



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

CIVIL APPEAL NO. 31 OF 2017

BETWEEN

AHARUB EBRAHIM KHATIRI.....APPELLANT

AND

NELSON MARWA.....1ST RESPONDENT

DEPARTMENT OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

*(Being an Appeal from the Ruling of the High Court of Kenya at Mombasa (Mwangi, J.) dated 14th March 2017)*

in

HCCC No. 4 of 2017

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JUDGMENT OF THE COURT

[1] When the suit against **Nelson Marwa** was filed before the High Court, he was at the material time discharging duties as a public officer as the Coast Regional Commissioner appointed under section 15 of the National Government Coordination Act. He was sued by **Aharub Ebrahim Khatri** (appellant) for the tort of defamation for words allegedly uttered in a press briefing on 14th January, 2017 which the appellant alleged were offensive and injurious to his reputation. Before the suit was heard, two applications were filed in court before **Mwangi J.**, which were heard together as they were seeking joinder of parties. One was brought by the Department of Public Prosecutions (DPP) seeking leave of the court to be admitted in the proceedings as an interested party. The second application was by the (AG) seeking principally to enjoin his office as a defendant in the matter and to strike out the claim and name of Nelson Marwa as the defendant.

[2] On hearing the two applications and by a ruling dated 14th March, 2017 the learned Judge issued several orders, some are to do with directions on case management but what is of relevance to the instant appeal is order No. 2 that directed the name of the defendant, **Nelson Marwa** be struck out of the plaint and record as a defendant the Attorney General was joined in the proceedings as the defendant while leave was granted to the DPP to be joined in the proceedings as the interested party.

[3] The factual background information is that on 19th January 2017, the appellant filed suit before the High Court against Nelson Marwa in his capacity as a public officer and coordinator of National Government within the Coast region. The appellant alleged he was injured or defamed by statements issued by the said Nelson Marwa, on or about 14th January, 2017 which were broadcast in Baraka FM and other social media forums. The said statements were allegedly made after the police had raided the

appellants' home in a purported campaign to arrest drug dealers or barons, illegal firearm holders and other vices. During the said raid, the police allegedly impounded three firearms which the appellant claimed he was licensed to own under the firearms Act. Following this raid Nelson Marwa is said to have held a press address and his speech tended to suggest that the appellant was arrested in possession of four firearms *'which were an illegal armoury and were for his use as alleged "drug baron"'*

[4] Since the whole episode was centred on an action carried out by the police whose mandate is investigations of persons suspected of committing crimes, the Attorney General sought to be joined in the suit as the defendant pursuant to the provisions of the Government Proceedings Act. The DPP too, whose mandate is prosecution of crime which includes directing the National Police Service to carry out investigations, also sought to be joined while arguing the said Nelson Marwa was in the company of police officers who were carrying out their mandate. The two applications also highlighted and underscored the fact that the allegations in the plaint described Nelson Marwa as the coast regional commissioner appointed under the National Government Coordination Act, which grants him immunity from any civil claim for actions done in the cause of his work, it was necessary to join those offices in the proceedings. Moreover under section 12 of the Government Proceedings Act, claims for or against the government are supposed to be instituted against the Attorney General.

[5] Based on the aforesaid ruling, in which the name of Nelson Marwa was struck out, the appellant filed an appeal challenging the decision of the learned Judge. The appellant contended that this was done at a preliminary stage even after concluding it was difficult to determine whether the words complained of were uttered by him and, for failing to appreciate a cause of action in defamation suits is predicated on words uttered by a named defendant as per the provisions of Order 1 rule 7 of the Civil Procedure Rules.

[6] During the hearing of the appeal, Mr. Omar, learned counsel for the appellant relied on his written submissions and made some oral highlights. According to counsel, the subject matter revolved around words spoken by Nelson Marwa which was done at a press conference where he uttered words which fall under the tort of Defamation. Allegations of defamation and the tort thereto as complained about by the appellant in the suit are personal. Thus the provisions of Section 12 of the Government Proceedings Act did not apply. Counsel drew a distinction between the functions of the police which fall under the command of the Inspector General of Police. In attempting to exercise any form of authority over the police, counsel submitted that Nelson Marwa was intermeddling with the police who are supposed to act independently without any directions.

[7] Counsel further submitted that the appellant is keen on pursuing the tort of libel against Nelson Marwa who uttered the offending words for personal liability; the line between whether the words were defamatory and whether they were personal or are covered by official immunity can only be determined after trial. Counsel relied on the case of **Ethics and Anti – Corruption Commission v Judith Mariyn Okungu and Another [2017]** eKLR among others to emphasize that an action of libel or slander is purely personal in nature. There is no way the appellant would have brought an action against the AG for words that were spoken by Nelson Marwa without his name as the link between the appellant, even before the injuries suffered can be assessed for compensation. Counsel urged us to allow the appeal and dismiss the cross appeal

[8] On the part of the Attorney General, Mr Wachira, learned Senior Principal State counsel relied on his client's written submissions and made some oral highlights. In addition to opposing the appeal, the AG also cross appealed urging the whole suit be dismissed as it went contrary to the provisions of section 40 of the Government Proceedings Act which require civil proceedings against the Government be instituted by or against the AG. Nelson Marwa was sued in his capacity as the regional commissioner for the coast region, a public officer appointed under the National Government Coordination Act. It was common ground that at the time he was alleged to have uttered the alleged defamatory words, he was donning his official attire and was surrounded by officers from the National Police Service which clearly indicated he was on public duty.

[9] Counsel for the AG further argued that the suit was filed without following the requisite procedure and ought to have been dismissed as the respondent also enjoys immunity from personal claims for

acts/or omissions done in the cause of official duty pursuant to Section 22 of the National Government Coordination Act. It was the view of Mr Wachira that the appellant was not in doubt who to sue for the alleged defamation as he wanted to pursue the claim against Nelson Marwa, in the circumstances the provisions of Order 1 rule 7 of the Civil Procedure Rules did not come to his aid. Counsel urged us to dismiss the appeal and allow the cross appeal since the name of Nelson Marwa was struck out, and the defamation suit sought a remedy in *personam*, the suit could no longer be sustained once the individual defendant was no more.

[10] The appeal was also opposed by the DPP who was represented by **Mr Muteti** learned Senior Assistant Director of Public Prosecutions. He supported the decision by the learned Judge to strike the name of Nelson Marwa; the Judge was lauded for appreciating the provisions of section 156 (d) of the Constitution; as long as the public officer was acting in his official capacity, he was immune from personal liability otherwise it would be next to impossible to perform public duty while worrying of when a public officer would have to bear responsibility for actions taken in performance of public duty.

[11] We have anxiously considered this appeal whose facts are very peculiar as they cut across a claim of defamation that was filed in *personum* yet it is admitted the defendant uttered the words complained about in the course of his duties as a public officer. The learned Judge is faulted for striking the name of the defendant from the suit while the AG is cross-appealing on the grounds that the defamation suit was seeking a remedy in *personam* and with the exit of the defendant, the suit by the appellant will have no leg to stand on. This is precisely the problem that we see in this matter, much as we appreciate the defendant was discharging his official duties on the material time, and the AG and DPP were necessary parties in this matter, we find it difficult to navigate the thin line that separates the juristic person who is apparently the link to a claim against the AG who was rightly joined in the suit as the defendant.

[12] Just as the learned Judge, we have brought to bear the provisions of **Order 1 Rule 10 (2)** of the Civil Procedure Rules which provides that a Court may at any stage of proceedings as it may appear just order the name of any party improperly joined, either as plaintiff or defendant, be struck out, and on the same breath the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit may be added. We agree the learned Judge was spot on when she ordered the AG in whose name all civil claims for or against the government should be undertaken to be joined and also the DPP perhaps under whose direction the investigations complained about by the appellant were undertaken.

[13] Where we think there is a thin line against which a court of law should navigate is by first of all appreciating the nature of every claim before it. In the instant case, the claim was predicated on words spoken by the Nelson Marwa in the course of discharge of his duties. The dilemma is when the court ordered his name struck out as a party from the proceedings before the matter was tried; this brings into question whether in the absence of the party who uttered the alleged words, the court would be able to effectually and completely adjudicate the matter. That is a legitimate question that would naturally be anticipated before trial and rather than leave it and inconvenience the court or parties, we agree in this regard the learned Judge erred by striking the name of Nelson Marwa too early before effectually hearing the matter. This is because it is through him that the AG as a legal representative of the government would eventually be adjudged culpable if at all. If for the sake of argument the same suit was filed without Nelson Marwa, we tend to think it would have faced the same problems as the appellant would have been hard pressed to demonstrate the connection of the spoken words and the government.

[14] We say so with abundant caution, while aware that the 1st defendant was a public officer recruited as the Coast Regional Commissioner under Section 15 (1) of the National Government Coordination Act. We are also alive to the provisions of section 22 of the same Act which provides;-

***“Nothing done by a public officer appointed under this Act shall, if done in good faith for the purpose of executing the functions of the office, render such officer personally liable for any action, claim or demand”***

It is not disputed the 1st defendant has immunity for actions taken in execution of his public duty. However the nature of the claim and the issue of whether the actions were carried out in good faith all require the participation of the 1st defendant. In his absence, we entertain considerable doubt as to whether the appellant would be able to proceed with the claim as against the AG and the DPP due to the provisions of the Government Proceedings Act. This explains why the AG has cross-appealed for the entire suit be dismissed.

[15] If the only way in which the appellant was to be able to ventilate his claim in a court of law was through the 1st defendant, in our view he should not be removed from the seat of justice as the broader interest in the administration of justice enjoins courts to address substantive justice as enunciated under **Article 50** and **159** of the Constitution by allowing parties to ventilate their cases while aiming to address the core issues in dispute as opposed to peripheral issues colloquially referred to as *sideshow*s. We think the 1st defendant is insulated by the provisions of the law as a public officer and he need not worry even if the appellant were to prove his case, it is the state that would be responsible to settle the damages. For the purposes of this case, we find it will be necessary for the 1st defendant to remain in the proceedings as the connection to the 2nd defendant who is the legal representative of the government in civil matters.

[16] For the aforesaid reasons we find merit in this appeal which we allow and for the same reasons we disallow the cross- appeal. The costs of this appeal shall abide the outcome of the civil suit.

**Dated and delivered at Malindi this 28th day of February, 2018**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**WANJIRU KARANJA**

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**JUDGE OF APPEAL**

**M.K. KOOME**

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**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original.*

**DEPUTY REGISTRAR**