



Amondi v Daily Nation Newspapers (Subsidiary of Nation Media Group) (Civil Appeal E736 of 2021) [2023] KEHC 1217 (KLR) (Civ) (17 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1217 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E736 OF 2021

DO CHEPKWONY, J

FEBRUARY 17, 2023

BETWEEN

TOLUWALASE M AMONDI APPELLANT

AND

DAILY NATION NEWSPAPERS (SUBSIDIARY OF NATION MEDIA GROUP) RESPONDENT

(Being an Appeal from the Judgment and Decree of the Communications and Multimedia Appeals Tribunal (CAMAT) delivered on 15th October, 2021)

JUDGMENT

Background

1. By a complaint dated May 7, 2020 which was amended vide amended complaint dated June 3, 2021, the Complainant sought for the following orders before the Communications and Multimedia Appeals Tribunal against the Respondent;
 - a. THAT the full costs of this appeal/complaint rests on the Respondent and his co-accused irregularly appointed director or agents of Sychar Centre Limited.
 - b. THAT the hearings, determinations, injunctions, reprimands and orders prayed be expedited by the court and concluded within 90 days, in the interest of justice for the Appellant, the Nigeria High Commission (Nairobi), the USAID Kenya/East Africa Agreement Officer, the Faith-based Consortium Group (Kenya), other beneficiary co-creation institutions (Kenya), Director of Immigration Services (Kenya), and twenty-two beneficiary counties (Kenya) who have all been established from court records, as possessing an indirect but



valid and legitimate interest in the success of this proceedings, that was solely moved by the Appellant.

2. The Appellant lodged his complaint with the Tribunal on May 8, 2020 and served the same upon the Respondent on May 11, 2020. The bone of contention is a defamatory and unconstitutional advertisement and or publication made on Wednesday, April 8, 2020 at page 35 of the Respondent's Daily Nation Newspaper. The Respondent is registered as Nation Newspapers Limited which is a wholly owned subsidiary Trademark asset of Nation Media Group Limited.
3. It is alleged that the impugned publication, marked as 'annexure 1' contained false, unverified, misleading, malicious, invalid, discriminatory and counterfeit private social media photograph, a falsified non-employee disclaimer record, which was attached to the confidential report and restricted government registration alien identity card number, and an expired or illegal Nigeria International Passport number.
4. The Appellant adds that the publication by the Respondent, which was sponsored by some irregularly appointed directors of Sychar Centre Limited, has negatively impacted on his registered copyrighted artistic creativity work and all other pertinent rights and protection. He added that due to the publication, the socio-economic development co-creation contract, which was aimed to benefit two counties in Kenya for an unspecified period of time, was deferred and eventually cancelled, once the publication landed on the United States Agency for International Development (USAID) and the Kenya/East Africa Agreement officer for contract No 72061519APS00003.
5. The Appellant also adds that the original copyright concept paper contract work rights, assured to him with the leader of the Evangelical Alliance of Kenya (Faith based Consortium Organization), was initially valued during USAID's Fiscal year from October 1, 2019 ending September 30, 2020 at US \$ 500,000 (Five Hundred Thousand United States Dollars) and the same vanished in thin air due to the publication.
6. The Complainant in summary accused the Daily Nation Newspapers Limited, Nation Media Group Limited and the Directors of Sychar Centre Limited are accused for;
 - i. Defamation and libel of his personality in Kenya and globally to millions online.
 - ii. Their continuous refusal to correct the misleading and destructive adverse information publicized and the alleged denial of my rights to fair administrative action.
7. The Respondent before the tribunal filed a response to the amended complaint dated June 25, 2021. It denied the allegations in the amended complaint stating that the Tribunal lacks jurisdiction to determine the issue of alleged violation of Articles 31(c) and (d), 35(2) and 40 of the *Constitution*. Further that the provisions of the Kenya Information and Communication Act, 1998 are inapplicable in the proceedings.
8. However, the Respondent admitted that Sychar Centre commissioned publication of the notice published on April 8, 2020, but stated that the nature of its business is such that it offers a platform to advertise material/content to third parties as a paid service and in this regard it received and published an advertisement from Sychar Centre, which is the subject of the proceedings herein.
9. That it is the third parties who are responsible for the contents in the advertisement such as images, photographs and the wording upon which they submit to the Respondent for advertisement.



Therefore it is the third parties who submit the material for advertisement to ensure that the advert is legally compliant. Consequently, it is contended that the third parties do issue warranties to the Respondent to the extent that the submitted content is not obscene, offensive, defamatory or illegal. The Respondent also avers that the advertiser also issues an indemnity to the Respondent against any third party liabilities, claims, costs, loss or damage that may arise from the publication of the advertisement.

10. It was stated that the Respondent accepts no responsibility for the content of the advertising material, including without limitation on any error, omission or inaccuracy, although it is within the Respondent's discretion to edit or deny publication of adverts which are defamatory in nature or otherwise offensive.
11. The Respondent has confirmed that Sychar Centre Limited indemnified it against any third party liabilities, claims, costs, loss or damage that would arise from the publication of the impugned notice and therefore the Complainant should therefore address its complaint or pursue its alleged claim with Sychar Centre Limited. In any event, despite making various allegations against Sychar Centre Limited, the complainant failed to sue or join Sychar Centre Limited as a party to the amended complaint.
12. The Respondent aver that it published the impugned notice innocently, without malice or ill will but in the genuine and bona fide belief that the information contained in the impugned article was true. Further that the Complainant and Sychar Centre Limited are not known to the Respondent or any of its employees and as such there was no malicious intent in the publication of the impugned notice.
13. According to the Respondent, the Complainant's claim if any, ought to have been against Sychar Centre Limited which procured the publication and commissioned as a paying customer. Based on the foregoing, the Respondent asked the Tribunal to dismiss the complaint with costs.
14. Upon considering each of the parties case, the evidence tendered and the submissions filed by the parties, the Tribunal delivered its Judgment on October 5, 2021 and dismissed the complaint.
15. Being dissatisfied with the Judgment of Communications and Multimedia Appeals Tribunal, the complainant/Appellant preferred an appeal before this court.

The Appeal

16. By a Memorandum of Appeal dated November 11, 2021, the Appellant has raised the following grounds of Appeal;
 - a. 'The CAMAT Tribunal erred in law and fact, when they failed to find that, based on the evidence tendered before it, specifically the Daily Nation Newspapers illegal advertisement of April 8, 2020 (page 35), and the Appellant's expired Nigerian passport number xxxx, that the Appellant had fully discharged his burden of proof and was therefore entitled to the reliefs sought in the Consolidated Amendment of Pleadings date June 3, 2021 and any other reliefs in Law for his protection and damages for copyright infringement.
 - b. The CAMAT Tribunal erred in law and fact, when after considering the weight of the two primary prima-facie evidences supplied and with several other valid supporting documents, they still failed and refused to conclusively adjudge and issue orders that the said illegal advertisement of the Respondent, was false, defamatory (at-risk, usurper-disclaimer



notice) counterfeit, discriminatory, copyright damaging, criminally acquired, processed, and unconstitutional; thereby null and void.

- c. The CAMAT Tribunal erred in law and fact by hearing and determining the matter of the Appellant's Constitutional Rights on Information, Privacy, Public Interest, Access to Information and Right to Property when in fact it has no jurisdiction to hear and determine constitutional rights matters.
- d. The CAMAT Tribunal erred in law and fact by hearing and determining the matter when in fact in its Ruling dated May 21, 2021 it had directed that it had no jurisdiction to hear and determine constitutional rights matters thereby violating the legal doctrines of *functus officio* and Jurisdiction of High Court, as the Tribunal expressed itself in Paragraphs 2 and 3 of the Judgment on the Appellant's Constitutional rights to privacy.
- e. The CAMAT Tribunal erred in law and fact when it failed to find that enjoining Sychar Centre Company Limited as a party to the Complaint and/or supplying copies of the Appellant's confidential Contract of service documents would not absolve the Respondent of their liability in publishing discriminatory, copyright damaging, criminally acquired and unconstitutional advertisement, defamatory information against the Appellant.
- f. The CAMAT Tribunal erred in law and fact when it relied on the wrong provisions of the law and facts and acquiesced to violation of Order 8, Rule 1 of the Civil Procedure Rules by admitting, an irregular submission to the Appellant's Closed Consolidated Amended Complaint dated June 3, 2021.
- g. The CAMAT Tribunal erred in law and fact by misinterpreting several provisions of the Law on Contract of Service, International treaties and Laws on Copyright ownership and Consumer protection; including the general rules of international law, as was submitted by the Appellant in his pleadings and under oath at the hearing, and was also independently corroborated in confidential documents, by four statutory and most reputable public and private interest bodies; the Executive Director of Kenya Copyright Board, Supreme Court appointed Notarized Advocate's Agent Authorization letter, the United States Agency for International Development (USAID) Kenya Agreement Officer letter, and Sasahost Limited's Agent contract receipts with Sychar Centre Limited.
- h. The CAMAT Tribunal erred in law and fact by failing to consider the substantive and material issues raised by the Appellant during the hearing and in his pleadings and submissions.
- i. The CAMAT Tribunal erred in law and fact by contradicting equitable and just application of the law, as they mis-apprehended and violated the bold Constitutional interpretation of a 'PERSON'- being Singular, who can sustain alone any suit action, and as was also expressed in the Complaint sections in the parent statute.
- j. The CAMAT Tribunal erred in law and fact when it failed to uphold the Appellant's justifiable cause, as affirmed before CAMAT, that he was irreparably injured and robbed from earning substantial life-time royalties



and project contract incomes from his hard-earned professional skills and registration of the USAID Kenya Literary Concept paper project-certificate LT015410 whose uncontroverted market value that was damaged and destroyed by the said illegal advertisement, and was claimed against the Respondent in the Appellants pleadings, for compensation worth USD97,500,000 for the first Complaint, in addition to any other Court approved annual life-time copyright ownership royalties- as evidenced by the USAID budget statement released and valid, specified as from October 1, 2020- September 30, 2021.

- k. The CAMAT Tribunal erred in law and fact when it failed to sanction the Respondent for the contradictory and false evidence provided and claimed during hearing and the sworn witness statements of the Company Secretary and Directors of the Respondent on the relationship between the Respondent and Nation Media Group thereby misleading the Tribunal.

17. It is proposed vide the Memorandum of Appeal that the court grants the following orders:-

- a. The Appeal be allowed with costs.
- b. The Judgment of CAMAT Tribunal delivered on October 15, 2021 and amended on November 5, 2021 in Nairobi in CAMAT Complaint No 2 of 2020 be and is hereby set aside.
- c. The Court reverses the findings in the Judgment by CAMAT and hold that the Appellant is entitled to reliefs sought in the Consolidated Amendment of Pleadings date June 3, 2021.

18. On July 26, 2022, this court issued directions that the appeal be disposed of by way of written submissions. The record shows that both parties complied with the said directions with the Appellant filing his written submissions dated March 29, 2022 while those of the Respondent were filed on September 20, 2022. I have read through the said submissions and the authorities relied. I wish to consider them in my analysis.

Analysis and Determination

19. I have considered the grounds set out in the Memorandum of Appeal, alongside the record of proceedings and evidence submitted before the Tribunal. I have also read through the written submissions and cited authorities filed by both parties. In my view, the issues crystalizing for determination are;

- a. Whether the Appellant led evidence to prove his reputation was damaged as a result of the impugned published notice.
- b. Whether the Tribunal erred in dismissing the Appellant's suit.

20. This being a first appeal to the High court, this court has a duty to re-evaluate and re-consider the evidence adduced before the trial court afresh and arrive at its own independent conclusion. This was



the position in the case of *Abok James Odera T/A AJ Odera & Associates –vs- John Patrick Machira T/ A Machira & Co Advocates [2013]eKLR*, where the court held as follows;

' This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.'

21. It is well settled that, a court will only interfere with a decision of a lower court or any subordinate Tribunal, if it is satisfied that the same was arrived at based on wrong principles of law. (See the case of *Bashir Ahmed Butt vs Uwais Ahmed Khan (1982-88) KAR*)
 - a) Whether the Appellant led evidence to prove his reputation was damaged as a result of the impugned published notice.
22. On the first issue, it was the evidence of the Appellant before the Tribunal that on April 8, 2020, the Respondent published an advertisement that contained the logo and the name of Sychar Centre Limited. That the notice was warning members of the public from dealing with the Appellant.
23. He told the court that in the publication, his private social media picture was used without his knowledge, authority and permission. That it exposed him to adverse publicity and his bio data could be used to hack his personal accounts although according to him, he had warned Sychar Centre Ltd and requested them not to publish his picture.
24. In his testimony, the Appellant argued that the Respondent be compelled to effect correction and render apology in addition to deleting the publication from all their online platforms, for being defamatory and illegal.
25. It then behoves the court to consider what amounts to 'defamation'. This court is guided by the *4th Edition Vol 28 of Halsbury's Laws of England*, the following statement appears at page 23:

' In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense'.
26. It would serve repetition to restate that the burden of proof lies with the Appellant to prove his case on a balance of probabilities as outlined by Section 109 of the *Evidence Act* which provides that 'the burden of proof lies with that person who wishes the court to believe in its existence' and based on the principle that 'he who asserts a fact must prove', as stipulated in Section 107 of the *Evidence Act*. Taking cue from the two Sections, in this case, the Appellant had the onus to show that material published by the Respondent was indeed defamatory. Better still, it was up to the Appellant to show that the circumstances under which the publication was done, a reasonable man would consider it as defamatory.



27. As to the test to be applied, I seek guidance in amongst other cases, the case of *Miguna Miguna –vs- Standard Group Ltd & 4 Others [2017]eKLR*, where the court held that;
- ' A claimant in a defamation suit ought to establish that there is a defamatory statement; that the defendant has himself published or caused another to publish that statement and that the statement refers to the Claimant.'
28. Similarly, the Court of Appeal in the case of *SMW –vs- ZWM [2015]eKLR* had the following to say:-
- ' A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided'
29. However, upon perusal of the court record, it has clearly come out that the impugned published notice was sanctioned by Sychar Centre Limited and the Respondent in this matter acted on instructions of the said firm. Sychar Centre Limited proceeded to sign an indemnity form to indemnify the Respondent against any liability arising out of the publication. By this, the Respondent was therefore absolved from any liability resulting from the publication, including the claim herein. The Appellant has also not led any evidence to show in which way the publication exposed him to public hatred, ridicule or lowered his esteem in the said publication. I find that the threshold for defamation was therefore not met.
- b) Whether the Tribunal erred in dismissing the Appellant's suit.
30. On the second issue, the Tribunal dismissed the claim for the reason that the Appellant ought to have enjoined Sychar Centre Limited as a necessary party since it is responsible for sanctioning the publication of the impugned notice. Having agreed with the Tribunal's finding that Sychar Center Limited had sanctioned the publication and issued indemnity on the same, I see no ground to infer error on the Tribunal's finding that Sychar Center Limited was the proper party for the Appellant to claim against for any liability flowing from the publication.
31. It was therefore upon the Appellant to show that the publication was sanctioned and published by the Defendant/Respondent and that the publication tends to lower his estimation by right thinking members of the society, then exposed him to public hatred and ridicule.
32. In the circumstances, it is this court's finding that the Tribunal correctly dismissed the Appellant's case, hence the appeal herein is without merit and the same is dismissed with costs to the Respondent.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Toluwalase M. Amondi

M/S Kyalo holding brief for Mr. Ogolla counsel for Respondent

Court Assistant - Simon

