



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Appeal 34 of 2003

D A O APPELLANT

VERSUS

NATION NEWSPAPERS RESPONDENT

JUDGMENT

“WHY CROOKS USE WOMEN TO TRAFFICK DRUGS”, was the main topic in the lifestyle magazine of the Sunday Nation’s edition of 30/8/1998. It featured instances of certain persons who had been apprehended in several countries for trafficking drugs and other related offences. Part of the article read as follows:

“In 1995, six Kenyans studying in India were arrested in Sweden for swallowing heroin pellets wrapped in condoms and then entering Sweden. The drugs were worth US\$1.5 Million (about Kshs.90 Million) of the six, two were women – DAO”

O who felt that the words which referred to her were malicious and libelous moved to court, and instituted her suit against Nation Newspapers Limited (hereinafter referred to as ‘Nation’). She prayed for general damages for libel, exemplary damages as well as costs and interest thereon.

After a full trial the learned trial Magistrate found that the defence of qualified privilege by Nation could not be sustained and that in the circumstances the publication was libelous. He also found that Nation had been activated by malice at the material time, and it could not therefore plead justification. He found in O's favour and awarded her K.Shs.350,000/= as general damages for defamation, K.Shs.50,000/= as exemplary damages, and costs and interests.

Nation which feels aggrieved by the said award has now preferred this appeal which it bases on the grounds that:

1. *THAT the learned Magistrate erred in law and fact in finding that the words complained of were defamatory of the plaintiff.*
2. *THAT the learned Magistrate erred in law in dismissing the defences of justification and qualified privilege when there was sufficient evidence to support and sustain the appellants defences of justification and qualified privilege.*
3. *THAT the learned Magistrate erred in law and in fact by awarding damages which were in the circumstances excessive.*

4. *THAT the learned Magistrate erred in awarding exemplary damages.*”

O who was not satisfied with the quantum in the award has preferred a cross appeal which is based on the following grounds:

- “1. *THAT the learned trial Magistrate erred in law and fact in awarding damages that were too low as to amount to an erroneous estimate of the loss actually suffered by the Respondent.*
2. *THAT the learned trial Magistrate erred in awarding compensatory damages of K.shs.350,000/= and exemplary damages of K.Shs.50,000/= when the minimum amount of damages exclusive of exemplary damages ought to be K.Shs.400,000/= under Section 16A of the Defamation Act, Cap.36 Laws of Kenya.*
3. *The learned trial Magistrate erred in law and fact in failing to award punitive damages to the Respondent.*”

As is expected of me, I have had to re-evaluate the evidence on record with a view to establishing whether O , whom I shall now refer to as ‘the respondent’, was able to prove her case to the expected standard in civil cases, it being a requirement that the claimant must prove her case on a balance of probability.

O’s evidence was that the Swedish police had found her in possession of a box containing drugs; that the box had been given to her for safe-keeping by a house mate, following which she was charged with the offence in 1995, but that she was however acquitted as it was not established beyond doubt that she had knowledge of what the said box contained. Her boyfriend was however convicted of drug related offences.

Nation maintained that the words complained of in their natural and ordinary meaning were true in substance and fact, and that though she had been charged for the related offence, she had however been acquitted. It therefore pleaded qualified privilege, and further that it was a fair comment on a matter of local and international public interest.

The journalist who had presented the article for publication was the only witness for Nation. He testified how he was assigned with the duty of writing a feature on Kenyan women who were involved in drug peddling and how he liaised with to Interpol, the Swedish Embassy and later to the Swedish Courts to who he had been referred by the local Narcotics Department. He also testified how he thereafter confirmed the correctness of the story with major news agencies as well as with Reuters. Though he never met the respondent and could not therefore have verified the facts from her, he however maintained that the article only made reference to the arrest and that it did not mention any convictions.

I am well minded of the legal position that subject to the provisions of this section 7(1) of Defamation Act Cap 36 of the Laws of Kenya, *“the publication in a newspaper of any such report or other matter as is mentioned in the Schedule to this Act shall be privileged unless such publication is proved to be made with malice.”*

Perhaps that would explain the requirement for compliance in matters of this nature as captured in Order VI rule 6 A (3) of Civil Procedure Rules which stipulates that *“where in an action for libel or slander the plaintiff alleges that the defendant maliciously published the words or matters complained of, he need not in his pleadings give particulars of the facts on which he relies in support of the allegation of malice; but if the defendant pleads that any of those words or matters are fair comment on a matter of public interest or were published upon a privileged occasion and the plaintiff intends to allege that the defendant was actuated by express malice, he shall file a reply giving particulars of the facts and matters from which the malice is to be inferred.”*

It is clear from the pleadings, that Nation denied that it had acted maliciously, and pleaded that the matter was of public interest and that the article was published under a privileged occasion. In my opinion, that denial and plea of privilege amounted to a rebuttal to the presumption of malice and the onus to prove the

express malice on the part of Nation was at that point shifted to the respondent, and it was therefore incumbent upon her to give the particulars of the alleged malice which as I have stated earlier converted to express malice upon rebuttal in her reply to the defence, a requirement which is also embodied in law, but she did not, which means that she failed to comply with the mandatory provisions of the above mentioned rules of procedure. I am of the humble opinion that had the learned trial Magistrate taken note of these omissions into account, the only logical conclusion would have been that the respondent had not shown any basis for her claim and that therefore she had no case against Nation.

In any event, there was no doubt the issue of malice could not have been sustained as the respondent confirmed that she had undergone trial in Sweden for the said charges. Needless to say, save for reporting that the respondent and others *'were arrested in Sweden for swallowing heroin pellets wrapped in condoms and then entering Sweden'* the article did not make any mention of convictions or even sentencing. DW 1 believed that the story was true and it would appear to me that the major portion of the article was true, save that the issue of her acquittal had been omitted. Was the omission negligent or was it malicious to negate the plea of privilege? I find that the malice was not proven as in any event it had not been pleaded as required. However as stated earlier, the article made no reference to convictions, and in the circumstances, the defences of qualified privilege and justification were readily available to Nation, and furthermore no element of negligence, or malice could be inferred against the nation at all, more so because DW1 evidence would tend to support the fact that he had carried out investigations, and he believed that what he presented for publication was correct.

The respondent prays for exemplary damages in her cross appeal, it is important to note that *"exemplary damages are rarely awarded, and the court will only make an award under this heading only where it can be shown that the defendant has published a scurrilous and defamatory statement, either knowing it to be untrue or quite reckless whether it is true or not, and with full knowledge that it is going to hurt somebody, but he publishes that statement after a cold and cynical calculation of profit and loss. If a man who is possessed of material which would be defamatory if published, and who does not really believe it to be true at all, decides to publish it simply because he can make a profit from publishing it and because he reckons any damages he might have to pay would be so small that it would be well worth it, then that man, and that is only the man, against whom an award of exemplary damages can be made* The only cases (and they must be exceptional) in which exemplary or punitive damages are permissible are as above" (Manson vs. Associated Newspapers as per Widgery, J.). The court also considered the issue further and added that the issue for consideration in such circumstances, would be whether *"it is an example of a cold, calculated publication with a view to profit, and in utter disregard of the feelings of the person referred to, ... or was it an occasional occurrence or was it an act of deliberate policy"*. Based on the evidence on record I form the opinion that the respondent failed to establish that Nation acted in a reckless manner or that the sole purpose was to gain profit at her expense, and on that account, her claim for exemplary or even punitive damages could not lie.

Based on the above I do allow this appeal and dismiss the cross appeal with costs to the appellant.

The judgment of the subordinate court is hereby set aside, and her suit against Nation is dismissed with costs.

Dated and delivered at Eldoret this 17th day of March 2006

JEANNE GACHECHE

JUDGE

Delivered in the presence of:

Mr. Kuloba for the respondent

Miss Konuche holding brief for Mr. Imende for the appellant