



REPUBLIC OF KENYA



**JGK v AWW (Civil Appeal E016 of 2021)
[2023] KEHC 21378 (KLR) (Civ) (4 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21378 (KLR)

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

CIVIL

CIVIL APPEAL E016 OF 2021

AN ONGERI, J

AUGUST 4, 2023

BETWEEN

JGK APPELLANT

AND

AWW RESPONDENT

*(Being an appeal from the judgment and decree of Hon G. A. MMASI
(SPM) in Milimani CMCC No. 2256 of 2019 delivered on 20/12/2020)*

JUDGMENT

1. The respondent sued the appellant and 3 others in Milimani CMCC No. 2256 of 2019 seeking general damages and punitive damages for defamation.
2. The respondent also sought an immediate unqualified apology and retraction of the impugned email sent to everyone on her email contacts by the appellant.
3. The respondent averred that the Appellant using a pseudonym either himself or through his agents caused the said email to be circulated to all addressees on her mailing list.
4. The plaintiff also averred that the said publication not only infringed her constitutionally guaranteed right of privacy but also impugned on her liberties and rights to privacy as protected under the *computer misuse and cyber crime* Act No.5 of 2018 and the *National and Aids Prevention Act*, No.14 of 2016.
5. The appellant filed a defence and denied the respondents case.
6. The trial court found that the appellant had violated the respondent's right to privacy and awarded her ksh.6,500,000 for defamation ksh.1,500,00 as general damages for violation of her rights to privacy and kshs.500,000 exemplary damages by the 2nd, 3rd and 4th defendants in lieu of an apology.



7. The appellant has appealed to this court on the following grounds;
That the Learned Magistrate erred in Law and in fact by finding as follows;
 - i. That the respondent had proved her case against the appellant and the other defendants;
 - ii. That the appellant shared the pleadings from Divorce Cause no. 149 of 2019 online without any proof;
 - iii. By re-opening the plaintiff's case for trial while it had been dismissed by the ruling dated 15th July 2019;
 - iv. By awarding the Respondent damages for a claim not made on the Plaint dated 28th September 2020;
 - v. In finding that the Appellant was in breach of the Respondent's Right to Privacy and condemning him to pay Kshs. 1,500,000;
 - vi. By awarding the Respondent General Damages amounting to Kshs. 6,500,000;
 - vii. By awarding the Respondent punitive damages.
8. Both Parties filed their submissions. The Appellant submitted that Respondent's burden of proof to prove the matters alleged was not discharged in the lower court, as required by sections 107 and 109 of the *Evidence Act*.
9. Further, that the Respondent did not prove the requirement and ingredients of defamation by libel. The Respondent did not adduce evidence to controvert the Appellant's evidence, and that there was no evidence adduced to demonstrate that any documents were given to the 2nd, 3rd and 4th Defendants by the Appellant, to Publish, and that there was no evidence that any other defamatory statements were published by the Appellant save for the pleading filed in the divorce proceedings that were privileged.
10. The Appellant also submitted that the Respondent has also not adduced any evidence of any harm occasioned to her after the Publication and thus undeserving of the damages awarded.
11. The Appellant also submitted that the Lower court erred in re-opening a matter which it had dismissed and decided that the issues should be dealt with in the Divorce Cause.
12. The Appellant further submitted that he had not breached the Respondent's right to privacy as the threshold for such breach had not been attained. No evidence adduced had proved that the Appellant got the information in an intrusive manner or through unauthorized means.
13. The Appellant thus implored the Court to allow the Appellant's Appeal.
14. The Respondent submitted that defamation law places the burden of proving the truth on a statement on the defendant rather than the Plaintiff except in the case of a Public concern where the Plaintiff would have to prove the falsity of a statement. For that reason, the burden of proof thus lies with the Appellant to prove that the statements made were not defamatory.
15. The Respondent also submitted that the test for whether a statement is defamatory does not depend on the intention of the publisher but the way that a reasonable person would perceive it.
16. Further the Respondent submitted that the statements made by the Appellant would cause a reasonable person to perceive the Respondent in a negative light. The suit, being premised on an action of defamation, breach of the Right to Privacy, contravention of the *Computer Misuse and Cyber Crimes*



Act and the National HIV and AIDS Prevention Act, the appellant's conduct was careless, reckless, inexcusable, malicious and injured the Respondent's reputation.

17. On sharing the pleadings as filed in Divorce Cause number 149 of 2019 the Appellant had not denied the cause of action in the lower court but only claimed that it was privileged. The Respondent submitted that a privilege immunizes the conduct that under ordinary circumstances, would subject the actor to liability, only when that privilege is properly exercised in the performance of a legal or moral duty, and which qualified privilege would be vitiated if the Plaintiff proved that there was malice on the part of the Defendant.
18. The Respondent also submitted that the Defense of qualified privilege is only applicable when there is good faith and without any improper motive. The Respondent had proved malice on the Appellant's part and he had failed to prove that the statements were privileged.
19. On reinstatement of the matter after dismissal, the Respondent submitted that re-opening of a case is an equitable remedy within the discretion powers of a court to grant. The trial court had power to reinstate the matter and the same was done judiciously.
20. On the issue of damages for defamation, the Respondent submitted that a successful Plaintiff in a defamation action is entitled to recover compensation for the wrong she has suffered. In assessing damages, the Court will consider the distress, hurt, and humiliation which the defamatory statement causes the Plaintiff and which amount was discretionary to the court.
21. She stated that it was therefore right for her to be awarded the damages as the defamatory publication closely touched on the Respondent's personal integrity, professional reputation and social standing.
22. On damages awarded for the breach of the Respondent's right to privacy, the Respondent submitted that the Appellant had published personal communication and pictures, shared with the Appellant in intimate conversation before their marriage, and the Respondent had neither given consent to Publish nor waived her right to privacy.
23. She cited several decisions that had relied on the Court's finding in the South African Case of Mistry -v- Interim National Medical and Dental Council of South Africa (1998)(4) S.A 1127 (CC) which set out the Principles the Court ought to take into account in determining whether there is a violation of the right to privacy as whether:-
 - i. The information was obtained in an intrusive manner;
 - ii. It was about intimate aspects of the person's life;
 - iii. It involved data provided by the person for one purpose and then used for another purpose;
 - iv. It was disseminated to the Press, or the General Public, or persons from whom an applicant could reasonably expect that such private information would be withheld.
24. As regards the award of punitive damages, the Respondent submitted that exemplary damages go beyond compensating the Plaintiff for wrong suffered but also punishing the Defendant for improper motive, malice and failure to apologize.
25. Further, that the Appellant refused and/or neglected to retract the defamatory statement published. The award was thus founded on a proper appreciation of Law.
26. The Respondent asked the court to dismiss the Appeal with costs to the Respondent.



27. This being a first appeal, the duty of the 1st appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether to support the findings of the trial court.
28. The issues for determination in this appeal are as follows;
 - i. Whether the respondent proved her case to the required standard.
 - ii. Whether the trial court was right in reinstating the respondent's case after dismissing it on 15/7/2019.
 - iii. Whether the award of damages was excessive.
29. On the issue as to whether the respondent proved her case, the trial court was right in holding that all the elements of defamation were proved as follows;
 - a. The matter to which the Respondent complained about was published by the Appellant;
 - b. The publication did refer to the Respondent;
 - c. The publication was defamatory in character;
 - d. The publication was published maliciously; and
 - e. The Publication caused the Respondent to suffer injury.
 - 30) Further, the Lower court noted that neither Appellant had not denied publication in terms of the Respondent's Cause of action save that they pleaded the same to be privileged by dint of absolute privilege. The trial court also rightly found that the that the Defense of qualified privilege is only applicable when there is good faith and without any improper motive.
 - 31) Divorce Causes are ordinarily done in camera and even the names of the parties are concealed by the use of initials to safeguard their identity and to protect their privacy.
 - 32) The sanctity of marriage should be preserved even in divorce and I find that it is wrong for the Appellant to divulge divorce proceedings in the manner he did.
 - 33) The Trial court thus reached a decision that the impugned words as published by the Appellant were defamatory to the Respondent's character.
30. On the issue as to whether the court was right in reinstating the suit against the Appellant, I find that the court has a discretion to reinstate a dismissed suit if sufficient cause is shown why the same should be done.
31. In the case of *Jim Rodgers Gitonga Njeru v Al-Husnain Motors Limited & 2 others* [2018] eKLR, the court outlined underlying principles which would apply for an application to reinstate a dismissed matter as follows;
 - a. It is more just if litigation is brought to an end after all parties have been heard on merit and substantive justice administered.
 - b. The very Rules of the court that provide for timelines for the performance of an act under the said Rules are the same Rules of the court that allow the court to exercise its discretion and extend time within which to comply in the event of any noncompliance with any of those Rules.
 - c. Article 159 of *the Constitution* of Kenya, 2010 enjoins the court to administer substantive justice.



- d. Sections 3A and 3B of the [Appellate Jurisdiction Act](#) through the overriding objective principle mandate the court to act justly and fairly.
 - e. The overriding objective principle is not aimed at giving justice to one party at the expense of another but for ends of justice to be met to all the parties involved or stand to be affected by the matter.
 - f. In seeking the court's intervention upon default and or noncompliance with a procedural step in litigation before the court, demonstration of existence of a reasonable explanation for delay in the supporting documents is sufficient basis for the exercise of the court's discretion in favour of a deserving party.
 - g. Consideration of the nature of the substratum of the litigation is also of paramount consideration in an application for extension of time within which to comply with the Rules.
 - h. Article 50 coupled with article 159 of [the Constitution](#) on the right to be heard and the need for a court of law to frown upon procedural technicalities in favour of substantive justice are meant to ensure substantive justice to all parties.
 - i. In an application for reinstatement of a court process, there is need to balance the requirement as to whether reasonable grounds have been proffered for reinstatement and the prejudice to be suffered by the opposite party if such an order for reinstatement were to issue bearing in mind at the same time that dismissal is a draconian order that drives parties away from the seat of justice and should therefore be employed sparingly.
32. On the issue as to whether the award of damages was excessive, an appellate court can only tamper with an award of damages if the same is too high or too low as to warrant interference or if the trial court relied on wrong principle and arrived at a wrong conclusion.
33. In the case of [Butt vs. Khan](#)[1981] KLR 349 the court held as follows;
- “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”.
34. Similarly, in the matter of [Kenya Broadcasting Corporation v Geoffrey Wakio](#) [2019] eKLR the court held:
- “The law on when an appellate court can interfere with an award of damages is firmly established. General damages are awarded if the claimant establishes in principle his legal entitlement to them, and a trial Judge must make his own assessment of the quantum of such general damages. In order to justify reversing the award of damages, this Court must be convinced that the trial Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.”
35. I find no justification to interfere with the award of damages by the trial Court.
36. This suit is premised on an action of defamation, breach of the Right to Privacy, contravention of the [Computer Misuse and Cyber Crimes Act](#) and the [National HIV and AIDS Prevention Act](#), and



the appellant's conduct was careless, reckless, inexcusable, malicious and injured the respondent's reputation.

37. I find that the damages awarded by the Trial court are reasonable in the circumstances of this case.

38. Consequently, I find that the appeal herein lacks in merit and I dismiss it with costs to the Respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 4TH DAY OF AUGUST, 2023.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

