Nganga v Matheri (Civil Appeal 6 of 2019) [2023] KEHC 2346 (KLR) (3 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2346 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL 6 OF 2019

JM CHIGITI, J

MARCH 3, 2023

BETWEEN

NAHASHON MAINA NGANGA .... APPELLANT

AND

JAMES NJOROGE MATHERI .... RESPONDENT

JUDGMENT

Brief Background

1. On 18th March 2012, the Respondent uttered words at Ndunyu Chege Market against the Appellant which the Appellant considered to be defamatory,

> " You Matheri and your committee are thieves. You stole a bail of wheat flour from below my mother's bed. I want you to return the bail to me this evening. I will come to your house to collect it. I will not allow you to miss use my mother"

2. According to the Appellant who was a church leader the words were meant to lower his reputation in the eyes of the public. The Appellant filed a suit alongside six other Appellants being the committee members of Matheri Family clan via a Plaint dated 14th September, 2012 wherein he sought damages for defamation.
3. The Respondent filed a Defence on 8th November, 2012 wherein he denied writing, publishing the words as alleged by the Appellant. He denied that the alleged words had the effect of being understood to refer to the Appellant as alleged.
4. The parties filed written submissions after the matter was heard viva voce. The trial court rendered its judgment on 10th December, 2018 allowing the 1st Appellants suit awarding him damages of Kshs.500, 000. The 2nd, 3rd, 4th, 5th, 6th and 7th Appellants suits were dismissed with costs.

5. Being dissatisfied with the judgement The Appellant filed a Memorandum of Appeal on 28th May, 2019.

6. The Appellant raised the following grounds of Appeal:

   a. That Honourable trial court erred in law and in fact when it failed to find that the pleadings were defective in nature and offended the provisions of Order 2 rule 7 of the *Civil Procedure Rules* otherwise rendering the judgment per incuriam.

   b. That the learned trial court erred in law and in fact when it made judgment which was faulty for want of proof of the cause of action by the Respondent.

   c. That the learned trial magistrate erred in law and in fact when she entered judgment against the Appellant on an uncorroborated evidence when the standard of proof is of beyond reasonable doubt rather than balance of probability as case law as militated.

   d. That the learned Trial Magistrate erred in law and in fact when she failed to distinguish that leave to file a representative suit was required under the provisions of order 1 rule 8 of the *Civil Procedure Rules*.

   e. That the learned Trial Court erred in law and in fact when she misguided herself that the threshold for proof of slander had been reached when in fact the Respondent was far too below the reach of the statutory threshold.

   f. That the learned Trial Court erred in law when she framed for herself issues for determination which were not in tandem with the determination of issues in matters of defamation by slander otherwise rendering a miscarriage of justice.

   g. That the learned Trial Court erred in law and in fact when it awarded damages unwarrantable of the circumstances when there was no proof of defamation.

   h. That the learned Trial Magistrate erred in law and in fact when she imputed that the proof of offence was anchored on Section 3 of the *Defamation Act* whereas the facts militated against the Respondent holding any office or calling capable of rendering defamation.

   i. That the learned Trial Court erred in law and in fact when she made a judgment which was not reasoned and which lacked flow.

7. The appellant filed its submissions on 14th December 2022 while the 1st Respondent filed hers on 16th December 2023.

Analysis and Determination;

8. In determining this appeal, this Court is guided by the case of *Selle v Associated Motor Boat Co. Ltd*. [1965] E.A. 123,wherein the Court set out the principles that guide the hearings of first appeals as follows,

> " This court is the first appellate court, its duty is to evaluate the entire evidence on record bearing in mind it had no advantage of seeing the witnesses testify."

9. In the case in the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal held:

> This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and 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.

10. The Appellant clustered and opted to argue the question of liability through grounds number 1, 2, 4 and 8.

11. On the issue of quantum of general damages, the Appellant advance his arguments within grounds number 3,4,5,6 and 7 of the Memorandum of Appeal.

12. The Respondent called the following witnesses to support his case. PW1 confirmed that the incident took place at Ndungu Chege market on 18th March, 2012.

13. According to him, the Appellant called the Respondent a thief and that he uttered the words in public and that many people heard including church members.

14. PW1 confirmed that the Appellant uttered the offending words and confirmed that they were from same committee for over 15 years with The Appellant. He told the court that people came home to ask him about the incident.

15. PW2 Peter Maina Kamau who was at the market on the Sunday of 18th March, 2012, told the court that he heard the Appellant who spoke loudly.

16. PW3 Ngugi Matungu Gichwe testified that, he was at the market stage on 18th March, 2012 and that the Respondent was at the market too, that there were around 50 since it was a market day. He said that he heard the Appellant speak loudly. He testified that the Respondent is a church elder. He repeated the words as pleaded in the Plaint.

17. The Respondent testified and said that, he knows the Appellant, and that he goes to the market on Sundays, and many people go to the market on Sundays since it's a market day. He testified that he was not at the market that day, he was at home. This was not raised in the defence.

Ground 1 and 4;

18. I have noted that the Respondent did not raise any concerns around the 2nd,3rd,4th,5th,6th and 7th Appellants being parties to the suit,

19. The suit against the 2nd,3rd,4th,5th,6th and 7th Appellants were dismissed with costs and they are not parties to the Appeal as a result of which nothing revolves around them in this Appeal.

20. It is my finding that this grounds 1 and 4 to be moot and they are hereby dismissed with costs.

21. Grounds 2, 3, 5, 6, 7 and 9 of the Memorandum of Appeal also fall by the way side given that they are related to grounds 1 through to 4.

Ground 7;

22. The Magistrate exercised her discretion pegged on sound assessment of the damage/injury suffered. This Court finds no reason or justification to interfere with the general damages.

23. I have perused the Record of Appeal, the Appellant's submissions and the Respondent's Submissions dated, alongside the applicable and the authorities as cited by the parties.

24. In *Miguna Miguna v Standard Group Limited & 4 others* [2017] eKLR, the Court of appeal stated as follows regarding defamation, and I have no reason to differ:

> "Speaking generally a defamatory statement can either be libel or slander. Words will be considered defamatory because they tend to bring the person named into hatred, contempt or ridicule or the words may tend to lower the person named in the estimation of right-thinking members of society generally. The standard of opinion is that of right-thinking persons generally. The words must be shown to have been construed or capable of being construed by the audience hearing them as defamatory and not simply abusive. The burden of proving the defamatory nature of the words is upon the Appellant. He must demonstrate that a reasonable man would not have understood the words otherwise than being defamatory. See *Gatley on Libel and Slander* (8th edition para. 31).
>
> The ingredients of defamation were summarized in the case of *John Ward v Standard Ltd*, HCCC 1062 of 2005 as follows:-
>
>> " .... The ingredients of defamation are:
>>
>> The statement must be defamatory.
>>
>> The statement must refer to the Appellant.
>>
>> The statement must be published by the Respondent.
>>
>> The statement must be false."

25. In *Halsbury's Laws of England*(*supra*), a defamatory statement is defined as :

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

26. In *Phinehas Nyaga v Gitobu Imanyara* [2013] eKLR it was held that defamation was not about publication of falsehoods against a Appellant but rather, the Appellant must show that the published falsehood disparaged his reputation and lowered him in the estimation of right thinking members of the society generally.

27. In *SMW v ZVM* [2015] eKLR , the Court of Appeal held that in determining the words for purposes of defamation, the court does not employ legal construction but that the words complained of must be construed in their natural and ordinary meaning.

28. In the case of *Newstead v London Express Newspaper Ltd* [1940] 1 KB 377 [1939] 4 ALL ER 319, it was held as follows:-

> " Where the Appellant is referred to by name or otherwise clearly identified, the words are actionable even if they were intended to refer to some other persons. It is not essential that the Appellant must be named in the defamatory statement; where the words do not expressly refer to the Appellant they may be held to refer to him if ordinary sensible readers with knowledge of the special facts could and did understand them to refer to him."

29. On this point, the Court of Appeal in *Raphael Lukale v Elizabeth Mayabi & another* [2018] eKLR overturning the decision of this court on the question of whether an audio radio broadcast must be produced in evidence to prove publication, held:

> " "We have said elsewhere in this judgment that the sole reason why the learned Judge dismissed the suit was the fact that there was no audio recording and/ or certificate of translation of the offending words, hence, in her opinion there was no proof of publication of those words.
>
> The word "publication" is repeatedly used without definition in the Defamation Act. Its permanent form has also not been explained. This is important in construing the provisions of section 8 of the *Act* on wireless broadcasting which provides that;
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> > " 8(1) For the purposes of the law of libel and slander, the publication of words by wireless broadcasting shall be treated as publication in a permanent form." (Our emphasis).
>
> *Black's Law Dictionary* 9th edition defines publication as
>
> > " the act of declaring or announcing to the public".

30. In *Pullman v Walter Hill & Co* [1891] 1 QB 524, the English Court of Appeal explained what publication constitutes as follows:

> " What is the meaning of 'publication"' The making known the defamatory matter after it has been written to some person other than the person of whom it is written. If the statement is sent straight to the person of whom it is written, there is no publication of it; for you cannot publish a libel of a man to himself. If there was no publication, the question whether the occasion was privileged does not arise....... If the writer of a letter shows it to his own clerk in order that the clerk may copy if for him, is that a publication of the letter" Certainly it is, showing it to a third person; the writer cannot say to the person to whom the letter is addressed, 'I have shown it to you and to no one else.' I cannot, therefore, feel any doubt that, if the writer of a letter shows it to any person other than the person to whom it is written, he publishes it" (per Lord Esher, MR). (Our emphasis).

Publication of a defamatory material occurs when the material is negligently or intentionally communicated in any medium to someone other than the person defamed.

The learned Judge insisted that there was no proof of publication merely because the appellant did not produce the audio version of the broadcast in the Luhya language as well as the certificate of translation.

Upon close reading of section 8 aforesaid we find nothing to suggest that all wireless broadcasts are either from recorded tapes or are reduced into some form of a document and that in order for a Appellant to prove publication of a wireless broadcast he must tape record it and produce the tape record in court as evidence. That proposition is not realistic as it would require people to always have in their possession devices for recording and dwell in constant and vigilant anticipation of being defamed.

The appellant's case was grounded on the fact that he and his four witnesses heard with their ears the words spoken by the 1st respondent and transmitted through the 2nd respondent's Mulembe FM radio station.

The learned Judge in insisting on an audio recording in the original language appeared to have had in mind the provisions of Section 106B of the *Evidence Act* which requires that for a party wishing to rely on a recording, it must be accompanied by a certificate by a person who operated the recording device. That is the admissibility of electronic records. In our opinion this provision does not make it mandatory for parties who wish to prove that some defamatory statement by way of broadcast has been made of them.

In this case the appellant did not seek to produce any audio evidence. As a matter of fact he relied on oral evidence of witnesses who heard the broadcast by the 1st respondent. This was direct evidence as defined in section 63(2)(b) of the *Evidence Act*. Publication in a permanent form conveys the meaning that the defamation is libel as opposed to slander which is in a non- permanent form. See: *Gatley On Libel And Slander* 11th Ed At Paragraph 3.9, like our section 8(1) confirms that;

> "…. 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."

We have emphasized that in Section 8 aforesaid and in the above authority that the publication of words by wireless broadcasting "will be treated" as publication in a permanent form; the key words being "treated as." So that, though slander is generally regarded as an oral defamatory statement, where it takes the form of broadcast it is considered to be permanent in form."[Emphasis added]"

31. The Court of Appeal in the *Miguna Miguna* (supra) Case stated further:

> "Author Patrick: Callaghan while discussing the subject of defamation in "*Common Law Series: The Law of Tort*" at paragraph 25.1 says:
>
> > "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…."(Emphasis added).

32. It was held in *Knupffer v London Express Newspaper Limited* [1944] 1All ER 495 that:

> "The only relevant rule is that in order to be actionable, the defamatory words must be understood to be published of and concerning the Appellant".

33. This Court while dealing with an appeal in a defamation case held in *SMW v ZWM* [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."(Emphasis added).

34. It has been held in various cases in Kenya and elsewhere that the test whether a statement is defamatory is an objective one and is not dependent on the intention of the publisher but is dependent on what a reasonable person reading the statement would perceive of it - See the English case of *Mortgage & Investment Society Limited v Odhams Press Limited* [1941] KB 440.

35. In the 4th Edition Vol. 28 of *Halsbury's Laws of England*, the following statement appears at page 23:

> " 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".
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> The "reasonable man" was explained in *Winfield & Jolowiez on Tort* 8th Edition at P. 255 as:
>
> > " The answer is the reasonable man. This rules out on the one hand persons who are so lax or so cynical that they would think none the worse of a man whatever was imputed to him, and on the other hand those who are so censorious as to regard even trivial accusations (if they were true) as lowering another's reputation or who are so hasty as to infer the worst meaning from any ambiguous statement. It is not these, but the ordinary citizen, whose judgment must be taken as the standard."

36. In *Phineas Nyagah* (*supra*) Odunga J held that:

> " Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice ... Malice may also be inferred from the relations between the parties ... The failure to inquire in the facts is a fact from which inference of malice may properly be drawn."

37. PW1 confirmed that the incident took place at Ndungu Chege market on 18th March, 2012.

38. The Respondent called the Appellant a thief and that he uttered the words in public and that many people heard including church members.

39. PW1 confirmed that the Respondent uttered the offending words and confirmed that they were from same committee for over 15 years with The Appellant. He told the court that people came home to ask him about the incident.

40. PW2 Peter Maina Kamau who was at the market on the Sunday of 18th March, 2012, told the court that he heard the Appellant who spoke loudly.

41. PW3 Ngugi Matungu Gichwe testified that, he was at the market stage on 18th March, 2012 and that the Respondent was at the market too, that there were around 50 since it was a market day. He said that

he heard the Appellant speak loudly. He testified that the Respondent is a church elder. He repeated the words as pleaded in the Plaint.

42. The Respondent testified and said that, he knows the Appellant, and that he goes to the market on Sundays and many people go to the market on Sundays since it's a market day. He testified that he was not at the market that day, he was at home.

43. This was not raised in the defence. I am satisfied that The Appellant used the words as pleaded within the dictates of Section 107 and 109 of The *Evidence Act*.

44. The Appellant is dissatisfied with the award of damages of Kshs.500, 000/= in favour of the Respondent.

45. A successful Appellant in a defamation action is entitled to recover the general compensatory damages of such sum as will compensate him for the wrong he has suffered.

46. The award must compensate him for damages to his reputation. Section 16A of the *Defamation Act* Cap 36 Laws of Kenya provides:

> " In any action for libel, the court shall assess the amount of damages payable in such amount as it may deem just: Provided that where the libel is in respect of an offence punishable by death the amount assessed shall not be less than one million shillings, and where the libel is in respect of an offence punishable by imprisonment for a term of not less than three years the amount assessed shall not be less than four hundred thousand shillings."

47. In *Nation Media Group & Another v Hon. Chirau Ali Makwere* C.A. No. 224 of 2010 (UR), the Court of Appeal discussed in detail factors to consider in awarding damages for defamation. The Court cited Tunoi, J.A. in *Johnson Evan Gicheru* (supra) where guidelines in assessing damages were set out as stated in the case of *Jones v Pollard* [1997] EMLR 233:

> " 1. The objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published, and any repetition.
>
> 2. The subjective effect on the Appellant's feelings not only from the prominence itself but from the Respondent's conduct thereafter both up to and including the trial itself.
>
> 3. Matters tending to mitigate damages, such as the publication of an apology.
>
> 4. Matters tending to reduce damages.
>
> 5. Vindication of the Appellant's reputation past and future."

48. The Court of Appeal also cited a passage from the case of *Wangethi Mwangi & Another v J. P. Machira t/a Machira & Company Advocates* [2012] eKLR setting out additional guidelines as follows:

> " In addition, the awards should also be geared where circumstances permit to act as a deterrence so as to safeguard and protect societal values of human dignity, decency, privacy, free press and other fundamental rights and freedoms, including rights of others and personal responsibility without which life might not be worth living. The category of considerations will no doubt change as our societal needs change from time to time. In this regard, we think that courts must strive to strike a proper balance between the competing needs in the special circumstances of each case".

49. It is also trite law that the award of damages is a matter of judicial discretion by the court.

50. The Court of Appeal in *C A M v Royal Media Services Limited* Civil Appeal No. 283 of 2005 [2013] eKLR stated:

> " No case is like the other. In the exercise of discretion to award damages for defamation, the court has wide latitude. The factors for consideration in the exercise of that discretion as enumerated in many decisions including the guidelines in *Jones v Pollard* [1997] EMLR 233-243 include objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published and any repetition; subjective effect on the Appellant's feelings not only from the prominence itself but from the Respondent's conduct thereafter both up to and including the trial itself; matters tending to mitigate damages for example, publication of an apology; matters tending to reduce damages; vindication of the Appellant's reputation past and future."

51. The Court of Appeal in *Johnson Evan Gicheru v Andrew Morton & Another* [2005] eKLR stated that in an action of libel, the trial court in assessing damages is entitled to look at the whole conduct of the Respondent from the time libel was published down to the time the verdict is given. It may consider what his conduct has been before action, after action, and in court during the trial. In the said case, the learned Judges of Appeal cited with approval the checklist of compensable factors in *Jones v Pollard* [1997] EMLR 233, 234 as reproduced above and which I apply in this case.

52. Applying the above principles to this case, and based on the evidence placed before this court, I find justification in the amount awarded by the trial court as a result of which I do not find any reason to interfere with the same.

Disposition;

53. Upon re-evaluation of the evidence and re-analysis, this Court is persuaded that, the Respondent proved his case on a balance of probability. The Trial Magistrate exercised its power and arrived at a proper finding that the Appellant uttered the offending words in the crowded market place on 18th March, 2012 as a result of which the Respondent.

Order.

The Appeal lacks merit and the same is hereby dismissed with costs.

DATED AND DELIVERED AT KIAMBU THIS 3RD DAY OF MARCH, 2023.

J. CHIGITI (SC)

JUDGE