



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), NAMBUYE & MAKHANDIA, J.J.A)

CIVIL APPEAL NO. 110 OF 2008

BETWEEN

WACHIRA WARURU.....1ST APPELLANT

THE STANDARD LIMITED.....2ND APPELLANT

AND

MARGARET WACHIRA.....1ST RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi (J. L.A Osiemo, J.) dated 19th October, 2007

in

HCCC No. 579 OF 2001)

JUDGMENT OF THE COURT

For reasons that include recusals by Judges, withdrawal by counsel from acting for a party and death of counsel explain why this appeal, filed way back in 2008 is being determined nine (9) years later. For that delay, we unreservedly apologize.

The action was instituted by the respondent, a judicial officer, who, at the time material to this appeal, was holding the rank of Principal Magistrate at the Milimani Court, Nairobi. Her complaint was that on 24th November 2000, the appellants published an article in the East African Standard entitled "Businessman aged 60 is guilty of sex assault." The respondent also published follow up articles in the publications of 25th and 26th November 2000, headed "Angry reaction to sex assault, racism ruling" ; "Inadequate Justice for Minor Abused" and "Women demand racist sex offender be tried." The articles related to an unfortunate incident where J.O, a female minor, in the company of her father went to Premier Club for swimming. J.O was in the female changing room undressing when one R.V Patel, the secretary of the club (Patel) stormed in the room, grabbed her by the hand and forcefully ejected her out of the room claiming that Africans were not permitted in the place. In the process of ejection the minor sustained bruises on her arm.

Through her father, as the next friend, she filed Civil Suit PMCC No. 6235 of 1993, John Willice Opot V R. V. Patel, for general damages. The respondent heard the case and awarded J.O a sum on Kshs.50,000 as general damages with costs and interest. There was an outrage following this determination. It was in that context that the articles complained about were published. Offended by these publications, the respondent instituted an action for defamation against the appellants claiming general and aggravated damages and costs. She contended that by reason of the publications, she was gravely injured in her reputation, credit, office, occupation, calling and character; and that she had been exposed to public and countrywide ridicule, contempt, odium and scandal.

While the appellants admitted having published the articles, they denied doing so maliciously and maintained, instead that the publication amounted to fair comment on matters of public interest and absolute privilege; that a minor was assaulted by a 60 year old businessman; that there was an element of racial discrimination against a minor; that the publication highlighted the plight of the girl-child in the society; and that it was the duty of a journalist to bring to light and publish comments and reactions of the general public on such issues which are of great interest and importance. After considering the evidence before him, the learned Judge (Osiemo, J) was satisfied that the respondent's professional integrity had been seriously undermined by the adverse publication. In dismissing the defence of justification, he concluded as follows:

“The Plaintiff has demonstrated that all that was reported concerning her and her profession was palpably false. The court proceedings were very clear that the claim was based on simple assault and not sexual assault and the Defendant did not care or failed to inquire into the true facts which is a fact from which inference of malice may properly be drawn. See GODWIN WACHIRA VS. OKOTH [1977] KLR 24.

The Defendant did not avail of the opportunity (sic) to appear at the trial to establish the plea of justification or privilege and therefore the plaintiff’s evidence goes unchallenged.”

Ultimately, in a judgment dated 19th October 2007, the learned Judge awarded to the respondent the sum of Kshs. 8,000,000 as general damages and Kshs. 2,000,000 as aggravated damages, plus costs and interest.

Dissatisfied, the appellants have lodged this appeal citing 9 reasons, complaining mainly about the award of damages.

Before us, Mr. Muthee, learned counsel for the appellant conceded liability. Citing the case of Joseph Njogu Kamunge V Charles Muriuki, Civil Appeal No. 42 of 2014, he urged us to interfere with the award because in granting it, the learned Judge failed to consider section 7A and 16A (1) of the Defamation Act; that he failed to give due regard to the principles to be applied in the award of general and aggravated damages and as a result arrived at an inordinately high award. Counsel relied on the cases of Kenya Tea Development Agency Limited V Benson Ondimu Masese t/a B.O. Masese & Co. Advocates, 2008 KLR 149, Butt V Khan, Civil Appeal No. 40 of 1997, Standard Limited V G.N Kagia t/a Kagia & Co. Advocates, Civil Appeal No. 115 of 2003 and David Kipkurgat & Another V Peter Okebe, Civil Appeal No.68 of 2004 for the guidelines to be considered by a trial court in determining the amount of damages to be awarded to a successful claimant, bearing in mind that an award for damages is an exercise of discretion and that the award must always be within limits set out in precedents. Counsel submitted that the following cases were comparable to the instant appeal.⁴

J.P Macharia t/a Macharia & Co. Advocates V Kamau Kanyanga & Another, HCCC No. 612 of 1996, Hon. Ambassador Chirau Ali Makwere V Royal Media Services Limited, HCCC No.57 of 2004, Martha Karua V Standard Limited & Another, Nairobi HCCC. No.295 of 2004, Andrew Mukite Musangi V Standard Group Limited, Nakuru HCCC No. 331 of 2009, Kenya Tea Development Agency Limited V Benson Ondimu Masese t/a B.O. Masese & Co. Advocates (2008) KLR 149, Johnson Evan Gicheru V Andrew Morton & Another, Civil Appeal No. 314 of 2000 involving advocates, Cabinet Minister, a Judge and Member of Parliament in judgments rendered between 2005 and 2010 and in which the courts awarded the injured parties between Kshs. 1.5 million and Kshs. 6 million in general and aggravated damages; that only in respect of Johnson Evan Gicheru (supra), a presiding Judge of the Court of Appeal at the time, was Kshs. 6 million awarded; and that the award of Kshs. 10 million to the respondent in this appeal, bearing in mind her standing, was excessive. The appellants urged us to reduce it to Kshs.1.5 million

Mrs. Githae, learned counsel for the respondent opposing the appeal stated that the appellants had paid Kshs.3 million of the sum awarded leaving a balance of Kshs.7 million. On general damages, counsel asked us to note the words complained of involved three publications on three consecutive dates and repeatedly classified the case as a “criminal” case yet it was civil; that the appellants ought to have read the court file and confirmed the actual nature of the case; that the publications damaged the respondent’s professional integrity and career progression in the Judiciary; and that her applications to the Judicial Service Commission for the position of a Judge have not been successful as a result of the articles. On those grounds, counsel urged us not to disturb the award of general and aggravated damages. To support her arguments, she relied on KL V The Standard Limited, Nairobi HCCC No. 20 of 2007, Hon. Amb. C.A.M V Royal Media Services, Civil Appeal No. 283 of 2015, Johnson Evan Gicheru (supra) and Daniel Musinga t/a Musinga & Co Advocates V. Nation Newspapers Ltd, Mombasa HCCC No. 102 of 2000.

This is a first appeal and as is settled, we are expected, indeed required to re-evaluate the evidence on record before us, and draw our own conclusions independently, but bearing in mind that we have neither seen nor heard the witness. See Selle V. Associated Motor Boat Company Ltd (1968) EA 123 at page 126.

The import 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 materially misdirected himself and as a result arrived at a wrong decision, or that he was clearly wrong in the exercise of his discretion as a result of which there was misjustice. See: Mbogo & Another V Shah (1968) EA 93.

In this appeal, liability, having been conceded, our determination only relates to the question whether the learned Judge properly and judicially exercised his discretion in awarding Kshs. 8,000,000 in general damages and Kshs. 2,000,000 for aggravated damages. To answer this question, the following principles must be remembered. The court will take into account, in assessing the level of damages whether the author or publisher of a libel material could have, with due diligence verified the libelous story; whether he was reckless or negligent. See Standard Limited V G.N Kagia T/A Kagia & Company Advocates , Civil Appeal No.115 of 2003.

Secondly, in assessing 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 attributes 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 more damage than a libel published to a handful of people. Further, the successful party in a defamation action is entitled to recover such sum in general compensatory damages as will compensate him for the wrong he has suffered.

Aggravated damages, on the other hand, will be awarded against a defendant who acts out of improper motive, actuated by malice. See the English case of John v MGM Ltd (1997) Q.B 586 applied with approval in Johnson Evan Gicheru v Andrew Morton & Another, Civil Appeal No. 314 of 2000. In Mohamed Jabane V Highstone T. Olenja (1986) [Vol. 1] KAR 982 the Court of Appeal emphasised that in considering the award of damages, each case will depend on its own facts; that the awards must not be excessive and must take into account the need to avoid escalation of insurance premiums; that comparable injuries should attract comparable awards; and that damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford.

Having set out these guiding principles, in the instant case, there were four different publications on various dates. What was before the respondent was a civil suit, PMCC No. 6235 of 1998 and not a criminal charge. Kshs. 50,000 awarded against Patel in favour of the minor was general damages and not a fine. There was no evidence that the minor was dissatisfied with the award which was for a minor injury to the arm.

Yet, without verifying these facts, the appellants published the offending article concerning the respondent. What attracted the public outrage was the misrepresentation that Patel was “*found guilty of sexually assaulting a 13 year old girl*” and was “*also found guilty of racial discrimination*”. The article even after noting that the respondent had ordered Patel “*to pay the victim KShs. 50,000/= in damages plus interest at court rates*” still went on, obviously in error to state that that sum was the sentence imposed by the respondent following a conviction.

These articles were widely circulated and the effect was that they provoked uproar among human rights groups that protested the respondent’s decision and demanded justice for the minor. Before publishing the offending articles the appellants failed to verify the accuracy of the story and erroneously misrepresented the facts on different occasions. They were instead adamant in their defence of justification and privilege and despite conceding liability they did not publish an apology that would vindicate the injured reputation of the respondent.

The respondent demonstrated that the articles had a negative impact on her judicial career. She has served in the Judiciary for over 30 years and although there is no direct evidence that her applications for the position of a Judge have been unsuccessful due to this story, we cannot rule out that it may have contributed. She was a Principal Magistrate in the year 2000 when the story was published and today 18 years later she has only moved to the position of Chief Magistrate. For purposes of considering comparable awards, her position can be equated to that of an advocate.

Although the Judge awarded Kshs. 8 million as general damages and Ksh. 2 million as aggravated damages to the appellant, he failed to base the award on any formula derived from similar decided cases, as is usually the requirement. Apart from citing the case of **Godwin Wachira V Okoth** (1977) KLR 24 for the proposition that a party must inquire into the true facts before publishing an article and that failure to do so may lead to an inference of malice being drawn, the Judge made no reference to any relevant decided authority in the entire judgment. The test is to maintain a similar level of awards in similar cases, bearing in mind inflationary trends. By the recent decisions, this award was not justified, taking into consideration a few of the comparables around 2007 when the judgment was delivered as follows:

Martha Karua V Standard Limited & Another, Nairobi HCCC No.295 of 2004, where judgment was delivered in May 2006, the plaintiff was an advocate, Member of Parliament and a Cabinet Secretary for Justice and Constitutional Affairs and was awarded Kshs. 4.5 million in general and aggravated damages.

Ken Odondi & 2 others V James Okoth Omburah T/A Okoth Omburah Company Advocates, Civil Appeal No. 84 of 2009 where this Court substituted the award of general damages of Kshs. 7 million with Kshs. 4 million and upheld the award of Kshs. 500,000 as aggravated damages. In that appeal, the respondent had been appointed a Senior Resident Magistrate from the private legal practice.

In the circumstances of this appeal and considering all the factors and principles enumerated above, this Court is entitled to interfere with the judgment in respect of the award of general and aggravated damages.

For those reasons, the appeal succeeds to the extent that we set aside the award of Kshs 8,000,000 and Kshs 2,000,000 in general and aggravated damages with Kshs 4,000,000 and Kshs 500,000, respectively. The appellant will also have one-half of the costs of this appeal.

Dated and delivered at Nairobi this 28th day of September, 2018.

W. OUKO, (P)

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

ASIKE – MAKHANDIA

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR