IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 284 OF 2005

BETWEEN

NATION MEDIA GROUP LTD.....1ST APPELLANT

MUTEGI NJAU.....2ND APPELLANT

BOB KIOKO.....3RD APPELLANT

AND

JOHN JOSEPH KAMOTHO.....1ST RESPONDENT

CHARLES GITHII KAMOTHO.....2ND RESPONDENT

JAMES KAMOTHO.....3RD RESPONDENT

DAVID KAMOTHO.....4TH RESPONDENT

(Appeal from judgment and decree of the High Court of Kenya at Nairobi (Ojwang, J) dated 1st July 2005

in

HCCC NO 368 OF 2001

****

JUDGMENT OF THE COURT

This is an appeal from a judgment of the High Court of Kenya at Nairobi (Ojwang J) given on 1st July 2005 by which the defendants, now the appellants, were jointly and severally ordered to pay various sums of money to each of the plaintiffs, now the respondents, as general damages and aggravated damages for defamation pursuant to publication by way of broadcast by the appellants of certain words allegedly defamatory to the respondents in the appellants' morning programme known as ***changamka*** of 18th January 2001 hosted and presented by Bob Kioko, the 3rd appellant herein.

The 1st appellant is a proprietor of the well known local radio and television stations, then known, respectively, as Nation Radio and Nation TV. At the time material to the suit the 2nd appellant was an employee of the 1st appellant and the News Editor of Nation Radio and Nation Television. The 3rd appellant, was, also, an employee of the 1st appellant and the host of the talk show programme on Nation Radio known as ***changamka.***

The genesis of the matter which eventually found its way to this Court through this appeal is the captivating programme ***Changamka*** as hosted and presented by the 3rd appellant on 18th January 2001 on Nation Radio. It was pleaded by the respondents that the 3rd appellant allowed a caller by the name ***Maina,*** described by the 3rd appellant as "a regular contributor", to go on air, as a result of which the following words were broadcast to the general public concerning the respondents:

".....this was about 7.15 this morning.....a white Peugeot 405 bursts into the parking lot at a speed of about 80 to 90 K.P.H.....the car has three young men and at that speed they are unable to control the car and the car slams into a stationary Nissan.....The young boys reversed the car and moved from the accident scene got out of the car and bounced off towards the parking office and guess what!!! The three spoilt brats are sons to a cabinet minister!!..... Right now I can see them on cellular phones.....I think they are just trying to call their father to try and get them out of this.....we don't need this.....I wonder whether they will be made to compensate those people who normally park in this parking lot before they can be allowed to leave.....hopefully the owner of the Nissan will get compensated and not harassed.....but we don't need this kind of spoilt children on our streets."

It was further pleaded that immediately after the broadcast the 3rd appellant went on air and broadcast the following:-

"The full effect of the law should apply and hopefully we will see it apply. Maina, you have given me the names of the young people.....if anybody in authority is interested in getting the names you can actually call us here.....We are still trying to get a team down to Westlands to check.

.....as Maina called us at 7.15 this morning, three kids and some of them apparently are cabinet ministers kids drove into a parking lot and while racing around it...they seemed to have been drunk or something.....they were driving off but the security officers have not allowed them to leave the compound of the parking lot. We'll bring you more details as soon as we are called by anybody in authority to ask us who the young men are then we can inform them and tell you how quickly it took them to respond"

The respondents further averred that none of them was at the scene of the accident as reported in the talk show and that the impugned publication referred to them and were understood, and the appellants meant the same to be understood by the general public as referring to the respondents. The respondents averred that owing to the circumstances prevailing, the impugned words were defamatory of the character of each and all of the respondents.

The particulars of defamation given by respondents are that the appellants had in three news bulletins of the morning of 18th January, 2001 published the words:

"a son of Local Authorities Minister Joseph Kamotho was involved in a scuffle after his friends hit another car in Westlands. Kamotho's son intervened after guards detained his friends soon after the accident to prevent them from leaving the scene. By 9.00 a.m. the matter had been sorted out and both vehicles left the scene."

The respondents stated that in the caption of the news bulletin in the Nation TV it was evident that none of the respondents was present at the scene of the accident. It is pleaded that the follow-up by the news bulletins of the appellants, despite being aware that there was no truth in the publication, was meant to confirm that the persons referred to in the impugned publications were the respondents. It is further

pleaded that the prominence with which the appellants had given what was a minor accident, was motivated by malice, with the intention of publishing to the general public the material which has caused them injury. They contended that despite learning of the falsity of the broadcast, the appellants neglected and refused to make amends.

The innuendo averred by the respondents was that by the said publication, in their natural and ordinary meaning, meant and was understood to mean-

(i) that the 1st respondent being a Cabinet Minister and Secretary General of KANU, is in the habit of abuse of office by subverting the due process of law, in instances in which his sons have transgressed the law;

(ii) that, in the same manner, the respondents committed criminal offences punishable under the provisions of the Penal Code;

(iii) that, the 2nd 3rd and 4th respondents being sons of the 1st respondent, are irresponsible in character and in the habit of using their father's office for gain including evading the due process of law;

(iv) that, the 2nd 3rd and 4th respondents usually commit criminal offences punishable under the provision of the Penal Code;

(v) that, the 2nd, 3rd and 4th respondents have not been well brought up by the 1st respondent and that they are spoilt, irresponsible and of very little social standing;

(vi) that the 2nd, 3rd and 4th respondents are immoral in character and are habitual drunkards.

And the respondents claimed that in consequence each of them has been greatly injured in his character, credit and reputation. For the 1st respondent as a Cabinet Minister and the Secretary-General of KANU then, it was averred that his reputation and integrity were greatly injured and compromised, not only among Kenyans, but also, in the world at large. For the 2nd and 3rd respondents, it was averred that their reputation and integrity as citizens of Kenya, including their professional standing, have been put in great jeopardy. For the 4th respondent, his reputation and integrity as a student was alleged to have been injured.

The respondents sought for aggravation of damages on the ground that the appellants had failed to apologize or propose a suitable recompense.

The appellants entered their statement of defence to the suit on 19th April, 2001. The 1st appellant admitted publishing the impugned words, but denies that those words were falsely or maliciously published. The 1st and 3rd appellants deny that the impugned words were understood to refer to the respondents or any of them, no names having been given nor any identification which pointed at them. They further assert that according to their publication, only friends of a son of the 1st respondent were involved in the incident occasioning this suit, and not the 2nd, 3rd and 4th respondents, and "there was therefore never any identification of the 2nd to 4th respondents with the young men referred to in the original broadcasts." The 1st and 3rd appellants assert "the decision whether to publish any incident is for them alone" and they had nothing to apologise for. They contend that no words published referred to the respondents and "no words published alleged that anyone let alone the 1st respondent was in the habit of abuse of public office." They pleaded that they had accused none of the respondents of having committed a criminal offence. The 2nd appellant further pleaded that the plaint showed no cause of action against him; and he prayed that the suit against him be struck out.

At the commencement of the trial issues were framed. The main ones are as follows:-

(a) whether the words complained of in the plaint were published by the 1st and 3rd appellants falsely and maliciously;

(b) whether the 2nd, 3rd and 4th respondents were at the scene of the accident that was reported in the 1st appellant's *Changamka Radio* Programme on 18th January, 2001;

(c) whether the words set out in paragraphs 8 and 9 of the plaint referred to and were understood to refer to the respondents or any of them; and whether the publication contained the names of the respondents or specifically identified or referred to the respondents;

(d) whether the words published by the 1st and 3rd appellants in their natural and ordinary meaning and/or in the innuendo therein alleged, were meant and were understood to mean the interpretation given by the respondents and whether the words published in its *Changamka* Programme and news bulletin thereafter, have injured the character and reputation of the respondents as alleged;

(e) whether the words published by the 1st and 3rd appellants in either its *Changamka* morning programme and/or in subsequent broadcast/news bulletins were defamatory of the respondents as alleged in the plaint;

(f) whether the respondents have suffered damage and whether they are entitled to the remedies sought.

The four respondents tendered evidence to prove the assertions in their pleadings. The tenor and effect of the evidence is that they were on the material day defamed several times by the broadcast and publication of a news story which referred to the 1st respondent's sons as spoilt brats who in a condition of drunkenness, had driven a vehicle at excessive speed into a parking area and caused damage; had caused a scuffle at the *locus in quo*; and then sought assistance of their powerful Cabinet Minister father to extricate themselves from the resulting legal implications.

The respondents gave the origin of the publication as an early morning talk show with an unidentified caller, one Maina, calling on telephone and claiming that he was at that very moment observing the objectionable conduct of the sons of a Cabinet Minister. The 3rd appellant then recast and relayed the story given by Maina and the 1st appellant's Radio and TV stations then at 9.00 a.m. and 11.00 a.m., respectively, turned the story into a news item which identified Hon. Joseph Kamotho in clear terms as the father of the brats.

On the other hand, the appellants' defence, in the main, is that

yes, it is true they published the words complained of but deny that the said words were falsely or maliciously published. Further, they deny that the words referred to the respondents or were understood to refer to them or any of them, no names having been given. Bob Kioko (DW1) the programme controller and also the host and the presenter testified that Maina called and made the statement and:

".....so I repeated it. I was given the names – sons of Hon. Kamotho's sons; but we did not put them out."

He admitted that he did not confirm the truthfulness of what was in the broadcast.

The learned trial Judge held that the respondents were in their standing in society, lowered in the perception of right – thinking persons by the appellants in their broadcast. He found that the content of the publication taken together did identify the 1st respondent as the Cabinet Minister whose sons were ill-conducted and had committed various acts of a criminal nature following which they had invoked the powerful public standing of their father to go scot-free. The learned trial Judge was satisfied that there was no evidence at all to show that any of the three sons of the 1st respondent had been anywhere in the Westlands suburb of Nairobi nor had they been shown that they had been engaged in a drunken brawl. He

concluded:

"It follows that all the four plaintiffs were defamed. They were wrongfully exposed in unfavourable light, through electronic newscasting, repeatedly on the material day. Their evidence that they lost esteem in the perception of right-thinking people, as a consequence of the publications, has not been successfully controverted. I therefore find and hold that the plaintiffs were defamed by the 1st defendant, and by the 2nd and 3rd defendants who were servants of the 1st defendant."

In awarding damages the learned trial Judge was of the view, and correctly so, that the sums awarded should be fairly compensatory in the light of the nature of the injury to reputation; and that a restrained hand in the award of damages is desirable since the court must maintain a stable mien; He also stated that awards should appear realistic in all the circumstances and awarded damages as follows:-

i) That the 1st respondent being a Cabinet Minister, a prominent politician with a substantial reputation, Shs.6,000,000 general damages and Shs.1,000,000 aggravated damages;

ii) That the 2nd respondent being a medical doctor who was engaged in further studies towards greater specialization in his calling Shs. 2,500,000 general damages and Shs.500,000 aggravated damages;

iii) That the 3rd respondent being a businessman in Nairobi, Shs.2,000,000 general damages and Shs.500,000 aggravated damages

iv) That the 4th respondent being a 23 year old student who was proceeding to Australia for further studies. Shs.1,000,000 general damages and Shs. 500,000 aggravated damages

It is significant that the learned trial Judge found for the respondents in all the framed issues. The appellants were aggrieved by the learned trial Judge's decision and awards and hence this appeal.

Mr. Kiragu Kimani learned counsel for the appellants argued the appeal more or less on the basis of the agreed issues, dealing with them, as had the learned trial Judge, in four tranches, namely the nature of the libel which constitutes grounds 1, 2 and 3 of the memorandum of appeal; evidential issues and conduct of the matter by the learned trial Judge these cover grounds 4, 8, 9 and 10 of the memorandum of appeal; position of the 2nd appellant, grounds 10 and 11; and finally whether the award of damages was manifestly excessive in the circumstances, grounds 11 to 15 of the memorandum.

It is trite law, and we accept Mr. Kiragu's submission that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect. See **Selle and Another v Associated Motor Boat Company Limited and others [1968] EA 123**.

Further, it is firmly established 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 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 convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in **Rook v Rairrie [1941] 1 ALL E.R. 297**. It was echoed with approval by this Court in **Butt v. Khan [1981] KLR 349** when it held as per Law, J.A that:

"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."

As was said in **Johnson Evan Gicheru v Andrew Morton and Another C.A. NO. 314 of 2000** the latitude in awarding damages in an action for libel is very wide, and the one thing the 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. See **Tanganyika Transport Co. Ltd v. Ebrahim Nooray [1961] E.A. 55**.

Also, in an 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 this 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 restitutio in integrum has necessarily an 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 Fairfax & Sons PTY. Ltd. 117 C.L.R 115, 150:**

"It seems to me that, properly speaking, a man defamed does not get compensated for his damaged reputation. He gets damages because he was injured in 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."

So much for the guiding principles of law. We will now endeavour to deal with the issues raised in the appeal.

Mr. Kiragu contended in the first limb of his submissions that the learned Judge had erred in law and fact in finding for the respondents when no single person gave evidence that they had heard any of the broadcasts connected to the respondents; and, that the essence for libel is wrongfully affecting the opinion of others, not what the respondents think. Broadcasting or wireless broadcasting is defined by section 2 of **The Defamation Act Cap** 36 Laws of Kenya as follows: -

2. "wireless broadcasting" means publication for general reception by means of radio communication within the meaning of the Kenya Posts and Telecommunications Act ……" and "broadcast by wireless" shall be construed accordingly."

For the tort of defamation to succeed the following elements must be proved by the claimant:

1. The statement must be defamatory.

2. It must refer to the claimant, i.e identify him.

3. It must be published i.e communicated to at least one person other than the claimant.

See **Winfield and Joloivicz on Tort**: **16th Edn 2002 PP. 159 & 162**

Traditionally, in common law, the fundamental distinction was between written (including printed) words, which were libel, and spoken words which were slander. Nowadays, the general view is that the test of libel is whether the publication is in a "permanent"form, other cases being slander. See **Lipumba v**

Mzee [2004] I EA LR 105 (CAT). However, many countries, Kenya being one of them, have made statutory provisions whereby broadcasting, both radio and television, and theatrical performances, are libel – **The Defamation Act** (ibid).

It is admitted by the appellants that the words complained of were broadcast on FM Radio station and TV. It is common ground that the two stations receive wide listening both within and without the country. The 3rd appellant candidly admitted that as the host and presenter of the *Changamka* programme he allowed one of his regular callers "Maina" to go on air and publish the words complained of. The 2nd appellant, also, as News Editor responsible for all news items allowed the said utterances to be broadcast in the news bulletins at 9.00 a.m and 11.00 a.m. Thus, the act of broadcasting or publication by the appellants had been proved.

Mr. Kiragu contended that there was lack of evidence of identification. But, the learned Judge on analysing the evidence was satisfied that the broadcast in the talk show, on the radio and television taken together did identify the 1st respondent the Hon. Mr. Kamotho as the cabinet minister whose sons had ill-conducted themselves and misbehaved during the material morning. Further, the said sons had shown before the learned Judge when they gave their evidence that they were not at the scene or anywhere in Westlands at the time. We are unable to find any fault with this holding. There is, in our view, sufficientevidence to establishthat the broadcast complained of clearly referred to all the respondents and what was aired was a clear case apparently founded upon rumours. We reject Mr Kiragu's submission.

It was strongly argued by Mr. Kiragu on behalf of the appellants that the words complained of were incapable of bearing the meaning that the respondents had pleaded in the innuendo, but, Mr. Kahonge learned counsel for the respondents contended, firstly, that as the publication was in a wireless form there was no need to call evidence on this; and secondly, the innuendo had been established in that the information passed on to the public was that the sons of the 1st respondent had misbehaved, breached the peace, had committed a criminal offence and had wriggled out of the consequences because of the position of standing of their father in the Government and in the political world. We would accept this submission because the first rule of construction is that words are to be given their natural and ordinary meaning as popularly understood.

We think, also, that taking into consideration the position of the respondents in society, there is no doubt whatsoever that their standing in society was lowered in the perception of right-thinking people or ordinary persons by the appellants' broadcast especially in that the 1st respondent is a national politician with a substantial reputation which was recklessly maligned by a fabricated story. The 2nd respondent, an ambitious medical doctor, had his career cast in bad light. Obviously, reputation is an integral and important part of the dignity of the individual and once besmirched by an unfounded allegation a reputation can be damaged forever, especially if there is no opportunity to vindicate one's reputation. See **Reynolds v Times Newspapers [2000] 2 L RC 760**.

On our independent analysis of the evidence tendered in the trial court we have no hesitation whatsoever in holding that the words broadcast by the appellants were libelous of the respondents, untrue in substance and did clearly refer to all the respondents. We have disposed of the first three limbs of the appellants' submissions.

As regards the last issue of damages, Mr. Kiragu contended that they were excessive and so inordinately high that it was incumbent upon this Court to interfere. On the other hand, Mr. Kahonge submitted that the learned trial Judge was correctly guided in his assessment and that there existed no ground for us to reconsider the damages. He submitted that the learned trial Judge had taken into account the respondents reputation, wide publication and reception that the 1st appellant's media enjoyed and the appellants' failure to apologise before he made the awards.

We have earlier on in this judgment set out the criteria for interfering with an award of damages. We would add that the successful plaintiff in a defamation action is entitled to recover as general compensatory damages, such sum as will compensate him for the damage to his reputation;

vindicate his good name; and take account of the distress, hurt and humiliation which the defamatory publication has caused. See **John v MGN Limited [1966] 2 All 35** at page 47. Again:

"In assessing the appropriate 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 greater potential to cause damage than a libel published to a handful of people. A successful litigant may properly look to an award of damages to vindicate his reputation: but the significance of this is much greater in a case where the Defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the Defendant acknowledges the falsity of what was published and publicly expresses regret that the libelous publication took place."

The learned trial Judge held that, 1st appellant's radio and TV have a wide listening and the inevitable conclusion is that the defamatory broadcast reached many people. He also found that the appellants had failed to make amends or apologise: We would disagree with Mr. Kiragu that the learned Judge based his awards on incorrect principle and were excessive. We are not prepared to say that the awards made are so manifestly excessive that the Court ought to interfere. We reject and dismiss the grounds of appeal raised before us.

For the reasons given above we order that this appeal be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 25th day of March, 2010.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

P.N. WAKI

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR