IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, MWILU, & OTIENO-ODEK, JJ.A.)

CIVIL APPEAL NO. 140 OF 2008

BETWEEN

KENNETH NYAGA MWIGE.....APPELLANT

AND

AUSTIN KIGUTA.....1ST RESPONDENT

BEDAN MBUGUA.....2ND RESPONDENT

THE PEOPLE LIMITED.....3RD RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya

at Nairobi (Khamoni, J.) dated 18th April, 2008

in

HCCC NO. 1930 OF 2000)

****

JUDGMENT OF THE COURT

1. The appellant ***Kenneth Nyaga Mwige*** filed a defamation suit against the three respondents, ***Austine Kiguta***, ***Dedan Mbugua*** and ***The People Limited***. The 3rd respondent is the publisher and printer of the People Daily, a newspaper with national circulation in Kenya and elsewhere around the world. At all material times the 1st respondent was a reporter in the employ of the 3rd respondent while the 2nd respondent was the Editor-in-Chief of The People Daily newspaper.

2. In the plaint, it is alleged that on 2nd August, 2000, the respondents falsely and maliciously printed and published or caused to be printed and published of and concerning the appellant the following words:

> *"Arrest warrant for KACA Official By Austin Kiguta A Nairobi court yesterday issued a warrant of arrest for a Kenya Anti Corruption Authority (KACA) Officer who failed to report in the court to answer a charge of assaulting a woman. Addressing the court after the file was called and Kenneth Nyaga Mwige failed to show up, the prosecutor, Robert Maiko Kyaa, applied to the court to have*

the officer arrested and brought to court for his plea to be taken…. A Kibera Senior Resident Magistrate Joanne Siganga immediately issued the arrest warrant and directed the order to Kilimani Police Station for execution."

3. In the pleadings, the appellant is described as an Advocate of the High Court Kenya then holding office as Legal Officer in the Kenya Anti-Corruption Authority. In the plaint, it is averred that the respondents knew that the appellant was an advocate and legal officer and that the allegations as published were untrue and were meant to cast aspersions as on his suitability as an Advocate and officer with the Kenya Anti-Corruption Authority.

4. The appellant averred that the words published were false and in their ordinary meaning were meant to mean that the appellant was a man of violent temperament, of uncouth character, unfit to hold office as a legal officer in the Kenya Anti-Corruption Authority, he is of criminal character and not fit to hold any office in society. The appellant averred that as a consequence of the said publication, his character and reputation was seriously damaged and he suffered distress and embarrassment.

5. In a joint statement of defence, the respondents admitted publication of the said article and admitted that the article referred to the appellant. The respondents pleaded that the words as published and printed were an accurate account of the court record and copy of the charge sheet filed in court on 1st August 2000. The respondents denied that the words were calculated to disparage the appellant socially and professionally.

6. At the centre of the respondents' defence are facts alleged to be in a handwritten photocopy document of the magistrate's court proceedings of 1st August, 2000; that there was in the court file a warrant for arrest of the appellant duly filed on 1st August, 2000 addressed to the Officer Commanding Kilimani Police Station. That the respondents perused the charge sheet presented by the prosecutor in court on 1st August, 2000 which clearly had been marked by the court prosecutor that the appellant had not been arrested and that he was to report to court on 1st August, 2000 and that the prosecutor had applied for warrant of arrest. That as per the handwritten photocopy of court proceedings of 1st August, 2000, the court ordered that a warrant of arrest be issued for the appellant to appear in court on 8th August, 2000 for plea taking.

7. The respondents opted not to call any witness before the trial court. After hearing evidence from the appellant, the trial court (Khamoni, J.) dismissed the appellant's suit expressing himself as follows:

"It is apparent that what was reported about issuance of the warrant of arrest in the criminal case was correct and the truth. Apparently, it was a fair and accurate account of the court record including the charge sheet filed in court on 31st July 2000 and published by the journalists on an occasion of absolute privilege in terms of Section 6 of the Defamation Act which states that a fair and accurate report of any newspaper of proceeding before any court exercising judicial authority within Kenya shall be absolutely privileged. The defendants in publishing the matter which was of public concern, under a sense of duty, social and or moral, to the public for the public benefit in this matter where the question of issuance of the warrant of arrest goes beyond what happened in court from the 1st to 8th August 2000 as same may be traced backwards up to the complaint in the Criminal Case while still at Kilimani Police Station. I therefore come to the conclusion that the words complained of were published in the honest belief that they were true and that the defence filed herein by the defendants is proper….I do not find that the plaintiff was defamed by the defendants as alleged…. I will therefore dismiss the suit because the plaintiff has failed to prove libel or defamation even on a balance of probabilities. But in case it is held that I should not have dismissed the plaintiff's suit, the result is that I would have awarded the plaintiff general damages in the sum of Ksh. 1,500,000/=…. I would not have awarded aggravated or exemplary damages. I would have added the plaintiff costs of this suit plus interest."

8. In order to understand why the trial court dismissed the appellant's suit, we reproduce the court's

reasoning which is recorded as follows:

> **"… The court prosecutor….as the record shows, went to …court on 1st August, 2000 and applied for the warrant of arrest …. and that is what the hand written photocopy of the court proceedings for that day shows ..... Indeed, following the proceedings on 1st August, 2000, Form "CRIMINAL 96" was prepared and its photocopy is part of the hand written photocopy proceedings of the Court shown by the Defence in MF1 2 with a line crossing through it suggesting it was subsequently cancelled. The journalists told the court on 8th August, 2000 that they had seen a warrant of arrest in the file and I can see a photo copy MFI 2 aforesaid.** (emphasis ours).

9. The critical aspect of this case is that "MF1 2" is an alleged handwritten photocopy of proceedings of the court and it was marked for identification but never formally produced as an exhibit. The trial judge relied on this document in making his determination. The legal issue is whether the trial judge erred in relying on a photocopy document marked for identification that was never produced in evidence and whose authenticity and contents were never formally proved.

10. Aggrieved by the trial court's dismissal of his suit, the appellant has raised four grounds of appeal in his memorandum to wit:

> *"(a) that the judge erred in failing to sufficiently appreciate that it was not open to him to rely upon documents marked for identification but not produced in evidence;*
>
> *b. the learned judge erred in failing to appreciate the real purport and thrust of the appellant's case was that there was never any allegation in the Kibera Criminal Case No. 6509 of 2000 that he had failed to attend court thereby necessitating the issuance of a warrant of arrest;*
>
> *c. the learned judge made a fundamental error in law in holding that the respondent's article was not defamatory when placed against the proceedings of 1st August 2000 in Kibera Criminal Case No. 6509 of 2000; and that*
>
> *d. the whole decision goes against the weight of evidence."*

11. At the hearing of this appeal, learned counsel Mr. Chacha Odera appeared for the appellant while learned counsel Mr. James Githaiya appeared for the respondents. The appeal was urged by way of written submissions filed by both counsel.

12. The central aspect of the appeal is that the judge erred by relying on an extraneous matter in making and arriving at his decision; the court failed to appreciate that it was not open to it to rely upon documents "Marked For Identification - MFI" and not produced in evidence; that when the respondent's counsel cross-examined the appellant, he was shown three documents that were marked for identification;

> "MFI 1" was a copy of the charge sheet, "MFI 2" were copies of the magistrate court handwritten notes at Kibera Criminal Court, "MFI 3" was The People newspaper article headlined correction; that all the three documents shown to the appellant were never produced by the respondents as exhibits because the respondents opted not to call any witness; that by not producing "MFI 2" as an exhibit, the appellant was not able to cross-examine on it and the said document became an extraneous matter and could not legally form the basis for determination of the dispute between the parties; that the trial court erred in relying on the "MFI 2" which was not an exhibit on record . The appellant cited various authorities on quantum of damages to be awarded in this case. The cases cited were: **Machira -v- Mwangi Nairobi HCCC No. 1709 of 1906 (2001) 1 EA 110; Kipyator Nicholas Kiprono Biwott -v- Clays Limited & 5 others HCCC No. 1067 of 1999; Martha Karua -v- Standard Limited & Another Civil Case No. 295 of 2004** and **Johns Evans Gicheru –v- Andrew Morton Civil Appeal No. 314 of 2000.**

13. The respondent in opposing the appeal submitted that the appellant was shown

> "MFI 2" and he was cross-examined and re-examined on the document; that at no time did the appellant contest the admissibility of the document marked for identification or allege that it was a forgery; that the trial court did not err in relying on the document marked for identification; that the trial judge correctly compared the typed proceedings from the Kibera Magistrate's court with the handwritten photocopy notes of the same court and established that the court prosecutor had applied for warrant of arrest to issue against the appellant. Counsel cited the persuasive High Court case of **Timsales Limited -v- Harun Thuo Ndungu, Civil Appeal No. 102 of 2005** where the learned judge (Emukule, J,) on the issue of failure to produce a document marked for identification stated:
>
> ***"As to the respondent's alleged failure to produce the treatment card, I am of the view that this did not render the evidence in Dr. W. K. Kiamba's Report valueless. Firstly, the treatment card was actually marked for identification for later production. It is not clear from the record who asked that the treatment card be marked for identification. Who was to identify and produce the respondent's treatment card? It does not belong to the hospital. It belongs to the individual patient….Is that evidence to be rubbished as non-consequential, to be ignored, relegated and subordinated to the initial treatment card? In my humble and sincere view, such evidence could only be doubted if there was some material evidence demonstrating differences between the date of injury and the treatment and the evidence of the patient like in this case, the respondent. There is no such evidence of differences here."***

14. Counsel for the respondents in citing the dicta in **Timsales Limited -v- Harun Thuo Ndungu, Civil Appeal No. 102 of 2005** urged this Court to find that there were no material differences between the charge sheet and the photocopy of the charge sheet; that notwithstanding that the three documents marked as MFI 1, MFI 2 and MF3 were not produced as exhibits, they should not be rubbished as non-consequential and be ignored.

15. We have considered the grounds of appeal and submissions by counsel. This is a first appeal and we are obliged to re-evaluate the evidence on record and arrive at our own conclusions. (See **Selle -vs- Associated Motor Boat Co. [1968] EA 123);** see also **(Abdul Hameed Saif vs. Ali Mohamed Sholan (1955) 22 E. A. C. A. 270)**.

16. The fundamental issue for our determination is the evidential effect of a document marked for identification that is neither formally produced in evidence nor marked as an exhibit. Is a document marked for identification part of evidence? What weight should be placed on a document not marked as an exhibit?

17. The respondents' contention is that the appellant by failing to object to the three documents marked as "MFI 1", "MFI 2" and" MFI 3" must be taken to have accepted their admissibility; that at no time did the appellant contest the documents or allege that they were forgeries.

18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on

record.

19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of a document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.

20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account.

21. In **Des Raj Sharma -v- Reginam (1953) 19 EACA 310,** it was held that there is a distinction between exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of **Michael Hausa -v- The State (1994) 7-8 SCNJ 144,** it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.

22. Guided by the decisions cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.

23. In the instant case, we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondents' case. The documents did not become exhibits before the trial court; they had simply been marked for identification and they have no evidential weight. The record shows that the trial court relied on the document "MFI 2" that was marked for identification in its analysis of the evidence and determination of the dispute before the court. We are persuaded by the dicta in the Nigerian case of **Michael Hausa -v- The State (1994) 7-8 SCNJ 144** that a document marked for identification is not part of the evidence that a trial court can use in making its decision.

24. In our view, the trial judge erred in evaluating the evidence on record and basing his decision on "MFI 2" which was a document not formally produced as an exhibit. It was a fatal error on the part of the respondents not to call any witness to produce the documents marked for identification. The respondents did not tender any formal evidence to challenge the defamation claim lodged against them.

25. We have considered the persuasive decision and reasoning in the case of **Timsales Limited -v- Harun Thuo Ndungu, Civil Appeal No. 102 of 2005.** In this case, there was additional evidence through the testimony of the medical doctor; in the present case, the respondents having opted not to call any witness, there was no evidence on record in support of the respondents' defence. A significant distinction with the ***Timsales case*** (supra) is that the High Court observed that

> "such evidence could only be doubted if there was some material evidence demonstrating differences…" In the present case, there are material differences in the typed proceedings of the court and the alleged handwritten photocopy of proceedings of the court marked as "MFI 2." These differences needed a witness to explain the authenticity of the handwritten photocopy, this could only be done if the document marked for identification as "MFI 2" were produced in evidence as an exhibit by the maker or any other competent witness. Failure to produce amounted to non-reception and legal exclusion of the document.

26. It is our view that this appeal has merit. We allow the same and set aside in entirety the judgment of the trial court dated 18th April, 2008 dismissing the appellant's claim in the plaint and substitute the same with a judgment for the appellant against the respondents jointly and severally as prayed for in the plaint. On the quantum of damages we see no reason to interfere with the views of the trial court. We adopt the decision of the learned judge and award the appellant the sum of Kshs.1,500,000/= as general damages for defamation. We make no award for aggravated or exemplary damages. Interest on the general damages to run with effect from 18th April, 2008 being the date of judgment of the trial court. The appeal is allowed with costs.

Dated and delivered at Nairobi this 16th day of October, 2015.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

P. M. MWILU

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR