



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 158 OF 2012

RACHEL WAMBUI SHEBESH.....1ST PLAINTIFF

FRANK SHEBESH.....2ND PLAINTIFF

VERSUS

THE NAIROBI STAR PUBLICATION LIMITED.....DEFENDANT

JUDGMENT

1. The Plaintiffs instituted this suit against the Defendant seeking damages arising out of alleged defamatory publications made by the Defendant.

2. It is pleaded that on or about the 27th January 2012 the Defendant under the column “**Corridors of Power**” at page 3 of **The Star Newspaper** published and/or caused to be published a false and misleading article about the Plaintiffs as follows:

“...Politicians make the greatest gossips and that is why this column will never run dry. Several MPs were overheard animatedly discussing one of their colleagues. They ripped apart her academic and professional background with one of them enthusiastically explaining that he had hard evidence to prove that their female colleague never completed high school and was expelled while in form two; was married early, enrolled in a tailoring course and soon afterwards was divorced. Now if only they could be as enthusiastic about issues that really matter to Kenyans!”

3. That on or about the 28th and 29th January, 2012 the Defendant under the column “**Corridors of Power**” at page 3 of **The Star Newspaper** published and/or caused to be published a false and misleading article about the Plaintiffs as follows:

“...A nominated MP is said to be at loggerheads with her estranged husband after the man, in a tit for tat move, decided to marry another woman. The husband is said to have opted to marry again as it emerged that the MP has been having an affair with a former legislator. It is now said that the MP and her husband have decided, for the sake of their children, to live in the same house but not share a bed. The MP, a former Kianda School who trained as a tailor, has been having flings with the former MP and another MP from ODM.”

4. It is pleaded that the said publications were malicious and injured the Plaintiffs’ reputation and career and brought them into public scandal, odium and contempt.

5. The Defendant filed a Statement of Defence and denied the claim. It is contended that the publications in question do not refer to the Plaintiffs nor provide any particulars that identifies them. That the Defendant after receiving a demand letter from the Plaintiffs published a clarification and an apology.

6. During the hearing of the case, PW1 Rachel Wambui Shebesh testified and adopted her witness statement. She produced the Plaintiffs’ bundle of documents as an exhibit. Her evidence was that at the material time she was a nominated Member of Parliament. She gave her educational background as having gone to Kianda School then proceeded to London Institute of Fashion Design. That she later joined the University of Nairobi for a Diploma in political science but did not complete the course.

7. PW1 further testified that she got married to Frank Shebesh the 2nd Plaintiff in the year 1997 and stated that they are blessed with two children.

8. PW1 stated that on 27th January, 2012, her husband the 2nd Plaintiff brought to her attention the aforesaid article. That she then proceeded to read the said article which she stated referred to both of them as illiterate, immoral and not worthy of respect or holding any leadership position. That she also received telephone calls from family members and friends who were shocked by the contents of the article.

9. PW1 testified that on or about 28th and 29th January 2012 the Defendant published the second article which portrayed both the 1st and 2nd Plaintiffs as uneducated and immoral. PW1 further testified that at the material time she was the only female nominated Member of Parliament who went to Kianda School and was identifiable in the article. That following communication with the Defendant through the Plaintiffs' lawyers, the Defendant admitted liability and proceeded to publish a retraction which was different from what the Plaintiffs had proposed. That the Defendant then failed to respond on the issue of damages.

10. PW2 Frank Shebesh Ambundo testified and adopted his witness statement as his evidence. He also produced the Plaintiffs' supplementary bundle of documents as exhibits. PW2 described himself as a businessman and a scholar who is a PHD finalist in Finance at Jomo Kenyatta University. That he is married to the 1st Plaintiff and they are blessed with two children. Referring to the two publications in question, he stated that he understood them to refer to PW1 and himself. That the said publications portrayed them as illiterate and immoral and lowered their standing in the society. That he also received calls from friends who had read the said publications.

11. PW2 further testified that the said articles made a thinly veiled reference to the 1st Plaintiff's identity as the only serving female nominated Member of Parliament.

12. That following the said publications, the Plaintiffs through their advocates wrote a demand letter to the Defendant who admitted liability but ended up publishing a retraction which was different from the one proposed by the Plaintiffs. That the Defendant then failed to respond to their demands for compensation.

13. PW3, Memba Muriuki and PW4, Samuel Matano testified and adopted their witness statements as their evidence. Their evidence is that they have known the Plaintiffs for decades as people of good moral standing and further expressed shock at the contents of the publications in question which they said were not true and portrayed the Plaintiffs as illiterate and immoral. That the 1st Plaintiff was at the material time a nominated Member of Parliament who attended Kianda School and they were therefore able to identify the Plaintiffs as the persons referred to in the publications.

14. DW1, Geoffrey Musoku testified on the Defendant's side. He adopted his witness statement as his evidence and produced the Defendant's bundle of documents as an exhibit. DW1 described himself as a journalist who at the material time worked with the Defendant. DW1's evidence was that he authored the articles in question in their political gossip column known as **"corridors of power"**.

15. DW1 stated that the contents of the article were based on information from sources who did not disclose the identity of the person in question. That he also took precaution and the articles in question did not in any way disclose any names nor expressly or by reference or implication allude to the 1st Plaintiff or provide any details that could establish the 1st Plaintiff's identity.

16. He further testified that he was not aware of any of the Defendant's readers who understood the said publications to refer to the Plaintiffs. That it is not known to the Defendant's general readership that the 1st Plaintiff attended Kianda School or that she trained as a tailor. That upon receipt of a demand letter the Defendant published a clarification and an apology despite the fact that none of the publications made any reference to the Plaintiffs.

17. 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 Gatley 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."

18. This is a suit founded on the tort of defamation. 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."**

19. From the evidence adduced, it is not in dispute that the Defendant published the articles in question. To determine whether the articles

were defamatory to the Plaintiffs, one must first establish whether their identities can be inferred from the said articles.

20. The features in the article of 27th January, 2012 which refer to the person the subject of the article are the following words: a female politician who never completed high school, was expelled in form two, was married early, enrolled in a tailoring course and soon afterwards was divorced. The Plaintiffs' evidence is that the 1st Plaintiff went to Kianda School and completed her Kenya Certificate of Secondary School there. The Kenya National Examinations Council Certificate was produced as an exhibit. The Plaintiffs' did not know if any other Member of Parliament went to Kianda School. Their evidence further reflects that the 1st Plaintiff was not the only nominated Member of Parliament who was married.

21. The article published on or about the 28th and 29th January, 2012 refers to a nominated member of parliament at logger heads with her estranged husband who had decided to marry another woman due to the member of parliament having an affair with a former legislator and another member of parliament from ODM. That the Member of Parliament and the husband have decided to live in the same house for the sake of the children but not share a bed. That the Member of Parliament is a former Kianda School dropout who trained as a tailor. Once again, the Plaintiffs and their witnesses could not tell if any other female nominated member of parliament went to Kianda School. The evidence whether the 1st Plaintiff trained as a tailor is contradictory. According to PW1 and PW2, the 1st Plaintiff trained as a fashion designer, not as a tailor as stated by PW3 and PW4. These are the features in the publication that could have lead somebody to link the 1st Plaintiff and by extension the 2nd Plaintiff to the same.

22. Given, there are many other couples out there who could be living in circumstances similar to what is described in the article. The former legislator and the ODM Member of Parliament have not been named. Even PW3 who stated that the 1st Plaintiff was the only nominated female member of Parliament who went to Kainda School stated that he checked online for the profiles of the nominated members of parliament after reading the articles in question.

23. From the evidence adduced by the Plaintiff's side, this court holds that the articles in question do not refer to the 1st Plaintiff or by extension to the 2nd Plaintiff. A person reading the articles would not connect the Plaintiffs to the same as any information in the publications that can be said to mirror the 1st Plaintiff's life is not in the public domain and there is no evidence to reflect that the said information applies to the 1st Plaintiff only.

24. As espoused by the Court of Appeal in the case of **Miguna Miguna v The Standard Group Ltd & 4 others [2017] eKLR**:

“It has been held in various cases in Kenya and elsewhere that the test whether a statement is defamatory is an objective one and is not dependent on the intention of the publisher but is dependent on what a reasonable person reading the statement would perceive of it”

25. With the foregoing, this courts finding is that the Plaintiffs' case has not been proved on a balance of probabilities. If I had found the case proved, I would have assessed general damages for libel at Ksh.2,000,000/= for each Plaintiff taking into account that if the Plaintiffs were identifiable in the said publications, that would have been by a limited number of people who knew the 1st Plaintiff's life history very well.

26. The articles in question did not mention any of the Plaintiffs by name. If the case had succeeded, I would have considered the clarification and apology that was published as sufficient as it was done in a similar fashion as the publication in question. I would therefore not have awarded any aggravated and/or exemplary damages.

27. Having found the Plaintiffs' case not proved, I dismiss the same. Taking into account the circumstances of the case, each party to bear own costs of the suit.

Date, signed and delivered at Nairobi this 23rd day of July, 2020

B. THURANIRA JADEN

JUDGE