



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 210 OF 2016

MICHAEL KAMAU MUBEA.....PLAINTIFF

VERSUS

NATION MEDIA GROUP LIMITED.....1ST DEFENDANT

EMMANUEL JUMA.....2ND DEFENDANT

KEN MIJUNGU.....3RD DEFENDANT

JUDGMENT

1. Michael Kamau Mubea, the plaintiff herein, filed the plaint dated 5th August, 2016 and which was amended on 7th October, 2016 seeking for judgment on the basis of the following reliefs:

(a) A declaration that the words broadcast by the defendants in the news bulletin aired on NTV live at 9.00 p.m. on 29th July, 2016, 1st, 2nd and 8th August, 2016 respectively and 28th September, 2016 concerning the plaintiff are false and malicious.

(b) General damages for libel.

(c) Aggravated and exemplary damages.

(d) Interest on (b) and (c) above.

(e) Costs of and incidental to the suit and interest thereon at court rates from the date of filing the suit.

2. Nation Media Group, Emmanuel Juma and Ken Mijungu being the 1st, 2nd and 3rd defendants herein respectively filed their statement of defence on 31st October, 2016 denying the plaintiff's claim.

3. The suit is largely premised on broadcasts made in connection with the widely reported National Youth Service (*hereinafter referred to as 'NYS'*) scandal. The said broadcasts were aired on diverse dates specified in the amended plaint whereof the plaintiff alleged that the same were defamatory to him since they sought to link him to controversial transactions aimed at terminating the investigations in respect to the NYS scandal.

4. It is the plaintiff's assertion that the broadcasts are false and were made maliciously and that no apology has been given by the defendants or retraction of the publications effected.
5. On their part, the defendants denied having published any libelous content and further pleaded the defences of privilege and fair comment, claiming that the publications were an accurate representation of statements alleged in Constitutional Petition No. 330 of 2016 filed by one Okiya Omtatah. The defendants were careful to add that the broadcasts were neither false nor coupled with malice.
6. Three (3) witnesses and one (1) witness gave evidence in support of the plaintiff's and defendants' cases respectively. The plaintiff testified as **PW 1** stating that he is an advocate of this court of more than 15 years standing.
7. PW 1 further stated that he was previously a Senior Partner at the firm of Michael Daud & Associates Advocates until his resignation sometime in 2013 to join the EACC as the Deputy Chief Executive Officer in charge of Technical Services. PW 1 adopted his two (2) witness statements already filed. This witness stated that prior to the challenged broadcasts, the defendants took no steps to contact him and yet the broadcasts made reference to him despite his resignation from the abovementioned firm; that at one point, his advocates had addressed a demand letter to the defendants but this did not stop them from making the broadcast on 2nd August, 2016.
8. PW 1 testified that the broadcasts alleged that he had received the sum of Kshs.50 million to ensure the protection and derailment of further investigations on the NYS scandal. He added that the said publications made it appear that he was compromised and is lacking in integrity; that as a result, he has suffered emotionally and socially amongst his colleagues, church elders and the general public.
9. He also reiterated that he is yet to receive an apology from the defendants and is therefore seeking both general and aggravated damages since the broadcasts were made in a series.
10. On cross-examination, PW 1 clarified that he joined the firm of Michael Daud & Associates Advocates in 2011 as a partner but left in 2013 though the firm retained his name.
11. He also confirmed that he is aware of the petition filed by Okiya Omtatah and that he constitutes one of the parties therein.
12. That among the allegations made in the said petition is the claim that he ought to be investigated over the receipt of Kshs.50,400,000/= as theft of the sum of Kshs.791 million.
13. That the media house broadcasted what was stated in the petition and which broadcast has damaged his reputation, and yet the facts in the petition were neither true nor factual; adding that the petition filed has since been withdrawn.
14. The above witness further averred that it is true that the firm under his name received the sum of Kshs.50,400,000/=. PW 1 restated his position on the above upon re-examination.
15. Halakhe Wako (**PW 2**), being the Chief Executive Officer of the EACC, testified and confirmed that the plaintiff was his deputy at the material time and also that the NYS scandal was one of the key topics in issue at the time.
16. PW 2 went ahead to assert that in the course of the controversial broadcasts, queries arose from within and without concerning the same, especially with regards to the plaintiff. That the plaintiff at one point offered to resign.
17. In cross-examination, PW 2 testified that he is also familiar with the petition filed by Okiya Omtatah and is aware that he was named as one of the interested parties therein. While stating that there is nothing wrong with reports made by the media, he was of the view that the media ought to first verify any allegations arising. This was also reiterated in his evidence in re-examination.

18. The plaintiff's former partner, Adan Daud Mohamed (**PW 3**) gave evidence and corroborated the averments made by the other witnesses that the plaintiff resigned from the law firm of Michael Daud & Associates in 2013 and that the said firm was involved in a land-sale transaction whereof it received a sum of Kshs.50,400,000/= in 2015 and that at the time, the plaintiff was no longer associated with the firm.

19. The witness added that upon following the broadcasts, he understood the same to mean that the plaintiff was paid the sum of Kshs.50.4 million as a bribe to derail the NYS investigations, which was a very serious allegation in view of the fact that the plaintiff was an employee of the Ethics and Anti-corruption Commission (EACC) at the time.

20. PW 3 added that his client was the vendor in the sale transaction involving the Kshs.50.4 million and that following the publications, he was contacted by various people asking him many questions concerning the transaction.

21. PW 3 in his evidence in cross-examination stated that the plaintiff's name Michael was retained after his resignation from the law firm. PW3 also said that he is aware of the existence of the petition filed by Omtatah. He averred that the media house did not invite his law firm to comment on the publications before publishing the offensive broadcasts.

22. Ken Mijungu, (DW1) the 3rd defendant herein, gave evidence in support of the defendants' case. He confirmed that he is both a lawyer and journalist by profession and has worked with the 1st defendant for a number of years.

23. Upon cross-examination, DW1 stated that the NYS scandal came into play in 2016 and that he participated in all the broadcasts.

24. DW1 further averred that as that particular scandal was being discussed, another scandal came to light involving the former Chairman of EACC and that the petition was filed in relation thereto. That it is not Okiya Omtatah but the defendants who instigated the broadcasting of the story related to the petition.

25. DW 3 added that the abovementioned Okiya Omtatah wanted the plaintiff to disclose the payment of the Kshs.50.4 million paid to him through the law firm.

26. He (DW1) admitted that he did not take any steps to reach either of the law firms involved in the sale transaction. It was his further testimony that at times the media houses rely solely on pleadings filed in court.

27. DW1 further stated that from the broadcasts made, it is clear that the disputed monies were paid to the plaintiff and that a few of the interviewees who participated in the live broadcasts stated that the plaintiff and his immediate boss were involved in the suspicious dealings and conduct.

28. DW 3 also stated that the broadcasts touched on a few issues that were not part of the court proceedings associated with the filed petition.

29. DW1 did not dispute that no opportunity was given to the plaintiff to rebut the statements made in the broadcasts. However, he asserted that it was beyond his power to offer an apology to the plaintiff; instead, it was well within the call of the 2nd defendant to do so.

30. Upon re-examination, DW 3 stated that as a court reporter, he is not required to determine whether or not a case is malicious, but that he holds nor malice or grudge against the plaintiff; adding that he routinely reports court cases upon obtaining documents from the court record.

31. At the close of the hearing, parties were invited to file and exchange written submissions and which they did. Having considered the same coupled with the evidence adduced by the various witnesses, the issues requiring this court's determination are as follows:

(i) Whether or not the plaintiff has demonstrated that the broadcasts made were defamatory of the plaintiff;

(ii) Whether or not the defences of fair comment and privilege are applicable herein; and

(iii) Whether or not the plaintiff is entitled to judgment as sought in his amended pleadings.

32. On the first issue, I will draw reference from the definition given in *Jacob Mwanto Wangora v Hezron Mwando Kirorio* [2017] eKLR as relates to libel or slander:

“Any impulsion which may tend to lower the plaintiff in the estimation of right thinking members of the society generally to cut him off from society or to expose him to hatred contempt or ridicule.”

33. The above definition was advanced in *Halsbury’s Law of England 4th Edition Volume 28* in this sense:

“A defamatory statement is a statement which tends to lower a person in the estimation of the right thinking members of the society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey any an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business.”

34. I am alive to the fact that the broadcasts made were closely tied to the NYS scandal whose talk was widespread across the country at the time.

35. In one way or another, the broadcasts associated the plaintiff with the said scandal purely on the basis of a petition filed in court at around the same time.

36. The plaintiff testified that as a result of the broadcasts, his reputation diminished fast and yet no verification was sought from him prior or even after such publications were made. This was backed by the successive testimony of the witnesses who followed.

37. In fact, the defence witness did confirm that the plaintiff’s version of events was not taken into account. From this view-point, it is obvious that the broadcasts had a grave negative impact on the plaintiff’s standing in society and especially in consideration of the fact that he was the serving Deputy Chief Executive Officer of the Commission the institution mandated by law to investigate the NYS scandal.

38. The defendants argued in their submissions that the plaintiff did not produce any evidence whether by way of video clips or CDs containing the defamatory material. In my humble view the evidence of the witnesses who testified was sufficient and in any case the defence did not refute the existence of the broadcasts.

39. I am satisfied that there is no strict requirement for the plaintiff to avail copies of the broadcast recordings in the circumstances of this case.

40. As regards the second issue, the defendants’ argument that the broadcasts were privileged by virtue of the fact that they were replicated from the pleadings filed in court in a constitutional petition; and that the same triggered the public interest thereby making it a matter of fair comment.

41. The defendants also submitted that they ought not to be held liable for the comments made by the guests in the course of the live broadcasts.

42. There is no doubt that the subject touching on the NYS scandal was truly a matter of public interest since it entailed the loss of large sums of public funds and therefore the media is bound to go to great lengths to expose the massive loss or theft of public funds.

43. However, it is imperative that the proper and accurate transmission of information is ensured. In this case the broadcasts were triggered by the lodging of a constitutional petition filed by one Okiya Omtata.

44. The defence witness admitted that it is in the ordinary course of business for the media to report based on court proceedings.

45. However, it is apparent that the facts raised in the petition are mere allegations that ought to be analyzed and determined by the court. Therefore the pleadings in court cannot be regarded as established facts until the court renders its decision having considered the evidence and submission of all the parties.

46. The plaintiff argued that he did not receive any funds as alleged in the broadcasts and neither was he associated with the law firm that received the funds. There was cogent evidence that the plaintiff that at the material time that the plaintiff had resigned as a partner in the firm of Michael Daud & Associates. It is apparent that broadcasts went live and persons were given the chance to give their views and/or comments. By permitting other persons to air their views and make comments in live broadcast the defendant denied themselves the right to rely on the defense of privilege and fair comment since the accuracy of the broadcast cannot be guaranteed.

47. This is coupled with the fact that the plaintiff was not accorded the opportunity of responding to or commenting on the broadcasts made. To this end, I find that there was evidence of malice as perceived by the court in *Nation Media Group Limited & another v Alfred N. Mutua [2017] eKLR* with reference to *J. P. Machira t/a Machira & Company Advocates vs. Wangethi Mwangi & another [1998] eKLR* that:

“Malice can be inferred from a deliberate, reckless, or even negligent ignoring of facts.”

48. It was established that the plaintiff’s side of the story was not sought and the defendants relied solely on the pleadings filed in court and which are in dispute. For the above reasons I find inference that the defendants acted maliciously in drawing from one source while neglecting to verify the facts from other relevant sources. Consequently, I find that the defences of **fair comment** and **qualified** privilege are not available to the defendant as a shield.

49. As regards the prayer of damages, I am satisfied that the plaintiff was defamed by the broadcasts made by the defendants therefore he is entitled to claim damages. In ascertaining the appropriate award of damages, this court is enjoined to take into account inter alia the stature of the plaintiff in society. It was not refuted that the said plaintiff was not only the Deputy Chief Executive Officer of the EACC at the material times but is equally an advocate of this court. He is also a church elder who was held in high esteem. The plaintiff is thereof a man of respectable standing in society.

50. As concerns the award on general damages, the plaintiff sought to be awarded a sum of Kshs.25,000,000/= and cited the following cases: **First** is the case of *Alnashir Visram v Standard Limited [2016] eKLR* where an award of Kshs.18,000,000/= was made. Secondly, is the case of *Samuel Ndung’u Mukunya v Nation Media Group Limited & another [2015] eKLR* and thirdly, is the case of *Henry Onyancha Obwocha v Head Link Publishers Limited [2014] eKLR* wherein the respective courts awarded the claimants a sum of Kshs.15,000,000/= each.

51. On their part, the defendants submitted that the award on general damages made should not exceed Kshs.2,000,000/=. The defendants also cited three cases. The first case is that of *Johnson Evan Gicheru v Andrew Morton & another [2005] eKLR* wherein the Court of Appeal awarded general damages of Kshs.6,000,000/=. The second case is that of *Mwangi Kiunjuri v Wangethi Mwangi & 2 others [2016] eKLR* in which the claimant was awarded Kshs.4,000,000/= as general damages and thirdly is the case of *Standard Limited v G.N. Kagia t/a Kagia & Company Advocates [2010] eKLR* where the Court of Appeal awarded the claimant a composite sum of Kshs.3,000,000/=.

52. Having taken into account the comparable awards made in the above-cited authorities by the respective parties, and having taken into account the plaintiff’s nature of work and status in society, I find that an award of Kshs.7,000,000/= is a reasonable award for general damages.

53. In regard to the prayer for **aggravated** and **exemplary** damages, the plaintiff is seeking for an award of Kshs.15,000,000/= while placing reliance on the case *Alnashir Visram* =vs= Standard Ltd (2016) eKLR and that of *Henry Onyancha Obwacha* =vs= Head Link Publisher Ltd (2014) eKLR wherein the awards of Kshs.8,000,000/= and Kshs.5,000,000/= were made respectively.

54. The defendants' simple submission is that the plaintiff is not entitled to aggravated and exemplary damages. It is apparent that the defendants did not offer an apology despite having received a demand notice. It is also not in dispute that the defendants continued to broadcast the offending information of the plaintiff. In the circumstances the plaintiff is entitled to an award of exemplary/ aggravated damages. He is awarded ksh.3,000,000/= being a comparable and reasonable award.

55. In view of the foregoing, judgment is entered in favour of the plaintiff and against the defendants as follows:

(i) A declaration is hereby made that the words broadcast by the defendants in the news bulletin aired on NTV live at 9.00 p.m. on 29th July, 2016, 1st, 2nd and 8th August, 2016 respectively and on 28th September, 2016 concerning the plaintiff are false and malicious.

(ii) General damages for defamation Kshs.7,000,000/=

(iii) Aggravated and exemplary damages Kshs.3,000,000/=

Gross total ksh.10,000,000/=

(iv) Interest at court rates on (ii) and (iii) above from the date of judgement until the date of full payment.

(v) The plaintiff shall have costs of the suit.

Dated, Signed and Delivered at Nairobi this 27th day of February, 2019.

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J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendants