Ongoche v Okoth t/a GS Okoth & Company Advocates (Civil Appeal 44 of 2019) [2023] KECA 203 (KLR) (17 February 2023) (Judgment)

Neutral citation: [2023] KECA 203 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 44 OF 2019

PO KIAGE, M NGUGI & F TUIYOTT, JJA

FEBRUARY 17, 2023

BETWEEN

OBADIAH AUKO ONGOCHE .... APPELLANT

AND

GEORGE SHANE OKOTH T/A GS OKOTH & COMPANY ADVOCATES .... RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Homa-Bay (H. A. Omondi, J.) dated 19th April, 2018 in High Court Civil Appeal No. 18 of 2017)

JUDGMENT

JUDGMENT OF TUIYOTT, JA

1. The client- advocate relationship between Obadiah Auko Ongoche, the appellant and George Shane Okoth t/a G.S Okoth & Company Advocates, the respondent, could have ended on a happier note.

2. Upon the instructions of the appellant, the advocate successfully represented the appellant in Civil Case No 16 of 2007 in which he obtained a decree against the Attorney General for the sum of Kshs 320,558.90. Once the advocate received the decretal amount plus costs and interests, he paid the client a sum of Kshs 226,312/90, withholding a sum of Kshs 94,246. On March 5, 2002, the client demanded the retained amount from the advocate who declined to release it contending it to be fees.

3. Displeased with the advocate the client lodged a complaint against the advocate before the Advocates Complaints Commission, a commission set up under the provisions of section 53 of the *Advocates' Act*. Correspondence was exchanged between the Commission, the client and the advocate. The advocate's

letter of October 8, 2014 is the source of the dispute giving rise to this second appeal. The client thought some words of that letter to be defamatory of him. The portion said to be offensive reads:

> "It is interesting that after being served with the said bill of costs the complainant has corruptly ensured that the file for the original civil suit No 16 of 2007 is misplaced or lost thus making it impossible for the court to tax the said bill. Our assertion is based on the fact that another file where we have a decree against the same complainant i.e Homa Bay SRMCC No 14 of 2011 Obadiah Auko Ongoche v George Illa as well cannot be traced."

4. On the basis of those words, though paraphrased in the pleadings, the client sued the advocate for general damages for libel in Homa-Bay civil case No 1 of 2015 Obadia Auko Ongoche v George Shane Okoth t/a G.S Okoth & Company Advocates.

5. Perhaps I need to say at this stage that unlike the defamation proceedings, the proceedings before the commission were amicably concluded when the parties entered a consent and in a letter of May 13, 2015, the commission wrote to the parties notifying them that the matter had been marked as closed.

6. Regarding the libel matter, the advocate not only filed a defence to it but also mounted a counterclaim raising various complaints, later abandoning them all save for a claim for Kshs 74,031/= with interest thereon. This is said to be an overpayment made to the client by then advocate in civil case No 10 of 2007.

7. Having received evidence from the client and advocate, the trial magistrate Hon Gichohi PM (as she then was), dismissed both the claim and counterclaim making a further order that each party would bear their own costs. Dissatisfied with the decision, the client preferred an appeal against the said decision. That appeal was not successful and the High Court (Hon Omondi J) as she then was) in the main held:

> "This is where the trial magistrate drew the rationale for his decision – and I concur. Indeed the Advocates Complaints Commission under part X of the Act does exercise quasi-judicial authority in dealing with complaints and disputes presented before it – hence the cover of privilege."

8. The client is before us on a second appeal in which he raises the following grounds; that the learned judge committed an error in upholding that the defamatory words by the respondent were not actionable in spite of the evidence adduced and that the respondent duly admitted having written such words while the complaints commission even wrote a warning letter dated January 9, 2015 addressed to the respondent indicating that he had not asked for alternative dispute resolution; that the learned judge erred in passing orders contrary to the provision of law and concurred with the decision of the subordinate court which did not state or specify how much the appellant could have been awarded in terms of general damages if successful; that the learned judge erred in upholding that the parties entered into a consent regarding the claim when indeed the appellant was forced to sign the said consent; that the learned judge erred in upholding that the complaints commission does exercise quasi-judicial authority yet the complaints commission did not determine the issue regarding the defamatory words as spelt in the respondent's letter dated October 8, 2014; that the learned judge erred in upholding the decision of the trial judge who did not fault the subordinate court in finding that the appellant did not file a reply to defence yet the same was duly filed and served; finally, that the learned judge committed an error in upholding that the appellant did not include particulars of malice in the plaint yet the same was fully demonstrated in the plaint.

9. At the virtual hearing of the appeal, the client appeared in person as did the advocate. The client chose to rely on the submissions he made before the High Court, while the advocate relied on his written submissions dated June 10, 2022.

10. I consider this appeal within the circumscribed mandate of a second appellate court which is restricted to matters of law only, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. (See *Stanley N. Muriithi & another v Bernard Munene Ithiga* (2016) eKLR).

11. It seems to me that the only issue that is properly before this court for determination is whether the High Court erred in upholding the decision of the trial court that the communication was made in a privileged occasion and would not found an action in defamation. The complaint that the High Court erred in concurring with a decision of the trial court which did not state or specify the damages that were deserved had the claim succeeded was not raised before the High Court and cannot properly arise before us (see *Floriculture International Limited v Central Kenya Limited & 3 others* [1995] eKLR)

12. Further, the client's grievance regarding the consent entered before the commission is a matter that was before the commission and not before the trial court and is moot as regards the defamation proceedings. In the same breath, it is not easy to understand why ground number 4 is raised before us. For clarity I set it out again;

    SUBPARA 4.

    The learned judge committed an error in upholding that the complaints commission does exercise quasi-judicial authority yet the complaints commission did not determine the issue regarding the defamatory words as spelt in the respondent's letter dated October 8, 2014.

13. The complaint of defamation was not placed before the Commission for it to determine and neither were the proceedings before the commission before the trial court and the appeal therefrom and is irrelevant here.

14. Last, the decision of the trial court as upheld by the High Court did not turn on the deficiency of pleadings and all issues regarding pleadings were resolved in favour of the client and it is worthless to raise them now.

15. On the important issue of privilege, the appellant contends that the Complaints Commission is a regulatory body and any defamation occasioned and directed to it amounts to libel. While the respondent was entitled to a defence, it could not do so in bad faith and there was no justification in alleging that the appellant was corrupt. We are told that privilege only arose in the following instances;

    1. Any statement made in the course of and with reference to judicial proceedings by any judge, party witness or advocate.

    2. Fair, accurate and contemporaneous reports of public judicial proceedings published in a newspaper.

    3. Any statement made in parliament by a member of either house.

    4. Parliamentary papers by a member of either house, any republication thereof by any person in full.

    5. Any statement made by one officer of state to another in the course of his official duty.

6. Reports by the national board for prices and incomes.

16. The respondent referred this court to the following passage by its predecessor in *Williamson Diamonds Ltd & another v Brown* [1970] EA 1 (EACA)

> " A person making a communication on a privileged occasion is not restricted to use of such language merely as is reasonably necessary to protect the interest or discharge the duty which is the foundation of his privilege; but that, on the contrary, he will be protected, even though his language should be violent or excessively strong if, having regard to all the circumstances of the case he might have honestly and on reasonable grounds believed that what he wrote or said was true and necessary for the purpose of his vindication, though in fact it was not so."

17. The respondent submits that absolute privilege applies not only to proceedings before a court of law but also where there is an authorized inquiry before a tribunal of the Disciplinary Committee of the Law Society. In this regard, the respondent makes reference to *Winfield and Jolowicz on Tort*, 19th Edition Vol 1 page 577 paragraph 13-058.

18. At trial the advocate raised the following defence:

> " 4A. The Advocates Complaints Commission established under section 57 of the *Advocates Act* is a quasi-judicial body and all words written to the commission in respect of a complaint made to it about an Advocate is privileged or enjoys qualified privilege and is thus not actionable."

19. It was the advocate's further defence that the letter of October 8, 2014 was only meant for the Commission and the parties to the dispute and not for publication to the public.

20. The Complainants Commission is established under section 53 (1) of the *Advocates Act*. Of its mandate subsection (4) provides:

    4. It shall be the duty of the Commission to receive and consider a complaint made by any person, regarding the conduct of any advocate,firm of advocates, or any member or employee thereof; and—

        a. if it appears to the Commission that there is no substance in the complaint it shall reject the same forthwith; or

        b. if it appears to the Commission whether before or after investigation that there is substance in the complaint but that the matter complained of constitutes or appears to constitute a disciplinary offence it shall forthwith refer the matter to the Disciplinary Committee for appropriate action by it under part XI; or

        c. if it appears to the Commission that there is substance in the complaint but that it does not constitute a disciplinary offence it shall forthwith notify the person or firm against whom the complaint has been made of the particulars of the complaint and call upon such person or firm to answer the complaint within such reasonable period as shall be specified by the Commission in such notification; or

        d. upon the expiration of the period specified under paragraph (c), the Commission shall proceed to investigate the matter for which purpose it shall have power to summon witnesses, to require the production of such documents as it may deem necessary, to examine witnesses on oath and generally take all such steps as it may consider proper and necessary for the purpose of its inquiry and shall, after hearing any submissions made to it by or on behalf of the complainant and the person or firm against whom

the complaint has been made, make such an order or award in accordance with this section as it shall in the circumstances of the case consider just and proper; or

e. if it appears to the Commission that there is substance in a complaint but that the circumstances of the case do not disclose a disciplinary offence with which the Disciplinary Committee can properly deal and that the Commission itself should not deal with the matter but that the proper remedy for the complainant is to refer the matter to the courts for appropriate redress the Commission shall forthwith so advise the complainant.

21. As is explicit in these provisions, the Commission receives and considers complaints made by any person regarding the conduct of any advocate, firm of advocates, or any member or employee thereof. In the matter at hand, upon receiving the complaint by the client, it invited the advocate to answer the complaint. In which event the complaint by the client was one which, in the estimation of the Commission, did not constitute a disciplinary offence and it was one it could determine (see subsection 5 (c) as read with subsection 5(d)). Clearly in receiving the complaint and inviting an answer, the Commission was acting as a quasi-judicial commission. At the core of its function is to investigate a complaint it has received and it would do so by interrogating any answer to the complaint with additional power to summon and hear witnesses on oath and require production of such documents as it may deem necessary. The Commission is not obliged to accept the validity or truthfulness of any complaint or answer it receives. If it were to do so then it would be failing in its primary mandate which is to investigate or to inquire into a complaint and by necessity an answer made to a complaint. Because it does not accept a complaint or answer at face value, then, inexorably, there can be no defamation in a complaint or answer made to the Commission. It is because of this that much in the same way as court proceedings, proceedings before the Advocates Complaints Commission, including complaints and answers filed before it, enjoy absolute privilege. The policy reason being that it would hamstring or hamper a complainant on the one hand or advocates on the other from freely making a complaint or making an answer if they were to look over their shoulder in fear that every statement in a complaint or answer could attract an action in libel. Any party making a complaint or answering to one has the luxury of protection against the tort of defamation even if in the end the complaint or answer is found to be invalid or indeed untrue. On the other hand, whether a party who abuses the privilege to deliberately and flagrantly vend falsehoods should be immune from criminal sanction for such misfeasance is a discussion that is outside the scope of this judgment and could arise on another day.

22. As would now be clear, I lean on the side of the trial court and the 1st appellate court in this all important question and would propose that the appeal be dismissed. On the question of costs, I would propose that each side bears its own costs.

<u>JUDGMENT OF KIAGE, JA</u>

24. I have had the benefit of reading in draft the judgment of Tuiyott, J.A I entirely agree with it and have nothing useful to add.

25. As Mumbi Ngugi, JA is in agreement, the appeal shall be disposed of as proposed by Tuiyott, JA.

<u>JUDGMENT OF MUMBI NGUGI JA</u>

26. I have had the benefit of reading in draft, the judgment of my brother, Tuiyott, JA. I entirely agree with the reasoning and conclusion arrived thereat and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 17TH DAY OF FEBRUARY, 2023.

F. TUIYOTT

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR