REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 448 OF 2017

THE MATER HOSPITAL.....1ST APPELLANT

DR. MARION DOLAN.....2ND APPELLANT

-VERSUS-

PETER WANJOHI KIAMA.....RESPONDENT

(Being the appellant's appeal against the Judgment of the trial magistrate Hon. A.M Obura

(Mrs.) SPM in the Chief Magistrate Court Civil Case No. 1412 of 2010 delivered on 16/8/2017)

JUDGEMENT

Introduction:

1. The 1st Appellants is a licensed medical facility operating as such within the Republic of Kenya, and the 2nd Appellant is being sued in its capacity as the Medical Director of the 1st Appellant. The Respondent herein at the material time was a registered medical doctor and sanctioned to operate as such within the Republic of Kenya.

2. The genesis of this appeal is the Respondent plaint dated 10th March, 2010 where he sought general damages and costs for defamation and libel against the Appellants. The Respondent cause of action herein originated from his instruction by a client named Walter Ndindi Wambu instructing him to attend to and participate in a post mortem of his client's deceased wife who had passed on in the appellants' facility.

3. Acting on his client's instructions, the Respondents attended his client's wife postmortem, the first one being conducted on 27th July, 2009 and the second one on 30th July, 2009, and pursuant to what transpired in the two post mortems the Respondent requested for a third post mortem, and as a result of this the Appellants wrote two letters which formed the basis of his suit as he alleges the same were defamatory.

4. The first letter is dated 11th August, 2009 addressed to his client informing him that his appointed representative ought to be a registered pathologist registered as such by Medical Practitioners and Dentist Board with a proof of such and the second letter is dated 17th August 2009 from the appellants Advocate which was to the effect that the Respondent would only be allowed to attend to the postmortem as an observer only.

5. It was the Respondents allegation that the appellants above letters depicted him as a conman masquerading as a pathologist, a criminal who unlawfully procures payment from the public and thrives in an illegal medical outfit and profession and that he is incompetent, unqualified and unprofessional.

6. The Appellant in response to the respondent suit denied that the above two letters were defamatory or libelous and argued that their actions were in line with their internal mechanism meant to ensure peaceful and professional operation.

7. The trial Court after a full trial held that the allegations of the Respondent were proved on balance of probability and awarded him general damages of Kshs. 5,000,000/= and costs of the suit.

8. The appellants being dissatisfied with the trial court decision filed the instant appeal and in their Memorandum of Appeal dated 23rd August 2017 and filed on 24th August, 2017 raised the following grounds:-

1) The learned magistrate erred in finding that the Respondent had made out a case for defamation when the pleadings before her did not particularize the alleged defamatory words and /or offended the mandatory provisions of Order 2 Rule 1 of the Civil Procedure Rules.

2) The Learned magistrate erred in law and fact in failing to consider that a demand issued by the respondent as an advocate for a disclosed client and a response thereto could not be deemed as defamatory if it contained a statement of fact as to his non qualification as a pathologist.

3) The learned magistrate erred in fact and in law in failing to hold that once a dispute is declared, the respondent could not be both an expert and an advocate in a potential medical negligence claim.

4) The learned magistrate erred in failing to hold that the respondent had not pleaded his claim for libel by innuendo as required under Order2 Rule 7(1) of the Civil Procedure Rules

5) The Learned Magistrate erred in law and fact in finding that the words complained of by the respondent were defamatory in their plain meaning in spite of evidence to the contrary

6) The learned magistrate erred in imputing malice on the part of the appellant.

7) The learned magistrate erred in law and in fact in holding that the 2nd Appellants letter dated 11th august 2009 and the appellants Advocate letter dated 14th August 2009 were defamatory in so far as they exposed the respondent to ridicule and demeaned him as a professional in the absence of evidence to support such finding.

8) The learned magistrate erred in holding the appellants liable for a letter not authored by them.

9) The learned magistrate erred in failing to find that the Respondent could not be an advocate, pathologist and witness in matters respecting the post mortem exercise of Ruth Gathoni Wambu.

10) The learned magistrate erred in failing to consider proceedings before Hon. Ngetich (as he was then) and more particularly when she did not take the evidence of any witness.

11) The learned trial magistrate erred in awarding Party and Party costs in a matter where the Respondent acted in person

12) The learned magistrate erred in both law and in fact in making an award of damages which was manifestly excessive especially after having found that the publication of the words complained of was not wide.

9. Both Parties filed written submissions and the appeal came up for hearing on 12th September, 2019 when parties highlighted their submissions.

Appellants' Submissions:

10. The appellants in the submissions filed on 14th August, 2019 addressed five issues. The first issue is as to whether the statements made were defamatory. They submitted that the lower court erred in finding that the two letters herein dated 11th and 17th August 2009 were defamatory.

11. They argued that the lower court failed to distinguish the scope of duty of the Respondent in the initial two postmortems and in the third one, in that the respondent was a witness in the former and wanted to be the one conducting the postmortem in the latter, thus necessitating the need for the appellant to demand his qualification from the Medical board.

12. This they argue was necessitated by the fact that it was the first time they were interacting with the respondent, fact not denied by the respondent.

13. In addition, they argued that the letter dated 11th August, 2009 was addressed to the family of the deceased and was just meant to inform them that they would allow only a recognized/registered pathologist by the Medical Practitioners and Dentist Board in line with their protocol.

14. And that the same never made any reference to the Respondent and it would not be said to be defamatory in its construction by a reasonable man.

15. In respect to the letter dated 17th August, 2009, the appellants submitted that the same was not defamatory as it only indicated that the pathologists who had worked with the appellants before and his documents ascertained (that is DR. Gachie) would be the lead pathologist whereas the Respondent who was not a recognized pathologist would be an observer.

16. They submitted that the court ought not to find the same defamatory just because it has been construed as such by the respondent. In this they relied in the case of ***SMW vs ZWM (2015) eKLR*** and ***Jones vs Skelton (1963) 3 ALL ER 952 at 958.***

17. Further, the appellants submitted that the fact that the Respondent never called a third party to demonstrate that the due diligence

involving requirement on whether he was duly qualified lowered his reputation.

18. They argued that he ought to have called his client, fellow medics, or the Medical board, alleging that nothing drew the court to conclude that he was ridiculed or demeaned as a Professional. In this they relied in the case of ***Daniel N. Ngunia vs K.G.G.C.U Limited (2000) e KLR, George Mukuru Muchai vs The Standard Limited (2001) eKLR*** and ***Joseph C. Langat vs Wilson K. Rono & Another (2019) eKLR.***

19. The second issue addressed by the appellants is on whether there was malice on the part of the appellant. In this respect they submitted that the lower court erred in finding that there was malice from the appellants. It is their argument that the impugned letters herein were in line with the appellant hospital protocol to uphold integrity and protect the interest of the respondent's client's family.

20. In addition, they submitted that their position herein was given credence by the Board letter dated 4th August 2009 stating that the Respondent was not registered as a pathologist with the board, yet it was the appellant requirement that only registered pathologists conducted the postmortem.

21. On failure to demand the same on the other pathologists they argued that they were already in their roll having dealt with them before. Further, they submitted that the lower court finding that the dispute arose after the respondent demanded a third postmortem is erroneous in their view, as that was not the case reiterating that the court finding on malice was erroneous.

22. The third issue addressed by the appellant is as to whether they were justified in publishing the impugned words. In this regard they submitted that the board letter to the effect that the respondent was only a General Practitioner and not recognized as a specialist pathologist implies that the alleged defamatory statements herein were founded upon the truth.

23. They submitted that the defence of justification applied in this case. In this they relied in the opinion of **Gatley** in the book ***Law and Practice of Libel and Slander in Civil Action at page156.***

24. The fourth issue addressed by the appellants is on whether the discharge of due diligence amount to defamation. In this respect they submitted that their inquiry about the respondent vide their letter dated 11th August, 2009 to the board cannot be defamatory as the same was pursuant to their own internal procedure to require that those who conduct postmortem are registered pathologist. They argued that their due diligence was neither unreasonable nor malicious to the respondent.

25. The fifth and final issue addressed by the appellant is on whether the damages awarded were grossly and manifestly excessive. In this regard they submitted that the Kshs. 5,000,000/= awarded to the respondent were excessive. In this they relied in ***Jones vs Pollard (1997) EMLR 233, 243*** and ***Benedict Ombiro vs Board of Governors Kenya Utalii College & Another (2018) eKLR*** and urged the court that in the event it finds the appellants letters defamatory Kshs. 300,000/= would be commensurate.

26. In sum they urged the court to allow the appeal and dismiss the respondent suit with costs.

Respondent's submission:

27. The Respondent vide his submissions dated 10th September, 2019 first raised a Preliminary issue on two grounds, the first being that he was not a party to Nairobi CMMC No. 1412 of 2010 in which the appellant appeal seem to arise from and secondly that the instant appeal does not meet the requirements of Order 42 Rule 2, in that the appellants have not exhibited the decree from which the appeal arises.

28. The Respondent without prejudice to the above addressed the appellants grounds raised in the memorandum of appeal. In respect to grounds 1 and 4 of the memorandum of appeal, the Respondent submitted that the same was dealt with by the ruling of Hon. A.K Ndungu dated 20th January 2011, where an appeal was also filed in the court being Civil Appeal No. 45 of 2011 and a judgment issued by Hon Justice DA Onyancha, where basically the court found that the Respondent herein had a cause of action which was triable.

29. On ground 2 and 8 the respondent submitted that the same is misleading as the said impugned letter did not state that the respondent was not qualified as a pathologist. In answer to ground 3 and 9 the respondent submitted that the issue was not before the trial court and is irrelevant. And in respect to grounds 5 and 7 of the appeal the respondent reiterated that the words and conduct of the appellant remain and is defamatory to date.

30. In regard to grounds 6 and 10 the respondent submitted that the letters herein were malicious and that the trial court considered all the issues and the appellant assertion in this respect is embarrassing. And on ground 11 regarding the award of costs, he submitted that the court never indicated that it was awarding party to party costs, arguing that he deserved costs for the suit.

31. In respect to ground 12 which is on the issue of the damages issued which the appellants contend that the same is excessive, the respondent submitted that the appellants never addressed the issue of quantum at the lower court and that he sought Kshs. 10,000,000/= but was awarded Kshs. 5,000,000/= and in his position the court rightly exercised its discretion and urged the court to dismiss this ground. He relies in the case of ***Nation Media Group Ltd & 2 others vs Joseph Kamotho & 3 Others (2010) eKLR.***

32. In sum the respondent urged the court to dismiss the appeal with costs.

Appellants' Supplementary Submissions:

33. The appellants in response to the Respondents submission put in their supplementary submissions filed on 12th September, 2019 where they addressed two issues raised by the Respondent. The first issue is on whether the typographical errors are excusable. They submitted that

the error on the case number alluded to by the respondent was as a result of a typographical error and urged the court to ignore the same as the respondent has suffered no prejudice.

34. The other issue addressed by the appellant is on whether the appeal is defective due to failure to exhibit a decree. In this regard they submitted that the respondent is estopped from raising this ground as he ought to have raised his objection when the matter came up for directions.

35. In addition, they argued that Order42 Rule 13 of the Civil Procedure Rule relied by the Respondent provides for either a judgment or a decree and therefore it is not mandatory to provide a formal extracted decree. In this regard they relied in the case of ***Hanif Igbal Khan vs Wines & Spirits Kenya Limited (2019) eKLR.***

Issues and Analysis:

36. This being is a first appeal and guided by the provisions of Section 78 of the Civil Procedure Act, this court ought to reevaluate and reexamine the lower court record and the evidence before it and arrive at its own independent conclusion , having regard to the fact that it neither saw nor heard the witnesses as they testified, as was stated in ***Selle vs Associated Motor***

hearing;

(e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;

(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

42. The Supreme Court In the case of ***Bwana Mohamed Bwana vs Silvano Buko Bonaya & 2 others [2015] eKLR*** held in this regard at paragraph 41;

> **"Without a record of appeal, a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or the Constitution, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues."**

43. It is therefore clear from the above provisions of the law that the record of appeal should contain the judgment, order or decree appealed from and the order (if any) giving leave to appeal. And that the lack of such documents including the decree or orders renders the appeal incompetent.

44. The Appellant in answer to this alleges that the respondent is estopped from raising the issue as he has done it too late in the day and has invoked the doctrine of estoppel, arguing that he ought to have raised the issue when the matter came up for directions on 31st May, 2019 before **Justice Sergon.**

45. In ***Hanif Igbal Khan vs Wines & Spirits Kenya Limited [2019] eKLR,*** a decision relied on by the appellant, the court noted that: -

> **"Order 42 Rule 12 (4) of the CPR which provides the contents of a valid appeal should therefore be read together with the interpretative provision of the CPA. Where a formal decree in pursuance of a judgment may not have been drawn up or may not be capable of being drawn up, the appellate court should proceed to determine the appeal based on the judgment or ruling appealed against. To insist that an appellant should avail a formal decree failure to which the appeal should be dismissed is to pander to procedural technicalities thus defeating the requirement by Article 159(2)(d) of the Constitution that justice shall be administered without undue regard to procedural technicalities."**

46. Consequently, I'm persuaded by the above decision, I do find that dismissing the instant appeal on this ground alone would be a draconian step and in the circumstance **Article 159(2)(d)** of the Constitution comes in aid of the appellant, in view of the fact that the Respondent seems to have acquiesced with the appeal as it is and at this stage is estopped from raising the issue.

b) Whether the letters dated 11th and 17th August, 2009 addressed to the Respondent were defamatory:

47. The alleged defamatory part of the letter dated 11th August, 2009 is where the appellants state as follows "**we are therefore agreeable to a postmortem being done on 12th August 2009 between 12pm and 1pm. We must emphasize that the appointed pathologist should be one duly registered as a pathologist by the undernoted board and we shall require evidence of such before proceeding with the Post mortem".**

48. In respect to the letter dated 17th August 2009, the impugned parts are as follows**.**

> **"That our client will also be agreeable to Dr. Kiama Wangai attending the said postmortem sessions as a family observer and no more. As the primary pathologist, it is expected you will ensure that this concern shall be strictly observed".**

49. The issue therefore is as to whether the above statements are defamatory to the Respondent as a professional. **Winfield in J.A. Jolowicz** and **T. Ellis Winfield on Tort 8th Edition** at page **254** defines defamation as;

> ***"The publication of a statement which tends to lower a person in the estimation of right-thinking members of society generally or which tends to make them shy or avoid that person".***

50. In addition, the ***Halsbury's laws of England 4th Edition Vol. 28. Paragraph 10*** defines defamation thus;

> **"A defamatory statement is a statement which tends to lower a person in the estimation of right thinking members of the society generally or cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey an importation on him disparaging or injurious to him in his office, profession, calling or business".**

51. The ingredients of defamation were summarized in the case of ***John Ward vs Standard Ltd, HCCC No. 1062 of 2005*** as follows: -

(i) The statement must be defamatory.

(ii) The statement must refer to the respondent.

(iii) The statement must be published by the defendant.

(iv) The statement must be false.

52. **Applying the above, the first issue is as to whether the contents of the above letters are defamatory**. One element which is essential in the law of libel is that the words should be defamatory, untrue and should be published of and concerning the complainant. In ***clerk and Lindsell on tort 17th Edition 1995-page 1018*** it is stated that;

> ***"Whether the statement is defamatory or not depends not, as has been printed and already, upon the intention of the defendant, but upon the publication of the case and upon natural tendency of the publication having regard to the surrounding circumstances. If the words published have a defamatory tendency it will suffice even though the importation is no believed by the person to whom they are published".***

53. The Appellants on their part alleges that the letters were not defamatory citing the defence of justification. It is their position that it is true that the respondent is not registered as a pathologist with the board and therefore their action therein is justified.

54. The respondent on the other hand alleges that he never carried out himself as a pathologist, arguing that there was no requirement under the law that for one to attend to a postmortem the requirement was one to be a registered pathologist with the medical board.

55. I agree with the lower court that indeed the two letters hereinabove are defamatory as they create an impression to a person reading it that the respondent herein does not qualify to undertake a postmortem on behalf of a client, a fact which is erroneous as the position under the law as rightly cited by the learned magistrate is that there is no requirement making it mandatory for one to be a registered pathologist with the medical board so as to be allowed to undertake a postmortem.

56. The appellant argument that their position was in line with their internal process requiring that a person they were to deal with must have been a registered pathologist by the board has no basis whatsoever as the Respondent was acting in his capacity as an external entity procured by a client and therefore not within the control of the appellants.

57. The second issue is as to **whether the letters referred to the Respondent**. And in this regard I have no doubt in my mind that the appellant's herein in their impugned letters herein made reference to the appellant.

58. The third issue is **whether the libel was published by the appellants.** It is not disputed that the two letters originated from the appellants. The letter dated 17th August 2009 was authored by the appellants advocate with their instructions a fact not denied.

59. The final issues is **whether the wordings of the letters herein false and malicious.** The respondent alleges that the words were false and malicious while the appellants maintain that the contents were not malicious but justifiable. In defamation, it is trite that where a defendant states that the words are true, it is his duty to prove the truthfulness of the publication.

60. It is a fact that for one to undertake a postmortem there is no requirement under the law that one must be a registered pathologist with the board and therefore the appellants' letters herein were malicious and without any basis.

c) Whether the damages issued were excessive:

61. Having found hereinabove that the contents of the appellants' letters were defamatory to the respondent, the next question is the damages that is commensurate at least to compensate him for loss of reputation suffered. In ***Jones vs Pollard [1997] EMLR 233*** a case that has been cited with approval extensively by the court of appeal, the guidelines for determination of quantum and award of damages were listed as follows:-

> **"1.The objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published, and any reputation.**
>
> **2. The subjective effect on the respondent'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.**
>
> **5. Vindication of the respondent's reputation past and future**."

62. Additionally, In the case of ***Biwott vs Dr. Ian West And Another Nairobi HCCC.1067 OF 1999*** it was held inter alia that: -

> **"In compensation damages, what is to be awarded is such sum as will compensate him for the wrong he has suffered. The sum must compensate him for the damage to his reputation vindicate his good name, and take account of the distress, hurt, humiliation which the defamatory publication has made"**

63. In this case the lower court awarded the respondent the sum of Kshs. 5,000,000/= as damages. In my view this sum is on the higher side considering that the said letters were not that widely distributed or read and therefore this ought to have mitigated the circumstances of this case. The only effect that the letter would have had is with respect to the respondent client who might as a result of the said letters considered him unqualified to participate in his wife's postmortem.

64. In ***Miguna Miguna vs Standard Group Limited & 4 Others [2017] eKLR,*** the court awarded the sum of Kshs. 5,000,000/= for a publication that was widely circulated in the newspapers. Hence it goes without saying that the above sum awarded by the lower court herein is excessive.

65. The appellants herein have proposed the sum of Kshs. 300,000/= as commensurate damages in the circumstances.

66. Under **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."***

67. Reputation is an integral and important part of the dignity of the individual and once besmirched by an unfounded allegation ones reputation can be damaged forever, especially if there is no opportunity to vindicate one's reputation. See ***Nation Media Group Ltd & 2 Others vs John Joseph Kamotho & 3 Others.***

68. In assessing damages in an action for defamation the court has to consider the particular circumstances of each case, the plaintiff's position and standing in society, the mode and extent of publication, the apology, if offered and at what time of the proceedings, the conduct of the defendants from the time when libel was published up to the time of judgment.

69. In determining damages, I am alive to the principle that the sums should be fairly compensatory in the light of the nature of the injury to reputation and that a restrained hand in the award of damages is desirable since the court must maintain stable bearing. The award should also appear realistic in all the circumstances.

70. In the English Court of Appeal decision in the case of **John v MG Ltd** the Court 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.....***
>
> ***Exemplary damages on the other hand had gone beyond compensation and are meant to "punish" the defendant. 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."***

CONCLUSION

71. I find the judgment of the lower court in all the circumstances of the matter, the trial magistrate erred in assessing damages as publication was limited and the guidelines in the above provisions of Defamation Act were ignored and thus the award is inordinately high as to be an erroneous estimate.

72. I find the a-foregoing being enough reasons to fault the award of damages arrived by the magistrate. Taking into account the circumstances of this case **the sum of Kshs. 1,000,000/= would suffice.**

i. The trial court award is reduced to ksh 1,000,000.

ii. The upshot is that I allow the appeal to that extent otherwise all other grounds are dismissed with no orders as to costs.

iii. Orders accordingly.

SIGNED, DATED AND DELIVERED THIS 20TH DAY OF DECEMBER, 2019.

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C. KARIUKI

JUDGE