



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW
COURTS) Civil Appeal 23 of 2007
LIVINGSTONE MAINA OMBETE
T/A L.M. OMBETE & COMPANY ADVOCATE.....APPELLANT

VERSUS

ROYAL MEDIA SERVICES LTD
T/A RADIO CITIZEN.....RESPONDENT

(Being an appeal from the judgment of the Ag.Chief Magistrate Hon. C.W. Meoli (Mrs) delivered on the 4th December, 2006, in Milimani CMCC No.3671 of 2005)

J U D G M E N T

1. This appeal arises from a suit which was filed in the Chief Magistrate's Court at Nairobi by Livingstone Maina Ombete t/a L.M. Ombete & Company Advocates (hereinafter referred to as the appellant). He had sued Royal Media Services Limited t/a Radio Citizen (hereinafter referred to as the respondent). The appellant contended that on 22nd November, 2004, the respondent through its popular radio station known as "Radio Citizen" published words about the appellant which in their ordinary meaning, analogy, connotation and innuendo, were defamatory of the appellant. The appellant claimed that as a result of the publication of the alleged defamatory words, the appellant suffered ridicule, public embarrassment and his image and reputation was lowered.

2. The appellant alleged that as a result of the publication, many of his clients and prospective clients treated him with a lot of suspicion. Notwithstanding demand, the respondent failed or refused to offer any apology to the appellant. The appellant therefore prayed for general damages for defamation and exemplary damages on account of malice and perpetuation of the defamation. Despite being duly served with summons to enter appearance the respondent neither entered appearance nor filed a defence. Consequently, interlocutory judgment was entered in favour of the appellant and the matter proceeded to formal proof.

3. During the hearing before an Ag. Chief Magistrate, 3 witnesses testified in support of the appellant's case. These were, Onyancha Bwomote who is an advocate, Daniel Francis Okalo a businessman and the appellant. Briefly their evidence was that on the morning of 22nd November, 2004, Citizen Radio announced in its 6.50 a.m. Kiswahili radio programme, entitled "Wembe wa Citizen" that the appellant, an advocate of the High Court had failed to remit payment to his client called Mburu Njuguna. The radio programme was broadcast nationally. Mr. Onyancha Bwomote, and the appellant's secretary amongst others informed the appellant of having heard the programme. The appellant tuned in to the evening repeat programme of "Wembe wa Citizen" and he heard the same report being aired about himself.

4. The appellant explained that he had a client called Njuguna Mburu who was a minor. The appellant filed a suit on behalf of the minor, through his father and next friend, Mburu Kibe in the year 1984. Initially the client lost the suit. The appellant however, successfully lodged an appeal and the client was awarded money which the appellant accounted for in the year 1998. The client's father lodged a complaint with the Advocates Complaints

Commission, but the Commission absolved the advocate of any wrongdoing. The appellant testified that as a result of the publication in the radio citizen, his credibility was lowered in the eyes of his people, as well as professional colleagues. The appellant wrote a letter to the respondent demanding an apology and threatening to sue. The respondent neither offered any apology nor responded to the letter of demand.

5. In her judgment, the trial magistrate found that the respondent aired offensive slanderous material concerning the appellant in its radio broadcast and refused to respond to the appellant's letter of demand. The trial magistrate noted further that the appellant was an advocate of long standing, and that the defamation went to the heart of the appellant's profession portraying him as unworthy of his client's trust. The trial magistrate also found that Citizen Radio has a wide reach in Kenya, and that the offending words were aired during peak hours. The trial magistrate noted that unlike libel, the publication by the respondent was not in a permanent medium such as a newspaper article. She distinguished the authorities cited by the appellant's counsel as involving publication in a book, which was libel actionable *per se*.

6. The trial magistrate further found that although the appellant had demonstrated that he suffered hurt feelings as a result of the alleged defamatory words, the appellant did not come out clearly about being shunned by professional colleagues and friends, or loss suffered in his business. The trial magistrate therefore ruled that the appellant only qualified for award of nominal damages. Accordingly, the trial magistrate awarded the appellant a sum of Kshs.50,000/= as general damages.

7. Being aggrieved by that award, the appellant has lodged this appeal citing 4 grounds as follows:

- (i) The learned magistrate erred in law and in fact in arriving at a judgment against the weight of evidence.
- (ii) The learned magistrate erred in law and in fact in awarding the appellant a total sum of Kshs.50,000/= in general damages for the respondent's proved act of gross and malicious defamation of the appellant.
- (iii) The learned magistrate erred in law and in fact by failing to consider cardinal principles considered when making an award in a defamatory matter, of the nature before court.
- (iv) The learned magistrate, erred in law and in fact, in making an award, which cannot adequately compensate the appellant for the damage to his reputation, vindicate his good name and profession, and further take account of the distress, hurt and humiliation suffered.

10. Following an agreement between the parties, written submissions were duly exchanged and filed. For the appellant it was submitted that the award of Kshs.50,000/= was grossly low and unfair to the appellant. The court was urged to intervene as the award materially failed to accord the appellant reasonable compensation, for the gross and malicious defamation.

11. Referring to the evidence adduced before the trial magistrate, it was submitted that the evidence confirmed a reckless and calculated effort by a broadcaster to defame and destroy the appellant's career. It was submitted that the trial magistrate erred in failing to appreciate that the respondent was malicious and unremorseful and therefore damages and exemplary damages were in order, and that the sum of Kshs.50,000/= awarded was completely inadequate. The court was urged to consider the authorities which were tendered to the trial magistrate and award a sum of Kshs.3 million.

12. For the respondent, it was submitted that the appellate court must not substitute its own opinion as to what it would have awarded, and that the court should only disturb the award if it was either inordinately high or low as to represent an entirely erroneous estimate, or established that the trial court proceeded on wrong principles or misapprehended the evidence in some material respect. It was submitted that in this case, the trial magistrate did not commit any error of principle to warrant interference in her award of damages.

13. It was maintained that the trial magistrate considered the issue of the appellant's status as an advocate of the High Court of many years standing. It was further contended that the trial magistrate also took into account other

important factors such as whether the respondent was motivated by prospects of making profit in the broadcast and the necessity for proof of damages in the case of slander. The court was urged to find that the trial magistrate properly appraised the evidence and applied the correct principles and the law and therefore the award of damages was sound and cannot be faulted.

14. I have carefully reconsidered and evaluated all the evidence which was adduced before the trial magistrate. I have also considered the submissions and the authorities cited before the trial magistrate and before me. I do note that the respondent failed to file any defence to the appellant's case. As a result interlocutory judgment was entered in favour of the appellant and the suit proceeded by way of formal proof. Thus, the issue of the respondent having made and published the defamatory statement was not in issue. What was before the trial court during the formal proof was simply the question as to whether the appellant was entitled to general and aggravated damages and if so, the assessment of the quantum thereof. Indeed, the appellant's appeal is against the assessment of damages.

15. In addressing this issue, the holding in the case of **Butler vs Butler [1984] KLR 225**, is instructive. In that case, the Court of Appeal dealing with an appeal from the High Court against an award of damages held that:

“The assessment of damages is more like an exercise of discretion by the trial judge and an appellate court should be slow to reverse the trial judge unless he has either acted on wrong principles or awarded so excessive or so little damages that no reasonable court would; or he has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered and, in the result, arrived at a wrong decision.”

16. The above principles were applied in **Kenfro Africa Ltd t/a Meru Express Services (1976) and another vs Lubia and another (2) [1987] KLR 30** where it was held as follows:

“The principal 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 that it must be satisfied that either that 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 damages.”

17. With the above principles in mind, I have considered the judgment of the trial magistrate wherein she states in part as follows:

“In this case the defendant severally aired offensive slanderous material against the plaintiff, refused to respond to his demand letters. They did not even contest the suit. The plaintiff is an advocate of long standing. The defamation goes to the heart of his profession portraying him as unworthy of his client's trust. This is injurious to him as a person and as a professional. The radio has a wide reach in Kenya and the offending broadcast was aired during peak hours. Unlike libel however the publication was not in a permanent medium such as say a written newspaper article.....And libel is actionable per se. In our present case, the onus is on the plaintiff to prove his suffering and loss due to the defendant's actions. Has he for example been shunned by his professional colleagues and friends? Has he lost potential or other clients due to the radio broadcast? How has his business been affected?”

18. It is apparent from the above extract of the judgment, that the trial magistrate held that the publication by the respondent of the defamatory words was not in permanent form. This was a misdirection as Section 8(1) of the Defamation Act Cap 36 of the Laws of Kenya, provides as follows:

“For the purposes of libel and slander, the publication of words by wireless broadcasting shall be treated as publication in a permanent form.”

Thus, in this case, the publication of the defamatory words by the respondent, having been made through the radio, the publication was in a permanent form. The effect of this, is that the slander was actionable *per se*.

19. Secondly, the trial magistrate rightly found that the words aired by the respondent were injurious to the appellant in his profession as they portrayed him as unworthy of his client's trust. In this regard, Section 3 of the defamation Act Cap 36, states as follows:

“In any action for slander in respect of words calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of the publication, it shall not be necessary to allege or prove special damage, whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business.”

The words aired by the appellant having been calculated to disparage the appellant in his profession, it was not necessary for the appellant to allege or prove special damages.

20. Therefore, the trial magistrate in her judgment misdirected herself by requiring the appellant to establish damage caused to him by the publication of the defamatory statement. This error affected the exercise of the trial magistrate’s discretion in assessing the quantum of damages leading the trial magistrate to wrongly conclude that the appellant could only qualify for nominal damages which she assessed at Kshs.50,000/=. The trial magistrate wrongly exercised her discretion in assessing the damages as she applied the wrong principles. As a result, she awarded damages which were inordinately low and did not meet the justice of the case. This is an appropriate case where the intervention of this court is necessary.

21. I find that this case is akin to ***HCCC No.368 of 2001 John Joseph Kamotho & 3 others vs Nation Media Group Ltd and 2 others***, where Ojwang J. awarded amounts ranging between Kshs.6 million and Kshs.1 million to the respective plaintiffs as general damages for defamatory statements broadcasted by the “Nation Radio” and “Nation TV” owned by the defendant. The case is also similar to ***Musinga T/A Musinga & Company Advocates vs Nation Newspapers Ltd [2005] 1 KLR 587***, in which Khaminwa J. awarded the plaintiff a sum of Kshs.10 Million for defamatory publication portraying the plaintiff as a dishonest and untrustworthy lawyer, who could keep an accident victim’s money from his client.

22. The appellant having filed his suit in the Chief Magistrate’s Court, the damages to be awarded to him could not exceed the jurisdiction of the trial magistrate. Indeed, the appellant’s counsel urged both the trial court and this court to award the appellant general damages of Kshs.3 million. This did not take into account the fact that the appellant’s claim was for general and exemplary damages. In awarding damages, the trial magistrate ought to have been guided by the above High Court decisions which though not cited before her, were available through the National Council for Law Reporting Website or Bench Research.

23. I find that had the trial magistrate properly directed herself and applied the correct principles, she would have found that a sum of Kshs.2 million would have been appropriate compensation to the appellant for the injury and embarrassment caused to him. Further, the respondent did not bother to apologize to the appellant nor did the respondent bother to attend the lower court to explain its action. Therefore, the appellant’s contention that the publication was malicious was not challenged. The conclusion to be drawn from the respondent’s conduct is that the respondent was not concerned about its action, the truth of the statements made, or how it affected the appellant. This would have been an appropriate case for awarding exemplary damages. Nevertheless, the appellant did not appeal against the trial magistrate’s failure to award exemplary damages and therefore I have no reason to award any.

24. The upshot of the above, is that I allow this appeal to the extent of setting aside the award of general damages made by the trial magistrate, and substituting thereof an award in favour of the appellant as against the respondent in the sum of Kshs.2 million together with costs and interest thereon from the date of the judgment of the lower court. I award the appellant costs of this appeal. Those shall be the orders of this court.

Dated and delivered this 26th day of April, 2010

H. M. OKWENGU
JUDGE

In the presence of: -

Nyaitho H/B for Namada for the appellant

Gacheru for the respondent

Eric - Court clerk