



**Hipora Securities Limited v Ododa & another (Civil Appeal
636 of 2022) [2024] KEHC 10614 (KLR) (30 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10614 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL 636 OF 2022
CJ KENDAGOR, J
AUGUST 30, 2024**

BETWEEN

HIPORA SECURITIES LIMITED APPELLANT

AND

PATRICK ODUOR ODODA 1ST RESPONDENT

HENRY KIOKO 2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. P. Muboli, Principal Magistrate, delivered on 22nd July, 2022 in Milimani C.M Civil Suit No. 10811 of 2018)

JUDGMENT

1. The 1st Respondent was gainfully employed by the Appellant until 26th October, 2018, when he was dismissed. On 13th October, 2018, he was arrested by the Police for inquiry and interrogation about a shoplifting incident that had allegedly occurred at the Appellant's place of work. The police released him the following day without preferring any charges against him. The next day, on 15th October, 2018, the 2nd Respondent allegedly published defamatory words against him in a WhatsApp Group meant for the supervisors of the Appellant. The 1st Respondent sued the Appellant and the 2nd Respondent for general and exemplary damages for defamation therefrom in Milimani CMCC No. 10811 of 2018.
2. Upon hearing the claim, the trial court held in favour of the 1st Respondent and awarded him general damages of Kshs.250,000/- and exemplary damages of Kshs.200,000/-. He was also awarded costs and interest.
3. Being aggrieved by the said decision, the Appellant lodged an appeal in this court, asking the court to set aside the judgment of the lower court. In its Memorandum of Appeal dated 7th August, 2022, the Appellant raises seven grounds of appeal which are as follows:



- a. That the Learned Honorable Magistrate erred in law and fact by entering judgment in favor of the 1st Respondent against the Appellant when on the contrary the Trial Court misapprehended and failed to properly evaluate written submissions by the Appellant and evidence on record.
 - b. That the Learned Magistrate erred in failing to take cognizance of the fact that there was no nexus and/or any relationship between the Appellant and the 2nd Respondent.
 - c. That the Learned Honorable Magistrate erred in law by failing to find that there was no material evidence presented to the Honorable Court that the alleged WhatsApp group is owned and/or managed by the Appellant.
 - d. That the Learned Honorable Magistrate erred in law and in fact in holding that the 1st Respondent had proved his claim for alleged defamation on a balance of probabilities.
 - e. That the Learned Magistrate erred in law by awarding the 1st Respondent General Damages of Kshs 250, 000 Exemplary Damages of Kshs. 200 000 plus costs of the suit and interest.
 - f. That the Learned Magistrate erred in law and in fact in failing to sufficiently appreciate that the 1st Respondent's evidence was purely based on falsehoods, hearsay, gaps, and hypothesis with no basis at all.
 - g. That the Honorable Magistrate erred in law and fact by making conclusions that are not supported by evidence on record.
4. The appeal was canvassed by way of written submissions, for which this court gave due consideration.

The Appellant's Case

5. The Appellant submitted that there was no nexus and/or any relationship between the Appellant and the 2nd Respondent. It also argued that there was no material evidence presented to the trial court to show that the alleged WhatsApp group was owned and/or managed by the Appellant. In addition, the Appellant submitted that its actions (which has been denied) was motivated by the desire to safeguard public interest in demanding for honest employees as well as to inculcate discipline to dishonest employees. It also submitted that the 1st Respondent did not adduce evidence to show that he was subjected to public hatred, contempt, ridicule, or caused him to be avoided. It also submitted that the words amounted to fair comment on a matter of public interest; they were published in good faith and were accompanied by assertions of truth and fair comment and were not defamatory at all.

The 1st Respondent's Case

6. The 1st Respondent submitted that there was a nexus between the Appellant and the 2nd Respondent in that the latter was an employee of the former. He submitted that the Appellant's contention that it did not own the said WhatsApp group beats logic since the same is run by its supervisors. He further submitted that the said comments were not fair comments and that he had proved his case against the Appellant on a balance of probabilities.

Issues for Determination

- a. Whether there was a nexus between the Appellant and the 2nd Respondent
- b. Whether the defense of fair comment is available to the Appellants



Whether there was a nexus between the Appellant and the 2nd Respondent

7. The 1st Respondent submitted that the 2nd Respondent was an employee and/or officer of the Appellant at the time of the alleged publication. He also alleged that it was the 2nd Respondent who published or caused the publication of the alleged defamatory words. The Appellant, however, denies that the 2nd Respondent was their employee.
8. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”
9. The role of the 2nd Respondent in the alleged publication of the defamatory statement was heavily contested at the hearing in the lower court. In his examination-in-chief, the 1st Respondent said ‘I know Henry Kioko, he was the operations manager.’ This statement was not controverted on cross-examination. In re-examination, he stated that ‘Henry is the General Manager. I did not work as the Human Resource in the Company.’ On the other hand, DW1, the H.R. Manager of the Appellants, stated in examination-in-chief, ‘I have never met Mr. Kioko. We do not have a General Manager, instead we have an operations manager.’ The trial court considered the two versions and believed the version given by the 1st Respondent.
10. The lower court did not place high premiums on the role of the 2nd Respondent in the alleged publication of the defamatory statement. Instead, the court found that the publication was made in a WhatsApp group of the Appellant’s supervisors, irrespective of who published the statement. The court observed, ‘Whoever published the words knew that they were not true in regard to the Plaintiff.’ Thus, the Court held that the Appellant published the defamatory Statement, even though it could not single out who among the Appellant’s supervisors posted the defamatory statement.
11. I have relooked at the evidence before me and have formed the opinion that the Appellant cannot detach itself from the defamatory publication. The information contained in the published statement points to the observation that the statement’s author had access to precise employment details of the Appellant’s employees. The author must have been a custodian of the Appellant’s employee records, including their respective employee numbers and information that could not have been available to a stranger. Notably, the accuracy of the employee’s details in the defamatory statement was not controverted during the trial. In my view, the 1st Respondent proved that it was more probable that the Appellant’s employee authored the defamatory message than an outsider.
12. During the hearing, the 1st Respondent stated that at the time of his dismissal in 2018, Mr. Kioko, the 2nd Respondent, was the operating manager. In his examination-in-chief, he stated, ‘I know Henry Kioko, he was the operations manager.’ When the Appellant’s HR Manager took to the stand on 21st September, 2021 (about three years after the 1st Respondent left the Company), he confirmed that the company’s organizational structure has the operations manager position. He did not controvert the 1st Respondent’s evidence that Mr. Kioko was holding that position in 2018 when the defamatory statement was said to have been published.



13. The Court is entitled to look at the evidence and the circumstances. The totality of such evidence and circumstances persuades me to hold that the 2nd Respondent published the defamatory statement, and he published it within the course and scope of his official duties as the Appellant's employee.
14. It then follows that the Appellant is vicariously liable for tortious acts of the 2nd Respondent.
15. The court in *National Social Security Fund Board of Trustees v Ankhan Holdings Limited & 2 Others* [2006] eKLR cited with approval the decision of the House of Lords in *Williams and Another v Natural Life Health Foods Ltd* and another [1998] 2 All ER 577 at 582 which held that:

“Whether the principal is a company or a natural person, someone acting on his behalf may incur personal liability in tort as well as imposing vicarious or attributed liability upon his principal.”
16. In the case of *Tabitha Nduhi Kinyua vs Francis Mutua Mbuvi & Another* Civil Appeal No. 186 of 2009 [2014] eKLR the court stated:-

“The principle of vicarious liability is an anomaly in our law because it imposes strict liability on an employer for the delict of its employee in circumstances in which the employer is not itself at fault. An employer will be held to be vicariously liable if its employee was acting within the course and scope of employment at the time the delict was committed...”
17. As to whether an employer can be held vicariously liable for defamatory actions of his employees, I am guided by in *Gatley & Lindsell on slander and Libel* 11th Ed. at page 197, as was quoted in *Sicily K. Kariuki v Standard Group PLC & 6 Others* [2020] eKLR:-

“An action for defamation is purely a personal action. The proper person to sue as a claimant is the person defamed and the proper person to be sued as the defendant is the person who published the defamatory words or caused them to be published (though this may include a person vicariously liable for another)”

Whether the Defense of Fair Comment is available to the Appellants

18. In *Halsbury's Laws of England* Fourth Edition Vol. 28 page 45, paragraph 145, the authors state;

“The defences of both fair comment and qualified privilege are defeated by proof that the defendant published the words complained of maliciously. In both cases proof that the defendant's sole or dominant motive in publishing the words was improper will establish malice. The fact that the defendant did not believe that what he said was true is usually conclusive evidence of malice to rebut the defence of qualified privilege; and in fair comment it is usually conclusive evidence of malice to show that the defendant did not honestly hold the opinion expressed. If a defendant publishes untrue defamatory matter recklessly, without considering or caring whether it is true or not, he is treated as if he knew it to be false”.
19. The appellant relied on the case of *Nation Media Group & Another vs Alfred N. Mutua* [2017] eKLR, where the court defined the scope of the defence of fair comment thus;

“To sustain the defence of fair comment, the appellants were required to demonstrate that the words complained of are comment, and not a statement of fact; that there is a basis of fact for the comment, contained or referred to in the article complained of; and that the



comment is on a matter of public interest [see Gately on Libel and Slander, 8th edition, 1981 (Sweet & Maxwell) at paragraph 692 at page 291)”.

20. During the trial at the lower court, the Appellant’s Officer, in cross-examination, admitted that the Police did not prefer any criminal charges against the 1st Defendant and that none of the recovered items were found in the 1st Respondent’s possession. He also states as follows; ‘The Claimant was only taken to Kasarani Police station. He was not charged in court. Some items were recovered, they were not in the claimant’s possession.’
21. The publication in question also depicted the 1st Respondent as a thief and was not meant to be an opinion. The message read as follows;-

“Thieves!!!!... Below former RSO deployed at Carrefour TRM have been suspended without pay for being involved in theft, collusion to steal and shoplifting. Hipora doesn’t tolerate such criminal acts by its staff and therefore any officer found involved in theft shall be dealt with. They were handed over to the police for legal action:-

1. Shadrack Obodo Aloo- HSS 0117
2. Paul Kipngeno Sang- HSS 0588
3. Josiah Obiko Omobogo- HSS 0724
4. Patrick Oduor Odor- HSS 0724
5. Damiano Ngunia Gachimu- HSS 0412.”

22. I rely on Gately on Libel and Slander 6th Edition Page 706 where the learned authors stated that:-

“If the words complained of contain allegations of facts, the defendant must prove such allegations of facts to be true. It is not sufficient to plead that he bona fide believed them to be true. The defense of fair comment does not extend to cover misstatement of facts, however bona fide. Bona fide belief in the truth of what is written may mitigate the amount, but it cannot disentitle the plaintiff to damages.”

23. The court associates itself with the decision of the High Court in HCCC No. 1709 of 1996 J.P Machira vs Wangethi Mwangi & Another, where it was held inter alia that:-

“ Any evidence which shows that the defendant knows the statement was false or did not care whether it be true or false will be evidence i.e. of malice. In the instant case, the plaintiff had supplied the defendant with the true position of the matter before the publication was made. Inevitably therefore, at the time of publication, the defendant knew or is taken to have known that the relationship between the plaintiff and Ms Grace Wahu Njoroge was not an advocate/client relationship and that there was no relationship of such a nature between them.

Further, considering also the post publication conduct of the defendant, the correction was made more than a week after the publication, which was made with the knowledge that it was false. I have no hesitation in finding the publication being malicious.”

24. In the circumstances, I find that the defence of fair comment did not apply as the publication was not expressed as an opinion of the Appellants but as proven facts. I find that the language used by the



- defendants in the publication is a clear manifestation of malice on their part against the 1st Respondent, and therefore, the defences raised are not available to them.
25. Lastly, the Appellant argued that the Learned Magistrate erred in law by awarding the 1st Respondent General Damages of Kshs.250,000/=, Exemplary Damages of Kshs.200,000/= plus the costs of the suit and interest. On the other hand, the 1st Respondent argued that the trial court awarded just damages against the Appellant and the 2nd Respondent, and as such, there is no reason for this Honorable Court to interfere with the awards.
26. In deciding whether to disturb the quantum given by the Lower Court, the Court should be aware of its limits. As an exercise of discretion, it should be done judiciously and conclusively in the circumstances to ensure that the award is not too high or too low to be an erroneous estimate of damages.
27. The Court of Appeal pronounced itself succinctly on these principles in *Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another vs Lubia & Another (No 2)* [1985] eKLR as follows:-
- “The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See *Ilanga v Manyoka*, [1961] EA 705, 709, 713 (CA-T); *Lukenya Ranching and Farming Co-operative Society Ltd v Kavoloto*, [1979] EA 414, 418, 419 (CA-K). This Court follows the same principles.”
28. I adopt the reasoning of the Court in *Joseph Njogu Kamunge vs Charles Muriuki Gachari* [2016] eKLR where the court held that;
- “Award of damages is an exercise of discretion of the trial court but the same should be within limits set out in decided case law and must not be inordinately so low or so high as to reflect an erroneous figure. In *Butt v Khan Law*, JA stated:-
- “... An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low...”
29. Similarly, in the English Court of Appeal decision in the case of *John v MG Ltd* the Court held:-
- “The successful plaintiff in a defamation action is entitled to recover, the general compensatory damages such sum as will compensate him for the wrong he has suffered. That must compensate him for damages to his reputation, vindicate his name, and taken account of the distress, hurt and humiliation which the defamatory publication caused.....
- Exemplary damages on the other hand had gone beyond compensation and are meant to “punish” the defendant. Aggravated damages will be ordered against a defendant who acts out of improper motive e.g. where it is attracted by malice; insistence on a flurry defence of justification or failure to apologize.”
30. I find nothing in the Judgment of the lower court to suggest or even in the arguments advanced by the Appellant’s Counsel to suggest that the Learned Magistrate erred in its findings, nor has it been



demonstrated that the award is inordinately high as to be an erroneous estimate. The upshot is that I hereby dismiss this appeal with costs to the 1st Respondent.

31. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS
ONLINE PLATFORM ON 30TH AUGUST, 2024.**

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Hellen

Advocate for Appellant: Adv. Tuwei holding brief for Adv. Kirimi

No appearance for the Respondents

