



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA

AT KISUMU

CIVIL APPEAL 12 OF 2003

RODGERS ABISAI T/A ABISAI & COMPANY  
ADVOCATES.....APPELLANT

AND

1. WACHIRA WARURU

2. THE STANDARD LTD.....RESPONDENTS

*(Appeal from the decree of the High Court of Kenya*

*at Kisii (Mr. Justice I.C.C. Wambilyangah) dated 16<sup>th</sup>*

*October, 2002*

in

KISII H.C.C. NO. 52 OF 2001)

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JUDGMENT OF THE COURT

The appellant, **Rodgers Abisai**, is an advocate of the High Court of Kenya, and practices at Migori in the name of Abisai & Company, Advocates. He filed a suit in the High Court, at Kisii, claiming general and exemplary damages, an order that the defendants, Wachira Waruru and the Standard Limited, make a full and unqualified apology, make amends, withdraw certain remarks and statements made and published by them against the plaintiff in the East African Standard Newspaper, on or about 16<sup>th</sup> December, 2000, and costs. The suit was founded on an article published on that day about the appellant.

Paragraph 5 of the appellant's plaint states in part that the publication stated:-

***“A Migori court was asked to detain fake accident claim files seized from 10 local advocates .... the accused's.”***

No advocate had been charged relating to any files, fake or otherwise. And paragraph 7 of the appellant's plaint reads, in part, that:-

***“The words herein above meant and were understood to mean that the plaintiff was dealing (sic) and/or party to fake claim files, and that the detained files were essentially fake, whereas no trial respecting the bona fides of the files had been done.”***

Paragraph 8 of the plaint continued:-

***“...the plaintiff was understood to be a person of corrupted morals dealing in fake claim files and fraudulent ....”***

Paragraph 9 of the plaint averred:-

***“In the same publication, the plaintiff was also referred to as “An accused,” a fact that meant to portray the plaintiff as having been charged and was facing a criminal trial at Migori Court.”***

The respondents, in a joint defence, admitted having published the offending article, but denied the words published were defamatory, denied the publication was maliciously done, denied the meaning ascribed to them, denied any of the said words were *“falsely or maliciously published”* as stated in the plaint and pleaded absolute privilege. In the alternative the respondents averred that the words were fair comment on matters of public interest.

Before the offending article was published, there were certain developments which we think are material in coming to a decision in this matter. The District Criminal Investigations Officer (DCIO), Migori District, swore an affidavit in support of an application he made before a Migori Court for leave to search the appellant’s office. The leave was granted and on the basis of it the DCIO, went to the appellant’s Chambers, conducted a search and went away with several client files. The appellant thought a wrong procedure was adopted and himself applied to the same court for the files to be deposited in court pending a proper application in accordance with the Criminal Procedure Code, for their seizure. According to the defendants, a reporter from the 2<sup>nd</sup> respondent’s paper covered the proceedings and the offending article allegedly related to those proceedings. In their view whatever he covered then was absolutely privileged and no cause of action lay against them on that account.

It is however, in evidence that the report in question was not confined to the judicial proceedings. It covered matters which the reporter gathered from people he interviewed after the proceedings in question. The reporter concerned, having admitted that fact when he testified, the defence of absolute privilege under **section 6** of the **Defamation Act, Cap 36** Laws of Kenya was not available to the defendants.

Be that as it may, after the pleadings closed, the appellant’s suit was set down for hearing. The appellant testified and called a witness, Dr. Protasins Maurice Ajuoga, a Consultant Surgeon, who testified inter alia, that when he read the report in question his attitude towards the appellant changed, and he told the appellant as much. He did not, thereafter, want to be associated with the appellant. Previously he had been preparing medical reports for the appellant’s clients and at times he used to give him legal work, but when he read the offending article, he ceased.

Only the reporter testified for the defence. His name is Kennedy Otieno Odondi, and as at the date of the report he had worked for the 2<sup>nd</sup> respondent for at least four years. His evidence was that he knew files had been taken from certain advocates, among them the appellant, and according to him *“.... they involved fake insurance claims.”* He arrived at Migori, Senior Principal Magistrate’s Court on the material date, and found a State Counsel, Mr. Ombwayo, submitting in answer to what the appellant had said. His report, he said, was verbatim as to what Ombwayo said. The matter involved 10 advocates, and in his view it was a matter of public interest. He said his report was fair, lacked any malice and was only confined to what took place in Court.

Under cross-examination the witness conceded Mr. Ombwayo, did not use the phrase *“fake claims.”* And that it was the seizure of the files that made him believe they concerned fake claims. He conceded that Mr. Ombwayo did not name the advocates. He is the one who got the names of the advocates from one

Tom Ochola, an employee of Lakestar Insurance Company. It was that company which had raised a complaint concerning fake insurance claims. The witness admitted he used the term “*accused*” even though it was neither used in the proceedings nor was it in the court record. It was his evidence that because files had been seized from various advocates’ chambers, he believed those advocates were “*accused persons.*”

he appellant’s case was heard by Wambilyangah, J. He found as a fact that neither the appellant nor any other advocate had been charged with any offence relating to making false claims from insurance companies, that the proceedings which the reporter purported to cover were initiated by the appellant, among other advocates, for the purpose of preserving the seized files, that the reporter had admitted that he had not listened to the submissions made on behalf of the appellant, and that he got the name of the appellant and other advocates not from the court record or in the course of submissions, but from one Tom Ochola who was neither a court official nor an advocate representing any of the parties. The learned Judge then concluded thus:-

***“In my view the reporter was quite reckless or else naïve in the discharge of his duties but I find that he was not at all actuated by any malice towards the plaintiff...”***

***In my considered view I find that this article constituted a privileged communication.”***

The learned Judge concluded his judgment by saying that although the article was false and certainly defamatory of the plaintiff, the defence of qualified privilege was available to the defendants. He then rendered himself thus:-

***“In this case there existed court proceedings and the fact that a newspaper has every right to report about such court proceedings is even a constitutional one. The public deserve to be informed that there are evil advocates in the society.”***

With tremendous respect to the learned Judge, in nowise had any finding been made or proceedings commenced about “*evil advocates in society.*” It was quite inappropriate for the learned Judge to use such language.

Be that as it may the learned Judge dismissed the appellant’s suit and thus provoked this appeal.

Seven grounds of appeal are preferred as follows:-

***“1. The Learned Trial Judge erred in Law when he dismissed the Plaintiff’s suit on account that the publication was privileged yet evidence abound that the said publication was not a true and accurate report of the proceedings held in Migori vide MISCELLANEOUS NO. 20 OF 2000, to warrant such privilege.***

***2. The Learned Trial Judge erred in Law and Fact in acquitting the reporter, DW1, of malice whereas the said DW1, had essentially admitted malice in his evidence.***

***3. The Learned Trial Judge misdirected himself in holding that the publication of the article complained of was not actuated by malice when there were (sic) overwhelming evidence that the said publication was false, hence malice was established.***

***4. The Learned Trial Judge misapprehended the extent and tenure (sic) of the Defence of qualified privilege when he held that the Defence of qualified privilege was available in respect of a publication that was false and inaccurate, thus occasioning miscarriage of Justice.***

***5. The Learned Trial Judge’s Judgment, reeks of contradiction insofar as the Judge had found as a fact that the reporter was reckless and naïve and on the other hand on holding that the reporter was not actuated by malice and/or spite.***

6. ***The Learned Trial Judge erred in Law in failing to assess general damages, even if he was of the considered opinion that the suit was bound to fail contrary to established Principles of Law.***

7. ***The Learned Trial Judge failed to properly and/or at all, evaluate the evidence on record cumulatively and hence reached a wrong conclusion in view of the evidence on record.***”

When the appeal was called for hearing before us on the 21<sup>st</sup> June, 2006 Mr. Majanja for both the respondents stood up and announced that he was conceding the appeal on the ground that the learned trial Judge decided the appellant’s case on the basis of a defence which had not been pleaded, viz qualified privilege and that he misapprehended the evidence before him and the principles of the law of defamation. The defence was not argued either. He at the same time sought leave to withdraw the notice of cross-appeal which had been filed to challenge the decision of the superior court.

Mr. Majanja then invited us to allow the appeal, dismiss the cross-appeal, but order a retrial of the suit.

Mr. Oguttu for the appellant while appreciating the gesture of counsel for the respondents, did not think a retrial is desirable. He urged us to deal with the matter pursuant to the provisions of **section 3(2)** of the **Appellate Jurisdiction Act, Cap 9** Laws of Kenya, and proceed to assess damages.

It is quite clear that we cannot possibly assess damages, as the trial court did not do it. The trial Judge did not assess damages, and we think quite improperly, as he should have been aware that in the event of an appeal and his judgment being overturned, this Court would itself wish to award damages to the appellant. But we will revert to this issue later on.

The issue which then arises is what should happen after we allow the appeal? Mr. Majanja, as we stated earlier, seeks a retrial. Mr. Oguttu thinks otherwise. It should however, be recalled that a retrial may only be ordered if an appellate court comes to the conclusion that the trial of the case was unsatisfactory. Can it be said that the trial before Wambilyangah J. was unsatisfactory?

The defence which the defendants put forward was absolute privilege on account of the provisions of **section 12**, of the **Defamation Act**. It is this defence which, according to Mr. Majanja, was not considered and instead qualified privilege was considered. All the evidence the parties had wished to tender is on record. A retrial of the entire suit is inappropriate in the circumstances.

Besides, the innuendo in the offending article is that the appellant had committed or was in the process of committing a criminal offence. The reporter cannot be said to have made a fair comment of the matter in issue. He imputed criminal conduct on the appellant which then denied the respondents the defence of fair comment. Besides the reporter having not confined himself to what transpired in the court room, cannot justifiably claim he lacked malice. He took the trouble to get the names of the advocates who had allegedly been involved in fake claims. He did not first check the court record regarding the nature of the matter the court was handling. He did not consult the advocates involved. Instead he consulted an employee of the Insurance Company which was alleging that certain advocates were involved in fake claims. By doing that he opened himself up to the imputation upon him of malice.

In the above circumstances, we do not think there is a need to order a retrial on the question of the liability of both respondents.

Before we make our final orders, we need to comment briefly on the approach adopted by counsel for the respondents. He conceded the appeal on the basis of the grounds of appeal preferred. The implication of that is that he agreed that the learned Judge erred as alleged, and as we have stated above, the respondents’ defences appear to have been caught up by the provisions of the **Defamation Act**. Consequently a retrial on liability would be undesirable.

As regards damages, we think that it will be proper to refer this matter to the superior court for assessment. We have the power to do so under **rule 31** of the **Court of Appeal Rules**, which provides;

***“On any appeal the Court shall have power, so far as its jurisdiction permits, to confirm, reverse or vary the decision of the superior court, or to remit the proceedings to the superior court with such direction as may be appropriate, or to order a new trial and to make any necessary incidental or consequential orders, including orders as to costs.”***

(Emphasis supplied)

In the result, we allow the appeal, dismiss the cross appeal, with costs of both to the appellant, and direct that this matter be referred to the superior court for assessment of damages. Considering the decision we have come to, it is not necessary to make any orders on prayer (b) relating to apology, amends, or withdrawal of the defamatory words or statements.

***Dated and delivered at Kisumu this 23<sup>rd</sup> day of June, 2006.***

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

**E.O. O’KUBASU**

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**JUDGE OF APPEAL**

**P.N. WAKI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**