REPUBLIC OF KENYA

IN THE HIGH COURT AT KENYA

AT NAIROBI

CIVIL APPEAL NO 772 OF 2001

THE STANDARD LIMITED …….……..……. APPELLANT

VERSUS

SCHOLASTICA OMONDI ……..…… 1ST RESPONDENT

JERRY OMONDI (Suing through his mother and next friend

SCHOLASTICA OMONDI) …….…….. 2ND RESPONDENT

JUDGMENT

The Respondents filed this claim in the lower court seeking Judgment for "general, punitive and aggravated damages for libelous innuendo" and costs of the suit. The basis of their claim, which was admitted by the Appellant, was publication of a certain photograph in the Appellant's newspaper known as the East African Standard. That photograph was first published on January 17, 2000. It was one of the 2nd Respondent, who is a son of the 1st Respondent, with his uncle with a caption as follows:

> ***"THRILLS: Swings are a source of great excitement for children as play thing. But they can be dangerous if not used properly".***

There was no serious complaint about this picture. The same photograph was published again on February 15, 2000 in a different context. This is the picture upon which the present claim was substantially premised. That photograph had a caption which read as follows:

> ***"FUN: Children enjoy the company of both parents. Break-ups leave them completely devastated".***

That photograph was published on one of the pages of the Appellant's newspaper which carried a special and exclusive feature on the effects of divorce titled "The Pain of Divorce."

The Respondents pleaded at paragraph 8 of their Plaint that the second publication of the photograph aforementioned "depicted, implied and was understood to imply, meant and was understood to mean:-"

1. That the 1st Respondent was a divorcee or undergoing painful divorce process

2. That the 1st Respondent was separated from her son Jerry Omondi (the 2nd Respondent)

3. That the 1st Respondent had been denied custody of her son and was guilty of child neglect

4. That the 1st Respondent (who was a Judicial Officer in the Juvenile Court) was not fit to preside over the Juvenile Court

5. That the 1st Respondent was incapable of sustaining marriage

6. That the 1st Respondent had cheated on her marital status and was a liar that all was well with her marriage

7. That the 1st Respondent had broken her marriage vows

8. That the 2nd Respondent was a victim of painful divorce

9. That the 2nd Respondent's parents were separated

10. That the 2nd Respondent's parents were masquerading as living happily

11. That the 2nd Respondent did not enjoy the company of both parents

12. That the 2nd Respondent had been deserted and/or neglected by his mother

13. That the 2nd Respondent was not the son of his father but of the Uncle he was photographed with

14. That the 2nd Respondent was stressed as a result of painful divorce.

At the trial in the lower court, the Appellant did not call any witness to controvert the Respondent's claim. In her testimony in the lower court, the 1st Respondent who was PW 1 said she was not consulted before the pictures complained of were published. She only learned of their existence from colleagues, relatives and friends. One of her son's teachers called her to inquire about the matter. After publication of the second picture, her son was distressed and became indifferent to school which caused his performance to drop. He became violent and fought with his school mates. The 1st Respondent was forced to go to the school on three occasions to discuss the 2nd Respondent's conduct. She said that the 2nd picture impacted negatively on her role as an officer of the Juvenile Court. This was reiterated by PW 2 who was the 1st Respondent's husband and the father of the 2nd Respondent.

At the conclusion of the trial, the lower court found for the 1st Respondent and awarded her general damages for Kshs.480,000/= but rejected the 2nd Respondent's claim. There was no cross-appeal by the 2nd Respondent from the refusal of his claim.

The Appellant was aggrieved by the decision of the lower court and appealed to this court. The appeal is based on two grounds set out in its Memorandum of Appeal, namely:

> "***1. THAT the Learned Magistrate erred in law in making a finding of liability for defamation by innuendo when extrinsic facts on circumstances had not been specifically pleaded by the Plaintiff (1 st Respondent)***
>
> ***2. THAT the Learned Magistrate erred in law and in fact in awarding damages which were excessive in t he circumstances of the case."***

At the hearing of the appeal, Mr Majanja, for the Appellant, argued that no innuendo had been pleaded as the Plaint "did not set facts to plead innuendo". For this proposition, he referred me to paragraph 26.22 of Gately on Libel and Slander at page 662 which states as follows:

"PLEADING TRUE OR LEGAL INNUENDOES. Where the Plaintiff relies on a legal innuendo

meaning, he must plead particulars of facts and matters on which he relies in support of such sense. These facts or matters will generally incorporate either a special definition of the words known only to a limited class of persons or facts extrinsic to the libel which, if known about, affect the way words complained of are understood. In either case, the Plaintiff m ust identify the person or persons to whom the words where (sic) published and who are alleged to have had knowledge of the special meaning or the extrinsic facts. In default of compliance with the requirements for pleading legal innuendo meanings, the pleaded meaning may be struck out."

My view is that the requirement to plead particulars of innuendo was, as properly pointed out by Mr Weda for the 1st Respondents, fulfilled by the statements in paragraphs 8 and 9 of the Plaint. I have already set out the particulars given in paragraph 8 earlier. In paragraph 9 of the same Plaint further details are outlined showing that the picture complained of would depict the 1st Respondent in bad light. However, even if I am not right in this view, I do not think that the default raised by Mr Majanja would have disentitled the lower court from entering Judgment in favour of the 1st Respondent as it did. I say this because the same authority cited by Mr Majanja confirms that in borderline cases where it is unclear whether the words complained of constitute an innuendo or are defamatory in their ordinary or natural meaning (even where this has to be ascertained), the Plaintiff may plead his case in the alternative. This is what the Respondents did. The beginning of paragraph 8 of the Plaint is clear in this respect. It said that "In its natural ordinary and innuendo meaning …" This was clearly recognized by the lower court in deciding the case in favour of the 1st Respondent. The Court did not base its decision on innuendo only but was also of the view that the pictures complained "taken in their ordinary meaning must have portrayed the 1st Plaintiff in extremely poor light."

Mr Majanja also submitted that the pictures were not defamatory as they did not disclose the identity of the 2nd Respondent. This is ludicrous. It is quite obvious that the people who knew the 2nd Respondent would recognise him as the son of the 1st Respondent. The picture complained of was published in the middle of an article discussing divorce and the caption on the page and below the picture suggested that the 2nd Respondent's parents had broken up. I, therefore, uphold the lower court's finding on liability.

On the question of damages, Mr Majanja argued that the award of the lower court was excessive and referred the court to the written submissions made on behalf of his client in the lower court. In those submissions, the Appellant urged the court to award Kshs.100,000/= to each of the Respondents. In the written submissions, the Appellant's Advocates referred to the lower court to two decisions where the Court of Appeal reduced the awards made by this court. The first case was that of ***The Nation Newspapers Limited vs Lydia Chesire (1984) 2 KAR*** where the Court of Appeal reduced an award of Kshs.15,000/= and awarded nominal damages of Kshs.1,000/= arguing that the matter complained of was not far fetched and did not have serious effect on the Respondent's reputation. In another decision, ***East African Standard vs Gitau (1970) E A 678*** , the Court of Appeal similarly reduced an award of this court on the ground that the extent of the defamation was slight as the matter complained of was only known to persons with special knowledge. It also held that because the Appellant had offered to apologise, the lower court was not entitled to award the damages that it did.

I have carefully considered the Appellant's submissions on quantum and I agree with Mr Majanja that the award was odd. Although the matters complained of could cause distress to the 1st Respondent, it was not anything that could be extreme to attract a heavy award. It is only those people who knew the 2nd Respondent and also knew that he was the son of the 1st Appellant who would have been affected or concerned with the matter complained of. I take the Appellant's desire to correct the wrong impression by its willingness to issue an apology as a good gesture and which should have gone a long way to mitigate the damage. It should also be pointed out that the Respondents' Advocate had urged the lower court to award both Respondent's Kshs.500,000/= for the damage suffered by them. I believe that was on the presumption that the award would be shared between the two Respondents. However, I am satisfied that the award was excessive. I am of the view that an award of Kshs.200,000/= would adequately compensate the 1st Respondent for the damage to her reputation. I, therefore, substitute the award of Kshs.480,000/= made to the Appellant with an award of Kshs.200,000/=.

In the circumstances, the appeal succeeds in part only reducing the award of damages from

Kshs.480,000/= to Kshs.200,000/= with an order that each party shall bear its/her own costs of the appeal. I see no reason to interfere with the order for costs of the lower court.

Dated and delivered at Nairobi this 26th day of April, 2004.

ALNASHIR VISRAM

JUDGE