



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 141 OF 2014

HON. ADAN KEYNAN WEHLIYE.....PLAINTIFF

VERSUS

THE STANDARD LIMITED.....1ST DEFENDANT

PETER WANYONYI.....2ND DEFENDANT

JUDGEMENT

The plaintiff approached this court vide the plaint dated the 22nd May, 2014 in which he has sued the Defendants claiming general and exemplary damages plus costs and interest.

The plaintiff avers that on 31st March, 2014, the defendants falsely and maliciously and without a reasonable cause wrote and published or caused to be published in the Standard Newspaper an article by the 2nd defendant under the heading;

“WITH THESE SILLY BILLS WHO NEEDS MP’S IN KENYA”.

The contents of the said article are set out in full in paragraph 5 of the plaint.

The plaintiff further averred that the article was accompanied by a caricature depicting the plaintiff “with a pair of scissors clipping off a flag from a Governors vehicle”. He states that at all material times, the defendants knew that the words would be read or stood to be read by people in the entire country and beyond. He has set out the natural and ordinary meaning of the said words in paragraph 8 of the plaint.

He contended that the published words were derogatory to him; exceedingly caused him embarrassment and were libelous and defamatory in their natural and ordinary meaning and were meant to ridicule and embarrass him in the eyes of the public. He stated that the defendants’ action portrayed him as someone who should be shunned by members of the public and is unfit to hold a public office and that the actions by the defendants were malicious and exhibited in bad faith.

The defendants have denied the plaintiff’s claim vide a defence filed on the 13th day of November, 2014. They denied having published false and malicious Article on the 31st March, 2014 as alleged by the plaintiff or at all. They have also denied that the alleged Article was defamatory or that in its natural or ordinary meaning meant what is alleged in paragraph 8, 9, 10 and 11 of the plaint. Further, the defendants have denied that the plaintiff suffered any loss and damage as alleged in the plaint.

The defendants state that in view of the plaintiff’s high profile occupation, he is prone to a greater public scrutiny and therefore, they have relied on the defence of fair comment as provided for under Section 15 of the Defamation Act as the comments relate to matters of great public importance and are of great public interest. The defendants further state that the plaintiff failed to mitigate his loss or damage by failing to exercise his right of reply or mitigate loss or damage as provided for in Section 7A and 16(1) and (A) of the Defamation Act. They have prayed for the dismissal of the plaintiff’s case.

At the hearing, the plaintiff testified as the sole witness in support of his case. The defendants did not call any witness.

The plaintiff adopted his witness statement filed in court on the 22nd May, 2014 as his evidence in chief. He also produced the list of documents filed on 22nd May, 2014 as exhibits in the case. In his statement, he has reiterated the contents of the Article and those of the plaint. In addition, he stated that in the article, the defendants criticized him because of a bill that he proposed namely “**Order of Precedence**” which bill was passed by parliament and it was assented to by the president.

It was his evidence that as a member of parliament the article portrayed him as incompetent and the region that he represents as that of Al Shabaab. He stated that his reputation was damaged to his constituents, to the international community and the article must have circulated widely in this era of the social media. He contended that the article portrayed him as an evil person and one who is frivolous.

In cross-examination, he stated that at the material time, he was the Member of Parliament for Eldas and thereafter he was re-elected in 2017 and prior to that, he was the Member of Parliament for Wajir East. That even after the publication, his constituents still had faith in him and they re-elected him. He stated that, though as a Member of Parliament he is subject to public scrutiny the same should be done within the law. He said the article was personal and not in public interest as security is a National Government issue but as a representative of the people, he is one of the actors in it. He further stated that the article was done by malice as it insulted him as the originator of the bill and the cartoon made a generalized assumption about the constituency that he represents and it does not reflect the correct position and therefore, it was not true.

As earlier stated the defendants did not call any witness to support their case.

At the end of the hearing, parties filed written submissions which this court has considered together with the pleadings, the evidence on record and the authorities cited. From the pleadings, the court identifies the following issues for determination;

1. *Whether the publication is defamatory as alleged*
2. *Whether the publication was done by the defendants*
3. *Whether the publication was false and malicious*
4. *Whether the defence of fair comment is available to the defendants*
5. *Whether the plaintiff suffered any loss or damages as a result of the publication and if so, whether he is entitled to the reliefs sought.*
6. *Who is to bear the costs of the suit*

The plaintiff's cause of action is based on the tort of defamation. In the 7th Edition of Salmond on the Law of Torts, Defamation is defined as follows;

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

In the famous case of Scott vs. Sampson (1882) QBD 491 at page 503 Dare J., defined the word as follows;

“A false statement about a man to his discredit”

Whereas in the well known work of Winfield he gives the following definition;-

“It is the publication of a statement which tends to lower a person in the estimation of the right thinking members of the society generally or which tends to make them shy away or avoid that person”.

On the other hand, Halsbury's law of England Vol. 28, 4th Edition at paragraph 10 page 7, the following definition is given;

"A defamatory statement which tends to lower a person in the estimation of right thinking members of the society or cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business."

Another authority often cited as definitive on defamation is that of Thomas vs. CBC (1981) 4WWR (29) as follows;

"The gist of the torts of Libel and Slander is the publication of matter (usually words) conveying a defamatory imputation. A defamatory imputation is one to a man's discredit or which tends to lower him in the estimation of others or to expose him to hatred, contempt or ridicule or to injure his reputation in his office, trade or profession or to injure his financial credit. The standard opinion is that of right thinking person's generally. To be defamatory, an imputation need not have actual effect on a person's reputation. The law looks into its tendency. A true imputation may still be defamatory although its truth may be a defence to an action brought on it. Conveying untruth alone does not render an imputation defamatory."

The test for whether a statement is defamatory is an objective one. It is not dependant on the intention of the publisher but on what a reasonable person reading the statement would perceive. In the Halsbury's Laws of England 4th Edition, the author opines thus;

"In deciding whether or not a statement is defamatory, the court must consider what meaning the word would convey to the ordinary man."

Having determined the meaning, the test is whether under the circumstances, in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense.

The elements of the tort of defamation are well set out in the case of J. Kudwoli vs. Eureka Educational and Teaching Consultants & 2 others Hcc. No. 126/1990 which are:

- 1. The matter of which the plaintiff complains were published by the defendant*
- 2. The publication concerned or referred to the plaintiff*
- 3. That it was defamatory in character*
- 4. That it was published maliciously;*
- 5. That in slander, subject to certain exceptions, the plaintiff has suffered special damages.*

The same principles were repeated in the case of Wycliffe A. Swanya vs. Toyota East Africa Limited & Francis Massai Nairobi CA. No. 70 of 2008.

Applying the above principles to our case, it is not in dispute that the article was published by the defendant and that it refers to the plaintiff. Infact, it mentions the plaintiff by name.

The defendants have also not denied having published the article but they have raised a defence of fair comment which I will revisit later in this judgment.

On whether the article was defamatory, the plaintiff in his submissions stated that the words used in their ordinary and natural meaning and by innuendo meant that the plaintiff was anti-development, frivolous, intolerant, idler and one who does not care for development of his people, among other imputations.

It was further submitted that the issues raised in the article being that of poor school performance, water scarcity and insecurity in Eldas Constituency were put in bad taste. That reading the article the defendants meant that the plaintiff was not performing his

roles and responsibilities as an elected Member of Parliament of Eldas Constituency but was rather taking up other irrelevant duties.

The plaintiff contended that the mandate of members of parliament is to represent, legislate and oversight and as representatives of the people, they have an obligation to voice the interests of their constituencies. Further, that the work of a Member of Parliament is to debate and ensure just laws are implemented and to oversee the executive and judiciary arms of government.

Counsel referred to the role of parliament as outlined in Article 94 of the Constitution of Kenya 2010.

It was further submitted that the defendants' publication was false for the reason that security is a National Government function and it's not dealt with at the constituency level and therefore, what the defendants reported was unverified information and no due diligence was done on their part to find out the roles and duties accorded to the plaintiff as a member of parliament.

The defendants on their part submitted that the words as published did not contain any defamatory meaning as alleged by the plaintiff or any words capable of bearing any defamatory meaning by innuendo. They argued that, the publication contained the facts of the occurrences of Eldas District in Wajir and the North Eastern Region at large, which were already in the public domain which facts were not contested by the plaintiff. According to them, a statement can only be termed as defamatory where it causes or exposes a person to public hatred, ridicule or mockery and injures the reputation of that person. Reliance was made on the case of SMW vs. ZWM (2015) eKLR on the definition of a defamatory statement.

The defendants also contended that no evidence was tendered by an independent witness to testify on the character and reputation of the plaintiff before and after the publication to show that he was shunned, avoided, disparaged, insulted or ridiculed. Reliance was made on the case of Daniel N. Ngunia vs. K.G.G.C.U. Limited (Civil appeal no. 281/1998).

On the same issue, they relied on the case of George Mukuru Muchai vs. The Standard Ltd HCCC. No. 2539/1997 where the court held inter alia;

"In my view, the most important ingredient in a defamation case is the effect of the spoken or written words in the mind of third parties about the complainant and not how he/she himself/herself feels the words portray about him/her"

The court has considered the submissions on this issue and has perused the article complained of under the heading;

"WITH THESE SILLY BILLS WHO NEEDS MP'S IN KENYA"

It is not disputed that the plaintiff was at the material time a sitting Member of Parliament (MP) of Eldas Constituency.

Article 94 of the Constitution of Kenya outlines the role of parliament;

1. The legislative authority of the Republic is derived from the people and at the national level is vested in and exercised by parliament.

In his capacity as an MP, the plaintiff brought a Bill to parliament for debate and this is the origin of the events leading to the publication of the article the subject matter of this suit. In the article, the first defendant starts by highlighting the poor performance in both KCSE and KCPE in Eldas District in Wajir, the scarcity of water, poor health care and the high level of insecurity. The article appreciates that the sorry state the area is in, is not the fault of the locals, but rather a consequence of systematic neglect and willful marginalization by successive governments in Nairobi.

The article reads in part;

"With such a horrific situation in the country, one would expect that the region's elected representatives would be working overtime to make life a little easier for their voters"

It further reads;

“One would also be wrong: Eldas MP Adan Keynan, instead of leading efforts to make life more bearable for his constituents, has some rather more frivolous concerns on his mind. He had all the time in the world to craft and take to Bunge a Bill that seeks to achieve utterly ridiculous aims.”

The plaintiff has submitted that the words in their natural and ordinary meaning, meant that he is frivolous, a person who does not care for development and a petty person, among others. I concur with that submission.

Further, as rightly submitted by the plaintiff, the defendants meant that the plaintiff is not performing his roles and responsibilities as an elected Member of Parliament of Eldas Constituency, but was rather taking up other irrelevant duties.

On the issue of security, it is common knowledge that the same is a National Government function and not one dealt with at the constituency level and especially that of Al Shabaab.

The defendants relied on the defence of fair comment and averred that the contents of the article are true and they do not refer to the plaintiff in person. As stated earlier, the defendants did not call any witness to support their case. In this regard, it is trite law that a defamatory statement is taken to be false and it is the duty of the defendant to prove such allegations are true. The court while dealing with the defence of fair comment in the case of Samuel Ndung’u Mukunya vs. Nation Media Group Limited & Another (2015) eKLR observed;

“If the words complained of contain allegations of facts the defendant must prove such allegations of facts to be true. It is not sufficient to plead that he bona fide believed them to be true. The defence of fair comment does not extend to cover misstatement of facts, however bonafide.”

On the defence of justification and fair comment Carter-Ruck On Libel and Slander 5th edition at page 54 noted the following;

“in order to succeed upon a plea of justification, the Onus lies upon the defendant to prove that the whole of the defamatory matter complained of, that is to say, the words themselves, and any reasonable inference to be drawn, from them are substantially true..... on the other hand, for the defence to be successful, it is not necessary that every “t” should be crossed and every “I” dotted; it is sufficient if the substance of the libelous statement is justified. As much must be justified as meets the sting of the charge and if anything be contained in the charge which does not add to its sting, that need not be justified.”

Further the same writer opines;

“The defence of Justification cannot succeed unless the defendant proves that the expression of opinion was based upon the facts..... if the facts upon which the comment purports to be based does not exist, the comment cannot be fair..... there are two qualifications to the general rule. In the first place where the facts commented upon are contained in a privileged document such as a parliamentary paper of a report of judicial proceedings, the defendant’s comments upon the fact set out in such reports is entitled to protection as fair comment even though the facts contained in the privileged document or referred to in the judicial proceedings, turns out to be untrue.”

Going by the above rendition and coupled by the fact that the defendants did not call any evidence to support their defence of fair comment, this court finds that the defences of justification and fair comment were not proven by the defendants.

On whether there was malice on the part of the defendants, it is trite that malice can be express or can be inferred from the language of the publication. In the persuasive case of Phinehas Nyagah. Vs. Gitobu Imanyara (2013) EKLR, Odunga J held:

“Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice..... malice may also be inferred from the relations between the parties ----- . The failure to inquire into the facts is a fact from which inference of malice may properly be drawn.”

On the other hand, malice can be assumed if what is stated in the publication is false and defamatory. See the case of Gideon Mose Onchwati vs. Kenya oil Co. Ltd & Another [Civil suit no. 140/2008]

In the case of ***Joseph Njogu Kamonge***, the court was also of the view that malice does not necessarily mean spite or ill will but there must be lack of justifiable cause to utter the words complained of. Evidence showing that the defendant knew the words complained of were false or did not care to verify can be evidence of malice.

The court has perused the article complained of, the article itself and more so the heading, were done in a sensational manner. The language used is utterly beyond or disproportionate to the facts. The defendants did not seek the plaintiff's comments or his side of the story before publishing the article. I concur with the plaintiff's submissions that the article was defamatory and in publishing the same, there was malice on the part of the defendants which can be inferred from language used and the contents of the same.

The article referred to the plaintiff and it mentions his name. Though the defendants in their defence contended that the matters raised therein were of public interest, they did not justify their comments. They used the platform to attack the reputation of the plaintiff. An ordinary man reading the article would get the impression that the plaintiff is a frivolous person, a person who does not care about development of his people, petty and an irresponsible man. This is notwithstanding that no evidence was adduced before the court to support the allegations made in the article. This court finds that the plaintiff proved his case on a balance of probability and I do find the defendants liable to him for defamation.

The defendants also raised the issue of plaintiff failure to call an independent witness. The court of appeal in the case of ***Miguna Miguna vs. The Standard Group Limited & Another (civil Appeal No. 164/2016)*** held that;

"Where the credentials of the plaintiff are not challenged, he/she need not call a character witness"

The defendants herein did not challenge the plaintiff's reputation in any way and therefore evidence of an independent witness was not necessary. This court is bound by that decision being that of a higher court.

Having made that finding, it follows that the plaintiff is entitled to damages. His reputation was negatively affected and in any event, libel is actionable per se.

As was held in the case of ***Nation Media Group Ltd & 2 others vs. Joseph Kamotho & 3 others***,

"In actions of defamation and in any actions where damages for loss of reputation are involved, the principle of restitution in integrum has necessarily or even more highly subjective element. Such actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but, in case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charges." Emphasis ours.

In awarding damages, the court has an absolute and wide discretion in assessing the damages to award. The court in the case of ***Jones Vs. Pollard*** set out some guidelines in what should guide the court in arriving at a fair and reasonable award as follows;

- a) *The objective features of the libel itself, such as its gravity, its prominence, the circulation of the medium in which it is published and any repetition.*
- b) *The effect on the plaintiff's feelings not only from the prominence itself, but from the defendants conduct thereafter both up to and including the trial itself.*
- c) *Matters tending to mitigate damages, such as the publication of the apology.*
- d) *Matters tending to reduce damages.*
- e) *Vindication of the plaintiff's reputation past and future.*

On his part, the plaintiff has urged the court to award kshs. 15 and 10 million as general and exemplary damages respectively. Numerous authorities were cited which included the case of ***Johnson Eyan Gicheru vs. Andrew Morton & Another*** wherein a sum of Kshs. 6 million was awarded, ***Kalya & Co. Advocates vs. Standard Limited (2002) eKLR*** where kshs. 9 million was awarded as

general damages and 2 million as aggravated damages while Kshs. 300,000/= was awarded as damages in lieu of an apology, and *Nation Media Group Ltd & 2 Others vs. John Joseph Kamotho & 3 others (2010) eKLR* wherein kshs. 6 million was awarded as general damages and kshs. 1 million as aggravated damages.

On their part, the defendants challenged the awards made in the decisions cited by the plaintiff but did not submit on what they thought was a reasonable award.

The court has considered the cases cited by the plaintiff vis-à-vis the guiding principles as enumerated in the case of *Polland (supra)*. I have also considered the plaintiff's position in life and the extent of circulation of the publication. I find that kshs. 4 million is a reasonable amount and especially being guided by the case of *John Joseph Kamotho (Supra)*, who was a Member of Parliament at the time he filed his case in court. The plaintiff did not prove his claim on aggravated damages as no evidence was lead to support the aggravating factors, if any.

The plaintiff is awarded the costs of the suit. General damages to earn interest from the date of this judgment.

It is so ordered.

Dated, signed and delivered at NAIROBI this 20th day of February, 2020.

L. NJUGUNA

JUDGE

In the presence of:

..... for the Plaintiff/Applicant

..... for the Defendant/Respondent



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