



**West FM Media v JMK (Civil Appeal 1 of 2020)
[2023] KEHC 692 (KLR) (10 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 692 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 1 OF 2020
RN NYAKUNDI, J
FEBRUARY 10, 2023**

BETWEEN

WEST FM MEDIA APPELLANT

AND

JMK RESPONDENT

*(Being an appeal against the judgment and decree in Eldoret CMCC
1148 of 2016 delivered by Hon. R. Odenyo on 9th December 2019)*

JUDGMENT

1. The appeal herein arises from Eldoret CMCC 1148 of 2016 where the respondent instituted a suit by way of amended plaint dated 16th August 2017 seeking general damages, exemplary damages, punitive and aggravated damages against the defendant for the tort of defamation. The respondent claimed that he was defamed on 3rd August 2016 in one of the appellants' programmes on air. The claim was based on the allegation that the appellant broadcasted words to the effect that the respondent impregnated his daughter.
2. The trial court entered interlocutory judgment in 30th March 2017 against the appellant for default to enter appearance. The appellant then filed an application to set aside the judgment and leave to file a defence. The court allowed said application and the appellant's statement of defence was deemed as duly filed.
3. The matter proceeded to full trial and the respondent testified as PW1. He stated that he was a pastor residing in Matunda and that on 2nd August 2016 during the respondent's news broadcast at 2pm they informed the public that he had sexual intercourse with his personal assistant who was his daughter. This announcement affected his preaching work and his business.



4. PW2 AM, testified that she heard on West FM that the respondent had impregnated his daughter and as such she had lost faith and respect in him. She was very shocked and had stopped associating with him after the hearing. PW3, LA, testified that the appellant had broadcasted the words to the effect that the respondent had impregnated his daughter. She lost respect for him and has since stopped associating with him. PW4, Luka Otiaho, testified that on 2nd August 2016 at 7pm, he heard the news that the respondent had impregnated his daughter. The same news was repeated on 3rd August 2016 at 10am.
5. The appellant presented one witness in its defence. DW1, JA, testified that he is a journalist at West Media Limited. Further, that on 3rd August 2016, he was in [Particulars Withheld] Village Likuyani County when he reported a matter about Purity Aronya, a female child. She said that her parents had refused to pay her school fees and forced her to make love with boys in the area to get money. She told him her story and he reported it verbatim.
6. Upon considering the testimonies of the witnesses, the pleadings and the submissions of the parties, the trial court held that the respondent was defamed and awarded him Kshs. 1,000,000/- in damages.
7. Being dissatisfied with the judgment and decree of the trial court the appellant instituted the present appeal *vide* a memorandum of appeal dated 14th January 2020. The appeal is premised on the following grounds;
 1. The Honourable Magistrate erred in law and in fact for failing to find and hold that the Appellant sued is not a legal person and/or entity capable of suing or being sued despite there being no evidence adduced by the Respondent to the contrary after the Appellant served stated its legal personality;
 2. The Honourable Magistrate erred in law for failing to find and hold that the suit was incompetent, bad in law and could not be maintained against the Appellant herein as the Appellant did not and does not exist in law to be capable of being sued;
 3. The Honourable Magistrate erred in law by misapprehending, misapplying and misinterpreting the rules on parties to the suit and the law of legal persons thereby proceeding on the wrong tangent that the Appellant herein was capable of being sued and rendering a judgment against the Appellant who, in fact and in law, does not exist;
 4. The Honourable Magistrate, notwithstanding the fact having been brought to his attention, failed to appreciate that the party against whom the action was brought, the Appellant herein, was and is not a party in the eyes of the law and with no legal existence;
 5. The pleadings, even though filed against the Appellant herein, were served upon the West Media Limited, an admission by the Respondent herein that the Appellant does not exist and the Honourable Magistrate erred in law and in fact for failing to take into account this admission despite the fact have been brought to the Court's attention in paragraph 3 of the Statement of Defence;
 6. The Honourable Magistrate erred in law and in fact for failing to find and hold that no relief could flow from the Appellant who does not exist in law and no damages are recoverable from the non-existent Appellant;
 7. The Honourable Magistrate erred in law and in fact for failing to interrogate whether the Appellant sued who is not a legal personality and who does not exist in law was capable of defaming the Respondent;



8. The Honourable Magistrate erred in law and in fact for failing to appreciate, find and hold that a non-existent body, the Appellant herein lacks *locus standi* before the Court and cannot be the subject of any liability as may be declared by the Court;
9. The Honourable Magistrate erred in law and in fact for finding that the Respondent was defamed by the Appellant yet the Court in its judgment stated “The Plaintiff admitted that he had not brought an audio recording of the words complained of’ and therefore the actual words or part thereof complained were not pleaded or adduced in Court as evidence;
10. The Honourable Magistrate erred in law and in fact for failing to find and hold that in the absence of the actual words complained of having been pleaded and proved, no action for defamation could succeed against the Appellant or any other party;
11. The Honourable Magistrate erred in law for failing to apply the binding authorities of *Veronica Wambui v Michael Wanjobi Mathenge* [2013] eKLR; *Odero O. Allred v Royal Media Group Limited* [2015] eKLR; and *Clement Muturi Kigano v Joseph Nyagah* [2010] eKLR which were brought to his attention to the effect that a tort of defamation cannot succeed in the absence of actual words complained of, thereby going contrary to the trite principle of *stare decisis*;
12. The Honourable Magistrate erred in law and in fact for failing to dismiss the suit for an action for defamation which did not plead the actual words complained of and in which no evidence was adduced by the Respondent herein of the actual words complained of even though the Court found as a matter of fact that the Respondent did not plead and bring to Court audio recordings of the actual words complained of;
13. The Honourable Magistrate erred in law and in fact for failing to hold that parties are bound by their respective pleadings thereby imputing alleged words complained of and holding that the Respondent was defamed yet the suit by the Respondent did not contain actual words complained for a claim of defamation to succeed;
14. The Honourable Magistrate erred in law and in fact for failing to find and hold that there was no evidence, of whatever nature, that was produced by the Respondent showing that the alleged presenter of the words complained of, ‘Robo the Quarterman’ exists and works for the Appellant;
15. The Honourable Magistrate erred in fact and law in failing to find and hold that even if ‘Robo the Quarterman’ exists and said the words complained of, the Appellant was not vicariously liable for the actionable conduct of the said ‘Robo the Quarterman;’
16. The Honourable Magistrate erred in fact and law that there was no relationship between the Appellant and the said ‘Robo the Quarterman’ at all so as to hold the Appellant liable for actionable conduct of the said ‘Robo the Quarterman;’
17. The Honourable Magistrate erred in fact and law by failing to find and hold that the said ‘Robo the Quarterman’ was not an employee or agent of the Appellant whose acts, omission, negligence and recklessness can be imputed to the Appellant;
18. The Honourable Magistrate erred in fact and in law by approbating and reprobating in the same judgment by on one hand holding that “The Plaintiff admitted that he had not brought an audio recording of the words complained of’ and on the other hand making erroneous conclusion on fact that “on whether one ‘Robo the Quarterman’ works for the Defendant, it is not in doubt that a programme was aired on the Defendant’s radio and the presenter



identified himself as such. Whether that is/was his real name or a pseudo, the fact is that the content of what was aired was via the Defendant's medium;"

19. The Honourable Magistrate erred in law and in fact by making assumptions of facts that;

“on whether one “Robo the Quarterman” works for the Defendant, it is not in doubt that a programme was aired on the Defendant’s radio and the presenter identified himself as such. Whether that is/was his real name or a pseudo, the fact is that the content of what was aired was via the Defendant’s medium” yet there was no audio recording of the actual words complained of for the Court to make such conclusion;
20. The Honourable Magistrate erred in law and in fact for failing to find that the Respondent’s witnesses were incredible and their evidence inadmissible for being a copy cut of each other and inconsistent with their oral testimonies in Court during cross examination;
21. The Honourable Magistrate failed to appreciate that the alleged Respondent’s witnesses whom the Court heavily relied upon to hold that the Respondent was defamed were all his wives and brother and their testimony was skewed and inconsistent during cross examination;
22. The Honourable Magistrate erred in law and in fact for failing to show how each of the elements of defamation was proved by the Respondent and instead shifted the burden to the Appellant;
23. The conclusion of the Honourable Magistrate that the Respondent was defamed by the Appellant is not based on evidence on record, ignores the evidence by the Appellant and it is inconsistent and/or at variance with testimony of the Respondent’s witnesses especially in cross examination;
24. The Honourable Magistrate erred in fact and in law by failing to consider, evaluate and give weight to the Appellant’s submissions which contended various aspects of the positions advanced by the Respondents now taken up by court in its judgment thereby failing to hear the appellant and;
25. The Honourable Magistrate erred in law and in fact for awarding damages of Kshs. 1,000,000.00 to the Respondent without any basis in law and without analysis of how the said sum comes about.

The parties filed submissions on the appeal.

Appellant’s Case

8. Learned counsel for the appellant submitted that the party sued at the trial court is not an entity in law capable of being sued. That the trial court agreed with the appellant that it was wrongly sued but still proceeded to enter judgment against the wrongly sued appellant. He submitted that it was incumbent on the respondent to ascertain the legal status of West FM before instituting the suit. Counsel cited the case of *Janto Construction Limited vs Enock Sikolia and 2 others* (2020) eKLR in support of the submission that the appellant being non-existent, could not be sued. It was his case that a non-existent entity was incapable of defaming the respondent. Further, that no decree of execution arising out of the defamation claim can be executed against a non-existent entity.
9. The appellants’ case is that the Respondent’s four witnesses were not credible given the inconsistency embodied in their written and oral evidence in court. The witnesses evidence as to the time and dates



they heard the alleged words were all different and they could not agree what programme, if any, were the words uttered and/or aired.

10. Counsel for the appellant contended that the respondent had not established that the words complained of had been uttered. He failed to establish his case on a balance of probabilities and none of the witnesses called produced the audio clip or any other exhibits. He relied on the case of *Nkalubo vs Kibirige* (1973) EA 102 to buttress his submissions alongside the cases of *Dr. Lucas Ndungu Munyua vs Royal media Services & Anor* (2014) eKLR and *Selina Patani & Anor vs Dhiraji V. Patani* (2019) eKLR.
11. Learned counsel contended that the respondent did not lead any evidence to prove his averment at paragraph 2 of the Amended plaint that the defendant, West FM Media, is duly registered media house with the capacity to sue and be sued. Given that West FM media does not exist in law, the suit against it is incompetent and no relief could flow from a non-existent entity called West FM Media to the respondent. He maintained that want of capacity to be sued is an essential component which must be determined before any order is made either for or against the entity which doesn't exist. He cited the case of *Housing Finance Company of Kenya Limited vs Embakasi Youth Development Project* (2004) eKLR and *Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints* (2016) eKLR in support of these submissions.
12. Learned counsel for the Appellant reiterated that West FM Media is not an entity at all but a mere name with no legal existence and a non-existent person cannot be sued. The trial court having stated that the defendant was wrongly sued at page 33 of the judgement and page 182 of the record of appeal, ought to have dismissed the suit with costs but subsequently went on to enter judgement against the appellant. The award of general damages was inconsistent with the finding of the trial court that the defendant was wrongly sued.
13. The appellant contended that the respondent did not establish the elements of the tort of defamation as laid out in the Court of Appeal case of *Musikari Kombo vs Royal media Services Limited* (2018) eKLR. He urged the court to set aside the decision of the trial court and allow the appeal with costs.

Respondent's Case

14. The respondent opposed the appeal and submitted that the witnesses' testimonies established that his case was proved on a balance of probability. The witnesses confirmed that the appellant broadcasted the words and that the issue was in the public domain that he had impregnated Purity Aronya and he had assisted her to abort. He contended that the appellant never called the said Purity Aronya as a witness to confirm that the words were uttered by her. He maintained that the words, if true could not be said to be fair comment and that it was incumbent upon the appellant to contact her to confirm if the words were true. Airing or broadcasting the words before establishing if they were true exposed the respondent to ridicule and public scandal in the eyes of his peers and friends.
15. The respondent contended that the appellant admitted to publishing the said words in its witness statement. The witnesses called by the respondent established that the words broadcast were false and untrue as no evidence was tendered by the appellant to prove that the respondent had impregnated Purity Aronya. Further that the appellant sought to rely on the defence of fair comment and privilege but did not establish the facts they sought to rely on were true and that the matter was of public interest. Malice was also informed from the deliberate, reckless and negligent ignoring of facts by the appellant.
16. The respondent submitted that the assessment for damages is discretionary and therefore the same was correctly awarded. He urged that the award should not be disturbed. Learned counsel submitted that the appellant was rightly sued and it was incumbent on the appellant to show that it was not a natural



person with capacity to sue or be sued. At paragraph 4 of the witness statement of Joseph Amunya Otieno, he confirmed that West Media Ltd runs a station by the name of west FM. He maintained that the party's existence was not in dispute and was supported by the evidence of the appellant. He urged the court to dismiss the appeal with costs.

Analysis and Determination

17. The Court of Appeal for East Africa set out the duty of the first appellate court in *Selle -Vs- Associated Motor Boat Co.* [1968] EA 123 in the following terms: -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

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 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

18. Upon considering the memorandum of appeal, the record of appeal and the submissions by the parties, the following issues arise for determination;

1. Whether the appellant was non-suited
2. Whether the respondent proved its case on a balance of probabilities
3. Whether the appellant was non-suited

19. The law on who may be joined as defendants is set out in order 1 rule 3 of the [Civil Procedure Rules](#) which states;

All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.

20. The general rule as to who can sue in a claim of defamation was succinctly discussed in [Gatley & Lindsell on Slander and Libel](#), 11th Ed. at page 197:-

An action for defamation is a purely personal action. The proper person to sue as a claimant is the person defamed, and the proper person to be sued as defendant is the person who published the defamatory words or caused them to be published (though this may include a person vicariously liable for another). A cannot bring an action of libel or slander against B for words defamatory of C, even though C has purported to assign to him his right of action; a right for damages for libel or slander cannot be assigned. If A suffers damages as a result of a defamatory statement maliciously made about C, who is associated with A's



business, A may have an action for malicious falsehood, but that is not the same thing as an action for defamation.”

21. I have perused the judgment of the trial court and it reveals that the trial magistrate agreed that the appellant was wrongly sued. It is therefore contradictory that he went ahead and issued a judgment against a party it acknowledges as non-suited. It then begs the question as to how the judgment and decree are to be executed. It is even more peculiar that the respondent seems to shift the burden of proving the rightful defendant to the appellant. The burden of proof rests on the respondent as it is he who alleges that West FM is a legal entity capable of being sued. The appellants did their part by filing a defence and putting the respondent to strict proof. An official company search would have been enough to settle this issue but the respondent chose to double down on the allegation that West FM Media was the entity to be sued and repeatedly served the appellant with pleadings despite repeated protests.

22. In *Janto Construction Company Ltd v Enock Sikolia & 2 others* [2020] eKLR the court held;

A claimant has a duty of ascertaining the legal status of a party intended to be sued. The reason being that it is only those entities which are either natural or legal persons which can successfully sue or be sued. Instituting legal proceedings against a non-legal entity renders the suit a non-starter.

...

In this case had the Plaintiff ascertained the status of the 2nd Defendant it would have found out that indeed Citizen TV is not a legal entity.

As a result of the foregoing, the suit against the 2nd Defendant cannot stand. It is hereby struck out accordingly.

23. In *Maurice Ooko Otieno v Mater Misericordia Hospital*[2004] eKLR the court held that;

The law requires that a suit be brought against a legal entity

24. The respondent failed to establish that the West FM Media he sued as the defendant was a legal entity capable of being sued. In the event that the appellant herein failed to enter appearance or appeal the judgment and decree, the same would have been rendered unenforceable. The judgment should have ended at the juncture that the trial magistrate acknowledged that the appellant was non-suited as the appellant lacked *locus standi* to defend itself against the allegations. The admission of DW1 that he was an employee of West Media Limited does not suffice to consider the appellant as properly suited as the same was not vide any pleadings. Further, the respondent had several opportunities to cure the defect in his pleadings as he amended the same and failed to do so. Allowing the said decision to stand amid the glaring contradiction would be a bad precedent. The same would amount to issuing a court order in vain as it would be unenforceable. The trial court having reached a conclusion of fact that the defendant was wrongly sued, should have dismissed the suit as it was incurably incompetent. In the premises, I find that the trial court erred in issuing judgment against a party it had already determined was wrongly sued.



Whether the respondent proved its case on a balance of probabilities

25. The ingredients of what constitutes defamation were set out by the Court of Appeal in *Musikari Kombo v Royal Media Services Limited* 156 of 2017 [2018] e KLR thus:

It follows 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.”

26. Section 107 of the *evidence Act* states;

- (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.

27. In *Odero O. Alfred v Royal Media Group Limited* [2015] eKLR it was held;

For an action in tort of defamation to succeed, there is also the requirement of publication. It must be proved that the defendant was responsible for the publication. In libel cases, plaintiff must present evidence of the publication by the defendant. Failure to so provide, the allegation of publication is deemed to be no more than bare assertion. See. Gantley on Libel And Slander (*supra*) at Paragraph 34.7.

The case before me is one of libel. I say so because, publication of words in the course of any programme included in a broadcasting service is treated as publication in a permanent form. Gately On Libel and Slander 11th Ed at Paragraph 3.9 provides as follows:

‘for purposes of the law of libel and slander the publication of words in the course of any programme included in a programme service shall be treated as publication in the permanent form’...there is no doubt that the effect of this is to make such broadcasts libel rather than slander.

It follows therefore that a duty lies on the plaintiff to produce evidence of such a broadcast. In our present case, the plaintiff did not produce such evidence. I do acknowledge the fact that it might have been difficult to obtain such evidence considering that it was in the hands of the defendant. Even so nothing would have stopped the plaintiff from asking for the Courts assistance to obtain the news clips.

28. In *Nkalubo v Kibirige* [1973] EA 102 it was held:

In all suits for libel the actual words complained of must be set out in the plaint.*In libel and slander the very words complained of are the facts on which the action is grounded. It is not the fact of the defendant having used defamatory expressions, but the fact of his having used those defamatory expressions alleged, which is the fact on which the case depends...*This is not a mere technicality, because justice can only be done if the defendant knows exactly what words were complained of, so that he can prepare his defence.



29. I note that Section 62 of the *Evidence Act* provides that all facts, except documents may be proved by oral evidence; the only caveat placed by section 63(i) is that such evidence must be direct which is defined at sub-section (i)(b) with reference to a fact which could be heard as is the case herein the evidence is of witnesses who say they heard it. There is no express provision in the *Defamation Act* or other relevant law requiring that in order to prove the fact of broadcast the radio clip must be produced as evidence. In the circumstances, the basis of the court determining that the statement existed was based on the evidence of the witnesses who testified on behalf of the respondent. In this regard I have considered said evidence of the witnesses and I find that it is inconsistent. The witness statements that were admitted as evidence in chief are those of Anjeni Mwika and Lilian Arisa which are similar in every aspect save for the names of the witnesses. It was PW1s evidence that the broadcast was done at 2.00pm on 2nd August 2016, but in cross examination he stated that the broadcast was at 7.00pm on 3rd August 2016. Pw2 testified that she heard the broadcast on 3rd August 2016 on the 9.00am news. PW3 testified that she heard the broadcast on 31st August 2016 at 10am and PW4 testified that he heard the broadcast on the news on 2nd August 2015 at 7am then on 3rd August 2015 at 10am. PW1 stated that the statements were made by Robo the quartermaster and PW2 stated that the statements were made by one NB.
30. It is my view that the evidence of the witnesses did not ascertain or establish that there was publication of the said statement. Further, the respondent admitted that he did not have the recording and could not produce it as evidence. He did not show any effort to obtain the recordings. Despite the lack of an express provision requiring the production of the audio recording as evidence, the doctrine of stare decisis dictates that the court be guided by precedent. Taking a cue from the authorities cited, I find that the respondent failed to establish, on a balance of probabilities, that the alleged words were uttered i.e. that there was the existence of a defamatory statement. Further, the trial court erred by stating that the appellant did nothing to help their case by not producing the verbatim account of the report. In doing so, it shifted the burden of proof to the appellant and misapplied the provisions of section 107 of the *Evidence Act*. In the premises, the respondent failed to prove on a preponderance of liabilities that the defamatory statement existed, or that it was published by the appellant.
31. Failing to prove that the statement was uttered by the appellants or that it existed, it follows that the respondent failed to prove that the publication referred to him. It is therefore clear that the respondent failed to satisfy the ingredients necessary to prove the tort of defamation.
32. I hereby find that the appeal is merited and dismiss the judgment and decree of the trial court with costs to the appellant.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 10TH DAY OF FEBRUARY 2023

.....
R. NYAKUNDI

JUDGE

Coram: Before Hon. Justice R. Nyakundi

Wekesa & Simiyu advocate

