



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 283 OF 2005

(CORAM: NAMBUYE, KIAGE & GATEMBU J.J.A)

BETWEEN

HON. AMB. C A M APPELLANT

AND

ROYAL MEDIA SERVICES LIMITED RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (P. J. Ransley) delivered on 10th May, 2005

in

H.C.C.C. NO. 57 OF 2005)

JUDGMENT OF THE COURT

1. This is an appeal from the Judgment of the High Court (The Honourable Mr. Justice P. J. Ransley) given on 10th May 2005 by which the court awarded the appellant damages for defamation in the sum of Kshs. 3,000,000.00 made up of general damages of Kshs. 1,000,000.00, exemplary damages of Kshs. 1,000,000.00 and aggravated damages of Kshs. 1,000,000.00. Being dissatisfied with that award the appellant instituted this appeal.

Background

2. In December 2003, the appellant was a politician “of considerable clout” and belonged to a class of people who have been described elsewhere as “prominent political elite.” [The words of Justice Tunoi JA, as he then was in the case of **Johnson Evans Gicheru vs. Andrew Morton and Another** [2005] eKLR]. He was a Member of Parliament representing Matuga Constituency and a cabinet Minister in the Government of Kenya in charge of Labour and Human Resources Development. At the time of trial he was the Minister for Foreign Affairs.
3. On 16th December 2003 the respondent aired a feature in its Citizen Radio Station in which its reporter, Waweru Mburu reported in Kiswahili language under a programme titled “yaliyotendeka”

“ Leo msikilizaji nakutembeza hadi barabara ya ukahaba na umalaya ya Koinange hapa mjini Nairobi ambapo yadaiwa waziri mmoja, naibu wa waziri, mbunge na wafanya biashara kadhaa walipatikana katika wachokiita Waiingereza “pants down” yaani uchi wa mnyama na wasichana makahaba.

Ufichuzi uliofanywaaa unawahusisha waziri wa L, A C M ambaye pia ni mbunge wa M, naibu wa waziri wa K, M K ambaye pia ni mbunge wa L M na mbunge wa G, J M. Jambo la kushangaza ni kwamba hata kabla ya majina yao kutajwa, waheshimwa walikimbia

kwenye vyombo vya habari kujitetea na kwa vitisho vya kuvipeleka vyombo hivi mahakamani. Sababu zao zilikuwa maelezo yaliyotolewa yanaonyesha ni wao.

..... Hatua mwafaka kuchukuliwa, niwa wabunge hawa kufikishwa mahakamani, walio mawaziri kama vile K na M kufutwa kazi na mara moja kuondolewa kwenye kamati za kampeni dhidi ya ukimwi katika sehemu zao za uwakilishi bunge.

..... Ukweli katika swala hili, sharti na lazima usemwe kwa sababu wananchi wa L E, G na M waliwachagua watu hawa kuwaakilisha bungeni na sio kwenda kumangamanga katika barabara ya Koinange wakikimbizana na vijana jike. Koinange sio G, L wala M.”

Which report when translated would be as follows:

..... Today listener I shall take you up to the street of prostitution of Koinange here in Nairobi where it is alleged that a Minister, an Assistant Minister, Member of Parliament and businessmen were caught pants down with prostitutes.

Investigations which were done involve the Cabinet Ministers of [particulars withheld], ACM who is also the member of Parliament of [particulars withheld], Assistant Minister MK who is also the Member of Parliament of [particulars withheld] and the Member of Parliament of [particulars withheld], J

M. The astonishing fact is that even before their names were mentioned, these honourable

ministers ran to the broadcasting stations to defend themselves with threats of taking the broadcasting stations to court reason being that the report which was given showed that they were the ones.

The right course of action to be taken is that the members of parliament to be taken to court, those who are cabinet ministers K and M to be sacked and at once to be removed from the committees dealing with AIDS at their representations in parliament.

The truth of this query must be told because the people of [particulars withheld], [particulars withheld] and [particulars withheld] elected these people to represent them in Parliament and not to go to Koinange Street running after girls. Koinange is not [particulars withheld], [particulars withheld] nor [particulars withheld].”

4. In a feature carried on Citizen TV in its English News the respondent through a reporter known as Daphne Kagota reported:

“Investigations by Citizen Radio and T.V. have unearthed unconfirmed reports that the Ministers who were found by police soliciting sex on Koinange Street were AM of the Ministry of [particulars withheld], Assistant Minister M K and Legislator J M.

Efforts to reach AM were unsuccessful but M K issued a statement this afternoon denying the allegations. Legislator M could not be reached to confirm

or deny our story. It is not clear whether the police will take further action against them.”

5. The appellant was offended by the publications and on 26th January, 2004 he filed suit No. 57 of 2004 in the High Court of Kenya at Nairobi against the respondent seeking general, aggravated and exemplary damages for defamation.
6. The defendant admitted publication of the words complained of but contended that it cannot be held liable for publishing pertinent facts pertaining to a public figure and cited Section 79 of the repealed Constitution and the principle in the American case of New York Times v Sullivan, 376 US 254(1964).
7. The report carried by Citizen TV made reference to the appellant as having been one of those found by the police along Koinange Street, Nairobi on 5th December 2003 soliciting for sex. During the trial however, the appellant presented evidence before the court, which placed him far away from Koinange Street on 5th December 2003. According to the evidence the appellant, in his capacity as *[particulars withheld]* Minister, had travelled by air from Kenya to Ethiopia on 2nd December 2003 to attend the A L Ministers Conference. He returned to Kenya on 6th December 2003 and could not therefore have been along Koinange Street on 5th December 2003 as claimed in the respondent’s broadcasts.
8. After hearing, the trial Judge was satisfied that the appellant established his case against the respondent and awarded him damages for defamation in the sum of Kshs. 3,000,000.00 made up of general damages of Kshs. 1,000,000.00, exemplary damages of Kshs. 1,000,000.00 and aggravated damages of Kshs. 1,000,000.00.
9. It is against that award of damages by the High Court that the appellant has instituted this appeal.

Grounds of appeal and submissions

10. The grounds of appeal are that the learned trial judge erred in failing to award appropriate damages for defamation; that the damages awarded were not adequate to compensate the appellant for the harm to his reputation, vindicate the appellant and take into account the distress, hurt and humiliation suffered by the appellant; that the learned judge failed to take into account the gravity of the defamation; that the learned judge erred in feeling constrained by his previous award and failed to take into account the peculiar circumstances in this case and that the learned judge erred in putting a cap on the damages that courts can award in Kenya with the result that the damages he awarded the appellant are inadequate.
11. At the hearing of the appeal before this Court, Mr. Ahmednassir Abdullahi, SC, learned counsel for the appellant, referred us to the principles under which this Court should interfere with an award of damages by a lower court. Citing Johnson Evans Gicheru vs. Andrew Morton and Another [supra] counsel submitted that having regard to the circumstances under which the appellant was defamed the

award of damages by the lower court is so low that it represents an erroneous estimate and that the learned judge proceeded on wrong principles in assessing damages.
12. As to what should be a fair award of damages counsel referred us to the case of Standard Media vs. Kagia & Co Advocates [2010] eKLR and submitted that the level of damages should be such

as to deter and instill a sense of responsibility on the part of authors and publishers of libel.

13. As regards exemplary damages counsel for the appellant cited the case of **John vs. MGN Ltd** [1997] Q B 586 and submitted that it is established that damages should be awarded to compensate for additional injury caused to the plaintiff's feelings by the defendant's conduct of the action as when the defendant persists in unfounded assertion that the publication was true or refuses to apologize or cross examines the plaintiff in a wounding or insulting way.
14. Counsel also submitted that in the present case the respondent refused to apologize; that in cross-examination the respondent persisted in hurting the appellant and that the false allegations were intended to embarrass the appellant. Accordingly, the court in assessing damages and making its award should have taken those factors and peculiar circumstances into account. Failure to do so, counsel submitted, resulted in an award of damages by the learned judge that was insufficient.
Counsel

also referred us to **KC vs. MGM Ltd** [2012] EWHC 483(QB) and **Butler v Butler** [1984] KLR225.
15. Counsel for the appellant further submitted that the learned trial Judge erred in that he considered himself constrained by his own previous awards for damages and thereby failed to take into account the peculiar circumstances of this case and further that the learned judge wrongly proceeded on the basis that a cap should be placed on awards for defamation.
16. Opposing the appeal, Dr. Kamau Kuria, SC, learned counsel for the respondent, submitted that assessment of damages is an exercise of discretion by the court and that this Court should be slow to interfere with that exercise of discretion unless the lower court has acted on wrong principles or awarded so excessive or so little damages that no reasonable court would, or the court has taken into consideration matters it ought not to have considered or failed to take into account matters it ought to have considered. In that regard, counsel cited the case of **Butler v Butler** (supra) and the case of **Gicheru vs. Morton** (supra) for the same proposition.
17. Dr. Kuria further submitted that the trial court rightly disapproved liberal awards when it observed that the prevailing economic, social and financial state of Kenya should be considered in making awards.
18. Counsel submitted that the reputation of politicians is not as critical as that of judges and that politicians should not get higher awards in damages for defamation than judges. In that regard, counsel referred to the case of **Akilano Molade Akiwumi vs. Andrew Morton and Another** HCCC 1717 of 1999 (UR) cited by the learned trial judge in which an award of Kshs. 3 million was made for general and exemplary damages for a judge.
19. Dr. Kuria submitted that the award made by the lower court is not too little, neither is it inordinately low so as to attract interference by this Court and that there can be no justification for interfering with the award simply because this Court would have given a different figure. He submitted that the learned trial judge considered and took into account all the complaints by the appellant when making his award for damages and that the respondent should not be penalized for defending itself the way it did before the trial court as a defendant is entitled to a robust defence and is also entitled to call all relevant witnesses after which the court should then evaluate that evidence.
20. Dr. Kuria further submitted that the award proposed by the appellant goes against precedent; that Kenya is a young democracy and this Court should be mindful that a chilling effect can be brought to the media if practice of journalism is made unbearable by high awards and that there is a need to balance values in a democracy; that free expression leads to democratic growth and that to live in a democracy is to accept the risk of being defamed. Counsel urged us to dismiss the appeal with costs and thereby send out a loud message that unsustainable awards should not be made.

Analysis

21. We have considered the grounds of appeal and the rival submissions. Although the appellant cited eight grounds of appeal, the question for our deferment is whether we should interfere with the award of damages by the lower court and if so to what extent.
22. The principle that emerges from many decisions of this Court is that an award of damages is a matter of judicial discretion by the trial court and this Court should be slow to interfere with awards of damages by the lower court. In **Butt V Khan (1981) KLR 349** this Court held:

“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 inordinately high or low.”

In case of **Butler V Butler (1984) KLR 225** the Court held:

“The assessment of damages is more like an exercise of discretion by the trial judge and an appellate court should be slow to reverse the trial judge unless he has acted on wrong principles or awarded so excessive or so little damages that no reasonable court would; or he has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered and, in the

result, arrived at a wrong decision.”

And in **Gicheru V Morton and Another (2005) 2 KLR 333** this Court stated:

“In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the Court of Appeal should be convinced either that 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 the Court, an entirely erroneous estimate of the damage to which the Appellant was entitled.”

23. The learned trial judge awarded Kshs. 3,000,000.00 consisting of general damages of Kshs. 1,000,000.00, exemplary damages of Kshs. 1,000,000.00 and aggravated damages of Kshs. 1,000,000.00. Does that award represent an erroneous estimate of the damage to which the appellant was entitled?
24. No case is like the other. In the exercise of discretion to award damages for defamation, the court has a wide latitude. The factors for consideration in the exercise of that discretion as enumerated in many decisions including the guidelines in **Jones V Pollard (1997) EMLR 233-243** include 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; 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; matters tending to mitigate damages for example, publication of an apology; matters tending to reduce damages; vindication of the Plaintiff's reputation past and future.
25. In the case of **Standard Media V Kagia and Co. Advocates** (supra) the court took the view that in situations where the author or publisher of a libel could have with due diligence verified the libellous 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. The court also stated that the level of damages awarded should be such as to act as deterrence and to instil a sense of responsibility on the part of the authors and the publishers of libel and that personal rights, freedoms and values should never be sacrificed at the altar of profiteering by authors and publishers.
26. Having found that the respondent is liable to the appellant for defamation and that the appellant is

entitled to damages, the learned trial judge proceeded to state as follows:

“I take into account the conduct of the Defendant who has failed to apologize but instead has insisted on pursuing the matter in court.

In this case so far as damages are concerned I refer to the case of Akilano Molade Akiwumi Vs Andrew Morton and another HCCC NO. 1717 of 1999. In that case allegations were made imputing corruption on the part a judge; Mr. Justice Akilano Molade Akiwumi, I awarded Kshs. 3 Million for general and exemplary damages. I stated what I considered to be the principles for assessing damages in libel matters:

“The rationale for any award of damages in our legal system is to try to compensate the injured person with a sum sufficient to reinstate that person back to the same position they were in prior to the injury being suffered. Hurt feelings are only awarded in a few exceptional cases. Defamation being one of them. It is a metaphysical exercise to gauge what sum will compensate for hurt feelings. It must however in my view be considered in light of the prevailing economic, social and financial state of Kenya. One Million is a large sum of money to the vast majority of Kenyans although it may not represent such a large sum in other wealthier nations.”

..... Taking all of these factors into account, I award Kshs. 1 Million by way of general damages to vindicate his reputation to the world and to compensate him for the injury to his feelings.

So far as exemplary damages are concerned, these are to punish the wrongdoer. I award in this respect a sum of Kshs. 1 Million.

I also award Kshs. 1 Million by way of aggravated damages, making total in all of Kshs. 3 Million. I grant the order for injunction restraining the Defendant from further publishing the alleged defamatory words complained of.”

27. It seems to us that the learned trial judge considered himself constrained by his earlier award in **Akilano Molade Akiwumi vs. Andrew Morton and Another** and thereby failed to appreciate the wide latitude in exercising his discretion with the result that he failed to take into account the peculiar circumstances of the case before him.

28. The learned judge awarded the appellant Kshs. 1 million in general damages to vindicate the appellant’s reputation and to compensate him for the injury to his feelings. Having regard to the gravity of the libel, we think that award was so low as to represent an erroneous estimate. In **John V MGM LTD (1997) QB 586** the court stated at page 607, paragraph F:

“In assessing damages for injury to reputation, the most important factor is the gravity of the libel; the more closely it touches the Plaintiff’s personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality the more serious it is likely to be. The extent of publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people.”

29. In this case, the defamatory remarks were broadcast on Citizen radio and television stations, which enjoy a large listener and viewer coverage in Kenya. The publication therefore had a considerably wide extent of publication. It was also proved during the trial that the defamatory remarks touch on the personal integrity, professional reputation and honour of the Appellant who was a Minister in the Cabinet as well as an Ambassador.

30. We are alive to previous awards for general damages for defamation by the High Court including

the case of George Oraro v Barack Weston Mbaja, HCC 85 OF 1992 in which an award of Kshs.1.5 million was made; the case of Abraham Kiptanui v Francis Mwaniki and 4 others HCCC 42 of 1997 in which an award of Kshs. 3.5 million was made; the case of Daniel Musinga t/a Musinga & Co Advocates vs. Nation Newspapers Ltd [2005] eKLR in which an award of Kshs. 10 million was made and subsequently reduced by this Court to a global award Kshs 4 million in Nation Newspapers Limited v Daniel Musinga T/A Musinga & Co Advocates Civil Appeal No. 120 of 2008. We are also alive to the observation by this Court in the case of Johnson Evans Gicheru vs. Andrew Morton to the effect that some past awards by the High Court lack juridical basis. We also caution ourselves that our role is not to substitute our own opinion for that of the High Court.

31. We agree with the observation of this Court in Nation Newspapers Limited v Daniel Musinga T/A Musinga & Co Advocates that while all people are equal before the law, injury suffered in the case of defamation is not the same for all persons and “**the status of a particular person affects the extent of the injury suffered.**” Having regard to the status of the appellant in that case relative to the status of the appellant in Johnson Evans Gicheru vs. Andrew Morton the Court concluded “the subject effect of defamation on a Chief Justice cannot be reasonably equated to an advocate of whatever standing in the profession.”
32. Guided by those considerations, having regard to the misdirection by the High Court to which we have made reference and the peculiar circumstances of this case to which we have alluded we consider that an award for general damages in the amount of Kshs. 3 million is commensurate with the injury and status of the appellant in this case.
33. We turn to exemplary damages. In a sense, exemplary damages represent an importation of a criminal law principle into civil law. That is the principle of punishment. Exemplary damages are awarded to serve the societal purpose of punishing the wrong doer and deterring him and others from similar conduct in the future. In this respect the trial judge awarded the appellant Kshs. 1 million.
34. In John V MGM LTD (1997) QB 586 the court stated:

“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 tortious 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.”

Widgery J in Mansion V Associated Newspapers LTD (1965) 2 ALL ER 954 at 957 stated that exemplary damages may be awarded:

“In a case in which a newspaper quite deliberately published a statement which it either knows to be false or which it publishes recklessly, carelessly, whether it be true or false.”

35. In this case, justification was neither pleaded nor proved. The publication was based on untrue facts on the face of them. It may have prevented the broadcast of the defamatory remarks had the Respondent made an effort to determine the truth of the facts and established the whereabouts of the appellant who at the time of the alleged ‘soliciting at Koinange Street’ was out of the country. The Respondent made their broadcasts on the basis of “*unconfirmed reports*” and proceeded to name the individuals including the appellant. The respondent did not have a solid foundation for publishing the material complained of. In our view, the learned trial judge does not appear to have taken those factors into account and thereby fell into error. In order to prevent, deter and punish the respondent from such reckless or negligent publication in the future, we enhance the award

under this head to Kshs. 1.5 million.

36. There remains a consideration of the award under the head of aggravated damages. We think the trial judge rightly awarded the appellant aggravated damages because the conduct of the respondent caused further humiliation or embarrassment therefore increasing the appellant's injury. The respondent failed to make any apology or retraction of their publication. Indeed in the defence filed in the lower court the respondent pleaded that it was under no obligation to apologize. Further, the cross-examination of the appellant at the trial aggravated matters delving as it did on the appellant's alleged escapades with the prostitutes in various locations, which were not pleaded. The trial judge cautioned the respondent that it was a dangerous path to tread if the allegations were not established as true, but which caution the respondent did not heed.

37. In the circumstances, we consider that the award by the trial court of Kshs. 1 million under this head was not a reasonable estimate so as to constitute an error. We enhance the award under this head to Kshs. 1.5 million, which we consider to be proportionate to the injury.

38. In the end, we allow the appeal, set aside the judgment and decree of the High Court and substitute the same with an award in favour of the appellant for the sum of Kshs. 6 million made up as follows:

General damages	- Kshs. 3,000,000/=
Exemplary damages	- Kshs. 1,500,000/=
Aggravated damages	- <u>Kshs. 1,500,000/=</u>
Total	- <u>Kshs. 6,000,000/=</u>

39. The appellant will have the costs of the appeal.

Dated at Nairobi this 18th day of October 2013.

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR