



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO 32 OF 2020

CARILUS OSERO NYAWIRI.....APPELLANT

VERSUS

ROYAL MEDIA SERVICES LIMITED.....RESPONDENT

(Being an appeal from the Judgment and decree of Hon S.N Telewa (SRM)

delivered at Kisumu in Chief Magistrate's Court Case No 269 of 2019

on 9th June 2020)

JUDGMENT

1. In her decision of 9th June 2020, the Learned Trial Magistrate, Hon S. N. Telewa, Senior Resident Magistrate, dismissed the Appellant's suit with costs to the Respondent herein.
2. Being aggrieved by the said decision, on 24th June 2020, he filed a Memorandum of Appeal dated 16th June 2020. He relied on three (3) grounds of appeal.
3. The Appellant's Written Submissions were dated 10th May 2021 and filed on 13th May 2021 while those of the Respondent were dated 3rd June 2021 and filed on 23rd June 2021. The Judgment herein is therefore based on the said Written Submissions which both parties relied upon in their entirety.

LEGAL ANALYSIS

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
5. This was aptly stated in the case of **Selle & Another vs. Associated Motor Boat Co Ltd & Others [1968] EA 123** where the court therein rendered itself as follows:-

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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...”

6. Having looked at the grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that all the grounds of appeal were related and that the question that had been placed before it was to consider of whether or not the Appellant had made a case for defamation against the Respondent. As all the grounds of appeal were related, the court dealt with them together.
7. The Appellant relied on the case of **Mercy Kirito Mugeti vs Beatrice Nkatha Nyaga & 2 Others [2013] eKLR** which had cited the case of **Selle & Another vs Associated Motor Boat Co Ltd & Others** (Supra) wherein the principles upon which the court acts on first appeal were well settled.
8. He submitted that although the Learned Trial Magistrate had held that the words, “the plaintiff was driven away by EACC officers”

referred to him but were not capable of being reasonably construed that the Appellant was a corrupt person, the Learned Trial Magistrate went ahead and questioned why was it so difficult for the Defendant to have verified the information before having it published.

9. It was his contention that having made the above finding, the Learned Trial Magistrate erred when she dismissed his case on the ground that there was no evidence from a third party showing that his reputation and standing in society had been injured as a result of the publication. He submitted that having made the above finding, ordinarily, her logical conclusion ought to have been to award him damages and costs.

10. He was emphatic that the evidence of Agnes Oloo (hereinafter referred to as "DW 1") showed that the false, malicious and defamatory publication was posted on the internet through <https://citizen tv.co.ke> as she had admitted that the publication referred to him by name, occupation and other descriptions. He pointed out that she had admitted that the only basis of her publication was a letter dated 24th May 2018 but that she did not call the author of the said letter as a witness. It was his submission that her evidence was contradictory as in her Witness Statement, she had indicated that she was the one who called The Secretary General of Kenya Magistrates and Judges Association (KMJA) but she had also alluded to the said Secretary General having called her.

11. It was his argument that DW I added that he was to be arraigned in court over corrupt deals, which information she did not verify before publishing the publication. It was his submission that she admitted during her Cross-examination that she did not know if he was ever arraigned in court, whether he was ever arrested over the issue and if he was involved in corrupt deals. He placed reliance on the letter from EACC dated 25TH May 2018 wherein Mr Waqo, its Secretary decried the negative and false impression that had been created by the circulation of the letter from KMJA in the mainstream and social media before it had reached EACC.

12. He submitted defamation involves a false derogatory statement made against a person without lawful justification. He added that the offending statement must be one that harms a person's reputation, regard, esteem, respect or confidence in which a person is held.

13. In support of his argument that he had proven his case of defamation, he relied on the case of **John Ward vs Standard Ltd [2006] eKLR** where the court gave the ingredients of defamation as follows:

1. **The words must be defamatory**
2. **The words must be false and malicious**
3. **The defamatory words must be shown to have been published by the Defendant.**
4. **The words must refer to the plaintiff.**

14. He also relied on the cases of **Omulo Okoth vs Sam Nyamweya & 2 Others [2020] eKLR** and **Alnashir Visram vs Standard Limited [2016] eKLR** where the common holding was that in instance of libel, the law presumes damage so long as the party has shown that the defamatory material was written or printed or in some permanent form, the plaintiff being a sole witness notwithstanding.

15. He also relied on the case of **Adan Keynan Wehliye vs Standard Limited & Another [2020] eKLR** where while relying in the Court of Appeal case of **Miguna Miguna vs The Standard Group Limited & Another Civil Appeal No 164 of 2014** (eKLR citation not provided), the court therein stated that where the credentials of the plaintiff were not challenged, evidence of an independent witness was not necessary.

16. On its part, the Respondent also referred to the case of **Selle & Another vs. Associated Motor Boat Co Ltd & Others** (Supra) emphasising that when reconsidering and/or re-evaluating the evidence that had been adduced in a trial court, the appellate court ought to consider that it neither heard nor took the evidence.

17. It submitted that the Appellant's failure to call an independent witness was fatal to his case. It argued that the contents of its publication was identical to the communication from Hon Derrick Kuto, the Secretary General of KMJA and that it was him who called her to publish the letter as a member of KMJA was missing. It was categorical that its publication was entirely based on the correspondences exchanged by the KMJA and the EACC.

18. It referred to the definition of defamation in the 17th Edition of Salmond on The Law of Torts which was that:-

“The wrong of defamation consists in the publication of a false and defamatory statement concerning another person without justification”

19. It further placed reliance on the case of **Ondonkara vs Astles [1970] EA 374** where it was held that a statement is defamatory if it lowers him in the estimation of ordinary and reasonable men.

20. It also placed reliance on the case of **George Mukuru Muchai vs The Standard Limited [2001] eKLR** and **Jacob Mwanto Wangora vs Hezron Mwando Kirorio [2017] eKLR** where the common holding was that a plaintiff had to demonstrate malice for a statement to be found to have been defamatory, which it submitted the Appellant had not done in this case.

21. It was categorical that the evidence of an independent witness was critical in proving a defamation case as was held in the cases of **Wycliffe A. Swanya vs Toyota East Africa Ltd & Another [2009] eKLR**, **Selina Patani & Another vs Dhiranju vs Patani [2019] eKLR** amongst other cases for the reason that one could not be defamed in his own eyes.

22. It relied on the defence of justification that was expounded in Section 24 of the Defamation Act Cap 36 Laws of Kenya and the treatise of **Carter Ruck on Libel & Slander 5th Edition** on page 111 which provide that this defence can only succeed if the expression of opinion was based on true facts.

23. It further added that in a case of defamation, the court has to balance between the right of reputation and the right of media to impart information under Article 33 of the Constitution of Kenya and had placed more weight on the freedom of expression.

I. PROOF OF THE DEFAMATION CASE

24. The courts have held that the following specific ingredients must be satisfied for a party to succeed in his or her claim for defamation as laid out in the cases that were relied upon by both the Appellant and the Respondent herein:-

i. That the statement must be published by the defendant.

ii. That the statement must refer to the plaintiff.

iii. That the statement must be defamatory.

iv. That the statement must be false.

v. That the statement must be malicious.

25. Further, in the case of **S M W vs Z W M [2015] eKLR** the Court of Appeal restated in the case of **Joseph Njogu Kamunge** (Supra) that:-

“A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right-thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided.”

26. In her judgment, the Learned Trial Magistrate stated as follows:-

“...it is not in dispute that the words were published and that they were in reference to the plaintiff. Looking at the words, “the plaintiff was driven away by EACC officers”. These words in their ordinary and natural meaning indirectly were capable of reasonably being construed in my view that the plaintiff is a corrupt person given the nature of his work. Though article 34 of the constitution provides for freedom of expression, one must ensure that in so doing, he/she must not injure another person.

The defendant is basing his argument for publication on the correspondences between the Secretary General KMJA and the CEO Ethics and Anti-Corruption, but then, I have had to question myself why was it so difficult for him to verify the information before having it published. This information was then actuated by malice and not just a fair comment on the matters of public interest... From what has been presented before this court, there is no evidence from a third party that as a result of the publication, his standing in the society has been damaged. The EACC in his correspondence with the secretary general lamented on the way the matter was handled. It is unfortunate that this officer was not called to testify.”

27. It was not clear from this finding who the Learned Trial Magistrate was referring to as not having verified the information before printing the same. It was also not clear to this court if the Learned Trial Magistrate meant that although the publication was accentuated by malice, the Appellant did not succeed because he did not call an independent witness.

