REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO 14 OF 2000

NATION NEWSPAPERS LTD .....APPELLANT

VERSUS

GILBERT GIBENDI.....RESPONDENT

JUDGMENT

This is an appeal against the decree of the Court below by which the appellant (as defendant), Nation Newspapers Limited, was found to have libelled the respondent (as plaintiff), Gilbert Gibendi. The respondent was awarded Kshs 100,000/- plus costs of the suit and interest. The respondent's case as set out in his plaint dated 22nd January 1998 was that on 18th June 1997 the appellant published a certain article (set out in the plaint) that was libellous to the respondent. The appellant duly entered appearance and filed a statement of defence dated 27th May 1998. In it, he denied that it published the article complained of or anything that was meant to libel the respondent, or that he was libeled as alleged or that he suffered any damage to his reputation. In the alternative and without prejudice, it pleaded justification, privilege and fair comment and eventually the case was heard. The respondent testified and called two witnesses. Six witnesses testified for the appellant.

The lower Court decree is challenged upon the following;

1. That the finding that the words complained of were defamatory of the respondent was contrary to the evidence (ground 2)

2. That the finding that the appellant did not prove that the words complained of were true in substance was wrong in law and contrary to the evidence (ground 3).

3. That the lower court erred in not finding that the words complained of were published on a privileged occasion (ground 4).

4. That the lower court erred in not finding that publication of the words complained of was not inspired by malice (ground 5).

5. That the lower court erred in not sufficiently relying on the evidence of DW I, DW 2, DW 3, DW 5 and DW 6 "the only witnesses without any interest to protect in the suit" (ground 7).

6. The respondent's case was not proved to the required standard (grounds 1, 6, 10 and 11).

7. That the award of 100,000.000\ as general damages was wrong and without foundation (grounds 8 and 9).

Learned counsel for the appellant submitted that the trial court failed to take into account and analyse the evidence tendered by the parties and thus reached the wrong decision. Counsel particularly took issues with the holding of the trial court that the story published of the respondent as not true in fact. The issue, counsel submitted, was whether the respondent beat up DW I as reported in the article. According to counsel this fact was well established of DW I and other evidence on record.

The appellant's counsel also submitted that the issues framed and answered by the trial court did not plow from the pleadings or the evidence tendered. It is to be noted that the parties themselves, though represented at the trial, did not agree on the issues to be adjudicated upon. However the appellant's counsel did so in his written submissions. It is the duty of the trial court to frame and answer such issues as may be disclosed by the pleadings and the evidence tendered before it. According to the appellant's learned counsel, the main issues disclosed by the pleadings were;

i) Whether the words complained of were defamatory of the respondent;

ii) Whether they were published maliciously;

iii) Whether the words were true in substance; and

iv) Whether they were published in privilege and in the public's interest.

It was the counsel's submission that none of these issues were addressed by the trial court, and further that had the trial court addressed its mind to these issues and the available evidence it would have found for the appellant. Learned counsel for the respondent replied as follows. The complaint against the publication was that it had falsely alleged that the respondent had assaulted DW. I; that the respondent was misusing the school vehicle as his own property; that the respondent was a spy for the headmistress of the school; and that he was misusing his influence to transfer teachers from the school. Counsel further submitted that the appellant in the evidence it called set out to prove the truthfulness of only the alleged assault and did not attempt at all to prove, and there was no proof of all the allegations. And taking all the available evidence into account, the alleged assault was not proved on balance as the medical evidence tendered was suspect among other deficiencies.

I have carefully read the testimonies of the witnesses who testified before the trial court. I also read its judgment. All the witnesses testified at length and were closely cross examined. I of course did not have the opportunity of seeing and hearing the witnesses myself as they testified. This was the privilege of the trial court. It is the one that had the opportunity to observe the witnesses and note their demeanour as they testified. The trial court found DW. I (the teacher allegedly assaulted by the respondent) not to be a truthful witness. It also found that the reporter who filed the story DW. 4 to have done so without first seeking substantiation of the story. In any event, the trial court found that the story published of and concerning the respondent was not true in substance and in fact. Having evaluated the evidence placed before the trial court on my own, I have no reason to depart from the finding of fact.

There was ofcourse no serious contention that the publication made of and concerning the respondent was indeed made by the appellant. The appellant pleaded justification. It was thus its duty to establish on a balance of probabilities that the story was true in substance and in fact. It failed to do so. That defence therefore failed.

That the story was defamatory of the appellant, there cannot be any doubt. It alleged that he had criminally assaulted a school teacher. It alleged that he was misusing school property. It alleged that he was unduly influencing the transfer of teachers and that he was a spy for the headmistress. None of these allegations were proved in substance and in fact.

The appellant had a defence under section 12 of the Defamation Act. Cap 36 had it chosen to plead it. That defence is that if a defendant shows that a libel contained in a newspaper or other periodical publication was published without malice and without gross negligence, and that before commencement of the action, or at the earliest opportunity thereafter he inserted in the same newspaper or periodical a full apology for the said libel. A defendant pleading this defence must also at the time of filing this defence make a payment into court by way of amends. It was a defence that the appellant herein never pleaded. But the appellant pleaded fair comment on a matter of public interest that is, qualified privilege. To defeat that defence the respondent needed to prove actual malice. Actual or express malice is ill-will or spite or any indirect or improper motive in the mind of the defendant at the time of the publication.

The trial court did not address this issue in its judgment. I must address it here. There was no evidence that in publishing the words complained of the appellant acted from an indirect or improper motive such as spite, illwill or jealousy. Even if it were to be accepted that the reported (DW. 4) was rash or negligent (and I do not think the available evidence establishes this) that would not be sufficient.

From the evidence placed before the trial court, I hold that the respondent failed to prove actual malice on balance on the part of the appellant. The appellant's defence of fair comment on a matter of public interest therefore succeeded, and the trial court should have so held. That the matter was of public interest there can not be doubt. This was a public school. There was evidence, on balance, that there had been some kind of disturbance and that some teachers in the school had staged a sit-in. the matter was serious enough to be investigated by the District Education Officer. The appellant had a social duty to write and comment upon it.

Upon the defence of fair comment on a matter of public interest, therefore, the respondent's action should have failed. Regarding the damages awarded, there must be some foundation or basis upon which the trial court will award a particular sum. The plaintiff must lead evidence of such actual damage to his reputation and character as will enable the trial court to assess an appropriate reward.

Posing only the defamation *per se* is not sufficient, to merit a substantial award of damages. Such a plaintiff would probably get only nominal damages. In the instant case, the respondent did not lead evidence to show what damage to his character and reputation he may have suffered. There was no basis for the award of 100,000/-. I would award him 40,000/-. But in the event, this appeal succeeds in its entirely. The decree of the lower court is set aside. A decree dismissing the plaintiff's suit with costs will be substituted therefore. The appellant shall have the costs of this appeal.It is so ordered.

Dated and delivered at Kakamega this 29th day of May, 2002

H.P.G Waweru

Judge