & Company Advocates; he was a family man and had served two separate terms as Chairman of the Law Society Kenya West Kenya Branch. He represented the East African Law Society in the East African Court of Justice and he represented many named corporate clients and had



never been a subject of investigation by any State agency. He was the lawyer for a beneficiary Stephen Ogendo in Kisumu High Court Succession Cause 213 of 1991; he and other counsel involved in the estate had filed a consent in Court on distribution of the estate as instructed by their respective clients but when, thereafter, he wanted to file his bill of costs the court file could not be traced forcing him to write letters to Court to avail the file. It was during one of the visits to the Court Registry in pursuit of the Court file that he was handed the 2 letters by a staff at the Registry. In the year 2014 he was the only Onsongo in Kisumu. He took issue with the words in the letters regarding bribery as he had never involved himself in corruption and it was he who had ensured that the matter in Court had moved forward. Prior to getting those letters from the Court Registry the appellants had not contacted him in any way to verify their assertion. Of the contents of the letters he said:

“The contents of the letter to any person reading it would perceive me as a very corrupt person, that I engage in bribery, is not of upright moral character, that I am untrustworthy and a person not capable of carrying out a clean practice of the law. In effect that means that I am not fit to have the clients I have. My colleagues see me as a crooked person. It has dented my reputation as an Advocate.”

He stated that by sending the letters to the Chief Justice and Registrar it created a permanent record of the Court. The appellants had been required to tender an apology and recant the contents of the letters through a publication but they had failed to do so. He asked for damages. He admitted in cross-examination that the letters were not addressed to him; they were not handed to him either by the Registrar or Chief Justice; he still practiced law as before.

7. In testimony before the Judge the 1st appellant said that she was a Member of Parliament representing Women of Kisumu County, elected in 2013. She was a daughter of Manason Ogendo (the deceased) and her brothers had petitioned to administer the estate. The process took long and there was intermeddling with the estate. She and the rest of the family were frustrated and decided to write to the Chief Justice and the Registrar. She said of the suit filed against them:

“There is nothing wrong with saying some Advocate in Kisumu had unusual interest in the matter. I said I suspected something was going on. Those who should have investigated my suspicion are the custodians of the case. I mentioned the lawyers who were in the case. I did not say Onsongo was involved in the corruption. I did not call him corrupt. I did not imply he carries out his practice in untrustworthy manner. I did not copy him the letter. I did not copy another individual. Our issue was could the file be dealt with. This was based on what was going on in the file. I did not say somebody had been bribed. If documents disappear mysteriously I suspect there was foul play.”

She did not circulate the letter and she denied that she was malicious in her action but she confirmed authoring the letter and delivering it to the Registrar.

8. The 2nd appellant admitted that she wrote the letter after the succession cause had taken over 20 years to be concluded. She took the letter to the Registrar and it was received by Registry staff.
9. The 3rd appellant also admitted being a co-author of the letter dated 18th February, 2014.
10. A Court official was called and testified on the movement of the Court file in the succession cause.
11. That is the evidence that was placed before the Judge and she made the findings we have set out.
12. When the appeal came up before us for hearing on a virtual platform on 27th July, 2021 learned counsel Mr. James Mwamu appeared for the appellants while learned counsel Mr. Sam Onyango appeared for the respondent. Both counsel had filed written submissions and what was left was a highlight of the



same. Mr. Mwamu submitted that it was not known to the appellants how the letters that were not addressed to the respondent had reached him. He referred to Article 35 (of the [Constitution of Kenya, 2010](#)) on access to information stating that the appellants were faced with a situation where the Court file on the succession cause disappeared often and documents were removed from the file. According to counsel the Judge did not analyse the evidence as the respondent continued to practice law as an Advocate yet the Judge had awarded aggravated damages. Counsel concluded by submitting that the awards were excessive and should be lowered.

13. Then it was Mr. Onyango's turn and he submitted that the letters were open and were not marked confidential so they could land on the hands of all at the Registry and be read accordingly. According to counsel the Judge had found that the respondent's reputation had been damaged, though not badly, and the damages awarded were appropriate.
14. We have considered the whole record, submissions and the law.
15. The appellants admitted that they authored the two letters dated 18th and 19th February, 2014. They denied that the words they had written were defamatory of the respondent and in the joint defence filed on their behalf they relied on Sections 14 and 15 of the [Defamation Act](#) which provisions are on a defence of "justification" and "fair comment". No evidence was however led on the defence of justification or fair comment.
16. As observed by the Judge in the impugned Judgment libel, is actionable without proof of damage. *Black's Law Dictionary* 11th Edition edited by Bryan A. Garner defines libel as follows:

A defamatory statement expressed in a fixed medium, esp. writing but also a picture, sign, or electronic broadcast. Libel is classified as both a crime and a tort but is no longer prosecuted as a crime. Also termed defamatory libel. The act of making such a statement; the unprivileged publication of defamatory matter by written or printed words; by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words...."

The same author says of "libel per se":

1. Libel that is actionable in itself, requiring no proof of special damages ...
2. Libel that is defamatory on its face, such as the statement "Frank is a thief".

The Judge analysed the evidence and found as fact that a lawyer "Onsongo" in the 2 letters was the respondent. This was not only because he stated so in testimony before her but it was a fact that the respondent was one of the lawyers in the succession cause representing one of the administrators in the estate. The appellants in any event confirmed in testimony before the Judge that they wrote the letters and complained of intermeddling with the estate by a number of lawyers and other persons including the respondent. We have already set out the relevant part of the letters that offended the respondent where the authors alleged that there was unusual interest in the estate by several lawyers in Kisumu and the authors suspected that bribery was taking place. The appellants were entitled to complain that the Court matter in which they were either parties or had an interest was taking long to be concluded. The letters they authored however went beyond a complaint on delay or misplacement of the Court file or Court documents. The letters went on to say lawyers and other persons including the respondent, were people who had an unusual interest in the Court file. They were not entitled to make that allegation and they admitted in Court that they had no evidence of corruption by those persons. It is on record that the respondent was the lawyer representing one of the administrators in the succession cause. He testified that upon instructions he and other lawyers involved in the succession cause filed a consent on



distribution of the estate. He certainly had an interest in the matter. He testified that he was entitled to his fees but that when he wanted to file his bill of costs he could not trace the Court file. While engaged in that endeavor, he was handed the two letters by Registry staff. The letters were addressed to the Registrar High Court Kisumu with copies to the Chief Justice and the Registrar High Court, Nairobi. They were not marked confidential in any way and they could be read by all and sundry who had access to the Court file in Kisumu and staff of the offices which the letters were copied to.

17. It was held in Kenya *Tea Development Agency Limited V Benson Ondimu Masese t/a B.O. Masese & Company Advocates [2008] eKLR* that a letter written by the appellant of the respondent to the Advocates Complaints Commission was defamatory even though the appellant was exercising its right to lodge a complaint against their lawyer to the said Commission.
18. The Judge analysed the facts before her and, citing some case law, she awarded general damages Ksh.2,500,000 and Ksh.500,000 aggravated damages.
19. The Judge considered the respondent's standing in society and the fact that he continued to practice as a lawyer; the fact that the appellants published the libel and continued to insist that they were justified in making the publications. Liability was proved to the required standard.
20. Assessment of damages is an exercise of judicial discretion and an appellate Court will not usually interfere with an award of damages unless it is satisfied that the Judge acted on wrong principles of law; has misapprehended the facts or has made a wholly erroneous estimate of the damages suffered. It is not for the appellate Court to consider what it would have itself awarded; it is whether the lower court acted on the wrong principles – See *Loise Wanjiku Kagunda v Julius Gachau Mwangi Civil Appeal No. 142 of 2003 (ur)*; *Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR*. This Court stated on the issue of an award of damages and how the appellate Court should deal with it in the case of *Butt v Khan [1981] KLR* that:

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.”

The Judge considered the factors we have discussed and made the award in respect of general damages. The same was not excessive in the circumstances at all.

21. The reason why the Judge awarded aggravated damages was the appellants had adamantly refused to apologize to the respondent before the suit and even after they were sued. That is a sound reason in law and there has not been any basis laid for us to interfere.
22. This appeal has no merit. We dismiss it with costs to the respondent.

**Dated and delivered at Nairobi this 22nd day of October, 2021.**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

**H. OMONDI**

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**JUDGE OF APPEAL**

**MUMBI NGUGI**



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**JUDGE OF APPEAL**

**I certify that this is a true copy of the original.**

**Signed**

**DEPUTY REGISTRAR**

