



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO.101 OF 2018

1. NATIONAL MEDIA GROUP

2. LABAN ROBERTAPPELLANTS

VERSUS

AWALE TRANSPORTERS LIMITED.....RESPONDENT

(Being an Appeal from the Judgment of the Hon. F. Kyambia, Senior Principal Magistrate(SPM) delivered on 18th May, 2018 in CMCC No.548 of 2015 at Mombasa)

JUDGMENT

1. The Appeal herein relates to the decision of the Subordinate Court delivered by Hon. F. Kyambia on **18th May, 2018**. On **27th March, 2015**, the Respondent filed a suit against the Appellants for damages for defamation in the Subordinate Court. The alleged defamatory words were published by the 2nd Appellant in his capacity as the agent of the 1st Appellant and the publication was done on the **10th March, 2015** and **12th March, 2015** via the 1st Appellant's newspaper, The Daily Nation.

2. The Appellants filed a Statement of Defence disputing the Respondent's claims, more specifically, that the words as published could not be construed as defamatory at all, and in any event, the publication was otherwise to discharge the Appellants' duty to the public without any malice to the Plaintiff/Respondent. To wit, that the Appellants published the article to show the problems Kenyans face in Sudan and the statement made by Kenyan Ambassador to Southern Sudan hence the publication was qualified.

3. Upon full hearing, the trial Magistrate delivered the Judgment on **18th May, 2018** and awarded the Plaintiff/Respondent a total sum of Kshs.7,000,000/= broken down into Kshs.6,000,000/= as general damages and Kshs.1,000,000/= in lieu of apology.

4. The Appellants were aggrieved by the said Judgment and have now lodged an appeal against it in this court. The grounds upon which the appeal is based have been listed in the **Memorandum of Appeal** as follows:-

a. The Learned Magistrate erred in law and in fact in holding that the Respondent had been defamed by the Appellants as the evidence adduced did not support the Respondent's Claim(s).

b. The Learned Magistrate erred in law and in fact by relying on controverted and hearsay evidence to arrive at a wrong determination and award.

c. The Learned Magistrate erred in law and in fact by admitting and relying on documentary evidence that was never formally produced at the hearing of the suit.

d. The Learned Trial Magistrate erred in law and in fact by misapprehending the provisions of the Defamation Act, chapter 36 of the laws of Kenya and thereby arriving at the wrong determination.

e. The Learned Trial Magistrate erred in law and in fact in awarding compensatory damages of Kenya Shillings six million (Kshs.6,000,000) to the Respondent which amount is inordinately high when taking into account the evidence, the pleadings and all other factors to be considered when assessing damages for defamation.

f. The Learned Trial Magistrate erred in law and in fact by failing to take into account and fully consider the various authorities submitted by the Appellants before arriving at the sum of Kenya Shillings six million (Kshs.6,000,000) which award was not

founded on any outlined legal principle or precedent and was inordinately high.

g. The Learned Trial Magistrate erred in law and in fact in awarding damages of Kenya shillings one million (Kshs.1,000,000) to the Respondent as damages in lieu of an apology which amount is inordinately high when taking into account the evidence, pleadings and all other factors to be considered when assessing damages for defamation.

h. The Learned Trial Magistrate erred in law and in fact by basing the award on extraneous considerations and factors.

5. Both parties sought to have the appeal disposed of by way of written submissions and highlighted them on **29th March, 2021** with **Mr. Gikandi**, Counsel appearing for the Respondent and **M/s Kemunto**, counsel appearing for the Appellants.

Appellants' submissions

7. In its submissions the Appellant summarized the grounds of appeal into three issues namely;

- 1. Whether the published articles referred to the Respondent herein;**
- 2. Whether the published articles were defamatory of the Respondent; and,**
- 3. What is the appropriate quantum of damages to be awarded?**

8. As regards the first issue, it is submitted that while it is true that the articles of **12th March, 2014** and **10th March, 2014** were authorized and published by the by the 2nd Appellant and 1st Appellant respectively, the publications were not defamatory of the Respondent as both articles did not refer to the Respondent herein. That the articles referred to an entity known as **Awale Transporters** but not **Awale Transporters Limited**, the Respondents herein. Therefore there is no nexus/relationship between **Awale Transporters** and **Awale Transporters Ltd**. The Respondent did not adduce any evidence to establish the relationship between the two entities.

9. According to the Appellants, the Respondent having failed to adduce the **Certificate of Incorporation**, lacked the status of a juristic person to institute the suit herein and as such, the trial court erred in failing to determine on this issue or otherwise ignoring to consider the exclusion of prefix "*Limited*" in the articles published by the Appellants. This line of argument was supported by an excerpt from the cases of **Root Capital Incorporated –vs- Cooperative Society Limited & Another (2016) eKLR**.

10. On the second issue, it is submitted that a statement can be deemed as defamatory only if it tends to lower a person in the estimation of right-thinking members of the society or if the statement causes the Claimant to be shunned or avoided. In that view, the Claimant ought to have called other witnesses to show how the words complained of, altered their perception of the aggrieved party. Respectively, the Respondents did not call any third parties. In any event, the trial court found the publications in question defamatory for other reasons that it was malicious and affected the aspect of reputation.

11. On the aspect of malice, it was submitted that the Respondents had the onus to prove the actual malice or improper motive in the mind of the publisher at the time of the publication. The appellants further submit that since the publication referred to an entity different from the Respondent herein, malice was never proved on part of the Appellants as against the Respondent. That, in any event, the publication concerned matters of public interests on the problems that Kenyans face in South Sudan.

12. On the aspect of reputation, it is argued that the Respondent never called any evidence of those referred to as the right-thinking members of the society to show that they thought adversely against the Respondent after reading the publication. All that is available is hearsay evidence by the Respondent and therefore the trial court erred in relying on such evidence and the claim ought not to have succeeded at all. Reliance is placed on the cases of **SMW –VS-ZWM [2015] eKLR**, **Selina Patani & Another V dhiranji –vs- patani[2019]eKLR** and **Daniel N. Ngunia –vs- KGGCU Limited [2000]eKLR**.

13. On quantum, the Appellants in this case submitted that the award of Kshs.7,000,000/= for damages was inordinately too high, lacked any legal basis and the trial court arrived the same award while taking into account irrelevant matters and disregarded those that were relevant. The Appellants then suggested that an award of Kshs.2,000,000/= would have been sufficient had the Respondent proved its claim in defamation. In reaching that conclusion, the Appellants relied on the cases of **Ken Odondi & 2 Others –vs- James Okoth Omburah T/A Okoth Omburah & Company Advocates (2013)eKLR**, where the court of appeal reduced an award of Kshs.7,000,000/= to Kshs.4,000,000/= and in the case of **Standard Limited –vs- G.N Kagia & Company Advocates [2010] eKLR**, where a total award of Kshs.6,000,000/= was reduced to composite award of Kshs.3,000,000/=.

Respondent's Submissions

14. The introductory part of the Respondent's submissions addresses the application dated **13th February, 2020** in which it sought the appeal to be dismissed. I will however deal with that application later in my determination.

15. As regards the Appeal, the Appellant submitted on each ground of appeal. With respect to ground No.1, which is on whether the Respondents have been defamed. It is submitted that the publication of the two articles on **10th March, 2015** and **12th March, 2015** was not denied and they intimated that the Respondents had authorized the burial of **Johnson Mwakavi Ngulu** in South Sudan without the consent of family kins when above all imagination the said Johnson was not the Respondent's employee. As a consequence of those publications, the Respondent received numerous calls from its clients and their business counterparts inquiring of the truthfulness in the said publications and also that the publications negatively affected the Respondent's business since most of its clients resolved to distance themselves from the

Respondent. Pw1 then produced a copy of certificate of incorporation to show that the entity referred to in the publications is the Respondent herein.

16. The Respondent submitted that the Appellants on the other hand failed to adduce documentary evidence in support of their case and also failed to call witnesses who were crucial on their part. In further explanation, it was submitted that DW1 had testified that the source of his information was **Hassan** and **Abdi Abdulai** but the two were never called to testify to that effect. DW1 also described the two as employees of the Respondent but it turned out that from the list of employees produced by PW2, both **Abdi** and **Hassan** never featured in that list as the Respondent's employees. In the Respondent's view, **Abdi** and **Hassan** were crucial witnesses to the Appellants' case and the failure to call them was detrimental to their case. This line of argument was supported with excerpts from the cases of **Linus Nganga Kiongo & 3others – vs- Town Council of Kikuyu [2012] eKLR.**

17. With respect to the 2nd and 3rd grounds of appeal, on whether the Magistrate relied on hearsay evidence, it is submitted that the Respondent called two witnesses in support of its case but the Appellants failed to call as witnesses the people who furnished them with information to the articles they published. The Appellants therefore knew that had they called such persons to testify, their then evidence would be injurious to their case. Lastly, that the failure by the Respondents to enquire on the truthfulness of the information they published clearly revealed malice on their part.

18. For the remaining Grounds of Appeal, it was submitted that that the trial Magistrate correctly considered the provisions of the Defamation Act and the principles guiding the award of general damages once one is found liable for defamation as it was stipulated in the cases of **C.A.M –vs- Royal Media Services Limited [2013]eKLR.**

Analysis and Determination

19. I have considered the record, the submissions made on behalf of the parties and the law. In my view, since the Respondent's claim was a defamation suit, the issues which ought to have been established and which are issues for determination are as follows;

a. Whether there exist a defamatory statement;

b. Whether the Defendant has published or caused the publication of the defamatory statement;

c. Whether the publication refers to the claimant.

20. However, before going into the merits of the appeal, I wish to first address the Respondent's **Notice of Motion** application dated **13th February 2020** seeking for an order to strike out the appeal for want of prosecution.

21. In support of that Application, **Mr. Gikandi** Counsel for the Respondent submitted that the **Memorandum of Appeal** was filed on **12th June, 2018** while the record of appeal was filed on **9th September, 2019** which period is over one year. The learned counsel relied on the provisions of **Order 42 Rule 11** of the **Civil Procedure Rules**, which provides that if no directions are taken within 30 days of filing the Memorandum of Appeal, then the Respondent will be entitled to apply for dismissal of the appeal. Further that **Order 42 Rule (2)** of the **Civil Procedure Rules** which provides that the Deputy Registrar shall on notice to the parties list the appeal before a judge for dismissal if the same has not been set down for hearing one year after the filing of the Memorandum of Appeal.

22. In response thereof, **M/s Kemonto**, Counsel for the Appellants argued in support of the **Replying Affidavit** filed on **9th October, 2020** and **Grounds of Objection** dated **22nd September, 2020**. In her view, the application had been overtaken by events and much of the delay was attributed to by the court in availing the certified copies of proceedings on **14th August, 2019**, just less than a month after when the Record of appeal was filed.

23. Having due regard to submissions by both counsel I am of the view that the reasons adduced by the Appellants are plausible in that the circumstances were beyond the control of the Appellants. It would be impractical to file the record of appeal without the certified copies of proceedings and indeed the appellant has adduced correspondences sent to court inquiring of the certified copies of the proceedings. The certified copies of proceedings also contain a court stamp showing that they were available as at **14th August, 2019**.

24. In my view, any delay attributable to the Appellants could only be viewed as from **14th August, 2019** when the proceedings were availed. It is undisputed that the record of appeal was filed on **9th September, 2019** which is 26 days later. In the circumstances, it cannot be gain said that 26 days exposed inordinate delay in preparing and filing a record of appeal. In conclusion, the application dated **13th February, 2019** fails and it is hereby dismissed with no orders as to costs.

25. Turning to the merits of the appeal, this court, as the first appellate court has the duty to re-appraise the evidence on record and reach its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. (See the case of **Selle – vs- Associated Motors**

26. In particular, this court is not necessarily bound to follow the Trial Magistrate's findings of fact if it appears that either he has clearly failed to take account of particular circumstances on some point 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.

27. In this particular case, it is not disputed that the articles in question were published in the Daily Nation Newspaper. Infact DW1, in his testimony before the trial court stated that;

“I published a story on the matter, I got information that Johnson Mwakavi Died in Juba. ...I contacted the Kenyan Embassy in Juba and they confirmed the same.He was working for Awale Transporters and the family told me the company was in touch. They also gave me the number of the owner and one person, when I talked with the person he said, the deceased was not working with them. My motive was public interest.

The body was not transported home as the situation in South Sudan currently state was volatile, to the published story. I talked with Awale Transporters Limited. I had to counter check before publishing the story. The document indicate the company as Awale Transporters and not Awale Transporters Limited. I pray that the suit be dismissed”.

28. As I understand the law of defamation and as rightly quoted by the Respondent is concerned with the protection of reputation. It 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.

29. Further, the law recognizes that in every man has 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.

30. In the **4th Edition Volume 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 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.”

31. The “reasonable man” is explained in **Winfield & Jolowicz on Tort 8th Edition** at Page 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.”

32. I have read through the Article published vis-à-vis the testimony of DW1 and I do take note that although Dw1 alleged to have called a person from the “**Company, Awale Transporters**” details of which he was given by the Deceased family, he was informed that the deceased never worked with the said company. He further stated that in order to counter check what he called **Awale Transporters Limited** although in his publication he described the Company as **Awale Transporters**. In my view, from DW1’s evidence he was describing the same entity that is **Awale Transporters Limited**, when he described the Company as **Awale Transporters** in his articles. It would be a thin line of argument to state that the company described in the article had no prefix “Ltd” since in his evidence in chief DW1 testified that he had called **Awale Transporters Ltd** to ascertain on the matter. Further it was not shown that the Company by the name **Awale Transporters** engaging in the business of transportation of goods to South Sudan other than **Awale Transporter Limited**. I therefore agree with the Trial Court that the articles would be understood to be published of and concerning the Respondent herein.

33. As for whether those articles were defamatory of the Respondent, my view is that a publisher can be held liable for defamation if he proceeds to publish the story without exercising due diligence in ascertaining the truthfulness of the story or part thereof of the publication. In this instant subject matter, Dw1 clearly stated that someone from **Awale Transporters** told him that the deceased was not one of their employees but he never took time to verify the truth. What he said is that **Awale Transporters** was unwilling to facilitate the transportation of the deceased to Kenya and it appeared that the circumstances of the deceased’s death were unclear, and the Company should have explained why its representatives allowed the body to be buried without involving the family.

34. Having stated that it was denied that the Deceased was an employee of the Respondent nor were any other person referred to in the article as sources of the information, specifically **Addi Abdillahi**, a driver who was allegedly described as to have been with the deceased, it was incumbent upon the Appellants to show how they otherwise believed the information to be true. Since that was not done I implore that the publication was done in bad motive and would paint a picture to any reasonable person reading the article that the Respondent contributed to the death of the deceased.

Therefore there was defamation of the Respondent and the Trial Magistrate has so held. There was no evidence at all that the Appellants were keen to establish whether the deceased was an employee of the Respondent.

35. On quantum, the Trial Magistrate awarded Kshs.6,000,000/= as general damages and Kshs.1,000,000/= in lieu of apology. However, the Magistrate did not refer to local case law in reaching that conclusion in any event, could the award be deemed as inordinate as submitted by the Appellants?

36. It was held by this Court in the case of **Butt v Khan [1981] KLR 349:-**

“That an appellate court should not interfere with the decision of the trial court unless it is shown that the judge proceeded on the wrong principle of law and arrived at misconceived estimates.”

37. It is a common ground in this case that there were two publications that have been made in this matter and the Respondent was unwilling in all circumstance to offer an apology as requested by the Respondent. I do take note that the Respondent is a reputable Company in the transport business. In my view, the award by the Trial Court is justified. In making that conclusion, reliance is placed on the case of **Miguna Miguna –vs- The Standard Limited & 4 Others [2017]eKLR**, where a sum of Shs.5,000,000 was awarded for general damages for defamation and an additional Sh.1,000,000.

38. In the upshot the appeal herein is found without merit and hereby dismissed.

It is hereby so ordered.

SIGNED and DATED at MOMBASA this 14th day of JULY, 2021.

D. O. CHEPKWONY

JUDGE

DELIVERED VIRTUALLY at MOMBASA this 15th day of JULY, 2021.

A. ONG'INJO

JUDGE

In the presence of:

Mr. Obinori advocate for Appellant

Mr. Gikandi & Co. Advocate for Respondent

Court Assistant - Ogwel

Court – Certified copies to be supplied upon payment of copying charges.