



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1995 OF 2016**

*(Formerly Nairobi High Court Civil Appeal No. 21 of 2007)*

**Before Hon. Justice Dr. Jacob Gakeri**

**VINCENT MILIMU.....APPELLANT**

*VERSUS*

**JOSE AUGUSTO PEREIRA..... 1<sup>ST</sup> RESPONDENT**

**KENYA WILDLIFE TRAILS LIMITED.....2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgement/decree of Hon. S. Muketi (Mrs), Principal Magistrate delivered on 15<sup>th</sup> December 2006) in CMCC No. 234 of 2004 at Milimani Commercial Courts, Nairobi*

**JUDGMENT**

**Introduction**

1. The Appellant Vincent Milimu was an employee of the 2<sup>nd</sup> Respondent. The 1<sup>st</sup> Respondent was the Managing Director of the 2<sup>nd</sup> Respondent. The Appellant was engaged on 1<sup>st</sup> March 1985 as the Airport Representative of the 2<sup>nd</sup> Respondent at a salary of Kshs.15,000/= per month and remained in employment until 10<sup>th</sup> November 2003.
2. He filed a suit at the Chief Magistrate Court Nairobi against the Respondent by way of a plaint dated 5<sup>th</sup> January 2004 seeking exemplary damages for defamation.
3. In a judgment delivered on 15<sup>th</sup> December 2006, Hon. S. Muketi, Acting Senior Principal Magistrate found that the alleged statements made by the 1<sup>st</sup> Respondent were defamatory since the Plaintiff though previously convicted of a criminal offence, succeeded on appeal and the conviction was quashed. The Learned Magistrate awarded Kshs.100,000/= plus costs and interest.
4. The Appellant was dissatisfied with the award by the Trial Court and preferred the present appeal.
5. In his Memorandum of Appeal dated 12<sup>th</sup> January 2007, the Appellant challenges the impugned judgment on the following grounds:
  - i. The Learned Magistrate erred in law and fact in failing to take into account the nature of the libel and thereby arrived at an assessment of damages which was manifestly inadequate and inappropriate in the circumstances.
  - ii. The Learned Magistrate error in law an fact in failing to appreciate that the circumstances of the case was such that any award of general damages could not general be less than Kshs.400,000/=.
  - iii. The Learned Magistrate erred in law and in fact in failing to award the Appellant damages on the footing of aggravated and/or exemplary damages when the nature of the libel, the circumstances under which it is published and the conduct of the Respondents prior to and during trial necessitated that aggravated and/or exemplary damages be awarded.
  - iv. In awarding the Appellant a sum of Kshs.100,000/= as damages, the Learned Trial Magistrate acted on wrong principles of law and thereby reached an erroneous estimate of the damages to which the Appellant was entitled and made an award which was

inordinately low

6. Consequently, the Appellant seeks the following orders:

- i. The appeal be allowed
- ii. That the award of Kshs.100,000/= given by the lower Court be set aside and in its place be substituted an award of Kshs.3,000,000/= as general exemplary and/or aggravated damages
- iii. Alternatively, such other order as this Honourable Court may deem fit, be made to the Appellant
- iv. Costs of the appeal be borne by the Respondent

### **Brief Facts of the Case**

7. This appeal stems from a defamatory claim by the Appellant where he alleged that the Respondents who he had worked for wrote a negative letter to the Federation of Kenya Employers. The Defendants state that they did not publish the information and that the same as not defamatory.

8. After careful consideration of the evidence presented before it, the Court held that passing the information to Federation of Kenya Employers was not qualified privilege and because the publication was found to be defamatory, the Appellant was been unable to secure employment. The Court awarded Kshs.100,000/= as damages for defamation.

### **Appellant's Submissions**

9. The Appellant tendered oral submissions and argued one ground of appeal, quantum of damages. It was contended that an award of Kshs.100,000/= as damages for defamatory statement sent to the Kenya Federation of Employers was inordinately low in light of the damage the statements had occasioned to the Claimant's repudiation. It had made it difficult for the Claimant to secure alternative employment.

10. The Appellant submitted that in the lower Court he made very precise and conclusive submissions and prayed for general damages of Kshs.2 million and aggravated damages of Kshs.1 million.

11. The Appellant relied in the holding **Ochieng v Standard Limited (2004)** and **Miridadi v Khalfan & Another (2004)**, to urge the Court to make the awards as submitted. In light of the conduct of the Respondents who were unapologetic and insisted that they stood by what they had published. The Appellant submitted that since the defamatory statement was published it was justified to claim aggravated and exemplary damages.

12. The Appellant submitted that an award of Kshs.100,000/= was an improper exercise of discretion by the Learned Magistrate and urges the Court to interfere and award an amount that is commensurate to

The reputational damage suffered by the Appellant.

13. The Appellant further seeks for costs and interests from the date of judgment in the lower Court as the amount was not paid and there was no stay of execution.

### **Analysis and Determination**

14. This being a first appeal, it behoves this Court to consider the case in its entirety on matters of both fact and law, notwithstanding the fact that the Court did not have a similar opportunity as the Trial Court to hear the evidence and appreciate the demeanour and delivery of the witnesses.

15. The guiding principles on the hearing of appeals by a first appellate Court were expounded by the Court of Appeal in **Association for the Physically Disabled of Kenya v Kenya Union of Domestic Hotels Educational Hospital and Allied Workers Union & another [2018] eKLR** as follows:

*"[10] This is a first appeal, it is therefore the duty of this Court imposed by law to evaluate afresh by way of a retrial the evidence recorded before the trial Court in order for it to reach its own independent conclusion. (See **Selle v. Associated Motor Boat Co. Ltd (1968) EA 123**) **Selle and Another v. Associated Motor Boat Company Ltd and Others, [1968] 1 EA 123** the Court of Appeal stated as follows:*

*"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 allowance in this respect. In particular this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. (**Abdul Hameed Saif v. Ali Mohamed Sholan, (1955), 22 E.A.C.A. 270.**"*

16. The Appellant lists four (4) grounds of appeal which constitute a single ground of appeal, namely quantum of damages.

17. Having considered the pleadings, submissions, the Court record and the applicable law, the only issue arising for determination is:

i. Whether the Learned Magistrate erred in law and in fact in awarding the Appellant Kshs.100,000 as damages for the defamation.

18. In the judgment read on 15<sup>th</sup> December 2006, the trial Magistrate states thus –

*“The cardinal issues that had to be determined are whether the publications were defamatory and even if they were whether any of the defences to defamation that is justification, qualified privilege or fair comment are open to the Defendants. The comments in the opinion of the Court were defamatory. The Plaintiff had been convicted of the offence upon which he was acquitted on appeal. The case of **Figueredo v Edition Sunday Nation [1968] EA 501** is relevant. The passing of the information to the Federation of Kenya Employers was not qualified privilege. By virtue of these publications, the Plaintiff has been unable to secure employment. The Court finds the comment defamatory. What damages is the Plaintiff entitled to? Given the facts surrounding the case and his station in life, the Court is of the opinion that Kshs.100,000 will suffice as damages.”*

19. This appeal turns on whether the circumstances justified the making of a higher award of damages.

20. The Learned Magistrate held that the Respondent’s passing over information to the Federation of Kenya Employers through a letter was not qualified privilege and that the said publication amounted to defamation for which the Court awarded Kshs.100,000/= as damages.

21. According to **W. V. H. Rogers in Winfield and Jolowicz 13 Edition 1990** page 294 defamation is defined simply as the publication of a statement which tends to bring a person into hatred, contempt and ridicule and is either libel or slander. Libel is actionable per se as in the instant appeal. The statement published by the Respondents was defamatory.

22. The Appellant is of the opinion that damages of Kshs.100,000/= was inordinately low.

23. In considering the issue of quantum of damages, the Court is guided by the holding in **Butt v Khan (1981) KLR 349** which stated as follows:

*“An Appellate Court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that 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.”*

24. In **Tanganyika Transport Company Limited v Ebrahim Nooray [1961] EA 55**, the Court of Appeal stated that –

*“The latitude in awarding damages in an action for libel is very wide, and one thing 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.”*

25. The Appellant relied on the holding in **Miridadi v Khalifan & Another (2004) eKLR 496** where the Court held that exemplary damages or aggravated damages are meant to compensate the plaintiff for additional injury going beyond that which flowed from words alone. The Court awarded Kshs.1,000,000/= as aggravated damages. Although actual malice was not proved, the Court reasoned that the Defendant had refused to apologise.

26. The principles governing the award of damages were clearly spelt out by the English Court of Appeal in **John v M. G. Limited [1967] ALL ER 35** where the Court held –

*“The successful plaintiff in a defamation action is entitled to recover, the general compensatory damages such sum as will compensate him for the wrong he has suffered. That must compensate him for damages to his reputation; vindicate his name, and taken account of the distress, hurt and humiliation which the defamatory publication caused ... Exemplary damages on the other hand had gone beyond compensation and are meant to “punish” the defendant. Aggravated damages will be ordered against a defendant who acts out of improper motive e.g., where it is attracted by malice; insistence on a flurry defence of justification or failure to apologize”.*

27. These principles were cited with approval by the Court of Appeal in **Wangethi Mwangi & another v J.P. Machira T/A Machira & Co. Advocates [2012] eKLR** where the Court upheld an award of aggravated damages by the Trial Court. The Court was emphatic that –

*“Thus, there were elements of recklessness on the part of the appellants in telling the truth behind the story after having been prompted or alerted the previous day by the respondent.”*

28. In the instant appeal, the Respondents insisted on their position and refused to tender an apology yet they were aware that the Claimant’s conviction had been quashed on appeal.

29. In **Johnson Evan Gicheru v Andrew Morton & another [2005] eKLR**, Tunoi JA (as he then was) had this to say on assessment of damages:

“... 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.”

30. The guidelines for the award of damages for libel were explained in **Jones v Pollard [1997] EMLR 233** at 243 as follows:-

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.*

31. Finally in **Ken Odondi & 2 others v James Okoth Omburah T/A Okoth Omburah & Company advocates [2013] eKLR** the Court of Appeal interfered with the High Court's decision on general damages but upheld the award of Kshs.500,000 as aggravated damages. The Court stated as follows –

“So the Respondent was not only entitled to general damages for defamation but was also entitled to exemplary damages to punish the appellants who had defamed him and refused to retract the offending article or apologise.”

32. As submitted by the Appellant, the Respondent's stood by their letter and offered no apology. Relatedly, the Appellant testified that they had not secured another job since the was dismissed. He laments that –

“I was not able to get after I lost that job, everyone wants to know where were working. **They refer to them.**” (is F.K.E) emphasis added.

33. The Appellant testified that his attempt to secure employment with Diameter Tours Company in 2004 fell through owing to a negative response from the former employer.

34. The Court is satisfied that the essential requirements for award of aggravated damages existed in this case. It is also important to note that the Trial Court awarded the sum of Kshs.100,000 as damages as a global figure without an indication of whether it was general damages or general and aggravated or exemplary damages.

**35. For the foregoing reasons, the Court is satisfied that it is entitled to interfere with the judgment of the Learned Magistrate in respect of the quantum awarded and award Kshs.400,000/= as aggravated damages. The award of Kshs.100,000/= damages is upheld.**

**36. The Appellant shall have costs in the lower Court and on appeal.**

**37. For the avoidance of doubt, interest on damages and costs of the Senior Principal Magistrates Court shall be from the date of judgment of the Senior Resident Magistrate's Court.**

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 14<sup>TH</sup> DAY OF DECEMBER 2021**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**