



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 123 OF 2015

THE STANDARD LIMITED.....1ST APPELLANT

THE EDITOR, THE STANDARD NEWSPAPER.....2ND APPELLANT

-VERSUS-

JONATHAN ABRAHAM CHELULE.....RESPONDENT

(Being an appeal from the judgment in the Chief Magistrate's court of Kenya at Molo by the Hon. D. Ole Keiwua, Senior Principal Magistrate dated 7th October 2015 in the Chief Magistrate's Court at Molo Civil Case No. 199 of 2011)

JUDGMENT

1. The appeal is against the judgment of the Senior Principal Magistrate in Molo CMCC No. 129 of 2011.

The Respondent alleged to have been defamed by some three articles published by the Appellant Newspaper on the 12th May 2010, 14th May 2010 and 29th June 2010.

Contents of the said Articles are stated in the Respondent's plaint dated the 11th May 2011.

He sought damages from the appellant who was sued together with the Editor of the Newspaper.

2. In their defence dated 1st March 2013 the appellant denied the claim and sought to rely on **Section 14 and 15 of the Defamation Act Cap 36 Laws of Kenya**, being fair comment made in good faith without malice being matters of public interest.

3. Upon full hearing the trial court found in favour of the respondent and proceeded to award exemplary damages in the sum of Kshs.500,000/= and general damages of Kshs. 3 Million.

4. I have considered the pleadings evidence and submissions of the rival parties.

My duty as the first appellate court is to re-consider and re-evaluate the evidence presented before the trial court and come up with my own findings, being minded that the court will not normally interfere with factual findings by the trial court unless they are based on no evidence or are based on misapprehension of evidence – **Makube -vs- Nyamiro (1983) KLR 403**.

5. It is not disputed that the complained of articles were not published on the dates stated...The Respondent describes himself as a farmer and businessman and a former senior police officer and at retirement time held the position of District Criminal Investigating Officer (DCIO) Nakuru District.

6. The Publication complained of was to the effect that the Respondent had been arrested in connection with the murder of a businesswoman and her two daughters in Kuresoi District and had been on the run after being implicated in the murder – publication of the **29th June 2010**.

7. In the Appellants Article dated the 12th May 2010 and 14th May 2010, it was to the effect that goods belonging to a woman who was killed in Olenguruone had been recovered from the home of a former Senior policeman, being a mobile phone, radio, remote control, clothes and other items. The Article proceeded to state that with assistance of the police and Safaricom Engineers they tracked down the user of the stolen phone belonging to the deceased and arrested a suspect at his home in Bomet.

8. In his evidence the Respondent who testified as **PW1** denied having been involved in the murder, was never charged and following the publications his houses were burnt 12 in total...It was his evidence that the appellant failed to offer an apology to him and as a result he lost his properties and reputation.

9. He was categorical that the Newspaper Articles referred to him though no names were stated as he was the only former DCIO in the area at the time.

He denied the appellants defence of fair comment or justification.

10. **PW2** wife of the respondent testified that their 12 houses were burnt and the family was threatened and lived under fear of danger after the publication.

11. **PW3** Vincent Koech then a police officer testified that the respondents name was badly damaged as he was portrayed as a murderer and that there was no former DCIO at Olenguruone at the time so the articles referred to the respondent.

He confirmed that the respondents houses were burnt and that villagers wanted to kill his son all because of the newspaper articles.

12. In their defence the 2nd Appellant who filed the story testified as **DW1** as a journalist, and that he never mentioned any names but that the items were recovered at the former DCIO's estate and the Respondent was arrested together with two of his office employees.

It was his evidence that the story was factual though he did not see or have a list of items he testified to have been recovered in the respondents home and estate. He also confirmed that the respondents houses were burnt.

13. **Article 33(3) Constitution of Kenya** mandates that while exercising the right to freedom of expression every person shall respect other persons rights and reputation.

14. Defamation is the publication of a statement which tends to lower a person's reputation in the estimation of right thinking members of the society or which makes him to be shunned or avoided – and such publication must be to other persons – **Phinehas Nyagah -vs- Gitobu Imanyara (2013) e KLR**.

15. It is trite that if the complained of words or articles contained allegations of facts, the party alleging must prove the facts as true. However where the allegations are disputed as being untrue and false the defence ought to show or establish the truth by justifying the same as fair comment – **Samuel Ndungu Mukunya -vs- Nation Media Group Ltd and another**.

16. **Issues for determination**

1. *Whether the Articles published were defamatory of the Respondent.*
2. *Whether the defence of justification and fair comment are available to the appellant.*
3. *Whether the awards granted to the respondent can be sustained in the circumstances.*

17. It is not disputed that the Appellant published the offensive Articles in its newspaper on the dates stated.

The Articles referred to a former DCIO whose home was at Bomet, and a neighbour of the woman killed together with her two daughters in Kuresoi District; and..that the former DCIO had been on the run after being implicated in the murder.

18. The Articles complained of, no doubt referred to the Respondent following which his houses were burnt down a fact confirmed by **DW2** a photojournalist who took photographs of the burnt houses (PExt 18) and **DW PW3** but insisted that the story as stated in the Articles was true as the said burnt houses belonged to the respondent.

19. No evidence was adduced by any of the witnesses testified that there was another former DCIO within or at Olenguruone area save the Respondent...It is.. therefore save to conclude that the former DCIO referred to in the Articles was the Respondent.

20. The Editor of the Articles **DW1** did not bring to court the OCPD Molo who he alleged to have given him the story nor did any documents produced from Safaricom to confirm ownership of the telephone alleged to have been recovered from the Respondents home...Indeed no evidence at all was adduced that indeed the Respondent was being investigated for the murder nor was he arrested and charged for the said offence.

21. It is no wonder that when the said Articles were published the area residents turned against the Respondent and burnt his houses in addition to threats on him and his family (PW2's evidence), as no other person fitted the description of former DCIO in the area.

22. Ingredients of defamation are that the words must tend to lower a parties reputation in the minds of right thinking person in the society, and may cause that party to be shunned...The said words must be malicious but not necessarily mean spiteful or ill will but there must be evidence of malice and lack of justifiable cause to publish the offensive words.

See **Civil Appeal No. 42/2014 Joseph Njogu Kamunge -vs- Charles Muriuki Gachani (2016) e KLR.**

23. The author of the offensive article (**DW1**) did not offer any evidence that he bothered to verify the “stories” before publication. The fact of the murder in the village was in the public domain at the area but there was no evidence to connect the Respondent to the murders. That is so because the Respondent was neither investigated, arrested nor charged...No evidence was adduced that the Respondent was on the run.

24. The defence of **justification** and fair **comment** pleaded by the Appellant means that the article must be true and justifiable. It is the duty of the defendant to produce sufficient evidence to prove the truth of such publications, in their ordinary and natural meaning.

25. Defamation law puts the burden of proving the truth of the alleged defamatory statements on the Respondent as such..statements are presumed to be false until proved to be true – See the **Joseph Njogu Kamunge case (Supra)**...Defences of fair comment, public interest as well as qualified privilege are such that the person making the statements has a duty to do so and the person who hears or reads the statement has corresponding interest in reading the statement more so in-publication in the media.

26. There being no doubt about the murders in the area the Appellants editor was fully performing his duty to report about the murders...He however failed to verify the truth of allegations that the Respondent was implicated and linked to the murders before implicating and linking him to the heinous crimes.

27. I do not agree with the appellants submission that as the Respondent's names were not published in the offensive articles, then the defence of **fair comment** insulated the appellants evidence as adduced, it is not controverted that as a result of the false publications the villagers were up in arms against the Respondent threatened his family and indeed burnt his twelve houses (PW2 and PW3 evidence).

28. For the foregoing I am satisfied that the offensive articles and statements referred to the Respondent were false and were defamatory of him...Further am persuaded that the..articles lowered the Respondents repute in the estimation of the reasonable readers.

In the **Phinehas** case (supra), the court further observed that

“----- malice did not necessary mean spite or ill will but recklessness itself may be evidence of such malice---if the language used is utterly beyond or disproportionate to the facts---- the failure to inquire into the facts from which interference of malice may properly be drawn....”

29. Had the Editor verified the story with some measure of due diligence, he would not have published such articles which pointed and squarely linked the Respondent to the crimes.

Accordingly I find that the Respondent was defamed in his character and suffered loss and damage by the Appellants publication linking him to the murder of the three women but failed to justify the truth of that the Respondent was thus implicated.

I proceed to dismiss the Appellant's appeal on the matter of liability..and uphold the trial magistrates findings.

30. A successful litigant in a defamation suit is entitled to recover general compensatory damages for the wrong he has suffered to his reputation and to vindicate his name...Account must be taken of the distress humiliation and hurt caused by the publication in the..circumstances of each case.

31. In **Patrick Nyoike -vs- People Limited (2013) e KLR** the court awarded the plaintiff Kshs.4 million as general damages and Kshs.100,000/= as aggravated damages.

In **Ken Odondi & 2 Others -vs- James Okoth Ombura t/a Okoth Obura & Co. Advocates (2013) e KLR, the Court of Appeal** awarded Kshs. 4 Million general damages for libel and Kshs.500,00/= aggravated damages.

32. I agree with the Hon. Rawal J (as she then was) when in the case..**Hon. Uhuru Muigai Kenyatta -vs- Baraza Ltd (2011) e KLR**, that it is very difficult to measure the agony suffered by loss of reputation or the feeling of a person hurt by such publication.

It is also trite that an appellate court should not disturb an..award of damages unless it is inordinately too high or low as to represent an erroneous estimate – **Butt -vs- Khan (1981) KLR 349**.

33. I have considered the awards by the trial magistrate, as well as propositions by both the Appellants and the Respondent...It is noted that the Appellants did not render an apology.

Section 7A of the Defamation Act gives a party who has been defamed a right of reply to any factual inaccuracy affecting them which has been published and which is damaging to their character or reputation.

The appellant failed to tender an apology or correction. As a result the defamed party is entitled to..additional awards of damages together with the general damages – Section 7A (6).

34. In this regard the trial magistrate awarded Kshs.500,000/= to the Respondent as aggravated damages.

While awarding to the Respondent Kshs.3 Million general damages the trial magistrate considered the parties submissions and cited authorities and even thanked counsel for the well written submissions.

35. I am satisfied that the trial magistrate considered all the relevant factors in arriving at the said awards.

I find no reason to interfere with the trial court's discretion in this regard. I further find the awards to be reasonable and within acceptable limits in the circumstances.

36. The upshot is that the Appellant's appeal is dismissed with costs to the Respondent.

Dated, signed and delivered this 20th day of December 2018.

J.N. MULWA

JUDGE



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