



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CIVIL APPEAL NO. 43 'A' OF 2019

GERALD MUTUKU.....APPELLANT

VERSUS

NATION MEDIA GROUP LIMITED.....RESPONDENT

(Appeal from the judgment and decree in Siaya PM's Court Civil Suit No. 34 of 2012 delivered on 13th September, 2019 by Hon Tom Mark Olando, Senior Resident Magistrate)

JUDGEMENT

Introduction

1. This appeal arises from the judgement of the Hon. Olando, T.M. Senior Resident Magistrate in Siaya Principal Magistrate's Court Civil Suit No. 34 of 2012 delivered on 13th September 2019. The appellant instituted suit seeking general damages and/or exemplary or aggravated damages on the allegations that the respondent published a libellous and malicious article of and concerning the appellant in the Daily Nation Newspaper of 21st June 2011.

2. In his judgment, the trial magistrate found that there was no malice in the publication and as such the publication was made in good faith thus finding that the appellant failed to prove his case on a balance of probabilities.

3. Dissatisfied with the trial court's decision, the appellant filed his memorandum of appeal setting out the following grounds of appeal:

- a. That the learned magistrate erred in disregarding evidence of the plaintiff,
- b. That the plaintiff had discharged his case to the requisite balance of probability,
- c. That the learned magistrate erred in not assessing damages awardable had the plaintiff succeeded,
- d. That the learned magistrate erred in failing to find the plaintiff had proved his case on a balance of probability,
- e. That the learned magistrate failed to consider the plaintiff's submission and authorities in support of his case,
- f. That the learned magistrate erred in dismissing a case that was uncontroverted and not orally undefeated,
- g. That the learned magistrate erred in totally failing to consider the plaintiff's evidence and witnesses contrary to law,
- h. That the learned magistrate erred in considering issues he ought not to have and thereby misled himself,
- i. That the learned magistrate erred in totally disregarding the relevant laws of evidence.

4. The parties agreed to canvass the appeal through written submissions.

Appellant's Submissions

5. It was submitted by the appellant that the effect of the evidence of DW1 was that the report he made in the Daily Nation on the 21st June

2011 was false. He further submitted that the aforementioned article was defamatory to him as it was injurious to the advancement of his Civil Service career as it painted him as being whimsical, unprofessional and unworthy of the post of D.O. which he held.

6. The appellant further submitted that the magistrate's finding that the article was not injurious to him was erroneous as his reputation and standing in the eyes of his colleagues was lowered.

7. It was submitted that the admission by DW1 that he attempted to reach the appellant for his side of the story but failed imputed malice on the part of DW1 and showed that DW1 was apprehensive of his story. On damages awardable, the appellant submitted that it was trite law that even in dismissal, the magistrate was duty bound to assess the damages awardable.

Respondent's Submissions

8. It was submitted that save for publishing the alleged article, the appellant failed to prove that the article was defamatory, false and referred to him. The respondent submitted that the said article was truthful and as such could not be defamatory. Reliance was placed on the case of **Kimani Ngunjiri v Standard Group Limited & 3 Others [2019] eKLR** where it was held that **"the truth of a statement is a key factor to the defence available to the 1st defendant namely being, justification, fair comment and qualified privilege."**

9. The respondent submitted that there was no evidence adduced by the appellant of public ridicule, odium or contempt and as such the appellant suffered no injury or defamation and was thus not entitled to any damages. Reliance was placed on the case of **Nairobi Civil Appeal No. 56 of 2006 SMW v ZWM** where the court held, *inter alia* that evidence of public ridicule must be adduced to warrant grant of damages.

10. The respondent submitted that the publication concerned a matter that was the duty of DW1 to report as a journalist as it was a matter of a moral and public interest that was therefore made on occasion of qualified privilege, a defence that was considered and allowed in the cases of **Stephen Thuo Muchina v Wainaina Kiganya, Daily Nation Group Newspaper Limited & Wilfred D. Kiboro [Nairobi HCCC No. 184 of 2005]** and that of **Julius Vana Muthangya v Katuuni Mbila Nzai [2019] eKLR**.

Analysis & Determination

11. The role of this court on first appeal as stipulated in section 78 of the Civil Procedure Act is to re-evaluate and reassess all the evidence adduced in the lower court and to reach its own conclusions in respect thereof, as was espoused in **Sielle v Associated Motor Boat Company Ltd** and restated in **Oluoch Eric Gogo v Universal Corporation Limited [2015] eKLR**.

12. The genesis of the suit and this appeal is that on the 21st June 2011, the respondent published the following article in its Daily Nation newspaper which article was the basis upon which the appellant instituted his suit for compensation for character assassination:

"Disrupted drinkers pelt Dos with stones

Two DOs in Siaya were pelted with stones after attempting to arrest revellers in a local bar before the stipulated closure time. Siaya DO Gerald Mutuku and his Karemo counterpart Rukia Chitechi met the wrath of the drinkers when they stormed the bar at 9.30pm. The patrons resisted arrest saying they were within the stipulated drinking hours. The officials were forced to flee for their safety."

13. The evidence adduced in the trial court in support of the pleaded facts was as follows: The appellant testified as PW1 and stated that the article was published by the defendant with full knowledge that it was untrue and pure fabrication meant to injure, disparage and lower the esteem with which right thinking members of the society regarded him. He stated that as a result of the article he had been brought into grave public ridicule and contempt. The appellant produced a letter dated 28th June 2011 addressed to the District Commissioner of Siaya County by the Provincial Commissioner of Nyanza requesting for a comprehensive report on the matter that was published, which letter the appellant replied to. He thus testified that this was evidence that his character was questioned by his bosses.

14. On being cross examined by the defence counsel, the appellant stated that it was true that they went to the bar before the stipulated closure time, with the purpose of closing the bar as it was not licensed.

15. PW2 testified that he came across the appellant's name in the defendant's Daily Nation Newspaper and upon asking the appellant whether the published article was truthful, he replied in the negative.

16. DW1 Erick Oloo, the reporter who published the article in the aforementioned newspaper testified that what he published was the truth as he had received the same information from the OCS whom he approached to confirm what had happened.

DETERMINATION

17. I have considered the appellant's grounds of appeal, the evidence adduced before the lower court and the submissions for and against this appeal. In my humble view, the main issues for determination are whether the appellant proved on a balance of probabilities that he was defamed to warrant judgment in his favour on liability and secondly, whether the trial court erred in failing to quantify general damages that he would have awarded the appellant had the claim on liability been proved.

18. The law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation. Defamation protects a person's reputation; that is the estimation in which he is held by others; it does not protect a person's opinion of himself nor his

character. The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements that injure his reputation. (See the case of **Selina Patani & another v Dhiranji V. Patani [2019] eKLR**)

19. Black's Law Dictionary 9th Edition page 479 defines defamation as the act of harming the reputation of another by making a false statement to a third person. The Court of Appeal in **SMW v ZWM [2015] eKLR** defined a defamatory statement in the following terms:

“A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided.”

20. The ingredients of what constitutes defamation were set out by the Court of Appeal in **Musikari Kombo v Royal Media Services Limited 156 of 2017 [2018] e KLR** thus:

“It follows that a claimant in a defamation suit ought to principally establish in no particular order:

i. The existence of a defamatory statement;

ii. The defendant has published or caused the publication of the defamatory statement;

iii. The publication refers to the claimant.”

21. From the evidence adduced, there is no doubt that the respondent published the article in its newspaper, the Daily Nation on Tuesday, 21st June 2011. Secondly, the publication clearly referred to the appellant by name satisfying two of the three ingredients of defamation. The only issue then is whether the publication was untrue and defamatory of the Plaintiff/appellant herein.

22. The test to determine whether a statement is defamatory is now well settled in various cases where it has been held that it is an objective test which depends on what a reasonable person on reading the statement would perceive. **Halsbury's Laws of England 4th Edition Volume 28** states at Page 23 thus:

“In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense.”

23. In this case, the appellant in his testimony admitted that indeed he and other officers visited the said bar prior to the stipulated closing time and went further to arrest some revellers. The evidence tendered by the respondent was that the appellant and his officers were pelted with stones by some of the revellers which evidence remained uncontroverted. The appellant also stated that he received a letter from his superior seeking clarification on the events reported on by the respondent which was evidence that his actions were being inquired into by his superiors.

24. Having read the published words and assessed the evidence adduced by both the appellant and Respondent's reporter, I am persuaded that an ordinary reading of the published article reveals the events as they unfolded. The contents of the said article were admitted as truth by the appellant in his testimony save for the fact that he wanted the article to indicate that the bar was unlicensed. In my humble view, as the article did not state that the appellant was invading a licensed pub, the published article reported on the true events that happened. The truth being that the appellant and his officers raided a bar before time for closure and as a result, the revellers pelted them with stones.

25. On whether the appellant's standing was lowered in the estimation of other right thinking members of the society generally, it is my humble view that the appellant failed to prove this. The query by PW2 as to the contents of the published article in my considered view merely amounted to an inquiry on the truthfulness of the article. Further, the letter from the Provincial Commissioner similarly wanted a comprehensive report on what had transpired during the raid and it is admitted by the appellant that once he made the clarifications, no further action or communication was made to him.

26. Accordingly, I am persuaded that the article published by the respondent said the truth of what happened and was not defamatory of the appellant. That being the case, the question is whether the defence of qualified privilege was available to the respondent? The essence of this defence is an attempt to balance two competing but vital interests in society; the individual's right to have their character and reputation protected and safeguarded from false, unwarranted and malicious or scurrilous attacks on the one hand, and the public's right to know as exercised and fed by freedom of expression, which is an indispensable feature of a free and democratic society as well as a major tool for public accountability. See **Kagwiria Mutwiri Kioga & another v Standard Limited & 3 others [2015] eKLR**. The defence is entrenched under Section 7 of the Defamation Act.

27. In **Reynolds v. Times Newspapers [1999] 4 ALL ER 609** the House of Lords set out a criterion for determining whether a publication is subject to qualified privilege. The same was restated in the case of **Musikari Kombo v Royal Media Services Limited [2018] eKLR** as herein under:

“Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only. (1) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. (2) The nature of the information, and the extent to which the subject matter is a matter of public concern. (3) The source of the information. Some informants have direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. (4) The steps taken to verify the information.

(5) The status of the information. The allegation may already have been the subject of an investigation which commands respect. (6) The urgency of the matter. News is often a perishable commodity. (7) Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed..(8) Whether the article contained the gist of the plaintiff's side of the story. (9) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. (10) The circumstances of the publication including the timing.”

28. In this case the respondent testified that his source had been the area OCS, he further stated that he made attempts to communicate with the appellant but the appellant failed to pick his calls. He reiterated that the contents of his article were truthful.

29. From the evidence adduced and on a balance of probabilities, it is my humble view that the published article was not defamatory in nature of and concerning the appellant and therefore the issue of qualified privilege does not arise. Accordingly, I find and hold that the trial magistrate did not err when he dismissed the appellant's suit. I uphold that finding and holding of the trial court.

30. On whether the trial magistrate should have quantified the damages he would have awarded the appellant had he found in favour of the appellant on liability, it is now trite law that a trial court is under a duty to assess the general damages payable to the plaintiff even after dismissing the suit. This position was confirmed by the Court of Appeal in the case of **Mordekai Mwangi Nandwa V Bhogals Garage Ltd CA No. 124 Of 1993 reported in [1993] KLR 448** where the court held that the practice that damages be assessed even if the case is dismissed does not imply writing an alternative judgment. Similarly, in the case of **Matiya Byabaloma & Others V Uganda Transport Co. Ltd Uganda Supreme Court Civil Appeal No. 10 of 1993 IV KALR 138** where the court held that the judge erred in not assessing the damage he would have awarded had the appellant been successful in her claim”.

31. From the above authorities it is clear that in the instant case, the trial court fell into error by not assessing the award of general damages he would awarded to the appellant had he proved his case to the required standard of balance of probabilities.

32. The principles guiding an award of damages in an action for libel were stated in the case of **Johnson Evan Gicheru V Andrew Morton & Another (Supra)** where the Court of Appeal stated, adopting the guidelines given in **Jones v Pollard [1997] EMLR 233-242** that no case is like the other. In the exercise of discretion to award damages for defamation the court has a wide latitude. The court must look at the whole conduct of the defendant from the time the libel was published down to the time the verdict is given. The court may also consider what the conduct of the defendant has been before action, after action, and in court during the trial. The above decision adopted the following checklist as the factors to be considered by the trial court in awarding damages in libel cases:

- 1. The objective features of the libel itself, such as the 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; and**
- 5. Vindication of the plaintiff's reputation past and future.**

33. I have considered the cases cited by the appellant in the lower court. In **Benard Bifwoli V Simon Wetundu & 2 Others**, general damages in the sum of Kshs. 500,000/- was awarded for defamatory words published a letter to a handful of people. In **Joseph Kiio & Another v Jonathan Muthae & 8 Others**, general damages in the sum of Kshs. 100,000/- was awarded for the defamatory letter was addressed to the Respondents and copied to other members of the society and the public. In **Emmanuel Omenda v Safaricom Ltd**, general damages in the sum of Kshs. 500,000/- was awarded for the words **“We have now arrested one of the credit card thieves. He will suffer the consequences”** which were uttered at the time of plaintiff's arrest.

34. In the instant case, had the published words of and concerning the appellant's actions been defamatory, I would have awarded him Kshs 600,000 general damages. However, as the appellant failed to prove his claim, I hereby award him nothing and dismiss his appeal.

35. Each party to bear their own costs of this appeal and of the lower court as ordered.

Orders accordingly.

Dated, Signed and Delivered at Siaya this 15th Day of February, 2021 virtually in the presence of Ms B. Asunah counsel for Respondent and Mr. Musomba counsel for the appellant

R.E.ABURILI

JUDGE

CA: Modestar and Mboya