IN THE COURT OF APPEAL

AT NYERI

(SITTING IN NAKURU)

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL NO 153 OF 2010

BETWEEN

ROYAL MEDIA SERVICES LIMITED …….....…..1ST APPELLANT

BENSON AMUKOWA …….....2ND APPELLANT

AND

JULIUS NJIRE MURAYA

DAVID KAMAU WACHIRA

(T/A MURAYA & WACHIRA ADVOCATES)……...….RESPONDENTS

(Appeal from the judgment and decree of the High Court of Kenya at Nakuru (Koome, J. as she then was) dated 1st August, 2008

in

NAKURU HCCC No 228 of 2005

****

JUDGMENT OF THE COURT

"Good name in man and woman, dear my lord, is the immediate jewel of their souls; who steals my purse steals trash; 'tis something, nothing; 'Twas mine, ' tis his, and has been slave to thousands; but he that filches from me my good name, robs me of that which not enriches him, and makes me poor indeed".

Shakespeare's timeless rendition in **Othello**, **Act 3**, **Scene 3** makes for an apt summary of the subject matter in this first appeal which arose from the filing of an action for damages in defamation by the respondents initially against the 1st appellant; and subsequently against the 1st and 2nd appellants. The respondents contended that the 1st appellant had defamed them in their professional capacities as Advocates of the High Court of Kenya practicing law under the name and style of Muraya & Wachira Advocates initially at Nakuru then subsequently at Mombasa. The cause of action concerned radio

broadcasts in form of programmes namely:- **'Wembe wa Citizen'** and **'Ndurika'** aired on **'Citizen Radio'** and **'Inooro Fm'** respectively ;owned, run and or operated by the 1st appellant. The offensive broadcasts took place on **10th June, 2005**, **11th June, 2005**; and **28th June, 2005** respectively at diverse times of the day.

The tenor of the said broadcasts was that the respondents had taken instructions from the 2nd appellant in their capacity as Advocates of the High Court of Kenya, for the conduct of a civil suit (***NAKURU CMCC 2895 OF 1998***) wherein the 2nd appellant was pursuing a compensation claim for personal injury on account of a road traffic accident. Upon entry of judgment in favour of the 2nd appellant, the respondents had allegedly declined to remit monies to the tune of **Ksh 250, 000**, due and owing to the 2nd appellant in spite of receiving the same in form of cheques from M/s Stallion Insurance Company which had insured the accident motor vehicle.

The Plaint contended that the said broadcasts were false and malicious for all intents and purposes as the 1st appellant did not seek any clarification from the respondents before airing the same. It also gave a litany of consequences which followed the broadcasts in question and prayed for a declaration that the broadcasts (publications) were false and malicious; general damages; an unqualified apology run in the said programmes in words acceptable to the respondents; costs; interest at court rates; and any other relief which the honourable court deemed fit to grant. The appellants filed a defence comprising a mix of denials and the twin defences of public interest and justification. Koome, J. (as she then was) presided over the trial in which the respondents herein testified as ***PW1*** and ***PW 2***, and also called the testimonies of ***PW 3 DAVID LANGAT (DAVID)***, ***PW 4 JOSEPH NYOIKE MUTONYI (JOSEPH)*** and that of ***PW 5 JOSEPH MWANGI KARIUKI (KARIUKI)***. In brief, the respondents gave an account about the commencement of their respective legal careers and the course it had taken; their Advocate/ Client relationship with the 2nd appellant and the events attendant thereto; and the malicious and libelous broadcasts by the 1st appellant and their attendant consequences.

David's testimony in a nutshell was that the respondents had not been paid any monies due and payable to the 2nd appellant; while the testimony of Joseph confirmed that he was an Advocate of the High Court of Kenya who was well acquainted with the respondents; that the respondents requested him to take up both office space and their pending files at their former offices at Nakuru, which request he accepted in consideration for fees; that among the files he took up was the 2nd appellant's which suit was yet to be heard and determined; that on or about the month of May 1997 the respondents departed for Mombasa where they set up offices. He further testified that the respondents did not flee from Nakuru as alleged in the broadcasts, and that in any event he was still handling some of their pending matters with a view to concluding the same. Another salient part of Joseph's testimony was that the 1st appellant did not obtain clarification before airing the libelous broadcast.

Kariuki's testimony was to the effect that he was a commission agent based at Nyahururu and was well acquainted with the respondents. He recounted how on the evening of **28th June, 2005** he heard the libelous broadcast complained of by the respondents aired in a programme called '***Gutiro Nduriko***' on Inooro FM run and or operated by the 1st appellant. He also testified how the said broadcast caused him to entertain aspersions on the respondent's integrity.

The 1st appellant's case before the trial court was anchored on the testimonies of the 2nd appellant and ***DW 2 RUBEN ROLEI (RUBEN)***. The 2nd appellant gave an account of his interaction with the respondents and the resultant Advocate/ Client relationship which got off to a good start only for relations to become frayed shortly after the entry of judgment in his favour in the sum of **Ksh 250, 000**. According to the 2nd appellant, his Advocates had received monies due and owing to him, but they were not intent on remitting the same to him. His allegation was informed by copies of cheques which had been drawn in the name of the respondents' law firm, which he subsequently presented at the 1st appellant's offices.

RUBEN testified that he was an employee of the 1st appellant based at Nakuru with his duties including

inter alia: - looking for information and or news with a view to transmitting the same to the 1st appellant's headquarters in Nairobi, for broadcast. He testified that the 1st appellant highlighted matters of public interest in its broadcasts especially in instances of injustice; that the 2nd appellant had visited the 1st appellant's offices at Nakuru and lodged a complaint in relation to the respondents; and that he brought with him copies of cheques and an explanatory letter addressed to the Advocates Complaints Commission. He also testified that he tried to confirm the veracity of the 2nd appellant's allegations from the respondent's law firm and M/s Stallion Insurance Co Ltd who all replied that they would revert back, but did not do so. He confirmed that the 2nd appellant's documents were sent to the head office for broadcast.

In a considered judgment delivered on **1st August, 2008** the learned Judge found the appellants liable and awarded the respondents **Ksh 4, 000, 000** as general damages and **Ksh 1, 000, 000** as punitive and aggravated damages. She also granted costs and interest at court rates. The said judgment provoked the present appeal in which the following grounds are cited:-

- ***The learned trial Judge erred in that she applied the wrong concept of the defence of justification or truth in that she failed to consider that for a defence of justification to succeed the defendant need not prove the truth of the whole of the defamatory statement.***

- ***The learned Judge erred in failing to consider the defence of constitutional privilege raised by the defendants as enshrined in Section 79 of the Constitution and NEW YORK TIMES VS SULLIVAN 376 US 254 (1964), THEOPHANOUS VS HERALD & WEEKLY TIMES LTD [1994] 3 LRC 369, and in most recent by the House of Lords in the case of JAMEEL & OTHERS VS WALL STREETJOURNAL (2006) 4 ALLER 1296.***

- ***The learned Judge erred in failing to consider that in view of the constitutional privilege defence raised by the defendants, even if a person is defamed, no liability arises when the matter is of public interest and defamation is not a tort of strict liability as was held in the case of NEW YORK TIMES VS SULLIVAN and NATION MEDIA LTD VS BOGOSHI (1998) 4 A 1196.***

- ***The learned Judge ignored the fact that the defendants had made the broadcast as a matter of public interest namely the way advocates accounted to their clients funds received on their account and a holding and recognition in England, South Africa, New Zealand and Australia of a defence based on a responsible journalism in a matter of public interest. In this particular case, the defendants had practiced responsible journalism for it was established that indeed cheques had been drawn in the name of the plaintiffs and the monies had not been released to the client.***

- ***The learned Judge erred in failing to allow an adjournment application by the defendants on 29th April, 2008 to allow them to call a witness crucial to their defence.***

- ***The learned Judge erred in awarding damages of Ksh 5, 000, 000 in relying on the decisions of the High Court, which were found to be without any juridical basis by the Court of Appeal in the case of JOHNSON EVANS GICHERU VS ANDREW MORTON (2005) KLR 332 at P. 343.***

- ***The learned Judge erred in holding that the plaintiffs were entitled to aggravated damages for the reason that the defendants had raised a flimsy defence of justification.***

- ***The award of Ksh 5, 000, 000 as damages is manifestly too high in the circumstances of the case.***

- ***The said award is at variance with the guidelines which this court gave in the case of JOHNSON EVANS GICHERU VS ANDREW MORTON [2005] KLR 332.***

- ***The awards made by the High Court are now threatening to stifle freedom of expression because of the court's failure to apply the doctrine of constitutional privilege recently recognized in***

democracies in protection of press freedom.

At the hearing of the appeal, **Mr. Karanja Munyori**, learned counsel appeared for the appellants while **Mr. D.M. Kimatta**, learned counsel appeared for the respondents. Mr. Munyori structured his arguments around three themes namely: - constitutional privilege; the defence of justification; and the award of damages. Grounds **2**, **3**, **4** and **10** of the memorandum of appeal formed the basis of the argument on constitutional privilege. Learned counsel submitted that the respondents are public figures and the public has a right to have information about them. The cases of ***NEW YORK TIMES VS SULLIVAN*** ***(Supra)*** and that of **CHIRAU *ALI MWAKWERE V ROYAL MEDIA SERVICES LIMITED [2005] eKLR*** were cited in support of the foregoing proposition. Next counsel addressed us on the defence of justification and submitted that what was reported by the 1st appellant was true in that there were photocopies of cheques amounting to the sum of **Ksh 250, 000** issued by the insurance company to the respondents. He made the unusual submission that notwithstanding evidence adduced to show that the said cheques were not cleared, the trial Judge erred in disallowing an application for adjournment to call a witness with whose evidence the 1st appellant's said defence would have been fortified. On damages, counsel submitted that the same were inordinately high and erroneous citing the cases of ***STANDARD LIMITED V G.N. KAGIA T/A KAGIA & COMPANY ADVOCATES [2010] eKLR***; ***PAUL GIKONYO MUYA V NATION MEDIA GROUP [2015] eKLR***; ***JOHNSON EVAN GICHERU V ANDREW MORTON & ANOTHER (Supra)***; ***KENYA TEA DEVELOPMENT AGENCY LTD V MASESE T/A B.O. MASESE & CO ADVOCATES [2008] eKLR***; ***J.P. MACHIRA T/A MACHIRA & COMPANY ADVOCATES V KAMAU KANYANGA & ANOTHER [2005] eKLR*** and that of ***FRED OLIVER OMONDI N'CRUBA OJIAMBO V STANDARD LIMITED & 2 OTHERS [2004] eKLR*** in support of his submission. He urged us to allow the appeal.

On his part **Mr. Kimatta** opposed the appeal by relying on his written submissions and stating at the outset that the appeal was devoid of merit. He argued that the respondents are Advocates of the High Court of Kenya whose livelihood depend on their reputation. As such there was absolutely no justification for the appellants' actions as the cheques which had been drawn in the name of the respondent's law firm were never sent to them, upon being prepared by M/s Stallion Insurance Co Limited. He added that the cheques in question were strangely retrieved from the receiver manager of M/s Stallion Insurance Co Limited by the 1st appellant, which was indubitable proof that they were never sent to the respondents. Indeed, an official from the Kenya Commercial Bank (KCB) confirmed that the said cheques had never been presented for payment. It was submitted that the 2nd appellant had complained to the Law Society of Kenya (LSK) and the Criminal Investigations Department (CID) who established and advised that the respondents were never paid any money which they failed to disburse.

Counsel also contended that there could be no justification if there was no truth in a publication. At any rate, the main complaint was that the respondents had received a client's money and declined to release the same. Moreover, in spite of the respondents' visit to the 1st appellant's offices and making the position clear, the 1st appellant repeated the offensive broadcasts nonetheless which demonstrated malice and or ill-will. Moreover, the residents of Mombasa were also warned in the same broadcast to be wary of the respondents. On constitutional privilege counsel submitted that none existed to warrant injury to the reputation of others without factual basis; especially when it relates to unfounded allegations of theft or professional misconduct. He further submitted that subsequent broadcasts were made with full knowledge of the facts.

As for the question of adjournment, counsel contended that there is no automatic right of adjournment as the same is subject to the discretion of the court. According to him the learned Judge found reason to reject the application for adjournment; and that the appellants were not denied the right to be heard. Finally, Mr. Kimatta submitted that considering the respondents had sought damages for each broadcast, the court's award was in fact mild, since the appellants ought to have been severely punished. He therefore urged us not to interfere with the award of damages. No reply was proffered by Mr. Munyori.

We have considered the record of appeal, grounds of appeal, submissions by learned counsel and the applicable law. In a first appeal our mandate is to re-evaluate the evidence on record with a view to

drawing conclusions therefrom. While at it, we are required to give allowance to the fact that we did not have the benefit of seeing the witnesses testifying. See ***SELLE VS ASSOCIATED MOTOR BOAT CO [1968] E.A. 123***.

It is not in dispute that the 1st appellant did broadcast the libelous material complained of by the respondents. What is in dispute in our considered view is whether the material was defamatory in nature. In ***KNUPFFER V LONDON EXPRESS NEWSPAPER LIMITED (1944) AC 116; [1944] 1 ALLER 495*** it was held that words are not actionable as defamatory unless they are published of and concern the plaintiff. Similarly, in ***NEWSTEAD VS LONDON EXPRESS NEWSPAPER LIMITED (1940) 1 KB 377, [1939] 4ALLER 319*** it was held that where the plaintiff is referred to by name or otherwise clearly identified, the words are actionable even if they were intended to refer to some other persons. It is not essential that the plaintiff must be named in the defamatory statement; where the words do not expressly refer to the plaintiff they may be held to refer to him if ordinary sensible readers or listeners with knowledge of the special facts could and did understand them to refer to him. See ***MORGAN V ODHAMS PRESS LTD [1971] 2 ALLER 1156***. Thus, the question becomes: -

Did the words broadcast by the 1st appellant make reference to; or concern the respondents?

We unhesitatingly answer in the affirmative.

We remain alive to the enduring difficulty in providing a precise definition of what qualifies as defamatory. Nonetheless, on this occasion we shall dwell on the effect which the words in question had on the respondents; specifically whether they:-

(i) ***caused the respondents to be shunned and avoided;***

(ii) ***brought the respondents into 'hatred, contempt or ridicule;***

(iii) ***lowered the respondents in the estimation of right-thinking members of society generally; or***

(iv) ***amounted to a false statement about the respondents to their discredit***.

Briefly, the gist of the broadcasts which were aired by the 1st appellant, the exact words whereof were specifically pleaded in the plaint as required, but which we do not consider necessary to set out herein, was that the respondents had failed to remit monies due to the 2nd appellant having pursued a personal injury claim on his behalf in their capacity as his Advocates and procured judgment in his favour. Was this the case? We answer in the negative fortified by the testimony of ***PW 3 (DAVID)*** who maintained both under examination-in-chief and cross examination that he was unable to trace any record of cheques cleared in favour of the respondents. What harm, burden and inconvenience was occasioned to the respondents prior to the said disclosure at trial? We are able to glean from the record: - inquiries directed at the respondents from their kith and kin, professional colleagues and the public alike expressing a mixture of concern, dismay and disappointment in equal measure. We are also able to discern loss of business, loss of esteem and injury to reputation on the part of the respondents. Accordingly, we find and hold that the broadcasts aired by the 1st appellant on **10th June, 2005**; **11th June, 2005**; and **28th June, 2005** at diverse times of the day were defamatory of the respondents. Ancillary to the foregoing is our finding that the 1st appellant was malicious in airing the offensive broadcasts even after receiving clarification on the same from the respondents.

What did the 1st appellant say in its defence? Principally, the 1st appellant's defence was that of justification supplemented by 'constitutional privilege' under the auspices of **Section 79** of the repealed **Constitution**; and the American Supreme Court decision of ***NEW YORK TIMES VS SULLIVAN (Supra)***. We were also able to gather an attempt to rely on the defence of 'Reynolds privilege' as espoused in ***REYNOLDS V TIMES NEWSPAPERS [2001] 2 A.C. 127***. We call to our aid the words of ***LORD FINDLAY*** in ***SUTHERLAND V STOPES [1925] A.C. 47*** to dissect the defence of justification, to wit:-

"A plea of justification means that the libel is true not only in its allegations of fact, but also in any comments made….. The defendant has to prove not only that the facts are truly stated but also that any comments upon them are correct."

We are further guided by the erudite words of ***LORD SHAW*** in the same breath and case to the effect that:-

"In a plea of justification the defence that a matter of opinion or inference is true is not that the defendant truly made that inference, or truly held that opinion, but is that the opinion and inference are both true".

When we place the foregoing excerpts against our finding on whether or not the respondents received monies due and owing to the 2nd appellant, the defence of justification spectacularly collapses. It was unavailable to the appellant.

Our perusal of **Section 79** of the repealed **Constitution** does not reveal the existence of a *carte blanche* in so far as the enjoyment of the fundamental right to freedom of expression was concerned at the time. We say so as the same was to be enjoyed within limits prescribed at **Section 70 (b)** and **Section 79 (2) (a) (b)** and **(c)** of the repealed **Constitution**. The notion of constitutional privilege accordingly dissipates and is bereft of any legal force. Had the 1st appellant conducted proper verification of the underlying facts before airing the offensive broadcast, it would have benefited from 'Reynolds privilege' which creates qualified privilege for publications to the general public on matters of public concern. To found its defence the 1st appellant ought to have adhered to standards of responsible journalism encompassing the verification of facts we have mentioned hereinabove. We find that not only was there a default in adherence in this instance but actual breach thereof in the form of ignoring the respondents' clarifications thus disentitling the 1st appellant from using the said privilege.

We have taken the trouble to acquaint ourselves with the facts and holding of ***NEW YORK TIMES VS SULLIVAN (Supra)*** and it suffices to state that the same is plainly distinguishable from the present case. We find and hold, with the greatest respect, that the said case is of no utility in the current circumstances. We are quite clear that there does not exist a right or privilege to take liberties and experiment willy-nilly with the reputation of another.

Having dispensed with the 1st appellant's arguments, we now turn to the remaining complaint by the appellants namely; quantum of damages. It is settled that assessment of quantum of damages is a discretionary exercise. The discretion must be exercised both judicially and in line with defined legal principles. In ***BUTT V KHAN [1981] KLR 349*** this Court stated 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…"

In contention is the award of **Ksh 5, 000, 000** as general damages which the appellants complain is manifestly high. What do we make of the complaint in view of our analysis hereinabove? The latitude in awarding damages in an action for libel is very wide and we must avoid substituting our views on what the damages should have been for the award by the learned Judge. See ***TANGANYIKA TRANSPORT CO LTD V EBRAHIM NOORAY [1961] EA 55***. In ***JOHNSON EVAN GICHERU V ANDREW MORTON & ANOTHER (Supra)*** Tunoi, JA (as he then was) rendered himself thus; and we agree:

"In action of libel the trial court in assessing damages is entitled to look at the whole conduct of the defendant from the time libel was published down to the time the verdict is given. It may consider what his conduct has been before action, after action, and in court during the trial: PRAUD V GRAHAM 24 Q.B.D. 53, 55."

We are alive to the fact that there have been several decisions of this Court rendered thereafter on the subject of quantum of damages for libel; including but not limited to: - ***J.P. MACHIRA T/A MACHIRA & COMPANY ADVOCATES V KAMAU KANYANGA & ANOTHER*** ***[2005] eKLR***, ***KEN ODONDI & 2OTHERS V JAMES OKOTH OMBURAH T/A OKOTH OMBURAH & COMPANY ADVOCATES*** ***[2013] eKLR*** and ***MWANGI KIUNJURI V WANGETHI MWANGI & 2 OTHERS*** ***[2016] eKLR***. We note that the learned trial Judge was well within the range of comparable awards notably the ***ODONDI*** and ***KIUNJURI*** cases which commend themselves to us.

In the premises we find this appeal to be devoid of merit and fails. The same is hereby dismissed with costs.

Dated and delivered at Nakuru this 2nd day of February, 2017.

P. N. WAKI

……

JUDGE OF APPEAL

R. N. NAMBUYE

……..

JUDGE OF APPEAL

P. O. KIAGE

……..

JUDGE OF APPEAL

I certify that this is a true copy

of the original

DEPUTY REGISTRAR