



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, OUKO & MURGOR, J.J.A.)**

**CIVIL APPEAL NO. 7 OF 2009**

**BETWEEN**

**1. THE STANDARD LIMITED**

**2. DEO OMONDI.....APPELLANTS**

**AND**

**ANYASI OLUSESE.....RESPONDENT**

(Appeal from the Judgment and Decree of High Court of Kenya at Nairobi (Khamoni, J.) dated 29th September 2008)

**in**

**H.C.C.C. No. 1869 of 1998)**

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**JUDGMENT OF THE COURT**

This appeal is in respect of the quantum of damages awarded to the respondent, **ANYASI OLUSESE** by the High Court in a suit for defamation in the form of libel, published by the appellants, in the 1st appellant's newspaper, namely the East African Standard Newspapers- Sunday Standard Edition concerning the respondent.

Briefly, the facts of the case are that the appellant is a limited liability company registered under the Companies Act, Cap 486 and engaged in the business of printing, publishing, distribution and sale of the East African Standard Newspaper. The respondent is a retired civil servant having been a State Counsel in the Attorney General's Chambers, and at the time under consideration was an ex officio member of the board of the Music Copyright Society of Kenya, **(the Society)** while the 2nd plaintiff in the High Court was the Society's Administrator.

On 31st August 1997 and 13th September 1997 the appellant wrote and caused to be written and published in the East African Standard Newspaper, Sunday Edition, false and malicious newspaper articles in respect of the respondent and the 2nd plaintiff and their occupation in both the front page and elsewhere in the newspaper, which words were reproduced in Paragraph 5 and 6 of the Amended Plaint filed on 22nd November 2000 to the effect that the respondent and the 2nd plaintiff claimed that the plain and ordinary meaning of the words implied that they were dishonest officers, who had misappropriated the Society's funds for personal ends, and were incompetent and unfit to manage the affairs of the Society, having neglected, frustrated and defrauded members of the Society by denying them their rightful dues.

Further, that the respondent and the 2nd plaintiff had engaged in corrupt and tribalistic practices in managing the Society. More particularly, the respondent was rude, overbearing and disrespectful of authority, and had dishonestly and fraudulently mismanaged the Society for his own personal and selfish ends, and was under suspicion and investigation by the police for various corrupt dealings, meaning that the respondent had committed criminal offences punishable under the Penal Code, Cap 63. The respondent and the 2nd plaintiff stated that the words complained of had greatly injured their credit, character, and reputation, and their offices or occupations had been brought into hatred and ridicule.

The appellant in its defence denied all the allegations, and asserted that the words were fair comment made in good faith and without malice upon a matter of public interest, in that they sought to provide information to the general public of the functions, conduct, and performance of the respondents in their employment as officials of the Society being the body responsible for the collection and distribution of musical and artistic products for all musicians and performing artists within Kenya and of foreign artists for sales within Kenya. Furthermore, the words complained of did not bear the meanings attributed to them by the respondent and the 2nd plaintiff; that the words were published under qualified privilege and as they had been requested for their version of the story.

By the time the suit came up for hearing before the High Court, the 2nd plaintiff was deceased and as a consequence, the 2nd plaintiff's suit abated.

In a judgment delivered on 23rd March 2004, the learned judge (Khamoni, J), found for the respondent, and ordered that the appellants pay the respondent a sum of Kshs. 3 million general and exemplary damages as well as the costs of the suit.

Aggrieved by the decision of the High Court, the appellants filed this appeal setting out nine grounds of appeal. When the parties came before us on 7th April 2014, Mr. Billing learned counsel for the appellant, relied on his submissions filed on 1st April 2014. Counsel informed the Court that only grounds 7 and 8 of the Memorandum of Appeal concerning the issue of the quantum of damages would be canvassed, while all the other grounds would be abandoned, as the appellants had admitted liability.

Regarding the issue of the quantum of damages, counsel contended that, the High Court had awarded damages on the higher side, and that this Court had powers to interfere with, and reduce the amount awarded. Counsel cited the cases of **MUTURI KIGANO VS JOSEPH NYAGAH** HCCC No. 509 of 2008 where the Court awarded Kshs. 1.1 million, **KOIGI WAMWERE & ANOTHER VS THE STANDARD LIMITED & ANOTHER** HCCC No 716 of 2003, **THE STANDARD LIMITED VS G.N. KAGIA T/A KAGIA & COMPANY ADVOCATES** Civil Appeal No 115 of 2003 where it was stated that damages to advocates should be between Kshs.1.5 million and Kshs. 2 million, and that the court should have regard for the status of the person defamed, the nature and event of the damages, and any mitigating circumstances from the respondent. The respondent was obliged in law to have a correction carried in the same publication, for which he did not request. Counsel submitted that the respondent retired from the Civil Service at age 55 years, and his leaving employment was on account of his retirement, and not the defaming publication. Counsel raised the issue of interest, and submitted that the appeal was filed in 2009 following the delivery of the judgment. Counsel enjoined us to compute interest from the dated of judgment of this Court, and not from the date the

judgment was awarded in the High Court, as the interest accrued would be punitive; that the appeal had come up severally, but that it had not been heard due to no fault of the appellants.

Learned counsel for the respondent Mr. Ombete on his part, relied on his submissions filed on 9th January 2014, and submitted that this Court has variously stated the principles in dealing with quantum of damages awarded by the High Court. Counsel cited **BUTLER VS BUTLER** [1984] KLR 225 for the proposition that the court should not interfere with the exercise of discretion in the discretion of the trial judge, unless the appellant can show that the wrong principles were applied, that the award was so excessive, no reasonable court would have ordered such an amount, and the court considered matters that it ought not to have considered. Counsel submitted that the learned Judge took into account all necessary matters and that, the appellant failed to call evidence or tender evidence or to retract the offending publication. The respondent has not shown where the learned Judge erred in arriving at the award of Kshs. 3 million in the judgment; that the award is adequate, and there is no reason for this Court to interfere with the award of the High Court. Counsel pointed out that the cases cited by learned counsel for the appellant, only deal with situations where liability was not proved.

In this case defamation was proved. In the case of **THE STANDARD VS KAGIA** (supra), this Court reduced the award from Kshs. 6 million to Kshs. 3 million, similar to the High Court award in the instant case, despite the reference to the respondent's retirement. In respect of interest, this issue was not raised in the submissions, and in any event interest on general damages commences from the time the suit is filed. From the bar, counsel informed the Court that an amount of Kshs. 1 million was paid to the respondent in January 2011.

Having considered the pleadings, the evidence, judgment of the High Court and the respective submissions of learned counsel, we find that the issue for consideration is whether to interfere with the award for general damages for reasons the learned Judge misdirected himself in awarding an inordinately high amount to the respondent.

In awarding damages the trial court took into account the respondent's standing in the legal profession, as a State Counsel in the Attorney General's Office, the extent and gravity of the libel, factors tending to mitigate damage and factors tending to aggravate the damages. In so doing, the learned judge considered **J.P. MACHARIA VS THE STANDARD LIMITED** HCCC No 612 of 1996 Nairobi where the advocate of many years standing was awarded Kshs. 1,250,000/- in general damages for an allegation that he was involved in a physical fight with a client outside the court building, **JOHN MACHIRA VS WANGECHI MWANGI & NATION NEWSPAPERS LIMITED** HCCC No 1709 of 1996 Nairobi where an advocate was awarded Kshs. 8,000,000/- as damages for a defamatory report alleging the stealing of client' money, **FRED OJIAMBO VS THE STANDARD LIMITED** HCCC No. 1996 of 1997 where the plaintiff, a Senior Counsel was awarded general damages of Kshs 1,000,000/- for a defamatory publication that he was being used corruptly to derail the Constitution and **JARED OMONDE KISERA VS THE STANDARD LIMITED** HCCC No. 160 of 2001, where the plaintiff, an advocate of considerable reputation and standing was awarded Kshs. 800,000/- for allegations of corruption.

As we consider the issue of quantum of damages, we must remind ourselves that the principles governing our mandate are set out in the case of, **Rock vs Fairrie [1941] 1 AER 297** which stated thus,

**“...the latitude in awarding damages in an action for libel is very wide, and that one thing that 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...”**

And in **Butt vs Kiyan (1981) KLR 349** this Court stated the principle as,

**An appellate court will not disturb an award for damages unless it is 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”.**

To begin with, in order to arrive at the amount to be awarded, the learned Judge considered the respondent's standing in the legal profession, as a State Counsel in the Attorney General's Office. In so doing, the learned Judge analysed a number of cases where varying amounts were awarded to advocates.

When we consider the more recent awards for reputational injury to members of the legal profession, it is clear that the standing of the individual within the profession and the society as a whole must be taken into consideration.

In the case of **JOHNSON EVANS GICHERU VS ANDREW MORTON & ANOTHER Civil Appeal No. 314 of 2000** this Court awarded a sum of Kshs 6,000,000/- taking into account the plaintiff's standing as the country's Chief Justice at the time.

In the case of **KAGIA T/A KAGIA & COMPANY ADVOCATES Civil Appeal No 115 of 2003** this Court reduced the sum awarded by the trial court from Kshs 5,000,000/- to Kshs.3,000,000/- and also awarded exemplary damages of Kshs 1,000,000/- .Also taken into account was the effect of the libel in diminishing the firm's clientele, and ability to recruit legal assistants.

In the case of **KENYA TEA DEVELOPMENT AGENCY LIMITED VS BENSON ONDIMU MASESE T/A B.O. MASESE & COMPANY ADVOCATES Civil Appeal No 95 of 2006**, this Court awarded a sum of Kshs 1,500,000/- and in so doing took into consideration the length of time the respondent had been in practice and the extent of the circulation of the defamatory statement which in the Court's view was not to "the whole world" but limited to two letters addressed to the Complaints Commission and to the Minister for Justice and Constitutional Affairs.

In the more recent case of **NATION NEWSPAPERS LIMITED VS DANIEL MUSINGA T/A MUSINGA & COMPANY ADVOCATES Civil Appeal No 120 of 2008** this Court reduced the quantum from the amount of Kshs. 10,000,000/- to Kshs. 4,000,000/- and stated thus:-

**“We note that Chief Justice Gicheru was awarded a composite sum of Kshs. 6,000,000/- for compensation in the above cited case. We concur with the observation made in THE STANDARD LIMITED VS G. N. KAGIA T/A KAGIA & COMPANY ADVOCATES, that the subject effect of defamation on a Chief Justice cannot be reasonably equated to an advocate of whatever standing in the profession. It is appreciated that the trial judge did not have the benefit of the Gicheru judgment, as she delivered her judgment before the Gicheru judgment. However the trial Judge misdirected herself by using the awards of Nicholas Biwott and Charles Kariuki in the afore cited cases for comparison purposes. We are of the view that if the Judge had the benefit of that judgment, and all the authorities which were cited, therein in regard to quantum, her award would not have been the same.”**

Having regard to the litany of cases that the learned Judge considered, and taking into consideration the more recent awards to members of the legal profession, we consider that the trial Judge was right in awarding the sum of Kshs.3 million to the respondent given the circumstances of the case. It is noteworthy that in making the award, the learned Judge bore in mind this Court's aversion for excessive awards for damages given by the courts in the past for damages for loss of reputation.

With regard to the extent and gravity of the libel, the learned Judge took into consideration the nature of the allegation, that the respondent had stolen money and even committed other additional criminal offences, such that, the crime that the respondent was alleged to have committed would have been punishable by prison for a term of not less than three years. The learned judge also took into account that the appellant failed to apologise and/or withdraw the offending articles so as to

mitigate against the damages. We do not agree with Mr. Billing that these were extraneous matters. To the contrary, we consider that the learned judge correctly applied these principles and in so doing arrived at a suitable award.

From the above, we find the amount awarded was not based on wrong principles, and we consider it to be in tandem with amounts awarded in other analogous suits, and, as such we find that we have no reason to interfere with the award of the trial court.

With respect to interest, it is noted that the issue was not raised in the Memorandum of Appeal dated 15th January 2009 or in the submissions, and having regard to rule 104 of this Court's rules we have no jurisdiction to consider this issue. But be that as it may, it is trite that costs follow the event, as does interest, and therefore the appellant must be held liable for the costs as well as interest accruing thereto from the date of the judgment of the suit at court rates. However, as the respondent has admitted being paid Ksh. One million in January, 2011, interest should be calculated on the balance of the award by the High Court.

Accordingly, we see no reason to interfere with the judgment of the High Court with the result that the appeal fails and is dismissed with costs to the respondent.

**Dated and delivered at Nairobi this 18th day of JULY, 2014.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**