28. Be that as it may, this court evaluated the evidence that was adduced in court and noted that the letter from KMJA dated 24th May 2018 addressed to the CEO of EACC stated as follows:-

“ As officials of Kenya Magistrates and Judges Association, we have reports that our member, Hon Corilus Osero Nyawiri is missing. We have further information that the said Hon. Magistrate is being held by Officers of the Ethics and Anti-Corruption (EACC). Hon. Nyawiri is the Senior Resident Magistrate, Malindi Law Courts.

The purpose of this letter is to request your good office to confirm if indeed the Hon. Magistrate is being held by your good officer; and if this is the position, what action is expected to be taken against him.

Your urgent response to this enquiry is welcome.”

29. In its letter dated 25th May 2018, the CEO of EACC stated as follows:-

“This is to notify you that Hon. Corilus Osero Nyawira is not in the custody of Ethics and Ant- Corruption Commission and neither has he been summoned to appear for questioning at our offices.

We appreciate your concern on the whereabouts of Hon. Corilus Osero. However, I wish to record my displeasure in the

manner the issue was handled. The above referenced letter was circulating on mainstream and social media before it was received at our offices thereby creating a negative and false impression.”

30. Notably, the Defendant published the following publication that was authored by DW 1: -

“MALINDI MAGISTRATE GOES MISSING AFTER ARREST

... Malindi Senior Resident Magistrate Carilus Osero Nyawiri was driven away from Malindi on Wednesday May 23, 2018 by people believed to be officers from the Ethics and Anti-Corruption Commission (EACC). The officers are alleged to have indicated that the magistrate would be arraigned at Milimani Law Courts, Nairobi, the following morning on suspicion of corrupt deals...”.

31. It was not in dispute that the alleged defamatory publication was published by the Respondent in its online platform <https://citizentv.co.ke> and that the same referred to the Appellant. This court had due regard to the case of **J. Kudwoli & Another vs Eureka Educational and Training Consultants & 2 others [1993] eKLR** where the court therein held that a publication may either be defamatory on its face or upon considering extrinsic circumstances.

32. Contrasting the letter that was written by KMJA to the said publication, it was clear that the said letter never stated the following, either explicitly or impliedly: -

- i. That the Appellant was driven away by EACC officials from Malindi.**
- ii. That the Appellant was to be arraigned in court the following morning on corrupt deals.**

33. Courts have held that in order to determine whether a statement or publication is defamatory, one must seek to understand the meaning conveyed by the words in question to an ordinary/reasonable person. The publication was defamatory of the Appellant as it had the tendency to his reputation in the estimation of right thinking members of the society. It had the potential of causing the right thinking members of the society to shun him because he was a corrupt person who would be charged in court. In the ordinary and natural sense, the words implied *inter alia*, that he was unfit for office, of bad character, untrustworthy and of questionable moral integrity.

34. Whereas DW I testified that Secretary General of KMJA Derrick Kuto gave her the aforesaid information on phone, this could not be verified as the Appellant submitted. Indeed, as the CEO of EACC denied ever having the Appellant in their custody, the Learned Trial Magistrate correctly observed that the said Derrick Kuto was a crucial witness in the Respondent’s case to prove the defence of justification.

35. While this court noted that the Trial Court dismissed the Appellant’s suit solely on the ground that he was the sole witness who testified in support of his case, it was alive to the existing legal principle that in instances of libel, the law presumes damage so long as a party has shown that the defamatory material was written or printed or in some permanent form. Such position was restated in the case of **Alnashir Visram v Standard Limited [2016] eKLR**.

36. In the case of **Kagwiria Mutwiri Kioga & Another vs The Standard Ltd & 3 Others [2015] eKLR**, the Court of Appeal cited with approval V.W. Rogers, the Learned author of **Winfield and Jelokwiz on Tort, of 6th Edition** 2002 at pp 404-405 where it was stated as follows:-

“12.2. Defamation is a publication of a statement which reflects on a person’s reputation and tends to lower him in the estimation of right thinking members of a society generally or tends to make them shun or avoid him. For historical reasons defamation takes the form of two separate torts, libel and slander, the former being more favourable to the claimant because it is actionable *per se* and injury to reputation will be presumed...”

In contrast, in cases of libel (and in some cases of slander) the claimant can recover general damages for injury to his reputation without adducing evidence that it has in fact been harmed, for the law assumes that some damage will occur in the ordinary course of things...”

37. While being cross examined, DW 1 admitted that allegations of corruption against a magistrate that are published damage the standing of such a magistrate in society especially since such an office should inspire confidence from the public. This confirmed the fact that the circumstances of this case did not necessarily require an independent witness.

38. In the circumstances of this case, it was immaterial that the Appellant did not call an independent witness as in the circumstances herein, the publication was proven and was enough evidence as the same was posted on the internet, an online platform which had a world-wide audience, through the Respondent’s employee through the digital platform <https://citizentv.co.ke> that had wide circulation.

39. In the premises, this court was satisfied that the Appellant had shown that the publication was defamatory of him and that he had proved his case on a balance of probability. This court was thus more persuaded by the submissions of the Appellant herein and found that the respondent was vicariously liable for the actions of DW 1.

II. QUANTUM

40. The impugned publication was posted on the internet, an online platform which had a world-wide audience, <https://citizentv.co.ke>. The Respondent submitted that the Appellant was not entitled to any damages. On the other hand, the Appellant prayed general damages in the

sum of Kshs 8,000,000/= and Kshs. 2,000,000/= for aggravated/exemplary damages and costs of both the Lower Court Trial and the appeal which he believed was reasonable in the circumstances.

41. In this regard he relied among several cases, the case of **Rosemary Kimingi vs John Bundotich & Another [2018] eKLR** where the Court awarded the Plaintiff who was a Magistrate at the time, the sum of Kshs. 10,000,000/= in general damages and Kshs 1,500,000/- in aggravated and exemplary damages.

42. He also relied on the **Pius Kinyua t/a Salambo Proprietary Club vs Nation Media Group Ltd [2019] eKLR**, **Johnson Evan Gicheru vs Andrew Morton & Another [2005] eKLR** and **Raphael Kitur vs Standard Group Limited [2016] eKLR** where the court awarded general damages in the sum of Kshs 5,000,000/=, Kshs 6,000,000/= and Kshs 6,000,000/= respectively. The respective courts also awarded aggravated damages in the sum of Kshs 1,500,000/= each in **Pius Kinyua t/a Salambo Proprietary Club vs Nation Media Group Ltd** and **Raphael Kitur vs Standard Group Limited.**

43. The Appellant testified that he was a serving magistrate having been employed in the year 2016 and had practiced as an Advocate for ten (10) years prior to that. This court noted the authorities cited by the Appellant which some involved persons of same professional standing as the Appellant's herein. This court was of the view that an award of Kshs 2,000,000/= would be reasonable in the circumstances.

44. In arriving at this figure, this court had due regard to the following cases:-

1. **Joseph Njogu Kamunge vs Charles Muriuki Gachari [2016] eKLR**

On determining the appeal therein in 2016, Mativo J refused to interfere with the award of Kshs 1,500,000/= that had been awarded by a lower court for libel.

2. **Equity Bank Ltd & Another vs Robert Chesang [2016] eKLR**

On determining the appeal therein in 2016, Aburili J refused to interfere with the award of Kshs 1,500,000/= that had been awarded by the lower court for libel.

3. **Samwel Kigoji Makunyi vs John Lawrence Odhiambo & Another [2018] eKLR**

This very court awarded general damages in the sum of Kshs 2,000,000/= in a defamation case.

45. In respect of the aggravated/exemplary damages, it was apparent that no formal apology was made by the Respondent in a bid to mitigate the damage already occasioned to the Appellant's reputation in the public eye. Although the publication was made only once, it had a wide audience.

46. Be that as it may, the Appellant did not demonstrate how he suffered as a result of the said publication. Indeed, he was not relieved of his duties and had continued to serve in the Judiciary. This court therefore came to the firm conclusion that the Appellant was not entitled to an award for aggravated damages.

DISPOSITION

47. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 24th June 2020 was merited. The effect of this is that the decision of the Learned Trial Magistrate that was delivered on 9th June 2020 be and is hereby set aside and/or vacated and replaced with the following order that judgment be and is hereby entered in favour of the Appellant against the Respondent for the sum of Kshs 2,000,000/= general damages together with costs and interest on general damages from the date of the judgment in the lower court until payment in full. The Respondent will also bear the Appellant's costs of this Appeal.

48. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF SEPTEMBER 2021

J. KAMAU

JUDGE