



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO. 11 OF 2019**

**TESSY N. MUSYIMI.....APPELLANT**

**-VERSUS-**

**STANDARD MEDIA GROUP LTD.....RESPONDENT**

(Being an appeal from the Ruling and Order of the Senior Resident Magistrate's Court in Eldoret CMCC No. 521 of 2018 dated 7 December 2018 by Hon. E. Kigen, SRM)

**JUDGMENT**

[1] This is an interlocutory appeal arising from the ruling and order dated 7 **December 2018** made in **Eldoret CMCC No. 521 of 2018: Tessa N. Musyimi vs. The Standard Media Group Ltd** by **Hon. E. Kigen, SRM**. The appellant had sued the Defendant in that suit for defamation in connection with some live audio and visual broadcast made by the Defendants reporters, anchor, commentators or agents on Kenya Television Network (KTN) News Channel on 5 **April 2018**.

[2] The Defendant entered appearance in the suit on 17 **May 2018** and filed along with it a Notice of Preliminary Objection of even date, contending that the jurisdiction of the lower court under **Article 165(3)(b)** of the Constitution had not been properly invoked, as provided for in **Article 22(3)** of the **Constitution** and the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**; and therefore that the lower court lacked the jurisdiction to hear and determine the suit. That preliminary point was taken up before the lower court and in her ruling dated 7 **December 2018**, the learned trial magistrate held that:

**“Article 165 establishes the High Court. Article 165(3)(b) confers jurisdiction on the high court to hear and determine the question of whether a right or fundamental freedom in the bill of rights has been denied violated, infringed or threatened. Article 22 confers jurisdiction on the high court to hear claims that a right or fundamental freedom in the bill of rights has been denied violated or infringed.**

**Article 23(2) gives parliament mandate to enact legislation giving original jurisdiction to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of or threat, to a right or fundamental freedom in the bill of rights.**

**Article 23(1) states that the high court has jurisdiction in accordance with article 165, to hear and determine applications for redress or denial, violation or infringement of or threat to right or fundamental freedom in the bill of rights.**

**The Magistrates Act 2015 confers jurisdiction to the magistrates court to hear and determine proceedings of a civil nature subject to its pecuniary jurisdiction.**

**The plaintiff is seeking damages for infringement of his rights to dignity out of actions of the defendant herein where it is alleged the defendant published an Article portraying the plaintiff as dangerous person and whose reputation has been damages. In my view the said reward can only be granted by the high court which has vested jurisdiction. As such I make a finding that this court lacks jurisdiction to entertain this suit.”**

[3] Being aggrieved by that ruling and order, the appellant filed this appeal on 16 **January 2019** on the following grounds:

[a] That the learned Magistrate erred in law and in fact by failing to consider and/or take into account the appellant’s submissions;

[b] That the learned Magistrate erred in law and in fact by applying the wrong principles of law in arriving at her decision;

[c] That the learned Magistrate erred in law and in fact by misinterpreting the provisions of the Constitution of Kenya;

[d] That the learned Magistrate erred in law and in fact by allowing the respondent's preliminary objection;

[e] That the learned Magistrate erred in law and in fact by failing to give reasons and/or analyze the issues and/or submissions tendered by the appellant so as to arrive at her decision.

[4] Accordingly, it was the appellant's prayer that the appeal be allowed; and that the ruling and order issued by the trial court on **7 December 2018** on the respondent's preliminary objection dated **17 May 2018** be set aside. She also prayed that an independent determination be made by this Court in respect of the preliminary objection and that she be awarded the costs of the appeal.

[5] At the instance of the parties, directions were issued on **23 July 2019** that the appeal be canvassed by way of written submissions. Thus, the appellant's written submissions were filed on **30 August 2019** by **M/s Ombima & Co. Advocates**. Counsel proposed two issues for determination in this appeal, namely:

[a] Whether the subordinate court has jurisdiction to hear and determine a defamation suit arising from infringement of rights by the media;

[b] Whether the subordinate court has power to grant the relief sought.

[6] According to **Mr. Ombima**, the appellant's cause of action before the lower court was based on the tort of defamation for which the appellant prayed for general, exemplary and aggravated damages together with interest and costs. Hence, in his view, since this was not a matter falling within the preserve of the High Court under **Article 165(3)** of the **Constitution**, the learned magistrate erred in law in allowing the preliminary objection. He added that the authorities cited by the respondent in support of the preliminary objection were totally irrelevant to the issue at hand and ought not to have formed the basis of the decision of the lower court.

[7] Counsel for the respondent, on the other hand, insisted that the subordinate courts lack the jurisdiction to entertain any suit against a media entity. He relied on **Christopher Ndarathi Murungaru vs. Standard Ltd & 2 Others** [2012] eKLR; **Standard Ltd & 2 Others vs. Christopher Ndarathi Murungaru** [2016] eKLR; **Ephraim Maina vs. Standard Group Limited** [2018] eKLR and **Bosire Ogero vs. Royal Media Services** [2015] eKLR to support the assertion that any party approaching the court for relief must do so only in the High Court and in the manner prescribed by **Article 22(3)** of the **Constitution** and **Rules 4 and 10** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**.

[8] The brief background of the matter, as can be gleaned from the record of the lower court, is that at all material times, the appellant and her husband were carrying on business in Eldoret Town as **KNAAN MOTORS LIMITED**. They were arrested in the year **2016** and charged before the Chief Magistrate's Court at Eldoret in **Eldoret Chief Magistrate's Criminal Case No. 3340 of 2016** with the offences of being in possession of firearms and ammunition without the requisite certificates. At paragraph 6 of her Complaint before the lower court, the appellant pleaded that, on **5 April 2018**, when that criminal case came up for hearing, she noticed the presence of a retinue of cameramen, reporters and journalists from **KTN** who she got to learn were interested in covering the proceedings of their case. She further averred that the journalists electronically covered the entire trial and upon conclusion, hurriedly left the court room.

[9] The appellant's cause of action was that, a few days later, she received phone calls and information from friends, relatives, colleagues and business associates who were:

**"...shocked, embarrassed, enraged, disturbed and/or hysterical and informed the plaintiff that they had watched and heard a live electronic broadcast aired by Kenya Television Network (KTN) News Channel, on the material date of the trial(s), specifically covering and/or reporting on the plaintiff's trial, streamed live on television and vide the YouTube link ... which broadcast explicitly described and/or identified the plaintiff and her spouse as known to violent leaders of a criminal gang based in Eldoret, who had frequently terrorized and or harassed the residents of Eldoret town and its environs for over six (6) months and had been arrested and charged before the Chief Magistrate's Court at Eldoret..."**

[10] The appellant contended before the lower court that the live broadcast and the contemporaneous reporting were defamatory of her; hence her suit. As the Notice of Preliminary Objection dated **17 May 2018** was filed along with the Respondent's Memorandum of Appearance, the lower court did not have the benefit of the Respondent's answer to the claim. It is however manifest in the Respondent's written submissions and the authorities cited that its contention is that the appellant's claim falls within Chapter 4 of the Constitution and therefore ought to have been filed before the High Court in the manner envisaged by **Articles 22 and 23** of the **Constitution** and **Rules 4 and 10** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**; and therefore that the lower court correctly held that it had no jurisdiction to entertain the claim. In the premises, the single issue for determination in this appeal is the question whether or not the lower court had the jurisdiction to hear and determine the defamation suit.

[11] In **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others** [2012] eKLR, the Supreme Court made the point that:

**"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings...Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a**

court of law beyond the scope defined by the Constitution. Where the Constitution confers power on Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

[12] The jurisdiction of the Senior Resident Magistrate's Court is therefore circumscribed by not only **Article 169** of the Constitution, but also the **Magistrates' Courts Act, No. 26 of 2015**, which provides thus in **Section 7(1)(d)**:

**"A magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed ... seven million shillings, where the court is presided over by a senior resident magistrate..."**

[13] On the face of it therefore, the court of the Senior Resident Magistrate had the requisite jurisdiction to entertain the suit; and the fact that the firm of **M/s Ombima & Co. Advocates**, deliberately took the decision to file that suit before the subordinate court can only be understood to signify the implied understanding that any award of damages, in the event of success would be capped by the upper limit of the pecuniary jurisdiction of the Senior Resident Magistrate's court as aforementioned. Moreover, **Section 5** of the **Civil Procedure Act**, is explicit that:

**"Any court shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which its cognizance is either expressly or impliedly barred."**

[14] Considerable effort was expended by the Respondent with a view of convincing the Court that the issue before the lower court was a constitutional one, and therefore could only be articulated before the High Court and in the manner envisaged by **Articles 22, 23 and 165(3)(b)** of the **Constitution** and the **Rules 4 and 10** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules**. To this end reliance was placed on **Christopher Ndarathi Murungaru vs. Standard Limited** (supra) and **Standard Ltd vs. Christopher Ndarathi Murungaru** (supra). In the first case, a preliminary objection was raised in a suit for defamation before the High Court on the ground that the High Court had no jurisdiction to entertain the suit by virtue of **Article 34(2)** of the **Constitution**. The argument in that case was that the courts are part of the State; and that the only body clothed with jurisdiction over media houses, by dint of **Article 34(2)** of the **Constitution**, is the Media Complaints Commission.

[15] The preliminary objection was found to be devoid of merit and was accordingly dismissed by **Hon. Odunga, J.** on **29 October 2012**. Here is the conclusion reached by the Honourable Judge:

**In conclusion, whereas I agree that the Court's authority to control, interfere with or penalise the media for any opinion or view or the content of any broadcast, publication or dissemination has to be viewed in light of the current Constitutional dispensation, the Court is not barred from investigating and adjudicating over any dispute where a person alleges that his rights or fundamental freedoms under Article 28 of the Constitution have been infringed and award appropriate remedy. To equate the powers of the Court with that of the Complaints Commission flies in the face of the express Constitutional provisions in Article 165(3)(b) which confers on the High Court the jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. Such reasoning will also go contrary to the powers of the High Court under Article 165(6) to supervise the subordinate courts and any person, body or authority exercising a judicial or quasi-judicial function. In the defendants' own submission it is admitted that there is a right of appeal to the High Court from a decision arising from the process under the Media Act, a recognition that even in cases where the Complaints Commission is clothed with jurisdiction the appellate jurisdiction of the High Court is not ousted. In fact even if there was no avenue for appealing to the High Court and even if the said Act had purported that its decision was final that would not oust the High Court's supervisory jurisdiction under Article 165(6) aforesaid.**

[16] On appeal to the Court of Appeal, the decision of the High Court was upheld in **Standard vs. Dr. Christopher Ndarathi Murungaru** (supra). The Court of Appeal held that:

**In our view, such express jurisdiction cannot be ousted or limited by implication, as the appellants assume. In our reading of Article 34(5) of the Constitution, which provides for the establishment of a media regulatory body, there's absolutely nothing that constrains, limits or otherwise affects the jurisdiction conferred on the High Court by Articles, 22, 23 and 165(3)(b), to enforce rights and fundamental freedoms. The Media Complaints Commission, whose membership is largely drawn from media and related practitioners, is first and foremost in the nature of a self-regulatory body that provides remedies in cases of breach of the code of conduct by journalists. The Commission has no powers, under section 38 of the Media Council Act to award the kind of remedies that the Constitution contemplates for violated or infringed rights and fundamental freedoms including a person's right to reputation and dignity. It cannot therefore be seriously argued that such a body is a substitute for the High Court in matters of enforcement of rights and fundamental freedoms, as argued by the appellants.**

[17] For its full tenor and effect, **Article 34** of the Constitution is reproduced hereunder. It provides that:

(1) Freedom and independence of electronic, print and all other types of media is guaranteed, but does not extend to any expression specified in Article 33(2).

(2) The State shall not –

(a) exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or

- (b) penalise any person for any opinion or view or the content of any broadcast, publication or dissemination.
- (3) Broadcasting and other electronic media have freedom of establishment, subject only to licensing procedures that—
- (a) are necessary to regulate the airwaves and other forms of signal distribution; and
  - (b) are independent of control by the government, political interests or commercial interests.
- (4) All State-owned media shall—
- (a) be free to determine independently the editorial content of their broadcasts or other communications;
  - (b) be impartial; and
  - (c) afford fair opportunity for the presentation of divergent views and dissenting opinions.
- (5) Parliament shall enact legislation that provides for the establishment of a body, which shall—
- (a) be independent of control by government, political interests or commercial interests;
  - (b) reflect the interests of all sections of the society; and
  - (c) set media standards and regulate and monitor compliance with those standards.

[18] It is manifest therefore that what was in issue in **the Murungaru Cases** is markedly different from what was at play before the lower court. There was no allegation in the Plaintiff that the suit was in enforcement of the Bill of Rights per Chapter 4 of the Constitution or **Article 34** in particular. It is also noteworthy that in **the Murungaru Case**, the Defendant had filed a Defence and specifically pleaded **Article 34(2) of the Constitution**; which was not the case before the lower court in this matter. I note too that in **Ephraim Maina vs. Standard Ltd.**, the argument that a defamation case can only be filed by way of a petition under Articles 22 and 23 of the Constitution was overruled.

[19] Being of the same persuasion as I am, I take the view, therefore, that on the basis of the Plaintiff that was filed before the lower court, and which was the only pleading for it to go by, the lower court had the jurisdiction to entertain the claim and to grant the reliefs sought by the appellant. It was therefore a misdirection on the part of the lower court to conclude that the issue before her was for enforcement of the right to freedom of the media under Article 34 of the Constitution when the issues as pleaded before her were of no constitutional moment. And, even if it later became manifest from subsequent pleadings that the suit had constitutional connotations which would have the effect of placing it within the purview of the High Court then, under **Section 18 of the Civil Procedure Act**, justice could still be done as mandated by **Article 159(2)(d) of the Constitution** by way of an appropriate application for transfer as opposed to literally chasing away the appellant from the seat of justice without according her case a hearing on the merits. In this respect, I find apt the expressions by the **Supreme Court of India in Mamraj vs. Sabri Devi [1999] AIR 96 that:**

**"One of the first and highest duties of all courts is to take care that the act of the court does no injury to any of the suitors and when the expression 'Act of the court' is used it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as a whole from the lowest court which entertains jurisdiction over the matters up to the highest court which finally disposes of the case."**

[20] *In the result, I find merit in the appeal. It is hereby allowed. The ruling and order of the lower court dated 7 December 2018 is hereby set aside and substituted with an order dismissing the respondent's preliminary objection dated 17 May 2018 with costs, including the costs of the appeal.*

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 15<sup>TH</sup> DAY OF MAY 2020**

**OLGA SEWE**

**JUDGE**