



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1227 OF 1976

GODWIN WANJUKI WACHIRA.....PLAINTIFF

VERSUS

P.G.OKOTH & 4 OTHERS.....DEFENDANTS

JUDGMENT

This is a libel action instituted by the plaintiff against the four defendants: namely, Mr P G Okoth, the Editor of the second defendant (which is a magazine); the first defendant was at the material time, an employee of the second and third defendants; the second defendant was alleged to be a newspaper duly registered at the GPO (will hereinafter refer to it as The Trust); the third defendant was alleged to be a limited liability company which was the employer of the first defendant as well as being the proprietor of The Trust (I will hereinafter refer to the third defendant as The Drum) and the fourth defendant was also alleged to be a limited liability company and at the material time the printers and distributors of The Trust. This is, of course, denied.

The plaintiff alleged that the first defendant, being the editor of The Trust as well as the employee of The Trust and The Drum, maliciously and without justifiable cause published of the plaintiff and caused to be circulated in the May issue of The Trust a photograph of the plaintiff which carried a libellous and malicious caption concerning the plaintiff as well as the alleged libellous and malicious story entitled "How Kenya Tackles the Car Smugglers" (I will be dealing with the publication complained of later in this judgment); that The Trust published the photograph and the article complained of; that The Drum, being the employers of the first defendant and the proprietors of The Drum, jointly and severally published the alleged libels; and that the fourth defendant printed and circulated in the May 1975 issue of The Trust the libel, the photograph, captions and the article defaming the plaintiff.

The last page of the May 1975 issue of The Trust lists the names of the publishers of The Trust in the words: "by the proprietors, Drum Publications (EA) Ltd; printed by Kenya Litho Ltd. Distributed in Kenya by Nation Newspapers Ltd" all of Nairobi, Kenya. There is a long list of distributors all over the world; but I consider it unnecessary to mention these except where distribution abroad will become necessary. The result is that the second, third and fourth defendants appear to be connected and involved in this matter by reason that they are alleged to be the proprietors, publishers and distributors, respectively, of The Trust.

The first, second and third defendants admit paragraphs 1,2,3,4,5,8,10,11 and 17 of the plaint, while the fourth defendant admits paragraph 16 of the plaint. The fourth defendant traversed every other allegation and thereby joined issue with plaintiff who has to prove the allegations.

The defendants raise the plea that the plaintiff's claim is time-barred because the publication complained of was published on 14th April 1975, and that the cause of the action did not accrue within twelve months before the commencement of the action. I will be dealing with this issue later.

The first, second and third defendants admit paragraphs 6 and 7 of the plaint in so far as publication of the alleged libellous photograph, captions and the article complained of are concerned; but deny that the publication was malicious or entirely without justifiable cause.

Without prejudice to plea of limitation, the first, second and third defendants admit the description of the parties, the publication of the alleged libellous photograph, captions and the article but deny that the alleged publication was malicious or without justifiable cause. That in the alternative, they say that if the publication was defamatory it was made without actual malice and without gross negligence and further say that they offered to withdraw the alleged libels and to publish a full apology for the libel in any newspaper or periodical selected by the plaintiff. The alleged damages are also denied by these defendants, averring that if any libel is proved to have been published and that without prejudice to the plea of limitation, then the mitigating factors should be taken into account in assessing the damages.

The fourth defendant denied each and every allegation contained in the plaint and further denied being the printer and distributor of The Trust. The fourth defendant stated that the May 1975 issue was printed by Kenya Litho Ltd and that the plaintiff was aware of this before filing the suit. The fourth defendant pleads limitation as well.

Mr Sampson, who appeared for the fourth defendant, did not wish the issue of who actually printed the May 1975 issue of The Trust to be pursued but instead he appeared to suggest that, should the fourth defendant be found liable for printing, arrangements exist between the fourth defendant and Kenya Litho that the latter would indemnify the former. I will therefore treat the fourth defendant as the printer and publisher for the purpose of this suit. Mr Sampson does not insist otherwise due to the special relationship which existed between the fourth defendant and Kenya Litho.

[His Lordship then made reference to the issue of The Trust in which the alleged libel was published and read out the article complained of. He further explained that in June 1974 the plaintiff had been convicted of dishonest handling of a stolen motor vehicle. His advocate, in a plea of mitigation, said that the plaintiff was "repentant" and would not do it again. He was sentenced to imprisonment for seven years with hard labour. On appeal his conviction was quashed and the sentence set aside. His Lordship then continued.]

In the intervening period between the plaintiff's conviction and sentence and the time when his appeal was finally determined setting him at liberty, the printing and the publication of the alleged libellous photograph, captions and the article appeared in the May 1975 issue of The Trust. The defendants contend that, in view of the fact that the plaintiff's advocate said on plaintiff's behalf that the plaintiff was "repentant", the defendants did not anticipate an appeal against such a conviction.

I consider it essential to dispose this contention at this early stage. The plaintiff was convicted on 16th December 1974. He had a right of appeal within fourteen days. He did in fact appeal and his appeal was subsequently admitted for hearing. This was before the May 1975 issue was printed. If the defendants wished to check whether the plaintiff had appealed against his conviction and sentence they could have discovered the true position. The plea that they had no reason to anticipate an appeal against the conviction will not avail them of a reasonable defence. I may go further and hold that failure to check the court records to ascertain the true position may very well be negligence on their part. In my opinion believing that a person may not exercise his legal right is no justification for publishing defamatory

statements on the mistaken belief that that person may not exercise his legal right. I find no merit in the defendants' contention in this respect.

[His Lordship then looked at the total and cumulative effect of the photograph, caption and article and concluded that they constituted a libel on the plaintiff. He then continued.]

The defendants did not seriously contest that the statement complained of was libellous in fact. I find as a matter of fact that the statement was untrue in the sense that it was a complete distortion of the facts of the offence with which the plaintiff had been convicted. The libels are further aggravated by the prominent position of the statement with the admitted large photograph of the plaintiff. It is an undoubted fact that the libellous statement refers to the plaintiff and to him alone.

Before I deal with the issue of damages, I will next deal with the plea of limitation raised by the defendants.

Mr Jasmer Singh Grawal, Managing Director of The Drum, gave evidence that The Trust is a sister magazine to The Drum and that he was in charge of publication of The Trust. He said that he was familiar with the May 1975 issue of The Trust; that the issue was put on sale on 14th April 1975 and that the next issue (ie for June) went on sale on 14th May 1975; that as soon as the June issue went on sale, the May 1975 issue was withdrawn (on 14th May 1975); and that the unsold issues were then returned, defaced and sold as waste while the sold ones remained with those who had bought them. In cross-examination by Mr Khanna, he admitted that the unsold issues were sold as waste paper but he did not know what happened to them thereafter. He said that the total sales for the May 1975 issue of The Trust were 38,757 copies in Kenya, Tanzania and Zambia and a few copies were sent to their London office.

Armed with this evidence the defendants advanced the plea of limitation, averring that, since the May 1975 issue of The Trust was put on sale on 14th April 1975 and withdrawn on 14th May 1975, the plaintiff's claim is time-barred by virtue of the provisions of section 4(2) of the Limitation of Actions Act and section 20 of the Defamation Act in that the plaintiff's action did not accrue twelve months before the commencement of his action. The plaintiff instituted this action on 27th May 1976.

The force of the defendants' plea is that, since the May 1975 issue of The Trust went out on sale on 14th April 1975 time started to run against the plaintiff from that date and that twelve months within which the plaintiff should have brought this suit ended on 14th April 1976, with the result that when the plaintiff instituted this suit he was already out of time and his action was time-barred.

According to the evidence of Mr Grawal, the May 1975 issue of The Trust was duly printed and sold to third parties in April/May 1975. It is a magazine which was intended for sale and in fact about 38,757 copies were subsequently sold in addition to those sold as waste paper. The defendants do not therefore deny that the statement complained of was published to a third party or parties. Indeed Mr Njumbu Njururi gave evidence that he read the May 1975 issue of The Trust and that he was shocked to learn that the plaintiff was a car smuggler; and that he immediately started shunning the plaintiff; that he subsequently met the first defendant who confirmed to him that what he had written of the plaintiff was true and that the first defendant would have written more if he had a space in the issue. Mr Ngumbu did not say when he read the issue of The Trust but it is clear that when he met the first defendant many times in March 1976 in front of the IPS Building he had already read the issue. If the issue had been withdrawn on 14th May 1975, then Mr Ngumbu could not have read it first before he met the first defendant in March 1976. It is reasonable to conclude that some issues were still in circulation even as late as March 1976 when Mr Ngumbu must have read it. In any case, if publication was challenged on the ground that it was published to unspecified members of the public generally, this challenge would not

stand in view of the unchallenged evidence of Mr Ngumbu to the effect that he read the issue and was shocked and that he challenged the first defendant in March 1976.

The only issue is when the May 1975 issue of The Trust was published. I am of the opinion that the word "publish" should be construed in the technical and legal sense of publication of the libel, as opposed to the printing of the issue. The issue might have been printed in April 1975 but kept and sold as the May 1975 issue.

The May 1975 issue of The Trust is printed "May 1975" without the actual date on which it was put on sale. It must be regarded as the May 1975 issue and any publication to a third party from 1st to 31st May 1975 constituted a libel. The defendants admitted that some issues were sold in May 1975 and Mr Ngumbu testified that he read the article and confronted the first defendant in March 1976. It cannot be said, therefore, that the defendants did not publish the libel to a third party in May 1975 and, in particular, to Mr Ngumbu subsequently. There was therefore the admission of publication in May 1975. There was also proof that Mr Ngumbu read the article about March 1976.

As I have said, the issue was printed "May 1975" with the result that the defendants are not allowed to contradict the date by alleging that printing was done earlier or that the issue was out on an earlier date. The issue might have been printed and kept for sale at the defendants' convenience; but for the purpose of this action it is May 1975. Publication thereof to third parties and in particular to Mr Ngumbu cannot be regarded to be earlier than May 1975, or subsequently. The result is that the publication of the libel was on a date in May 1975 and subsequently, so I hold.

I am mindful that proof of a date for publication of a libel is relevant for the purpose of limitation period. In this case since publication is admitted and since the issue is dated May 1975, the plaintiff is entitled to choose the date most favourable to him. In this regard, 31st May, 1975, the last day when the issue was to expire, may be taken as the date of the publication for the purpose of limitation period. The defendants admitted that the issue remained in circulation and may still be in circulation notwithstanding the withdrawal of the unsold issues which were subsequently sold as waste paper. The withdrawal of the unsold issues does not affect the publication of the defamatory statement.

I am also mindful that the onus is on the plaintiff to prove that action accrued within the limitation period. There can never be any doubt about this; and there are authorities to support this finding. If one is needed, *Wilby v Henman* [1834] 2 Cr & M 658 will provide the authority. See also Gatley: *Libel and Slander* (6th Edn) page 382, paragraphs 831 and 833.

The admitted evidence is there in the nature of the printed date "May 1975" on the issue of The Trust. The publication of the defamatory statement must be regarded as being from 1st to 31st May 1975. The nature of the magazine must be taken into account as the issue was meant for sale in May 1975 and subsequently until the following issue replaced it. Even with the replacement the regular readers would wish to read the May 1975 issue subsequently. Mr Ngumbu did. The plaintiff had discharged the onus cast upon him on the required standard. I do not consider that where the issue is mentioned "May 1975" then the plaintiff should be fixed to a date. Any date in May subsequent thereto will suffice. Mr Ngumbu said he read the article and confronted the author in March 1976. This may be regarded as proof of publication of the defamatory matter. I will go further and hold that the last day in May 1975 should be relevant as the only last day favourable to the plaintiff. He sued for only one publication and the last day is relevant unless it can be rebutted that no such publication was ever made on the last day in May 1975. I was not convinced by Mr Grawal when he said in evidence that no sales of the issue were made on 31st May 1975. Mr Ngumbu read the article subsequently. I do not agree that Mr Ngumbu read the article in April 1975 and almost a year later (ie in March 1976) confronted the

author. He read the article on a date just before March 1976. In these circumstances, the statutory plea of limitation will not avail the defendants as a defence. [His lordship having described the effects of the arrest, conviction, appeal and publication of the article on the plaintiff's career, continued:] From the above facts, it is clear that the plaintiff was a successful journalist of repute and that his reputation before his arrest was above average. He was held in high estimation by members of his profession, as well as members of the public generally. Also, he enjoyed a comfortable income from his profession and businesses.

There can never be any doubt that this high reputation was severely shaken and destroyed by his arrest, trial and conviction of a serious offence of dishonest handling of a motor vehicle. Whether this destruction of his reputation by a criminal prosecution was completely restored by his subsequent acquittal on appeal remains to be seen. To a certain extent his reputation was restored by the acquittal. If the publication complained of confined itself to the facts of the charge with which the plaintiff was convicted then there would be a very strong case of mitigation on damages. Unfortunately this is not the case here. The pill of the publication complained of lies in the fact that it branded and portrayed the plaintiff as a car smuggler and mastermind of the car-smuggling racket. It goes further to portray the plaintiff as a dishonest and untrustworthy person, not fit to be held as a reputable person in his profession as a journalist. To that extent, his acquittal by the criminal appellate court of a charge of dishonest handling does not restore his reputation. The plaintiff remains a car smuggler and a mastermind of the racket.

The plaintiff's conviction also affected his profession and businesses. *The Evening News* closed with his arrest; with the result that his income from that source and from other sources ceased except from his farm. Perhaps his acquittal might have revived his reputation and thereby rendered him acceptable to his professional associates as well as being able to generate finances from financiers to revive his *Evening News* paper. Perhaps he would have gone back to his full pre-arrest occupations. I will bear in mind the effect of his arrest and conviction on his employment and business which closed as at that date. Unfortunately, this is not what happened. He says that due to the libellous publication complained of whose facts are untrue, malicious and unconnected with the facts of the offence with which he was convicted, he has been unable to gain his grounds; that he has been shunned and avoided by his friends and distrusted by influential personalities such as financiers. That he has failed to secure employment even from the Tea Development Authority where he was shortlisted for interview and possible employment. No wonder that anyone branded as a mastermind of car smugglers should not find it easy to obtain employment in a public undertaking or any business for that matter. There is no doubt that the plaintiff's reputation suffered considerably as a result of his arrest, prosecution and conviction of dishonest handling. Equally true is the fact that his credibility was tarnished by the conviction; and that his competence and ability as a journalist was doubted. However, these are matters which must be taken into account in assessing damages. They are not matters to justify the defendants in publishing an untrue story and are distorted from that which the judicial proceedings published. There is no plea of justification raised in the case.

The defendants say that they were not actuated by actual malice or gross negligence. I have already held that the defendants were negligent in that they failed to check the true position before publishing the libel complained of. They also published the untrue story without checking the correct facts and version. The whole publication is a complete distortion of the true story. The dates of publication are relevant in that the defendants must be deemed to have acted recklessly in publishing the distorted story.

I am not prepared to hold that the first defendant caused the publication complained of disbelieving in its truth. He may have believed that the defamatory statement was true. He is also a journalist and was prepared to put more if he had a space in his paper. More of what" From the tone of the whole

publication, it is clear what the first defendant was telling of the plaintiff. He appears to spill out a dislike and contempt. He was reckless in his writing the article. The first defendant cannot be regarded as having expressed his comment or opinion fairly in the matter. The tone of the publication is not that of a honest critic. I hold that the author published the defamatory statement complained of without belief that it was just or true or with reckless indifference as to whether it was just or unjust. He was actuated by malice against the plaintiff. The story was not fair. It was recklessly published. I would go further and hold that failure on the part of the first defendant to inquire into the true facts and true position from the court records when he should have found that the plaintiff had appealed against his conviction is a fact from which inference of malice may properly be drawn. I infer malice in these circumstances.

Having found that the publication complained of was libellous and that the authors were actuated by malice express or implied, I will now deal with the issue of damages. The defendants contended that the plaintiff's reputation was destroyed considerably by his arrest and conviction of a charge whose facts were not similar or substantially similar to those published in the libel complained of. They also say that he was not creditworthy as he claimed. I have evaluated the evidence in these respects.

The only mitigating factor which now needs consideration is that of offer of amends. The defendants say that they offered to publish an apology in any newspaper or periodical of the plaintiff's choice. I note that the suggested apology was not published in any newspaper or periodical. If the defendants did so, then a strong mitigating factor in damages would be relevant. I do not consider that the plaintiff's refusal to agree with the suggested apology should have stopped the defendants from publishing the apology. This course of action on their part would have at least shown their *bona fides*. However, the fact that the plaintiff refused the apology will be borne in mind.

It is also a fact that the offer of amends was conveyed to the plaintiff after this suit was filed. The plaintiff had a choice to accept the offer of amends or prosecute his case. He chose to prosecute his case. I am of the opinion that the offer of amends will afford the defendants a small measure of mitigation in damages and I will consider it in the totality of the award I will eventually arrive at.

There was no evidence that the plaintiff was of bad character or reputation before his arrest and conviction. From the evidence, his record appears to be unblemished and that of an upright person. The defendants did not shake him in his evidence as to his character and reputation before his arrest. He may have had some financial problems, but these did not make him to be a man of bad character or reputation.

It is common ground that his reputation and loss of his employment and income ceased with his arrest. It is also common ground that his businesses suffered. He also lost his friends who shun or avoid him even to this day. He cannot transact his business with his former associates. I will take these facts into account in assessing damages.

On the other hand of scale, the plaintiff was acquitted of his conviction on appeal. This fact restored his reputation as far as the charge of which he had been convicted was concerned. Then there is the publication complained of, the facts of which are quite different from the true facts of the charge of which he was acquitted. This publication aggravated the situation with the result that the plaintiff's acquittal, which exonerated and restored his reputation, was negated by the libellous publication complained of. The plaintiff appears to me to suffer condemnation in two ways, namely his conviction (for which he was exonerated on appeal) and the libellous publication complained of (which remains). The offer of amends did not help since it was never published to correct or at least to exonerate the plaintiff in his reputable public image.

Then there is the question of damages to his profession and businesses. The libellous publication complained of left him stripped naked of his profession. His businesses suffered considerably. He will be lucky to recover his loses even with an award of exemplary damages. His loss and damage are incapable of quantification.

I am of the opinion that the mere fact that a person has been convicted of an offence is no justification for any person to injure the convict beyond the facts of the charge with which he was convicted, like in this case. Here is a person who was convicted rightly or wrongly of one offence and the defendants recklessly portrayed him as a habitual car smuggler and mastermind of car smugglers; the facts which were not even suggested in the charge. Without the element of judicial proceedings which led to the plaintiff's convictions I would hold that the libellous publication is the worst type I have come across. It is a grave type of libel which the Court would view with grave concern in the interest of justice.

I was referred to recent decisions to indicate the levels of damages the Court have awarded in libel cases. In *East African Standard v Gitau* [1970] EA 678 the appellant published in its newspaper the photograph of a motor car, which had been in an accident and which was unidentifiable, over an incorrect statement that the driver was nowhere to be seen, no-one had reported the accident and no-one had been admitted to hospital; the respondent sued for libel. It was held that the publication of the libel was only to a small number of persons and that the extent of the defamation was very slight. An award of Shs 8000 was found to be ample to cover the injury to the respondent's reputation and feelings.

In the instant case, the publication of the libel was wide and to many readers. The plaintiff suffered financial loss in his business. He is not able to obtain employment with ease. He was defamed in his profession, business and reputation. I am of the opinion that the facts of the present case are such that the extent of the libel was grave.

In *Onama v Uganda Argus Ltd* [1969] EA 92 damages for libel were assessed at Shs 50,000. In the recent case of *EA Newspapers (Nation Series) Ltd v Opondo* [1974] EA 32, where it was found that the defamation was mild, damages of Shs 10,000 were awarded. There was no malice to aggravate damages.

In the present case, I found that there was malice on the part of the first defendant, that the defamation complained of injured the plaintiff in his profession and business, that the publication had a wide circulation and that the defendants did not offer the apology before this action was filed.

I take into account the value of money today and the fact that the defamation complained of will remain indelible in the minds of the plaintiff's associates in his profession as a journalist as well as in the minds of right-thinking members of the community who held the plaintiff in high reputation.

I am of the opinion that an award of Shs 100,000 will be ample award and I assess damages at that figure. This is a case in which I am of the opinion that aggravated damages should be awarded.

Judgment against the defendants jointly and severally with costs.

Dated and Delivered at Nairobi this 16th day of February 1977.

M.G.MULI

JUDGE



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