



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, NAMBUYE & OKWENGU, JJ.A

CIVIL APPEAL NO. 32 OF 2017

BETWEEN

BENEDICT OMBIRO..... APPELLANT

AND

THE BOARD OF GOVERNORS

KENYA UTALII COLLEGE1ST RESPONDENT

THOMAS DUDAH.....2ND RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi, (K. Sergon, J.) Dated 12th February, 2016

in

HCCA No. 450 of 2012)

JUDGMENT OF THE COURT

This is an appeal against the Judgment of the High Court (J.K. Sergon, J.) Dated the 12th day of February, 2016.

The background to the appeal is that, the appellant was employed by the 1st respondent on the 22nd day of October, 1975, and served the 1st respondent in various capacities before his employment with the 1st respondent was terminated on 17/08/1990. He moved on and sought greener pastures elsewhere from a prospective employer, namely **Lonrho Hotels (K) Ltd.** The prospective employer sent a questionnaire to the first respondent seeking an appraisal of the appellant's character as his former employer. Upon receipt of the questionnaire, the 1st respondent tasked the 2nd respondent to fill it in, which the 2nd respondent filed in and accordingly returned the same to the prospective employer. In it, the appellant had been described as a person of erratic temper. It is not clear from the scanty information on the record as to whether that description caused the appellant his future prospects with the prospective employer, but one thing which is not in doubt is that it aggrieved him and as a result of which he moved to the subordinate court and filed a suit against the respondents seeking damages for defamation of his character, arising from the content of the said questionnaire; which the appellant contended was intended to portray him as

a man of bad reputation, temperamental and lacking in judgment.

In response to the appellant's claim, the respondents denied being the authors of the offensive words; and in the alternative, that if at all any such words were authored by them, then the same were privileged and amounted to a fair comment about the appellant's character and were therefore justified.

The trial court after assessing, analyzing and evaluating the record before it, found in favour of the appellant and awarded him damages for defamation in the sum of Kshs. eight hundred thousands only (Kshs. 800,000/=)

The respondents were aggrieved and preferred an appeal to the High Court raising various grounds. The learned Judge re-evaluated the record before him and made observations, there on and then proceeded to render himself *inter alia* as follows:-

“I have on my part re-evaluated the evidence that was presented before the trial court. There is no doubt that the Respondent was an employee of the 1st Appellant for many years. It is also not in dispute the respondent was eventually dismissed from the employment of the 1st appellant. It is also not in dispute that the respondent sued the 1st appellant for wrongful dismissal and that action was dismissed. The evidence tendered indicates that the respondent applied for employment with Lonrho Hotels (K) Ltd who in turn requested for a letter of recommendation from the 1st appellant in respect of the respondent. It is apparent that Lonrho Hotels (K) Ltd had sent a questionnaire to be filed by the 1st appellant over the respondent.

The learned chief magistrate formed the opinion that there was no evidence called by the appellant to show that the respondent had erratic behavior and quick temper. With respect, I think the trial court fell into error because there was sufficient evidence already tendered by the respondent showing the opinion the appellant had formed about the respondent. The respondent had produced the questionnaire filled by the 2nd appellant on the instructions of the 1st appellant showing the respondent had erratic behavior and high temper. The aforesaid document was admitted in evidence. It is apparent from the proceedings of the trial court that the appellants had every justification and good reason to hold the view about the respondent's character. It was neither reckless nor careless to do so. The appellants were merely fulfilling an obligation to fill the questionnaire just like the credit reference bureau reports forwarded to banks and financial institutions. In my estimation there was no apparent malice exhibited by the appellants. In the case of Hellen Makone versus Francis Kahos and another [2004] e KLR the Court of Appeal held *inter alia* that qualified privilege would arise when a prospective employer makes an inquiry to a former employer regarding an employee as long as there was no malice. sus Mbutia [1985] eKLR, the Court of Appeal held that a publication becomes privileged in occasions where the author and the publisher has an interest or legal, social or moral duty to the recipient and the recipient has a corresponding interest and duty to receive it.

In the end I see no justification to find appellants liable for defamation.

The last ground of appeal relates to the assessment of damages in which the trial court awarded the respondent Kshs.800,000/=. In a near similar case decided by Majanja Judge i.e James Omenda Abusa Versus Ludia Atieno Onyango [2015] eKLR damages was assessed at Kshs. 100,000/=. In my view, the award given to the Respondent was way above comparable awards. If the appeal had failed I would have nevertheless adjusted the award from Kshs. 800,000/= to Kshs. 200,000/= which in my view appears to be reasonable and commensurable to the nature of damage the respondent suffered.

In the end, I find the appeal to be well founded. Consequently, the appeal is allowed. The judgment of the trial court is set aside and is substituted with an order dismissing the suit. The appellants to have costs of the appeal and those of the suit before the trial court.”

The appellant was aggrieved and has preferred this appeal, raising seven (7) grounds of appeal which learned counsel in his written submissions, subsequently compressed into three (3) clusters with grounds 1,2,3 &4 forming the first cluster, ground five (5) as the second cluster; and, grounds 6&7 forming the third cluster.

These may be paraphrased as follows:- The learned Judge fell into an error of law:-

(1) when he held that the questionnaire filled by the respondent containing the defamation statement was sufficient evidence, an opinion and therefore afforded sufficient justification for holding that the appellant was a man of erratic behavior and that the content of the said questionnaire did not exhibit malice on the part of the respondents.

(2) when he proceeded to disturb the findings and award of the trial court without any justification as there was no evidence tendered by the respondents to the contrary.

(3) when he set aside the award of the trial court on the ground that it was way above comparable awards.

The appeal was canvassed by way of written submissions, buttressed by the digest of case law.

In support of the first cluster of the grounds, the appellant contended that the only action the respondents took in defence of the appellants claim was a denial in their defence with no attendant supportive document annexed to it, or evidence tendered in support thereof. There was therefore no way the questionnaire could have been tendered in evidence on their behalf.

To buttress the above submissions, the appellant cited **Linus Nganga Kiongo versus Town Council of Kikuyu HCCC No, 79 of 2011** for the proposition that where a party adduces no evidence in support of its pleadings, the pleadings remain mere statements of facts.

In support of the second cluster of the grounds, the appellant submitted that the appellant's unshaken evidence went to establish that the words authored by the respondents were defamatory; that they were in reference to the appellant and that they were also malicious because the injurious words were authored by the respondents at a time when the relationship between the appellant and some of the 1st respondent's senior managers who harboured ill feelings against him was strained. He had also filed a civil case No. 4507 of 1990 against the 1st respondent which was still ongoing; while the questionnaire was filled by the 2nd respondent who was incharge of Academics, instead of the incharge of Human Resource. Malice was also borne out by the respondents' failure to issue a warning or a show cause letter to the appellant to demonstrate their justification for describing him as a person of erratic temper.

Turning to the third cluster of the grounds, the appellant relied on the principles enunciated in **Kemfro Africa Limited t/a Meru express Services Gathogo Kanini versus A.M. Libia and & Olive Lubia [1982-88] 1KLR** for the parameters that guide an appellate court when interfering with a trial court's award of damages, which parameters the appellant contended were absent in the instant appeal.

In opposition to the first cluster of grounds, the respondent submitted that the learned Judge did not misapprehend the evidence on the record. In the respondent's view, the failure to so adduce evidence in support of their defence did not in itself bar the learned Judge from assessing the record before him in totality and finding them (respondents) not liable in defamation as the onus of proving thate comments in the impugned questionnaire amounted to defamation was by law placed solely on the appellant.

To buttress the above submissions, the respondents relied on the Court of Appeal decision in **Gibson Ombonya Shiraku versus British Airways PLC [2014] KLR** as approved in **Peter Maina Ndirangu t/a Express Service Agency versus Standard Group Limited [2016] eKLR** for the proposition that where a defendant adduces no evidence at the trial, this does not absolve the plaintiff from his duty to prove his case on a balance of probability; and that all such a default does is to make the plaintiff's task of proving his case on a balance of probability easier because the case is one sided and the court does not have to

compare the case of the plaintiff with any other evidence from the respondent but the burden and the standard of proof remain the same.

Turning to the learned Judges holding that the publication in the impugned questionnaire was a mere opinion, the respondents urged us to affirm that finding for the reasons that it was well founded on the record before the learned Judge; that the respondents were merely fulfilling an obligation in filling in the questionnaire that had been forwarded to them. They also reiterated that no evidence of malice was demonstrated in the contents of the questionnaire. The findings were also well founded on the case law that the learned Judge referred to namely, *Hellen Makone versus Francis Kahos & Another [2004] eKLR*; and *University of Nairobi versus Mbuthia [1988] eKLR* for the holding, *inter alia*, that a publication becomes privileged in occasions where the author and the publisher had an interest or a legal, social or moral duty to the recipient and the recipient had a corresponding interest and duty to receive it.

In opposition to the second cluster of grounds on alleged proven malice, the respondent contended that none attachés to the questionnaire as it is the appellant who gave the go ahead to the prospective employer **Lonrho (K) Limited**, to seek the information from the respondents through the questionnaire, while fully aware of the circumstances under which he had been relieved of his employment with the 1st respondent, namely on account of making unsubstantiated allegations against his seniors the on hand, and on the other hand showing disrespect to his superiors. He was also guilty of insubordination and having strained relationship with his superiors, all of which were upheld by the court when it dismissed the appellant's claim for wrongful dismissal. It was also the respondents' argument that the information supplied by the respondents in the impugned questionnaire was by all means a true evaluation of the appellant's conduct and they therefore reiterate that there was no malice on the part of the respondents since all that they did was to fulfill their moral obligation towards **Lonrho Hotels (K) Ltd** as fellow employers and stakeholders in the hospitality industry, by responding to their request to fill the questionnaire on a former employee for their necessary action.

To buttress the above submissions, the respondents relied on *Phinehas Nyagah versus Gitobu Imanyara [2013] eKLR* for the proposition that, evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportional to the facts; and *Bedan Moses Kinyangu Mbae versus Robinson Njagi Gachogu [2007] eKLR* for the proposition that a presumption of privilege would arise where an appraisal report is written in the context of employment, from a senior manager of the employer relating to a junior manager and addressed to a recipient entitled to receive and have access to such information in the same capacity.

Turning to the third cluster of grounds, the respondents have urged us to find that the learned Judge fell in no error when he interfered with the trial courts' finding on liability and the attendant award of Kshs. 800,000.00 as general damages because first, the incident occurred between a limited number of persons. Second, there was no malice or recklessness involved in the manner in which the respondents' conducted themselves as the content of the questionnaire was confined to the 2nd respondent as the author on instructions of the 1st respondent as the former employer on the one hand and the prospective employer **Lonrho Hotel (K) Ltd** on the other hand.

To buttress the above submissions, the respondents relied on *Joseph Njogu Kamunge versus Charles Muriuki Gachari [2016] eKLR* for the holding, *inter alia*, that in assessing damages in an action for defamation, the court has to consider the particular circumstances of each case, the plaintiff's position and standing in society, the mode and extent of publication, the apology if offered and at what time of the proceedings such an apology was offered, the conduct of the defendant from the time when the libel was published upto to the time of the Judgment. Further, that in determining damages, the court is obligated to ensure that the sums awarded are fairly compensatory and commensurate to the nature of the injury occasioned to the reputation of the plaintiff and also appear realistic in the circumstance of the particular case.

Alternatively, and without prejudice to the above submission, relying on *Namalwa Christine Masinde versus National Bank of Kenya Ltd [2016] eKLR* where in the plaintiff who had been wrongly listed in the credit Reference Bureau as a loan defaulter and as a result could not obtain loan facilities from a

financial provider, submitted that even if we were to find that there was basis for the trial courts' holding that the impugned questionnaire was defamatory, which according to them (respondents) it was not, we should find that in terms of the holding in *Joseph Njogu Kamunge versus Charles Muriuki Gachari* (supra) the trial court went overboard in the exercise of its discretion in the discharge of its mandate to assess damages, when it arrived at the award reached and that the learned Judge was therefore entitled to interfere with the exercise of that discretion and revise the award downwards.

This is a second appeal. Our mandate is therefore restricted to considering matters of law only. See *Onyango & Another Vs. Luwayi [1986] KLR 513* wherein this Court held *inter alia* that:

“the Court of Appeal would not interfere with the findings of fact of the two lower courts unless it was clear that the magistrate and the Judge had so misapprehended the evidence or that their conclusions were based on incorrect bases.”

We have considered the record in the light of the rival submissions set out above and the constraints of the exercise of our mandate as a second appellate court. In our view, only two issues fall for our determination namely:-

- (1) whether the learned Judge misapprehended the evidence on the production of the questionnaire and therefore arrived at the wrong conclusion on the weight to be attached to that evidence.
- (2) whether the learned Judge fell into error when he reversed the trial courts assessment of the quantum of damages.

When the above identified issues are considered in the light of our mandate highlighted above, it is our view that issues of misapprehension of evidence and misapplication and or misapprehension of principles of law that guide the court when assessing quantum of damages are issues of law. We are therefore properly seized of the two issues.

With regard to the production of the questionnaire, it is common ground that the questionnaire was filled by the 2nd respondent on the instructions of the 1st respondent. It was accordingly forwarded to the prospective employer **Lonrho Hotels (K) Ltd.** The appellant accessed it and viewed the contents as defamatory hence the initiation of the litigation resulting in this appeal. At the trial, he tendered a copy as evidence in support of his averments in the plaint. The respondent unsuccessfully objected to the production of the said copy through the appellant, and no appeal was preferred against that overruling.

The respondents tendered no evidence in support of their defence, meaning that what the trial court had before it for purposes of evaluation, was the one sided evidence as laid before it by the appellant inclusive of the content of the questionnaire tendered through the appellant, and the respective parties competing pleadings. The trial court found the contents of the questionnaire filled by 2nd respondent defamatory. The first appellate court re-evaluated the said contents and found them not defamatory. The appellant has taken issue with the 1st appellate court findings on the ground among others that since the respondents never tendered the said questionnaire in support of their defence, there was no way the learned Judge could have used the contents of the same questionnaire to find in (respondents') favour as he (the Judge) did when he absolved them from any liability to the appellant in defamation.

As submitted by the respondents, the onus fell on the appellant to prove his case on a balance of probability, even if he were to proceed by way of formal proof had the respondents elected not to file even a defence. Further, that the learned Judge in the same vein as the trial court was entitled to act on the evidence on the record before him when determining whether the appellant had established his claim against the respondents on a balance of probability or not. We find nothing wrong with the respondents above submissions as these were well founded on the provisions of sections **107, 108** and **109** of the Evidence Act which specifically stipulate that he who asserts has the burden of proof. In the instant appeal, it is the appellant who asserted that the contents of the questionnaire were defamatory. He therefore had the burden of proof to prove that the contents of the questionnaire were indeed defamatory.

The observation made by the learned Judge on the questionnaire were that the contents of the questionnaire were published only once, and to the prospective employer, who was entitled to receive it after it was authored by the 2nd respondent on the instructions of the 1st respondent as the former employer of the appellant; that the former employer had an obligation and or a moral duty to give the information to the prospective employer, who in turn had amoral duty or obligation to receive it.

The learned Judge also considered principles of case law that guide the court on the determination of what does or does not amount to defamatory material as set out above. In the light of all the above, it is our finding that there was no evidence on the record of any misapprehension of either the evidence or the law that was allegedly committed by the Judge when reaching the conclusions reached, which conclusions in our view, were not only sound but also well founded on the content of the record as already explained above.

Turning to issue number 2, the principles of law that the learned Judge was enjoined to bear in mind when determining whether to interfere with the assessment of the quantum of damages by the trial court are well settled. In **Butt versus Khan [1982-88] 1KLR 1**, it was held *inter alia* that:-

“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.”

From the above assessment of the record, there is clear demonstration that the learned Judge took into consideration factors which in our view, were factors relevant to the appeal before him namely, that the publication was restricted to few persons; that the respondent had a moral duty to give that information to the prospective employer; that the prospective employer also had a moral obligation to receive that information. Likewise, the learned Judge also applied principles of law that guide the court on the assessment of damages in defamatory claims. He also took note of comparables which he highlighted on the record before arriving at the conclusion that the award made by the trial court was on the high side and therefore merited interference for its revision downwards. We also agree with the learned Judges’ findings that an award of damages in a defamatory claim is meant to compensate the injury suffered by the plaintiff to his reputation; that damages must be commensurate with that injury and that low publication of any defamatory material attracts damages on a lower scale, and also that publication was low and restricted and therefore warranted damages on a lower scale than that accorded by the trial court.

The upshot of all the above assessment and reasoning is that we find no merit in this appeal. It is accordingly dismissed.

Dated and Delivered at Nairobi this 16th Day of February, 2018.

E.M. GITHINJI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

H.M. OKWENGU

.....

JUDGE OF APPEAL

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

Deputy Registrar.