



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 52 OF 2017

THE NAIROBI STAR PUBLICATION LIMITED.....APPELLANT

VERSUS

ELIZABETH ATIENO OYOO.....RESPONDENT

(Being an Appeal from the Judgment and Decree in Kisumu CMCC No. 412 OF 2016 delivered by Hon. J.Ng'arng'ar (CM) on 25th May, 2017)

JUDGMENT

1. ELIZABETH ATIENO OYOO (*hereinafter referred to as respondent*) sued THE NAIROBI STAR PUBLICATION LIMITED (*hereinafter referred to as appellant*) in the lower court seeking the following orders:

- i. General damages for libel and for publishing words concerning the plaintiff without taking any sufficient steps or precautions to establish whether they were true or not
- ii. Exemplary damages for malicious libel for publishing words concerning the plaintiff with reckless disregard as to whether or not they were injurious to the plaintiff
- iii. Aggravated damages arising from the defendant's refusal to apologize or retract the statement after demand to do so
- iv. Permanent injunction to restrain the defendant from publishing the words contained in the article
- v. Costs of the suit
- vi. Such further or other relief

2. The defendant/appellant filed a statement of Defence and denied the claim.

3. By a ruling dated 28th April, 2016, the statement of defence was struck out and judgment on liability was entered in favor of the respondent. Matter proceeded for formal proof on 8th February, 2017. In a judgment delivered on **25th May, 2017, judgment was entered against the appellant for Kshs. 7,500,000.00. The court also issued a permanent injunction to restrain the defendant from publishing such words as contained in the offending article and awarded costs of the suit to the respondent.**

The Appeal

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 4.7.17 filed the Memorandum of Appeal dated 29.6.17 which sets out 7 grounds of appeal that: -

- 1. The Learned trial Magistrate erred in law in the assessment of quantum of general damages**
- 2. The general damages of Kshs. 5,000,000.00 awarded are excessive and exorbitant**
- 3. The Learned trial Magistrate erred in law in holding that the respondent was entitled to exemplary damages**
- 4. The exemplary damages of Kshs. 2,000,000.00 awarded are excessive and exorbitant**
- 5. The Learned trial Magistrate erred in law in holding that the respondent was entitled to aggravated damages**
- 6. The aggravated damages of Kshs. 500,000.00 awarded are excessive and exorbitant**
- 7. The Learned Magistrate disregarded the appellant's submissions and decision on the ascertainment of quantum of damages**

SUBMISSIONS BY THE PARTIES

5. This appeal was argued by way of written submissions. In further exposition of the appeal, both parties cited various authorities.

Appellant's submissions

6. Appellant holds the view that respondent was not entitled to the damages she was seeking because she did not establish that she suffered negatively in her social life, family life or in her employment as a result of the offending article.

7. Appellant faulted the trial court for awarding what it termed as excessive general damages of Kshs. 5,000,000.00 when all the ingredients of defamation had not been proved.

8. Appellant urged court to find that respondent did not prove that appellant acted maliciously or that its action was calculated to make profit or material gain and to thus set aside the award of exemplary damages of Kshs. 2,000,000.00.

9. Appellant additionally urged the court to find that respondent did not prove additional injury over and above injury to reputation and consequently set aside the award for aggravated damages. The appellant submitted that the court did not consider that appellant had made an offer for apology to the respondent which was a mitigating factor in the assessment of damages.

10. In support of the foregoing submissions, appellant relied on the following authorities.

a. SELLE V. ASSOCIATED MOTOR BOAT CO., (1968) E.A. 123

b. BENARD BIFWOLI V SIMON WETUNDU & 2 OTHERS [2008] eKLR

c. JOSEPH KIIO & ANOTHER V JONATHAN MUTHAE & 8 OTHERS [2015] eKLR

d. BUTT V KHAN (1978) eKLR

e. RADIO AFRICA LTD & ANOTHER V NICHOLAS SUMBA & ANOTHER [2015] eKLR

f. EMMANUEL OMENDA V SAFARICOM LTD [2012] eKLR

g. JUMA MIKIDADI V ALI KHALFAN & ANOTHER [2004] eKLR

Respondent's submissions

11. Respondent started off on its Notice of Preliminary Objection dated filed on 4.7.17. It was submitted that under the provision of Section 79G of the Civil Procedure Act, the appeal is null and void *ab initio* having been filed outside the time limited for filing an appeal, without leave of court to enlarge time or admit the appeal out of time and further that the decree or order appealed from was not filed together with the memorandum of appeal or at a later date as contemplated under Order 42 rule 2 of the Civil Procedure Rules.

12. On the award for general damages, respondent submitted that the trial court considered the various positions she holds; that shew as not a member of the Tender Committee at Maseno University and further that appellants failed to apologize after it was notified that the impugned article was injurious to her.

13. It was also submitted that respondent suffered damage from the mere invasion of her right to her reputation and was thus properly awarded general damages .

14. On the issue of exemplary damages, respondent submitted that the impugned publication was published recklessly and was accessible to millions of readers globally and had a greater potential to cause damage that a libel published to a handful of people.

15. On the issue of aggravated damages, respondent submitted that appellants failed to apologize after it was notified that the impugned article was injurious to her. failed to apologize after it was notified that the impugned article was injurious to her.

16. Respondent urged the court not to interfere with the awarded by the learned magistrate since it had not been demonstrated that the court abused its discretionary power of misapplied the principles of assessment of quantum of damages.

17. In support of its proposition, respondent relied on the following authorities:

a. ARTICLE 33(3) OF THE CONSTITUTION

b. SECTION 35(2) OF THE MEDIA ACT

c. CLAUSE 1 AND 5 OF THE CODE OF CONDUCT AND PRACTICE OF JOURNALISM IN KENYA

d. HARLSBURY'S LAWS OF ENGLAND 4TH EDITION VOLUME 28

e. KULWANT SINGH ROOPRA V JAMES NZILI MASWILI [2014] eKLR

f. GREGORY KIEMA KYUMA V MARIETTA SYOKAU KIEMA [1988] eKLR

g. MARINE DIVING AND TECHNICAL SERVICES LTD VS SOUTHERN ENGINEERING CO. LTD. [2009] eKLR

h. ANDREW NGANGA NDUNGU VS GODFREY KARURI & ANOTHER [2006] eKLR

i. JOHNSON EVAN GICHERU V ANDREW MORTON & ANOTHER [2005] eKLR

j. STANDARD LIMITED V G.N. KAGIA T/A KAGIA & COMPANY ADVOCATES [2010]

eKLR

k. JOHN V MGN LIMITED [1996] ALL ER 35

l. FRANCIS XAVIER OLE KAPARO V STANDARD LIMITED & 3 OTHERS [2010] eKLR

m. ALNASHIR VISRAM V STANDARD LIMITED [2016] eKLR

n. KEMFRO AFRICA LIMITED T/A MERU EXPRESS SERVICE, GATHOGO KANINI VS A.M.M. LUBIA & ANO. (1982-88)1 KAR 777

o. SAMUEL NDUNGU MUKUNYA V NATION MEDIA & ANOTHER [2015] eKLR

p. KIPYATOR NICHOLAS BIWOTT V DR. IAN WEST & ANOTHER [2000] eKLR

Analysis and Determination

18. 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*

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

i. Whether the appeal is null and void *ab initio*

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

iii. Whether the general damages of Kshs. 5,000,000.00 awarded are excessive and exorbitant

iv. Whether the exemplary damages of Kshs. 2,000,000.00 awarded are excessive and exorbitant

v. Whether the aggravated damages of Kshs. 500,000.00 awarded are excessive and exorbitant

i. Whether the appeal should be struck out

20. The judgment from which this appeal arises was delivered on 25th May, 2017. Section 79G of the Civil Procedure Act states: -

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

21. 42 rule 2 of the Civil Procedure Rules on the other hand provides that:-

“Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such a time the court may order, and the court need not consider whether to reject appeal summarily under section 79B of Act until copy is filed.”

22. Appellant filed the Memorandum of Appeal on 4th July, 2017 which was a period of 9 days outside *the thirty days period that the appeal ought to have been filed*. There is no evidence that appellant sought leave of court to enlarge time or admit the appeal out of time. There is similarly no evidence as to when the decree dated 21.8.17 was applied for but the fact that it was issued after the memorandum of appeal was filed confirms that it was obtained after the filing of the memorandum of appeal.

23. **Section 79G of the Civil Procedure Act, Order 42 Rule 1(2) and Rule 13(4) of the Civil Procedure Rules**, are provisions that directly relate to the necessity of a decree or an order in every appeal that that is filed from the magistrate's court; it is significant to note that they are couched in a mandatory language meaning non-compliance with these provisions will no doubt render the appeal fatally defective (See **Kulwant Singh Roopra v James Nzili Maswili [2014] eKLR**).

24. In my considered view, the 6 days in filing the appeal can be excused on the ground that it has not been demonstrated that any prejudice has been caused to the respondent. I find that It would be reasonable to conclude that appellant completed the filing of the appeal when it filed the decree appealed from together with the record of appeal. I have considered the decisions in **Gregory Kiema Kyuma v Marietta Syokau Kiema (Supra)**; **Marine Diving and Technical Services Ltd Vs Southern Engineering Co. Ltd. (Supra)** and **Andrew Nganga Ndungu Vs Godfrey Karuri & Another (Supra)** but I find that the overriding objective under Section 3A of the Civil Procedure Act confers on the Court considerable latitude in the interpretation of the law and rules made thereunder, and in the exercise of its discretion always with a view to achieving any or all the attributes of the overriding objective. Appellant ought to have its day in court and this court therefore declines to strike out the appeal as urged by the respondent.

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

25. Defendant did not deny that it published the impugned article which respondent said was injurious to her. In a letter dated 7.8.14, appellant in conceding liability made an offer to apologize. 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.”*

26. In **Francis Xavier Ole Kaparo V Standard Limited & 3 Others (Supra)**, 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.

27. From what is stated hereinabove, I find that the learned magistrate rightfully found that appellant breached the provisions of Article 33(3) when it failed to respect the rights and reputation of the respondent. The court acted properly in assessing damages awardable to the respondent from the defamation committed against her by the appellant.

iii. Whether the general damages of Kshs. 5,000,000.00 awarded are excessive and exorbitant

28. In the case of **Kemfro Africa Limited t/a Meru Express Services, Gathogo Kanini v A.M.M Lubia & Another (Supra)** the Court of Appeal stated as follows:

"the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

29. 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.*

30. I have considered the cases cited by the appellant in the lower court. In **Benard Bifwoli V Simon Wetundu & 2 Others** (Supra), 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** (Supra), 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** (Supra), 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.

31. Respondent cited **Alnashir Visram V Standard Limited** (Supra) and **Samuel Ndungu Mukunya V Nation Media & Another** (Supra) where general damages in the sum of Kshs. 18,000,000.00 and Kshs. 15,000,000.00

32. In **Butt v Khan** (Supra), 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. I have perused the cases that were cited before the trial court and are of the considered opinion that the trial magistrate did not proceed on a wrong principle of law at all in making the award of Kshs. 5,000,000/- as general damages. The award was based on a correct appreciation of the law and I decline to interfere with the magistrate's discretion in that regard.

iv. Whether the exemplary damages of Kshs. 2,000,000.00 awarded are excessive and exorbitant

33. As regards exemplary damages, the same are only to be awarded in limited instances. The categories

of cases in which exemplary damages should be awarded are set out, at paragraph 243 of *Halsbury's Laws of England*, as follows: -

“Exemplary damages should be awarded only in cases within the following categories: -

- (1) Oppressive, arbitrary or unconstitutional action by servants of government;**
- (2) Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff; or**
- (3) Cases in which the payment of exemplary damages is authorized by statute.**

34. When elaborating on the three categories, the learned authors of *Halsbury's* emphasize that: -

“In demonstrating the defendant’s calculation as to profit, it is not sufficient to show merely that the words were published in the ordinary course of business run with a view to profit; the publication must be intended to make a specific profit.”

35. In *John V MGN Limited* (Supra); *Kipyator Nicholas Biwott v Dr. Ian West & Another* (Supra); *Juma Mikidadi V Ali Khalfan & Another* (Supra); *Standard Limited V G.N. Kagia T/A Kagia & Company Advocates* (Supra) and *Radio Africa Ltd & Another v Nicholas Sumba & Another* (Supra), the courts held that exemplary damages are awarded where the defendant’s conduct was calculated to make some profits for the defendant which would have exceeded the compensation payable to the plaintiff.

36. In my assessment of the evidence before the trial court, I find nothing to indicate that the offending publication was intended for a specific profit. I therefore hold that the plaintiff is not entitled to an award of exemplary damages.

v. Whether the aggravated damages of Kshs. 500,000.00 awarded are excessive and exorbitant

37. In seeking aggravated damages, plaintiff must satisfy the principles as laid out in **GATLEY ON LIBEL AND SLANDER 12th Edition para 9.18 at page 353** which deals with aggravated damages as follows:

“The conduct of the defendant his conduct of the case, and his state of mind are all matters which the claimant may rely on as aggravating the damages in so far as they bear on the injury to him.

“It is very well established that in cases where the damages are at large the judge can take into account the motives and conduct of the defendant, where they aggravate the injury done to the Plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff’s proper feelings of dignity and pride. These are matters which the jury can take into account in assessing appropriate compensation.”

38. In this instant case the respondent, soon after the publication sought an apology from the appellant in a letter dated 11th July, 2014. By a letter dated 22nd July, 2014, the appellant wrote a reply and denied that the article complained of made any reference to the respondent. This prompted then respondent to write again on 7th August, 2014 clarifying to the appellant among other issues that respondent was the only legal officer at Maseno University and that she was not a member of the Tender Committee and did not award any tender to Riley Falcon Security Services Ltd. By a letter dated 7th August, 2014, appellant wrote back and offered to publish an apology. here not. When the matter came up for hearing on the 8th February, 2017, the appellant had not published the apology it had offered to publish.

39. Appellant was notified of the error by a letter dated 11th July, 2014. An apology is supposed to be

published immediately one discovers the error. This was not done in this case even as at the time the case was heard 3 years from the date of discovery of the error. To this day, the appellant has not published an apology. Appellant's action is a mark of arrogance. It is malicious.

40. On this issue, the learned magistrate awarded the respondent Kshs. 500,000/-. In my considered view, the learned magistrate rightfully found that failure on the part of the defence to correct the injury by way of an apology despite admitting their fault aggravated the damages. In the circumstances of this case, the sum of Kshs. 500,000/- for aggravated damages is well deserved and I decline to interfere with the magistrate's discretion in that regard.

Disposition

41. In view of the foregoing finding, the *Appeal partly succeeds. He award 5,000,000.00 for Kshs. general damages and Kshs. 500,000.00 for aggravated damages is upheld while the award for exemplary damages in the sum of Kshs. 2,000,000.00 is set aside.* Each party shall bear its own costs of this appeal.

DATED AND SIGNED IN KISUMU THIS 27th DAY OF *September*, 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Appellant - Mr Abade/Mr Heri

Respondent - Mr Odeny /Mr Gachoba