



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 156 OF 2017

BETWEEN

HONOURABLE MUSIKARI KOMBO.....APPELLANT

AND

ROYAL MEDIA SERVICES LIMITED.....RESPONDENT

(An appeal from the judgment of the High Court at Nairobi (Odunga, J.) dated 7th November, 2014

in

H.C.C.C No. 89 of 2011)

JUDGMENT OF THE COURT

1. The appeal herein relates to the decision of the High Court (Odunga, J.) wherein the **Hon. Musikari Kombo's** (the appellant) suit seeking damages for defamation against **Royal Media Services Limited** (the respondent) was dismissed. It is trite law that this Court as a first appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect. See ***Selle and Another vs. Associated Motor Boat Company Limited and others [1968] EA 123.***

2. The salient facts giving rise to this appeal are that on 2nd March, 2011 at around 7:00 p.m. the appellant received a telephone call from his daughter who was in tears. She drew his attention to the respondent's news programme known as 'Citizen Nipashie' which was at the time airing a story under the caption '***Kosgey in the Dock/Kombo's wife also charged over graft***'. In regard to that caption the presenter Janet Chapia uttered the following words in Kiswahili:-

“Na katika Mahakama nyingine ya kupambana na ufisadi, mkewe wa waziri wa zamani Musikari Kombo alishtakiwa kwa ufujaji wa zaidi wa shilingi milioni tisa. Elizabeth Kaloki Kombo aliyekuwa naibu wa mkurugenzi wa elimu, anadaiwa kujipatia kwa njia ya ulaghai shilingi milioni mbili nukta mbili huku shilingi milioni saba nukta sita akizitoa kwa mkurugenzi wa elimu kwa jina Onesmus Mutinda. Fedha hizo zinasemekana zilikiwa za kugaramia warsha kuhusu ugonjwa wa ukimwi katika chuo cha mafunzo ya ualimu cha Shanzu. Kombo alikanusha kutekeleza vitendo hivyo kati ya Aprili mwaka wa 2009 na mwezi wa Mei mwaka huo huo. Kesi hio itaskizwa tarehe tisa mwezi ujao.”

The English translation of those words as per the appellant were-

“And in another anti-corruption court today, the wife of a former Minister, Musikari Kombo was charged with fraudulently acquiring more than nine million shillings. Elizabeth Kaloki Kombo, who was an assistant director of education, is alleged to have requested for money purporting that it was needed to pay participants at an HIV/AIDS workshop held at Shanzu Teachers Training College in Mombasa. Kombo denied the charges that alleged that she committed the acts between April 2009 and May that year. The case will be heard on 9th next month.”

3. Troubled by that broadcast which he deemed as false, the appellant immediately called the respondent's office and spoke to Peter Opondo the then respondent's news editor, who assured him that he would look into his complaint. However, the appellant was dumbfounded when on the same evening at 9:00p.m. the respondent repeated the above story this time in its news programme known as 'Citizen at 9'. Giving highlights of the story, the respondent's news anchor, Michael Njenga stated:

“At the same time the wife of FORD Kenya Chairman and Nominated Member of Parliament Musikari Kombo, Elizabeth Kaloki, was charged with misappropriating over 9 Million Shillings in the course of her duty as an Assistant Director of Education.”

Expounding on the details thereof Hussein Mohammed also the respondent's newscaster said –

“Still from the courts, Nominated MP Musikari Kombo's wife Elizabeth Kaloki has been charged with fraudulently acquiring about 9 Million Shillings. While working as an Assistant Director of Education, she is alleged to have requested for money purporting that it was needed to pay participants at an HIV/AIDS workshop held at Shanzu Teachers Training College in Mombasa.

Elizabeth Kaloki Kombo is accused of acquiring 2.2 Million Shillings fraudulently while acquiring another 7 Million on behalf of a senior director of education, Onesmus Mutinda. She denied the charges. The alleged offences are said to have been committed between April and May 2009 with Lady Justice Nyambura ordering her to pay a 1 Million Shilling bond pending the hearing of the case on the 9th of April this year.”

4. The appellant took great exception to those broadcasts as he was convinced they were malicious. To begin with the lady mentioned in the broadcast, Elizabeth Kaloki Kombo was not his wife; his wife's name is Dorcas Florence Kombo who had never been charged with any criminal offence let alone held the position of Assistant Director of Education. As far as he was concerned, the innuendo in the offending broadcasts was that-

a. He was married to Elizabeth Kaloki Kombo.

b. He is an unfaithful husband and dishonest family man.

c. He is a dishonest person and is involved in a conspiracy to defraud the public of money.

d. He has committed or is involved in fraud against a public company through the instrumentality of his wife.

e. He engages in corruption and corrupt practices.

f. He is an evasive character who lives a life of hypocrisy.

g. He cannot be trusted to hold public office.

5. He was convinced that the foregoing was defamatory and lowered him in the estimation of right thinking members of society. No sooner were those programmes aired than he began receiving telephone calls from members of his family, acquaintances and political fraternity questioning him on the same. As a result, vide a letter dated 3rd March, 2011 the appellant demanded a retraction and an apology from the respondent. When none was forthcoming he filed suit seeking *inter alia* an unconditional apology and general damages from the respondent.

6. In its defence the respondent denied publishing the alleged defamatory words. It maintained that even if the words complained of were broadcasted they were not capable of bearing the meaning alluded to by the appellant. In the alternative, the respondent averred that if the words were broadcasted about the appellant it was done in good faith and in public interest thus raising the defence of qualified privilege.

7. At the trial, the appellant gave particulars of his credentials. He was then a nominated Member of Parliament, he had served in the government in various ministerial levels and most importantly he was a crusader against corruption. He went as far as introducing a motion which saw the formation of a committee which came up with a list of names of public officials who were perceived as corrupt popularly known as the '*list of shame.*' He was a member of that very committee which also spearheaded the enactment of the then ***Ethics and Anti-Corruption Act***. The newscasts affected his reputation both nationally and internationally. In point of fact at that time he had just applied for an America Visa to travel to Mexico for the Global Organization of Parliamentarians Against Corruption (GOPAC) conference wherein he was a member of the Executive Board. Immediately after the broadcasts he was called to the American Embassy and questioned on the same. Despite being granted the visa he was still put to task over the broadcasts at the conference.

8. The respondent, through its witness Janet Chapia, admitted to airing the programmes. Janet testified that on the material day she was at the Anti-Corruption Court when a lady by the name Elizabeth Kaloki Kombo was charged. While other journalists were taking photos of her the court orderlies ordered them to stop and stated '***Wacheni Kupiga bibi ya mheshimwa picha***' which translated in English meant '***stop taking photographs of the Honourable Member's wife.***' It was pursuant to those utterances that Janet together with other journalists came to the conclusion that it was the appellant's wife. She also stated that following the appellant's complaint it was established that there was a mistake and that the lady was not the appellant's wife. Her then boss, Peter Opondo, indicated that they would offer an apology to the appellant.

9. Upon weighing the judgment dated 7th evidence before him the learned Judge (Odunga, J.) in a November, 2014 dismissed the appellant's suit for the reason that it did not disclose a cause of action against the respondent. In holding so, he expressed in his own words-

“My understanding of the foregoing is that a relative of a person cannot, as a general rule, successfully sustain a claim in defamation unless the publication of the defamatory material also necessarily imputes that the claimant is in some way connected to the defamatory matter. Therefore, Gatley on Libel and Slander is clear that even where the person defamed is said to keep a brothel, it is only the spouse who lives or resides with him who can sustain an action in defamation. Whereas, it is true that people who are related to a defamed person may have their reputation affected by that fact, it would in my view amount to overstretching the tort of defamation to permit all the people related to the defamed person to successfully maintain an action for defamation. They can only do so where the publication is meant to impute that the claimant is in some way connected to the defamatory matter in question such as by contributing to it and not by the mere fact that he/she is related to the person defamed. Where for example it is published that a person is a brothel keeper, the imputation would be that the spouse living with him is a prostitute and that would reflect directly on the reputation of the claimant/spouse.

...

Clearly this was not a case where there was any imputation on the reputation of the plaintiff. Whereas certain people may have arrived at the conclusion that the plaintiff, a crusader against corruption was not after all without blemish based on the alleged conduct of his wife, that alone in my view would not meet the threshold of the defamation in order to attach liability on the Defendant for injury caused to the plaintiff. As stated hereinabove, defamation is not about publication of falsehoods against a person hence it is necessary to show that the published falsehood disparaged the reputation of the plaintiff or tended to lower the person in the estimation of right thinking members of society generally. Therefore an injurious falsehood, though actionable may not necessarily be an attack on the plaintiff's reputation so as to elevate it to the tort of defamation. To do so would in my view open floodgates for other members of the family and relatives of the defamed person to similarly lodge claims for damages in respect of the same defamation.”

10. It is that decision that is the subject of the appeal before us which is against the learned Judge's finding on the respondent's liability. The appellant complains that the learned Judge erred in law and fact in-

i. Finding that the offending publication was not defamatory to the appellant.

ii. Framing and determining an issue not pleaded in the defence filed by the respondent.

iii. Framing an issue for determination on the basis of admitted facts.

iv. Solely relying on common law on the issue of defamation as set out in Gatley on Libel and Slander 11th Edition.

v. Dismissing the appellant's claim on liability when in fact there was an admission by the respondent both formally and in the testimony of Janet Chapia.

11. Mr. Saluny, learned counsel for the appellant, faulted the learned Judge for finding that the appellant was not defamed despite the respondent admitting the same. This admission was evidenced firstly in its own statement of defence; secondly, Janet testified that she had been informed of the appellant's complaint and the respondent's intention to offer an apology by her boss, Peter Opondo. Thirdly, the respondent's letter dated 17th March, 2012 to the appellant's advocate inquiring on the format the intended apology should take. According to him, based on that admission the learned Judge erred in framing the same as an issue for determination.

12. Nonetheless, the appellant had established that the defamatory material referred to him. By way of illustration it was submitted that where an offending article refers to a limited group each member could bring an action for defamation as long as they demonstrate that a reasonable man is likely to understand that the material refers to the claimant. This case was no different since the offending words referred to both the appellant and his wife thus they were both entitled to sue. It was urged that the learned Judge misapprehended that the appellant was seeking to benefit from the injury suffered by his wife on account of the defamatory words. Rather the appellant sought relief for the damage he had suffered as a result of the inclusion of his name in the offending article. In addition, the respondent's witness, Janet confirmed that the use of the appellant's name was used to catch the attention of many people.

13. Furthermore, the offending broadcasts imputed he was polygamous by naming the wrong person as his wife. Making reference to this Court's decision in ***Radio Africa Ltd & Another vs. Nicholas Sumba & Another [2015] eKLR*** it was contended that the appellant had proved that the respondent's actions were motivated by malice. This is simply because after he registered his complaint the respondent still went ahead to run the offending broadcast once again at 9:00 p.m. On those grounds the Court was urged to allow the appeal.

14. Ms. Kamau, learned counsel for the respondent, submitted that in a claim for defamation a plaintiff ought to establish that the offending statement is defamatory to him/her as explained in ***Gatley on Libel and Slander 10th Edition*** at page 8:-

“There is no wholly satisfactory definition of defamatory imputation. Three formulae have been particularly influential: (1) would the imputation tend to ‘lower the plaintiff in the estimation of right-thinking members of society generally?’ (2) would the imputation tend to cause others to shun or avoid the claimant? (3) would the words tend to expose the claimant to ‘hatred’ contempt or ridicule? The question what is defamation relates to the nature of the statement made by the defendant: words may

be defamatory even if they are believed by no one and even if they are true, though in the latter case they are not, of course, actionable.”

In her view, the appellant had failed to prove that the offending words were made concerning him and had the effect of lowering his standing in the estimation of right thinking members. Referring to ***Registered Trustees of the Sisters of Mercy v/a Mater Misericordiae Hospital vs. Jacinta W. Maina & Another [2014] eKLR*** she added that the only evidence tendered on behalf of the appellant was that of his wife and daughter which was not sufficient. Independent evidence was required to prove defamation in the eyes of third parties. Be that as it may, the respondent had issued an apology for the mistake.

15. She argued that it was clear that the offending words were published concerning the appellant's wife and not him. The general rule as to who can sue in a claim of defamation was succinctly discussed in ***Gatley & Lindsell on Slander and Libel (supra)*** at page 197:-

“An action for defamation is a purely personal action. The proper person to sue as a claimant is the person defamed, and the proper person to be sued as defendant is the person who published the defamatory words or caused them to be published (though this may include a person vicariously liable for another). A cannot bring an action of libel or slander against B for words defamatory of C, even though C has purported to assign to him his right of action; a right for damages for libel or slander cannot be assigned. If A suffers damages as a result of a defamatory statement maliciously made about C, who is associated with A's business, A may have an action for malicious falsehood, but that is not the same thing as an action for defamation.”

Therefore, the learned Judge rightly found that the appellant had no cause of action against the respondent. The respondent also relied on ***Carter- Ruck on Libel and Slander, 5th Edition*** page 78.

16. Moreover, the intention of the respondent's journalist was to report on the public interest issue pertaining to corruption. For that reason the defence of qualified privilege was available to the respondent. Besides, the appellant being a public figure ought to expect unflattering statements made about him since it came with the territory.

17. Lastly, it was submitted that a court is empowered under ***Order 15 Rule 2*** of the ***Civil Procedure Rules*** to frame issues for determination from allegations made on oath by parties, allegations in the pleadings and the contents of documents produced by either party. In this case the learned Judge was guided by those provisions in framing issues for determination. As it stood the learned Judge did not err in framing the issues as he did.

18. We have considered the record, submissions made on behalf of the parties and the law. We understand the appellant's argument concerning the issues framed to be that the learned Judge erred in formulating them as he did especially with regard to whether he had a cause of action against the respondent. According to the appellant, the respondent had already admitted liability. This Court in ***Abok James Odera T/A A.J Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR*** expressed -

“With regard to the alleged appellants admission of the respondents entire claim in HCCC No. 183 of 1998, we wish to refer to the case of Choitram versus Nazari (1984) KLR 32), which has laid down the parameters of what does or does not amount to an admission. In a summary, an admission must be premised on the provisions of order XII rule 6 Civil Procedure Rules as it was then (now order 13 rule 2); that the pleadings presented by a party against whom the relief is sought must be those that do not contain specific denials and no definite refusals to admit allegations; demonstration that there are allegations of facts made by one party and not traversed by the other which are deemed to be admitted; demonstration that there has been implied admission of facts inferred from pleadings in instances where the defendant has specifically failed to deal with allegations of fact in the plaint, the truth of which he does not admit or instances where a defendant has evasively denied an allegation in the plaint; demonstration that there is admission of facts discerned from correspondences or documents which are admitted or that there is an oral admission as the rules use the words “or otherwise.”

Further, this Court in ***Tea Board of Kenya vs. Gideon Asirigwa Mbagaya [2015] eKLR*** observed that-

“Our analysis and understanding of the previous decisions by this court in Herta Elizabeth Charlotte Nazari (supra) is that the learned Judge was expected to analyze the entire pleadings before her and not just portions of any one of them in isolation. There must be a purposive application of the pleadings in order to infer an admission as to enable the court act on it.”

19. Applying the above parameters or ingredients to the case at hand we are satisfied that the respondent had not admitted the appellant's claim. It is crystalclear from its statement of defence that the respondent denied the allegations of defamation. In the alternative, it pleaded that if indeed the offending words were aired concerning the appellant it was not in bad faith. To us this cannot amount to an admission which would have justified the entry of judgment on liability without the benefit of evidence being adduced.

20. The law of defamation is concerned with the protection of a person's reputation. Patrick O'Callaghan in the ***Common Law Series: The Law of Tort at paragraph 25.1*** expressed himself in the following manner:

“The law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation: 'As a general rule, English law gives effect to the ninth commandment that a man shall not speak evil falsely of his neighbour. It supplies a temporal sanction ...' 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 to his discredit' and it affords redress against those who speak such defamatory falsehoods...”

It follows that a claimant in a defamation suit ought to principally establish in no particular order:

- i. The existence of a defamatory statement;
- ii. The defendant has published or caused the publication of the defamatory statement;
- iii. The publication refers to the claimant.

See this Court's decision in *Nation Media Group & Another vs. Hon. Chirau Mwakwere –Civil Appeal No. 224 of 2010 (unreported)*.

21. It is not in dispute that the broadcasts in question were aired by the respondent as pleaded. What is in issue is whether the offending words in those broadcasts were concerning the appellant. We agree with the learned Judge that the general rule as to who can sue in a claim for defamation is that it is the person against who the defamatory words have been published. This much was appreciated by *Lord Atkin in Knapffer vs. London Express Newspaper Ltd. [1944] 1 ALL ER 495* thus:-

“The only relevant rule is that in order to be actionable the defamatory words must be understood to be published of and concerning the plaintiff.”

Similarly, there is no cause of action, for instance, if the words are defamatory of the claimant's relatives, unless they reflect on the claimant. See *Gatley on Libel and Slander Eleventh Edition para 7.1*.

22. We also agree that the offending words referred to the appellant's wife who we were informed filed a separate claim and succeeded. However, we unlike the learned Judge, find that the broadcasts were also concerning the appellant to a certain extent. We say so because his name and his status were clearly mentioned in both broadcasts. The respondent's witness, Janet was categorical that the use of the appellant's name was to sensationalize the story and attract a wide audience. Therefore, unlike the learned Judge, we are not persuaded that the appellant's cause of action was based purely on his relationship to his wife. In our opinion, the appellant was entitled to file suit on his own right because the broadcasts referred to him and more importantly the woman named therein was not his wife.

23. The next issue that falls for consideration is whether the statements or words used therein were defamatory as against the appellant? As succinctly put by this Court in *S M W vs. Z W M [2015] eKLR:-*

“A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided.”

24. The test for whether a statement is defamatory is an objective one. It is not dependent on the intention of the publisher but on what a reasonable person reading the statement would perceive. In *Halsbury's Laws of England 4th Edition Vol. 28 at page 23* the authors opined:

“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.”

25. Looking at the broadcasts in question the ordinary meaning of the words uttered therein is that the appellant was polygamous and his wife was involved in corruption. In our view, the appellant tendered uncontroverted evidence of how that story affected him and his family who received inquiries on the issue far and wide. In light of the foregoing coupled with the appellant's political standing, the defamatory nature of the broadcasts are quite clear.

26. Was the defence of qualified privilege available to the respondent? The essence of this defence is an attempt to balance two competing but vital interests in society; the individual's right to have their character and reputation protected and safeguarded from false, unwarranted and malicious or scurrilous attacks on the one hand, and the public's right to know as exercised and fed by freedom of expression, which is an indispensable feature of a free and democratic society as well as a major tool for public accountability. See *Kagwiria Mutwiri Kioga & another vs. Standard Limited & 3 others [2015] eKLR*. The defence is entrenched under *Section 7* of the *Defamation Act*.

27. In *Reynolds vs. Times Newspapers [1999] 4 ALL ER 609* the House of Lords went on further to set out a criteria for determining whether a publication is subject to qualified privileged as herein under:

“Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only. (1) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. (2) The nature of the information, and the extent to which the subject matter is a matter of public concern. (3) The source of the information. Some informants have direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. (4) The steps taken to verify the information. (5) The status of the information. The allegation may already have been the subject of an investigation which commands respect. (6) The urgency of the matter. News is often a perishable commodity. (7) Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed..(8) Whether the article contained the gist of the plaintiff's side of the story. (9) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. (10) The circumstances of the publication including the timing.”

28. In as much as we agree with the respondent's contention that the issue of corruption involving public figures is a public interest issue we do not think it was in public interest for the respondent to set out the offending description which associated the appellant with the story and the woman named therein. Besides, Janet in her evidence stated that she did not verify whether the accused woman was the appellant's wife. She simply stated that she drew an inference from the court orderlies' utterances that she was the appellant's wife.

We find that there was no basis for such an inference since she also testified that the said orderlies did not mention the name of the 'mheshimiwa' they alluded to. The reporter having not confined herself to what transpired in the court room cannot justifiably claim that she lacked malice. Additionally, it was the appellant's uncontroverted evidence that after the first broadcast he called the respondent and registered his grievance. It is not clear why the respondent ran the story again at 9:00 p.m. without verifying the complaint. All of these we believe opened the respondent up to the imputation of malice against the appellant, hence the defence of qualified privilege was not applicable.

29. Ultimately, it was the respondent's contention that it had issued an apology the following day at 7:00 a.m. in its programme known as the 'Breakfast Show'. It is clear that the said apology did not receive the same magnitude of coverage as the offending broadcasts which were aired at prime time. Both the appellant's witnesses as well as the respondent's own witness acknowledged that not many people watch that early morning programme. Consequently, we find that the apology was not adequate in the circumstances.

30. We think we have said enough to demonstrate that the learned Judge erred in finding that the appellant had no cause of action. Accordingly, we set aside the impugned judgment to that extent and find that the appellant had established his claim on defamation as against the respondent. As to the quantum of damages we find no reason to interfere with the learned Judge's assessment of the same in the sum of Kshs.6,000,000. We hereby confirm that award of damages in favour of the appellant. For purposes of clarity, the damages awarded were:-

a)	General	damages	Kshs.5,000,000
b)	Aggravated	damages	Kshs.1,000,000
Total	Kshs.6,000,000		

31. Accordingly, the appeal herein has merit and is hereby allowed with costs to the appellant. The appellant shall also have costs of the High Court suit.

Dated and delivered at Nairobi this 9th day of February, 2018.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR