



**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: VISRAM, KARANJA & KOOME, JJ.A)**

**CIVIL APPEAL NO. 85 OF 2017**

**BETWEEN**

**JAMES KIMEU MULINGE.....APPELLANT**

**AND**

**NATION MEDIA GROUP.....RESPONDENT**

(Being an appeal against the Judgment and Orders of the High Court of Kenya at Malindi (Chitembwe, J.) dated 28<sup>th</sup> July, 2017 and delivered by (Korir, J.) on 3<sup>rd</sup> October, 2017 at Malindi in HCCCNo. 69 of 2008)

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**JUDGMENT OF THE COURT**

[1] On 28<sup>th</sup> July, 2008 the Nation Media Group (respondent), published an advertisement which was headed “Notice to appear”. The notice was meant for James Kimeu Mulinge (appellant), who was being directed to file an answer to a divorce petition that was purportedly filed before the Chief Magistrate’s Court at Malindi where he was named as a co-respondent in a divorce petition filed by Stephen Mwinzi Muinde. It turned out there was no such divorce petition and the advertisement was fictitious. Perhaps if such had happened in the present day when the media, both print and electronic are inundated with fake news, it would not have worried the appellant. It transpired through a letter from the Executive Officer Malindi Law Courts dated 27<sup>th</sup> August, 2008 that there were no such proceedings being Divorce Cause No. 52 of 2008 that had been filed at the Chief Magistrate’s Court at Malindi.

[2] The appellant, a senior citizen, family man who retired while holding the title of Major General of the Kenya Defence Forces in 2007 and at the material was serving as a the Kenyan Ambassador to Somalia, was irked by the said notice. He inferred malice on the part of the respondent as he claimed the advertisement defamed him and portrayed him as a person of immoral character who was not worthy to hold a public position. In the ensuing suit filed before the High court, the appellant sought exemplary and general damages for libel, an apology and a permanent injunction restraining the appellant from publishing or continuing to publish words defamatory of the appellant with costs and interest.

[3] The respondent put up a defence admitting that it published a notice to appear on the daily nation of 28<sup>th</sup> July, 2007 in respect of Malindi Chief Magistrate’s Court Divorce Cause No. 52 of 2008; Stephen Mwinzi Muindi vs. James Kimeu Mulinge as a 2<sup>nd</sup> co-respondent but denied that the publication was made falsely and/or maliciously. Further that the said publication was not defamatory of the appellant and the words published could not be understood in the natural and ordinary meaning to impute immorality or in any way defamatory of the appellant in the eyes of a reasonable thinking person. Finally the respondent published the notice based on information received from a petitioner one Stephen Mwinzi Muindi who was not joined in the suit; the appellant did not demand from the respondent a correction of the wrong information that was published but merely filed suit seeking damages.

[4] The appellant prosecuted his suit and during the hearing he gave evidence and narrated how he suffered distress on reading the said advertisement; he was called by his former colleagues in the military and also his friends and family to find out about the matter. He on his part called his lawyer who made enquiries from the court and established there was no such case. However the respondent declined to publish an apology. The appellant also relied on the evidence of his former colleague in the military one **Joseph Nyaga Nguru** who testified that when he read the advertised notice in the papers he called the appellant because he was surprised that the appellant was being associated with immoral behaviour. The respondent did not call any witness but both counsel filed lengthy submissions and list of authorities.

[5] In his considered judgment, **Chitembwe J.**, weighed the evidence against the law in particular the Defamation Act, and found that as the notice was purportedly issued by the Chief Magistrate’s Court in Malindi, it was a paid for advertisement, it would have been possible for newspapers to verify the correctness of every information brought by an advertiser. The learned Judge found that the publication to the said

notice fell within the provisions of **Section 7** of the **Defamation Act**, and dismissed the suit with each party to bear their own costs.

[6] This is what has given rise to the present appeal that is predicated on the grounds that fault the learned Judge for failing to find that the publication of the notice by the respondent on its daily newspaper was defamatory; misapprehending the overwhelming evidence adduced in court to prove defamation; holding there was no malice on the part of the respondent despite agreeing that it published the notice without verification of the truthfulness of the same; by holding that it was impossible and a waste of time and resources to verify the truthfulness of notices being published in newspapers; by finding the notice fell under **Section 7(1)** of the **Defamation Act**, that is privileged publication and finally for finding the appellant had failed to prove his case against the respondent despite uncontroverted evidence.

[7] During the plenary hearing, both counsel relied on their written submissions and list of authorities. Counsel for the respondent was absent although even counsel for appellant did not make any oral highlights. According to counsel for the appellant, his client was able to establish his reputation was damaged in the eyes of reasonable or right thinking members of the society following the publication of the said notice that associated him with adultery being the most popular ground for divorce in Kenya. The appellant was named as a co-respondent in a divorce case which would reasonably be deduced to mean that he was involved in an adulterous relationship with the petitioner's wife. Counsel made reference to the case of *Miguna Miguna vs. Standard Group Ltd & 4 Others* [2017] eKLR page 10 -11 where it was held that:-

**“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”**

[8] Counsel went on to state that the test to be applied in deciding whether or not a statement is defamatory, is the consideration of the meaning the words would convey to the ordinary man. See the text book WINFIELD & JOLOWICZ on Tort 8<sup>th</sup> Edition at P. 255 which states;

**“The answer is the reasonable man. This rules out on the one hand persons who are so lax or so cynical that they would think none is worse of a man whatever was imputed to him, and on the other hand those who are so censorious as to regard even trivial accusations (if they were true) as lowering another's reputation or who are so hasty as to infer the worst meaning from any ambiguous statement. It is not these, but the ordinary citizen, whose judgment must be taken as the standard”**

[9] Counsel stated that the Judge ignored the evidence by the appellant and his witness that demonstrated how the meaning of the said notice was taken by reasonable members of the society who treated the appellant with suspicion and mistrust; the said publication lowered his estimation in the eyes of his colleagues, family and friends as well as the general public. Counsel further stated that the respondent did not deny the publication and poured cold water on the holding that the appellant had a duty to join the so called 'petitioner' as the person who placed the publication and paid for it. On qualified privilege as defence, counsel for the appellant was of the view that the circumstances of this case did not pass muster as there was no such case that was filed in Malindi Chief Magistrate's Court or any other court. The respondent had a duty to verify such information as it was held in the case of;- *Musikari Kombo vs. Royal Media Services Ltd* [2018] eKLR where it was held:-

**“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”.**

[10] The Judge was also faulted for holding that it was impossible to verify details of paid advertisements and in particular for not censuring the respondent for failure to adduce any evidence on when the petitioner booked the advertisement; what documentation was presented as proof of the existence of the case or the nature of instructions such as records or receipts showing who paid or placed the notice. Counsel urged us to find the appellant had proved his case to the required standard and in the event his claim should be allowed as prayed in the plaint.

[11] On the part of the respondent, Kinyua Muyaa & Co Advocates filed written submissions basically regurgitating the submissions made before the trial court. It seems that during the trial, the suit took another turn when counsel for the respondent learnt, after the close of the case, that there were 5 other suits filed by the appellant in various High court stations involving the same appellant and some 4 other media houses that were sued in connection with the same notice that was also published by the Standard Group Ltd, Headlink Publishers Ltd, and Radio Africa Ltd. The appellant was faulted for withholding this information which was extracted after protracted court proceeding that threatened the striking off of the appellant's case; thereby casting aspersions on the appellant, more so for omitting to include these documents in the record of appeal; counsel stated that he had to file a supplementary record of appeal to bring out the appellant's lack of candour.

[12] According to counsel, the appellant did not wish the trial Judge to know about those other suits which he had filed in different courts. Counsel hypothesised a question as to why a person who is unknown would spend thousands of shillings to put up newspaper notices in all media houses concerning fictitious suits against the appellant. This was followed by another loaded question why the appellant had never reported all the false notices to the police for investigations. Counsel also submitted that there was no possibility that nearly all the media houses in Kenya would publish false notices and court orders relating the appellant and he as a 'reasonable man' would fail to report the matter to the police so that the truth can be known who the fictitious person was as well as the motive.

[13] Counsel supported the decision by the trial Judge as he argued the appellant failed to demonstrate there was malice on the part of the

respondent in publishing what appeared to be a legitimate notice. Moreover the appellant remained an ambassador for Kenya in Somalia therefore his reputation was not affected by a fictitious suit; a notice to appear without more in a divorce cause that did not name the respondent to the cause could not import the word adultery as the appellant could not have been adulterous with unnamed respondent. On the issue of apology, counsel was of the view that the respondent did not generate the words in the notice, it published it as it was, and did not write a story, article of news or an editorial; the respondent had no duty to carry out investigations on the validity of the notice; at the material time in 2008, before the advent of “fake news” it was incomprehensible to suspect that a person would spend money to pay for a publication of false court orders and notices. Counsel urged us to dismiss this appeal for not only lacking merit but being an abuse of the court process.

[14] We have considered the grounds of appeal, the submissions and reviewed the entire evidence as per the above summary. This being a first appeal, we are enjoined by law to proceed by way of re-hearing and re-appraise, re-evaluate and re-analyze all the evidence on record in a fresh and exhaustive way before arriving at our own independent conclusions; See **Rule 29** of the **Court of Appeal Rules**. This is also in recognition of our limitations, our initial deference to the factual findings of the trial Judge and the parameters of our interference therewith were well summed up in the case of ***Selle vs. Associates Motor Boat & Co.*** [1968] EA, where the predecessor of this Court put it 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 vs. Ali Mohamed Sholan* [1955], 22 E.A.C.A.270).”**

[15] All this boils down to one issue which we think is the gravamen in this appeal; that is whether the appellant proved he was defamed by the “notice to appear” published by the respondent in the daily nation of 28<sup>th</sup> July, 2008. It is not contested that this was a paid advertisement and the person who paid for it or the motive thereto remained a mystery. We think it is important to reproduce the entire notice as it was published.

**“The Republic of Kenya**

**In the Chief Magistrate’s Court**

**at Malindi Court**

**Divorce Case No. 52 of 2008**

**Stephen Mwinzi Muindi .....petitioner**

**Versus**

**James Kimeu Mulinge.....2<sup>nd</sup> co-respondent**

**NOTICE TO APPEAR**

**To James Kimeu Mulinge**

**Nairobi**

**TAKE NOTICE; That you are required within fifteen days after service hereof upon you inclusive of the day of such service to enter an appearance either in person or by your Advocate at the divorce registry of the Chief Magistrate’s Court Malindi.**

**Should you think fit so do and thereafter to make answer to this petition and that in default of your doing, the court will proceed (sic) hear the petition and pronounce judgment your absence notwithstanding**

**The petition is filed and this notice is issued by MR. STEPHEN MWINZI MUINDI P.O BOX 241 MALINDI**

**DATED at MALINDI on this 8<sup>th</sup> day of July 2008.**

**CHIEF MAGISTRATE MALINDI**

**NOTE: Any person entering an appearance must at the same time furnish an address for service.”**

[16] Was the above notice defamatory of the appellant? The law of defamation is, to put it plainly, concerned with the protection of a person’s reputation. **Patrick O’Callaghan** while discussing the nature of defamation in the ***Common Law Series: The Law of Tort at paragraph 25.1*** expressed thus:

**“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 recognises 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...”**

[17] It follows therefore that a claimant such as the appellant in a defamation suit ought to principally establish in no particular order:

1. The existence of a defamatory statement;
2. The defendant has published or caused the publication of the defamatory statement;
3. The publication refers to the claimant.

