



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL SUIT NO 169 OF 2012**

**HENSON NIGEL GRAHAM.....PLAINTIFF**

**VERSUS**

**THE STANDARD GROUP LIMITED.....DEFENDANT**

**J U D G M E N T**

1. In this suit the plaintiff seeks as against the defendant a declaration that the publication made on the 14.06 2012 and concerning the plaintiff was false and defamatory of the plaintiff; an order that the defendants offers and publishes an unequivocal apology to the plaintiff in words and photographs to the satisfaction of the plaintiff, general, punitive and aggravated damages plus costs and interests.

2. It was pleaded in the plaint dated 17.09.2012 that as a result of the false publication of 26.06.2012, comprising words and photographs, the plaintiff was cast and portrayed in bad light in that the publication meant and was understood to mean that the plaintiff was a defiler, paedophile, sex predator and tourist over juvenile girls and boys and therefore one with a corrupt and low moral values and thus a social - misfit. It was then pleaded that the publication had seriously injured the plaintiff in his character, standing, reputation and credit and exposed him to public and family scandal, contempt and odium in the eyes of the right thinking members of the society who then shunned and avoided him all of which tribulations have visited upon him mental anguish and torture with the attendant injury and damage for which he claims damages. The exact words deemed defamatory were reproduced in the plaint it being added that a demand was made for apology, retraction and admission of liability but the defendant ignored and failed to respond hence the suit was invited.

3. In opposing the suit and its remedies the defendant filed a statement of defence on the 25.02.2015 in which that publication was admitted but falsehood was denied it being asserted that the same was inspired by the need to stop a trend that was emerging in which schoolgirls and other young persons were being lured into prostitution. The story was justified by the defendant to have been for public good and intended to discourage the menace of child and sex tourism and a defence of fair comment was thus put forth. The defendant essentially denied any liability to the plaintiff and invited very strict proof of the claim.

4. At the trial the plaintiff was the only person to give evidence. He adopted the witness statement filed with the plaint as his evidence in chief and produced the documents being, the copy of the newspaper, two email to the defendant, a demand letter by his advocate and a certificate of posting.

5. The gist of the evidence was that on the date of the publication, the plaintiff received calls from his friends who told him to get a copy of the newspaper and read for himself. He told the court that he got a copy of the newspaper, read and made attempts to reach the defendant on phone to no avail before he did an email which was however never acknowledged. He added that on the 22.06.2012 he wrote second email which was then acknowledged.

6. He went on to say that at that time he lived on the beach and owned a boat he would use for self and to hire out. He was in the process of applying to join Nyalali Golf Club as a member but had to abandon the same for four years owing to the report and the fact that some of his friends believed the story. He said he became a target of bad talk and was forced to sell the boat, move houses from an own compound into a block of flats for the sake of security and resorted to staying indoors having been labelled a paedophile. He clarified that the girlfriend with whom he was photographed was 26 years old and that the defendant had the right to publish the story but no right to align his photo to it with the story to illustrate the story and without permission.

7. Upon cross-examination the plaintiff told the court that the events being charged all started in June 2013 when he met the Mombasa

Governor at a cinema and the governor ordered his arrest and that the girls arrested with him were later found to have been minors but was not aware that they were charged and convicted on own plea of guilt. For his trial he said the matter proceeded fully and he was acquitted. He however confirmed that he did not feel threatened to walk with the minors to the cinema. On re-examination the witness stressed that the alignment of the story to his photo made him be the subject of the story, that he moved from his residence owing to lack of security and the fact that he had been removed from beach life and lastly that after acquittal he had not been charged with any other offence. That evidence marked the close of the plaintiff's case and the field was then set for the defence case.

8. It is to be noted that even though such defence was filed raising what was apparently substantial issues, the defendant failed to comply with trial directions in time and at all but resorted to challenging the suit by a number preliminary objections and an application which however failed. As a consequence, the defendant denied itself the chance to lead evidence and on the date set for the defence case no appearance was made and the case was closed without any piece of evidence being availed on behalf of the defendant.

9. On the direction by the court after the close of both cases, parties filed submissions which the court has had a chance to peruse while preparing this decision.

10. In their submissions, the plaintiff emphasized the point that the fact of publication of the story alongside the plaintiff picture was outright defamatory of him for casting him as a pest and child exploiter and that the defence filed was a general denial which was never supported by any evidence whose mainstay was alleged lack of jurisdiction but the same had been considered and dismissed by the court. On the basis of the evidence tendered the plaintiff took the view and position that he had proved his case to the requisite standards and was thus entitled to general as well as punitive and aggravated damages for defamation. The plaintiff cited to court some five decisions; three from the Court of Appeal and two from the High Court. All discuss what constitute defamation, proof of the same and assessment of damages. To the plaintiff, the materials provided disclosed four substantive issues for determination by the court.

11. For the defendant, submissions were offered to the effect that the plaintiff had not proved defamation on the basis that he confirmed having been indifferent to going into a cinema hall with underage children without permission and knowledge of the parents. It was stressed that the plaintiff submissions which made no reference to any statute, academic writing or precedence was of no assistance to the court but detrimental to the plaintiff's case. It was the defendant's submissions that the words and photographs published did not identify the plaintiff and were not capable of identification as referring to the plaintiff. It was also added that there was no evidence as to falsehood and none by an independent witness that the publication referred to the plaintiff. For that submission, the defendant cited to court the decision in **Daniel Ngunia vs KGGCU Ltd (2000) eKLR** to the effect that in the absence of independent witness confirming that the words referred to the plaintiff it is not possible to find for the plaintiff even in the absence of the defence of qualified privilege. The onus and incidence of burden of proof was underscored to have been upon the plaintiff but was not discharge regarding relating the story with the plaintiff and the injury inflicted.

12. It was further submitted that the words as published consisted of expression of opinion and fair comment on a matter of great public importance and that there was an absolute defence because a honest expression of opinion is fundamental right and that such matter every member of the society is expected to have access to. The decisions in **Slim vs Daily Telegraph (1968)1 All ER,497**, **London Artists Ltd vs Littler (1969)2 All ER**, **Spiller vs Joseph (2010) UKSC,53** and **Fraser vs Evans (1969)** were cited on the defence of fair comment on a matter of great public importance. Invitation was then made of the application of judicial notice pursuant to section 59 of the Evidence Act and the decision in **Jeneby Mawira vs Ann Whiler (2027)eKLR** where the court said that a court is obliged to take notice of matters of some notoriety it being urged that the trend of young people being incited and recruited into sexual act in the coast region.

13. The position taken was that the plaintiff was not entitled to any damages and that if the court was to be persuaded to award damages then it should award a sum of Kshs 100,000 being guided by section 16A defamation Act while noting that damages must be kept low so as not to impact negatively on the freedom of speech and that damages for defamation should be solatium rather than to compensate for harm measurable in monetary terms.

14. Having given due regard to the pleadings filed, the evidence led and submissions offered, including the emergent issues as framed by each party, I have formed the opinion and view that the fact of publication is not disputed. What emerges to be in dispute is whether the publication concerning and referring to the plaintiff and if as a result the plaintiff was defamed and suffered any damage. With such position I find the following issues to isolate themselves for determination by the court: -

- i. Did the publication and photographs refer and belong to the plaintiff?
- ii. Were the words published defamatory of the plaintiff or were they an expression of opinion and fair comment on a matter of great public importance?
- iii. What relief, if any, is the plaintiff entitled to?

15. In coming up with the four issues, I am not oblivious of the plaintiff defence and objection that the court lacks jurisdiction to entertain the matter. I do take cognisance of that fact but note that this court did consider the same in details in its ruling dated 24.02.2017. with that ruling on record, and before it is reversed on appeal, the matter is *res judicata* before this court and cannot be revived for litigation afresh.

**Did the publication and photographs refer and belong to the plaintiff?**

16. I have had a chance to read the very elaborate article and story as published and I entertain no doubt that it casts a gleam picture of persons who are bent on sexual exploitation of the minors and other marginalised persons because of poverty and vulnerability. I have no doubt therefore that the words are in every way defamatory, if proved to refer and concern a particular individual complainant. In fact, on their own, the words allege commission of indictable offences under the Sexual Offences Act, Penal Code and children's Act with heavy prison penalties and would in law be actionable *per se*.

17. In a claim for defamation, however, the incidence and onus of proof is always upon the plaintiff to prove that the word indeed

referred and concerned him and nobody else, and tend to lower his standing in the eyes of right thinking members of the society. In this case, no mention by name is made of the plaintiff at all. The photograph taken are also from behind and do not clearly identify the plaintiff. In evidence nothing peculiar was shown to relate the plaintiff as the person in the photo. In fact, in evidence the plaintiff did not call a third party to identify the photo as his. That was an inescapable obligation once there was a pleading denying that the publication concerned the plaintiff. In fact, it must be noted that from the word go the plaintiff appreciated the need to prove that the photo was his when he filed three different witness statements by three different people but then chose not to call any of them at trial. That failure to lead evidence and identify the publication as referring to and concerning the plaintiff removes the very foundation a suit for defamation must be grounded. In the words of Lord Atkin in **Knuffer Vs London Express Newspaper Ltd (1944)1All ER** 'to be actionable the defamatory words must be understood to be published of and concerning the plaintiff'.

18. I do find that failure to prove that the publication was in fact about and concerning the plaintiff negates the entire claim which I hereby dismiss. With such dismissal it is now moot to consider the other issues framed for determination.

19. The only issue that remains for consideration is the quantum of damages that would be payable had the suit succeeded. Damages for defamation are known to be intended not to retribute any monetary loss but to vindicate the plaintiff to the society and a consolation to him for the wrong done.<sup>[1]</sup>it is also of note that democracy demands the protection of freedom of speech as a medium of correcting wrongs in society and therefore damages for defamation ought to be kept modest so as not to appear to muzzle and throttle the right to express opinion. In **Evan Gicheru vs Andrew Morton (2005) eKLR** the Court of Appeal reiterated the position of the law that the gravity of the libel matters.

20. In this matter, the allegations of child molestation are indeed very grave as they would expose the plaintiff if convicted to very severe jail terms. Even though no evidence was led on the plaintiffs standing or profession the fact that there was allegation of criminal offences punishable by imprisonment is itself grave enough. Taking all the relevant matters into consideration, I would have awarded to the plaintiff a composite award of Kshs. 4,000,000 for general damages. in doing so I would have ignored the submission and proposal of Kshs. 100,000 by the defendant as to low, tiny and being against the threshold of section 16A, Defamation Act. I would also have discounted the plaintiff's proposal of Kshs. 15,000,000 as too exorbitant and astronomical for damages on the fact placed before the court.

20. In the end this suit fails ,it is dismissed and costs awarded to the defendant.

**Dated, signed and delivered at Mombasathis 22<sup>nd</sup> day of May 2020**

**P. J. O. OTIENO**

**JUGDE**

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[1] In **John v MG Ltd,[1996] I ALL E.R. 35** the Court held:

“The successful plaintiff in a defamation action is entitled to recover, the general compensatory damages such sum as will compensate him for the wrong he has suffered. That must compensate him for damages to his reputation, vindicate his name, and

taken account of the distress, hurt and humiliation which the defamatory publication caused.....