



Nation Media Group Limited & another v Wambui & another (Civil Appeal 270 of 2018) [2023] KECA 89 (KLR) (3 February 2023) (Judgment)

Neutral citation: [2023] KECA 89 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 270 OF 2018
HM OKWENGU, HA OMONDI & JM MATIVO, JJA
FEBRUARY 3, 2023**

BETWEEN

NATION MEDIA GROUP LIMITED 1ST APPELLANT

MARGARETTA WA GACHERU 2ND APPELLANT

AND

PENINAH WAMBUI 1ST RESPONDENT

STEPHEN KIMANI 2ND RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Sergon, J.) dated 20th day July, 2017 in HCCC No. 275 of 2014)

JUDGMENT

1. The appellants herein appeal to this Court against the whole of the judgment of Sergon (J), delivered on the 20th day of July 2017 in HCCC No 275 of 2014 finding liability in favour of the respondents and awarding damages.
2. The genesis of this appeal stems from the respondents' suit filed on September 10, 2014 against the appellants seeking general and aggravated damages on a claim for alleged defamation based on a story published on January 19, 2014 in the Sunday Nation Newspaper issue. The respondents also sought a permanent injunction to restrain the 1st appellant from further publishing the story which had been authored by the 2nd appellant, and also demanded an unqualified apology.
3. The respondents' complaint was that the appellants falsely and maliciously printed and published or caused to be written, printed and published of and concerning them, defamatory statements captured in the phrase 'crime of the west stalks Kenya as oil painting vanish.'



4. An interlocutory judgment was entered on February 17, 2015 and the matter proceeded for formal proof on February 8, 2017 and both respondents gave evidence. The 1st respondent was the proprietor of a guest house in Village Market, Gigiri, and she came to know about the publication from friends and family. The publication was produced as PEX 1.
5. The 1st respondent averred that the said publication affected her business and that many diplomats moved out of her guest house and influenced others not to do business with her and that as a result of the publication her business went down and her landlord refused to renew the lease; she demanded an apology from the appellants when the oil painting was found, 3 days before the publication but the apology did not follow.
6. On cross examination the 1st respondent insisted that her reputation had been damaged and that she lost her business although did not produce any statements of account to show the profit and loss of her business.
7. The 2nd respondent, a taxi driver stated that the story affected his taxi business, and he was treated as a liar and a dishonest person, resulting in clients shunning him; causing him heavy losses and forcing him to undertake other businesses. However, the 2nd respondent did not produce any profit and loss statements for his business.
8. On cross examination, the 2nd respondent stated that the alleged lost paintings belonged to a client of the 1st respondent, who also happened to be his friend, and who had left the painting at the guest house to be delivered to him later on. Further, he did not know about the theft until the publication, later on January 17, 2014 when the client called to tell him that the painting had been found.
9. By a judgment dated July 20, 2017, the trial court having considered the parties' pleadings, testimony, and evidence on record, entered judgment in favour of the respondents, awarding general and exemplary damages to each respondent and directing that the appellants issue an apology within 30 days of the judgment.
10. The learned Judge in his judgment identified two issues for determination, firstly whether or not the respondents had been defamed, and secondly whether the respondents were entitled to the award of damages sought and if so, how much?
11. The trial court in its judgment agreed with the respondents that the publication targeted them and that by innuendo, the said publication was intended to be understood that the respondents were presumed to be untrustworthy persons of dubious character, who were involved in the disappearance of the painting, since the article mentioned the two respondents as the proprietor of the guest house and taxi driver. The trial court was of the view that since the appellants did not adduce any evidence to prove the publication as true, the defendant had to be liable.
12. The court held that the appellants were liable, and had failed to issue an apology; and awarded each respondent general damages in the sum of Kshs.2,500,000.00 and exemplary damages in the sum of Kshs.500,000.00 and the appellants were ordered to publish an apology and also bear costs of the suit.
13. The appellants aggrieved by the decision of the trial court filed its memorandum of appeal challenging the judgment of the Superior Court on 8 grounds although the last 4 grounds are more or less a repetition of the same issue, so we have condensed them for precision. The appellants argue on grounds that: the evidence did not support the respondents' claim; the award was based on extraneous considerations; the general damages were inordinately high the award of 2,500,000.00 was not founded on any legal principle or precedent; the trial Judge erred in treating aggravated damages and exemplary



- damages as being synonymous, and there was no justification for the award under that head, which in any event was inordinately high, and based on extraneous considerations.
14. The appellants seek that the appeal be allowed, and the judgment dated July 20, 2017 be set aside, and the suit against the appellants in the High Court be dismissed with costs, or in the alternative the award of damages made be varied and/or reduced.
 15. The appellants in their submissions have abandoned grounds 2, 4 and 5 in the Memorandum of Appeal, namely the award being based on extraneous considerations; the award of 2,500,000.00 was not founded on any legal principle or precedent.
 16. In our view the remainder of the grounds on appeal raise the similar issues for the determination of this Court as formulated by the High Court, namely whether the learned Judge erred in law and fact in finding that the respondents had been defamed. In its submissions the appellants on this ground contend that the trial court had a paramount duty to consider whether the essential elements of defamation have been proved as stated by this court in *Wycliffe S. Swanya v Toyota East Africa Ltd & another* Civil Appeal No. 70 of 2008 [2009] eKLR and that failure to satisfy the stated elements, a claim anchored on defamation cannot stand.
 17. The appellants submit that a statement would be said to be defamatory if it tends to lower a person in the estimation of right thinking members of the society. That without proof of damage to reputation an action for defamation cannot stand, and that it was therefore mandatory for the claimant to call other witnesses to demonstrate how the words complained of altered their perception of the aggrieved party. In support of this argument, the appellants rely on the case of *Daniel N. Ngaruiya v KGGCU Limited* CA 281 of 1998 (2000) eKLR. The appellants thus argue that the respondent failed to show how their reputations were damaged as a result of the publication.
 18. On this ground, the respondents submit that the fact that the matter went for formal proof hearing without a defence on record demonstrates that the claim by the respondents was never challenged and/or opposed, and as such the conduct of the appellants in the Superior Court was an admission of liability, and that the Superior Court was correct to hold the appellants liable.
 19. The respondents draw from the decision in *Gilbert v Smith* (1976) 2 c.d. 686 at page 688-689 cited by this court in *Tea Board of Kenya v Gideon Asirigwas Mbagaya*, that the admission of facts would entitle a claimant to the order asked for, however, the rule is not meant to be applied where there is a serious question of law to be argued.
 20. The respondents argue that there are no serious points of law raised on appeal with regards to the pleadings filed by the respondents on point of law and as such the issue of liability against the defendant ought to be upheld. Further, that the fact that the article was published despite the oil painting having been found 3 days prior to the publishing of the article was proof enough that the article targeted the respondents painting them in bad light as criminals to the public.
 21. As regards awarding General damages of Kshs.2,500,000.00 to each respondent as being inordinately high when taking into account the evidence, the pleadings and all other documents, it is the appellants' contention that the award on general damages was arrived at without due consideration of the evidence on record and requested this court to set the same aside. The appellants invite us to consider the case of *Kemfro Africa Limited T/A Meru Express Service, Gathogo Kanini v AM Lubia and Olive Lubia* [1982-88] 1 KAR 727 & *Butt v Khan* Civil Appeal No. 40 of 1977 where this court set out principles to be observed by an appellate court when determining whether to interfere with a decision of a trial court.



22. The appellants maintain that the trial court took into account irrelevant matters in arriving at an award which was inordinately high, as the court failed to take into account the fact that the article occasioned no damage to the respondent's reputation.
23. The respondents on the other hand submit that an award of damages in defamation cases is discretionary and rely on the case of *CAM v Royal Media Services Limited* Civil Appeal No. 28 of 2005 [2013] eKLR; and that the rationale for awarding damages in defamation actions is to restore or give back to the party injured what he lost, taking into consideration the particular circumstances of each case and the standing in society of the claimant, the mode and extent of the publication, the apology and conduct of the publishers.
24. The respondents contend that the conduct of the appellant from the word go was wanting as there was no verification of the statements, given the criminal nature of the allegations; that in any event, the appellants did not file a defence nor publish an apology. It is thus submitted that the trial court properly exercised its discretion, and the appellants failed to show that the award was too high, and as such there was no need to disturb the same.
25. As relates to the award of exemplary damages in the sum of Kshs.500,000.00 the appellants submit under this ground that the rationale for awarding exemplary damages is to punish a defendant for a willful tort, and that there are limited instances when the court can award punitive and exemplary damages such as where it is proven that at the time of publication the defendant knew the publication would be tortious.
26. The appellants argue that the respondents have not led any evidence showing that the appellants were aware that the publication would be tortious or that the said publication was driven by need for official gain or that the publication was the sole reason the public bought that day's paper. Further, that no evidence has been led to show that the article was published with a deliberate calculation to disparage the respondents, and further that failure to issue an apology is not reason enough to warrant an award of exemplary damage. The respondents insist that aggravated and exemplary damages are awarded on the failure to issue an apology, and as such the Superior Court's award was reasonable.
27. This being a first appeal, our mandate as a first appellate court as set out in Rule 29
 1. of the *Court of Appeal Rules* and as reiterated in several decisions of this court, places a primary duty on us to re-evaluate the evidence on the record in order to come to our own independent conclusion on the evidence and the law. This duty has been reiterated in *Abok James Odera t/a A.J. Oders & Associates v John Patrick Machira t/a Machira & Company Advocates* [2013] eKLR.
28. In our view, the main issues in this appeal revolve around:
 - a. Whether the respondents were defamed by the appellants.
 - b. Whether the damages awarded were inordinately high.

With regard to the question of the respondents being defamed by the publication of the story, we must emphasize that the law of defamation, or more accurately, the law of libel and slander is concerned with the protection of reputation. 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 that injure his reputation.

(See Patrick O'Callaghan in the *common law series: The Law of Tort* at paragraph 25.1)



This court in *Selina Patel & another v Dhiranji V. Patel* [2019] eKLR, cited the case of *John Ward v Standard Ltd* HCCC 1062 of 2005 which summarized the ingredients of defamation as follows: -

- a. The statement must be defamatory.
- b. The statement must refer to the plaintiff.
- c. The statement must be published by the defendant.
- d. The statement must be false.

Also see this court's decision in *Nation Media Group & another v Hon. Chirau Mwakwere* Civil Appeal No. 224 of 2010 (unreported).

29. It is not in dispute that the publication was done by the appellants as pleaded. What is in issue is whether the same was defamatory of the respondents. This court stated in *SMW v ZWM* [2015] eKLR:

“A statement is defamatory of the person of whom it was 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 it causes him to be shunned or avoided.”

The test for whether a statement is defamatory is objective as it is not dependent on the intention of the publisher but on what a reasonable person reading the statement would perceive. In *Halbury's Laws of England* 4th Edition Vol. 28 at page 23, ‘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.’

30. Looking at the publication in question, and reading it in its entirety the same is not defamatory. The publication states that the Ghanaian collector, Osei Kofi, flew home to Geneva and is alleged (emphasis ours) to have left two large paintings in the safe keeping of a Ms. Peninah, the proprietor of a guest house near Village Market, Gigiri, and then he told Mr. Wadu (the owner of the paintings) where the paintings were. The agreement was that Mr. Kofi's driver, Stephen Kimani, would deliver the paintings to Mr. Wadu's home in Limuru.
31. In the same publication it states the Stephen Kimani admitted to the police during questioning that he took the oil paintings from the guest house to his house in Ruiru for safekeeping. It is noteworthy that the respondents did not deny the contents of the publication but just that the same was defamatory. Also, the respondents never called other witnesses to show that indeed their reputation had been besmirched.
32. In our considered view we do not think that the defamatory nature of the publication is clear and as such the same cannot be labelled as defamatory as against the respondents. The respondents have not tendered uncontroverted evidence as to how the article affected them in the eyes of right thinking members of the public.
33. As to whether the damages awarded were inordinately high, the appellants have argued that since malice had not been proved, the general damages awardable was substantially mitigated and there was nothing in the conduct of the appellants to aggravate the defamation.



The respondents on the other hand submit that the appellants portrayed extreme malice and no remorse and as such the damages awarded were not inordinately high and were within acceptable margin.

34. The award of damages is discretionary. This court has in the case of *Standard Limited v G.N. T/A Kagia & Company Advocates* Civil Appeal No. 115 of 2003 set out principles to be taken into consideration in awarding damages in defamation cases in situations where an author/publisher could have, with due diligence verified the libelous story, or in other words where the author/publisher was reckless, these factors should be taken in to account in assessing damages.

The level of damages awarded should be such as to act as deterrence and to instill a sense of responsibility on the part of the authors, and publishers. Person rights, freedoms and values should never be sacrificed at the altar of profiteering by authors and publisher.

35. In the case of *John v MGM Ltd* (1997) Q.B 586 at page 607 paragraph (f),

“...in assessing damages from injury to reputation the most important factor is the gravity of the libel; the more closely it touches the plaintiff’s personal integrity, professional reputation, honor, courage loyalty and the core attributes of his personality; the more serious it is likely to be. The extent of the publication is also very relevant: a libel published to millions has greater potential to cause damage than libel published to a handful of people.”

36. The respondents testified that they were business owners and that the said publication was detrimental to the businesses leading them to incur losses and eventually shut down. It is noteworthy that neither of the respondents produced statement to show how the publication adversely affected their business. The respondents also did not call other witnesses save for themselves to persuade the trial court that their reputations had been besmirched. The learned trial Judge also failed to take into account the respondents standing (or lack thereof) in terms of status, fame, recognition, credit, and reputation in reaching the award for general damages.

37. Taking the above into consideration as well as the evidence on record, we hold the view therefore that the trial court’s assessment of general damages was excessive in the circumstance, and the award of Kshs.2,500,000.00 ought to and shall be set aside.

38. The trial court awarded the respondents Kshs.500,000.00 each as punitive and exemplary damages for the reason that the appellants actions showed they were actuated by malice and targeted the respondents, and they had failed to apologize for the publication.

The appellants have submitted that the respondents are not entitled to this head of damages as there was no proof that the publication was made intentionally to make a specific profit.

39. What are exemplary damages and do they have the same meaning as aggravated damages? Exemplary damages are meant to punish the defendant, and arise as an award for libel where the claimant pleads, and is able to demonstrate recklessness on the part of the defendant in publishing the words complained of despite being aware at the time of the impugned publication, or knowing that the publication was tortious, but decided to publish it nonetheless because of the prospects of material advantage. Exemplary Damages are awarded in the following instances: (1) oppressive, arbitrary or unconstitutional actions by servants of government; (2) conduct calculated by the defendant to make him a profit; or (3) cases in which payment of exemplary damages is authorized by statute, see *Halbury’s Laws of England*, 4th Edition, 1979 (Sweet and Maxwell) at paragraph 243 at page 120 and *Bank of Baroda (K) Limited v Timwood Products Ltd* [2008] 236. Aggravated damages will arise where a



defendant acts out of malice or insists on a defence of justification and fails to apologize. [See *John v MG Ltd* [1996] 1 All E.R. 35.

40. It would appear that the distinction between the two is that Aggravated damages aim at cushioning a claimant who suffers increased distress as a result of the manner in which a defendant behaves when committing the wrong or thereafter, whereas Exemplary damages are intended to demonstrate the court's disdain and disapproval of the conduct of the defendant and to deter its repetition by the defendant or others.

Since the 1st appellant is a media house it falls in the category of what *Halsbury's Laws of England* (*supra*) states:

“In demonstrating the defendant’s calculation as to profit, it is not sufficient to show merely that the words were published in the ordinary course of business run with a view to profit; the publication must be intended to make specific profit.”

In our considered view, we are persuaded that the respondents did not prove that the appellants aimed at maximizing their profits to a certain degree and as such the award of exemplary damages is unmerited. We are thus inclined to interfere with the findings of the trial court both on the issue of liability, and quantum as the trial court acted on the wrong principle of law and did not take into account relevant factors, and thus arrived at an erroneous conclusion.

41. Consequently, we thus hold that the appeal is merited and is allowed in the following terms:
- a. The judgment of the High Court entered in favour of the respondent be and is hereby set aside in its entirety and substituted with an order dismissing the respondents suit with costs.
 - b. Costs of the appeal is awarded to the appellants.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

