Keitany v Nation Media Group Limited & another (Civil Appeal 491 of 2019) [2024] KEHC 9736 (KLR) (Civ) (8 August 2024) (Judgment)

Neutral citation: [2024] KEHC 9736 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 491 OF 2019

HI ONG'UDI, J

AUGUST 8, 2024

BETWEEN

WILLIAM KIMUTAI B. KEITANY ..... APPELLANT

AND

NATION MEDIA GROUP LIMITED ..... 1ST RESPONDENT

AGGREY MUTAMBO ..... 2ND RESPONDENT

(Being an appeal against the Judgment and decree of the Nairobi Milimani Commercial Courts delivered on 26th July, 2019 by Hon. A. M Obura, Senior Principal Magistrate in CMCC No. 3525 of 2013)

JUDGMENT

1. The appellant who was the plaintiff in the lower court filed a plaint dated 18th June, 2013 in which he prayed for judgment against the respondent for an award of general, aggravated and exemplary damages together with costs plus interest.

2. He claimed that on or about 24th July, 2012, the 2nd respondent authored while the 1st respondent caused to be published an article in its online edition of their newspaper "Daily Nation" with the headline banner "Minister: No Favours In NHC Housing Scheme". That the respondents falsely and maliciously printed and published or caused to be printed and published of the appellant the following words:

> " Mr. Shitanda, however, blamed the NHC management for their "apparent weaknesses" in complying with the housing policies and allocating themselves more than one housing unit.

> Mr. Shitanda said Tuesday all beneficiaries of the housing scheme were subjected to the same conditions before they got the units, but the NHC staff gave themselves preferential treatment.
>
> The chairman, Bosire Ondego, got five units while the Managing Director James Ruitha got four. The Finance manager Manasseh Wandabwa got nine and the Legal Officer William Keitany is said to have amassed 21 units.
>
> They have since been suspended, he said.
>
> No houses are reserved for any selected members of the society and all applicants are subjected to the same allocation criteria', he said."

3. He stated further that in publishing and/or causing to be published the said words, the respondents were motivated by spite and malevolence and the appellant suffered aggravated injury to his dignity, self-confidence and reputation as a well respected member of the legal fraternity and of society generally. As a consequence, the publication of the said words drastically affected him to the detriment of his career progression in the Civil Service.

4. The appellant claimed damages and stated that in the writing and publishing of the said words, the 2nd respondent was acting within the scope of his employment with the 1st respondent. He stated that the 1st respondent was vicariously liable for the acts of the and 2nd respondent.

5. He additionally stated that the respondents authored and published the aforementioned article without substantiating the veracity of the allegations which were unfounded, untrue and libelous as he was still serving the corporation in the capacity of Senior Legal Officer. That despite issuing them with a demand and notice of intention to sue, the respondents failed and/or neglected to make good the appellants claim for damages thereby making his suit necessary.

6. The respondents on their part failed to enter appearance or file a defence, as a result of which judgment in default was entered against them on 9th September, 2013 and the matter proceeded to formal proof. In the ruling delivered on 4th March 2015, the trial magistrate dismissed the respondents' application seeking the setting aside of the judgment on the grounds that the (one) 1 year delay in filing the application was not explained. The respondents appealed against the said ruling and equally filed two applications all of which were dismissed by the High Court.

7. Later, the trial magistrate delivered Judgment in which she established that the appellant had proved his case on a balance of probabilities. This was on 26th August, 2019. She awarded him general damages amounting to kshs. 1,000,000/= together with the costs of the suit plus interests.

8. The appellant was aggrieved by the Judgment and filed this appeal raising seven (7) grounds namely;

    i. The learned magistrate erred in fact by finding that the appellant had not filed written submissions subsequent to the close of the formal proof hearing held on 4th November 2015.

    ii. The learned magistrate erred in law and fact by disregarding the appellant's written submissions and authorities both dated 8th May 2019 and filed in court on 10th May 2019 in assessing the quantum of general damages for defamation.

    iii. The learned magistrate erred in law and fact by failing to consider that the respondents' submissions and authorities, which the court relied upon in arriving at the award of Kenya Shillings One Million (Kshs. 1,000,000/=) in general damages, were filed in response to the appellant's submissions and authorities dated 8th May 2019.

iv. The learned magistrate erred in law and in fact in awarding the appellant general damages of kenya shillings one million (Kshs. 1,000,000/=), which amount was so inordinately low when considering the evidence on record, legal principles and all other relevant factors to be considered in assessing damages for defamation.

v. The learned Magistrate erred in law and fact in awarding the Appellant the sum of Kenya Shillings One Million (Kshs. 1,000,000/=) as general damages for defamation, which amount was so unreasonably low and not within the range of awards given in similar cases by the same court, considering that in the case of Chief Magistrate's Civil Case No. 399 of 2015 Tony Mochama versus Shailja Patel and Another, the learned Magistrate awarded the Plaintiff in that case the sum of Kenya Shillings Nine Million (Kshs. 9,000,000/=) as damages for defamation.

vi. The learned magistrate erred in law and fact by disregarding the appellant's written submissions and authorities both dated 8th May 2019 and filed in court on 10th May 2019 and consequently failing to find that the Appellant was entitled to an award of exemplary and aggravated damages for defamation considering the pleadings and. evidence on the record.

vii. The learned magistrate erred in law and fact by failing to set out the concise statement of the case, the points for determination and the reasons for the decision.

9. The appellant prayed that the judgment delivered on 26th July, 2019 be set aside and the court to grant him costs of the lower court suit plus any other remedy that the court may find expedient to issue.

10. The appeal was canvassed by way of written submissions, and both parties complied.

Appellant's submissions

11. These were filed by the firm of Nderitu & Partners Advocates and are dated 20th March, 2024. Counsel gave a factual background of the case and identified three issues for determination.

12. The first issue is whether the trial Magistrate erred in failing to consider the appellant's written submissions and list of authorities both dated 8th May 2019 in making her determination hence arriving at an

13. erroneous finding. Counsel answered in the affirmative and urged the court to find so. He placed reliance on the case of Andy Forward Services Limited & 2 other v Godfrey Githiri Njenga [2018] eKLR where Njuguna J found that the trial court had erred by failing to consider the appellant submissions. She stated thus:

> "11. in his judgment, the magistrate admitted that he could not trace the appellants' submissions in the court file. This court has perused the file and established that the appellants did in fact file submissions on 2374 July, 2015. Furthermore, when the matter went before the trial magistrate on 21% September, 2015 he ascertained that the submissions had been filed. However, the circumstances under which the submissions supposedly went missing are unclear. It follows that the trial magistrate did not take into account the appellants' submissions and authorities in arriving at his decision on quantum and in failing to do so, he erred."

14. The second issue is whether the learned magistrate erred in awarding the appellant damages of kshs. 1,000,000/= which amount to him is inordinately low considering the evidence on record, legal principle and all other relevant factors to be considered in assessing damages for defamation. The

court's attention was drawn to the following cases; Samuel Ndung'u Mukunya v Nation Media Group Limited & Another [2015] eKLR, Alnashir Visram v Standard Group Limited [2016] eKLR, Elisha Ochieng Odhiambo v Booker Ngesa Omole [2021] eKLR, Standard Limited v G.N. Kagia t/a Kagia & Company Advocates [2010] eKLR, The Nairobi Star Publication Limited v Elizabeth Atieno Oyoo [2018]eKLR, WMM v Standard Group Limited [2017] eKLR.

15. Lastly, on who should bear the costs of the appeal, counsel submitted that the court had discretion to make orders on costs in accordance with section 27 of the *Civil Procedure Act*, Cap 21 Laws of Kenya. He urged the court to allow the appeal with costs to the appellant.

Respondents' submissions

These were filed by the firm of & Wilcock Advocates and are dated the 15th April, 2024.Counsel gave a factual background of the case and condensed the grounds of appeal to two (2).

16. Regarding the first ground, counsel submitted that the trial Court in its judgment correctly applied its mind to all the relevant facts, evidence as adduced and case law in arriving at its decision of 26th July 2019. Further, that the said decision was not anchored on any wrong principles of law for the same to warrant any interference by this honourable court. In support of this position he relied on the case of Nation Media Group & Another v Awale Transporters Limited [2021] eKLR which cited with approval the case of Butt v Khan [1981] KLR 349.

17. Counsel further relied on the case of BK vs. Dr. J.D Patel & Komatsu Limited 2014 eKLR which observed as follows;

> " The damaged reputation is either restored to what it was, or it is not. It cannot be more restored by a higher award, and less restored by a lower one. It is the judicial finding in favour of the integrity of the complainant that vindicates his or her reputation, not the amount of money he or she ends up being able to deposit in the bank."

18. On ground 2 counsel submitted that the appellant ought not to have been awarded any damages since he failed to prove that the article was indeed defamatory. In support of this argument counsel relied section 16A of *Defamation Act* Cap 36 Laws of Kenya and on the judicial decisions in Heziekiel Oira v Standard Limited & Another [2016] eKLR, Miguna Miguna v Standard Group Limited & 4 Others [2017] eKLR, Daniel N Ngunia v KGGCU Limited CA 281 of 1998 [2000] eKLR, SMW v ZWM [2015] eKLR and Selina Patani & Another v Dhiranji V. Patani [2019] eKLR.

19. He urged the court to dismiss the appeal with costs to the respondents.

Analysis and determination

20. This being a first appeal, the court is required to re-evaluate and re-analyze the evidence and come to its own conclusion while bearing in mind that unlike the trial court it did not have the advantage of seeing and assessing the demeanor of witnesses. See the dictum in Selle & Another vs. Associated Motor Board Co. Ltd [1968] EA 123

21. In Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, the Court of Appeal stated that:-

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though

it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect"

22. I have carefully considered the record, the grounds of appeal, record of appeal, the rival submissions, legal authorities and principles of law relied upon by the parties in support of their respective positions, in light of the above authorities. I find the main issue for determination to be whether the appeal is merited.

23. It is important to note that the law of defamation is concerned with the protection of a person's reputation. Patrick O'Callaghan in the Common Law Series, The Law of Tort at paragraph *25*, expressed himself in the following manner:

> " The law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation: 'As a general rule, English law gives effect to the ninth commandment that a man shall not speak evil falsely of his neighbour. It supplies a temporal sanction...' Defamation protects a person's reputation that is the estimation in which he is held by others; it does not protect a person's opinion of himself nor his character. 'The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit' and it affords redress against those who speak such defamatory falsehoods..."

24. It therefore follows that the appellant in his claim on defamation against the respondents had to establish three ingredients as discussed in the case of Nation Media Group & Another vs. Hon. Chirau Mwakwere –Civil Appeal No. 224 of 2010 (ur), These elements are:

    a. The existence of a defamatory statement;

    b. The defendant has published or caused the publication of the defamatory statement;

    c. The publication refers to the claimant.

25. On proof of existence of the impugned defamatory matter, it has been shown that on or about 24th July, 2012, the 2nd respondent authored and the 1st respondent caused to be published an article in its online edition of their newspaper "Daily Nation" with the headline banner "MINISTER: NO FAVOURS IN NHC HOUSING SCHEME", the contents of the said article have been quoted under paragraph *2* above.

26. The Court of Appeal in S M W vs. Z W M [2015] eKLR found that:

> " 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."

27. In light of the above authority, it is evident that the test on whether a statement is defamatory is an objective one. It is not dependent on the intention of the publisher but on what a reasonable person reading the statement would perceive it to mean. In Halsbury's Laws of England 4th Edition Vol. 28 at page 23 the authors opined:

> " 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."

28. Having read through the article in question, I find that its paragraphs three (3) to five (5) refer to the appellant (Mr. William Keitany) and other three individuals. One Mr. Shitanda blamed them being the NHC management for their "apparent weaknesses" in complying with the housing policies and allocating themselves more than one housing unit. Paragraphs *3*, *4* and *5* state as follows;

> The chairman, Bosire Ondego, got five units while the Managing Director James Ruitha got four. The Finance manager Manasseh Wandabwa got nine and the Legal Officer William Keitany is said to have amassed 21 units.
>
> They have since been suspended, he said.
>
> No houses are reserved for any selected members of the society and all applicants are subjected to the same allocation criteria', he said."

29. From the above excerpt read alongside paragraphs *1* and *2* the picture painted of the appellant in my view is of one who is corrupt, unscrupulous, unethical and a dishonest employee. I find the defamatory nature of the article to be evident. The trial Magistrate in her judgment found that the plaintiff's claim was uncontroverted and that the respondents despite filing extensive submissions, never adduced any evidence to justify their actions.

30. In Hon. Uhuru Muigai Kenyatta v Baraza Limited, Rawal J (as she then was) observed that the information that causes defamation, will be assumed to be untrue until the defendant proves otherwise. The learned judge stated:-

> "...While taking defence of justification or qualified privilege in the Defamation Case, the Defendant was required by law to establish the true facts and the Plaintiff has no burden to prove the defence raised by the Defendant..."

31. There is no dispute that the respondents failed to file any defence or call any evidence to justify their actions. Their attempts to file a defence were followed by delays on their part and the trial court addressed those issues. The respondents' counsel never cross examined the appellant following his absence in court despite being aware of the hearing date and time.

32. Additionally, on 26th April 2017 counsel for the appellant informed the court that the appeal (Civil Appeal No. 499/2015) on the formal proof ruling was dismissed together with the applications therein and so he sought for further directions as the matter had reached the stage of filing of submissions. Counsel for the respondents confirmed that to be the position. The trial court then proceeded to write its Judgment on the matter.

33. The trial Magistrate and later this court have made a finding that vide the article published by the respondents in their "Daily Nation" newspaper of 24th July, 2012 the appellant was defamed. The next issue for determination is the amount of compensation due to him. The trial court awarded him Ksh 1,000,000/= as general damages which the appellant has contested.

34. On damages the Supreme Court of Kenya in Petition No.1 of 2020 – Hon Attorney General V Zinj Limited had this to say:

> "29. It is a trite principle of law, that any injury or loss suffered by a person either through a tortious act, omission or breach of contract, attracts redress in a court of law. The redress included an award of damages to the extent possible

as may be determined by the court. The question regarding the type, extent and quantum of damages to be awarded had long been settled through a long line of decisions from the courts. Under Article 22(1) of *the Constitution*, every person had the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or is threatened. Among the reliefs that a court may grant upon proof of violation of a fundamental right, is an order for compensation (Article 23(3)(e). The quantum of damages to be awarded, depends on the nature of the right that is proven to have been violated, the extent of the violation and the gravity of the injury caused".

35. Being well guided by the above decisions of the Supreme Court, I will proceed to determine whether the award by the trial court was too low as claimed. The law on circumstances under which an appellate court would interfere with an award of damages has been reiterated in numerous authorities in various jurisdictions throughout the world and the general principle is the same. The Court of Appeal of Nigeria discussing the same issue in the case of Dumez (Nig) Ltd V. Ogboll had this to say: -

> " It is settled law that "An Appellate Court will not interfere with an award of general damages by a trial Court unless:- (a) where the trial Court acted under a mistake of law; or (b) where the trial Court acted in disregard of principles; or (c) where the trial Court took into account irrelevant matters or failed to take into account relevant matters: or (d) where the trial Court acted under a misapprehension of facts; or (e) where injustice would result if the Appellate Court does not interfere; or (f) where the amount awarded is either ridiculously low or ridiculously high that it must have been erroneous estimate of the damage."

36. In Mbogo & Another V Shah 1968 EA 93 the Court of Appeal stated thus:

> " A Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice".

37. In view of the above authorities, it is clear that an award of damages is an exercise of discretion of the trial court. The same should however be within limits set out in decided case law and must not be inordinately so low or so high as to reflect an erroneous figure. It is only in the circumstances where the award is too low or too high that an appellate court can interfere.

38. This court notes that the appellant herein was awarded Kshs. 1,000,000/= as general damages for defamation. The award granted by the trial court was based on the authority relied on by the respondents in their submissions since according to the trial court the appellant never filed submissions (see page 89 of the record of appeal). The appellant on ground 2 of his memorandum of appeal contested this statement by the trial Magistrate.

39. Upon perusal of the lower court record, I do note that indeed the appellant filed submissions dated 10th May, 2019 and the same are also found at pages 57 to 68 of the record of appeal. Further, the matter came up for mention on 19th June, 2019 where M/s Kangata counsel for the appellant informed the court that they had filed submissions and the court gave a judgment date for 19th July, 2019 and ordered the respondents to avail their submissions within 14 days.

40. The respondents in compliance filed submissions and under paragraph 2.4 (page 2 of the supplementary record of appeal) they indicated that the same were in response to the appellant's

submissions dated 8th May, 2019. The trial Magistrate therefore erred in her judgment in stating the appellant failed to file submissions and thus relied only on the respondents' submissions in awarding general damages.

41. The appellant in his pleadings prayed for Kshs. 6,000,000/= as general damages, Kshs. 3,000,000/= as exemplary damages and Kshs. 1,000,000/= as aggravated damages.

42. It is not denied that the impugned article placed the appellant in the limelight and in a very bad way. The 1st respondent ought to have found out what the true position was before publishing the material authored by the 2nd respondent. Despite the writing of a demand letter (PEXB 2) dated 24th July and another dated 31st July, 2012 (pages 40 and 45 of record of appeal) to the respondents by counsel for the appellant, there was no response to the same.

43. The appellant only wanted them to apologize and remove the Article. They were therefore not apologetic to what they had done to the appellant. Had the 2nd respondent availed to the trial court the source of this heartbreaking information against the appellant then he would have been said to be justified in his actions. It has been noted that the 1st respondent is a reknown Publication center. It ought to have counterchecked the information contained in the impugned article before publishing it. It did not. It was an act of real negligence on its part, which action it has not justified. The appellant had no duty to prove his innocence as claimed by the respondents who did not avail any evidence to justify their Article.

44. Having considered all the material above and the following cases:

    i. Ken Odondi & 2 others V James Okoth Omburah T/A Okoth Ombura & Co Advocates [2013] eKLR.

    ii. Miguna Miguna V The Standard Group Limited & 4 others (Court of Appeal) [2017] eKLR

    iii. DR W. M. M. V The Standard Group Limited [2017] eKLR

    I am of the humble opinion that the award of Ksh 1,000,000/= was too low in the circumstances of this case. I hereby award him Ksh 3.5 Million as general damages.

45. The appellant also claimed exemplary and aggravated damages. In the case of *Barclays Bank of Kenya Limited V Mema (Civil Appeal E011 of 2021)* [2021] KEHC 333 (KLR) Majanja J observed as follows:

> " Punitive damages also known as exemplary damages are awarded in two instances. First, where the Government action or conduct complained of is oppressive arbitrary or unconstitutional. Second where the defendant has calculated that its conduct will result in a profit for himself and may well exceed the compensation payable to the claimant".

In John V M G Limited [1977] QB 58 the court held:

> " Aggravated damages will be ordered against a defendant who acts out of improper motive e.g where it is attracted by malice; insistence on a flurry defence of justification or failure to apologize".

46. The appellant had the duty to prove that the respondents had an improper motive and were driven by malice in publishing the Article. Having considered the evidence on record and the principles laid out in the above cases, I do not find any justification for awarding aggravated and exemplary damages sought in this case.

47. The general damages the court has awarded are a compensation for the wrong the appellant suffered, touching on his reputation and will take care of the distress, hurt and humiliation caused by the defamatory Article.

48. I therefore set aside the Judgment of the lower court and substitute it with a Judgment for Ksh 3,500,000/= (Three Million, five hundred thousand shillings only) plus costs and interest from the date of Judgment in the lower court. The appellant is also awarded costs of the appeal.

49. Orders accordingly.

DELIVERED VIRTUALLY, THIS 8TH DAY OF AUGUST, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE