REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO. 3 OF 2013

JOSEPH ELON JOLLEBO.....PLAINTIFF

VERSUS

STANDARD GROUP LIMITED.....1ST DEFENDANT

EDITOR –IN-CHIEF, THE STANDARD NEWSPAPER.....2ND DEFENDANT

KEVIN ODIT, COLUMNIST OF MONDAY BLUES,.....3RD DEFENDANT

STANDARD NEWSPAPER

THE PUBLISHERS, THE STANDARD LIMITED.....4TH DEFENDANT

JUDGMENT

Outline of facts from the pleadings

1. On 26th November 2012, it was pleaded in the plaint dated 24th January 2013, the defendants as publishers, editor in chief and columnist of one of the daily newspaper in Kenya published a story to the effect that the plaintiff, a deejay, had been locked up in prison at Shimo La Tewa on accusation of having maliciously damaged the property of his girlfriend. The same story alleged that the arrest followed a night of drinking spree and identified the subject as the winner of the Best DJ of the year in the 2012 Zumari Awards. It was thus pleaded that the words when put together with the plaintiff's photograph and an identifying caption pointed to no other but the plaintiff who then accused the publication to have painted him as a person irresponsible and incapable of trust with money, a dishonest, violent, reckless spendthrifts and a callous scrounge who pilfered from a girlfriend and thus incapable of compassion. It was further pleaded that the publication painted the plaintiff as a criminal, jail-bird and one who attached no value to property rights and family value with emphasis on an expectant mother being mistreated. Those portraits were said to have damaged the plaintiff's reputation and standing as a financial advisor and a disco jockey both of which engagements cherish integrity and the effect was that the plaintiff had been shunned and treated with odium by right thinking members of the society and associates.

2. When the plaintiff demanded a retraction and apology, the defendants carried out a publication on the 8th December 2012 which the plaintiff considered insufficient for failure to amend having been christened **DJ Define**. For those reasons, the plaintiff prays that judgment be entered for him against the defendants jointly and severally for exemplary, punitive and general damages plus costs and interests.

3. With the plaint was filed a witness statement and a bundle of documents which included academic certificates, PIN certificate, and Registration certificate with Insurance Regulation authority, agent agreement as well as the offending publication and the offered correction.

4. The suit was resisted by the joint statement of defence by the four defendants which admitted the description assigned in the plaint together with the fact that the 1st defendant publishes the newspaper but the extent of circulation was denied and strict proof invited.

5. All the allegations in the plaint alleging defamation including any reference of the words to the plaintiff, all the meanings assigned to the words and any defamatory effects were all denied and plaintiff invited to strictly prove his case.

6. An admission was however made that the plaintiff's photo was indeed inadvertent published but the said photo was said not to have assigned to the plaintiff the name DJ Define, which is not his name and that the names could not be confused for the plaintiff so as to lead to him being shunned as a result of defamation. The photograph was admitted to have been incorrect but the words used were actual, made no reference to the plaintiff it being added that the defendant is a reputable publication since 1902 which adheres to journalistic ethics and therefore violation of the media Act was denied. The defendants lastly pleaded that the article had been published under the context of *"Entertainment Gossip"* its publication ought not to have invited any serious attention but treated with a pinch of salt as the columnist was involved in journalism for information, entertainment and leisure.

7. That defence was accompanied by a witness statement by one STEVEN KISULI MUENDO, an editor of the 1st defendant who reiterated that the publication of the photograph was out of inadvertent mistake not propelled by malice and that the plaintiff was yet to deny the accuracy of the story. There was however, no bundle of document filed by the defendants.

8. At the hearing, each side called a witness who then relied on the witness statements filed and thereafter cross-examined.

Evidence by the plaintiff

9. In his evidence in chief, the plaintiff described himself as a financial advisor with old mutual and also a disc jockey. He relied upon his witness statement as evidence in chief. He said the publication was brought to his attention by a sister on the 26th November 2012 having attended an award ceremony in which he was given the accolade for the best DJ in Mombasa. To him the publication was to the effect that he had been locked into police cells on the complaint by a pregnant girlfriend. He then got hold of the article and sought legal advice because he took the view that article referred to him as a drunkard and a wife beater and therefore a person lacking in integrity to continue being a financial adviser and a disc jockey. He gave evidence that for those who did not know his stage name, the article could only refer to him having been identified by his photograph as he received the award and that the recipient of the award had been arrested and charged with a criminal offence.

10. He went on to state that out of the publication and being married to a wife with one child, he was asked many questions by the wife who wanted to know about the existence of an expectant girlfriend. He made a demand for correction and apology but there was no apology offered even though there was a publication of which was headed correction but without an apology to the plaintiff. The plaintiff then produced copies of the defendant's publications of 26th November 2012 and 3rd December 2012 as exhibits and marked the rest of the documents for identification subject to the originals being availed by the plaintiff.

11. On being cross examined, the plaintiff said that his stage name is DJ Elon and that DJ Define was not in the same event and that the article did not refer to DJ Elon but to DJ Define. He confirmed that the article appeared on the show bits section of the newspaper and was published under the column of gossip. To him a gossip is an untold story. He denied any grudge with the 3rd defendant who was the photographer at the event. On his marriage he said he was married under customary law. With that evidence the plaintiff's case was closed.

12. For the defendant, STEVEN KISULE MWENDO, gave evidence by adapting his witness statement as evidence in chief. In that evidence the publication is admitted. It was said that the publication was that of the plaintiff's photograph which was taken by the defendants' team operating in Mombasa. He gave the explanation that there had been two events and there occurred a mistake by mismatching the photographs with the story. He said that as the editor in charge of entertainment, he personally called the plaintiff and undertook to make amends by publishing an apology of equal prominence. He then produced the two documents as exhibits D1 and 2.

13. When cross examined, he admitted that the publication appeared as part of Monday blues which is an entertainment segment of the newspaper and indeed targeted the plaintiffs fans as readers. He reiterated that though the photograph was the plaintiffs, the story was about DJ Define and not the plaintiff. In re-examination, the witness said that he knew the plaintiff stage name as DJ Elon and not Define. When asked a question by the court the witness confirmed that a person looking at the photograph and the story would have the impression that the person whose photograph appears was locked up in accordance with the story. That then marked the close of the defendants' case.

14. Parties were then directed to file and exchange written submissions. Pursuant to such directions, the plaintiff's submissions were filed on the 8th June 2017 together with a separate list of authorities while the defendant filed theirs bound together with authorities on 21st July 2017.

Submissions by the plaintiff

15. In the written submissions which were highlighted orally, the plaintiff over and above setting out the outline of the respective cases sought to address its issues filed in court on the 5th November 2015. On the first issue whether the publication was defamatory to the plaintiff, it was submitted that as defined by the defamation Act, words include photographs, visual images and even gestures. It was then submitted, while relying on the decision in ***PHINEHAS NYAGAH VS GITOBU IMANYARA (2013) eKLR*** that the photograph when read together with the story referred to the plaintiff and had the effect of lowering his esteem as a person who had engaged in a disgraceful conducts leading to his arrest, being detained in the cells and thereafter being charged with the offence of malicious damage to property.

16. On whether the words in the publication referred to the plaintiff, it was submitted that both the photograph and the caption under it left no doubt because it was the plaintiff who had received the award at the event referred to in the story and caption and that anybody who was privy to his accolade would not doubt the fact that the story referred to the person in the photograph.

17. On the question whether the words were made out of malice, reliance was put on the decision in ***GODWIN WACHIRA VS OLEONI (1977) KLR cited in PHINEHAS NYAGAH (supra)*** for the proposition that an utterance of malice would be drawn whenever there is failure by the author to inquire into the facts or where there exist evidence that the defendant knew the statement to be wrong or just didn't care whether the statement be true or false.

18. Aligning such proposition of the law to the facts of this case, the plaintiff submitted that the defendant had the opportunity and a duty to verify that the photograph published was that of DJ Define as well as the fact that it was the plaintiff and not Define who was presented with an award but chose not to carry out the due diligence.

19. On the second issue whether the correction published was sufficient and an admission of the defamatory publication, the plaintiff submitted that there was no candid taking of responsibility for the use of the plaintiff photo in the publication and that there was no clear apology. For the fact that the publication was defamatory of and concerning the plaintiff, it was submitted that the defendants were solely and severally liable to the plaintiff. It was stressed that there was no question as to publication and the wide readership of the publication in

the entire East African and beyond through the internet. The provisions of the media Act and Code of conduct and practice for journalism in Kenya, 2nd Edition were also relied upon to show that the defendants had fallen short of expectation of the law.

20. On quantum of damages, the plaintiff proposed a sum of Kshs. 15,000,000 stressed the fact that damages are due to not only compensate the plaintiff for the injured reputation and esteem but also to vindicate the plaintiff to the society. Reliance was placed on the decisions in ***Ken Odondi and others vs Okoth Ombura (2013)*** ***eKLR, JOSHUA KEPKALEI VS KALAMKA LTD (…) Benson Masese vs Kenya Tea Development Agency Ltd (2005) and Chirau Ali Mwakwere vs Nation Media Group.*** In those decisions, the awards were Kshs. 4,500,000 for general and aggravated damages in Ken Odondi's case, Kshs. 10,000,000 for General, Aggravated and exemplary damages in Mwakwere's case and Kshs. 3,000,000 in Nyaga's case had the suit succeeded.

21. The plaintiff also prayed that he be awarded the costs of the suit.

22. For the defendant submissions were offered to cover issues to include; whether the plaintiff had proved publication of the alleged defamatory words, whether there had been injury to the plaintiff in the eyes of the right thinking members of the society and on the quantum of damages payable.

23. On burden and standard of proof, the defendant underscored the fact that the burden remained rested with the plaintiff pursuant to the provisions of Section 109 and 112 of the Evidence Act and that it was always upon him to prove all the elements and ingredients of defamation.

24. The ingredients of defamation were therefore set out and help sought from the English decision in ***SCOTT VS SIMPSON (1982) QBD 491, Jones vs Skelton (1963) KLR 1963*** as well as Halburry's Laws of England, 4th Edition volume 28 paragraph 10. Those sources define defamation to be any statement which tends to lower the plaintiff's esteem and estimation in the eyes of right thinking members of society or which causes him to be shunned, avoided or exposes him to hatred, contempt to or ridicule. It may also be a statement which conveys an imputation on him dispersing him in his office, profession, calling, trade or business.

25. On proof of publication, the defendant submitted that there had been failure to prove publication in that the plaintiff was not only required to produce the article complained of but also that the words were indeed read by some third party (ies). It was the defendants position that if indeed there had been publication then the plaintiff ought to have called at least one such reader as a witness which was not done. The evidence by the plaintiff that he was notified by his sister was to the defendant an inadmissible hearsay. The decisions in ***KCB VS Thomas Wandera Oyalo (2005) eKLR, Prime bank Ltd vs Joseph O. Asige (2005) eKLR, AL amoudi vs Brisad (2006)*** EWHC and section 63 of the evidence were relied upon to define what amounts to inadmissible hearsay. For failure to call any person who read the article the defendant urged that this court finds that no proof was made and the suit be dismissed.

26. On the quantum of damages payable, the defendant made submissions under two heads; Exemplary or punitive damages and general damages. For exemplary and punitive damages submissions were offered to the effect that the award was at the discretion of the court but the plaintiff was duty bound to prove the conduct of the defendant to have been oppressive, arbitrary of high handed, was made with the intention to make profits and even where the law provides for such, the court retains the duty to find if the plaintiff was a victim of punishable behavior. In this case the defendant took the position that there was no evidence that the publications was reckless or designed to generate financial benefit to the defendant or that there was intention to disparage the plaintiff. For those reasons the defendant submitted that no exemplary or punitive damages were due for award.

27. Regarding general damages, it was submitted that the goal of such damages was to vindicate the plaintiff to the public a goal which was freely achieved when the apology was published. In addition, it was submitted, while relying on the decision of ***Johnson Evan Gicheru vs Andrew Morton (2005) and Ken Odondi (supra)*** that in assessing damages for defamation the court must have regard of the defendants conduct from the time of publication to the time of the verdict and that some of the awards made at the beginning of 21st century were nolonger good law having ignored the fundamental principle of awarding damages. On that basis, submissions were made to the effect that if the court was to find for the plaintiff, then a sum of Kshs. 100,000 would be sufficient. On the authorities cited it was submitted that the plaintiff in those cases were public figures unlike the plaintiff here. The ultimate prayer was that the suit be dismissed with costs.

Issues for determination

28. There is a document titled Agreed issues and only signed by the plaintiff counsel but not the defendant's. I consider the same to be issues as isolated by the plaintiff alone. On the other side, the defendant did not file any issues. With such state of affairs, it behoves the court to perform its duty by crafting and isolating such issues in line with the pleadings filed as is mandatory under the rules1.

29. Having gone through the pleadings filed and evidence led, I do consider that the fact of publication was not seriously put into dispute. I say so with the appreciation that publication of the

1 Order 21 Rule 8

newspaper is admitted at paragraph 3 with an issue being raised on its circulation. In addition, paragraph 9 and 10 of the plaint expressly admitted to publication of the photograph the only issue taken being that it was done by inadvertence and that the publication did not defame the plaintiff. Granted that the defendants have in submissions exerted themselves heavily on the need for proof of the publication having been read by a third party, that was not a defense put forth for it to attract evidence or indeed submissions. In fact in the evidence led, DW1 did not dispute the fact that the newspaper was widely circulated. In his own words DW1 said:

> *"When we detected the mistake, I personally called the plaintiff, apologized and undertook to take consequent measures by publishing an apology of equal prominence".*

30. That evidence was in line with the witness statement adopted as evidence in chief in which the publication is expressly admitted at paragraph 3 and explanation offered at paragraph 4.

31. My finding is that the question of fact of publication having been admitted, it is not in dispute and a court of law has no business imposing a dispute for determination where parties have not curved out a dispute by the pleadings filed. In any event parties are bound by own pleadings and the defendant is in law not permitted to lead any evidence contrary to the pleadings filed2. In this matter however no evidence was led to deny publication save that the defendant has raised that from the first time in its submissions. Such submissions

2 *Order 2 Rule 6, civil Procedure Rules*

cannot be taken seriously because submissions are the opinion of the person filing same. They cannot be a substitute or supplement to the Pleadings. Having so said, the issue that I consider to present themselves for defamation are as follows:

(i) Were the words published on the 26th November 2012 refer to and defamatory of the plaintiff?

(ii) What was the nature and effect of the publication of the 3rd December 2012 titled correction?

(iii) What is the extent and quantum of any damages suffered by the plaintiff?

(iv) What orders should be made as to costs?

32. It cannot be denied that the written story clearly referred to DJ Define but the photograph accompanying the story and the caption of such photo was equally agreed to have been that of the plaintiff. There is no other story to connect to the photograph prior that the story of a popular DJ having been arrested and charged with the offence of malicious damage to property belonging to a pregnant girlfriend from whom the DJ had borrowed money which he used to go out and squander on alcohol.

33. Any person on the streets of Mombasa including the disco going Kenyans or just those traveling in GENO SACCO or MOBA SACCO matatus, if shown that publication and is familiar with the face of the plaintiff would tie and marry the story and the picture and conclude that it was indeed the person whose photo appeared who had been charged with the offence of malicious damage to property. It was the same person who was depicted as spendthrift who takes money from a business co-owned with an expectant girlfriend to squander on alcohol. To this court, the photograph was self-speaking of who the author intended to write and communicate about.

34. Having found that the publication referred to the plaintiff, the next question is whether the same tended to lower his reputation and esteem in the eyes of right thinking members of the society. In my view the test of a reasonable man or right thinking members of the society must not be the highly elitist nor the very ignorant in society.

35. In this matter using the standards of a reasonable man I do find that the publication depicted the plaintiff as the person who was charged with an indictable offence of malicious damage to property and would be liable to a term of imprisonment for up to 5 years if convicted. That was clearly defamatory in that it is never an exaltation to be deemed a criminal offender or just suspect. In any event, both in common law and under the defamation Act, in so far as the publication alleges a criminal offence against the plaintiff, the same is actionable per se and the plaintiff needed not prove special damage or injury.

36. Actionable par se means that the law presumes that the plaintiff has IPSO facto, by the fact of publication, suffered some harm by the publication and does not need to call evidence by a third party to prove that he now sees the plaintiff in a lower esteem.

37. In ***Kagwira M. Kioga vs The Standard News (2015) eKLR,*** the Court of Appeal underscored this established position of the when it said:

This view, which we accept as long established law, is also expressed by Gatley on Libel and Slander (9th Edn) thus, at p. 69;

" In English Law, libel is always actionable per se, that is to say the plaintiff is not required to show any actual damage, and substantial, rather than nominal damages may be awarded even in the absence of such proof, whereas in slander, with four exceptions, the cause of action is not complete unless there is „special damage? i.e. some actual, temporal loss".

Given that position in law, we respectively think the complaint is justified and the learned Judge did fall into an obvious error when he dealt with this issue as follows;

"In my view, in order to be awarded damages for defamation, it is not sufficient only to prove defamation… the plaintiff must lead evidence of actual damage to her reputation and character to enable the court to assess an appropriate award. I have already in the earlier passages of this judgment stated that the plaintiff failed to call any witness to corroborate her testimony with regard to the damage she claimed to have sustained or suffered to her reputation and character…".

38. On account of the fact that the defendants indeed published the offending photograph and the law being established that the nature and manner of publication was actionable *per se*, I do find that the plaintiff has proved his case to the requisite standards and is therefore entitled to damages. In coming to this conclusion, I have found that the publication was defamatory; it referred to the plaintiff, as far as the plaintiff was concerned, the statement was false and was published by the defendant.

What was the nature and effect of the publication of 3rd December 2012 titled correction?

39. In the submissions filed and the defence at paragraph 9 together with the evidence of DW1, great emphasis was laid on the fact that an apology was offered and acknowledged by the plaintiff. That apology has been pleaded and pursued on the basis that, the requirements of Section 16 of the Defamation Act was satisfied. that provision reads:

> **"In any action for libel, the court shall assess the amount of damages payable in such amount as it may deem just: Provided that where the libel is in respect of an offence punishable by death the amount assessed shall not be less than one million shillings, and where the libel is in respect of an offence punishable by imprisonment for a term of not less than three years the amount assessed shall not be less than four hundred thousand shillings".**

40. In my view the offer of tender of an apology and correction is never of a defence to a claim for libel but is a mitigating factor at the time court assesses damages. It is one of the conduct of the defendant the court considers whether or to the plaintiff has showed remorse. In my view, for a publication to pass, it must clearly retract its words published of the plaintiff and recall same in whole before offering an unreserved apology. The apology must also get the prominence of the offending publication. Here defendant did publish the following words as the correction and apology:

> **"Last week on this space, under an article featuring DJ DEFINE we erroneously captioned a picture of DJ ELON. We apologize for the mix-up as DJ Elon is seen here being awarded for BEST DJ in Mombasa at the Zumari awards ceremony"**

41. I am convinced that the prominence given to the publication was commensurate with the offending publication. However, I am not satisfied that there was sufficient retraction of the message passed by the offending publication. It would not have been difficult to say in the later publication that the story published with the photograph did not concern or intend to refer to the plaintiff here. It would also have sufficed if it was expressly said that the plaintiff had not been charged and had no expectant girlfriend who had lodged a complaint against him.

42. I also find that the apology ought to have been directed to the plaintiff in an unequivocal manner. It is not enough to say vaguely that we apologize to the mix up without an apology for any distress and hurt occasioned to the plaintiff. I do find that the defendant having set and made a decision to effect amends and apologize to the plaintiff, it succeeded in the retraction but shied away from offering an apology. I do conclude that the intended apology as effected was merely half-hearted. Be that as it may, i would all the same given it the necessary regard while assessing damages payable.

What is the extent and quantum of damages suffered by the plaintiff?

43. In the plaint, prayers were made for exemplary, punitive and general damages. In undertaking that task of assessment, I remind myself that assessment of damages invites no mathematical precision and accuracy rather it is a discretionary power aimed at meeting the purpose of making awards for libel. I understand the purpose to be the vindication of the plaintiff to the public and to console him for the hurt visited upon him. I am equally reminded that there are factors I need to take into account including the conduct of the defendant from the date of the publication until the date of this determination over and above taking into account the extent of circulating of the offending publication and the publication by the defendant titled correction. I have noted and held that the defendant needed to have done more in its correction and apology. It did not help much by failing to directly and unequivocally apologize to plaintiff and by distancing the plaintiff away from the accusations of being charged, having a pregnant girlfriend and being spendthrift. For that reason the correction is of no help toward mitigation or just reduction of the damages payable. However even the plaintiff did not make any effort to lead evidence on how gravely the publication had affected him particularly with the wife. No evidence was led on how the said wife reacted after inquiring about the pregnant girlfriend.. That the plaintiff was a financial advisor, I understand that to mean an insurance agent based on the documents exhibited and a disc jockey was not disputed, I have taken all into account and while aware that damages awarded by court should be purely compensatory and not seen to enrich the claimant, I do consider that an award of Kshs. 2,000,000 would be reasonable compensation to the plaintiff as general damages.

44. For exemplary and punitive damages, the same are only awarded by the court to show disapproval of the defendants 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"**

45. Exemplary damages, being aimed of punishing the defendants are also called punitive damages and therefore refer to one and the same remedy.

46. 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. Therefore, even though I have not established improper motive or malice in the publication, 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

47. In conclusion, I do award to the plaintiff the sum of Kshs. 2,600,000 being general as well as exemplary damages for libel together with costs and interests.

Dated and Signed at Mombasa this 20th day of April, 2020

P J O Otieno

Judge

Dated and delivered at Mombasa this 23rd April 2020

E Ogola Judge