



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**(CORAM: CHERERE-J)**

**CIVIL APPEAL NO. 36 OF 2019**

**BETWEEN**

**JACK J.A. ONONG'NO .....APPELLANT**

**AND**

**JOSEPH OYOO .....RESPONDENT**

**Consolidated with**

**CIVIL APPEAL NO. 44 OF 2019**

**BETWEEN**

**JOSEPH OYOO .....APPELLANT**

**AND**

**JACK J.A. ONONG'NO .....RESPONDENT**

**(Being an Appeal from the Judgment and Decree in Kisumu CMCC No. 235 of 2015 delivered by Hon. M.Agutu (SRM) on 26th February, 2019)**

**JUDGMENT**

1. **JOSEPH OYOO (Joseph)** sued **JACK J.A. ONONG'NO (Jack)** in the lower court seeking the following orders:

- a. **General aggravated and punitive damages for libel Page 1 of 16**
- b. **Costs of the suit**
- c. **Interest on (a) and (b)**
- d. **Any other further relief**

2. Jack filed a statement of Defence and denied the claim.

3. By a judgment dated 26th February, 2019, the trial court found the Jack liable and awarded Joseph damages in the sum of Kshs. 200,000/-

**The Appeal**

4. Both Jack and Joseph were dissatisfied with the lower court's decision and they preferred **Civil Appeal No. 36 Of 2019** and **Civil Appeal No. 44 Of 2019** respectively which have been consolidated for the purpose of this hearing.

5. From the Memorandum of Appeal dated 25.03.19 and filed on even date, Jack asserts that Joseph's case was not proved. On the other hand, Joseph by his Memorandum of Appeal dated 01.04.19 filed on 03.04.19 faults the trial magistrate for awarding low general damages

and for not awarding aggravated damages yet evidence showed express malice and Jack had failed to apologize.

## **SUBMISSIONS BY THE PARTIES**

6. This appeal was argued by way of written submissions and cited authorities.

### **Jack's submissions**

7. Jack concedes that he wrote the impugned letter and copied it to Joseph's superiors. He holds the view that he had a genuine concern concerning his land and that Joseph being a cartographer in Kisumu County occupied such an office that would ordinarily have been involved in executing the sort of thing that affected his land and that it was not therefore far-fetched that Jack would point at Joseph as a possible culprit that ought to have been investigated.

### **Joseph's submissions**

8. Joseph's counsel started off by restating the ingredients of defamation reaffirmed in the case of **Joseph Njogu Kamunge V Charles Muriuki Gachari [2016] eKLR**. It was additionally submitted that malice could be inferred from the language used in the impugned letter (See **Phinehas Nyagah v Gitobu Imanyara [2013] eKLR**) and from deliberate or reckless or even negligently ignoring facts (See **J.P Machira T/A Machira & Company Advocates v Wangethi Mwangi & another [1998] eKLR**).

9. In addition, it was submitted for Joseph that the impugned letter was published when it was delivered to the person it was copied to and reliance was placed on **Chrispus Keah v Joyce Mburu [1982] eKLR**.

10. It was also submitted for Joseph that Jack neither pleaded truth or fair comment nor proved that the words complained of were true. In this regard, reliance was placed on Order 2 rule 7(2) of the Civil Procedure Rules and **Grace Wangui Ngenye V. Chris Kirubi & Another [2015] eKLR**.

11. Finally, it was submitted for Joseph that the words complained of are in respect of the offences of alteration of official documents which attracts a minimum sentence of 7 years' imprisonment and further that Joseph was entitled to aggravated damages since Jack had failed to offer an apology.

### **Analysis and Determination**

12. This being the first appeal, it is my duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion considering the fact that I did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd (1968) EA**.

13. I have summarized the issues for determination as follows:

- i. Whether the impugned letter was published**
- ii. Whether the impugned letter was defamatory**
- iii. Whether the general damages of Kshs. 200,000.00 was low**
- iv. Whether Joseph is entitled to aggravated damages**

#### **Whether the impugned letter was published**

14. Jack concedes authoring the letter complained of, and concerning Joseph and copying it to Joseph's superiors. In view of that admission, it follows that the fact of the publication, the content of the publication and the fact that the publication referred to Joseph was proved. (See **Grace Wangui Ngenye V. Chris Kirubi & Another** (above).

#### **Whether the impugned letter was defamatory**

15. In the case of **Joseph Njogu Kamunge V Charles Muriuki Gachari** (above), the court reiterated the ingredients of defamation as follows: -

**"A statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule, or contempt or which causes him to be shunned or avoided or has a tendency to injure him in his office, profession or calling. The ingredients of defamation are: -**

- i. The statement must be defamatory.**
- ii. The statement must refer to the plaintiff.**
- iii. The statement must be published by the defendant.**

iv. The statement must be false.

16. Order 2 rule 7(2) of the Civil Procedure Rules provides as follows: -

**“Where in an action for libel or slander the defendant alleges that, in so far as the words complained of consist of statements of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, or pleads to the like effect, he shall give Page 6 of 16 particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true.”**

17. The rule requires that the defendant, (*in this case Jack*) not only to give particulars stating which of the words complained of he alleges are justified and true but of the facts and matters he relies on in support of the allegation that the words are true. (See *Riley Falcon Security Services Ltd v Nairobi Star Publication Limited* [2016] eKLR).

18. A perusal of the defence demonstrates that it did not fully comply with Order 2 rule 7(2) of the Civil Procedure Rules for the reason that Jack did not plead particulars of the facts and matters he relies on in support of the allegation that the words complained of are justified and true. Similarly, the evidence tendered before the trial court did not disclose those facts and the most logical conclusion is that the letter was false.

19. To confirm the fact the letter was false, Jack in his submissions stated as follows:

*Joseph being a cartographer in Kisumu County occupied such an office that would ordinarily have been involved in executing the sort of thing that affected his land and that it was not therefore far-fetched that Jack would point at Joseph as a possible culprit that ought to have been investigated.*

20. On whether the letter complained of was malicious, Joseph was not required to give particulars of facts on which he relies in support of allegation of malice in the plaint. Moreover, Joseph is not required to prove that the words were published falsely and maliciously for the law presumes those facts in its favor.

21. From the wording of the letter, I am persuaded as was the trial magistrate that the language used was deliberate, reckless and disproportionate to the facts. The words complained of, in their natural and ordinary meaning associate Joseph to alteration of official documents which is a criminal offence punishable by 7 years' imprisonment. The words are plain and unambiguous and required no further evidence of their meaning. This court therefore holds that a reasonable person would understand them in a defamatory sense and the trial court's finding that they were defamatory was therefore well founded.

**Whether the Learned trial Magistrate erred in law in the assessment of quantum of general damages**

22. As pointed out hereinabove, Jack did not deny that he published the letter complained of. In Halsbury's Laws of England 4th Edition Vol 28 paragraph 1 it is stated that:

**“In English Law, speaking generally, every person is entitled to his good name and to the esteem in which he is held by others, and has a right to claim that his reputation shall not be disparaged by defamatory statements made about him to a third person or persons without lawful justification or excuse. If a defamatory statement is made in writing or printing or in some other permanent form, the tort of libel is committed and the law presumes damage.”**

Paragraph 18: **“if a person has been libeled without any lawful justification or excuse, the law presumes that some damage will flow in the ordinary course of events from the mere invasion of his right to his reputation, and such damage is known as general damages. Thus, a plaintiff in a libel action is not required to prove his reputation, nor to prove that he has suffered any actual loss or damage. The plaintiff is not obliged to testify, although it is a customary for him to do so, but, having proved a statement is defamatory of him and not excused by any available defence, he is always entitled to at least nominal damages. However, it is open to a plaintiff in a libel action to plead and prove special damage which he is entitled to recover in addition to general damages. In appropriate circumstances, he may also seek aggravated or exemplary damages.”**

23. In Francis Xavier Ole Kaparo v Standard Limited & 3 Others [2010] eKLR, the court held that where a plaintiff's reputation and dignity are injured, he is entitled to general, exemplary and aggravated damages to vindicate him to the public and to console him for the wrong done.

24. Reputation is an integral and important part of the dignity of the individual and once tainted by an unfounded allegation one's reputation can be damaged forever, especially if there is no opportunity to vindicate one's reputation.

25. The rationale behind awarding of damages in defamation actions is to restore or give back to the party injured what he lost save in exceptional circumstances where punitive or exemplary damages may be awarded. A successful plaintiff in a defamation action is entitled to recover, the general compensatory damages such sum as will compensate him for the wrong he has suffered. The award must compensate him for damages to his reputation.

26. 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 2005] eKLR where the Court of Appeal, adopted 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.

27. Damages should be fairly compensatory in the light of the nature of the injury to reputation and should also appear realistic in all the circumstances. The English Court of Appeal decision in the case of **John v MG Ltd [1996] I ALL E.R. 35** held: -

**“The successful plaintiff in a defamation action is entitled to recover, the general compensatory damages such sum as will compensate him for the wrong he has suffered. That must compensate him for damages to his reputation, vindicate his name, and taken account of the distress, hurt and humiliation which the defamatory publication caused.....”**

28. Joseph had sought damages in the sum of Kshs. 2,000,000/-. I have considered **Phinehas Nyagah v Gitibu Imanyara** (above) cited in the lower where the court assessed damages at Kshs. 3,000,000.00 for the plaintiff who was defamed in a press conference. Jack did not make any offer.

29. Section 16A of the Defamation Act provides that: -

**In any action for libel, the court shall assess the amount of damages payable in such amount as it may deem 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.**

30. In **Butt V Khan (1978) eKLR** it was held that an appellate court should not interfere with the decision of the trial court unless it is shown that the Judge proceeded on the wrong principle of law and arrived at misconceived estimates.

31. Clearly, the award of general damages in the sum of Kshs. 200,000/- was based on the wrong principle of law and contravened Section 16A of the Defamation Act. I am therefore persuaded to interfere with the award by the learned trial magistrate’s discretion in that regard.

#### **Whether Joseph is entitled to aggravated damages**

32. Aggravated damages will be ordered against a defendant who acts out of improper motive e.g. where it is attracted by malice; insistence on a flurry defence of justification or failure to apologize. (See **John v MG Ltd (above)**).

33. The conduct of the defendant, his conduct of the case, and his state of mind are all matters for consideration in assessing aggravated damages in so far as they bear on the injury to the complainant. (See **GATLEY ON LIBEL AND SLANDER 12th Edition para 9.18 at page 353**).

34. The record demonstrates that soon after the publication, Joseph by his letter dated 29.01.15 sought an apology from Jack. Jack in his defence stated that he did not respond to the letter seeking an apology because it was allegedly from a stranger. The stranger here being Joseph’s advocate. He additionally stated that he stood by the words of the letter he published.

35. Jack insisted on his unsound defence. His justification for failure to apologize was hopeless. His conduct demonstrates that he committed the wrong complained of malevolently so as to injure Joseph’s proper feelings of dignity and pride. These are matters that the trial ought to have considered as aggravating the damage caused to Joseph.

36. In view of the foregoing analysis, this Appeal succeeds. The award of Kshs. 200,000.00 for general damages is set aside and substituted with an award of Kshs. 500,000.00 (**Five hundred thousand**). Joseph is additionally awarded aggravated damages in the sum of Kshs. 50,000.00 (**Fifty thousand**). Jack is also condemned to pay the costs of this appeal and costs in the lower court.

**DATED AT KISUMU ON THIS 22ND DAY OF SEPTEMBER 2020**

**T.W. CHERERE**

**JUDGE**

**Court Assistants - Ms. Amondi/Ms. Okodoi**

**For Jack J.A. Onong’no - Mr. Ochieng for P. Ochieng Ochieng & Co Advocates**

**For Joseph Oyoo - Mr. Odhiambo for Odhiambo Ouma & Co. Advocates**

**This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic.**