

' SOME ASPECTS OF THE LAW OF DEFAMATION IN KENYA'

- (i) Common Law
- (ii) Statutory Law
- (iii) Any distinction? Is it substantive?

CHAPTER II Historical development of the Law of defamation.

- (i) What interests were originally protected?
- (ii) How cultural imperatives and legal norms shaped the nature of these interests?
- (iii) What remains of the law's original interests protected?

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CHAPTER III Distinction between libel and slander.

- (i) Nature of the distinction.
- (ii) Is it substantive?

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- (i) What was it intended to achieve?
- (ii) What provisions did that?
- (iii) Any similarities with English Act? Why copy English Act?

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CHAPTER IV Reform of the Law of defamation.

- (i) What should be aims of the Law of defamation?
- (ii) From above, does the Kenya Law achieve that?
- (iii) If not what are the hardships caused?

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PREFACE

I am highly indebted to Mr. Farouk Muslim, Lecturer, Faculty of Law, for patiently & willingly guiding me throughout the writing of this paper. I am also grateful to Miss Mercy Nyaga of H.C.D.A and Mrs Fatuma Kassim of MAWENZI SAFARIS LTD for undertaking the arduous task of typing it.

INTRODUCTION

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The law of defamation is primarily concerned with protecting interests in ones reputation. Like any other tort, the law of defamation or the administration thereof is a process of weighing two conflicting interests. The plaintiff demands protection from the court on the grounds that he is entitled to have his reputation untarnished while the defendant claims that he has unfettered freedom to air his views and to criticize where necessary. Sometimes this balancing exercise is disturbed by the element of public interest being thrown into the conflict. The result may be a tilt of the balance for or against the plaintiff depending on what the objects of the law are. Apart from protecting the reputation of the individual, the law of defamation was during the heyday of the court of ~~Star~~ Chamber in England (in the 17th and 18th centuries) concerned with maintaining peace and order in the society. The law was then used to suppress dissemination of libellous news. Development and changes have taken place since then and the law was accordingly affected. The idea of using criminal law to suppress dissemination of news was not dispensed with altogether. In Kenya, there is both civil defamation which protects individual reputations and criminal libel. S.194 of the penal code makes it an offence for anybody who unlawfully publishes any defamatory matters concerning another person with intent to defame that person. The aforementioned section of the penal code is invoked very rarely. Individuals are content to use civil law to protect their interests, a fact which may be motivated by the monetary reward that accrues therefrom. E. Veitch argues that civil defamation can also be used in the protection of the security of the state and of public officials. (1).

The purpose of this paper is to show that the law of defamation as it is cannot be said to be free of anomalies. It will also be shown that some of these anomalies are the result of the haphazard development of the law of defamation. The historical development of this tort has had great influence on the existing law today. Some of the oddities which are discerned in the law were incorporated from the English Common Law and still owe their existence from rules laid down in the 17th and 18th centuries in England.

The purpose of enacting an Act in 1970, namely the Defamation Act of Kenya, was to modify, liberalise and even replace some of the outmoded common law rules. It will be shown in this paper that the foregoing exercise was not carried to a logical and total success. There still remains in the law some areas which one cannot give a rational explanation other than that of historical accident. The areas which the author will probe with special interest is the distinction between libel and slander. This can only be dealt with adequately, in the Kenyan context, if the defamation Act is also examined.

With the foregoing in mind, the paper sets out to give a brief historical development of the law of defamation. The aim is to show a link, between the history and what is in existence now. Having shown this link, the author will proceed to consider the distinction between libel and slander, the basis of the distinction, and its consequences. A brief examination of the Defamation Act (1970) will be made for the purpose of considering whether the Act achieved the goals which it was intended to achieve. It is worth noting that the main aim of the Act was to consolidate the common law. Common law was found unsatisfactory especially in the newly independent country, because being unwritten it was rather vague and judges had to rely heavily on English precedents.

After highlighting the shortcomings, if any, in the law, the author will suggest some reforms which he deems necessary if the law is to achieve its goals and to play a meaningful role in the society.

FOOTNOTES

- 1) Civil defamation in Uganda - 7 E.A.L.J. No.1 of 1971.

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CHAPTER 1

DEFINITION OF DEFAMATION

What is Defamation?

(1) AT COMMON LAW

The law recognises in every body the right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit (1). The law of defamation therefore aims at protecting the reputation of persons. The law acts as an unofficial censor on the freedom of speech. Every individual has a right to express himself as he wishes; on the other hand, every person is entitled to retain his reputation un- tarnished. As in every definition, there is not a wholly satisfactory definition of defamation or a defamatory imputation. Salmond defined defamation as consisting "in the publication of a false and defamatory statement concerning another person without lawful justification".

(2). The foregoing definition is not adequate because one is compelled to look into the meaning of what a 'defamatory statement' is. This is a statement which lowers the esteem of another person and is made without lawful justification. (3). The classic definition of a defamatory statement is one which was advanced in PARMITER V COUPLAND. (4). In this case a defamatory statement was said to be one "which is calculated to injure the reputation of another by exposing him ^{to} hatred, contempt or ridicule". The defamatory words raises an imputation which leads to the plaintiff being shunned and his reputation lowered in the estimation of the right- thinking men.

The test of what is defamatory is objective. A right-thinking man of the society must think the statement was capable of defaming the plaintiff. The plaintiff may think that he has been defamed by the words uttered by the defendant but this per se may not be adequate if a reasonable man would not have construed the words to be defamatory. There is the obvious problem of trying to ascertain who is a reasonable man in the society. The problem has been solved to some extent in England by the use of the jury in the courts. The jury is taken to be composed of ordinary and right thinking Members of the society and whatever they deem defamatory is taken in Law to be defamatory. There is no jury system in Kenya. The judge therefore discharges the work of the jury.

It is difficult to say whether a judge, who belongs to the upper stratum of the society, can discharge competently the work which is normally reserved for the jury composed of ordinary people even from the working class. The words which the plaintiff complains to have defamed him are normally construed in their natural and ordinary meaning as popularly understood. (5). The meaning of a word may vary with the content and circumstances in which they are published. It is at times misleading to cite authorities of decided cases to show that a particular word has been held in a particular case to be defamatory. Due to changes with time, place, and society, the same word may not carry the same defamatory meaning as it had before, for instance, there was a time when reasonable men in Britain or U.S.A. could have held that the word 'communist' was defamatory. As a result of changes, political or otherwise, the word now can hardly be said to be defamatory in these countries. The meaning which is attached to a word must be which an ordinary reasonable man would have understood it. As Lord Reid said in LEWIS V DAILY TELEGRAM:

"The Ordinary man does not live in any ivory tower, and he is not inhibited by knowledge of the rules of construction. So he can and does not read between the lines in light of his general knowledge and experience of worldly affairs."(6)

On the basis of the foregoing, a statement may be defamatory although the recipient may know it to be unfounded. (7). Therefore if words are used which impute discreditable conduct to my friend, he has been defamed to me, although I do not believe the imputation and may even know that it is untrue,

It should be noted that a man is defamed if as a result of the spoken or written words that a substantial and respectable proportion of the society would think less of the man provided the reaction is not antisocial or irrational. What is a substantial and a respectable proportion of the society? Should it mean a substantial proportion of a community such as a tribe or the whole nation? (7a). A Masai may not feel that he has been defamed if the defendant calls him a stock thief but Kikuyu or a Luo may not feel the same. In deciding what a substantial proportion of the Society is, the judge should be guided by the same principles which guide him in ascertaining what a reasonable man is. Problems do arise as evidenced in an East African case where it was held that a statement could be defamatory even though only a person with a special knowledge of the circumstance could connect it with

the plaintiff. (8). The judge further stated that the general impression to be created in the minds of the right thinking persons must be the test and not too close analysis of the words used.

There are four essential elements which constitute a defamatory statement. A statement must be made, the same must be published, it (the statement) should be false and without any legal (law-ful) justification and it should be made by the defendant. The statements need not be made orally. In fact the law of defamation refers to the torts of Libel and Slander. The former generally deals with written statements while the latter is oral. Also in the Defamation Act 'words' include pictures, visual images gestures and other methods of signifying meaning. (9). These other methods of signifying meaning may include communication of ideas as was demonstrated in MUCKLE V. SUDAN POWER LIGHTING CO. (10). In this case, the defendants, a Power Lighting Company, used to send the bills to their customers. A Yellow card stamped 'express' was normally sent to bad customers. The defendant company sent such a yellow card to the plaintiff. He therefore sued stating that the yellow card was an innuendo which could be interpreted by reasonable men to mean that he was a bad payer of electricity bills. The plaintiff's argument was based on the plea that 'this type of demand card was known to all people in Sudan as send to only bad payers.' The Court found for the plaintiff.

For a defamatory statement to subsist a publication must be made. Publication is the act of making known to any other person other than the plaintiff himself, of the statement and its essence". It is not enough that the publication was sent to the plaintiff but a private and confidential communication to a single person is sufficient. Under the common Law and also in the Kenya Evidence Act a husband and wife are one. (12). A Communication between spouses cannot amount to publication. It must here be noted that the foregoing does not absolve a third party from liability if he makes a defamatory statement to the wife or husband of the plaintiff. (13). Publication is effective if the person who receives the Communication appreciates the contents thereof. In SEDGROVE V. HOLE the defendant send by a post-card to another person a defamatory statement about the plaintiff. The plaintiff was not expressly mentioned in the post card. The court held that there was no effective publications since the people who read the card did not know who was being defamed. (14). The same goes for instances where

publication is received accidentally e.g. where A is talking to B and unknown to A, C over hears the defamatory remarks. Though this may not be a publication, whether or not B is defamed depends on the carelessness of A. A situation similar to the foregoing was discussed in HUTH V. HUTH (14a).

INNUENDOS

There are some statements which are p rima facie innocent and are not actionable unless they have a latent or secondary defamatory meaning which the plaintiff can sufficiently prove in Court. These statements may connote defamatory imputation only by reason of some special knowledge to those the statements are published or due to some special meaning or inference to be attached or drawn from the words. In such a case the plaintiff sets forth to explain clearly the defamatory sense which he attributes to the statement. Such an explanatory statement is called an Innuendo. Where the plaintiff fails to prove the Innuendo, he will not necessarily be precluded from succeeding in the action for he can in such a case, treat his unproved innuendos as surplusage and contend that the words are defamatory in their natural and ordinary meaning. (15). Fraser on Libel and Slander 7th ed. states that "no innuendo is necessary where the words complained of are defamatory of the plaintiff in their ordinary meaning" .(16).

(ii) UNDER THE DEFAMATION ACT

The above definition of defamation was evolved in English common Law. It is at this juncture, pertinent to look into the definition of defamation in other branches of Law, namely in the Defamation Act (Cap 36) and customary Law defamation if any. The Kenya Defamation Act (1970) did not define defamation. (17). The Act has what looks like a preamble and states that it is an "Act of Parliament to consolidate and amend the statute Law relating to Libel, other malicious false hoods." This preamble perhaps was aimed at giving the reasons for passing the Act but did very little to explain some of the words contained therein such as 'defamation', 'Libel' and 'Slander'. Without the def. defamation in the Act, the Courts are bound to rely on the English common Law when it becomes necessary to get these meanings. The doctrine of stare decisis also demands that previous decisions be followed. The Act defined 'words' to include pictures, visual images and other methods of signifying meaning. This definition was a development of the general meaning attached to Libel and Slander. (18).

(iii) CUSTOMARY LAW

Under Customary Law, defamation as known today did not exist as a wrong. Customary Law was not so much concerned with protecting interest in reputation but was rather concerned with protecting injured feelings and dignity. SP
The law of defamation does not protect injured feelings and dignity but is mainly concerned with reputations. The main purpose of the law is to maintain peace in the Society, otherwise persons who feel that they have been defamed may take the Law in their hands. It is, however, true to say that under customary Law it was wrong to utter words showing disrespect to elders or to use abusive or insulting words against another person. This Customary law, cannot, strictly speaking be equated with defamation. There has been a tendency among many people to confuse mere abuse or insult with defamation. In PARKINS v SCOTT it was held that vulgar abuse or insult does not amount to a defamatory statement. (19). On the same subjects, Lord Bramwell SP observed thus "to my mind, the word abuse does not convey a definite meaning, it is not a word of art, in popular language, it means calling names; abusing by words. Insult or abusive language consists in words or conduct offensive to a man's dignity. It therefore seems that customary law protected the injured feelings of the complainant. The Idea was to keep peace in the community and avoid social disruption which could result from people settling disputes in their own way. It further seems that although the law of defamation protects reputations and the customary law protected injured feelings and dignity, the end result was one. The person's estimation in the society was protected and thus peace was maintained.

(iv) WHO CAN BE DEFAMED?

Every person in being can be defamed. The nature of defamation cases is so personal that in English Law, words of defamatory nature directed to a dead person cannot sustain an action by relatives who cannot prove that their reputations have been tarnished. (20). There being no express provisions to the contrary in the Defamation Act (Cap 36), the same principle applies in Kenya. A trading corporation being a legal entity is capable of being defamed. (21). The only difference between a Corporation and a living person is that the former has no social reputation but has a commercial one. For example, a Corporation cannot succeed in an action if the defendant called it a murderer, a drunkard or even a prostitute. Lopen L. J. put it aptly when he stated that a statement "must attack the Corporation in the method of conducting its affairs, must accuse it of fraud or mismanagement or attack its financial position." (22). A trade union just like a corporation can sue for unjustified attacks of its activities. (23).

FOOT NOTES

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- (1) SCOTT v SAMPSON 1882 IH & C, (1882) 8 QBD at P. 503
- (2) Salmond on the Law of torts: 11th ed by R:F.V. Heuston.
- (3) Lord Atkin in SIM v STRETCH (1936) 52 T.L.R. at 671.
- (4) (1840) 6 M & W 105 at Page 108.
- (5) Adongkaro v Astles (1970) E.A. 374.
- (6) (1964) AC 234.
- (7) Hough v. London Express Newspapers Ltd (1940) 2 KB 507
Bondezel v Singh (1953 20 EACA 53.
- (7a) See B.K.M. Kiwanuka v. Hon. A.M. Obote & another case No. 315 of 1965.
- (8) East African Standard V. Gitau (1970) E.A.
- (9) Section 2 of the Act.
- (10) Sudan Digest 1953/4.
- (11) PULLMAN v. HILL (1891) 1 QB 524.
- (12) Section 130 Kenya Evidence Act Cap. 80. This Section makes Communications between husband and wife privileged.
WEHAK v, MORGAN (1888) 20 QBD 635.
- (13) WENMAN v. ASH (1853) 13 CB 836
WATT v. LONGSDON (1930) 1 KB 139.
- (14) (1901) 2 KB 1
- (14a) (1915) 3 KB 32
- (15) Gatley on Libel & Slander 6th ed. Paragraph 119 Page 67.
- (16) Page 18. Quoted with approval in Odongkaro v. Astles (1970) E.A. 374.
- (17) Cap 36.
- (18) Section 2 of the Act.
- (19) 1862 I H & C 153.
- (19a) Ibid
- (20) Porters Committee's report on defamation, Paragraph 27.
- (21) South Hutton Coal Co. v. N.E. News Association Ltd. 1894 1 QB 133.
- (22) See above case at Page 141.
- (23) National Union of general & Municipal Workers v. Gillian (1946) KB 8.

CHAPTER 2

HISTORICAL DEVELOPMENT OF THE LAW OF DEFAMATION

The law of defamation in England was evolved to protect persons in high positions and in effect the law aimed at preventing the dissemination of treasonable or seditious libel. It will be found that in the reign of Edward 1 (1272 - 1307) the Statute of Westminster was, inter alia, directed against the "diversions of tales whereby discord or occasion of discord have thence arisen between the King and his people or great men of his reign" (1) In the following years, such as in the reigns of Richard II (2) the Statute of Gloucester declares "that every deviser of fake news, of horrible and false lies of prelates, dukes, earls, barons and other nobles and great men of the realm shall be punished. "In 1389 (3) another Act was passed for those who slander "great men!"

not added

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The aforementioned statutes were not intended to protect private reputations by means of civil actions and the punishments of such offences were severe (4). The real purpose behind those statutes was to protect persons, who on account of their own greatness or the lowly positions of their defamers could not avail themselves of such redress as was available to them presumably in the local courts (5).

During the period before 1500 A.D. most of the cases of defamation were heard by local courts. Up to 1066 A.D. similar courts and ecclesiastical courts were not strictly separated. Defamation cases were mostly concerned with the punishment of insulting words and abusive language. These courts gave adequate protection to the persons defamed for they not only punished insults but also gave the plaintiff a remedy even though no disgrace was suffered as where the words resulted in financial loss (6). Ecclesiastical courts also exercised some jurisdiction over defamation cases. The term "defamatus" in Church terms connoted "that ill reputation which was itself sufficient basis for a charge of sin!"

The jurisdictions of Ecclesiastical Courts was slowly diminished as a result of the King's policy to usurp more and more jurisdiction from the local and ecclesiastical courts. In the King's Court themselves no redress was offered for defamation (8). The foregoing was the position before 1500 A.D. and it, appears that defamation cases were only dealt with in local courts and ecclesiastical courts though the powers of these were slowly usurped by the Kings Courts.

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(i) COMMON LAW COURTS

After 1500 A.D. the Common Law courts allowed a remedy for defamation which took the form of an action on the case for words. (9). The action for words was first taken in 1508 A.D. Before this date, that is between 11th century and 14th century, action for defamation could only be brought at common law if only accompanied by some overt act such as assault or injury to property. No distinction was made between libel and slander. Damage was sine quo non of the action and unless the plaintiff could prove that he had sustained damage as a result of the words complained of he failed. This, in effect, meant that a publication must have been made to a third party otherwise there would be no damage, secondly that truth was a complete defence and thirdly that the action died with the person. Actions for defamation became so numerous that by the end of the 16th century judges were showing determination to stop the tide. (10). An eminent judge of that period Chief Justice Coke stated that, "we shall not give more favour to actions now being too frequent." (11). In order to discourage the flood of these actions the judges started to give the words strained constructions. Absurd views, were taken as to what damage could be natural and probable consequences of the alleged defamation (12). This attitude was coupled with a very strict view as to what damage would and what damage would not be sufficient to sustain an action. Save in exceptional cases, nothing short of proof of social damages sustained as direct result of words complained of would enable the plaintiff to succeed (13).

(ii) LIBEL

The law of libel was evolved in the Court of the Star Chamber during the 16th and 17th centuries. The invention of printing in the 16th Century was accompanied by great intellectual thinking. Libel was treated as a crime and the Courts were mainly concerned with stamping out sedition. Large number of political writings appeared in the form of poems and pamphlets causing political crises. Duelling had also increased and led to breaches of the peace. Sending of duelling challenges was therefore forbidden under the law of libel. It was the duty of the Star Chamber to punish the people who disturbed the natural order.

In 1559 (14) it obtained power to punish seditious words which it did with fervour and efficiency. The view of the Star Chamber was that no defence was possible for political libels. Truth was therefore no defence. The action was primarily Criminal in nature but compensation was occasionally awarded to the offended party. A clear distinction was not made between Civil and Criminal actions. The primary concern of the Courts was to punish conduct which led to the breach of the peace.

The court of the Star Chamber was abolished by the Act of Abolition of the Star Chamber in 1641. The abolition left a vacuum since the government was made incapable of silencing its critics. Censorship of the press was still needed but the problem was that the common Law only entertained Civil actions, for the compensation of the injured party. The nature of the libel in Star Chamber as said earlier was Criminal. The common Law Courts, unlike the Star Chamber made a distinction between Private and Criminal law. Much of the work done by the Star Chamber had permanent value and a good deal passed into the common law. Libel had already been established as a legal wrong and in King v. Lake (16) the common Law Courts recognised libel as a Civil wrong which was actionable without proof of special damage. The distinction of libel and slander will be discussed fully in the following chapter.

There were three main differences between the law applied by the Star Chamber and the common law. Firstly, truth did not constitute a defence, secondly, publication of a third person was never regarded as essential (the main element of criminal libel being the statements complained of were calculated to cause a breach of the peace.) Thirdly, the death of a person defamed was no base to proceedings. *now clear*

(iii) LEGISLATION AND IMPORTANT DECISIONS

The foregoing was the position until the passing of the 18th century (17). As this century passed the dissemination of printed matter and the rise of a more literate society presented more problems particularly in the field of newspaper reporting. The concept of privilege reporting emerged. The Parliamentary Papers Act, 1840, was the first measure which accorded privilege to any report however defamatory. Other measures were passed which created a further defence or partial defence for defendants in

libel proceedings. These defences were embodied in the Libel Act of 1843 and the libel Act of 1845. The last measure was passed in 1855 under which the ecclesiastical courts were finally divested of their remaining jurisdiction in defamation cases.

The most important measure to newspapers published was the Law of Libel (amendment) Act (1888). This Act accorded privilege to fair, accurate and contemporaneous reports of judicial proceedings published in newspapers and extended privilege to a number of other reports such as reports on public meetings. The Act also contained other provisions and was a considerable step forward in the provisions of the defence of privilege for certain classes of reports and but for this, newspapers and other published would have been considerably tampered with in their dissemination of news. The Act was further extended in 1952 (19). In 1891 the Slander of Women Act was enacted. The Act, added to the excepted cases in which a slander action could be maintained without proof of actual monetary damage, i.e., words which imputed immorality or adultery to any woman or girl.

In the 20th Century, an important decision was made in HULTON & CO. v. JONES (20). The effect of this decision was that the intention of the author publisher or printer matters not when defamatory words as published are such that reasonable men would take them to apply to the complainant. This decision was followed by another case of Cassidy v. Daily Mirror Newspapers Ltd. (21). Development of the defamation law in the 20th century can only be inferred from cases decided in the turn of the century. For instance in 1887 (22) a decision which dealt with yet another defence was made (23). The defence of fair comment upon a matter of public interest and the test as to whether the matter complained of is fair comment or not is contained in the same case as per Lord Esher who stated that "every latitude must be given to opinion and to prejudice and then on ordinary set of med with ordinary judgement must say whether any fair man would have such a comment."

(iv) GROUP LIBELS

The Law of defamation in regard to group or class libels was classified by the decision in KNUPFFERS v. LONDON EXPRESS NEWSPAPERS LTD. (24). An essential ingredient of an action of defamation is that the plaintiff should prove not only publication to a third party but also that the words complained of have been understood to refer to him in a defamatory sense. In Knupffer's

case it was determined that where defamatory words are written of a class of persons it is not open to a member of that class to say that they were written of him unless the words although they purport to refer to a class yet in the circumstances of that particular case in fact refer to the individual. Because of the erratic nature of the development of defamation law, the Porter Committee of the Law of defamation was appointed (25). The report was published in 1948 and it led to the Defamation Act of 1952. This Act is now the basis of English Law on Defamation and to a larger extent the Kenyan Law as I shall endeavour to show later.

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FOOTNOTES

- (1) 3 E.D.W. I c 34.
- (2) 2 Ric II c 5
- (3) 12 Ric II c 11
- (4) Punishment could be in the form of hanging drawing and quartering the offender, burning him on the fore head, cropping his ears, slittingh his nose or by fine and imprisonment.
- (5) These local Courts were the Manorial Courts which entertained Civil actions for damages at the instance of the person defamed.
- (6) Bhavdara Ranchod - The Foundation of the South African Law on Defamation at page 104.
- (7) Plucknett - A concise History of the Common Law at Page 484.
- (8) In 1295 the question came before the Court. It was held that "in the realm it is not the practice to plead cases of defamation in the King's Court." See Parliamentary Rolls (i) 133 of Pollock and maitland.
- (9) This action, according to Lord Porter was adopted because of the fear that the ecclesiastical Courts would take over the Jurisdiction formerly excercised by Local Courts.
- (10) In 1585, C.J. Wray said "The judges are resolved that actions for scandals should not be maintained by any strange construction and arguments nor any favour given to support them for in these days they are more bound than in times past."
- (11) Croft v. Brown 3 Bukstrode 167.
- (12) e.g. If by any fault of construction a non-defamatory sense could be given to manifestly defamatory words this was invariably done. PF Carter-Ruck: Libel and Slander, Page 40.
- (13) P.F. Carter - Ruck Page 40.
- (14) This was under the last re-enactment of the statute Scandalum Magnatum.
- (15) Bhavdra Ranchod: Foundations of the South African Law of Defamation at Page 111.

- (16) (1668) Hadres 470.
- (17) An important Act was passed in 1792, the Foxes Libel Act which ruled that it is for the Judge to determine whether the matter published is capable of defamatory meaning and for the jury to determine whether the words are defamatory.
- (18) 18 and 19 Vic. C 41.
- (19) The Defamation Act.
- (20) (1910) A. C. 20.
- (21) (1921) 2 K. B. 331.
- (22) MARIVALE v. CARSON (1887) 20 QBD 275, PP 280-1.
- (23) The case dealt with defence of Justification and fair comment.
- (24) (1944) AC 116.
- (25) Prosser on Law of Torts PP 737 argues that there is a great deal of the law of defamation which makes no sense. He argues that actions for defamation developed according to no particular aim or plan.

CHAPTER 3

THE DISTINCTION BETWEEN LIBEL AND SLANDER

There are two branches of the law of defamation, namely libel and slander. Different rules in some respects apply to these two branches. Libel is in general written while slander is oral. In libel the defamatory statement is made in some permanent and visible form such as writing, printing, pictures or effigies. On the other hand, slander is made in spoken words or in some other transitory form, whether visible or audible such as gestures or inarticulate but significant sounds. (1). The distinction is, however, not that simple. The court of Appeal in Youssoupoff v.M.G.M. Pictures (2), held that defamation in a 'talking' film was libel and not slander. In coming to this holding Glasse, L.J. had this to say:

"there is no doubt that so far as photographic part of exhibition is concerned, that is, permanent matter to be seen by the eye, and is the proper subject of an action for libel, if defamatory."

Glasse, regarded the speech which is synchronised with the photographic reproduction and forms part of one complex, common exhibition as "an ancillary circumstance, part of the surroundings explaining that which is to be seen." The problem as to whether broadcasting by a radio was Libel or slander was solved when the English Defamation Act (1952) provided that broadcasting of words by radio was libel. The Kenya Defamation Act followed suit in 1970(3). Another main distinction between libel and slander is that the former is actionable per se while the latter, save in special cases, is actionable only on proof of actual damage.

The distinction and the different rules applicable to libel and slander are mainly due to the erratic and anomalous development of the law of defamation. As pointed out in the last chapter libel was originally concerned with written or printed words. It (libel) was Criminal in its origin and was dealt with in the Court of Star Chamber. The Court of Star Chamber was abolished in 1641 and this left a vacuum. Libel being criminal in nature could not be taken to common law Courts for these courts only entertained Civil wrong which was actionable without proof of special damage. The Judge in King v. Lake said that although general words spoken once without writing or publishing them would not be actionable, "yet here they belong writ and published which contains more malice than if they were once spoken they are actionable."

The distinction between Slander and Libel was confirmed in Thorley v. Kerry 5. Here the distinction was made between the need to allege and to prove damage in actions for Slander (unless in special case) and the absence of any such requirement in action for libel. In confirming the distinction Lord Manis field had this to say: "We cannot venture to lay down this day that no action can be maintained for any words, written for which an action could not be maintained if they are spoken." The result of the decision was that the law of Courts was burdened with a new wrong which by definition and function and also historically belonged to the Criminal Law.

(i) SLANDER

Generally, Slander is not actionable per se. This means that in order for the plaintiff to succeed in an action for Slander, he must prove that he suffered actual damage as a result of the defamatory words. There are, however, certain exceptions to the foregoing general rule whereby the plaintiff can succeed in an action of Slander without proving any special damage. Under the common law, there were four of these exceptions. Firstly, words imputing a crime were actionable per se. The original basis of this exception seems to have been that the plaintiff was thereby placed in danger of criminal prosecution. Another basis of this exception could be that the plaintiff would be ostracised from the society (6). The crime need not be an indictable one but it must be one for which the plaintiff could be made to suffer corporally. (6a). A general imputation of criminality without reference to the specific offence is enough. The view towards which the Courts have been struggling is that the imputation is to be actionable without proof of damages only if it involves a major(7). The policy behind this could be that the courts are trying to discourage people from instituting actions based on trivial grounds. Secondly, to impute that a person has a loathsome disease was actionable per se under the common law. The words must impute that the plaintiff is suffering from the disease at the time when the words spoken. Words which impute that the plaintiff has suffered from a contagious disease in the past (unless they import he is still suffering from the disease) are not actionable without proof of special damages for they do not show that he is at present unfit for society and therefore the substance of the action is wanting. (8). The rationale for this exception is that such an imputation could probably lead to the exclusion of the plaintiff from the society. The exception has been limited to cases of venereal diseases since these are particularly contagious or infectious (9). Another reason could be that people suffering from venereal disease are generally thought to be of loose morals. This in fact is the important reason because other diseases such

as cholera are more contagious or infectious but they do not fall in the class of loathsome disease for the purposes of the law of slander. Thirdly, slander in respect of office, profession, calling, trade or business is actionable without proof of actual damages. In the common law, such slander was actionable per se if it was calculated to disparage the plaintiff in his office and was spoken in relation to his (plaintiff) office. The words must impute some want of integrity or some corrupt or dishonest conduct in office whether of profit or honour.(10). Lastly, the Slander of Women Act 1891 made "words spoken and published.....which impute unchastity or adultery to any woman or girl shall not require special damage to render them actionable."

The Kenya Defamation Act 1970, contains two of the aforementioned exceptions. Section 3 of the Act provides that slander in respect of words calculated to disparage the plaintiff in any office, profession, calling or business held by or carried on by him at the time of publication is actionable per se. Section 4 of the said Act states that it shall not be necessary to allege or prove special damage in any action for slander in respect of words imputing unchastity to any woman or girl. It appears that the legislature did not intend the other two exceptions namely imputation of a crime and imputation of a contagious disease, to apply in Kenya. Instead the Act added a new exception, that is, section 5 whereby the plaintiff need not prove special damages in any action for slander of title, slander of goods or other malicious falsehood, if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or the permanent form or if the said words are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by him at the time of publication. It can be argued that this section was included in the act on the grounds that Kenya being a capitalist country treats private property and making of profit as sacred. Therefore the idea behind the inclusion of section 5(1) was to compensate the plaintiff for loss of profits resulting from the words uttered by the defendant. As for the two exceptions which were not included in the Act, the position now is that Kenyan Courts cannot treat them in the special category as sections 3, 4, and 5, the ~~plain~~ plaintiff must prove special damage. The Defamation Act was codifying Act and therefore superseeds the common Law and any other unwritten Law ?

(ii) SPECIAL DAMAGE

It now becomes necessary to ask what constitutes special damage, without which the plaintiff cannot succeed in action for slander. Special damage is some 'temporal loss' (11). It must be a loss of some 'material or temporal advantage which is pecuniary or capable of being estimated in money' for example the loss of a client, or refusal of employment or loss or/and postponement of a marriage" (12). Mere injury to the feelings does not constitute special damage. (13) and therefore the mental suffering is too remote an action for slander. Annoyance, trouble and disgrace or the loss of society or good opinion of friends or neighbours or the loss of religious community to which no material advantages attach do not constitute special damage. (14). For the action to succeed, the special damage must have accrued before the action was brought. A Mere apprehension of temporal loss is not sufficient. On this point, De Grey, C.J. observed:

"I know of no case where ever an action for words was grounded upon eventual damages which may possibly happen to a man in future"(15).

The special damage must be the natural and result of the defendant's words (16).

(iii) DISTINCTION BETWEEN LIBEL AND SLANDER

The distinction between Libel and Slander as seen earlier has no logical basis. (17). It is founded on historical accident. One therefore wonders why the distinction has been retained in the English Defamation Act and especially in the Kenya Defamation Act. Some Lawyers argue that the distinction is useful in practice. Words tend to have many meanings: the ascertainment of the content of the written words is easier than that of the spoken word. The content of a written word is simply the document, as for the spoken word, it has to be gathered from uncertain and often conflicting memory of witnesses (18). This is all the more so in a country like Kenya where Civil actions can keep pending for a long time and by the time the cases comes up for hearing the witness have forgotten what exactly had been said by the defendant. The argument against assimilating Libel and Slander is the fear that if Slander is made actionable per se, the Court would be flooded with frivolous actions. This was the argument put forward by the Porter Committee in England. 1188
The argument could, to some extent, be convincing in respect to Slander in England but it certainly does not hold good in Kenya where defamation cases are very few indeed. Due to the high illiteraly rate many people are not aware of their rights and hence the few cases. In any case there

is no such distinction in Scotland and many other countries and the available evidence does not show any flood of trivial and frivolous cases in the Courts, It is even doubtful whether printed words is any more malicious or evil than spoken words. Another argument advanced in favour of the distinction was the tendency of written defamation to provoke a breach of the peace. This argument is not a sufficient reason for the distinction, for oral defamation specially when spoken in the presence of the person defamed is often more likely to lead to the same result, that is, breach of the peace. The foregoing arguments advanced in favour of the distinction are not very convincing and one is bound to arrive at the conclusion that the distinction was merely an historical accident which became so entrenched that it was difficult to sweep it aside. The Porter's Committee on the law of Defamation in England while admitting that the distinction was arbitrary and illogical", (it) also came to the conclusion that the existing rule was not amiss as a working rule and forms a not unsatisfactory compromise"(19).

In England, Libel was regarded as more serious than Slander because it (libel) was capable of wider circulation. This was true during the 18th and 19th centuries when printing and publishing of newspapers was gaining momentum in Britain. The Kenya Defamation Act adopted the same distinction on presumably the same reasoning that being in print, libel is capable of reaching more people than if it was Slander. This reasoning loses a lot of meaning if it is closely analysed. To say one is a bastard on a post card is actionable per se but to brand one a bastard in audience of one thousand or more people is not. It should also be noted that the concept of wide circulation does not make much sense in Kenya were a substantial majority of the population does not know how to write or read. The newspapers in the Country are read by about less than 10% of the population. The significance of the foregoing is that while libel may be justified in England because of the wide circulation a written matter may get, the conditons in Kenya are rather different and the test of wide circulation should be disregarded. The question of whether the distinction between libel and slander is desirable in countries like Kenya was raised in an Adenian case of Mrs. Fernandes and Saldanha v. Goan Institute (20).

This case was decided in 1954 when Aden was under the jurisdiction of the Eastern Africa Court of Appeal. The facts of the case were that the plaintiffs were opponents in a club badminton tournament when the umpire stopped the game and announced: "This is the most unsporting game I have ever seen." They (plaintiffs) sued the club for slander but proved no special damage. The defendant pleaded that the words were not defamatory and could not be actionable without proof of special damages. The Court held that slander was actionable in Aden without proof of special damages.

In reaching this decision the Court had to decide whether "an action for damage for slander can be maintained in this Court without proof of special damages in a case on which this would not be allowed in English common Law." The learned judge therefore proceeded to decide the issue against the background of an Act which allowed the Courts in Aden to exercise this jurisdiction in "conformity with common Law.....so far as the circumstances of the colony and its inhabitants permit and subject to such qualifications as local circumstances render necessary." (21). The judge further cited some Indian cases of persuasive authority in Aden. (22). The Indian decisions refused to accept that English Law as regards Slander and libel was applicable in British India. The decision one based on grounds that English Law of defamation was inconsistent and unreasonable. The judge therefore concluded that the local circumstances of Aden did not permit the application of English common Law to be imported whole sale; therefore the words uttered by the defendant were found to be Prima facie defamatory and actionable.

Aden as was pointed out above was under the same jurisdiction as Kenya in 1954. The circumstances and local conditions were also similar. The Kenya Courts did not, however, adopt the same attitude as the Indian and Adenian Courts English common law was imported and applied in Kenya without taking into any account the local conditions. The same attitude continued even after Independence as evidenced By the Defamation Act (1970). A brief look at the position in India as regards Defamation Law may throw some light on the subject. India also fell under common law jurisdiction until 1947. The Law of defamation was discussed by the Indian Law Commission and the commission was of the view that the defamation Law of England was not "founded on natural justice and should not be imported on into the law of British India." (23). Some academicians argue that the reason why British India did not receive English Law in toto is because the British found well established institutions in India and it was thus difficult to brush them aside. This was not the case in Kenya, where the 'natives' did not have established institutions when the British came.

The British Colonialists were therefore in a better position to impose their institutions with little coercion. After Independence, the same law was carried over because the people who took over power cherished British ideas and did not want a revolution in the Law. This will be appreciated even more if it is pointed out that the people who took over were the educated elite who received their education in Britain and were as a result instilled with British values. It must also be noted that the judiciary, even after 13 years of independence, is more or less run by expatriates or white Kenya Citizens.

My submission, therefore, is that the Kenya Law on defamation and in particular the distinction between Libel and Slander is unsatisfactory and leaves a lot to be desired. E. Veitch rightly pointed out that rumour in East Africa is more potent weapon of spreading news than any written word. (24). It is also strange that Kenya should retain law which even the English people themselves find unsatisfactory (25).

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FOOT NOTES

- (1) MONSON v. TASSAUD'S LTD (1894) 1 Q B 672
- (2) (1934) 50 T.L.R. 581
- (3) Section 8 (1) Kenya defamation Act.
- (4) Hadres 470, 146 E.R. 499
- (5) 4 Taunt 355, 128 E.R. 367
- (5a) The learned Judge reached this decision reluctantly as evidenced by the following words:"..if the matters were no hesitation in saying that no action can be maintained for written scandal, which could not be maintained for the words if they had been spoken."
- (6) Grey v. Jones (1939) 1 Aller 798.
- (6a) Webb v. Beavan (1883) 11 QBD 609
- (7) Grey v. Jones (1939) 1 Aller 798. There are no East African cases on this point but the Kenya Defamation Act did not include imputation of crime as being actionable per se.
See Odongkara v. Astles (1970) E.A., 374 for a general discussion.
- (8) Gatley on Libel and Slander 7 ed. Paragraph 167.
- (9) Leprosy can be included but there is no binding authority on this point
- (10) Street on Torts 5th ed. page 284.
- (11) See Gatley on libel and slander 7th ed Chapter 5 paragraph 201-213.
Also RATCLIFFE v. EVANS (1892) 2 Q B 532.
- (12) Bowen, L.J. ibid
- (13) WELDON v. DE BATHE (1884) 54 L.J. QB 113. unfortunately I could not trace an East African case on this point.
- (14) PROSSER ON TORTS 4th ed.
- (15) See Gatley on Libel and Slander 7th ed. Page 99 also ONSLow v. HONE (1771) 3 wils 188.

- (16) WARDS v. LEWIS (1955) 1 W.L.R. 9
- (17) See chapter 2, historical development of the Law of defamation.
- (18) BHANDRA RANCHOD: Foundations of the South African Law of Defamation.
- (19) The Porters Committee report.
- (20) Civil suit No. 705 of 1954.
- (21) Section 41 of the Interpretation and General Clauses ordinance
Laws of Aden, Cap. 74.
- (22) HIRABAI v. DINSHAN A.I.R. (1927) Bombay 22.

PARVATHI v. MANNAR (1886) 10 ALL 425, Mahmed pointed out that English
Law of Slander as forming part of the law of defamation and the
distinction between words actionable per se and words requiring proof
of special damage was not necessarily applicable in India.
- (23) Macaulay's Works; Introductory report.
- (24) Civil Defamation in Uganda, F.E.A.L.J. No. 1, 1971.
- (25) ROBERTS v. ROBERTS 33 L.J. QB 249, Cockburn C.J. pronounced the law
of England unsatisfactory and regretted he was bound by it. In
LYNCH v. KNIGHT 9 H.C.C. 593 Lord Broughave declared that English
Law was in respect of the distinction not only insatisfactory but
barbarous.

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CHAPTER IV

LEGISLATION

The Kenya Defamation Act No. 10 of 1970 came into effect on January 1st 1970, 18 years after the English Defamation Act was enacted. In introducing the Bill into the parliament, the Attorney-General explained at length why a Defamation Act was necessary in Kenya at that particular time. He argued that the idea of the Bill was to give Kenya its own statute law since:

"the written Law regarding Libel and Slander which is applicable to this country is contained in statutes and Laws of United Kingdom, namely England which are dated as far back as 1840 and the more recent one in the United Kingdom is dated 1891." (2) *not de*

The English statutes on Libel and Slander were imported into Kenya as a result of the 1897 Order in Council which contained the reception clause to the effect that:

"the substance of common Law, doctrines of equity and statutes of general application in force in England on 12th August 1897 were applicable in Kenya....."

The reception clause re-enacted in the 1902 Order in Council and to some extent in the Judicature Act (1967) (3). Therefore, until 1970, *118p.* English Common Law and English Statutes applied in Kenya. A change was necessary considering that Kenya was now an independent country and the law had to be brought into line with the changing conditions of a developing nation. It is also worth noting that the English Law on Libel and Slander was until the 1952 Act full of anomalies which could be explained by the erratic development of the Law." (4). These anomalies forced the British Parliament to form a committee to look into the Law of Defamation; the Committee came up with various recommendations most of which were adopted in the 1952 Act (5).

The major defect in Common Law was that it was unwritten and this made the work of the Courts very difficult because they had to rely heavily on precedents. The few English statutes which applied in Kenya by virtue of the reception clause did not cover the law satisfactorily (6). Also at common law the press enjoyed no special protection, nor was it permitted any greater latitude in what is published than the ordinary citizen. The Law of Libel Amendment Act (1888) section 4, gave a limited measure of protection to newspapers

which published fair and accurate reports of certain meetings (7). This remained the position until the 1970 Act was enacted. The Defamation Act (hereinafter referred to as the Act) extended the defence of privilege by widening the definition of 'newspaper' to include any paper published in Kenya either periodically or in parts or numbers at intervals not exceeding thirty six days and also by extending the categories of reports entitled to such privileges thus giving effect to changes which had taken between 1888 and 1970. Another defect in the Common Law was the application of the strict liability rule on the defendant who unintentionally defamed the plaintiff. This rule was clearly demonstrated by Russel, L.J. when he said that "liability" for Libel does not depend on the intention of the defamer but on the fact of the defamation" (8). We shall see later how the Act tackled this unfair rule.

The reasons stated above shows that there was a need to codify the law in regard to libel and slander. Infact the preamble of the Act states clearly that it was:

an Act of Parliament to consolidate and amend the state law relating to Libel, other than Criminal libel, slander and other malicious falsehoods.

Consolidation of rules aims at putting various rules of law in a compact, single statutes easily accessible and also easily ascertainable. The Act was consolidating the English Common Law, case law and English statutes enacted before 1897. 11 88

There were other reasons for enacting the Act in 1970. It will be noticed that the latest written Law applicable in Kenya before the enactment was a statutes of England dating as far back as 1891.(9). Considerable changes in social, economic and political conditions had taken place since 1891; most important of which were the improvements and changes in the methods of newspapers reporting. These changes had to be covered in the Act. It was seen earlier that the definition of newspapers was widened (10). Not only that newspaper reporting which was a major apparatus of dissemination of news had to be given some measure of protection as we shall see later. When the 1891 Act was passed in England, newspapers reporting was at its initial stages and the need for protection was not as great as in 1970. The Act on the other hand intended to curb the activities of newspapers which to quote the Attorney-General:

".....have been grossly neglected, grossly irresponsible, they have not checked their facts before the paper goes to print, they rush too quickly, they are out to glamorise and bring about sensationalism and as a result lose their heads....."

Legislation here was to be used for the purpose of restraining the activities of irresponsible editors, The changes in newspaper reporting did not take place in isolation; other devices of disseminating news were invented.

When the latest English statute, namely, the 1891 Act was enacted, wireless and television broadcasting were not brought into the ambit of the Statute simply because these devices had not been invented. The invention of these devices for reporting news brought a new dimension to the law of defamation. The 1978 Act aimed at making the position clear in respect to wireless and television broadcasting.

The Act also amended the existing statute on the limitation of Actions(12). The limitation period in regard to libel and slander was thought to be too long, namely, three years. Since an action for defamation is essentially an action to clear the name of the plaintiff this should be done promptly. People who are defamed should not be allowed to hold a threat over the defendant for a period of three years. There is even a greater need for bringing an action for defamation quickly the action should be instituted // before the witnesses have forgotten what was actually said by the defendant. Not only that, to wait for three years would be bad because witnesses die, others disappear or leave the country and human memory tends to get hazy.

The foregoing, in brief, were the aims which the act was intended to achieve. It is now pertinent to show how these ends were provided for in the Act. The preamble as we saw earlier made it clear that the Act was a consolidating one. Parts of Common law were codified and put into writing. The English statutes passed before 1897 were amended, extended or repeated in the Act. As regards the interpretation of words, Section 2 of the Act gives definition of various words, a most helpful guideline to Judges, lawyers and even Laymen. ^{At the} Common law, being unwritten, interpretation of words was left to the whims of the judges and the result was that the position was not very clear.

The Act also made several provisions to cover the newspapers industry. The problem facing the Attorney-General and his draftsmen here was how to curb the activities of irresponsible newspapers at the same time giving the newspapers a chance to report objectively without fear of being dragged to

Court every time they criticised a person. In other words, the draftsmen had to restrain the activities of newspapers without stifling the freedom of press. Newspapers editors are at times inclined to abuse the freedom of expression by hurling unfair and totally uncalled for criticisms to public personalities. Irresponsible journalism had to be curbed, regard being taken of the fact that strict control over newspapers reporting is not a healthy thing in a free society and is in fact contrary to the Provisions of the constitution. (13). The Act was a sort of a compromise between the two extremes stated above. The Act therefore grants absolute and qualified privileges for statements reported in certain circumstances. Section 7 extends qualified privilege to reports made by newspapers set out in the schedule to the Act but in sub-section 3 of the Act, the privilege does not extend to:

publication of any matter, the publication of which is prohibited by law, or of any matter which is not of public concern and the publication of which is not for the public benefit.

The question has been raised whether it is sufficient for the defendant to prove either the subject-matter of the report is of public concern or that the publication is for the public benefit or whether he should prove both to satisfy the section. The correct construction of the Section should be that the publication is for the public benefit besides being of public interest" (14). The public may be interested in the subject-matter of the report but it does not necessarily follow that it will be for their benefit that such report be published. The provision is rather vague and the result is that the privilege which is extended to the newspapers is reduced considerably; words such as 'public benefit' or 'public concern' are in themselves vague and are open to abuse by the people (judges) defining them.

Absolute privilege was accorded to newspapers under s.6 which provides that:

"a fair and accurate report in any newspaper of proceedings heard before any Court exercising Judicial authority within Kenya is absolutely privileged."

The section does not, however, authorise the publication of any blasphemous, seditious or indecent matter. It appears that the section contemplated a situation where the privilege could be extended to cover other tribunals recognised by the Law provided they are "exercising functions equivalent to those of an established Court" (15). Such Courts include the Rent Tribunals, the Industrial Courts etc. It has also been questioned whether this privilege covers Court proceedings of a Court acting outside its jurisdiction, for example, where a District Magistrate Court entertains a matter which falls in the jurisdiction of a Resident Magistrate's Court or High Court. This issue has not yet been discussed in Court but it would appear that the protection would be extended that far. Newspapers can where the defence of qualified privilege fails, avail themselves of the defence of fair comment. Common Law is expressly reserved in s.7 (4) which states that:

"Nothing in this section shall be construed as limiting or abridging any privilege subsisting (otherwise than by virtue of s.4. of the Law Libel Amendment Act 1888 of United Kingdom) immediately before the commencement of this Act or conferred by this Act."

At common Law, it was not clear whether wireless broadcasting was libel or slander. In one English decision it was held that wireless broadcasting was libel where the broadcaster was reading from a script (16). Apparently, the decision was based on the ground that recorded broadcasts were libel while live ones were slander. Many leading academic writers and also an Australian case did not agree with the above decision. (17). The Act settled this controversial point by enacting that:

"For the purposes of the Law of libel and slander, the publication of words by wireless broadcasting shall be treated as publication in a permanent form" (18).

This section was based on the premises that wireless broadcasts had a greater potentiality for harm as they reached a wider audience.

The limitation period for cases on libel or slander was reduced to twelve months in section 20 of the Act which amended s.4. of the Limitation of Actions Act by adding the following:-

provided that an action for libel or slander may not be brought after the end of twelve months from such date.

A quick comparison between the Kenya Act (1970) and the English one will reveal that the former is more or less based on the latter. There are, however, a few minor differences, namely the definition of 'legislature', 'parliamentary report', 'wireles broadcasting'; differences which are mainly due to geographical and constitutional reasons. The English Act, section 10, provides that neither in local or national elections shall statements made by or on behalf of a candidate be deemed privileged merely because they are material to a question in issue in the election. The draftsmen of the Kenyan Bill had an intention of including a similar section in the Act (1970) as evidenced by clause 6 of the Bil (19). But this clause was the subject of bitter criticisms from the M.P.s during the debate so much so that the Attorney-General had to withdraw ^{it} same. I ^{had} must point out in passing that due to the technical nature of the Bill, most M.Ps limited their speeches to making general remarks and the only clause which nearly every M.P. showed his concern was clause 6. Most M.Ps were of the opinion the clause would generally limit their freedom to criticise their opponents during the election campaigns. (20). The only other difference between the Kenya Act and the English Act is the Limitation period. In Kenya the Limitation period for actions of Libel or Slander was reduced to twelve months while the English Act stuck to six years (21). It is not difficult to find reasons as to why the Kenya Act was based on the English Act (1952). It was observed earlier that the 1952 Act was based on the recommendations of the porter committee. Unfortunately no such a committee was formed in Kenya to consider the existing Law prior to the enactment of the Act. The result was that the draftsmen of the Bill saw the report of the porter committee and the 1952 Act as a nice precedent on which they could base the 1970 Act. This is not surprising considering that most of these draftsmen were English and therefore could not look elsewhere for legal guidance. It is also worth noting that English Common Law in regard to Libel and Slander had been applied to Kenya for a very long time prior to the enactment of the Act.

The Kenya Defamation Act though based on the English Act dealt satisfactorily with some areas of the Common Law. At Common Law there are various authorities which support the proposition that a person charged with Libel cannot defend himself by showing that it was not his intention to defame (22), or that he had actually not known the statement was defamatory (23). The Act made an effort to modify the foregoing proposition.

The provision provided that in certain cases of unintentional defamation, the publisher may make an offer of amends consisting of a publication of a correction and apology, together with reasonable steps to notify who have already received the challenged document that the words are alleged to be defamatory (24). If the offer is accepted, the High Court, in default of agreement as the steps to be taken in fulfilment of the offer, shall decree the measure to be taken to make full amends (25). If the offer is not accepted, a special defence to an action for damages is created, provided the words are unintentional, and are not the result of negligence and that an immediate offer of retraction was made when the defendant found that the words were considered defamatory. (26). The foregoing provision went a long way to ameliorate a situation which was unnecessarily harsh. But it must be noted that this defence is only available to the defendant who took reasonable care.

The Act, however, did not succeed in solving all the problems which were caused by the vagueness of the Common Law. The distinction between libel and slander was retained even though the circumstances prevailing in Kenya are completely different from those in England. The Act further retained a provision which imported English Law directly. By virtue of s.7 (4) a provision in the law of Libel Amendment Act 1888 was made applicable in Kenya. It also appears that under s.3 (2) of the Judicature Act 1967, any shortcoming in the Act can be rectified by falling back on "substance of common law, doctrines of equity and statutes of general application" which is some sort of a residual Law. English cases are of persuasive authority in Kenya and the Courts can also ^{be} seen rely on same for interpretation of cases.

FOOTNOTES

- (1) Hon. Charles Njonjo - The National Assembly official Report, volume XX at column 877-880.
- (2) Infact these were four statutes which were imported into Kenya by virtue of the reception clause, namely, (i) The Libel Acts 1843 and 1845; (ii) The Newspaper Libel and Regulation Act 1881; (iii) The Law of Libel (Amendment) Act 1888 and (iv) Slander of Women Act 1891.
- (3) S. 3 (1) which made the provision subject to the constitution and any other written laws.
- (4) This was explained in the last chapter.
- (5) The committee under the chairmanship of Lord Porter was established in 1939. The 1952 Act could not be extended to apply to Kenya since it (the Act) fell outside the reception date.
- (6) See 2 supra.
- (7) In the 1888 Act 'Newspaper' was defined to include any paper published periodically or at intervals not exceeding twenty-six days. S.4 of the 1888 Act was replaced by s.7 of the 1970 Act. The publication which is privileged was divided into two groups as shown in the schedule to the Act.
- (8) CASSIDY v DAILY MIRROR NEWSPAPERS (1929) 2 KB of p.354.
- (9) The slander of Women Act.
- (10) The 1888 Act was inadequate eg a large number of important associations whose decisions were of great public interest were not protected in a newspaper. A large number of journals and other publications did not inform to definition of a newspaper.
- (11) The National Assembly official Report volume XX (part I) column 897.
- (12) S.20 of the Act.
- (13) Chapter 5 of the constitution; S.79 guarantees the freedom of expression.
- (14) Sharman v. Merrit (1916) 32 T.L.R. 360.
- (15) Addis v. Crocker (1961) 1 QB II; also Gatley on Libel and Slander 7th ed. para. 622.
- (16) Forrester v. Tyrell (1893) 57 J.P. 532; 9 T.L.R. 257
- (17) Harry Street: the law of Torts, 5 ed. at page 281.
Meldrum v. Australian Broadcasting Corp. (1932) V.L.R. 425
- (18) S.8 (1).

(19) The clause stated that:

"A defamatory statement published by or on behalf of a candidate in any election to the National Assembly or to a local authority shall not be deemed to be published on a privileged occasion on the ground that it is material to a question in issue in the election, whether or not the person by whom it is published is qualified to vote at the election."

(20) See the speeches of Honourable Morara, Shikuku, Karungaru, Kivuitu and many more in the National Assembly Report (Supra).

(21) Limitation Act 1939; s. 2(1) (a).

(22) Hulton & Co. v. Jones (1910) AC 20.

(23) Cassily v. Daily Mirror Newspapers (Supra)

(24) S.13 generally

(25) S.13 (4) (a).

(26) S.13 (2).

CHAPTER V
REFORM AND CONCLUSION

The Defamation Act (1970) attempted to clarify some parts of the common law which were vague. In the last chapter, it was shown that the Act instead of clarifying the situation merely reproduced the common law position in some parts. It was further pointed that some areas such as the distinction between libel and slander which we saw ^{was} based on historical accident were retained. Above all, the Act did not attempt to relate the law of defamation to the conditions prevailing in Kenya. It is no use enacting a statute which for a practical purposes should have been enacted for English people. Infact the law of defamation is not well established in this country as evidenced by the number of suits filed in the High Court (1). It would therefore seem that the Act was enacted for a very small proportion of the society. This small proportion is mainly composed of the educated elite who fully appreciate their rights. In this class should be included politicians who are prone to having their reputations tarnished by their political opponents who may be tempted to use unfair campaigning tactics (2). Apart from the small class aforementioned, the law of defamation is not yet open to the bulk of the society. This can be partly explained by the fact that the illiteracy rate is pretty high and these people do not really appreciate fully their rights. Again, the same people will not be enthusiastic to take their fellow people to court for what they consider as a trivial matter and which can be solved amicably between themselves. The result is that there are few cases instituted in the courts.

The law of defamation sometimes act as an unofficial censor against the right of freedom of speech (and freedom of press). The Act, as saw earlier and the Attorney General himself stated, was seen as an instrument of curbing the activities of the newspapers. The constitution of Kenya gives the individual the right of expression but this right must be exercised subject to the rights of the other people (3). The newspapers have also got the right to report matters of public interest. The tort of defamation therefore seeks to maintain a delicate balance between the rights of an individual and Liberty of speech which is vital in a free-society. The legislators had this in mind when enacting the defamation Act. This was demonstrated in several ways and clearly so in the newspaper industry. Newspaper activities were curbed in a way, because they were made open to litigation in case of any irresponsible piece of journalist (4). On the other hand, the Act protected freedom of press by ~~Ve~~iterating the common law defence of qualified and absolute privilege (5).

Privilege exists when there is some just occasion for publishing defamatory matter in the public interest or in the furtherance or protection of the rights or lawful interests of individuals. Where an occasion is privileged, the freedom of speech is allowed to prevail over individual reputation.

The above are some of the objects the tort of defamation attempts to achieve - the Act was enacted with the above objectives in view but it cannot be said it (the Act) was entirely successful. In the last chapter it was pointed out that codification was an important objective of the Act. The Act, however, failed to codify all the existing law on defamation; For instance, the Act did not provide for group defamations and survival of actions. This therefore means that the courts will be bound to ^{fall} ~~pull~~ back on common law and case notes when adjudicating in these areas. It is suggested that the Attorney-General and his draftsmen should have made an extensive research on the tort before the enactment of the Act. Such research would have been of invaluable help in that the Act would have been extended to cover all areas of libel and slander thus ^{severing} ~~severing~~ the link with common law. On the survival of rights of actions, the common law position whereby an action for defamation cannot be maintained by a relative of the deceased applies in Kenya. This position is explained by the essentially personal character of a man's right to his good reputation. The fact that the tort is essentially personal does not mean that close relatives of the deceased do not suffer mentally and that the reputation of the deceased is not affected. Examples abound where a public figure dies and soon thereafter his critics or a newspaper starts to spoil the good reputation and name he had before his death. In such cases, the close relatives of the deceased - may be wife or children should be allowed by law to sue those defaming their deceased. A leading jurist argues that on an action for defamation upon deceased persons, an injunction or an action for damages should lie only within a limited period after death (6). There are also cases where the plaintiff in a defamation suit dies before the suit is over; this is another instance where the wife or children should take over the case and proceed to have the reputation of the deceased cleared. Another area connected with the foregoing is that under the tort of defamation, the injured feelings of the plaintiff alone cannot form a basis for a suit. It is my submission that this should also be protected. It appears that many cases on Libel and slander are instituted because the plaintiff feels injured and therefore seeks to hit back at his defamer.

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Under English law and therefore in the Defamation Act (1970) the test whether a word is defamatory is objective - whether a reasonable man in the society would have deemed it defamatory. This test makes many plaintiffs go without redress because under the test what matters is that the statement complained of is prima facie or by innuendo capable of bearing a defamatory meaning. The court fails to consider the meaning the defendant attached to the words complained of or the purpose for which they were uttered. It may be argued that it would be difficult to ascertain what the defendant's intention was. A partly subjective and half objective ~~test~~ should be applied.

The area in defamation law which has provoked much debate among academic writers and practising lawyers is the distinction between libel and slander. It was earlier noted that apart from a few special instances, slander is not actionable per se, on the other hand, libel is always actionable without proof of any special damage. The requirement that is in slander one has to prove special damage causes a lot of hardships to the plaintiff because of difficulties to prove special damage. It is sometimes difficult in practice to prove special damage in any action for defamation since a man's reputation as an individual may have suffered grievous harm without it being possible to prove any direct pecuniary loss. Because of these hardships caused to the plaintiff in cases of slander, many academic writers have come up with suggestions as to how the situation can be rectified.

It has been suggested that the problem can be solved by making defamation cases whether libel or slander, actionable without proof of damage. This system has been adopted in many countries, for example, Scotland, Australia and Newzealand and it has been seen to work smoothly. Some critics have argued that such a move may lead to a deluge of trivial and petty cases of defamation in the courts (8). The same critics further point that there should be left a safety valve for expression of unflattering views in the interest of freedom of speech. Making slander actionable per se will be a move in the opposite direction and would tend to stifle this ~~re~~ freedom. The foregoing argument can only hold good in countries where the bulk of the society take its rights seriously. But even ~~in~~ some of these countries eg Scotland, making slander actionable per se was not followed by an increase of petty cases in the courts. In any case, the situation is completely different in Kenya where, as we had an occasion to see earlier, there is a high illiteracy rate. Generally, the people do not show keen

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interest in taking others to court for serious matters let alone petty and trivial ones. Written word, however, seems to carry a lot of weight especially with people living in the rural areas but this is not enough ground for retaining the distinction. One can infact be defamed more by word of mouth than by written one, given that word of mouth travels quite fast in Kenya.

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Another suggestion is to require in all cases, proof of actual damage. This suggestion is reinforced by the attractive proposition that it would do away with many suits of trivial nature. But it is difficult to prove actual damage in many cases where, from the character of the defamatory words and circumstances of publication, it is not certain that serious harm has infact resulted (9).

Other ways of dealing with this problem include making a distinction between major and minor defamatory imputations. The major imputation should be actionable without proof of special damages in the minor defamatory imputations. The major imputation should be actionable without proof of special damages, while the plaintiff should prove special damages in the minor defamatory imputation. But it would be difficult to draw the line between what is and what is not a major defamatory imputation (10). To insist on such a distinction would lead to the same arbitrary distinction which characterises the present law on slander, where only a few exceptions are held to be actionable per se.

Distinction can also be made on the basis of the manner and extent of publication. A distinction should be made between really 'public' defamation and a private letter or conversation. 'Public' defamation should here include publicity given in the newspapers, over the radio or the television or in a public rally and these should be made actionable per se. This is because of the greater potentialities for harm and the impossibility of determining how far it has affected the reputation of the plaintiff. Injustice may be occassioned to the defendant considering that he may not be responsible for the publication in the newspaper or radio or television. But he must be held liable on the premises that a person is presumed to intend the consequences of his act. On the other hand, a private letter or conversation may not be so harmful to the plaintiff's reputation.

Alternatively, it has been suggested that the procedure be made to consist of two stages. In stage one, the plaintiff would be required to establish before the trial judge what he expects to prove as to extent of publication and meaning, to those who heard them, of the allegedly slanderous words. If sufficient probability of damage is demonstrated, special damage need not be proved. If the case does not appear to involve major harm, special damage will have to be proved (11). The major weakness of this suggestion is that it will make the court procedure too long and cumbersome, a defect which is prevalent in our courts at present.

The only other area in the tort of defamation which needs to be examined is in respect to damages. The practise in England is that the jury decide how much the plaintiff deserves to get as a compensation for his tarnished reputation. In assessing the damages, the jury is governed by the circumstances of a particular case. They take into consideration the conduct of the plaintiff, his position and standing, the mode and extent of publication (12), absence of retraction or apology and the whole conduct of the defendant. The natural injury to the feelings of the plaintiff; natural grief and distress are also taken into account. It is not clear whether the jury perform this task competently and sometimes they may find it difficult to assess damages for loss of reputation hence awarding excessive damages. The practise in Kenya where the judge awards damages seems to be better for the judge being learned can assess the damages more competently. After all, the jury which is composed of different classes of men may be influenced by trivial matters. The Judge in reaching the final figure is, however, governed by the above considerations which govern the jury in England. There is a problem of determining whether the damages should be punitive or merely compensatory. It is the opinion of the author that damages in the law of torts should be awarded for the purposes of compensating the injured party. Though a case can be made for punitive damages (acting as a deterrance), it is an area which should be left entirely ^{to} ~~for~~ criminal law.

The main problem as regards damages is caused by the basic principle of granting damages (monetary) for non-pecuniary loss (loss of reputation). The idea is to restore the plaintiff, so far as money can do so, in the pre-injury situation. It is doubtful whether pecuniary remedy - in form of damages - can provide adequate relief to the plaintiff whose reputation has

been harmed, for instance, in a public press. Suitable apology seems to offer a better relief. There is a possibility that monetary remedy may be used by some unscrupulous people who may capitalise on ~~some~~ cases in order to benefit financially. Nominal damages should therefore be awarded where no actual material loss can be proved. This should be seen against the background that it is not clear whether there is a relationship between money and non-pecuniary injury.

From the decided cases in our courts, it appears that the judges do grant large damages to injured parties. Granting such a huge amount of damages is a way of encouraging people to file suits in the courts for the plaintiffs will partly be attracted by the financial reward which may accrue from the suit. Considering that the courts should generally strive to discourage litigations, parties to a dispute should be encouraged to solve their disputes amicably and among themselves. This goal cannot be achieved if the injured party thinks that he may make a fortune through a suit by way of damages.

In conclusion, it must be noted that the Defamation Act seems to be operating smoothly in Kenya, the above shortcomings notwithstanding. This can be partly attributed to the fact that the Act is invoked only rarely. But as the people's understanding of their rights increase, so will be the need to amend the law. In the meantime, the law is only open to the educated few and the politicians who use the law to silence their critics and perhaps incidentally fatten their purses (14). Criticism of public officials is in itself a good thing but it must be viewed against the principle that the public also has an equal interest in the maintenance of the public character of public men, and public affairs would not by ~~men of honour~~ with a view to the welfare of the country, if the courts were to sanction attacks upon them destructive of their honour and character and ~~muds~~ without foundation (15). The law of defamation therefore helps in keeping the honour and reputation of public figures intact. By this way, the law is used as an instrument of maintaining peace and respect in the community.

FOOTNOTES

- (1) A brief look at the East African Law Reports revealed that from 1969 - 1973 there were only 11 cases one of which was from Kenya's High Court. This is not conclusive but a sketchy research done in the High Court registry revealed almost similar results.
- (2) Edward Veitch clearly demonstrated this phenomena in his article 'Defamation in Uganda' T.E.A.L.J. Not of 1971 where most of the cases quoted therein, seemed to have been instituted by politicians or 'big' men in the Government. The law was being used for purpose of protecting the reputation of the individuals and that of the political parties.
- (3) S.79 of the constitution grants this right subject to specified exceptions.
- (4) Many cases of libel in Kenya have one of the parties especially the defendant being a newspaper e.g. Gitau v. East African Standard (1970) EA 678 a recent unreported case: Wachira v. Drum Magazine reported in the Daily Nation of 18th February 1977.
- (5) The newspapers can also avail themselves of the defence of fair comment especially in matters affecting public officials. See a discussion in: Publishers of 'Munyonyozi' v. The Lukiko of Buganda 3 U.L.R. 124.
- (6) D. Hirst, The Law of Libel; what need for change? Law Guardian 55 (1970), at page 17. The penal code, cap 63, section 195 grants this right subject to consent of the Attorney-General.
- (7) LEWIS v. DAILY TELEGRAM (1964) AC 234.
- (8) This was the view of the porter's committee Report in England which ended up by stating that the existing law was a workable compromise. See 12 Mod. L.R. (1949) at page 220.
- (9) Prosser: Law of torts, 4 ed at page 764.
- (10) Paton: Reform and the English Law of defamation, 1938, L.J. 440.
- (11) 66 Havard Law Review 476.

- (12) Gitau v. East African Standard (Supra) where amount of damage was reduced because the words were only understood by limited section of the community.
Also see LOWO v. A.G. (1972) EA 311.
- (13) A High Court Judge, namely Mulli, J. awarded damages to the tune of 100,000/= to the plaintiff in a Libel case. This was in the case of Godwin Wachira v. Drum Magazine.
- (14) In his article "Civil Defamation in Uganda 1902-1970", Edward Veitch illustrated that most of the cases were brought forward by politicians and high ranking civil servants. A look at the East African Law Reports reveals that in Kenya the few reported cases were filed by civil servants or at least by persons who are educated. See 4.EA.L.J. 1971 No.1.
- (15) The Hon. A. Nekyon v. Tanganyika Standard Ltd; civil Suit No. 393 of 1964 (unreported)

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