**Biwott v Clays Ltd**

**Division:** High Court of Kenya at Nairobi

**Date of judgment:** 20 December 2000

**Case Number:** 1067 and 1068/99

**Before:** Visram Commissioner of Assize

**Sourced by:** LawAfrica

**Summarised by:** W Amoko

*[1] Libel and defamation – Damages – Liability not disputed in court – Compensatory damages.*

*[2] Libel in court – Exemplary damages – Whether Plaintiff entitled to*.

**Editor’s Summary**

In 1999 the Plaintiff, a Minister in the Kenyan government, brought two separate actions against a total of six Defendants seeking damages for defamation arising from statements made in a book entitled “Dr Ian West’s Casebook”. The Plaintiff alleged that at page 88 the book contained words that, in their ordinary and natural meaning, were calculated to mean that the Plaintiff somehow participated in or was involved in the murder of the late Kenyan Minister for Foreign Affairs. The offending segment also allegedly contained words that implicated the Plaintiff in corruption. The Plaintiff’s testimony was to the effect that the words had damaged his reputation by portraying him as a murderer and a corrupt person.

The Defendants in the first action were the book’s British printer and publisher together with two

Kenyan companies. The two Defendants in the second action were W, a leading UK pathologist and S, a

British writer. W had been the pathologist on the Scotland Yard team that had been called in to investigate the murder of the late Foreign Affairs Minister. The investigation had never been completed and it had not been established how the deceased met his death. Though service of summons was effected in the UK on the British Defendants, they neither entered appearance nor filed any defences. The two Kenyan Defendants admitted liability and, on 12 July 2000, a consent judgment was entered against them requiring them to pay the Plaintiff KShs 5 million each and to make an unqualified apology for publishing the offending material. Default judgments were entered against the remaining Defendants and the suits were now before the Court for assessment of damages. On the Plaintiff’s application, the suits were consolidated pursuant to Order XI, rule 2 of the Civil Procedure Rules.

**Held** – (1) As liability was not at issue, the Court’s only concern was the question of damages payable to the plaintiff and whether or not he should be awarded exemplary damages. The fact that the plaintiff had accepted payment of damages from the two Kenyan defendants did not prevent him from proceeding with the suit against the remaining defendants. (2) In awarding damages for libel a court had to be guided by the principle that the damages must compensate the plaintiff for the injury to his reputation and the hurt to his feelings. Such damages were known as compensatory damages and were aimed at vindicating the plaintiff in public and consoling him for the wrong done; *John v MGN* [1996] 2 All ER 35 applied.

Though the assessment of damages was a complex matter, the principles governing the assessment of compensatory damages were: (i) the award must compensate the plaintiff for pain and suffering caused to him by the publication; (ii) the award should vindicate the plaintiff’s reputation in the eyes of the public

– *Cassell and Co. v Broome* [1972] 1 All ER 801 followed; (iii) the whole conduct of both the plaintiff and the defendant had to be considered from the time of publication to the time of judgment. The damages would be aggravated if the defendant partook in malicious and insulting conduct with such “aggravated” damages being aimed at compensating the plaintiff for additional injury going beyond that which flowed from the words alone – *Praed v Graham* 24 QBD – *Sutcliffe v Pressdram Ltd* [1990] 1 All

ER 269, *McCarey v Associated Newspapers Ltd* [1964] 3 All ER 947 followed; (iv) the court would consider any previous damages recovered by the plaintiff in order to ensure that he was not compensated twice for the same loss – *Lewis v Daily Telegraph Ltd* [1963] 2 All ER 151 applied; and (v) the court would consider the manner of the publication and the extent of circulation. Applying these principles to the facts of the case, the Plaintiff was entitled to a sum that would represent proper compensation and vindication for the serious injury to his reputation. (3) Where a defendant knows that publication is tortious, his conduct is calculated to make him profit that may exceed the compensation payable to the plaintiff, and he nevertheless proceeds to publish the words complained of, then a court will award exemplary damages; *John v MGN* followed. Though the award of damages was not meant to enrich the plaintiff and a reasonable relation had to be maintained between the wrong done and the damages awarded, this would not prevent the court from making a high award in a proper case. The defendant’s conduct after publication of the offending words in this instance merited the award of exemplary damages.

In the circumstances, the grave nature of the libels perpetrated against the plaintiff merited the award of compensatory damages in the sum of KShs 15 million and exemplary damages in a like amount of KShs 15 million. The Kenyan Defendants would be liable for no more than KShs 10 million as per their settlement and the First Defendant in the first action for no more than KShs 15 million, as exemplary damages had not been claimed against it. The Defendants would also be restrained from selling and circulating the book within the Court’s jurisdiction.

**Cases referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*Gicheru v Morton and another* HCCC number 214 of 1999

*Oraro v Mbaja* HCCC number 85 of 1992

***United Kingdom***

*Cassel and Co Ltd v Broome and another* [1972] 1 All ER 801 – **F**

John v MGN Ltd [1996] 2 AII ER 35 – **AP** & **F**

Lewis and another v Associated Newspaper Ltd [1963] 2 AII ER 151 – **AP**

McCarey v Associated Newspaper Ltd [1964] 3 All ER 947 – **F**

Mitchell v Hirst, Kidd and Rennie Ltd [1936] 3 All ER 872

Praed v Graham [1889] 24 QBD – **F**

Sutcliffe v Pressdram Ltd [1990] 1 All ER 269 – **F**