



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), WARSAME & ODEK, JJ.A)

CIVIL APPEAL NO. 130 OF 2013

BETWEEN

NATION MEDIA GROUP.....APPELLANT

AND

HON. JAKAYO MIDIWO.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (A. Aroni, J.) dated 23rd day of October, 2009

in

H.C.C.C. No.381 of 2004)

JUDGMENT OF THE COURT

In defamation cases, the court balances between the individual rights and fundamental freedoms of the people guaranteed by the Constitution on the one hand, to a free media and access to information, and on the other hand, the freedom of expression and the individual's right to access to information. This balance was recognized as long ago as 1891 in the oft-cited case of **Bernard & Another V Perriman** (1891-4) ALL E.R 965 where Lord Coleridge, CJ said;

“The right of speech is one which it is for the public interest that individuals should possess, and indeed, that they should exercise without impediment, so long as no wrongful act is done; and unless an alleged libel is untrue there is no wrong committed.”

That was the balance the court below was invited to strike when the respondent, a former Member of Parliament, alleged that the appellant had published during the 9pm news on its television network, the following words regarding the respondent;

“..... Gem Member of Parliament Jakoyo Midiwo in a bar brawl with patrons.

Valentine's Day started on a rather disturbing note for Gem Member of Parliament, Jakoyo Midiwo. He was arrested along with 2 of his body guards last night and their guns confiscated, they were later set free ... trouble started at 10.00p.m. when the legislator entered the bar in the company of the guard, his driver and a lady when immediately upon being spotted by a group of drunk revelers shouts of Koinange Street, K Street rent the air as the Legislator settled down for a drink..”

The respondent instituted an action in which he contended that the broadcast injured his person, character as a family man, in his office and calling as a Member of Parliament for Gem Constituency; that it was actuated by malice on the part of the appellant; that as a result of the publication he was brought to hatred, ridicule, scandal, odium and contempt, exposed to considerable stress and embarrassment in the face of his family, members of the public, fellow Members of Parliament, his constituents and those who look up to him as a respectable member of the society.

The respondent explained that he understood the words in question in their natural and ordinary usage to mean that;

“(a) he had in his company a woman.

- (b) the woman was not his wife.**
- (c) the woman must have been a prostitute.**
- (d) the drunk revelers must have known the woman's identity.**
- (e) the drunk revelers started shouting Koinange Street, K. Street because the Plaintiff was in the company of a prostitute.**
- (f) he had planned to spend valentine day with the said woman and not his wife.**
- (g) he is shameless enough to appear even in public with women of questionable characters such as prostitutes.**
- (i) he is a philanderer who engages in questionable nocturnal activities.**
- (j) he is guilty of adultery as he is a married man.**
- (k) he is guilty of professional misconduct in which case he is unfit to hold the public position he holds as member of Parliament in the Society.**
- (l) he is guilty of loose morals as to engage in solicitation of sex from Prostitutes.**
- (m) he is guilty of aiding and abetting the Commission of Criminal Offences punishable under the penal code by imprisonment for which he should be punished.**
- (n) he is not fit and proper person to be elected as a member of parliament.**
- (o) he is not a fit and proper person to continue to serve as a member of parliament.**
- (p) he is an immense contributor to the promotion of sex trade.**
- (q) he engages in violence when people question his moral turpitude.**
- (r) he is not a role model for all the people at National and Constituency level.”**

The respondent gave evidence in support of the complaint and called one witness, while the appellant did not call any evidence. Thereafter, the parties made extensive submissions before the trial court.

The appellant, for its part, admitted the publication and broadcast but denied the meaning of the words ascribed to them by the respondent. It maintained that the words and accompanying images were true in substance; that the words consisted of expression of opinion and fair comment; and that they were published without malice.

Noting that the appellant did not call any evidence in rebuttal of the respondent's case, and relying on the provisions of **sections 107 and 108** of the Evidence Act as well as on the case of **Edward Mariga V Nathaniel David Schalter and Anor**, Civil Appeal No. 23 of 1997, the learned trial Judge found that the words complained of were defamatory and entered judgment in favour of the respondent. The court accordingly awarded a sum of Kshs. 5,000,000 in damages to the respondent guided by the checklist of compensable factors in the case of **John Evan Gicheru V Andrew Morton**, Civil Appeal No. 314 of 2000. The court took into account the status of the respondent, circumstances surrounding the case including the element of aggravation.

The appellant now brings this appeal to challenge that decision on five (5) grounds contending that the learned Judge erred; in finding that the publication complained of was defamatory of the respondent; by failing to distinguish between *innuendo* and the ordinary meaning of the words in the publication complained of and failing to consider the legal implications thereof; by failing to consider that no *innuendo* meaning of the words complained of was pleaded; in awarding aggravated damages in the circumstances of this case; and in misdirecting herself in the assessment and consequent award of damages that were inordinately high in the circumstances.

These grounds have been condensed in the appellant's written submissions into two: failing to distinguish *innuendo* from the ordinary and natural meaning of the words in the publication; and secondly whether the award of damages was excessive in the circumstances of the case.

On the first issue, it was the appellant's submission that the learned Judge did not take into consideration that the appellant's publication was based on actual events that happened on 13th February, 2004, and as such the appellant was not driven by malice; and that the evidence given by PW2, Mr. Charles Billy Oduor, indicated that there was a commotion between the respondent and a group of rowdy youth who were eventually thrown out by the hotel's security. This fact was also corroborated by the respondent when he reported the incident at the police station; and that indeed the fact of some commotion was admitted by the respondent.

The appellant urged us to find that there was in fact evidence of commotion, brawl, fight, quarrel or altercation; that it was out of this event, that the appellant made the publication in question; and that the appellant published a story honestly believing it to be a fair and true account of events that actually took place.

The appellant disagrees with the natural and ordinary meaning assigned to the words by the respondent and instead maintains that no *innuendo* meaning was pleaded and no extrinsic facts as would give rise to that meaning were equally pleaded. The appellant insisted that the eighteen (18) meanings ascribed by the respondent in the plaint were incorrect; that the article did not use the word “prostitute”; that the word “lady” used in its ordinary and natural meaning is a form of a title or a respectable or distinguishable woman which does not include a prostitute; and further that the lady was not described as being in a relationship with the respondent. In the result, the appellant has submitted that the respondent was not entitled to ascribe to the words any other meaning than the ordinary and natural meaning.

On damages, the appellant erroneously submitted and relied on **Sutcliffe V Pressadram Ltd** (1990) 1 AER and **Wangethi Mwangi & Anor V J.P Machira Co. & Advocates**, Civil Appeal No. 143 of 2003, on the question of aggravated damages yet no such award was made by the learned Judge.

The only relevant part of the submissions in respect of damages is the argument that it would be a mitigating factor that the respondent recovered damages in the sum of Kshs. 3,000,000 in HCCC No. 380 of 2004, **Hon. Jakoyo Midiwo V Kenya Times Media Trust Ltd** in respect of a publication which had similar effect as this one and on which this action was founded; that the learned Judge ought to have taken this into consideration in view of **section 16(2)** of the Defamation Act.

The respondent in opposing the appeal agreed with the learned Judge’s consideration of the import of **sections 107 and 108** of the Evidence Act and as enunciated in the case of **Edward Mariga V Nathaniel David Schulter** (supra). On the authority of **Vizetell V Mudies Select Limited** (1900) 1 QB 170, the respondent argued that the fact of publication of false and defamatory matter concerning a person was itself evidence of malice and that a man must be taken to intend the natural consequences of his own act in publishing the libel.

The respondent further argued that the appellant specifically named him; the publication was false as he was not at the Mamba Hotel with a lady on Valentine’s day (14th February 2004); was not involved in a brawl with patrons; was not arrested alongside two of his bodyguards; and that his guns were never confiscated. That, to allege that he went to Mamba Hotel at 10pm on Valentine’s Day in the company of a lady was to suggest he was engaged in sexual impropriety as a married man; that, to assert that he was engaged in a brawl in a public place where alcohol is consumed being a public figure was to demean his position in the society; and that the respondent went against **Article 1** of the **Code of Conduct & Practice of Journalism** which calls for accuracy and fairness of reporting and **Article 9** on obscenity, taste and tone in reporting.

Legal *innuendo*, according to the respondent, did not arise from the pleadings before the trial court as the impugned words were plain and were equally capable of bearing the meanings attributed to them by the respondent.

Finally, the respondent submitted that the trial Judge took into consideration relevant factors and arrived at the correct quantum damages.

This is a first appeal and the duty of this Court is well established. It must reconsider the evidence on record, evaluate it and draw its own independent conclusion, but bearing in mind that it has neither seen nor heard the witness and further that, it is not bound to follow the trial Judge’s findings of fact. See **Selle V. Associated Motor Boat Company Ltd** (1968) EA 123, 126. The logical corollary of this principle is that this Court may only interfere with the exercise of discretion of the trial judge, if it is satisfied that the judge misdirected himself and as a result arrived at a wrong decision, or that he was clearly wrong in the exercise of his discretion and that as a result there has been misjustice. See: **Mbogo & Another V Shah** (1968) EA 93.

We once again underscore the necessity of accurate reporting. Indeed, under both the **Defamation Act** and the **Code of Conduct for the Practice of Journalism in Kenya**, accuracy and fairness are emphasized.

On the other hand, evidence is the cornerstone of any trial. Cases are won or lost on evidence presented and the applicable laws. That is why a whole statute was enacted, the Evidence Act, to provide for both the standard and burden of proof in a trial.

Sections 107 and 108 of that Act respectively provide as follows:

“107.(1)Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2)When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.

Section 108 on the other hand states;

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

The burden was on the respondent to prove, on a preponderance of evidence that these words below were defamatory of him;

“..... Gem Member of Parliament Jakoyo Midiwo in a bar brawl with patrons.

Valentines Day started on a rather disturbing note for Gem Member of Parliament, Jakoyo Midiwo. He was arrested along with 2 of his body guards last night and their guns confiscated, they were later set free ... trouble started at 10.00p.m. when the legislator entered the bar in the company of the guard, his driver and a lady when immediately upon being spotted by a group of drunk revelers shouts of Koinange Street, K Street rent the air as the Legislator settled down for a drink..”

Did those words convey the meaning that the woman in whose company the respondent was said to be not his wife; was a prostitute; that he had planned to spend the Valentine's night with her; that he was shameless to appear in public with such a woman; that he is a philanderer who engaged in questionable nocturnal activities; and was what happened not a brawl?

As noted by this Court (Kneller, Hancox, as he then was JJA & Nyarangi Ag JA, as he then was) in Nation Newspapers Limited V Lydia Chesire [1984] eKLR, an action for libel by *innuendo* depends for its success on the proof by the plaintiff that special circumstances, or extrinsic facts, are known to persons who read the offending publications.

It is common factor that the respondent was, at the time under consideration a Member of Parliament for Gem Constituency. It was equally conceded that on the night in question he was at Mamba Hotel in the company of his bodyguards and that there was some confrontation arising from some four rowdy men. It was on the night of Valentine's Day.

The part of the report that appear to have aggrieved the respondent was that he was involved in a "bar brawl" with patrons, and that;

"...trouble started at 10.00p.m. when the legislator entered the bar in the company of the guard, his driver and a lady when immediately upon being spotted by a group of drunk revelers shouts of Koinange Street, K Street rent the air as the Legislator settled down for a drink.."

In his own evidence, the appellant denied that there was brawl or that he was in the company of any woman. He denied that what happened was a brawl. He however confirmed having arrived at Mamba Hotel in Kisumu from Nairobi at around 10p.m. in the company of 6 other men for a meal; that no sooner had he settled down, than three men who appeared drunk started talking aloud questioning what type of an MP he was, as he could not buy them alcohol; that they asked him to go back to Koinange Street; and that the men continued shouting to the irritation of the other patrons. When things got worse, the Hotel security and the appellant's body guards forcibly removed the trouble - makers from the hotel. But even as the respondent went to report the matter to the Police one of those people followed him.

This account received support from the evidence of PW2, Mr. Charles Billy Oduor, the Manager at Mamba Hotel, who confirmed that there was noise, exchange of words and shouts of "Koinange Street".

The question for us to determine is whether the words printed and/or published by the appellant were defamatory; whether a reasonable bystander reading these words or faced with such circumstances would conclude that the character, person, office and standing of the respondent was defamed; and whether the publication was actuated by malice.

First the incident took place at the place it is reported it took place at Mamba Hotel in Kisumu as reported. Secondly, according to the Oxford English Dictionary a "brawl" is a fight or quarrel in a rough or noisy way. This was a brawl which was admitted by the respondent and clearly corroborated by PW2. That is what took place at Mamba Hotel on the night in question, going by the evidence presented at the trial. In his evidence, the respondent stated that, because of the commotion, 8 to 9 people were involved in ejecting the men who confronted him; that the men were hooligans and drunk; that, "the incident was fairly serious that is why I reported to the police station....there was commotion"; that he told the police that he was in danger and would have been harmed. In view of this evidence nothing turns on the complaint that what took place was no brawl. It is also a matter of fact that those who confronted the respondent were shouting "Koinange, Koinange Street or K Street".

The respondent's major complaint was that by the appellant reporting that he was in the company of a lady, the insinuation was that the lady was not his wife; was a prostitute; that he had planned to spend the Valentine's night with her; that he was shameless to appear in public with such a woman; that he is a philanderer who engaged in questionable nocturnal activities; that he was guilty of adultery and of professional misconduct and therefore unfit to hold the public position he held as Member of Parliament.

It is absurd to claim that by making reference to his companion as a "lady" the respondent was insinuating that he was with a prostitute. The term lady has for decades been used to mean a woman of superior social position; a woman of refined manners; a term used in a courteous reference to a decent woman. The respondent's interpretation of the word was a stretched connotation out of its natural and ordinary meaning. The respondent complained that;

"The Nation meant that since I was not with my wife I was with a lady, therefore she was a prostitute....that I started my Valentine's Day on 13th at Mamba with my lady friend"

With utmost respect, the meaning and interpretation given to the word 'lady' is out of place and context. In our view, the respondent supported extraneous matters into a plain and ordinary word and gave it, his own meaning and interpretation. We think, with profound respect to the trial learned Judge, the meaning and interpretation of the words complained of were overstretched. In the report in question, where was it suggested that the lady was not the respondent's wife, or was a prostitute? Those were words from the respondent's own mouth. By referring to the lady as a 'prostitute' the respondent was unfair to himself and to the appellant.

We have said and reiterate that the respondent, at the time of the report was a Member of Parliament, a national leader and a public figure who was subject to public scrutiny on higher plane or limits than ordinary persons. This test was illustrated by the European Court of Human Rights in the case of Lingens V Austria, judgment of 8th July 1986 Series A No.103 pp 2-23 paras 26-30 when it stated that;

"... The limits of acceptable criticisms are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10(2) enables the reputation of others – that is to say of all individuals – to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection

have to be weighed in relation to the interests of open discussion of political issues.”

Both the Defamation Act and the Code of Conduct for the Practice of Journalism in Kenya emphasize accuracy and fairness in reporting; without malice and without gross negligence. Therefore, in a suit founded on defamation, the plaintiff must, among other elements, prove that the defamatory article was published maliciously. See: **Wycliffe A. Swanya V Toyota East Africa Limited & Another** (2009) eKLR. On the other hand, the maker of a statement will be protected if he might have honestly and with reasonable ground believed that what he wrote or said was true and necessary for the purpose of his vindication, though in fact it was not so. No evidence of malice or negligence was presented. See: **Williamson Diamonds Ltd V Brown** (1970) EA 1. This is buttressed by the provisions of **section 14** of the Defamation Act which states that:

“In any action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the reputation of the plaintiff having regard to the truth of the remaining charges”.

Section 15 further provides as follows;

“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”.

What the appellant published was truthful and that the words in their ordinary meaning did not defame the respondent.

We agree with Lord Denning MR when he stated in **Fraser V. Evans & others** (1969) All ER 6 that:

“There are some things which are of such public concern that newspapers, the press and indeed everyone is entitled to make known the truth and to make their comment in it. This is an integral part of the right of speech and expression. It must not be whistled away.”

We also adopt the following passage by Peter Carter in **Rucks Treatise on Libel and Slander**, it is stated as follows:

“To state accurately and clearly what a man has done and then to express an opinion is comment which cannot do any harm or work injustice. For the defence of fair comment to succeed it must be proved that the subject matter of the comment is a matter of legitimate public interest; that the facts upon which the comment is based are true and that the comment is fair in the sense that it is relevant to the facts and in the sense that it is expressed of the honest opinion of the writer. A writer is not entitled to overstep those limits and impute sordid motives not warranted by the facts.”

There can be no doubt from what we have said that the learned Judge erred in basing her decision merely on the ground that the appellant did not present any evidence. It was for the respondent to prove his claim on a balance of probabilities. That burden did not depend on the appellant’s case.

Accordingly, we allow this appeal, set aside the judgment rendered in favour of the respondent by the court below and in its place substitute an order dismissing the respondent’s action.

Parties to bear their own costs, both in this appeal and in the High Court.

Dated and delivered at Nairobi this 27th Day of July, 2018.

W. OUKO, (P)

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

OTIENO – ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR