Mwangi & another v Hashi Empex Limited (Civil Appeal 131 of 2017) [2024] KECA 92 (KLR) (9 February 2024) (Judgment)

Neutral citation: [2024] KECA 92 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 131 OF 2017

HM OKWENGU, A ALI-ARONI & JM MATIVO, JJA

FEBRUARY 9, 2024

BETWEEN

WANGETHI MWANGI ..... 1ST APPELLANT

NATION MEDIA GROUP LIMITED ..... 2ND APPELLANT

AND

HASHI EMPEX LIMITED ..... RESPONDENT

(An appeal from the Judgement and Orders of the High Court at Nairobi (Mbogholi Msagha, J.) delivered on 8th December, 2016 in H.C.C.C. NO. 272 OF 2008)

JUDGMENT

1. The 2nd appellant, is a leading newspaper publisher with wide readership in Kenya, the region and world over, by virtue of its newspapers and internet publication. It is incorporated as a limited liability company under the *Companies Act* (Chapter 486) of the Laws of Kenya. Its publication includes, The Daily Nation, Saturday Nation and Sunday Nation newspapers and the online publications. The 1st appellant is an editor with the 2nd appellant.

2. In the pleadings the respondent is described as a leading player in the African Petroleum industry since its incorporation in 1991, and supplies over 24,000m^3 of oil per year to countries in East and Central Africa, with a turnover of Kshs.1 billion a month.

3. The issues subject of this appeal arose from the 2nd appellant's online Daily Nation publication of the 3rd of June 2008, where the following words were published;

> " Man on the run; Kenya may face UN sanction as Kabuga allegedly surfaces in Norway with offer" "...The blogger maintained in a telephone interview that he had met Kabuga who is charged with supplying machetes to militia in the 1994 Rwandan Genocide in which at least 800,000 were killed...

> ... according to ICTR documents seen by the Sunday Nation two years ago, 73-year-old Felician Kabuga is a wealthy Hutu Businessman who is believed to have vast interests in Kenya.
>
> He is associated with three companies including Hashi Empex Limited of View Park Towers."

4. The respondent was aggrieved by the publication claiming that the words published by the appellants in their ordinary and natural meaning, meant and were understood to mean: -

    a. The respondent had business dealings with an international criminal and fugitive from justice responsible for or connected/associated with genocide of 800,000 persons in Rwanda;

    b. The respondent was associated with an international criminal and fugitive from justice.

    c. The respondent is an unscrupulous company that associates with an international fugitive from justice.

5. It was the respondent's case that none of its directors ever had any association with Felicien Kabuga, or any other criminal or fugitive, and the appellants therefore, had no legitimate reason for publishing the words complained of. Further before the publication the appellants did not verify with the respondent the accuracy of the information they published.

6. In addition, the respondent claimed that, as a result of the publication, it was seriously injured in its credit, its business nationally and international was affected; and it was brought into public scandal, odium and contempt, which necessitated the engagement of a public relations firm for a period of six months to deal with damage control, as a consequence of the publication.

7. Further as a consequence of the said publication, the respondent claimed to have suffered substantial loss and damage and sought for reliefs as follows:

    i. Special damages against the appellants as follows: -

        a. Kshs. 650,000/- per month for 6 months paid to the Public Relations Company totaling to Kshs. 3,900,000/-.

        b. Cost of the respondent's managing director's travel to Rwanda to meet major clients at Kshs.500,000/-.

        c. Cost of the plaintiff's legal manager's travel to Arusha to follow up the issue with the international criminal court for Rwanda and to brief the media Kshs. 50,000/.

    ii. General, exemplary and aggravated damages.

8. In his defence the 1st appellant stated that the suit against him was incompetent as he was merely an agent of the 2nd appellant. On its part the 2nd appellant admitted the words published but denied that the publication was made falsely or maliciously. It equally denied that the words in their natural and ordinary meaning or even by way of innuendo referred to any of the constructions attributed to them by the respondent, and that the words were not capable of carrying out any defamatory meaning.

9. Further the appellants claimed that there was no reason or justification for the expenditure claimed to have been incurred by the respondent. In the alternative, the appellants pleaded that the expenses were exorbitant and not incurred in mitigation of any damage. In the alternative the defendants pleaded that the plaintiff had failed to particularize the expenses claimed.

10. Further the appellants contended that the respondent is a separate and distinct legal entity from the sister company in Rwanda, and any claim on behalf of the sister company was unsustainable in law. Further, in the publication there was no malice or spite to support a claim for exemplary damages.

11. At the hearing the respondent's director Mr. Ahmed Hashi Adan and one more witness testified. The defence did not call any evidence. In its judgment dated 8th December, 2016 the trial court rejected the submissions made by the appellants and held that the evidence by the respondent remained uncontroverted. In the end the court entered judgment in favour of the respondent as follows; -

    a. General damages Ksh. 15,000,000/-

    b. Aggravated damages Kshs. 10,000,000/-

    c. Exemplary damages Kshs. 4,000,000/- (d)Special damages Kshs. 4,450,000/- Total Kshs. 33,450,000/-

    (e) Costs of the suit.

12. The appellants were aggrieved by the judgment and preferred this appeal on grounds that; -

    a. The learned judge erred in law and in fact in failing to consider the nature of defamation as personal to the respondent and the concept of separate legal personality, in circumscribing the appellants' liability for the publication complained in spite of extensive cross- examination and submissions on the same by the appellants. (sic)

    b. The learned judge erred in law and in fact in failing to consider the nature of defamation as personal to the respondent and the concept of separation of legal personality in limiting the quantum of the damages awardable to the respondent.

    c. The learned judge erred in law and in fact in awarding aggravated and exemplary damages on the basis of the material before him which did not justify such awards.

    d. The learned judge erred in law and in fact in awarding Kshs. 4,450,000/- as special damages.

    e. The learned judge erred in law and in fact in awarding an excessive sum of Kshs. 15,000,000/- as general damages.

    Based on the above grounds the appellants sought for setting aside of the entire judgment and/or for the court to substitute the awards with appropriate awards.

13. The matter was listed for hearing on the virtual platform. Mr. Kiplagat counsel for the respondent was present. The appellants' counsel did not attend despite service of the hearing notice. Both parties had filed written submissions and the court therefore proceeded on the basis of the written submissions on record. Mr. Kiplagat took liberty to briefly highlight his submissions.

14. In summary, the appellants submitted that the nature of defamation herein is personal, and an action based on the same is intended to vindicate the injury to the reputation of the claimant, that is the person who ought to sue. In this regard counsel cited the case of *Hon. Musikari Kombo v Royal Media Services Ltd* [2014] eKLR.

15. It was submitted further, that, when it concerns a trading corporation or company, an action in defamation is founded on injury to its trading or business reputation. In support of this argument the appellants relied on the holding in *Derbyshire County Council v Times Newspapers Ltd & Others* [1993] 1 ALL ER 1011.

16. Further, the appellants submitted that the only common ground between the respondent and the other companies with similar names, is that they share common directors but are separate legal personalities and, that although the respondent was the one named in the impugned publication, the case is about the trading reputation to its sister company in Rwanda, whose business in Rwanda was said to have been adversely affected.

17. The appellants further argued that in the event the court is not persuaded with the preposition that the suit is untenable, then the general damages awarded were manifestly high. In this regard, the appellants quoted the case of *Paul Muli & Stella Kanini Mutisya t/a Stepal Dressing Making & Design v Nation Media Group Ltd* [2017] eKLR.

18. Further the appellants argued that the respondent deserved a nominal amount as it failed to demonstrate actual damage to its subsidiary in Rwanda as there was no prominence of publication save for one sentence that included other entities, which the trial court failed to consider.

19. Further, the appellants submitted that the trial court had no basis for awarding aggravated, exemplary and special damages. That a court would award aggravated damage against one who has acted out of malice, without a flurry defence of justification or where there is failure to apologize.

20. As concerns exemplary damages the appellant argued that this head of damages is awarded when the publisher acts in expectation of material gain which was not the case in this instance and therefore the award is not justifiable.

21. On special damages it was contended that no proof of the same was brought forth save for one invoice, as the rest of the documents were generated by the respondent.

22. On its part, the respondent submitted that the impugned publication was no coincidence but intended to coincide with an international multimillion tender in Rwanda which it had just won for supply to the government of Rwanda of more than 108,000m^3 of heavy electro gas and petroleum related products.

23. Further, the respondent submitted that the immediate effect of the publication was reduction of the respondent's contract from 3 to 1 year and soon thereafter its cancellation, which was a demonstration of the intent of the publication, which was to destroy the respondent's business in Rwanda and the entire region where Felicien Kabuga was adversely known. That the action was deliberate, malicious and planted by the respondent's rivals in an elaborate and effective scheme to gain business advantage.

24. The respondent drew a distinction between ordinary defamation and war-crime libel, which he submitted, attracted substantial damages world over. In this regard he relied on the words of Lord Beldan in *Baron Aidington v Watts & Another* [1989] OBD where the court justified exceptional damages.

25. The respondent went further to submit that in this case the appellants failed to establish any link between the respondent and the war criminal Felicien Kabuga; and when called upon they failed to tender any apology. In addition, the defamatory material continues to exist on their website.

26. The respondent urged further, that defamatory suits on war crimes is distinct from ordinary defamation where there would be injury to reputation. That in war crime libel, there would be loss of good will and financial damage to a corporate entity occasioned by a defamatory statement.

27. On whether corporate libel is actionable without proof of damage the respondent urged that there is no such obligation to prove actual damage to the character and reputation suffered by such a claimant. He relied on the case of *Jameel & Others v Wall Street Journal Europe* [2006] U KHL 44.

28. Further the respondent submitted that the libelous material published in Kenya did not require it to prove damage as the cause of action is actionable per se, therefore the libel against Hashi Kenya was actionable and the injury suffered by Hashi Rwanda is the damage caused by the publication. That the appellants chose to link the respondent to the defamatory statement with full knowledge that Hashi Rwanda would suffer instant prejudice.

29. Having considered the record of appeal and the submissions filed before us we are of the view that three issues stand out for determination.

    a. Whether the claim for defamation was properly before the trial court.

    b. Whether the impugned publication by the appellants on its website on 3rd June, 2016 connecting the respondent to Felicien Kabuga was defamatory in its natural and ordinary meaning.

    c. If the answer to (a) & (b) above is in the affirmative, whether there was a basis for award of general, aggravated, exemplary and special damages; and

    d. Whether the damages awarded by the trial court were excessive as to justify intervention by this court.

30. The appellants do not dispute having printed the words complained of by the respondent. Nor did they plead any justification or produce any evidence linking the respondent to the fugitive Felicien Kabuga nor did they tender any apology to the respondent for their action.

31. The appellants' case before court was that the words do not connote the natural and ordinary meaning attributed to the same by the respondent, and more specifically no action lies, because the words against the respondent were personal to it and could not translate to a damage against another entity and/ or that the injured party could not sue through a proxy.

32. It is common knowledge world over, if not, within the region that over the years one Felicien Kabuga, a Rwandese national was linked to the infamous Rwanda genocide and was on the run from the International Court of Justice for 26 years, hence the description of him as a criminal fugitive. He was eventually arrested in Paris in May 2020. It had earlier been rumored that the said person was being harbored in Kenya.

33. The appellants did not adduce any evidence, nor did they plead that the publication was justifiable. Mere denial in their defence that the publication was not defamatory was not sufficient. Therefore, without proof or any evidence that the publication was justified, the publication connecting the respondent with the fugitive was without any basis. Having so stated, we shall proceed to consider whether the statement that the "fugitive Felicien Kabuga was associated with the respondent" in its natural or ordinary meaning was in itself defamatory. The test for this, in our view is how the community around, reading the publication would view the words. The said words to us connote that the respondent associated with a criminal. There is no denial that these words must have had a negative impact on the respondent's reputation as a business entity.

34. The next question is whether a statement made in Kenya said to have had an impact upon a sister company in Rwanda can be actionable in Kenya? There is no doubt that defamatory words of the magnitude reported by the 2nd appellant associating Felicien Kabuga with the respondent would affect the directors of the two sister companies but would have more impact in Rwanda.

35. The appellants' argument is that if that were the case a suit should have been filed by the subsidiary company in Rwanda. The respondent thinks otherwise since this is a case of corporate libel.

36. For starters, we consider that it takes effort, hard work and discipline of many years, for a corporation to gain trust from competitors and their customers; this trust is invaluable and may not necessarily be quantifiable. It is a reputation that needs to be fiercely protected and preserved. That is not to say that critics or the public ought to be gagged from making fair and reasonable comments on matters that touch on corporates for public good or where the comments are justified.

37. In this instance, the evidence before Court is that the respondent's sister company in Rwanda had its multimillion- dollar contract reduced and eventually cancelled not long after the publication. Indeed, the trial judge noted that the respondents counsel had written a letter to the appellants, setting out concerns arising from the said publication which were libelous and published before the said information was verifies by the respondent. In the said letter counsel pointing out the likely adverse effects of the publication sought for: unqualified withdrawal of the publication; an apology commensurate to the prominence given to the publication, on the first page of the publication of the Nation newspaper; an undertaking that the publication will not be repeated; and admission of liability to be followed by discussions on quantum. The judge had further observed that there was no reply to the said letter.

38. PW1 Ahmed Hashi the managing director of the respondent had this as part of his evidence;

> " I do not know where the allegations could have stemmed from. Kabuga is not a shareholder in my company or any of its sister companies. I have never met Kabuga physically or even spoken to him. I have never had any business dealings with him either. I have only seen him on photos, newspapers articles and magazines.
>
> ...I can only believe that Nation Media Group was purposely trying to negate our business reputation in Rwanda. The statements were made maliciously and without due regard to truth. No one in my company was even contacted to verify the validity of the statement before the same was published... Rwanda is a very small and reserved country. I know for a fact that as a businessman one cannot service the Rwandan government if one is associated with an enemy of State. Felicien Kabuga is an enemy of the State and in fact it was almost taboo for the Rwandese people to even talk about Kabuga." (sic)

39. The above statement was not denied. The words published by the 2nd appellant were grave and would have put the respondent into disrepute, no doubt. Further there was no evidence to controvert the loss of reputation and business loss incurred. We do agree with the finding of the trial court and equally find that the published words were libelous towards the respondent.

40. The observation of the trial court was that the ordinary and natural meaning was as pleaded by the plaintiff. Locking at the words published, one cannot avoid the conclusion that the respondent was associated with an international criminal and was of the same league. We cannot fault the trial court for arriving at the finding.

In *Jameel & Others v Wall Street Journal Europe* [2006] U KHR 44, a decision of the House of Lords, Lord Bingham of Cornhill stated;

> "(17) ...I conclude that under the current Law of England and Wales a trading company with a trading reputation in this country may recover general damages without pleading or proving special damages if the publication complained of has the tendency to damage it in the way of its business."

In addition, we cannot agree more with the words of Lord Scott of Foscote, where he stated;

> "(121) It seems to me plain beyond argument that reputation is of importance to corporations. Proof of actual damage caused by the publication of defamatory material would, in most cases, need to await the next months' financial figures, but the figures would likely be inconclusive. Causation problems would usually be insuperable. Who is to say why receipts are down or why advertising has become more difficult or less effective? Everyone knows that fluctuations happen. Who is to say, if the figures are not down, whether they would have been higher if libel damaging its reputation had not been published? How can a company about which some libel, damaging to its reputation, has been published ever obtain an interlocutory injunction if proof of actual damage is to become the gist of the action?
>
> (125) But a holding company's reputation might be indistinguishable from that of the corporate group to which it belonged. If, however, the conclusion can be reached that the remarks in question were indeed defamatory, damaging to the reputation of the company and apt to damage its ability to pursue its trading or charitable or other objects. I can see no reason of principle why the long-standing rule of enabling the company to pursue a remedy in a defamation action without the need to allege or prove actual damage should be changed."

41. The purport of the holding above, which we subscribe to, is that once you use defamatory words against a corporate, that in itself is actionable, you have to face the consequences of your actions, meaning in this instant case, the fact that the sister company in Rwanda was affected only goes to bolster the damage that occurred.

42. What are the damages and/or compensation deserved? The trial court gave general damages, aggravated, exemplary, special damages and cost of suit.

    As relates to general damages, we are persuaded by the respondent's argument that the defamation in this matter is a war-crime defamation and grave. Further the appellants' conduct and circumstances of the case ought to attract a big award. The appellants did not verify the information they received, they failed to seek the respondent's comments before publication. Linking a big company in the league of the respondent to an international criminal, ought to have prompted the appellants to verify the information received, before publishing the same, which they either deliberately or otherwise failed to do.

43. The damage to the respondent was certainly immense and the award of Kshs.15 million for general damages to us appear to be reasonable.

    As for aggravated damages, we take note that a request for an apology was made but no response was received from the appellants. Further, no evidence was adduced in court to counter the proposition that the publication was purposely malicious, or that the publication was initiated by the respondent's rivals. Nor was there any evidence of the defence of justification.

    We equally find the sum of Kshs.10 million for aggravated damages justifiable in the circumstances.

As for exemplary damages, we find the conduct of the appellants before and after publication connotes malicious intent. Nothing would have been easier than to make an apology in mitigating the loss likely to be suffered by the respondent. An apology would have at the same time averted any inference of ill motive. Needless to say, that despite the respondent's concerns, the appellants were least bothered as the publication remained on the 2nd appellant's website. We see no basis for interfering with this award either.

44. Special damages are to be proved. The record shows clearly that a Public Relations Company was engaged specifically due to the impugned publication. In our view, this was not controverted. The evidence on record indicates the terms of engagement between the respondent and the said firm and costs incurred. Further evidence in form of tickets to and from Rwanda and expenses incurred were produced as part of the record. We equally see no need to interfere with the special damages that were awarded.

45. In the end we find no merit in the appeal. The same is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

ALI-ARONI

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

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

Signed

Deputy Registrar