REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 515 OF 2016

THE NAIROBI STAR PUBLICATIONS LTD.....1ST APPELLANT

VINCENT AGOYA..... 2ND APPELLANT

-VERSUS-

AMBROSE OTIENO WEDA.....RESPONDENT

[Being an Appeal from the Judgment of Hon. Racheal Ng'etich (CM) in the Chief Magistrate's Court at Nairobi (Milimani Commercial Courts) Civil Case No. 4644 of 2010 as consolidated with Civil Case No. 4645 of 2010, delivered on 30th June 2016].

JUDGEMENT

INTRODUCTION

1. The Respondent filed two suits in the lower Court seeking *inter alia* general, punitive, aggravated and exemplary damages for defamation together with costs. The causes of action were said to arise from two publications of the Respondents which were published in a newspaper known as the 'Nairobi Star'.

2. The Appellants filed a joint statement of defence in which they denied any liability. The matter was eventually heard and judgment was entered in favour of the Respondent. He was awarded Kshs. 5,000,000/= as general damages and Kshs. 1,000,000/= as aggravated damages.

3. Aggrieved by the entire judgment, the Appellants filed this appeal and listed 6 grounds stating that the learned magistrate erred in law and fact by;

> ***1. Finding the Appellants liable in respect of the publication of 29/07/2009 on the basis of failing to report what was not part of the proceedings of the day i.e. the Respondent's role as a lawyer in the transaction.***
>
> ***2. Finding the Appellants liable in respect of the publication of 13/11/2009 due to an insubstantial inaccuracy concerning the complainant in the case***
>
> ***3. Failing to…..the Appellant's defence of absolute privilege including the question of what constitutes a fair and accurate report of Court proceedings.***
>
> ***4. Failing to find that what was defamatory in the publications was the fact of the Respondent facing a criminal trial in relation to an allegedly fraudulent transaction, not the identity of the complainant.***
>
> ***5. Giving an award of damages that was manifestly excessive in the circumstances.***
>
> ***6. Awarding aggravated damages without any basis being laid and proved for the same.***

4. Directions were given that the appeal be canvassed by way of written submissions.

APPELLANTS' SUBMISSIONS

5. The Appellants condensed their grounds of appeal into two issues for determination i.e.

> ***a) Whether the publications of 29/07/2009(1st publication) and 13/11/2009 (2nd publication) were a fair and accurate record of***

the proceedings before the Chief magistrates Court at Kibera Law Courts (criminal Court) in Criminal Case No. 490 of 2008.

b) Whether the Respondent was entitled to the general and aggravated damages as assessed and awarded by the trial Court.

6. The 1st and 2nd publications will collectively be referred to as '*the publications'*.

7. On the first issue, the Appellants submit that the Respondent was charged as the 1st accused in Kibera Criminal Case No. 490 of 2008 (*the criminal case)* and the publications were reports of what had transpired in Court.

8. That the role of the Respondent as a lawyer in the purported conveyance transaction was immaterial to the trial Court and ought not to have been considered in the first place.

9. That the learned trial magistrate was bound to strictly examine the record of the criminal Court's proceedings for 28/07/2009 and 11/11/2009 only in relation to the publications as they were the only two days when the 2nd Appellant was present in Court.

10. Further, it is their submission that a perusal of the Court proceedings for those two days reveals that the Respondent's role as a lawyer in the purported conveyance transaction was never mentioned. That the trial Court's finding implied that the 2nd Appellant ought to have reported information on an occurrence which did not transpire before the criminal Court.

11. It is their contention that doing so would have resulted in a report which was not fair and accurate. Further, it is their contention that finding the Appellants liable for not reporting on something that did not happen was prejudicial.

12. They also submit that the Appellants were protected by section 6 of the defamation Act, Cap 36 Laws of Kenya which provides that ***"a fair and accurate report in any newspaper of proceedings heard before any Court exercising judicial authority within Kenya shall be absolutely privileged."***

13. Further, they submit that what amounts to fairness and accuracy is subject to the discretion of a Judge. They relied on Gatley on Libel & Slander. Ninth Edition par 13.45 at pg 321 where it was stated that ***"…it is for the judge to decide whether the matter complained of can be fairly said to be a report of judicial proceedings."***

14. They also submit that the publications are short and condensed reports of what transpired but that did not distract them from being accurate, fair and therefore privileged. They rely on **par. 13.34** at **pg 312** of **Gatley on Libel & Slander** where it was observed that:

> ***"it is not necessary that the report should be verbatim; an abridged or condensed report will be privileged, provided it gives a correct and just impression of what took place in Court. It is sufficient to establish a fair summarized account. The privilege-a valuable privilege for the public-of publishing reports of proceedings in Courts of justice, would be useful if it were necessary to set out every word of the evidence and the speeches and of what was said by the judge…that is not necessary; if what is stated is substantially a fair account of what took place, there is an immunity for those who publish it."***

15. Further, they submit that even if the publications were inaccurate, which is denied, the inaccuracy was slight, minimal and had no consequential effect to make the publications unfair. They rely on par. 13.35 at pg 313 of **Gatley on Libel & Slander** where it was observed that:

> ***"if the whole report is substantially an accurate report of what took place, the fact that there are a few slight inaccuracies or omissions is immaterial. A report in a daily newspaper is not to be judged by the same strict standard of accuracy as a report coming from the hand of a trained lawyer. Unless fair and reasonable latitude is given, there would be no safety in reporting the proceedings of Courts of justice. It would be impossible to exercise the privilege if every trifling slip in a report denied it the privilege."***

16. They contend that the judgment did not at all comment on the accuracy and/or fairness of the publications and as such, a finding of liability for defamation was prejudicial.

17. On the second issue, the Appellants submit that the trial magistrate was bound to look at their conduct before making the determination on quantum.

18. They relied on *inter alia* the Court of Appeal decision in **Johnson Evan Gicheru –Vs-Andrew Morton & Anor (2005) eKLR** where it was held that;

> ***"In action for libel, the trial Court in assessing damages is entitled to look at the whole conduct of the defendant from the time the libel was published down to the time the verdict is given. It may consider what his conduct has been before action, after action and in Court during the trial: Praud v Graham 24 Q.B.D. 53,55."***

19. They contend that no investigations were conducted into the Appellants' conduct before, during and after the proceedings so as to establish whether the publications and Appellant' conduct were tainted with improper motive or malice to justify such an award.

20. They also submit that factors which were not proved were considered in the assessment of damages. That the learned trial magistrate made a finding that the Respondent suffered financial loss as an Advocate yet there was no evidence in support. They urged the Court to

allow the appeal.

RESPONDENT'S SUBMISSIONS

21. In opposing the appeal, the Respondent submits that the publications were a clear departure from the proceedings of the day and as the learned magistrate correctly pointed out, there was a misreporting in both of them. That they were malicious because the Appellants did not verify the facts from the Respondent or from the Court records.

22. On whether the Appellants were liable, the Respondent submits that the clear misreporting was a reckless action which led to injury of his reputation. He relied on **SMW –Vs- ZWM (2015) eKLR** where it was stated that

> ***"a statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if causes him to be shunned or avoided."***

23. He also relies on **Halsbury's Laws of England, 4th Edition Vol. 28** at pg **23** where the authors opined that;

> ***"In deciding whether or not a statement is defamatory, the Court must first consider what meaning the words would 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."***

24. Further, he relies on **Reynolds –Vs- Times Newspapers (1999) 4 ALL ER 609** where the House of Lords set out the criteria for determining whether a publication is subject to qualified privilege as follows;

> ***"Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only. (1) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. (2) The nature of the information, and the extent to which the subject matter is a matter of public concern. (3) The source of the information. Some informants have direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. (4) The steps taken to verify the information. (5) The status of the information. The allegation may already have been the subject of an investigation which commands respect. (6) The urgency of the matter. News is often a perishable commodity. (7) Whether comment was sought from the Plaintiff. He may have information others do not possess or have not disclosed..(8) Whether the article contained the gist of the Plaintiff's side of the story. (9) The tone of the article.***
>
> ***A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. (10) The circumstances of the publication including the timing."***

25 The Respondent further submits that the law of defamation is concerned with the protection of a person's reputation. He quotes Patrick O'Callaghan in the ***Common Law Series: The Law of Tort at paragraph 25.1*** where he expressed himself as follows:

> ***"The law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation: 'As a general rule, English law gives effect to the ninth commandment that a man shall not speak evil falsely of his neighbour. It supplies a temporal sanction …' Defamation 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. 'The law recognizes in every man 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……"***

26. On whether the Respondent was entitled to general, aggravated and punitive damages, the Respondent relies on the **Johnson Evan Gicheru case *(supra)*** and submits that the 2nd publication is a repeat libel. That there are other cases pending in the High Court and as such, the Appellants are repeat offenders.

27. He submits that there are guidelines in assessing damages as set out in the case of **Jones –Vs-Pollard (1997) EMLR 233** i.e.

> ***a) 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.***
>
> ***b) 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.***
>
> ***c) Matters tending to mitigate damages, such as the publication of an apology.***
>
> ***d) Matters tending to reduce damages.***
>
> ***e) Vindication of the Plaintiff's reputation past and future.***

28. Further, he submits that the award for both general and aggravated damages was manifestly low in light of the decision in **John –Vs-MG Ltd (1997) QB 586** where it was held that,

> **"Aggravated** ***damages will be ordered against a defendant who acts out of improper motive e.g. where it is attracted by malice, insistence on a flurry defence of justification or failure to apologize."***

29. He submits that the Appellants failed to offer an apology and instead did other publications inundated with half truths and innuendos. That the Appellants' conduct in this circumstance smacks of malicious intent against the Respondent and deserves an award for punitive damages that the trial magistrate failed to award although pleaded. He urges the Court to dismiss the appeal with costs.

PROCEEDINGS BEFORE THE LOWER COURT

30. PW1 was the Plaintiff. He testified that he was a practicing Advocate, Weda & Co. Advocates, having been admitted to the bar in February 1995. He had also served as a chancellor of the Anglican Church, Advocates Disciplinary committee and was a member of the Law Society of Kenya.

31. At the time of testifying, he was serving as the chairman, Board of Director of the South Nyanza sugar Company being a presidential appointment. That he was also a family man with a wife and children, both adult and young.

32. He narrated how he was introduced to Edison Kiplagat Bundotic and Felix Kimayo Ng'eno by his client Hon. Moses Sirma, the then MP for Eldama Ravine Constituency. That the said Felix was a personal assistant and close friend of one of president Moi's daughter called June.

33. That the MP was introducing the team so that the Plaintiff could represent them in a land transaction. That the introduction was necessary because the Plaintiff was not in the habit of taking clients directly especially in serious matters.

34. He agreed to take up the matter and continued to explain that Felix was entitled to a commission and the Plaintiff was to ensure that he got it directly upon payment of the purchase price. That the team got a buyer who had a lawyer and they delivered the relevant documents to the Plaintiff i.e. the original Title deed, a duly registered power of Attorney, a rates clearance certificate, consent to transfer land and rates receipts. The transaction went on as planned.

35. That towards the end of 2007, police officers went to his office and accused him of selling land owned by Jennifer Chemutai Moi. That he explained his role in the transaction and upon being asked whether he would refund the fees charged, he declined. He was arrested and taken to the CID headquarters where he recorded his statement.

36. At first, he was charged with fraudulently making a power of Attorney but the charge was dropped. He was then charged with obtaining money by false pretense.

37. Further, that the buyer went to the criminal Court and testified that the Plaintiff had done nothing wrong. That Jennifer Moi never attended Court and the prosecution withdrew the case.

38. That in the course of the trial, the 1st Respondent sent the 2nd Respondent to collect news of the proceedings and make a report. That each time the reports were made, they were a complete departure of what had transpired in Court and had the effect of hurting his reputation. That with regard to the 1st publication, it was reported that the case would proceed without the prime suspect which was not true.

39. That it was also reported that the Plaintiff had denied taking part in the deal which implied that there was an element of illegality. He referred to the publication as pleaded in the plaint and the effects thereof. That the sum total of the publication was that the Plaintiff was involved in a fraudulent deal and that he had stolen land which he then sold.

40. That the publication injured his reputation as a lawyer because the transaction was honest on his part and if there was a disagreement between Jennifer and her agent, then he was not part of it.

41. That he received various calls from friends expressing sympathy. That he could no longer be trusted as it was during the height of land deals in the Country. That the 2nd publication implied that the Plaintiff had conned one David Kimita who he had approached as an agent of June Moi. That the correct position was that the said Kimita did not say the he was approached by the Plaintiff. That the reporting also injured his reputation.

42. That the attack from the media house was so consistent and it was only because of God that he did not get a mental breakdown. He prayed for damages but noted that it would not compensate him for the trauma he went through.

43. On cross examination, he said that there is nothing objectionable if Court proceedings are reported accurately. That a report of accurate Court proceedings is protected by law but inaccurate reporting is not protected. He was referred to various pages of the proceedings of the criminal Court and reiterated his role as a lawyer in the land transaction.

44. PW2 was Samson Owino Ojiayo. He testified that he was a businessman and also worked for civil society. At the time of testifying, he was a director at Athi water services. That he had known the Plaintiff for more than 20 years and they also hailed from the same village. That he knew the Plaintiff to be a good person.

45. With regard to the case, he said he had a received a call from a friend in Mombasa asking whether he had read an article on page 5 of the star on 29/07/2009. The friend proceeded to ask whether he had seen the article stating that the Plaintiff had been sued by June Moi about land.

46. That upon reading the article, he formed a negative impression about the Plaintiff i.e. that on the one hand, the Plaintiff was pretending to be good and on the other hand, he was engaging in bad activities to *wit,* fraudulent sale of land. He adopted his statement as evidence.

47. That after reading the publications, he no longer regarded the Plaintiff as before. He also produced the two relevant pages of the newspaper.

48. The Plaintiff's case was closed at that point.

49. DW1, Vincent Agoya adopted his statement as evidence which was basically lifted from the proceedings of the criminal Court. Further, he stated that both articles were based on a fair and accurate report of Court proceedings. He also stated that he did not have any malicious intent against the Plaintiff.

50. On cross examination, he agreed that the statement was his version of what had transpired in the criminal Court on 28/07/2009.

51. That he had read the Court file and there was a report that the Plaintiff had posed as an agent of June Moi.

52. The defendants closed their case at that juncture.

DUTY OF COURT

53. The duty of the first Appellate Court is to subject the whole of the evidence to a fresh exhaustive scrutiny and make any of its own conclusions about it bearing in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of **Selle & Anor –Vs- Associate Motor Boat Co. Ltd 1968 EA 123.**

54. I have looked at the record of appeal, the grounds of appeal, the rival submissions and specifically the issues identified by the parties. It is my considered view that the following issues arise for determination;

> ***a) Whether the two publications were a fair and accurate record of the proceedings before the criminal Court in Criminal Case No. 490 of 2008.***
>
> ***b) Whether the Respondent was entitled to the damages as assessed and awarded by the trial Court.***

Whether the publications were fair and accurate

55. From the well known elements of defamation and the totality of the evidence on record, I am satisfied that the two publications were done by the Appellants and they referred to the Respondent. As to whether they lowered him in the estimation of right thinking members of the society, PW2 testified that after reading the articles, he formed a negative impression of the Plaintiff and thought he was just a pretender. The Plaintiff also testified that he had to do a lot of explaining to family and friends about what the true position was.

56. The Appellants did not offer any rebuttal to PW2's evidence and it is my considered view that the Respondent discharged his burden of showing that he was lowered in the estimation of right thinking members of the society.

57. The point of departure between the Appellants and Respondent is whether the publications were an accurate representation of what transpired in the criminal Court on the relevant days. According to the Appellants, the publications were accurate and they were therefore entitled to absolute privilege.

58. There is no doubt that the Respondent was the first accused in the criminal case and that indeed, there were proceedings in the criminal Court on 28/07/2009 and 11/11/2009. At this juncture, it is imperative to reproduce the publications.

> ***1st publication.***
>
> *Moi daughter's case to go on without suspect*
>
> *By Vincent Agoya*
>
> *The case in which former president Moi's daughter June has sued two businessmen and a city lawyer over the sale of her property will proceed without the prime suspect, a Court ruled yesterday. The Court ruled a warrant of arrest issued against the missing man, Fredrick Kiprotich alias Leonard Bundotich, remains in force. The Court summoned his surety to explain his whereabouts when the hearing resumes in September.*
>
> *However, Bundotich's absence will not hinder the trial of lawyer Ambrose Weda and businessman Felix Kimaiyo who have denied taking part in the deal.*

59. The relevant Court proceedings are as follows;

> *"28/07/2009*

Before: U.P Kidulla (Mrs) C.M

Court Prosecutor: CIP Musyoka

Court clerk: Issa

Accused: 1st Present

2nd Absent

3rd Present

Mr. Wandago for 1st accused

Mr. Makori for 3rd accused

Prosecutor: *I had two witnesses. We are ready to proceed but the 2nd accused is absent. I apply for warrant of arrest for him.*

Mr Wandago: *I am ready to proceed.*

Mr. Makori: *I am also ready to proceed*

Court: *We cannot proceed in the absence of the 2nd accused. A warrant of arrest is to issue for him. Summons also to issue for surety. In the meantime, we will fix a hearing date. Prosecutor to ensure the 2nd accused is arrested and brought to Court before the hearing date. Hearing date on 21/09/09 Court 1. No further mention for the two accused persons present..."*

60. I have carefully looked at the publications *vis a vis* the court proceedings. With regard to the 1st publication, the heading of the article was that Moi's daughter case would go on without suspect. That was a catchy heading by all means. However, a plain reading of the day's proceedings does not reveal that there was mention of 'Moi's daughter' anywhere.

61. The Appellants contend that the mention of Moi's daughter was in PW1's testimony. From the proceedings of the criminal Court, PW1's testimony was recorded on 11/11/2009 which essentially means that at the time of publication, the testimony was unavailable to the 2nd Appellant.

62. I can't help but wonder where he got that information from. For the Appellants to now submit that the implication of the trial Court's finding was that they were supposed to bring out the Respondent's role as a lawyer despite not being mentioned in the day's proceedings is in my view, an attempt to blow hot and cold.

63. The Appellants also reported that the case would proceed without the prime suspect. For those of us in the legal profession, such an occurrence would actually be illegal. That notwithstanding, the record is in black and white that the case could not proceed in the absence of the 2nd accused.

64. It was also reported that the Respondent and another had denied taking part in the deal but the absence of the 2nd accused would not hinder their trial. There is no mention of a deal anywhere in the proceedings of the day.

65. The Appellants also reported that the case in the criminal Court was about former president Moi's daughter but from the proceedings, my considered view is that this fact was not established. The complainant in the case was Jennifer Chemutai Moi but in the article, the Appellants referred to a lady by the name June as being Moi's daughter. It is also noteworthy that the identity of the complainant did not come up in the day's proceedings.

66. I have considered the above comparison against the totality of the evidence, the status of the Respondent in society and the fact that the article was published in a newspaper with wide circulation and I am satisfied that in their natural, ordinary and innuendo meaning, the words in the article were understood to give the meaning pleaded in the plaint i.e., that president Moi's daughter June had sued the Respondent over the sale of her property and that there was a deal with regard to the alleged sale which the Respondent had denied taking part in.

67. Further, a comparison of the proceedings and publication shows that the misreporting is so evident that a reasonable man would not have understood the article otherwise than being defamatory. Consequently, the publication does not constitute a fair and accurate report of the Court proceedings as discussed in Gatley on Libel & Slander *(supra).*

68. In fact, the audacity of the Appellants to publish such an article even before the first witness took the stand leads me to the inevitable conclusion that they had some grapevine sources albeit distorted. I bet the idea of a catchy headline excited them so much that they did not bother to verify the information.

69. Failure to verify the information or at least check with the Respondent led to an unfair and inaccurate report and as such, the defence of privilege is not available to the Appellants.

70. In fact, failure to inquire into the facts is in itself an inference of malice. In **Nairobi HCCC No. 697 of 2009 Phinehas Nyagah -Vs- Gitobu Imanyara (2013) eKLR,** Justice Odunga observed that:-

> ***"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. .....Malice may also be inferred from the relations between the parties.... The failure to inquire in the facts is a fact from which inference of malice may properly be drawn."***
>
> ***2nd publication.***
>
> *Moi's daughter confronted me, developer tells Court.*
>
> *By Vincent Agoya*
>
> *A trader recounted how former president Moi's daughter June, confronted him at the CID head quarters over a plot she claimed the businessman bought against her will. The plot in Ridgeways Nairobi is the subject of a kshs 18 million fraud case in which June claims was disposed off fraudulently.*
>
> *But he will continue holding the 5 acre plot as it's rightful owner even though it is at the centre of a Court battle, the trader said.*
>
> *He said he got a genuine title deed from people approached him purporting to be June's agents.*
>
> *Daniel Kimita, property developer told a Kibera Court that he was summoned to the CID headquarters where he met June who told him she had not instructed anyone to sell the property.*
>
> *"I have since sub divided the plot and sold it" Kimita said.*
>
> *He was testifying in a case in which lawyer Ambrose Weda, businessman Felix Ng'eno and Leonard Ruto have denied conning him out Kshs. 18 million in 2007 by posing as June's agents. The case was adjourned to February 2 and 3.*

71. The relevant proceedings for the 2nd publication were attached in the record of appeal.

72. I have keenly looked at the publication and the relevant proceedings and just like the 1st publication, the 2nd one does not qualify as a fair and accurate report. I agree with the trial magistrate that the article depicted the Respondent as a conman. I also agree with the Respondent that the 2nd publication was a repeat libel.

73. The upshot of the foregoing is that the learned trial magistrate arrived at a proper finding with regard to liability.

QUANTUM

74. I have considered the authorities submitted by the parties especially the Court of Appeal decision in the **John Evan Gicheru case**.

75. The Appellants repeated the libel in their 2nd publication and even after termination of the criminal case on 03/02/2010 as per the Respondent's evidence, there is no indication that the Appellants' reported about the outcome with the same zeal. In short, there is nothing to mitigate their conduct.

76. The Appellants complained that in assessing the damages, the learned trial magistrate considered a factor that was not proved i.e. that the Respondent had incurred financial loss as an Advocate.

77. In my view, Advocates are in the service industry where reputation and image are critical. A damaged reputation causes one to be shunned by clients and potential clients thus leading to an automatic loss of income. These are issues that the Court can take judicial notice of.

78. On the other hand, the Respondent complained that the award was manifestly low but in the absence of a cross appeal, I cannot interrogate the issue.

79. The upshot is that the award given by the learned trial magistrate will not be disturbed. As for costs, the same must follow the events.

CONCLUSION

80. The court thus find the appeal has no merit and is hereby dismissed with costs.

SIGNED, DATED AND DELIVERED THIS 14TH DAY OF DECEMBER, 2018 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE