



**Standard Group PLC v Chengo (Civil Appeal E082 of 2021)
[2023] KEHC 3767 (KLR) (26 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3767 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E082 OF 2021**

**OA SEWE, J
APRIL 26, 2023**

BETWEEN

THE STANDARD GROUP PLC APPELLANT

AND

NGUMA CHARO CHENGO RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Lesootia Saitabau, Principal Magistrate, dated on 18th June 2021 in Mombasa CMCC No. 2160 of 2017)

JUDGMENT

[1] The appellant was the defendant in Mombasa CMCC No. 2160 of 2017: Nguma Charo Chengo v The Standard Group. It had been sued by the respondent vide a Plaint dated 20th December 2017 on the grounds that it falsely and maliciously published defamatory material concerning the respondent in its newspaper edition for 11th October 2017; and that by reason of the publication, the respondent was injured in his credit and reputation. The respondent had further alleged that he had been brought into public scandal, odium and contempt for which he claimed the following reliefs:

- [a] An apology and retraction of similar prominence as the defamatory statement;
- [b] General damages;
- [c] Aggravated or exemplary damages;
- [d] Costs of the suit;
- [e] Interest on [a] and [b] above;
- [f] Any further relief the Court deems fit to grant.



- [2] In its Defence filed on 14th June 2018, the appellant admitted having published the article complained of but denied that it was actuated by malice in making the publication. The respondent asserted that the words complained of were published in all honesty and were never intended to maliciously discredit the respondent in his reputation. It also averred, at paragraph 5 of its Defence that it duly published a correction and apology on 1st February 2018 pursuant to Section 12(1) of the *Defamation Act*. Hence, the appellant denied liability in the matter and prayed that the respondent's suit be dismissed with costs.
- [3] Upon hearing the parties, the learned magistrate found as a matter of fact that:
- “...the advertisement in question depicted the plaintiff as a conman, a liar and a suspected robber, the Plaintiff's business suffered loss and his reputation as a leader was brought to disrepute, I therefore find that the Plaintiff suffered damages to merit an award in general damages. I'm guided by the various authorities cited and I'm of the considered view that an award of Kshs. 4,000,000/= in general and exemplary damages will suffice...”
- [4] Being dissatisfied with the lower court's decision, the appellant filed this appeal on 28th June 2021 on the following grounds:
- [a] That the trial magistrate erred in fact and in law by holding that the appellant was liable in the unique circumstances of the matter and further misdirected himself in fact and in law by finding that the respondent had proved his case.
 - [b] That the trial magistrate erred in fact by failing to consider that the appellant was not the author of the publication.
 - [c] That the trial magistrate erred in fact and in law by failing to adhere to the principle of judicial precedent in considering that the appellant cannot be found liable for publishing a paid-up advertisement as held in the Court of Appeal case of James Kimeu Mulinge v Nation Media Group [2018] eKLR.
 - [d] That the trial magistrate erred in law and in fact by failing to consider all the evidence placed before him and in wrongly relying on the evidence of the witnesses whose testimonies did not demonstrate that they changed their estimation of the respondent after reading the appellant's publication.
 - [e] The trial magistrate erred in law and in fact by failing to consider that the appellant had effortlessly proved that there was no malice in the publication of the impugned article. Hence the mandatory ingredient for proving the tort of defamation was absent.
 - [f] That the trial magistrate erred in law and in fact by finding that the publication ruined the reputation of the respondent in the matter as the respondent did not suffer any loss or damage to his reputation as a result of the publication.
 - [g] That the trial magistrate erred in law and in fact by awarding excessive damages of Kshs. 4,000,000/= against the principle that damages should be compensatory in the light of the nature of the alleged injury to the respondent's reputation as stated in the case of Joseph Njogu Kamunge v Charles Muriuki Gachari, Civil Appeal No. 42 of 2014.
 - [h] That the trial magistrate erred in law and in fact in by failing to consider at all the full tenor of the appellant's submissions and the authorities cited.



- [i] That the trial magistrate erred in law and in fact by noting that “...I’m guided by the authorities cited and I am of the considered view that an award of Kshs. 4,000,000...” and failing to give a justification for the award yet the respondent relied on one authority where the award to the plaintiff was Kshs. 1.5 million.
 - (j) The trial magistrate erred in law and in fact by combining general and exemplary damages yet the two are separate and distinct.
- [5] In the premises, the appellant’s prayer was for the appeal to be allowed with costs to the appellant both in this Court and the Magistrate’s Court; and that the award of Kshs. 4,000,000/= as general and exemplary damages be set aside. In the alternative, the appellant prayed that the general and exemplary damages be reduced; and that such further or other relief that the Court may deem fit and just in the circumstances be granted.
- [6] The appeal was canvassed by way of written submissions, pursuant to the directions issued herein on 22nd March 2022. Thus, learned counsel for the appellant, Mr. Limo, relied on his written submissions filed on 13th June 2022. He proposed the following issues for determination:
- (a) Did the respondent prove the elements of defamation to the required standard?
 - (b) Whether the appellant ought to be held liable on contents of a paid up advertisement; and
 - (c) Was the finding on assessment of damages proper?
- [7] Counsel relied on *Wycliffe A Swanya v Toyota East Africa Ltd & Another* [2009] eKLR among other authorities as to the essential elements of defamation, namely:
- (a) That the statement must be defamatory.
 - (b) The statement must refer to the plaintiff.
 - (c) The statement must be maliciously published by the defendant.
 - (d) The statement must be false.
- [8] In his submissions, Mr. Limo urged the Court to find that the words complained of were neither false nor defamatory of the respondent in so far as the respondent himself confirmed that he was the chairman of a group known as Pwani Youth Trust Association at page 153 of the Record of Appeal. He further pointed out that PW2 and PW3 only testified to the fact that they knew the respondent as the chairman of the Association and that they saw the impugned advertisement. They did not unravel the effect of the publication on the respondent or his estimation in the eyes of right-thinking members of the society. Mr. Limo underscored the fact that the respondent remained the chairperson of the Association despite the publication; and therefore that it is absurd to imagine that any reputational loss was occasioned to him when the members of the Association still entrusted him with leadership.
- [9] It was further the submission of Mr. Limo that malice was not established by the respondent. He pointed out that the advertisement was sanctioned and paid for by a person other than the appellant and was published in the ordinary course of business. He added that, a further indication of the absence of malice was in the fact that the appellant subsequently tendered an apology and correction to the respondent through the same medium. Counsel accordingly urged the Court to find that, having found as a fact that there was no malice, the learned magistrate erred in his conclusion on liability and quantum.



- [10] In respect of Grounds 2, 3 and 8 of the appellant’s Grounds of Appeal, Mr. Limo submitted, on the basis of the doctrine of *stare decisis*, that the lower court ought to have taken into consideration the decisions made by the higher courts touching on the subject under consideration. In particular, he referred to the decision of the Court of Appeal in *James Kimeu Mulinge v Nation Media Group* [2018] eKLR to the effect that the notice was published as a paid advertisement; and therefore it was not within the remit of the defendant to establish whether it was genuine or not. Counsel reiterated the appellant’s evidence that the impugned advertisement was ordered and paid for by one Albert Zoka and submitted that, the lower court was, in the circumstances bound by the decision of the Court of appeal in the case of *James Kimeu Mulinge v Nation Media Group* (supra). He consequently invited the Court to return a verdict that there was no liability on the part of the appellant for the paid advertisement.
- [11] On quantum of damages, Mr. Limo relied on *John v M G Ltd* [1996] 1 ALLER 35 in which a distinction was made as to the purpose of general, exemplary and aggravated damages. He accordingly posited that, since general damages serve a purpose different from exemplary damages, distinct factors are come into play in assessing the two kinds; and therefore the lower court ought to have delimited the extent of each and the factors taken into account in awarding the sums it awarded. Thus, Mr. Limo urged the Court to find that the trial court fell into grave error in awarding a global sum.
- [12] Mr. Limo also impugned the sum awarded on the ground that it is enormous; granted that in the only authority cited before the lower court by counsel for the respondent, the award was only Kshs. 1,500,000/=. On his part, Mr. Limo took the view that an award of Kshs. 600,000/= would have sufficed as general damages; and that the case was not fit for an award of aggravated damages. He relied on the following authorities:
- (a) *Mary Koli Kitonga v Ghetto Radio Limited* [2020] eKLR in which the plaintiff was awarded Kshs. 700,000/= in general damages.
 - (b) *Jacob Kipngetich Katonon v Nation Media Group Limited* [2017] eKLR where an award of Kshs. 200,000/= was made.
 - (c) *Benaiah Sisungu v Tom Alwaka T/a Weekly Citizen & Another* [2007] eKLR, where the court awarded Kshs. 600,000/= as general damages for defamation.
- [13] Mr. Chebukaka, learned counsel for the respondent, relied on his written submissions filed on 8th August 2022. He proposed the following issues for determination:
- [a] Whether the article complained of was defamatory;
 - [b] Whether the defence of justification is available to the defendants;
 - [c] Whether the respondent is entitled to damages.
- [14] He relied on *Cecil Guyana Miller v Nation Media Group Ltd & Another* [2016] eKLR, *Musikari Kombo v Royal Media Services Ltd* [2018] eKLR and *Joseph Njogu Kamunge v Charles Muriuki Gachari* [2016] eKLR as to the four elements of the tort of defamation. In his submission the respondent proved all the four elements before the lower court; having demonstrated that the appellant published an article calling the respondent “a robber, conman and a liar” without any attempt at verification of the information. He added that malice can be inferred from the publication itself if the language used is utterly beyond the facts; and that in this instance, the appellant cannot justify the said advertisement as not being false.



[15] On whether the respondent is entitled to damages, Mr. Chebukaka relied on Section 16A of the Defamation Act, Chapter 36 of the Laws of Kenya, which provides that:

“In any action for libel, the court shall assess the amount of damages payable in such amount as it may deem fit and just;

Provided that where the libel is in respect of an offence punishable by death the amount assessed shall not be less than one million shillings, and where the libel is in respect of an offence punishable by imprisonment for a term of not less than three years the amount assessed shall not be less than four hundred thousand shillings.”

[16] Consequently, he submitted that the respondent is entitled to the award made by the lower court. He relied on *J.P. Machira T/A Machira & Company Advocates v Wangethi Mwangi & Another* [2018] eKLR, among other authorities, in urging the Court to dismiss the appeal with costs.

[17] This being a first appeal, I am mindful that it is the duty of the Court to review the evidence adduced before the lower court with a view of drawing its own conclusions thereon, while giving allowance for the fact that I did not have the advantage of seeing or hearing the witnesses. In *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was articulated 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...”

[18] By way of evidence, the respondent testified on 11th July 2019 and adopted his witness statement dated 20th December 2017. He testified that he is the chairman of Pwani Youth Peace Trust Trust Association and produced a Certificate of Registration to prove that the Association is a registered body. His cause of action was that the appellant published an article in the Standard Newspaper dated 11th October 2017 (at page 36) depicting him as a robber, conman and land grabber. He added that, as a result of the publication his estimation was lowered in the eyes of right thinking members of the society. He called two witnesses, namely, Bakari Abdalla Nuyeye (PW2) and Vincent Mwangi (PW3), who testified that they have known the respondent for several years and were therefore shocked by the advert that alleged he was a robber and a conman. They both alleged that the respondent’s business collapsed thereafter; and that his wife also deserted him following the advert.

[19] On behalf of the appellant, its employee by the name Asmaa Mbura Zangui (DW1), testified on 11th December 2019 to the effect that on 10th October 2017, one Albert Zoka went to their office and sought to place an advert in the Standard newspaper; and that the advert was in respect of one Nguma Charo Chengo. The client was accordingly required to sign an indemnity after which the advert was ran. He further stated that Nguma Charo Chengo was hitherto unknown to him; and that after the complaint was raised, the appellant published an apology in connection with the impugned advert on 1st February 2018.

[20] Having heard both parties, the Learned Trial Magistrate held that:

“As to whether there was malice on the part of the Defendant, the evidence on record is that the advert was placed by one Albert Zoka, I take notice that the Defendant is a newspaper publishing company that had no association and or knowledge of the Plaintiff to harbor



malice against the Plaintiff. Be that as it may through its officers the Defendant owed a duty to its readers and to the Plaintiff in particular to publish an advert that is not injurious and or defamatory in nature. It is unfathomable that the Defendant allowed a publication to be carried on its platform that the Plaintiff is a liar, a conman and a suspected robber without any confirmation of the same. The Defendant failed to employ due diligence which fact is admitted by the Defendant in its apology carried on the 1st February 2018 newspaper edition.

For the reasons I find the Defendant wholly liable for defamation.”

[21] Thus, the learned trial magistrate proceeded to award the respondent a global sum of Kshs. 4,000,000/ = as general and exemplary damages together with interest at court rates and costs of the suit.

[22] I have given due consideration to the foregoing summary of evidence and the Judgment, the Grounds of Appeal as well as the written submissions filed herein. There is no dispute that the impugned advert was published of the respondent in the appellant’s newspaper dated 11th October 2017 as alleged; or that the appellant thereafter published an apology in the same newspaper on 1st February 2018 after this suit was filed by the respondent. Hence, the twin issues that present themselves for my determination are:

[a] Whether the respondent proved his case before the lower court to the requisite standard;

[b] Whether the learned magistrate committed an error of principle in making the awards he made.

[a] Whether the respondent proved his case to the requisite standard

[23] In Winfield on Tort, 8th Edition at page 254, defamation is defined as:

“...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...”

[24] Hence, in the case of Wycliffe A. Swanya v Toyota East Africa Ltd & Another [2009] eKLR, the Court of Appeal held that:

“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 the defamatory statement or utterance was published by the defendants. The 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...”

[25] Similarly, in J. Kudwoli & Another v Eureka Educational Training Consultants & 2 Others [1993] eKLR, it was held:

“...for a defendant to be tortiously liable in a suit for defamation the plaintiff must prove on a balance of probability that the matter complained of:

(a) is defamatory



- (b) refers to him
- (c) was intentionally, recklessly or negligently published of and concerning him
- (d) was so published by the defendant, and
- (e) was published without lawful justification on an unprivileged occasion."

[26] It is therefore important to reiterate the observation made in *Uren v John Fairfax & Sons Pty Ltd* 117 C.L.R 115, 150 that:

"...a man defamed does not get compensated for his damaged reputation. He gets damages because he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways - as a vindication of the plaintiff to the public and as a consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money."

[27] Whereas there is evidence that the appellant published defamatory material about the respondent in its newspaper for which it later offered an apology, not all the ingredients set out herein above were proved. Hence, whereas there was proof that the matter of which the plaintiff complained was defamatory in character and that the defamatory statement was published by the defendants, there was no proof that it was published maliciously. Indeed, the learned magistrate found as a fact that:

"As to whether there was malice on the part of the Defendant, the evidence on record is that the advert was placed by one Albert Zoka, I take notice that the Defendant is a newspaper publishing company that had no association and or knowledge of the Plaintiff to harbor malice against the Plaintiff..."

[28] In connection with the ingredient of malice in defamation cases, I find instructive the expressions of Odunga, J. in *Phinehas Nyaga v Gitobu Imanyara* [2013] eKLR that:

"...the words must be malicious. Malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice but the law does not weigh in a fair balance and it does not follow merely because the words are excessive, there is therefore malice. Malice may also be inferred from the relations between the parties before or after publication or in the course of the proceedings. Malice can be founded in the publication itself if the language used is utterly beyond the facts. The failure to inquire into the facts is a fact from which inference of malice may properly be 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."

[29] In the instant matter, the offending publication was placed at the instance of one Albert Zoka as a paid-up advertisement in the classified section of the appellant's newspaper and was not attributable directly to the appellant or its agents or employees. It is manifest then that malice, an essential ingredient of the tort of defamation, was not proved before the lower court. Moreover, the learned magistrate appears to not have paid attention to the question as to whether, in the circumstances, it was proper to hold the appellant liable on the basis of a paid-up advertisement, granted the decision of the Court of Appeal in



James Kimeu Mulinge v Nation Media Group [2018] eKLR in which the Court of Appeal observed that:

“...the notice was published by the respondent as a paid advertisement and in the circumstances it was not within their remit to establish whether it was genuine or not. At least it is clear from the evidence as no burden was placed upon the respondent to prove otherwise. To that extent we agree with the learned judge that the respondent published the notice innocently, believing it was a bona fide one and therefore cannot be said to have been driven by malice.”

[30] In the circumstances, it is my finding that, in the absence of malice, the learned magistrate erred in holding the appellant liable in this instance.

[b] Whether the Learned Trial Magistrate committed an error of principle in making the awards he made.

[31] As has been pointed out herein above, learned magistrate awarded the respondent a composite amount of Kshs. 4,000,000/= as general and exemplary damages. It is not lost on the Court that the latitude in awarding damages in an action for libel is wide and as pointed out in *Butt v Khan* [1981] KLR 349:

“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.”

[32] And in *C A M v Royal Media Services Ltd* [2013] eKLR, the Court of Appeal pointed out that:

“No case is like the other. In the exercise of discretion to award damages for defamation, the court has wide latitude. The factors for consideration in the exercise of that discretion as enumerated in many decisions including the guidelines in *Jones v Pollard* [1997] EMLR 233-243 include objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published and any repetition; subjective effect on the Plaintiff's feelings not only from the prominence itself but from the Defendant's conduct thereafter both up to and including the trial itself; matters tending to mitigate damages for example, publication of an apology; matters tending to reduce damages; vindication of the Plaintiff's reputation past and future.”

[33] As pointed out by counsel for the appellant, the respondent relied on one authority, namely, *Joseph Njogu Kamunge v Charles Muriuki Gachari* (supra) in which the award was Kshs. 1,500,000/= only. Although he indicated that he was guided by the authorities cited, the learned magistrate did not justify the award of Kshs. 4,000,000/= considering his acknowledgment that there was no malice; and that an apology had been tendered by the appellant. Indeed, in *Johnson Evan Gicheru v Andrew Morton & Another* [2005] eKLR, the Court of Appeal pointed out that:

“In action of libel the trial court in assessing damages is entitled to look at the whole conduct of the defendant from the time libel was published down to the time the verdict is given. It may consider what his conduct has been before action, after action, and in court during the trial: *Praud v Graham* 24 Q.B.D. 53,55.

In *Broom v Cassel & Co.* [1972] A.C. 1027 the House of Lords stated that in actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of restitution in integrum has necessarily an even more highly subjective element.



Such actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but, in case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a by-stander of the baselessness of the charges...

I would think that in the instant case to arrive at what could have been said to be a fair and reasonable awards the learned trial Judge could have drawn considerable support in the guidelines in Jonesv Pollard[1997] EMLR 233. 243 and where a checklist of compensable factors in libel actions were enumerated as: -

1. The objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published, and any repetition.
2. The subjective effect on the plaintiff's feelings not only from the prominence itself but from the defendant's conduct thereafter both up to and including the trial itself.
3. Matters tending to mitigate damages, such as the publication of an apology.
4. Matters tending to reduce damages.
5. Vindication of the plaintiff's reputation past and future.

[34] It is noteworthy therefore that, in Johnson Evan Gicheru v Andrew Morton & Another, it was proved as a fact before that the passages complained of in the offending publication were untrue in every material respect and had been published maliciously; and that when invited by the appellant's counsel to publish an apology correcting the offending paragraphs, the respondent's solicitors maintained the stance that the respondents were highly respected international publishers and that they did not publish books which contained untrue and defamatory statements. It was also evident from the record that the respondents, during the trial justified their posturing and sought to have certain paragraphs of the Plaint struck out for disclosing no reasonable cause of action, arguing that the words complained of were not capable of bearing the meanings attributed to them by the appellant. In the instant matter, in addition to the fact that there was an apology tendered by the appellant, there was no proof of malice.

[35] The learned magistrate further fell into error by making a composite award for both general and exemplary damages because, it is trite that two serve different purposes. Since exemplary damages are meant to punish a defendant, a plaintiff claiming damages under that head must prove improper motive. In Halsbury's Laws of England, it is opined that:

“Exemplary damages should be awarded only in cases within the following categories:-

- (1) Oppressive, arbitrary and unconstitutional actions by servants of government;
- (2) Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff; or
- (3) Cases in which the payment of exemplary damages is authorized by statute.

[36] It was further opined in the treatise aforementioned that in demonstrating the defendant's calculation as to profit, it is not sufficient to show merely that the words were published in the ordinary course of business run with a view of profit; but that the publication was intended to make a specific profit.



This was not proved by the respondent. It is therefore worth reiterating the expressions of the Court of Appeal in *Wangethi Mwangi v J.P. Machira T/A Machira & Co. Advocates*, that:

“We think that while the “Gicheru” judgment will continue to be a useful guide as regards the level or quantum of damages in similar situations, it was never intended to be a yardstick cast in concrete for all time and for this reason we think that peculiar facts of each case should continue to be the hub upon which the awards gravitate or revolve, provided that the Court remains alert to other relevant considerations such wider public interest goals, juridical basis for awards, including any pressing public policy considerations a sense of proportionality and the need for the courts to always recognize that they are often the last frontier of the need to ensure that truth is never sacrificed at the altar of recklessness, malice and even profit making. In addition, the awards should also be geared where circumstances permit to act as a deterrence so as to safeguard and protect societal values of human dignity, decency, privacy, free press and other fundamental rights and freedoms, including rights of others and personal responsibility without which life might not be worth living. The category of considerations will no doubt change as our societal needs change from time to time. In this regard we think that courts must strive to strike a proper balance between the competing needs in the special circumstances of each case.”

[37] Accordingly, I would have set aside the finding of the lower court on the award of Kshs. 4,000,000/= and replaced it with an award of Kshs. 1,500,000/= as general damages on the basis of the comparable case of *Joseph Njogu Kamunge v Charles Muriuki Gachari* (supra).

[38] In the result, and for the reasons aforesaid, I find merit in the appeal. The same is hereby allowed and orders granted as hereunder:

[a] The decision of the learned magistrate in Mombasa CMCC No. 2160 of 2021 dated 18th June 2021 be and is hereby set aside and substituted with an order dismissing the respondent’s suit.

[b] Each party to bear own costs of the lower court suit as well as the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 26TH DAY OF APRIL 2023

OLGA SEWE

JUDGE

