IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, KIAGE & MURGOR, JJ.A)

CIVIL APPEAL NO. 64 OF 2013

BETWEEN

NATION MEDIA GROUP LIMITED.....APPELLANT

AND

GEORGE NTHENGE.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Sitati, J.) dated 26th September, 2008

in

H.C.C.C. NO. 1354 OF 2004)

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JUDGMENT OF THE COURT

In this appeal, the appellant, the Nation Media Group challenges the finding by the High Court at Nairobi (Sitati, J.) that it had defamed the respondent, **George Nthenge** in consequence of which it was ordered to pay general and aggravated damages of Kshs. 5 million and Kshs. 2 million, respectively. This was on account of a publication carried in the appellant's Daily Nation Newspaper of Thursday, December 12, 2003 as a special report on old boys of Mangu High School who went on to make a mark in national politics. In the story titled "*Guess who Is Top of the Class;Old Boys Who Made Mark in Kenya"* was reported of and concerning the respondent the following words;

> ***"Definitely in the opposition camp is Mr. George Nthenge, best remembered as one the six founder members in 1991 of the "Forum for the Restoration of Democracy (FORD), the pressure group that marshalled final push for multiparty democracy and paved way to the opposition?s rise to power a decade lateR. He served as Kamukunji MP in the seventh Parliament (1992-1997) having earlier served as MP in the third Parliament (1974-79).***
>
> ***Yet Mr. Nthenge?s headteacher at Mang?u in 1946-47 junior secondary class did not believe he would have much to offer. His testimonial reads „Below average intelligence. A bit mental, controversial. Sent home due to failure in studies and suspicion of staff."***
>
> ***In his last school examination in form 2, Mr. Nthenge failed in all subjects except Agriculture, never took part in any sporting activity and was described as an introvert."***

The respondent in his suit following the publication complained that these words in their ordinary meaning meant that he was "a dimwit, a very foolish and stupid person" who had nothing to offer to society and was therefore incompetent. He charged that he had in consequence been injured and his estimation in the eyes of the right-thinking members of society had been lowered and he had been exposed to ridicule, hatred, contempt and odium. He went on to claim that the appellant published those offending words recklessly, without lawfully excuse and while actuated by malevolence or spite towards him because it knew or ought to have known;

> ***"(a) That no such testimonial as was published had been made a head-teacher against the plaintiff.***
>
> ***(b) That the plaintiff had not failed in all his subjects in Form 2 except Agriculture as alleged by the defendant.***
>
> ***(c) That the plaintiff has passed his examinations other than Geography."***

Moreover, it had published the words calculating through the sensational scoop to increase the circulation of the newspaper with a view to making a profit from the sale, and maliciously failing to ascertain the true position or veracity of the news item. It had also failed, refused and or neglected to tender an apology and make amends despite demand.

The appellant admitted publication but denied that it was false and maliciously done or that the words were malicious. It went on to state as follows in its amended defence;

> ***"4B. In the alternative the defendant avers that in so far as the said words in the publication consist of facts that they were true in substance and in fact, and in so far as they consist of opinions, they were fair comment, on a matter of public interest, namely that the public has a right to know of the background and history of politicians and political leaders.***
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> **Particulars under Order VI Rule 6A of the Civil Procedure Rules:**
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> **Particulars of facts**
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> (a) The plaintiff's head teacher stated in his testimonial that he was "below average intelligence,"
>
> (b)The plaintiff was described as an introvert.
>
> **Particulars of opinion**
>
> (a) The plaintiff's performance as compared to those of his peers mentioned in the said article was wanting.
>
> (b) The plaintiff had failed in some of his subjects such as geography.
>
> ***4C. The defendant will rely on Section 15 of the defamation Act, Cap 36, Laws of Kenya*.*"***

When the matter went to trial before the learned Judge, the respondent testified on his own behalf and was duly cross-examined by the appellant's advocate but no evidence was called or tendered on behalf of the appellant before the impugned decision was rendered.

Even though the Memorandum of Appeal lodged shows that the appellant was aggrieved by both liability and quantum, its learned counsel, **Mr. Mwangi** in arguing the same, abandoned the first three grounds dealing with liability and instead directed his attack at the assessment and award of damages. He submitted that even though we are all equal before the law, in defamation suits the status of the person defamed is material. Applying that notion, he asserted that the respondents' status and standing had

diminished over time and his contemporaries had passed on. Counsel criticized the learned Judge for making an excessive award even after finding that the impact of the publication was quite mild. The learned Judge was assailed for relying on the cases of ***FRED OLIVER OMONDI N?CRUBA OJIAMBO vs. STANDARD LIMITED & 2 OTHERS*** **[2004] eKLR** and of ***J.P MACHIRA vs. THE STANDARD LIMITED*** Nairobi HCCC No. 612 of 1996 as both concerned prominent lawyers who were, moreover, awarded much lower sums of Kshs. 1.0 million and Kshs. 1.25 million.

The learned Judge was also blamed for failing to reduce the amount of damages payable to the appellant by reason of his having failed to exercise his right of reply under **section 7(A)** of the **Defamation Act**. Counsel urged that in all the circumstances of the case the learned Judge should not have given an award higher than the Kshs. 1 million that the appellant had proposed, and should not have made any award of aggravated damages. Counsel blamed the learned Judge for abdicating her duty to determine whether this was a proper case for aggravated damages which are payable only under three scenarios namely;

> ***(i) Where recognized by statute.***
>
> ***(ii) The wrong involves oppressive actions by agents of government.***
>
> ***(iii) The act is done with guilty knowledge solely for purpose of profit.***

It was contended that the trial court erred in uncritically granting exemplary damages without any references to the law.

Opposing the appeal in person, the respondent submitted, with a lucidity and eloquence that proved his eighty years to be but a number, that he was an outstanding student and that even though many of his contemporaries were now deceased, their children knew him well; he has been known by the people of Kenya and had not stopped existing. Referring to his five electoral parliamentary polls victories over time, he charged that he was so elected because he had started being publicized in the year 1953.

Stating that everybody is worth something, he claimed to have grand children who are lawyers and that his calibre in fact surpassed that of the late powerful Cabinet Minister Nicholas Biwott, whose record-breaking awards in damages the learned Judge did not emulate, adding that Biwott came along when the respondent was already an outstanding leader. He went on to proclaim what he perceived as his being a person of substance; he brought his first-house in Nairobi in 1962 and in the 1970's used to be "a Business Premises Rent Tribunal Judge" and that the appellant came to Kenya when he had already established a big name so that this was a case of a young man comparing himself to his grandfather. He urged us to dismiss the appeal.

The award of damages lies in the discretion of the trial court and the circumstances under which, and the principle that govern the interference therewith by an appellate court as the appellant invites us to do are well known. In ***BUTT vs. KHAN*** **[1981] KLR 349**, Law, J.A, expressed the principle thus at p. 356;

> ***"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."***

See also ***GICHERU vs. MORTON & ANOR*** ***[2005] 2 KLR 332*** where this Court held, and we respectfully agree, that;

> ***"The latitude in awarding damages an action for libel is very wide, and the one thing a Court of Appeal must avoid is to substitute its own opinion as to what it would have awarded for the sum awarded by the court below it."***

Did the learned Judge err in principle, take into account matters he ought not or fail to take into account what he ought with the result that he came up with an excessively and wholly erroneous estimate to

warrant our interference? Starting with general damages for defamation, we take the view that whereas monetary compensation hardly suffices to repair damage done to one's reputation or good name, nevertheless such awards provide solatium to the injured party and represent the law's acknowledgement that something of an innate, if intangible, value has been despoiled by the reckless publication of wanton and false words concerning the person defamed. Much as we acknowledge the intrinsic value of freedom of the press, we do not subscribe to the notion that the pen is a passport to experimentation and the taking of liberties with people's reputations. Indeed, in some instances, a good name is all that a person has when much else is lost or gone, as was so poignantly the case with the respondent in this case who had had more than his fair shares of personal tragedy as the record shows.

We think, therefore, that it was disingenious of the appellant to argue, as it did, that the respondents' status had diminished over time and his contemporaries had departed this life, thereby meaning, we understand, that his reputation was thereby worth somewhat less and its injury should have attracted less damages. We think that the learned Judge did well to eschew the Biwott awards that were way out of the ordinary and to amend something higher than the Ojiambo and Machira, award given the passage of time. We therefore do not see any error in principle or a patently excessive award that would justify, less still compel, our interference. We remind ourselves that we would not be entitled to interfere with the trial Judge's assessment of damages merely because we would have been inclined to award a different sum had we been sitting in first instance.

The attack on the Kshs. 5 million is therefore without basis and we have no difficulty upholding the general damages awarded as being generally in line with some of the awards this Court has given such as ***CHIRAU ALI MAKWERE vs. ROYAL MEDIA LTD*** **[2005] eKLR** and ***KIUNJURI vs. MWANGI & 2 OTHERS*** **[2008] KLR 525.**

We note, also, that the appellant did nothing to mitigate the damage done to the respondent's reputation such as by publishing an apology. In fact, far from publishing one, the appellant adamantly refused to do so thereby hindering the respondents path to vindication to the public and a consolation for the wrong done as was expressed by this Court in ***LAKHA vs. STANDARD LTD T/a EAST AFRICA*** **[2009] KLR 432.**

The appellant's more substantial complaint relates to the award of exemplary damages of Kshs. 2 million that the learned Judge awarded the respondent. Its complaint is that the learned Judge had no proper basis for awarding the sum of Kshs. 2 million. The learned Judge in awarding damages on the aggravated footing reasoned thus;

> ***"Exemplary Damages***
>
> ***42. Regarding these, I am persuaded that the plaintiff is entitled to the same. The testified that upon publication of the article, the plaintiff, through his counsel, wrote to the defendant seeking an apology, but no apology was published, nor did the defendant even have the courtesy to respond to the letter demanding the apology. No evidence was called by the defendant to rebut all the facts that the plaintiff stated in his evidence on oath.***
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> ***43. I also note that the authorities relied upon by both parties, and in particular by the defendant were made almost five years ago."***

The law on exemplary damages was held by the predecessor of this Court in ***OBONGO vs. MUNICIPAL COUNCIL OF KISUMU*** **[1971] E.A. 91** to be as authoritatively declared by the former English House of Lords in ***ROOKES vs. BARNARD & OTHERS*** **[1964] AC 1129**. The Court understood that English decision, per Law JA at P. 96-98;

> ***"To be to the effect that exemplary damages are appropriate in two classes of case; oppressive, arbitrary and unconstitutional action by the servants of government, and conduct by a defendant calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff, and these classes should not be extended."***

This Court has endorsed that to be the law in this country in ***BANK OF BARODA (K) LTD vs. TIMWOOD PRODUCTS LTD*** **[2008] 236,** among others.

Whereas the learned Judge did not make reference to these cases in the brief reasoning in this aspect of the case, we think that she certainly had them in mind, not least because the plaint specifically alleged that the appellant published the offending words calculating through the sensational thereby to increase the circulation of the said newspaper with a view to making a profit from the sales. We therefore are persuaded that a basis did exist for making an award under this head.

Given, however, that the award under general damages could well be said to have been quite generous, though within reasonable range, we think that the award for exemplary damages was in the circumstances, excessive and seems not to have paid undue regard to the fact that the sum of general damages substantial. The exemplary damages therefore did not reflect a fair estimate and would warrant our interference which we do by reducing it from Kshs. 2 million to Kshs. 1million. In this respect only, the appeal succeeds with the result that we set aside the learned Judge's award of Kshs. 2million exemplary damages and substitute therefor an award of Kshs. 1million which therefore reduces the total damages payable to the respondent from Kshs. 7 million to Kshs. 6 million.

We order that each party do bear own costs of this appeal.

Dated and delivered at Nairobi this 15th day of December, 2017.

W. OUKO

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR