



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 545 OF 2015

THE NATION MEDIA GROUP LIMITED.....1ST APPELLANT

HUGHOLIN KAMARO.....2ND APPELLANT

VERSUS

DAMARIS WAIRIMU KURIA.....RESPONDENT

(Being an appeal from the Judgment of the Hon. A M Obura Principal Magistrate delivered on 5th November, 2015 in CMCC No. 2138 of 2011 at Nairobi)

J U D G M E N T

1. Damaris Wairimu Kuria, the Respondent herein filed a compensatory suit for defamation against Nation Media Group Ltd and Hugholin Kamaro the 1st and 2nd Appellants respectively before the Chief Magistrate's court vide the Plaint dated 7th June, 2011.
2. The Appellants filed a defence to deny the Respondent's claim.
3. When the suit came up for hearing the Respondent called two witnesses to testify in support of her case while the Appellants opted to close their case without calling any witness.
4. On 5th November, 2015, Hon. A M Obura, learned Principal Magistrate entered judgment in favour of the Respondent and against the Appellants.
5. The Respondent was awarded Ksh.1,500,000/- and Ksh.500,000/- for general and aggravated damages respectively plus costs.
6. The Appellants being aggrieved by the aforesaid decision, filed this appeal and put forward the following grounds: -
 - i. The learned magistrate erred in law and in fact in holding that the Respondent had been defamed by the Appellants as the evidence adduced did not support the Respondent's claim(s).**
 - ii. The learned magistrate erred in law and in fact by misapprehending the provisions of the Defamation Act, Chapter 36 of the laws of Kenya and thereby arriving at the wrong determination.**
 - iii. The learned magistrate erred in law and in fact in awarding General damages of Kenya Shillings One Million Five Hundred Thousand (Kshs.1,500,000/-) to the Respondent, which amount is inordinately high when taking into account the evidence, the pleadings and all other factors to be considered when assessing damages for defamation.**
 - iv. The learned magistrate erred in law and fact by failing to take into account and fully consider the various authorities submitted by the Appellants before arriving at the sum of Kenya Shillings One Million Five Hundred Thousand (Kshs.1,500,000/-) which award was not founded on any outlined legal principle or precedent and was inordinately high.**
 - v. The learned magistrate erred in law and in fact in awarding damages of Kenya Shillings Five Hundred Thousand (Kshs.500,000/-) to the Respondent, which damages were not proved taking into account the evidence, the pleadings and all other factors to be considered when assessing damages for defamation.**
 - vi. The Learned magistrate erred in law and fact by failing to take into account and fully consider the various authorities submitted by the Appellants before arriving at the sum of Kenya Shillings Five Hundred Thousand (Ksh.500,000/-) which award was not founded on any outlined legal principle and precedent.**

vii. The learned magistrate erred in law and fact by basing the award on extraneous considerations and factors.

7. When this appeal came up for hearing, learned counsels appearing in the matter recorded a consent order to have the appeal disposed of by written submission.
8. Though the Appellant put forward a total of seven (7) grounds of appeal, two issues touching on liability and quantum commend themselves for determination.
9. On Liability, it is the Appellants submission that the article complained of was not defamatory of the Respondent. They argued that a statement is defamatory only if it has a defamatory imputation to a reasonable person.
10. It was pointed out that the reading of the contents alongside the photograph, a reasonable person would have come to the conclusion the Respondent's photo might have appeared there erroneously as the Respondent's name was not mentioned anywhere in the article.
11. The Appellants' further submitted that the article was not published of and concerning the Respondent and the mere fact that the Respondent's picture appears in the article did not make it defamatory. It was pointed out that the Respondent failed to demonstrate that the article damaged her reputation and character since she was not viewed differently or shunned, ridiculed by any person as a result of the publication.
12. The Respondent on the other hand is of the submission that the use of her photograph alongside the said article without her consent and knowledge seriously injured her credit, reputation and was put to public scandal, ridicule, odium and contempt in the eye and estimation in right thinking members of the society.
13. The Respondent further argued that she presented evidence showing that her reputation was injured by the publication and that her evidence was not controverted by the Appellants.
14. I have re-evaluated the evidence presented before the trial court. Damaris Wairimu Kuria (PW 1) told the trial court that the article published by the Appellants on 18th September, 2010 alongside the said article, they published her photograph with a caption to the photograph reading ***"Hizi picha za Bi. Theresa Waruiru Ndogo ikimwonyesha hali yake ilivyodhoofika baada ya kutumia dawa fulani na ile kubwa baada ya kushauriwa na daktari kusitisha matumizi ya dawa hizo."***
15. It is PW 1's evidence that the aforesaid publication implied that she was suffering from an undisclosed ailment and that it further implied that she suffered from H.I.V.
16. Ernest Karanja (PW 2) stated that he called PW 1 when he saw her photograph in the newspapers. Pw 2 further stated that he read the caption below the photo and the article which referred to some undisclosed medication which alleged the Plaintiff was using.
17. PW 1 stated that she was greatly affected and traumatized to the extent that she fell ill. PW 1 further stated that she was viewed differently by her family and spouse. PW 1 also stated that most people spoke in low tones and that they feared to approach her and further that she was psychologically affected.
18. The Appellants do not dispute that the Respondent's photograph was published alongside a story over some undisclosed items and medication. The Appellants have stated that it was an innocent mistake.
19. However, if the mistake was unintended, the question which remains unanswered is why didn't the Appellants tender an apology as demanded by the Respondent. The Appellants did not present evidence to controvert the evidence tendered by the Respondent and her witness, which were to the effect that she was defamed and affected by the publication.
20. After a careful re-evaluation of the evidence, I am convinced that the Respondent presented credible evidence which established liability for defamation against the Appellants on a balance of probabilities.
21. The Respondent adduced evidence proving that the Appellants' publication gave the wrong impression that she was sickly due to the misuse of drugs.
22. Having determined the issue touching on liability, I now turn my attention to quantum. It is the submission of the Appellants that the article never in any way caused reputational damage to the Respondent and therefore, the award made by the trial court was, therefore unwarranted and lacked merit.
23. The Appellants further argued that the award on general damages was not founded on any legal principles and that it was also inordinately high. This court was beseeched to adjust it downwards from Ksh.1,500,000/- to Kshs.500,000/-.
24. The Appellants also attacked the award on aggravated damages arguing that the trial magistrate did not elucidate nor spell out the applicable principles in making the award of Kshs.500,000/-. The Appellants pointed out that there was no evidence that their conduct led to the increase of the injury to the Respondents nor that the Appellants acted oppressively before the filing of suit and during the hearing.
25. The Respondent argued the rationale behind the awarding of damages in an action for defamation is to restore or give back to the injured party what it lost, therefore, the Respondent is entitled to damages to compensate her for the injury she suffered

26. With respect, I agree with the Respondent's submissions that once a party has established liability for defamation like in this case, she is entitled to damages. Consequently, the learned principal magistrate cannot be faulted for making an award for damages.

27. The remaining question is whether or not those awards were inordinately high. I have considered the authorities relied upon by both parties before the trial court and on appeal. The record clearly shows that the Respondent had prayed for Ksh.3,000,000/- as general damages and Ksh.1,500,000/- for aggravated damages.

28. On general damages, I find the figure awarded of Ksh.1,500,000/- to be reasonable and within the range of awards previously made by this court for similar injuries.

29. The Appellant has seriously contested the award on aggravated damages claiming it was not justified. The Respondent tendered evidence showing she fell ill after the article was published and that she was viewed differently by family members and particularly by her spouse. She also stated that she demanded for an apology but the Appellants did not deem it fit to do so.

30. In my view, the Appellants' conduct further aggravated the further suffering of the Respondent. I am satisfied that the Respondent was in the circumstances entitled to the award of aggravated damages. The figure given in my view is reasonable.

31. In the end, I find no merit in this appeal. It is dismissed with costs to the Respondent.

Dated, signed and delivered at Nairobi this 21st day of September, 2018.

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J K SERGON

JUDGE

In the presence of

..... for the Appellants

..... for the Respondent.