



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 78 OF 2015

THE STANDARD LIMITED..... 1ST APPELLANT

HEZRON OCHIEL.....2ND APPELLANT

VERSUS

DR. NERRY O. OMOLO.....RESPONDENT

*[Being an appeal from the judgment of the Honourable Mrs Lucy
Gitari, the (then) Honourable Kisumu Chief Magistrate delivered*

on the 27th August 2015 in Kisumu CMCC No. 189 of 2014]

JUDGMENT

The Appellant, a gynaecologist lodged suit claiming that he was defamed by an article published by the 1st Respondent in its publication of 11th March 2014. The said article was headlined “*Doctor sacked over negligence.*” He claimed that the article contained untrue facts and that it was maliciously published with a view to maligning him. He asserted that he was a reputable gynaecologist and that the article exposed him to odium, ridicule, public scandal and contempt. He also claimed that the article was crafted to cause him pecuniary, professional and moral damage and to prejudice his medical practice and source of livelihood. He therefore sought prayers as follows -

- (a) General damages for defamation;**
- (b) Aggravated damages;**
- (c) Costs;**
- (d) Interest;**
- (e) Other relief deemed suitable to grant.**

After hearing evidence from both sides the trial magistrate found the appellants liable and awarded the respondent general damages in the sum of Kshs.5,000,000/=, costs of the suit and interest.

Being aggrieved the appellant filed this appeal. The grounds of appeal as set out in the Amended Memorandum of Appeal are -

“1. The learned trial magistrate's findings on liability are unsupported by the respondent's testimony and court record.

2. The learned trial magistrate erred in not finding that the article published of and concerning the respondent was not defamatory.

3. The quantum of damages awarded is manifestly excessive as to be a wholly erroneous estimate of damages.

4. In assessing quantum of damages payable the learned trial magistrate failed to take into account relevant factors in consequence of which she made an excessive award of damages.

5. The learned trial magistrate failed to adequately and reasonably evaluate, consider and apply the appellants' submissions on liability and quantum of damages payable.

6. The learned trial magistrate's award of damages is a miscarriage of justice and sets a bad precedent.”

Mr. Namorongi, Advocate, for the appellants and Mr. Amondi, Advocate, for the Respondent filed written submissions although only Counsel for the Respondent attended the oral hearing of the appeal.

The circumstances giving rise to this appeal are that on or about 12th September 2012 one Dominic Ooko a brother of Lucy Ooko, deceased who was a patient of the respondent at the Aga Khan Hospital Kisumu, lodged a complaint before the Medical Practitioners and Dentists Board regarding her death. The Board referred the complaint to the Preliminary Inquiry Committee as provided by the Act. Thereafter a Professional Conduct Committee was constituted which duly heard the complaint. Its findings in respect of the Respondent were -

“1. DR. NERRY OTIENO OMOLO

49. The Committee finds that:-

i. Dr. Nerry Otieno Omolo was the gynaecologist who operated on the patient and he visited the Hospital three (3) times in the immediate post-operative period without reviewing her. By visiting and reviewing the deceased he should have picked the danger signs which had been noted by the nurses.

50. In view of the above the committee finds that the charge as set out in the Notice of Inquiry dated 28th January 2013 as against Dr. Nerry Otieno Omolo has been proved satisfactorily

D. ORDERS

In view of the above findings the committee makes the following orders:-

i. Dr. Nerry Otieno Omolo be and is hereby admonished for the manner in which he managed the deceased especially in the immediate post-operative period.

ii. Dr. Nerry Otieno Omolo do furnish the Board with evidence of a valid Professional Indemnity Cover within a period of 14 days from the date hereof.

iii. Dr. Nerry Otieno Omolo, in liason with Dr. Esther Akelo and the Aga Khan Hospital – Kisumu, do jointly initiate mediation with the beneficiaries of the Estate of the late Lucy Ooko Onyango with a view to compensating the said beneficiaries and the Estate of the deceased and update the Chairman of the Medical Practitioners and Dentists Board within a period of 90 days from the date hereof.

iv. Dr. Nerry Otieno Omolo do pay the Medical Practitioners and Dentists Board the sum of Kenya Shillings One Hundred and Fifty Thousand (Kshs.150,000/=) within a period of thirty (30) days from the date hereof as part costs of the Committee's sitting”

It was the Respondent's case that the article published by the 1st Appellant was defamatory. That on the material day he received phone calls from various colleagues, clients and friends who were concerned and alarmed by its contents. He contended that the article disparaged his character and standing not only as a doctor but also as a Christian, husband and father. He was particularly irked by the article's assertion that he was a quack given that he had trained intensively for ten years and painstakingly built his career spanning 23 years. He also contended that he had to regularly clarify issues regarding the article and that people seeking medical attention were discouraged from seeking medical attention from him. His plea to the 1st Appellant to retract the article and to publish an apology went unheeded and he therefore sued them.

On their part the Appellants pleaded justification and privilege which the trial magistrate found they did not prove and found them liable.

As the first appellate Court, in addition to considering the submissions by both sides, I have reconsidered and evaluated the evidence in the lower court so as to arrive at my own findings.

The impugned article which was contained at page 18 of the Standard Newspaper of Tuesday March 11, 2014 a copy of which was produced in the lower court is headed -

“Doctor Sacked over negligence”

It then has a sub-heading

“The Medical Practitioners and Dentists Board also fined Dr. Nerry Omollo 150,000”.

The first paragraph of the article then continues -

“A doctor at Aga Khan Hospital in Kisumu County was sacked and fined Sh.150,000 for alleged negligence, leading to the death of a patient.

The Medical Practitioners and Dentists Board also fined the hospital Shs.250,000/= for allowing a “quack” to practice in the institution.”

Clearly this article was published of and concerning the Respondent. Juxtaposed with the findings of the Committee and its subsequent orders the headline, sub-heading and body of the article more so the first paragraph were false and distorted. The Respondent was admonished which means he was reprimanded but not sacked. The 150,000/= the article refers to as a fine was in fact costs for the Committee's sitting. The 250,000/= the Hospital was ordered to pay was not a fine for allowing a quack to practice in the institution but was part costs of the Committee's meeting. Moreover the Respondent was not a quack as alleged by the article but a duly qualified gynaecologist and Obstetrician as evidenced by his academic and professional certificates and licence. Like the trial magistrate it is my finding that the article in so far as it alleged that the respondent was sacked, that he was fined and by giving the impression that he was unqualified to practice medicine, it was defamatory. I do not agree with Mr. Nyamorongi's submission that the fact that “the article was generally true in substance” overshadowed the defamatory headline, sub-heading and opening paragraph. The appellant made certain that the headline and sub-heading were bold and catchy and whoever did not bother to read the rest of the article must have believed in them.

Despite being notified of the inaccuracy of the article by Ms. Amondi & Company Advocates letter dated 12th March 2014 the 1st Appellant did not retract or publish an apology. Instead they pleaded justification and privilege. This when they referred to the Respondent as a “quack”. The publishing of this article was clearly malicious and the words complained of – sacked, fined, quack, clearly referred to the respondent and not to the other professionals evaluated by the Committee, as Counsel for the

Appellants asserts. The words in their natural meaning are defamatory and I do not agree that the respondent “nit picked” them out of their context. The Committee did not stop the Respondent from practising either at the Aga Khan Hospital or any other hospital and neither did it question his qualifications as a doctor. The words “sacked, fined and quack” were those of the appellants. Article 32 of the Constitution guarantees every person freedom of conscience, religion, belief and opinion and Article 33 the right to freedom of expression. The same do not advocate for defamation of others. Indeed Article 33(3) provides that “in exercise of the right to freedom of expression every person shall respect the rights and reputation of others”. The submission by Mr. Nyamorongi that Article 32 (or is it 33) affords his clients protection is therefore incorrect. Accordingly I find that the trial magistrate did not act on a wrong principle in finding the appellants liable.

On the award for damages, Mr. Nyamorongi submitted that the same was manifestly excessive as the trial magistrate did not take into account firstly, the guidelines set out in **Miguna Miguna V. The Standard Group Limited & 4 Others [2016]eKLR**, secondly the fact that the respondent was found guilty of professional negligence, thirdly the effect of the rest of the article which correctly set out the respondent's conduct which in any case potentially damages the Respondent's reputation as a medical doctor notwithstanding the erroneous use of the word sacked; fourthly that the publication was a one off publication, fifth that the respondent himself admitted his own failings as a professional to the Committee, sixth that the findings of the Committee were never set aside and was in the public domain, seventh that the profile of the personalities involved in the authorities relied upon by the trial magistrate were bigger than that of the respondent and lastly that the trial magistrate did not consider the appellants authorities. Mr. Nyamorongi submitted that normal award of Kshs.200,000/= would have sufficed. In her judgment the trial magistrate stated that she had considered the authorities cited by both the Respondent and appellants and came to the conclusion that an award of 5,000,000/= would adequately compensate the Respondent. It is therefore not correct to say that she only considered those of the Respondent.

It is a well settled principle that “an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate based on some wrong principle or on a misapprehension of the evidence” - see

Shabani V. City Council of Nairobi [1985] KLR 516, Kigaragavi V. Aya [1985] KLR

273. The trial magistrate, though not expressly, properly applied her mind to the facts and the law. She found that the standard of proof was whether reasonable people who knew the Respondent would be led to the conclusion that the article referred to him. She found that it did and that it portrayed him as unprofessional (quack) a fraudulent doctor and a charlatan who did not have the basic skills to practice. She also took into consideration that the defence of justification and privilege were not established as the Appellants distorted the facts which were within their knowledge. She also made a finding that the article was actuated by malice. I do not agree that the profile of the Respondent, a gynaecologist and Obstetrician of twenty three years standing, is so low that it could not attract the sum awarded. Indeed I do not find that the award was inordinately high as to represent an entirely erroneous estimate or that the same was based on some wrong principle or on a misapprehension of the evidence. The appeal has no merit and it is dismissed with costs to the Respondent.

Signed, dated and delivered at Kisumu this 25th day of May 2017

E. N. MAINA

JUDGE

In the presence of:-

N/A for the Appellants

N/A for the Respondent

