



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

CIVIL CASE NO. 01 OF 2020

WILFRED NYAUNDI KONOSI.....PLAINTIFF

VERSUS

THE STANDARD GROUP LIMITED..... 1ST DEFENDANT

JULIUS CHEPKWONY.....2ND DEFENDANT

JUDGEMENT

1. By a plaint dated 3rd January 2020, the plaintiff herein instituted this suit against the defendants seeking the following orders:

- a. A permanent injunction restraining the defendants either by themselves, servants or agents or otherwise howsoever, from publishing or causing, published words defamatory of the Plaintiff and an order directing the Defendants to give a full apology.
- b. General, exemplary and aggravated damages for libel and malicious falsehood.
- c. Costs of the suit.
- d. Interest on (d) and (d) above.
- e. Any such further or other relief as May to this Honourable Court appear fit and just to grant.

2. This suit is as a result of a publication by the defendants in its Standard newspaper number 392400 of 7th January 2019 at page 25. The said publication reads in part;

“Nakuru. Three law firms received the payments. General questions Sh 119 paid out to lawyers. A law firm associated with the county attorney received Sh10 million, raising allegations of conflict of interest.

By Julius Chepkwony

newsdesk@ [standardmedia.co.ke](mailto:newsdesk@standardmedia.co.ke)

The Auditor General has questioned payments made by the Nakuru County government to three law firms. Konosi and Company Advocates, Ikua Mwangi and company advocates and Gakinya and company advocates collectively received a sum of Sh. 119 million. The audit said County Attorney Harry Gakinya on June 6, 2017 wrote to the chief officer public service management requesting him to process payments.

“In this request, details of cases handled, charge out rate and status of the cases were not indicated,” read the report.

Outstanding balance

“It is not clear why a county employee was awarded a contract to provide legal services, which paints a clear case of

conflict of interest.”

Audit overview

- Three law firms received sh119 million.
- County claimed to have filed over 900 court cases, but failed to provide their full details.
- It was alleged that Sh9 million was paid to a surveyor two months before the land valuation was done.
- Spatial plan launched in 2014 yet to be delivered despite the county paying Sh.114million.
- Another Sh155 million as paid to improve Afraha stadium, but the money could not be accounted for.
- County failed to explain how 18 employees were promoted up three job groups in 12 months.
- Also, Sh25 million as paid for solar street lights, which auditors found were not working

One of the firms, Gakinya and Company advocates, which received Sh.10 million is owned by Mr. Gakinya. The audit also said the firms claimed to be owned an outstanding balance of Sh854million. The audit said the county produced a list of 914 cases which were in various stages in the courts, although it was unable to produce a schedule of the cases.

“It is not clear why the county is bogged by so many cases whose details were not confirmed,” read the report.

“The authenticity of these cases could not be confirmed since the files were either missing or had scanty information.”

Sale agreement

In the period under review, two individual lawyers were paid over Sh2.6 million as conveyance fees for drawing up and executing sale agreements in the purchase of land by the ministries of Education and Culture, Youth and Sports. The sale agreements for all the five parcels were undated and had been signed only on the last page despite having several pages that needed a signature. Over Sh29.5 million was spent on the acquisition of the land. However, the county government had budgeted only Sh2million. The audit asked why the two law firms were paid conveyance fees. Even after the alleged acquisition, the land owner was still occupying it and there was no indication that a transfer had been carried out. Another project for the construction of a mobile market for hawkers in Nakuru town was allocated money but as never executed. The audit said the county spent Sh25million to install street lights in various wards, but a physical verification by the auditors found that none as working. It said Shi55million meant for the rehabilitation of Afraha stadium could not be accounted for. The report also said that some employees were promoted to various job groups, receiving hefty salaries, without following the right criteria.

“The management did not explain how and why the promotions were done,” read the report.

The audit also flagged the county for spending Sh13million on market sheds in Free Area and Menengai which were not in use despite being completed and handed over to the administration.”

3. The Plaintiff contends that the above publication was not an accurate and fair report of the Auditor General’s report and contains deliberate untruths that are libelous and have brought the Plaintiff’s reputation to odium and public ridicule in the eyes of right-thinking members of the society and the Legal profession of which he is a respected member.

4. The Defendants in their joint written statement of defence filed on the 12th February 2020, admitted to the publication in The Standard No. 392400 of the January 2019 on page 25 titled, “**AUDITOR GENERAL QUESTIONS SH. 119M PAID OUT TO LAWYERS**” as stated in Paragraph 5 of the Plaintiff but vehemently denied the averments that the same was for the intentions so alleged by the plaintiff, or that it was defamatory. The Plaintiff was put to strict proof thereof.

5. In his testimony the plaintiff stated that he was an advocate of the High Court of Kenya having been admitted on 20th February 1992 and set his practice in the name of Konosi & Co. in 1994. He produced Exhibit P1 which was his practicing certificate for the year 2019, Exhibit 2 is page 25 of the Standard Newspaper of 7th January 2019. He stated that he had not bought the paper but received calls from clients inquiring about the story. That on 8th January 2019, he received a call from M Oriental Bank Limited in which he had a facility which was due and was questioned about the newspaper report and why he had not paid the entire amount due since he had been paid.

6. He also produced exhibit 3 which was a copy of the Auditor general’s report of the financial status of Nakuru County and the relevant part is at pages 33-34 of the bundle of documents. Exhibits 4 (a), (b) and (c) entailed the demand letter to the Defendants dated 6th February 2019 and receipts for registered post. He urged the court that he be awarded the prayers in the plaint, including general damages for libel and malicious falsehood and costs of the suit.

7. On cross-examination, he testified that the publication was about what was contained in the Auditor General’s report and the same had other stories. That the title stated that payment was to lawyers and not Konosi alone but to Konosi and Co. That Konosi appeared once in the publication and the report stated that three law firms collectively received Kshs 119 million. He said that he received kshs 3 million and the balance of Kshs 116 Million went to the three lawyers. He testified that he would not have a problem if it was reported that he had received Kshs 3 million. That the report was a matter of public interest depending on how it was published and the Defendants ought to have confirmed that he received the money.

8. Upon re-examination, he testified that the report showed that his firm had been paid Kshs 3 million and the other 2 firms received 4 million and 10 million all totaling to Kshs 17 million. That the report did not state that the three firms received Kshs 119 million.

9. **PW 2, Alphonso Victor Gambo Maropia** testified that he was the Chief Manager of M Oriental Bank in its Nakuru Branch. That he had known the Plaintiff for over 10 years as he offered legal services to the bank. That the Plaintiff was offered a loan facility of Kshs 1,588,421 in August 2017 and that he had read the publication in the newspaper touching on the Plaintiff and as a bank, they did not take the report lightly.

10. He went on to testify that the plaintiff's account had been irregular and he thought that the Plaintiff was being dishonest because he had channeled the payments he had received to another bank. He produced the Plaintiffs bank statement as exhibit 5. He testified that the plaintiff requested for a facility after regularizing his account, but the bank could not approve it because of the publication in the newspaper.

11. On cross-examination, he testified that he read the article on 8th January 2019 and that he had produced the plaintiff's loan account. He testified further that the article addressed the Auditor General's report for the period ended 30th June 2017 and the loan was taken in August 2017. He confirmed that there was no agreement that the loan would be repaid from the payments from Nakuru County Government and that the facility had been paid in full.

12. On re-examination he confirmed that the auditor's report was dated 16th July 2018 and not 2017. He testified that if the plaintiff diverted the funds the property he had offered as security would be auctioned.

13. On the defendants' part only one witness was called that is the 2nd defendant herein **Julius Chepkwony** who testified as DW1. He testified that he was journalist in Nakuru County and he adopted his witness statement dated 17th June 2020 as part of his evidence. He went to testify that he knew the plaintiff in person and that he does not have any bad blood with him. He testified that they were friends, they met after the filing of the suit and he was representing a client against Cytonn investment.

14. On cross-examination, he confirmed that he knew the plaintiff in person in 2020, prior to his reporting in 2019 and he had not met him. He testified further that he did not have to seek his comment since the publication was the subject of an audit report. That the report was questioning the payment of Kshs 119 million to 3 law firms which included the plaintiff's law firm.

15. He testified further that there was a request for processing of fees and in total Kshs 17 million was paid to the three law firms. That he never wanted to narrow down to each law firm thus he stated the general amount. That further there was no reason to single out one law firm as the status was that the three law firms shared Kshs 119 million as per the report

16. When the matter came up for hearing the court directed the parties to file their written submissions which they have complied.

Plaintiff's Submissions

17. The plaintiff in his submission identified five issues for determination. The first being whether the defendants published the words complained of. The plaintiff submitted that it was trite law that in defamation, he must prove that the defendants communicated a statement about the plaintiff to another. That is to a party other than the person defamed and that publication must have been done maliciously. The plaintiff submitted further that the defendant admitted the publication of the story in the standard newspaper No.392400 of 7th January 2019 on page 25 titled "**AUDITOR GENERAL QUESTIONS SH. 119M PAID TO LAWYERS**". That the said newspaper has a wide circulation not only in Kenya but also in the East Africa region, with stories published in print to be accessed and read by all. That therefore the defendant had the intention to publish this story to persons other than the plaintiff.

18. On the second issue, whether the words complained of refer to the plaintiff, he submitted that the story could only be regarded as capable of referring to the plaintiff since there was no evidence of any other person going by the name Konosi and even if there were it would not make any difference.

19. On the third issue, on whether words complained of were defamatory of the plaintiff he submitted that a publication which ascribed to another conduct, character or a condition that would adversely affect his fitness for the proper conduct of his business, trade or profession was defamatory *per se*. The plaintiff went on to submit that statement to the effect that he had engaged in fraud within the context of business, would tend to impugn his integrity and thereby blacken his business reputation. That the story complained was therefore defamatory of him because being engaged in the provision of legal services he had a sensitive reputation which naturally would be harmed by any sort of allegation that he was a dishonest, fraudulent, corrupt and money-squandering person. He placed reliance on the following cases; **Purcell v Westinghouse Broad. Co, 191 A.2 d 662 [Pa.1963], Turner v Metro-Goldwin Mayer Pictures [1950] 1ALL E.R. 449, Sim vs Stretch 2 and Clement v Lewis [1822], 3 Brod & Bing 297.**

20. The fourth issue was whether there were any defenses available to the defendants. The plaintiff placed reliance on the case of **Harrison Kariuki Mburu v National Bank of Kenya & Credit Reference Bureau Africa Ltd, HCC No. 97 of 2012**, where the court held that in libel and slander the very words complained of are the facts on which the action was grounded. The plaintiff submitted that in the instant case, the defendants had put forth the defence of justification, fair comment and qualified privilege. That however upon his perusal of **Section 7 of the Defamation Act** and the schedule to the Act, that the qualified privilege of newspaper only avail to a publisher if what was published was fair and accurate report on a matter of public interest is not proved.

21. The plaintiff submitted that reading the said section and schedule to the Act, the privilege was rather conditional rather than absolute and would be forfeited if the publisher steps out of the scope of the privilege or abuses the occasion. He submitted that the Auditor General's report was not subject to any privilege and the defence of qualified privilege did not avail the defendants. That the same was not fair and accurate and that **Section 7(1) of the Defamation Act** provided that qualified privilege is destroyed where malice is shown.

22. The plaintiff drew the courts attention to the following cases; **Royal Media Services Limited & Another v Jakoyo Midiwo [2018] eKLR, Nation Media Group v Hon. Jakoyo Midiwo Civil Appeal No. 130 of 2013, Samuel Ndung'u Mukonyu v Nation Media Group Limited & Another [2015] eKLR, Reynolds v Times Newspapers Ltd [2001] 2 AC 127, 205, [1999] UKHL 45; [1999] 4 ALL ER 609; [1999]3 WLR 1010, Phinehas Nyagah v Gitobu Imanyara Civil [2013] eKLR and Adam v Ward [1917] AC 309.**

23. Lastly, on whether the plaintiff is entitled to the remedies sought he submitted that a person's reputation has no actual value and the sum to be awarded in damages is therefore at large and the court is free to form its own estimate of the harm taking into account all the relevant circumstances. That there had been no apology or retraction by the defendants of the offending story. The plaintiff urged the court that he be awarded general damages in the sum of Kshs. 20,000,000/= for libel and malicious falsehood, Kshs. 6,000,000/= as exemplary and aggravated damages and Kshs. 1,500,000/= in lieu of apology.

24. The plaintiff filed supplementary submissions dated 15th December 2021 and reiterated his earlier submissions that the 2nd defendant embellished the story while actuated by malice.

Defendants' Submissions

25. The defendant identified three issues for determination namely; was the publication defamatory of the plaintiff and published with malice. The defendants submitted that they were well within their right and privilege to make the publication of the contents thereof to members of the public who may not have access to the huge and not easy to read and comprehend audit report. That the statements made in the publication did not cause the plaintiff to be shunned, avoided or injure his reputation at work as the evidence adduced before the court did not attest to the same. That defamation was not to persons defamed but to others and that the plaintiff through his witness failed to demonstrate how his reputation was injured as a result of the publication.

26. The defendants placed reliance on the case of **Phinehas Nyagah v Gitobu Imanyara [2013] eKLR** and submitted that no malice could be inferred if the language used was not disproportionate to the facts. That they had reported what was in the report and that there was no previous relation whatsoever between them and the plaintiff as to lead this court to infer malicious intention. The defendants submitted that **section 12** of the **Defamation Act** provided that in any action for libel contained in a newspaper or other periodical publication, it shall be a defence for the defendant to show that such libel was inserted in such newspaper or periodical without malice and without gross negligence.

27. On the second issue, whether the publication was justified in fair comment, justification and qualified privilege, defendants while placing reliance on the case of **George Benedict Maina Kariuki v Nairobi Star Publication Limited & Carole Maina [2016] eKLR**, submitted that the publication was a subject of public interest and it was an accurate report of the audit report which facts were true, fair and accurate.

28. On the last issue, whether the plaintiff was entitled to the reliefs sought the defendants placed reliance on the case of **Micah Cheserem v Immediate Media Services [2000] I EA 371** and submitted that an injunction is granted only in the clearest possible case and that the court must be satisfied that the words or matter complained of are libelous and manifesting defamatory that any verdict to the contrary would be set aside as perverse.

29. On the general damages, the defendants submitted that the court should be guided by the guidelines of awarding damages drawn from the case of **Jones v Pollard [1987]**. On exemplary damages, the defendants placed reliance on the case of **Board of Trustees, National Social Security Fund v Judy Wambui Mungai [2017] eKLR** and submitted that their conduct was not improper or actuated by malice and thus the said damages should not be awarded. The defendants urged the court to dismiss the plaintiff's case with costs.

Analysis and Determination

30. Upon analyzing the facts of the case, evidence and the submissions tendered by the plaintiff, the following issues arise for determination namely; **whether the plaintiff has made out a case for the tort of defamation and whether the plaintiff is entitled to an award of damages and if so how much.**

31. In addressing the first issue, **whether the plaintiff has made out a case for a tort of defamation.** The **Black's Law Dictionary 8th Edition** defines defamation as:

"The act of harming the reputation of another by making a false statement to a third person. A false written or oral statement that damages another's reputation".

32. In **Halsbury Laws of England 4th Edition Vol. 28 at paragraph 22**, the defamatory words must refer to the plaintiff. The same states:

"The proper purpose of an action of libel or slander is to vindicate the reputation of the person defamed, and accordingly the proper and the only party to bring the action is the person actually and personally defamed. This is not enough that the words reflect on the persons properly; there must also be imputation against the plaintiff personally.....".

33. Further, in **Miguna Miguna v Standard Group Limited & 4 others [2017] eKLR**, the Court of appeal stated as follows regarding defamation, and I have no reason to differ:

"Speaking generally a defamatory statement can either be libel or slander. Words will be considered defamatory because they tend to bring the person named into hatred, contempt or ridicule or the words may tend to lower the person named in the estimation of right-thinking members of society generally. The standard of opinion is that of right-thinking persons

generally. The words must be shown to have been construed or capable of being construed by the audience hearing them as defamatory and not simply abusive. The burden of proving the defamatory nature of the words is upon the plaintiff. He must demonstrate that a reasonable man would not have understood the words otherwise than being defamatory. See Gatley on Libel and Slander (8th edition para. 31).

The ingredients of defamation were summarized in the case of John Ward V Standard Ltd , HCCC 1062 of 2005 as follows:-

“.....The ingredients of defamation are:

The statement must be defamatory.

The statement must refer to the plaintiff.

The statement must be published by the defendant.

The statement must be false.”

34. In view of the foregoing, it is now clear that in concluding that the statement is defamatory, it must be shown that the same refer to the plaintiff, it was published by the defendant, and that the same was false. Further, in order to prove defamation, the plaintiff must establish or demonstrate that the matter complained of was defamatory in nature, that the defamatory statement was uttered to someone else other than the person who was said to have been defamed and that the defamatory statement was published maliciously. In other words, the elements of the tort of defamation are that the words must be defamatory in that they must tend to lower the plaintiff's reputation in the estimation of right minded persons in the society or they must tend to cause the plaintiff to be shunned or avoided by other persons. The burden of proving the above is upon the plaintiff to demonstrate that a reasonable man in a market place would not have understood the words otherwise than being defamatory.

35. In applying the said principles to this case, the publication by the defendants which the plaintiff claims are defamatory is titled “AUDITOR GENERAL QUESTIONS SH.119M PAID TO LAWYERS.” as quoted under paragraph 2 herein and the same reads in part; **The Auditor General has questioned payments made by the Nakuru County government to three law firms. Konosi and Company Advocates, Ikua Mwangi and company advocates and Gakinya and company advocates collectively received a sum of Sh. 119 million....**”. The Plaintiff contends that the said words as published were malicious, that the story complied was defamatory of him because being engaged in the provision of legal services he had a sensitive reputation which naturally would be harmed by any sort of allegation that he was a dishonest, fraudulent, corrupt and money-squandering person.

36. It is clear from the words in the publication by the defendants that the law firm of Konosi and Co. Advocates together with 2 other law firms were paid Kshs. 119M. The name “**Konosi**” as captured as published in the defendants' newspaper matches the plaintiff's last name. In my humble view the publication was in regard to the law firm bearing the name Konosi and Co. Advocates and not the plaintiff herein known as **Wilfred Nyaundi Konosi**.

37. The plaintiff failed to produce any evidence showing that he practiced in the name and style of Konosi and Co. Advocates but only mentioned the same in his testimony. He only produced his practicing certificate indicating his name and it does not show his link to the said firm. As a matter of fact, he admitted during cross examination that he was not the only lawyer in the firm but there were other four.

38. On whether the said defamatory words as published by the defendants were done with malice, the court in **Phineas Nyagah (supra)** held that: -

“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 in the facts is a fact from which inference of malice may properly be drawn.”

39. In the instant case I note that the law firm which the plaintiff alleges to be practicing in was mentioned only at the beginning. The plaintiff did not adduce any evidence to prove that the language used in the said publication was disproportionate to the facts or that there was any relationship between him and the defendants. DW2 testified that he only met the plaintiff in year 2020 after the filing of the suit in the year 2019.

40. On whether the statement in the publication was false, the plaintiff in his testimony admitted to having been paid Kshs. 3 million from the County Government of Nakuru and that he would not have an issue if the publication by the defendants had captured the same. That the plaintiff's contention was on the generalization of the award of Kshs. 119M. It is noted however that the county government of Nakuru paid the three law firms and it is not disputed that the plaintiff was among the three firms.

41. This statement was not false as admitted by the plaintiff. The Kshs.3million he received was part of the kshs.119 million. It never came from another vote other than that identified by the auditor general. What then was false in the statement? I respectfully do not find the same a lie. Further, the same were obtained from a public document where the Auditor General is mandated by **Article 229 (4)** of the **Constitution of Kenya 2010** and the same is available for public knowledge, confirmation and public scrutiny.

42. Neither does this court find the image and reputation of the plaintiff injured as pw2 tried to explain. The loan he had taken from them was not pecked on the plaintiff paying from the proceeds from the county government of Nakuru. The same was secured by another collateral and not legal fees. At any rate the loan was paid within the stipulated time. There was no evidence that the plaintiff was denied loan because of the impugned publication.

43. Consequently, the report as published by the defendants was from a public office and it was meant for public consumption. The report indicated that the three law firms were paid an aggregate sum of Kshs.119million which amount included the three million paid out to the plaintiff's firm. There was nothing absolutely false on that as the money was received by the plaintiff.

44. For the above reasons this court does not find merit in this suit. The ingredients for the tort of defamation mentioned above were not established on a balance of probability.

45. This suit is otherwise dismissed with costs.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 17TH DAY OF FEBRUARY, 2022

H K CHEMITEI.

JUDGE