IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, OUKO & GATEMBU, JJ.A)

CIVIL APPEAL NO. 165 OF 2012

BETWEEN

NATION MEDIA GROUP LIMITED …..1ST APPELLANT

KENFREY KIBERENGE ……..2ND APPELLANT

AND

DR. ALFRED N. MUTUA ……. RESPONDENT

(Being an Appeal from the Judgment and Decree of the Superior Court (Dulu, J delivered on 18th March, 2011 in

H.C.C.C. NO. 132 OF 2008)

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JUDGMENT OF THE COURT

1. This is an appeal from the judgment of the High Court (Dulu, J) delivered on 18th March 2011 holding the appellant liable for defamation and awarding the respondent Kshs. 4.5 million in general damages. The main issue in this appeal is whether the learned trial Judge erred in rejecting the defence of fair comment that had been advanced by the appellant.

Background

2. At the material time, the 1st appellant was the publisher of a newspaper, Daily Metro. On 11th February 2008, it published an article in that newspaper under the title, "***Dangerous Talk***" authored by the 2nd appellant concerning the respondent. At the time, the respondent was the spokesperson of the Government of Kenya. As that article was the basis of the respondent's claim, it is necessary to reproduce it in its entirety:

"*DANGEROUS TALK Kenya's King of cheap TALK takes a turn for worse - careless TALK*

WHILE the political fires were being put out everywhere in Kenya this past weekend, hawk Alfred Mutua flew into Uganda to add fuel to the fire in his trademark style. "I don't foresee power sharing because that would be unconstitutional," the government spokesman confidently told a Kampala talk show on Thursday, a day on which political divisions were being narrowed by international mediators.

That, he added would be tantamount to allowing the Opposition party to “eat the piece of the cake that does not belong to one.”

He was not finished. In clear breach of a ban on the government or opposition leaders publicly discussing issues before the mediation team Mutua declared on the 93.3 KFM's Hot Seat Programme: “You cannot have more than one President in a country. Mr. Kibaki was validly elected and legally sworn in. He is the people's choice and 102 leaders across the world have recognized him as the (duly elected) President of Kenya.”

That would have been news to the President himself, if the events of the following day were anything to go by.

Unlike Mutua, President Kibaki threw his weight behind the talks last Friday saying he was satisfied with the progress made so far. His main rival Raila Odinga, for his part said he would support the outcome of the talks.

"I have no idea who is still retaining him because he does more harm than good to the Government," said former MP Paul Muite. "I do not know who interviewed him, he has no authority, his statements, rather outbursts, consistently portray his employer in very poor light."

Mutua's recent outbursts are only the latest in a career steeped in controversy. But they're also perhaps the most dangerous at time when a remark out of place could inflame passion.

His hawkish caused immeasurable alarm and turmoil that followed the December election when he poured cold water on a visit by then African Union Chairman and Ghanaian President John Kufuor.

Mutua infamously remarked that Kufuor was coming all the way for a "cup of tea with Kibaki."

He said at the time “President Kibaki has said he is not ready to negotiate for peace because we are not a nation at war." In the ensuing days the spokesman made similar, sometimes contradicting statements. On January 6, he said the President was in support of a government of national unity but maintained the government was opposed to international mediation.

Two days earlier, Mutua had said, "What will they (international mediators) come and do that we have been unable to do as Kenyans""

More recently, after the murder of Embakasi MP Melitus Were, Mutua told media corps that all MPs had been assigned security and wondered why they moved around without them.

The following day, House Speaker Kenneth Marende told him off wondering where he had got his information.”

3. In his plaint, testimony and submissions before the trial court the respondent complained that, that headline and the story published in that article is defamatory of his character and professional standing; that it was published in bad faith, is false and malicious; that the headline and story were understood, in their natural and ordinary meaning or by innuendo, to mean that the respondent is a hawk and not fit to live with humans; that he travelled to Uganda and made a mockery of mediation talks in Kenya; that he perpetually engages in cheap, careless talk and is of loose tongue; that he was unqualified for the position of government spokesperson and was inefficient, reckless, inconsiderate and insensitive and bent on causing chaos; that his statements after the 2007 General Elections in Kenya were partly responsible for the chaos that ensued thereafter; that the manner in which his photograph carrying a video camera was transposed with the story was malicious and in bad faith and aimed at destroying his image as the government spokesperson.

4. According to the respondent, the publication was actuated by malice in that the appellants knew or ought to have known: that the publication was not truthful; that the appellants omitted, deliberately, to publish the questions posed to the respondent during the interview the subject of the article; that the appellants did not make enquiries or seek the respondent's comments to ascertain the truth of their allegations.

5. In addition to seeking general, aggravated and exemplary damages for the alleged defamation the respondent also sought an injunction to prohibit the appellants from publishing or further publishing defamatory material.

