



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 5 OF 2017**

**THE STANDARD LIMITED-----APPELLANT**

**VERSUS**

**ALFRED MINCHA NDUBI-----RESPONDENT**

*Being an appeal against the Judgement of the Hon. E. K. Nyutu – PM in Nyamira PMCC No. 76 of 2014 delivered on the 7<sup>th</sup> day of March 2017*

**JUDGEMENT**

The appellant was the 2<sup>nd</sup> defendant in a defamation suit filed by the respondent vide a plaint dated 19<sup>th</sup> March, 2014. The respondent alleged to have been defamed by two articles published by the 2<sup>nd</sup> respondent in its newspapers dated 4<sup>th</sup> December 2013 and 3<sup>rd</sup> December 2013. The article in the newspaper dated 4<sup>th</sup> December 2013 stated: -

***“MCAs Protest over Assault”***

***Over 30 ward representatives in Nyamira yesterday stormed the office of the county commissioner Wilson Wanyanga to demand their personal security. The commissioner was forced to cut short a crucial security meeting to address the concerns raised by the MCAs.***

***Majority Leader Beauttah Omanga raised their security concern after Thaddeus Nyabaro of Ekerenyo ward was last weekend attacked by a former military man. The man reportedly slapped Nyabaro and injured him.***

***The MCAs accused police of dragging their feet over the matter. The man was allegedly released hours after he was arrested by paying Kshs. 5,000= cash bail.***

***Mr. Omanga claimed the former military officer was dangerous and demanded that Nyabaro be assigned police officers to protect him.***

***The man is walking free and bragging that nothing can be done to him. By releasing him, this is like adding insult to injury, said Omanga.”***

The second article read: -

***“Ex-soldier held for slapping ward rep.***

***An ex-military officer has been arrested for allegedly slapping a ward representative in Nyamira County. Area Police Boss Shadrack Maithya yesterday said the man, a former Kenya Air-force officer was in police custody following the incident that happened on Saturday. Thaddeus Nyabaro of Ekerenyo ward told The Standard that the man attacked him in public at Ekerenyo trading centre leaving him with a swollen eye. “He slapped me several times claiming I was obstructing him from getting a County Assembly job, said Mr. Nyabaro.”***

In his plaint the respondent averred that the words interpreted in their natural and ordinary meaning referred to him as a criminal, a dangerous person and as a person who did not respect the law and that the same had lowered his standing and reputation in the eyes of right thinking members of the society. He contended that as a result of the articles he had been exposed to hatred, scandal, odium and rejection and further that he had suffered special damage.

Upon hearing testimony from the parties the trial Magistrate found the appellant culpable and awarded the respondent Kshs. 4 million as

damages whereupon the appellant preferred this appeal. The appeal is premised on seven grounds which mainly fault the Magistrate for finding that the two articles were defamatory and for awarding a sum of Kshs. 4 million despite her finding that the respondent was only entitled to nominal damages.

By the appeal, this court is urged to set aside the judgement of the lower court and award the costs of this appeal to the appellant or in the alternative to set aside the award of the trial Magistrate and substitute it with a nominal award.

The appeal was canvassed by way of written submissions which this court has considered fully. However, as the first appellate court this court has a duty to evaluate and re-consider the evidence before the trial court so as to arrive at its own conclusion – See **Selles & Another Vs. Associated Motor Boat Co. Ltd & Others [1968] EA page 123**. I do so bearing in mind that I did not have the benefit of observing the demeanour of the witnesses as I did not see or hear them giving evidence. I am also guided by the principle that: -

**“A court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on a wrong principle in reaching the finding he did – See Ephantus Mwangi & Another Vs. Duncan Mwangi Wambugu [1982] 1KAR 278 at page 292.”**

What the respondent needed to prove was that the words in the two articles were published of and concerning him, that the words were defamatory and that they were false – see **John Ward Vs. Standard Ltd, HCCC 1062 of 2005** cited with approval in **Raphael Lukale Vs. Elizabeth Mayabi & Another [2018] eKLR** where the court stated:

**“.....The ingredients of defamation are: -**

***The statement must be defamatory.***

***The statement must refer to the plaintiff.***

***The statement must be published by the defendant.***

***The statement must be false.”***

In the case of **Raphael Lukale Vs. Elizabeth Mayabai (supra)** the court of Appeal stated: -

**“Speaking generally a defamatory statement can either be libel or slander. Words will be considered defamatory because they tend to bring the person named into hatred, contempt or ridicule or the words may tend to lower the person named in the estimation of right thinking members of the society generally. The standard of opinion is that of right thinking persons generally. The words must be shown to have been construed or capable of being construed by the audience hearing them as defamatory and not simply abusive. The burden of proving the defamatory nature of the words is upon the plaintiff. He must demonstrate that a reasonable man would not have understood the words otherwise than being defamatory. See Gately on Libel and Slander (8<sup>th</sup> edition paragraph 31).”**

In the same case the court stated: -

**“We reiterate that the words complained of will only be defamatory if they are proved to be false...”**

To succeed the plaintiff in an action for libel must also prove that the publication was actuated by malice – see **Nation Newspapers Limited Vs. Gibendi [2002] 2 KLR**. In **Raphael Lukale Vs. Elizabeth Mayabi (supra)** the court of Appeal considered what is malice and stated: -

**“.....Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. Malice may also be inferred from the relations between the parties before or after the publication or in the conduct of the defendant in the course of the proceedings. See Godwin Wachira Vs. Okoth [1997] KLR 24 and J. P. Machira Vs. Wangethi Mwangi Civil Appeal No. 179 of 1997.”**

On her part the trial Magistrate found that the respondent proved all the above ingredients on a balance of probabilities. On my part I am not persuaded that the respondent other than proving that the words were published of and concerning himself, proved the other elements of defamation. It is my finding that in the first place the words were not false and were therefore not defamatory. In his testimony the respondent admitted there was an altercation between him and MCA Thaddeus Nyabaro and that the said MCA reported an assault to the police. In the typed proceedings at page 7 of 34 he is quoted as stating:-

**“I assaulted Thaddeus Momanyi on 30.11.2013. I was charged. The case was finalized. The photocopy of the charge sheet is part of the proceedings and documents filed in court. It is Criminal Case No. 901/2013. Complainant is Thaddeus Momanyi and the other witnesses.”**

During cross examination by counsel for the appellant, the respondent stated: -

**“..... I was charged in a court of law, for a criminal offence, Cr. Case No. 901/2013. At Ekerenyio, I was picked and set free.**

*At the police station, I was released on a cash bail of Kshs. 5,000/=. This is on 30.11.2013, when it was said I slapped the M.C.A.*

*..... The MCAs were protesting on the issue of one of the MCA's security. The report by the Standard paper was false. The criminal case was still on when I filed this suit. County Commissioner addressed the MCAs."*

Later when he was re-examined by his own advocate he stated: -

***"Thaddeus did not defame me."***

The impugned articles contained matter which the respondent himself admitted was correct. The appellant article published on 3<sup>rd</sup> December 2013 reported his arrest for allegedly assaulting a ward representative. It does not state that he in fact assaulted the ward representative. Indeed, the trial Magistrate found no defamatory matter in that article.

The second article is a narration of the storming of the County Commissioner's officer by 30 ward representatives following the incident of 30<sup>th</sup> November 2013. It also reports that the respondent was released on a cash bail of Kshs. 5,000/=. All this is admitted to be true. As was held by the court of appeal a publication can only be defamatory if it is false. The two articles did not in any way impute guilt to the respondent. To the contrary they were an accurate reporting of what had happened in respect of the matter between the respondent and the said Thaddeus and how his colleagues had thereafter conducted themselves in respect of the matter. The respondent called a witness but this witness did not state that his estimation of the respondent was lowered upon reading the articles or that the same caused him to shun the respondent. There was therefore no evidence that the was defamed.

Accordingly, I find merit in the appeal. It is allowed. The judgement of the lower court and the consequent award are set aside and substituted with an order dismissing the respondent's suit with costs to the appellant. The appellant shall also get the costs of this appeal. It is so ordered.

**Signed, dated and delivered in Nyamira this 23<sup>rd</sup> day of May 2019.**

**E. N. MAINA**

**JUDGE**