IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KOOME, WARSAME & G.B.M. KARIUKI (JJ.A)

CIVIL APPEAL NO 78 OF 2012

BETWEEN

RADIO AFRICA LTD ……..……1ST APPELLANT

JIMMY GATHU ……..…….2ND APPELLANT

AND

NICHOLAS SUMBA……..……..1ST RESPONDENT

THOMAS OKAL……2ND RESPONDENT

(an appeal from the judgment and decree of the High court of Kenya at Nairobi (Abida Ali Aroni J) dated 18th August 2010

in

H.C.C.C. No 1176 of 2003)

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JUDGMENT OF THE COURT

On the 4th day of May 2003, at around 9:50pm, the 1st appellant was running a radio programme show called "The People's Parliament". It was hosted by the 2nd appellant. The programme consisted of a radio phone-in segment where callers were asked to call in to contribute to an ongoing discussion. It was then that the 2nd respondent called in and the following conversation ensued:

> ***Jimmy Gathu: Hello, this is kiss 100, Hallo Benson***
>
> ***Thomas: Hallo, this is Thomas, I want to talk about my case, and then Benson will talk also. My name is Thomas O. I'm calling for assistance because I have a pending case at the Central Police Station. I was assaulted on 10th July, last year by a lawyer who I had***
>
> ***given a case to demand payment for me from my former employer, and after the assault, I took this case to the Central Police Station on the same evening and it was recorded as OB102/10/7/2002.***

Jimmy: Just read that again.

Thomas: it was OB102/10/7/2002, and then I was told to go the following day to room number 4 where I found Corporal Onyango, who issued me with a P3 form, after successful completion of the P3 form the case was assigned to one constable Kimundi, who investigated and ascertained that I was assaulted, and then on 27th August 2002, Corporal Onyango organized for a reconciliary meeting with the lawyer called Mr. Sumba who had assaulted me, and I demanded for apology letter, which Mr. Sumba also refused that he can't give me and we agreed that we were to meet again on 29th, so on 29th I went and saw the labour officer who was dealing with my case before I took it to the lawyer and he gave me a letter which I took to the Deputy DCIO, Chief Inspector Macharia, Macharia took me to the OCS, who was by then Chief Inspector Muli, and after I had explained the case to Muli, Muli offered assistance by ensuring the case will go to court the following week. Hallo,

Jimmy: I can hear you.

Thomas: yeah, so when I went back on the 2nd of September 2002 to know when we are going to court, I was arrested for creating a disturbance in that lawyer's office, and I was taken to Deputy OCS Inspector Musangi, but after he had listened to the dispute, he disqualified the case of assaulting me, of creating disturbance on condition that there was no police file on that file, and he told those guys to let my case go to court, and again when I went back on 4th December to see when we are going to court, I was arrested by a constable called Esther Munuve, and this time, she, when I took her to deputy DCIO, she told Chief Inspector Macharia that she had instructions from the OCS, who had been instructed by the deputy PPO, to align me in court. After that the lady took me to their office in room no 10, she disclosed to me that Corporal Onyango was colluding with this lawyer to harass me.

Jimmy: Okay which police station is this? Thomas: Central Police Station, Nairobi. Jimmy: okay

Thomas: she told me that Corporal Onyango was colluding with this lawyer, and even it's the corporal who assisted this man to file those charges against me.

…."

The 1st respondent was aggrieved by the aforesaid utterances. He filed suit in the High Court in which he claimed that the said statements were understood by right thinking members of society to mean that he was a violent, corrupt and unprofessional man, and further insinuated that he was primitive, ignorant, dishonest, corrupt, violent and unworthy of respect. The 1st respondent claimed that the allegations were malicious and false, and were meant to injure his professional calling as a respected advocate of the High Court of Kenya, and his standing in the wider society. He therefore prayed for an award of general damages and exemplary damages, as well as special damages in the amount of Kshs 35,509.00.

The appellants opposed the suit. They all admitted that the statements in question were aired on the 1st appellant's radio station, but denied that they had the import of bearing any meaning attributed to them by the 1st respondent. The appellants claimed that if the statements were indeed defamatory as claimed, it was unintended and innocent, and to this end, they had attempted, in a letter dated 23rd September 2003, to make amends under section 13 of the Defamation Act; they alleged that despite the fact that the 1st respondent never responded to this offer of amends, it was never withdrawn and as such requested the court to dismiss the suit.

The 2nd respondent on his part admitted the comments made but denied that he had defamed the 1st

respondent. He testified that the comments that he made on the radio show were true in substance and fact, and further that they were fair comment in a matter of public interest.

A full trial in which the 1st respondent called four witnesses resulted in judgment in favour of the 1st respondent for the sum of Kshs 3,000,000.00 in general damages, and special damages in Kshs 35,503.00, as well as interest and costs of the suit. Being dissatisfied with the judgment of the court, the appellants have filed the present appeal in which they fault the holding of the trial court in its entirety. In particular, the appellants fault the trial judge for failing to uphold their defence of unintentional defamation; for refusing to make a determination on their claim for indemnity; and for making an excessive award of damages for the 1st respondent.

The parties filed written submissions which were argued before us on 20th July 2015. To establish the tort of defamation, we are required to consider whether or not the elements comprising it have been proved. The elements of the tort of defamation, as set out in ***Nation Media Group Limited and 2 Others v John Joseph Kamotho and 3 Others (Civil Appeal No 284 of 2005 (unreported)),*** include first, that the statements complained of are defamatory in character, secondly that the statements referred to the claimant or that he could be identified, and thirdly, that the statements were published or communicated to someone other than claimant.

There is no question that the conversation in question occurred, and the utterances therein were made by the 2nd respondent on a platform that was directed and controlled by the appellants. The words, in their ordinary sense, are indicative of a lawyer who first assaulted his client, and then used his influence and standing to collude with the police and harass him.

The trial court correctly found that these words utterances injured the reputation of the 1st respondent based on the evidence presented. Isaac Mirenga (PW3) testified that he was once a former client of the 1st respondent, and that after he heard the broadcast, he formed the opinion that the 1st respondent had colluded with the police to harass the caller. Nyamogo Ochieng Nyamogo (PW4) testified that he was disgusted by the description of the conduct of the 1st respondent and that even after seeking an explanation from the 1st respondent, he was not convinced that the comments made by the 2nd respondent were not true.

In light of this testimony, we are satisfied that the defamatory comments clearly identified the 1st respondent. We agree with the 1st respondent that in the minds of ordinary and right thinking members of the society, his reputation was lowered and his standing in the society as an advocate was called into question.

The appellants submitted that the defamation was unintentional. They submit that after the trial judge correctly found that an offer of amends by way of a letter of apology was made to the first respondent, the court ought to have found that the publication was unintentional and was not malicious. The appellants contend that the offer of amends was made as provided by section 13 (1)(b) of the Defamation Act which reads as follows:

> ***"(1) A person (in this section referred to as the defendant) who has published words alleged to be defamatory of another person (in this section referred to as the plaintiff) may, if he claims that the words were published by him innocently in relation to the plaintiff, make an offer of amends under this section, and in any such case—***
>
> ***(b) if the offer is not accepted by the plaintiff, then, except as otherwise provided by this section, it shall be a defence, in any proceedings by him against the defendant in respect of such publication, to prove that the words complained of were published by the defendant innocently in relation to the plaintiff and that the offer was made as soon as practicable after the defendant received notice that they were or might be defamatory of the plaintiff, and has not been withdrawn."***

The appellants contended that after the 1st respondent sent a demand letter to them, the 2nd appellant sent a letter offering amends as prescribed under section 13(1) of the Act. On the other hand, the 1st respondent submitted that his advocates never received the offer of amends and that if his advocate had received the offer, then that offer would have been acted upon. The 1st respondent therefore contends that since there was no evidence that the amends were ever made, the trial judge ought not to have placed any premium on it.

To buttress this submission, the 1st respondent relied on the authority of ***Nyangilo Ochieng & Another v Fanuel B. Ochieng & 2 Others [1996] eKLR (Civil Appeal No 148 of 1995)***. In that case, the Court was determining whether or not a bank had proved that a statutory notice had been received, it held that ***"… [u]nless the receipt of statutory notice is admitted, posting therefore must be proved and upon production of such proof the burden of proving non-receipt of such notice or notices shifts to the addressee as is contemplated by section 3(5) of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya."*** As the bank had failed to prove that it had posted the statutory notice, the Court was constrained to find that the statutory notices had not been properly given and that any consequential actions detrimental to the chargor were unlawful. This is the route that the 1st respondent would have us take with regard to the letter of apology from the appellants.

It is our finding that there was evidence that the letter was sent to the 1st respondent's advocate's office by way of a delivery note from Fair Havens Enterprises showing that on 26th September 2003, a letter was dropped off and received at the 1st respondent's advocates office.

According to the appellants, this letter was accompanied by an affidavit to the effect that the defamation was unintentional. In particular, the 2nd appellant deponed that ***"at the material time, I did not know, nor could reasonably have been held to know that the caller's complaint could possibly be defamatory***." Did the offer of amends meet the threshold set out in section 13 (1) (b) of the Act. Section 13(5) of the Act provides that the defence of unintentional defamation would apply if, and only if:

> ***"(a) … the defendant did not intend to publish them of and concerning the plaintiff, and did not know of circumstances by virtue of which they might be understood to refer to the plaintiff; or***
>
> ***(b) that the words were not defamatory on the face of them, and the defendant did not know of circumstances by virtue of which they might be understood to be defamatory of the plaintiff,***
>
> ***and in either case that the defendant exercised all reasonable care in relation to the publication; and any reference in this subsection to the defendant shall be construed as including a reference to any servant or agent of his who was concerned with the contents of the publication."***

This issue is closely related to the appellants' second ground of appeal, which is the alleged failure of the trial judge to make a decision on whether or not the publication was malicious. Relying on Winfield & Jolowicz on Tort, 12th Edition, to describe malice as being "***inferred from the relations between the parties before or after publication or in the conduct of the defendant in the course of the proceeding",*** the appellants submit that there was no malice in the words, as there were no relations between the appellants and the 1st respondent prior to the making of the offensive publication, and therefore no malice could be imputed, since once they were informed that the publication had offended the 1st respondent, they made an offer of amends as soon as was practically possible. In the appellants' view, they acted with remorse even during the trial of the matter, and therefore the defence of innocent and unintended publication ought to have been upheld.

In response, the 1st respondent contended that the appellant never made any amends, and there was never any proof of amends being made, or an affidavit of amends required under section 13 of Defamation Act. In addition, the appellants never showed any remorse in the manner they treated the 1st respondent. Therefore, defence of innocent publication was not proved since the conduct of the 2nd appellant did not show that he was apologetic, as was demonstrated from his evidence in cross examination, where he

admitted that he never made any effort to get a response from the 1st respondent.

The 1st respondent maintained that the conduct of the appellants did not suggest that they were in any way innocent, and averred that he ought to have stopped the conversation, that he never sought the 1st respondent's side of the story and maintains that it was the duty of the 1st appellant to moderate what is aired on its radio station in accordance with the ethics of journalism. In the 1st respondent's view, the conduct of the appellants negated their defence of unintentional publication.

In ***Mikidadi v Khalfan & another*** ***[2004] 2 KLR***, the High Court correctly held that recklessness may be inferred where:

> ***"… the defendant in a defamation suit fails to contact the plaintiff to verify the truth or otherwise of the statement before causing it to be published and upon publication says that no apology is necessary or warranted and even further insists that the contents are factual when they are not, that may be a clear manifestation of an attitude of recklessness."***

This holding was approved by this cour in ***JP Machira t/a Machira & Co Advocates v Wangethi Mwangi & Another*** ***(Civil Appeal No 179 of 1997)*** when Omollo JA held that malice can be inferred from deliberate, or reckless, or even negligently ignorance of facts. In that appeal, the Court further held that malice would destroy the defence of qualified privilege.

In ***Nation Newspapers Limited v Daniel Musinga t/a Musinga & Co Advocates Civil Appeal No 120 of 2008 (unreported)***, this Court inferred malice from circumstances similar to those giving rise to this appeal. In that appeal, the appellant newspaper had published defamatory comments about the respondent, who was at that time of publication, an advocate. The statement of facts turned out to be untrue, and thus the court found that the appellant behaved recklessly and maliciously.

It is apparent from the conversation that the 2nd appellant never made any attempt to stop the 2nd respondent. When questioned on this in cross examination, the 2nd appellant testified that he never saw the need to interrupt the 2nd respondent, or to verify if what he stated was the truth. All he did was to give the 2nd respondent a phone number to call so that he would have his complaint attended to. In the 2nd appellant's words, ***"I did not see need to cut off or switch off or dub the conversation. I did not find that necessary…. I made no effort to get a response from the lawyer. I did not find that necessary."***

The appellants also stated that they have wide coverage, estimated by them to be ***'wide coverage over Africa and the world.'*** These statements were therefore broadcast to a large number of people. The appellants' conduct, and inaction in terms of conducting its own due diligence before allowing the defamatory comments on air, leads us to the conclusion that they did not exercise any reasonable standard of care, and therefore cannot hide under the defence of unintentional or innocent defamation.

To succeed in their defence, it was necessary for the appellant radio to establish that there was a public element in the airing. It is in our opinion necessary to incorporate public element inherent in the concept of the radio show in a manner which affords a satisfactory means to distinguishing it from a malicious gesture. It seems to us that there was no public policy or interest that was being perpetuated or enhanced, but a private interest which was not only intentional but was also malicious. If the participants in the radio show were being invited due to a particular relationship with the organizer of the show, then they were not constituent of the public.

We must also consider whether the defamatory contents could have been on matters of public interest within the narrow and technical meaning of the word that would then qualify the appellants' freedom of media and the 2nd respondent's freedom of expression. The role of the press to the proper functioning of a modern democratic society cannot be gainsaid; even so, fundamental freedoms related to expression can never be absolute, and legislation provides a measure of protection from unjustified attacks.

In a society such as ours, often, only a minority of citizens can participate directly in the discussions and decisions which shape public life in a particular society. The majority can participate only indirectly by exercising their rights as citizens to vote or express their opinions or make representations to authorities from pressure groups and so on. We appreciate that the majority cannot participate in the public life if they are not alerted to and informed about matters which call for consideration, concern or action. It is very largely through the media, including of course radio shows such as the one through which the 1st respondent was defamed, that a majority of people will be alerted and informed. The proper functioning of a participatory democracy requires that the media be free, active, professional, informative and engaging. As we have recognized that such functions are so fundamental and cardinal to press freedom, we agree the need for any restriction on that freedom should be proportionate and no more than necessary than to protect the legitimate object of the restriction. Sometimes the press takes the initiative in exploring factual situations.

From the facts, it is plain to see that the radio show was not intended to achieve a public interest or to enhance public policy as claimed by the 2nd respondent. He never presented any evidence to show that the events that he described on the radio did take place. The fact that the appellants too never took any steps to further investigate the matter, by reaching out to the 1st respondent is an indication that the show was never intended to properly inform the public. The trial judge's approach focused on the intention of the radio show and in our view, the judge correctly found that neither the organizers nor the participants exercised reasonable care and caution before the 2nd appellant and the 1st respondent went on air. We therefore find no reason to interfere with this aspect of the decision of the trial court.

The appellants also faulted the trial judge for failing to uphold the claim for an indemnity against the 2nd respondent, or to apportion damages in accordance with liability. It is their contention that once she found the 2nd respondent's defence of justification had failed, then she should have considered the appellant indemnified since the 2nd respondent was a caller to a live radio talk show, and it was he who uttered the offensive words. The appellants' position is that they are innocent, and that they could not have known what the 2nd respondent was going to say, and in the context of a live call in show, there would have been no opportunity for them to verify the words uttered by the 2nd respondent. Their position is that it would be unfair for them to suffer punishment for words uttered by the 2nd respondent. Thus given the totality of the circumstances, the award of damages ought not to have been done jointly and severally, and should have been in proportion to liability. It is settled that the defamation was done on a platform that was provided by the appellants, who have a wide coverage in Africa. In our view, the appellants cannot seek an indemnity when they facilitated the defamation. This ground of appeal therefore fails.

The appellants final ground of appeal concerns the award of damages made by the trial judge, which they contend is too high, and against the parameters set out in section 16A of the Defamation Act which provides that:

> ***"16A. Award of damages***
>
> ***In any action for libel, the court shall assess the amount of damages payable in such amount as it may deem just:***
>
> ***Provided that where the libel is in respect of an offence punishable by death the amount assessed shall not be less than one million shillings, and where the libel is in respect of an offence punishable by imprisonment for a term of not less than three years the amount assessed shall not be less than four hundred thousand shillings."***

The appellants contend that the words in question did not relate to an offence punishable by death, where the damages are set out at a minimum of Kshs 1,000,000.00, and therefore the amount awarded was inordinately high. In cross appeal, the 1st respondent contend that the damages awarded were inordinately low. We are certain that section 16A cited above refers to only the minimum award that a court may make in certain cases of defamation. It would therefore not apply here.

We turn now to consider whether or not the amounts in damages awarded by the trial court were appropriate. In ***Johnson Evan Gicheru v Andrew Morton & Another*** ***[2005] eKLR (Civil Appeal No 314 of 2000)*** this court held that

> ***"it is trite that this Court will be disinclined to disturb the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have gen a larger sum. In order to justify reversing the trial judge on the question of the amount of damages it will general be necessary that this Court should be convinced either the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled….***
>
> ***The latitude in awarding damages in an action of libel is very wide, and one thing a court of appeal must avoid doing is to substitute its own opinion as to what it would have awarded for the sum which has been awarded by the judge below."***

In that appeal, after evaluating various decisions on the law on actions of libel, Tunoi JA (as he then was) enumerated a checklist of compensable factors in libel actions as follows:

1. ***"The objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published, and any repetition;***

2. ***The subjective effect to the plaintiff's feelings not only fro the prominence itself but from the defendant's conduct thereafter both up to and including the trial itself;***

3. ***Matters tending to mitigate damages such as the publication of an apology;***

4. ***Matters tending to reduce damages;***

5. ***Vindication of the plaintiff's reputation past and further."***

In that appeal, the court took into consideration that the publication was in a permanent nature, by way of a book that continued to live on, and also took cognizance of the fact that the appellant was the presiding judge of the Court of Appeal, and was also the Chief Justice of the Republic of Kenya, and enhanced his award to Kshs 6,000,000.00.

In ***Standard Limited v G.N. Kagia t/a Kagia & Company Advocates*** ***[2010] eKLR (Civil Appeal No 115 of 2003)*** this Court also set out the two following guiding principles which in addition to the above may guide an award of damages:

> ***"1. In situations where the author or publisher of a libel could have with due diligence verified the libelous story or in other words, where the author or publisher was reckless or negligent, these factors should be taken into account in assessing the level of damages;***
>
> ***2. the level of damages awarded should be such as to act as a deterrence and to instill a sense of responsibility on the part of authors and publishers of libel. Personal rights freedoms and values should never be sacrificed at the altar of profiteering by authors and publishers."***

Following these principles, the court found that a composite figure of Kshs 3,000,000.00 was appropriate and awarded the same. The respondent who had been defamed in that matter was an advocate, just like in the present appeal. In this appeal as well, we are persuaded that the amount of Kshs 3,000,000.00 awarded as general damages was sufficient to vindicate the 1st respondent's reputation, and we decline the parties' invitation to interfere with it.

Another point taken on cross appeal by the 1st respondent is the failure of the trial court to make an award

of exemplary or aggravated damages. The 1st respondent contends that in the absence of an apology from the appellants, the trial court ought to have made of exemplary or aggravated damages. In ***John V MGN LTD (1997) QB 586***, cited with approval by this Court in ***C A M v Royal Media Services Limited [2013] eKLR (Civil Appeal No. 283 of 2005)*** it was held that:

> ***"Exemplary damages can only be awarded if the Plaintiff proves that the Defendant when he made the publication knew that he was committing a tort or was reckless whether his action is tortuous or not, and decided to publish because the prospects of material advantage outweighed the prospects of material loss...if the case is one where exemplary damages can be awarded the court or jury should consider whether the sum which it proposes to award by way of compensatory damages is sufficient not only for the purposes of compensating the Plaintiff but also for the purpose of punishing the Defendant."***

While we have found that the appellant's acted somewhat recklessly in the manner that they caused the defamatory material to be aired we are satisfied that the 2nd appellant cut short the conversation and later attempted to make amends. This conduct will mitigate against an award of exemplary damages, and also against an award of aggravated damages. In addition, as was imputed by the predecessor to this Court in ***Obongo v Municipal Council of Kisumu [1971] EA 93*** exemplary damages are appropriate where the conduct of the defendant is calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff. We have already found that there an attempt at an apology from 2nd appellant to the 1st respondent. In addition, we do not perceive the 2nd respondent's conduct to be that of a man who was intent of making a profit out of the humiliation of the 1st respondent. Thus there was no basis upon which the trial court could have awarded exemplary or aggravated damages.

In light of what we have stated, we find no merit in this appeal. We dismiss it with costs to the 1st respondent. The cross appeal too is devoid of merit and we also dismissed it.

Dated and delivered at Nairobi this 6th day of November 2015

M. K.KOOME

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JUDGE OF APPEAL

M. WARSAME

…….

JUDGE OF APPEAL

G.B.M. KARIUKI

…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR