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**THE ROLE OF CIVIL LAW OF
DEFAMATION IN EAST AFRICA.**

I would also like to place on record my debt to Professor D. K. Mutungi, the Dean, without whose invaluable and devoted assistance this work would not have been undertaken.

A Dissertation submitted in partial fulfillment of the Requirements for L. L. B. Degree, University of Nairobi cheerfully and patiently undertook the enormous task of typing this dissertation.

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B. W. KAMUNGE

Nairobi. June, 1977

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However, opinions and expressions, errors and omissions remain mine.

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ABBREVIATIONS

A. C. - African Court

A. C. A. African Court of Appeal

C. A. Civil Appeal

C.C. Civil Case

D.A.C. District African Court

E.A.L.J. East African Law Journal

Mag. Appeal Magistrate

L. Q. R. Law Quarterly Review

INTRODUCTION

A glance at the East African Law Reports would disclose ^{through} that/tort Litigation as such is scanty, suits on defamation and negligence are becoming more and more. Early Law Reports do not disclose a spate of Litigation. It is only during the last two decades that the volume of Litigation is increasing.

Both the Kenyan and Ugandan constitutions guarantee the freedom of speech and expression. The Tanzanian constitution does not lay down Fundamental Rights. Importance of this right in the modern times hardly needs emphasis. Habits and fashions of the people are changing very fast. A man's life is so much centred round the institutions which are commercial or otherwise; it is difficult to imagine his life without them. Potentialities on the field of Literature and fine arts are in ascendancy.

All these and many other modern conditions call for an urgent need for an assessment of the judicial role in balancing the conflicting interests involved in the tort.

The scope of this study is very much limited. It would be futile in a work like this to attempt to discuss English law, for that would occupy several pages. Such a study would bear no fruits. Instead an attempt to cover some aspects of the East African law of defamation may enable us to draw some useful conclusions.

Reference to unreported cases referred to in some research works was felt necessary to draw some conclusions on the social aspect of the tort. Cases reported in High Court Digests have also been referred to in an anxiety to make the study wholesome and up to date.

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CHAPTER 1

THE OBJECTIVES OF THE LAW OF DEFAMATION:

Thou shall not go up and down as a tale
bearer among thy people:
Bible, Leviticus XIX, 16.

The purest treasure moral times afford is
spotless reputation; that away men are but
gilded loam or painted clay: Shakespeare,
Richard I, Act I, Scene I.

Moral condemnation of defamation is from biblical times.

A. Importance of reputation:

Law recognises in every man his interest in reputation.¹
The object of the civil law of defamation is to compensate
the plaintiff for injury done to his interest in reputation
by awarding him damages. Defamation consists of libel and
slander, the former being actionable per se, and the latter,
except in certain circumstances being actionable only on
proof of special damage. The wrong of defamation consists
of publication of a false and defamatory statement
respecting another person without lawful justification.²

The law of defamation is a compromise between
freedom of speech and the individual's interest in
reputation. The defences available both at common law
and in the statutes is an attempt to balance these interests.

B. Nature of Liability in Defamation:

Today civil actions of defamation have become dominant.
This trend is attributable to the social, political and
economic changes, new methods of entertainment and
newsmedia which have taken place in the present century.

Litigants have shown a great liking for persuing their private squabbles under the official umbrella of the law court³ instead of settling their disputes by the rule of sword in duelling or having the defamer criminally prosecuted. In the late nineteenth century liability in defamation was extended and made more strict because of the menace occasioned by the new popular press and its mass circulation. Liability did not depend on the intent of the defendant but on the fact of defamation.⁴ Apart from the question of malice which is important only in the defences of qualified privilege and fair comment the intention or motive with which the words are used is immaterial in determining the liability.⁵ The modern trend which is the result of legislative enactments is more liberal than the common law and will be considered in chapter four.

C. Development and Modern Conditions

In the Middle Ages, the objectives of the law of defamation was to maintain the stability of the state and public order rather than protecting individual's interest in his reputation.⁶ The Court of the Star Chamber,⁷ reigned by punishing criminal libels heavily. The Star Chamber was an organ of the stuart kings. Ecclesiastical courts had power to punish defamation only as a sin and were forbidden to award damage to the wronged party. They could only inflict spiritual penalties like repentance and excommunication.

One's claim to social life became as dear as one's claim to life. On the whole reputation came to be regarded as an asset and interest of substance.

Today the introduction of democracy and the acceptance of a society based on so many institutions is a factor which the present civil law of defamation must cope up with.

Modern ways of entertainment, hobbies and recreations which include television - watching, films,¹⁴ festivals¹⁵ and plays¹⁶ provide opportunities to attack individuals' characters. This explains the reason why law has laid a requirement that criticism should be on the work and not on the personal character as such.¹⁷

One finds that newspapers today are the defendants on most of defamation suits. Although newspapers have a duty to keep the public informed, they nevertheless owe a duty to individuals not to defame them in the course of discharging their duty. But there are instances where newspapers are either reckless¹⁸ or their staff are fond of unnecessary glamorizing¹⁹. These are commercial enterprises and the law can not allow them to make profits out of publications which are defamatory of individuals. All the above conditions are also present in East Africa today besides the increasing social intercourse.

The Civil Law of defamation has an important role to play in recognizing and balancing the conflicting interests.

The English Defamation Act, 1952²⁰ and its Kenyan counterpart²¹ are legislative attempts which reflect these modern needs. A hope is entertained that the courts while deciding suits in defamation reflect these trends.

CHAPTER II

RECEPTION OF ENGLISH COMMON LAW OF DEFAMATION IN EAST AFRICA:

A. Customary Law:

Gossips and scandals were discouraged in the East African community by religious and community sanctions. One who went spreading damaging rumours about other persons was out of favour with the other members of the community. This was because if such rumours were founded, their victims suffered social ostracism if the allegations against them were serious. Allegations like witchcraft and theft were serious. They would be shunned by the other members of the community. The latter's generosity of food and drinks would be denied to them. Their help, individual or communal in time of need would also be withheld. It can therefore be seen that by using western terminology, such plaintiffs suffered damages, albeit not pecuniary, for no money was in use.

If such a plaintiff wanted to exonerate himself/herself a council of elders would hear the dispute and award damages to the aggrieved, taking into consideration the sexes and status of both parties. If a woman defamed a man or another woman she would pay a peace - offering of say, bananas or brew porridge for the aggrieved. If the defamer was a man he would pay a fat goat to the aggrieved or if the latter was elderly, the defamer would pay one goat's worth of beer.

If the defamer was a young man with no personal property his father would compensate the aggrieved. But such incidents were rare. Damages were complementary to other social codes maintaining discipline like the desire to stand well in the public opinion, social ostracism and public ridicule which gossipy and insulting persons would incur.

B. Basis of application of English Law:

The basis for application of English Law is the Orders - In - Council for the three East African countries¹ as reproduced in the Judicature Acts². Importing English Law, the Orders-In-Council mentioned different dates for its reception - Uganda 11th August, 1902; Kenya, 12th August, 1897, and Tanzania, 22nd July, 1920.

The Judicature Acts are all identical. Kenya Judicature Act S. 3 says:

"The jurisdiction of the High Court and all subordinate court shall be exercised in conformity with ... the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897 ... "

This means that the English Law to be applied is that which was in force in England before the dates mentioned. This is subject to the proviso that;

"The said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstance of Kenya and its inhabitants permit and subject to such qualifications are these circumstances may render necessary "3

Expression "substance of the common law" means that it is the

spirit rather than the letter of common law that was intended. Doctrine of equity refers to the general ideas of fairness and humanity. Statutes of general application mean the statutes applied in all courts, in England to the generality of the community.⁴

Although the East Africa Courts do not seem to adhere to reception dates, theoretically the dates are relevant in ascertaining the substantive law in East Africa.

By implication the Magistrate Courts Acts⁵ exclude customary law of defamation.

C. Law of Defamation and the Constitution:

Chapter Five of Kenya Constitution⁶ guarantees fundamental rights⁷. S. 79 (1) says:

" Except with his consent, no person shall be hindered in the enjoyment of his freedom of expression ... "

But the constitution puts a limitation on this right. S. 79 (2) (b) says:

" Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision that is reasonably required for the purpose of protecting the reputations ... of other person."

Thus the law of defamation is a reasonable limitation of the right of freedom of expression.

Among East African countries only Kenya has passed a Defamation Act⁸ modelled on English Defamation Act of 1952.⁹

The latter was not a codifying but a consolidating statute which means that most of the law of defamation, unless the Act has altered it shall be found in common law.

CHAPTER III

FACTORS RESPONSIBLE FOR DEFAMATION SUITS IN EAST AFRICA:

A. Introduction:

An attempt has been made in this chapter to examine the factors responsible for defamation suits in East Africa. In an attempt like this one, it is not possible to unearth the whole of reported and unreported case law. Only some reported and unreported cases have been consulted and reliance has also been placed upon some research articles in various journals.

B. Generally:

English law of def^{fa}amation which East Africa has adopted has developed in an economic, political and social set up which are very different from those generally prevailing in East Africa. English community is racially Heterogenous and without much social stratification based either on economic, educational or social status. English men do not live in communities of relatives, families or kuri as is the case in East Africa, but live in communities of total strangers. Gluckman rightly says¹:

" Most African cases involve disputes between closely related persons, involved in a close-knit network of relations whileas English cases involve persons who are strangers to one another outside of a single linking relationship.²"

Naturally one finds that the facts giving rise to defamation suits in East Africa and the parties to these suits indicate that the role played by the civil law of defamation may differ from its functions in England.

A difference is discernible between suits heard in the High Courts and suits heard in subordinate courts. Parties in the High Court suits are the country's elite such as the professionals e.g. doctors,³ advocates,⁴ school teachers,⁵ prosperous businessmen,⁶ religious leaders,⁷ companies general managers,⁸ companies' former directors,⁹ politicians,¹⁰ government high-ranking officials,¹¹ administrative officers¹² etc. These suits are removed from the jurisdiction of subordinate courts by the damages sought and awarded¹³. They are technically sophisticated and with a few exceptions¹⁴ legally defended. They are decided in terms of the received English common law.

Suits filed in subordinate courts especially District Magistrate Courts are comparatively unsophisticated by any standard, almost invariably legally undefended and the damages claimed and awarded too low. These are suits by the peasants. The parties to these suits are not strangers, to each other.

Different factors can be adduced for the cause of defamation suits for the different social groups. However, there are borderline cases which are hard to make categorical compartmentalization. For example, in both High Court and subordinate courts suits whose subject-matter is imputations of witchcrafts¹⁵, crimes,¹⁶ land transactions,¹⁷ and politics¹⁸ are usual.

Apart from these suits of common ground it can generally be said that in the period between 1961 and 1971 Uganda had more suits (invariably political suits) than any other East African country. This was the period immediately before her political independence. Political turmoil with the accompaniment

political, social and economic changes account for these suits. In the years immediately before her independence there were considerable political activities to determine who and which political party should lead Uganda to independence. In the case of Nekyon V. Tanganyika Standard¹⁹; a Ugandan Minister of Broadcasting Information and Tourism was the plaintiff alleging that the defendant - newspaper had defamed him in a report discussing the current rumour of the plaintiff's detention and disagreement with the Prime Minister as to who should be the Resident of Uganda.

In 1966 there was a boarder clash between Uganda and Congolese armies which gave rise to rumours of personal gain accruing to certain government officials. The case of Onama V. Uganda Argus Ltd.²⁰ arose out of a report of a news conference given by a political opponent which alleged complicity on the part of the plaintiff (a minister for defence) with other government leaders in the use of the Ugandan army for personal gain against the Congolese army in 1966.

In 1969 there was an attempt to overthrow President Obote and the case of Odongkara V. Astles²¹ arose out of this. In 1971 President Amin ousted Obote.

Not a lesser cause was the tribal factionalism which strengthened political rivalry. A good illustration of this is the case of Kiwanuka V. Obote²², where the plaintiff alleged that he was defamed among the Baganda by the defamatory statement of the defendant. Both the plaintiff and the defendant were leaders of opposing political parties and the suit arose out of a political campaign.

It is clear then that in such political chaos and instability there are a steady procession of civil suits.

C. Suits in Subordinate Courts:

Many factors account for the existence of defamation suits in Subordinate Courts. The all-pervasive is the realisation by the indigineous tribes that a court of law is the legal and a better forum for settling disputes after the breakdown of the elder-system under the pressure brought to bear by the modern economic and social changes. This is in addition to the realisation that criminal prosecution will befall any person who would take the law in his/her own hands to revenge a grievance. Subordinate Courts have admitted that what they adjudicate are suits founded on traditional insults and abuse but that these are to be clothed with a "civilized terminology" of defamation. Ainley, J. sitting in court of review noted in one case that the plaintiff's reputation was not lowered but that the Kamba custom may possibly permit a man to recover compensation for mere vulgar or scurrilous insults and abuse which may cause him affront and distress.²³

Rumours and gossips reflect the values of African life and traditions. In any community the contents of defamation suits reveals the moral value of that society. Therefore one finds that most of the defamation suits heard in the subordinate courts have elements of what a given society has always shunned and looked at as abhorrent. The most dominant are allegations of witchcraft, for example allegations that the plaintiff is a witch/wizard or is using witchcraft²⁴, or that he/she is employing witch doctor to harm others²⁵.

Others include allegations of theft and sexual slurs like prostitutions, venereal diseases, incest, impotence, seduction and rape. The above are amongst the most abhorrent allegations that can be said of a member of an African community. Allegations of a bad reputation in African societies is very serious.

The alleged defamatory statement which give rise to suits may have been made as a result of provocation by the plaintiff²⁶, or may have been said in form of just (which can be very delicious if understood in the African way), or when the defendant is under the influence of alcohol.

School affairs have been subject - matter of defamation suits not only in the subordinate courts but also in High Courts. This is to be understood in the light of the fact that many African parents today are sending their children to school in ever increasing numbers. These parents can not utterly be unconcerned with what goes on in those schools, especially where their children are personally involved. This mostly happens in primary schools which in rural areas cater for those children from the immediate locality. Suits have therefore arisen which involve teachers themselves or the teachers with their headmasters or allegations of immoral dealings between the teachers and school girls.²⁷

Reports by private persons to law-enforcing agents like Sub-Chiefs, Chiefs, and Police Officers have been made subject-matter of defamation suits. Such suits are increasing after independence. These suits are identical to the English Common Law where imputations of ~~a crimes~~ for which the plaintiff can be made to suffer physically

by way of punishment²⁸, and allegations of suspicions which would make a reasonable man think that the plaintiff has committed a crime²⁹ are actionable per se.

Exercise of official duties,³⁰ judicial and administrative proceedings (invariably against the parties and sometimes witnesses to such proceedings) have also formed subject - matter of defamation suits. At common law judges and juries,³¹ parties to a suit³² and witnesses³³ are accorded absolute privilege. This is on grounds of public policy and convenience; for in such instances public interest outweighs the harm which might be done to the reputation of the individual.³⁴

Another important area where tensions and disputes have led to a steady procession of defamation suits is the question of land. This is not restricted to the parties with the land dispute themselves but may be extended to their interested friends and relatives who subsequently might find themselves parties to defamation suits with one of the original contestants, especially the loser. This may arise not only prior to or during the hearing of land disputes but also after disputes have ceased, for the grudge will remain. This is also true of suits in High Courts. In Mangat V. Sharma,³⁵ the defamation suit arose out of a land transaction where the plaintiff - advocate was acting for the defendant - vendor. The client wrote defamatory letters to the Commissioner of Land and to a bank. This letters formed the subject - matter of the suit.

Both petty and big political issues have been subject-matter of suits both in High Courts and Subordinate Courts. Some cases quoted above suffice to indicate that politicians find it useful to enhance their political interests in courts under the guise of protecting their reputation.

The above are some of the factors responsible for defamation suits. But in the fast developing (economically and socially) East Africa when interests of reputation of the increasing class of professionals, businessmen, high-ranking government officials and administrative officer are invaded, there is no reason to suspect that the number of suits in defamation will fall. Defamation seems to be potentially a fertile area of litigation.

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CHAPTER IV

EVALUATION OF EAST AFRICAN DECISIONS:

A. INTRODUCTION

The tort of defamation is only next to negligence in order of frequency of tort litigation in East Africa. However, case law is not available on different aspects of the tort. And so what has been attempted is not to develop this as a part of East African jurisprudence but to critically evaluate the reported decisions, unreported decisions which are collected from High Court digests and those referred to in some research materials.

B. ESSENTIALS OF DEFAMATION

In order to succeed in defamation suit, a plaintiff must prove that - (i) the statement is defamatory; (ii) there was publication to someone other than the plaintiff; (iii) the statement referred to him (iv) and if it is slander, unless it falls into the exceptions where slander is actionable per se, that he has suffered special damage. The burden of proving each one of the above essentials lies on the plaintiff.

C. DEFAMATORY

A statement may be defamatory either on the face of it or by innuendo. To be defamatory, the statement must lower the plaintiff in the estimation of right-thinking members of the society generally.¹ The following have been held defamatory - imputation of fraud and dishonesty;² - plaintiff was one of a group of persons meeting for the purpose of working out a plan to cause chaos and to overthrow the government;³ - theft;⁴ that

a Director of Public Prosecutions is acting on instructions of the Attorney -General,⁵ or the Attorney-General is unconstitutionally interfering with the course of justice;⁶ - a medical practitioner is a Quack;⁷ - the plaintiff is suffering from an infectious heart disease which makes him unfit for his office;⁸ - some members of a Board of Directors (which is limited to eight members) are taking money out of the country for their personal accounts;⁹ - allegations of bribery and exploitation;¹⁰ - the plaintiff after an accident tried to conceal his identity for sinister motive;¹¹ - imputation of bibulousness;¹² - the plaintiff using supernatural powers killed the deceased person;¹³ - propensity to assassinate or murder;¹⁴ etc. However, it is not defamatory to say without more that the plaintiff has borrowed money;¹⁵ - a former employee has ceased to be in employment;¹⁶ or merely reporting a criminal offence to the police.¹⁷

It may be noted that Slander of Women Act¹⁸ has been made applicable in East Africa¹⁹. The distinction between slander and slander actionable per se is further eliminated by S. 3 of Kenya Defamation Act, 1970.

A few cases deserve comment here. In Kiwanuka V. Obote²⁰ the court equated reasonable man with an educated man and "society generally"²¹ with the whole of Uganda disregarding the fact that the Baganda of Buganda form one of the largest tribes in Uganda. It is submitted that this decision was reached per in curium of S. 3 of Uganda Judicature Act which states that the courts shall consider the circumstances of Uganda and her inhabitants.

Another case is Mwaiopope V. Smithy Manyafu²² which decided that for a man to succeed in a defamation suit where imputations of

adultery or immorality are made against him, he must prove special damage. As has been seen above this is not the case if such imputations are made against a woman or a girl. This gives special treatment to women in an age of sex equality. Men as well as women have reputation to lose, although the stigma that would be attached to adultery or immorality of the former is not as high as of women. An opinion is expressed that the difference should be reflected in the award and the distinction may be altogether abolished.

D. PUBLICATION

The requirement of publication to third party was held satisfied where a libellous telegram had been sent;²³ display of a defamatory circular on a shop's window;²⁴ making defamatory statements in an interview;²⁵ writing a libellous letter concerning the plaintiff to his father;²⁶ where newspapers or periodicals publish defamatory matters concerning plaintiffs;²⁷ where an individual procures publication of defamatory statement;²⁸ where a defamatory letter was sent to a third party;²⁹ or broadcast of a defamatory song.³⁰ However, it no publication to write a defamatory letter to the plaintiff himself.³¹

E. REFERENCE TO THE PLAINTIFF

Identification can be by express reference to the plaintiff³² or by a reference which a reasonable man can understand to be referring to the plaintiff.³³ In Onama V. Uganda Argus³⁴, the plaintiff was using a parliamentary report to identify himself with a subsequent interview. But the court held that the publication of the parliamentary debate was absolutely privileged and could not be relied upon to identify the plaintiff. Spry, J., following an English case³⁵ observed,

" Whether a man is called by one name ...
or whether he is described by a pretended
description of a class to which he is known
to belong, if those who look on know well
who is aimed at, the very same injury is
inflicted ... as would be done if his name
and christian names were ten times repeated" 36

In Rwabugakaya V. East African Newspapers Ltd.³⁷ the
plaintiff, a medical practitioner alleged that a photograph in the
newspaper advertising a certain deodorant was his and was defamatory
of him. Witnesses gave evidence that on looking at the photograph
they thought that it belonged to the plaintiff. But the plaintiff
failed only because the photograph was proved to belong to another
person. But the common law is that if in describing a fictional
or an existing person a defendant defames another person that
other person can also claim damage.³⁸ In this case the photograph
was identified by those who knew the plaintiff as belonging to
him; and even if it belonged to another person, the plaintiff still
remained defamed. It is submitted that this was a case where the
newspaper should have been asked to publish an explanation.

F. SPECIAL DAMAGE

All libels are actionable per se but in slander, unless
it falls under certain well-defined categories where slander is
actionable per se, special damage must be proved. Courts have
strictly adhered to this distinction.³⁹ The distinction is
historical in England and does not find favour with many judges.⁴⁰
An opinion is expressed that the East African conditions do not
warrant the retention of the distinction and should be abolished.

G. DEFENCES:

Besides the general defences common to all torts, the tort
of defamation recognises the following defences:-

- (i) Privilege (Absolute and qualified)
- (ii) Justification;
- (iii) Fair comment;
- (iv) Apology and
- (v) Umintentional defamation.

H. ABSOLUTE PRIVILEGE

This is a complete defence and even malice will not destroy it. It is statutorily given to members of parliament, giving them full immunity from legal proceedings (civil or criminal) for words spoken before, or written in a report to the assembly or its committee including motions and resolutions introduced in the assembly.⁴¹

Statements made in judicial proceedings proper are absolutely privileged,⁴² and so are statements made in proceedings quasi - judicial in nature.⁴³ Such absolute privilege is given to judges, counsels and witnesses for purposes of public policy.⁴⁴ It is not clear in East Africa whether this privilege also covers magistrates of lower grade. An opinion is expressed that they should be covered by this privilege when they are acting within their jurisdictions appreciating the fact that courts of justice are presided over by those who, from their high character are not likely to abuse the privilege.⁴⁵

Absolute privilege is not accorded administrative tribunals.⁴⁶ In Suleman Ltd. V. Sayani,⁴⁷ the defendant, an advocate was representing an owner of a rival transport business in a public session of Transport Licensing Authority. The suit arose out of replies made by the defendant to objections raised by the rival plaintiff, - company. The court referred to the U.K. Committees Report On Tribunals,⁴⁸ in making it quite clear that administrative tribunals are not accorded absolute privilege.

S. 132 of Kenya Evidence Act⁴⁹ accords absolute privilege to official communication. This privilege is accorded on grounds of public expediency and is in accordance with the common law principle in Chatterton V. Secretary of State for India⁵⁰. However, it is not clear how high such officials must be.

It is submitted that since such wide and complete immunity is a serious derogation of a citizen's right, it should be conceded only in the few cases where overwhelmingly strong reasons of public policy make it imperative to do, and should be restricted only to high government officials strictly in the course of their duty.

I. QUALIFIED PRIVILEGE

No action lies upon a communication made upon an occasion of qualified privilege and fairly warranted by it unless it is proved to have been made maliciously. The scope of this defence covers a wide range of situations and it is therefore hard to make a categorical compartmentalization of such situations. It suffices to give instances where this defence has been invoked.

In Mangat V. Sharma⁵¹ it was held that an occasion of qualified privilege arises where there is reciprocity of an interest (legal, moral or social) to communicate on one hand and to receive on the other. This reciprocity was said to be essential in Farmer V. Uganda Argus⁵². Such an occasion arises - where a defendant who is not actuated by malice is vindicating his cause⁵³, or he is protecting his character which has been attacked by the plaintiff;⁵⁴

where the recipient of the allegedly defamatory material has a legal interest to be informed of all that is happening and the informer has a legal, moral or social duty to dispatch such information;⁵⁵ where the defendant is informing members of the public of his no more business connection with the plaintiff and disclaims any responsibility;⁵⁶ where the plaintiff provokes the defendant and the latter does no more than put his side of the attack.⁵⁷

S. 7 of the Kenya Defamation Act lays down this defence for newspapers and the schedule to the Act lays down instances when such privilege is subject or is not subject to contradiction or explanation. But this defence can be abused by newspapers. In Shah V. Uganda Argus⁵⁸ the court considered a publication to be governed by qualified privilege. But the facts in this case do not given right to the defence of qualified privilege. The plaintiffs had been defamed as having forged passports. The defendant - newspaper relied on the defence of qualified privilege in that they were publishing government information as they were requested to do. The government information as such was not defamatory but the newspaper added cosmetics which made the information defamatory. In finding for the defendant on a defence of qualified privilege, the court relied on the fact that a government official had asked the newspaper to publish it. An opinion is expressed that that alone could not give rise to the defence of qualified privilege, and especially so when the defendant - newspaper had altered the meaning of the original information by adding cosmetics of their own.

J. JUSTIFICATION

This is a complete defence⁵⁹. But it requires strict proof⁶⁰. S. 14 of Kenya Defamation Act following S. 5 of the U.K. Act mitigated the rigour of common law by requiring that only substantial

allegations need to be proved for this defence to succeed. There is no case law on Kenyan Acts on this point.

K. FAIR COMMENT

Sir Udo Udoma, C.J., explained the essentials of defence of fair comment in Nekyon V. Tanganyika Standard Ltd.⁶¹ as a comment of public matters, which is an expression of opinion and not a statement of facts and which is fair⁶². A fair comment must not carry imputations of an evilsort or immorality except where the facts truly stated warrant the imputation. It does not follow a man into his private life or pry into his domestic concerns⁶³. S. 15 of Kenya Defamation Act mitigates the rigour of common law and its new test⁶⁴ overrules the decision of Dickson J. in Figuerendo V. Editor of Sunday Nation and Others⁶⁵ where the learned judge held that for this defence to succeed the truth of all the facts stated must be proved.

L. UNINTENTIONAL DEFAMATION

S. 13 of Kenya Defamation Act exonerates a defendant who tenders a suitable apology and correction⁶⁶. This defence is called unintentional defamation. As yet there are no Kenyan decisions to illustrate its application.

M. DAMAGE

In Japhet Mwanga V. Mtemi Senge⁶⁷ the court noted that it is difficult to assess by monetary standards an event which is of non-monetary nature⁶⁸. Generally, courts in assessing the damages take into consideration the mode and extent of publication⁶⁹, the nature of imputation, the status of the parties and the conduct of the defendant between the time of publication and court verdict.

Courts seem to have been very much influenced by the status of plaintiffs. For instance, in Mayanja V. The White Fathers⁷⁰

and Onama V. Uganda Argus⁷¹ the status of the ministers; In Farmer V. Uganda Argus⁷², the status of Attorney - General and D.P.P., and in Shah V. New African Press⁷³ advocate - plaintiffs were awarded considerably high amounts.

The highly criticised judgement of the House of Lords in Rookes V. Barnard⁷⁴ has been applied in East Africa⁷⁵ without due consideration. This is a case where the House of Lords have limited the award of exemplary damages to a few limited categories. A view is expressed that the courts should have given application of this decision a due consideration in the light of mounted criticism outside England.

Courts of appeal have generally refused to interfere with the awards of courts of intiation. But they did interfere in a few cases where the defamation was only defamatory in a technical sense⁷⁶, where the plaintiff was a criminal⁷⁷, or where the trial court failed to take into consideration that the plaintiff had been already awarded a substantial sum on the same publication⁷⁸.

Instead of discussing the courts' attitude in assessing damages in East Africa case by case it was thought that a table like the one presented below may give a better idea of the judicial role in assessing damages.

TABLE OF AWARDS IN DEFAMATION SUITS

CASE	STATUS OF THE PARTIES	IMPUTATIONS	MODE OF PUBLICATION	AWARD	REMARKS
Mayanja V. The white Fathers	Minister def.- Newspaper	Advocacy of illegal and immoral proselytization	Newspaper	Sh.50,000/=	The article was most vicious and jeering. Apology inserted was half-hearted.
Onama V. Uganda Argus	Minister def.-Newspaper	Use of Uganda army for personal gain	Newspaper ⁸	Sh.50,000/=	Such imputations on the plaintiff discharge of his ministerial office were serious.
Nekyon V. Tanganyika Standard Ltd.	Minister def.-Newspaper	Tribalism and nepotism	Newspaper	Sh.20,000/=	Circulation of the newspaper in Uganda was 92 copies only.
Farmer V. Uganda Argus	Attorney-General and D.P.P. def.-Newspaper	Unconstitutional interference with criminal proceedings.	Newspaper	Sh.50,000/= for the Attorney- General. Sh.40,000/= for D.P.P.	imputations were serious.

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CASE	STATUS OF THE PARTIES	IMPUTATIONS	MODE OF PUBLICATION	AWARD	REMARKS
Tanganyika Transport Company Ltd. V. Nooray	Businessman def.-a limited company	Contravention of motor licence	Letters	Sh.20,000/=	The plaintiff sole livelihood was threatened
Shah V. New African Press Ltd.	Advocates and others. Def. - Newspaper	Forgery of Passports	Newspaper	Sh.30,000/= each for advocates. Sh.20,000/= each for others.	Imputations were very serious.
Kajima V. East African Newspapers (Nation series) Ltd.	Medical Practitioner Def. - Newspaper	Professional incompetence.	Newspaper	Sh, 4,000/=	Such imputations were serious as affecting plaintiff's profession.
Odongkara V. Astles	Assistant Superintendent of Police. Def. - Television Operations Manager.	Plot to overthrow Uganda Government	Slander	Sh. 5,000/=	Imputations of disloyalty were serious but publication was limited to one person.

CASE	STATUS OF THE PARTIES	IMPUTATIONS	MODE OF PUBLICATION	AWARD	REMARKS
Olowo V. Attory-General	Assistant Superintendent of Police. Def. - Uganda Government	Witchcraft	Broadcast	Sh.8,000/=	Allegations were held to be serious
Biryabaremma V. Kakwere	A school Headmaster Def. - common man	Cruelity, corruption and profiteering	Letters	Sh.1,200/=	Parish - pump Politics.
Thakers Ltd. V. Barnard	A common man def. - Newspaper	Bibolousness and immorality	Newspaper	Sh. 100/=	Plaintiff was already serving a jail sentence on a charge of theft.

CONCLUSION

With the advent of constitutions with the basic norm of democracy which guarantees fundamental right of freedom of speech and expression, the law of defamation in East Africa has to play a very vital role. The customary law of defamation may be said to have been relegated to the relics of museum. It was crude and not meant to meet the needs of the present century.

Though we have received the English law through the Orders-In-Council and later on Judicature Acts, Courts in East Africa are no longer bound to apply English decisions. But because of their training, judges are still following the English decisions. When the much criticised decision of the House of Lords in Rookes V. Barnard has been applied in East Africa, one can comment that courts here should not blindly follow English decisions always. However, there have been no cases so far where the courts have been called to alter the principles of English law to suit the local conditions. Except a couple of decisions, the judiciary may be said to have played its role.

Courts in East Africa seem to follow a pattern of awards. Where the trial courts have made wrong assessments, the courts of appeal have not hesitated to interfere. This is a healthy trend. On the whole the civil law of defamation in East Africa can not be viewed as a gold-digging operation. But it is to be noted that a Kenya High Court decision¹ has awarded a sum of one hundred thousand shillings which is by far above the ordinary standards of awards.

Only Kenya, of the three East African countries has passed a legislation on the lines of the Defamation Act of 1952, (U.K.) In so far as the Act has mitigated the rigour of common law in the defences of Fair Comment and Justification, and clarified the law on Qualified Privilege, it is a great improvement.

Introduction of unintentional defamation and apology under certain circumstances is another welcome feature of the Act.

However, the Act failed to take the opportunity to rectify some of the defects of the English Legislation. The Act failed to abolish the much criticised distinction between Libel and Slander. It also failed to remove the technical defects like the meaning of innocent defamation. The defence of unintentional defamation may not serve a useful purpose because of the procedures involved. These things should have been simplified instead of following the English enactment verbatim. So far there are very few cases on the Kenyan Act, and so it is too early to offer any valid comments. However, Tanzania and Uganda may take note of the defects of the English Legislation whenever they take up such matters for legislation.

7. See Goldsmith, *op. cit.* A History of English Law, Vol. VII, p. 273 - 274.

8. While tortious liability is based upon the plaintiff as a social and rather than a commercial unit; for the latter, remedies are in commercial torts.

9. Spencer-Kemper, Code of Unintentional Defamation (1903).

FOOT NOTES

CHAPTER I

1. See Scott V. Sampson, (1882) 8 Q.B.D. 419, per Cave J, at P. 503.
2. Salmond, The Law of Torts (1961), P. 517.
3. Street, Torts, P. 280, (5th Ed.).
4. See Cassidy V. Daily Mirrors Newspapers Ltd, (1929) 2 K.B. 331 per Russel, L. J. at P. 354.
5. Hulton V. Jones (1909) 2 K.B. 441; Newstead V. London Express Newspapers Ltd., (1940) 1 K.B. 377 along with Cassidy's case are authority for this wide common law proposition.
6. The case of Rex V. Barnardiston (1684) 9 S.T. 1333 illustrates this. In that case the accused person was sentenced to a fine of £10,000 for mere expression of political opinions to a private friend in a private letter. More serious punishments were not rare.
7. It was abolished in 1641 by The Long Parliament Act of that year.
8. See Holdsworth, W. S., A History of English law, Vol.VIII P. 275 - 276.
9. Civil defamation strictly so called protects the plaintiff as a social man rather than a commercial man; for the latter, remedies are in commercial torts.
10. Spencer Bower, Code of Actionable Defamation (1908).
11. Ibid. at PP. 275 - 276.

12. In 1476 Caxton set up the first printing Press in England.
13. Criticism must be on the work but not on the person:
Kensley V. Foot (1952) A. C. 345 (H.L.).
14. In Yonssonpoff V. Metro-Goldwyn-Meyer Pictures Ltd. (1934)
50 L.T.R 581 (C.A.), in a talkie film, the scenes depicted
on the screen itself were defamatory of the plaintiff.
15. In Hulton V. Jones (1910) A. C. 20, (H.L) the cause of
action arose in a motr festival at Dieppe, France.
16. In McQuire V. Western Morning News Co., (1903) 2K.B.100,
a critic of a play had said it to be "dull, vulgar and
degraded".
17. Kensley V. Foot. , Supra.
18. In Mayanja V. The White Fathers and others, Civil Suit No.643
of 1960 (U), unreported, the defendant - Newspaper admitted
recklessness in failing to check on the source of
information.
19. In introducing the Kenya Defamation Bill, the Attorney-
General commetned on the newspapers high responsibility
and their high vulnerability to damages to the aggrieved
individuals which results from their failure to discharge
that responsibility well - see The Kenya National Assembly
Debates, (1970) Vol. 20 Col. 879 .
20. 15 ~~x~~ 16 Geo. 6 ~~x~~ 1 Eliz. 2 C. 66
21. Kenya Defamation Act, 1970. (Cap. 36, The Laws of Kenya).

CHAPTER II

1. For Uganda it is Uganda Order-In-Council 1962, Art. 15 (2); for Kenya it is East African Protectorate Order-In-Council 1902, Art. 15 (2) and for Tanzania it is Tanganyika Order-In Council 1920, Art. 17 (2).
2. Judicature Act of Uganda, Act. 11 of 1967; Judicature Act of Kenya, Act. 16 of 1967 and Judicature and Application of Laws Ordinance of Tanganyika, 1961.
3. Proviso to 3(1) of Kenya Judicature Act. Tanzanian and Ugandan Judicature Act provisos are identical.
4. Statutes of general application for the purposes of the received English law on defamation are:-
 - a) Stamp duties on Newspapers Act, 1836 (6 \times 7 Will.4, C. 76).
 - b) Libel Act, 1843 (6 \times 7 vict. C.96).
 - c) Libel Act, 1845 (8 \times 9 Vict. C.75).
 - d) Law of Libel Amendment Act, 1888, (51 \times 52 Vict. C. 64).
 - e) Slander Of Women Act, 1891 (54 \times 55 Vict. C.51)
5. See S. 2 of Kenya Magistrates Courts Act, No. 17 of 1967. Tanzania and Uganda have similar Acts.
6. Act No. 5 of 1969.
7. Uganda Constitution has similar provisions. But Tanzania Constitution does not have.

CHAPTER III

8. Cap. 36, Laws of Kenya. *Journal of Current Jurisprudence* (1963)

9. 15 & 16 Geo. 6 & 1 Eliz. 2, C.66.

10. *Omanghara V. East African Newspapers Ltd.* (1963) 1 L.L.J. 576 (Q); *Ngũgĩ V. East African Newspapers (Kenya Edition) Ltd.* (1970) K.L.R. 25.

11. *Obote V. Uganda Army* (1970) S.L. 352 (U)

12. *Biryabarema V. Kisoro*, Civil Suit No. 372 of 1963 (U). Unreported.

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13. *Tanganyika Transport Company V. Pindoy* (1961) S.L. 33 (Tang.)

14. See *Biryabarema V. Kisoro*, supra.

15. *Williamson Diamonds Ltd. V. Brown* (1970) S.L. 1 (U.S.)

16. *De Souza V. George Brothers Ltd.* (1957) S.L. 119 (U.S.)

17. This is a major source and there are a number of cases on this e.g. *Farmer and Another V. Uganda Army* (1964) S.L. 358; *Harris V. The White Palmers*, Civil Suit No. 543 of 1960 (U); *Isalaba V. Lokidi* (1971) S.L. 87 (U.S.); *Omang V. Uganda Army* (1960) S.L. 37; *Kivungu V. Obote*, Civil Suit No. 313 of 1962 (U); unreported.

18. *Farmer and Another V. Uganda Army*, *ibid.* IN this case the two plaintiffs were the Attorney-General and the Director of Public Prosecutions.

19. See *Omanghara V. Antler* (1970) S.L. 374.

CHAPTER III

1. Max Gluckman, Gossip and Scandal, 4 Current Anthropolgy (1963)
2. ibid. at P. 12
3. Rwabugahaya V. East African Newspapers Ltd. (1968) E.A. 576 (U); Kajima V. East African Newspapers (Nation Series) Ltd. (1972) K.H.C.D. No. 25.
4. Shah V. Uganda Argus (1970) E.A. 352 (U)
5. Biryabarema V. Kakwere, Civil Suit No. 372 of 1963 (U).
Unreported.
6. Tanganyika Transport Company V. Nooray (1961) E.A. 55 (C.A.)
7. See Biryabarema V. Kakwere, Supra.
8. Williamson Diamonds Ltd. V. Brown (1970) E.A. 1 (C.A.)
9. De Souza V. George Brothers Ltd. (1957) E.A. 115 (C.A.)
10. This is a major source and there are a number of cases on this e.g. Farmer and Another V. Uganda Argus (1964) E.A. 568; Mayanja V. The White Fathers, Civil Suit No. 643 of 1960 (U); Lalobo V. Lakidi (1971) E.A. 87 (C.A.) Onama V. Uganda Argus (1969) E.A. 92 Kiwanuka V. Obote, Civil Suit No. 315 of 1965 (U); unreported.
11. Farmer and Another V. Uganda Argus, ibid. IN this case the two plaintiffs were the Attorney-General and the Director of Public Prosecutions.
12. See Odongkara V. Astles (1970) E.A. 374.

13. See S. 5 of Magistrates Courts Act, (Cap. 10, Laws of Kenya) stating the monetary civil jurisdiction of courts. Tanzania and Uganda have similar Acts.
14. In Rwekenika V. Binamungu, (1974) E.A. 388 (T) the Tanzanian High Court, reversing the trial court judgement observed that where parties are not legally represented a defamation suit may be difficult to decide.
15. In Olowo V. A.G., (1972) E.A. 311 (U), the parties did not call it witchcraft but 'supernatural' powers.
16. Odongkara V. Astles, 1970 E.A. 374 (U).
17. Mangat V. Sharma (1968) E.A. 620 (T).
18. One finds suits based on politics in both High Courts and subordinate courts. The only difference is that the latter arise in rural areas and involve petty politics and posts.
19. Civil Suit No. 393 of 1964 (U).., unreported.
20. Op. cit.
21. Op. cit.
22. Op. cit.
23. Paul V. John, Court of Review decided by Ainley J. on 1/2/67.
24. Filimon Deya s/o Odeny V. Thomas Ogega s/o Ogondo, Kisumu D. A. C. C.C 114.67 quoted in E.A.L.J. Vol.VII No. III (1971) at P. 221.

25. Akongo V. Owuor; Kosele D. A. C, C.C. 44/64 quoted in E. A. L. J. Vol. VII No. III (1971) at P. 221.
26. Catherine Anyango V. Oruko Opiko Kisumu D. A. C., C.C. 381/66 quoted in E.A.L.J. Vol. VII No. III (1971) at P. 197.
27. Joshua Ogutu V. Owino Agwok and Others, Kisumu Mag. C. A. 119/66 quoted in E. A. L. J. Vol. VII No. III (1971) at P. 202.
28. See Gray V. Jones (1939) 1 All. E. R. 789.
29. Lewis V. Daily Telegraph Ltd., (1964) A.C. 234 (H.L.)
30. Paskalia Oyugi V. Obiero, Towe Bura Rongo Mag., C.A., 111/66, quoted in E.A.L.J. Vol. VII No. III (1971) at P. 205.
31. Anderson V. Gorrie. (1895) 1 Q. B. 668.
32. Seaman V. Methercliff (1876) 2 C.P.D. 53, (C. A.)
33. Marrinan V. Vibart (1973) 1 Q. B. 528.
34. For a good discussion on this, see Ramamoorthy, Law of Malicious Prosecution and Defamation, (1976) at P.P. 197 - 199; Gatley, Libel and Slander P. 174 (6th Ed.),. Also see the judgement of Lopes J. in Royal Aquarium V. Parkinson (1892) 1 Q.B. 431 at p. 451.
35. Op. cit.

CHAPTER IV

1. Kiwanuka V. Obote and Another, op. cit.
2. Bendzel V. Singh, (1953) E.A.C.A. 53 (C. A.)
3. Odongkara V. Astles, op. cit.
4. Rwekanika V. Binamungu, op. cit.
5. Farmer and Another V. Uganda Argus, op. cit.
6. Farmer's Case, ibid.
7. Kajima V. East African Newspapers (Nation Series) Ltd., op. cit.
8. The Publishers of Munonyozi V. The Lukikko of Buganda, 3 U.L.R. 124.
9. Kigozi V. Mayanja, Civil Suit No. 149 of 1965 (U), unreported.
10. Desani and Others V. Uganda Newspapers Ltd. and Another (1971) E.A. 450 (U).
11. East African Standard V. Gitau (1970) E.A. 678 (C.A.)
12. Thakers Ltd. V. Barnard (1965) E.A. 82 (T).
13. Olowo V. A. G. (1972) E.A. 311 (U).
14. Japhet Mwangi V. Mtemi Senge (1969) T.H.C.D. No. 21.
15. Singh V. Notkin (1952) 19 E. A. C. A. 117 (K).
16. Caltex V. Oddie (1955) 22 E. A. C. A. 334.
17. Athman Loojw V. Sodiki Athman (1965) T.H.C.D. No. 123.

- 17. Yohana Mujuni V. Isaya s/o Bakobi (1969) T.H.C.D. No. 23;
Rwekanika V. Binamungu, Op. cit.
- 18. 1891, 54 & 55 Vict. G. 51.
- 19. Vera Florence Cornelius and Benjamin Cornelius V. William
Martinaglia (1934) 1 T. L. R. (R) 492. S. 4 of Kenyan
Defamation Act has incorporated the provisions of that Act.
- 20. Op. cit.
- 21. The Court followed Tolley V. Fry (1930) 1 K. B. 467 (C.A.)
- 22. (1969) T.H.C.D. No. 192.
- 23. Pfeiffer V. Steffens 1 T.L.R.(Revd.) 178.
- 24. Agit Singh V. Harman Singh (1967) E.A. 547 (C.A.)
- 25. Lakidi V. Lalobo (1971) E.A. 87 (C.A.)
- 26. Kati V. Elder (1964) U. H. C. D. No. 437.
- 27. There are many cases on this and only a few like Mayanja V. The White Fathers, supra; Onama V. Uganda Argus
Ltd. (1968) E.A. 352 (C.A.); Farmer and Another
V. Uganda Argus, Supra, will be quoted here to illustrate.
- 28. De Souza V. George Brothers Ltd. (1957) E.A. 115 (C.A.)
- 29. Evan Maina V. Joseph Chibo (1964) E.A.668 (K); Tanganyika
Transport Co. V. Nooray (1961) E.A. 55
- 30. Olowo V. A.G. supra.
- 31. Athman Lusaju V. Sadiki Athmani (1965) T.H.C.D. No. 128.

32. Bendzel V. Singh, supra.
33. Shah V. United African Press (1961) E.A. 93
In Kigozi V. Mayanja, supra; Desani and Others
V. Uganda African Newspapers Ltd. and Another, supra;
East African Newspapers (Nation Series) Ltd. V. Opondo
(1974) E. A. 32 (C.A.), Court followed the test laid down
in Knupper V. The London Express Newspapers Co. Ltd. (1944)
A. C. 116, in identifying plaintiffs.
34. Op. cit.
35. Lefanu V. Malcolmson (1884) 9 E.R. 910.
36. ibid. at P. 923.
37. Op. cit.
38. Hulton V. Jones, supra; Newstead V. London Express(1940)
1 K.B. laid down this principle.
39. In Odongkara V. Astles, supra, Phakde J. said,
" ... it is well established that where spoken words do not
fall under certain well - defined categories, an action
of Slander can only be maintained if the plaintiff has
suffered special damage." See also Lalobo V. Lakidi, per
Russel J.
40. See Paravathi V. Manna (1884) I.L.R. 8 Mad. 175 per
Turner, C.J.
41. S. 3 of Kenya National Assembly (Powers and Privileges) Act,
(Cap. 6, Laws of Kenya) as amended by Act. No. 14 of 1966,
gives this privilege.

S. 13 extends this immunity to outsiders who are called
upon to give evidence before a parliamentary Committee or
the parliament itself. Tanzania and Uganda have similar
Acts.

42. Japhet Mwangi V. Mtemi Senge, supra. See also Kenya Evidence Act (Cap. 80, Laws of Kenya), generally Chapter Five, Part II. Tanzania and Uganda have similar Evidence Acts.
43. Mandavia V. Mangat and Other (1954) K.L.R. 68.
44. Mandavia V. Mangat, ibid.
45. See Royal Aquarium V. Parkinson (1892) 1 Q.B. 431 per Lopes L. J. at P. 451.
46. Suleman V. Sayani, (1963) E.A. 603.
47. ibid.
48. Comm. Paper No. 218 (1957)
49. Act. op. cit.
50. (1895) 2 Q.B. 188 (C. A.)
51. Supra.
52. Supra.
53. Suleman V. Sayani, supra.
54. Williamson Diamond Ltd., and Another V. Brown, supra.
55. Nkalubo V. Kibirige (1973) E.A. 102 (C.A.)
56. De Souza V. George Brothers Ltd., supra.
57. Hoare and Others V. Eric Jessop (1965) E.A. 218 (C.A.)
58. (1971) E.A. 362 (U)

59. Hoare V. Eric Jessop, supra.
60. In United African Press V. Shah, supra, the court expressed the view that although the standard of proof required is not as high as that required by criminal law, a more serious imputation would require a higher degree of justification.
61. Civil Suit No. 393 of 1964 (U).
62. The test is objective. Malice of one can not be imputed to another: Hoare Jessop, supra, following Egger V. Chelmsford (1965) 1 Q.B. 248.
63. In Publishers of Munyonyozi V. The Lukikko of Buganda, supra, Guthrie Smith J., observed that a defence of fair comment deals only with such things as invite public attention or call for public comment. It does not follow a man into his private life. It does not attack the individual but only his work. It is a judgement on certain facts expressed by one ^{who has considered them} and assumed them to be true.
64. The new test is whether the words complained of are a fair comment having regard to the facts which have been proved to be true.
65. (1968) E.A. 501 (U).
66. But in Uganda and Tanzania where similar legislation is not so far undertaken S. 2 of Libel Act 1843, (U.K.), 6 & 7 Vict. C. 96, would govern the situation. See Manyanja V. The White Fathers, op. cit.
67. Op. cit.
68. Professor Wade has also observed that the question of damage is a dangerous territory for an academic lawyer to invade - see Wade, Defamation, (1950) 16 L. Q.R. 348 at P. 355.

69. In this connection it is to be noted that where publication is through newspapers plaintiffs usually get high damage.

In Mandavie V. Mangat, op. cit. the plaintiff was awarded Sh. 1,000/= only because of the narrow area of publication, besides the fact that the plaintiff himself had provoked defendants state of anger. See also Nekyon V. Tanganyika Standard Ltd., supra.

70. Op. cit.

71. Op. cit.

72. Op. cit.

73. Op. cit.

74. (1964) A.C. 1129.

75. Applied in Visram & Kharsan V. Bhatt (1965) E. A. 789 (C.A.);
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76. East African Newspapers (Nation Series) Ltd. V. Opondo
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CONCLUSION

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