



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO.19 OF 2018**

**ROYAL MEDIA SERVICES LTD.....APPELLANT**

**-VERSUS-**

**VALENTINE MUGURE MAINA.....1<sup>ST</sup> RESPONDENT**

**MAUREEN MURIMI.....2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the ruling and order in Nyeri Chief Magistrates Court Civil Case No. 376 of 2017(Hon. P. Mutua, Senior Principal Magistrate) delivered on 27<sup>th</sup> March 2018)*

**JUDGMENT**

On 8 November 2017 the 1<sup>st</sup> respondent filed in the subordinate court a suit against the appellant and the 2<sup>nd</sup> respondent for damages for defamation. The alleged defamatory words were published on the appellant's website, www.citizenstv.co.ke, on 10 June 2015 and the publication was maintained up to and including the time the suit was filed.

The appellant filed a statement of defence disputing the 1<sup>st</sup> respondent's claims; it also filed a notice of preliminary objection alongside its statement of defence disputing the validity of the suit on the grounds that the court had no jurisdiction to entertain it and that, by virtue of section 4(2) of the Limitation of Actions Act, cap.22 the suit was time-barred.

The magistrate's court rightly determined the preliminary objection *in limine* and overruled it; in his ruling dated 27 March 2018 the learned magistrate found as a fact that the publication of the defamatory words was internet based and every visit to the site constituted a fresh cause of action notwithstanding the date the words were first published. As long as the offensive words remained on the appellant's website and were accessible to all and sundry, so held the learned magistrate, "there is a continued publication constituting a cause of action."

The appellant was aggrieved by this decision and it is for this reason that it has now lodged an appeal against it in this honourable court. The grounds upon which the appeal is based have been listed in the memorandum of appeal as follows:

- 1. The learned magistrate wholly misunderstood the preliminary objection before him.**
- 2. The learned magistrate erred in not holding that the suit before him concerned an action for libel which may not be brought after the end of twelve months from such date which the cause of action accrued as provided for by Section 4(2) of the Limitation of Actions Act and as held by the Court of Appeal in *Wycliffe A. Swanya –v- Toyota East Africa Ltd & another* [2009] eKLR.**
- 3. The learned magistrate erred in holding that each individual publication gives rise to a separate cause of action subject to its own limitation period.**
- 4. The learned magistrate erred in holding that so long as the posting had not been pulled down, then there is continued publication with each publication constituting a cause of action.**
- 5. The learned magistrate erred in dismissing the said preliminary objection with costs.**

Both parties sought to have the appeal disposed of by way of written submissions and though they intimated that they would highlight them at a later date, they never did but opted instead to adopt them as filed.

I agree with the learned counsel for the appellant that as was succinctly put in ***Selle versus Associated Motor Boat Company Ltd (1968) EA 123, 126***, the duty of the appellate court in a first appeal is to evaluate the evidence afresh and come to its own conclusions but always bearing in mind that it has neither seen nor heard the witnesses. However, as far as the present appeal is concerned, it is obvious that no

evidence was led at the trial and the decision appealed against is impugned strictly on a single point of law which is whether the 1<sup>st</sup> respondent's suit is statute-barred. As a matter of fact, all I gather from the parties' respective submissions is an escalation of their arguments before the magistrate's court on this point which, as noted, was determined as a preliminary issue in the court below.

The provision of law in issue is section 4(2) of the Limitation of Actions Act and more particularly the proviso thereto; it states as follows:

***(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:***

***Provided that an action for libel or slander may not be brought after the end of twelve months from such date.***

A cause of action in defamation suits arises as soon as the defamatory words are published. Indeed, strictly speaking, what is alleged to be libelous or slanderous only assumes that description, upon the defendant relaying the words complained of to a party other than the party to whom they refer; only then can it be said that there is publication. It follows that publication, of itself, is an essential and a necessary element in proof of defamation.

There appears to be no much dispute that the publication of the defamatory words was on 10 June 2015; I pick this information from paragraph 4 of the plaintiff's pleadings which, owing to the centrality of the averment to the issue at hand, it is only reasonable that I reproduce it here; it is couched as follows:

***4. On or about 10.6.2015, the Defendants published and continue to publish in the webpage under the Uniform Response locator (U.R.L) <https://citizentv.co.ke/news/woman-chops-off-husbands-manhood-in-nyeri-88524/>, the story thereunder containing the following statements about and with reference to the plaintiff;***

***A middle-aged man is nursing serious injuries at Nyeri County Referral Hospital after his wife reportedly chopped off(sic) his private parts. Paul Mwangi was seriously attacked and injured by his wife Valentine Mugure.***

In the appellant's view, considering the date of the publication which is the date the cause of action accrued, and in view of the proviso to section 4(2) of the Limitations Act, the 1<sup>st</sup> respondent's suit ought to have been filed by 9 June 2016 which is the date the limitation period lapsed. In support of this position, counsel cited the Court of Appeal decision in **Wycliffe A. Swanya versus Toyota East Africa Ltd & Another (2009) eKLR** and several other decisions of this Court which have, more or less, embraced the holding in the Swanya case. In that case the Court of Appeal held that a cause of action in slander accrues from the date the slanderous remarks are made. Accordingly, the remarks having been made on 12 November 2005 'the latest the suit should have been filed would have been 11<sup>th</sup> or 12<sup>th</sup> November, 2006'. In the ultimate, the Court upheld the decision of this court in striking out the appellant's suit for having been filed out of time.

The 1<sup>st</sup> respondent successfully introduced a new angle to section 4(2), at least as far as the decision of the learned magistrate goes, that the cause of action against the appellant is not subject to any limitation period as long as the offensive post remains on the appellant's website; every visit to that site, so it was argued on her behalf, constitutes a fresh publication so that the clock did not start ticking when the post was first published but it begins at every time one accesses the site and reads the post.

As earlier noted, the learned magistrate accepted this argument and in doing so he followed the English decisions of **Duke of Brunswick and Lunenburg versus Harman (1849) 14 QB 154** and **Godfrey versus Demon Internet (1997) ALL ER 342**; in this latter decision it was held by Morland, J. that;

***In my judgment the defendants, whenever it transmits and whenever there is transmitted from the storage of their news server a defamatory posting, publish that posting to any subscriber to its ISP who accesses the news group containing that posting.***

The concept postulated here is what is commonly referred to as the 'multiple-publication rule' which, as its name suggests, allows for a new and separate cause of action each time a defamatory statement is published. In the off-line world this means that each copy of a book or a newspaper is a separate, actionable case of defamation with its own limitation period. It does not necessarily follow that the same litigant can take multiple actions arising from the same defamatory statement; it only means that in the case where the rule applies, any limitation period will run from the date of the last publication as opposed to the first. (See **Ursula Connolly, Multiple Publication and On-Line Defamation- Recent reforms in Ireland and the United Kingdom, Masaryk University Journal of Law and Technology, Vol.6:1**).

Until the new Defamation Act, 2013 of United Kingdom came into force in April 2014 the multiple publication rule applied to England, amongst a few other commonwealth jurisdictions; it was succinctly explained in the United Kingdom Government Consultation Paper on Multiple Publications in these terms:

***The effect of multiple publication rule in relation to online material is that each "hit" on a webpage creates a new publication, potentially giving rise to a separate cause of action, should it contain defamatory material. Each cause of action has its own limitation period that runs from the time at which the material is accessed. As a result, publishers are potentially liable for any defamatory material published by them and accessed via their online archive, however long after the initial publication the material is accessed, and whether or not proceedings have already been brought in relation to the initial publication. (Government Consultation Paper: The Multiple Publication Rule CP 20/09 at Para 3)***

Some jurisdictions have found this rule as being unsuited to modern era, in particular, where statements can be uploaded to the internet in an instant, viewed in multiple jurisdictions, endlessly republished and exist indefinitely if not removed. The effect of the rule on internet free speech, so it has been argued, is disproportionate to the interests being protected.

So, in the United States, it was rejected as early as 1948 while in Ireland it was abolished by the Defamation Act 2009 which has adopted a single publication rule which, contrary to the multiple publication rule, it sets the clock ticking on eligible claims being brought from the date the material is being published publicly. **Section 38 (1) (b)** of the Irish Act is to this effect; it provides as follows:

***For the purposes of bringing a defamation action with the meaning of the Defamation Act 2009, the date of accrual of the cause of action shall be the date upon which the defamatory statement is first published and, where the statement is published through the medium of the internet, the date on which it is first capable of being viewed or listened to through that medium.***

The English legislature has also followed suit and has, in its Defamation Act 2013, deviated from the decisions of the English courts which have hitherto embraced the multiple publication rule and instead introduced the single publication rule; this rule is expressly provided for in section 8 of that Act.

Now, the 1<sup>st</sup> respondent has not demonstrated that the multiple publication rule is applicable to this country. The English court decisions which the learned counsel for the 1<sup>st</sup> respondent cited are of persuasive authority and not binding on our courts; but more importantly, the English themselves have abandoned the multiple publication rule upon which those decisions were based. It will be foolhardy for us in this country to follow those decisions when their very basis has been found wanting to such an extent that a legislative intervention in the form of section 8 of the Defamation Act 2013 has been found necessary.

In any event, however persuasive the English decisions on any particular subject are, they can never be an alternative to the statutory instruments from our own legislature. Express statutory provisions, even in England itself, are never supplanted by judicial precedents unless, of course, those precedents have unequivocally invalidated the provisions in question.

I am of course minded that there are technological achievements in media communication the prominent of which is, invariably, the internet, and which by their very nature have some bearing on such torts as slander and libel in a way that may not have been foreseen. No doubt it is necessary that the law should be equally dynamic and keep pace with these advancements as need arises. I should suppose that it is the policy makers that need to take the initiative and act accordingly; the most courts can do is to point out the deficiencies in the law hoping that the legislative arm of the government will rise to occasion and take appropriate steps to mitigate those deficiencies. In the absence of legislative acts, courts can do nothing more than apply the law as it is.

It is in this light that I have to remind the 1<sup>st</sup> respondent that our Limitation of Actions Act, in particular section 4(2) thereof, has never been amended as to vary the point in time when a cause of action from libel or slander accrues. As far as libel is concerned, the cause of action accrues when the defamatory material is published and in the present case the alleged defamatory was published more than a year before she filed her suit. In short, her suit was filed out of time and the learned magistrate ought to have held so and struck it out.

Before I conclude, I must mention that section 4(2) is couched in such terms that the trial court is left with discretion to extend the time within which a claimant can file suit for damages in defamation claims. It may be that the claimant was under disability of some sort and therefore he could not, for that reason, file the claim within the statutory period.

It may also be equitable that the action should be allowed to proceed if the statutory time limit prejudices the plaintiff. Either way, the court has also to be cautious that the defendant is not prejudiced by its order.

Where the court is inclined to extend time, it must have regard to all the circumstances of the case and in particular to such circumstances as the length of, and the reasons for, the delay on the part of the plaintiff; where the reason or one of the reasons for the delay was that all or any of the facts relevant to the cause of action did not become known to the plaintiff until after the expiry of the statutory limitation period. In this latter instance the court, in making its decision, will consider the date on which any such facts did become known to him; and the extent to which he acted promptly and reasonably once he knew whether or not the facts in question might be capable of giving rise to an action.

The court will also consider the extent to which, having regard to the delay, relevant evidence is likely to be unavailable, or to be less cogent than if the action had been brought within the statutory limitation period.

Whatever the case, the court must be moved by way of an application for leave for extension of time. This, however, is not the case here. The 1<sup>st</sup> respondent was of the firm position that she could file her suit outside the limitation period from the date the offensive post was first published on the appellant's website. I have said enough to demonstrate that the position she adopted is legally untenable. In the end I find the appellant's appeal has merits and, accordingly, I allow it with costs. For avoidance of doubt, I substitute the learned magistrate's order with the orders that:

- (a) The appellant's notice of Preliminary objection dated 15 December 2017 is sustained;
- (b) The 1<sup>st</sup> respondent's suit is struck out with costs.

It is so ordered.

**Dated, signed and delivered in open court this 18<sup>th</sup> day of October, 2019**

**Ngaah Jairus**

**JUDGE**