



REPUBLIC OF KENYA



**Wekesa v Headlink Publishers Limited (Civil Suit 297 of 2015)
[2022] KEHC 11208 (KLR) (Civ) (25 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 11208 (KLR)

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

**CIVIL
CIVIL SUIT 297 OF 2015**

JK SERGON, J

JULY 25, 2022

BETWEEN

MONI WEKESA PLAINTIFF

AND

HEADLINK PUBLISHERS LIMITED DEFENDANT

JUDGMENT

1. The plaintiff in the present instance lodged a suit against the defendant vide an amended plaint dated August 6, 2018 and sought for the following reliefs:
 - a) That the defendant whether by themselves, agents or servants and/or any other person acting on their behalf be and hereby restrained by an injunction from circulating, distributing, selling, any further publication or any other dealings with the story in Citizen Newspaper vil.18 No.34 of August 24th -30th 2015 touching on the plaintiff in print or electronic form.
 - b) That the defendant be ordered to pay damages in lieu of apology.
 - c) Damages for defamation
 - d) Exemplary damages
 - e) Cost of this suit be awarded to the plaintiff.
 - f) Any other relief that this honourable court will deem fit and just to grant.
2. The plaintiff pleaded in his plaint that from 12th August to 16th August 2015 that he had attended the Law Society of Kenya Annual Conference at Leisure Lodge Mombasa and that the defendant published a photo of the plaintiff on the front page of the Citizen Newspaper Vol.18 No.34 of August 24th -30th August 2015 with the Caption “Sex Escapades unravel at lawyer’s Conference”.



3. The plaintiff further pleaded in his plaint that the said publication to an ordinary reader can be interpreted to mean that the plaintiff was involved in the alleged sex escapades and the caption just below his photo is calculated to cause the plaintiff to be shunned by fellow advocates and other right thinking members of society.
4. The plaintiff pleaded in his plaint that the defendant went further and published a story mentioning him by name at page 23 of the said newspaper as follows:

“A case in hand is that of a law professor Moni Wekesa, a sports enthusiast who doubled up as a presenter at the said conference.

The professor booked in room 71 at Leisure Lodge. It is alleged not less than four young advocates visited and spent the night in room 71 with the professor lawyer. The big question then is how is the same “respected” law don and LSK presenter who is expected to instil ethics found in such compromising situation. Could the young advocates be the ones soliciting for sex from them?

The don allegedly portrays different character during the day as a “gentleman” and resorts to weird character at night akin to a person who preaches water and drinks wine.

To start with the professor was demoted from a dean to a lecturer at Mount Kenya University due to sex for marks scandal. He is known for his generous invitations for tea, lunch or dinner to young advocates, students and colleagues whom he seduces, it is claimed.

Things backfired on the professor on August 14 2014 at midnight when he allegedly attempted to solicit for sex from wife of prominent city advocate, who is also an advocate who was attending the conference. According to sms allegedly sent by the professor through his mobile number xxx at 12:24 midnight to the lady advocate which reads:

I saw u dancing are through I come and pick you” “I am in room No.71 Can you come over”
After the message went unanswered, he quipped

Hey, hope you are not mad at me

It is now claimed that the professor was on a hunting mission was soliciting for sex from married young advocate but his advances were thwarted.”

5. It is pleaded in the plaint that the plaintiff has never been sacked or demoted at the said institution or any other institution on account of sex for marks or any other ground and that he did not solicit for sex from any lady advocate married or single or at all during the duration of the LSK Annual Conference 2015.
6. It was further pleaded in the plaint that the publication of the said materials is meant to portray the plaintiff as an extremely amorous person and a person of loose morals and also a person who abuses his position of authority over students to demand sex for marks a position that is not correct.
7. The plaintiff pleaded that contents of the said publication were not only false, malicious and spiteful but also highly defamatory to him as particularized under paragraph 33 of the amended plaint.
8. The plaintiff also pleaded that the materials complained of have injured his reputation and lowered his esteem before the right thinking members of the society.
9. Despite being served with Summons to enter appearance, the defendants neither entered appearance nor filed any defence. The suit was therefore set down for hearing as an undefended suit.



10. In his chief testimony, the plaintiff stated that he was admitted as an Advocate of the High Court of Kenya in December 2004 and that he has previously taught at the Catholic University but moved to Mount Kenya University as from mid-2010 as the dean up to 2016 then moved to Daystar University.
11. The plaintiff adopted his executed witness statement as evidence dated 6/8/2018 filed on 27/8/2018 and produced his bundle of documents as P. Exh 1-11.
12. The plaintiff stated that the contents of the said publication were false, defamatory and spiteful and that his students were shocked to read the same and that he felt like hiding in a hole where people would not point fingers at him.
13. In its submissions, the plaintiff gave brief facts of the matter and identified four issues for determination to be as follows:
 - i. Whether the statement complained of was defamatory
 - ii. Whether the statement refers to the complainant
 - iii. Whether the statement complained of is actuated by malice
 - iv. Whether the complainant is entitled to the prayers sought
14. On the first issue the plaintiff submitted that the defamatory article was captured on social media and widely circulated and that the same has been expressed by the courts in the case of *CFC Stanbic Bank Limited v Consumer Federation of Kenya (COFEK) being sued through its official namely Stephen Mutoro & ors* (2014) eKLR where it was held that:

“article complained of is not only defamatory but its continued publication on the world wide web may continue to damage the plaintiff’s international business, the plaintiff is a bank of repute operating not only in Kenya but throughout Africa; the continued circulation of the article in the worldwide web of the defendant may hinder or affect the plaintiff’s reputation and business operations;”
15. On the second issue, the plaintiff submitted that he denied all the facts stated in the defamatory publication by the defendant and provided evidence of their untruths and that the defendant has not defended the suit to prove facts stated in the defamatory statements, he therefore urges the court to find the statement complained of was actuated by malice.
16. On this the plaintiff relied on The Court of Appeal case in Civil Appeal No.286 of 2016 *Raphael Lukale v Elizabeth Mayabi & another* eKLR dealt with the issue of malice and recklessness in the following manner:-

“Malice can be inferred from a deliberate or reckless ignoring of facts. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. Malice may also be inferred from the relations between the parties before or after the publication or in the conduct of the defendant in the course of the proceedings. See *Godwin Wachira v Okoth* (1977) KLR 24 and *J P Machira v Wangethi Mwangi*, Civil Appeal No 179 of 1997.”
17. On the fourth issue, the plaintiff contends that the plaintiff was demoted from dean to lecturer at Mount Kenya University due to sex for marks and that the defendant was careless in his publication because he was not present during the conference.



18. The plaintiff further contends that the defendant claimed that no institution of higher education would keep a lecturer who has been accused of such grievous claim, and that there were no records of any disciplinary hearing against the plaintiff.
19. On this the plaintiff relied on the case of *Francis Xavier Ole Kaparo v Standard Limited & 3 others* (2010) eKLR the court held that where a plaintiff's reputation and dignity are injured, he is entitled to general, exemplary and aggravated damages to vindicate him to the public and to console him for the wrong done.
20. The plaintiff pointed out he was in Mombasa serving as a Law Society of Kenya presenter at the time of publication, harming his reputation among his peers, and that LSK would not have chosen him if they had doubts about his character and integrity. He had been practicing law for 40 years and had earned their loyalty.
21. The plaintiff further pointed out that because the aforementioned article appeared in a major newspaper and was thus available to millions of people nationwide, it seriously damaged his image and resulted in hate speech, derision, and/or scorn, among other things. On this the plaintiff relied on the case of *Henry Onyancha Obwocha v Headlink Publishers Ltd* (2014) eKLR in which the defendant did not offer an apology, the court awarded the plaintiff 20M in damages plus costs and interests.
22. The plaintiff therefore urges the court in our present case where no apology of any kind was issued by the defendant that an award of 20M would be appropriate in the circumstances.
23. I have looked at the pleadings before me, the evidence and the comprehensive submissions by the plaintiff. This suit is undefended therefore all the evidence is uncontroverted. I adopt the plaintiff's issues for determination which I shall address as below.
24. 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:
 - i. The libel must be published by the defendant.
 - ii. The published words must refer to the claimant.
 - iii. The statement as published must be false and defamatory of the plaintiff.
 - iv. The publication was malicious.
25. From my analysis of the pleadings and evidence placed before me, I established that it is not in dispute that the impugned publications were made by the defendant 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.
26. On the third ingredient to do with whether the publication was false and defamatory of the plaintiffs, 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 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.”



27. 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.
28. In his 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.
29. 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 his reputation in the minds of members of the public.
30. I opine that the plaintiff would succeed in their claim so long as they are 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.”
31. 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.
32. On the ingredient of malice, while it is apparent that plaintiff has denied all the facts stated in the impugned publication by the defendant and provided evidence of their untruths.
33. In other words, the defendant has not shown by way of credible evidence that the decision to publish the impugned material was made in good faith and upon the exercise of due diligence and the carrying out of thorough investigations. I am therefore satisfied that the plaintiff has proved that the impugned publication was actuated by malice.
34. In so finding, I am 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.”
35. In the premises, I find that the plaintiff has proved his claim for defamation against the defendant.
36. This brings me to the third issue for determination, on the reliefs sought by the plaintiff.
37. On general damages for libel, I considered the professional standing of the plaintiff who going by his testimony and supporting evidence, is an advocate of the High Court of Kenya with a well of experience



in the legal field. I also took into account his evidence that he has taught in various universities in Kenya and other countries like Namibia as well as Botswana and also a member of various committees, so he is well known both in Kenya and internationally.

38. I also considered 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,
39. 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.
40. I therefore find the award of Kshs.3,000,000/ to be reasonable for the plaintiff, in the circumstances.
41. For exemplary and punitive damages, the same are only awarded by the court to show disapproval of the defendant's conduct when the court is satisfied that the publication was oppressive or arbitrary and propelled by the desire and as a way of drawing a financial benefit. The Court of Appeal in *Board of Trustees, National Social Security Fund v Judy Wambui Muigai* (2017) eKLR reiterated the position of the law when it held:

“Such damages are in our view called for in situations of oppressive, arbitrary or unconstitutional actions by servants of the government or wrongful conduct which has been calculated by the defendant to make a profit for himself, where such award is expressly authorized by the statute...

...exemplary damages go beyond compensation and are meant to punish the defendant may well be ordered against a defendant who acts out of improper motive or where he is actuated by malice”

42. Exemplary damages, being aimed of punishing the defendants are also called punitive damages and therefore refer to one and the same remedy.
43. In this matter I do find that having had the opportunity to apologise but failed to do so, the defendant was in effect grand standing and therefore acted improperly. I do find that failure to apologise when demanded, justify and award of damages. With such determination, I do award to the plaintiff exemplary damages in the sum of Kshs 600,000/=.
44. In the end, judgment is entered in favour of the plaintiff and against the defendant in the following terms.
- i. That the defendant whether by themselves, agents or servants and/or any other person acting on their behalf be and hereby restrained by an injunction from circulating, distributing, selling, any further publication or any other dealings with the story in Citizen Newspaper vil.18 No.34 of August 24th -30th 2015 touching on the plaintiff in print or electronic form.
 - ii. General damages for defamation.....Kshs.3,000,000/=
 - iii. Exemplary damages.....Kshs. 600,000/=
- TotalKshs.3,600,000/=
- iv. Costs of the suit.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 25TH DAY OF JULY, 2022.

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J. K. SERGON

JUDGE

In the presence of:

..... **for the Plaintiff**

..... **for the Defendant**

