



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 330 OF 2012

PATRICK NYOIKE.....PLAINTIFF

VERSUS

LINUS GITAHL.....1ST DEFENDANT

NATION MEDIA GROUP LIMITED.....2ND DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit against the Defendant vide a plaint dated 11th June, 2012. The suit is based on the tort of defamation. The Plaintiff's complaint is that on 1st April, 2012 the Defendants published a defamatory article concerning him in the **Sunday Nation Newspaper** on their website, www.nation.co.ke headed:

“KENYA’S OIL FIND: THE UNTOLD STORY

- Minister Wetang’ula, PS Nyoike and former government adviser linked to a company that raked in nearly 1 billion by selling land where oil was found.
- PS accused of colluding with Turkana Development Corporation to “steal” results of chemical analysis of substance discovered in Turkana believed to have been crude.
- Discovery set to change regional politics and Kenya’s future relations with neighbours especially Uganda, South Sudan, Ethiopia and Tanzania”

2. It is further pleaded that the Plaintiff’s photograph was also published alongside the following words:

“Patrick Nyoike: was sued by people who were in the business of borehole drilling and stumbled on what they thought was crude oil”

3. The Plaintiff’s claim is as follows:

“a) General damages

b) Aggravated and/or exemplary damages

c) A permanent injunction restraining the Defendants jointly and severally, by themselves, their agents, servants and/or employees from publishing and/or circulating such defamatory and derogatory materials as have been published concerning the plaintiff.

d) Retraction of the false and malicious story published by the Defendants on 1st April, 2012, tendering an unconditional apology to the plaintiff and the same be published in a prominent front page banner headline as the offending story in words acceptable to the plaintiff.

e) Costs of this suit.

f) Interest on (a) ,(b) and (e) above.

4. The claim is denied as per the joint statement of Defence dated 31st March, 2015. It is stated that the article was published as fair comment made under public duty. That a follow up article was published on 15th April, 2012 and gave the Plaintiff the opportunity to set the record straight.

5. The Plaintiff filed a reply to Defence, joined issues with the statement of Defence and reiterated the contents of the plaint. It is contended that the publication was not made as a matter of public duty but was made maliciously to injure the Plaintiff's reputation.

6. The Plaintiff, Patrick Nyoike testified and adopted his witness statement as his evidence herein. The Plaintiff described himself as a retired civil servant who was a Permanent Secretary, Ministry of Energy at the material time. He produced the article in question as an exhibit and stated that the publication was false and malicious and that no clarification was sought from him or from the Ministry of Energy prior to the publication. That he demanded an apology but none was forthcoming. That the Plaintiff subsequently caused to be published in the Defendants' daily newspaper and in the **Sunday Standard** the facts regarding the oil exploration and discovery of oil in Turkana County.

7. The Plaintiff further stated that he was distressed following the publication of the article and that his family was also traumatized. That the article disparaged his reputation and lowered his esteem before his family, friends, associates, superiors, colleagues, subordinate and the public at large.

8. PW2 Angnes Nyoike, the Plaintiff's wife and PW3 Lincoln Njogu Nyoike the Plaintiff's son testified and narrated how the Plaintiff was negatively affected by the publication.

9. Sekou Owino (DW1) testified on behalf of the Defendants. His evidence was that the publication was fair comment made under public duty and was done without any malice. That the article was based on a case that was filed by Interstate Oil Company against the Ministry of Energy wherein the said Company accused the Plaintiff herein of stealing the results of samples presented for analysis of the contents of the oil discovered by Interstate Petroleum Company in Turkana by the Ministry of Energy. That the Plaintiff was interviewed and given an opportunity to set the record straight and to clarify the allegations made against him by Interstate Petroleum Company.

10. Defamation is defined in **Winfield in J.A. Jolowicz and T. Ellis Lewis – Winfield on Tort 8th Edition**, thus:

“Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of the society generally, or which tends to make them shun or avoid that person.”

A defamatory statement, according to Gately on Libel and Slander 8th Edition by Phillips Lewis paragraph 4 page 5 discredits a man or tends to lower him in the estimation of others or to expose him to hatred, contempt or ridicule or to injure his reputation in his office trade or profession or to injure his financial credit.”

11. The Court of Appeal in the case of **Wycliffe A Swanya v Toyota East Africa Limited & another Nairobi CA No. 70 of 2008** set out the elements of defamation thus:

“It is common ground that in a suit founded on defamation the plaintiff must prove:-

(i) That the matter of which the plaintiff complains is defamatory in character.

(ii) That the defamatory statement or utterance was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.

(iii) That it was published maliciously.

(iv) In slander subject to certain exceptions that the plaintiff has suffered special damages.”

12. I have read the article in question which is headed “Kenya's Oil find: The untold story. The same concerns *inter alia*, the Plaintiff and identifies him by name and title and includes the Plaintiff's photograph. The subheading thereof links the Plaintiff to a Company that is said to have raked in nearly Ksh.1 billion by selling land where oil was found. The article further accuses the Plaintiff of colluding with Turkana Development Corporation to “steal” results of chemical analysis of substance discovered in Turkana believed to have been crude. The article further states that the Plaintiff was sued by people who were in the business of borehole drilling and had stumbled on what they thought was crude oil.

13. The article then proceeds with the story in the next page headed “**The inside story of Kenya's Oil**” and names the Plaintiff once again as one of the people who had raked in money by selling the “**black gold**”. The Plaintiff is also named as having been sued by Interstate Petroleum Company allegedly after three samples had been submitted to him for chemical analysis but the company was not given the results. The article then mentions that the case was lost on technicalities. The Plaintiff is then named as one of the people behind the sale of the blocks of land with the oil find in lucrative deals.

14. The article in its natural and ordinary meaning and by way of innuendo reflects the Plaintiff, as pleaded in the plaint, as a thief, corrupt, incompetent, dishonest, untrustworthy, unscrupulous, irresponsible, morally defective and a criminal.

15. The Defendant's case is that the publication was fair comment made under public duty in matters of public interest regarding the prospect of Kenya's oil find. Although the defence witness stated that the story was based on a case that was filed by Interstate Oil Company against the Ministry of Energy wherein the Plaintiff is said to have been accused of stealing results of samples of oil presented for analysis, the proceedings in the said case were not produced as exhibits herein. The Plaintiff's position that the said suit was dismissed was confirmed by the Defendant's witness during cross-examination. This court is therefore not able to take the said case into account in weighing the contents of the article in question.

16. As stated by the Court of Appeal in the case of **Nation Media Group Ltd & another v Alfred N. Mutua [2017] eKLR**

"28. To sustain the defence of fair comment, the appellants were required to demonstrate that the words complained of are comment, and not a statement of fact; that there is a basis of fact for the comment, contained or referred to in the article complained of; and that the comment is on a matter of public interest [See Gatley on libel and slander 8th edition 1981 (Sweet & Maxwell) at paragraph 692 at page 291].

29. The respondent could however defeat the defence of fair comment by showing that the comment was not made honestly or was actuated by malice. In **J.P. Machira t/a Machira & Company Advocates v Wangethi Mwangi & another [1998] eKLR** the Court said that malice "can be inferred from a deliberate, reckless, or even negligent ignoring of facts" and that "deliberate lies can also be evidence of malice."

30. In **Mong'are t/a Gekong'a & Momanyi Advocates v Standard Ltd (above)** this Court stated, "that comment can only be fair if the basic facts upon which the comment is premised are correct. A comment which is based on lies or falsehood cannot be designated as fair" And in **Grace Wangui Ngenye v Chris Kirubi and another. Civil Appeal No. 40 of 2010 [2015]eKLR** this Court reiterated that a fair comment must be based on facts that are true or substantially true; and that a fair comment is a commentary, an expression of opinion based on true or substantially true facts.

31. An exposition of what Lord Phillips, the President of the Supreme Court of England described as "the outer limits of the defence" of fair comments is set out in the Supreme Court of England decision in **Spiller & another v Joseph & others [2010] UKSC 53**. In that case, Lord Phillips adopted with approval what the Court of Final Appeal of Hong Kong characterized as the five "well established" "non-controversial matters" in relation to the defence of fair comment. First, the comment must be on a matter of public interest. Second, the comment must be recognizable as comment, distinct from an imputation of fact. Third, the comment must be based on facts, which are true or protected by privilege. Fourth the comments must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made. The reader or hearer should be in a position to judge for himself how far the comment was well founded. Fifth, the comment must be one which could have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views."

17. The Defendant's witness was not able to establish the truth of the article. Indeed, the said witness admitted during cross-examination that the clarification that followed acknowledged errors in the article. There was recklessness on the Defendant's side as there is no evidence of any investigations or verification carried out to establish the truth of the matter. (See for example **Hon. Uhuru Muigai Kenyatta v Baraza Limited [2011] eKLR; Phineas Nyagah v Gitobu Imanyara 2013 eKLR**).

18. There was no apology to the Plaintiff. Indeed the defence evidence also admits that the clarification was on page 10 of the newspaper and not on the front page like the impugned article. It has also been admitted by the Defendant's witness that the article is still available online. Even with the admission of errors, the defence continued to deny the case and proceeded with the said stand to the end. The Plaintiff is therefore entitled to aggravated and or exemplary damages.

19. As stated by the Court of Appeal in the case of **Miguna Miguna v The standard Group Ltd & 4 others [2017] eKLR** while quoting the case of **John v GM Limited [1993] QB 586**

"Aggravated damages will be ordered against a defendant who acts out of improper motive e.g. where it is attracted by malice; insistence on a flurried defence of justification or failure to apologize."

20. Exemplary damages go beyond compensation. They are meant to punish the wrongdoer and act as a deterrent from similar conduct in future (See for example **Ken Odondi & 2 others v James Okoth Omburah T/a Omburah & Co. advocates [2013] eKLR** and **Standard Ltd v G. N. Kagia T/a Kagia & Co. Advocates [2010] eKLR**..

21. On general damages, the Plaintiff's counsel submitted on an award of Ksh.20,000,000/= while the Defendant's counsel submitted on Ksh.200,000/=.

22. The principles to be considered by the court in awarding damages in a defamation suit were set out by the Court of Appeal in the case of **Johnson Evans Gicheru v Andrew Morton & another Civil Appeal No. 314 of 2000** while quoting from the English decision of **Jones v Pollard [1997] EMLR 233,243** as follows:

"1.The objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published, and any repetition;

2. The subjective effect on the plaintiff feelings not only from the prominence itself but from the Defendant's conduct thereafter both up to and including the trial itself;

3. Matters tending to mitigate damages, such as the publication of an apology;

4. Matters tending to reduce damages;

5. Vindication of the plaintiff's reputation past and future.”

23. I have also noted the observations made by the Court of Appeal in the **Johnson Evan Gicheru (supra)** case regarding the awards made in some of the defamation cases involving prominent politicians, high ranking civil servants and advocates as follows:

“my considered opinion of the awards so made is that they lack juridical basis, they may be found to be manifestly excessive and should not at all be taken as persuasive or guidelines of awards to be followed by trial courts, since the trial judges concerned appeared to have ignored basic fundamental principles of awarding damages in libel cases.”

The Court of Appeal further observed that compensation is a solatium more than a monetary recompense for harm measurable in money.

24. The Plaintiff's counsel proposed Ksh.5,000,000/= as aggravated damages and Ksh.3,000,000/= in lieu of an apology. On the other hand, the Defendant's counsel did not assess the same. I award Ksh.5,000,000/= as general damages Ksh.1,000,000/= as aggravated damages. In doing so I have considered similar some authorities e.g.

(a) **Hon. AMB Chirau Ali Makwere (supra)** where the Plaintiff who was a former ambassador and a politician was awarded Ksh.3,000,000/= as general, exemplary and aggravated damages.

(b) **Martha Karua v Standard Limited & another Nairobi HCCC No. 295 of 2004** where a cabinet minister was awarded Ksh.4,500,000/= as general and aggravated damages.

25. There is no evidence that the Defendants have continued to publish and to circulate any other defamatory material concerning the Plaintiff. It is also rather late in the day for the apology to be tendered and circulated in the newspaper. In any event, the Plaintiff has already been awarded aggravated damages. The Defendants should however retract the story from their online post.

26. In the upshot, I enter judgment for the Plaintiff for the total sum of Ksh.6,000,000/=, a permanent injunction in terms of prayer (c) of the plaint, a retraction of the online article plus costs and interest.

Date, signed and delivered at Nairobi this 29th day of May, 2020

B. THURANIRA JADEN

JUDGE