Graham v Standard Group Limited (Civil Appeal 63 of 2020)
[2023] KECA 649 (KLR) (9 June 2023) (Judgment)

Neutral citation: [2023] KECA 649 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 63 OF 2020

SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA

JUNE 9, 2023

BETWEEN

HENSON NIGEL GRAHAM ..... APPELLANT

AND

THE STANDARD GROUP LIMITED ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Mombasa (P. J. Otieno J.) delivered on 22nd May 2020) in Mombasa HCCC No 169 of 2012)

JUDGMENT

1. The case by Henson Nigel Graham, the appellant herein, and which gives rise to this appeal, is that on June 14, 2012, Standard Group Limited (the respondent herein), published a story on page 18 of its Standard newspaper under the heading "childhood smothered in the name of money", with various banners, including "the desire to enjoy a lavish lifestyle draws juvenile prostitutes to coastal beaches and villas", "beaches of sin" and "sex tourism", and reproduced the alleged defamatory statements made under the said banners. Further, that in the story, the Respondent published a clear and distinguishable photograph of the appellant walking on the beach holding hands with his girlfriend who was 26 years of age. He contended that the story and photograph was malicious, defamatory and libellous and based on falsehoods, as the publication in its ordinary meaning was understood to mean that he wasa defiler, paedophile, sex predator, sexually assaults and is a defiler of juvenile girls and boys, is a person of low moral values, a social -misfit, prostitute and corrupt.

2. Further, the publication had seriously injured his character, standing, reputation and credit and exposed him to public and family scandal, contempt and odium in the eyes of the right-thinking members of the society, who then shunned and avoided him all of which tribulations have visited upon him mental anguish and torture with the attendant injury and damage. The appellant thereupon made a demand for an apology, retraction and admission of liability, which the respondent ignored and failed to respond, hence the suit was invited. These averments were detailed in a plaint dated September 17,

2012 that the appellant filed in the High Court at Mombasa in Mombasa HCCC No 169 of 2012, and in which he sought a declaration that the said publication was false, malicious, defamatory and libellous of the appellant, general damages for defamation and libel, punitive and aggravated damages, an order directing the respondent to publish an unequivocal apology in words and photographs acceptable to the appellant and costs. The appellant also availed a copy of the said publication which he stated he would rely on.

3. In opposing the suit, the respondent in its statement of defence dated February 24, 2013, admitted to publishing the article in the Standard Newspaper on June 14, 2012 on page 18 with the title 'childhood smothered in the name of money' , but denied that the photographs used referred to the appellant and put him to strict proof thereof. Further, it denied that the words and photographs published and complained of were malicious and libellous and capable of bearing the meanings and pleaded in the plaint. The respondent further denied being bent on injuring the appellant's character and standing, reputation and credit, exposing him to the public and family scandal, odium, contempt, spite or malice as alleged in the plaint. Additionally, the respondent contended that the said words published were fair comment on matters of public interest and consisted of allegations of fact and were true in substance and consisted of expression of opinion.

4. During a hearing held in the High Court on December 6, 2017, the appellant testified that on the date of the publication, he received calls from his friends who told him to get a copy of the newspaper and read it. He got a copy of the newspaper, read and made attempts to reach the respondent on phone to no avail, he wrote an email to the respondent which was never acknowledged. He added that on the June 22, 2012 he wrote second email which was then acknowledged. He testified that he previously lived on the beach and would walk on the beach, and owned a boat he would use for self and to hire out, but had to move house after the said publication, resorted to staying indoors and sold the boat having been labelled a paedophile, as he feared for his safety. Further, that he was also in the process of applying to join Nyali Golf Club as a member, but had to abandon his application for four years owing to the publication, and the fact that some of his friends believed the story. He clarified that the girlfriend with whom he was photographed was 26 years old, and that while the respondent had the right to publish the story, it had no right to align his photo to it with the story to illustrate the story and without permission. During cross-examination the appellant confirmed that he had been charged in 2013 with holding an expired identity card, exploitation and prostitution, but was acquitted.

5. The appellant did not call any other witness to testify during the trial, and closed his case, whereupon various applications were filed by the respondent and objected to by the appellant, that sought orders that the respondent be allowed to file their witness statements and bundle of documents before the matter was set for the defence hearing; and to recall the appellant for cross examination on new evidence. The said applications were dismissed and during the defence hearing, it was observed that the respondent did not file any witness statements or documents and the learned trial judge (P. J Otieno J) closed the defence case, and the parties were ordered to file submissions.

6. The learned trial judge after consideration of the pleadings filed, the evidence led and submissions offered, identified the issues before him as follows:

> " I have formed the opinion and view that the fact of publication was not disputed. What emerges to be in dispute is whether the publication concerning and referring to the plaintiff and if as a result the plaintiff was defamed and suffered any damage. With such
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> position I find the following issues to isolate themselves for determination by the court: -
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> 1. Did the publication and photographs refer and belong to the plaintiff?

2. Were the words published defamatory of the plaintiff or were they an expression of opinion and fair comment on a matter of great public importance?

3. What relief, if any, is the plaintiff entitled to?"

7. On whether the publication and photographs referred to the appellant, the learned trial judge found that there was no doubt therefore that the words published were defamatory, if proved to refer and concern a particular individual complainant. While noting that in a claim for defamation, the incidence and onus of proof is always upon a plaintiff to prove that the words indeed referred and concerned him and nobody else and tend to lower his standing in the eyes of right thinking members of the society, the learned trial judge observed that there was no mention by name made of the appellant in the publication, therefore going by the case of *Knuffer v London Express Newspaper Ltd* (1944) 1 All ER, there was no proof that the publication was about and concerning the appellant; that the photograph taken was from behind and did not clearly identity the appellant, and that the appellant did not call a third party to identify the photo as his despite filing three different witness statements. The judge therefore found that there was failure to prove that the publication was in fact about and concerning the appellant, and it was moot to consider the other issues framed for determination. The appellant's case was accordingly dismissed and costs awarded to the respondent.

8. The appellant being aggrieved by the judgment proffered this appeal, and raised five (5) grounds of appeal in his memorandum of appeal dated August 17, 2020 and lodged on September 8, 2020 namely:

1. The learned trial judge erred in law and in fact in holding that the photograph in contention did not identify the appellant clearly on a balance of probability in view of the uncontroverted evidence on the issue.

2. The learned trial judge in law and in fact in holding that the appellant's evidence on his identity in the Newspaper photograph/ caption needed to be corroborated with the evidence of third party so as to identify the photo as his. This went beyond the standard of proof in civil case which is as a balance of probability and the relevant principles on matters of defamation.

3. The learned trial judge misapplied the *ratio decidendi* in *Knuffer v London Express Newspaper Ltd* (supra) hence arrived at a wrong finding in the matter considering the only evidence on record was not controverted

4. The learned trial judge in law and in fact in holding that no nexus had been established between the offending article/ photograph and the appellant with the uncontroverted evidence on record.

5. The learned trial judge in law in holding that the appellant had not proved the tort of defamation on a balance of probability.

9. The appellant therefore prays that the judgment by P. J. Otieno J dated May 22, 2020 in Mombasa HCCC 169 of 2012 dismissing his case with costs be set aside, and be replaced by a judgment in his favour for damages plus costs and interest as prayed in his plaint filed in the trial court. We heard the appeal on this court's virtual platform on November 30, 2022, and learned counsel Mr Jengo appeared for the appellant holding brief for Ms Kariuki, while learned counsel Mr Pamba Ouma appeared for the respondent. Mr Jengo wholly relied on the written submissions filed on behalf of the appellant dated February 5, 2022, in which it was submitted that that had the trial court analysed the evidence as a whole, it would have held that the appellant had proved on a balance of probability that the

publication and the picture referred to him, and the effect of the publication on his life created a rebuttable presumption or inference on third parties that it related to him.

10. Further, that to require more would raise the standard of proof to above preponderance of evidence, and reliance was placed on the decision in the cases of *Ignatius Makau Mutisya v Reuben Musyoki Muli* [2015] eKLR and *Mitchell Cotts (K) Ltd v Musa Freighters* [2011] eKLR on the applicable standard of proof being on a balance or preponderance of probabilities. The appellant's counsel argued that the preponderance of probabilities would tilt in the appellant's favour having called evidence indicating that the publication of the article and photograph depicted him and affected his life and in the absence of the evidence by the respondent. The case of *Miguna Miguna v Standard Group Limited & 4 others* [2017] eKLR was also cited for the proposition that by holding that the appellant needed to call witnesses to prove that the story was viewed and read as published, the learned judge placed too high a standard on the part of the appellant whose duty did not extend beyond the usual standard in a civil case such as the one that was before him to prove the case on a balance of probabilities.

11. On whether the appellant proved the defamation of libel on a balance of probability, the counsel cited the cases of *Musikari Kombo v Royal Media Services* [2018] eKLR, and *S.M.W v Z.W.M* [2015] eKLR on the requirements to be proved, namely that the defamatory words were spoken or written; that those words refer to the claimant; that those words are false; that the words are defamatory or libellous and that the claimant suffered injury to reputation as a result. Further, that the appellant's evidence of living on the beach, having a boat and his friends calling him was uncontroverted. Therefore, the judge properly directing himself would have held with this evidence that the tort of libel as against the appellant had been proved to the required standards. Additionally, the trial judge in requiring the appellant to call a third party as a witness so as to prove his case failed to draw a distinction between the tort of libel which he was dealing with and that of slander and raised the standard of proof beyond the requisite standard, and was not alive to the fact that libel is actionable per se. Lastly, the appellant's counsel submitted that the respondent had the onus of proving the defence of justification and qualified privilege and did not call any evidence to prove the same, hence defamation was proved on a balance of probability.

12. Mr Pamba highlighted the respondent's written submissions dated June 24, 2021, in which three issues were identified for determination namely; was the publication defamatory as alleged by the appellant, whether the appellant proved his identity from the publication, and whether he was entitled to the reliefs sought. With regards to whether the publication was defamatory as alleged by the appellant, reliance was placed on the definition of defamation set out in the case of *Phinehas Nyagah v Gitobu Imanyara* [2013] eKLR, and it was submitted that the respondent admitted to making the publications but denied the appellant's assertion that his reputation was affected or that he was shunned or avoided. Further reliance was placed on the case on *Nation Media Group Ltd & 2 others v John Joseph Kamotho & 3 others* [2010] eKLR on the elements to be proved in defamation, and it was submitted that the appellant ought to have proven on a balance of probabilities that the words written referred to him or that from the publication, he was able to be identified, they were false and as a result he suffered injury to his reputation.

13. Mr Pamba therefore submitted that the only issue in the appeal was whether the photograph in the publication was that of the appellant and that the trial court made a proper finding that there was no identification of the appellant in the publication given the that the photograph was taken from behind, and that there was nothing peculiar or distinctive that could identify the appellant with the photograph in question. Further, that the trial court had the opportunity to see a coloured photograph of the appellant that was in the publication and also to see the appellant in person and it made a finding that the photograph in the newspaper could not be attributed to the appellant. On the question,

of corroborative evidence on the identity of the appellant, the counsel distinguished the decision in *Miguna Miguna v The Standard Group Limited* (supra), on the basis that the name, the image and description of the plaintiff therein was indisputable, unlike in the present appeal.

14. This being a first appeal, the duty of this court is reiterated as was set out in the decision of *Selle & another v Associated Motor Boat Co Ltd & others* (1968) EA 123 which is to reconsider the evidence, evaluate it and draw our own conclusion of facts and law, and we will only depart from the finding by the trial court if they were not based on evidence on record; where the said court is shown to have acted on the wrong principles of law as was held in *Jabane v Olenja* (1986) KLR 661, or where its discretion was exercised injudiciously as was held in *Mbogo & another v Shah* (1968) EA.

15. The law on the elements and proof of defamation is settled. In this respect, a defamatory statement is defined in *Halsburys Laws of England*, fourth edition, volume 28 (Reissue) at paragraph 10 as "a statement which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided, or to expose him to hatred, contempt or ridicule, or to disparage him in his office, profession, calling, trade or business". A distinction is in this respect made between two forms of defamatory statements, libel and slander, with libel being a defamatory statement that is made in writing, printing or some other permanent form, and in which damage is presumed; while slander is where the defamation is in oral form, which requires proof of damage. Lastly for libel to be actionable, the defamatory statement that is made or conveyed by written or printed words or some other permanent form, is required to be published of, and concerning the plaintiff, and to a person other than the plaintiff. This position was reiterated by the Court of Appeal (Tunoi, O'Kubasu &Waki JJA) in *Nation Media Group Ltd & 2 others v John Joseph Kamotho & 3 others* [2010] eKLR as follows:

> "For the tort of defamation to succeed, the following elements must be proved by the claimant:
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> 1. the statement must be defamatory
> 2. it must refer to the claimant, i.e identify him
> 3. It must be published i.e communicated to at least one person other than the claimant."

16. It is not contested that the subject publication was made by the respondent and published in the Standard Newspaper, and the trial court found that on its face it would be defamatory if indeed it was published of and concerned the appellant. The requirement that the defamatory statement must be "published of and concerning" the plaintiff or claimant was established by the decision in *Knuffer v London Express Newspaper Ltd* (supra) that was applied by the trial court, and is the main issue in this appeal. The requirement that required to be proved in this respect are set out in *Halsburys Laws of England*, fourth edition, volume 28 (Reissue) at paragraph 39 as follows:

> "...Where the plaintiff is referred to by name, or otherwise clearly
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> identified, the words are actionable even if they are intended to refer to some other person, and both the plaintiff and the other person may have a cause of action. However, it is not essential that the plaintiff
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> should be named in the statement. Where the words do not expressly refer to the plaintiff they may be held to refer to him if ordinary sensible readers with knowledge of special facts could and did understand them to refer to him, such facts are material facts, must be

pleaded in the statement of claim and must be proved in evidence in order to connect the plaintiff with the words complained of. (emphasis ours) Such a pleading is often called a reference innuendo in contrast to a true innuendo where the extrinsic facts only bear on the defamatory remaining. In certain circumstances the plaintiff may be required to identify the persons who are alleged to know the special facts relied upon...."

17. It is not in disputed in the present appeal that the publication by the respondent did not refer to the appellant by name, and the appellant relied on the photograph published in the publication as proof of the reference. The law therefore placed a requirement and onus on the appellant to plead and prove the reference innuendo arising from the photograph published by the respondent. Other than stating that he would rely on the photograph, the appellant did not indicate in his plaint what aspects of the photograph identified him as the person referred to in the publication, nor did he call any witnesses to do so. The trial court in this regard noted as we also did, that the subject photograph is taken from the back of two persons, and their faces are not shown.

18. In the circumstances, the appellant was required to adduce evidence of special facts that connected the appellant to the photograph on which he could then be cross-examined, either of special features in the photograph that identified him, or witnesses who were able to identify him as the person in the photograph, which he did not, and therefore did not discharge the burden of proving that the he was the person in the photograph, and that the publication was thereby connected or referred to him and was defamatory of him. Having failed to prove his case, the onus did not move to the respondent to prove any defence. The learned trial judge therefore did not err in finding that there was a failure on the part of the appellant to prove that the publication was in fact about and concerning him and in dismissing his claim.

19. We therefore find no merit in this appeal, which we dismiss it in its entirety with costs to the respondent.

20. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF JUNE 2023

S. GATEMBU KAIRU, FCIArb.

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR