



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 158 OF 2007

JAMES K. MAINA.....APPELLANT

-VERSUS-

ROBERT SANGA.....RESPONDENT

(Being An appeal from the Judgment and Decree of Hon. S. Atonga, Principal Magistrate, delivered on 29 November 2007 in Kapsabet SPMCC No. 334 of 2003)

JUDGMENT

[1] The Appellant herein, **James K. Maina**, was sued by the Respondent, **Robert Sanga**, before Kapsabet Senior Principal Magistrate's Court in **Kapsabet SPMCC No. 339 of 2003: Robert Sanga vs. James K. Maina**, for General and Exemplary Damages, interest and costs, for defamation of character. The Respondent's contention before the lower court was that, on or about **29 September 2003**, the Appellant wrote or caused to be written in English language, a letter containing the following defamatory words about him:

"You have impregnated one LJ, a Primary school girl."

[2] According to the Respondent, the words, in their natural and ordinary meaning, were understood to mean:

- [a] That the Respondent is a person of loose moral character;
- [b] That the Respondent is a social misfit;
- [c] That the Respondent is a sexual maniac;
- [d] That the Respondent should be ostracized by the society;
- [e] That the Respondent is a beast.

[3] It was further averred by the Respondent in his Complaint dated **24 December 2003** that, by writing the said statement, the Appellant falsely and maliciously sullied his character, credit and reputation; lowering it in the eyes of right thinking members of the society, and in particular his friends, workmates, relatives and all those who know him. He further averred that the said statement exposed him to ridicule, odium and contempt, hence his claim for damages.

[4] The Appellant had denied the claim before the lower court and having heard the parties, the Learned Trial Magistrate found for the Respondent and awarded him **Kshs. 80,000/=** as General Damages plus a further sum of **Kshs. 120,000/=** as Exemplary Damages together with costs and interest. Being dissatisfied with the lower court's decision, the Appellant filed this appeal on **10 December 2007** on the following grounds:

- [a] That the Learned Trial Magistrate erred in law and fact in failing to hold that the Plaintiff did not prove his case on a balance of probability;
- [b] That the Learned Trial Magistrate erred in failing to evaluate the evidence tendered judiciously;
- [c] That the Learned Trial Magistrate erred on all points of fact and law in as far as the award of damages is concerned;

[d] That the Learned Trial Magistrate erred in law and in fact in failing to apportion liability judiciously;

[e] That the Learned Trial Magistrate's award of exemplary damages was erroneous;

[f] That the Learned Trial Magistrate's assessment of both general and exemplary damages was misconceived and exorbitant;

[g] That the Learned Trial Magistrate erred in law and in fact in failing to dismiss the Plaintiff's case;

[h] That the Learned Trial Magistrate erred in law and in fact in disregarding the formidable defence evidence tendered; and

[i] That the Learned Trial Magistrate erred in law and in fact in failing to hold that the Respondent was not injured while on duty.

[5] In the premises, the Appellant's prayer was for the appeal to be allowed with costs; that the Judgment of the lower court on liability and quantum to be set aside; and that a proper finding be made by this Court. The appeal was canvassed by way of written submissions, pursuant to the directions issued herein on **29 September 2015**. Consequently, the Appellant's Counsel filed written submissions herein on **22 January 2016** contending that the Respondent did not discharge the burden of proving defamation to the requisite standard in that, the Respondent was the only witness who testified as no other witness was called to prove publication; an essential ingredient of defamation. In support of this argument, Counsel relied on **J. Kudwoli vs. Eureka Educational and Training Consultants & 2 Others** and **Daniel N. Ngunia vs. Kenya Grain Growers Co-operative Union Ltd, Civil Appeal No. 281 of 199.**

[6] It was further the argument of the Appellant that it raised the defence of justification and called four witnesses in proof thereof, including the mother of the girl in question who confirmed that the girl was indeed impregnated by the Respondent, but that the lower court did not give the defence evidence sufficient attention. According to the Appellant, the Respondent had no reputation for purposes of vindication in the suit, having taken advantage of an innocent school going girl without considering that she was under-age; and therefore the Respondent's suit ought to have been dismissed by the lower court. The Appellant urged the Court to consider the character of the Respondent, in line with the holding in **Johnson Evan Gicheru vs. Andrew Morton & Another [2005] eKLR** and **Uren vs. John Fairay & Sons Pty Ltd, 117 C.L.R. 115, 150.**

[7] The Respondent's written submissions were filed on **10 May 2016** by **M/s Nyachiro Nyagaka & Company Advocates**. The said Advocates defended the lower court decision contending that the quantum awarded was reasonable. Counsel relied on **Butt vs. Khan [1981] KLR 349** for the proposition that an appellate court ought not to disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It was the submission of Counsel for the Respondent that the Learned Trial Magistrate, in assessing damages considered the conduct of the Appellant from the time the libel was published down to the time the verdict was given; and did not overlook the fundamental aspects of the case or the applicable law.

[8] Counsel cited **Jones vs. Pollard [1997] EMLR 233-243** and **John vs. MNG Ltd [1997] QB 586** for a checklist of compensable factors in libel actions. Reliance was also placed on the following authorities:

[a] **Nairobi HCCC No. 420 of 2011: Samuel Mukunya vs. Nation Media Group Ltd & Another;**

[b] **Nairobi HCCC No. 315 of 2014: CFC Stanbic Bank Limited vs. Consumer Federation of Kenya;** and

[c] **Nairobi HCCC No. 547 of 2008: Hon. Nicholas Ombija vs. Kenya Commercial Bank Ltd.**

[9] This being a first appeal, I am mindful that it is the duty of the Court to review the evidence adduced before the lower court with a view of satisfying itself that the decision was well-founded; while giving allowance for the fact that I did not have the advantage of seeing or hearing the witnesses. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, this principle was expressed thus:

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 allowance in this respect..."

[10] By way of evidence, the Respondent testified as **PW1** before the lower court. His evidence was that he was working at Kibabet Tea Estate, an Estate belonging to Eastern Produce Kenya Limited. That on the **29 September 2003**, he received a letter from the Manager of the Division, who is the Appellant herein, informing him of an accusation that he had impregnated a class 7 school-girl by the name **LC**. He added that after a meeting that was held on **29 September 2003** to discuss the matter at the Manager's office, he was suspended and thereafter sacked from his employment without any investigation being done to ascertain the veracity of the allegations against him. He therefore asserted that his reputation was damaged.

[11] The Appellant on his part told the lower court that the complaint against the Respondent was made to him by the Headmaster of [Particulars withheld] Primary School, where the complainant was learning. He was then the union leader of the division in which the Respondent worked. He told the court that, upon receiving the complaint that the Respondent had impregnated the girl called **LC**, he convened a consultative meeting at which he read to them the contents of the Headmaster's letter. It was thereafter resolved by the company to have the Respondent suspended and ultimately dismissed in public interest. He added that it was in that regard that he wrote to the Respondent the letter dated **29 September 2003**. The evidence of the Appellant was augmented by the evidence of the complainant's mother, **TS (DW2)** and the complainant, **LC (DW3)**. They both reiterated their contention that the Respondent had befriended **DW3** and impregnated her as alleged and that the child died soon after birth.

[12] Having heard both parties, the Learned Trial Magistrate held that:

"...The court therefore became convinced that DW1 defamed the Plaintiff by:

(1) Copying the letter to the said third parties before the said allegation was verified to be true or false.

(2) Although DW2 gave evidence in court to support the evidence of DW3 her daughter that the Plaintiff impregnated her and also that the Plaintiff admitted before her, the evidence of DW3 were hearsay evidence of DW3 and DW2, since there was no Doctor nor nurse who was called to give evidence that the Plaintiff impregnated DW3.

(3) Lastly, although the Exhibits No. 2 and No. 3 were produced by the Defence, they never assisted this court in arriving at just decision since their authors or their makers were never called to give evidence in court.

Therefore for the 3 reasons given above, this court observed that DW1 by his written exposed the Plaintiff to hatred or contempt in the eyes of reasonable thinking members of the society and enter judgment in favour of the Plaintiff as follows:-

(a) General Damages Kshs. 80,000/=

(b) Exemplary Damages Kshs. 120,000/=

(c) Costs of this suit

(d) Interest on (a) (b) and (c)..."

[13] Having given due consideration to the lower court record, and in particular, the Judgment, the Grounds of Appeal as well as the written submissions filed herein, I have no hesitation in disregarding the last ground of appeal, namely, that the Learned Trial Magistrate erred in law and in fact in failing to hold that the Respondent was not injured while on duty, as it has no relevance to the facts of this case. Hence, the twin issues that present themselves for my determination are:

[a] Whether the Respondent proved his case before the lower court to the requisite standard;

[b] Whether the Learned Trial Magistrate committed an error of principle in making the awards he made.

[a] Whether the Respondent proved his case to the requisite standard

[14] In Winfield on Tort, 8th Edition at page 254, Defamation is defined as:

"...the publication of a statement which tends to lower a person in the estimation of right-thinking members of society generally, or which tends to make them shun or avoid that person..."

Hence, in Uren vs. John Fairfax & Sons Pty Ltd (supra) it was held that:

"...a man defamed does not get compensated for his damaged reputation. He gets damages because he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways - as a vindication of the plaintiff to the public and as a consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money."

[15] In the light of the foregoing, what was the Respondent obliged to prove before the lower court? In the case of Wycliffe A. Swanya vs. Toyota East Africa Ltd & Another [2009] eKLR, the Court of Appeal held that:

"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 the defamatory statement or utterance was published by the defendants. The 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..."

[16] Similarly, in J. Kudwoli & Another vs. Eureka Educational Training Consultants & 2 Others [1993] eKLR, after an admirable exposition of the relevant law and authorities on the subject, Kuloba, J. concluded thus:

"To summarize the legal position in Kenya, in so far as it relates to the instant cases before me, ... I have found the law of defamation in this country to be that for a defendant to be tortiously liable in a suit for defamation the plaintiff must prove on a balance of probability that the matter complained of:

(a) is defamatory

(b) refers to him

(c) was intentionally, recklessly or negligently published of and concerning him

(d) was so published by the defendant, and

(e) was published without lawful justification on an unprivileged occasion."

[17] There is no dispute that the Appellant wrote the letter dated **29 September 2003**. That letter was produced before the lower court and marked the **Plaintiff's Exhibit 1**. For its full tenor and effect, the pertinent parts are reproduced here below:

"...Following discussion held today 29th September, 2003 at Divisional Office and attended by the lower Tier Union Representative, the undersigned, the parent/guardian of standard 7 pupil LJ, Silanga Village elder and yourself, in regard to you having been accused of impregnating the 16 years old L who was a standard seven pupil at [Particulars withheld] Primary School - Ref. Kipkeikei Headmaster letter to Divisional Manager dated 26th September, 2003, it was found necessary to suspend you from employment for a period of one week, to allow proper investigation be done.

Both parties i.e. L's and yours will meet on 6th October, 2003 to listen to this case and take necessary action thereafter..."

[18] From the foregoing, and from the evidence presented before the lower court by the Appellant and his witnesses, it is manifest that he did not assert, in the letter aforementioned that **"You have impregnated one LJ, a primary school girl"** as alleged in the Plaintiff's Complaint. The essence of the letter is that the Appellant was reacting to an accusation that he had received from the mother of the subject pupil through the Headmaster of Kipkeikei Primary School; and the letter is explicit in this regard. Hence, it was not the Appellant who originated the accusation. Secondly, it is also evident that the letter was not written to third parties but to the Respondent personally, and although copied to **TS**, the guardian of the school girl, the Headmaster of [Particulars withheld] Primary School, the Union Representation and the Senior Estate Manager; these are the same people who had attended the meeting of **29 September 2003** at which the matter was discussed prior to the writing of the letter complained of. There was therefore no proof that the Appellant was actuated by malice in writing the letter in question.

[19] In connection with the ingredient of malice in a defamation case, I find instructive the expressions by Odunga, J. in **Phinehas Nyaga vs. Gitobu Imanyara [2013] eKLR** that:

"...the words must be malicious. Malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice. 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 but the law does not weigh in a fair balance and it does not follow merely because the words are excessive, there is therefore malice. Malice may also be inferred from the relations between the parties before or after publication or in the course of the proceedings. Malice can be founded in the publication itself if the language used is utterly beyond the facts. The failure to inquire into the facts is a fact from which inference of malice may properly be drawn. Any evidence which shows that the defendant knows the statement was false or did not care whether it be true or false will be evidence of malice."

[20] In the instant matter, it is manifest that the Appellant was temperate in his letter, by stating that the Respondent was **"...accused of impregnating the 16 years old L..."** He also called for a meeting to discuss the matter and was merely putting on paper the decision that had been taken following the meeting. He even added that the matter would be inquired into for appropriate action to be taken. Moreover, the Appellant raised the defence of truth and justification and called **TS (DW2)** and **LJ (DW3)** as his witnesses. **DW2** confirmed that she made a complaint to the Headmaster of [Particulars withheld] Primary School and was therefore the originator of the alleged defamatory words. **DW3** confirmed to the lower court that she had been impregnated by the Respondent; yet the lower court erroneously dismissed their evidence as hearsay evidence just because **"...there was no Doctor nor nurse who was called to give evidence that the Plaintiff impregnated DW3."** Thus taking into account the evidence adduced before the lower court, it cannot be said that the Respondent proved all the ingredients of libel to warrant a decision in his favour on liability.

[b] Whether the Learned Trial Magistrate committed an error of principle in making the awards he made.

[21] As has been pointed out herein above, Learned Trial Magistrate awarded the Respondent **Kshs. 80,000/=** as General Damages plus a further sum of **Kshs. 120,000/=** as Exemplary Damages. It is not lost on the Court that the latitude in awarding damages in an action for libel is wide and as pointed out in **Butt vs. Khan** (supra):

"An appellate court will not disturb an award of damages unless it is so 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."

[22] And in defamation cases, the Court of Appeal held, in **C A M vs. Royal Media Services Ltd [2013] eKLR** that:

"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 Plaintiff's feelings not only from the prominence itself but from the Defendant'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 Plaintiff's reputation past and future."

[23] Accordingly, had I agreed with the lower court on liability, I would have had no quarrel with the award of **Kshs. 80,000/=** as General Damages. As for the award of **Kshs. 120,000/=** Exemplary Damages, there appears to be no justification at all for the same, either in the evidence adduced before the lower court or in the Judgment. It is trite that since, exemplary damages are meant to punish a defendant, a plaintiff claiming damages under that head must prove improper motive. For instance, in **Johnson Evan Gicheru vs. Andrew Morton & Another** (supra), it was proved as a fact before the lower court that the passages complained of in the offending publication were untrue in every material respect and had been published maliciously; and that when invited by the Appellant's Counsel to publish an apology correcting the offending paragraphs, the Respondent's solicitors replied that the Respondents were a highly respected international publishers and that they do not publish books which contain untrue and defamatory statements. It was also evident from the record that the Respondents, during the trial justified their stance and wanted certain paragraphs of the Plaint struck out for disclosing no reasonable cause of action as the words complained of were not capable of bearing the meanings attributed to them by the Appellant. In the instant matter, there was not a single aggravating factor raised by the Respondent before the lower court.

[24] Accordingly, I would have reversed the finding of the lower court on the award of **Kshs. 120,000/=** as Exemplary Damages and allowed only **Kshs. 80,000/=** as general damages for libel. However, having found that the Respondent had not proved his case to the requisite standard, this appeal succeeds with costs and the Judgment of the lower court is hereby set aside in its entirety; and is hereby replaced with the Judgment of this Court dismissing the Respondent's claim with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 17TH DAY OF JANUARY 2019

OLGA SEWE

JUDGE