IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), GITHINJI & SICHALE, JJ.A)

CIVIL APPEAL NO. 301 OF 2017

BETWEEN

JEFF OTIENO.....1ST APPELLANT

WANGETHI MWANGI.....2ND APPELLANT

NATION MEDIA GROUP.....3RD APPELLANT

AND

MARTIN NG'ANG'A.....RESPONDENT

(Being an appeal against the Judgment and Decree of the High Court

at Nairobi (J.K. Sergon, J) dated 12th February 2016

in

HCCC No. 1372 of 2005)

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JUDGMENT OF THE COURT

In an action for defamation two elements are involved; the defamatory nature of the words complained of and the award of damages if the claim is proved. As a general rule the defamation law protects a person's reputation, recognises in every man and woman a right to have the estimation in which he or she stands in the opinion of others unaffected by false statements to his or her discredit and it affords redress against those will violate this basic tenet by speaking defamatory falsehoods. This is the essence of **Article 33** of the Constitution of Kenya, which guarantees every person the right to freedom of expression while at the same time requires every person to respect the rights and reputation of others.

Whether or not a statement is defamatory will depend on how the words are understood by the ordinary man. Once the meaning of the words are determined, the next test is to ascertain 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.

A defendant in an action for defamation will escape liability, according to **sections 14 and 15** of the Defamation Act, upon proving that the offending statement was truthful and justified in the circumstances; or that the statement amounted to fair comment, made honestly; or that the subject of the comment is a matter of public interest, whose publication was reasonably believed to be in the public interest; or that the defamatory statement was made in a situation of absolute privilege, for instance in the course of parliamentary or court proceedings; or that it was made under qualified privilege of newspapers or that the publication was inserted without malice or gross negligence.

We said at the beginning of this judgment that the second aspect of an action for defamation is the award of damages if the claim is proved.

It is now established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages. In order to justify reversing the trial judge on the question of the amount of damages it must be shown 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 this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.

See **Butt V. Khan (**1981) KLR 349.

Secondly, compensation in defamation cases is awardable not for damaged reputation but as a way of vindication of the plaintiff to the public and as a consolation to him for a wrong done. See **Uren V. John Fairax & Sons Pty. Ltd,** 117 C.L.R. 115, 150.

A successful plaintiff is entitled to an award of damages proportionate to the injury he has suffered as a result of the libel. **John V. MGN Ltd** (1997) QB 586, offers the following invaluable guidance as to the proper approach in assessing appropriate damages for defamation.

> **"In assessing the appropriate 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 attributed 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 handful of people".**

Having set out the law as we have done in the foregoing paragraphs, we turn to relate it to the facts in dispute in this appeal. The respondent, Martin Ng'ang'a, a finance controller with the Kenya Wildlife Services at the time material to this dispute, sued the three appellants, Jeff Otieno, Wangethi Mwangi and Nation Media Group claiming that they had published in the latter's newspaper an article that stated that:

> "***Report says KWS hit by fraud.***
>
> **It also blames Mr. Martin Ng'ang'a the current financial controller for authorising payments for questionable deals that have left KWS in financial constraints. After an internal inquiry into kshs 2,553, 105 loss in the finance department, Mr. Ng'ang'a and other employees were recently sent on compulsory leave by the director, Mr. Evans Mukolwe, who was himself suspended last week..."**

The respondent insisted that the article above was defamatory and that it referred to him as corrupt, fraudulent and un-ethical; and that the appellants were malicious in publishing the article. In the result he instituted an action for;

a. an order of permanent injunction to restrain the appellants from publishing or causing to be published any defamatory material contained in the said article or any such material as would be scandalous or defamatory to the respondent in any form or manner whatsoever.

b. an award of general damages as well as exemplary and/or aggravated damages.

c. costs of this suit and

d. interest

The appellants denied the claim and argued that the publication was done in good faith and in the public interest. They said that the article was not defamatory as the content therein was true in substance and form; and that it was an accurate report that necessitated fair comment on matters of public interest since the public has a right to know of any transactions involving the Kenya Wildlife Service (KWS).

At the hearing, the respondent was the only witness who testified in support of his case while the appellants did not call any witness.

In his testimony, the respondent stated that the new Board of Directors of KWS appointed by the Narc Government accused him of leaking information; that even when he reported a case of theft to the internal auditor he was instead investigated, interdicted and finally dismissed; that the expenditure for which he investigated was in fact approved by the late Minister, Dr. Newton Kulundu; that a report was filed in which the names of all those who were implicated were listed; that it was in bad faith and with malice that only his name was mentioned by the appellants. He further stated that, after losing his job because of the report, he could not find another job and he left the country for the United States of America to look for a job as an asylum seeker. He denied that the Criminal Investigation Department found him culpable.

On the basis of this evidence, the learned Judge (Sergon, J) was of the view that only four issues fell for his determination namely:

a. whether the article published constituted defamatory remarks about the respondent

b. Whether the respondent suffered any damages as a result of the article c. Whether the defence of privilege was available to the appellant

d. What measure of damages would the appellant be entitled. The learned Judge resolved all the issues outlined above thus;

> **"9. In the same correspondences** (sic) **notes gross irregularities in respect of payments made to former and current chief executives of Kenya Wildlife Service. A recommendation is made to surcharge the Plaintiff. The reports further raised audit queries relating to procurement of furnishings and purchase of a BMW Limousine for the director. A recommendation for the taking of a disciplinary action against the Plaintiff for professional negligence in abetting an irregular payment for accommodation and incidental expenses for Mr. Mukolwe at the Norfolk Hotel. It would also appear from the documents exhibited by the Plaintiff that the Plaintiff was eventually summoned to appear before the Kenya Wildlife Service Board. Upon hearing the Plaintiff, the Board of Trustees terminated the Plaintiff's services**.…….

It is apparent that the Defendants did not produce the records or reports or grounds they relied upon as the basis of their publication, namely the report of NACCOPI consultants…….

In the absence of such crucial evidence in support of the Defendants' averments, the pleadings remain unsupported and hence cannot stand…...

It is clear to me that the article was reckless and in the circumstances of this case was actuated by malice. The Defendants selectively published the Plaintiff as the person involved in the fraud even when the report of the Inspectorate of State Corporations had named other individuals along with the Plaintiff under several heads on its investigation report. In the end I find no merit in the Defendants' defence. The published article contained offensive remarks that were defamatory and aimed at tarnishing the Plaintiff's character and reputation. The article was made carelessly and maliciously against the Plaintiff as they were neither factual nor verified on their authenticity before being published……."

On the measure of damages, the learned Judge, making reference to the decisions in **George Oraro V. Barack Mbaja** H.C.C.C no. 85 of 1992, **Abraham Kiptanui V. Francis Mwanini & 4 others** H.C.C.C no. 42 of 1997, **Daniel Musinga T/A Musinga & Co. Advocates V Nation Newspapers Ltd** Mombasa H.C.C.C no. 102 of 2000, awarded to the respondent a sum of Kshs. 2.5 million.

The appellants have challenged this determination on seven grounds contained in the appellant's memorandum of appeal, which, when the appeal came up for hearing were condensed into only two arguments. Namely, that the learned Judge erred in failing to consider and uphold the appellant's defences of justification, fair comment and qualified privilege as separate and independent factors of each; and for awarding Kshs. 2.5m to the respondent, which sum in their view was excessive in the circumstances.

The appellant submitted that it was irregular for the Judge, having made reference to the extract of the report of the inspectorate of State Corporation in which the respondent was implicated, and to a letter dated 4th November, 2004 sending the respondent on compulsory leave, to reject the defence of fair comment and of qualified privilege; that the article in question was based on real events and facts constituting matters of public interest.

On quantum of damages, and as an alternative to the foregoing submissions, it was appreciated that damages in a suit for defamation are compensatory and discretionary hence the learned Judge improperly exercised his discretion and as a result, awarded excessive damages.

The respondent for his part, urged us to dismiss the appeal with costs because the appellants had failed to discharge the burden of proving that the article carried truthful and factual statements; that the documents upon which the offending article was based did not become part of evidence on record, as they were not produced as an exhibit at the trial; and that the learned Judge correctly found the article to contain offensive and defamatory comments about the respondent's character and reputation. He further argued that, whereas the report of the Inspectorate of State Corporation had named the respondent along with other individuals for surcharge, the report did not blame the respondent for loss of Kshs. 2,553,105.00/= as alleged in the article and; that the mere recommendation for surcharge alone did not impute culpability.

The respondent supported the award of Kshs. 2,500,000.00/= as being reasonable and made in accordance with the provisions of **section 16A** of Defamation Act; and that in terms of the holding in **Nation Media Group Limited & 2 others V. John Joseph Kamotho & 3 others** (2010) eKLR, this Court will only interfere with an award of damages if it is convinced that the judge either acted upon some wrong principle of law, or that the amount awarded was so extremely high or so low as to make it an entirely erroneous estimate of damage.

We have given our due consideration to these arguments and reiterate that this is a first appeal and the Court has a duty to re-evaluate the evidence on record so as to arrive at its own independent determination. See **Peterson Ndung'u & 5 others V. Kenya Power & Lighting Company Ltd** (2018) eKLR.

The twin questions in this appeal, as we have said earlier, are whether the words contained in the article were defamatory of the respondent, and if they were, whether the general damages awarded by the learned Judge were appropriate.

The article in question made reference to a report and stated that KWS had been "hit by fraud"; that to be blamed for this, with others, was the respondent, Mr. Martin Ng'ang'a who was at the time the financial controller. He was blamed for authorising questionable payments; that an internal inquiry into Kshs. 2,553, 105/= loss which led to the respondent and other employees being sent on compulsory leave. Was the respondent the financial controller of KWS during the period in question? Yes, he was. Were there Investigations into allegations of graft at KWS from which a report was generated? Yes, there was a Special Management Report on KWS in which the respondent was said to have facilitated the questioned payments. For instance, the report recommended that surcharge action be taken against the respondent, among others for having **"occasioned losses of public funds at the KWS".** The report also found that the irregular procurement of a BMW limousine was facilitated by the respondent and two others; that the respondent was professionally negligent and abetted irregular payment of *per diem* allowance to the new Director even before he formally joined KWS. Clearly, all that the appellants published was drawn from this report. To the extent that the learned Judge observed that the report recommended that disciplinary action be initiated against the respondent for professional negligence and for abetting irregular payments for which his services were terminated, he was in agreement with the appellants that the appellants did not originate or fabricate the story, but that they reported it as it was. It was therefore in error for the learned Judge to turn around and discredit the source, by insisting that the appellants ought to have produced **"the records or reports or grounds they relied upon as the basis of their publication"**. It is apparent to us from the record that, parties by consent before the learned Judge agreed to the admission of the documents contained in their respective lists of documents. Though they were initially marked for identification, by that consent they were, as a matter of fact, produced as exhibits. Further, it was in error for the learned Judge to conclude that **"The Defendants selectively published the Plaintiff as the person involved in the fraud even when the report of the Inspectorate of State Corporations had named other individuals along with the Plaintiff under several heads on its investigation…. "**.

Contrary to this statement, we confirm that there are several others persons named in the article. For example, the former Minister, Dr.

Newton Kulundu, Mr. Evans Mukolwe, Dr. Richard Leakey and Mr. Joseph Mutie.

Was the respondent and other employees sent on compulsory leave by the director? By a letter dated 4th November, 2004, the Director addressed a letter to the respondent and directed him to proceed on compulsory leave with immediate effect to pave way for further investigations. The Director attributed this course of action to **"the finding of Internal Audit Inspection into the theft of Kshs. 2,553,105/= within the Financial Department".**

There being no doubt of the fact that KWS is established under the Wildlife Conservation and Management Act as a State body tasked with the role of managing wildlife, a public resource, it inevitably follows that its management and any matter affecting it positively or adversely is a matter of great interest to the public. Sources of funds to KWS include monies approved and allocated by the National Assembly as part of the budget process. (See **section 14(a)** of the Wildlife Conservation and Management Act).

The appellants in their statement of defence pleaded that the words in the publication consisted of facts, which were "true in substance and in fact" and amounted to fair comment on a matter of public interest; that the words were published in good faith and were accompanied with assertions of truth and fair comment backed by privilege.

Section 15 of the Defamation Act provides that;

> **"In any action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved".**

Lord Phillips of the UK Supreme Court in his leading judgment in a recent case, **Spiller & Anor V. Joseph & Other** (2010) UKSC 53, suitably described in the passage below the circumstances under which a defence of fair comment can be available;

> **"First, the comment must be on a matter of public interest. Second, the comment must be recognizable as comment, distinct from an imputation of fact. Third, the comment must be based on facts, which are true or protected by privilege. Fourth, the comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made. The reader or hearer should be in a position to judge for himself how far the comment was well founded. Fifth, the comment must be one which could have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views."**

Lord Denning (MR) in his usual true element in the case of **London Artists Ltd V. Littler** (1969) 2 ALL ER 193, cited with approval in **Nation Media Group Limited & another V. Alfred N. Mutua** (2017) eKLR, defined what would constitute public interest thus;

> **"Whenever a matter is such as to affect people at large, so that they may be legitimately interested in or concerned at, what is going or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make fair comment… where the fact relied on to justify the comment are contained only in the particulars, it is not incumbent on the defendant to prove the truth of every fact so stated in order to establish his plea of fair comment…"**

We cannot emphasise more the general obligation on the media to communicate important information on matters of general public interest and the public has a right to receive such information. See **Ndung'u Njoroge & Kwach Advocates & another V. Standard Limited & 8 others** (2018) eKLR.

For all the reasons we have stated we come to the inevitable conclusion that the publication was well founded. It was an expression of an opinion based on reports and correspondence. We have ourselves, like the learned Judge, not seen the report by NACCOPI Consultants on record, which was relied on by the appellants in their article. However, to reiterate, the appellant's application did have a basis. As observed by the learned Judge, on record was the extract of the reports by the Inspectorate of State Corporations, on which the Judge himself relied. The extracts contain information on the surcharges and recommendations for disciplinary action against the respondent. The information from these extracts qualify as privileged as stipulated under **section 7** of the Defamation Act as read with **clause 7(d)** of the schedule. The Inspectorate of State Corporations is an office established under the State Corporations Act hence its reports qualify as statements that are privileged subject to explanation or contradiction. The respondent in his letter to the Inspectorate of State Corporations dated 16th June, 2005 categorically stated that he was not contesting the contents of their report except a few factual mathematical errors that he recommended be excluded from the report.

Further, the publication related to a matter which concerned the public. The statement did not deliberately distort or exaggerate the true situation as reported. No offensive words were used of and regarding the respondent. The learned Judge appreciated the contents of the report; that it noted **"gross irregularities in respect of payments made to former and current chief executives of Kenya Wildlife Service"**; that it recommended that the respondent be surcharged and in addition a recommendation for the taking of a disciplinary action against the respondent **"for professional negligence in abetting an irregular payment for accommodation and incidental expenses for Mr. Mukolwe at the Norfolk Hotel".**

In view of that position, we are at a loss how the Judge could turn around to insist that there were no grounds or basis for the publication.

We have pointed out several instances in the extract of the report and in the correspondence where the respondent was blamed for misappropriation of funds as a consequence of which he was even sent on compulsory leave.

This appeal is meritorious and accordingly allowed. The judgment and decree of the High Court is set aside. We award costs of this appeal

and in the High Court to the appellants.

Dated and delivered at Nairobi this 20th day of December, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR