



**Kitur v Radio Africa t/aThe Star (Civil Case 337 of 2013)
[2022] KEHC 11171 (KLR) (Civ) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11171 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 337 OF 2013

JK SERGON, J

MAY 31, 2022

BETWEEN

RAPHAEL KITUR PLAINTIFF

AND

RADIO AFRICA T/A THE STAR DEFENDANT

JUDGMENT

1. The plaintiff herein filed a suit by way of the plaint dated August 15, 2013 and sought for judgment against the defendant in the following manner:
 - i. A permanent injunction restraining the defendant by itself, servants, directors, editors and/or employees or otherwise from publishing or causing to be published or continuing to published or continuing to publish any or every words or matters and statements regarding and touching on the plaintiff or about him or concerning him which may in any way or manner be injurious or prejudicial to the plaintiff.
 - ii. General, exemplary, punitive and aggravated damages.
 - iii. An order for publication of an apology.
 - iv. Costs of this suit.
 - v. Interest on (b), (c) and (e) above
 - vi. Any other relief the court may deem fit to grant.
2. The plaintiff pleaded in his plaint that the defendant as a publisher of the publication called ‘The Star’ in the edition of September ,18th 2012 at page 7 under the caption ‘Ex –MP charged over dud cheque’ published the following statement and words of and concerning the plaintiff.



3. “former Transport and Communication Assistant Minister Raphael Kitur was charged in a Nairobi Court for issuing a bad cheque. Kitur was accused of issuing the dud cheque to John Maina of intercom on June, 6th. The prosecution told the court that the former Konoin MP issued the cheque of Kshs.450, 000/= to even though he was aware that his equity bank account had no sufficient funds. He denied the charge before Nairobi Senior Principal Magistrate Lucy Nyambura. He was directed to pay cash bail of Kshs.100,000/= to secure his release pending trial. The case will be heard on October 5th”
4. The plaintiff further pleaded that the aforesaid words in their natural and ordinary meaning and in context in which they were written and published by the defendant meant and were understood that the plaintiff is a corrupt and unscrupulous person involved in fraudulent activities, he is untrustworthy and unfit to hold office, he should be shunned by members of the public, clients, business associates, and society at large, he has committed criminal offences under the penal code for fraud, he does not pay his debts, and he should be shunned by members of the public.
5. It is was pleaded that the plaintiff’s credit has been seriously harmed and his reputation has been lowered among right-thinking members of society, all those who know him, in particular his peers, constituents, friends, family, political opponents, and the community in general, as a result of the said publication of the aforesaid words.
6. It was further pleaded that the words or statements were malicious, false and calculated to injure the plaintiff and cause him pecuniary, political and moral damage.
7. The defendant entered appearance upon service of summons and filed its statement of defence on October 18, 2013 to deny the plaintiff’s claim.
8. At the hearing, the plaintiff testified and the defendant called one witness to support its case.
9. The plaintiff who was PW1 adopted his signed witness statement as his evidence in chief and to produce his bundle of documents dated August 15, 2013 and supplementary list of documents dated March 16, 2014, March 13, 2017 and September 23, 2014.
10. The plaintiff testified that he was not charged with the offence of issuing a bad cheque and that the charge sheet (PEXH-2) shows the person charged is known as Raphael Kipkirui Kitur and his full name is Raphael Kiprono Arap Kitur.
11. It was the testimony of the plaintiff that in the defence that there was a letter written by the defendant dated 25/9/2012 and the only name is Raphael Kitur and that Kipkirui has been left out and that no one has contacted him to clarify the issue.
12. It was also the testimony of the plaintiff that the publication was circulated all over the village and that he lost respect in his area and he demanded for an apology but none was forthcoming.
13. In cross examination, the plaintiff stated that he was a former transport and communication assistant Minister and that he lost when he contested for the senate of Bomet because of the article which was widely published which attributed to his loss.
14. The plaintiff stated that it was indicated in the letter that the star corrected the problem, that the apology was not made on the same page, and that the ostensible apology was made after the damage had occurred. There was no concern about the apology being inadequate.
15. In re-examination, the plaintiff stated that the star did not call him to clarify the situation, and that his team were taken aback when the opponents duplicated and spread the article.



16. Linda Musita who testified as DW1 also adopted his signed witness statement as evidence in chief and produced list and bundle of documents dated October 18, 2013 and another one dated October 19, 2021.
17. It is DW1 testimony that an apology was published a day after the publication and in the apology a photo was published for purposes of clarifying the issue however the publication was done when the country was close to election time.
18. It is DW1 testimony that the person charged in court was not the plaintiff and that they apologized when they realized there was a mistake.
19. In cross-examination, DW1 stated that the publication was a story emanating from court proceedings and there was an offer to settle the matter.
20. In re-examination DW1 stated that they do have a physical archive of the newspaper and can be easily be availed from the archives and cannot confirm whether the publication complained of is online.
21. It is the testimony of the DW1 that the particulars of the charge does not mention the plaintiff's status and does not state that the accused is a former assistant minister and former Member of Parliament and that names appearing in the charge sheet are different from those appearing in the Identification Card.
22. Upon close of the hearing, the parties were directed to put in written submissions. Going by the record, it is apparent that at the time of writing this judgment, this court only had the submissions by the plaintiff. It is also apparent that the submissions by the defendant were not traceable from the online portal and hence this court could not make direct reference to them.
23. By way of their submissions dated February 15, 2022 the plaintiff, on the issue of liability submitted that the plaintiff has substantially demonstrated by evidence that all of the allegations of facts published were false and proved, and that the defendant's defense of innocence is not available and must fail because there is no evidence to show that the defendant's facts published were true as tendered.
24. On this the plaintiff relied on the case of *J.P Machira v Wangethi Mwangi & another* HCC No.1706 of 1996 where the court held as follows :

“ Any evidence which shows that the defendant knows the statement was false or did not care whether it be true or false will be evidence i.e. of malice. In the instant case, the plaintiff had supplied the defendant with the true position of the matter before the publication was made. Inevitably therefore, at the time of publication, the defendant knew or is taken to have known that the relationship between the plaintiff and Ms Grace Wahu Njoroge was not an advocate/client relationship and that there was no relationship of such a nature between them.

Further, considering also the post publication conduct of the defendant, the correction was made more than a week after the publication, which was made with the knowledge that it was false. I have no hesitation in finding the publication being malicious.”

25. The plaintiff contends that the offer of amends by the defendant does not meet the requirements of not being accompanied by an affidavit made by the defendant as per section 13 (2) of the [Defamation Act](#) Cap 36.
26. The plaintiff submitted that the title of the apology being “for the record” is not genuine apology and it appears the defendant was just doing it for the sake of it and that the title of the publication denotes no empathy or apology.



27. On the issue of quantum of damages, the plaintiff relied on the case *Hon. Chirau Ali Makwere v Nation Media Group & Another* 2009 eKLR cited with approval the English Court of Appeal decision in the case of *John v MGN Ltd* (1996) ALL ER 35 where the court held:

“The successful plaintiff in a defamation action is entitled to recover in general compensatory damages, such sums as will compensate him for the wrong he has suffered. The sum must compensate him for the damage to his reputation vindicate his good name, and take account of the distress, hurt and humiliation which the defamatory publication has caused. In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel, the more closely it touches the plaintiff’s personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of the publication is also very relevant; a libel published to millions has a greater potential to cause damages than a libel published to a handful of people..... it is well established that compensatory damages may and should compensate for additional injury caused to the plaintiff’s feelings by the defendant’s conduct of the action, as when he persists in unfounded assertion that the publication was true, or refuses to apologize, or cross-examines the plaintiff in a wounding or insulting way.....”

28. In the circumstances of this case, the plaintiff requested that a general damages judgment of Kenya Shillings Fifteen Million (Kshs.15, 000,000/=) would be fair and appropriate recompense for the plaintiff’s injury.

29. For aggravated damages, the plaintiff proposed Kenya Shillings Five Million (Kshs.5 Million).

30. The plaintiff in tendering these proposals on quantum ,he was guided by the following decisions

- a. In HCCC No.420 of 2011 *Samuel Mukunya Ndungu v Nation Media Group Limited & Another* as a 2015 decision, the plaintiff was awarded Kenya Shillings Fifteen Million, 1.5 Million for general damages, aggravated damages and damages of in lieu of an apology respectively.
- b. In HCCC No.1709 of 1996 J. P Macharia v Wangethi Mwangi & another the High Court awarded the plaintiff Kshs.8,000,000/=in general damages and Kshs.2,000,000/= aggravated damages .The award on quantum was upheld by the Court of Appeal in Civil Appeal No. 148 of 2000 Wangethi Mwangi & Another J. P Machira.
- c. In Chirau Mwakwere (*supra*) this court made reference to HCC No.375 of 1997 *Joshua Kulei v Kalamka Ltd* where the plaintiff was awarded Kshs.10, 000,000/= and HCCC No.1068 of 1999 Nicholas Kiprono Biwot v Ian West and another where a global sum of Kshs.30, 000,000 was awarded.
- d. In HCC No. 1230 of 2004 *Francis Ole Kaparo v The Standard Limited* the court awarded Kshs.7, 000,000/=

31. The plaintiff urged the court to find that he has proved his claim on a balance of probability as required in law and that the defendant is liable for the injuries caused to the plaintiff by the publication of the clearly defamatory article.

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

- a. Whether the plaintiffs have made a case for defamation against the defendants;



- b. Whether the plaintiffs are entitled to the reliefs sought.
33. On the first issue, I borrow from the Black's Law Dictionary, 8th edition definition of the term 'defamation' as follows:
- “ the act of harming the reputation of another by making a false statement to a third person.”
34. The ingredients of a defamatory claim were laid out by the Court of Appeal in the case of *Raphael Lukale v Elizabeth Mayabi & another* [2018] eKLR and are that:
- 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.
35. In respect to the second and third ingredients which I wish to begin with, from my evaluation of the oral evidence tendered by and on behalf of the plaintiff, I established that the publications in question were made by the defendant and made reference to the plaintiff. In its pleadings, the defendant admitted to making the said publications and did not deny that the same related to the plaintiff herein.
36. I am therefore satisfied that the plaintiff has established the two (2) referenced ingredients on defamation.
37. This brings me to the first ingredient to do with whether the impugned publications are defamatory of the plaintiff.
38. At the heart of a defamatory statement lies its tendency to lower the reputation of the claimant in question. This was the position held by the Court of Appeal in the authority of *S M W v Z W M* [2015] eKLR and restated in the case of Joseph Njogu 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.”
39. The legal position is that in order to determine whether a statement or publication is defamatory, one must seek to understand the meaning conveyed by the words in question to an ordinary/reasonable person.
40. On his part, the plaintiff under paragraphs 3, 4 and 5 of their plaint pleaded that the words complained of in the impugned publications were defamatory of them in the sense that they could be inferred in their ordinary and natural sense to imply that they are inter alia, is corrupt and unscrupulous person involved fraudulent activities, untrustworthy and not fit to hold public office, is a criminal, he does not pay his debts and should be shunned by members of the public.
41. I noted that the defendant stated that it did an apology which was published a day after the publication and that the same was a story emanating from court proceedings in which the accused and plaintiff shared the two names, the first and last names i.e Raphael and Kitur were similar and that there was an offer to settle the matter too.
42. That notwithstanding, I am satisfied that though the plaintiff did not set out verbatim the words published concerning them, they were able to set out the title of the said publications and describe in



- fair detail the nature of the publications made, as well as particularize their meaning in the ordinary and natural sense.
43. Upon considering the aforementioned particulars of defamation and innuendo pleaded in the plaint and in the absence of any contrary evidence, I conclude that the words published would ordinary sense be taken to have the meaning pleaded in the plaint.
 44. Concerning the reputation of the plaintiff, credible evidence was tendered to support the claim that following the impugned publications, his reputation was negatively affected. The plaintiff stated that he would have become senator but his opponents used the article against him by photocopying and supplying the impugned article to the constituents.
 45. Further to the foregoing, I am alive to the existing legal principle that in instances of libel, the law presumes damage so long as a party has shown that the defamatory material was written or printed or in some permanent form. This was the position taken by the court in the case of *Peter Maina Ndirangu v Nation Media Group Limited* [2014] eKLR where the court stated that in an action of libel damage suffered need not be proved. Such position was restated in the case of *Alnashir Visram v Standard Limited* [2016] eKLR.
 46. In the premises, I am satisfied that the plaintiff has shown that the publications in question is defamatory.
 47. On the ingredient touching on malice, the court in the case of *Phinebas Nyagah v Gitobu Imanyara* [2013] eKLR was of the view that malice is not restricted to spite or ill will but may extend to reckless actions drawn from the publication in question.
 48. Upon considering the nature, frequency and circumstances of the impugned publications coupled with the impact namely the fact that the defendant stated that the publication was defamatory but a true and honest publication going by the evidence tendered, it is my view that the plaintiff has proved malice against the defendant. It is noteworthy that malice was not refuted by the defendant by way of evidence.
 49. In respect to the ingredient to do with whether the publication was false, the court in the case of Joseph Njogu Kamunge (supra) reasoned that a defamatory statement is presumed to be false unless and until the same is shown to be true by a defendant.
 50. In view of the foregoing, I am satisfied that the plaintiff has established a claim for defamation against the defendant on a balance of probabilities.
 51. This brings me to the second issue touching on whether the plaintiff is entitled to the reliefs being sought.
 52. On general damages, the plaintiff testified he is a former assistant minister, vied for Bomet Senate seat, business man and that his business has suffered.
 53. I note that the authorities cited by the plaintiffs in their submissions concern persons of different professional standing from themselves.
 54. I therefore considered the case of Honourable *Martha Karua vs the Standard Group Limited* HCC No. 295 of 2004 wherein Justice Kihara Kariuki awarded (in May 2006) the plaintiffs a learned advocate and member of parliament the sum of Kshs 4 million as general damages and the sum of Kshs 500,000 as aggravated damages this arising out of the defendants publication of defamatory articles in their paper under the banner ‘politicians just want a license to behave.’



55. In the case of *Nation Media Group Ltd & 2 Others vs. John Joseph Kamotho & 3 Others* Civil Appeal No. 284 of 2005 where the Court of Appeal upheld the award to the 1st respondent, a prominent politician with a substantial reputation, of Kshs 6,000,000.00 general damages and Kshs 1,000,000.00 aggravated damages.
56. In the circumstances, I find an award of Kshs.4, 000,000/= in the present instance to be reasonable.
57. As was held in *Nation Media Group Ltd & 2 Others vs. John Joseph Kamotho & 3 Others* (*supra*) where it was held:

“The successful plaintiff in a defamation action is entitled to recover as damages compensatory damages, such sum as will compensate him for the damage to his reputation; vindicate his good name; take account of the distress, hurt and humiliation which the defamatory publication has caused. In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel; the more closely it touches the Plaintiff’s personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of publication is also very relevant; a libel published to millions has a greater potential to cause damage than a libel published to a handful of people. A successful litigant may properly look to an award of damages to vindicate his reputation: but the significance of this is much greater in a case where the Defendant assert the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libellous publication took place.”

58. Concerning the prayer for an injunction, I note that though the plaintiff prayed for the same, he made no mention of it at the evidence stage or in their submissions, thereby making it unclear whether the prayer was eventually abandoned. On that basis, I am not convinced to grant the same.
59. In the end and having considered the evidence before this court, the submissions from the parties and the law applicable, I hereby enter judgment in favour of the plaintiff and against the defendant in the manner hereunder:

General damages Kshs. 4,000,000/=

Aggravated damages Kshs.1,000,000/=

Total Kshs.5,000,000/=

60. The plaintiff shall have costs of this suit and interest at court rates from the date of judgment until payment in full.

Dated, signed and delivered online via Microsoft Teams at Nairobi this 31st day of May, 2022.

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant

