



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL APPEAL NO. 22 OF 2019**

**PATRICK LANG'AT.....1<sup>ST</sup> APPELLANT**

**NATION MEDIA GROUP LIMITED.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**SAMWEL OTIENO ODERA.....1<sup>ST</sup> RESPONDENT**

**MILDRED MIRIAM OMONDI..... 2<sup>ND</sup> RESPONDENT**

**FACTOR CONNECT LTD..... 3<sup>RD</sup> RESPONDENT**

***[Being an appeal arising from the Judgment of the Hon. W. k. Onkunya (SRM)***

***delivered in Kisumu CMCC No. 451 of 2016 on 6<sup>th</sup> February 2017]***

**JUDGMENT**

The Appellants, **PATRICK LANG'AT** and **NATION MEDIA GROUP LIMITED** were held liable for the defamation of the Respondents, **SAMWEL OTIENO ODERA**, **MILDRED MIRIAM OMONDI** and **FACTOR CONNECT LIMITED**, following the publication of an article on an online platform known as **NAIROBI NEWS BLOG**.

1. The trial court awarded to the Respondents the sum of Kshs 2,000,000/= as General Damages, and Kshs 1,500,000/= as Exemplary Damages.

2. The Respondents were also awarded the costs of the suit, plus interest at court rates, from the date of judgment until payment in full.

3. Being dissatisfied with the judgment, the Appellants lodged an appeal to the High Court citing eight Grounds of Appeal. I find that the said Grounds of Appeal may be summarized as follows;

***(i) The trial court failed to evaluate the evidence exhaustively and/or cumulatively.***

***(ii) Defamation was not proved as the article complained of was true in most parts.***

***(iii) In any event, the article only referred to the 3<sup>rd</sup> Respondent.***

***(iv) The article in issue contained allegations in a corruption case in respect of which the respondents were eventually acquitted.***

***(v) The trial court failed to consider the circumstances which mitigated any award of damages payable to the respondents.***

***(vi) The trial court failed to consider the appellants' submissions.***

***(vii) The Damages awarded were manifestly or inordinately high.***

4. Based on the said grounds of appeal, the Appellants asked this court to set aside the judgment of the trial court.
5. In the alternative, the Appellants asked this court to review, vary or reduce the award of damages, so that the same is brought in line with relevant decisions.
6. Finally, the Appellants asked the court to award them costs of the appeal and also of the suit.
7. Being the first appellate court I am enjoined by law to carry out a fresh comprehensive evaluation of all the evidence on record.
8. First, it is common ground that the Appellants published the article in contention. The said article was in the following words;

***“How Kisumu Speaker Took Husband to ‘Honeymoon Trips Using County Funds.’ Kisumu Assembly Speaker, Ann Adul is***

***on the spot for taking her husband Elijah Adul on three ‘honeymoon trips’ paid for by funds from the county assembly.***

***These are part of the accusations leveled against her during the hearing of a case in which she is charged alongside six others on Tuesday.***

***Ms Adul is said to have used her position as chairperson of the County Assembly Service Board to Single source for the trips using a proxy company, Factor Connect.***

***The prosecution said that Ms Adul took her husband to Singapore, China and Israel at a total cost of Shs 17.4 Million alongside a section of MCAs.***

***Mr. and Mrs. Adul were present in all the trips by different committees of the House.”***

9. In the event, I hold the considered opinion that only 3 issues arise from the grounds of appeal: the same are;

***(1) Whether or not there was Defamation.***

***(2) If the answer to (1) is in the affirmative, did it relate to all the 3 respondents or only to the Company?***

***(3) Was the award of Damages manifestly or inordinately high?***

**1. Was there Defamation?**

10. The Appellants reiterated that the Defence of justification provided an adequate defence, as the publication was made on an occasion of qualified privilege.

11. It was a statement concerning court proceedings which were going on; and the case was one that was of public interest. Therefore, the Appellants submitted that they were under a social and moral duty to publish the said words to members of the public, who had a like duty or interest to receive them.

12. It is common ground that the defence of justification or qualified privilege is a complete defence to an action founded on defamation. **Section 6** of the **Defamation Act** provides as follows;

***“A fair and accurate report in any newspaper or proceedings heard before any court exercising judicial authority within Kenya shall be absolutely privileged provided that nothing in this Section shall authorize the publication of any blasphemous, seditious or indecent matter.”***

13. Clearly, for a publication to constitute an absolute defence to a claim founded upon defamation, it must be a fair and accurate report.

14. When a statement was factually accurate, it cannot lower the reputation of the person about whom it is spoken or written. That which is factually accurate is a true reflection of said person.

15. If a person is a thief, and he is called a thief, he cannot seek compensation; and that is because he would have been described fairly and accurately.

16. At paragraph 37 of their submissions the Appellants submitted thus;

***“My Lord, the Plaintiffs/Respondents were already painted as corrupt and their reputation already suffered by the fact that they were charged under the Ethics and Anti-Corruption Court with offences of conspiracy to defraud and fraudulent acquisition of public property through facilitation of three international trips, notwithstanding that the prosecution had to prove the case against them.”***

17. I was simply astounded at the audacity of that pronouncement! I am unable to fathom how the fact that a person has been charged with a criminal offence, of itself, causes his reputation to suffer.

18. I find that even the Appellants themselves are not convinced that that submission has a sound legal foundation. I so find because at paragraph 42 of their submissions they said;

***“My Lord, the matter being criminal, any ‘reasonable person’ knew that the Plaintiffs/Respondents were presumed innocent until proven guilty and that the article rested with the outcome of the Ruling.”***

19. If any reasonable person knew that the Plaintiffs/

Respondents were presumed innocent until proven guilty, it cannot then be true that their reputations had suffered simply because they were on trial for alleged criminal offences.

20. The 1<sup>st</sup> Appellant was, during the proceedings in the criminal case against the Respondents, (together with other accused persons), convicted in relation to the words he had used in the publication dated 8<sup>th</sup> October 2015.

21. He was then sentenced to pay a fine of Kshs 1,400/=, or in default, he was to serve 10 days imprisonment.

22. At the material time, the record of proceedings shows the 1<sup>st</sup> Appellant as saying;

***“The word ‘proxy’ gives a wrong impression.”***

23. It is then, that the learned trial magistrate pronounced herself thus;

***“Mr. Langat stated that he misreported court proceedings. I will have no option save to invoke provisions of Section 121 of the Penal Code Cap. 63 Laws of Kenya, which relates to offences in judicial proceedings.”***

24. It is within that context that the 1<sup>st</sup> Appellant was convicted and fined.

25. At paragraph 16 of their submissions, the Appellants said that the 1<sup>st</sup> Appellant;

***“... was admonished and apologized in open court for ‘misreporting’, and besides, the Plaintiffs/Respondents, and in particular the 3<sup>rd</sup> Plaintiff/Respondent did not suffer any loss or damage as a result.”***

26. I carefully perused the record of the proceedings before the trial court. I note that the 1<sup>st</sup> Appellant first said the following about the reporting of 8<sup>th</sup> October 2015;

***“I state that I abide by the statement of the Nation and Media Council.”***

27. In other words, the 1<sup>st</sup> Appellant did not see anything wrong, initially.

28. However, he went on to;

***“..... plead with the court if words might have been erroneous.***

***The error will not be repeated.”***

29. In other words, the 1<sup>st</sup> Appellant ultimately admitted that there was an error. He said that the error would not be repeated.

30. However, I did not find any apology from either of the Appellants.

31. More significantly, the Appellants did not lodge any appeal against the decision of the learned trial magistrate. In the circumstances, it follows that it is not open to the appellants to contradict the findings which have not been challenged by an appeal.

32. At any rate, the Appellants conceded, at paragraph 32 of their submissions that the use of the word ‘proxy’ amounted to a misreporting.

33. By that concession, the Appellants are deemed to have also admitted that the report was not factually correct, because if it had been factually accurate, it would not have been a misreporting.

34. It therefore follows that the Appellants failed to demonstrate how they could benefit from the provisions of Section 6 of the Defamation Act.

35. In the case of UHURU M. KENYATTA V. BARAZA LEORNAD [2011] eKLR Rawal DCJ held as follows;

***“While taking the defence of justification or qualified privilege in the defamation case, the defendant was required by law to establish the true facts and the plaintiff has no burden to prove the defence raised by the defendant. Once verified, the justification or qualified privilege does insulate the defendant, and in any event, the onus that the same is true, rests on the defendants, to make it a fair publication.”***

36. I can only add that that which is not shown to be factually accurate cannot, at the same time, be construed as fair.

37. I hold the considered view that when the 3<sup>rd</sup> Respondent (“the Company”) was referred to as a proxy of persons facing criminal charges, that implied the said Company had held itself out as having authority for and behalf of those other persons, whilst in fact the Company had no such authority.

38. PW2 testified that through the use of the word “proxy”;

***“It also comes out that the company belonged to Anne Adul and was not our company.”***

39. The article said that Ms Adul used her position as chairperson of the County Assembly Service Board to single source for the trips using a proxy company, Factor Connect.

40. PW1 testified that that implied that the company

***“... M/s Adul sourced for, conspired of this 15.4 Million to facilitate the 3 international trips.”***

41. In my considered view, a company that allows itself to be used as a proxy, by someone who does not own it; and which then enables that person to commit an offence is dubious.

42. Therefore, the article in question was definitely dematory.

## **2. Who was defamed?**

43. The article named the 3<sup>rd</sup> Respondent only.

44. In the case of HON. MWANGI KUNJURI Vs WANGETHI MWANGI & 2 OTHERS CIVIL APPEAL NO. 221 OF 2012, the Court of Appeal said;

***“26. For defamation to succeed, the statement must be published of and concern the claimant.”***

45. The Court made it clear that words were not actionable as defamatory unless they were published of and concerning the Plaintiff.

46. However, the said Court also made the following point, regarding the question about whether or not the Plaintiff can only bring an action for defamation if he was named in the article;

***“It is not essential that the plaintiff must be named in the defamatory statement: where the words***

***do not expressly refer to the plaintiff 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 (See Morgan V Odhams Press Ltd [1971] 2 All E.R. 1156). Such special facts are material facts which must be pleaded in the plaint and must be proved in evidence in order to connect the plaintiff to the words complained of.***

***Such pleading is often referred to as ‘reference innuendo’ in contrast to a ‘true innuendo’ where the extrinsic facts only bear on the defamatory meaning.”***

47. In this case the Plaintiffs did not plead any reference innuendo. The Plaint made reference to the “natural and literal meaning” of the words in issue.

48. In any event, the Plaintiffs did not prove any reference innuendo.

49. Accordingly, it is only the 3<sup>rd</sup> Respondent which was defamed.

### **3. Quantum of Damages**

50. It is well settled that the appellate court shall not reverse the award of damages which was granted by the trial court unless it is shown that the trial court either took into account irrelevant factors or failed to take into account some relevant factors.

51. The Appellants have submitted that the Respondents ought to have been granted only nominal damages.

52. The grounds for that submission are that the Appellants did not lead any evidence to prove that they suffered any loss or harm attributable to the defamatory article.

53. I was invited to rely on the case of **NATION NEWSPAPERS LIMITED Vs LYDIA CHESIRE, CIVIL APPEAL NO. 26 OF 1982**, to award Kshs 100,000/=.

54. In that case, the trial court awarded Kshs 15,000/=, but that sum was reduced by the appellate court, to Kshs 1,000/=, in the year 1984.

55. But the Appellants also appreciate that;

***“71. My Lord, this is because although libel is actionable per se and the court may presume that a plaintiff has suffered harm as was stated in the Mohammed Nasoro Dima Vs Mohamed Omar Soba [2013] eKLR, the degree of such harm must as of necessity be proved.”***

56. The Appellants appear to be mixing up issues, when they concede that libel is actionable per se, yet they go on to urge that the Plaintiff must prove the degree of the harm he suffered.

57. In my understanding, when it is said that libel is actionable per se, (in relation to the aspect of compensation) it implies that the Plaintiff is not required to prove that he suffered any damages, in order to either have a cause of action or in order to be awarded compensation.

58. In this case, the Appellants did not publish any apology. If anything, as I alluded to earlier, the 1<sup>st</sup> Appellant expressed the view that they were not at fault.

59. Even in their current submissions, the Appellants still stated that **DW1** was admonished for “misreporting”.

60. By putting the word “misreporting” in quotation marks, the Appellants are saying that they still did not believe that their action constituted misreporting.

61. Bearing in mind that the fact that the 1<sup>st</sup> Appellant was convicted for the said misreporting, I hold the view that the Appellants continued rejection of a finding made by the trial court, and which was not challenged by an appeal, is indicative of the Appellants’ attitude.

62. In my considered view, the said attitude is sufficient basis to justify the award of both the General Damages and the Exemplary Damages granted by the trial court.

63. Accordingly, the appeal is dismissed, save for the fact that the Judgment in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents is set aside.

64. The Appellants will pay to the 3<sup>rd</sup> Respondent, the costs of the appeal.

65. However, as regards the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, they will pay costs of the appeal, to the Appellant.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 3RD DAY OF MARCH 2021**

**FRED A. OCHIENG**

**JUDGE**