IN THE COURT OF APPEAL KENYA

AT NAIROBI

CIVIL APPEAL NO. 115 OF 2003

BETWEEN

THE STANDARD LIMITED ……..……...APPELLANT

AND

G.N. KAGIA t/a KAGIA & COMPANY ADVOCATES….RESPONDENT

(Appeal from the judgment & decree of the High Court of Kenya at Nairob I (Rimita, J.) dated 14th march, 2002

in

H.C.C.SUIT NO. 1058 OF 2000)

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JUDGMENT OF THE COURT

This is an appeal from the judgment and decree of the superior court (***Rimita, J.)*** delivered on 14th March 2003 in High Court Civil Appeal No. 1058 of 2000.

The appellant was represented by ***Mr Billings,*** advocate while the respondent was represented by ***Mr Mugi***, advocate.

The respondent is an advocate of the High Court of Kenya and is currently practicing law in the name and style of ***Kagia & Company***, advocates. He is an advocate of 30 years standing having been enrolled in November, 1980.

The appellant is the proprietor and publisher of the daily newspaper known is as "the Standard" but at the relevant time the publication was known as "The East African Standard."

The cause of action as pleaded was that on or about 6th December, 1999 the appellant wrote printed and published or caused to be written, false and published of and concerning the respondent, the following false and defamatory words in the widely subscribed article known as the ***"Big Issue of the East African Standard:"***

"AKI RELEASES CASES OF MISAPPROPRIATION BY ADVOCAATES

Documents made available by the Association of Kenya Insurers show a plethora of cases of compensation award misappropriation as well as bogus claims by lawyers.

The following are examples of case studies by AKI … *Civil Suit No. Gatundu SRMCC Nos. 31,42,62,63, of 1997.*

PARTIES

1. ***Agnes Nyakeru Nyamo***
2. ***Daniel Mbugu***
3. ***Jane Wambui Kagombe***
4. ***Mary Wothaya Nderitu***
5. ***Florence Wanjiru***

REMARKS:

Fake claims with awards totaling Kshs.1,052 million had been made. Advocates withdrew later pleading that they were not aware of the fraud. Advocates: Kagia & Company advocates.

PARTIES:

1. ***Nancy Waithera Kiarie***
2. ***Dominic Kimondo***
3. ***Benson Chege***
4. ***Mary Mbere Kimani***
5. ***John Mburu Njoroge***
6. ***Peter Kinyanjui***
7. ***Lydia Wanjiru***
8. ***Peter Kigoro Ndambi***

REMARKS:

Fake claims with a global outlay of Kshs.743,347/- settled. One of the claimants was a Clinical Officer who treated the genuine claimants.

The Insurance Company is directly recovering the money from the claimant. Matter reported to CID.

Advocates: Kagia & Company Advocates."

Following a full hearing in the superior court, Rimita, J. found for the respondent and awarded him general damages in the sum of Kshs.5,000,000 and exemplary damages in the sum of Kshs.1,000,000.

Aggrieved by the said judgment, the appellant has appealed to this Court listing the following grounds:-

1. That the learned Judge erred in law and fact in reaching a finding that the respondent widely published in the East African standard information concerning an impending explosive article in the "BIG ISSUE" concerning crooked, dishonest and fraudulent lawyers in Kenya who had corruptly obtained colossal sums of money from their clients and insurance companies when there was no evidence before the Court to support such a finding.

2. The learned Judge erred in law and in fact in holding that an ordinary, just and reasonable citizen who read the report of the BIG ISSUE would make no other conclusion other than that <u>KAGIA & CO. ADVOCATES</u> had misappropriated some of the money awarded when no such meaning could be attributed to the words complained of in their ordinary and natural sense.

3. The learned Judge erred in law and fact in relying on hearsay and uncorroborated evidence of the respondent (PW1) to find that the publication of the words complained of had a big negative impact on the plaintiff's legal practice.

4. The learned Judge erred in law in looking at the words "CROOKED LAWYERS" to find that the motive of the words complained of was to expose crooked lawyers and that if anything touched on an advocate who was not crooked, malice must be inferred when the said words were not pleaded in the plaint as to form apart of the words complained and such were not in issue before the court for determination and such no evidence could be led on the words neither could the court

5. make a finding thereon nor make reference to them in its findings.

6. The learned Judge erred in law and fact in holding that the defence of fair comment had not been established by the appellant and that no attempt were made to show that the allegation were true when to the contrary the evidence before the court established that substantially the words complained of by the plaintiff were true, the basis upon which the defendant made comments which were fair in the circumstances.

7. The learned Judge erred in law and fact in failing to find that words complained of were published on an occasion of qualified privilege when the same together with the particulars pleaded in the defence were not denied by the plaintiff and as such were in the circumstances taken to be admitted and the appellant was therefore discharged from the obligation to prove this defence.

8. The learned Judge misdirected himself in law in holding that "if a defamatory writing is published without lawful excuse, the law conclusively presumes that the publisher is actuated by malice, which gives the injured party a cause of action" as a result of which the Judge reached an erroneous findings (sic).

9. The learned Judge erred in law and fact in presuming malice against the appellant when there was no evidence of malice whatsoever before the court but ample evidence of lack of malice.

10. The learned Judge erred in law and fact in awarding damages to the plaintiff which were excessive in the circumstances of this case.

11. The learned Judge erred in law in awarding exemplary damages to the respondent when the same was not pleaded and particulars provided so as to become as an issue before the court for determination.

12. The learned Judge erred in law and fact in awarding exemplary damages to the respondent when there was no evidence before the court to support such an award.

13. The learned Judge erred in law and in fact in failing to mitigate the quantum of damages against the chance of apology offered to the respondent who declined the same and the damage already caused to the respondent's reputation by third parties at the time of publication of the words complained of.

14. The learned Judge erred in law and fact in granting a perpetual injunction restraining the defendant by itself, its agents or servants from further publishing or causing to be published any matter defamatory of the plaintiff when the said order has the effect of going beyond the matters in issue in the suit thereby contravening the legal rights of the appellant as by law provided and in any event enforcement thereof would require a court's intervention on.

15. ***The learned Judge erred in law and fact in ordering the respondent to publish an apology in a suitable form to be approved by the respondent when the respondent had declined to avail himself of the opportunity offered by the appellant to publish a reply by way of an explanation.***

When the appeal came up for hearing on 8th July, 2010, Mr Billing for the appellant abandoned all the grounds touching on liability thereby conceding liability and instead restricted his submissions to the quantum of damages awarded.

The appellant counsels' submissions centred on the ground that the damages awarded were inordinately high and out of line with awards in four comparable cases which he cited and that there was no basis for the award of exemplary damages in the absence of proof that the publication of the defamatory matter was done with the intention to make a profit and in addition, this head of damages was not pleaded; that the respondent failed to mitigate his loss because an offer of amends had been made by the appellant and finally, that a Kshs.2,000,000.00 award in respect of general damages would be sufficient and that interest on the award should commence from the date of the judgment in this appeal since awards were not meant to be penal and the appellant had nothing to do with the seven year delay between the date of the award and the hearing of the appeal.

On his part, learned counsel for the respondent, Mr Mugi highlighted his submissions by first addressing the Court on past decisions touching on when an appeal court is entitled to interfere with the trial court's award of damages; that the appellant's counsel in the superior court did not address the court on the issue of quantum of damages and that the superior court did consider many relevant comparable decisions as regards quantum; that the award was neither excessively high or inordinately high; that in all the authorities relied by the appellant on quantum, damages awarded were in the range of 1 (one) to 2 (two) million and were distinguishable because in some, the libel was restricted to either one institution or it was contained in a book and publication was restricted to the book readers as opposed to the libel the subject matter of this appeal, where the publication was to all readers and their associates; that an advocate of 30 years standing in terms of injury to his reputation was in the same position as other prominent advocates and other prominent people awarded damages in the range of (6) six to (30) thirty million in the past and finally that, there was proof that his client had lost business as a direct consequences of the libel.

We have carefully weighed the rival submissions put forward on behalf of the parties. We have also considered fully the comparable decisions cited by both counsel in support of their submissions on quantum. A good starting point is to remind ourselves that, we are the first and final appellate Court in this matter and in view of this the first guiding principle concerning our mandate was very well defined in the case of ***ROCK v FAIRRIE [1941] I ALL ER 297*** as follows:-

"the latitude in awarding damages in an action for libel is very wide, and the 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…"

The principle above was fully endorsed by the predecessor to this Court in the case of ***TANGANYIKA TRANSPORT COMPANY LTD. –vs- EBRAHIM NOORAY [1961] E.A. 55*** and the same principle was restated differently in the case of ***BUTT –vs- KIYAN*** **[1981] KLR 349** as under:-

"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 second guiding principle in determining our latitude in the appeal before us was well set out in the case of ***PRAED –vs- GRAHAM 24 QBD 53, 55*** in these words:-

"In action of libel, the trial court in assessing damages is entitled to look at the whole conduct of the defendant from the time the libel was published down to the time the verdict is given. It may consider where his conduct has been before action, after action and in court during the trial."

The third guiding principle was well described in the case of ***URN -vs- JOHN FAIFAX & SONS PTY LTD 117 CLR 115, 150,*** in these words:-

"It seems to me that properly speaking, a man defamed does not get compensation 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."

Apart from the factors and principles set out in the case law above, we think that for the purpose of this appeal, the following two guiding principles should be added:-

1) In situations where the author or publisher of a libel could have with due diligence verified the libellious 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.

2) The level of damages awarded should be such as to act as deterrence and to instill a sense of responsibility on the part of the authors and publishers of libel. Personal rights, freedoms and values should never be sacrificed at the altar of profiteering by authors and publishers.

Thus, in the matter before us, we have considered the two additional principles hence the reason of the slight enhancement of the damages awarded to the appellant compared to those previously awarded to advocates of his status which have so far been within the range of 1 to 2 million shillings.

As regards exemplary damages, Mr Billings' argument that they should not have been awarded in the circumstances cannot be right in that, all that the newspaper needed to do was to pick up the phone and verify the facts either with the firm of advocates or with the insurance companies associated with the story. The publication was very well caught by the principle established in the case of ***JOHN –vs- MGM LTD [1997] Q.B 586*** and ***KIAM v MGM Ltd [2002] 3 WLe 1036*** as follows:-

"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."

In the ***John v MGM Ltd supra***the English Court of Appeal said in part 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."

We agree with this holding and for the purpose of this appeal, the publication was much wider than in the local cases cited by ***Mr Bilings*** concerning advocates of almost the same standing as the respondent.

In this regard, we also endorse fully the ruling by Widgery, J. in ***Manson –vs- Associated Newspapers Ltd [1965] 2 ALL ER 954 at page 957*** where he held 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, careless whether it be true or false."

Again our courts should be able to sufficiently vindicate the plaintiffs right where there are circumstances pointing to contumelious disregard of the defendant's rights see ***Cassell & Co. Ltd –vs- Broome [1972] I ALL 801 at 831.*** Exemplary damages should also be awarded by the court to indicate the displeasure of the Court at the heneiousmness of the defendants conduct. Such damages are intended to serve the societal purpose of punishing the wrong doer and deterring him and others from similar conduct in future. In our view, the courts should use this tool to ensure that the plaintiffs' rights are not deliberately abused due to reckless disregard of those rights or outright irresponsibility on the part of a defendant or lack of professionalism by the defendant in disregarding those rights.

With the above guidelines in view, we think that the award was excessive in that the awards for other successful advocates whose cases have come to this Court range from 1 million to 2 million – see ***Kenya Tea development Authority -vs- Benson O. Masese t/a B.O. Masese & Company Advocates KSM at 95 of 2001*** (unreported), where an award of Kshs.1,500,000 was given to an advocate and ***Aziz Kassim Lakha -vs- The Standard Limited t/a East African Standard, C.A. 81 of 2009 (unreported)*** where an award of Kshs.2,000,000 was awarded to a prominent business person. Granted that the publication in the ***Masese*** case was restricted to one organization, we still think that the award in this matter was on the higher side even after taking into account the wider circulation of the libel in the current case to all newspaper readers. We say this because we think there is need in having regard to comparables even in terms of the standing of the libeled person because both the law and the level of awards must of necessity continue to be certain and predictable. In this regard, we have in mind the locus classics case of ***Johnson Evan Gicheru -vs- Andrew Morton & another (2005) e KLR,*** where the current Chief Justice who was at the relevant time an appellate Judge of this Court, was awarded a composite award of Kshs.6 million. Surely, the subjective effect on a Chief Justice cannot be reasonably be equated to an advocate of whatever standing in the profession. All the same, we are also not oblivious to the need to take into account awards in other comparable cases touching on the effect of libel on advocates. Thus, in the matter before us there was evidence that the libel had directly resulted in a diminishing clientele to the firm and also impaired the firm's ability to hire legal assistants. In our view this factor does justify a slightly higher award. Taking this into account the above principles and circumstances of the case as above, we consider a composite figure of Kshs.3 million a reasonable award.

Accordingly, we set aside the judgment dated 14th March, 2007 and in substitution thereof we hereby award the respondent a composite award of Kshs.3 million plus costs of this appeal and the suit below together with interest at Court rate from 14th March, 2003.

DATED and delivered at Nairobi this 24th day of September 2010.

P.K. TUNOI

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JUDGE OF APPEAL

MOIJO OLE KEIWUA

……...……..…

JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR