Oyugi v Law Society of Kenya & another (Civil Suit 482 of 2004)
[2023] KEHC 1301 (KLR) (Civ) (24 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1301 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 482 OF 2004

JK SERGON, J

FEBRUARY 24, 2023

BETWEEN

STEPHEN OKERO OYUGI ..... PLAINTIFF

AND

LAW SOCIETY OF KENYA ..... 1ST DEFENDANT

SANJEEV KHAGRAM ..... 2ND DEFENDANT

JUDGMENT

1. The plaintiff in the present instance lodged a suit against the 1st and 2nd defendants vide the plaint dated 12th May, 2004 and sought for the following reliefs:

    a. General, punitive and exemplary damages.

    b. Costs of the suit.

    c. Interest.

2. The plaintiff pleaded in the plaint that sometime on or about the 18th day of December, 2002 he applied for a practicing certificate for the year 2003 and issued cheque No. 00300 for the sum of Kshs.9,330/= to the 1st defendant and that on or about the 30th day of January, 2004 he again applied for a practicing certificate for the year 2004

3. The plaintiff pleaded in the plaint that later on or about 17th March, 2004 the 1st defendant maliciously and without justifiable cause published a letter addressed to the 2nd defendant, bearing the following defamatory content relating to the plaintiff:

> " ...the above advocate had a practicing certificate in 2002 but did not take out one in 2003. As at 4th March, 2004 he has not taken out one for this year..."

4. It is pleaded in the plaint that the aforesaid statement could in its natural and ordinary meaning, be taken to infer that the plaintiff is; *inter alia*; unfit to practice law and guilty of professional misconduct, as well as being a person of questionable character.

5. The plaintiff pleaded in the plaint that the impugned statement was subsequently circulated by the 2nd defendant to various advocates and was used in a court matter, namely High Court Miscellaneous Application No. 27 of 2004 wherein the 2nd defendant on 10th May, 2004 flashed the written statement in open court in the presence of advocates and litigants, including the plaintiff's clients.

6. The plaintiff also pleaded in the plaint that as a result of the aforesaid defamatory statement, his reputation was brought to question and that he suffered ridicule and humiliation in the eyes of the public.

7. Upon being served with summons, the 2nd defendant entered appearance and put in his statement of defence dated 22nd June, 2004 to deny the assertions made against him in the plaintiff' claim.

8. In the statement of defence, the 2nd defendant while admitting to disclosing the contents of the impugned publication, denies that the same was actuated by malice and/or is defamatory of the plaintiff, stating instead that the words contained in the impugned publication were disclosed in the course of judicial proceedings and were further disclosed to the 2nd defendant's firm's client pursuant to the professional duty of disclosure.

9. Upon the request of the plaintiff, an interlocutory judgment was entered against the 1st defendant on 26th April, 2005 for failing to file its statement of defence within the stipulated timelines or at all.

10. At the hearing, the plaintiff testified and called one (1) additional witnesses, while the 2nd defendant gave evidence.

11. In his chief testimony, the plaintiff, who is an Advocate of the High Court of Kenya by profession, proceeded to adopt his executed witness statement as evidence and to produce his bundle of documents as P. Exh 1-9.

12. The plaintiff testified that the 1st defendant published the defamatory letter dated 17th March, 2004 claiming that the plaintiff had not taken out a practicing certificate for the years pleaded in the plaint and that the 2nd defendant made a similar pronouncement in open court and flashed the aforesaid letter, and yet the plaintiff had a valid practicing certificate.

13. The plaintiff further testified that on 23rd June, 2004 the 2nd defendant did not attend court for the matter on which he was on the opposing side but that he sent one advocate Allen Gichuhi to represent him, and that the said advocate made similar defamatory comments against the plaintiff, for which he later apologized.

14. It is the testimony by the plaintiff that as a result of the defamatory publication followed by the statements made by and on behalf of the 2nd defendant, he suffered embarrassment and injury to his reputation, despite having practiced law for 12 years at the time.

15. In cross-examination, it is the testimony by the plaintiff that he is a Senior Advocate, having been admitted to the bar in the year 1992 and that he was issued with a practicing certificate for the year 2004 but not for the year 2003 despite having made the requisite payments.

16. The plaintiff went on to testify that the defamatory letter was later filed in court, going by the list and bundle of documents filed by the 2nd defendant.

17. It is the evidence by the plaintiff that the defamatory letter was flashed in court on 10th May, 2004 by the 2nd defendant while appearing on behalf of the objector in High Court Miscellaneous Application No. 27 of 2004.

18. In re-examination, the plaintiff stated that the defamatory letter was specifically addressed to the 2nd defendant personally.

19. Daniel Karuru Mwaura who was PW2 testified that he too is an Advocate of the High Court of Kenya and that he and the plaintiff have known each other since the year 1995. He then proceeded to adopt his signed witness statement as his evidence-in-chief.

20. In cross-examination, the witness stated that he was present in court during the time the defamatory letter was flashed and that this caused him to doubt the status of the plaintiff, until the plaintiff confirmed that he was eligible to practice law for that year by showing him a valid practicing certificate.

21. During re-examination, the witness testified that it is always prudent for an advocate to seek clarification from the other advocate on matters on practice status and that the 2nd defendant ought to have clarified the correct position with the plaintiff. This marked the close of the plaintiff's case.

22. The 2nd defendant on his part adopted his executed witness statement as evidence and also produced his list and bundle of documents as defence exhibits.

23. He then testified that he was admitted to the bar in the year 1997 and is therefore an Advocate of the High Court of Kenya.

24. The 2nd defendant testified that as at 1st January, 2004 the plaintiff had not made payments towards the renewal of his practicing certificate and that he only later made such payments on 30th January, 2004.

25. During cross-examination, the 2nd defendant testified that he wrote to the 1st defendant following an action by the plaintiff of executing a decree despite the existence of an order for a stay of execution and that he indicated to the court that the plaintiff did not have a valid practicing certificate, following which the court instructed him to attach the letter from the 1st defendant.

26. The 2nd defendant further testified that he wrote to the 1st defendant upon the instructions of his client who was the objector to the material proceedings before the court in order to inquire about the status of the plaintiff.

27. It is the evidence by the 2nd defendant that he later forwarded a copy of the impugned letter to his client.

28. It is also the evidence by the 2nd defendant that he did not deem it necessary to tender any apology to the plaintiff since he did not act maliciously.

29. In re-examination, the 2nd defendant stated that the 1st defendant confirmed that the plaintiff did not have a practicing certificate in the year 2003 and that he did not doubt the veracity of the impugned letter.

30. Upon close of the hearing, the parties were directed to put in written submissions.

31. The plaintiff by way of his submissions dated 15th December, 2022 contends that in order for his claim for defamation to succeed, he would be required to satisfy the following ingredients listed by the court in the case of *John Ward v Standard Limited*, HCCC 1062 of 2005 which was quoted in the case of *Selina Patani & Anor v Dhiranji V Patani* [2019]eKLR:

> " ...The ingredients of defamation are
>
> a) The statement must be defamatory.
>
> b) The Statement must refer to the Plaintiff.
>
> c) The statement must be published by the Defendant.
>
> d) The statement must be false."

32. Concerning whether the impugned letter written by the 1st defendant and statements made by the 2nd defendant resulting therefrom are defamatory, the plaintiff sought to define the term "defamation" by borrowing from the authority of *SMW v ZWM* [2015] eKLR where the court held that:

> " ...a statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of the right thinking members of the society generally or if it exposes him or her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided."

33. According to the plaintiff, the published letter and statements are defamatory since they portray him in the manner pleaded in the plaint and mentioned hereinabove.

34. The plaintiff also submits that there is no question that the impugned publication makes reference to him and that it was published by the 1st defendant; whom interlocutory judgment had already been entered against; and the 2nd defendant; who made utterances in court by referring to the impugned letter and further forwarded it to third persons, citing *inter alia*, the case of *Philomena Mbete Mwilu v Standard Group Limited* [2018] eKLR where the court stated that:

> " In this case, since there is no evidence to indicate whether the information was true or false, it is important to point out that the republishing of a rumour or libelous material is a new libel. As stated by the learned authors of *Gatley on Libel and Slander 9th Edition Sweet and Maxwell 1998 at pages 150-152*:
>
> > "At common law, every republication of a libel is a new libel and if committed by different persons, each one is liable as if the defamatory statement had originated with him...When defamatory publication purports to repeat or report the defamatory statement of another, it is an essentially different libel from one where the same importation is conveyed directly. It may require to be changed or defended differently."
>
> In view of the above, the defendant cannot seek refuge in the source of the information it published if the information was not true in the first place and it was defamatory of the applicant."

35. It is the submission by the plaintiff that the impugned letter and statements that followed are not only untrue but were actuated by malice since neither the 1st nor the 2nd defendant sought to clarify the true position regarding the plaintiff's practicing status, before making the said publications.

36. It is also the submission by the plaintiff that the defence of qualified privilege which the 2nd defendant rides on cannot stand since the latter has not satisfied the principles associated with the qualified privilege, and pronounced by the court in the case of *Charles Katiambo Musungu v Dorine Lusweti* [2021] eKLR thus:

> "For the defence of qualified privilege to be available the Defendant must show that the statement was made (a) in good faith and (b) without any improper motive. Where the plaintiff establishes that the Defendant acted in bad faith and was driven by improper motives then the defence of qualified would have been demolished. ...Where malice is proved or inferred destroys the defence of privilege advanced."

37. On quantum, the plaintiff proposes the sum of Kshs.7,000,000/= on general damages. He has cited a number of authorities and I will mention only a few from that list, hereinbelow:

a. In *Ruth Njiru James v Njoroge Ndirangu* [2015] eKLR-the plaintiff was awarded the sum of Kshs. 5,000,000/= on general damages.

b. In *Michael Kamau Mubea v Nation Media Group Limited & 2 Others* [2019] eKLR-the plaintiff who was both a lawyer and journalist was awarded the sum of Kshs. 7,000,000/= on general damages.

c. In *Ken Odondi & 2 others v James Okoth Omburah T/A Okoth Omburah & Company advocates* [2013] eKLR-the Court of Appeal granted the sum of Kshs. 4,000,000/= to the respondent who was an advocate.

38. The plaintiff also contends that he is entitled to the sum of Kshs.2,000,000/= on punitive, exemplary and aggravated damages, with reliance on the case of *Nation Media Group v Chirau Ali Mwakwere*– Civil Appeal No. 224 of 2010 in which the court awarded the sum of Kshs.1,000,000/= under the same head. The plaintiff has also sought for costs of the suit plus interest thereon.

39. In reply, the 2nd defendant who filed the submissions dated 30th January, 2023 argues that the plaintiff has not made a case for defamation against it. More specifically, the 2nd defendant argues that the contents of the impugned letter cannot be termed as being false since they contain truthful facts to the effect that the plaintiff had not taken out a practicing certificate for the year 2003, quoting the case of *S M W v Z W M* [2015] eKLR in which the Court of Appeal rendered itself thus:

> "see *Gatley on Libel and Slander (10th edition)*. A plaintiff in a defamation case must prove that the words were spoken /written; that those words refer to him/her; that those words are false; that the words are defamatory or libelous and that he/she suffered injury to reputation as a result."

40. It is the submission by the 2nd defendant that the plaintiff did not tender any evidence to show that the former circulated the impugned letter to third parties, in order to satisfy the ingredient for defamation that the publication needs to have been made to other persons.

41. It is also the submission by the 2nd defendant that the ingredients of malice have not been proved against him.

42. The 2nd defendant further argues that the defence of qualified or absolute privilege becomes applicable herein, since he has shown that mention of the impugned letter was made in the course of court proceedings and that a copy of the impugned letter was forwarded to the 2nd defendant's client, which communication is protected by advocate-client privilege.

43. The 2nd defendant submits that the plaintiff has failed to demonstrate the manner in which his reputation was negatively impacted by the impugned letter.

44. For the above reasons, the 2nd defendant urges this court to find that the plaintiff has not proved his case for defamation against him, and to dismiss the suit against him with costs.

45. On quantum, it is the submission by the 2nd defendant that upon the failure by the plaintiff to prove his case to the required standard, he is not entitled to any award on damages.

46. Upon considering the evidence tendered and the competing submissions together with authorities relied upon, I find the following to be the issues arising for determination:

    i. Whether the plaintiff have made a case for defamation against the defendants;

    ii. Whether the defence of absolute/qualified privilege is available to the 2nd defendant; and

    iii. Whether the plaintiff is entitled to the reliefs sought.

47. As earlier mentioned, interlocutory judgment was entered against the 1st defendant upon its failure to file a statement of defence. I will therefore lean more to the plaintiff's case against the 2nd defendant.

48. In addressing the foremost issue, I turn my attention to the case of *Samuel Ndungu Mukunya v Nation Media Group Limited & another* [2015] eKLR wherein the court aptly laid out the ingredients to be proved in a defamatory claim as follows:

    a. The libel must be published by the defendant.

    b. The published words must refer to the claimant.

    c. The statement as published must be false and defamatory of the plaintiff.

    d. The publication was malicious.

49. From my analysis of the pleadings and evidence placed before me, it is apparent that the impugned publication was made by the 1st defendant and addressed to the 2nd defendant, who further republished it in court and to a third party/third parties, and that the same made reference to the plaintiff. I am therefore satisfied that the plaintiff has satisfied the first and second ingredients for defamation.

50. On the third ingredient to do with whether the publication was false and defamatory of the plaintiff, I considered the definition of what constitutes a defamatory statement as demonstrated by the Court of Appeal in the authority of *S M W v Z W M* [2015] eKLR cited in both the plaintiff's and the 2nd defendant's submissions, thus:

> " A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided."

51. The courts have unanimously held that in order to determine whether a statement or publication is defamatory, one must seek to discover the meaning conveyed by the words in question to an ordinary/reasonable person.

52. In the plaint, the plaintiff set out the natural and ordinary meaning of the words associated with the impugned publication in the manner indicated earlier in this judgment.

53. Upon considering the same alongside the contents of the publication in question, I am convinced that the plaintiff has demonstrated the manner in which the publications could be inferred in the mind of the ordinary man and consequently lowered their reputation in the minds of members of the public, particularly upon taking into account the acknowledgement by the 2nd defendant that the contents of the impugned publication were further pronounced in open court in the course of court proceedings.

54. On a similar note, in addressing the 2nd defendants' position that the plaintiff did not tender evidence to demonstrate the manner in which his reputation was subjected to ridicule and lowered, I opine that the plaintiff would succeed in his claim so long as he is able to demonstrate how a reasonable person would receive the defamatory publication, which has been done. In so finding, I borrow from the Court of Appeal's rendition in the recent case of *Miguna Miguna v Standard Group Limited & 4 others* [2017] eKLR where it held thus:

> " By holding that the appellant needed to call witnesses to prove that the story was viewed and read as published, the learned Judge placed too high a standard on the part of the appellant whose duty did not extend beyond the usual standard in a civil case such as the one that was before her to prove the case on a balance of probabilities. We are of the respectful opinion that the appellant proved the case to the required standard."

55. Furthermore, PW2 who was a material witness to the plaintiff's case stated in his evidence that he was present during the time the contents of the impugned letter were disclosed by the 2nd defendant in open court, and the perception that was planted in his mind concerning the plaintiff as a result.

56. In addition, upon my consideration of the record, it is apparent that the practicing certificate which is of more relevance to suit is that of 2004.

57. From my perusal of the record, I note that while the contents of the impugned letter by the 1st defendant made mention that as at 4th March, 2004 the plaintiff had not taken out a practicing certificate for the year 2004, the plaintiff tendered a copy of his practicing certificate dated 1st January, 2004 which invalidates the position indicated in the letter.

58. In the absence of any credible evidence to the contrary, I am therefore satisfied that the plaintiff has proved that the publication is defamatory against him.

59. On the ingredient of malice, upon my examination of the material and evidence tendered at the trial, it is apparent that none of the defendants granted the plaintiff an opportunity to clarify the position on his practicing status, before making and/or releasing the impugned publication/ defamatory statements.

60. As the parties rightly pointed out, the institution responsible for the issuance of practicing certificates is the Registrar of the High Court and not the 1st defendant, and hence the duty fell first and foremost with the 1st defendant to confirm whether or not the plaintiff was eligible to practice law in the material year, before releasing the impugned letter to the 2nd defendant. This position was clarified by the Court of Appeal in the case of *Kenya Power and Lighting Company v Chris Mahinda t/a Nyeri Trade Centre* [2005] eKLR cited in the submissions by the plaintiff, when it stated that:

> " Practising Certificates are dealt with in Part VII of the *Advocates Act* from which it is clear that the issue of practising certificates is the responsibility of the Registrar of the High Court and not of the Law Society. The Practising Certificate for the year 2004 exhibited to the advocate's affidavit in support of the application is dated 22nd September 2004 and signed by

the Registrar of the High Court. In that Certificate the Registrar certifies that the advocate "is duly enrolledas an Advocate and is entitled to practise as such Advocate."

61. Concerning the 2nd defendant, I note from his evidence that he admitted to not making any effort to contact the plaintiff in order to verify the veracity of the allegations before proceeding to contact the 1st defendant or before disclosing the contents of the impugned letter during a court session, and further forwarding the said letter to a third party.

62. In other words, the 2nd defendant has not shown by way of credible evidence that the decision to republish or pronounce the contents of the impugned material was made in good faith and in line with the professional courtesy which would be expected amongst learned colleagues, thereby making him equally liable. In my finding, I am supported by the case of *Philomena Mbete Mwilu v Standard Group Limited* [2018] eKLR found in the submissions by the plaintiff, where the court held thus:

> " In this case, since there is no evidence to indicate whether the information was true or false, it is important to point out that the republishing of a rumour or libelous material is a new libel. As stated by the learned authors of *Gatley on Libel and Slander 9th Edition Sweet and Maxwell 1998 at pages 150-152*:
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> > "At common law, every republication of a libel is a new libel and if committed by different persons, each one is liable as if the defamatory statement had originated with him...When defamatory publication purports to repeat or report the defamatory statement of another, it is an essentially different libel from one where the same importation is conveyed directly. It may require to be changed or defended differently."
>
> In view of the above, the defendant cannot seek refuge in the source of the information it published if the information was not true in the first place and it was defamatory of the applicant."

63. I am therefore satisfied that the plaintiff has proved that the impugned publication was actuated by malice on the part of the defendants, being also persuaded by the following decision adopted by the court in the case of *Phinehas Nyagah v Gitobu Imanyara* [2013] eKLR thus:

> " Malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice. 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 but the law does not weigh in a hair balance and it does not follow merely because the words are excessive, there is therefore malice. Malice may also be inferred from the relations between the parties before or after publication or in the conduct of the defendant in the course of the proceedings. Malice can be founded in the publication itself if the language used is utterly beyond the facts. The failure to inquire into the facts is a fact from which inference of malice may properly be drawn."

64. In view of all the foregoing circumstances, I find that the plaintiff has proved his claim for defamation against the defendants, jointly and severally.

65. On the second issue concerning whether the defence of absolute/qualified privilege is available to the 2nd defendant, having already found that the plaintiff has shown on a balance of probabilities that the impugned letter and pronouncement thereof were not made in good faith but were actuated by malice,

I am of the view that this defence cannot stand. I draw persuasion from the case of *Charles Katiambo Musungu v Dorine Lusweti* [2021] eKLR where the court determined that:

> "For the defence of qualified privilege to be available the Defendant must show that the statement was made (a) in good faith and (b) without any improper motive. Where the plaintiff establishes that the Defendant acted in bad faith and was driven by improper motives then the defence of qualified would have been demolished. ...Where malice is proved or inferred destroys the defence of privilege advanced."

66. This brings me to the third and final issue for determination, being the reliefs sought by the plaintiff.

67. On general damages for defamation, I considered the professional standing of the plaintiff who going by his testimony and supporting evidence, is a Senior advocate of the High Court of Kenya.

68. Upon my consideration of the authorities cited by the plaintiff, and in the absence of any guiding authorities by the 2nd defendant, I am persuaded by the case of *Miguna Miguna v Standard Group Limited & 4 others* [2017] eKLR in which the Court of Appeal upheld an award of Kshs.5,000,000/ = made under this head, and the more recent case of *Michael Kamau Mubea v Nation Media Group Limited & 2 others* [2019] eKLR in which this court awarded a sum of Kshs.7,000,000/= on general damages to a plaintiff who was both a lawyer and a journalist. I therefore find the award of Kshs.7,000,000/= to constitute a reasonable compensation for the plaintiff, in the circumstances.

69. On punitive/aggravated damages, it is apparent that no formal apology was made by any of the defendants in a bid to mitigate the damage already occasioned particularly to the reputation of the plaintiff despite a written demand by the plaintiff, and given the circumstances under which the impugned letter was pronounced. I am therefore satisfied that the plaintiff is entitled to an award of aggravated damages. I find the sum of Kshs.1,500,000/= to be fair upon considering the award made in the sum of Kshs.1,000,000/= in the case of *Nation Media Group v Chirau Ali Mwakwere* (*supr*a).

70. In the end therefore, judgment is hereby entered in favour of the plaintiff and against the 1st and 2nd defendants jointly and severally, in the following manner:

    i. General damages Kshs.7,000,000/ =

    ii. Aggravated damages Kshs.1,500,000/=

        Total Kshs.8,500,000/=

    iii. The plaintiff shall have costs of the suit and interest on the total award of Ksh.8,500,000/= at court rates from the date of judgment until payment in full.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2023.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the 1st Defendant

..... for the 2nd Defendant