



IN THE COURT OF APPEAL

AT NYERI

(SITTING IN NAKURU)

CIVIL APPEAL NO. 71 OF 2010

(CORAM: WAKI, NAMBUYE & KIAGE, JJA)

BETWEEN

NATION NEWSPAPERS LIMITED..... APPELLANT

AND

PETER BARAZA RABANDO.....RESPONDENT

*(Being an appeal from the Judgment/Decree of the High Court of Kenya at Nakuru (Kimaru, J)
dated on 15th day of November 2006*

IN

H.C.C.C. No. 505 OF 1998

JUDGMENT OF THE COURT

The sole issue for our determination in this appeal is whether the award of Ksh. 2 Million being general damages made by the High Court at Nakuru (**Kimaru J**) against the appellant for defaming the respondent ought to be interfered with.

That award followed a finding that the appellant was liable in libel for publishing two articles in its *Daily Nation* newspaper that were false and malicious. The first article appeared in 30th October 1998 under the title 'MAN INJURED MILKING ELEPHANT' and stated as follows:

“A young farm hand suffered two broken ribs and a dislocated shoulderafter trying to milk an elephant. The elephant, which had been browsing peacefully with her calf, suddenly realized she was being handled and indignantly tossed 21 year old Peter Baraza into the air together with his half-filled can of milk. Badly wounded, he struggled to escape by climbing a nearby tree, but she seized the tree with one violent tug and waved it in the air with Peter clinging desperately to a branch”....

Witnesses said he tried to milk the elephant when he came across her near the Kenya Agricultural Research Institute in Ol Joro Orok division, last Saturday”.....

Baraza, she said, had obtained almost one pint of milk from the elephant before he was attacked”....”

It was followed by another on 4th November 1998 titled “THE MAN WHO MILKED A JUMBO” commanding the *Nation Wednesday Magazine* of that day and started with the words;

“Twenty two year old Peter Baraza is a daring man. He did what nobody has ever attempted to do – he milked a rogue elephant”

That story was accompanied by a photograph of the respondent holding a milking can full of, allegedly, the elephant's milk. Also on the page was superimposed the picture of the elephant.

On account of these publications the respondent alleged that the words in their ordinary meaning as well as by the innuendos they conveyed were injurious to his credit, character and reputation and had lowered him in the estimation of right thinking members of the society and had exposed him to hatred, ridicule, scandal, odium contempt and he had become a laughing stock.

The learned Judge found that the stories the appellant had published were false in fact and substance, the truth having been that the respondent was going on with his normal work of weeding maize when he was attacked by a stray elephant which injured him; causing him to lose consciousness which he regained two days later at the Nyahururu District Hospital where he was taken. He had, moreover, denied that he had attempted to milk an elephant, a denial that the appellant ignored as it went ahead to publish the second article.

The learned Judge went on to find as follows:

“It is clear that the said articles were published by the defendant because it was a sensational and incredulous story. A right thinking member of the society would obviously interpret the contents of the articles to imply that the plaintiff was a very daring but stupid man. The innuendo intended was the plaintiff was an obvious idiot who would attempt to milk a wild elephant. I agree with the plaintiff that the said articles portrayed him in the eyes of the right thinking members of the society to be an idiot.

To reinforce the thrust of the said articles, particularly the article published on the 4th of November 1998, the defendant manipulated a picture of the plaintiff to show the plaintiff holding a can full of milk. At the background of the picture was a superimposed image of an elephant. The innuendo of the said picture was clear for a right thinking member of the society to see. It was meant to portray the plaintiff as an idiot who dared milk an elephant. It was further meant to portray the plaintiff as having been lucky to survive after daring to do such a stupid act as trying to milk a wild elephant.”

Aggrieved by that decision, the appellant preferred this appeal raising some five grounds in its memorandum of appeal. At the hearing of the appeal, however, its learned counsel, **Mr. Gabriel Mwangi** abandoned grounds 1, 3 and 4 which challenged the learned Judge's finding on liability and concentrated on grounds 3 and 5 which are that the learned Judge:

- **Misdirected himself in fact and law in his assessment of damages thereby awarding excessive damages in the circumstance of the case.**
- **erred in law and in fact in failing to take into account the status of the respondent on society in his assessment of damages.**

Urging the appeal, **Mr. Mwangi** first submitted, and this is not in dispute, that the award of damages being at the discretion of the trial Judge, the appellate Court's power to interfere is carefully circumscribed and limited to some well-known circumstances. He cited the case of **MBOGO VS. SHAH [1968] E.A** where the predecessor of this Court held as (per NEWBOLD P.) that;

“a Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that he misdirected himself on some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and as a result there has been misjustice”

We accept that principle. See also **EVANS VS. BARTLAM [1937] 2 ALL ER 646**.

Counsel next cited this Courts' decision of **BUTT VS. KHAN [1981] KLR 349** for the principle on interference with an award of damages captured by Law JA who, at p 356 quoted Windeyer J in **WREN VS. FAIRFAX & SONS PTY LTD [1967] 117 CLR 118** at 150 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.”

As to the purpose an award of damages for defamation serves, Mr. Mwangi called in aid the decision of the former English House of Lords in **CASSEL & CO. LTD VS. BROOME & ANOTHER [1972] 1 ALL ER 801** where the Lord Chancellor, Lord Hailsham of St. Marylebone, opined in the leading judgment as follows;

“It seems to me that, properly speaking a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways – as a vindication of the plaintiff to the public, and as a consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money.” (Emphasis his)

Learned counsel then contended that whilst all people are equal before the law, the injury suffered from defamation is not the same for all persons since, in counsel's view, a person's status affects the extent of the injury suffered. He found support for that submission in this Court's decision in **C.A.M VS. ROYAL MEDIA SERVICES [2013] eKLR** where the Court accepted and followed that same reasoning as it had in **NATION NEWSPAPERS LIMITED VS. DANIEL MUSINGA T/A MUSINGA & CO. ADVOCATES [2005] eKLR** thereby allowing lower damages than had been awarded in **JOHNSON EVANS GICHERU VS. ANDREW MORTON** because *“the subject (sic) effect of defamation on a Chief Justice cannot be reasonably equated to an advocate of whatever standing in the profession”*.

Pressing that line of argument, and applying these principles to this appeal, counsel submitted that the award of Kshs 2 million made to the respondent was inordinately high, considering that all that was known of and about him was that he was employed at the Kenya Agricultural Research Institute (KARI) and that he was weeding a maize crop at the time. Notwithstanding that the respondent had a dignity inherent to himself and a reputation that was injured, the injury ought not to have been equated to that suffered by a prominent politician, Cabinet Minister and Diplomat in **C.A.M VS. ROYAL MEDIA** where an award of Kshs 3 million was made. Nor, for that mater, was it comparable to that of a prominent businessman and professional in **AZIZ LAKHA VS. THE STANDARD LIMITED T/A EAST AFRICAN STANDARD [2009] eKLR** or to **OJIAMBO VS. STANDARD LIMITED & 2 OTHERS [2004] KLR 496** where the High Court awarded some Kshs 1 million to an eminent lawyer. So saying, **Mr. Mwangi** concluded by stating that the sum of Kshs 200,000 which the appellant had offered should be sufficient damages in this case.

In opposing the appeal, the respondent's learned counsel **Mr. Mburu** elected to rely on the same authorities cited by his learned counterpart. He supported the judgment of the learned Judge who, he submitted, considered the prominence of the stories: the first was on page 1 while the second was a full page report in the *Wednesday Magazine*. The learned Judge also considered, in counsel's submission, the conduct of the appellant in arrogantly replying to the demand letter that sought an apology, as well as the wide circulation of the newspaper.

Stating that nobody should be defamed irrespective of status, counsel submitted that the respondent was forced to relocate from his usual place of residence and work and even had difficulty getting a wife as he was thought not to be normal. He therefore urged us not to disturb the award made by the learned Judge considering that they had sought an award of Kshs 40 million.

In a brief reply to those submissions, Mr. Mwangi urged us not to place any weight on the conduct of the appellant as this should only have been relevant to a consideration of exemplary damages, which the respondent neither pleaded, particularized, nor prayed for.

As we have already observed, the appellant did defame the respondent. It came up with and published a rather incredible and entirely false story which served only to ridicule the respondent. It made a regular fool of him, the story being the stuff of an April Fool's day, which it was not. Worse, it engaged in creative and actionable journalism by manipulating photographs and creating the impression that the respondent had managed the uncommon feat of extracting a bucket-ful of milk from the teats and udder of a rogue elephant. A picture of such a Jumbo to create the impression of reality, commanded the page of its *Wednesday Magazine* which had a commentary that "*The story of the young man's escapade spread through the country like a bush fire.*" It is a fire lit, fanned and spread by the appellant who had clearly taken liberties with the respondents' reputation and character. And it did well to concede the appeal on liability.

All of the cases cited before us by the parties are germane to our consideration of this matter. We accept that damages are at the discretion of the first instance court. As long as the learned Judge did not clearly err by misdirection or non-direction, and as long as he did not proceed on wrong principles, misapprehend the evidence in some material respect thereby arriving at an award that is so inordinately high or low as to amount to an entirely wrong estimate, we would not interfere. Not even if we would ourselves perhaps have arrived at a different figure.

Whereas we think that on the whole the learned Judge properly undertook the process of assessment of damages and had in mind the applicable principles, thereby arriving at a figure much lower than the Kshs 40 million sought by the respondent who placed reliance on the case of **KNK BIWOTT VS. CLAYS LIMITED NAIROBI HCCC 1067 OF 1999**; we are of the view that there is one aspect that he did not take into account. It is not clear from the learned Judge's judgment that in arriving at the figure of Kshs 2 million, he considered the fact that the respondent, though clearly defamed, did not stand in the same place in terms of status, fame, recognition, credit and reputation as the plaintiffs in some of the awards made by this Court and the High Court. It is unfortunate that the respondent's counsel in his written submissions before the High Court cited only the **NICHOLAS BIWOTT** case (supra) which, with respect, could not serve as a guide for the damages the respondent could hope to obtain given the vastly different personal and professional circumstances between the respective plaintiffs.

We reiterate that all persons are equal before the law but it would be a Utopian fallacy to assume that a defamatory publication calls for an equal compensation regardless of the status, standing and character of the persons defamed. We dare say that for a person who is not known beyond the local limits of his immediate family, residential and work environment calls for less damages than a person of prominence whose station, position, profession, fame and notoriety may spread beyond county and country. We therefore reiterate as correct what this Court has stated before that the status of a particular person affects the extent of the injury suffered.

On the authorities, therefore, we are quite satisfied that the award of Kshs 2 million made in favour of the respondent which was higher, even with the passage of time, than what had been awarded in the **AZIZ KASSIM LAKHA** and **OJIAMBO** cases was manifestly and inordinately high. It was in the circumstances excessive and calling for our interference and adjustment downwards since the geographical and numerical spread of the solatium and vindication the appellant is entitled to is much narrower.

In the result, the appeal succeeds in part. The award of damages made by the learned Judge is set aside and substituted with an award of Kshs 1.2 million.

Each party shall bear its own costs of the appeal.

Dated and delivered at Nakuru this 27th day of April, 2016.

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