



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, SICHALE & KANTAL, JJ.A.)

CIVIL APPEAL NO. 54 OF 2008

BETWEEN

THE STANDARD NEWSPAPERS LIMITED.....APPELLANT

AND

HON. JOSEPH KONZOLLO MUNYAO.....RESPONDENT

(An appeal from the judgment and decree of the High Court at Nairobi ( Khamoni, J.) dated on 30th May, 2007 in HCCC NO. 917 OF 2003)

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JUDGMENT OF THE COURT

The appellant, The Standard Newspapers Limited, on 13th July, 2003 under its “*Benson’s World*” page published the following article of and concerning the respondent, *Joseph Konzolo Munyao*:

**“MUNYAO STICKS TO FAMILIAR FASHION TRENDS**

**In my view it is not such a bad thing that many of our Cabinet ministers have not allowed power to go to their heads.....**

**But there are obvious extremes that should be avoided, we don’t for instance, want a repeat of the late 1970s and early 1980s which inspired Peter Enahoro to write of a former president in Africa Now newsmagazine that he behaved like a rural teacher lost in town....**

**This is a trap that in my humble view Livestock Development Minister (sic) Joseph Munyao is in danger of falling into.**

**Like former Cabinet minister Kamwithi Munyi and his brilliantly coloured suit(s). Munyao has established himself as a conservative dresser.**

**Many had hoped that after ascending to high office he would exchange his worn shirt collars, V-neck short-sleeved pullovers and hand bag for attire and accouterments more befitting his new station.**

**But no, Munyao the opposition politician and Munyao the Cabinet minister are inseparable.**

**It was therefore quite in character when on Wednesday afternoon, he stroke out of the HFCK Kenyatta Avenue branch, looking preoccupied like one going to address a Press Conference to damn the Government. His shirt collar was worn our (sic) as usual, he wore the same old pullover and the trademark handbag was under his armpit.**

**He was on the far side of the road before his security men realized what was happening and gave chase to remind him that he had an official limousine, national flag aflutter, waiting near the bank’s door to take him wherever he pleased. It was obvious that Munyao was yet to get used to the trapping of high office.”**

By a letter dated 18th July, 2003 the respondent, through his lawyers informed the appellant that the published words were defamatory of the respondent and had injured his reputation, integrity and social standing; that the words were untrue and the appellant was required to tender an apology, admit liability for defamation and enter into discussions on the issue of damages to be paid to the respondent for defamation. It

would appear that the appellant did not respond to this letter and this led to a suit being filed at the High Court of Kenya, Nairobi, where it was alleged that the words published by the appellant were untrue; that they had injured the respondents character and brought him into ridicule and contempt for which he was entitled to general, punitive and exemplary damages.

The appellant delivered a defence where it was stated, amongst other things, that statements of fact complained of by the respondent were true in substance and in fact and that expressions of opinion were fair comment on a matter of public interest as the same concerned the conduct of a Minister in the government.

A hearing took place before Khamoni, J., who in a judgment delivered on 30th May, 2017 held the appellant to be liable for defamation. The learned Judge awarded the respondent Kshs. 5,000,000/= general damages. Those findings led to this appeal which is premised on the Memorandum of Appeal drawn for the appellant by its then lawyers, M/S Guram and Company Advocates where five grounds of Appeal are taken. The learned Judge is faulted for finding the appellant liable; for finding that the respondent had proved his case; for finding that the respondent had been defamed; that the Judge shifted the burden of proof and finally, for making the said award of general damages which the appellant says is exorbitant and high.

This is a first appeal from the judgment of the High Court and it is our duty as a first appellate court to review and reevaluate the evidence and reach our own findings and conclusions on the same. We remind ourselves that we have not heard or seen the witnesses, an advantage the trial Judge has, and we should therefore respect findings of fact of the trial Judge unless those findings are not backed by the evidence or the findings are made in a way that a reasonable tribunal properly exercising its mind would not make or that the findings are perverse. (See, for a judicial pronouncement on the duty of a first appellate court the often cited case of **Selle & Another Vs Associated Motorboat Company [1968] E.A 123**).

The respondent gave evidence in support of his case and he called 2 witnesses. He was the Member of Parliament for Mbooni Constituency and was the serving Minister for Livestock Development and Fisheries in the Government of Kenya. He had served in various capacities both in the public and private sector, had never been a teacher and, of the article subject of the suit, he denied that he dressed in shady or torn clothes. He stated;

**“..... I did not know Peter Enchoro. To compare me to a school teacher was meant to refer me as a rural person. I have never carried a hand bag and I have never owned one. They are usually carried by ladies. An old man from my community or a man, cannot carry a handbag....”**

He denied suffering memory lapse and testified that the article would affect his life as a politician stating further that his family would wonder whose handbag he was carrying. Further,

**“ I would not agree that was fair comment.**

**It is very disturbing affecting not only me but also my family. Members of my family called me as well as my fellow MPs and friends.....”**

He testified that on the material day he was alleged to be in Nairobi in the article he was actually playing golf in Machakos.

**George Omari Nyamweya**, a lawyer and politician who was serving as Deputy Secretary General of DP of Kenya testified, amongst other things, that he had read the article complained of; had found it to be abusive of the respondent and of rural teachers. He had known the respondent for more than 15 years and had found him to be a senior person who dressed well.

**Salim William Kamula**, served as a councillor of Kalau/Athi River Ward; was a resident of Mbooni where the respondent was Member of Parliament and he had known the respondent for more than 30 years. He had read the article complained of and had found it disturbing. He knew the respondent as a person who dressed smartly and decently, and:

**“...The article affected my perception of the plaintiff. I thought it was blackmailing and affecting him politically. I am familiar with humour. In my opinion those words were written as humour. They were just as a joke but members of the public would not understand it so. I have never seen the plaintiff carrying handbags. I understand handbags are carried by women.**

**I think this article would have adverse political effect upon the plaintiff as people would think that is truth.....”**

At the close of the respondent's case the appellants' counsel announced that he was not calling any witnesses.

The learned Judge analysed the evidence recorded and found the appellant liable for defamation.

At the hearing of the appeal on 4th July, 2018 Mrs. C.W. Githae, learned counsel, appeared for the appellant while learned counsel Mr. G. Maina appeared for the respondent. Both parties had filed written submission and appeared before us to make highlight of the same.

Mrs. Githae submitted that the words complained of compared the respondent with a rural school teacher and, in her view, there was nothing wrong or offensive with that. Counsel faulted the learned Judge for not finding that it was the respondent's duty to prove that he was in Machakos on the material day, not in Nairobi as published by the appellant. On general damages awarded it was counsel's view that the sum of Ksh.5,000,000/= was too high and exorbitant for which we should interfere.

In opposing the appeal Mr. Maina submitted that the article complained of was meant to ridicule the respondent and to demean him by stating that he was absent minded, wore torn clothes and was carrying a handbag. In his view, the article was not published in the public interest at all.

On general damages awarded Mr. Maina submitted that the same was reasonable, it not having been shown by the appellant that the Judge took irrelevant factors in making the award which he had made.

In a brief rejoinder, counsel for the appellant submitted that it had not been shown that the article had affected the respondent's political career.

We have considered the record of appeal, submissions made and the law and this is the position we have taken in this appeal. It was not disputed that the appellant had published the impugned article or that the same referred to the respondent.

The article named the respondent in person; it identified him as a Minister of Government and stated that he had on a named day been at HFCK on Kenyatta Avenue looking preoccupied and wearing torn clothes and carried a handbag under his armpit. It further stated that he had forgotten that he had an official limousine and a security detail and that he was:

**“...yet to get used to the trappings of high office...”**

The respondent testified before the learned Judge and denied being on Kenyatta Avenue on the stated date stating, instead, that he was playing golf in Machakos. He denied wearing torn clothes and denied ever carrying a handbag. He testified that he had been defamed by the article and this was confirmed by his 2 witnesses who testified before the Judge. The learned Judge found that the decision by the appellant not to call any evidence in support of the defence left the defence to be a mere allegation not clothed by evidence.

It was stated in the defence that the impugned article carried words which were in fact true and that the comments were on a matter of public interest as they concerned a Minister in the Government of Kenya. Various particulars as required by **Order 6A** of the **Civil Procedure Rules** were then set out and it was stated that the respondent had failed to exercise a statutory right of rejoinder as was required by **Section 7A** of the **Defamation Act** and thus waived his rights.

As we have shown the appellant chose not to call any evidence to support its case. The learned Judge found that the appellants defence would not hold in the absence of any evidence to support the same. We agree.

The appellant pleaded in the defence that statements and opinions it relied on were true in substance and in fact. The statements and opinions stated various things concerning the respondent-that he was absent minded even forgetting that he had a security detail and a limousine to match his status as a Minister of Government; that he dressed shabbily and carried a handbag, something associated with ladies, not men. The appellant decided not to call any evidence to support those allegations and the Judge was right in the premises to reject the defence and accept the respondent's testimony which was backed by 2 witnesses. The words complained of were not humour or satire at all. They defamed and demeaned the respondent in the eyes of right thinking members of society and the Judge was right to find that liability held against the appellant. We reject the grounds of appeal on the issue of liability.

The appellant complains that the award made was high and exorbitant in the circumstances of the case that was before the trial judge.

This Court will be disinclined to disturb the findings of a trial Judge as to an award of damages simply because we think that had we tried the case in the first instance we would have given a higher or lower award. In order to justify reversing the trial Judge on an award of damages, it will generally be necessary that this Court is convinced either that the trial Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in our judgment, an entirely erroneous estimate of the damage, to which a plaintiff is entitled. Law, JA in the case of **Butt v Khan [1981] KLR 349** recognized this principle in the following words which have so far stood the test of time:

**Law, JA in Butt v Khan [1981] KLR 349** recognized this principle as follows:

**“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low”.**

The learned Judge awarded to the respondent Ksh.5,000,000/= general damages for defamation. Judgment was delivered on 30th May, 2007. The Judge reviewed various cases like **HCCC No.72 of 1999 Trustees of Catholic Archdiocese of Nyeri v Standard and Nation Newspapers (ur)** where, on allegations that a Catholic Priest had raped a minor, an award of Ksh.1,500,000/= was made as general damages for defamation. He also considered **HCCC No.42 of 1997 Abraham Kipsang Kiptanui v Francis Mwaniki & 4 Others (ur)** where an award of Ksh.3,500,000/= was made on an unstated date and also the cases **HCCC No.1067 of 1999 Kipyator Nicholas Biwott V Clay Limited & Others** (Ksh.30,000,000/= general damages awarded for defamation) and **HCCC No.1709 of 1996 Patrick Machira v Wangethi Mwangi & Nation Newspapers Limited (ur)** (Ksh.8,000,000/= general damages awarded for defamation).

The learned Judge found that the words complained of were defamatory of the respondent but he dismissed the respondent's claim for exemplary and punitive damages.

On our own analysis and considering comparable awards made, we think that the Judge did not err in the award of general damages that he made. The award was not high or exorbitant; it was reasonable in the circumstances that obtained in 2007 when the award was made. There

is no merit in this appeal which we dismiss with costs to the respondent.

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

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**