



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 318 OF 2015

OMULO OKOTH.....PLAINTIFF

-VERSUS-

SAM NYAMWEYA.....1ST DEFENDANT

FOOTBALL KENYA FEDERATION (Being suedthrough its officials SAM NYAMWEYA,

MICHAEL ESAKWA, ROBERT ASEMBO).....2ND DEFENDANT

CITIZEN WEEKLY.....3RD DEFENDANT

JUDGEMENT

1. Omulo Okoth, the plaintiff herein, filed a suit by way of the plaint dated 11th September, 2015 in which he sought for judgment against the 1st, 2nd and 3rd defendants jointly and severally in the following manner:

a. General damages for libel.

b. Exemplary and aggravated damages for libel.

c. A complete and unequivocal withdrawal, retraction and apology from the defendants in the same manner published and of equal prominence.

d. Costs of the suit.

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

2. The plaintiff pleaded in her plaint that on or about the 5th day of June, 2015 the 1st defendant in his personal capacity and as the president of the 2nd defendant caused a defamatory statement to be published against the plaintiff by way of print through the 3rd defendant.

3. The plaintiff particularized the words complained of in his plaint as follows:

“...What confounds is that you would be so driven by vendetta as to turn a national newspaper into a vehicle for fighting a narrow cause. And, it appears nothing can stop you even when I do not have a similar platform from which to defend myself. I know coverage and comment does not license you to persistently ridicule, demean and portray my work as Football Kenya Federation (FKF) President and as a public servant in negative terms at every turn, day in and day out...

But the first reason for your campaign against me is personal and anchored in my refusal to advance you Kshs.500,000/ you said you desperately needed for cultivation of your sugarcane farm in Migori. You know the detail of this and I will therefore say no more for now.

...The second reason is personal because I declined your urgent and ardent plea to me to prevail over a parastatals chief executive to dismiss a staffer who you claimed was putting your marriage in jeopardy. Again, you know the rest so I will not give details for now...”

4. The plaintiff pleaded that the publication was made in the local weekly newspaper of the 3rd defendant and that it is accessible to the public.
5. It was also pleaded by the plaintiff in his plaint that as a result of the defamatory publication, his reputation and character have been subjected to ridicule and contempt by right thinking members of the society, and that his family has also suffered immeasurable distress and anxiety as a result of the publication.
6. The 1st and 2nd defendants entered appearance upon service of summons and put in a joint statement of defence to deny the plaintiff's claim.
7. When the parties appeared before this court on 9th July, 2019 the plaintiff's advocate sought for and was granted leave to withdraw the suit against the 3rd defendant.
8. At the hearing of the suit, the plaintiff testified while the 1st and 2nd defendants closed their case without calling any witnesses.
9. The plaintiff who was PW1 began his chief testimony by adopting his signed witness statement and tendering the documents numbered 5-21 from his list and bundle of documents dated 9th July, 2019 as P. Exh 1.
10. The plaintiff gave evidence that the impugned letter upon publication was read by some of his friends and that the letter was authored by the 1st defendant using a letter head belonging to the 2nd defendant.
11. According to the plaintiff, the publication whose contents were untrue portrayed him in a negative light and he therefore prays for the reliefs sought in the plaint.
12. In cross-examination, the plaintiff testified that during his employment with Standard Group on 1st June, 1987 until his retirement in April of 2016, he had an on and off relationship with the 1st defendant which was made worse by the publication.
13. The plaintiff further testified that he did not give any response to the publication and that he was gravely affected by the publication, including receiving calls from members of the church in which he fellowshiped.
14. In re-examination, it was the evidence of the plaintiff that he had no personal vendetta against the 1st defendant neither was he biased against him.
15. It was also his evidence that the publication was directed at him as the head of sports news at the time.
16. At the close of the hearing, this court called upon the parties to file and exchange written submissions. I note that at the time of writing this judgment, the original submissions of the plaintiff were not on record. I only saw the submissions by the 1st and 2nd defendants and the reply submissions of the plaintiff.
17. The 1st and 2nd defendants submit that in order for the plaintiff to succeed in his case, he ought to satisfy the following ingredients associated with the tort of defamation listed in the case of **J Kudwoli & another v Eureka Educational and Training Consultants & 2 others [1993] eKLR:**

- a. That the matter of which he complains was published by the defendant, and**
- b. That it was published of and concerning him, and**
- c. That it is defamatory in character; and,**
- d. That it was published maliciously; and**
- e. In slander, subject to certain exceptions, that he has thereby suffered special damage.**

18. The 1st and 2nd defendants also drew the attention of this court to the Halsbury's Laws of England, 4th edition, volume 17 at paragraph 14 which reads that:

“The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues.”

19. According to the defendants, overall the plaintiff has not discharged the legal burden of proof in respect to the aforementioned ingredients and that it matters not that the defendants did not summon any witnesses.

20. The defendants have argued that they are neither employees nor servants of the 3rd defendant and that the publication was intended to apply solely between the plaintiff and the 1st defendant.

21. The defendants have further argued that the plaintiff was required to bring an independent witness to testify on his reputation but he did not do so, thereby failing to show that the publication was defamatory of him. In this regard, the defendants cited the decision by the High Court in the case of **Miguna Miguna v Standard Group Limited & 4 others [2016] eKLR** thus:

“The plaintiff cannot be his own witness in a defamation case on what he or others perceive to be his good character. A book, however good or bad it is, cannot read itself. It must be read by others who can tell how good or bad it is. It is therefore worth mentioning that what this court witnessed in this case was nothing but mere showy drills of the plaintiff’s self-praise assertions which are devoid of proving the claim of defamation.”

22. On general damages, it is the submission of the defendants that should this court find it fit to award damages, then the same ought to be reasonable as opposed to exorbitant. The defendants cited the following authorities on this subject:

a. Eric Gor Sungu v George Odinga Oraro [2014] eKLR: in this case, the Court of Appeal substituted an award of Kshs.3 million in general damages with one of Kshs.5 million made to an advocate.

b. David Kirui v Tonny Ketter [2019] eKLR: here, the High Court sitting on appeal substituted an award of Kshs.2 million with one of Kshs.1 million.

23. The defendants are also of the view that the plaintiff has not brought any evidence or shown any circumstances that would entitle him to an award of exemplary damages.

24. In his reply submissions, the plaintiff reiterated his original submission that in view of the failure on the part of the 1st and 2nd defendants in calling any evidence, it is clear that the plaintiff’s case remains uncontroverted.

25. The plaintiff also submits that publication within the context of defamation takes various forms as stated by the court in the case of **J Kudwoli & another v Eureka Educational and Training Consultants & 2 others [1993] eKLR** in the manner hereinbelow:

“(1) a publication by the author to the publisher when the matter is submitted for publication;

(2) publication by the author and publisher jointly to the printer for printing;

(3) publication by the author, publisher and distributor of the printed work to the public (and if the printer goes beyond handing back to the publisher or author, he, too, would be participating in the publication to third persons).”

26. The plaintiff is of the view that he has shown that the letter was written by the 1st and 2nd defendants and published through the 3rd defendant and that the said letter was defamatory of him.

27. It is the contention of the plaintiff that it was not mandatory for him to summon an independent witness to explain the impact of the defamatory publication on his or her perception of the plaintiff, since the plaintiff has already described the meaning of the words published and the context/circumstances in which the publication was made.

28. On the subject of damages, it is the argument of the plaintiff that in view of the absence of a retraction or expungement of the defamatory letter by the 1st and 2nd defendants, he is entitled to an award of damages.

29. I have considered the evidence tendered alongside the contending submissions and authorities relied upon. The following are the issues arising for determination:

i. Whether the plaintiff has made a case for defamation against the defendants; and

ii. Whether the plaintiff is entitled to the reliefs sought.

30. On the first issue, I note that the parties referred to various authorities that have defined the term ‘defamation.’ In addition to those, I borrow from the **Black’s Law Dictionary, 8th edition** definition as follows:

“the act of harming the reputation of another by making a false statement to a third person.”

31. Though in varying terms, the courts have unanimously held that the following specific ingredients must be satisfied for a party to succeed in his or her claim for defamation, as laid out in the case of **Joseph Njogu Kamunge v Charles Muriuki Gachari [2016] eKLR** cited by the 1st and 2nd defendants:

- i. THAT the statement must be defamatory.**
- ii. THAT the statement must refer to the plaintiff.**
- iii. THAT the statement must be published by the defendant.**
- iv. THAT the statement must be false.**

32. The aforementioned ingredients were reaffirmed by the Court of Appeal in the case of **Raphael Lukale v Elizabeth Mayabi & another [2018] eKLR**.

33. In respect to the second and third ingredients which I wish to begin with, from my evaluation of the evidence tendered by the plaintiff, I established that the letter in question and dated 5th June, 2015 was drawn by the 1st defendant and addressed to the plaintiff, with reference being made to the plaintiff.

34. I also established that the said letter bears the letter head of the 2nd defendant and that the same was drawn and signed by the 1st defendant in his capacity as the president of the 2nd defendant at the time. It is thus manifest that while the 2nd defendant denied any association with the letter, the evidence and shows that it was made on behalf of the 2nd defendant.

35. On the subject of publication, I note that the defendants are of the view that there they did not publish the letter but that the same was published purely by the 3rd defendant.

36. Upon examination of the evidence, I note that the publication was made in the 3rd defendant's weekly newspaper. It is clear that the publication is a replica of the letter addressed to the plaintiff.

37. The defendants did not call any evidence to show how else the 3rd defendant could have come into possession of or had knowledge of the letter or the authority by which it decided to publish it.

38. To my mind, the plaintiff has sufficiently shown that the 1st and 2nd defendants caused the letter to be published with the 3rd defendant, thereby granting third parties access to the publication. I am therefore satisfied that the plaintiff has established the two (2) ingredients on defamation.

39. This brings me to the first ingredient to do with whether the publication was defamatory of the plaintiff. The heart of a defamatory statement lies in 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** (supra) as hereunder:

“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.”

40. The above position was elaborated in the case of **J Kudwoli & another v Eureka Educational and Training Consultants & 2 others [1993] eKLR** relied upon by both the plaintiff and the defendants where the court held that a publication may either be defamatory on its face or upon considering extrinsic circumstances.

41. The courts have unanimously held 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.

42. On his part, the plaintiff referred to paragraph 12 of his plaint where he pleaded that the words complained of in the impugned letter and which I have particularized were defamatory of him in the sense that they could be inferred in their ordinary and natural sense to imply that he is inter alia, a corrupt sports editor, bankrupt, unprofessional and of questionable moral integrity. The plaintiff also stated in his testimony that as a result of publication of the letter, his reputation was lowered.

43. The 1st and 2nd defendants on their part did not call any evidence to refute the claims by the plaintiff and cannot be heard to argue their case through their submissions.

44. Upon considering the aforementioned particulars of defamation and innuendo pleaded in the plaint coupled with the article and the evidence tendered in court, I conclude that the words published would ordinary sense be taken to have the meaning pleaded in the plaint.

45. Concerning the reputation of the plaintiff, while I note that he was the sole witness who testified in support of his case, 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. Such position was restated in the case of **Alnashir Visram v Standard Limited [2016] eKLR**.

46. In the premises, I am satisfied that the plaintiff has shown that the publication is defamatory of him.

47. On the ingredient of 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.

48. In addressing my mind to this particular ingredient, I took into account the evidence of the plaintiff that his relationship with the 1st defendant had been capped with tension on and off and that there was really no justification for making the publication. I also took into account the absence of any evidence by the 1st and 2nd defendants to show lack of malice.

49. Upon considering the wording of the published letter, the mode of publication and the circumstances surrounding the relationship between the parties as denoted by the evidence, it is my view that the plaintiff has proved malice against the defendants.

50. In respect to the ingredient to do with whether the publication was false, the court in the case of **Joseph Njogu Kamunge** (supra) reasoned that a defamatory statement is presumed to be false unless and until the same is shown to be true by a defendant.

51. In the present instance, the plaintiff has stood by his evidence that the letter published was a falsehood, which evidence was not countered by the defendants at the trial. Moreover, the defendants did not plead the defence of truth. To my mind therefore, the plaintiff has shown that the publication was untrue.

52. From the foregoing, I am satisfied that the plaintiff has established a claim for defamation against the defendant on a balance of probabilities.

53. I now address my mind to the second issue touching on whether the plaintiff is entitled to the reliefs being sought.

54. On general damages, the plaintiff testified that prior to his retirement, he worked as a senior sports editor with the Standard Group of Companies and that he enjoyed a successful career throughout. The plaintiff further brought documentary evidence to support his statement, which I have examined.

55. It is noted that the authorities cited by the 1st and 2nd defendants involve persons of different professional standing from the plaintiff herein.

56. In the case of **Michael Kamau Mubea v Nation Media Group Limited & 2 others [2019] eKLR** this court awarded a sum of Kshs.7,000,000/ on general damages to a plaintiff who was both a lawyer and a journalist. I find this award to be reasonable in the present instance as well, taking into consideration the plaintiff's long standing and respectable career in the field of journalism.

57. On aggravated/exemplary damages, it is apparent that no formal apology was made by the defendants in a bid to mitigate the damage already occasioned to the plaintiff's reputation in the public eye, noting that the publication had a wide circulation, though it is apparent that the broadcast was made only once. I am therefore satisfied that the plaintiff is entitled to an award of aggravated damages. I therefore find a sum of Kshs.2,000,000/ upon considering my award of Kshs.3,000,000/ made on aggravated/exemplary damages in the aforementioned case of **Michael Kamau Mubea** (supra) though in that case, the publications were broadcast of the defamatory publication were continuously made.

58. However, I am reluctant to award the plaintiff any exemplary damages in the absence of any evidence or extenuating factors to show that the defendants essentially ought to be punished for the publication.

59. In the end and having considered the evidence before this court, the submissions from the parties and the law applicable, I hereby enter judgment in favour of the plaintiff and against the 1st and 2nd defendants jointly and severally as follows:

a. General damages	Kshs. 7,000,000/=
b. Aggravated damages	<u>Kshs.2,000,000/=</u>
Total	<u>Kshs.9,000,000/=</u>

c. The 1st and 2nd defendants shall cause to be published a full and formal apology through the 3rd defendant within 30 days from the date of this judgment.

d. The plaintiff shall have costs of this suit and interest on the total award of Ksh.9,000,000/ from the date of judgment until

payment in full.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 30th day of July, 2020.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant