**EA Newspapers (Nation Series) Ltd v Opondo and others**

**Division:** Court of Appeal at Nairobi

**Date of judgment:** 29 November 1973

**Case Number:** 31/1972 (4/74)

**Before:** Sir William Duffus P, Spry V-P and Law JA

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**Appeal from:** High Court of Kenya – Madan, J

*[1] Defamation – Identification – Reference to office-bearers a reference to all six – Office-bearers*

*acting as such.*

*[2] Defamation – Innuendo – Criminal offence – Innuendo of special meaning not pleaded or proved.*

*[3] Defamation – Damages – Malice – Same principles as malice negativing qualified privilege.*

*[4] Defamation – Malice – Newspaper not liable for malice of freelance journalist.*

**JUDGMENT**

The following considered judgments were read.

**Spry V-P:** This is an appeal from a judgment and decree of the High Court, awarding the respondents in six consolidated suits damages for libel of Shs. 44,000/- each against the appellant. The present appeal is primarily against the finding of liability, and secondly against the quantum of damages. The words complained of appeared in a Sunday newspaper owned and published by the appellant company. They appeared under a headline “Luos Sack Nairobi Officials” and, as quoted in each of the plaints, read as follows: “The president of the Luo Union (East Africa), Mr. Paul Mboya, has dismissed the present officials (meaning the Plaintiff inter alios) of the union’s Nairobi branch and has ordered immediate elections for new officials. A statement issued in Kisumu by the assistant Secretary-general of the union, Mr. Philip Owili Magak, claimed that the Nairobi officials (meaning the Plaintiff inter alios) had been dismissed because of ‘too much indulging in politics’. Mr. Magak said that it had been noted with regret that in recent years certain officials (meaning the Plaintiff inter alios) of the Luo Union in Nairobi had gone beyond the union’s constitution by setting themselves up in opposition to the Government. ‘We wish to dissociate the Luo Union from any organisation which is hostile to the Government of the Republic’, Mr. Magak said.” The first three grounds of appeal concerned the question whether the words complained of sufficiently identified the respondents as the persons referred to in the publication. Mr. Sampson submitted that an innuendo as to identity should have been pleaded and that the words complained of were incapable in law of referring to the respondents and did not in fact refer to them. He complained that a late amendment had been allowed, supplying certain particulars, but, with respect, I do not think it made any material difference. On these questions, we did not think it necessary to call on Mr. Owuor for the respondents. These submissions all depended on a question of fact, whether the respondents were or had been the officers of the Nairobi branch of the Luo Union or only some of them. It was not disputed that the respondents had been the office-bearers of the branch, but Mr. Sampson contended that they had ceased to be such, either, under the constitution of the union, after a year in office or after dismissal, and, further, that some one hundred and eight locational representatives were also officials of the branch. As regards the first point, the respondents were undoubtedly performing the functions of the branch office-bearers at all material times and it is immaterial, on the question of identification, whether their appointments were valid or invalid, subsisting or not. As regards the second point, while I think that technically, for certain purposes, such as the Societies Act, the locational representatives may rank as officials of the branch, the evidence clearly shows that any ordinary, reasonable person would have understood a reference to the officials of the branch as meaning the office-bearers. The office-bearers were only six in number and I think any reference to them must be regarded as a reference to each of them. The judge so held, and I think he was right. He went on to remark, obiter, that even if he had held that the locational representatives were also officials, he would still have held that the words complained of pointed personally towards each of the plaintiffs. There, with respect, I cannot agree. As I understand it, a reference to a class is only to be treated as a reference to an individual member or members of that class where the members of that class are few in number and closely associated in their common activity, such as trustees of a trust, except when there is something in the publication itself or in the circumstances that points to all or any of the members personally. This is a matter of degree, and while a reference to a body of six office-bearers concerned with the day-to-day running of a society may fairly point to each of them personally, a reference to a body of a hundred and fourteen officials, who, on the evidence, only met together infrequently, could, in my opinion, not possibly be defamatory of each and all of them. A further point raised by Mr. Sampson on the question of identification was that while the first two paragraphs of the publication referred to “the officials” the third only referred to “certain officials” and the fourth was only a general policy statement not aimed at anyone. This is an attractive argument, but I do not think it is sound. I think the publication must be looked at as a whole and not split up into separate parts, and if the first two paragraphs clearly point to the first respondents, anything defamatory in the other two is bound to be associated with them. The main issue on the appeal was whether or not the words complained of were defamatory. The respondents did not plead any legal innuendo; they relied on the ordinary and natural meaning of the words. They did plead a popular innuendo, in that they alleged that the words complained of meant, in their ordinary and natural sense, that the first respondents had engaged in politics to an extent and in a manner which merited their dismissal from the Union, had set themselves up in opposition to the Government and thereby violated the constitution of the Union and had associated themselves with an organisation hostile to the Government, from which the Union wished to be dissociated. The judge seems to have treated the words as obviously defamatory and he only dealt with their meaning when dealing with the matter of damages. He then said: “What did the article do. What was the nature of the article. The imputations in it are of a criminal character. The libel exposed the plaintiffs to the risk of interrogation by police and security officers, investigation of their activities and mode of private life and unpleasant inquiries about them from other people. It subjected them to the indignity of being suspect as citizens. It exposed them to the fear of incarceration. It must have injected a deep sense of anxiety in their minds about their personal safety. A mind cast into a state of fear is nerve wracking.” With respect, I do not think the words complained of could possibly convey such a meaning, unless they conveyed an innuendo, that is, a legal innuendo, which would have had to be pleaded and proved. I think that, in the context of Kenya in 1970, the words complained of were mildly defamatory. It would not have been defamatory to say that the first respondents indulged in politics, because many respected citizens do so, but the use of the words “too much”, coupled with the successive references to opposition and hostility, does suggest something going beyond the constitutional rights of freedom of speech and opinion. Following the statement that the officials had been dismissed, it suggests that their involvement in politics would harm the Luo Union. On the other hand, I do not think the words convey an imputation of sedition or of any offence of a criminal nature: that would be going beyond the ordinary meaning of the words and call for the pleading of an innuendo. Next, Mr. Sampson argued that the plaints claimed that the first respondents had been disparaged in their capacity as officers of the Union. He submitted that this placed the onus on them of proving that at the material time they were officials of the Union. I agree that the onus was on the first respondents, but I think that they did sufficiently discharge it. Mr. Sampson’s arguments here were, first, that as the constitution of the Union provided for annual elections, their tenure of office had expired, and, secondly and in the alternative, that they had been dismissed. Although the officials were in default in failing to call elections, there is no provision in the constitution for automatic vacation of office and in the absence of any such provision, I think they continued in office, unless, of course, properly dismissed. There is no evidence at all of dismissal in accordance with the constitution: the suggestion was that they had been dismissed by the president of the Union, but under the constitution, he had no power of dismissal. Mr. Sampson next argued that the judge had erred in finding malice and consequently in awarding aggravated damages and also submitted that the damages were in any case so excessive as to call for interference. The finding of malice was five-fold. In the first place, the judge found evidence of malice in the gravity of the defamation and in the violence of the language used. I have already quoted the judge’s remarks on the natural meaning of the words used and indicated that in my opinion the words are incapable of such a meaning. It was presumably on the basis of his interpretation that he referred to violence of language but, with respect, I can see nothing violent in the language used. Language is said to be violent when it is highly exaggerated or emotional. The use of epithets such as “villain” or “scoundrel” or adjectives such as “wicked”, “horrible” or “disgusting” may be described as violent. Here, the words complained of appear factual: they may be incorrect and they may be defamatory, but they are not, in my opinion, violent. The judge also found an indication of malice in the behaviour of one Odera, a journalist in Kisumu. Assuming that his conduct showed malice, I do not think it can, in law, be imputed to the appellant. There are two East African decisions, somewhat differently worded, to the effect that the malice of its servants may be imputed to a corporation (*Puri v. Kenya Farmers’ Association* (1946), 22 (2) K.L.R. 1 and *Hoare v. Jessop* [1965] E.A. 218) and in England it was held, in *Egger v. Chelmsford*, [1965] 1 Q.B. 248 that an innocent principal is liable for the malice of his agent, acting within the scope of his authority, whether the agent is acting for his principal’s benefit or not (per Lord Denning at p. 261). These cases were all decided on the issue whether there was express malice defeating the defence of qualified privilege, but I see no reason to apply any different principle in deciding whether there was such malice as would aggravate the damages. I accept the principles set out in those cases, but I do not think they are relevant here. As Mr. Sampson pointed out, Odera, though regarded as an agent of the appellant, was a free-lance journalist who contributed to other papers and was paid by the appellant on a line basis. He was, I think, more of an independent contractor than a servant or agent and I do not think his malice can be imputed to the appellant. The judge also found evidence of malice, first, in particulars filed in support of a defence of fair comment, and, secondly, in the failure of the appellant to publish an apology. The particulars were filed in response to a request for particulars but one day later the defence of fair comment was abandoned and no evidence in support of the particulars was ever led. With respect, I do not think the filing of these particulars is itself evidence of malice and I see no significance in the withdrawal of the defence, since it was obviously inappropriate, as the words complained of were clearly not comment. Refusal to apologise may be an aggravating factor, but in the present case, there was no express refusal and the appellant did immediately publish a denial of the offending words by one of the respondents. Mr Sampson argued that to have published an apology would have been tantamount to an admission of guilt. With respect, I think, as the judge suggested, that the appellant could well have published a qualified apology, and might have been wise to do so, but do not think too much should be made of this. The judge also took into account that at an election held a little over three months later, the respondents failed to be re-elected. There was no evidence to establish that this was a direct result of the publication and I do not think it can be inferred. The evidence shows that the president of the Union had purported to suspend the respondents for failing to comply with the constitution of the Union and this indicates that there may well have been other reasons for their non-election. Finally, on the question of damages, the judge dealt at length with the distinguished careers and prominent status of the respondents. With respect, I think this was somewhat exaggerated on the evidence, and I note in this connection that one of their own witnesses, a Luo living in Nairobi and Archbishop of the Legio Maria, knew the names of only two of them. In my opinion, with respect, there was no justification for aggravated damages and I think the damages should have been assessed on the basis that this was a border-line case, with the words complained of only mildly defamatory. I would reduce the damages awarded to each of the first respondents from Shs. 40,000/- to Shs. 10,000/-. To sum up, I would dismiss this appeal so far as it is an appeal against liability but I would allow it so far as it is an appeal against the quantum of damages, which I would reduce to Shs. 10,000/- for each of the respondents. I would award the appellant one-half of its costs as against the respondents, with a certificate for two advocates. I would leave the order for costs in the High Court unchanged.

**Sir William Duffus P:** I have read and agree with the judgment of the Vice-President and with the order he proposes and as Law, J.A. also agrees it is ordered accordingly.

**Law JA:** I have had the advantage of reading in draft the judgment prepared by Spry, V.-P. with which I agree. The factors which influenced the trial judge in his assessment of the damages awarded seem to have been the following: (*a*) the meaning attached by the judge to the defamatory words; (*b*) the violence of the words used; (*c*) the failure to publish an apology; (*d*) the imputation to the appellant of malice found to have existed on the part of the author of the article, Mr. Odera, and (*e*) the prominence of the respondents in the public estimation. As regards (*a*), I am of the opinion that the popular innuendo pleaded in the plaint was made out, that the respondents had engaged in politics to an extent which merited their dismissal from the Luo Union, that they had set themselves up in opposition to the Government thus violating the Union’s constitution, and that they were hostile to the Government. But the judge went much further. He found that the imputations were of a criminal character, making the respondents liable to investigation and interrogation by the police and security officials, and exposing them to the fear of incarceration. No such meaning can be read into the ordinary and natural meaning of the defamatory article, and no legal innuendo alleging any such meaning was pleaded. As regards (*b*), I do not see how the language used in the article can be described as violent. No gratuitously offensive or scurrilous epithets were used. As regards (*c*), I agree with the Vice-President that a conditional apology could well have been published, without prejudicing the appellant’s contention that the words used in the article were not defamatory, but in my view whilst the absence of an apology may well justify not mitigating damages, it is not normally a reason for awarding aggravated damages. As regards (*e*) I consider, for the reasons given by the Vice-President, that it was not proved that Mr. Odera was an agent, acting within the scope of his authority, for whose malice the appellant was liable. He seems to have been a free-lance journalist, whose contributions were paid for on a line basis when used. Finally, I agree that too much was made of the respondents’ alleged prominence in public life. For these reasons, with respect, I consider that the judge was unduly influenced in favour of the respondents and awarded them damages which were manifestly excessive. I concur in the order proposed by the Vice-President. *Appeal allowed in part*

For the appellant:

*RN Sampson* and *JV Juma* (instructed by *Archer & Wilcock*, Nairobi)

For the respondents