6. In their defence and submissions before the trial court, the appellants admitted publishing the article but denied that the same was defamatory or that the publication was done maliciously or falsely.

7. The appellants asserted that the article was published in the public interest at a time when Kenya was in a crisis due to the post 2007 General Elections skirmishes; that the publication was true and consisted of what the respondent had stated; and that in so far as it consisted of opinion, it was fair comment in public interest. The appellants did not adduce evidence at the trial.

8. Having considered the publication, the pleadings and submissions before him, the learned trial Judge observed that although the appellants "raised issues of truth and fair comment" in their defence, "they were bound to prove the same" but did not tender evidence to prove the same and that the contentions in their defence could not help them except to the extent that the respondent "himself has given evidence that tends to support those allegations."

9. The Judge stated further that "from the evidence tendered by the [respondent]…some of the facts given in the article were true but left out some gaps which would give rise to various interpretations." In his view however, the gaps left in the facts reported by the appellants "were not unduly injurious" to the respondent and were not defamatory. In that regard, the Judge made reference to Section 14 of the Defamation Act.

10. The Judge went on to say that "the interpretations or comments given by the [appellants] to the facts were the ones that [to him] appear to [be] injurious." The learned Judge concluded thus:

"The purported interpretation and comments were defamatory. They appear to be completely out of context. They went beyond the freedom of expression under Section 79 of the replaced Constitution, and Article 33 and 34 of the Constitution (2010). When one attributes to someone comments like "dangerous talk", and "add fuel to the fire in his trade mark style" at that time as regards the Kenyan situation, it amounts to nothing less than defamation, especially when no evidential justification has been given for those comments. The innuendo is very damaging on the reputation of the person to whom those comments are attributed. I therefore find that there is defamation with respect to the interpretations and comments." *(Emphasis)*

11. Having thus found, the Judge awarded the respondent general damages which he assessed at Kshs. 4.5 million but rejected the claims for aggravated or exemplary or punitive damages. Aggrieved, the appellants lodged this appeal.

The appeal and submissions by counsel

12. In their memorandum of appeal, the appellants framed six grounds of appeal. However, during the hearing of the appeal, learned counsel for the appellants Mr. Guto Mogere compressed those grounds to a single question, namely, whether the appellants were entitled to the defence of fair comment. At the same time, counsel withdrew the complaint that the amount awarded by the trial Judge as general damages is excessive.

13. Highlighting his written submissions, Mr. Mogere submitted that the article complained of by the respondent was a commentary on certain aspects of an interview the respondent had given to a radio station; that the words "*dangerous talk*" and "*add fuel to the fire in his trade mark style*" which the Judge singled out from the article as being defamatory of the respondent were no more than a fair comment on the statements made by the respondent in the interview.

14. According to counsel, the respondent made statements in the course of the interview on which, being matters of public interest, the appellants were justified in making the comments that they did. Counsel drew our attention to the transcript of the interview that was produced before the lower court as an exhibit and pointed out the statements made by the respondent during that interview that, in the appellants view, justified the commentary.

15. To illustrate, counsel gave examples of such statements made by the respondent during the interview as follows: That the respondent claimed that the leadership of ODM had planned and organized the killing and massacres that had occurred in parts of Rift Valley; and that the same leadership had orchestrated ethnic cleansing which the respondent likened to the Jewish holocaust.

16. Counsel urged that considering that the respondent made the statements on 7th February 2008 during the post-election violence and before any investigations had been done to ascertain who was culpable for the violence, and considering also that nobody had been convicted in connection with such violence, and considering further that mediation talks were going on in Kenya at the time and power sharing was seen as the only prospect for peace in the country, the statements made by the respondent during the interview were inflammatory and it was fair for the appellants to characterize them as

dangerous.

17. Referring to **Gatley on Libel and Slander**, 9th edition, counsel argued that "*the right of fair comment is one of the fundamental rights of free speech and writing*" and that "*there are matters on which the public has a legitimate interest or with which it is legitimately concerned and on such matters it is desirable that all should be able to comment freely, and even harshly, so long as they do so honestly and without malice*."

18. Citing a decision of the Supreme Court of England in the case of **Spiller & Anor vs. Joseph & others [2010] UKSC 53**, counsel urged that the prerequisites for the application of the defence of fair comment were present in this case and the learned Judge erred in rejecting the appellants' defence in that regard.

19. Counsel stressed that the respondent was the Government Spokesperson at the time he gave the interview and that whatever he said or did was construed as the Government position. He reiterated that the statements made by the respondent were, in the context of the circumstances obtaining in Kenya at the time, undoubtedly inflammatory, and that the appellants correctly characterized them as reckless or careless or dangerous as they were capable of inflaming passions and adversely affecting the peace process that was then going on. In that regard, counsel found support in the case of **London Artists Limited vs. Littler [1969] 2 All E R 193** where Lord Denning stated that "*whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned what is going on; or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make fair comment*."

20. In counsel's view therefore, the learned Judge should have come to the conclusion that the criticism of the respondent by the appellants was legitimate and should have upheld the appellants' defence of fair comment.

21. Opposing the appeal, learned counsel for the respondent Ms. Kethi Kilonzo relied on her written submissions, which she highlighted, and submitted that the trial Judge correctly assessed the facts and the applicable law and reached the correct decision.

22. Counsel referred us to **Gatley on Libel and Slander**, 8th edition, 1981 (Sweet & Maxwell) at paragraph 359 at page 153 for the argument that if a libelous article in a newspaper is introduced by a libelous heading or title, evidence that the facts stated in the article are true is not sufficient and that the heading or title must also be justified; that the substantive article should relate to the headline; and that in this case there was no basis in the article for the headline.

23. In counsel's view, the heading of the article was an allegation of fact as opposed to an expression of opinion. In that regard, counsel invited us to compare the article in question with other publications that reported on the interview.

24. Counsel urged us to consider the English decision in **Galloway vs. Daily Telegraph [2006] EWCA Civ 17** and the decision of the High Court of Kenya in **Khasakhala vs. Aurah and others**

[1995-1998] 1 EA112 arguing that the defence of fair comment is not available in this case; that for a comment to be fair, it must be based on facts contained in or referred to in the publication complained of; that the facts must be sufficiently true to make the comment fair (**Mong'are t/a Gekong'a & Momanyi Advocates vs. Standard Ltd [2002]eKLR**); that if the comment contains an inference of fact, the comment must be shown to be justified; that the comment must be such as fairly to be described as criticism; and that the comment must represent the honest opinion of the commentator and be published without malice; and that malice can be inferred from a deliberate, reckless or even negligently ignoring the facts.

25. Counsel went on to say that given the materiality of the state of mind of the appellants at the time they published the article, the second appellant, as the author of the article, should have been called as a witness to justify the characterization of the respondent in the heading and the sub heading of the article; and that there was no basis for describing the respondent as the king of cheap talk or king of careless talk or a person who had taken a turn for the worse.

26. Furthermore, the picture of the respondent transposed did not cast the respondent in good light. In counsel's view, therefore, the Learned Judge arrived at the correct decision and the appeal should be dismissed.

Analysis and determination

27. We have considered the appeal, the submissions and the authorities cited. As already indicated, the only question for determination in this appeal is whether the learned trial Judge erred in rejecting the defence of fair comment advanced by the appellants.

28. To sustain the defence of fair comment, the appellants were required to demonstrate that the words complained of are comment, and not a statement of fact; that there is a basis of fact for the comment, contained or referred to in the article complained of; and that the comment is on a matter of public interest. [See **Gatley on Libel and Slander**, 8th edition, 1981 (Sweet & Maxwell) at paragraph 692 at page 291].

29. The respondent could however defeat the defence of fair comment by showing that the comment was not made honestly or was actuated by malice. In **J. P. Machira t/a Machira & Company Advocates vs. Wangethi Mwangi & another [1998] eKLR**, the Court said that malice "can be inferred from a deliberate, reckless, or even negligent ignoring of facts" and that "deliberate lies can also be evidence of malice."

30. In **Mong'are t/a Gekong'a & Momanyi Advocates vs. Standard Ltd** (above) this Court stated, "that comment can only be fair if the basic facts upon which the comment is premised are correct. A comment which is based on lies or falsehood cannot be designated as fair." And in **Grace Wangui Ngenye vs. Chris Kirubi and another, Civil Appeal No. 40 of 2010 [2015]eKLR** this Court reiterated that a fair comment must be based on facts that are true or substantially true; and that a fair comment is a commentary, an expression of opinion based on true or substantially true facts.

31. An exposition of what Lord Phillips, the President of the Supreme Court of England described as "the outer limits of the defence" of fair comment is set out in the Supreme court of England decision in **Spiller & another vs. Joseph & others [2010] UKSC 53**. In that case, Lord Phillips adopted with approval what the Court of Final Appeal of Hong Kong [1] characterized as the five "well established" "non-controversial matters" in relation to the defence of fair comment. First, *the comment must be on a matter of public interest. Second, the comment must be recognizable as comment, distinct from an imputation of fact. Third, the comment must be based on facts, which are true or protected by privilege. Fourth, the comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made. The reader or hearer should be in a position to judge for himself how far the comment was well founded. Fifth, the comment must be one which could have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views."*

32. Given those parameters, was the defence of fair comment available to the appellants in the present case" The article complained of was, as indicated, published in the 1st appellant's newspaper, Daily Metro, on 11th February 2008. It was based on an interview of the respondent, the Government Spokesperson of the Republic of Kenya at the time, by a Ugandan radio station. A full transcript of the interview was produced as evidence before the trial court. The appellants pleaded that the publication was done in public interest at a time when Kenya was in crisis due to post 2007 general elections skirmishes.

33. Based on the transcript of the interview, it is not in dispute that the respondent asserted during the interview that: "*we are very clear that the leadership of the ODM planned, organized the killing, and massacres that we saw in parts of Rift Valley and other sections of the country*."; "*It was the beginning of that ethnic cleansing agenda of*

[1] In the case of **Tse Wai Chun Paul vs. Albert Cheng [2001] EMLR 777**

targeting the kikuyus and the people who supported the President from that Mt. Kenya region as the mafia so as to justify it. It is the old trick of Hitler trying to call the Jews rats just because they were doing the businesses and were seemed (sic) you know, to be very close to the centres of power at that time. It's the same trick same psychology of trying to demonize the kikuyus which justified the genocide we saw in the Jews which justified the ethnic cleansing we saw happening in Kenya." "*We know the people who did (sic) are the leaders of ODM, or, you know that ODM machinery participated in it*."

34. In the article complained of the appellants characterized those statements as "dangerous talk". In the text of the article itself, it was indicated that "while political fires were being put out everywhere in Kenya" the respondent had flown to Uganda "to add fuel to the fire in his trademark style."

35. In our view, the characterization as "dangerous talk" of the statements attributed to the respondent was an expression of an opinion, as opposed to an allegation of fact, by the appellants regarding those statements. It was, in our view, an opinion that could have been expressed *"by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views"* upon a matter of public interest.

36. As regards the subtitles, “Kenya’s King of cheap TALK takes a turn for the worse-careless TALK” “Who does he speak for"” the article chronicled statements attributed to the respondent on five different occasions as justification for those subtitles. The statements attributed to the respondent were:

“February 7, 2008

In Uganda to give interviews with local press on the situation in the country, Mutua says: “I don’t foresee power-sharing because that would be unconstitutional.”

The following day President Kibaki threw his weight behind the talks widely expected to lead to just that!

January 31, 2008

On the death of Embakasi MP Melitus Were: “All the MPs had already been given bodyguards by the Government soon after they were sworn-in. We were shocked to hear of his death.”

The following day, House speaker Kenneth Marende says: “Most of these MPs here can individually confirm that they have received state security. I don’t know what Dr. Mutua means by his remarks.”

January 7, 2008

On Ghananian President John Kufuor’s visit: “This is a fact-finding tour… They (Kufuor and Kibaki) are age-mates and friends, and Kufuor is coming to have a cup of tea with him.”

Kufuor arrived a few days later and held talks with both Kibaki and Raila. He later proposed that former UN Chief Kofi Annan takes over the process Somuch for Mutia’s storm in a tea cup.

January 4, 2008

On mediation: “What will they (international mediators) come and do that we have been unable to do as Kenyans"”

January 2, 2008

With 500 dead and 250,000 homeless: “The violence has only affected about 3 percent of the country’s 34 million people. It’s good to see that things have gone back to normal. Many people have agreed to go back to work and have said they are tired of politics.”

37. With specific reference to the sub title, “Who does he speak for"” it was also stated in the article that unlike the respondent, “President Kibaki threw his weight behind the talks last Friday saying he was satisfied with the progress made so far. His main rival, Raila Odinga, for his part said he would support the outcome of the talks.”

38. Considering that the respondent was the Government Spokesperson, and to the extent that the position he took during the interview appears inconsistent with that expressed by the President, there was in our view justification in the comment and the question posed by the appellants.

39. All in all, there was therefore a basis of fact, in our view, for the comments by the appellants. In other words, there were facts contained in or referred to in the publication complained of on the basis of which the comments were made.

40. As to whether the publication concerned a matter of public interest, there can be no doubt that the subject matter of the article is a matter, to borrow the words of Lord Denning in **London Artists Ltd v Littler [1969] 2 All ER 193** "such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others" and a matter "on which everyone is entitled to make fair comment."

41. As the learned trial Judge, himself pointed out:

"In a free democratic society one cannot prevent the government from having a spokesperson. That spokesperson can also give statements that are subject to various interpretations by member *(sic)* ***of the public.***

Those interpretations would either agree with his interpretations or they could be different."

Had the Judge applied that statement to this case, we have no doubt he would have reached a different decision.

42. The upshot of the foregoing is that we uphold the appellants complaint that the learned Judge failed to consider the legal test on what constitutes fair comment and in failing to uphold the defence of fair comment advanced by the appellants. We therefore allow the appeal and hereby set aside the judgment of the High Court delivered on 18th March 2011. We substitute the judgment of the High Court with an order dismissing the respondent's suit with costs to the appellants. The appellants shall also have the costs of this appeal.

Orders accordingly.

Dated and delivered at Nairobi this 17th day of November, 2017.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR