



**Standard Group Limited v Kimutai (Civil Appeal 110 of 2014)
[2023] KEHC 20205 (KLR) (17 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20205 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 110 OF 2014
RN NYAKUNDI, J
JULY 17, 2023**

BETWEEN

THE STANDARD GROUP LIMITED APPELLANT

AND

DONALD KIMUTAI RESPONDENT

JUDGMENT

Coram: Before Hon. Justice R. Nyakundi

M/s Ochieng, Onyango, Kibet & Ohaga Advocate for the Appellant

M/s Yego & Co. Advocates

- 1 The appeal before this court arises from the judgement and decree in Eldoret CMCC No 229 of 2013. The respondent instituted a claim for defamation vide a plaint dated April 16, 2013. The cause of action was that the defendant/appellant had published an article on July 23, 2012 wherein it discredited him. Upon considering the pleadings, testimony in court and documentary evidence, the trial court awarded the plaintiff/respondent Kshs 1,000,000/- general damages and Kshs 200,000/- aggravated damages. The court also directed the defendant to publish a clarification within 15 days.
- 2 Being aggrieved with the judgement and decree, the appellant instituted the present appeal vide a memorandum of appeal dated September 11, 2014 premised on the following grounds;
- 3 The learned magistrate erred in law by failing to find that the words cited in their natural and ordinary meaning did not in fact bring our any meaning libellous of the respondent;
 1. The learned magistrate erred in failing to find that the respondent had not sufficiently pleaded facts in aid of the plea of innuendo as required by the provisions of Order 2 Rule 7(1) of the *Civil Procedure Rules* 2010;



2. The learned magistrate failed to apply or otherwise distinguish binding precedent of the High Court with respect to the requirement of pleading innuendo;
3. The learned Magistrate erred in law and fact by finding that the tort of defamation had been proved whilst the respondent did not satisfy all the ingredients of defamation;
4. The learned Magistrate erred in fact by finding malice on the part of the appellant without taking into consideration the whole tenor of the article and the testimony given by the appellant's witnesses.
5. The learned Magistrate erred in law and fact in finding malice when the error complained of was attributed to mistake undercutting any inference of existence of malice;
6. The learned trial magistrate erred in fact and law in failing to appreciate the appellant's witnesses' evidence.
7. The learned magistrate in the analysis of the evidence applied the wrong principles with respect to a claim for libel;
8. The learned magistrate erred in law and fact in putting more weight on how the respondent felt the article portrayed him rather than the effect of the article in the minds of third parties.
9. The learned magistrate erred in law and fact in ignoring the mitigating factors on behalf of the appellant and going ahead to award substantial damages.
10. The learned magistrate failed to take into account the failure by the respondent to exercise his right of reply in the assessment of damages;
11. The learned magistrate erred in law and fact by awarding aggravated damages without the respondent demonstrating that exceptional harm was done to him.

4 The appeal was prosecuted by way of written submissions.

Appellant's case

5 Learned counsel for the appellant submitted that the holding of the trial court at page 15 of its judgement was not supported by law or facts. That the first error of law the trial court made was to conclude that the words cited in their natural and ordinary meaning brought out a meaning libellous to the Respondent. Counsel urged that in a defamation suit, the Plaintiff must prove to the required standard all the ingredients of the tort of defamation, as was elaborated in *Joseph Njogu Kamunge v Charles Muriuki Gachari (2016)eKLR*. He urged that in order to determine the natural and ordinary meaning of the words of which the Plaintiff complains it is necessary to take into account the context in which the words were used and the mode of publication. Thus, a Plaintiff cannot select an isolated passage in an article and complain of that alone if other parts of the article throw a different light on that passage. He urged that the Respondent's case failed to meet the standard requisite of defamation matters as set the court in *Phinehas Nyagah v Hon Gitobu Imanyara [2009] eKLR*.



- 6 The appellant urged that Trial Court erred by failing to appreciate that the Respondent did not satisfy the elements of Defamation. Further, that the evidence on record could only lead to an objective and logical conclusion that the attribution of Donald Kipkorir was done in error and the Trial Court erred in failing to find so. The Trial Court erred in failing to appreciate that the publication was an account of what had actually transpired in the CDF Audit and was a report of a verbatim statement made by the Keiyo South MP Jackson Kiptanui. He stated that the Learned Judge erred in law by placing more weight on how the Respondent felt the article portrayed him rather than the effect of the article in the minds of third parties.
- 7 The appellant submitted that the Respondent failed to plead the claim for defamation as is required under Order 2 rule 7(1) of the [Civil Procedure Rules](#) 2010 and as such he is not entitled to damages for libel. He relied on the case of [Byrum Kenneth Olenja versus Michael Opundo & Another \(2011\) eKLR](#) in support of his submissions. Counsel urged that the Trial Court failed to appreciate that the Plaintiff by his testimony stated he did not avail himself the right of reply neither did he state that he was denied the exercise of this right to enable him clarify the inaccuracy. Section 7A of the [Defamation Act](#), Cap 36 provided for the right of reply which if the Plaintiff exercised would have had a publication done free of charge and given similar prominence as the impugned publication. Further, that the trial court failed to appreciate that the failure to exercise this right is critical in the Assessment of damages awardable. He urged that damages be assessed on the lower scale of Kshs. 400,000/-, citing section 16A of the [Defamation Act](#). In summary learned counsel for the appellant in support of the appeal relied on the following case law and text: (See Winfield and Jolowicz on Tort (15th Edition, Sweet & Maxwell 1998, Libel and Slander (6th Edition, Sweet & Maxwell 1967), [Joseph Njogu Kamunge v Charles Muriuki Gachari \(2016\) eKLR](#), [Charleston v New Group \(1995\) 2 ALL ER 313](#) as cited in [Martha Karua v the Standard Limited & Another \(2007\) eKLR](#), [Phinehas Nyagah v Hon. Gitobu Imanyara \(2009\) eKLR](#), [Odongkara –vs- Astles \(1970\) EA 374](#), [Hezekiel Oira v Standard Limited & Another \(2016\) eKLR](#), [Igunaq Miguna VS Standard Group Limited & 4 Others \(2017\) eKLR.](#), [Frazer Vs Evans & Others: \(1969\) ALL ER 6](#) as cited in [Alnashir Visram V Standard Limited \(2016\) eKLR](#), [Alnashir Visram V Standard Limited \(2016\) eKLR](#), [Alnashir Visram v Standard Limited \(Supra\)](#) by referring to the phrases in Gerald R. Smith in [Valparaiso University Law Review Volume 27 No. 1992 of Malice and Men. The Law of Defamation: Page 39:93.](#) , [Butt v Khan Butt v Khan \(1978\) eKLR](#), [Luisa Muriugu Mugo v Nguyo Joseph Kingori & Another \(2019\) eKLR](#), [Byrum Kenneth Olenja versus Michael Opundo & Another \(2011\) KLR](#), [C.A. M v Royal Media Services Ltd \(2013\) EkLr](#) and finally [Ken Odondi & 2 Others v James Okoth Omburah T/A Okoth Omburah & Company Advocates \(2013\) eKLR](#)
- 8 Counsel prayed that the appeal be allowed and the judgement and decree in the trial court be set aside.

Respondent's case

- 9 Learned counsel for the respondent filed submissions dated April 18, 2023. Counsel urged that the Appellant defamed the Respondent and despite being issued with a demand letter, they failed to publish an apology or clarification to date. The said article defamed the Respondent by innuendo as the words in their ordinary and natural meaning created the impression in the eyes of the public particularly those who knew him, that he was an imposter and a fraudster impersonating as the Chairman of Keiyo South CDF Committee. Additionally, his close friends and business associates held him in disrepute, contempt and ridicule upon reading the article. His friends shunned and avoided him as a result of the article. From the above, it is evident that the Respondent has sufficiently pleaded facts in aid of the plea of innuendo as required by the provisions of Order 2 Rule 7 (1) of the Civil Procedure Rules, 2010. Therefore, the trial magistrate was right in finding that the article was defamatory in nature.



- 10 Citing *Alnasbir Visram v Standard Limited(2016) eKLR*, the respondent submitted that it is irrelevant whether the publisher or author intended to make a defamatory statement of and concerning the Respondent when he published the defamatory words complained of. The applicable test is an objective test; whether or not the statement is defamatory is judged against contemporary community standards from the stand point of a reasonable person. In this matter, the main issue is whether or not the ordinary person would tend to form a significantly lower opinion of the Respondent because the Respondent is the subject of that criticism.
- 11 Counsel for the respondent submitted that the Appellant defamed the Respondent because the publication lowered the Respondent’s reputation in the eyes of an ordinary man. That it is not in doubt that the Appellant defamed the Respondent as by denying the Respondent due credit and recognition and giving it to Mr Donald Kipkorir, the Appellant defamed the Respondent. The impression in the eyes of the ordinary man who knew the Respondent was that they were an impostor who had been claiming credit for Mr Kipkorir’s effort. Counsel submitted that the Respondent availed a witness, Gideon Kirwa Buigutt, who admitted that he read the article dated July 23, 2013 and formed an opinion that his friend, the Respondent, had been impersonating as the Keiyo South CDF Committee Chairman. He said that the Plaintiff had been defamed and his estimation lowered in the eyes of the right-thinking members of the society. He said that he shunned and avoided the Respondent upon reading the said article as he formed a low opinion of him. Therefore, the trial magistrate was right in finding that the article was defamatory as it lowered the opinion of the Respondents in the minds of third parties.
- 12 Counsel submitted that the publication was not an error, that it was a malicious publication considering that an apology was not published in correction of the apparent error as is usually the norm. The Appellant’s witness, Vincent Bartoo, the author of the article admitted during cross examination that he knew both Donald Kipkorir and Donald Kimutai as prominent persons. He further elaborated that if such incidents of mistake occur, the press usually issued a correction or a clarification on the same day. However, no such correction, clarification or apology has been forthcoming from the Appellant to date. He stated that the Appellant is actuated by malice having sustained a vendetta against him dating back to 1997. In particular on May 25, 1997 and December 18, 2002, the Appellant published defamatory material against him in which they cheekily referred to him as Donald Kipkorir instead of Donald Kimutai very much following the script herein. Your Lordship, the Appellant previously defamed the Respondent in a similar manner prompting the Respondent to sue them.
- 13 Counsel urged that the award of damages was consistent with the law. That it is unequitable for the Appellant to claim mistake yet they took no action in remedying the same. To date, no apology has been issued to the Respondent. The Appellant lacks the humility and character to issue an apology and a correction in the Standard Newspapers and thus they should not claim mistake. It is trite law that failure to publish an apology attracts aggravated damages. This was determined in the case of Ochieng and 6 others vs The Standard Limited. (Nairobi HCCC No 170 of 20021 where it was held that failure to publish an apology attracts aggravated damages. From the foregoing, the trial magistrate applied the law justly in awarding the Respondent aggravated damages. Counsel cited the case of Standard Media V Kagia and Co Advocates and submitted that the Appellant was negligent as they did not bother to verify the information that they published.
- 14 Counsel for the respondent urged the court to dismiss the appeal with costs.



ANALYSIS & DETERMINATION

15 As an appellate court this court has a duty as was set out in *Abok James Odera T/A AJ Odera & Associates v John Patrick Machira T/A Machira & Co Advocates [2013] eKLR*, where the court stated as follows-

' This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.'

16 The principles guiding an appellate court in determining whether to interfere with an award for damages were set out in the celebrated case of *Butt v Khan {1981} KLR 470* where the court pronounced itself as follows;

' An appellate court will not disturb an award for damages unless it is 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 either inordinately high or low.'

17 Upon considering the memorandum of appeal and attendant submissions, the following issues arise for determination;

1. Whether the respondent proved its case to the required standard
2. Whether the trial court erred in its award of damages

Whether the respondent proved his case on a balance of probabilities

18 Before delving into the elements required to prove the tort of defamation, I note that the appellant raised the issue of compliance with Order 2 Rule 7(1) of the Civil Procedure Rules. It states as follows;

1. Where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of such sense.

19 I have perused the record of the court and the pleadings in particular. The plaint sets out the words complained of clearly and has given particulars of the words he complains were used in a defamatory sense, and he has given the particulars of the facts and matters on which he relies in support of the claim that they were defamatory to him. It follows that the respondent complied to order 2 rule 7(1).

20 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 25.1 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...'



21 The Court of Appeal in the case of *Wycliffe A. Swanya v Toyota East Africa Ltd & Another civil Appeal 70 of 2008 [2009] eKLR* stated:

For the purpose of deciding a case of defamation, the Court is called upon to consider the essentials of the tort generally and to see whether these essentials have been established or proved. It is common ground that in a suit founded on defamation the plaintiff must prove:-

- (i) That the matter of which the plaintiff complains is defamatory in character.
- (ii) That defamatory statement or utterance was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.
- (iii) That it was published maliciously
- (iv) In slander, subject to certain exceptions, that the plaintiff has suffered special damage.”

22 The first issue for consideration is whether the statement was defamatory. The Court of Appeal in *S M W vs Z W M [2015] eKLR* stated as follows:-

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.’

23 The test for 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. 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.’

24 I have considered the defamatory words being the reference to Donald Kipkorir as the chairman of the Keiyo South CDF Committee instead of the respondent herein. The article did not mention the respondent in any manner whatsoever therefore, I do not find that in their ordinary words, the use of the wrong name would cause an ordinary thinking man to assume that the respondent is an impostor or that he has been impersonating the board chairman. The respondent did not show what words referred to him to create such an innuendo. In the premises, it is my considered view that the statement was not defamatory.

25 It is not in dispute that the statement was published by the appellant. However, there is no evidence that the same was published maliciously. Considering that the mentioned Donald Kipkorir is a lawyer and the respondent is a former PS and reading the alleged defamatory statement to wit; ‘For instance my chairman is a former permanent secretary Donald Kipkorir’ it is clear that the same was an honest mistake as corroborated by the appellants’ witness, Vincent Bartoo. Having received a phone call from the MP who the article was about, it is plausible that he did not believe it was a significant issue. For the present purposes indeed it is an open question whether in every statement suggestive of defamation gives rise to recovery of general damages as of right. The gist of the tort should not be entirely divorced from the provisions of Article 33 of the *Constitution* save that it falls within the ambit of the exceptions in Article 33 (2) construed and interpreted as a whole. The criteria that the words complained of tendered to lower the respondent in the estimation of right thinking members of society generally is a formulation which turns on the supposed impact of the statements on those to whom



it was communicated. The other basis upon which the court has to hold the characterization of the defamatory statement or words is to review the meaning accorded by the ordinary reasonable reader or recipient which will attach a defamatory nuance. The other question which an appeal of this kind must answer is whether the action for defamation as action per se on the respondent reputation can be presumed within the confines of the tort forming the cause of action. It is also recognised in our legal framework on defamation that if in fact there was no or minimum actual damage upon the claimant against the defamatory statement or words the manifestation by the court is to give effect to the right of freedom of expression for the protection of the adverse party of the proceedings. In a nutshell as a form of restatement of the law a statement is not defamatory unless it is publication as caused or is likely to cause serious harm to the reputation of the claimant. That for purposes of this tort harm to the reputation of the person or body that threatens for profit is not serious harm unless it has caused or likely to cause the person or body serious financial loss or ruin. In addition before the statement or words can be regarded as defamatory and action per se on top of the above requirements the meaning inferred to the aforesaid words or statement must be inherently injurious. It must also be shown that the words or statement complained of must produce serious harm to reputation which must be established by extraneous evidence. My point of departure from the impugned judgement of the court below the threshold of serious harm to the respondent by the publisher was not met by the evidence analysed and evaluated to support the final verdict on liability and award of damages. The question then which emerges from the entirety of the memorandum of appeal is the unanswered question from the impugned judgement that the communication subject matter of the cause of action was defamatory and tended to harm his reputation and to lower it in the estimation of the community, or society or to deter third parties/persons from associating or dealing with him in any of the human relationships and transactions. Defamation essentially is a recipient centred thought which then establishes the harm to be redressed by mandatory injunction or an award of damages. The trial court would then require the recipient interpretation of the valued stamen of defamation. This simply means that rhetorical hyperbole may not find its place in defamatory cause of action.

26 In the premises, I find that the trial court erred in law and fact on its finding that the respondent was defamed. The respondent did not prove his case on a balance of probabilities. He failed to prove that the article was defamatory or that it was published maliciously. The fact that he was not mentioned by name informs my finding that he was not defamed by the appellant.

27 The decision of the trial court is hereby set aside and the appeal is allowed with costs to the Respondent. The Appellant shall also have costs of the suit in the trial court.

28 It is so ordered

DELIVERED AND DATED AT ELDORET ON THIS 17th DAY OF JULY 2023

In the Presence of:

M/s Chebet for the Respondent

.....

R. NYAKUNDI

JUDGE

