



**Balala v Nation Media Group Limited (Civil Suit 368 of 2011)
[2022] KEHC 13961 (KLR) (Civ) (19 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 13961 (KLR)

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

**CIVIL
CIVIL SUIT 368 OF 2011**

**JK SERGON, J
OCTOBER 19, 2022**

BETWEEN

NAJIB MOHAMED BALALA PLAINTIFF

AND

NATION MEDIA GROUP LIMITED DEFENDANT

JUDGMENT

1. The plaintiff herein filed a suit by way of an amended plaint dated May 21, 2018 and sought for judgment against the defendant in the following manner:
 - a. General damages
 - b. Damages on the footing of aggravated or exemplary damages;
 - c. A permanent injunction to restrain the defendant from further alleging, writing, printing and publishing allegations that the plaintiff is among Kenyans funding the activities of the Al Shabaab terror group.
 - d. A permanent injunction to restrain the defendant from alleging that the plaintiff is in any associated with or a supporter of Al Shabaab terror group or any terror group.
 - e. Costs;
 - f. Interest on (a), (b) and (d) above



2. The plaintiff pleaded in his plaint that in the defendant's daily Nation newspaper issue of July 29, 2011, it was published the following article as a headline of and concerning the plaintiff;

“Minister and MP gave cash to terrorist group United report exposes reach of al Shabaab in Kenya.

A cabinet Minister and a nominated MP are among prominent Kenyans funding the activities of the al Shabaab terror group, claims a new United Nations report.”

3. The plaintiff further pleaded that the said words in the natural and ordinary meaning meant and were intended to mean that the plaintiff was among the prominent Kenyans funding the activities of Al Shabaab terror group, that the United Nations in its report had exposed the plaintiff as a funder of the said terror group, that he donated Kshs 200,000/= in 2009 the terror group and that he is a terrorist.
4. It was also pleaded that the plaintiff had been seriously injured in his character and reputation as a person, Member of Parliament, Cabinet Minister, and politician. He has been subjected to public scandal, odium, and contempt, and has fallen in the estimation of right-thinking people generally both locally and internationally. The aforementioned allegations and or/publication were entirely false and manufactured by the defendant with the express purpose of harming and ruining the plaintiff's reputation and human dignity.
5. The plaintiff avers that the International Media which repeated or republished the said article citing the defendant as the source included the voice of America whose publication is also on the website and reads as follows;

“Kenya's tourism minister is rejecting as a conspiracy a United Nations report that accuses him and other prominent Kenyans of funding activities of the Somali insurgent group al-Shabaab.

Najib Balala condemned the Islamic militants as a detriment to the wellbeing of the people of Somalia and Kenya.

“I do not have any links with al-Shabaab, I have not financed al-Shabaab and I have condemned al Shabaab in all manner, “he said.”I don't believe in the Islamic movement. It is power –hungry and has no right to interfere in the politics of Somalia.”

Described by Washington as a terrorist organization with links to Al Shabaab is preventing some international humanitarian groups from providing relief aid to people under areas it controls.

Kenya's Nation newspaper quoted the UN report as accusing minister Balala of supporting the construction of a mosque in 2009 with a donation of 200,000 Kenya shillings (\$2,199.74). The UN says the funds were wired to an account operated by the group.

The report also accused him of donating 500,000 Kenyan shillings (\$5,494.70) to an account operated by a leading al-Shaabab financier on February 17 this year.

Balala said he is consulting his attorneys to challenge the UN report.”



6. The plaintiff further avers that in addition to the repetition by other media entities, the defendant also republished as well as repeating the said defamatory words of and concerning the plaintiff in the said newspaper on August 6, 2011 as follows;

“ A bad week forNajib Balala –The Government officially announced that the Tourism Minister and nominated MP Amina Abdalla were under local police investigation over allegations linking donations they gave to a mosque to al Shabaab activities”
7. The plaintiff pleaded that the said republication and injury to the plaintiff originated entirely from or was entirely caused by the defendant and has continued to republish daily on its website the said article and thereby further defame the plaintiff’s reputation to the whole world.
8. The defendant entered appearance upon service of summons and filed its statement of defence on November 10, 2011 to deny the plaintiff’s claim.
9. At the hearing, the plaintiff testified while the defendant did not call any witness to testify on their behalf.
10. In his chief testimony, the plaintiff stated that he is the current Cabinet Secretary for Tourism & Wildlife and proceeded to adopt his executed witness statement as evidence and to produce his bundle of documents as P. Exh 1-9
11. The witness stated that the impugned publication referred to him and that the defendant put his picture and name, even in the defendant’s witness statements it is admitted that the article referred to him as a cabinet Secretary.
12. The witness further stated that the article affected him in many ways as it came out on a weekend when he was with his family, that he never practiced extremism and now he is being referred as a terrorist which has made him have difficulties to obtain a visa to travel to the United States of America.
13. It is the testimony of the plaintiff that when he sought for a visa to visit the USA some time back, it took longer than expected for all of his delegates to acquire theirs because he had to undergo questioning by Homeland Security in order to be cleared.
14. In cross examination, the witness stated a nominated member of parliament invited him to the fund raising since his contribution was noted in the United Nations Report, which also painted him as a terrorist, even though the first piece mentions a cabinet minister by name. He was the only cabinet minister who attend.
15. In re-examination, the witness stated that although he was the only Cabinet Secretary who attend the fundraiser for the building of a mosque, he was unaware that the money would be used to support terrorist organizations.
16. At the close of the hearing, this court called upon the parties this court gave directions to have the suit disposed of by written submissions.
17. I have re-evaluated the arguments presented before this court.
18. I have also considered the rival written submissions. The issues for determination put forward by both parties revolve around the following issues:
 - a. Whether the words complained of were defamatory of the plaintiff.
 - b. Whether the statement refers to the complainant



- c. Whether the statement complained of is actuated by malice
 - d. What is the quantum of damages the plaintiff is entitled to
19. On this 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.”
20. 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.
21. In respect to the second and third ingredients which I wish to begin with, from my evaluation of the oral evidence tendered by 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.
22. I am therefore satisfied that the plaintiff has established the two (2) referenced ingredients on defamation.
23. This brings me to the first ingredient to do with whether the impugned publications are defamatory of the plaintiff.
24. 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 Kamunge \[2016\] 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.”
25. 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.
26. On his part, the plaintiff under paragraphs 4 and 5 of his plaint pleaded that the words complained of in the impugned publication were defamatory of them in the sense that they could be inferred in their ordinary and natural sense to imply that he is inter alia, a terrorist, funds terrorist activities, supports and or/has supported the terrorist activities of Al Shabaab terror group, aided and abetted terrorists activities and atrocities including piracy,bombing,hijacking,kidnapping of people ,killing people, causing injury to people on a mass scale and unfit to hold a public office.
27. The plaintiff also pleaded and testified that as a result of the impugned publications, his character, credit and reputation has been injured and has brought into public hatred, scandal, odium and contempt.



28. At the submissions stage, I note the argument by the defendant is that the plaintiff was the only witness in his own case and did not call any witnesses to testify in support of his character or reputation after the impugned publications, which means that the plaintiff has a duty to present credible evidence that any right thinking members of society who knew him prior to and after reading the said publications viewed him differently. The defendant relied on the case *Daniel N Ngunia v KGGCU Limited, CA 281 OF 1998 (2000) eKLR* wherein in the court of appeal observed as follows-

“We assume that ground concerned the appellant's claim for damages for defamation. Leaving aside any question of privilege upon which the learned Judge dismissed that aspect of the appellant's claim, we note from the record that the appellant was the only person who testified in support of his claim. In those circumstances, we cannot see how a claim based on defamation could have possibly succeeded even in the absence of the defence of qualified privilege.”

29. I also note that the defendant on its part did not call any witness to refute the claim by the plaintiff or raise the above issue at the preliminary stages of the suit and cannot therefore be heard to argue its case through their submissions.
30. That notwithstanding, I am satisfied that though the plaintiff did not set out verbatim the words published concerning him, he was 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.
31. 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.
32. 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* cited in the plaintiffs' submissions, 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*.
33. In the premises, I am satisfied that the plaintiff has shown that the publications in question are defamatory of him.
34. On the second issue, the ingredient touching on malice, the court in the case of *Phinehas 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.
35. Upon considering the nature, frequency and circumstances of the impugned publications coupled with the impact namely the issue of delaying of his United States of America Visa together with the fact that the United Nations report which put him on the spotlight as a funder of Terrorism and going by the evidence tendered by the plaintiff, it is my view that the plaintiff has proved malice against the defendant.
36. In respect to the ingredient to do with whether the publication was false, the court in the case of *Joseph Njogu Kamunge 2016 eKLR* reasoned that a defamatory statement is presumed to be false unless and until the same is shown to be true by a defendant.



37. In the present instance, I am satisfied that the plaintiff brought credible evidence to demonstrate the false nature of the impugned publications and which evidence was not countered by the defendant at the trial. Furthermore, while I note that the defendant pleaded the defence of fair comment, it did not tender any evidence at the trial to support such defence. To my mind therefore, the plaintiff has shown that the impugned publications were untrue.
38. 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.
39. This brings me to the second issue touching on whether the plaintiff is entitled to the reliefs being sought.
40. The plaintiff submitted that the guiding applicable in providing an adequate relief or remedy to the plaintiff by way of damages, is given in the binding decision by the Court of Appeal in the case of *Chase International Investment Corporation and Another v Laxman Kesbra and Others (1978) KLR 143 AT PAGE 153 to 154* as follows:
- “Most mature systems of law have found it necessary to provide, outside the fields of contract and civil wrongs, for the restoration of benefits on grounds of unjust enrichment. There are many circumstances in which a defendant may find himself in possession of a benefit which, in justice, he should restore to the plaintiff.
- Obvious examples are where the plaintiff has himself conferred the benefit on the defendant through mistake or compulsion. To allow the defendant to retain such a benefit would result in his being unjustly enriched at the plaintiff’s expense, and this, subject to certain defined limits, the law will not allow ... The principle of unjust enrichment presupposes three things: first, that the defendant has been enriched by the receipt of a benefit; secondly, that he has been so enriched at the plaintiff’s expense; and thirdly, that it would be unjust to allow”
41. The defendant submitted that as a point of law, the plaintiff is not entitled to any reliefs including damages and that if the plaintiff had succeeded in its claim on liability, then an award of damages in the sum of Kshs 2 Million would be adequate.
42. On general damages for libel, I considered the societal standing of the plaintiff who going by his testimony and supporting evidence, is a cabinet secretary and also a former Member of Parliament.
43. 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.
44. 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.
45. I therefore find the award of Kshs 3,000,000/= to be reasonable for the plaintiff, in the circumstances.
46. 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 VS 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”

47. Exemplary damages, being aimed of punishing the defendants are also called punitive damages and therefore refer to one and the same remedy.
48. 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/=.
49. I enter judgement in favour of the plaintiff and against the defendant in the following terms.
 - i. General damages..... Kshs 3,000,000/=
 - ii. Aggravated or exemplary damages.....Kshs 600,000/=
 - iii. An order is hereby given for permanent injunction to restraining the defendant from further alleging, writing, printing and publishing allegations that the plaintiff is among Kenyans funding the activities of the Alshabaab terror group.
 - iv. An order is hereby given for a permanent injunction to restrain the defendant from alleging that the plaintiff is in any way associated with or a supporter of Al Shabaab terror group or any terror group.
 - v. Costs of this suit

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 19TH DAY OF OCTOBER, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant

