



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NUMBER 23 OF 2016

ELIJAH ADUL.....PLAINTIFF

VS

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

GEOFFREY MOSOKU.....2ND DEFENDANT

ODUOR OGWEN.....3RD DEFENDANT

DR DAVID OLIMA.....4TH DEFENDANT

RONALD NGENY.....5TH DEFENDANT

BETH SYENGO.....6TH DEFENDANT

ALL ACTING AS ODM TASK FORCE

JUDGMENT

1. In his Complaint dated and filed on 28th January 2016, the Plaintiff sought the following reliefs :-

- a. General damages for libel**
- b. Exemplary and aggravated damages for injury to reputation and feelings.**
- c. Costs of the suit and interest at court rates.**

2. The 1st and 2nd Defendants' Statement of Defence was dated 23rd March 2016 and filed on 24th March 2016 while that of the 3rd to 6th Defendants was dated and filed on 11th April 2016. The Plaintiff's Reply to the 3rd to 6th Defendants Defence was dated 19th April 2016 and filed on 20th April 2016.

3. All parties relied on their respective Written Statements and bundle of documents in support of their cases. Their respective witnesses who testified in court adopted their Witness Statements as their examination-in-chief. Notably, although the 3rd, 4th and 5th Defendants filed Written Statements, it was only the 6th Defendant who testified on her own behalf and on their behalf.

4. The Plaintiff's Written Submissions with authorities attached thereto were dated and filed on 20th August 2019. The 1st and 2nd Defendants' Written Submissions with case law attached thereto were dated 11th September 2019 while the Written Submissions of the 3rd to 6th Defendants and their List and Bundle of Authorities were both dated 27th August 2019 and filed on 6th September 2019.

LEGAL ANALYSIS

5. The Plaintiff's List of Agreed Issues was dated 17th May 2016 and filed on 19th May 2016. This court determined that the issues that had been placed before it were as follows:-

- a. Whether or not this court had jurisdiction to hear and determine the case herein?
- b. Whether or not the 3rd to 6th Defendants were appointed by the Orange Democratic Movement (ODM) Party to make an inquiry into affairs of the County Assembly of Kisumu?
- c. If so, whether or not a Report was produced following the inquiry?
- d. Whether or not the Report contained defamatory words of or concerning the Plaintiff?
- e. Whether or not the 3rd to 6th Defendants were responsible for the words that were published in the Standard Newspaper?
- f. Whether or not the 1st and 2nd Defendants' published in the Standard Newspaper a publication containing words that were defamatory to the Plaintiff?
- g. Whether the Plaintiff's reputation and feelings were seriously injured and damaged?
- h. Whether the Plaintiff suffered distress, embarrassment and anxiety as a result of the said publication?
- i. Whether or not defences were available to the 3rd to 6th Defendants?
- j. If not, whether or not the Plaintiff under the circumstances and in view of the foregoing, was entitled to damages as prayed in the Plaintiff?
- k. If so, who was liable?
- l. Who was to bear the costs of the suit?

6. The court therefore dealt with the same under the distinct and separate heads shown hereinbelow.

I. JURISDICTION

7. The 1st and 2nd Defendants submitted that the court did not have jurisdiction to hear and determine the matter herein by virtue of Article 43(2) of the Constitution of Kenya, 2010. They had in fact filed a Notice of Preliminary Objection dated 1st March 2016 and filed on 7th March 2016 raising the said issue.

8. When the matter came up for hearing on 17th October 2018, their counsel indicated that he had wanted to canvass the same but that if the court was inclined to proceed with the said hearing, then he was also ready to proceed. This issue was not addressed and parties proceeded to trial.

9. Suffice to state that this very court had in the case of **Samwel Kijogi Makunyi vs John Lawrence Odhiambo & Another [2018] eKLR** dismissed a similar Preliminary Objection that had been raised by the Defendants therein and determined that it had jurisdiction to hear and determine defamation matters under common law. This court did not therefore deem it necessary to spend any more time on this issue.

10. Notably, none of the other parties submitted on this issue and the 1st and 2nd Defendants did not submit on any of the aforesaid issues.

II. PROOF OF THE PLAINTIFF'S CASE

11. The Plaintiff's case was that on 19th February 2015, the 1st Defendant published an Article that was not factual. The words that he complained of were published as follows:-

“...the speaker is alleged to have used county assembly service board funds to pay membership fees of Kshs 120,000.00 for her husband at the Karen County Club in Nairobi while some of the firms contacted by the assembly wired kickbacks to the bank accounts of people close to her including her husband...”

12. He was emphatic that the Speaker of the County Assembly was entitled to certain benefits including payment of club membership and that together with her, they had been members of the Karen County Club since 2006 where they had always paid membership fees. It was his evidence that the payment of the membership fees could not be said to have been solely paid for him. He pointed out that the sum of Kshs 120,000/= that had been indicated in the Article for membership fees was incorrect.

13. He took issue with the 1st and 2nd Defendants for not having sought his side of the story before they published the Article as a result of which they had exposed him to ridicule, odium and destruction of his reputation which he had taken over thirty (30) years to build.

14. He testified how he was traumatised by the said Article and that save for one of his friends who called him, all others shunned him. He added that his golf mates were reluctant to give him a golf game which depressed him because a lack of playing partners was one of the greatest punishment an avid golfer could suffer. He lamented that as a retiree, he had no time to build his damaged reputation.

15. He therefore averred that he was therefore entitled to be paid damages because even after his advocates demanded an apology from the Defendants, they refused to offer him any apology or to offer any amends including publishing a correction of the story.

16. Maurice Kanjenjo (hereinafter referred to as "PW 2") testified in support of the Plaintiff's case. His evidence was that after he read the Newspaper Article complained of, he formed an opinion that the Plaintiff was not honest as he had made him and other golf players believe and as a result, he and other golfers were reluctant to associate with him because he had been mentioned adversely as having participated in the wife's corrupt activities at the County Assembly of Kisumu.

17. The 2nd Defendant testified on his own behalf and on behalf of the 1st Defendant herein. He stated that on 18th February 2015, the Party Leader of ODM, Hon Raila Odinga called a press conference at Orange House where he received a Report that was published by a Task Force consisting of the 3rd to 6th Defendants.

18. He pointed out that the said Report had made reference to remittances having been made from Factor Connect to accounts of persons deemed to have been close to the Speaker. It alluded to Factor Connect having been paid by the County Assembly and it remitting monies to the Plaintiff herein and it indicating that it had dealings with the Plaintiff predating the election of his wife as a Speaker.

19. He added that under the item titled "Payment of Kshs 121,000 to a private members' club" the Report stated thus:-

"... we are satisfied by the findings of the PIC/PAC committee of the Assembly that due process was not followed...The Speaker had a perfect opportunity to mitigate this when the committee attempted to table its report on the floor of the Assembly but she used her position as Speaker to forestall the tabling and debate of this report."

20. It was therefore his contention that his Article that he published on 19th February 2015 was a fair and accurate report of the proceedings of the said Task Force and it was privileged under Part II of the Schedule to the Defamation Act.

21. The 6th Defendant relied on the contents of the Report in its entirety. She averred that the said Report was prepared after an exhaustive inquiry and was predicated on an honest opinion based on evidence and testimony collated from different key players. She denied that she and 3rd to 5th Defendants published and/or participated in the dissemination of any material published by the 1st and 2nd Defendants. She was emphatic that there was no intention to defame the Plaintiff herein.

22. It was not in dispute that the 1st and 2nd Defendants published an Article on 19th February 2015 in the Standard Newspaper. There was also no dispute that the 3rd, 4th, 5th and 6th Defendants were members of a Task Force that authored a Report relating to disruption of normal business at the County Assembly of Kisumu.

23. What they were not agreed upon was whether or not the Article was defamatory of the Plaintiff, whether or not his reputation had been seriously injured and damaged among members of the society, his family, business acquaintances and fellow members, whether or not he had suffered distress, embarrassment and anxiety as a result of the publication by the 1st and 2nd Defendants and whether or not he was entitled to general, exemplary and aggravated damages for the injury to his reputation and feelings.

24. The 3rd to 6th Defendants submitted that the words used in the Standard Newspaper were different from what was contained in their Report. They stated that what they reported was as follows:-

"The Speaker was accused of abuse of office as the CEO of the Assembly for ordering that a sum of Kenya Shillings One Hundred and Twenty One thousand (Sh 121,000) be paid to Karen Golf Club in Nairobi on behalf of her husband , Mr Elijah Adul..."

25. They added that the Report further stated as follows:-

"On June 6, 2014, the County Assembly paid a sum of Kshs 5,614,400/= to FACTOR CONNECT. The following day, FACTOR CONNECT remitted to the Bank Account of Mr Elijah Adul, the Speaker's husband a sum of Kshs 521,196/="

26. They were categorical that these findings were as a result of information given by third parties during the Inquiry and not the opinion of the Task Force and hence the words could not be said to have been defamatory and that in any event, the recommendations in their Report did not mention the Plaintiff herein. They added that PW 2 admitted in his evidence that he had not seen the Report.

27. It was their submission that in the event the court was to find that the words were defamatory, then they urged it to find that the said words were not malicious. In this regard, they referred it to the case of Phineas Nyagah vs Gitobu Imanyara [2013] eKLR where it was held that the words complained of must be malicious and that malice does not necessary mean spite or ill will but that recklessness itself may be evidence of malice.

28. They further argued that they were entitled to the defence of justification and fair comment as the Report was prepared because the County Assembly of Kisumu was facing severe management issues. It was their averment that in their natural meaning, the words complained of were published were out of a sense of public duty.

29. In the Halsbury's Laws of England 4th Edition Volume 28, a defamatory statement is defined as:-

“A defamatory statement is a statement which tends to lower a person in the estimation of the right thinking members of the society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt ridicule to convey any imputation on him disparaging or injuries to him in office, profession, calling, trade or business.”

30. In the case of SMW vs ZVM [2015] eKLR, the Court of Appeal held that in determining the words for purposes of defamation, the court does not employ legal construction but that the words complained of must be construed in their natural and ordinary meaning.

31. Evidently, a perusal of the words complained of in Paragraph 8 of the Plaintiff which were extracted from the 1st and 2nd Defendants' Article and the words in the Task Force Report showed that they were different. However, they both alluded to the Speaker having been accused of using public funds to pay membership fees at Karen County Club in the sum of Kshs 120,000/= on her behalf and that of the Plaintiff who was her husband.

32. It was immaterial that the Standard Newspaper Article had stated that the Speaker was alleged to have used the County Assembly Board funds to pay the membership fees at the Karen County Club while the Task Force Report had stated that the Speaker was accused of abuse of office as the CEO of the Assembly for ordering that a sum of Kshs 121,000/= be paid to Karen Golf Club in Nairobi on behalf of her husband, the Plaintiff herein. The issue was not whether or not the membership fees were paid for the Plaintiff only but rather public funds were used to pay membership fees to a private club.

33. The Task Force Report also alluded to monies having been paid to the Plaintiff's account after Factor Connect had been paid by the County Assembly of Kisumu. The 1st and 2nd Defendants used the words that some of the firms contacted by the assembly “wired kickbacks” to the Plaintiff's account.

34. It was the opinion of this court that these were mere semantics as the 1st and 2nd Defendants merely paraphrased the contents of the Task Force Report. Paraphrasing is a form of expression provided that the meaning of the words does not change. In both publications, the ordinary and plain meaning of the words was that membership fees to Karen County Club were paid for both the Plaintiff and his wife, the Speaker. In the same vein, this court was also not therefore persuaded by the Plaintiff's submission that the use of the word “kickbacks” was defamatory because the 1st and 2nd Defendants merely reported in alternative words that were contained in the Task Force Report.

35. The fact that the Plaintiff was acquitted in HCCA No 12 of 2016 Republic vs Anne Atieno Adul & 7 Others on 6th March 2017 did not imply that the Task Force that was handed over to the Party Leader of ODM Party on 18th February 2015 was defamatory *per se* because the same contained interviews by numerous key players. In the said Report, it was indicated that the Members of the County Assembly had raised a host of integrity issues around the person of the Speaker, which ranged from financial impropriety to conflict of interest. Save for the payment of the membership fees, the Plaintiff herein was not adversely mentioned in the said Report. Indeed, the contents in the said Task Force Report were not the opinions of the 3rd to 6th Defendants but rather, they were findings made after several key players were interviewed.

36. Notably, the Plaintiff had submitted that the Speaker was entitled to certain benefits, one of them being payment of membership fees to clubs. He, however, did not adduce any evidence to this effect and/or call the wife to attest to this fact. He did not also rebut the 2nd Defendant's evidence that the Speaker failed to appear before the Task Force to explain about the said payment.

37. It has been stated in Halsbury's Laws of England 54th Edition Vol 28 at page 23 that:-

“In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning the test is whether, under the circumstances in which the words were published, a reasonable man to whom publication was made was likely to understand them in a defamatory sense.”

38. It must also be satisfied that there is malice as was held in the case of Ann Wairimu Njogu vs Radio Africa Limited [2017] eKLR.

39. Notably, in the case of Wycliffe A Swanya vs Toyota East Africa Ltd & Another [2009] eKLR, the Court of Appeal laid down the principles to be considered when hearing a defamation case. These were:-

a. That the matter of which the plaintiff complains should be defamatory in character.

b. That the defamatory statement or utterances were published by the defendant's publication in the sense of defamation that the defamatory statement was communicated to someone other than the person defamed.

c. That it was published maliciously.

d. In slander, subject to certain exceptions, that the plaintiff has suffered special damages.

40. Whereas the publication was made to someone other than the Plaintiff herein because it was reasonable to expect that many people read the Article in the Standard Newspaper which this court took judicial notice had wide circulation, the words were not false and/or defamatory in nature having been obtained from a Task force Report that had obtained its contents from third parties and they were not published maliciously. The onus was on the Plaintiff to show that the contents in the said Report touching on him were made maliciously.

41. Notably, the burden of proof lay with the Plaintiff to demonstrate that the statement that was published by the Defendants herein was false, defamatory and malicious as stipulated in Section 109 of the Evidence Act Cap 80 (Laws of Kenya) that provides that the burden of

proof lies with that person who wishes the court to believe in its existence and that he who asserts a fact must prove as stipulated in Section 107 of the Evidence Act.

42. In the case of **Phineas Nyaga vs Gitobu Imanyara**(Supra) it was held that defamation was not about publication of falsehoods against a plaintiff but rather, he had to show that the published falsehood disparaged his reputation and lowered him in the estimation of right thinking members of society generally.

43. The fact that a plaintiff's reputation has been lowered in the estimation of right thinking members of the society does not necessarily mean that he has been defamed. This is because he may have been engaged in negative behaviour that dented his reputation without there having been any defamation.

44. Accordingly, having considered the evidence that was tendered by the parties herein, this court came to the firm conclusion that the Plaintiff did not prove his case on a balance of probability. It formed the opinion that the Report was made after a collation of views from different key players that were shown on pages 57 and 58 of the said Task Force Report and that the 1st and 2nd Defendants merely reported what was in the said Report albeit by using different words which in the plain and ordinary meaning to any person meant the same thing.

45. In the circumstances foregoing, this court found that the Plaintiff was thus not entitled to any general, exemplary or aggravated damages as he had sought in his Plaintiff.

DISPOSITION

46. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's suit was not merited and the same is hereby dismissed with costs to the Defendants herein.

47. It is so ordered.

DATED and DELIVERED at NAIROBI this 12th day of March 2020

J. KAMAU

JUDGE