



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPEAL NO. 109 OF 2011

BETWEEN

KAGWIRIA MUTWIRI KIOGA.....1ST APPELLANT

SIRIAKA MWONJIRU KINYUA.....2ND APPELLANT

AND

THE STANDARD LIMITED.....1ST RESPONDENT

PATRICK MUTHANGANIA.....2ND RESPONDENT

KIPKOECH TANUI.....3RD RESPONDENT

NIXON NG'ANG'A.....4TH RESPONDENT

(An appeal from the Judgment and Order of the High Court of Kenya at Meru (Emukule, J) dated 21st May 2010

IN

H.C.C.C. NO. 84 OF 2005)

JUDGMENT OF THE COURT

This appeal is against the dismissal by Emukule J on 21st May 2010 of two suits filed at the High Court in Meru. The two, HCCC 84 and HCCC 85, both of 2005, were filed by **KAGWIRIA MUTWIRI KIOGA (Kioga)** and **SIRIAKA MWONJIRU KINYUA (Kinyua)**, respectively. The duo are the appellants herein and had sued the **Standard Limited, Patrick Muthangania, Kipkoech Tanui** and **Nixon**, who are the respondents herein.

The learned Judge seems to have proceeded on the basis that the two High Court suits, arising from the same facts, had been consolidated and he dismissed Kinyua's suit on the basis of her not offering any evidence in support of her claim. It is conceded by the respondents herein that the said dismissal, which is the subject of Ground 7 of the Memorandum of Appeal herein, was erroneous as Kinyua's suit had not

come up for hearing and so it was dismissed unheard. The appeal to that extent partially succeeds and we shall say no more of Kinyua's case.

Kioga filed suit against the respondents for general, aggravated and exemplary damages for defamation in that on or about 28th April 2005 and on other days subsequent thereto, they published of and concerning Kioga a page 1 headline story titled "**Robbing the Dying**" which was an expose of a scandal of how "**Government officials and activists turned Aids Council into a cash cow and took money for fighting disease**".

It continued that "**Top Government Officials, University Professors, Doctors and Activists have turned the fight against Aids into a cash cow taking home Ksh.4.3 billion provided by donors to help the sick and dying**".

The newspaper had a headline from page 2 to 3 titled "**Shame of Public Officers Feasting on HIV/AIDS Funds**" listing a number of such officers, including Kioga, and the amounts feasted on. Against her name was Ksh. 93,500 for the year 2002.

At page 4 it had a headline "**How top NACC officials irregularly paid themselves over Ksh. 37 billion**". There were a number of statements on that page about which Kioga complained and which made reference to a Government report that the respondents were quoting from. They included;

- **"It says the Council irregularly paid Kshs.6 million in bonuses to staff that had completed a year of service in 2002. The payment which had not been approved by the Government were made directly to the workers bank accounts without their knowledge.**
- **However, it notes that Kshs.1,580.076/- had been recovered from staff seconded to the Council from Government Ministries.**
- **It adds that the five Senior Council Official – Orege, A.S. Talwa, B.K. Osoro, M. Karanja, E.K. Kasaka, K.M. Kioga – irregularly received more than Kshs.1.5 Million in salary increments"**.

Kioga in the premises pleaded at paragraph 5, 6 and 7 of her plaint as follows;

"5. The plaintiff states and avers that this publication is damningly defamatory to the plaintiff who is a public servant as she had been portrayed therein as a public robber, thief, dishonest and fraudulent. A person who has no morals or qualms to steal from the sick and the dying and therefore unfit to hold any public office or leadership of any kind whatsoever.

6. That as a result of the said publication, the plaintiffs reputation and standing in society and amongst her workmates, associates and even relatives has been thrust into hatred reprobation and disrespect.

7. The plaintiff states further that she has also been riled and poorly portrayed in her job as a Government servant and that her job is now at stake."

Upon being served with process, the respondents entered appearance and filed a joint statement of defence in which they admitted publication but denied that the same was false, malicious or defamatory of Kioga. They also raised the defence of qualified privilege and asserted that the words concerned issues of great public interest and, where they consisted in opinions, they constituted "**fair comments made in good faith and without malice on a matter of public interest namely, that the general public needs to be informed of the use of funds allocated for HIV/AIDS related projects in a country marred by the scourge of aids**".

In compliance with the requirements of order VI Rule A (then) of the Civil Procedure Rules, they provided the requisite particulars of that defence as follows;

“(a) HIV/AIDS is widespread in Kenya and hundreds die daily from complications caused by the disease. AIDS was declared a national disaster in 1999. This is therefore a matter of great public interest.

(b) That the Public has a direct interest in knowing how funds aimed at reaching and alleviating the condition of Aids sufferers are used .

(c) The creation of the National Aids Control Council (NACC) evidences the stretch of the Aids concern by the Government of Kenya.

(d) Millions of shillings are allocated every financial year to support the various Aids/Hiv related projects across the country.

(e) Corruption in Government establishments has reached epic proportions resulting in public scrutiny and concern.

(f) The words published by the Defendants arise from a report titled Financial Management Audit of the National Aids Control Council by the Office of the President’s Efficiency Monitoring Unit (EMU).

(g) The said Efficiency Monitoring Unit has since released the report to the public.

(h) The Defendants have a moral duty to publish accurate reports on issues that concern all Kenyans and the public has a commensurate duty and right to receive information of public interest.

(i) The defendants published the words in good faith and without malice”.

The Respondents further relied on Section 7 of the Defamation Act and Part II of the Schedule to that statute.

Kioga responded to the respondents’ defence by filing a reply to defence joining issue with them and stating that the words published were actuated by express malice which could be inferred from facts and matters particularized as;

“(a) The defendants published the words complained of recklessly.

(b) The defendants had no honest belief in truth of the said words.

(c) The defendants have neither withdrawn the words complained of nor have they given or offered any apology or correction”.

At the hearing of the suit, Kioga was the only witness for herself while the respondents had two witnesses. PW2 was **PATRICK MATHANGARI**, one of the defendants, while PW1, procured by way of witness summons applied for by the respondents, was **GERISHON RWERI WANGIRA**. He was the Deputy Director at the Efficiency Monitory Unit (EMU) domiciled in the office of the President and he appeared for purpose of producing the EMU report that formed the basis of the impugned publication by the respondents. After the trial the learned Judge found against Kioga as we have said, prompting this appeal.

The memorandum of appeal raises a number of complaints including that the learned Judge erred by;

- ***Failing to find that the appellant proved defamation, despite evidence.***
- ***Holding that the defence established qualified privilege***

- ***Holding that the plaintiff should have called a witness to prove damage to her reputation and character.***
- ***Not differentiating between libel or slander.***
- ***Not finding that even in privilege or for comment, the facts must be true.***

Arguing the appeal before us, **Miss Kiome**, learned counsel for the appellant echoed and highlighted the written submissions earlier filed which were, in the main, that Kioga had proved the publication of the offending words, and they were libelous. The submission was that the defence of fair comment was not available to the respondents because they were actuated by malice. She referred to and urged to be applicable herein the High Court decision of **ONYINKWA & 2 OTHERS –VS- STANDARD LTD** e KLR where Ibrahim J (as he then was) observed that;

“The Constitution does not give any person including the media the right to make and publish scandalous and libelous statements which are actuated by ill-will and malice and geared towards the destruction of another’s name, character and reputation. An individual has a right to his good name, character and reputation and laws of the country must protect him/her”.

And that;

“The defendant had no duty legal, public, social or moral to publish a report which was false and defamatory of the plaintiff”.

Counsel also cited **PETER WAITHAKA CHEGE –VS- GEORGE MBUGUA & ANOR**(HCCC 1994 OF 1999), another High Court decision, on the same.

On the learned Judge’s finding that the publication was insulated by fair comment and qualified privilege, counsel referred to the old English case of **CAMPBELL –VS- SPOTTISWOODE** [1862] 176 E.R 188 NISI PRIUS; [1863] 122 ER 288 QUEENS BENCH, where **Cockburn C.J.** in an instruction to the jury stated;

“But it cannot be said that because a man is a public man, a public writer is entitled to not only pass judgment upon his conduct, but to ascribe to him corrupt and dishonest motives. That, in my view, is not the law, and the privilege of comment does not go to that extent...”

Miss Kiome submitted that libel is actionable *per se* and took issue with the learned Judge’s finding that Kioga’s failure to call an independent witness meant that she had failed to prove damage. She cited in aid the High Court case of **MOHAMED NASORO DIMA –VS- MOHAMED OMAR SOBA** [2013] e KLR where **Mutuku J.** restated the position that;

“Libel is actionable per se. An action for defamation is essentially an action to compensate a person for the harm done to his reputation. In all actions for libel, and in some actions for slander the law presumes that the plaintiff has suffered harm and on these actions, usually described as actions per se, the actual sums to be awarded as damages are said to be at large...”.

Counsel urged us to allow the appeal.

On his part, **Mr. Echessa**, learned counsel for the respondents contended that the learned Judge properly appreciated and applied the defence of fair comment to the case before him. Counsel then proceeded to defend the learned Judge’s holding that Kioga should have called an independent witness to prove damage to her reputation by stating that as the law of libel is premised on a person’s reputation being lowered a claimant must prove it as it cannot be presumed by the law. Nor can it depend on one’s estimation of oneself. He insisted that even though libel is actionable *per se*, one must still call

independent testimony to prove the impact of the impugned words.

Mr. Echessa reiterated his written submissions that the publication was based on a report that **Mr. Wangoni** (DW2) the Deputy Director of EMU produced in evidence and confirmed to have been authored by EMU. Under **Section 7 of the Defamation Act, (Cap 36)** as read with **Part II** of the Schedule to that statute, the report qualified as a report by a body constituted to investigate a matter of public concern. He defended the production and admission of the report as being properly founded on **Section 147 of the Evidence Act** and also invited this Court to take judicial notice that matters relating to the HIV/AIDS pandemic are matters of considerable public interest and notoriety. He added that the respondents have an interest- and duty as part of Civil Society to disseminate findings touching on the unauthorized and irregular expenditure of Government of Kenya and donor-sourced funds by the National Aids Control Council (NACC).

Counsel asserted further that as pointed out by DW2 **PATRICK MUTHANGARI**, the facts in the articles complained of were derived directly from the EMU report and were true in substance and in fact. He urged us to apply and uphold the public interest defence recognized in the common law as the Reynolds Defence (from **REYNOLDS –VS- TIMES NEWSPAPER** [1999] 3 WLR 1010) and therefore protect the publication alleged to be defamatory on the basis that the respondents acted responsibly in disseminating the material that was of sufficient importance to the public. The respondents were not actuated by malice, counsel submitted, without proof of which they could not be held liable in the circumstances. He cited the High Court case of **NATION NEWSPAPERS LTD –VS- GIBENDI** [2002] KLR 406 where **Waweru J.** held that;

“The appellant had pleaded the defence of fair comment on a matter of public interest i.e qualified privilege. To defeat the defence, the respondent needed to prove actual malice, which is ill will or spite or any indirect, or improper motive in the mind of the appellant at the time of the publication”.

He urged us to dismiss the appeal.

This being a first appeal, we are enjoined by law to proceed by way of re-hearing and re-appraise, re-evaluate and re-analyze all the evidence on record in a fresh and exhaustive way before arriving at our own independent conclusions; See Rule 29 of the Court of Appeal Rules. The approach we take, in recognition of our limitations, our initial deference to the factual findings of the trial Judge and the parameters of our interference therewith were well summed up in the case of **SELLE –VS- ASSOCIATES MOTOR BOAT & CO.**[1968] EA, where the predecessor of this Court put it thus;

*“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 in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions 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 Hameed Saif – vs- Ali Mohamed Sholan** [1955], 22 E.A.C.A.270).”*

Bearing those principles in mind, and having carefully perused the learned Judge’s judgment, the record before us, the submissions both written and oral by counsel and the authorities they cited, we apprehend that the main issue for our determination in this appeal is whether the learned Judge erred, as urged, in finding that the publication complained of fell under the rubric of qualified privilege and that Kioga could not therefore succeed in the tort of defamation and be compensated in damages. Before dealing with that issue, however, it is meet to draw a distinction between libel and slander and dispose of Kioga’s complaints in Grounds 4 and 5 of the memorandum of appeal that the learned Judge failed to do so, hence his holding that Kioga should have called a witness to corroborate her testimony regarding

damage to her character and reputation.

V. W. Rogers, the learned author of Winfield and Jolowikz on Tort, 16th Edn 2002, at pp.404-5 states as follows;

'12.2 Defamation is the publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of right-thinking members of society generally or tends to make them shun or avoid him. For historical reasons defamation takes the form of two separate torts, libel and slander, the former being generally more favourable to the claimant because it is actionable per se and injury to reputation will be presumed.'

(Our emphasis)

He then addresses the distinction between the twin torts, and we would call them fraternal, as opposed to identical twins, as follows;

"The consequences of the distinction, between libel and slander are that libel is a crime and slander is not; and libel is always actionable per se, whereas in most case(sic) of slander, 'special damage' must be shown..."

In contrast, in cases of libel (and in some cases of slander) the claimant can recover general damages for the injury to his reputation without adducing any evidence that it has in fact been harmed, for the law presumes that some damage will occur in the ordinary course of things. If, of course, the claimant in a libel case contends that actual damage has been suffered he can plead it and prove it if he can, but even if he breaks down on this point he can still recover general damages.

At pp. 406-407;

(Our emphasis)

This view, which we accept as long established law, is also expressed by Gatley on Libel and Slander (9th Edn) thus, at p. 69;

"In English Law, libel is always actionable per se, that is to say the plaintiff is not required to show any actual damage, and substantial, rather than nominal damages may be awarded even in the absence of such proof, whereas in slander, with four exceptions, the cause of action is not complete unless there is 'special damage' i.e. some actual, temporal loss".

Given that position in law, we respectively think the complaint is justified and the learned Judge did fall into an obvious error when he dealt with this issue as follows;

"In my view, in order to be awarded damages for defamation, it is not sufficient only to prove defamation...the plaintiff must lead evidence of actual damage to her reputation and character to enable the court to assess an appropriate award. I have already in the earlier passages of this judgment stated that the plaintiff failed to call any witness to corroborate her testimony with regard to the damage she claimed to have sustained or suffered to her reputation and character..."

We now turn to the main issue of whether indeed the respondents were liable to Kioga in libel or were, as they urged and the learned Judge accepted, insulated by privilege. The law in this area is an attempt to balance two competing but vital interests in society; the individual's right to have their character and reputation protected and safeguarded from false, unwarranted and malicious or scurrilous attacks on the one hand, and the public's right to know as exercised and fed by freedom of expression, which is indispensable feature of a free and democratic society as well as a major tool for public accountability.

The essence of the tort of defamation, is damage to reputation as a result of malicious publication to third parties of matter that is false. At the very onset therefore, it behoved Kioga to prove the falsity of the factual statements in the publications complained of. The learned Judge found, and correctly so upon our own assessment of the record, that she failed to prove falsity. This is because the newspaper articles were mere reproductions of a report that was prepared and produced by EMU following an investigation into financial impropriety at NACC ordered by the Head of the Public Service. The report at page 19 had a table showing irregular payments of leave allowances to some sixteen officials of NACC and the amounts each was paid. It included Kioga. She was also mentioned in the findings by EMU to have received irregular transport allowances, increment arrears and bonuses. It did not appear to us to have been Kioga's evidence that the EMU report was false or inaccurate. Falsity was therefore not proved and we uphold the learned Judge in his finding that defamation was not proved.

But even if it had been proved, it appears to us, and we so hold, that the publication by the respondents fell under the defence of qualified privilege that they raised. That defence is provided for in **Section 5 of the Defamation Act, (Cap 36)** as follows;

“7(1) Subject to the provisions of this Section the publication in a newspaper of any such report on such matter as is mentioned in the Schedule to this Act shall be privileged unless such publication is proved to be made with malice;

(2) In an action for libel in respect of the publication of any such report or other matter as is mentioned in Part II of the Schedule to this Act, the provisions of this Act shall not be a defence if it is proved that the Defendant has been requested by the Plaintiff to publish, in the newspaper in which the original publication was made, a reasonable letter or statement by way of explanation or contradiction and has refused or neglected to do so, or has done so in a manner not adequate or not reasonable having regard to all the circumstances.

(3) Nothing in this Section shall be construed as protecting the publication of any matter the publication of which is prohibited by law, or any matter which is not of public concern and the publication of which is not for the public benefit”.

That Section is followed by **Section 7A** which provides for a right of reply whereunder a person aggrieved by a newspaper publication may provide a rebuttal or clarification which the newspaper is bound to carry with the same prominence the impugned publication and at the earliest. **The Standard** in its May 1st 2005 issue did carry a full-page statement by the NACC which was a response to the Article **“Robbing the Dying”** thus the NACC itself did exercise the right of reply.

The right of reply exists alongside the privilege the law accords to certain otherwise defamatory statements. These are in Part III of the second schedule to the Defamation Act and include;

“9. A copy or fair and accurate report or summary of any notice or other matter issued for the information of the public by or on behalf of the government, publisher, local authority or gazette police officer.”

We find, as did the learned Judge, that the respondent's impugned publication falls within the scope of the provision. So far as it was a fair and accurate summary of the EMU report, they would not be held liable in defamation unless they were actuated by actual malice in any comments they made on the EMU report. It is clear from a full consideration of the case that what riled and rankled Kioga the most was not any alleged inaccuracy of the facts and figures contained in the publication, but the headlines given, especially the main one of **“Robbing the Dying”** and others like **“Shame of Public Officers Feasting on HIV/AIDS Funds”**. Those headlines themselves did not, in our view, contain facts. They were expressions of opinion. The test to be applied to them is one of honesty. If the opinions were honestly held by the respondents, culpability does not attach. We think that the opinion of **Lord Denning MR. in SLIM –VS DAILY TELEGRAPH [1968] 1 All E.R. 497** is apposite;

“If [the writer] is an honest man expressing his genuine opinion on a subject of public interest,

then no matter that his words conveyed derogatory imputations; no matter that his opinion was wrong or exaggerated or prejudiced, and no matter that it was badly expressed so that other people read all sorts of innuendos into it, nevertheless he has a good defence of fair comment. His honesty is the cardinal test. He must honestly express his real view. So long as he does this, he has nothing to fear, even though other people may read more into it... I stress this, because the right of fair comment is one of the essential elements of freedom of speech. We must ever maintain this right intact. It must not be whittled down by legal refinements. When a citizen is troubled by things going wrong, he should be free to 'write to the newspaper'[or write in the newspaper, as is the case herein] and the newspaper should be free to publish his letter [or article]. It is often the only way to get things put right. The matter must of course be one of public interest. The writer must get his facts right; and he must honestly state his real opinions But that being done, both he and the newspaper should be clear of any liability. They should not be deterred by fear of libel actions..."

We are fully satisfied that the learned Judge was right in holding as he did that there was nothing shown by Kioga to remove the articles complained of from the protection of the rolled up defence they mounted, of qualified privilege and fair comment without malice on a matter of public interest. That being so, the claim for defamation had to fail and so does this appeal on that critical point.

The upshot of our consideration of this appeal is that on the merits it cannot succeed and it is accordingly dismissed. The dismissal of HCCC No. 85 of 2005 by the learned Judge is upheld.

As HCCC No. 84 of 2005 has not been heard, however, we set aside the order dismissing it and direct that it be mentioned before the High Court in Meru within thirty (30) days of the date hereof for purposes of fixing a hearing date for it, should the plaintiff therein be minded to still prosecute it.

The parties shall bear their own costs in this appeal.

Dated and delivered at Nyeri this 14th day of October, 2015.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR