



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ. A)**

**CIVIL APPEAL NO. 84 OF 2009**

**BETWEEN**

**KEN ODONDI .....1<sup>st</sup> APPELLANT**

**WACHIRA WARURU .....2<sup>nd</sup> APPELLANT**

**THE STANDARD LIMITED .....3<sup>rd</sup> APPELLANT**

**AND**

**JAMES OKOTH OMBURAH t/a**

**OKOTH OMBURAH & COMPANY ADVOCATES .....RESPONDENT**

***(Appeal from a Ruling of the High Court of Kenya at***

***Kisii D. K. Musinga, J) dated 28<sup>th</sup> November, 2008***

**in**

**KISUMU HCCC No. 199 OF 2001)**

**\*\*\*\*\***

**JUDGEMENT OF THE COURT**

In a Plaint filed at the High Court of Kenya, Kisii, the Plaintiff, James Okoth Omburah trading as Okoth Omburah & Company Advocates sued the Defendants, the cause of action being founded on a publication carried by the Defendants in their issue of 16<sup>th</sup> December, 2000 where allegations were made concerning the Plaintiff. The publication named the plaintiff, an Advocate of the High Court of Kenya, and alleged that the plaintiff had been involved in certain acts of fraud. The Plaintiff enumerated the various ways the said publication had injured the plaintiffs' reputation and prayed for aggravated and/or exemplary damages and general damages for libel. The defendants filed a defence where they freely admitted publishing the words complained of but denied that the same were false. The defendants in essence pleaded defence of privilege and justification. The matter came for hearing before D. Musinga, J (as he then was) and only the plaintiff testified. The plaintiff testified that he was an Advocate of the High Court of Kenya and he had a successful law practice at Rongo town. He stated that after the publication of the article some of his clients left him and that an Advocate he was to get into partnership with rejected

the offer. The plaintiff eventually opted to join the judiciary and was a Senior Resident Magistrate by the time of the trial.

The Defendants did not call any evidence. No apology was offered to the plaintiff nor were the words complained of retracted. The submissions filed by the defendants reiterated the said defences of privilege and justification.

In a considered judgement delivered on 28<sup>th</sup> November, 2008 the learned Judge found the defendants liable and awarded the plaintiff Kshs. 7,000,000/= as general damages and Kshs. 500,000/= as aggravated damages. This is the judgement which provoked the present appeal.

The principles upon which this court can interfere with the exercise of discretion of the trial judge are well established. This court must, to interfere, be satisfied that the judge has misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice – **Mbogo & Another v Shah [1968] EA 93; Ephantus Mwangi & Another v Wambugu [1983/4] 2 KCA 100** and also **Sumaria & Another v Ahed Industries Ltd (ur) Civil Appeal No. 203 of 2002.**

When the appeal came for hearing before us on 5<sup>th</sup> June, 2013 Mr. M. Billing, learned counsel for the appellants, abandoned all the grounds relating to liability and only urged the grounds on quantum. Mr. Omondi Kiseru, learned counsel for the respondent, opposed the appeal submitting that damages awarded were fair.

Learned counsel for the appellants submitted that the award of general damages and aggravated damages was so high that it should be disturbed on appeal. He buttressed his submission by citing authorities such as (i) **HCCC No. 1463 of 2002 Dr. Joseph N. K. Arap Ngok v The East African Standard Limited (ur)** where Dulu, J,

stated that he would have awarded general damages Kshs. 400,000/= had the suit succeeded. This was in July, 2011. (ii) **HCCC No. 509 of 2008 Clement Muturi Kigano v Hon. Joseph Nyagah (ur)** involving a senior advocate where Mwera, J, (as he then was), stated that he would have awarded Kshs. 1,100,000/= general damages for defamation. This was in March, 2010. (iii) **HCCC NO. 716 of 2003 Hon. Koigi Wa Wamwere & Another v The Standard Limited & Another (ur)** where Mwera, J (as he then was) stated that he would have awarded nominal damages for defamation). This was in June, 2010. (iv) **Civil Appeal No. 115 of 2003, The Standard Limited v G.N. Kagia t/a Kagia & Co Advocates** where the Court of Appeal reduced awards of Kshs. 5,000,000/= general damages and Kshs. 1,000,000/= exemplary damages to a

composite sum of Kshs. 3,000,000/=. This was in September, 2010.

Mr. Kiseru in opposing the appeal reminded us of the duty of the Court of Appeal which should not interfere with an award of a trial judge on damages unless wrong principles were applied or there is a clear misapprehension of the evidence in a material manner by the trial judge. Counsel submitted that award of damages at the time of the judgement appealed from and even at the hearing of this appeal was still at large with each case being determined on its peculiar facts. Counsel particularly reminded us that in **Kisii HCCC No. 52 of 2001 Rodgers Abisai t/a Abisai & Co Advocates v Wachira Waruru & Another** which fell on all fours with the present appeal because the publication complained of was the same as the publication complained of here general damages were awarded at Kshs. 6,000,000/= and exemplary damages Kshs. 500,000/= by the late Kaburu Bauni, J, on 18<sup>th</sup> May, 2007.

We are grateful to both counsel for the appellants and counsel for the respondent for their able submissions and the various authorities cited before us. We have considered all of them.

We agree that this court will not ordinary interfere with the findings of a trial judge on an award of damages merely because this court may take the view that had it tried the case it would have awarded higher or lower damages different from the award of the trial judge. To so interfere this court must be

persuaded that the trial judge acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled. This is the general principle to be found in Rook v Rairrie [1941]1All E.R. 297. This principle was adopted with approval by this Court in Butt v Khan [1981] KLR 349 where it was held per Law, JA:

**“... An appellate court will not disturb an award of damages unless it is so 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...”**

The latitude in awarding damages in an action for libel is very wide and we must avoid substituting our own views on what the damages should have been against the award by the judge – Tanganyika Transport Co. Ltd v Ebrahim Nooray [1961] EA 55.

Tunoi, JA (as he then was) in Civil Appeal No. 314 of 2000 Johnson Evan Gicheru v Andrew Morton & Another [2005] e KLR 1 had this to say on assessment of damages:

**“ In action of libel the trial court in assessing damages is entitled to look at the whole conduct of the defendant from the time libel was published down to the time the verdict is given. It may consider what his conduct has been before action, after action, and in court during the trial: PRAUD V GRAHAM 24 Q.B.D.53, 55.**

In BROOM V CASSEL & CO [1972] A. C. 1027 the House of Lords stated that in actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of restitution in integrum has necessarily and even more highly subjective element. Such actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but, in case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a by-stander of the baselessness of the charges. As Windeyer J. well said in UREN V JOHN FAIRAX & SONS PTY.LTD., 117 C.L.R. 115,150:

**“It seems to me that, properly speaking, a man defamed does not get compensation for his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways – as a vindication of the plaintiff to the public and as a consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money.”**

I would think that in the instant case to arrive at what could have been said to be a fair and reasonable awards the learned trial Judge could have drawn considerable support in the guidelines in JONES V POLLARD [1997] EMLR 233.243 and where a checklist of compensatable factors in libel actions were enumerated as:-

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 on the plaintiff's feelings not only from 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 future.*

In the Gicheru case (supra) the Court of Appeal interfered with award of damages and enhanced it. That was on 14<sup>th</sup> October, 2005.

In a judgement delivered by the Court of Appeal on 29<sup>th</sup> March, 2012 in Civil Appeal 148 of 2003

**Wangethi Mwangi & Another v J. P. Machira t/a Machira & Co. Advocates** (ur) the court delivered itself thus in the course of the judgement:

**“We think that while the “Gicheru” judgement will continue to be a useful guide as regards the level or quantum of damages in similar situations, it was never intended to be a yardstick cast in concrete for all time and for this reason we think that peculiar facts of each case should continue to be the hub upon which the awards gravitate or revolve, provided that the Court remains alert to other relevant considerations such wider public interest goals, juridical basis for awards, including any pressing public policy considerations a sense of proportionality and the need for the courts to always recognize that they are often the last frontier of the need to ensure that truth is never sacrificed at the altar of recklessness, malice and even profit making. In addition, the awards should also be geared where circumstances permit to act as a deterrence so as to safeguard and protect societal values of human dignity, decency, privacy, free press and other fundamental rights and freedoms, including rights of others and personal responsibility without which life might not be worth living. The category of considerations will no doubt change as our societal needs change from time to time. In this regard we think that courts must strive to strike a proper balance between the competing needs in the special circumstances of each case .”**

Justice Tunoi, in the judgement cited above, had this to say of the many authorities referred to by counsel where awards of general damages in defamation cases had ranged from Kshs. 1,500, 000/= to Kshs. 30,000,000/=:

**“...My considered opinion of the awards so made is that they lack juridical basis, they may be found to be manifestly excessive and should not at all be taken as persuasive or guidelines of awards to be followed by trial courts, since the trial judges concerned appeared to have ignored basic fundamental principles of awarding damages in libel cases ...”**

It is noteworthy that the decisions criticized by Justice Tunoi were the self same authorities cited before Musinga, J (as he then was) and which the learned Judge adopted in arriving at the awards already alluded to.

The respondent in the appeal before us was an Advocate of the High Court who was clearly defamed by the libel published by the appellants. The respondent testified that as a result of the libel many of his clients left him and he also lost an opportunity to go into a partnership with another Advocate. These were indeed grave and serious losses. But the record also shows that the respondent had by the time of the trial joined the judiciary and was the Senior Resident Magistrate at Kitui Law Courts. He had according to his testimony been appointed a magistrate in January, 2004, over 3 years after the publication of the offending article on 16<sup>th</sup> December, 2000. If, indeed, the publication had defamed the respondent so gravely would he have been able to join the judiciary and rise to the position of Senior Resident Magistrate which he held at the trial? We think not.

Mr. Billing, for the appellant, submitted that the award of aggravated damages should also be reduced or set aside. Mr. Omondi Kisera was of a different view.

We note that in the demand letter dated 30<sup>th</sup> November, 2011 the Advocates acting for the plaintiff required the defendants to retract the offending article and to tender an apology. That letter was met by a reply by the Legal /Human Resources Manager of the appellants which denied liability and stated the appellants position that they would strenuously defend the intended suit. That position was adopted in the appellants defence, submissions and at the trial. In any event the respondent established through evidence that not only had he lost clientele but a prospective partnership with another lawyer did not materialize as a direct result of the defamatory article. So the respondent was not only entitled to general damages for defamation but was also entitled to exemplary damages to punish the appellants who had defamed him and refused to retract the offending article or apologise. In the English Court of Appeal decision in the

case of **John v MG Ltd.**[1996] I ALL E.R. 35 the Court held:

**“The successful plaintiff in a defamation action is entitled to recover, the general compensatory damages such sum as will compensate him for the wrong he has suffered. That must compensate him for damages to his reputation, vindicate his name, and taken account of the distress, hurt and humiliation which the defamatory publication caused.....**

**Exemplary damages on the other hand had gone beyond compensation and are meant to “punish” the defendant. Aggravated damages will be ordered against a defendant who acts out of improper motive e.g where it is attracted by malice; insistence on a flurry defence of justification or failure to apologize”.**

In the matter before us all essential elements for award of aggravated damages which are well set out in the said English case existed and the award of Kshs. 500,000/= was founded on a proper appreciation of the law. We cannot interfere with this aspect of the judgement.

Learned counsel for the appellant also submitted that award of damages should attract interest at court rates from the date of our judgement. No legal basis was laid for this submission. Costs and interest will usually follow the event as provided in the Civil Procedure Act.

Having therefore reviewed the whole matter and all the relevant factors that go into the award of damages which we have enumerated in this judgement we are persuaded that the appellants complaint that the award of Kshs. 7,000,000/= as general damages is on the high side, not without merit. The same followed a pattern where damages were awarded at large and which as Justice Tunoi showed in the “*Gicheru case*”lacked judicial basis or justification. Trial judges awarded damages without attempting in any way to find a balance between the damage done to claimants against other factors like constitutional protection of free speech and issues of public policy which we have discussed in this judgement.

In the circumstances of this appeal and considering all the factors we have enumerated in this judgement we are entitled to interfere with the judgement in respect of the award of general damages. In the event we set aside the award of Kshs. 7,000,000/= general damages and substitute thereof a sum of Kshs. 4,000,000/= general damages for libel. The award of Kshs. 500,000/= aggravated damages is upheld. The appellant shall have ½ costs of this appeal. The respondent shall have ½ costs of this appeal and ½ costs of the High Court. For the avoidance of doubt interest on damages and costs of the High Court shall be from the date of the judgement of the High Court.

These, then, are our orders.

***Dated and Delivered at Kisumu this 19<sup>th</sup> day of July, 2013***

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**