REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

CIVIL APPEAL 314 OF 2000

JOHNSON EVAN GICHERU……..…..……..……APPELLANT

AND

ANDREW MORTON……..1ST RESPONDENT

MICHAEL O'MARA BOOKS LIMITED……...…….2ND RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Aluoch, J) dated 28th September, 2000

JUDGMENT TUNOI, J.A.

This is an appeal from a judgment of the High Court of Kenya at Nairobi *(Aluoch, J)* given on 28th September, 2000 by which the plaintiff, now the appellant, was awarded a sum of Shs.2,000,000.00 as general damages and Shs.250,000.00 as exemplary damages for libel on the publication of a book.

The sole question for decision in this appeal is whether the awards made by the learned trial Judge were inadequate and, if so, what are the proper sums to be substituted for them. It is argued with great force by Mr. Ngatia, counsel for the appellant, that the libel complained of a very grievous character, in view of the particular circumstances in which it was published, the position of the appellant as a Judge of the Court of Appeal, the ignominious way in which the respondents treated the libel and their approach to the suit. *Mr Ngatia*, therefore, submits that the awards made were grossly inadequate.

Introduction

The appellant was appointed a Puisne Judge in 1982 after having served as a State Counsel for a period of about nine years. He was elevated to the Court of Appeal in 1988 and subsequently became its Presiding Judge, a position he held during the trial for the libel sued upon. In 1990, he was appointed Chairman of the Judicial Commission of Inquiry into the death of ***Dr. Robert Ouko,*** the then Foreign Affairs Minister. The appellant is now the Chief Justice of Kenya, having been appointed into that position in early 2003.

The 1st respondent, ***ANDREW MORTON***, the well-known author of several books and biographies, is the author of the book under the title "***Moi the Making of an African Statesman"***. The 2nd respondent is the publisher of the book. Their address is given as ***9 Lion Yard, Trenmadoc Road, London, SW 47 NQ.*** Though a defence was filed on their behalf, the same was struck out on 22nd November, 1999, under Order VI rule 13(1)(a) of the Civil Procedure Rules and though a Notice of Appeal was filed by them no appeal was ever preferred until the appellant formally proved his case.

The Libel

The subject matter of the book, and its title is the biography of the retired President of Kenya, ***Daniel Toroitich Arap Moi.*** He retired in the year 2002. The book is ***Moi the Making of an African Statesman.*** It was published in 1998 and was soon thereafter available for sale in Kenya. Again, the book was serialized by one of the popular local dailies. The offending words appear in Part III Chapter 12 page 228. They read:

> ***"In September, 1990, at the end of his 110 day inquiry, Troon handed over his weighty 150 page report to the Attorney General, Mathew Muli, fully expecting the immediate arrests of his two principal suspects, Nicholas Biwott and Hezekiah Oyugi. Instead, the government set up a Judicial inquiry chaired by Mr. Justice Evans Gicheru. At the time the President took no action because the man who briefed him on the conclusions of Troon's report was one of the main suspects, Hezekiah Oyugi. He poured cold water on much of Troon's evidence, sometimes emphasizing the suicide theory, sometimes the possible involvement of his principal rival at State House, Nicholas Biwott. Oyugi thoroughly doctored the report,' recalls the former Cabinet Secretary, Professor Philip Mbithi. 'It took a long time before the President discovered the full extent of Oyugi's treachery' Oyugi even tried to direct the inquiry's conclusions, regularly entertaining the commission judges at his home, on at least one occasion slaughtering a goat in their honour. It was only after the commission had been sitting for a year that Troon was called back from Britain to give his evidence. For the first time the two principal suspects were named in public. By now, though, the full extent of Oyugi's duplicity was beginning to be appreciated by the President, and these suspicions were confirmed when James Kanyotu, the head of the Special Branch, bugged the hotel rooms of the three judges. Transcripts of their conversations showed that Oyugi was attempting to direct the commission to find Biwott guilty. The fact that the commission had lost sight of its original brief by admitting all kinds of wild and often malicious conjecture lay behind the President's decision, in November, 1991, to bring its deliberations to an end. At the same time, now aware of the true nature of Troon's evidence, he ordered the arrest of Oyugi, Biwott, the former Nakuru District Commissioner Jonah Anguka, the Nyanza Provincial Commissioner Julius Kobia and others".***

The Defamatory meanings

The appellant relied on both the natural and ordinary meaning of the words and also an innuendo. The article suggested, he contended, first, that the appellant had been compromised in the discharge of his duties by a party implicated in the matter he was inquiring into; secondly, that the appellant was corrupt; thirdly, that the appellant was not a fit and a proper person to be a judge and finally, that he had manipulated proceedings in which he was presiding contrary to his undertaking as a judicial officer and was therefore a dishonest Judge and lacked integrity.

The passages in the book would have suggested by way of an innuendo that the appellant was out to undermine the proceedings of the Inquiry he was chairing so as to whitewash the perpetrators of the macabre killing of the late Dr. Ouko.

The Aggravating facts

It was manifest from the evidence tendered during the trial of the suit that the passages complained of in the book were untrue in every material respect and had been published maliciously. When invited by the appellant's counsel on 16th December, 1998, to publish an apology correcting the offending paragraphs in the book, the respondents' Solicitors Messrs. *Mishcon de Reya* replied that the respondents are a highly respected international publisher and an author of international renown and standing and they do not publish books which contain untrue and defamatory statements. They added that because it was known that there were matters in the book which could cause controversy they took particular care to ensure the accuracy of the book, including an interview with the retired President Moi himself. The Solicitors concluded:-

"In relation to the passages of which your client complains at page 228 of the book we have advised our clients that these passages are not capable of any defamatory meaning of your client. In relation to the comments as to the reason for the cessation of the inquiry, President Moi himself said when commenting in June, 1992 on his decision to disband the Commission of the Inquiry, '….. The Commission went astray and starting striving on hearsay'".

Another major aggravating feature of the case was the respondents' conduct at the trial. The 2nd respondent took out a Chamber Summons under Order 6 rule 13 (1)(a) of the Civil Procedure Rules for an order:

"That the meanings pleaded in paragraph 6 of the plaint be struck out as showing no reasonable cause of action since the words of which the plaintiff complains do not bear and are not capable of bearing the said meanings or any of them or any meaning defamatory of the plaintiff……."

The application was heard by the Principal Deputy Registrar who dismissed it with costs. Again, the respondents failed to give a reply to the Request for Particulars as asked for by the appellant. The record further shows that the written Statement of Defence was struck out on 22nd November, 1999. Subsequently, on 13th July, 2000, the respondents new counsel *Messrs. Makhecha & Co.* Advocates moved the trial court under a Certificate of Urgency asking for a stay of all orders and proceedings including proceedings of formal proof pending the hearing and determination of an intended appeal. *Aluoch, J.* dismissed the application on the ground that the respondents had brought the application in bad faith and that in the past the respondents had "induced" the appellant on three occasions to agree to adjourn the formal proof on purported negotiations yet they knew there were no chances of reaching a settlement. She thought the application was only meant to delay the suit and frustrate it from being heard and determined.

Judgment of the High Court

The learned trial Judge held that the passages complained of in the book were defamatory of the appellant. In assessing damages, she took into account the appellant's position in the Judiciary. She also considered the feelings of the appellant on the allegations made against him by the author and the fact that the offensive passages had not been willingly expunged from the book which was being sold locally and abroad in both the hard and paper-back editions. The learned Judge found no guidance from the decided cases and authorities presented to her by respective counsel for the parties since none of those decided cases had similar facts. She refused to grant an order to restrain the respondents from "further publishing or causing to be published the said similar words of the plaintiff". The basis the learned trial Judge assigned for the refusal to grant the injunction is because the book has been in circulation since 1998 and the hard cover form of the book was not tendered in court as an exhibit nor was there **"any evidence to show that the sales of this book which contains the three paragraphs complained of is still going on to show that the defamation is still being repeated."** The learned Judge concluded:-

"The prayer for damages as I see it was left to the Court's discretion as no obvious principle to be followed in calculating damages was given by either of the 2 lawyers.From the evidence on record, I find judgment for the plaintiff against the 2 defendants jointly and severally, and exercising my discretion, I proceed to award a sum of Kshs.2,000,000/= as general damages, and Kshs.250,000/= as exemplary damages, thus making a total sum of Kshs.2.25 million plus costs and interests at court rates. I am unable to award interest at the rate of 30% because this was not pleaded".

The Grounds of Appeal

It was submitted for the appellant, first, that the learned trial Judge had failed to take into account the nature of the libel, the cognizance of the mode and extent of publication and as a result arrived at an assessment of the awards which were manifestly inadequate and inappropriate in the circumstances; secondly, it was contended that in making the award the learned Judge failed to appreciate that it was not

open to her to embark on assessment of the damages without taking into account the absence or refusal of the respondents to provide any retraction or apology and the general conduct of the respondent; and thirdly and finally, it was argued that having admitted publication of the book with the offending paragraphs, it was not open for the learned Judge to find that she could not grant an injunction on the grounds that the "hard cover" form was not produced in court to show that any sales of the book is being effected.

In buttressing his submissions Mr. Ngatia argued that this was a very bad and offensive libel without mitigating circumstances. He asserted that malice could be inferred from the unjustified publication.

Powers of this Court

It is trite 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 small 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"***

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. See ***TANGANYIKA TRANSPORT CO. LTD V EBRAHIM NOORAY [1961] E.A. 55.***

The Law

In 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: ***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 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 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 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."***

I would think that in the instant case to arrive at what could have been said to be a fair and reasonable awards the learned trial Judge could have drawn considerable support in the guidelines in ***JONES V***

POLLARD [1997] EMLR 233. 243 and where a checklist of compensable factors in libel actions 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's 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.*

Comparables

It is important now to summarise those defamation cases in which the superior court dealt with recently.

In ***GEORGE ORARO V. BARACK WESTON MBAJA*** (HCCC NO. 85 of 1992) the High Court awarded Shs. 1.5 million for defamation contained in an affidavit sworn in the U.S.A but published in Kenya. In ***ABRAHAM KIPTANUI VS. FRANCIS MWANIKI & 4 OTHERS HCCC NO. 42 OF 1997*** Juma, J. awarded a former Comptroller of State House Kshs. 3,500,000 as general damages for libellous statements published by the now defunct, "Target" newsletter.

In ***JOSHUA KULEI VS. KALAMKA LTD. HCCC No. 375 of 1997***, *O'Kubasu, J.* (as he then was) again in a case involving a former Comptroller of State, awarded Kshs.10,000,000 as general damages as against "***The People"*** daily newspaper. In the twin "Biwott cases" i.e NICHOLAS BIWOTT VS. CLAYS LTD, & ANOTHER AND NICHOLAS BIWOTT VS. DR. IAN WEST & ANOTHER (HCCC No. 41068 of 1999), a sum of Kshs. 30,000,000 was awarded for publications that clearly had international circulation as well as local circulation.

In the case of ***CHARLES KARIUKI T/A CHARLES KARIUKI & CO. ADVOCATES*** H.C.C.C No. 5 of 2000 (Meru) an award of shs. 20,000,000/= was made to an advocate for libel.

On 6th May, 2005; Khaminwa, J. in Mombasa HCCC No. 102 of 2000 ***DANIEL MUSINGA T/A MUSINGA & CO. ADVOCATES***, the Judge made an award to the then advocate and now a Puisne Judge for a published libellous statement in a local daily, of Shs. 10,000,000.00.

Earlier on, in January, 2004, Lenaola, J made an award of Shs. 17,000,000.00 to the plaintiff in HCCC 956 of 2003 ***OBURE V TOM ALWAKA & OTHERS*** who had sued a local tabloid of the sensational type, namely, ***"The Weekly Citizen"*** on libellous publication on its headline titled: - ***"Ex-Minister Obure steals man's wife".***

On 28th January, 2005, Ransley, J in HCCC No. 1717 of 1999 made an award of Shs.2,500,000.00 general damages and Shs.500,000.00 exemplary damages to retired Honourable *Mr. Justice Akiwumi* who had sued the respondents herein for libel the subject matter of this appeal. *Justice Akiwumi* is a retired judge of this Court and was one of the three Commissioners in the Judicial Commission of Inquiry in the death of Dr. Ouko. I believe that in making the awards Ransley J. was greatly influenced by the awards made by Auoch, J.

The common denominator in the first six aforementioned cases and awards are that, first; they mostly concern prominent political elite the majority of them being a politicians of considerable clout, or high ranking civil servants and advocates; secondly, the publications condemned in damages are mostly what qualify to be termed ***"gutter press".*** Thirdly, the defendants in almost all of the cases did not defend the suits. Finally, for unknown reasons, no appeals have been preferred, and if lodged not yet heard by this

Court, at least so far. My considered opinion of the awards so made is that they lack juridical basis, they may be found to be manifestly excessive and should not at all be taken as persuasive or guidelines of awards to be followed by trial courts, since the trial judges concerned appeared to have ignored basic fundamental principles of awarding damages in libel cases.

Conclusion

The present appeal, of course, is one where the complaint is not that the damages are too high, but that they are too low on the face of it, and when considered in the light of all the circumstances of the case, it is argued, they were an entirely erroneous estimate. In this regard we are asked by *Mr. Ngatia* to adopt the award in ***Biwott's case.*** I would disagree. The decision in that case is in fact what the learned Judge termed a "compromised deal". In my view it is of no persuasive material.

The damages in a libel case are, of course at large. The latitude is very wide. See ***BRAY V FORD [1896] AC 44***. It would often be impossible to say that the verdict was a wrong one, whether the damages were assessed at Shs. 2,000,000.00 or at Shs. 5,000,000.00.

In the present case, I venture to think that the learned trial Judge overlooked very fundamental aspects of the libel and the victim. I agree with Mr. Ngatia that the learned trial Judge did not express her sense of the iniquity of the respondents. Neither did she consider the absolute blamelessness of the victim, the appellant. It is manifestly clear that the false charges and insinuations against the appellant are absolutely without the slightly foundation.

It may be argued that not much was thought of the libellous publication since, in any case thereafter, the appellant was elevated to the positions of the Presiding Judge of the Court of Appeal and that of the Chief Justice. But, the allegations are there in print and they live on and persist permanently for generations to come because the respondents have refused to expunge the offending passages.

For my part, therefore, I would think that the learned Judge's awards were based on incorrect principle and were inadequate. The conduct of the respondents prior to and during trial and their persistence in repeating the libel were relevant on this point.

I would allow the appeal and set aside the awards made by the learned Judge below. Taking into account all the surrounding circumstances, including the element of aggravation, I think that the composite award of Shs.6,000,000.00 would represent a fair and reasonable solatium to the appellant. Having done that I would find no reason for making a separate award as exemplary damages. The award will bear interest at Court rates.

The appellant shall have the costs of the appeal.

DATED and DELIVERED at NAIROBI this 14th day of October, 2005.

P.K. TUNOI

…….

JUDGE OF APPEAL

JUDGMENT OF OMOLO, J.A.

I had the advantage of reading in draft form the judgment of TUNOI, J.A. I fully agree with his exposition of the law and the conclusions at which he has arrived. I agree with him that the High Court cases cited to us concerning the quantum of damages in matters of libel do not appear to have a solid juridical grounding and like TUNOI, J.A. , I would find it very difficult to base my decision on them, particularly in view of the fact that they may well end up in this Court by way of appeal. I agree with the orders proposed by TUNOI, J.A., and as GITHINJI, J.A., also agrees, the orders of the Court shall be

those proposed by TUNOI, J.A.

Dated & delivered at Nairobi this 14th day of October, 2005.

R.S.C. OMOLO

…….

JUDGE OF APPEAL

JUDGMENT OF GITHINJI, J.A.

I agree that for the reasons given by Tunoi JA, this appeal should be allowed. I also agree that the award of damages should be enhanced to Shs.6,000,000/=. General Damages for libel are at large. A successful plaintiff is entitled to an award of damages proportionate to the injury he has suffered as a result of the libel. That is easier said than done for the search for a proper award in each case is not an easy task. The two English cases, namely, ***JOHN V MGN LTD*** [1997] QB 586 and ***KIAM V MGN LTD*** [2002] 3 WLR 1036 both illustrate the complexity of the matter and offer invaluable guidance as to the proper approach in assessing appropriate damages for defamation. In the first case (i.e. ***John v MGN Ltd***) the English Court of Appeal said in part at page 607 paragraph F:

> ***"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 attributed 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 handful of people".***

It is beyond contention in this case that the libel not only touches the appellants personal integrity, professional reputation and honour but was also published to the world at large thereby justifying an award such will compensate the appellant and re-establish his reputation.

Dated and delivered at Nairobi this 14th day of October, 2005.

E. M. GITHINJI

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR