King'ori v Royal Media Services (Civil Appeal E037 of 2022)
[2024] KEHC 5994 (KLR) (8 May 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E037 OF 2022

DKN MAGARE, J

MAY 8, 2024

BETWEEN

CHARLES KING'ORI ..... APPELLANT

AND

ROYAL MEDIA SERVICES ..... RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment and Decree of Hon. M. Okuche– Principal Magistrate dated 24/6/2021 arising from Nyeri CMCC No. 273 of 2021. The Appellant, who is an advocate of this court, was the Plaintiff in the lower court.

2. The matter proceeded for hearing. Upon hearing all parties the learned magistrate made the impugned his Judgement dismissing the suit for lack of merit. Appellant lodged a Memorandum of Appeal from the said decision and set out the following grounds: -

    a. The Learned Magistrate erred in law and fact in delivering a judgement that was against the weight of evidence.

    a. The Learned Magistrate erred in law and fact in failing to find that the publication was admitted in the course of the proceedings

    b. The Learned Magistrate erred in law and fact in misapprehending the principles applicable to internet publication

    c. The Learned Magistrate erred in law and fact in applying wrong principles of law on damages for defamation

    d. The Learned Magistrate erred in law and fact in rendering judgement per incuriam

Pleadings

3. In the Plaint dated 6th September 2021, the Plaintiff pleaded that on 9th March 2021, the Defendant broadcasted at 9 pm on its television network news program as follows: Wanderi fell from the top of the building they were constructing and as a result he became disabled but he could not get justice. Wanderi is neither the Appellant nor the respondent.

4. It was pleaded that the publication was in Kikuyu language and was uploaded on you tube and continuously maintained thereon. It was also stated that the publication was meant to and defamed the Plaintiff as it imputed to the right-thinking members of the society that:

> " The Plaintiff as advocate instructed by Wanderi failed to offer adequate legal services:
>
> a. Acted with recklessness and incompetence
>
> b. Is cunning, fraudulent and callous
>
> c. Has raised suffering to the client
>
> d. Was paid but eaten compensation
>
> e. Is not fit to act as advocate
>
> f. Is a person of low morals and ethics
>
> g. The Plaintiff was depicted negatively in the eyes of potential clients
>
> h. The effect of the statements was to cause gross actual bodily and psychological harm and injury or death to the Appellant.

5. The Respondent entered appearance and filed Defence denying the particulars of defamation as pleaded in the Plaint. It was averred that a fair comment on a matter in the public interest.

Evidence

6. PW1, was one Nickson Theuri Ndungu. He testified that he downloaded the audiovisual and video comments on 28th August 2021 and translated them in the English Language. He produced them in court.

7. In cross examination, it was his case that he had the certificate showing the translation.

8. PW2 was the Plaintiff. He adopted his witness statement and bundle of documents. He stated that he was an advocate of the High Court of Kenya. He produced the documents in his list of document as exhibits.

9. In cross examination, it was his case that the broadcast stated that he was still acting for Wanderi when he was not.

10. It was his case that he lost clients as a result of the publication. That he had an interview with the reporters prior to the publication and he gave them the correct position but they reported falsehoods about him.

11. It was also his case that he had received calls in and out of the country on the same publication and his associates had in fact left his employ after the publication.

12. PW3 was George Waremi Mugo. It was his case that he was an associate working with the Plaintiff. He relied on his witness statement. He stated that the clients in Kerugoya whose matters he handled refused to give the Plaintiff instructions after the publication.

13. The Respondent called DW1 Hellen Wanjugu Maina. She introduced herself as journalist. She adopted her witness statement. In cross examination, it was her case that the publication was still on you tube. That they did not see any reason to remove it as it was a balanced story with right reply.

Appellant's Submissions

14. The Appellant submitted that the publication was false since they did not represent Wanderi as alleged therein. That their legal representation had been outlawed by the Supreme Court in Law Society of Kenya v Attorney General & Others (2019) eKLR.

15. They relied on the case of Uhuru Muigai Kenyatta v National Media Group (unreported) to submit that a media house was responsible for defamatory comments posted on public sites.

16. It was also submitted that the publication was defamatory and portrayed the Appellant as having 'eaten' the client's money. He relied on relied on Royal Media Services v J.A Makau t/a Makau & Co. Advocates (2020) eKLR where the court stated as follow:

> The Respondent was an advocate of the High Court of Kenya whose reputation was his forte and which had been damage as a result of defamation.

17. It was submitted there was no justification for the malicious publication on the basis of fair comment and freedom of expression.

Respondent's submissions

18. The Respondent submitted that there was no publication. They relied on the case of Odero O Alfred v Royal Media Group Limited (2015) eKLR to submitted that that publication was necessary to found defamation claim.

19. They also submitted that the words were not defamatory. The said words were a fair comment on a matter in the interest of the public and was without malice. They relied on National Media Group & Another v Alfred Mutua (2017) eKLR.

20. It was their case that the court had a duty to balance defamation and right of the medial to impart information under Article 33 of *the Constitution*. They urged to dismiss the Appeal with costs.

Analysis

21. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a learned magistrate, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

22. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to

take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

23. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123, where the law looks in their usual gusto, held by as follows; -

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the learned magistrate's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

24. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the learned magistrate that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

25. In the case of Peters vs Sunday Post Limited [1958] EA 424, court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

26. The issue before me for determination is whether the court erred in dismissing the Appellant's claim for defamation. For such a claim to succeed, it must be meticulously pleaded. Order 2 rule 7 provides as follows: -

1. Where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of such sense.

2. Where in an action for libel or slander the defendant alleges that, in so far as the words complained of consist of statements of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, or pleads to the like effect, he shall give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true.

3. 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 plaint 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.

4. This rule shall apply in relation to a counterclaim for libel or slander as if the party making the counterclaim were the plaintiff and the party against whom it is made the defendant."

27. The rights protected under defamation laws are balanced against constitutional imperatives under Articles 33 of *the Constitution*. The said article provide as follows:-

> " 33.
>
> (1) Every person has the right to freedom of expression, which includes-
>
> (a) freedom to seek, receive or impart information or ideas;
>
> (b) freedom of artistic creativity; and (c) academic freedom and freedom of scientific research.
>
> (2) The right to freedom of expression does not extend to-
>
> (a) propaganda for war;
>
> (b) incitement to violence;
>
> (c) hate speech; or
>
> (d) advocacy of hatred that-
>
> (i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or
>
> (ii) is based on any ground of discrimination specified or contemplated in Article 27 (4).
>
> (3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.

28. On the other hand there is freedom and independence of electronic, print and all other types of media is guaranteed, article 34 of *the constitution* limits that freedom and does not extend to any expression specified in Article 33 (2).

29. The said provisions respectively deal with the fundamental right to the freedoms of expression, media and access to information. Consideration also is to be inevitably granted to Article 28 in respect of the inherent dignity of every person which dignity must be respected and protected.

30. On the right to access information and the freedom of expression, Lord Denning MR stated in Fraser v Evans &others (1969) All ER 6:

> " There are some things which are of such public concern that newspapers, the press and indeed everyone is entitled to make known the truth and to make their comment in it. This is an integral part of the right of speech and expression. It must not be whistled away."

Lord Coleridge, CJ in Bernard & another v Perriman (1891-4) ALL E.R 965had previously stated that:

> " the right of speech is one which it is for the public interest that individuals should possess, and indeed, that they should exercise without impediment, so long as no wrongful act is done; and unless an alleged libel is untrue there is no wrong committed."

31. As a corollary, the people have a right to know. Whatsoever, the media decides to let us know though their media houses and forums. As they do this care should be taken to avoid lack of objectivity. The media house should never be worried of the truth being misinterpret or court placing a burden far beyond the norm standards. News fight against currency, and as such speed and alacrity is crucial. Paranormal fears have no place in publication. Hence the mantra, publish and be damned. On occasions when media houses get it wrong, they must be prepared to repair reputations that they have shuttered. However, no man is entitled to have his reputation bloated to levels above the true self.

32. This then calls for inward assessment of value and place of services rendered and interpretation of services. A man's view of himself will always be unrealistically high while others cultivate images carefully. There is no objective way of knowing a man's reputation except the eyes of right thinking members of society. Sometimes people who have a false sense self-importance will sue to be paid for a name they don't have.

33. This then brings us to a rather convoluted question of demystifying what is defamation? It is convoluted sicne the ansewer will get us back to where we started. As succinctly put by this Court in S M W vs. Z W M [2015] eKLR:-

> " A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided."

34. The delicate balance was discussed in the case of as follows: -

54. In the decision of the Supreme Court of Appeal of South Africa in Hoho vs The State (493/05) [2008] ZASCA 98 (17 September 2008). The Appellant before the South African Supreme Court had been found guilty of criminal defamation for having 'compiled, produced and/or published' several leaflets during the period 2001 to 2002 in which he defamed various public officials. The Court was considering whether criminalization was consonant with the South African Constitution, which is very similar to the Kenyan Constitution. The Court found as follows –

> "But the freedom of expression is not unlimited. Although it is fundamental to our democratic society it is not a paramount value. It must be construed in the context of other values such as the value of human dignity.
>
> Human dignity is stated in s 1 of *the Constitution* to be a foundational value of our democratic state and s 10 of *the Constitution* provides:
>
> > 'Everyone has inherent dignity and the right to have their dignity respected and protected.'
>
> The value of human dignity in our Constitution . . . values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual' ie an individual's reputation. In regard to the importance of protecting an individual's

reputation Lord Nicholls of Birkenhead said in Reynolds v Times Newspapers Ltd [2001] 2 AC 127 at 201:

> 'Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged forever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed choice, the electorate needs to be able to identify the good as well as the bad.'

The law of defamation, both criminal and civil, is designed to protect the reputation of people. In doing so it clearly limits the right to freedom of expression. Such limitation can be consistent with *the Constitution* only if it can be said that 'an appropriate balance is struck between the protection of freedom of expression on the one hand, and the value of human dignity on the other'. In Khumalo that was held to be the case in so far as the civil remedy for defamation is concerned."

35. To be defamatory a statement must be false. If facts have to be stained to find out whether it is false, then it is not. Two things arise from the definition. Reputation being lowered and the statement being false, Windeyer J, Uren John Fair Fax & Sons Pty Ltd 117 CLC 115 at 115 brought this out as hereunder.

> " Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of society generally, or which tend to make them shun or avoid that person."

36. Can a person looking at the statement, find defamation. To be able to prove defamation, all elements must be addressed. Halsbury's Laws of England 4th Edition Vol. 28 defines a defamatory statement as:

> " A defamatory statement is a statement which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business."

37. The elements can be further elucidated as follows: -

    a. There has to be publication of information

    b. The person being defamed was identified by the statement.

    c. The statement had a negative impact on the person's reputation.

    d. The published information is demonstrably false.

    e. The defendant is at fault.

38. What was published. That Wanderi fell. This particular aspect is admitted by both sides. That was the basis for the Applicant agreeing to file suit. If it were false, it cannot be the appellant or defendant's fault.

39. The second aspect was that Wanderi did not get justice. All parties agree the said claimant did not get justice. From the claimant's perspective, he was injured, he blamed someone for the loss. This someone is the employer. He wanted to be paid but has not been paid to date. Who is to blame for all this. This is the story that was covered. On the record of the court in the primary case, the Appellant's client had not been paid. At no time did they insinuate that the Appellant misappropriated money.

40. What is this justice and who was to provide the same? I don't there is a sane Kenya, who could believe that the Appellant had or has ever had duty to provide justice to his client. He duty to provide justice, in absolute terms is codified under article 159 of *the constitution*. The same provides as follows: -

> " 159.
>
> (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.
>
> (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles-
>
> (a) justice shall be done to all, irrespective of status;
>
> (b) justice shall not be delayed;
>
> (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
>
> (d) justice shall be administered without undue regard to procedural technicalities; and
>
> (e) the purpose and principles of this Constitution shall be protected and promoted.
>
> (3) Traditional dispute resolution mechanisms shall not be used in a way that—
>
> (a) contravenes the Bill of Rights;
>
> (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or
>
> (c) is inconsistent with this Constitution or any written law.

41. Justice was placed squarely within the court. *The constitution* places the entire justice sector on the judiciary. A party who has been denied justice, will always blame this side of the divide. I cannot fathom, anyone consuming the publication and blaming the advocates. Even where case are not prosecuted,

court do not blame the Advocates alone. It is shared blame. See *Wambugu v Securicor Security (K) Ltd & another (Civil Appeal 61 of 2018*) [2024] KEHC 4717 (KLR) (2 May 2024) (Judgment).

42. In the case of Duale Mary Ann Gurre –Vs – Amina Mohamed Mahamood & Another [2014] eKLR, Hon Justice Mutungi held as follows: -

> " An advocate is the agent of the party who instructs him and such instructing client as the principal continues to have the obligation and the duty to ensure that the agent is executing the instructions given. In the case of litigation, the suit belongs to the client and the client has an obligation to do follow up with his Advocate to ensure the Advocate is carrying out the instructions as given. The litigation does not belong to the Advocate but to the client. If the Advocate commits a negligent act the client has an independent cause of action against the Advocate."

43. Joseph Lekodi Teleu v Jonathan Paapai & another [2022] eKLR, justice J N Onyango stated as follows: -

> 20. The Applicant ought to know that having been sued by the Respondent, it was his obligation to ensure that the suit filed against him was expeditiously prosecuted in court by making all necessary follow ups. He was not supposed to sit pretty and wait until an execution order is served upon him for him to rush to his Advocate's chambers for an interpretation of the same. In the case of Savings & Loan Limited –Vs- Susan Wanjiru Muritu Nairobi (Milimani) HCCC NO.397 OF 2002, the court stated thus: -
>
> > "Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former advocate's failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the Defendant to be prompted to action by the Plaintiff's determination to execute the decree issued in its favor, is an indictment of the Defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favor of such a litigant.

44. It follows that a publication that a justice was denied cannot be an impeachment of the Appellant. There was no distilled particulars and excerpts from the publication, in the plaint, as to the defamatory words. The words that were defamatory or tended to lower the reputation of the Appellant were not pleaded. What was pleaded did not refer to the Appellant and did not suggest that they refer to him by innuendo. A party cannot throw recordings to court for the court to read or listen and decipher what was defamatory.

45. The Appellant was under a sole duty to tell the court his reputation. A mere fact that one is an advocate does not mean that they have a reputation. No evidence was led on the reputation the Applicant had and how it was lowered. First the specific reference was not made about the Appellant in the suit. If it was by innuendo, then he should not be worried as he was not the advocate for the party. If it was in

the publication, the excerpts of defamatory words referring to the Appellant were not pleaded contrary to order 2 rule 7.

46. On a more altruistic note, is it that true that the Applicant was not o record for Wanderi? Order 9 rule 5 of the civil procedure Rules provides as follows: -

> A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.

47. I have not seen any notice of change of advocates or notice to act in person. it is my sincere hope that the Appellant knew about this provision, otherwise it says a lot about the reputation he is trying to protect. Hence, one of the facts that the Appellant flagrantly lied to court is that he was not the advocate In law *Society of Kenya v Attorney General & another (Petition 4 of 2019*) [2019] KESC 16 (KLR) (Civ) (3 December 2019) (Judgment), the supreme court did not at all outlaw anything. The court stated as hereunder. .

(i) Petition of Appeal No 4 of 2019 dated 1st February 2019 is hereby dismissed

(ii) For the avoidance of doubt the determination in Civil Appeal No. 133 of 2011 (Waki, Makhandia, Ouko JJ.A) is hereby upheld.

(iii) Each party shall bear their costs of the Appeal.

48. The Appellant did not establish his reputation. Secondly, the advocate painted himself in very dark light when he misinformed this court and the court below that he was not an advocate. Therefore, there was nothing shown to have been lowered. I have also not seen the advice or notice given to the client that from 3/12/2019, he was on his own. In the case of John Patrick Machira Vs Wangethi Mwangi & Another Nairobi HCCC No. 1709 of 1996 that: -

> " A defamatory publication is the publication of a statement about a person that tends to lower his reputation in the opinion of right thinking members of the community or to make them shun or avoid him."

49. It follows that the common thread in the definition for a defamatory statement or utterance is one that if published tends to lower the estimation of the person it refers to in the opinion of the right-thinking members of the community and may cause them to shun the person away. The Appellant has simple but solemn duty to prove his case on a balance of probabilities as pleaded. He cannot plead one case and prove another.

50. Therefore, parties are bound to plead their cases fully. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as doth: -

> " 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position

was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

> "…..it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded……
>
> …In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

51. In the case of Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

> As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings …….for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice….
>
> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

52. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in an election petition: -

> " In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the

court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....'"

53. After pleading, the Appellant must proceed to prove his case. The duty is placed upon the party alleging under section107-109 of the *evidence Act*, which provides that: -

107.

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

54. In Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

55. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

56. In Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR, the judges of Appeal held that:

> " Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -
>
> > "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept,

where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."

57. The legal burden lay on the Appellant. He failed to discharge the same. It is not enough to say that publication was admitted in the course of the proceedings. The appellant failed to meet both the legal and evidentially threshold. In Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR it was held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

58. Consequently, the words leading to the controversy in this case were stated as follows:

> Wanderi fell from the top of the building they were constructing and as a result he became disabled but he could not get justice.

59. In his pleadings, the Appellant averred in material inter alia that the publication would, in its ordinary sense, mean that the Appellant:

a. Acted with recklessness and incompetence

b. Is cunning, fraudulent and callous

c. Has raised suffering to the client

d. Was paid but eaten compensation

e. Is not fit to act as advocate

f. Is a person of low morals and ethics

g. The Plaintiff was depicted negatively in the eyes of potential clients

h. The effect of the statements was to cause gross actual bodily and psychological harm and injury or death to the Appellant.

60. It was also pleaded that contemporaneous with the broadcast, the Respondent uploaded the news feature in its you tube channel which is to date maintained and continue to be published inviting public online comments.

61. In this case, the alleged defamatory content is said to have been published via television broadcast on Inooro TV. I consequently start by establishing whether the content was defamatory.

62. In the case of John Ward v Standard Limited [2006] eKLR the court stated as follows: -

> " A statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule, or contempt or which causes him to be shunned or avoided or has a tendency to injure him in his office, profession or calling. The ingredients of defamation are: -

The statement must be defamatory.

The statement must refer to the plaintiff.

The statement must be published by the defendant.

The statement must be false."

63. Subsequently, the Court of Appeal in Nation Media Group & Another vs. Hon. Chirau Mwakwere – Civil Appeal No. 224 of 2010 stated that a Claimant in a defamation suit ought to principally establish in no particular order:

i. The existence of a Defamatory Statement;

ii. The Defendant has published or caused the publication of the defamatory statement;

iii. The Publication refers to the Claimant.

iv. The statement refers to the Plaintiff.

64. In the Halsbury's Laws of England 4th Edition Vol. 28 at page 23 the authors opined as follows:

> " In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense.

65. Whereas the position of the Appellant is that the words were defamatory, referred to the Appellant, were published and therefore, the Learned Magistrate misapprehended the principles of internet publication, the Defendants' case is that the words constituted a fair comment on matters in the public interest.

66. On the face of the words, I am unable to agree with the Appellant that anyone who read the caption, would understand the broadcast to refer to the Appellant and to mean as alleged that the Appellant and advocate if the high court:

a. Acted with recklessness and incompetence

b. Is cunning, fraudulent and callous

c. Has raised suffering to the client

d. Was paid but eaten compensation

e. Is not fit to act as advocate

f. Is a person of low morals and ethics

g. The Plaintiff was depicted negatively in the eyes of potential clients

h. The effect of the statements was to cause gross actual bodily and psychological harm and injury or death to the Appellant.

67. As was held in the case of Onama v Uganda Argus Ltd [1969] EA 92, the Learned Judges of the Easter African Court of Appeal set out inte alia that:

> " In deciding whether the words are defamatory, the test is what the words could reasonably be regarded as meaning, not only to general public, but also to all those who have greater or special knowledge of the subject matter....."

68. I equally do not find basis to infer malice in the said words and the follow up television broadcast both on live television and the subsequent you tube. As was held in the case of John Patrick Wachira (supra): Malice can be inferred from deliberate or reckless or even negligent ignoring of facts as can be deliberate lies.

69. The Respondents submitted that the publication was a fair comment on matters in the public interest. In my view, before finding whether the broadcast and its you tube channeling were a fair comment in the public interest, the Court had to first find defamation. The lower court found no defamation.

70. The Appellant had the burden to prove that the words referred to him and were defamatory. Before he proves that his reputation was lowered, he has to have one. Not being candid to court is not a sing of high reputation. I have scrupulously perused the pleadings and evidence produced by the Appellant and find no basis to interfere with the reasoning of the Learned Magistrate. Like the lower court, I find that the broadcast and its contemporaneous you tube channel displays were not defamatory to the Appellant. The words were true in fact. If anything, the Appellant was guarding a false reputation. How can he protest when he has not, many years later informed his client of the fate of his WIBA case.

71. Having found no defamation, it is equally difficult for me to find malice on the part of the Respondent. Consequently, I will not disturb the decision of the lower court.

72. As to the General Damages for defamation, the Court of Appeal in Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd [1992] KLR 177 stated that:

> ...General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it...

73. In the case of Butler –V- Butler (1984) KLR 225 the court held: -

> " 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, and in the result arrived at a wrong decision."

74. Consequently, if the court were to find defamation, it would have only awarded nominal damages assessed at Ksh. 10,000/=. The amount of Ksh. 12,000,000/= proposed by the Appellant was no doubt excessive. The term "nominal damages" was defined in the case of Kanji Naran Patel V. Noor Essa & Another, (1965) E.A. 484 while referring to the case of The Mediana (1900) AC 116, as follows:

> Nominal damages' is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damage that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term nominal damages does not mean small damages. The extent to which a person has right

> to recover what is called by the compendious phrase damages, but may be also represented as compensation for the use of something that belongs to him, depends upon a variety of circumstances, and it certainly does not in the smallest degree suggest that because they are small they are necessarily nominal damages.

75. The consequence of the foregoing is that I find and hold that the Appeal is devoid of merit and is accordingly dismissed with costs of Ksh. 105,000/=.

Determination

76. In the upshot, I make the following Orders:

    i. The Appeal is dismissed for lack of merit.

    ii. The Respondent shall have the costs of the Appeal of Ksh. 105,000/=.

DELIVERED, DATED AND SIGNED AT VIRTUALLY ON THIS 8TH DAY OF MAY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Mbuthia fore the Appellant

No appearance for the Respondent

Court Assistant- Brian