



**Radio Africa Group v Nyawiri (Civil Appeal E032 of 2020)
[2023] KEHC 27150 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27150 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E032 OF 2020
RE ABURILI, J
DECEMBER 20, 2023**

BETWEEN

RADIO AFRICA GROUP APPELLANT

AND

CARILUS OSERO NYAWIRI RESPONDENT

(An appeal arising out of the Judgement of the Honourable P.N. Gesora in the Chief Magistrate's Court at Kisumu delivered on the 10th December 2020 in Kisumu CMMC 267 of 2019)

JUDGMENT

Introduction

1. The appellant Radio Africa Group was sued by the respondent for both general and aggravated damages for defamation of character vide an amended plaint dated 3rd October 2019 following an online article published by the appellant on the 24th May 2018.
2. In its defence, the appellant denied the respondent's allegation and put the respondent to strict proof further contending that no cause of action had been demonstrated as the suit was filed out of time.
3. In the impugned judgement, the trial magistrate found that the respondent had been granted leave to file the suit out of time, an order that had not been overturned by any court and further that the respondent had proved his case on a balance of probabilities. The trial court awarded the respondent damages of Kshs. 6,000,000 as well as costs of the suit.
4. Aggrieved by the trial court's ruling, the appellant filed the instant appeal vide a Memorandum of appeal dated 17th December 2020 and filed on the 22nd December 2020 raising 12 grounds of appeal that can be summarised as follows:



- a. The honourable magistrate erred in law by conferring upon himself jurisdiction to hear and determine this matter when the same was lacking ab-initio as provided in the mandatory provisions of statute and in particular Section 4 (2) and 27 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya.
 - b. The Honourable Magistrate erred in fact and law by ignoring clear provisions of the *Constitution* and in particular, Articles 33, 34 and 35 respectively of the *Constitution* of Kenya, 2010 and thereby failing to uphold the freedom of expression, freedom of the media and right of access to information.
 - c. The honourable magistrate erred in fact and law by holding that the ingredients of the tort of defamation had been met contrary to the evidence adduced.
 - d. The honourable magistrate erred in fact and in law by failing to hold that the publication complained of consisted of fair comment on a matter of public interest as it concerned communication exchanged between officers of public interest bodies, namely, the Kenya Magistrates and Judges Association (KMJA) as well as the Ethics and Anti –Corruption Commission (EACC).
 - e. The honourable magistrate erred in fact and in law by failing to find that there was no communication or publication of the alleged defamatory article because no evidence was adduced by other witnesses (some right thinking members of the society), other than the respondent, to show that they read the subject publication and came to the conclusion that the respondent was defamed.
 - f. The honourable magistrate erred in fact and in law by failing to properly evaluate the evidence adduced by taking into account irrelevant considerations and ignoring critical matters hence leading to a miscarriage of justice.
 - g. The honourable magistrate erred in fact and law by failing to properly consider the comparable judicial authorities availed for consideration and thereby purporting to overturn Court of Appeal decisions.
 - h. The honourable magistrate erred in fact and in law by failing to consider, evaluate and give due weight to the appellant’s submissions and thereby occasioning a miscarriage of justice.
 - i. The honourable magistrate erred in fact and law by applying wrong principles pertaining to assessment of damages and or compensation thereby arriving at a manifestly excessive award and hence miscarriage of justice.
5. The parties filed submissions to canvass the appeal.

The Appellants’ Submissions

6. The appellant submitted that there was no cause of action against the appellant because the claim had been filed out of the one-year statutory limitation time and further that the law does not allow extension of time for defamation claims under any circumstances as was held in the case of *Royal Media Services Ltd v Valentine Mugure Maina & Another* [2019] eKLR.
7. It was further submitted that without jurisdiction, the subordinate court had no power to entertain the respondent’s claim and thus its decision amounted to nothing as was held in the case of *Phoenix of E.A. Assurance Company Limited v S.M. Thiga t/a Newspaper Service* [2019] eKLR.



8. It was submitted that the honourable magistrate erred in fact and in law by failing to hold that the publication complained of consisted of fair comment on a matter of public interest as it concerned communication exchanged between officers of public interest bodies, namely, the Kenya Magistrates and Judges Association (KMJA) as well as the Ethics and Anti –Corruption Commission (EACC) and further that the court did not apply the principles governing the defence of fair comment on a matter of public interest as was defined in the case of *Nation Media Group Limited & Another v Alfred N. Mutua* [2017] eKLR.
9. The appellant submitted that the honourable magistrate erred in fact and law by holding that the ingredients of the tort of defamation had been proved contrary to the evidence adduced whereas it was only the respondent who had testified and he cannot determine his own defamation as was held in the case of *Patrick Nyaga & Another v Sanitam Services EA Limited* [2021] eKLR. The appellant further submitted that third party evidence was necessary to establish the tort of defamation as was held by the Court of Appeal’s decision in the case of *Selina Patani & Another v Dhiranji Patani* [2019] eKLR.
10. It was submitted that the trial magistrate failed to consider the authorities cited by the appellant and further that an award of Kshs. 1,000,000 would be appropriate if defamation was proved. Reliance was placed on the case of *Raphael Lukale v Elizabeth Mayabi & Another* [2018] eKLR.
11. The appellant submitted that a sum of Kshs. 200,000 would have been sufficient as exemplary damages.

The Respondents’ Submissions

12. The respondent submitted that he filed his claim against the appellant on time having initially filed it on the 23rd May 2019, a day before time lapsed before which he could bring the suit and subsequently amended the plaint on the 3rd October 2019 and filed the same on the 4th October 2019 and further that section 4 (2) of the *Limitation of Actions Act* gives the court discretion to entertain a suit which has exceeded the statutory period if there is sufficient reason to warrant a delay as was held in the case of *Royal Media Services Ltd supra*, that of *M’ikiara M’Rinkankanya & Sebastian Nyamu v Gilbert Kabetere M’Mbijiwe* and that of *Nation Media Group Limited & 2 Others v Margaret Kamene Wambua* [2021] eKLR.
13. It was submitted that the respondent satisfied all the conditions for the award of damages for defamation as the appellant’s agent acted in contravention of the Code of Conduct for the Practice of Journalism by publishing an article that was reckless and malicious. The respondent further submitted that the article published by the appellant was made without any justification and any basis which words had a negative impact on the respondent’s character painting him as a man who led an immoral way of life.
14. On quantum, it was submitted that the award rendered by the trial court was reasonable taking into comparison comparable awards cited before the trial court.

Analysis and Determination

15. As a first appellate court, section 78 of the *Civil Procedure Act* obligates this court to examine matters of both law and fact and subject the whole of the evidence adduced in the trial court to a fresh and exhaustive scrutiny before drawing its own conclusion from that analysis bearing in mind that the court did not have an opportunity to hear the witnesses first hand. See the Court of Appeal case of *Elizabeth Njambi Kimemia v Florence Ngina Banga* [2018] eKLR.
16. I have perused the pleadings herein as well as those before the trial court. In my view, the first issue for determination before this court is whether the respondent’s claim was time barred and if so, then



the trial court would have no jurisdiction to entertain the same and as jurisdiction is everything, the respondent's claim would stand dismissed. It would then not be necessary to delve into the other grounds of appeal.

17. Section 4(2) of the *Limitation of Actions Act* provides that:

“An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued;

Provided that an action for libel or slander may not be brought after the end of twelve months from such date.”

18. Admittedly, the cause of action in this instance allegedly accrued on or about 24th May 2018 when the appellant published through one of its employees/agent namely Emmanuel Wanjala through the site www.the-star.co.ke/news/2018-05-24-judges-write-to-eacc-after-malindi-magistrate-goes-missing/without-any-justification-at-all.

19. The appellant initially filed the suit vide a plaint dated the 20th May 2019 and filed on the 23rd May 2019, a day before time lapsed before which he could bring the suit and subsequently amended the plaint on the 3rd October 2019 and filed the same on the 4th October 2019. However, it is worth noting that the initial suit filed on the 23rd May 2019 was the respondent against Startimes Media (Kenya) Co. Ltd. The appellant herein and Startimes Media (Kenya) Co. Ltd are two distinct entities. In essence, the amendment allowed by the trial court following the respondent's application dated 20.9.2019 introduced a new party to the suit, which was substantially a fresh claim against the appellant herein.

20. It is trite that when it comes to amendments of pleadings, they should be allowed freely as long as they can be made without prejudice to the other party and/or that if any prejudice is occasioned to the said party, the same can be compensated by way of costs. These principles were laid down by the Court in the decision in *Eastern Bakery v Castelino*, [1958] EA at p. 461 where it was held as hereunder-

“It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearings should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.” (emphasis added).

21. In the case of *Abdul Karim Khan v Mohamed Roshan* [1965] EA at P. 289, which was cited by Nyakundi J, in *St. Patrick's Hill School Limited v Bank of Africa Kenya Limited* [2018] eKLR, it was held that Courts will not permit an amendment that is inconsistent with the original pleading and which entirely alters the nature of the defence or plaint.

22. I reiterate that the courts would normally not grant a request for amendment of pleadings where the proposed amendment would have the effect of creating a new cause of action which is time- barred. This position is supported by the decision in the case of *Nzirane v Lukwago* 1971 EA 328 as reiterated in the case of *Eunice Chepkorir Soi v Bomet Water Company Ltd* [2017] eKLR.

23. The respondent upon noticing that he had brought a suit within time but against a wrong defendant, filed an application before the trial court for extension of time to file suit against the appellant herein and to amend the plaint to bring on board the appellant, the correct party. By the time of the filing of the application and the amended plaint, one year had already lapsed. The question therefore is whether the trial court had jurisdiction to enlarge time for filing of a suit for defamation of character, which time had already lapsed, admittedly and therefore whether the amendment cured the issue of limitation.



24. The marginal notes to Section 27 reads as follows:
- “Extension of Limitation period in case of ignorance of material facts in actions for negligence etc.”
25. Section 27 (1) provides that Section 4(2) of the Act which provides for the specific limitation period to specific causes of actions may not afford a defendant a defence if:
- a) The action is for damages for negligence, nuisance or breach of duty.
 - b) If the damages under (a) above consist of or include damages in respect to personal injuries of any person.
 - c) The court has, whether before or after the commencement of the action granted leave for purposes of the action.
 - d) The requirements of sub-section (2) of Section 27 are fulfilled in relation to the cause of action.
26. Section 27 is intended to deal with causes of action based on claims for damages due to negligence, nuisance or breach of duty and allows the court to enlarge time if the provisions of Section 27(2) are fulfilled.
27. In the case of *Mary Osundwa V. Nzoia Sugar Company Limited* Civil Appeal No. 244 of 2000 [2002] eKLR, the Appellant had successfully sought leave (granted by consent in the High Court) to file a cause for alleged breach of contract, some 7 years since the cause of action accrued. The Court of Appeal after setting out the provisions of Section 27 (1) of the [Limitation of Actions Act](#) stated that:
- “The section clearly lays down the circumstances in which the court would have jurisdiction to extend time. The action must be founded on tort and must relate to torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort. The section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other causes of action other than those in tort. Accordingly, Osiemo J. had no jurisdiction to extend time as he purported to do on 28th May, 1991. That the order was by consent was neither here nor there; the parties could not confer jurisdiction on the Judge by their consent”. (Emphasis added)
28. Similarly, in *Bosire Ogero v. Royal Media Services* [2015] eKLR and *Dr. Lucas Ndung’u Munyua V. Royal Media Services Ltd & Another* [2014] eKLR, the courts held that Section 27 (1) does not provide for the extension of time to file a suit for defamation.
29. This court echoing the holdings in *Wycliffe A. Swanya V. Toyota East Africa Limited and Another* [2009] eKLR; *Rawal v Rawal* (1990) KLR 275 and *Dhanesvar V. Mehta vs Manilal M. Shah* [1965] EA 321, I restated the rationale behind the [Limitation of Actions Act](#), in *Bosire Ogeto’s* case as follows:
- “The Law of Limitation of actions is intended to bar plaintiffs from instituting claims that are stale and (is) aimed at protecting defendants against unreasonable delay in bringing of suits against them. The issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same”.
30. No doubt, the orders sought by the respondent against the appellant herein were statute barred under the [Limitation of Actions Act](#) and the Law of [Defamation Act](#). As such, in the event that the proposed



amendment was allowed, it would be in contravention of the said statutes and would serve as a great injustice to the proposed defendant who would be introduced to a cause of action that accrued almost two years from the date of the publication.

31. In *Weldon v Neal* [1887] 19 Q.B. D, 394 it was held that the Court would ordinarily refuse to grant leave where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment, for instance by depriving him of a defence of limitation accrued since the issue of the writ.
32. It is evident that the respondent vide the amended plaint dated 3rd October 2019 introduced and/or enjoined a new defendant, thus the issue of the Limitations of Actions Act did arise.
33. This court having considered the undisputed date on which the instant cause of action arose finds that, on a plain reading of Section 27(1) of the *Limitation of Actions Act*, and based on precedent, there was no jurisdiction conferred on the trial court to extend time for the filing of a defamation suit.
34. Even taking into consideration Ngaah J's persuasive decision in *Royal Media Services Ltd v Valentine Mugure* supra is to no avail. The learned Judge's comments at the conclusion of his judgment considered only the provisions of Section 4(2) and not Section 27(1) of the *Limitation of Actions Act* and appear to be obiter dictum in nature.
35. I thus find that the trial court had no jurisdiction to entertain the respondent's claim initiated vide the amended plaint dated 3rd October 2019. That claim is thus struck out and the suit against the appellant dismissed.
36. The upshot of the above is that the instant appeal is meritorious and is hereby allowed.
37. Accordingly, the Judgement of the trial court delivered on the 10th December 2020 is hereby set aside and substituted with an order striking out the plaintiff/respondent's suit for want of jurisdiction owing to the suit having been filed out of the statutory limitation period, with an order that each party bear their own costs of the suit and of this appeal.
38. This file is closed.
39. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 20TH DAY OF DECEMBER, 2023

R.E. ABURILI

JUDGE

