



**Music Copyright Society of Kenya v Rose (Civil Appeal E130 of 2021)  
[2023] KEHC 1954 (KLR) (Civ) (17 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1954 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E130 OF 2021**

**AN ONGERI, J**

**MARCH 17, 2023**

**BETWEEN**

**MUSIC COPYRIGHT SOCIETY OF KENYA ..... APPELLANT**

**AND**

**JACINTA NUNGARI ROSE ..... RESPONDENT**

*(Being an appeal against the judgment and decree of the Hon. A. N. Makau (PM) in Nairobi  
Milimani Commercial Civil Suit no. 528 of 2016 delivered on the 5th of February 2021)*

**JUDGMENT**

1. The Respondent sued the Appellant in Nairobi CMCC no. 528 of 2016 seeking general damages and exemplary and aggravated damages for the defamation arising out of publications the Appellant posted in social media after the Respondent reported to the police that her music had been pirated and some culprits were arrested.
2. The defamatory words were as follows:

“Be aware dear members please be aware of the lady Jacinta Nungari. She has been going around impersonating MCSK staff stealing from members of the public.”
3. The Appellant denied the allegations. The court heard the case and found that the words were defamatory and that they referred to the Respondent.
4. The trial court also found that the publication contained a picture of the Respondent and names and they were in an account bearing the Appellant’s name.
5. The court found that the wording in the publication portrayed the Respondent as a dishonest person, a pretender or a person with questionable moral values.



6. The trial court awarded the Respondent general damages of kshs. 5 million and aggravated damages of 1.5 million together with costs of the suit and interest from the date of judgment until payment in full.
7. The Appellant is aggrieved with the judgment and decree of the trial court and has now brought this appeal on the following grounds:
  - a. The learned magistrate erred in law and in fact by finding that the publication was made by the appellant.
  - b. The learned magistrate erred in law and in fact by finding that the respondent was entitled to damages from the respondent.
  - c. The learned magistrate erred in law and in fact by finding that the appellant is to blame for the respondent's failed marriage to her husband in the absence of any evidence adduced to that fact.
  - d. The learned magistrate erred in law and in fact by establishing liability in the absence of supporting evidence.
  - e. The learned magistrate erred in law and in fact by speculating that the appellant had a hand in publication of defamatory claims.
  - f. The learned magistrate erred in law and in fact by imposing a sum of Kshs. 5,000,000 as general damages.
  - g. The learned magistrate erred in law and in fact by awarding aggravated damages of Kshs. 1,500,000 which was excessive and unjustified.
8. The parties filed written submissions as follows:
9. The appellant submitted that the only evidence produced by the respondent to demonstrate ownership of the facebook and twitter account were printouts/screenshots and the respondents testimony where she claimed she was informed by the appellants CEO that the words had been published by an officer of the appellant she identified as Gerald Kitaya. That with this the trial court then concluded that the same belonged to the appellant despite it denying being the owner and publisher.
10. The appellants further argued that the trial court shifted the burden to the appellant to prove who the publisher of the defamatory words was and was contrary to the provisions of Section 107 and 109 of the Evidence Act which directs that he who alleges must prove.
11. It was the appellants contention that section 106B of the Evidence Act makes it a requirement that where a party desires to adduce electronic evidence, such record must be accompanied by a certificate. That in the absence of the certificate the print outs adduced by the respondents were inadmissible. In support the appellant cited County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015] eKLR;

“In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106B(2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced.

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The averments in that affidavit themselves did not meet the above stated threshold of subsection 106B(2) of the *Evidence Act*. Those averments therefore fell short of the required certificate. In the circumstances, we agree with counsel for the appellants that the electronic evidence of Denis Kongo was inadmissible and the learned Judge erred in relying upon it.”

12. The appellant further contended that the respondent relied on hearsay evidence to prove that the appellant was the publisher. The respondent admitted that she did not have an independent report verifying that the appellant was the publisher of the defamatory words and the appellant was under no obligation to prove that it was not the publisher.
13. It was the appellants submission that defamation was defined in *Phinebas Nyagah v Gitobu Imanyara* [2013] eKLR as 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 him be shunned or avoided. The appellants argued that abusive words do not amount to defamation in the absence of evidence showing that the respondents reputation was disparaged in the estimation of right thinking member of the society. That the only evidence by the respondent prove that she was defamed was her oral testimony together with the said defamatory publication. She never produced any evidence to support her claim that she was unable to secure a job, defamation to her friends and family, the withdrawal of her music from media or the desertion by her husband.
14. On damages the appellants submitted that the award of damages is discretionary and an appellate court does not interfere with such discretion unless it is proved that the trial court proceeded on wrong principles. That in the case herein the trial magistrate misapprehended both the law and facts and consequently the awarded damages should be set aside.
15. The respondent on the other hand submitted that at trial the appellant admitted that the respondent was a member of their association and no complaints were made as to whether she was a bona fide member.
16. The respondent argued that she was defamed to the extent of her being shunned by family members and her friends. All her music was withdrawn from the media and youtube and her husband left her because he believed she was a thief. She argued that at the time of the publication she was happily married and the marriage turned sour after the publication of the defamatory words. She became a topic of public discussion, people believed that she engaged in an extra marital affair and consequently she was shunned and exposed to public ridicule.
17. It was her contention that she proved her case to the required standard and thus entitled to the reliefs that she was granted by the lower court.
18. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence before the trial court and to arrive at my own conclusion whether or not to support the findings of the trial court while bearing in mind that the trial court had an opportunity to see the witnesses.
19. The issues for determination in this appeal are as follows:
  - i. Whether the Appellant published the defamatory words.
  - ii. Whether the damages awarded were excessive.
  - iii. Who pays the costs of this appeal.
20. On the issue as to whether the Appellant published the defamatory words, I find that there are elements the Respondent was required to establish in order to prove the tort of defamation.



- i. That the words were defamatory.
  - ii. That the words referred to the plaintiff (now Respondent)
  - iii. That the words were published by the defendant (Appellant)
21. I find that the words were defamatory and that they referred to the plaintiff since her names and picture were contained in the caption.
  22. I also find that the words were published by the Appellant since they were in an account bearing the names of the Appellant.
  23. The Appellant's defence was a mere denial. The Appellant did not deny that the account where the publication was done belongs to them.
  24. On the issue as to whether the award of general damages of kshs. 5 million and aggravated damages of kshs.1.5 million were excessive, I find that the trial court took into account several relevant factors before arriving at the said figures.
  25. I find that there is no evidence that the trial court relied on wrong principles or that the award is too high or too low as to deserve interference by this court.
  26. In *Butt v Khan* (1981) KLR 349 the Court held:

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate; it must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was inordinately high or low.”
  27. In *Charles Oriwo Odeyo v Appollo Justus Andabwa & Another* [2017] eKLR the court said that –

“On the issue of damages, it is settled that the award of damages is within the discretion of the trial court and the Appellate court would only interfere on the particular grounds. These grounds were and are

    - (a) that the court acted on wrong principles or that the award is so excessive or so low that no reasonable tribunal would have awarded or
    - (b) that the court has taken into consideration matters which it ought not to have or left out matters it ought to have considered and in the result arrived at wrong decision.”
  28. I find that the publication was circulated through social media and there is evidence that the Respondent's reputation suffered damage.
  29. This being a claim in libel, the same is actionable perse and the Respondent does not have to prove that she suffered loss before she is awarded damages.
  30. I find that the trial court was right in the amount of damages awarded.
  31. I find that this appeal lacks in merit and I dismiss it with costs to the Respondents.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 17<sup>TH</sup> DAY OF MARCH, 2023.**

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**A. ONGERI**

**JUDGE**

In the presence of:-

..... for the Appellant

..... for the Respondent

