Techbiz Limited v Royal Media Services Limited (Civil Suit 45 of 2018) [2023] KEHC 19750 (KLR) (29 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19750 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 45 OF 2018

DKN MAGARE, J

JUNE 29, 2023

BETWEEN

TECHBIZ LIMITED ..... PLAINTIFF

AND

ROYAL MEDIA SERVICES LIMITED ..... DEFENDANT

JUDGMENT

1. The infamous NYS scandal or as per others, a scandal that never was, has visited, again. This time in terms of litigation. In this litigation Techbiz Ltd is protecting its name. A name is crucial and must be protected at all times.

2. According to the plaint filed on 21/6/2018 the Defendant published a news item in its citizen Limited.

3. This was said to have been broad cast at Citizen Nipashe, Citizen Live at 9 and the Defendant's you tube Account.

4. According to the plaintiff these words meant that the Plaintiff cause massive losses of Public Resources. They have set out pursuant to Order 2 Rule 7 enumerated 9 elements on what these words that were broad cast were meant to be.

5. The plaintiff maintained that the publication was actuated by malice. The main aspect being that the defendant never transacted with the National Youth Service. They maintain that the directors of the plaintiff and as such the Defendants conduct was in breach of Section 2(2) and 2(3) of the code of conduct for the practice of Journalism.

6. The plaintiff pleaded further that they have caused agony ordeal humiliation, ridicule, they averred that as a result of the broadcast their Assets recovery agency has without reason or purpose frozen their assets this crippling their ability to trade and conduct business.

7. Consequently, the plaintiff sought following prayers: -

a. An order for the broadcast or an apology of the defamatory clips one the citizen Nipashe, citizen live at 9 and Kenya Citizen TV You tube about.

b. An order directing deletion of and references to the Plaintiff from the news clips published/ and or broadcasted by the Defendant on all online versions of the news clip.

c. A permanent injunction restraining the defendant from publishing and or broadcasting similar clips linking the plaintiff to NYS scandal.

d. General damages for libel.

e. Exemplary damages.

f. Aggravated damages.

g. Costs.

8. The publication is said to have been made on citizen Nipashe and citizen TV as follows: -

> " .... Wenye kampuni zinazodai kuto huduma hizi wakishutumiwa kutunia mfumo wa malipo serikalini IMFIS kujiongezea pesa walizolipwa. Wanaaaaripotiwa kupata malipo maradufu, na hata wakati mwingine mara tatu Zaidi ya kima kilichoratibwa. kampuni zilizopokea kiasi kikubwa Zaidi ya pesa. Techbiz Limited kilichokabidhiwa kima cha shilingi millioni mia saba sitini na saba."
>
> "About twenty individuals as we told you earlier suspected to have taken part directly or indirectly in the massive plunder of nine billion shillings through factious supplies at the nation a Youth Service were today grilled at the Directorate of Criminal Investigations headquarters in Nairobi. Among those questioned is head of NYS supply chain Steven Mwenda, his deputy, Eliud Koome who are reported to have had rough time explaining how tenders were awarded and payments made .....
>
> The DCI headquarters like any other day was a beehive of activity. Among those who made their way in and out of the Directorate, were those closely linked to the nine billion shilling NYS scandal. Inside sources intimating that twenty (20) individuals I suspected to have taken part in the biggest scandal yet were being interrogated by a team of detectives hand-picked by the Director of Criminal Investigations, George Kinoti .....
>
> ... With the beneficiaries suspected to have manipulated the IFMIs system to achieve double and sometimes even quadruple payments of a single bid .....
>
> The companies include.... Techbiz Limited whose share was 767 million. The directors from the companies were grilled by a team of trusted detectives handpicked by the DCI form all financial crimes investigation units .....".

9. The operative date in this matter is 21/5/2018 when the alleged defamatory words were uttered. Part of the documents annexed to the list of documents is an affidavit of No. 60040/5/SG-7 Fredrick Musyoki an investigator attached to Assets Recovery Agency. They were making in inquiries pursuant to Section 3(9) of the Proceeds of Crime Anti Money Laundering Act, related to Enamel Accounts).

10. They have set out the meaning of the words so spoken. These words meant that the plaintiff was corrupt and obtained 767 million from the NYS. This showed, according to the plaintiff that the defendant used public officers to obtain undeserving payments from the public. That they had have

no integrity and that they earned money without working on it. The plaintiff set out particulars of what they call falsity and malice.

11. The consequences, as plaint have that the plaintiff's reputation was lost they lost business and relationships.

12. The Investigation was in relation to information received on 26/4/2018 about funds fraudulently stolen from the National Youth Service, a Department of the under the Ministry of Youth and Gender Affairs involving collusion of staff and suppliers of the said organization. The Affidavit was dated 25/6/2018 and requesting to unfreeze the account.

13. Various Demand letters were issued. I am worried that the documents, like the order freezing the account of the Application that were made by the Asset recovery agency and not the Party whose assets were frozen.

14. A man's character ought to be defended. That is available. What if that man has no character? Then he should be shown to be a scoundrel. As I was writing this judgment. I was reading a story the story of John Marshall Harlan, America's Dissent hero by Peter S. Canellos. I kept asking myself one question. Why do I write what I write? As I was thinking the words of Chief Justice David Maraga kept ringing in my mind. He had stated, in the presidential petition No. 1 of 2017 – as doth:-

> " It is also our view that the greatness of a nation lies not in the might of its armies important as that is, not in the largeness of its economy, important as that is also. The greatness of a nation lies in its fidelity to *the Constitution* and strict adherence to the rule of law, and above all, the fear of God. The Rule of law ensures that society is governed on the basis of rules and not the might of force. It provides a framework for orderly and objective relationships between citizens in a country. In the Kenyan context, this is underpinned by *the Constitution*.
>
> 395. And as Soli J Sorabjee, a former Attorney General of India once wrote, the rule of law is the heritage of all mankind and a salutary reminder that wherever law ends, tyranny begins. [122] Cast the rule of law to the dogs, Lutisone Salevao once observed and government becomes a euphemistic government of men... He adds: History has shown (sadly, I might add) that even the best rulers have fallen prey to the cruel desires of naked power, and that reliance on the goodwill of politicians is often a risky act of good faith.[123] The moment we ignore our Constitution the Kenyans fought for decades, we lose it."

15. As we pen these judgments, we touch lives in more profound was then the care to admit to ourselves. Sometimes we are led by our conscience in court. However, at times our collective is so bloodied that it cannot speak. This case goes to the core of all that is wrong. Pleadings cry our alound for a voice in widerness to hear them. I have heard them.

16. This reminds one of the poem postulations by Prof. Everett Standa, when he stated, in his I speak for the Bushes.

I speak for the bush,

When my friend sees me

He swells and pants like a frog

Because I talk the wisdom of the bush!

He says we from the bush

Do not understand civilized ways

But, my friend, why do men

With crippled legs, lifeless eyes,

Wooden legs, empty stomachs

Wander about the streets

Of this civilized world?

Teach me, my friend, the trick,

So that my eyes may not

See those whose houses have no walls

But emptiness all around;

Show me the wax you use

To seal your ears

To stop hearing the cry of the hungry;

Teach me the new wisdom

Which tells men

To talk about money and not love,

When they meet women;

I speak for the bush:

You speak for the civilized-Will you hear me?

17. I conjured up images of the sick and dying and the effect of the publication. I digress.

18. The defendant filed a defence on 25/7/2018. The defence could be improved to avoid prefabricating. The case of Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR, where the court of Appeal stated as doth: -

> " The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in Thorp v Holdworth (1876) 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible", (underling supplied).
>
> I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the appellant's defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes including that of 0 6 r 13(1)(a)."

19. It is thus important that defence be cogent and not having it both ways.

20. The defence was that the publication was not done. Even if it was the same was in good faith in public interest and without malice and it was intended to injure the character of the plaintiff.

21. In that context it was privileged and a fair comment on a matter of public interest. They thus relied on qualified privileges.

22. They state they published after confirm the veracity by interviewing officers from the Directorate of Criminal Investigations, Headquarters. They also rely on Article 33 and 34 of *the Constitution*. The two articles provide as follows: -

> " 33. Freedom of expression
>
> 1. Every person has the right to freedom of expression, which includesa. freedom to seek, receive or impart information or ideas; b. freedom of artistic creativity; and c. academic freedom and freedom of scientific research.
>
> 2. The right to freedom of expression does not extend toa. propaganda for war; b. incitement to violence; c. hate speech; or d. advocacy of hatred thati. constitutes ethnic incitement, vilification of others or incitement to cause harm; or ii. is based on any ground of discrimination specified or contemplated in Article 27 (4).
>
> 3. In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.
>
> 34. Freedom of the media
>
> 1. Freedom and independence of electronic, print and all other types of media is guaranteed, but does not extend to any expression specified in Article 33 (2).
>
> 2. The State shall not: -
>
> a. exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or
>
> b. penalise any person for any opinion or view or the content of any broadcast, publication or dissemination.
>
> 3. Broadcasting and other electronic media have freedom of establishment, subject only to licensing procedures that
>
> a. are necessary to regulate the airwaves and other forms of signal distribution; and
>
> b. are independent of control by government, political interests or commercial interests.
>
> 4. All State-owned media shall
>
> a. be free to determine independently the editorial content of their broadcasts or other communications;

b. be impartial; and c. afford fair opportunity for the presentation of divergent views and dissenting opinions.

5. Parliament shall enact legislation that provides for the establishment of a body, which shall

a. be independent of control by government, political interests or commercial interests;

b. reflect the interests of all sections of the society; and c. set media standards and regulate and monitor compliance with those standards.

23. They thus beseech the Court to dismiss the suit. The parties testified. After close of the defence, the plaintiff sought and was granted leave to introduce statements of Manoj Shah and Harish Shah.

Plaintiff's case

24. Ketan Doshi testified on 14/5//2019 where he testified and adopted his statement. Ketan Doshi stated that he was a director. He stated that they dealt with IT Solutions. He provided no evidence. She stated he watched the news at 7am and 9 a.m. He did not know who posted the clip-on YouTube. He stated he lost business. All the losses were not demonstrated. He stated that the police came after publication and assets were frozen.

25. DW1 testified, that is Hassan Mugambi. He adopted hi statement dated 15/2/2017. On cross examination he sated he was the reporter and not the author. The author was Hussein Mohamed. He did mention the plaintiffs name. He stated that, it is the directors who were grilled. He stood by his report. On cross examination by the court, the witness stated that he learnt that day in court that the plaintiff did not receive 767,000,000 from NYS.

26. After the submissions the plaintiff added more witness. PW3 Manoj Jayantilal Shah testified that he is an electoral engineer and wrote a statement dated 25/8/21. He stated that he saw the clip on 21/5/2018 and a newspaper publication. He stated that company stopped dealing with the plaintiff. He stated he does not do business with Doshi. On Re– Examination he changed his mind and stated he saw the 2 clips. Kiswahili on being prompted by the court, he stated he did not believe the clips. He stated this Techbiz has never had any corruption.

Analysis

27. The Defendant and Plaintiff had different cases. The plaintiff was working on the truth of the allegations relating to Ksh. 767,000,000/=. On the other had the Defendant was working on the fact that the reposts indicated that the directors were grilled by the directorate of criminal investigations.

28. The Plaintiff did not at any Time deny that the directors were grilled by the DCI. The report was not that they had stolen money but that they had been grilled.

29. It is established that the NYS scandal did in fact occur. At no time did the defendant state that the directors took. They stated: -

> " They were grilled over a share of Kshs. 760 million ....."

30. The grilling was done over 20 individuals who were suspected to have taken part in the NYS scandal.

31. The operative parts was "The companies include - Techbiz Limited whose share was 767 million. The directors from the company were grilled by a team of trusted detective handpicked by the DCI from all financial crimes investigation unit.

32. These words do not at all connote that they stole the money. They state that they are among 20 or so individually grilled suspected to have taken part directly or indirectly. The grilling of directors over a share of 767, Million was a fact within the knowledge of the plaintiff. Sections 112 of the *evidence Act* states as follows: -

> " 112. Proof of special knowledge in civil proceedings In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

33. The question for determination is not whether or not the money was stolen but whether the directors were grilled. The Plaintiff did not tender evidence for all the directors of the company that they were not grilled. Their case is that asset recovery found them innocent. That was not the case. The directors were said to have been grilled. If evidence of wrong doing is found, then, they will be charged. If not they may not be charged. Being grilled is not a bad thing. However, unpleasant it may sound the police have power to interrogate suspects. Being a suspect does not connote, ipso facto that you are a thief.

34. Being grilled byte DCI is not, by itself defamations. The DCI lead duty under Section 52 of *NATIONAL POLICE SERVICE ACT* no 11 A of 2011, to: -

> " 52. Power to compel attendance of witnesses at police station
>
> (1) A police officer may, in writing, require any person whom the police officer has reason to believe has information which may assist in the investigation of an alleged offence to attend before him at a police station or police office in the county in which that person resides or for the time being is.
>
> (2) A person who without reasonable excuse fails to comply with a requisition under subsection (1), or who, having complied, refuses or fails to give his correct name and address and to answer truthfully all questions that may be lawfully put to him commits an offence.

35. Therefore, before someone is arraigned in Court, no one will shun a person for being suspected. Being grilled, which is a journalist speak for being suspected. It is not defamatory.

36. It will be impossible to deal with crime it reports are not made till the finding of guilty is made. Further, the state and the people of Kenya lost money to shadowy figures who used technical knowhow, or is it know-who to manipulate the National Government Integrated Financial Management Information Service. (IFMIS and disappear with 9.6 billion shillings.

37. They state public had a right to know from the DCI on who he was investigating. The Defendant had not duty to interview the suspects who were then in police custody. The DCI is expected to know which information to and not to release to the media.

38. Indeed, the other arm of Government Asset Recovery Agency had also proceeded to Freeze Assets on 26/4/2018. This was one month before the publication.

39. In a real twist, contrary to normal occurrences where it is the affected parties who make application, it is Sgt. Fredrick Musyoki who made the application to unfreeze the assets. I need not add any more.

40. PW3 confirmed that he did not believe, after hearing the story that the plaintiff was corrupt. Nevertheless, they shunned him enough to testify for him (pun intended).

41. This goes to show that the alleged shunning was not caused by the publication.

42. I am aware that Article 33 provides for the freedom of expression which ember's to seek receive or import information or ideas.

43. It is concertized in Article 34 of *the constitution* which provides for freedom of the media. Given the Constitutional protection of the media, the same standards used in the 1990s during the passing of case of Kipyator Nicholas Kiprono Biwott v Clays Limited & 5 others [2000] eKLR, where justice A. Visram stated: -

> "Let me conclude by saying that I fully recognize that the award made by this Court is the highest ever made in this country for the tort of libel. However, the fact that such an award has not been made in the past, does not mean it cannot be made at this time, or whenever appropriate circumstances present themselves.
>
> I believe that time is propitious to send a clear message to all those who libel others with impunity, and who get away with ridiculously small awards, that the Courts of law will no longer condone their mischief. No person should be allowed to sell another person's reputation for profit where such a person has calculated that his profit in so doing will greatly outweigh the damages at risk."

44. That was a decision that turned on those days and is gone forever. It is not the forte for the current constitutional dispensation. The reputation has to be solid and impeccable otherwise the Kenyans have a right to know. Defamation was used then as a tool to suppress the truth.

45. To be able to know whether the words are defamatory, the question you ask yourself is you ask them to correct the publication what will they say without lying. I do not see anything that can be said. They cannot deny the grilling which actually took place. The directors have not denied being grilled. This will be pending the truth too much. It is an understatement to say the other directors of the Plaintiff did not find the publication to be defamatory.

46. The publication was a fair comment on public affairs. The test for fair comment was stated in the case of Jacob Mwanto Wangora v Hezron Mwando Kirorio [2017] eKLR, by justice R. NYAKUNDI as follows: -

> "In the persuasive authority from the Supreme Court of Appeal Canada, the court in Wilradeolia v Simpson [2008] SCC 40 set out the requirements for the fair comment defence:
>
> (a) The comment must be on a matter of public interest.
>
> (b) The comment must be based on fact.
>
> (c) The comment though it can include inference of fact must be recognizable as a comment.
>
> (d) The comment must satisfy the following objective test could any person honestly express that the opinion on the proved facts.

(e) Even though the comment satisfies the objective test, the defence can be deflated if the plaintiff proves that the defendant was actuated by express malice."

47. In the same court in the case of Grant v Torstar [2009] 3 SCR 640 SCC 61 the delivering of judgement the court provided the following guiding principles:

a. The defamatory statement must be read in context of the publication as a whole.

b. Public interest is not synonymous with what interests the public.

c. An individual's reasonable expectation of privacy must be respected in this determination.

d. It is enough that some segment of the community would have a genuine interest in recovering the information on the subject.

e. The subject matter must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens or one to which considerable public no notoriety or controversy has attached.

f. The public has a genuine stake in knowing about many matters ranging from science and the arts to the environment, religion and morality."

48. I am thus satisfied that the words were not only true but also a fair comment. It is a report of the actual happenings at the DCI. THE subject matter is and was a matter of public attention as a colossal sum had been lost though the NYS scandal

49. The court continued as doth in the case of Jacob Mwanto Wangora v Hezron Mwando Kirorio [supra]

> " It is therefore the duty of this court to construe the meaning of the words as they could be interpreted in the context of a reasonable man to consider the defamatory effect. In the case of Hayward v Thompson & Others [1981] 3 ALLER Lord Denning stated thus, "One thing is of essence in law of libel. It is that the words should be defamatory and untrue and should be published if and concerning the plaintiff. That is the plaintiff should aimed at or intended by the defendant....."
>
> In the scholarly by Gatley on libel and slander 6th Edition the legal meaning of defamation is stated as follows:
>
> "A man commits the tort of defamation when he publishes to a third person words (or matter containing an untrue imputation against the reputation of another."
>
> In English Law publication to the person himself defamed, "is not actionable, though it may be criminal. The interest protected is not personal pride broadly speaking, if the publication is made permanent form or is broadcast. The matter published is libel, if in fugitive form it is slander. The most important distinction of the two is that the law presumes that some damage will flow from the publication of a libel."

50. A fair comment is an opinion. It does not give or purport to state that there are facts. The defendant indicated that this as the investigation the DCI was carrying out, it had not concluded that the complained named were guilty.

51. Further, the journalist quoted sources, form the DCI. The journalist must look at the compelling interest of currency and information relevancy. By seeking clarification from DCI then the Defendant fulfilled their obligations.

52. The Defendant is a non-descript that firm without known address. No evidence was placed before the court on what they do. The only evidence was that the asset recovery order was vacated. That order is not useful for this case. According to the plaintiff the order was in situ in May and vacated in thereafter. The Defendant said nothing about it.

53. However, at the time of publication the order for Freezing the plaintiff's assets had been in situ for a month. That alone is enough to show that the company assets were being looked into.

54. The setting aside of the order is not evidence that investigations were not being done. To make matters worse the plaintiff is a company. There are directions of the company. All of one person testified. She did not place on the record evidence that she had a resolution from directors to sue and that he is a director.

55. The Plaintiff's witness admitted there are other directors. Were these directors grilled? They tendered no evidence to that effect. The witness did not establish herself as having any relationship with the plaintiff.

56. The other aspect that is disturbing is the caliber of the witness that was introduced. The plaintiff admitted that they are the ones who made collage to them, if they had watched. The plaintiff thus was not called over the same. The witness who testified added no value. He looked coached. He kept changing goal posts. He did not know whether he watched one or two broadcast. He admitted he watched videos. This mean that he do not see the broadcast of 21/5/2018. He was totally miserable.

57. Defence witness Hassan Mugambi on the other hand maintained that there was as a fact a corruption scandal involving National Youth Service. It was highlighted by various media houses.

58. This scandal formed a part of discussion and parties who were suspected were grilled including senior members of the National Youth service. They are said to have manipulated IFMIS to achieve their scheme. He also states that as a fact the assets recovery did indeed Froze the plaintiffs account. The lifting or unfreezing of the accounts was done after completion of investigations on 25/6/2018. Investigations properly so called cannot be done without the directors. I also note that the freezing of the account was done long before the publication and as such it was not caused by the publication. This also tell us that there were indeed investigations which yielded the unfreezing.

59. The body mandated to investigate in Kenya is the keys police in General and DCI in this particular case. The Defence was able to show their good faith.

60. In the circumstances I make a finding that the plaintiff's case is bereft of merit. There was no defamation. consequently, I dismiss the entire suit in limine with costs of Ksh. 550,000/= to the Defendant.

61. The law requires that where I dismiss a matter, I need to assess costs. The plaintiffs did not show the extent of their losses and their current reputation. Other than their assets being frozen by Asset recover y agency, there is no contract or business they show they are involved in. I will thus have awarded them nominal damages of Kshs. 200,000/=. In the decision of Barclays Bank of Kenya Limited v Hellen Seruya Wasilwa [2021] eKLR, where the court stated: -

> " I do find that the Respondent is entitled to nominal damages which should not be so low as to amount to no compensation for the harm caused and not so high as to amount to severe

punishment to the appellant who breached the contract. The term "nominal damages" was defined in the case of Kanji Naran Patel V. Noor Essa And Another, (1965) E.a. 484 while referring to the case of The Mediana (1900) AC 116, as follows:

> "'Nominal damages' is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damage that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term nominal damages does not mean small damages. The extent to which a person has right to recover what is called by the compendious phrase damages, but may be also represented as compensation for the use of something that belongs to him, depends upon a variety of circumstances, and it certainly does not in the smallest degree suggest that because they are small they are necessarily nominal damages."

62. This is because, there was no evidence tendered at all on the reputation of the Plaintiff or any loss they suffered. This was a broadcast. There was no known person who shunned them. This was confirmed by their own witness. The freezing of accounts was lawful and was done before the publication.

Determination

63. In the circumstances I make the following orders: -

    a. The plaintiff's suit is dismissed with costs of 550,000=.

    b. The Court could have awarded nominal damages of Ksh. 200,000=. had the plaintiffs succeeded. There was no evidence for award of aggravated, exemplary damages.

    c. The prayer for deletion of broadcast or apology for defamation is dismissed.

    d. The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 29TH DAY OF JUNE, 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

No Appearance by the Plaintiff

Munyori for the Defendant

Court Assistant - Brian