REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 241 OF 2018

NEHEMIAH STONE BIC MISIANI

T/A STONEBIC HIGH SCHOOL...APPELLANT

VERSUS

RADIO AFRICA GROUP LIMITED......................................1ST RESPONDENT

NJENGA GICHEHA..2ND RESPONDENT

STAR NEWSPAPER PUBLICATIONS LTD..........................3RD RESPONDENT

(Being an appeal from the Judgment and decree of the Chief Magistrates Court at Milimani Commercial Courts, Hon E.A. Nyaloti (Mrs) Chief Magistrate delivered on 10th May 2018 in CMCC 2370 of 2013)

JUDGMENT

INTRODUCTION

1. In her decision on 10th May 2018, the Learned Trial Magistrate, Hon E.A. Nyaloti (Mrs) Chief Magistrate entered judgment in favour of the Appellant against the Respondent for a sum of Kshs 500,000/= general damages together with costs and interest thereon at court rates from the date of judgment.

2. Being dissatisfied with the said decision, the Appellant filed his Appeal dated 7th September 2018 and filed on 10th September 2018. He relied on three (3) grounds of appeal.

3. The Appellant was acting in person. His Written Submissions were dated 22nd February 2019 and filed on 25th February 2019. When the court granted him leave to respond to the Respondents' Written Submissions on 9th May 2019, he filed Amended Written Submissions. These were similar to the Written Submissions he filed on 25th February 2019. The Respondents' Written Submissions and List & Bundles of Authorities both dated 29th April 2019 were filed on 2nd May 2019.

4. Parties asked this court to render its decision based on their respective Written Submissions that they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

5. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.

6. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

> **"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"**

7. Having considered the parties' respective Written Submissions, it did appear to this court that the issues that had been placed before it for determination were:-

> **1. Whether or not the Learned Trial Magistrate awarded the Appellant damages that were so manifestly low as to have warranted interference by this court.**
>
> **2. Whether or not the Learned Trial Magistrate erred in not ordering the removal of the impugned article from the internet.**
>
> **3. Whether or not the Learned Trial Magistrate erred in not having ordered the Respondent to apologise or in not awarding damages in lieu of the apology.**

8. The court deemed it prudent to address the issues under distinct and separate headings.

I. <u>ADEQUANCY OR OTHERWISE OF AWARD OF GENERAL DAMAGES</u>

9. Ground of Appeal No (1) was dealt with under this head.

10. The Appellant submitted that the Learned Trial Magistrate correctly found that he had proven his case against the Respondent on a balance of probability. He, however, faulted her for having awarded him damages that were manifestly low as to have warranted interference by this court.

11. He referred this court to the case of **<u>Jones vs Polland [1997] EMLR 233,243</u>** where he stated the guidelines to be followed in arriving in libel actions are set out as follows:-

> **1. The 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.**
>
> **2. The 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.**
>
> **3. Matters tending to mitigate damages, such as the publication of an apology.**
>
> **4. Matters tending to reduce damages**
>
> **5. Vindication of the plaintiff's reputation past and future.**

12. He contended that his schools closed down, a newly built Teacher Training College could not start **(sic)**, he suffered humiliation and embarrassment and was shunned by members of the public.

13. It was his further averment that the archiving of the impugned Article in the internet which had serious allegations of sexual harassment continued to cause him injury and the several adjournments on the request of the Respondent caused the trial to last for more than five (5) years.

14. He added that his reputation could not be vindicated and consoled by an award of Kshs 500,000/= as general damages. His argument was therefore that he ought to have been awarded Kshs 15,000,000/= as general damages and Kshs 5,000,000/= as aggravated damages giving a total of Kshs 20,000,000/=.

15. In that regard, he relied on the case of **<u>Broom vs Cassel & Co [1972] A.C. 1027</u>** where it was held that:-

> **"In actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of restitution in integrum has necessarily and even more highly subjective element. Such actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but, in case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a by-stander of the baselessness of the charges."**

16. He also placed reliance on the cases of **<u>John vs MG Ltd [1997] QB 586</u>** and **<u>Wangethi Mwangi & Another vs J.P. Machira t/a Machira & Co Advocates [2012] eKLR</u>** to buttress his argument that he ought to have been awarded aggravated damages.

17. On their part, the Respondents submitted that the words that were published of and of concerning the Appellant's schools were true and urged this court to dismiss and/or set aside the award of Kshs 500,000/= as he had not made out a case to be awarded general damages.

18. They referred this court to **<u>Gatley on Libel and Slander 12th Edition, Sweet & Maxwell</u>** where it was provided that:-

> **"The jury should not take into account in assessing damages any part of the words complained of in respect of which the defendant has made out a defence".**

19. In his evidence during trial, the Appellant stated that in 2014, one of his most popular schools was closed by Public Health Office because the classrooms were stinking and that the school had no septic tank and was discharging sewerage. He said that he knew that there was bad blood between him and the Education officials. He admitted that a Report was presented before the District Education Board together with another Report from District Quality Assurance office. He stated that the matter was discussed at the Board and a recommendation was made that Stonebic School be closed. He averred that this decision was subsequently reversed.

20. He accused the 2nd Defendant of having gone to a neighbouring school and taking a picture of the residential house. He also stated that the Article contained contradictory information mentioning schools that did not exist. He added that the Article portrayed him as dishonest, a sexual pervert and potential murderer.

21. On being cross-examined, he stated that Stonebic Girls was recommended for closure and that only two (2) out of his eight (8) schools were still operational. He pointed out that there was no report of the poor state of the school when the Article was published.

22. Samson Kitiga Kageli (PW 2) stated that he enlisted his daughter at Stonebic High School but when he saw the Article in the internet indicating that the school was operating illegally, he withdrew his daughter from the school after two (2) days.

23. Evanson Njomo (PW 3) told the Trial Court, that he had known the Appellant herein for fifteen (15) years. He stated that he developed a negative attitude towards him when he read the Article in the The Star newspaper. He said that he stopped supplying milk to the school because he was apprehensive that the school would be closed which would cause him to lose money. He had, however, resumed supplying milk to the school.

24. The 2nd Respondent admitted that he was the author of the Article. He told the Trial Court that when he got information from District Commissioner about the closure of the Stonebic Group of Schools, he did not seek the opinion of the Appellant before he published the Article. He stated that he published the Report as he received it from the Kikuyu Education Office as it was a matter of public interest. He stated that the Report came from a public office. He said that there was no ill-intention on his part.

25. As the Respondents submitted correctly, there is no wrong that is done if a comment that has been made is true and that it is a fair comment on a matter of public interest as was held in the case of **Fraser vs Evans & Others [1969] I ALL ER.**

26. The court also agreed with the holdings in the case of **Micah Cheserem vs Immediate Media Services & 4 Others [2000] eKLR** and **Stephen Thuo Muchina vs Wainaina Kiganya & 2 Others [2012] eKLR** that a defendant would be able to plead the defence of qualified privilege if it is proved that what was published was a fair and accurate account of a matter of public interest and malice was not proven.

27. The converse is also true. The defence of qualified privilege will be displaced if malice is proved.

28. Indeed, Section 7(1) of the Defamation Act Cap 36 (Laws of Kenya) provides as follows:-

> **"Subject to the provisions of this section, the publication in a newspaper of any such report or other matter as is mentioned in the Schedule to this Act shall be privileged unless such publication is proved to be made with malice.**

29. The Article in the Star titled **"Teachers let down schools in Kikuyu"** in page 32 of the Record of Appeal made reference to the closure of eight (8) schools and a college in Kikuyu after approval by the Kikuyu District Education Board chaired by the area DC Fred Kitema.

30. The schools listed therein were Stonebic Mixed Academy, Stonebic Boys High School, St Anne's Sigona Girls Secondary School, Sigona Girls High School, Utafiti Behavioural Correctional Centre and upcoming Sigona Teachers College.

31. The Article alluded to comments by the DC and investigations that were carried out that showed that there were allegations of sexual harassment. It also stated that the schools were run by one (1) director, the principal and a teacher. Notably their names were not mentioned.

32. In the second Article titled **"Parents confront Stonebic director for fees refund"** on page 32 of the Record of Appeal, the Appellant herein was named and his photo appeared next to the Article. In this Article, the Appellant was said to have promised the parents a refund of the fees they had paid.

33. A perusal of the Report titled **"Investigative Report for Stonebic Girls High School"** signed by the Kikuyu District Education officer on 13th April 2012 showed that it was in respect of one (1) school, Stonebic Girls High School. However, the recommendation was for the closure of Stonebic Group of Schools. The conclusion was as follows:-

> **"The establishment of Stonebic group of schools is a violation of the provisions of the Education Act Cap 211 on Establishment of schools. The premises and accommodation of the pupils did not prescribe to the minimum health and safety regulations and the manner was unsuitable to manage the school. Since the school had failed to comply with the provisions of the Education Act on Section 16(a),(b),(c),(e) on the establishment of schools, there was therefore an urgent reason for the immediate closure of the schools."**

34. There were also handwritten statements from students in Stonebic Girls High School and St Anne Sigona Stonebic Girls High School annexed to the said Report.

35. Looking at the Report, the 2nd Respondent appeared not to have reported verbatim. The names of the schools were not set out in the said

Report and in a letter dated 6th June 2012 from the Ministry of Education to the OCS informing him of the closure of Stonebic Group of Schools. It was not clear from his evidence how he knew that the schools set out in his Article belonged to the Appellant more so as the Appellant had denied some schools having belonged to him or were non-existent.

36. DW 1's evidence was that the school was closed on 2nd May 2012 and he published the Report on 4th May 2012. It was the considered view of this court that the 2nd Defendant reported the gist of the Report he obtained from the Education office.

37. In her judgment as the Learned Trial Magistrate observed that the 2nd Respondent herein did not seek clarification before publishing the Article. In this regard, this court agreed with her that the Respondents could not plead justification or fair comment or qualified privilege. Notably, the Respondent failed to call the author of the Report to testify.

38. The court considered all the submissions and case law that was cited by the Respondents regarding the defence of justification and qualified privilege, this court came to a firm conclusion that the Appellant had proved his case on a balance of probability.

39. Having said so, the Appellant could not purport that the 2nd Respondent had reported erroneous facts because it was a fact that the Report had indicated that Stonebic Group of Schools were closed. What this court determined was that the 2nd Respondent ought to have sought the Appellant's comments because in the first Article, it was not clear whether the allegations therein cut across all schools. It was for that reason that this court took the view that the Appellant was entitled to general damages.

40. This court also agreed with the Learned Trial Magistrate that the allegations in the Article were so serious especially those on sexual harassment because they had the potential of parents withdrawing their children *enmasse* from the schools thus occasioning the Appellant great harm if the allegations were found to have been untrue. In its view the sum of Kshs 500,000/= was inordinately low in the circumstances of the case.

41. In seeking an enhancement of the general damages, the Appellant did not furnish the court with any cases to guide the court in awarding general damages.

42. It was this court's view that a sum of Kshs 1,000,000/= general damages would be adequate compensation as the Article was to a great extent factual. The Appellants' concern was that the archived Article in the internet would continue harming him. However, its history in the internet was not in a conspicuous place because one had to mine the internet to locate the said Article.

43. In arriving at the said figure, this court had due regard to the following cases which offer comparable awards:-

> 1. <u>**Phineas Nyagah vs Gitobu Imanyara [2013] eKLR**</u> **where Odunga J held that he would have awarded the plaintiff therein Kshs 3,000,000/- general damages had he succeeded.**
>
> 2. <u>**Ahmednasir Maalim Abdullahi vs The Star [2019] eKLR**</u> **wherein it awarded the plaintiff therein general damages in the sum of Kshs 3,500,000/= for defamation where not one fact was not true.**
>
> 3. <u>**James Ogundo vs Standard Group Ltd [2019] eKLR**</u> **where it also awarded the plaintiff therein general damages in the sum of Kshs 3,000,000/= for defamation where no fact in the Article therein was true.**

44. This court was not, however, persuaded that it should award the Appellant aggravated damages as in his own admission during cross-examination, only two (2) out of eight (8) schools had closed down. He did not attribute the closure to the said Article.

45. In the circumstances foregoing, this court found and held that Ground of Appeal No (1) was merited and was hereby allowed.

II. <u>REMOVAL OF IMPUGNED ARTICLE FROM THE INTERNET</u>

46. Ground of Appeal No (2) was dealt with under this head.

47. The Appellant submitted that the Respondents archived the Article in the internet to ensure that his schools never rise again.

48. On the other hand, the Respondents argued that since he did not prove his case, then the order should not be granted. This argument had, however, been rendered moot as this court found and held that the Learned Trial Magistrate arrived at a correct conclusion that the Appellant had proven his case on a balance of probability.

49. The court perused the Appellant's Plaint dated 29th April 2013 and filed on 2nd May 2013 and noted that it did not see a prayer for removal of the impugned Article from the internet. Courts should not grant orders based on what is contained in submissions. They should only grant what has been pleaded in the pleadings.

50. In the circumstances foregoing, this court found and held that Ground of Appeal No (2) was not merited and same is hereby dismissed.

III. <u>APOLOGY OR DAMAGES IN LIEU OF APOLOGY</u>

51. Ground No (3) was dealt with under this head.

52. The Appellant contended that the Learned Trial Magistrate ought to have ordered that the Respondents place a prominent publication of their apology to change the perception of the public towards his schools.

53. As has been seen hereinabove, the Respondents' arguments he was not entitled to any damages because he had not proved his case had been rendered moot.

54. Nonetheless, this court found and held that the damages awarded to a plaintiff in a defamation case will more often emanate from a defendant refusing to apologise for defamatory words uttered leading to the filing of a suit. The failure to publish an apology ought not to be in itself a separate ground under which damages should be awarded. It was the view of this court that an award of damages in lieu of an apology would amount to double enrichment of the Appellant. The publication of an apology is a mitigation factor in assessing damages to be awarded.

55. In the premises foregoing, this court found and held that Ground of Appeal No (3) was not merited and the same is hereby dismissed.

DISPOSITION

56. For the foregoing reasons, the upshot of this court's decision was that the Appeal that was lodged on 7th September 2018 and filed on 10th September 2018 was partially successful. The effect of this decision is that the judgment that was entered in favour of the Appellant against the Respondents in the sum of Kshs 500,000/= general damages is hereby set aside, vacated and/or varied and in its place it is hereby directed that judgment be and is hereby entered in favour of the Appellant against the Respondents for the sum of Kshs 1,000,000/= general damages and interest at court rates from 10th May 2018 until payment in full plus costs.

57. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF NOVEMBER 2019

J. KAMAU

JUDGE