IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MWERA & AZANGALALA, JJ.A)

CIVIL APPEAL NO. 224 OF 2008

BETWEEN

PAUL GIKONYO MUYA……..APPELLANT

AND

NATION MEDIA GROUP……RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Nairobi (Hon. J.L.A. Osiemo) on 19th October 2007

in

H.C.C.C. NO. 1404 OF 2002

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JUDGMENT OF THE COURT

The appeal before us is brought by **Paul Gikonyo Muya**, the appellant herein. The respondent, **Nation Media Group Limited**, is the proprietor and publisher of the Newspaper called "*The Daily Nation"*. The appeal arose in this way.

By a plaint dated and lodged in the High Court at Nairobi on 23rd August, 2002, the appellant claimed from the respondent general damages for libel plus costs and interest. The statement claimed to have been libellous was published in the respondent's said newspaper in its issue of 5th

September, 2001 and was as follows:-

> ***"DP MP BOOED OVER KANU MOLE CLAIM More than 200 delegates booed Tetu MP Gikonyo Muya during a Democratic Party sub-branch election on Monday. This forced the DP legislator to withdraw, from vying for treasurer's post which was won by his rival Mr. Wanjuki Muchemi. The MPs claim that some contestants were KANU moles had angered the delegates."***

Following a full hearing in the High Court, Osiemo J, did not find as proved the libel alleged and dismissed the suit with costs.

Aggrieved by the said judgment, the appellant has appealed to this court citing the following complaints:

he faulted the learned judge for not finding the said words defamatory in their natural and ordinary meaning; he complained that the learned judge did not appreciate that the said words were untrue and were published without lawful excuse and were calculated to injure his reputation; he faulted the learned judge for failing to find in his favour even when there was no evidence offered in rebuttal; he complained that the learned judge was concerned about his (appellant's) status as a politician rather than the accurancy and truthfulness of the said words; he faulted the learned judge for not finding that the evidence of his witness demonstrated that he was shunned and avoided by right thinking members of the society because of the said words; in his view an adverse inference should have, but was not, made against the respondent for failing to adduce rebuttal evidence; he faulted the learned judge for not awarding him compensation.

When the appeal came up for hearing on 7th May, 2015, Mr. Ngigi, learned counsel for the appellant, relied upon submissions made before the High Court. In high lighting them, learned counsel, contended that the words published by the respondent were defamatory in their ordinary and natural meaning and were defamatory of the appellant, as according to him, they meant he was unfit to hold public office. Counsel was also of the view that as the words were not true and were not rebutted by evidence to the contrary, the publication was made with malice and the appellant deserved protection and an award of damages including exemplary and aggravated damages, more so, since he lost the subsequent election for MP Tetu Constituency.

Responding to those submissions Ms. Janmohamed, learned counsel for the respondent, also relied upon the submissions which were made on behalf of the respondent in the High Court. She then highlighted the same as follows: That the alleged meanings attributed to the published words were infact incorrect and the learned Judge's conclusion could not, according to her, be faulted. Learned counsel contended that the failure of the appellant to recapture the Tetu Constituency seat was not related to the said statement as, according to her, the appellant was doomed to lose. Learned counsel, citing the record of the High Court, stated that the appellant did not campaign for the seat and even prior to the publication of the impugned words, the mood of the voters in the constituency had changed against the appellant prompting his withdrawal from seeking Democratic Party Treasurer's seat at sub-branch level. In any event, according to counsel, no evidence was adduced to demonstrate that the appellant had been shunned because of the publication.

On the submissions on exemplary and aggravated damages, learned counsel stated that the same had not been pleaded and were not proved and submissions on the same were therefore misplaced. In any event, according to counsel, no malice had been pleaded nor alleged at the trial.

We have carefully weighed the rival submissions put forward on behalf of the parties. We have also considered fully the record, the decisions cited by both counsel in support of their submissions and the grounds of appeal. This being a first appeal we are in law enjoined to revisit the evidence that was before the trial court afresh, analyse it, evaluate it and come to our own independent conclusion but always bearing in mind that the trial court saw the demeanour of the witnesses, and heard them and so we must give allowance for that – see the case of ***Selle and Another - v - Associated Motors Boat Company Ltd. & Others [1968] EA 123***, where it was held:

> ***"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 are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusion 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 Hamed Saif v Ali Mohamed Sholan [1955], 22 E.A.C.A. 270)"***

The learned judge of the High Court dismissed the appellant's case because, in his view, the appellant had

not adduced any evidence to prove that the said statement caused right thinking members of society to shun him or avoid him and that "*loss of his parliamentary seat was caused by the alleged statement by his opponents in public political meetings where blame is the order of the day even to the highest office."* That conclusion, in our view cannot be faulted but before giving our reasons why we say so, we shall first consider whether the statement published by the respondent is defamatory.

We have anxiously considered every word of the statement singularly and in the context of the entire statement and are unable to detect any word of the statement which may be described as defamatory. The learned judge understood a defamatory statement to mean a statement which tends to bring

"a person to hatred, ridicule or contempt or which causes him to be shunned or avoided or which has a tendency to injure him in his office, profession or calling." This meaning is in consonance with the meaning the appellant attributed to the statement in the submissions made on his behalf at the trial. According to the appellant, "defamation has been defined as a publication without justification or lawful excuse, which is calculated to injure the reputation of another by exposing him to hatred, contempt and ridicule as per Lord Winsley in *Pamiter -vs- Compound [1840] 6 Maw 105, 108 as adopted by Lenaola J. in Ochieng and & Others -v- Standard Limited [2004] 1 KLR*

225." The learned judge was indeed more generous in his definition of a defamatory statement than the appellant as he did not use the term

"calculated to injure" in the meaning he applied.

The words "*D P MP"* are not defamatory in any language nor is the phrase *"KANU mole"*. We take judicial notice of the fact that at the time and even now KANU was and is a registered political party and being a member thereof cannot and could not be demeaning. It is also significant that as at the time of the statement KANU was the ruling party. It is irrelevant that the party may not have had a significant following in the appellant's area but it is another thing to claim that being referred to as belonging to it could ever be described as defamatory. The statement, "*more than 200 delegates booed*

Tetu MP Gikonyo Muya during a DP sub-branch elections on Monday….." in themselves are not defamatory as expressing approval or disapproval of a speaker in any meeting cannot, in our view, be described as defamatory. It happens every day more so, at gatherings of political competitors.

The words that "*the above statement forced the DP legislator to withdraw, from vying for the treasurer's post which was won by his rival Mr. Wanjuki Muchemi,"* are not defamatory in their natural and ordinary meaning. There is also nothing defamatory about withdrawing candidature for any seat including a political seat. Lastly the statement that *"the MP's claim that some contestants were KANU moles angered the delegates,"* is not and cannot be defamatory given what we have already stated about KANU.

We have also considered the entire statement published by the respondent and as already observed it is devoid of any defamatory material. The statement may have been incorrect but it certainly cannot be described as defamatory. It also certainly did not mean that the appellant as a public figure is so incompetent as not to be trusted with a public office, *"nor that the appellant cannot be entrusted with public duties and responsibilities and as such is not worthy of such office."* The words could not also in their natural and ordinary meaning mean or be understood to mean that "*the appellant is a coward."* So, the meaning ascribed to the said statement by the appellant in the plaint cannot be said to be correct.

The appellant did not even say so, in his testimony before the trial court. In his own words:

> ***"I felt that that story was intended to interfere with my campaigns as the elections for Parliament were near. The other two contestants for treasurer's post were aspirants for Parliamentary seat Wanjuki Muchemi and F. Nyamu."***

He continued:

> ***"The publication damaged my political career. Since the delegates there reported that they had booed me which means that I lacked support within the party. I was made to spend a lot of money to fight the other contestants who took advantage of what was reported in the Daily Nation. This booing was attributed to me by the Daily Nation instead of F. Nyamu and the supporters of those other parliamentary aspirants by using that booing in their campaign. The next election campaign becomes very costly and in the end I lost the elections at the party nominations Wanjuki Muchemi won the treasurer's election. The alleged booing meant that I was not popular at all."***

It is plain that in his evidence, the appellant did not say that the publication meant that he was so incompetent as not to be capable of holding a public office. He also did not say that it meant that he could not be trusted with public duties and responsibilities or that he was a coward. The appellant did not therefore demonstrate that the publication had the meanings he had claimed they had in his plaint.

It is significant that the appellant did not plead any innuendo. In our view however, even if he had, we doubt whether the meanings he attributed to the publication would have been demonstrated by his evidence at the trial.

On cross-examination he put the issue beyond controversy. He stated:

> ***"Currently I am a member of the Church Makadara P.C.E.A. and I am a member of PCA Fellowship and I serve as a Treasurer P.C.E.A. (MF) Men Fellowship. I was a member of Muthaiga Golf Club up to 2004 when my membership ceased due to lack of funds. I still lead members of my clan back in the village for more than 10 years. Since the alleged defamation I have still vied [for] posts in society."***

The appellant may have failed to recapture his seat as M.P. for Tetu Constituency but he nevertheless continued in his leadership role in public life even after the alleged offending publication. It cannot therefore be true, as he claimed in his plaint, that as a consequence of the publication, his reputation both personal and as a member of Parliament for Tetu Constituency was seriously damaged and that he suffered considerable distress anxiety and embarrassment. In fact, according to his witness **James Githinji Wamani**, (PW. 2), even before the election for Tetu Parliamentary seat, the appellant had already lost favour of the voters. For any serious contender for a Parliamentary seat, sub-branch elections for his party in the constituency are important. The appellant, as the sitting MP, was expected to be abreast with his party's activities in his constituency. Yet those elections were organized without his knowledge and he only came to know about them only three days before they were held through PW 2 at the funeral of the appellant's mother-in-law. It is therefore not surprising that when he offered his candidature for the post of Treasurer of the sub-branch, the voters were not with him. PW 2 testified that *"when he (appellant) assessed the mood of the delegates, he decided to step down…. He did not have time to talk of [to] the delegates before the elections due to the funeral arrangements of the mother-in-law the previous week."* Those events were before the impugned publication.

The appellant, himself appreciated, the significance of the sub-branch elections of his party. In his own words:-

> ***"The other two contestants for the treasurer's post were aspirants for Parliamentary seat Wanjuki Muchemi and F. Nyamu. The position was that whoever won the seat for the treasurer was the likely winner of Parliamentary seat at the coming elections."***

So, on his own concession, his decision to withdraw from vying for the treasurer's seat at the sub-branch level sealed his fate. You will recall that the appellant withdrew from contesting the seat after *"assessing the mood of the delegates ….. as he was doomed to lose….."* according to PW 2

When eventually the election for Tetu Constituency was called, slightly over a year later, the appellant was not the sub-branch treasurer for his party. He was therefore, given his evidence, not expected to win the seat. He could not therefore blame his loss to the alleged offending publication.

It is now evident why we stated earlier that we cannot fault the conclusion of the learned judge that the alleged offending publication did not

cause right thinking members society to shun the appellant or avoid him and that the loss of his Parliamentary seat was not caused by the publication of the statement by his opponents in public political meetings.

Having come to the conclusion that the publication was not defamatory of the appellant and it did not bear the meanings attributed to it by the appellant, we do not find it necessary to analyse the various defences proffered by the respondent in its written statement of defence.

We, however, feel impelled to briefly comment that under Order VI rule 6A(2) (now Order 2 rule 7(2)) of the Civil Procedure Rules, where justification is pleaded as a defence, as the respondent did, particulars should be given. The respondent in its written statement of defence did not identify which of the words complained of were true nor did he state the matters it relied upon to support its allegation.

The respondent was, however, on firmer ground in its submission that after pleading fair comment on a matter of public interest and that the publication was on a privileged occasion, if the appellant intended to rely upon the pleading that the publication was actuated by express malice, he had to say so in his reply and give particulars of the facts and matters from which the malice was to be inferred. That is by dint of the provisions of Order VI rule 6A(3) (now Order 2 rule 7(3)) of the Civil Procedure Rules.

We observe that the appellant did not plead any malice in the reply nor did he give any particulars of the facts and matters he was to rely upon to support that plea. We, therefore, agree with the respondent that the submissions on behalf of the appellant regarding alleged malice were misconceived.

A word on the issue of damages. A libellous publication is a tort actionable *per se* without pr oof of actual damage. Proof of actual damage would only have affected the quantum awardable. In this case however, the appellant did not lead any evidence on the actual damage he sustained. He mentioned spending "*a lot of money*" at the nomination stage without adducing evidence of the actual spending incurred. He also claimed that the publication made his campaign costly without stating the alleged cost. So, only general damages would have been awardable as prayed in his plaint if we had found the publication defamatory of the appellant. The aggravated or exemplary damages sought in the appellant's submissions would not have been awarded as they were not pleaded and no evidence was led in proof of the same.

The upshot is that we find no merit in this appeal and order that it be and is hereby dismissed with costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF JUNE 2015.

W. KARANJA

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JUDGE OF APPEAL

J.W. MWERA

……..

JUDGE OF APPEAL

F. AZANGALALA

…….

JUDGE OF APPEAL

I certify that this is a true

Copy of the original

DEPUTY REGISTRAR