Nation Media Group v Chiguzo (Civil Appeal 14 of 2020)
[2022] KECA 765 (KLR) (24 June 2022) (Judgment)

Neutral citation: [2022] KECA 765 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 14 OF 2020

SG KAIRU, A MBOGHOLI-MSAGHA & P NYAMWEYA, JJA

JUNE 24, 2022

BETWEEN

NATION MEDIA GROUP ..... APPELLANT

AND

ATHUMANI N. CHIGUZO ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Mombasa (Njoki Mwangi, J.) dated 9th October 2019 in High Court Civil Case No. 131 of 2015)

JUDGMENT

1. In a judgment, the subject of this appeal, delivered on 9th October 2019, the High Court (Njoki Mwangi, J.) found the appellant, Nation Media Group, liable for defamation for which the court awarded the respondent, Dr. Athuman N. Chiguzo, Kshs. 4,000,000 as general damages and Kshs. 1,500,000 as aggravated damages. Aggrieved, the appellant contends that the Judge erred in holding that the statements it published concerning the respondent were defamatory; that the Judge erred in awarding damages; and that the awards are, in any case, excessive.

2. The facts are that on 12th March 2015, the respondent, then an Executive Committee Member, Medical Services & Public Health at County Government of Kwale, accompanied the County Governor in a series of activities within the County one of which was the official opening of Katangani Early Childhood Education Centre where the respondent and his colleagues were seated on the left side of the podium. They stood up as the Governor rose to address the gathering. According to the respondent, as he was sitting, his plastic seat broke and a Member of the County Assembly who was seated next to him supported him and he did not fall down. Another plastic seat was added to the broken seat for stability and proceedings went on. It is the manner in which that event was reported in the appellant's publications, Daily Nation and Taifa Leo of 14th March 2015 that infuriated the respondent giving rise to the respondent's suit for damages for defamation against the appellant.

3. Omar Mohamed Mwagao (PW2), an officer in charge of communications at the County Government of Kwale was at the same function on 12th March 2015 and testified for the respondent. His evidence was that when the Governor stood to speak, members of the public rose up and then took their seats. That the respondent's "seat broke as he was sitting down. Before he fell down, those who were nearby assisted him and a second seat was added to the broken one for stability. He (the respondent) then sat down."

4. Mwemphi Jackson Ndoro (PW3), a County Assembly Member, was also at the stated function and also testified for the respondent. He stated that he was sitting next to the respondent; that when the Governor stood up to address the gathering, he also stood up and that, "as we were sitting down, the [respondent's] chair which was on a sloppy ground broke and we held the [respondent]."; that he and his colleague "held him and he did not fall"; that they then placed a second seat on top of the broken one to stabilize it and the respondent then sat down.

5. The following extract is how the story was carried in the Daily Nation of 14th March 2015:

> " Kwale County Health Executive Athman Chiguzo yesterday collapsed as Governor Salim Mvurya addressed a public meeting. Mr. Mvurya was giving a speech during the opening of Katangini Nursery School Shimba Hills, Matuga sub-County, when Dr. Chiguzo fell off a chair on the podium. The Governor temporarily stopped his speech as First Aiders rushed to assist the official back to his seat. Dr. Chiguzo had been seen dozing off, only to suddenly fall off the chair. Some people could not help breaking into laughter on realizing he was asleep when he fell down."

6. The publication in Taifa Leo newspaper of 14th March 2015 was as follows:

> " Waziri wa Afya katika kaunti ya Kwale DKt Athman Chiguzo, jana alizirai katika hali ya kutatanisha, hali iliyozua wasiwasi katika mkutano uliokuwa ukihutubiwa na Gavana Salim Mvurya.
>
> Kisa hicho kilifanyika baada ya Kiongozi huyo kuanza kuhutubu katika hafla ya kufungua rasmi shule ya chekechea ya katangini katika eneo la Shimba Hills katika Kaunti Ndogo ya Matuga.
>
> Gavana huyo alilazimika kukatiza hotuba yake huku watoaji huduma ya kwanza wakikimbia alipokuwa ameketi ili kumhudumia.
>
> Haikubainika mara moja kilichompelekea kuzirai ingawa awali alikuwa ameonekana akiwa mwenye usingizi.
>
> Baadaye alianguka kutoka kiti chake, hali iliyopelekea baadhi ya watu kuamini kuwa alikuwa mgonjwa."

7. The respondent's English translation thereof as set out in his witness statement was as follows:

> " Minister of County collapses while addressing a meeting."
>
> "Minister of Health in County of Kwale Dr. Athman Chiguzo yesterday collapsed in mysterious circumstances, a situation that caused panic in a meeting addressed by the Governor Salim Mvurya.
>
> The incident occurred when the said leader started to address in a ceremony to officially open Chekechea School in the area of shimba Hills in Matuga sub-County.

> The said Governor was forced to stop his speech while first aiders running (sic) to where he was seated to attend to him. It was not immediately established what caused him to collapse but earlier on he was seen to be sleepy.
>
> Afterwards he fell from his chair, a situation that causes (sic) a Section of people to believe he was sick."

8. The respondent averred in his plaint that, the publications, in their natural and ordinary meanings and by insinuation and innuendo meant and were understood to mean by right thinking members of the public: that the respondent was incapable of maintaining focus or concentration during meetings addressed by the Governor or any other public function; that he was susceptible to falling asleep and dozing off during official public meetings and had no regard for the Office of the Governor of the County; that he was unprofessional and "abuses his authority by dozing and falling off a chair during public meetings"; that his integrity is questionable and he is incapable of maintaining proper decorum during official functions; that he was in bad health and prone to fits of falls and cannot hold a public office.

9. The respondent contended that the publications were malicious because, among other things, the appellant did not seek to verify the truth and recklessly and maliciously published the false statements and knowingly breached freedom of press and thereby exposed the respondent to embarrassment and public ridicule. The respondent prayed for general damages, aggravated and /or exemplary damages.

10. In its statement of defence the appellant admitted having published the words complained of but denied that the same were false, misleading, malicious or negligently published. The appellant averred that the words were reported as factual event of what took place on the ground; and that the same were published innocently and without malice.

11. In the alternative, it was pleaded for the appellant that the words complained of, in so far as they consist of expressions of opinions, are true and fair comment on a matter of public interest; that it is true that the respondent fell off his chair at the public baraza graced by the Governor; that the members of the public helped the respondent back to his seat after it was established that he had only dozed off and not collapsed due to injury or sickness; that there was a simple explanation for the incident as the explanation was given by the respondent himself to medical emergency officers attending him.

12. The appellant pleaded further that the publication was made on an occasion of absolute privilege on occasion of reporting a County Government function publicly as events unfolded; it denied that it published the words with malice; and it denied that the respondent was injured by reason of the publications.

13. At the trial the respondent testified on his own behalf, and as already stated, called Omar Mohamed Mwagao and Mwemphi Jackson Ndoro as his witnesses. The appellant did not call any witness at the trial, despite having filed a written witness statement by its head of legal department, one Sekou Owino.

14. Based on the evidence tendered, the learned Judge made a finding of fact that during the function in question, the respondent "was alert and did not doze and fall off his seat at the meeting...as reported" in the newspaper; that the respondent "neither collapsed nor did first aiders go to assist him during the said event" as published; that it was proved by the respondent and his witnesses that the respondent "could not have been dozing off as alleged in the said newspapers". The Judge held that:

> "...the words published by the [appellant] were in their natural and ordinary meaning defamatory to the [respondent]. The said words were reckless in nature and going by the

evidence adduced for the [respondent], they damaged his credibility, character, reputation and professional standing in the eyes of right thinking members of Society."

15. The Judge further found, that the articles were read by people who knew the respondent in Kwale and also in Nairobi and Garissa who called the respondent and told him about the articles as they also sought to find out if all was well with him as the newspapers portrayed him as a sick person. The Judge then concluded that:

> " ...in their natural and ordinary meaning, the 2 articles, by way of insinuation and innuendo could only mean and were meant to mean and were understood to mean that the [respondent] had no respect for the office occupied he in the County Government of Kwale and he was not worth the appointment he held in the said County Government. Paragraph 8 of the amended plaint particularized the manner in which right thinking members of the public were likely to interpret and understand the publications in issue."

16. The Judge rejected the defences of fair comment and absolute privilege that the appellant had advanced and proceeded to award general and aggravated damages as already noted.

17. The appellant, being aggrieved by that judgment, filed this appeal in which it framed seven grounds of appeal in its memorandum of appeal. We have considered the appeal and the appellant's written submissions on which learned counsel Mr. Karina relied in support of the appeal as well as the respondent's written submissions on which learned counsel Ms. Kaguri relied in opposition to the appeal during the virtual hearing before us on 7th March 2022.

18. The grounds of appeal coalesce into the main question whether the learned Judge erred in holding that the words complained of were defamatory of the respondent and in awarding him damages.

19. Defamation is the publication of a statement which tends to lower a person in the estimation of right-thinking members of society generally; or which tends to make them shun or avoid that person. Per P. H. Winfield, *A Textbook of the Law of Torts* (5th edition) at page 242. In *Wycliff A. Swanya vs. Toyota East Africa Ltd and another* [2009] eKLR this Court stated that:

> " For the purpose of deciding a case of defamation, the Court is called upon to consider the essentials of the tort generally and to see whether these essentials have been established or proved. It is common ground that in a suit founded on defamation the plaintiff must prove:-
>
> (i) That the matter of which the plaintiff complains is defamatory in character.
>
> (ii) That defamatory statement or utterance was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.
>
> (iii) That it was published maliciously
>
> (iv) In slander, subject to certain exceptions, that the plaintiff has suffered special damage."

20. See also of the ruling of the High Court in the case of *John Ward vs. Standard Limited* [2006] eKLR where Osiemo, J. stated:

> " A statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule, or contempt or which causes him to be shunned or avoided or which has a tendency to injure him in his office, profession or calling.

The ingredients of defamation are:

(i) the statement must be defamatory

(ii) the statement must refer to the plaintiff

(iii) the statement must be published by the defendant

(iv) the statement must be false."

21. It is not in dispute that the words complained of were published by the appellant and that they refer to the respondent. The main contention is whether they are defamatory. In that regard, it was submitted for the respondent that the words were reckless and damaged the respondent's credibility, character, reputation and professional standing in the eyes of right thinking members of society; that the ordinary reasonable reader of the articles reading about the respondent's alleged collapse and or fall from his chair due to dozing off during a public function would understand the event as an implication that the respondent is sick or is lazy and not keen on carrying out his duties due to dozing off; that the publication did in fact harm his career prospects as he was not rehired in 2018 on account of the incident having been raised by the civil society during his vetting for the position.

22. On the other hand, counsel for the appellant submitted that a layman's understanding of the words complained of, in their natural and ordinary meaning meant that the respondent fell from his seat because he was dozing off; that there was no connotation that he fell from his seat because he was sick as alleged; that based on the test of a reasonable ordinary person, the words could not convey the meaning ascribed by the respondent. In that regard reference was made to the decision of this Court in of *SMW vs. ZWM* [2015] eKLR. It was submitted that no evidence of public ridicule, hatred or even shunning was tendered before the trial court to show that the respondent's reputation in the estimation of right-thinking members of society was lowered.

23. As already noted, the appellant did not adduce any evidence before the trial court. That did not, however, reduce the burden on the part of the respondent to establish his claim on a balance of probabilities. In his testimony, the respondent adopted his written witness statement in which he stated the publication was malicious because he did not doze off nor collapse as alleged; that his integrity and innocence was easily available and effortlessly accessible to the appellant; that the appellant was reckless in publishing false statements without caring to verify the truth; that the appellant did not seek information from him to ascertain what really happened; that the appellant ought to have known the statements were false and breached the freedom of press; that the truth of the matter, contrary to the publication, is that he was sitting on a plastic chair that broke; that he did not doze off or collapse; that there were no first aiders at the meeting; that the Governor did not stop his speech; that despite his calls, the appellant did not retract the statements or offer an apology.

24. He stated that as a result of the publication his reputation was brought into public scandal and contempt; that his relatives worried whether he was fine; that the perception from the publication was that he was overworked and has no time to rest; that the publication tarnished his name and he felt embarrassed.

He testified further that on 14th March 2015, he received telephone calls from friends and relatives in Garissa, Nairobi and Kwale inquiring how he was; that his uncle and father also called him having read in the newspapers that he had collapsed.

25. Under cross examination when he testified before the trial court on 20th April 2017, he reiterated that the articles did not carry the correct facts which were that he did not fall; that as he was sitting, his chair

broke, partially collapsed and he was slightly destabilized and was assisted by an Member of County Assembly (MCA) who was next to him; that the MCA supported him from behind; that he was not sleeping as published; that there was no commotion and no first aiders came to his assistance; that they put another chair on top of the broken one and he sat down.

26. He stated further in cross examination that he was "worried that the issue of the publication can be brought up during vetting if the Governor decides to appoint me for another term"; that no petition for his removal had been filed since the incident and that he was still the County Executive in charge of Health. He stated that as a result of the publication, his relatives and friends perceived him as a sick person; they asked him if he was unwell and whether he was able to carry out his duties; that they thought he was bedridden; that the publication affected his integrity as it made him appear as if he was not in a position to discharge his duties and was not able to control himself; that the publication affected his reputation and was in bad taste.

27. Omar Mohamed Mwagao and Mwemphi Jackson Ndoro (PW2 and PW3) corroborated the testimony of the respondent as to what transpired on the material date. However, according to PW3 who testified before the trial court on 5th November 2018, after the incident, "an impeachment motion was almost filed" against the respondent due to the report that he was dozing during the meeting; that during the second term the civil society picked up the issue when county executives were being picked in 2017 and the respondent was not appointed for a second term.

28. Based on the evidence before the trial court, there is no doubt that the facts as reported in the two newspapers were embellished and inaccurate in certain respects. There was no evidence, that the respondent either dozed off, was asleep or collapsed as reported in the publications. There was also no evidence of commotion or of first aiders rushing to assist the respondent as reported. To that extent, the respondent did establish that those statements were false.

29. But were the statements defamatory of the respondent? In that regard, it was incumbent upon the respondent to prove that as a consequence of the publication, his character and reputation were diminished. The editors of *Halsbury's Laws of England* 4th Edition Vol. 28 at page 23, state that:

> " 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. This Court in *Selina Patani & another vs Dhiranji V. Patani* [2019] eKLR expressed that defamation protects a person's reputation, that is, the estimation in which he is held by others and that it does not protect a person's opinion of himself. In that regard, the Court stated as follows:

> " As to whether the appellants character and reputation was destroyed, there is no evidence on record from a third party stating that as a result of reading the impugned letter, the appellants' reputation and standing in society was injured. It is in this context that we agree with the learned Judge that a person's own view about his/her reputation is not material in a claim for defamation; there must be evidence from a third party to the effect that the standing and reputation of the claimant has been lowered as a result of the defamatory publication".

31. As already stated, there was no evidence, that the respondent either dozed off, or was asleep at the function as reported in the publications. As the Executive Committee Member for Health, attending

an official function in that capacity, we would agree that the innuendo of the incorrect statement is that the respondent was literally and figuratively 'sleeping on the job'. In that regard, the learned trial Judge accepted the claim by PW3 that after the incident an impeachment motion was contemplated and that the issue was raised subsequently when county executives were being picked in 2017. We are however not persuaded that the statement that the respondent collapsed or that first aiders rushed to assist him, which was not backed by any evidence, would, in the eyes of a reasonable person, have the meaning attributed to it by the respondent. To the extent we have indicated, we agree with the learned Judge that the statements that the respondent dozed off or was asleep during the function were defamatory.

32. As for the damages awarded, the learned Judge awarded the respondent Kshs. 4,000,000 as general damages and Kshs. 1,500,000 as aggravated damages. Award of damages being a matter of judicial discretion by the trial court, this Court should be slow to interfere. As this Court stated in *Butt vs. Khan* (1981) KLR 349:

> " An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate; it must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was inordinately high or low."

33. In the same vein, in *Gicheru vs. Morton and Another (2005) 2 KLR 333* the Court stated that:

> " In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the Court of Appeal should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the Appellant was entitled."

34. In awarding Kshs. 4,000,000 as general damages, the Judge considered the case of *Arthur Papa Odera vs. Peter O. Ekisa alias Shujaa Peter O. Ekisa* [2016] eKLR where an award of Kshs. 2,000,000 was made for general damages. That case involved publication of defamatory material on Facebook concerning the plaintiff therein, a member of parliament, with claims that implicated him in corruption. The Judge also considered the case of *Kimani Ngunjiri vs. Standard Group Limited & 3 others* [2019] eKLR where an all-inclusive award of general damage of Kshs. 4,000,000 was made. That case also involved a member of parliament and the publication implicated the plaintiff in mega corruption. Also considered by the Judge was the case of *Raphael Kitur vs. The People Media Group Ltd t/a The People* [2017] eKLR where an award of general damages of Kshs. 3,000,000 was made for general damages for defamation made in favour of the plaintiff, an assistant minister and member of parliament in connection with false claims of dishonor of a cheque.

35. Although it is not clear whether those High Court decisions were ever challenged on appeal, apart from the status of the plaintiffs in those cases, the matters forming the subject of the defamation actions in those cases were grave. In *Nation Newspapers Limited vs. Daniel Musinga T/A Musinga & Co Advocates* Civil Appeal No. 120 of 2008, the Court appreciated that while all people are equal before the law, injury suffered in the case of defamation is not the same for all persons and "the status of a particular person affects the extent of the injury suffered." In the English case of *John vs. MGM LTD* (1997) QB 586 the court stated that:

> " In assessing damages for 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, honour, courage, loyalty and the core attributes of his personality the more serious it is likely

to be. The extent of publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people."

36. In the present case, there was, in our view, some factual basis, albeit embellished, for the publication in the sense that the respondent conceded that his chair broke and was in the process of falling and was assisted by his neighbour; that the Governor, who was then on his feet, did turn around and offered sympathy to the respondent. Having regard to the gravity of the libel in cases on which the learned Judge relied, as well as the status of the plaintiffs in those cases, we think that the award of general damages of Kshs. 4,000,000 in the present case is manifestly excessive. In our view, taking all factors into account, an award of general damages of Kshs. 1,500,000 is adequate remedy.

37. As for the award of aggravated damages, despite the averment in the plaint that the publication was malicious, there was no evidence of intent to commit a wrongful act on the part of the appellant. The error made by the appellant was in failing to verify the facts with the respondent before publishing the story. The appellant did not offer an apology or correct the story when the demand was made to do so. In our view, an award of Kshs. 500,000 suffices as aggravated damages.

38. In conclusion therefore, we uphold the finding by the trial Judge that part of the words complained of, to the extent indicated in this judgment, were defamatory of the respondent.

39. We set aside the awards of general and aggravated damages of Kshs. 4,000,000 and Kshs 1,500,000 respectively and substitute therefor a consolidated award of Kshs. 2,000,000. Interest thereon shall accrue at court rates from the date of judgment of the High Court.

40. As the appellant has partially succeeded in the appeal it will have half the costs of the appeal. The respondent shall have the costs of the proceedings in the High Court.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF JUNE 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

I certify that this is a true copy of original.

Signed

DEPUTY REGISTRAR