



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 59 OF 2005

PIUS KINYUA T/A SALAMBO PROPRIETARY CLUB.....PLAINTIFF

VERSUS

NATION MEDIA GROUP LIMITED.....DEFENDANT

JUDGMENT

The plaintiff's case

1. The plaintiff filed a suit on 16th March, 2005 alleging the tort of defamation against the defendant. On 25th September, 2006 the plaintiff filed an amended plaint. He states that he is a trained and qualified professional restaurateur with a business in Mombasa under the name of Salambo Proprietary Club and also in Nairobi as Conference Caterers at the Kenyatta International Conference Centre. He states that he is also a family man, a Church Elder and a Farmer.

2. The plaintiff states that the defendant is the proprietor, printer and publisher of the Coast Express, a weekly newspaper with substantial circulation and readership in Mombasa and the larger Coast region and also the Daily Nation, a national daily newspaper with circulation not only in Kenya but throughout the East African region and a much greater worldwide electronic or internet readership. The plaintiff avers in the plaint that on the Coast Express edition of 18th March, 2004 to the 25th March, 2004, the defendant published a front page headline in the words "**property dispute at centre of couple's death**", and that the article, the subject of the said headline, referred to him.

3. The plaintiff further states that on or around 24th March, 2004, on his instructions, his Advocates wrote to the defendant seeking an apology following the libelous publication but the defendant ignored the same. That further, in aggravating the injury to his feelings and reputation, the defendant published another defamatory article in the Daily Nation edition of 5th April, 2004, in an article headed "**Mombasa Couple's Murder Still Baffles Police**".

4. The plaintiff claims that the defendant published the two publications knowing that they were false, or recklessly as to their truth or falsity having calculated the benefit would far outweigh any compensation which would become payable to the Plaintiff.

5. The plaintiff further avers that in their ordinary and natural meaning, the statements in the said publication meant and were understood to mean that-

(i) Following the murder of Mr. Gidoomal and his wife, investigations revealed that they were murdered by a tenant who operated a night club in a building which they owned through their company Multi Investments; and

(ii) From the in-depth analysis of the stormy relationship between that tenant and the deceased, and the fact that the deceased was to testify against the tenant in a case before the Municipal Court, the article left no doubt that the plaintiff was that tenant.

6. The plaintiff's claim against the defendant is for general damages including aggravated damages and costs of this suit plus interest.

The defendant's case

7. The defendant responded to the plaint by way of a defence filed on 3rd May, 2005. It denies the contents of the plaint and that the words published were of and concerning the plaintiff. The defendant also denies that the words refer and were understood to refer to the plaintiff.

8. The defendant further avers that the words as published are incapable of bearing the meanings ascribed to them either expressly or upon any reasonable construction as alleged by the plaintiff.

9. The defendant states that it did not at any time prior to the said publication receive any letter seeking an apology from the plaintiff and or his Advocates and that the publications were not in any way libelous, defamatory and or derogatory and were not meant and did not refer and were incapable of being read and or understood to refer to the plaintiff.

10. The defendant states that the suit discloses no reasonable cause of action and that the remedies sought should not be granted and prays for the plaintiff's suit be dismissed with costs.

Summary of the evidence adduced

11. **PW1**, Maina Chege, testified that he has known the plaintiff since the year 1989 and they have been friends since then. That he had done rental assessments for the premises in question on several occasions and knew the owner of the premises to be the late Mr. H. Gidoomal. He was aware that Mr. Gidoomal and Mr. Kinyua (the plaintiff) had differences regarding rent and some structures which the plaintiff had allegedly constructed in the rental premises without the permission of Mr. Gidoomal. He further testified that as a result of the publication in the Coast Express by the defendant, the message he drew therefrom was that the plaintiff may have been involved in the death of Mr. and Mrs. Gidoomal due to the property dispute between the plaintiff and Mr. Gidoomal.

12. On cross-examination, PW1 stated that he was not a member of Salambo Proprietary Club but knew that whoever was running the club had disputes with the owner of the premises due to increase of rent but he was not aware about the distress for rent. He was of the view that a claim for rent for 33 months showed that the plaintiff might not be an upright businessman. He further stated that the plaintiff filed a reference in regard to increase of rent from Kshs. 21,894.80 to Kshs. 45,000/=. He further confirmed that as per the registration of business names, Papius Thuku Kinyua carries out business under the name of Salambo Club registered on 23rd July, 1985.

13. PW1 on re-examination confirmed that he only came to know that the plaintiff was also known as Papius Kinyua in a document showed to him by the defendant's Counsel. That he was on occasions instructed by the plaintiff to carry out valuation for him and that he was certain that the plaintiff was the owner of the Salambo Proprietary Club. He further stated that the publication did not mention the name of any company and that he did not expect a company to commit murder as companies are run by people.

14. PW1 testified that having read the publication in the Coast Express, he and his friends wondered if the plaintiff could have been involved in such an offence and if he was a man to be trusted. PW1 further stated that he did not know if the plaintiff was charged and there was still doubt in his mind if he was involved.

15. **PW2** was Joseph Ndungi Waweru. He was a Manager in the plaintiff's business known as Conference Caterers at Kenyatta International Conference Centre, where he started working in the year 1990. He indicated that he knew the plaintiff by the name Pius Kinyua and Papius Kinyua. He stated that the plaintiff would at times assign him duties at Salambo Proprietary Club such as stock taking, delivering letters to lawyers as well as relieving some workers in the said Club. He stated that the plaintiff has different investments and knows him to be a good man as he was a Church Elder and a respected member of the society of the PCEA Parish Ndiani, Mukurweini. He was also involved in development of churches in the area.

16. It was PW2's evidence that the plaintiff took over the Club from Mr. Wanjohi in the year 1999 and therefore knew the plaintiff as the owner of Salambo Proprietary Club. He stated that on 19th March, 2004 he was in Mombasa to relieve a staff member at Salambo Proprietary Club, who was on leave. He testified that he found people at the entrance of the said Club reading newspapers and that one of their customers called him between 7:00 - 7:30 a.m., and informed him of what his boss (plaintiff) had done and that is when he read the Coast Weekly Paper by the Nation Media Group Ltd. He testified that the headline stated - "**property dispute at the centre of couple's death**" and it went on to explain the dispute about the property. He stated that there was no business in the said property apart from Salambo Proprietary Club. PW2 gave evidence that people started gathering at the said place and said that the owner of Salambo Proprietary Club was a murderer. He indicated that the impression he got from reading the article was that the plaintiff is the one who murdered the couple. PW2 further stated that he knew the plaintiff as an upright and straightforward person but after reading the article, he started seeing him in a different light, as a murderer.

17. PW2 gave evidence about another publication made on 5th April, 2004 which was to the effect that Mr. Gidoomal and the tenant had differed on many issues, including the decision by the latter to build a temporary extension. PW2 further indicated that he was aware that the plaintiff was not charged with any offence relating to Mr. Gidoomal.

18. On cross-examination, PW2 stated that he joined the plaintiff in the year 1990 when the Club was up and running and the makuti structure was already in place. He stated that the Club closed in the year 2016. He further testified that the article did not mention Salambo Club. He explained that he used to consider the plaintiff as an upright person but thereafter, he had questions in his mind about his uprightness. He stated that in his view, a person who puts up a structure without approval of the relevant authority cannot be seen as an upright person. He did not know if the plaintiff lost some of his friends after the article was published but the business suffered.

19. On re-examination, PW2 indicated that as a result of the publication the business went down and Salambo Proprietary Club was closed in the year 2016 as creditors stopped giving them credit. He further indicated that the article referred to the business as a night club.

20. **PW3** was Papius Kinyua alias Pius Kinyua who is the plaintiff herein. He explained that he has worked in the hospitality industry for over 40 years. He had studied hospitality in Switzerland, South Africa, Germany and the United States of America. He indicated that he has a restaurant at Kenyatta International Conference Centre where he caters for international guests and local ones. He stated that he was married and a retired Elder of the PCEA Ndiani Parish, Nyeri.

21. He testified that in the year 1989, he acquired Salambo Club which was running Salambo Proprietary Club from its previous owner who was his cousin, by the name of Francis Wanjohi. He explained that Salambo Proprietary Club was connected to Salambo Limited which was owned by Mr. Wanjohi, but his interest was to run Salambo Club. It was his evidence that on 1st July, 1989 he together with the Chairman of

the Club (Mr. Wanjohi) and the Landlord (Mr. Gidoomal) discussed the transfer of the property and the arrangement was agreeable to him (Mr. Gidoomal).

22. PW3 explained that Salambo Investment Limited was a company but Salambo Investments was registered as a business name. He stated that they had agreed with Mr. Gidoomal that the tenancy agreement was to be between Multi-Investment Ltd and Salambo Investment Ltd. He indicated that he was trading under the name of Salambo Proprietary Club. It was PW3's evidence that in the premises where he was a tenant, there was no other night club. He was also aware that Mr. Gidoomal had no other building in Mombasa town which had a night club or restaurant.

23. PW3 stated that he and Mr. Gidoomal had a cordial relationship but the relationship went sour when the latter requested PW3 to make him a partner in the business. PW3 told him that he would consider the proposal after he improved the business. PW3 also said that Mr. Gidoomal asked him to sell the property as he had a willing buyer, but he declined. That soon thereafter, he was served with a notice of termination of tenancy addressed to Salambo Ltd, which required PW3 to vacate the premises for reasons that he was a trespasser. He responded to the notice and instructed his Advocate to file a reference in the Business Premises Rent Tribunal which was heard and determined by Mr. G.K Mwaura, who ruled in his favour. The Landlord (Mr. Gidoomal) then appealed but the High Court upheld the Judgment by the Business Premises Rent Tribunal.

24. PW3 testified that upon a series of court battles several issues arose, one of them being a Notice from Mombasa Municipal Council indicating that he had erected illegal structures. He was summoned to the Municipal Court, for failing to demolish an unauthorized structure.

25. It was PW3's evidence that he learnt of the publication in the Coast Express Newspaper of 19th to 25th March, 2004 through his Manager (PW2), who called him on 19th March 2004 at 7.30 a.m., when he was at his home in Nyeri. PW2 told him that the Coast Express had published an article about the murder of the Landlord and it was giving details of PW3's dispute and the Landlord in court, which showed that he was involved in the murder. PW3 asked him to send a copy of the said Newspaper to him. He stated that another friend of his by the name of Maina Njanga called and told him about the article. It was his evidence that he told his wife about it and they traveled to Nairobi where he got a copy of the Coast Express Newspaper which had been sent to him by PW2.

26. It was his evidence that after reading the article, he found out that it was referring to the property dispute between him and Mr. Gidoomal. He said that the 2nd paragraph of the article stated that Mr. Gidoomal was to appear before the Municipal Court as part of his effort to evict a businessman operating a nightclub in his building. The article further said that the businessman was to tell the court on Wednesday that he was unable to pull down the structure because he had been unable to access the premises. PW3 stated that although his name and that of his company were not mentioned, it was clear to him that the article was referring to the dispute between him and Mr. Gidoomal. Further, that the case between them in the Municipal Court was the one which was mentioned in the said article.

27. PW3 testified that when he told his wife about the article, she asked him "are you sure you did not do it?". He stated that other people called him about the said article including his clients at Salambo Proprietary Club. He said that his sons in Australia and the United Kingdom called him and they were shocked about the article in issue to the extent that he had to visit them, to comfort them.

28. PW3 further testified that although he and his Company name were not mentioned, it was clear that the article was referring to a dispute between Mr. Gidoomal and him. He further stated that clients in his business called him inquiring whether he had committed the crime. PW3 stated that he was so shocked to read that he had been implicated by the Nation Media in the murder of Mr. Gidoomal. He explained that Mr. Gidoomal had introduced him to Mombasa Sports Club and he could not even have thought of killing him.

29. PW3 further testified that he instructed his Advocate to write a letter that was dated 24th March, 2004 to the defendant as the article was damaging and malicious. In the said letter, he requested that an apology be published in the same publication and be given the same prominence as the article that had been published. In the said letter, the defendant was also informed that it would be sued if it failed to apologize but no apology was published.

30. It was PW3's evidence that on 5th April, 2004 another article was published in the Daily Nation Newspaper. He indicated that in the 2nd column of the said article, it stated that **"the Police say that the businessman was waiting to appear in court over a protracted fight for the control of a multi-million shilling in downtown Mombasa. He was to appear before the Municipal Court as part of his efforts to evict a fellow businessman from running a night club in the building."**

31. He further said that the Police never questioned him about the murder of the Gidoomals but he went personally to the Police as he felt insecure due to the talk in Mombasa town about his being linked to the murder. He explained that 2 employees of the Gidoomals were arrested and that their watchman who had disappeared was arrested later.

32. PW3 emphasized that he had nothing to do with the death of the Gidoomals and that he did not murder them. He said that he was a respectable and successful businessman and the article defamed him. That people lost confidence in him and shied away from his businesses. He stated that at times he would go to the Club and on joining a group of people, they would gradually leave him. He indicated that his suppliers lost faith in him and revelers stopped visiting the Club. He said that his children were traumatized. He prayed for damages for defamation, costs and interest.

33. On cross examination, PW3 confirmed that the Club belonged to members but that he was running it as a business through Salambo Investment Limited. He did not have documents to prove he bought the business from one Mr. Wanjohi.

34. **DW1** Francis Thoya, stated that he was the County Secretary in the County Government of Mombasa. In the year 2004 he was working with Nation Media Group having joined it in the year 1995. He left employment in June 2005 after working for 10 years. That he used to work as a Court Reporter/Investigative Journalist. He would get information from court proceedings and the Police. He said that the article in the Coast Express about the death of Mr. and Mrs. Gidoomal was written by the Coast Express Team, of which he was a party. He said that

the couple was killed and that there was a protracted dispute in court between the deceased and some other people. He stated that he wrote an article in respect to a couple that had died in the midst of a certain litigation. He said that they had been told that the entire issue had been reported to Nyalali Police Station and that the Editor told them to countercheck the information. He admitted that the deceased was involved in litigation and that there was a case before the Municipal Court, where the Magistrate was Hon. Mdivo.

35. DW1 further testified that they were in possession of the proceedings and Mr. Gidoomal was to appear before the Municipal Court to explain why he had been unable to remove illegal structures in his property. He explained that they established that there were as many as 10 cases in court relating to the property dispute. He indicated that there was extreme care in trying to protect the identity of the persons and the only names published were of the deceased persons.

36. On cross examination, he confirmed that the property dispute was at the center of the couple's death. That he was not aware that a complaint had been lodged against the Nation Media Group by the plaintiff in regard to the articles in issue. He admitted that the article published in the Daily Nation Newspapers had some background information drawn from the Coast Express. He stated that the Daily Nation is one of the newspapers with a wide circulation in East Africa. He further stated that in the year 2004, there was internet and that the Daily Nation publication was online but the Coast Express publication was not available online. He disclosed that the Coast Express was published for 2 years, for circulation in the coast region. He explained that only 5,000 copies of the Coast Express were published but agreed that it was possible for a person to buy a copy in the coast region and move with it to another region.

37. He stated that he did not know if anyone was arrested with regard to the case and charged or whether other parties were involved in the property dispute. DW1 testified that when he got information about the death of the Gidoomals, he had the names of the suspects who were arrested and the names of the persons who had a property dispute. The Editor of the Nation Media Group however chose not to publish the names of the persons to avoid being sued for defamation.

ANALYSIS AND DETERMINATION

38. The plaintiff's Counsel filed his submissions on 12th February, 2019 while the defendant's Counsel filed his on 7th March, 2019. The plaintiff's Counsel highlighted his submissions. The defendant's Counsel relied entirely on his written submissions. In making an analysis of the evidence adduced and in arriving at a determination hereof, I have considered the submissions filed by both Counsel and the decided cases cited by Counsel for the plaintiff and other decided cases.

39. This court is called upon to establish whether or not the 2 publications by the defendant defamed the plaintiff. Consolidated issues for determination are:-

(i) Whether the published words were made in reference to the plaintiff;

(ii) Whether the plaintiff was the only tenant operating a night club business in the deceased's building in the heart of town and with whom he had numerous tenancy disputes;

(iii) Whether the published words in their ordinary and natural meaning either expressly or indirectly were capable of reasonably being construed to mean that the plaintiff was behind the murder of the deceased; and

(iv) If the plaintiff is entitled to damages, costs and interest.

40. Defamation involves a false derogatory statement made against a person without lawful justification. The offending statement must be one that harms a person's reputation, regard, esteem, respect, or confidence in which a person is held. The meaning of a defamatory statement was well stated in the case of **John Ward vs Standard Ltd** [2006] eKLR as follows:-

(i) The words must be defamatory in that they tend to bring a person to hatred, ridicule, or contempt or which cause him to be shunned or avoided or has a tendency to injure him in his office, profession or calling;

(ii) The words must be false and malicious in that there is lack of justifiable cause to utter the words complained of. Evidence showing the defendant knew the words complained of were false can be evidence of malice;

(iii) The defamatory words must be shown to have been published by the defendant; and

(iv) The words must refer to the plaintiff.

41. It was the plaintiff's submission that in ordinary meaning, the utterances by the defendant were understood to mean that the plaintiff was the person behind the murder of Mr. and Mrs. Gidoomal, due to a property dispute that played out during the evidence adduced by witnesses in this case.

42. The Coast Express Edition of the period 18th March, 2004 to 25th March 2004 on the front page bore the headline "**PROPERTY DISPUTE AT CENTER OF COUPLE'S DEATH**". On 5th April, 2004 the Daily Nation published an article with the heading "**MOMBASA COUPLE'S MURDER STILL BAFFLES POLICE**". A section of the article in the Coast Express edition of the period 18th March, 2004 to 25th March 2004 stated as follows:-

"...Investigations by Coast Express have established that Mr. Ram Hiranand Gidoomal, 71 was to appear before the Municipal Court as part of his efforts to evict a businessman operating a night club in his building, Mr. Gidoomal and the "tenant" had

differed on many fronts including the fact that the latter had constructed temporary structures in the business premises...". The article further stated as follows-

"According to intelligence sources, police investigating the bizarre deaths have narrowed down their investigations to the property dispute. Preliminary findings point to murder. The couple might have been killed at the height of the property dispute a police source said". (emphasis added).

43. The Coast Express article further stated as follows-

"Coast Express established that the battle for control of the business premises dates back to 1989, when Mr. Gidoomal, through his company Multi-Investment Limited rented out the building to a prominent Mombasa businessman. Problems between the two started in 1992 when Mr. Gidoomal discovered that the businessman had rented out the building to a third party. This prompted him to seek legal redress in the Rent Tribunal. After a nine year battle, Mr. Gidoomal lost the case." (emphasis added).

44. According to the plaintiff's (PW3's) evidence, Salambo Proprietary Club was the only Club within Mr. Gidoomal's business premises and the publications in issue referred to a pending court case between him as Mr. Gidoomal's tenant and Mr. Gidoomal as the Landlord. DW1 admitted that in conjunction with a team of his colleagues, they authored the article in the Coast Express.

45. The 2nd article in the Daily Nation was authored by Patrick Mayoyo. A section of it stated as follows:-

".....Police say that the businessman was waiting to appear in court over a protracted fight for the control of a multi-million shilling building in downtown Mombasa. He was to appear before the municipal court as part of his efforts to evict a fellow businessman running a night club in the building." (emphasis added).

46. The defendant's Counsel put up a spirited fight in his submissions and took issue with the plaintiff's claim that he traded as Salambo Proprietary Club, for the reason that it was registered as a Society, whereby property is held under registered trustees. It was pointed out that the plaintiff did not file the suit on behalf of the society or as a trustee of the Society. It was also submitted that the plaintiff kept on referring to Salambo Proprietary Club by different names, thus clouding the issue of ownership, to such an extent that the plaintiff could not be said to be the person behind the business known as Salambo Proprietary Club. The defendant's Counsel submitted that if anything, Francis Wanjohi was a Director of the company known as Salambo Investments Limited which had rented office space from Mr. Gidoomal. DW1 and his Counsel defended the publications by stating that the defendant did not publish the name of the plaintiff. They were therefore of the view that the 2 publications were not defamatory to the plaintiff.

47. The plaintiff in his evidence was categorical that when he took up the business of Salambo Proprietary Club from Francis Wanjohi, they informed Mr. Gidoomal that the tenancy would continue under the name of Salambo Investments Limited. The plaintiff produced a letter to the said effect written to Mr. Gidoomal. In the correspondence produced in court by the plaintiff between him and Mr. Gidoomal and in court proceedings, the plaintiff used the terms "Pius Kinyua T/A Salambo Proprietary Club", "Salambo Club", "Salambo Proprietary Club", "Salambo Proprietary Club", "Salambo Investment Limited", "Salambo Investments Limited", "Salambo Night Club", "Salambo Limited", "Salambo Day and Night Club", "Salambo Investments", interchangeably, to refer to the business that was being run by the plaintiff. He explained that Salambo Investments was registered as a business name, he produced a certificate of registration of the said business name. The Mombasa Municipal Council licence issued for the year 2008 was in the name of Salambo Night Club. A liquor licence granted by the District Commissioner Mombasa on 31st December, 2008 for a Proprietary Club was in the name of Pius Thuku T/A Salambo Day and Night Club. It was for a business on plot No. 91/XX/MN, which was owned by Mr. Multi Investment Ltd, where Mr. Gidoomal was a Director. That was also the property which was the subject of the case in the Business Premises Rent Tribunal, the appeal to the High Court, the Municipal Court case and other cases between the plaintiff and Mr. Gidoomal. The names Multi Investment and Multi Investments were also referred to interchangeably, in the court cases referred to above.

48. In a Judgment delivered on 31st March, 2000 which was upheld by the High Court in Mombasa, it was established that Salambo Proprietary Club was the new tenant of Multi-Investment Limited after Francis Wanjohi handed over the business premises to the plaintiff herein, with the consent of Mr. Gidoomal. As per the evidence of PW1 and PW3 and as was submitted by Counsel for the plaintiff, irrespective of the fact that the business was known as Salambo Proprietary Club, it was being run by the plaintiff herein. He was the face behind the business. It is my finding that had the defendant done a thorough background check as to the cases that had taken place before the Municipal Court Case came up, it would have established that the plaintiff herein believed in following the legal process in determining disputes between him in his trade as Salambo Proprietary Club and Mr. Gidoomal.

49. In this court's considered view of the evidence adduced and the tenor of the said publications, although the name of the tenant was not published, they left no doubt in the mind of any right thinking members of the society as to who the undisclosed tenant was. Having carefully analyzed the content of the two articles, they implied that the death of Mr. Gidoomal was directly as a result of a tenancy dispute and/or differences with the tenant who was running a night club in the property of Mr. Gidoomal.

50. I hold that the publications connecting the plaintiff to the death of Mr. and Mrs. Gidoomal were unjustified and unwarranted. The innuendo created by the publications was that the plaintiff had either murdered or arranged for the murder of the couple. It is my finding that the plaintiff was a successful businessman operating Salambo Proprietary Club and other businesses, he was a Church Elder, which he must have earned by being a respectful member of the society. I further hold that the 2 publications in issue severely injured the plaintiff's character, personal credit, dignity, integrity, self esteem and personal standing in the society. The said publications humiliated him and adversely affected his reputation and standing as a successful businessman, to the extent that after the said publications, he was shunned by his friends and customers. In the course of time, Salambo Proprietary Club suffered lack of credit facilities and he had to close it down. As a result thereof, he suffered loss of income from the said business.

51. In the case of **Standard Media vs Kagia and Co. Advocates** [2010] eKLR the court took the view that in situations where the author or publisher of a libelous article could have with due diligence verified the libelous story or where the author or publisher was reckless or

negligent, these factors should be taken into account in assessing the level of damages. The court also stated that the level of damages awarded should be such as to act as deterrence and to instill a sense of responsibility on the part of the authors and the publishers of libel and that personal rights, freedoms and values should never be sacrificed at the altar of profiteering.

52. I have done a careful consideration of the pleadings, the evidence and the submissions by the parties hereto and from the foregoing summation, I am satisfied that the plaintiff has established on a balance of probabilities the tort of libel against the defendant and thereby defamed him.

53. In **Ken Odondi & 2 Others vs James Okoth Omburah t/a Okoth Omburah & Company Advocates** [2013] eKLR the court stated thus:-

“So the respondent was not only entitled to general damages for defamation but was also entitled to exemplary damages to punish the appellants who had defamed him and refused to retract the offending article or apologize. In the English Court of Appeal decision in the case of John v MG Ltd [1996] 1 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 take account of the distress, hurt and humiliation which the defamatory publication caused.....

Exemplary damages on the other hand had gone beyond compensation and are meant to “punish” the defendant. 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 flurry defence of justification or failure to apologize”.

54. In assessing damages in defamation cases, the following factors *inter alia* are taken into account:-

- (i) Gravity of the allegation;
- (ii) Extent of circulation of the impugned publications;
- (iii) The conduct of the defendant prior to the commencement of the action up to judgment; and
- (iv) Mitigating factors.

55. The plaintiff in his submissions prayed for general damages in the sum of Kshs. 8,000,000/= and aggravated damages in the sum of Kshs. 2,000,000/=. He cited the case of **Honourable Musikari Kombo vs Royal Media Services Limited** [2018] eKLR, where the appellant was awarded Kshs. 5,000,000/= in general damages and Kshs.1,000,000/= in aggravated damages. The appellant was also awarded costs of the appeal and the High Court case.

56. The plaintiff pleaded and tendered evidence to prove that the defendant’s utterances were published widely in both the Coast Express whose circulation was in the coast region. DW1 agreed that it could not be ruled out that the said publication could reach another region, if as a person bought the publication and took it to another region. DW1 explained that the Daily Nation had a wide coverage and was available online, as at the time of publication of the 2nd article. The foregoing in my considered view aggravated the injury and damage to the plaintiff’s reputation and character.

57. There was also evidence tendered showing that the defendant subsequently repeated the false and libelous statements in a second publication in the Daily Nation of 5th April, 2004. This was after the plaintiff had written to the defendant seeking an apology from the first publication. It is my finding that the publications by the defendant were malicious and severely tarnished the plaintiff’s character and reputation and have lowered his esteem before right thinking members of the society. Although the publications implied that the plaintiff was connected to the murder of the Gidoomals, he was never charged in court. The plaintiff also said that he was never arrested and interrogated by the Police but took himself to the Police due to the negative effect that the publications had on him.

58. In reaching the damages due to the plaintiff, I have taken into account comparable cases in the realm of the tort of defamation, inflationary trends since the awards were made and that the defendant herein published 2 defamatory articles.

(i) In **Patrick Nyoike vs People limited** [2013] eKLR, the court awarded the plaintiff Kshs. 4,000,000/= general damages and Kshs.100,000/= as aggravated damages

(ii) In **Ken Odondi & 2 Others vs James Okoth Omburah T/A Okoth Omburah & Company Advocates** [2013] eKLR, the Court of Appeal awarded the appellant Ksh 4,000,000/= general damages for libel and Kshs. 500,000/= in aggravated damages; and

(iii) In **Miguna Miguna vs the Standard Group Limited & Others** [2017] eKLR, the Court of Appeal awarded the appellant general damages in the sum of Kshs.5,000,000/= and aggravated damages in the sum of Kshs. 1,000,000/=.

59. In the circumstances of this case, I am satisfied that the plaintiff has made out a case for the award of general damages, aggravated damages, costs of the case and interest. I therefore enter judgment in favour of the plaintiff as against the defendant in the following terms:-

- (i) General damages in the sum of Kshs. 5,000,000/=;

(ii) Aggravated damages in the sum of Kshs. 1,500,000/=;

(iii) Costs of this suit; and

(iv) Interest at court rates.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 28th day of June, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Gathuku for the plaintiff

Mr. Muthuri holding brief for Mr. Kinyua for the defendant

Mr. Oliver Musundi - Court Assistant