IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 148 OF 2003

BETWEEN

WANGETHI MWANGI ……..……..……. 1ST APPELLANT

NATION NEWSPAPERS LTD ……...…….…….. 2ND APPELLANT

AND

J.P. MACHIRA T/A MACHIRA & CO.ADVOCATES.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (Kasanga Mulwa, J.)

dated 7th September, 2001

in

H.C.C.C.NO.1709 OF 1996

****

JUDGMENT OF THE COURT

This is an appeal against an award of damages against the appellants by the High Court (Mulwa, J.) in a judgment dated 7th September, 2001.

The background facts are that the respondent who is an advocate of the High Court of Kenya, filed a defamation suit on 12th July, 1996 against the appellants claiming inter alia full apology from the appellants for having printed and disseminated information which the respondent regarded as libelous, general damages and aggravated damages for defamation together with costs. In response, the appellants filed a defence on 13th August 1996 denying the averments contained in the plaint. In a further response to the filing of the defence, the respondent applied to have the defence struck out under the then Order 6 ***rule 13(1)(b & c)*** and ***(d)*** of the Civil Procedure Rules. The application to strike out the defence was dismissed by the High Court (Mbogholi Msagha, J.). An appeal to the Court of Appeal filed by the respondent against the ruling of the High Court was allowed on 4th June 1998. The Court of Appeal set aside the order of the high Court and substituted it with an order striking out the defence and entered an interlocutory judgment in favour of the respondent and also directed that the suit be set down for assessment of damages. Thereafter the respondent was awarded compensatory damages in the sum of Kshs. 8 million together with aggravated damages in the sum of Kshs. 2 million. It is this award which triggered this appeal, which in turn is grounded on the following grounds:-

1. The learned Judge erred in law and in fact in failing to make its own estimate of the harm suffered by the respondent (Plaintiff) before making an award of Kenya Shillings eight million (Kshs.8,000,000/-) as compensatory damages.

2. The learned Judge erred in law and in fact in awarding compensatory damages of Kenya Shillings Eight Million (Kshs.8,000,000/-), which was inordinately high when taking into account the evidence, the pleadings and all the other relevant factors when assessing damages for defamation.

3. The Learned Judge erred in law and on facts in relying on an overall impression of the respondent as an incompetent advocate in the face of an undisputed fact that the relationship between the lady in question and that of the respondent was not a client/advocates relationship.

4. The Learned Judge erred in law and on facts in failing to appreciate that there was no or no adequate evidence to establish any malice on the part of the appellants.

5. The Learned Judge erred in law and on facts in finding that there was any evidence of any conduct on the part of the appellants justifying any award of aggravated damages of Kenya Shillings Two Million or any other sum and, in particular, misdirected himself in holding that any defence raised by the appellants was flimsy or failed (sic) was any evidence of malice.

6. The learned Judge erred in law and in fact in awarding aggravated damages of Kenya Shillings Two Million (Kshs.2,000,000/-) which was inordinately high when taking into (sic) the evidence and all other relevant factors when assessing the same (which in any event should not have been awarded).

7. The Learned Judge erred in Law and in accepting the opinion of the superior court that the award made in Gicheru vs Andrew Morton & Another HCCC No 214 of 199, unreported was manifestly and inordinately low without giving any reason whatsoever for the same.

8. The Learned Judge erred in Law and on facts in failing to take into account the apology in making a just and fair award of damages as the appellants contend the one made is excessive.

9. The Learned Judge erred in Law and on facts in making a pecuniary award in lieu of the apology or that there was any basis of an award of Kenya Shillings Two Hundred Thousand (Kshs.200,000/-).

10. The Learned Judge erred in Law and in failing to deliver his judgment within forty-five (45) days as in required by law.

From the foregoing, it is clear that the thrust of this appeal is the quantum of damages awarded.

In the appeal the appellants were represented by Mr O.P. Nagpal as the lead counsel assisted by Miss C. A. Nyaidho whereas the respondent was represented by learned counsel Mr Njoroge Wachira.

The submissions in this appeal were by consent of counsel made by way of written submissions pursuant to an order of this Court of 13th October 2010.

The sequence of the submissions was as follows:-

1. Appellants' written submissions filed on 2nd November, 2010.

2. Respondents' written submissions filed on 23rd November, 2010.

3. Appellants' further written submissions filed on 30th November, 2010.

In addition, the appellants filed a list of authorities on 11th October, 2010 while the respondent filed his submissions on 7th February, 2012.

On our part, we have fully considered the written submissions filed on behalf of the parties including the respective lists of authorities.

At the outset, we think that the appellants' grounds of appeal are directed at challenging the quantum of the award. The appellants contend that the damages awarded were excessive and not comparable to those awarded in almost similar cases in the past. On the other hand, the substance of the respondent's submissions is that each case must be treated on its own peculiar facts and as long as the trial Judge remained within the parameters of established principles, the exact quantum awarded is left to the discretion of the trial Judge and that there was nothing in this case to warrant any intervention by this Court.

For the purpose of the appeal, we consider it useful to tell the background story in the trial Judge's own words as set out in his judgment:

"The plaintiff gave evidence that on 9th November, 1995 while waiting outside the Judge's Chambers, he was accosted by a lady. He avoided her but she later confronted him in the library. This confrontation was witnessed by the press reporters who followed them. Later he and his assistant Mr Kiiru went to the office of the Daily Nation and saw Mr Mulaa who was a reporter assigned to the High Court. They showed to Mr Mulaa the documents related to the purchase of Mr Machira's land by the lady, emphasizing that there was no client/advocate relationship. They asked him to report the truth in the light of these documents.

Despite the information they gave the Daily Nation and the sister paper Taifa Leo published the story in their front pages. He produced copies of the publishers. His firm hurriedly called a press conference in which they explained the facts and asked 2nd defendant, the Nation Newspaper to make a correction of their story which they did not. They eventually purported to make corrections which were published in the inside pages of the papers. He further testified that the publication of the story affected his business as an advocate. It also affected his health he had to undergo some treatment. According to the plaintiff, the second defendant has an circulation of over a million copies as it is also on the website. His own clients grew suspicious of him and did not want him to hand their money. He was shunned by his colleagues in the United Kenya Club where he is a member."

With the above background, the starting point is that the award was clearly made in exercise of the trial judge's discretion and if so, the question for us is, did he apply the correct principles? Those principles have been well set out in the now famous case of ***Gicheru Vs Andrew Morton & Another supra*** where Tunoi, J.A. reproduced the principles enunciated in the case of ***ROOK v RAIBRIE 1 (94) I ALL ER 297*** and in the case of ***BUTT v KHAN (1981) KLR 349*** as follows:-

"It is true that this court will be slow 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 given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be concerned either that the judge acted upon some wrong principle of law, 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 was entitled. Law J.A., in the case of BUTT v KHAN (supra) stated the principle in these words:-

"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."

In the case of ***Tanganyika Transport Company Lt vs Ebrahim Nooray*** (1961) EA 55, the Court had way back in the fifties held:-

"The latitude in awarding damages in an action for 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 a nutshell, the appellants' counsel has in his submissions relied on the Gicheru case (supra) in urging us to use it as the ultimate yardstick for quantum of damages for now, presumably because the office the then appellant in that appeal held at the material time. In that case the then appellant, the former Chief Justice was awarded a total of Kshs. 6 million by the Court of Appeal following an appeal from the High Court which had awarded Kshs.2 million. On our part, our first concern or focus should be on the peculiar circumstances of the appeal before us. Thus, it is common ground that the basis of the appellant's claim was that in the front pages of the respondent's newspaper a caption of the appellant had appeared depicting him being held by his tie in a scuffle with a lady who was allegedly his client. It is also not in dispute that on the previous day appellants had been informed that the lady was a buyer of the respondent's property but failed to bring this truth out the following day. The holding of the press conference by the appellant advocate late on the same day did not have any impact in convincing the appellant to correct the impression created by the caption. In contrast, the Gicheru story by comparison was printed in the cold pages of a book. In our view, whereas the former Chief Justice occupied a relatively higher professional and social status than the respondent in this matter, we believe that the award of Kshs.6 million was not intended to be a yardstick for all times and circumstances. For this reason, the award by the High Court does not in our view contravene any of the generally accepted principles for awards of damages for libel. In this regard, we note that in the body of his judgment the Judge did remind himself concerning the widely accepted principles in making awards in libel cases.

The other consideration is what the award was meant to achieve. The principle here is that the award of damages to the plaintiff is for the purposes of vindicating him to the public for the wrong done to him – see the English Court of Appeal decision in the case of ***John v MG Lt (1996) I ALL ER 35*** where 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." …….

Examplary 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 appologise."

We consider that most of the essential elements for the award of aggravated damages as set out above, were in our view present and for that reason, the judge was perfectly entitled to award them and in addition the level of the damages cannot in the circumstances be said to lack a juridical basis because the learned Judge had clearly set out the elements he considered before making this part of the award. Thus there were elements of recklessness on the part of the appellants in telling the truth behind the story after having been prompted or alerted the previous day by the respondent. The Court cannot therefore be faulted. We think that while the "***Gicheru***" judgment 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. In the

matter before us we think a sound balance was struck by the trial court.

In the result, this appeal must fail and the same is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 29th Day of March, 2012.

E. M. GITHINJI
.....
JUDGE OF APPEAL

J. G. NYAMU
.....
JUDGE OF APPEAL

H.M. OKWENGU
.....
JUDGE OF APPEAL

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

DEPUTY REGISRAR