



**Mediamax Network Limited & 2 others v Maina (Civil Appeal
74 of 2019) [2024] KEHC 9846 (KLR) (6 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 9846 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL 74 OF 2019
S MBUNGI, J
AUGUST 6, 2024**

BETWEEN

MEDIAMAX NETWORK LIMITED 1ST APPELLANT

JAMES MURUMI 2ND APPELLANT

MWINGIRWA KITHURE 3RD APPELLANT

AND

VALENTINE MUGURE MAINA RESPONDENT

(Being an appeal from the judgment and order of the chief magistrate's court of Kenya at Nyeri delivered on the 12th day of November, 2019 by the Honourable M. Okuche (Mr.) in Nyeri CMCC No. 373 of 2018.)

JUDGMENT

Introduction

1. This appeal arises from the judgment and order of the Chief Magistrate's Court of Kenya at Nyeri delivered on the 12th day of November, 2019 by the Honourable M. Okuche (Mr.) in Nyeri CMCC No. 373 of 2018
2. The appellants herein being dissatisfied with the judgment filed an appeal seeking the following orders:
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 - a. That the appeal be allowed.
 - b. That the Respondents' suit be struck out with costs.
 - c. That costs of the appeal be borne by the Respondent.
3. The Appellants seven (7) grounds as stated in the Memorandum of Appeal are as follows: -



- i. That the learned Magistrate erred in law by holding that section 4(2) of the limitation acts only applies to hard copies of publication.
 - ii. That the learned magistrate erred in law by holding that a defendant who maintains a website of bulk numbers is indefinitely vulnerable to claims for defamation for years and even decades after the initial hard copy and internet publication.
 - iii. That the learned magistrate erred in law by holding that as long as the publications remained on the 1st appellant's website and archive they remain defamatory indefinitely.
 - iv. That the learned magistrate erred in law by holding that the multiple publication rule is applicable to publications on the internet.
 - v. The learned magistrate erred in fact and in law by holding that there has not been a watershed case in regards to single and multiple publications in the jurisdiction of Kenya despite the holding in Nyeri HCCC No. 19 of 2018 Royal Media Services Limited versus Valentine Muture Maina and Maureen Murimi delivered on 18th October, 2019
That the learned magistrate erred in law by adopting non-binding authorities in reaching his decision contrary the provisions of a statutory instrument.
 - vi. That the Learned Magistrate erred in law by failing to dismiss the respondents suits despite them being barred by limitation of time.
4. The court directed the parties to file their written submissions. Both parties complied.

Appellants Submissions

5. The Appellant in its submissions reproduced Section 4(2) of the [limitation of Actions Act](#) Cap 22 laws of Kenya which provides as follows;

An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date.
6. The proviso was effected under Section 20 of the [defamation Act](#) Cap 36 laws of Kenya which amended the [limitation of actions act](#) as follows.
 20. Subsection (2) of Section 4 of the limitation of acts act is hereby amended by the addition thereto of the following-

Provided that an action for libel or slander may not be brought after the end of twelve months from such date.
7. It further submitted that it was not in contention that the alleged defamatory publications were made on 10th and 11th June 2015 and the Respondent instituted her claims on 8th November 2017. The claims were clearly filed out of time and cited the case of Wycliffe A Swanya Versus Toyota East Africa Ltd & another (2009) e KLR where the court of appeal in determining when a cause of action in libel and slander accrues held that....in case of libel or slander no action may be filed after the end of 12 months from the date the cause of action accrued and we understand this to meant from the date the slanderous remarks are made. (see proviso to Section 4(2) of the [limitation of actions act](#) and section 20 of the [Defamation Act](#)). It would be absurd for slanderous remarks to be made about a person and then he/



- she waits until he/she feels the effects thereof to file an action in court. If this be the case then there would no need for any limitation period to specified.
8. The Appellants submits that the trial court having found there being no contention on when the alleged publications were made and the claims instituted, it ought to have dismissed the Respondents claims.
 9. The Appellant further submits that the trial court erred in making the determination that the alleged publications were subject to the doctrine of multiple publication.
 10. The trial court held as follows: -
 - a. Multiple publication rule holds that each publication of defamatory material gives rise to a separate cause of action which is subject to its own limitation period. That the effect of multiple publication rule in relation to online material is that each hit on a webpage creates new publication, potentially giving rise to a separate cause of action should it contain defamatory action. Each action has its limitation period that runs from the time at which material accessed and as a result publisher are potentially liable for any defamatory material published by them and accessed via their online archive, however long after the initial publication is accessed and whether or not proceedings have already brought in relation to the initial publications.
 11. According to the appellant the trial court compounded the error by holding that there has not been a watershed case within the jurisdiction of our country in regards to the single and multiple publication rules.
 12. In holding that the multiple publication rule applies in Kenya, the trial relied on the English cases of duke of Brunswick versus Hermen (1849) 14QB185, Louctchansky Versus Carries Newspaper Ltd and others (2002) and Godfrey versus demon internet limited (1999) 4 AII ER 342
 13. And thus, the trial court fatally concluded that holding in those cases fell in the face of the provisions of Section 4(2) of the *limitation of actions act*, which it believed were put in place in regards to publications of hardcopy, and that so long as the publications continues to exist in the website and in the archive, it remains defamatory separately.
 14. The appellant referred the court to a case where this court in a similar case in Royal Media Services Limited Versus Valentine Mugure Maina and another (2019) eKLR where the respondent relied on the afore mentioned English cases determined the issue of multiple publication rule and held as follows.... The 1st Respondent has not demonstrated that the multiple publication rule is applicable to this country. The English court decisions which the learned counsel for the 1st respondent cited are of persuasive authority and not binding on our courts; but more importantly, the English themselves have abandoned the multiple publication rule upon which decisions were based. It will be foolhardy for us to this country to follow those decision when their very basis has been found wanting to such an extent that a legislative intervention in the form of Section 8 of the *defamation act* 2013 has been found necessary. In any event, however persuasive the English decisions on any particular subject are, they can never be an alternative to the statutory instruments from our own legislature. Express statutory provisions, even in England itself are never supplanted by judicial precedents unless, or course, those precedents have unequivocally invalidated the provisions in question.
 15. The High Court further held that ...I am of course minded that there are technological achievement in media communication the prominent of which is, invariable, the internet, and which by their very nature have some bearing on such torts such as slander and libel in a way that may that may not have been foreseen. No doubt it is necessary that the law s should be equally dynamic and keep pace



with these advancements as need arises. I should suppose that it is policy makers that need to take the initiative and act accordingly; the most courts can do is to point out the deficiencies in the law hoping that three legislative arms of the government will ruse to occasion and take appropriate steps to mitigate those deficiencies. In the absence of legislative acts, courts can do nothing more than apply the law as it is. It is int his light at I have to remind the 1dt respondent that our limitations of actions act, in particular section 4(20 thereof, has never been amended as to vary the point in time when a cause of action from libel or slander accrues. As far as liber is concerned, the cause of action accrues when the defamatory material is published and in the present case the alleged defamatory was published more than a year before she filed her suit. In sort, her suit was filed out of time and the leaner magistrate ought to have held so and struck it out.

Respondents Submission

16. The Respondent submitted that the present appeal revolves around only one question; whether our jurisdiction follows multiple publication rule or single publication rule in respect of online publication of apparently defamatory content.
17. The Respondent submitted that multiple publication rule applies in our jurisdiction as she had argued in the trial court for the following reasons; -
 - a. The Appellant places reliance on the watershed judgment of this court, differently sitting in Royal Media Service – Vs Valentine Mugure as attached to the appellants submission and as fronted in the grounds of appeal. The same equally involves the respondent herein, who has pending appeal in the court of appeal against the same.
 - b. The Respondent observes that the said judgment does not bind this court, coming from a court of coordinate jurisdiction.
 - c. In the said judgment, the court reasoned that Section 4A of our *defamation act*, which is in Pari Materia with Section A of the English *defamation act* 1980 provides for a limitation period of one year in defamation claims. The court therefore concluded that the said time limit is cast in statute. That was wrong, the respondent submits; the court rightly noted technological advancement in our communication., notably internet. However, it failed to appreciate the now recognized internet publication rule, which informed Britain to amend its defamation law to align with that technological aspect, and the underlying common law rule of multiple publication as formulated in Duke of Burnsswiok Case. The good judge therefore fell into error by failing to appreciate that this is a common law concept, rather than statutory, and unless our law is amended as it was done in English to a align with that concept, it remains part of our law. Being so, the English authorities on the point are not only persuasive but binding the respondent submits, common law being par to the law of English as readily received by our jurisdiction. This is not customary law of which we have our own.
18. She further referred the court to the cases of: -Gdfrey – Vrs- Demon Internet LtdLoutchansky – Vs- Times News Paper LtdDon King V- Lennox Lewis
19. In conclusion, the Respondent submitted that unless our Section 4A is amended as was done in England in 2013, we are stuck with the multiple publication rule. In the questioned judgment, the other court reasoned that, by their amendment, the English jurisdiction abandoned the multiple publication rule that is wrong. The amendment only gave the court an unfettered discretion to consider the delay post the twelve months period. See Russel Vs. Reed Elseveir (UK) LTD. Also see English *Defamation Act*, 2013 Section 8. The amendment retained the multiple publication rule if the



character and gravity of publication changed from that of first publication, no matter the lapse of time. See *Richard Son Vs Facebook Goggle*.

Issue For Determination

20. From the above the only issue for determination is well captured in the submissions filed by the respondent, that is: -

Whether our jurisdiction follows multiple publication rule or single publication rule in respect of online publication of apparently defamatory content.

Determination

21. Being a first appeal, the court relies on a number of Principles as set out in *Selle and another vs. Associated Motor Boat Company Ltd & others* (1968) 1 EA 123: “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 witness and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take into account particular circumstances or probabilities materially to estimate the evidence.”
22. I have looked at the pleadings, the evidence, the submissions filed by the appellant and the respondent and the judgment appealed against.
23. From the proceedings of the lower court the parties seem to agree that the publication complained of was defamatory against the respondent. The issue is whether the respondent filed a claim out of time.
24. The Respondent’s case is that her claim was not time barred in view of the doctrine of multiple publication.
25. The lower court succinctly discussed the doctrine of multiple publication and single publication and after analyzing the case law in the cited cases which I have reproduced in this judgment, found that the doctrine of multiple publication applies in Kenya.
26. The respondent cited another case between the same parties which went on appeal in the high court after analyzing the judgment of the lower court found that the doctrine of multiple publication do not apply in Kenya in view of clear provisions of Sections 4 (2) of the Limitations Act Cap 22 Laws of Kenya and Section 20 of the *defamation Act* Cap 36 Laws of Kenya.
27. I have read the judgments delivered in Nyeri HCCC No. 19 of 2018 *Royal Media Services Limited versus Valentine Muture Maina and Maureen Murimi* delivered on 18th October, 2019 and also Nyeri Civil Appeal No. 62 of 2018.
28. In light of the reasoning in the two cited cases which I fully associate myself with, it is clear that Section 4(2) of the Limitations of Actions Act has never amended as to vary the point in time when a cause of action for libel or slander accrues. As for libel, the cause of action accrues when the defamatory material is published.
29. The appellants contend that the alleged defamatory publications were made on 10th June, and 11th June 2015 while the defamatory suit was filed on 8th November 2017. Therefore, they were filed out of time in violation of section 4(2) of the Limitations of Actions Act cap 22 laws of Kenya and section 20 of the *defamation act* cap 36 of the laws of Kenya.



30. The doctrine of multiple publication rule is an English doctrine developed by English courts as shown in the cases which the trial magistrate relied on. To me statutory law is superior and overrides case law/common law. Legislation is the primary source of law and determination of cases starts by interpretation of the relevant statute. Case law or common law comes in handy where there is no clear statute covering the issues in question.
31. In Kenya we have limitations of Act Cap 22 and *defamation Act* Cap 36 of Laws of Kenya clearly stipulating when to commence an action alleged to be defamatory.
32. If the trial magistrate had addressed himself properly on the above cited provisions of the two statutes and the fact that case law does not override statute law he would have arrived into a different conclusion.
33. The upshot of the above is that I do find that the appeal has merit. I do allow it. The judgment of the lower court is set aside and substituted with an order that the respondent case in the lower court is dismissed with costs to the appellant.
34. Right of appeal 30 days.

JUDGMENT, DATED, DELIVERED AND SIGNED THIS 6TH DAY OF AUGUST, 2024 IN KAKAMEGA HIGH COURT.

HON. MR. JUSTICE S MBUNGI

JUDGE OF THE HIGH COURT

In the presence of:

1st Appellant /Advocate-Absent

2nd Appellant/Advocate -Absent

3rd Appellant/Advocate -Absent

Court Assistant – Elizabeth Angong'a

