Nation Media Group Limited v Odenyo (Civil Appeal 239 of 2020)
[2024] KEHC 15095 (KLR) (Civ) (28 November 2024) (Judgment)

Neutral citation: [2024] KEHC 15095 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 239 OF 2020

JN NJAGI, J

NOVEMBER 28, 2024

BETWEEN

NATION MEDIA GROUP LIMITED ..... APPELLANT

AND

RICHARD ODENYO ..... RESPONDENT

(Being an appeal from the judgment and decree of Hon. L.L. Gicheha, Chief Magistrate, in Milimani CMCC No. 1860 of 2016 delivered on 29/ 5/2020)

JUDGMENT

1. The respondent herein instituted a suit against the appellant in which he was seeking damages for defamation over a publication ran by the defendant in its Daily Nation Newspaper that the respondent deemed to be defamatory. The defendant denied the claim. The trial court upon hearing the matter found the publication to be defamatory and awarded the respondent the following damages:
    i. General damages- Ksh.2,000,000/=
    ii. Exemplary damages – Ksh. 500,000/=
    iii. Punitive damages – Ksh.500,000/=
    iv. Costs of the suit and interest
2. The appellant was aggrieved by the judgment and lodged the instant appeal on the following grounds:
    1. That the learned Magistrate erred in law and in fact in delivering an inconsistent judgment.

2. That the learned Magistrate erred in law and in fact inholding that the Respondent had proved his case noting that the Respondent had failed to set out and/or particularize in the plaint the alleged libelous words in verbatim.

3. That the learned Magistrate erred in law and in fact in holding that the Respondent had been defamed by the Appellant yet the evidence adduced did not support the Respondent's claim.

4. That the learned Magistrate erred in law and in fact in failing to hold that the Respondent did not discharge his burden of proving or establishing malice on the part of the Appellant.

5. That the learned Magistrate erred in law and in fact in concluding that merely because the Appellant did not call any witness at trial then the article complained of was defamatory.

6. That the learned Magistrate erred in law and in fact in awarding general damages Kshs 2,500,000/- or Kshs.2,000,000/- to the Respondent which prayer for general damages had not been pleaded by the Respondent in the plaint.

7. The learned Magistrate erred in law and in fact in awarding general damages of Kshs 2,500,000/- or Kshs.2,000,000/- to the Respondent, which amount is inordinately high and not founded on any outlined legal principles.

8. The Learned Magistrate erred in law and in fact in awarding the sum of Kshs 500,000 as exemplary damages and Kshs. 500,000as punitive damages respectively as different heads of damages contrary to established legal principles.

9. That the learned Magistrate erred in law and in fact in awarding the sum of Kshs 500,000 as exemplary damages and Kshs500,000 as punitive damages respectively which awards were inordinately high taking into consideration the evidence adduced and all other relevant factors when assessing the same (which in any event should not have been awarded).

10. That the learned Magistrate erred in law and in fact by basing the award on extraneous considerations and factors.

3. The appeal was disposed of by way of written submissions of the respective advocates appearing for the parties.

Appellant`s Submissions

4. The appellant submitted that the suit was defective in that the respondent did not set out the offending article verbatim in the plaint as required by Order 2 rule 7 sub-rule 1 of the Civil Procedure Rules, 2010.

5. The appellant submitted that the provisions of the said rule are mandatory. The appellant relied on the case of Nkalubo v Kibirige (1973) EA 102 where the Court of Appeal held that:

> " In all suits for libel the actual words complained of must be set out in the plaint. In libel and slander the very words complained of are the facts on which the action is grounded. It is not the fact of the defendant having used defamatory expressions, but the fact of his having used those defamatory expressions alleged, which is the fact on which the case depends.... This is not a mere technicality, because justice can only be done if the defendant knows exactly what words were complained of, so that he can prepare his defence.

6. It was submitted that the trial court erred in awarding damages on a defective suit.

7. The appellant submitted that the trial court erred in holding that the appellant had defamed the respondent yet the evidence adduced did not prove the respondent`s case on a balance of probabilities. More so that the trial court erred in finding the appellant liable on account that the appellant did not adduce any evidence to prove that the contents of the publication are true when it was the duty of the respondent to prove his claim on a balance of probabilities which did not depend on the appellant`s case. The appellant in this respect relied on the holding in the case of Nation Media Group v Jakayo Midiwo, Civil Appeal No. 130 of 2013 (2018) eKLR where the court held that:

> There can be no doubt from what we have said that the learned Judge erred in basing her decision merely on the ground that the appellant did not present any evidence. It was for the respondent to prove his claim on a balance of probabilities. That burden did not depend on the appellant's case.

8. It was submitted that even in the absence of evidence to prove the truthfulness of the publication, the burden of proof could not be shifted to the appellant as was done in this case.

9. The appellant submitted that the respondent did not prove essentials of defamation as was set out in the case of Wycliffe A. Swanya v Toyota East Africa Ltd & another (2009) eKLR. That in this case, the statement published by the appellant was not defamatory to the respondent as there was no deliberate attempt or ulterior motive by the appellant to attack the respondent`s reputation in the said article even on the face of it and does not depict spite or ill will or recklessness complained of and the language used was not disproportionate to the facts which were admitted by the respondent. That the article merely gave a fair report of the allegation made against the respondent by the Ethics and Anti-Corruption Commission, a fact that was admitted by the respondent. That the respondent in his testimony admitted that he was actually investigated by the said body on his approval for release on bond terms of the Akasha brothers. The appellant referred to the letter from the commission produced by respondent.

10. It was submitted that no evidence was adduced by the respondent to prove that the article complained of was actuated by malice or done deliberately to disparage the respondent`s character and reputation. The appellant relied on the case of Simeon Nyachae v Lazarus Ratemo Musa & another (2007) eKLR where the court held that:

> In an action for defamation, the actual words complained of and the substance must be proved by the plaintiff. And it is not sufficient to show the defendant made defamatory statements. The plaintiff must give particulars of the facts and matters from which the malice is to be inferred. He must show to court that the defendant acted maliciously. In my humble view, words are not defamatory perse, there has to be a statement of fact or expression of opinion or imputation conveyed by them, which will have the effect of defaming an individual.

11. The appellant further submitted that though the respondent had claimed that he suffered loss by missing a promotion as a result of the publication, he did not produce records or anything to prove damage to his career. That the respondent continued to discharge his judicial duties notwithstanding the subject article. Consequently, the appellant submitted that the trial magistrate erred in finding that the respondent was defamed by the appellant as the evidence adduced did not support the respondent`s claim.

12. The appellant submitted that the respondent in his plaint never pleaded for general damages in his claim of defamation against the appellant. It was their submission that it is settled law that parties in a civil suit are bound by their pleadings as was held in the case of Independent Electoral and

Boundaries Commission & another v Stephen Mutinda & 3 others (2014) eKLR where the court cited the Malawian Supreme Court of Appeal in Malawi Railways Ltd v Nyasulu (1998) MWSC 3 where the court faulted the trial judge for determining the case on the basis of matters not properly pleaded before her.

13. The appellant submitted that the respondent in his plaint only pleaded for punitive and exemplary damages and therefore that it was wrong for the trial court to award the respondent general damages of Ksh.2,500,000/= or Ksh. 2,000,000/= which were not pleaded. In this respect the appellant further cited case of Caltex Oil (Kenya) Limited v Rono Limited (2016) eKLR where it was held that:

> In the plaint, we have noted that the respondent never claimed to have suffered any damage as a result of the appellant's breach. In the circumstances, having not made a claim for general damages, there cannot be a basis for awarding the same. The court has no inherent jurisdiction to award damages whether separate or in addition to specific performance where no such plea was made in its pleadings. Damages cannot be plucked from the air simply because a party alleges to have suffered an injury or loss. Damages must be pleaded so that the other party can reply through the defence. That is not what happened in this matter. It was not right for the trial court to purport to engage in an exercise in futility. No matter how many times it is canvassed before court, the respondent is not entitled to damages and the court has no basis to grant the same. To find otherwise would amount to the court exercising a power it does not have and rendering decisions without any parameters or borders which would lead to total disorder and abuse of the judicial process. It would also be a recipe for the formation of public anger against the judiciary. The fundamental question is whether the respondent made a specific prayer in its plaint. The answer is in the negative, since the prayer was in the alternative. A prayer for damages must be specifically pleaded and particularized because the claimant has suffered as a result of the wrong that is complained of. There was no justification for a court to award damages for an alternative prayer as couched above.

14. It was on the other hand submitted that in making an award for compensatory damages in a claim for defamation, the court must take into consideration the damage the article complained of had on the respondent`s reputation. That in this case, the award of Ksh. 2,500,000/= or Ksh.2,000,000/= in general damages was arrived at without proof that the article caused reputational damage to the respondent. Therefore, that the award was devoid of any legal basis.

15. The appellant submitted that the trial magistrate erred in awarding both exemplary and punitive damages as different heads of damages contrary to established legal principles. The appellant in this respect relied on the Black`s Law Dictionary, 10th Edition of the definition of punitive damages also known as exemplary damages/vindictive damages as damages awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit; or damages assessed by way of penalizing the wrongdoer or making an example to others. The appellant further cited the Halsbury`s Law of England on Libel and Slander, 4th Edition and Reissue Vol. 28 at paragraph 256 on the aspect of exemplary damages where it is provided as follows:

> Generally exemplary damages will only be awarded for libel or slander where the plaintiff pleads and proves, that at the time of publication the defendant knew that the publication would be tortious, or was reckless as complained of because the prospects of material advantage outweighed the prospects of material loss. The mere fact that the words were published in the ordinary course of a business run with a view to profit is to itself sufficient to establish the required calculation of material advantage.

16. It was submitted that in this case there was no evidence that the appellant had knowledge that the intended publication would be tortious or that the same was driven by the need for financial gain. That the fact that the article was published in the cause of business is itself not reason enough to infer that there was financial motive or financial gain. That the respondent did not establish that the appellant was willfully negligent in publishing the article or that the same was aimed at increasing profits for the appellant to warrant the award of Ksh.500,000/= as punitive damages and Ksh.500,000/= as exemplary damages yet the two are the same and were not supported by evidence on record or judicial principles.

17. It was submitted that this was not a case fit for an award of exemplary or punitive damages having regard to the evidence adduced before the court. The appellant in this respect relied on the case of Manson v Associates Newspapers Ltd (1965) 2All ER 9945 which expounded further on instances when exemplary damages may be awarded as follows:

> " Exemplary damages are exceptional and only in rare cases are they awarded. It behooves that you give the most earnest consideration to the matter before deciding that it is a case of exemplary damages at all. There must be evidence that directly point to the publication having been made with cynical disregard for consequences or a publication made simply with a view of some benefit to be acquired thereby by the defendants. Exemplary damages cannot be awarded unless after giving it such consideration one is satisfied that the only inference to be drawn is that the publication was made with a view to profit or benefit in the form of scoring a match on the competing newspapers and in the knowledge that the damages payable would be insufficiently large to make the publication an unprofitable step in the interests of the defendants, but if there is likelihood that there was a little over enthusiasm on the part of some reporter...if it was one of those things which happen occasionally and was not an act of deliberate policy, then exemplary damages must not be awarded.

18. The appellant further relied on the holding in the case of Hezekiah Oira v Standard Limited & another (2016) eKLR where the court declined to award exemplary damages as there was no evidence on the conduct of the defendant before, during and after the trial of the suit to show that the defendant republished the alleged defamatory words with a sinister motive. It was submitted that if the court were inclined to award damages, the award ought to be fair and a restrained hand is desirable and a composite figure of Ksh.500,000/= would suffice. In this respect the appellant made reliance on the case of David Odhiambo Awino v Nation Media Group Limited (2008).

19. The appellant urged this court to allow the appeal or in the alternative to vary the award of damages to the extent it deemed fit and to award the costs of the appeal to the appellant.

Respondent`s Submissions

20. The respondent submitted that the appellant has not tendered any evidence to show that the trial court in arriving at its decision misdirected itself and as a result arrived at a decision that was erroneous.

21. It was submitted that the appellant did not avail any witness to controvert the respondent`s case and in failure to do so their statement remained mere allegation, as held in Trust Bank Ltd v Paramount Universal Trust Bank Limited & 2 others (2009) eKLR.

22. The respondent submitted that the respondent and his two witnesses gave uncontroverted testimony in proof of that the publication was defamatory to the respondent. It was submitted that the defamatory words used by the appellant, "Drug suspect", needed the appellant to avail its witnesses and

explain the story. That without such explanation any reasonable person would view the respondent as a drug suspect.

23. The appellant submitted that he pleaded in paragraph 9 of the plaint that he suffered loss and damage as a result of the defamatory words and therefore that there was a basis for the award of general damages.

24. It was admitted that the award made by the trial court was Ksh.2,000,000/= in general damages, Ksh. 500,000/= in exemplary damages and Ksh.500,000= in punitive damages.

25. It was submitted that the trial court gave reason as to its award by indicating the circumstances, the prominence and the audience that the publication had reached. That the appellant has not shown that the trial court proceeded on wrong principles or misapprehended the evidence in some material respect and as a result arrived at a figure which is inordinately high.

26. It was submitted that the publication on the respondent had a nation-wide circulation and therefore that the damage was extensive. That the publication was reckless and careless. That even after being issued with a demand letter to withdraw the defamatory words. The appellant deliberately refused to correct their mistake, hence punitive and exemplary damages were justified.

27. The respondent urged the court to uphold the damages awarded by the trial, dismiss the appeal and award him the costs of the appeal.

Analysis and Determination

28. This being a civil matter the standard of proof is on a balance of probabilities. The degree was set out by the Court of Appeal in Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR, as follows:

> " Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say;
>
> > "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability is equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

29. Defamation is defined in the Halsbury's Laws of England, 4th Edition, Vol. 28 as follows:

> " A defamatory statement which tends to lower a person in the estimation of right-thinking members of the society or cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business."

30. Winfield on Tort gives the following definition;

> " It is the publication of a statement which tends to lower a person in the estimation of the right-thinking members of the society generally or which tends to make them shy away or avoid that person".

31. In Wycliffe A. Swanya v Toyota East Africa Ltd & another [2009] eKLR the Court of Appeal set out the elements of defamation as follows:

> " For the purpose of deciding a case of defamation, the Court is called upon to consider the essentials of the tort generally and to see whether these essentials have been established or proved. It is common ground that in a suit founded on defamation the plaintiff must prove: -
>
> "(i) That the matter of which the plaintiff complains is defamatory in character.
>
> (ii) That defamatory statement or utterance was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.
>
> (iii) That it was published maliciously."

32. And in Kudwoli & Ano. v. Eureka Educational & Training Consultants & 2 others (1993) eKLR, Kuloba J.(as he then was) defined defamation as follows:

> Defamation is the publication of a statement which tends to lower a person in the estimation of right-thinking members of society generally, or which tends to make them shun or avoid that person....
>
> .....A defamatory imputation is one to a man's discredit or which tends to lower him in the estimation of others or to expose him to hatred, contempt or ridicule or to injure his reputation in his office, trade or profession or to injure his financial credit....

33. A defamatory statement is thus one which tends to disparage a person in the eyes of right-thinking members of society as to expose the person to hatred, contempt or ridicule.

Whether there was publication of the statement complained of

34. A plaintiff in a case of defamation must prove that the statement complained of was publicized to a third party by the defendant. The Black's Law Dictionary 9th edition defines publication as –

> " The act of declaring or announcing to the public."

34. In Raphael Lukale v Elizabeth Mayabi & another [2018] eKLR, the court cited the case of Pullman v Walter Hill & Co (1891) 1 QB 524, and stated that:

> Publication of a defamatory material occurs when the material is negligently or intentionally communicated in any medium to someone other than the person defamed....

35. The defendant in this case does not deny that they published the story. They however argued that the plaintiff did not set out the offending article verbatim in the plaint as required by Order 2 rule 7 sub-rule 1 of the Civil Procedure Rules, 2010 and therefore that the claim is defective.

The said rule provides as follows:

(1) Where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of such sense.

The plaintiff in paragraph 3 of the plaint pleaded as follows:

> On the 1st day of April 2015, the defendant without any just cause published the plaintiff's photograph in the front page and underneath the photograph put the words "Drug suspect" in bold and reported that the EACC was questioning the manner in which the plaintiff gave bail to the Akasha sons facing drug trafficking charges.

36. In my view, the above paragraph captures the specific words complained of by the plaintiff. In the premises, I am satisfied that the plaintiff properly pleaded the words complained of. The words were, "Drug suspects" in bold and the report that the EACC was questioning the manner in which the plaintiff gave bail to the Akasha sons facing drug trafficking charges". The defendant never indicated that there were other words in the publication other than the words complained of. I do not see any defect in the pleadings. The element of publication of the story concerning of the plaintiff was therefore proved.

Whether the statements complained of were defamatory to the plaintiff

37. The burden of proof in a defamation suit is on the plaintiff to establish that the words complained of were defamatory to him/her. The test for determining whether or not a statement is defamatory is an objective one that is based on what an ordinary reasonable person reading the statement would understand the statement to mean and not the intention of the publisher. In Miguna Miguna v Standard Group Limited & 4 others (2017) eKLR, the Court of Appeal stated the following:

> "Speaking generally a defamatory statement can either be libel or slander. Words will be considered defamatory because they tend to bring the person named into hatred, contempt or ridicule or the words may tend to lower the person named in the estimation of right-thinking members of society generally. The standard of opinion is that of right-thinking persons generally. The words must be shown to have been construed or capable of being construed by the audience hearing them as defamatory and not simply abusive. The burden of proving the defamatory nature of the words is upon the plaintiff. He must demonstrate that a reasonable man would not have understood the words otherwise than being defamatory. See Gatley on Libel and Slander (8th edition para. 31).

38. The plaintiff in paragraph 5 of the plaint enumerated the following as the particulars of the defamation:

SUBPARA (i)

Printing the plaintiff's paragraph with the inscription in bold with "Drug suspects" underneath it and thereby insinuating that that the plaintiff was a drug suspect.

(ii) Publishing a report with the words 'EACC questioning manner in which he gave bail to the Akasha sons facing drug trafficking charges.'

(iii) Insinuating that the plaintiff has no regard for laid down procedures in granting bail to accused persons.

(iv) Insinuating the plaintiff is easily corruptible by the parties who appear before him.

39. The trial court upon considering the evidence adduced before it came to the conclusion that the words complained of were defamatory to the plaintiff's character in that they imputed that the plaintiff had engaged in illegal acts during the course of delivering his duties as a Deputy Registrar which was false.

40. It was the evidence of the plaintiff that he was at the time a Senior Principal magistrate at Mombasa Law Courts. That he was also a Deputy Registrar of the High Court and among his duties of a Registrar was to approve bonds in matters where the High Court had granted bonds in criminal cases. That in this case the High Court had granted bond to the Akasha brothers and all he did was for him to approve bond where security provided was adequate. However, the publication stated that he had given bail to drug suspects. That the publication also said that he was a drug suspect and that EACC was investigating the bail given.

41. It was the averment of the plaintiff that the story was untrue as it was saying that he granted bail to the Akasha brothers which he never did. He averred that the story besmirched his name as fellow colleagues were wondering whether he uses drugs or deals with drug suspects. That he consulted his advocates who wrote to EACC who made a reply that they had investigated the manner the bond was granted but the file had been closed. That he was summoned by the EACC at their Offices where he was interrogated on the manner he gave bail to the Akasha`s sons.

42. The plaintiff called 2 witnesses. Joyce Gandani PW2 testified that she was at the material time a magistrate at Mombasa Law Courts. That it was her duty to prepare duty roasters for magistrates. That magistrates were performing duties of Deputy Registrars for the High Court. That in criminal cases, the High Court judges would grant bond terms but it was the duty of the Deputy Registrars to verify the documents presented for bail and to approve the surety. The plaintiff was at the time a Deputy Registrar at the High Court Criminal Registry. That in relation to this case she saw the article in the newspaper. The same was misleading as it portrayed the plaintiff as the one who had granted bond when it is the High Court which had done so. That a casual look at the headline looked like to state that he plaintiff had colluded with drug traffickers. That their colleagues suspected that he had relationship with drug suspects.

43. The third witness for the plaintiff was Eugene Nyongesa Wangila testified that he was a at the material time a prosecutor in the Plaintiff`s court. That on 1/4/2005, a judge of the High Court called Muya had granted bond to the Akasha brothers. He was present in court when the bond was granted. That the matter then went to the plaintiff`s court for bond approval. It is another prosecutor who handled the matter at the time but he was present during bond approval. The plaintiff approved the bond. There was no irregularity on the bond approval. Later he saw the offensive article in the newspaper that portrayed the plaintiff in bad light that he granted bond when what he did was to approve it.

44. From the above evidence, it is clear that the plaintiff was a Deputy Registrar of the High Court. It was his duty as a Deputy Registrar to approve bonds where the same had been granted by the High Court. In this case the plaintiff approved bond for Akasha brothers after it was granted by a High Court judge. However, the story as published by the defendant was that it is the plaintiff who had granted bail to the drug suspects. I am convinced that any ordinary person reading the story would be led to the believe that the plaintiff had some illegal connection with the mentioned drug suspects. The story insinuated that the plaintiff had no regard to laid down procedures in granting bail to accused persons and also insinuated that the plaintiff was easily corruptible.

45. I am persuaded that the words complained of when taken in their ordinary sense suggested that the plaintiff is not a person worthy of the high office that he occupies. I find that the words complained of tended to disparage the reputation of the plaintiff in the eyes of right-thinking members of society and his standing as a magistrate.

46. Besides, the defendant did not adduce evidence in the case and that being so, the evidence of the plaintiff and his two witnesses that the words complained of were defamatory remains uncontroverted and unchallenged, see Trust Bank Ltd v Paramount Universal Trust Bank Limited & 2 others (supra).

Consequently, the defendant`s defence was a mere denial. I am therefore in agreement with the trial court that the words complained of were defamatory to the plaintiff.

47. A plaintiff for defamation must prove that the publication was done with malice. Malice can be inferred by failure to inquire the facts with the Plaintiff before publishing the statement. In Joseph Njogu Kamunge v Charles Muriuki Gachari [2016] eKLR, Mativo J. (as he then was) held that:

> Further, the words must be malicious. Malicious here does not necessarily mean spite or ill will but there must be evidence of malice and lack of justifiable cause to utter the words complained of. Evidence showing the defendant knew the words complained of were false or did not care to verify can be evidence of malice.

48. Malice can be express or implied from the circumstances and to the relationship between the parties before the publication. This was the position of the court in *Phinehas Nyaga v Gitobu Imanyara Civil Suit No. 697 of 2009* wherein Justice Odunga (as he then was) held as follows:

> " Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts... Malice may also be inferred from the relations between the parties before or after publication or in the conduct of the Defendant in the course of the proceedings... the failure to inquire into the facts is a fact from which inference of malice may be properly drawn. 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 of malice."

49. The particulars of malice as stated in paragraph 4 of the plaint wer: reporting that the plaintiff granted bail to accused persons facing drug trafficking charges without ferrying the facts; publishing the plaintiff`s photograph with the inscription "Drug suspects" underneath it and thereby insinuating that the plaintiff was a drug suspect and insinuating that the plaintiff was corrupt and/ or inept judicial officer who grants bail to drug suspects without following the laid down procedures.

50. In this case the defendant did not check the facts with the court before publishing the story. In publishing such a sensational story of a magistrate granting bail to drug suspects without checking the facts with the court smacks of recklessness in the publication of the story. Malice as particularized in paragraph 4 of the plaint is to be inferred from failure to check the facts. Malice was therefore proved in the case.

51. In view of the foregoing, I find that the plaintiff has proved on a balance of probabilities the four elements of the tort of defamation against the defendant. I hold the defendant liable in damages towards the plaintiff.

Quantum

52. The trial court awarded the plaintiff Ksh.2,000,000/= in general damages. The defendant argued that the said award was made in error since it was not pleaded. That the plaintiff only pleaded for exemplary and punitive damages. They argued that parties are bound by their pleadings and that the court cannot have awarded what was not pleaded.

53. Indeed, the plaintiff in paragraph 5 of the plaint only pleaded for exemplary and punitive damages wherein he stated that:

> The plaintiff has suffered loss and damage as a result of the actions of the defendant and claims punitive and exemplary damages.

54. In his final prayers in paragraph 11(c) of the plaint the plaintiff prayed, for inter alia, that:

> The defendant be compelled to pay the plaintiff exemplary and punitive damages.

55. In view of the clear prayers in the plaint, I am in agreement with the defendant that the plaintiff did not plead for general damages and only pleaded for punitive and exemplary damages. It is a cardinal principle of law that parties are bound by their pleadings, see Independent Electoral and Boundaries Commission & another v Stephen Mutinda & 3 others (supra) and as such a court cannot go outside the pleadings to award what is not pleaded. In the case of Galaxy Paints Co. Ltd V Falcon Guards Ltd (2000) EA 885, it was held, inter alia, that:

> " The issue of determination in a suit generally flowed from the pleadings and a trial court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the court's determination. Unless pleadings were amended, parties were confined to their pleadings. Gandy vs. Caspair (1956) EACA 139 and Fernandes vs. People Newspapers Ltd (1972) EA 63".

56. In this case there was nothing to show that the issue for general damages was framed by the parties and left to the court to make a determination. It is my finding that the trial magistrate erred in awarding general damages for defamation when the same was not pleaded. The award is hereby set aside.

57. The trial court awarded Ksh.500,000/= in exemplary damages and Ksh.500,000/= in punitive damages. The trial magistrate based the awards on the fact that the defendant had failed to verify the information before publication which depicted malice on the part of the defendant. The court cited the case of Alnasir Visram v Standard Group Limited as cited with approval in the Daily Nation v Makundi & another (1975) EA 311 where it was held that:

'When the defendant publisher accepted an item for publication, it had the right and indeed the duty to see whether such item contains seditious or libelous matters, and if it fails in that duty, it always publishes at its own risk and that that suggested recklessness on the defendant's part.'

58. The appellant argued that the two awards amounted to the same thing and therefore the court erred in making the two awards.

59. Exemplary and punitive damages amount to the same thing, see *Barclays Bank of Kenya Limited v Mema (Civil Appeal E011 of 2021*) [2021] KEHC 333 (KLR) (Commercial and Tax) (3 December 2021) (Judgment). They are awarded where the defendant acted in a wanton, fraudulent, reckless or oppressive manner.

60. In this case the appellant failed to check the truthfulness of the story before publishing it. They declined to give an apology even when the truth of the matter was brought to their attention. This, as stated earlier, was reckless reporting for which the respondent warranted to be compensated in form of exemplary/punitive damages.

61. In the case of Milka Muthoni Wagolo v County Government of Kirinyaga & 2 Others [2017] eKLR, the court awarded KShs.500,000/= in exemplary and punitive damages. In PN Mashru Ltd v Ojenge (Civil Appeal 64 of 2020) [2023] KECA 473 (KLR) (28 April 2023) (Judgment), the Court of Appeal upheld an award of Ksh.500,000/= in exemplary damages. I find the award of exemplary or punitive damaged of Ksh.500,000/= to have been justified. The award for punitive damages as a separate award is set aside as it was a duplication of exemplary damages but I uphold the award for exemplary damages (also known as punitive damages) of Ksh.500,000/=.

62. The result of the appeal is as follows:

(1) The award in general damages of Ksh.2,000,000/= is set aside.

(2) The award of Ksh.500,000/= as a separate award in punitive damages is set aside and the award of Ksh.500,000/= in exemplary damages (also known as punitive damages) is upheld.

63. Since the appeal has partially succeeded, I order each party to bear its own costs to the appeal.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF NOVEMBER 2024

J. N. NJAGI

JUDGE

In the presence of:

Miss Ndunge for Appellant

No appearance for Respondent

Court Assistant - Amina