



IN THE COURT OF APPEAL

AT NAROB

CORAM: NAMBUYE, KARANJA & J. MOHAMMED JJ.A)

CIVIL APPEAL NO 224 OF 2018

BETWEEN

CLIFFORD OKELLO RACHUONYO

T/A RACHUONYO & RACHUONYO ADVOCATES.....APPELLANT

AND

MOHAMED YUSUF SOROYA.....1ST RESPONDENT

KEDE ENTERPRISES LIMITED.....2ND RESPONDENT

OKERO S. OYUGI T/A OYUGI & CO ADVOCATES.....3RD RESPONDENT

ROBERT OTACHI KIBAGENDI.....4TH RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi

(Njuguna, J.) dated 25th January 2018)

in

(H.C.C.No 118 of 2010)

JUDGMENT OF THE COURT

BACKGROUND

1) The appellant, **(Clifford Okello Rachuonyo t/a Rachuonyo & Rachuonyo Advocates** filed suit for defamation against **Mohamed Yusuf Soroya** (the 1st respondent) before the High Court at Nairobi by a plaint dated 2nd March, 2010

2) In a nutshell, the background of the appeal is that the appellant, an advocate of the High Court of Kenya was instructed by the 1st respondent in February, 2008 to act for him in the purchase of Land Title Number Nairobi/Block/94/184 located in Nyari Estate, Nairobi (the suit property) from the vendor, **Kede Enterprises Limited** (the 2nd respondent). **Okero S. Oyugi t/a Oyugi & Co Advocates** (the 3rd respondent) were the 2nd respondent's advocates in the sale transaction while **Robert Otachi Kibagendi** (the 4th respondent) was a Director of the 2nd respondent.

3) In the plaint, the appellant contended that upon receipt of instructions from the 1st respondent to act for him in the purchase of the suit property, he approved by amendment the Sale Agreement in respect of the suit property; that he prepared a transfer indicating that the purchase price of the suit property was Kshs 6,000,000.00 as agreed between the parties; that he forwarded the same to the 3rd respondent (the Vendor's advocates) for execution; that without notice to the appellant, the 1st respondent altered the transfer and/or caused another transfer to be prepared by the 3rd respondent which indicated that the purchase price in respect of the suit property was Ksh. 4,000,000.00 and proceeded to register the suit property in the 1st respondent's name; that the role of registering the suit property should have been carried out by the appellant as the 1st respondent's advocates; that despite being denied the role of registering the suit property, the appellant established with the Chief Land Registrar the validity of their records in respect of the suit property and forwarded the same to the appellant and further obtained a guarantee from the 2nd respondent's directors and the 3rd respondent towards the sale transaction.

4) The suit property was registered in favor of the 1st respondent who was aggrieved that he did not obtain vacant possession of the suit property as a third party claimed ownership of the suit property. On 11th November, the 1st respondent wrote the impugned letter to the appellant which was copied to The Law Society of Kenya, C.I.D Headquarters, Director of C.I.D, Commissioner of Police and the Attorney General. The impugned letter stated as follows:

“I fully paid you the agreed conveyance fee. This notwithstanding, you are aware the transaction later turned out to be a fraud from which CID Nairobi Headquarters are handling and which I have reliably learnt from M/s Umazi and Kiragu of CID that you have been uncooperative in their investigation.

I am further disgusted to learn that instead of forwarding Ksh. 4.4 million which was the last and final payment of the purchase price to M/s Oyugi & Co. Advocates acting for alleged vendor, you only forwarded Ksh. 4.2 million. What happened to Ksh. 200,000.00?

Your conduct and manner in which you undertook this work, coupled with this letter in question, cast a lot of doubt as to your professionalism to this conveyance and makes it hard for me to know whether it was negligence, collusion or omission that resulted in me losing that land and / or money.

By a copy of this letter, am also asking the Provincial CID Headquarters Nairobi to look into your letter, together with your failure to cooperate with their fraud investigation and see whether you acted in cahoots with fraudsters, Mr. Otachi and his advocates M/s Oyugi and Co. Advocates.

Your only alternative is to recover my money which I lost due to your negligence or leave it to the law to take its course”

5) The appellant filed suit against the 1st respondent. The particulars of the defamatory claim were that despite the appellant’s diligence in the sale transaction, the 1st respondent falsely and maliciously printed and widely circulated a letter to the appellant which was copied to various authorities.

6) In the plaint, the appellant contended that by the impugned letter, the 1st respondent meant and was understood to mean that the appellant was untrustworthy and an accomplice to the fraud; that the appellant is corrupt and not fit to practice as a lawyer; that the appellant is unprofessional, negligent and colludes with fraudsters; that the appellant is a criminal and more specifically a thief; that while forwarding the purchase price, the appellant retained, stole and or embezzled Kshs. 200,000.00.

7) It was the appellant’s further contention that by application of the said words, he has been injured in his credit and reputation and his profession has been brought to scandal, odium and contempt and that he is no longer held in high esteem by the public and colleagues and has thereby suffered damages. The appellant prayed for judgment against the 1st respondent for general damages, costs and any other relief the court may deem fit to grant.

8) The 1st respondent denied the appellant’s claim and filed a Statement of Defence and Counterclaim dated 7th April, 2010 wherein he admitted appointing the appellant to act for him in the sale transaction in respect of the suit property. He denied revoking his instructions to the appellant in respect of the sale transaction. He contended that the recipients of the impugned letter are persons entitled to receive such communication as the same was communicated to them in their respective official capacities.

9) In the counterclaim, the 1st respondent joined the 2nd, 3rd and 4th respondents in the suit and claimed that on 12th August, 2008, he executed a transfer in respect of the suit property for Kshs. 6,000,000.00 but subsequently learnt that the transfer instrument that he executed and which was witnessed by the appellant was changed to read Kshs. 4,000,000.00 without any notice to him.

10) It was the 1st respondent’s further claim that the appellant disregarded his instructions not to release the balance of the purchase price to the 3rd respondent until the appellant had fully ascertained that the 2nd respondent was the registered proprietor of the suit property; and that the appellant obtained indemnities from the 3rd and 4th respondents and released the balance of the purchase price to the 3rd respondent.

11) The 1st respondent further contended that the appellant was professionally negligent for failing to account for Kshs. 200,000.00 which he withheld; that the appellant failed to call for the completion documents from the 3rd respondent to facilitate the lodging of the same at the Lands Registry; and witnessing the transfer instrument without pointing out to the 1st respondent that the purchase price indicated therein had been altered to read Kshs. 4,000,000.00

12) It was the 1st respondent’s further contention that the 2nd, 3rd and 4th respondents acted fraudulently; that the 2nd respondent purported to be the registered proprietor of the suit property and received money from him when they knew that the 2nd respondent was not the duly registered proprietor of the suit property; that the 2nd, 3rd and 4th respondents altered the purchase price on the transfer instrument and fraudulently misrepresented that they were capable of handing vacant possession of the suit premises to the 1st respondent; and that the 4th respondent received Kshs 200,000.00 for fencing the suit property when he knew or ought to have known that he could not fence the suit property.

13) The 1st respondent prayed for a refund of Kshs. 6,000,000.00 being the purchase price in respect of the suit property; Kshs. 200,000.00 paid to the 4th respondent for fencing the suit property; general damages for professional negligence by the appellant; general damages for fraud, negligence and collusion by and between the appellant, 2nd, 3rd and 4th respondents; a full reimbursement by the 3rd and 4th respondents of all expenses incurred by the 1st respondent in the sale transaction; interest and costs of the suit.

14) The appellant filed a Reply to the 1st respondent’s defence and a defence to the counterclaim dated 14th April, 2010. In response to the defence, the appellant justified his action of procuring the indemnity from the 3rd and 4th respondents to protect the 1st respondent from any

loss that may have occurred as a result of the 1st respondent proceeding with the sale transaction without the appellant's advice. In response to the counterclaim, the appellant contended that he drafted a transfer instrument indicating Kshs 6,000,000.00 as the purchase price as per the sale agreement but subsequently learnt that the 1st respondent had colluded with the vendor (the 2nd respondent) and the 3rd respondent to prepare a transfer indicating the purchase price as Kshs 4,000,000.00 and proceeding to register the suit property in favour of the 1st respondent without the appellant's knowledge. It was the appellant's further contention that he conducted due diligence at all stages of the sale transaction in respect of the suit property; that he paid the balance of the purchase price in the sum of Ksh 4,400,000.00 in full settlement as indicated in the documented evidence; and that the 1st respondent's claim in the impugned letter is highly defamatory.

15) The 3rd respondent filed a Statement of defence to the counterclaim dated 28th May, 2010 and claimed that the appellant in the counterclaim altered the amount in the transfer documents from Kshs 6,000,000.00 to Kshs 4,000,000.00 to avoid paying the requisite stamp duty payable on the purchase price. The 3rd respondent denied the particulars of fraud as exhibited against him and stated that the appellant conducted a title search in respect of the suit property and was satisfied with his findings.

16) The 2nd and 4th respondents filed their defence dated 22nd June, 2010 and claimed that the transfer was altered at the instance of the 1st respondent with a view to avoiding paying the requisite stamp duty on the purchase price. The 2nd and 4th respondents denied the claims on negligence and fraud and claimed that the transfer in favour of the 1st respondent is valid; that the action in the counter-claim was founded in crime and the suit contravened the Civil Procedure Rules; and that the indemnity was not enforceable as it related to the process of registration of the transfer.

17) At the hearing, the trial court heard the appellant who testified on oath and reiterated that he acted on behalf of the 1st respondent in the sale transaction in respect of the suit property with due diligence and in the 1st respondent's best interests at all material times. On the impugned letter, the appellant testified that he did not have evidence that copies thereof had been circulated to the authorities copied therein and was relying on the 1st respondent's own admission that the letter had been circulated to the said authorities.

18) In his evidence, the 1st respondent testified that the appellant did not act in his best interests leading to financial loss; that he did not instruct the 3rd respondent at any stage in the transaction; and that he was aware of the indemnity prepared in his favor against the 3rd and 4th respondents.

19) The parties filed written submissions. In his submissions, the appellant chronicled the events leading to the impugned letter which was the basis of his claim. Counsel for the appellant submitted that the words in the impugned letter were construed to mean that he was incompetent, dishonest and a fraudster; that the statement was unjustified and that there was no evidence that he had embezzled Ksh 200,000.00. The appellant urged that in the absence of proof of negligence, improper conduct or fraud, an award of Ksh 7.5 million as general damages and Ksh 500,000.00 as exemplary damages was reasonable taking into account the 1st respondent's failure to mitigate damages by apology as provided by the Defamation Act.

20) Counsel for the 1st respondent submitted that the impugned letter was not defamatory but rather a reaction borne of frustration, not malice; and that the threat to circulate it to the named authorities was an empty threat. On the counter-claim, the 1st respondent insisted that the appellant acted in collusion with the 2nd, 3rd and 4th respondents to entirely defraud him of the suit property, or prevent him from acquiring possession of the same.

21) The 2nd 3rd and 4th respondents filed joint submissions dated 18th September, 2017 in which they admitted that the transfer instrument was drafted by the 2nd and 3rd respondents but that the 1st respondent had not proved that the registration was being challenged by any other party. As a result, the 1st respondent could not sustain a claim for refund of the purchase price or a transfer of the property back to the 2nd respondent.

22) Vide its judgment dated 25th January, 2018, the trial court dismissed the appellant's claim of defamation stating as follows;

“In a claim for defamation, the Plaintiff has to adduce evidence to show that the complained statement was published to other parties other than himself. The Plaintiff did not call any witness who might have received the impugned letter neither did he provide any evidence to show that the letter complained of was indeed sent to and received by the persons to whom the letter was copied.”

23) Regarding the 1st respondent's counter-claim for professional negligence, the learned Judge held that;

“Having regard to the circumstance of this case, and considering the actions of the plaintiff and the steps he took to safeguard the interests of the defendant, it would be unfair to say that the plaintiff acted in gross negligence in the performance of his professional services. Even after the defendant went ahead and colluded with the 2nd defendant to change the transfer form without involving the plaintiff, the plaintiff still came to the rescue of the defendant and indeed demanded for a deed of indemnity before he could release the balance of the purchase price. It is noted that the plaintiff was continuously informing the defendant what was happening in the transaction. The defendant, therefore, cannot claim that the plaintiff colluded with the vendor and their advocate to defraud him. There is no evidence of the said collusion that has been provided by the defendant.”

24) On the allegations of fraud against the 2nd, 3rd and 4th respondents, the learned Judge held that the evidence before the court showed that the appellant conducted due diligence to ascertain the validity of the registration and that the transfer was properly effected and the title issued in the 1st respondent's favor. It was the learned Judge's finding that even though there was alteration of the original transfer, the subsequent one was properly executed and the title verified as being genuine and, therefore, there was no proof of fraud.

25) On the quantum of damages, the learned Judge assessed the quantum of damages that would have been awarded had the appellant's suit succeeded. The court considered the appellant's suggested figures of Ksh 7,000,000.00 as general damages and Ksh 1,000,000.00 exemplary damages and held that Ksh 5,000,000.00 was a reasonable award as general damages. The learned Judge declined to award exemplary

damages as no evidence was adduced to justify the award under that head. Each party was ordered to bear their own costs of the suit.

26) Aggrieved by this decision, the appellant filed a Notice of appeal and a memorandum of appeal raising 4 grounds; that the learned Judge erred in fact and law by: holding that the appellant had not demonstrated injury to his reputation because the offensive letter had not been published; and in failing to award any sum under the claim for exemplary damages on the premise that there was no evidence to prove the claim of libel; that the learned Judge failed to critically analyze the evidence, submissions and pleadings before reaching his decision to dismiss the claim of defamation; and that the learned Judge applied the wrong principles of law to the evidence placed before him.

27) The appellant sought orders that the impugned judgment be set aside and substituted with an order for damages against the 1st respondent assessed at Ksh 7,500,000.00 as well as exemplary damages for aggravated libel assessed at Ksh 1,000,000.00; that the 1st respondent's defence and counter-claim be dismissed with costs to the appellant. The appellant also sought for costs of the suit and of the appeal.

28) The 1st respondent also filed a cross-appeal in which he raised 11 grounds which can be summarized as that the learned Judge erred by: failing to find the 1st respondent had not been given vacant possession of the suit property; failing to find that the 2nd, 3rd, and 4th respondents had colluded to defraud the 1st respondent; failing to enforce the deed of indemnity; finding that the appellant had acted with due diligence throughout the transaction; and that the learned Judge failed to consider all the evidence placed before him.

The 1st respondent sought orders that the judgment dismissing his counterclaim be set aside and that the appeal be dismissed with costs.

SUBMISSIONS BY COUNSEL

29) At the hearing of this appeal, **Mr. Ng'ani**, learned counsel for the appellant, faulted the learned Judge for finding that the appellant was not defamed despite the 1st respondent admitting the same. Counsel submitted that the admission was evidenced; firstly, in the 1st respondent's statement of defence where he stated as follows; "*The defendant avers that the recipients of his letter are persons entitled to receive such communication as the same was communicated to them in their official capacity*"; and secondly, in the 1st respondent's testimony that the appellant had refused to cooperate with the authorities investigating the fraud. Counsel asserted that the trial court had erred by shifting the burden of proof of the publication to the appellant while the issue of non-publication was not pleaded nor proved by the 1st respondent.

30) On the issue of quantum of damages, learned counsel argued that the appellant has been an advocate for over 37 years and the publication of the impugned letter was a serious aggravation to his character of good standing. As such, the 1st respondent's admission of publication of the letter and failure to show remorse was sufficient grounds for the Court to award Ksh 1,000,000.00 as punitive damages. Counsel further urged the Court to dismiss the cross-appeal with costs as the 1st respondent had not filed submissions nor entered appearance.

31) The 1st respondent was represented by **Ratemo & Co Advocates** who were served with the notice of appeal but did not file any submissions or enter appearance at the hearing. The Court being satisfied that they had due notice of the hearing of the appeal, allowed counsel for the respective parties present to prosecute the appeal.

32) **Mr. Moindi**, learned counsel for the 2nd 3rd and 4th respondents did not oppose the appeal but urged the Court to dismiss the cross-appeal against the 2nd, 3rd and 4th respondents with costs.

DETERMINATION

33) We have considered the record, submissions made on behalf of the respective parties, the authorities cited and the law. It is settled law that the duty of a first appellate court is to re-evaluate the evidence adduced before the court appealed from both on points of law and facts and come up with its own findings and conclusions. (See **Selle v Associated Motor Boat Company (1968) EA 123**)

34) This appeal raises two main issues: firstly, whether the impugned letter was actually published to a third party; and secondly, whether the appellant led evidence to prove that his reputation was damaged arising from the publication of the impugned letter to a third party or parties.

35) The crux of the appellant's argument is that the 1st respondent admitted publishing the impugned letter hence justifying the claim of defamation. In his memorandum, the appellant raised six grounds of appeal which in our view can be addressed effectively by answering the following questions;

(a) whether the appellant established the necessary ingredients for publication of a libel; and

(b) whether there are valid grounds to interfere with the award of quantum of damages.

36) At common law, defamation covers any communication that tends to lower the esteem of the subject in the minds of ordinary members of the public. The tort of defamation was well described in the case of **Murphy v LaMarsh (1970) 73 W.W.R 114** where it was stated thus;

"Defamation is where a shameful action is attributed to a man (he stole my purse) a shameful character (he is dishonest), a shameful course of action (he lives on the avails of prostitution) (or) a shameful condition (he has smallpox). Such words are considered defamatory because they tend to bring the man named into hatred, contempt or ridicule. The more modern definition of defamation is words tending to lower the plaintiff in the estimation of right-thinking members of society generally."

37) This Court in Selina Patani & another v Dhiranji V. Patani [2019] eKLR stated as follows:

“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.”

38) In light of the above threshold, the elements of the tort of defamation are that the defamatory words must tend to lower the plaintiff's reputation in the estimation of right-minded persons in the society, or cause the plaintiff to be shunned or avoided by other persons. In other words, the words complained of must be shown to have injured the reputation, character or dignity of the plaintiff. (See Miguna Miguna v Standard Group Ltd & 4 Others [2017] eKLR and Phineas Nyaga v Gitobu Imanyara [2013] eKLR).

39) And what is a defamatory statement? This Court has had occasion to pronounce itself on several occasions on the meaning of a defamatory statement. In Raphael Lukale v Elizabeth Mayabi & another [2018] eKLR this Court held that:

“Speaking generally a defamatory statement can either be libel or slander. Words will be considered defamatory because they tend to bring the person named into hatred, contempt or ridicule or the words may tend to lower the person named in the estimation of right-thinking members of society generally. The standard of opinion is that of right-thinking persons generally. The words must be shown to have been construed or capable of being construed by the audience hearing them as defamatory and not simply abusive. The burden of proving the defamatory nature of the words is upon the plaintiff. He must demonstrate that a reasonable man would not have understood the words otherwise than being defamatory.”

40) The test for whether a statement is defamatory is an objective one. It is dependent on what a reasonable person reading the statement would perceive and not the intention of the publisher. In Halsbury's Laws of England 4th Edition Vol. 28 at page 23, the author stated:

“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.”

41) It is not in dispute that the words contained in the letter dated 11th November, 2009 were written by the 1st respondent and were directed at the appellant. What is under contest is whether the letter was then circulated to the recipients copied in the said letter; that is (a) the Law Society of Kenya; (b) C.I.D Headquarters; (c) the Director of C.I.D; (d) the Commissioner of Police; and (e) the Attorney General.

42) In his statement, the 1st respondent denied circulating the letter and insisted that it was an empty threat borne of frustration. On cross examination, he stated as follows;

“I remember writing the letter dated 11th November 2009 to Rachuonyo Advocates complaining the he did not pay a sum of Ksh 200,000.00 to Oyugi and Company Advocates. I did that letter complaining and I can identify the signature. Though I copied the letter to many people I did not send them the copies. I told my advocate that I did not send that letter.”

43) Rebutting the denial, the appellant referred to the 1st respondent's assertions in the plaint and defence where he had stated that the impugned letter was sent to the people copied there in their official capacity. The trial court found that the appellant had failed to show that his reputation was damaged in the eyes of third parties. The learned Judge relied on the case of George Mukuru Muchai v The Standard Limited [2001] eKLR which set out the elements a plaintiff must prove in a defamation suit to include;

(a) that the matter of which the plaintiff complains is defamatory in nature;

(b) that the defamatory statement or utterance was published or communicated to someone other than the person defamed;
and

(c) that it was published maliciously.

44) The learned Judge held that although ingredient (a) and (c) were present, ingredient (b) was absent since the Plaintiff did not call any witness who might have received the impugned letter, neither did he provide any evidence to show that the letter complained of was indeed sent to and received by the persons to whom the letter was copied. It was the appellant's contention that the learned Judge erred in shifting the burden of proof to him; and that the burden remained on the 1st respondent to prove that he did not circulate the letter.

45) This Court in Selina Patani & another v Dhiranji v Patani

(supra) stated as follows:-

“In law, to constitute a cause of action, the alleged defamatory statement should be published to a third party. If the statement complained of has only been made to the person the letter is addressed to, this will not suffice...The burden to prove publication is on the claimant...Nevertheless, in certain cases the law will presume the publication to a third party unless evidence to the contrary is forthcoming. In Huth v Huth (supra) at 39, Lord Reading expressed that such a presumption arises where the document is put in the way of being read and understood by those through whose hands it passes in the ordinary course of events...However, the presumption can be rebutted and the onus of doing so rests with the defendant.”

46) Defamation law highlighted above therefore puts the burden of proving the truth of alleged defamatory statements on the defendant rather than the plaintiff. In this instance, the learned Judge found that indeed the allegations of fraud and negligence were false. However, the fact that the words were not published meant that the appellant's claim did not meet the threshold for a cause of action for defamation.

47) **Section 108** of the **Evidence Act** provides that;

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all was given on either side.”

A claimant cannot, as a general rule, successfully sustain a claim of defamation unless the publication of the defamatory matter is widely circulated to other people other than the claimant.

48) In **Swanya v Toyota East Africa Ltd & Another [2009] eKLR** this Court stated as follows;

“The words allegedly uttered by the respondents and which gave rise to the case in the superior court do not appear to have been communicated to third parties or shown to have been intended to disparage or directed at disparaging the appellant in his office, profession, calling, trade or business held or carried on by him. The pleadings or even the proceedings do not disclose this important aspect of the case nor do they disclose any third party who would have heard the disparaging remarks in order to establish the ingredient of publication and to hold the appellant to ridicule or contempt. Neither is the defamatory nature of the alleged remarks clearly brought out. Given all these circumstances, we are of the view that no defamation case was made out by the respondents against the appellant...”

49) Publication is an essential and necessary element of proof of defamation. A cause of action in defamation only arises once the defamatory words are published. Strictly speaking, what is alleged to be libelous or slanderous only assumes that description upon the defendant relaying the words complained of to a party other than the party to whom they refer; only then can it be said that there is publication.

50) In **Pullman v Walter Hill & Co (1891) 1 QB 524**, the ~English Court of Appeal explained what constitutes publication as follows:

“What is the meaning of ‘publication’? The making known the defamatory matter after it has been written to some person other than the person of whom it is written. If the statement is sent straight to the person of whom it is written, there is no publication of it; for you cannot publish a libel of a man to himself. If there was no publication, the question whether the occasion was privileged does not arise...If the writer of a letter shows it to his own clerk in order that the clerk may copy it for him, is that a publication of the letter? Certainly, it is, showing it to a third person; the writer cannot say to the person to whom the letter is addressed, ‘I have shown it to you and to no one else.’ I cannot, therefore, feel any doubt that, if the writer of a letter shows it to any person other than the person to whom it is written, he publishes it.” (per Lord Esher, MR).

51) In the instant matter, the learned Judge held that there was no proof that the impugned letter was publicized and read by a third party. The learned Judge observed that no third party was called to give evidence that they had received the impugned letter. The appellant testified as follows: **“I do not have copies of the letters that were received by the people who were copied to, the letter. I do not have witness to corroborate my evidence that I was defamed.”** We agree with the learned Judge that the burden was on the appellant to show in what way the impugned letter lowered or damaged his reputation in the estimation of right thinking members of the society generally, or cause others to shun or avoid him, or expose him to hatred, contempt or ridicule. Therefore, we find that the learned Judge correctly interpreted and applied the law on the tort of defamation. Accordingly, we find no reason to interfere with the learned Judge's finding and dismiss this ground of appeal.

52) On the question whether the appellant's character and reputation were destroyed, there is no evidence on record from any third party stating that as a result of reading the impugned letter, the appellant's reputation and standing as a lawyer with over 35 years' experience had been injured. In the absence of evidence from a third party, we find that the learned Judge did not err in arriving at the finding that the appellant did not prove his claim for defamation.

53) The next issue for determination is whether we should interfere with the quantum of damages as assessed by the trial court. The appellant had proposed an award of Ksh 7,500,000.00 based on a comparable case of **Ombura T/A Okoth Ombura & Company Advocates [2013] eKLR**. The 1st respondent did not make a counter proposal. The learned Judge found that in the circumstances of this case she would have awarded the appellant Ksh 5,000,000.00 had the appellant succeeded in his claim of defamation to warrant an award of damages. Counsel for the appellant urged us to uphold the award of general damages but also to award punitive damages because, firstly, the 1st respondent had failed to show remorse. Second, he had continued to aggravate the appellant's reputation in the cross-appeal.

54) It is trite law that assessment of damages is discretionary. The law on circumstances under which an appellate court would interfere with an award of damages has been crystallized by case law emanating from this Court numerous times. (See **Butt v Khan [1981] KLR 349**) In the case of **Kemfro Africa Limited t/a**

Meru Express Services & Another v A.M. Lubia and Another (No.2) (1982-88) KAR 727, it was stated thus;

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor or leaving out of account some relevant factor) or misapprehended the evidence and so arrived at a figure so inordinately high or

low as to represent an erroneous estimate.”

(See also Mbogo v Shah [1968] EA 93)

55) The rationale behind awarding of damages in defamation actions is to restore or give back to the injured party what he lost, save in exceptional circumstances where punitive or exemplary damages may be awarded. In its assessment, the trial court’s duty was to look at the whole conduct of the 1st respondent from the time libel was said to be published to the time the matter was heard in court. The learned Judge analyzed the 1st respondent’s conduct before the action, after the action and in court during the trial. (See Johnson Evan Gicheru v Andrew Morton & Another [2005] eKLR) Guided by the checklist of compensable factors in libel actions as enumerated in Jones v Pollard [1997] EMLR 233.243 the learned Judge held that an award of Ksh 5,000,000.00 general damages would have been reasonable in the circumstances.

56) We are alive to the principle that an award of damages should be fairly compensatory in light of the nature of the injury to reputation and that an award must appear realistic in the circumstances. In the English Court of Appeal decision in the case of John v MG Ltd [1996] 1 ALL E.R. 35 the Court held that;

“The successful plaintiff in a defamation action is entitled to recover, the general compensatory damages such sum as will compensate him for the wrong he has suffered. That must compensate him for damages to his reputation, vindicate his name, and taken account of the distress, hurt and humiliation which the defamatory publication caused...Exemplary damages on the other hand had gone beyond compensation and are meant to “punish” the defendant. Aggravated damages will be ordered against a defendant who acts out of improper motive e.g. where it is attracted by malice; insistence on a flurry defence of justification or failure to apologize.”

57) We find nothing in the judgment of the trial court to suggest that the learned Judge erred in assessing damages. The learned Judge found, correctly in our view, that the appellant’s claim for defamation having failed, the claim for damages could not lie. Accordingly, we find no reason to interfere with the learned Judge’s finding and dismiss this ground of appeal.

58) We now come to the cross-appeal. The 1st respondent continues to assert that the appellant colluded with the 2nd, 3rd and 4th respondents to defraud him. The 1st respondent’s counterclaim was founded on fraud. It is trite law that a party relying on fraud must specially plead it. In R. G. Patel v. Lalji Makanji [1957] EA 314, the predecessor of this Court stated thus:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.” (See also Gudka v. Dodhia, CA. No. 21 of 1980 and Richard Akwesera Onditi v. Kenya Commercial Finance Co Ltd, CA. No. 329 of 2009).

59) It was the 1st respondent’s contention that the appellant, acting without instructions, released the balance of the purchase price to fraudsters, leaving the 1st respondent without both the property and the money. Having carefully re-evaluated the evidence, we are satisfied that the learned Judge did not err by concluding that fraud was not proved to the required standard and that the counter claim be dismissed. The learned Judge stated as follows;

“There is no evidence of the said collusion that has been provided by the defendant. In any event, throughout the hearing it was clear that the Plaintiff protested at the actions of the 3rd Defendant. The Plaintiff even advised the Defendant to institute a suit against the vendor for reimbursement of the purchase price which advice was not heeded to.... It is the finding by this court that the plaintiff acted in accordance with the instructions given to him by the Defendant and in the best interest of the Defendant. The claim on profession negligence therefore fails”

60) We are unable to fault the learned Judge’s reasoning and hereby dismiss the cross-appeal. We find nothing in the judgment of the trial court, to suggest that the learned Judge erred in dismissing the claim for defamation and the counterclaim based on fraud. The upshot is that we hereby dismiss both the appeal and the cross-appeal with no orders on costs.

Dated and delivered at Nairobi this 22nd day of May, 2020.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR