



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA**

Civil Appeal 81 of 2009

**AZIZ KASSIM LAKHAAPPELLANT (ORIGINAL
PLAINTIFF)**

AND

THE STANDARD LIMITED T/A

**EAST AFRICAN STANDARD...RESPONDENT (ORIGINAL
DEFENDANT)**

(An appeal from the judgment and decree of the High Court of Kenya at

Mombasa

(Khaminwa, J.) dated 2nd November, 2007

in

H.C.C.C. NO. 436 OF 2002)

JUDGMENT OF THE COURT

This is an appeal from the judgment and decree of the superior court at Mombasa (J. N. Khaminwa, J) delivered on 2nd November, 2007 in Mombasa HCCC NO. 436 of 2002.

Mr. Buti appeared for the appellant and Mr. Werimo Echessa appeared for the respondent.

The appellant is a prominent businessman and a professional based in Mombasa. The respondent is a limited liability company which carries on publishing business under the title of the East African Standard and is a publisher of news through daily publications in Kenya, East Africa Region and other parts of the world.

It is not in dispute that on or about the 21st December, 2001, the respondent caused to be published in its daily publication falsely and maliciously and knowing the same was not true of and concerning the appellant a sub-heading entitled:-

Coast Traders charged with stealing power.

The actual words used were:-

“A prominent Mombasa businessman yesterday appeared in court on charges of making illegal power installations and stealing electricity. Mr. Aziz Kassim Lakha who is the owner of Oceanic Hotel, Oceanic View Beach Hotel, Jumbo Holdings and Bahari Chalets was charged before Resident Magistrate Mueeni. Lakha jointly with others not before the court was charged with making an illegal connection of power to Ocean View Beach Hotel. The offence was committed on December 14, 2001, the accused connected to conductor to an electric supply belonging to Kenya Power & Lighting Company without their consent.”

The appellant has contended that the respondent’s publication must have been read by millions of people both in Kenya and other parts of the world.

The factual background is that the appellant had been charged in court under **section 95 (i) (b)** of the Electric Power Act 1997 with the offence of unauthorized installation of a conductor. It is common ground that the Electric Power Act under which the appellant was charged does not have any offence of stealing power and in any event the appellant contended that electric power was not capable of being stolen pursuant to **section 268 (1)** of the Penal Code, which sets out the ingredients of the offence of stealing.

While admitting publication as contended by the appellant, the respondent in its statement of defence denied that the publication was done either falsely or maliciously and further averred that the said words were not referring to the appellant. The respondent further pleaded the defence of justification and further denied that the appellant was identified by his name although the relevant article bore the name Aziz Kassim Lakha.

When the appeal came up for hearing before us on 23rd July 2009 counsel for both parties informed the Court that what was in dispute was the quantum of damages awarded and that liability of the respondent was not in dispute. We do not therefore find it necessary to set out the pleadings in full. However, for the purpose of making a determination on quantum, it is apt to reproduce in extenso what we consider to be a critical part of the judgment of the superior court. At pages 11-12 of the judgment the learned Judge summed up the critical factors as under:-

“The plaintiff in this case is a businessman who carries on business in Kenya and (sic) outside there was no dispute about his high business status. After considering the evidence before the court and the gravity of the allegations and the fact that the defendant failed to prove the defence as pleaded (sic) justification, privilege or fair comment, I have come to the conclusion that a sum of Sh.500,000/= is a reasonable and adequate compensation to the plaintiff.”

The appellant was not happy with the award of damages in the sum of Kshs.500,000/= and on 22nd April, 2009, he filed a memorandum of appeal in the court which raised the following grounds:-

- “1. The learned Judge erred in making an award of Kshs.500,000/= as damages which was manifestly low and inadequate in the circumstances of the case.***
- 2. The learned Judge made an award of Kshs.500,000/= as damages based on incorrect principle and which were inadequate.***
- 3. The learned Judge erred in failing to consider the correct principles in awarding damages in libel cases thereby arriving at a manifestly low award of Kshs.500,000/=.***
- 4. The learned Judge failed to consider that permanence of the libel, the conduct of the respondent both before, during and after trial thereby arriving at an inadequate award.***

5. *The learned Judge was wholly wrong in arriving at an award of Kshs.500,000/= as damages.*
6. *The learned Judge was biased against the appellant in the award of damages in that:-*
 - (a) *She failed to consider the submissions made in favour of the appellant.*
 - (b) *She made an award suggested by the respondent without any basis.”*

In his submissions the learned counsel for the appellant Mr. Buti did not argue the grounds seriatim but instead adopted a global approach. Thus, he contended that the learned Judge did not consider the issue of libel and victim; the status of the victim; the conduct of the respondent both before and after the trial including the falsehood that the appellant had not been identified by name yet his name have had been prominently displayed in the offending articles; the word stealing was neither in the charging provision nor in the charge sheet itself; failure to offer an apology even when confronted with the correct position regarding the charge facing the appellant; the defence of justification against the weight of the evidence to the contrary and sheer malice and stubbornness. With the above lapses in view the learned counsel submitted that the learned Judge did not apply the correct principles in giving the award of Kshs.500,000/=. The learned counsel concluded his address by contending that the superior court did not consider comparable awards in similar situations and as a result the award of Kshs.500,000/= was manifestly inadequate. The learned counsel also faulted the court for setting out in extenso very persuasive authorities without applying the principles enumerated in those cases and further emphasized that calling a former Chairman of the Aga Khan Council in Kenya a petty thief called for a substantial award.

Mr. Werimo Echassa, learned counsel for the respondent in his brief submissions urged the Court to note that the trial Judge in his award did take into account the conduct of the respondent; the appellants status and position in the society and all surrounding circumstances and that the award satisfies the twin goals of vindication to the public and consolation to the appellant from the harm. He asked the Court to note that here was no prayer for aggravated damage. Touching on the relevant law, Mr. Echassa submitted that, the power of an appellate court to interfere with an award of damages is restricted unless it is demonstrated (and this was not done) by the appellant that the trial Judge misapprehended the law, or acted on wrong principles and as a result awarded manifestly low or high award. Finally, Mr. Echassa invited the Court to note that the appellants had not shown how that Judge had erred to justify this Court’s intervention.

We have carefully weighed the rival submissions put forward on behalf of the parties. Having done so, we consider that a good starting point is, at the outset, to consider the limits of our mandate as an appeal court in terms of interfering with award of damages by trial judges. In this regard, our latitude was clearly defined in the case of **ROOK V. FAIRRIE [1941] 1 ALL E R 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 outlined above was fully endorsed by the predecessor to this Court in the case of **TANGANYIKA TRANSPORT CO. LTD v. EBRAHIM NOORAY (1961) EA 55**. The same principle was restated in a different style in the case of **BUTT v 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 **FRAUD v GRAHAM 24 QBD 53, 55** in these records:-

“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 his conduct has been before action after action and in court during the trial.”

A careful perusal of the judgment the subject matter of the appeal shows that the trial Judge did take into account that the defamatory article was published recklessly without checking the correct position as per the court records; and for this reason the report was inaccurate and unfair; that the appellant at the age of 72 could not have climbed the electricity pole and had no technical knowledge to install or connect a conductor to an electric supply and finally that the trial Judge did consider the high status of the appellant and the fact that the respondent did plead the defence of justification. However, we do agree with Mr. Buti that the trial Judge did not fully address the conduct of the respondent both before action and after action, for example the respondent’s failure to publish an apology or to make amends even after it was drawn to the respondent’s attention that electric power was not capable of being stolen and that the word stealing was not in the charge; respondent’s specific denial was that the appellant had not been harmed in the defamatory article although in point of fact he was named twice and that the respondent was still stubborn in its defence even after the charge was withdrawn by the prosecution. Arising from the above omissions we are of the view that the trial Judge did act on wrong principles when she gave the challenged the award of Ksh.500,000. We again agree with Mr. Buti that the linkage of the impact of the libel to the victim was not also properly addressed by the trial Judge.

In the judgment at page 152 the trial Judge rendered herself thus:-

“At the trial the plaintiff testified that he is an international business man having business in Kenya, Kampala and Karachi. He is a member of various reputable organizations including the Aga Khan Council of which he was president between 1972 – 1975. He has been a Chief Mukhi of the Aga Khan Community, president of Rotary Club of Mombasa. He was in 1955 honoured with Presidential Award of the “Order of the Grand Warrior”. He was chairman of the Aga Khan Tribunal for Africa, a member of Hotel Authority on Kenya and the Wages Council in Kenya. He is a well known personality in business circles in Kenya and in East Africa Region. At the time of trial he was 72 years old. He is a director of various companies including Ocean View Beach Hotel Ltd Baharini Chartels Ltd and Jumlea Holdings Ltd.”

It is clear to us that there is nothing in the judgment which shows that the quantum of damages of Ksh.500,000 is sufficiently capable of removing the sting of the libel to a victim who has such a glowing record as set out by the trial Judge. Thus in the case of **BROOM v. CASSEL & CO.** [1972] A.C. 1027 (HL) which were relied on by this Court in the *locus classicus* case of **JOHNSON EVAN GICHERU v ANDREW MORTON & ANOR** [2005]e KLR, the House of Lords held:-

“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 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 any 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 bystander of the baselessness, of the charges.”

Again going by the checklist of compensable factors in libel actions we are of the view that the trial Judge did omit to consider a number of the factors and where she made an attempt to consider that she did not do so fully. In the case of **JONES v POLLARD** [1997] E & KLR 233, 243 the factors 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 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."*

Again concerning the issue of libel and compensation the case of **URN v JOHN FAIFAX & SONS PTY LTD** 117 CLR 115, 150 is illustrative:-

"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."

In our view the **OREN** case suggests quote rightly in our view that the trial court reflects in its award of damages a just balance between the need for both public vindication and consolation. In the matter before us, the respondent had refused or declined to apologise thereby hindering the appellant's path to vindication.

Similarly, going by compensatable factors in the **JONES** case above, with respect, we are of the view that the trial Judge did not take into account or where she did, did not give sufficient weight to factors 1, 2, 3 and 5. As a result, even after exercising considerable caution and at the same time extending to the trial court, considerate deference as regards the award given, we are all the same and for the reasons given above, we are constrained to intervene with the award. All in all we allow the appeal and hereby set aside the award of Ksh.500,000 given on 2nd November 2007 and substitute thereof an award of Kshs.2,000,000 (2 million) plus costs of the appeal and the suit below.

It is so ordered.

Dated and delivered at Mombasa this 16th day of October, 2009.

S. E. O. BOSIRE

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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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