



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), WARSAME & OTIENO-ODEK, JJA)

CIVIL APPEAL NO. 76 OF 2013 BETWEEN

HON. JAKOYO MIDIWO ..... APPELLANT

AND

NATION MEDIA GROUP LIMITED ..... 1<sup>st</sup> RESPONDENT

WANGETHI MWANGI ..... 2<sup>nd</sup> RESPONDENT

*(Being an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Mwera, J.), dated 5<sup>th</sup> December, 2011In*

*H.C.C.C. No. 1342 of 2003)*

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JUDGMENT OF THE COURT

1. By a Plaintiff dated 17<sup>th</sup> December 2003, the appellant, **Hon. Jakoyo Midiwo**, filed suit for defamation against the respondents for an article published at the front page in the “**Sunday Nation Newspaper**” of 14<sup>th</sup> December 2003 with the caption “MINISTERS and MP HELD IN SWOOP ON PROSTITUTES.”

2. At all material times, the appellant was the Member of Parliament (MP) for Gem Constituency in the then Nyanza Province of the Republic of Kenya.

The 1<sup>st</sup> respondent, **Nation Media Group Limited**, is the proprietor, printer and publisher of the “Sunday Nation Newspaper” and the 2<sup>nd</sup> respondent, **Wangethi Mwangi**, is the Editorial Director of the 1<sup>st</sup> Respondent company charged with the responsibility of deciding the articles to be published in the newspaper.

3. The particulars of the alleged defamation were that on the 14<sup>th</sup> day of December 2003, the 1<sup>st</sup> respondent at the front page of the Sunday Nation carried out an exclusive report falsely and maliciously printed and or caused to be printed and published the headline story titled: “MINISTERS and MP HELD IN SWOOP ON PROSTITUTES.” The story in the article read thus:

***“One Cabinet Minister, an Assistant Minister and a Narc MP were caught by police in a notorious red light area with half naked girls in their cars. They were first watched and videotaped before police moved in.***

***The politicians were seen shamelessly beckoning the girls to their cars then ushering them inside, before the police descended. .... They came from Rift Valley Province, the Coast and Nyanza and were all elected on a Narc ticket.....This time, an undercover police squad videotaped and photographed both the girls and the men who wanted them.***

***The photos and the tapes will be preserved as evidence so that those caught do not try to claim they were framed, police said. Prostitution is illegal in Kenya and some twilight girls who operate on Koinange Street are barely 12 years old.***

***First to be caught was the MP. He at first refused to identify himself when police reservists found him with a girl. They whipped out their pistols and ordered him to drive to Central Police Station where he finally identified himself as he was about to be thrown into a cell. A senior Police Officer then intervened and had the MP freed.....”***

4. In his plaint, the appellant averred that the sensational manner in which the article was splashed on the front page and given prominence

against full colour images of skimpily dressed prostitutes along the infamous Koinange Street depicted sleaze and immorality and immediately excited passion and debate on the article as an immediate matter of national interest. The appellant asserted that right on the heels of this story, the Royal Media Services through its television station in its headline news in Kiswahili telecasted in its 7.00 pm news bulletin and positively identified the appellant by name as the Narc Member of Parliament who was found by police soliciting for sex on Koinange Street.

5. The appellant asserts that the Royal Media Services Limited through its broadcasting station known as Citizen Radio at its 6.00am news bulletin repeated the contents of the previously aired news. That on 15<sup>th</sup> December 2003, the said Royal Media Services Limited through another of its broadcasting station known as Ramogi FM which airs its programs in the Luo language repeated the broadcast by both Citizen TV and Radio airing the same in Luo language as follows:

**“...Jotelo mayande ne obila oyudo kachoko ochodoroche Koinange Street waseyudo..... Ramogi nyo odwaro mo oyudo in to ngawa gini mawachore ni ne oyud rando gi obila ka okawo ochodoroche maloko dendgi e Koinange Street....to jabura maduoug mawadendo ni M.P. en Jakoyo Midiwo ma jaod Orindi ma dwond bura ma Gem Jakoyo Midiwo....nyocha bende watemo dwaro Jakoyo Midiwo mondo okwer kata oyie to njok ok wayude...en wach ma omako wang dhano kabisa....”**

The English version of the said words are:

**“..the leaders whom the police found while collecting prostitutes on Koinange Street have now been identified....**

**Ramogi Radio searched, investigated and found out whom it was being said were caught red-handed while collecting the prostitutes who sell their bodies on Koinange Street.... the other leader is Jakoyo Midiwo who is called the voice of the people and the Member of Parliament for Gem Constituency...We tried unsuccessfully to trace Jakoyo Midiwo to either admit or deny but couldn't find him....”**

6. The appellant stated that on 15<sup>th</sup> December 2003, in the company of other Members of Parliament he convened and attended a press conference for the benefit of all print and electronic media with a view to extricate himself from the negative publication which had been initiated by the respondents in linking him to the alleged arrest of a Member of Parliament along Koinange Street on the night of 5<sup>th</sup> December 2003.

7. That on 16<sup>th</sup> December 2003, the respondents carried out, printed and published its headline article titled: “We are not the MP’s in sex raid scandal.”

8. That during the 1.00 pm news bulletin on 16<sup>th</sup> December 2003, the Police Commissioner **Mr. Edwin Nyaseda** came on record and disavowed the media reports. The Commissioner is reported to have said “No politician be they a Cabinet Minister, Assistant Minister or MP was arrested or questioned in the Koinange Street swoop of the night of 5<sup>th</sup> December 2003. The Police did not videotape or photograph the said operation.”The respondent in reporting the statement by the Police Commissioner reiterated and expressed that “The Nation stands by the report that appeared in the Sunday Nation.”

9. In his plaint, the appellant averred that the impugned article in the Sunday Nation was false and published with malice. That it was defamatory of the appellant; that the respondents in publishing the article were actuated with malice and spite.

10. The particulars of malice and spite was pleaded in the Plaint. The appellant averred that the natural and ordinary meaning of the complained defamatory words were meant and were actually understood to mean *inter alia* that:

*“(a) The appellant was in Nairobi on the night of 5<sup>th</sup> December 2003.*

*(b) The appellant was at Koinange Street at the time the Police made a swoop on the prostitutes on Koinange Street.*

*(c) The Police caught the Appellant with naked girls in his car*

*(d) The appellant was video-taped and photographed by the police before being arrested.*

*(e) The video tape is in safe custody of the Police.*

*(f) The appellant was involved in promotion of prostitution which is an illegal activity.*

*(g) The appellant refused to identify himself.*

*(h) The appellant was released after the intervention of a Senior Police Officer.*

*(i) The appellant is a philanderer who engages in questionable nocturnal activities.*

*(j) The appellant, though a married man, is guilty of adultery.*

*(k) The appellant is of loose morals as to engage in solicitation of sex from prostitutes.*

(l) *The appellant is guilty of aiding and abetting commission of criminal offences punishable under the penal code by imprisonment for which he should be punished.*

(m) *The appellant 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.*

(n) *The appellant is not a proper person to be elected a Member of Parliament.*

(o) *The appellant is not a fit and proper person to continue to serve as a Member of Parliament.*

(p) *The appellant contributes immensely to the promotion of sex trade.*

(q) *The appellant engages in immoral activities, which promotes the spread of HIV AIDS which has been declared a national disaster.*

(r) *The appellant is not a role model for all the people at national and constitutional levels.”*

11. The appellant prayed for general and exemplary damages. Particulars in support of exemplary damages were pleaded. In addition, the appellant prayed for a permanent injunction restraining the respondents from publishing and or circulating any article whatsoever in reference to the appellant in regard to the Police swoop on prostitutes on Koinange Street.

12. The Respondents in their statement of defence denied *in toto* the particulars of defamation as pleaded in the plaint. They averred that the article complained about referred to a class of people *to wit*, Members of Parliament. That the Article did not and could not refer to the appellant independent of the said class and that the said words could not and were not understood as having referred to or capable of referring to the appellant.

13. Whereas the respondents admitted publishing the words complained of, they averred that the publication of the words was not malicious either as pleaded in the Plaint or at all. That they neither named nor otherwise linked the appellant to the article complained of; that they are not responsible for the investigation or editorial policy of other media houses; that the respondents neither be blamed nor held liable for content, articles or stories published by other media houses; that the respondents did not know and could not have reasonably been expected to know that the appellant would be adversely mentioned or that the appellant would come out and deny the contents of the article; that the article published by the respondents was not false but a fair comment on a matter of general public and national importance; that the respondents never identified the appellant as the Narc Member of Parliament referred to in the Article.

14. Upon hearing the parties, the trial court in a judgment dated 5<sup>th</sup> December 2011 dismissed the appellant's suit with costs. In dismissing the suit, the trial court expressed as follows:

***“The article of 16.12.03 carried the Plaintiff's denial he expressed at the press conference he with others had called. The article clearly stated the 3 politicians denied being involved in the subject swoop. It was all well that their photographs were carried in that paper. They had called the press conference. Did they not want also to be photographed? And in any event, why did they call the conference to deny contents of an article which did not carry their names or photographs? If the 1<sup>st</sup> defendant repeated what it had said on 14.12.04 and which was the subject of the denials, could that mean it was naming the 3 politicians? This court cannot think so. The article did not but the 1<sup>st</sup> defendant asserted that it still stood by its report of 14.12.03 which did not name the plaintiff with the two others. Then was the plaintiff justified for proving his identity by alluding to what other media house services who carried his name said? Not so. Those were doing their own thing and DW1 told the court that it was their policy not to share with competitors such things. So if the defendant's attention was drawn to those other news outlets, they were not bound or to be found liable for what those others were doing. Indeed, the court was told that the plaintiff sued those others for defamation and was handsomely given awards. As for this one, the plaintiff had not proved his claim. If he had, a sum in the region of Sh. 2.5 million could have been considered as an award. In sum, this suit fails with costs.”***

15. Aggrieved by the dismissal of his suit, the appellant lodged the instant appeal citing the following grounds *inter alia*:

*“(i) The judge erred in law and fact in disregarding to make specific finding on each individual issue framed for trial before arriving at his final decision.*

*(ii) The judge erred in failing to find that the factual elements of the alleged arrest of politicians on 5.12.03 was false.*

*(iii) The judge erred in failing to find that the article published in the Sunday Nation of 14.12.2003 was against public interest.*

*(iv) The judge erred in failing to consider and evaluate all the circumstances that were triggered by the sensational article carried out in the respondents' newspaper editions of 14/12/2003 through to 16.12.2003.*

*(v) The judge erred in narrowing his decision to the mere fact that since the appellant was not named in the respondents' article of 14.12.2003 they could not be held liable for defamation.*

*(vi) The judge erred in failing to find that responsible journalism demands the reciprocal duty of factual publication.*

(vii) *The judge erred in failing to find that the respondents anticipated a response from the persons adversely named to have been arrested as per their sensational article carried out in the edition of 14.12.2003.*

(viii) *The judge erred in law and fact in dismissing the appellant's claim.*

(ix) *The judge erred by assessing the appellant's claim in the sum of Ksh.2 million (sic)."*

16. At the hearing of this appeal, learned counsel Mr. T.T. Tiego appeared for the appellant while learned counsel Ms. Diana Ogula appeared for the respondent. All parties filed written submissions and list of authorities in this appeal.

17. Counsel for the appellant reiterated the grounds of appeal and relied on the written submissions filed in this matter. He submitted that the defamatory statement complained of was not fair comment and was false. The defamation was by innuendo and the trial court erred in failing to appreciate that there can be defamation by innuendo. Counsel further submitted that the article as published was not a matter of public interest; that whereas the Police categorically stated that no Member of Parliament was arrested, the respondents insisted that they stood by the story and article published on 14.12.2003. That by insisting and standing by the article, the respondents were acting maliciously and with spite. That the statement by Police shifted the burden of proof to the respondents to demonstrate that the contents of the article was true; that it was incumbent upon the respondents to prove that a Member of Parliament was indeed arrested; that the respondents led no evidence to prove this fact with the inescapable inference that the article was false.

18. The respondents in opposing the appeal urged us to dismiss the same. It was submitted that for an action in defamation to succeed, the complained publication should either expressly or by innuendo refer to the person complaining. That in the instant case, the respondents in the published article neither mentioned nor referred to the appellant by name or innuendo; that the respondents cannot and should not be held liable for articles, broadcast or news bulletin of other media houses; that in relation to the press conference of 15<sup>th</sup> December 2003 and the article published on 16<sup>th</sup> December 2003, the said presser was called by the appellant and the article of 16<sup>th</sup> December 2003 is a fair and accurate report of the press conference held on 15<sup>th</sup> December 2003. Counsel submitted that in the impugned article or publication, the appellant was never mentioned or referred to by name.

19. This is a first appeal and it has oftentimes been stated that our duty is to analyze and re-assess the evidence on record and reach our own conclusions.

In **Selle -vs- Associated Motor Boat Co. [1968] EA 123**, it was expressed thus:

***"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 allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif -v - Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)."***

20. We have considered the grounds of appeal, submissions by counsel and authorities cited in support of the submissions. The fundamental issue in this appeal is whether the respondents are liable to the appellant in an action for defamation based on the impugned article published in the Daily Nation Newspaper of 14<sup>th</sup> December 2003.

21. The contestation revolves around two issues. First, the appellant contends that he was defamed by the article published on 14<sup>th</sup> December 2003. Second, the respondents contend that the impugned article neither referred to the appellant by name nor by innuendo and if at all, it referred to a class of persons and the appellant cannot identify and isolate himself from the class of persons and maintain a suit in defamation. The contestation between the appellant and respondent boils down to the issue of liability.

22. The impugned publication referred to a Member of Parliament as having been arrested in the swoop. At the material time, there were over 200 members of Parliament in Kenya. It is not contested that the impugned article neither expressly mentioned nor referred to the appellant by name. The appellant contends he was referred to and mentioned by innuendo. He bears the legal and evidential burden to prove this.

23. A class of persons is considered defamed only if the publication refers to all its members—particularly if the class is very small—or if particular members are specially imputed. There is no dispute that the appellant was at all material times a Member of Parliament and thus a member of that class or group known as Members of Parliament. A member of a defamed group, however, lacks the means to vindicate his good name and redress his injury. Under current defamation law, a group member has no cause of action against the publisher of the defamation unless the group is very small or the defamatory statement applies specifically to the member. This rule follows from the requirement that, in order to establish a prima facie case of defamation, a person must demonstrate that a "reasonable person" could perceive the defendant's statement to be "of and concerning" the plaintiff. Unless the defamation designates the plaintiff so that those reading or hearing the publication understand that the plaintiff is implicated, the plaintiff's reputation cannot be tarnished. An exception to this general rule arises when the defamation, though made in group terms, is really a veiled reference to a specific group member.

24. Applying the foregoing principles to the instant case, there is no evidence on record that the article published by the respondents had a veiled reference to the appellant. There is no evidence on record demonstrating that a reasonable person could perceive the respondent's article published on 14<sup>th</sup> December 2003 was of and concerning the appellant. The burden to prove that the impugned statement was of and concerning the appellant rested with the appellant. He failed to discharge the legal and evidential burden on this issue. We find that the burden to prove that the impugned article was "of and concerning the appellant" was not discharged.

25. In our considered opinion, the trial court did not err in finding that the respondents were neither accountable nor liable for publications, news bulletin or actions of other media houses. If another media house defamed the appellant by expressly referring to and or mentioning him by name, the appellant is at liberty to pursue any relief against such media house.

26. In addition, there is no error on the part of the trial court in finding that the publication made on 16<sup>th</sup> December 2003 after the appellant called a press conference was not defamatory. In our view, the article of 16<sup>th</sup> December 2003 was a fair and accurate report of the events relating to the press conference called by the appellant himself. Such fair and accurate reporting is not defamatory.

27. As regards other several grounds raised in the memorandum of appeal, we are of the view that the grounds cannot stand if liability is not on the respondents. We are of this view for among other reasons, that there is no principle of law that responsible journalism demands reciprocal duty on the part of different media houses to regulate, control, supervise and vet each other in matters of articles for publication and broadcast material. The appellant urged that such a principle exists. In his oral and written submissions, the appellant has not alluded to the legal source of such a principle of reciprocal duty and we have not discerned any legal foundation for such a principle. In addition, the appellant faults the trial court that the judge ought to have found that the respondents ought to have anticipated response from persons named in the impugned article. We have considered this ground of appeal. No specific person was named in the impugned article published in the Sunday Nation of 14<sup>th</sup> December 2003. Any person who responded to the article did so on his/her own volition.

28. Further, the appellant contended that the impugned article was false and it imputed that the appellant was arrested and he refused to identify himself. In this matter, the bottom line is who said that the impugned article as published referred to and was of concerning the appellant? It is the appellant who contends that the article refers to and concerns him. He has led no evidence to prove that the impugned article refers and concerns him. All that the appellant has done is to refer to broadcast by a third party *to wit* Royal Media Services. It is the third party broadcast that referred to the appellant by name. Based on the third party broadcast, the appellant has urged us to find and impute that the article published on 14<sup>th</sup> December 2003 was a reference to him by innuendo.

29. **Black's Law Dictionary, 9<sup>th</sup> Ed. at page 860** defines innuendo as an oblique remark or indirect suggestion usually of a derogatory nature. In defamation law, an innuendo is the plaintiff's explanation of a statements' defamatory meaning when that meaning is not apparent from the statement. The issue for our determination is whether the publication by the respondent in the Sunday Nation had an indirect or implicit reference to the appellant. Would any person reading the Sunday Nation Newspaper article of 14<sup>th</sup> December 2003 identify the appellant as the Member of Parliament referred to? Is there any material in the article that implicitly or indirectly identify or refer to the appellant? We do not think so. In our considered view, the mentioning of the appellant by a third party, in this case Royal Media Services, is not publication by innuendo on the part of the respondent that can sustain action in defamation.

30. Finally, the appellant urged us to find that the trial court erred in assessing general damages at Ksh.2 million (sic). The trial court assessed damages, if any, at Ksh.2.5 million. In our view, the court did not err in assessing the quantum of damages. Such assessment was done in the alternative in the event that an appellate court held that there was liability on the part of the respondents for defamatory publication vide the article in the Sunday Nation of 14<sup>th</sup> December 2003. On our part, having found that there is no liability on the part of the respondents for defamation, we are convinced that this ground of appeal is academic.

31. In totality, the upshot is that this appeal has no merit and is hereby dismissed with no order as to costs.

**Dated and delivered at Nairobi this 12<sup>th</sup> day of October, 2018.**

**W. OUKO (P)**

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**JUDGE OF APPEAL**

**M. WARSAME**

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**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

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**JUDGE OF APPEAL**

I certify that this is a

True copy of the original

**DEPUTY REGISTRAR**