See **Defamation law, procedure and practice by David Price, Korieh Duodu and Nicola Cain, 4<sup>th</sup> Edition para 1-02.**

[18] To begin with it is not in dispute that the notice in question was published in daily nation of 28<sup>th</sup> July, 2008 but what is not known is who caused the publication. The other auxiliary issue is whether the notice was defamatory of the appellant and whether the Judge erred by drawing a conclusion that the publication was a privileged statement under **Section 7 (1) and (2)** of the **Defamation Act** which is a defence. The said provisions stipulate:

**“7 (1) Subject to the provisions of this section, the publication in a newspaper of any such report or other matter as is mentioned in the Schedule to this Act shall be privileged unless such publication is proved to be made with malice.**

**2. In an action for libel in respect of the publication of any such report or matter as is mentioned in Part II of the Schedule to this Act, the provisions of this section shall not be a defence if it is proved that the defendant has been requested by the plaintiff to publish, in the newspaper in which the original publication was made, a reasonable letter or statement by way of explanation or contradiction, and has refused or neglected to do so, or has done so in a manner not adequate or not reasonable having regard to all the circumstances.”**

[19] A careful consideration of the above provisions of the law examined against the evidence in this matter leaves clear doubts as to whether the notice was defamatory in itself; whether it was indeed capable of lowering the estimation of the appellant in the eyes of the right thinking reasonable members of the society or whether the respondent was entitled to the statutory defence. We also need to mention that by virtue of **Section 7(4)** of the **Defamation Act** the defence as recognized and developed in common law also applies. In common law the privilege was recognized where it was deemed that the maker of the statement in question has a legitimate interest in making the statement and the recipient(s) of the statement have a legitimate duty or interest in receiving it. As **Lord Atkinson in Adam vs. Ward [1917] A.C 309** at page 334 best put it:

**“A qualified occasion is an occasion where the person who makes a communication has an interest, or duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it. This reciprocity is essential.”**

[20] Another matter of key concern to us is the fact that this was an advertiser’s notice, the identity of the person(s) who placed and paid for it remains unknown. A crucial question was posed by counsel for the respondent as to who was to benefit from this fictitious notice. The person who was to benefit from the notice is the one who paid for it. The two questions were nonetheless not answered but what is clear to us and perhaps was to the trial Judge, was the fact that the notice was published by the respondent as a paid advertisement and in the circumstances it was not within their remit to establish whether it was genuine or not. At least that is clear from the evidence as no burden was placed upon the respondent to prove otherwise. To that extent we agree with the learned Judge that the respondent published the notice innocently, believing it was a bona fide one and therefore cannot be said to have been driven by malice.

[21] It is also obvious to us that if the appellant was truly seeking to unravel the mystery about this fictitious person, he would have joined the purported ‘petitioner’ in the suit, the one named as **Stephen Mwinzi Muindi**. That way, perhaps the motive or the truth behind this strange publication would have been revealed. The court would have been able to establish whether the said ‘petitioner’ placed the notice to defame the appellant for his own gain or as the respondents postulated, the appellant could have done it so as to be awarded damages as he sued nearly all the media houses. We say this because these fictitious notices were spread out in almost 5 different media houses. This in itself depicted a worrisome tread by a faceless, and unknown person(s) a matter, in our considered view, that would have entailed serious investigations perhaps even of a criminal nature to nail the culprit. The appellant was also less than candid when he filed this suit; he did not disclose there were 5 other suits that were filed all over the country thereby lending credence to the allegations by counsel for the appellant that the whole saga could have been contrived to abuse the court process.

[22] We also find the contents of the said notice cannot as a matter of fact convey a message that could easily associate the appellant with immorality because the co- respondent was not named. 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.”**

[23] When one examines the said notice, it is incomplete because the co-respondent is not named and again the person who would read between the lines and figure out that the appellant was being associated with immorality with an unknown woman would be a learned person perhaps in law who does not happen to be the reasonable man in the streets. 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.”**

The above being our findings, we agree with the learned Judge the claim for defamation had to fail and so does this appeal and for the reasons we enumerated hereabove we order it dismissed with costs to the respondent.

**Dated and delivered at Mombasa this 11<sup>th</sup> day of October, 2018.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M.K. KOOME**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**