



IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Kneller, Hancox JJA & Nyarangi Ag JA)

CIVIL APPEAL NO. 26 OF 1982

BETWEEN

NATION NEWSPAPERS LIMITED.....APPELLANT

AND

LYDIA CHESIRE.....RESPONDENT

(Appeal from the High Court at Nairobi, Chesoni J)

JUDGMENT

Kneller JA On July 12, 1979 Mr Justice Chesoni of the High Court in Nairobi found the Nation Newspapers Limited (the Nation) had libelled Mrs Lydia Chesire, refused her application for an injunction to restrain the Nation from repeating it and awarded her Kshs 15,000 damages with costs and interest on both sums.

The Nation appealed from the finding and the award, complaining that the former was not proved and, if it were, the latter was, in the circumstances excessive.

It asked this court to allow the appeal, set aside that decision, order the refund to the Nation of the decretal amount already paid to Mrs Lydia Chesire and award it the costs here and below.

On September 25, 1977 the *Sunday Nation* had an item in it at page 30 about a golf tournament at Kericho the week before. It was for the Tea Hotel Trophy and the winner was shown, in a reproduction of a photograph, receiving it from a lady while the manager of the hotel stood nearby.

The lady was named as Mrs Chesire the wife of the Kenya Tourist Development Corporation Chairman, Mr Reuben Chesire.

At the time Mrs Lydia Chesire was Mr Chesire's lawful wife and the lady in the photograph could not be so described. Mrs Lydia Chesire consulted her advocates who sent a letter before action on March 17, 1978 to the Nation asking it to admit liability within 7 days and then prepare to discuss with them an appropriate sum for damages. They thoughtfully cited and summarized in their letter the English Court of Appeal decision in *Cassidy v Daily Mirror Newspaper Limited* [1929] 2 KB 331 for the editor of the Nation to study. On April 25, 1978 the Nation's advocates replied denying liability, alleging Mrs Lydia Chesire had not been defamed and *Cassidy* would not be followed by any court in Kenya.

Mrs Lydia Chesire claimed in her plaint she had been injured in her credit, character and reputation as a schoolmistress and been brought into hatred, ridicule and contempt by this picture and the words under it in that *Sunday Nation*, because they meant the lady in it was Mr Chesire's lawful wife and Mrs Lydia Chesire was not but, instead, a woman of loose, vulgar, unchaste, mean morals, Mr Chesire's concubine, the mother of his illegitimate children, someone who poses as his lawful wife, and in all, a person who was unfit to be a schoolmistress, and furthermore, the Nation refused to publish any apology or correction or make any amends and intended to repeat the offence.

The Nation's defence admitted publication and its refusal to apologise for it or correct it because, it maintained, the picture and words under it did not bear any of the meanings Mrs Lydia Chesire ascribed to them and were not defamatory so she suffered no damage.

Mr Justice Chesoni recorded evidence from Mrs Lydia Chesire, Mr Tito Kiprono Birech Kuruna, a Principal in the Central Bank, and Mr Morris Masengo, a Public Relations Consultant.

Their testimony revealed Mr Masengo took the photograph and wrote the caption which the Nation published. He knew Mr Chesire but not Mrs Lydia Chesire. The general manager of African Tours and Hotels introduced the lady, who presented the trophy, as Mrs Chesire and, in conversation with Mr Masengo, she confirmed it and Mr Chesire, in his brief interview with Mr Masengo did not correct that impression. They had both taken part in the competition.

Mrs Lydia Chesire's colleagues saw the item in that *Sunday Nation* and the next day asked her how the lady in the picture could also be called Mrs Chesire? They doubted she was married to Mr Chesire and thought she was his mistress and, thus, they came to have a low opinion of her. Worse still, a Nakuru friend saw it and thought it was her, and looking so smart.

She was humiliated and distressed by all this, apparently, because she was a schoolmistress at Elgon Estate Primary School in Nakuru. She was married to Mr Reuben Kiplangat arap Chesire, when he was a District Officer, on December 9, 1964 in Kapropita in Baringo according to the rites and ceremonies of the African Inland Church, and has since born him three children who in early 1979 were 14, 13 and 11 years old. Her father, Chief Gideon arap Tarus, and her mother were still alive and, like herself, Christians and so, by conviction and practice, monogamous.

She admitted, however, that, though she was known as Mrs Lydia Chesire at the school, she had reverted to her maiden names Lydia Cheroni Gideon outside it, she had not lived with Mr Chesire as his wife since 1970, he was known by her friends and acquaintances to have lived with various women in turn, including one by whom he had had three other children, which was the custom for Kalenjin men and she had filed in the High Court on November 7, 1977 a petition for the dissolution of their marriage.

Mr Kuruna knew Mr Chesire and Mrs Lydia Chesire, and that they were lawfully married. He saw the picture and words under it, and assumed Mr Chesire now had two wives, and this did not lead him to think any the less of Mrs Lydia Chesire whom he respected.

Mr Justice Chesoni believed all the witnesses who testified before him, if I assess rightly the tenor of his judgment. He made the following findings of fact and or law. Mrs Lydia Chesire was at the material time the only lawful wedded wife of Mr Chesire. They were married under the provisions of the African Christian Marriage and Divorce Act (cap 151) which provided a form of marriage for monogamous African Christians and this Act, together with the Marriage Act (cap 150), made any purported second marriage by either spouse during their life and their subsisting marriage the criminal offence of bigamy. He acknowledged most marriages in Kenya were potentially polygamous and that there were other appropriate legal forms of marriage for those who were not committed Christian monogamists but, in his view, this was irrelevant to the issue of the liability but relevant to the issue of quantum. The picture together with the description of the lady presenting the trophy as Mrs Chesire were not defamatory in their ordinary meaning, but by reason of special facts were capable of being understood in a secondary and defamatory sense by persons to whom the special facts are known. It is unnecessary to call any evidence that any such person did so understand them. He cited for all this *Hough v London Express*

Newspaper Ltd [1940] 2 KB 507 (CA) which was approved of and followed by the former Court of Appeal for Eastern Africa in *East African Standard v Gitau* [1970] EA 678 and in *Hough's* case the English Court of Appeal's decision in *Cassidy v Daily Mirror Newspaper Ltd* [1929] 2 KB 331 was held to be binding, so, the learned judge continued, that should also be followed by the courts in Kenya for it was good law and appropriate to do so.

The Nation, he went on, had not availed itself of the provisions of sections 12 and 13 of the Defamation Act (cap 36) by publishing any correction and apology which was astonishing. Mr Gitau in *East African Standard v Gitau* was awarded Kshs 24,000 damages but the Court of Appeal reduced it to Kshs 8,000 because no financial loss or physical injury had been incurred by him as a consequence of the libel but here, said Mr Justice Chesoni, Mrs Lydia Chesire had lost her reputation which was an invaluable asset. The defamation was slight, he held, because she sometimes called herself Lydia Cheron Gideon and she had been separated from Mr Chesire for about ten years. An injunction was unwarranted because she had since the publication filed suit for divorce and Kshs 15,000 damages was the appropriate award of damages for the injury she had suffered.

If the test for liability in libel in this appeal was 'Did the Nation intend to refer to Mrs Lydia Chesire?' The answer would be 'NO' because it and Mr Masengo did not know her or of her existence and the publication did not refer to her. This would be a subjective test and appropriate for libel which is a crime and that is, presumably, why the words and the picture are said to have been published 'falsely and maliciously of and concerning' Mrs Lydia Chesire.

Unfortunately, the test has been objective in England since 1910 and then it became, put simply, what the reader is presumed to understand and not what the publisher meant. Lord Loreburn LC in his speech in *Hulton v Jones*, [1970] AC 20, 23 said:

'A person charged with libel cannot defend himself by showing that he intended in his own breast not to defame; or he intended not to defame the plaintiff, if in fact he did both'

And it is from there the majority decision in *Cassidy v Daily Mirror Newspaper (ibid)* flows, which Lord Denning has, extra-judicially, described as 'the climax of absurdity.'

Lord Justice Greer dissented in *Cassidy* saying (at page 350):

'If the decision of my brethren in this case is right, it would be right to say that I could be successfully sued for damages for libel, (if, having been introduced to two apparently respectable people as persons engaged to be married, I repeated that statement in a letter to a friend) on the ground that my words meant that a lady, totally unknown to me, who was in fact the wife of a man, was not his wife and was living in immoral intercourse with him. It seems to me wholly unreasonable to hold that my words could be construed as meaning anything of the kind'

and Lord Justice Goddard in *Hough* agreed with that, and so do I. I wondered if the time had come for this court in Kenya in 1984 boldly to depart from the decision of its distinguished predecessor which approved and followed *Hough*, and therefore *Cassidy*, in *East African Standard v Gitau*, (*ibid*), but I think it cannot do so for two reasons. First, the law of libel has probably 'passed beyond redemption by the courts' as Lord Justice Diplock said *Slim v Daily Telegraph Ltd*, [1968] 2 QB 157, 179 (CA). Secondly, parliament did not try to rationalise it but, instead, in the Defamation Act (cap 36) which was:

"An Act of Parliament to consolidate and amend the statute law relating to libel, other than criminal libel, slander and other malicious falsehoods"

and began on June 17, 1970, in sections 12 and 13 provided the publisher with the two separate defences of publication without malice, and unintentional defamation, though the burden of proof is on him and it is a heavy one.

The orthodox principles of the relevant law are summarized in the judgment of Hancox JA and I

respectfully agree with that summary and the finding that the learned judge in the High Court did not misdirect himself on the issue of liability for the picture and the words together were in law capable of being understood by reasonable people to mean that the presenter of the trophy was then the lawful wife of Mr Chesire and that at that time Mrs Lydia Chesire was not lawfully married to him.

Turning to the issue of the quantum of damages, I am in respectful agreement with all that will fall from Nyarangi Ag JA, and that Kshs 15,000 was an excessive award, in the circumstances of the case, and one of Kshs 1,000 should be substituted. The Nation, as it happens, should have made an offer of amends.

Pyrrhus, it will be recalled, won a victory, and lost the best of his army in doing so. Mrs Lydia Chesire has done the same, so I do not think she should have her costs of the appeal.

I would dismiss this appeal with no order as to costs, uphold the finding of Mr Justice Chesoni that the Nation was liable, but set aside the award of Kshs 15,000 damages and substitute for it one of Kshs 1,000 only with costs and interest on both sums. Mrs Lydia Chesire must repay the balance of the decretal amount to the Nation.

Hancox JA and Nyarangi Ag JA, agree, so those are the orders of the court.

Hancox JA. The facts of this case, which led Chesoni J (as he then was) to award Kshs 15,000 by way of damages to the respondent for a libel in the issue of the *Sunday Nation* of September 25, 1977, have been fully narrated by Kneller JA, whose draft judgment I have had the advantage of reading, and I need not repeat them. Mr Barasa submitted on behalf of Nation Newspapers Ltd, who have appealed from Chesoni J's decision, that the learned judge was wrong in holding that the picture of another woman in company with the respondent's husband, together with the words captioned to the picture, were capable in law of bearing the meaning ascribed to them by the respondent in paragraphs 4 and 5 of her plaint, which I now set out:

"4. The said words were juxtaposed with the picture of a smiling lady. By the said words and picture as aforesaid in their natural and ordinary meaning the defendant meant and was understood to mean falsely that the lady whose picture accompanied the said words was the lawful wife of Mr Reuben Chesire aforesaid.

5. Further or in the alternative, the said words meant and were understood to mean:

- (a) that the plaintiff was not lawfully married to Mr Reuben Chesire at all,
- (b) that the plaintiff is a woman of loose, vulgar, unchaste and mean morals who had lived with Mr Reuben Chesire as a concubine and borne children with him without being lawfully married to him at all.
- (c) that the plaintiff was a liar and a cheat who had falsely held herself out to society as being the lawful late wife of Mr Reuben Chesire without in fact being duly married to him.
- (d) The plaintiff was living as a concubine and was thereby morally unfit to be a teacher."

Mr Barasa submitted that the two authorities on which the High Court decision was substantially based, *Cassidy v Daily Mirror Newspapers Ltd*, [1929] AE Rep 117, and *Hough v London Express Newspaper Ltd*, [1940] 1 AER, 31, which were decided in England at a time when that country could fairly be said only to recognize a monogamous form of marriage, were inapplicable to a country like Kenya in which the class of persons to which the respondent and Mr Chesire (her husband) belonged could lawfully contract no less than five kinds of marriage, of which only two were monogamous. Therefore the wrong description of a person as being the wife of another when in fact she was not would not lead right thinking members of society in Kenya to think any the less of the lawful wife. Thus the picture and caption in the *Sunday Nation* were not capable of bearing the defamatory meaning ascribed to them or, indeed, any defamatory meaning.

Secondly, Mr Barasa submitted, the two authorities which I have mentioned are not good law and should not have been followed in Kenya, if only by reason of the proviso to section 3(1) of the Judicature Act, (cap 8), which states:

“but the common law, doctrines of equity and statutes of general application shall apply so far only the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.”

The correct approach, Mr Barasa said, was that stated by Sir Charles Newbold P in relation to this court’s predecessor in *Dodhia v National and Grindlays Bank Ltd*, [1970] EA, 195 at p 199, as follows:

“It is, I think, beyond dispute that since this court became the final Court of Appeal for the sovereign countries of Kenya, Tanzania and Uganda no decision of the Privy Council or of any English court or of any foreign court is binding on this Court. Indeed, no such decision would be binding on any court in Kenya, Tanzania or Uganda, unless it was a decision of the Privy Council on an appeal from any of those countries, though in so far as any such decision sets out what is the English law, the High Courts of Kenya, Tanzania and Uganda would normally accept such to be the position and this court would, I have no doubt, have regard to any decision of an English court setting out what is the English law. It would, however, always be a matter for the countries of Kenya, Tanzania and Uganda to decide what is the law of those countries. Even where English law is applied in any such country, its application would be subject to such modifications as the circumstances of the country and its inhabitants required; and it would be for the courts of such country to determine what those modifications, if any, would be in any particular case in order to determine what is the law of such country.”

In amplification of his submissions under the first head, Mr Barasa referred us to portions of the evidence of the only witness called as to the effect the article had on him, a Mr Kuruna, who said:

“I do not know the woman in the picture. She is not Mrs Chesire. I felt nothing when I read the caption”

and, under cross examination:-

“I know and respect Mrs Lydia Chesire. When I saw the caption I did not have any change in my opinion of Mrs Chesire.”

Mr Khaminwa, for the respondent, on the other hand, submitted that the two English cases both related to a similar situation, in that the action was brought by the real wife in relation to a newspaper picture or article which stated or suggested that because of the husband’s connection with another woman the real wife had only been illicitly cohabiting with him. Though not binding, they were of strong persuasive effect, and the decisions were on facts which were particularly opposite to the instant case.

An action for libel by innuendo depends for its success on the proof by the plaintiff that special circumstances, or as it is frequently put, extrinsic facts, are known to persons who read the offending publications (see *Clerk & Lindsell on Torts* 14th Edition at paragraph 1701, *Gatley on Libel & Slander* 6th Edition paragraph 116). Evidence must therefore be led of special circumstances which were known to the recipients of the libel. As is demonstrated in *Hough v London Express Newspapers Ltd* (supra), per Slessor LJ at p 34, the evidence does not have to establish that the witness or witnesses understood the words complained of in a defamatory sense, but that there was some fact known to them which would be sufficient to entitle any reasonable man with such knowledge to interpret the words in a defamatory sense – see Greer LJ in *Tolley v Fry & Sons Ltd*, [1930] 1 KB 467, at p 480. It may be noted that Greer LJ was the dissenting member of the court in *Cassidy v Daily Mirror* (supra) where the plaintiff received £500 damages), and that Goddard LJ said in *Hough v London Express Newspaper* that he would not have found the words complained of in that case capable of the defamatory meaning alleged had he not felt bound by *Cassidy v Daily Mirror*.

In the instant case, in my judgment, it matters not that the supporting witness did not himself think the picture and caption defamatory, since his evidence established that he knew Mrs Chesire was married to

Mr Chesire (though he did not know the form of the marriage they had undergone), and that was the special circumstance which founds the condition for the proof of innuendo to which I have just referred. I think *Hough's* case was correct, and that that evidence was enough to enable Chesoni J to find in law that the words and picture were capable of a defamatory meaning. I cannot put it better than the judge did when he said:

“In brief the case of *Hough v London Express Newspaper Ltd* (*supra*) lays down that where words are capable of being understood in a defamatory sense by persons to whom special facts are known, it is unnecessary to prove more than that there (are) people who knew those special facts and so might reasonably understand the words in a defamatory sense (also see *Morgan v Odhams Press Ltd* (1971) 1 WLR 1239).”

This receives ample support from the following passage from Slessor LJ in *Hough's* case at p 34:

“... Conversely, here the mere fact that two women knew that Mrs Hough was Hough's wife, and so did not regard the article as defamatory upon her, though possibly as defamatory upon the curly-headed woman, or upon Hough himself, does not acquit the defendants of liability.”

Accordingly, I agree with the learned judge that the words complained of were capable in law of bearing a meaning defamatory of the respondent. The question then arises: which defamatory meaning of all those that her enthusiastic advisers inserted in the plaint? The judge, by the context of his judgment clearly thought the innuendo in paragraph 4 and that in paragraph 5(a) were established. If that is so, I agree. The words were capable of being understood in those senses by reasonable people. I do not think there is any justification for saying they were capable of being defamatory in any of the other senses alleged.

The judge went on to find, in effect, that the words were defamatory in fact, and I do not think there exist any grounds for differing from that finding. Mr Barasa said in his reply that the judge exaggerated the position when he said that *Hough's* case was “followed with approval” in *East African Standard v Gitau*, [1970] EA, 678, but I do not think this is so. Law Ag VP, said, at p 682 of that report, that although the words complained of were not defamatory in their ordinary meaning, they were reasonably capable of being understood in a defamatory sense by persons having special knowledge of the circumstances. That is to my mind very similar to the context of Slessor LJ's judgment in *Hough's* case from which I have just quoted.

It follows that in my judgment there was no misdirection by the learned judge on the issue of liability and I would uphold his decision in that respect and dismiss the first four grounds of the appeal.

Turning to ground 5, the quantum of damages, I agree with Nyarangi Ag JA, whose judgment I have also had the advantage of reading, in this respect. That part of the evidence of Mr Kuruna which was emphasized by Mr Barasa, while not affecting the question of whether the picture and words were capable in law of being defamatory, nevertheless show that the degree by which the respondent's reputation fell in the eyes of those that knew her was minimal. She herself cannot have suffered much distress for she and Mr Chesire had been separated since 1970, and was known by her maiden name of Gideon. Although she said people thought she was just another of the women with whom he cohabited, and thought less of her, this was not borne out by Mr Kuruna, the only supporting witness. Moreover the respondent agreed that men of her community do marry more than one wife. Indeed the judge twice described the extent of the libel as slight.

In these circumstances I would award nominal damages only to the respondent. I would reduce the award of Kshs 15,000 to a nominal sum. While I might, for myself, have fixed this at rather less than the Kshs 1,000 arrived by my brethren, I am not prepared to differ with their views on this aspect of the case. Accordingly I would allow this appeal to the extent only of reducing the damages awarded from Kshs 15,000 to Kshs 1,000. I also concur in the orders proposed by both Kneller JA and Nyarangi Ag JA.

Nyarangi Ag JA. I have read the judgment of Kneller JA and that of Hancox JA and I respectfully agree that the trial judge's decision on the issue of liability was correct. The test for liability in libel is objective

and in this action it did not matter that the reproduction of the photograph and the description of the lady as Mrs Chesire were not ordinarily defamatory. The issue was if reasonable people who knew that Mrs Lydia Chesire (Lydia) was still the wife of Mr Chesire might understand the photograph and the caption in a defamatory sense. As was stated in *Hough v London Express Newspaper*, [1940] 3 All ER page 31 at page 35, per Goddard, LJ:

‘Thus, when circumstances are proved which will clothe with a defamatory meaning words otherwise innocent, the question must equally be whether reasonable people who know the special circumstances might understand them in a defamatory sense. If words which impute discreditable conduct to my friend are used, he has been defamed to me, although I do not believe the imputation and may even know that it is untrue, ...’

Lydia was defamed. The photograph and the caption considered together are not capable of good interpretation. It could not therefore be said that only bad words have been seized to give a defamatory meaning: *Caltex v Oddie* (1955), 22 EACA 334.

In considering the appeal against the quantum of damages it is necessary to bear in mind that Lydia got married to Mr Chesire on January 15, 1965, has not lived with her husband since 1970, was popularly known as Lydia Cheron Gideon, that on November 7, 1977 she filed a divorce petition in the High Court to divorce her husband and that she knew that her husband was living with various women as concubines and had had children with one of the women.

The persons who had special knowledge of Lydia can reasonably be presumed to have known as much about Lydia and her husband. That knowledge could not have been affected in any way by the libel. One person who was aware of the special circumstances and who said he must have seen the defamatory caption testified as PW 2 in support of Lydia’s case. The witness said on page 8 of the material record *inter alia* as follows:

“I felt nothing when I read the caption. I thought may be Mr Chesire has another wife.”

That means that PW 2’s opinion of and regard for Lydia was not affected one way or the other by the libel.

Lydia and Mr Chesire lived together for five years and separated in 1970. Lydia was so convinced that her marriage to Mr Chesire had broken down that she petitioned for divorce in 1977. The filing of the petition amounted to a publication of the difficulties she was facing with her marriage and a public plea to terminate the marriage. All that was known, at the very least, by persons who had known of her marriage. The libel could not change their view of the state of the marriage. Besides, Lydia could not have been the only one who knew that her husband was living with various women. It is possible, I put it no higher, that Lydia assumed the popular name of Lydia Cheron Gideon as an earnest attempt to dissociate and distance herself from the misconduct of her husband and additionally as a determined effort to terminate the marriage. It is reasonable to believe that Lydia’s conduct regarding her marriage was common knowledge to the persons who knew her, including her fellow teachers and the farmers, and that the libel was subsequent to the common knowledge.

In view of all that, it would be stretching matters much too far for this court to think that the persons who knew the special circumstances relating to Lydia’s marriage had, notwithstanding the libel, changed their impressions of Lydia. The defamation was light.

The appellants were under a legal obligation to apologise for the defamation. The trial judge held as astonishing the refusal of the appellants to publish an apology. It would appear that in determining the quantum of damages, the trial judge placed greater emphasis on the appellant’s refusal to apologise and to publish a correction than on the extent and effect of the defamation. But the appellant’s erroneous attitude did not in the circumstances worsen the very minor defamation. Lydia deserved no more than nominal damages. The sum of Kshs 15,000 is quite clearly excessive.

This court may alter an award if it is so high or so low as to have been wrongly assessed: *Butt v Khan*, Civil Appeal 40 of 1977 as per Law JA. The excessive figure of Kshs 15,000 was mainly arrived at as a result of an over-emphasis of the unjustified refusal by the appellants to publish an appropriate apology – See *Channan Singh & Another v Channan Singh & Handa* (1955), 22 EACA at page 129. Even allowing for inevitable differences of views and of opinions in the sphere of awarding monetary compensation, the figure of the assessment in the circumstances calls for substantial reduction: *H West & Son v Sheppard*, [1963] 2 All ER 625. In my judgment, a nominal award of Kshs 1,000 as damages would meet the ends of justice. The award of Kshs 15,000 should be set aside and substituted with an award of Kshs 1,000.

The court was informed that the sum of Kshs 15,000 had been paid to the respondent. The balance of Kshs 14,000 should be returned to the appellants as per the order of Kneller JA.

I would dismiss the appeal against liability and allow the appeal against the quantum of damages to the extent indicated above.

I too concur in the orders proposed by Kneller JA.

Dated and Delivered at Nairobi this 29th day of May 1984.

A.A.KNELLER

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JUDGE OF APPEAL

A.R.W.HANCOX

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JUDGE OF APPEAL

J.O.NYARANGI

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AG.JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR