

held at the material times or any office in society. The offending article is said to have been circulated to the media, the mayor Webuye Municipal Council, the District Commissioner, Bungoma and other Public Officers within the Ministry of Local Government. He further contended that the defendants circulated the said article with full knowledge that the contents thereof were untrue.

As a result of the said article, he claims to have suffered mental injury. He had asked the defendants to tender an apology but they had refused to do so hence his filing of this suit.

In their original defence (which was never amended after the amendment of the plaint) the defendants stated that the plaint did not disclose any cause of action. They further stated that they were acting according to the wishes of other members of the union. They further stated that their actions were fair, justified and privileged in the circumstances. They also denied that the said words were defamatory in nature and therefore denied that the plaintiff is entitled to any damages whatsoever. The defendants were subsequently served with a notice to admit documents – a list of which was sent to their counsel on 24.10.2005. There was no response to that notice.

Ordinarily therefore, it means that they indeed admitted the existence and correctness of the said documents. Among the said documents was the letter dated 11.12.1991 which forms the basis of this suit. In spite of being served with the amended plaint, the defendants did not amend their defence, may be there was nothing to amend. When served with a notice to admit the listed document, they did not respond either. In spite of being served with hearing dates on several occasions, the defendants' counsel never appeared on the hearing dates. Indeed on 5.4.2006 when the matter came up for hearing, Mr. Samba appeared on behalf of counsel on record for the defendants and informed the court that he had been asked to conduct the defence on behalf of Mr. Fwaya. He asked for more time to do discovery which time was allowed. The matter was adjourned to 28/11/06 in his presence, when he turned up in court on 28/11/06, he changed the story and told the court that he had no instructions to take over the matter and so he was unable to proceed. The defendants were not in court on that day and the court ordered that the matter proceeds ex-parte which it did. The plaintiff testified and called no witnesses. He reiterated the contents of his plaint and produced many documents in support of his claim. After the close of the case, his counsel filed a written submission and attached several authorities. He ended his submission by urging the court to award the plaintiff Ksh.10,000,000/= as general damages and a further Ksh.2 million as aggravated/exemplary damages because the defendants had refused to offer any apology after being asked to do so.

I have considered the evidence of the plaintiff including his exhibits and counsel's submission. By and large, this evidence was not controverted by the defendants. They did not testify, nor did they file any submission in support of their defence. They did not deny that they published the said letter. Although they tacitly seemed to offer a defence of justification or fair comment in their defence, they did not testify in court so that they could explain why they claimed that the contents of the document were not untrue – or that they were justified. The court will therefore proceed on the basis that the document in question was not denied by the defendants. I therefore make a finding that they did indeed author and publish the words in question. That leaves me with only 2 other issues for determination namely:-

- 1) *Whether the said words were defamatory;*
- 2) *Whether the publication was privileged and/or justified;*

On the first issue as to whether the words were defamatory or not, if indeed the said words were untrue, then without a doubt, the same would amount to defamation. I say so because they imported dishonesty, incapability, fraud and also unethical conduct on the part of the plaintiff who was a public

officer. These words in their natural meaning are definitely defamatory. In absence of any explanation to the contrary by the defendants, my finding is that the said article was indeed defamatory to the person. On issue no.2, again in absence of evidence of justification or fair comment from the defendants, the court has no basis whatsoever of finding that the comments were justified and/or truthful. Accordingly, I find that the publication was neither justified nor truthful or privileged.

That then brings me to the last issue of the assessment of the quantum of damages to be paid to the plaintiff. In my view, most of the authorities cited by counsel for the plaintiff are only persuasive. Some may by now have been reduced by the Court of Appeal. They do not therefore assist me much in this judgment. I will nonetheless consider the Court of appeal decision in JOHNSON EVAN GICHERU -V- ANDREW MORTON and MICHAEL O'MARA BOOKS LIMITED CIVIL APPEAL NO.314/2000 where the Court of appeal gave a composite award of Ksh.6,000,000/= to the appellants.

In an action of libel, the trial court in assessing damages is entitled to look at the whole conduct of the defendant from the time the libel was published down to the time the award is given. In this case, although as will be seen in the record the defendants failed to come to court or file a notice of non-admission etc, they do not appear to have been actuated by any malice at all. Indeed in some of the court sessions, the defendants did appear but they were failed by their counsel. I also note that although they authored the said publication, they did so in their capacity as officials of the 'KLGWU' Webuye Chapter and not in their private capacities.

It was at a time when even the other workers had staged a strike showing that indeed they were as workers disenchanted by the plaintiff's manner of working. The defendants had no expectations of any monetary gain in their publication. They did not actually gain anything from this publication. In my considered view also, they had no capacity on their own to publish an apology unless the people they represented mandated them to do so. My view therefore is that an award for aggravated/exemplary damages cannot lie in these circumstances. That prayer for exemplary/aggravated damages is therefore dismissed.

In considering the general damages for defamation of character, I will quote with approval Windyer's comment in UREN -VS- JOHN FAIRFAX & SONS PTY LTD 117, C.L.R. 115, 150 where he said:-

"It seems to me that, properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways – as a vindication of the plaintiff to the public and as a consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money."

The wrong done to the plaintiff herein cannot be quantified in terms on money. In arriving at the correct amount of the solatium, it is important to look at the whole picture, what was the effect of the publication to the plaintiff's stand in society" In the employment arena, in his family life etc" It will be noted that the plaintiff was actually reinstated to his job, the publication notwithstanding. He was transferred to a more senior local authority at this request and he continued to work there until his retirement.

The said publication rather than causing him some discomfort does not appear to have had any serious repercussions on his integrity as far as his employers were concerned. Indeed, he did not suffer any monetary loss whatsoever and his dented reputation was redeemed when he was reinstated to his old job. He does not definitely deserve the amount of monetary award he is claiming.

After a careful consideration of all these circumstances, I am satisfied that an award of Ksh.500,000/= will be a fair and just award for the plaintiff. Accordingly, judgment is entered in favour of the plaintiff against the defendants jointly and/or severally for Ksh.500,000/= plus costs and interest on both at court rates. The prayers for injunction and exemplary damages are hereby disallowed. Orders accordingly.

W. KARANJA

JUDGE

DELIVERED at Kitale this 21st day of May 2008.



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