IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: WAKI, GATEMBU & M'INOTI, JJ.A.)
CIVIL APPEAL NO. 113 OF 2010
BETWEEN

BARAZA LIMITED.....1st APPELLANT

ERIC GOR SUNGU.....2nd APPELLANT

AND

GEORGE ONYANGO OLOO.....RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Ali-Aroni, J.) dated 19th November 2009

in

HCCC. No. 1029 of 2003)

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JUDGMENT OF THE COURT

This appeal arises from the judgment of the High Court of Kenya at Nairobi (Ali-Aroni, J.) dated 19th November 2009 in which the learned judge found the 1st appellant, Baraza Limited and the 2nd appellant, Eric Gor Sunguh to have defamed the respondent, George Onyango Oloo and awarded him damages of Kshs 2,500,000.00 with costs and interest. The appellants challenge the findings of the learned judge as regards liability as well as the quantum of damages that she awarded, which they find to have been manifestly high and unjustified. On his part, the respondent, in addition to opposing the appeal, has lodged a cross-appeal in which he contends that, granted his standing in society and the extent of publication, the quantum of damages was manifestly low and inadequate, so as to justify enhancement and a further award of aggravated damages, which the learned judge denied.

The background to the appeal is as follows. At all material times the 1st appellant was the proprietor of a television station known as the Kenya Television Network (KTN). In the general elections held in Kenya in December 2002, the 2nd appellant and the respondent were among six candidates vying for nomination by the National Rainbow Coalition Party (NARC) as its candidate for Member of Parliament, Kisumu Town East Constituency. Following violent clashes between the supporters of the candidates in the constituency, the respondent alleged that at 7 pm on 17th November 2002, KTN's news anchor, Lilian Odera, interviewed the 2nd appellant as a result of which KTN published words, pictures and images that were defamatory of the respondent. The following were the words that the respondent complained of:

> Lilian: "Former legislator Gor Sungu's Toyota LandCruiser was reduced to this, this afternoon. He had gone on a meet-the- people tour of Nyalenda, Dunga Simba and Oboch
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> Gor Sungu: When we were about to leave they blocked the car with a stone and started brandishing stones in front of us. I immediately sensed danger and took over from my driver who was inexperienced to drive away. In the process they hit the windscreen with a very huge stone, both the front and rear. One of them called Mada or Murder (that is his nickname) is a well known follower of a candidate known as Onyango Oloo."
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> Lilian: The next four days ahead of the NARC nominations are expected to be rough for the six Kisumu Town East Pa.rliamentary aspirants on a NARC ticket.
>
> Gor Sungu: These nominations are very fairly simple exercise. We have not even gone to the main elections. This is just primary and it is a pity that some candidates are resorting to violence.
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> Lilian: Some of the aspirants had earlier accused the immediate former MPs of intimidating them and using their influence to

undermine the other aspirants. Lilian Odera, KTNNews."

In a further amended plaint dated 13th May 2004, the respondent, who is an advocate of the High Court of Kenya, pleaded that the above words and the accompanying pictures, images and innuendo meant and were understood to mean that he was a criminal who was not worthy of election as a lawmaker because he was engaged in criminal activities such as promotion of warlike activities, commission of election offences, contravention of the electoral code of conduct, malicious damage to property, and attempted murder. Due to the said defamation, the respondent further pleaded that he was temporarily disqualified from the NARC party nominations, was injured in his standing and reputation as a lawyer, and was shunned and avoided by right thinking members of society.

In a joint defence filed on 18th November 2003, the two appellants denied publication of the alleged defamatory words on the date and time specified by the respondent and further averred that if indeed the words, pictures and images were published as alleged, they were not defamatory of the respondent because in their natural and ordinary meaning or innuendo, they could not be understood to bear the meaning that the respondent ascribed to them. The appellants also raised the defence of justification and fair comment on matters of public interest.

The learned judge heard the action in which the respondent testified and called two witnesses. The appellants did not call any evidence, electing instead to rely on their submissions. In the impugned judgment, the learned judge found that the publication was defamatory of the respondent and awarded him damages of Kshs 2,500,000.00, as we have already noted.

Although the appeal is premised on six grounds of appeal, absent obvious hair-splitting and tedious repetition, the appellants' real grievance is that the learned judge erred by finding that they were liable for defamation; and by awarding the respondent damages of Kshs 2, 500,000.00.

On the first issue, Mr. Werimo, the appellants' learned counsel, submitted that the learned judge erred by finding the appellants liable in defamation whilst the respondent's case was founded on innuendo which was not particularized as required by law. Counsel cited paragraph 5 of the further amended plaint and submitted that the appellants case was founded on innuendo and that Order VI Rule 6Aof the Civil Procedure Rules in force at the material time required them to give particulars of the sense in which the words alleged to be defamatory were used other than in their natural and ordinary meaning, which they had failed to do. Accordingly, counsel submitted that the learned judge erred by finding the words complained of were defamatory without the particulars of the innuendo and without addressing the alleged innuendo.

Still on the issue of liability, counsel submitted that the respondent did not adduce any evidence to prove publication of the words complained of. In his view, publication could only have been proved by production of a transcript of the news broadcast complained of, which the respondent failed to do.

On quantum of damages, the appellants argued that the learned judge erred by merely referring to the decision of this Court in Johnson Evan Gicheru v. Andrew Morton& Another [2005] eKLR instead of considering the factors set out therein for determining quantum of damages for libel, such as gravity of the libel, circulation, repetition and factors mitigating or reducing damages. For failure to take into account those relevant considerations, the appellants submitted that this Court is entitled to interfere with the award of damages by the trial court. They added that should we find against them on liability, we should award the respondent damages of between to Kshs 500,000Kshs 1 million because the award by the learned judge was manifestly excessive.

Mr. Weda, for the respondent opposed the appeal, urging that it had no merit. On liability, he submitted that the appellants admitted publication of the words complained of in the defence filed on 23rd October 2003 and further that the respondent was specifically named in the defamatory news broadcast. In his view, the respondent's plaint was compliant with the Civil Procedure Rules as regards pleadings and the innuendo. Lastly, counsel submitted that the learned judge's findings on liability cannot be faulted because the appellants did not adduce any evidence before the trial court to discount publication or to challenge the defamatory nature of the words complained of.

On quantum of damages, the respondent contended that the award was not manifestly high as claimed by the appellants. Instead, he urged us to find, on the basis of the cross-appeal, that the award was manifestly low and inadequate because the learned judge erred by failing to award aggravated and exemplary damages as prayed. He relied on the award of this Court in Eric Gor Sungu v. George Odinga Oraro [2014] eKLR which he contended was comparable, and urged us to interfere with the award of damages by the trial court and instead award the appellant damages of Kshs 5,000,000.00 and aggravated damages of Kshs. 4,000,000.00.

We have carefully considered the appellants' grievances in the appeal as well as those of the respondent in the cross-appeal and the respective responses thereto. On the question of the appellants' liability, the respondent is not correct when he asserts that the appellants admitted publication of the words complained of in paragraph 4 of the defence filed on 23rd October 2003. The learned judge found that defence to have been irregularly entered by a firm of advocates that was not on record and therefore ignored it. Instead she relied on the defence filed by the appellants' present advocates on 18th November 2003. The decision of the learned judge in that regard has not been appealed or otherwise challenged. We note that in the defence that the learned judge relied upon, the appellants expressly denied publication.

Having said that however, we cannot fault the learned judge for finding that the words complained of were indeed published as contended by the respondent. The appellants did not call any evidence to counteract that of the respondent as regards publication. On his part, the respondent testified and was cross-examined on how he saw and heard the news broadcast in question. His two witnesses, Amos Outa Wandago and Michael Ben Otieno also testified to having watched the news broadcast. The learned judge, who had the advantage of hearing and seeing the witnesses as they testified, believed their evidence as regards publication. That is not a matter that we can readily disagree with. (See Jaban v. Olenja [1986] KLR 661). On the basis of the evidence on record, we are satisfied that the learned judge cannot be faulted for holding that the respondent had proved publication of the broadcast, even in the absence of the transcript, because transcript of the broadcast is not the only means of proving publication. We do not find any merit at all in this aspect of the appeal.

The second issue as regards liability is whether innuendo was properly pleaded to justify a finding of liability against the appellants. The

Black's Law Dictionary, 8th Ed. 2007 defines an innuendo in the context of the law of defamation to mean:

> "the plaintiff's explanation of a statement's defamatory meaning when the meaning is not apparent from the statement's face.

Ordinarily the innuendo meaning is resorted to show that words that are on the face of it innocent carry a different and defamatory meaning that is not in general knowledge. It is for that reason that Order 2 rule 7 (formerly Order VI rule 6A) of the Civil Procedure Rules requires a party who relies on an innuendo to give particulars of the defamatory meaning of the words complained of, if such meaning is not apparent in their natural and ordinary meaning. (See Grace Wangui Ngenye v. Chris Kirubi & Another [2015] eKLR).

We agree with the appellants that the respondent's pleadings were not elegantly drawn. He simply lumped together the ordinary and natural meaning of the words of the broadcast as well as the alleged innuendo and pleaded their meaning in paragraph 6 of the plaint. Strictly speaking other than throwing around the word "innuendo" in the plaint, the respondent neither pleaded an innuendo properly so called, nor gave any special meaning of the words in the broadcast. A careful reading of the judgment leaves no doubt that the learned judge determined the case on the basis of the ordinary and natural meaning of the words complained of, which she found to be defamatory of the respondent. She totally ignored the alleged and ill-pleaded innuendo, and for that we cannot fault her. We are satisfied that as regards liability, this appeal has no merit.

On quantum of damages, the learned judge referred to the judgment of this Court in Johnson Evan Gicheru v Andrew Morton & Another (supra) and stated that she would apply the "checklist" of factors set out therein as a guide in assessing damages for libel. Those factors, adopted from Jones v. Pollard [1997] EMLR 233, are:

> (i) The objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published, and any repetition.
>
> (ii) The subjective effect on the plaintiff's feelings not only from the prominence itself but from the defendant's conduct thereafter both up to and including the trial itself.
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> (iii) Matters tending to mitigate damages, such as the publication of an apology.
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> (iv) Matters tending to reduce damages, and
>
> (v) Vindication of the plaintiff's reputation past and future.

Thereafter the learned judge merely stated that the checklist guided her in awarding the respondent damages of Kshs. 2,500,000.00. However, from the judgment it is not apparent what aspects of the checklist the learned judge took into account. For example, the words complained of were only to the effect that one of the people who damaged the Mr. Sungu's motor vehicle was a well-known follower of the respondent. While the words were broadcast during the 7p.m. news, there is no evidence on record that they were ever repeated at any other time subsequently. There is also no evidence that the appellants conducted themselves, after the publication up till the trial, in any aggravating manner. Further the learned judge did not consider whether there were any matters mitigating or reducing damages.

On principle, an appellate court will not interfere with award of damages by the trial court unless it is shown that it proceeded on wrong principles or misapprehended the evidence in some material respect and thereby made an award so inordinately high or low as to represent an entirely wrong estimate. (See Standard Ltd v. G. N. Kagia [2010] eKLR). Granted that the learned judge in this appeal did not consider all the relevant factors in making the award of damages, we are entitled to interfere with the award of damages that she made.

The quantum of damages in Johnson Evan Gicheru v. Andrew Morton & Another (supra) and Eric Gor Sungu v. George Odinga Oraro (supra), which the respondent relied upon as comparables are not appropriate. They involved more grave libels, attributing on the one hand, corruption to a judge of appeal who subsequently rose to be a Chief Justice of the Republic of Kenya, and on the other, murder of a client to a senior member of the Kenyan bar. In the former case the publication was in the form of a book that was sold internationally and the defendant had obstinately rebuffed appeals for correction and apology. In the latter case publication was far and wide, on radio, television and print media and to add insult to injury, a baseless defence of justification was found to be based on perjured evidence. Taking all the foregoing into account, we are satisfied that an award of damages of Kshs 1,500,000.00 is adequate compensation to the respondent in the circumstances of this appeal.

As regards the cross-appeal, the respondent contends that the learned judge erred by failing to award him aggravated or exemplary damages. In The Standard Ltd v. Alnashir Visram, CA No. 89 of 2017 this Court recently considered the purpose and the circumstances under which exemplary damages will be awarded. It expressed itself thus:

> "Be that as it may, and notwithstanding that the place of exemplary damages is highly contested elsewhere in common law jurisdictions, it is quite easy to distinguish it on the basis that, it is meant to punish only two categories of conduct; oppressive, arbitrary or unconstitutional action by servants of the government or where a tort is committed under guilty knowledge with the motive of economic advantage outweighing any possible economic or physical penalty. Unlike compensatory damages which are concerned with how much a plaintiff should receive for his injury, punitive damages focus on how much the defendant ought to pay for his conduct...Another critical distinction is that exemplary damages, in cases where they are appropriate, are payable if, but only if the sum the court has in mind to award as compensation including on aggravated footing, is not adequate to punish for his outrageous conduct as to show disproval and to deter repetition."

Having carefully evaluated the evidence on record, we do not find any basis upon which, in the circumstances of this case, the respondent could have been awarded aggravated or exemplary damages as explained above. None of the conduct that would have justified such punitive

damages is in existence in this appeal. Ultimately the appeal succeeds to the extent that the award of damages of Kshs 2,500,000.00 is set aside and in lieu thereof the respondent is awarded damages of Kshs 1,500,000.00. The cross-appeal has no merit and is dismissed in its entirety. Each party shall bear their own costs. It is so ordered.

Dated and delivered at Nairobi this 7th day of December, 2018

P. N. WAKI

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb.

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR